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# Recasting Vagueness: The Case of Teen Sex Statutes

Cynthia Godsoe*

*Abstract*

*When two minors below the age of consent have sex, who is the victim and who is the offender? Statutory rape law makes consensual sex among minors illegal in almost every state. Where half of high school students have had intercourse, the law's immense scope and inevitable underenforcement allow prosecutors to virtually define the crime by the tiny percentage of cases they choose. Through the lens of peer statutory rape, this Article introduces and critiques "vaguenets"—broad, under-defined laws that punish widespread and largely harmless conduct, and invite selective enforcement. Like problematic police dragnet searches, the immense sweep of these statutes ensnares much innocent conduct in an effort to root out societal undesirables. For sexually active adolescents, this means disproportionately those breaching heterocentric or racialized gender norms.*

*This Article brings juveniles into an overcriminalization conversation that has largely ignored them. It also takes a fresh look at a potential tool to curb the punitive state—the constitutional vagueness doctrine. While several scholars recognized vagueness' historic use as cover for judicial*

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*consideration of equality and liberty concerns in the vagrancy cases, contemporary overcriminalization scholars have forgotten this potential. This Article charts the doctrine's past use to halt excessive moralizing via the criminal law and its revitalization by recent Supreme Court cases, and argues that vagueness, in letter or spirit, can serve as a blueprint for much needed criminal justice reform. It concludes with one such reform, recommending the decriminalization of all consensual peer sex under the age of sixteen.*

*Table of Contents*

## *I. Introduction*

When two minors below the age of consent have sex, who is the victim and who is the offender? No one can agree. Consider these two recent cases: In the first, four or five middle school boys and girls had consensual[1] oral sex and vaginal intercourse at a "sex party."[2] The police arrested and charged all the minors.[3] The second case concerned two preteen boys who had consensual anal sex several times.[4] After one boy's father complained to the police, the other boy was adjudicated guilty of statutory rape and sentenced to suspended incarceration, probation for an indefinite number of years, and sex offender treatment.[5] Statutory rape law makes consensual sexual activity among minors illegal in almost every state.[6] At the same time, sex among minors is extremely

1. Because age-based consent is a legal fiction, here I use consensual "in its conventional, rather than legal, sense." *In re* ZC, 165 P.3d 1206, 1207 n.1 (Utah 2007). The average age of consent is sixteen years old. *See generally infra* Appendix A.

2. *See Four Brown Deer Middle Schoolers Face Sexual Assault Charges After 'Sex Party'*, WISN, http://www.wisn.com/news/four-brown-deer-middle-schoolers-face-sexual-assault-charges-aftersex-party/30973722 (last updated Jan. 29, 2015) (last visited Mar. 6, 2017) ("Four Brown Deer middle school students are facing sex assault charges after recording themselves at a so-called sex party.") (hereinafter *Four Brown Deer*) (on file with the Washington and Lee Law Review).

3. *See id.* (explaining that four teens were arrested at the scene and may be charged).

4. *See In re* D.B., 950 N.E.2d 528, 530 (Ohio 2011) ("A.W. testified that he had observed D.B. and M.G. engage in anal sex.").

5. *See id.* at 530–31 (explaining that the trial court convicted D.B. on multiple counts and was sentenced, but without evidence of force during any act, D.B. was acquitted on other counts).

6. Statutory rape is "consensual sexual relations with an individual not old enough to legally consent to the behavior." KARYL TROUP-LEASURE & HOWARD N. SNYDER, OJJDP JUVENILE JUSTICE BULLETIN, STATUTORY RAPE KNOWN TO LAW ENFORCEMENT 2 (Aug. 2005), https://www.ncjrs.gov/pdffiles1/ojjdp/208803.pdf.

widespread—almost half of all high school students have had intercourse, millions of younger children have as well, and many minors of all ages have engaged in oral sex and other sexual activity.[7] The law's immense scope and requisite underenforcement give police and prosecutors the power to virtually define the crime.[8]

In this Article, I identify and critique "vaguenets"—broad and under-defined laws that invite selective enforcement.[9] Vaguenets criminalize harmless conduct or conduct bringing some harm, where the costs of criminalization outweigh the benefits.[10] The scope of covered conduct means that underenforcement is inevitable, as is a vast gap between the law on the books and the law in action. Historic examples include

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State statutes vary widely, but the vast majority criminalize consensual sex between some parties below the age of consent. *Infra* Appendices A & B. I use minors, children, and adolescents interchangeably to indicate someone below the age of consent.

7. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUTH RISK BEHAVIOR SURVEILLANCE—UNITED STATES, 2013 24 (2013), http://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf [hereinafter CDC] (providing that 46.8% of high school students have had sex, 5.6% of those students before age thirteen); GUTTMACHER INST., AMERICAN TEENS' SEXUAL AND REPRODUCTIVE HEALTH (2014), http://www.guttmacher.org/pubs/FB-ATSRH.pdf (reviewing data and trends in teen sexual behavior throughout the country).

8. *See* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1492 (2008) [hereinafter Buell, *The Upside of Overbreadth*] ("These [overly broad] codes are so deep, redundant, and larded with excessive penalties that they have effectively delegated to the executive branch actors the power to determine the true content of the criminal law through enforcement practices . . . .").

9. Named after a fishing net, dragnet searches are group or location-based searches based on generalized government interest rather than individualized suspicion. *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 263 (2011) ("[I]t is the distinguishing characteristic of a dragnet to be general, to reach everyone in a category rather than only a chosen few."). As such, they have been found to violate the Fourth Amendment. *See id.* at 263–74 (evaluating various cases involving dragnet searches). I use "breadth" here to describe the scope of statutes, not to refer to the overbreadth doctrine. Although the vagueness and overbreadth doctrines are intertwined, overbreadth is limited to the First Amendment context. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 859–61, 1030–31 (2d ed. 1988) (distinguishing between the overbreadth and vagueness doctrines).

10. *See* Buell, *The Upside of Overbreadth*, *supra* note 8, at 1492 ("[A]n overbroad law [might] create worries about sunk costs in the form of wasteful overdeterrence, needless enforcement expenses, and the opportunity for discrimination and caprice by state actors . . . .").

bans on vagrancy and loitering; more recent examples include crimes such as marijuana possession and music piracy.[11] Vaguenets cannot be solved by clarifying the statutory language, in part because, as I elaborate further in Part II, the constitutional vagueness doctrine is not solely or even mostly about clarity of language. Instead, the problem with vague statutes run much deeper; these laws sometimes criminalize based on inappropriate criteria, thus threatening the rule of law itself.[12] Accordingly, as Robert Post aptly noted about vagrancy laws, they "cannot simply be rewritten . . . [but] must instead be refashioned to reflect entirely alternative models of social life."[13] Sometimes this refashioning will be a full decriminalization of the conduct, as happened with vagrancy.[14]

Peer statutory rape, or the criminalization of consensual sex between minors, is a particularly good lens into the over-criminalization problem vaguenets present. The immense pool of law-breakers, lack of a *mens rea* requirement in most jurisdictions, gap between empirics and morality about adolescent sex, and severe sanctions and stigma accorded to sex offenders combine to make statutory rape one of the most punitive of these laws.[15] This is compounded by the victim-

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11. *See* DOUGLAS N. HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 29–30, 170–73 (2008) [hereinafter HUSAK, OVERCRIMINALIZATION] (demonstrating how the enforcement of drug laws and gun control laws has led to issues of proportionality in sentencing and overinclusion); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1741–43 (2006) (listing laws against marijuana possession and music piracy as examples of underenforced laws).

12. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) ("[T]he rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible.").

13. Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 492 (1994) [hereinafter Post, *Reconceptualizing Vagueness*]. Of course, Post does not use the term vaguenets to refer to the laws, but vagrancy laws fit my definition of vaguenets.

14. For a valuable history of this watershed, see RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016) [hereinafter GOLUBOFF, VAGRANT NATION] (linking vagrancy laws to the civil rights, peace, gay rights, welfare rights, sexual, and cultural revolutions).

15. Here I use overcriminalization to mean too much criminal law, too broad a potential group of offenders, and too much and excessively harsh punishment. *See infra* Part II.A and accompanying text (discussing the epidemic

offender overlap, or the fact that minors are defined by statute as both potential victims and potential offenders.[16] When the overlap is built into the law, as with peer statutory rape, this important distinction becomes like the popular optical illusion of two women—from one perspective the picture is of a young, beautiful woman, from the other an old "hag."[17] Lacking any legislative distinction between legal and illegal conduct, prosecutors may pick and choose based on ad hoc and subjective factors, hiding any substantive commitments beneath the immense shield of statutory rape law.[18] Just as race and poverty have driven vagrancy and marijuana possession prosecutions, peer statutory rape prosecutions are sometimes based on the similarly illegitimate criteria of traditional gender roles and an ongoing distaste for same-sex intimacy.[19]

Two broader contributions to the dialogue on overcriminalization come from this examination of peer statutory rape. Building on the seminal account of William Stuntz, a rich literature expounds the harms of our carceral state and explores solutions.[20] This attention, however, has largely overlooked both

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of overcriminalization in the United States).

16. Criminologists define the victim-offender overlap as "the strong empirical and theoretical relationship between victimization and the perpetration of crime and delinquency." Jennifer M. Reingle, *The Victim-Offender Overlap*, *in* THE ENCYCLOPEDIA OF THEORETICAL CRIMINOLOGY 911 (2014) [hereinafter Reingle, *The Victim-Offender Overlap*].

17. *See Young Lady or an Old Hag?!*, MIGHTY OPTICAL ILLUSIONS (May 21, 2006), http://www.moillusions.com/young-lady-or-old-hag (last visited Oct. 18, 2016) (depicting the illusion of an image appearing to be both a young lady and an old woman) (on file with the Washington and Lee Law Review).

18. *See* Buell, *The Upside of Overbreadth*, *supra* note 8, at 1496 ("[B]road prohibitions confer wide authority on prosecutors to use their charging decisions and plea bargaining practices to determine the true content of the criminal law."). I use the term "selective enforcement" here to describe enforcement on illegitimate grounds unrelated to culpability.

19. Although there is no available data, experts agree that same-sex conduct is likely disproportionately punished. *See* CAROLYN E. COCCA, JAILBAIT 130 (2004) [hereinafter COCCA, JAILBAIT] ("The implications for policies grounded in disparate constructions of gender and sexuality appear to be that policy implementation will be uneven."); *see also infra* Part III.A.2.a and accompanying text (arguing that statutory rape laws stigmatize and disproportionately affect LGBTQ children).

20. *See, e.g.*, HUSAK, OVERCRIMINALIZATION, *supra* note 11, at 132–33 (developing a "test of criminalization" involving three separate inquiries); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress*

a site of, and a potential tool to address, these harms—the harsh systemic punishment of juveniles and the vagueness doctrine and its underlying principles.

First, most explorations of overcriminalization have focused on federal law, ignoring the prosecution and punishment of even very young minors.[21] Although numerous commentators have aptly critiqued the juvenile justice system, a literature I draw upon here,[22] these critiques have been largely siloed, with overcriminalization scholars and juvenile justice scholars rarely in conversation. Yet, they have much to offer each other. The informal structure and paternalistic mandate of the juvenile justice system have led to particularly robust overcriminalization.[23] The punishment for statutory rape of even very young children reflects this—in 2012 alone, 40 children under ten years old and 461 children under sixteen were adjudicated guilty of this offense designed to protect them.[24]

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*Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005) [hereinafter Beale, *Overcriminalization*] (listing "excessive unchecked discretion," "disparity among similarly situated persons," "potential to undermine other significant values," and "misdirection of scarce resources" as some of the harms of overcriminalization); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001) [hereinafter Stuntz, *Pathological Politics*] (exploring ways to solve the problem of overcriminalization, for example, by abolishing enforcement discretion and "end[ing] legislatures' ability to decide how far criminal law's net should extend").

21. The cases discussed herein are mostly delinquency cases in the juvenile justice system. Despite different nomenclature, there are many similarities to the criminal justice system. Numerous scholars have noted the demise (or non-existence?) of the juvenile justice system's rehabilitative purpose. *See, e.g.*, Martin Guggenheim, Graham v. Florida *and A Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 487 (2012) ("Americans [no] longer take seriously the Progressive ideal that the juvenile justice system does not punish young offenders, least of all that the amount of punishment ought to have nothing to do with what the young person did."). Accordingly, I argue that both systems, and related quasi-criminal systems such as the status offender system, are inappropriate tools for regulating peer sexuality.

22. *See infra* notes 108–109, 121, 126 and accompanying text (asserting that the juvenile justice system often imposes longer sentences on juveniles than adults, disproportionately affects minorities, and more frequently punishes girls for victimless crime).

23. *See infra* Part II.B.1 (explaining that deliberately vast discretion and the absence of checks on that discretion, like juries, have led to overcriminalization).

24. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, SEX OFFENSE

Thousands more were arrested or charged on related grounds.[25] The consequences can include incarceration and sex offender registry.[26] These harms are magnified by minors' diminished culpability and increased vulnerability.[27] The same characteristics, however, render minors an appealing group for reform who could function as a wedge for broader decriminalization efforts.[28]

In this account, I also challenge a widely held view of the vagueness doctrine as ineffective or even counterproductive as a curb on the criminal justice system's excesses.[29] Vagueness doctrine guards against inadequate notice, and arbitrary or selective enforcement, with the latter being the primary concern.[30] Courts and commentators often interpret the doctrine

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OFFENDERS, STATUTORY RAPE, SEX AND RACE BY AGE, 2012 (2012), https://ucr.fbi.gov/nibrs/2012/table-pdfs/sex-offense-offenders-statutory-rape-sex-and-race-by-age-2012 (breaking down all statutory rape offenses in 2012 by age, race, and sex).

25. *See id.* (comparing total arrests with guilty convictions).

26. *See infra* Part II.B.2 (discussing the wide variety of disciplinary options available to prosecutors in statutory rape cases).

27. The Supreme Court has recognized these differences in a recent line of cases. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (holding that mandatory life imprisonment without parole for those who are minors at the time of their crime violates the Eighth Amendment's prohibition on cruel and unusual punishment); Graham v. Florida, 560 U.S. 48, 74 (2010) (prohibiting life imprisonment for minors who have not committed homicide and requiring the state to give minors a "meaningful opportunity" to obtain release); Roper v. Simmons, 543 U.S. 551, 568 (2005) (finding that the execution of individuals who committed their crime when they were minors violated the Eighth and Fourteenth Amendments).

28. Indeed, they are already serving as such in some contexts. For instance, President Obama recently recognized youth's difference in banning solitary confinement for juveniles in federal prisons. *See* Michael D. Shearjan, *Obama Bans Solitary Confinement of Juveniles in Federal Prisons*, N.Y. TIMES (Jan. 25, 2016), http://www.nytimes.com/2016/01/26/us/politics/obama-bans-solitary-confinement-of-juveniles-in-federal-prisons.html (last visited Mar. 6, 2017) ("President Obama . . . banned the practice of holding juveniles in solitary confinement in federal prisons, saying it could lead to 'devastating, lasting psychological consequences.'") (on file with the Washington and Lee Law Review).

29. *See infra* Part II.A (exploring the harms stemming from overcriminalization: "too much criminal law and punishment; excessive and uneven discretion; and the erosion of the criminal law's legitimacy").

30. *See* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) ("[T]he more important aspect of the vagueness doctrine 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" (quoting

to center on unclear statutory language.[31] Perhaps because of this narrow construction, the doctrine is largely absent in current scholarship on overcriminalization. Stuntz even praised vaguely worded laws because they permit "judges and juries to exercise judgment when applying those boundaries to individual cases."[32] This praise misses the mark. On the contrary, I argue that vagueness may offer the quasi-constitutional limitation on the substantive criminal law that Stuntz so desperately sought.[33]

To support this claim, I return to the doctrine's robust use in the past to void vagrancy and loitering statutes, and build on scholarship stemming from those cases.[34] The scope and malleability of vagueness doctrine arguably renders it a substantive rather than procedural review—what Anthony Amsterdam described as a "means to an end"[35] and John Calvin Jeffries termed a judicial "makeweight" to prohibit normatively problematic criminalization.[36] Demonstrating this use, legal historian Risa Goluboff has mapped how liberty and equality concerns animated the Supreme Court's voiding of vagrancy laws

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Smith v. Goguen, 415 U.S., 566, 574 (1974))).

31. *See*, *e.g.*, United States v. JDT, 762 F.3d 984, 997 (9th Cir. 2014) ("Cases assessing whether a statute allows arbitrary and discriminatory enforcement consider unguided enforcement based on vagueness in the text of the statute."); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998) ("The traditional rule for construing criminal statutes is . . . that penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties . . . .").

32. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 303 (2011) [hereinafter STUNTZ, COLLAPSE].

33. *See infra* Part II.B.1 (suggesting that striking laws for vagueness could rein in statutory schemes that are overly permissive of prosecutors' and judges' uses of discretion).

34. These cases and scholarship date from the 1960s–1990s. *See infra* notes 386–388 and accompanying text (describing various circumstances in which the courts have used void-for-vagueness doctrine to strike down laws).

35. *See generally* Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court: A Means to an End*, 109 U. PA. L. REV. 67 (1960) [hereinafter Amsterdam, *The Void-for-Vagueness Doctrine*] (recognizing the procedural due process elements of vagueness review, but likening it more to substantive due process analysis).

36. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985) (using this term to refer to the related judicial tool of strict statutory construction).

in the earliest vagueness cases.[37] Although only hints of these substantive due process concerns remain explicit in the final opinions, scholars have persuasively argued that these cases may be read as a prohibition on the use of the criminal law to impose mainstream morals on marginalized citizens.[38]

Recent decisions bolster this reading of vagueness, supporting my argument that the doctrine can be repurposed to address contemporary overcriminalization.[39] Indeed, Justice Thomas recognized this potential in his recent concurrence in *Johnson v. United States*.[40] There, Justice Thomas asserted that the doctrine's "uncomfortably similar history with substantive due process" so troubled him that he explores jettisoning vagueness altogether.[41] Commentators have also noted that *Johnson* "broadens" the doctrine, facilitating successful challenges and signaling the Court's concern with our flawed criminal justice system.[42] Another recent decision, *Skilling v.*

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37. Goluboff has demonstrated through archival research that prior versions of Justice Douglas' draft opinion in *Papachristou* included Ninth Amendment and substantive due process analysis. *See* Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1365–70 (2010) [hereinafter Goluboff, *Dispatch*] (asserting that "draft opinions in the Justices' papers did not in fact rely on vagueness alone").

38. *See* Amsterdam, *The Void-for-Vagueness Doctrine*, *supra* note 35, at 115 (arguing that the cases constitute limitations on legitimate uses of state coercion); Post, *Reconceptualizing Vagueness*, *supra* note 13, at 498 (asserting that *Papachristou* stands for the proposition that "the norms of middle-class virtue are not a constitutionally acceptable basis for ordering the relationship between police and citizens). Like peer statutory rape, *Papachristou* entailed the enforcement of mainstream gender and sexuality norms; the defendants included two interracial couples whose relationships were unpalatable in 1960s Florida. *See id.* at 496–99 (discussing *Papachristou*).

39. *See* Johnson v. United States, 135 S. Ct. 2551, 2557–58 (2015) (using the vagueness doctrine to strike portions of the Armed Career Criminal Act of 1984); Skilling v. United States, 561 U.S. 358, 412 (2010) (upholding a statute defining "a scheme or artifice to defraud" because it was not so vague as to include a multitude of uncertain misconduct).

40. 135 S. Ct. 2551 (2015).

41. *See id.* at 2564 (Thomas, J., concurring) (arguing that, while he has joined the Court in decisions involving the "modern vagueness doctrine" before, the "origins and application" of the doctrine have become troubling).

42. *See* Carissa Byrne Hessick, Johnson v. United States *and the Future of the Void-for-Vagueness Doctrine*, 10 N.Y.U. J.L. & LIBERTY 152, 159 (2015) ("[T]he case may make it easier for criminal defendants to prevail on vagueness challenges in future cases . . . ."); *Armed Career Criminal Act—Residual*

*United States*,[43] also focuses on the immense net of the criminal statute at issue, hinting at the doctrine's use for limiting state coercion of widespread behavior.[44] Finally, three state supreme courts recently used vagueness reasoning to prohibit peer statutory rape prosecutions where both children were under the age of consent.[45] These decisions reinforce the promise vagueness holds for substantive criminal law reform—to limit who can be prosecuted and on what grounds they can be selected and punished.

Similar to the historic vagrancy and loitering laws, peer statutory rape law imposes mainstream morals on a small group of offenders selected for illegitimate reasons. Given this punitive and unjust use of state power, I make the novel argument to decriminalize all consensual peer sex, peers being those below the age of sixteen-years-old. Other scholars considering statutory rape have suggested thoughtful reforms, but all support the ongoing criminalization of these consensual peer interactions in some form.[46] In contrast, I contend that no modifications can

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*Clause*—Johnson v. United States, 129 HARV. L. REV. 301, 310 (2015) [hereinafter *Armed Career Criminal Act*] ("Justice Scalia's opinion demonstrates the great lengths to which the Court is prepared to go when a poorly drafted statute imperils defendants' liberty and due process rights.").

43. 561 U.S. 358 (2010).

44. *See infra* Part II.B.2 and accompanying text (discussing the impact of laws regulating common behavior and the often absurd enforcement results).

45. *See In re* D.B., 950 N.E.2d 528, 533 (Ohio 2011) ("As applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13 . . . [the law] is unconstitutionally vague . . . ."); *In re* Z.C., 165 P.3d 1206, 1207–08 (Utah 2007) (determining that a plain language reading of a Utah statute that led to the prosecution of a thirteen-year-old girl for sex with a twelve-year-old boy, and vice versa, led to absurd results); *In re* G.T., 758 A.2d 301, 308 (Vt. 2000) (arguing that a plain language reading of a Vermont statute that led to the prosecution of a fourteen-year-old boy for sex with twelve-year-old girl led to absurd results). The court in *D.B.* voided the statute as vague. The other two courts based their holdings on the statute's "absurdity" to avoid reaching the constitutional issues, but their main concern was an overly broad statute and selective enforcement.

46. *See, e.g.*, Kay Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 712 n.82 (2006) [hereinafter Levine, *Intimacy*] (reviewing historical reforms in statutory rape law); Michele Goodwin, *Law's Limits: Regulating Statutory Rape Law*, 2013 WIS. L. REV. 481, 533–40 (2013) [hereinafter Goodwin, *Law's Limits*] (suggesting that funds be reallocated and juvenile perpetrators of consensual statutory rape be diverted around the criminal justice system); Michelle

rectify the problems because overcriminalization and selective enforcement are built into the law. Like other vaguenet crimes, adolescent sexual activity is very prevalent, and of limited harm, but still widely frowned upon.[47] While twenty to thirty percent of fourteen to sixteen-year-olds have had intercourse, sixty-six percent of adults believe that sex at this age is "always wrong."[48] This public morality runs counter to medical expertise that peer sexual exploration is developmentally normal, even at young ages.[49] Indeed, the strong views by adults against adolescent sexuality likely reflect what one expert has described as a class, gender, and race-based "[a]dult [d]isgust[] and . . . [d]emand for [i]nnocence."[50] Just as the use of vagrancy by "the establishment to keep the untouchables in line"[51] was impermissible, so is the

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Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 71 (1994) [hereinafter Oberman, *Turning Girls into Women*] (proposing that institutions impose stricter standards on what constitutes "consent"). I address their analyses further *infra* Part III.A.

47. *See* TOM W. SMITH & JAESOK SON, NORC, TRENDS IN PUBLIC ATTITUDES ABOUT SEXUAL MORALITY, GENERAL SOCIAL SURVEY 2 (2013), http://www.norc.org/PDFs/GSS%20Reports/Trends%20in%20Sexual%20Morality_Final.pdf (examining teen sexual behavior and public attitudes regarding that behavior).

48. *Id.*

49. For instance, the "Bible of psychiatry," the DSM-5, prohibits a diagnosis of pedophilia in those below age sixteen and bans diagnosing even older teenagers unless the victim is at least five years younger. Even then it cautions against a pedophilia diagnosis. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 697 (5th ed. 2015) (enumerating diagnostic criterion that include the "individual is at least age 16 years and at least 5 years older than the child").

50. R. DANIELLE EGAN, BECOMING SEXUAL: A CRITICAL APPRAISAL OF THE SEXUALIZATION OF GIRLS 107 (2013). In prior work, I have argued that the regulation of sexuality plays an overly intrusive role in various areas of law. *See, e.g.*, Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 147–48 (2015), [hereinafter Godsoe, *Perfect Plaintiffs*] (arguing that desexing gay couples was necessary to render same-sex palatable to the mainstream); Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1317–18 (2015) [hereinafter Godsoe, *Punishment as Protection*] (critiquing the punishment of prostituted minors in the name of protection).

51. GOLUBOFF, VAGRANT NATION, *supra* note 14, at 135 (quoting Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 207, 233 n.4 (1967)).

use of peer statutory rape by prosecutors and parents to police minors' sexual conduct that displeases them.[52]

Two caveats are necessary. First, my argument is not that peer adolescent sexual activity is never harmful; it may be where, for instance, there is a very large age difference. The costs of criminalization, however, outweigh the benefits.[53] Second, I do not claim that courts should or will void every peer statutory rape law for vagueness; procedural limitations and the contested scope of the doctrine make that impossible.[54] Instead, my more limited point is that the rule of law and fairness principles underlying vagueness can offer a blueprint for much needed reform.[55]

This Article unfolds as follows. Part II delineates the overcriminalization endemic to the juvenile justice system.[56] After discussing statutory rape's long use, Part II details several successful recent challenges in peer cases, outlining the courts' concerns with overly broad statues and selective enforcement.[57] Part III uses peer statutory rape to illustrate the harms of vaguenets.[58] It argues that the law is used to selectively police the widespread harmless conduct of adolescent sexuality, concomitantly enforcing gender roles and punishing same-sex conduct.[59] It next maps the vagueness doctrine and contends that it has great potential, in letter or in spirit, to address equality and liberty concerns underlying overcriminalization.[60]

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52. Parents are the primary parties who initiate proceedings. *Infra* notes 172–174 and accompanying text.

53. Other state interventions, such as a public health approach, could help empower parents to address their children's sexual activity. *See* Goodwin, *Law's Limits*, *supra* note 46, at 490–91 (comparing the benefits of statutory rape laws with the high cost of aggressive enforcement).

54. Nor do I claim that vagueness constitutes a full or clear constitutional limitation on the substantive criminal law. Instead, I argue that it allows courts to address these concerns and, as Jeffries pointed out, may provide good "cover" for this analysis. *See* Jeffries, *supra* note 36, at 218 (describing the vagueness doctrine as a tool to curb arbitrary and discriminatory enforcement of the law).

55. Accordingly, while I make the argument that peer statutory rape should be abolished, I do not specify whether that should happen via legislatures or courts. There are benefits and drawbacks to both.

56. *Infra* Part II.

57. *Id.*

58. *Infra* Part III.

59. *Id.*

60. *Id.*

Part IV argues for the full decriminalization of peer statutory rape.[61] In so doing, it posits a new category of offender-less harms—societal problems for which no one should be punished.[62] I conclude by gesturing toward questions this analysis might raise for one of the law's most deeply entrenched legal classifications, that of victim and offender.[63]

## *II. Regulating Adolescent Sexuality in the World of Overcriminalization*

This Part argues that the immense discretion and paternalistic mandate of juvenile court has led to a "perfect storm" of overcriminalization. Indeed, minors are sometimes subject to more punitive control than adults.[64] It begins by briefly sketching out the conversation on overcriminalization, a conversation that has largely overlooked juveniles. After demonstrating the excessive punishment of juveniles, it argues that their diminished culpability and increased vulnerability make them a particularly important part of reform efforts.

Statutory rape serves as a lens into children's dual status as victims and offenders, a status highly dependent on gender and race.[65] The crime of statutory rape was developed at the same time as the juvenile court, both tasked with protecting children's sexuality from adult exploiters—particularly white, female, and middle class children.[66] In the 1980s and 1990s (unfounded) fears

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61. *Infra* Part IV.

62. *Id.*

63. *Infra* Part V.

64. For instance, juveniles can be punished for non-criminal status offenses and are sometimes subject to indeterminate sentences or longer sentences than adults. *See generally* BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 71–72, 710–28, 858–62 (2000) [hereinafter FELD, JUVENILE JUSTICE].

65. *See* Julian D. Ford, *Psychosocial Interventions for Traumatized Youth in the Juvenile Justice System: Research, Evidence Base, and Clinical/Legal Challenges*, 5 J. JUV. JUST. 31, 39 (2016), http://youthlaw.org/wp-content/uploads/2016/04/Ford-et-al-Psychosocial-Interventions-for-Traumatized-Youth.pdf (stating that the term "dual status" often refers to "youth who become involved in both the child welfare and juvenile justice systems").

66. *See* COCCA, JAILBAIT, *supra* note 19, at 16 (describing how the juvenile court was established and issues the court faced).

about a coming generation of youth "superpredators" contributed to the rise of the carceral state.[67] At the same time, the (also unfounded) panic about child sex abuse by strangers resulted in extremely harsh sex offender penalties.[68] This Part ends with a close examination of three recent prosecutions of minors for peer consensual sex. These cases illustrate the other side of statutory rape—its use not as a "shield" to protect minors but as a "sword" against them.

### *A. The Over-Criminalization Epidemic*

Overcriminalization is undoubtedly the most pressing criminal justice problem of our era.[69] It is defined in a number of ways; here I use the broadest definition to include both the volume of criminal laws as well as the range of prohibited conduct.[70] These combine to create an impermissible level of state coercion. Scholars have identified three main types of harms stemming from overcriminalization—too much criminal law and

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67. *See* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 408 (2013) (documenting the 1980s narrative that the crime problem was a "black youth" problem); *see also* Sara Sun Beale, *You've Come a Long Way Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 525 (2009) [hereinafter Beale, *You've Come a Long Way*] (stating that the media perpetuated the notion of "superpredators").

68. *See, e.g.*, PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 1 (1998) (describing the "creation of social facts" including "the belief that children face a grave danger in the form of sexual abuse and molestation"). The surprisingly scant scholarly and policy attention given to peer statutory rape also reflects this gap between public perceptions of adolescent and child sexual activity, and the reality.

69. *See Overcriminalization: An Explosion of Federal Criminal Law*, HERITAGE FOUND. (Apr. 27, 2011), http://origin.heritage.org/research/factsheets/2011/04/overcriminalization-an-explosion-of-federal-criminal-law (last visited Mar. 2, 2017) (detailing statistics on the exponential increase in criminal laws) (on file with the Washington and Lee Law Review).

70. *See* John Gardner, *Doug Husak, Overcriminalization: The Limits of the Criminal Law*, NOTRE DAME PHIL. REVS. (Aug. 3, 2008) (book review), http://ndpr.nd.edu/news/23674-overcriminalization-the-limits-of-the-criminal-law/ (last visited Feb. 27, 2017) (setting forth this definition and noting that "[t]he rule of law is threatened no less by the sweepingness of criminal laws than by their proliferation") (on file with the Washington and Lee Law Review).

punishment; excessive and uneven discretion; and the erosion of the criminal law's legitimacy.[71]

The harms of too harsh a level of punishment are self-evident, so instead I chart here the harm of too much criminal law—particularly the criminalization of harmless or morals offenses. Erik Luna has described overcriminalization as "a broad phenomenon . . . always involving the unjustifiable use of the criminal justice system."[72] Of particular concern is the punishment of harmless or blameless conduct. Doug Husak persuasively argues for two constraints on criminalization: the non-trivial harm and the wrongfulness constraints.[73] Relatedly, criminal laws must serve substantial state interests and be based on empirical data.[74] Under this rubric, Husak concludes that most drug offenses do not merit criminalization.[75]

The sanctioning of "morals" offenses, such as consensual sexual activity, is a particularly troublesome symptom of criminalization. Sanford Kadish presciently opposed such a use of the criminal law long before *Lawrence v. Texas*[76] largely eliminated it, arguing that the criminalization of widespread, harmless behavior risks selective enforcement and erodes the law's legitimacy.[77] More recently, Sara Sun Beale has documented the ongoing use of such crimes as fornication and adultery either to impose mainstream morality on certain people, or as a pretext for more serious and harder to prove offenses such

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71. *See generally* Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191 (2015). There is also the opportunity cost of money and time that could have been spent on other programs to address social problems. *See generally id.*

72. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 718 (2005).

73. *See* HUSAK, OVERCRIMINALIZATION, *supra* note 11, at 65 (arguing that these constraints "limit the reach of criminal sanction").

74. *See id.* at 153 ("[I]t is eminently sensible to demand more than a mere rational basis for believing that the law *might* produce its intended benefits.").

75. *See id.* at 166–70 (referring to various scholars who argue that criminalization does more harm than good).

76. 539 U.S. 558 (2003).

77. *See* Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 908 (1961) (arguing that selective enforcement is not necessarily "a legitimate and necessary means of making the law act soundly and in accordance with common sense").

as non-consensual rape.[78] Pretextual prosecutions, even of persons who are guilty of other unprovable offenses, bring significant harms.[79] Morals have also influenced the regulation of more serious sex offenses, resulting in what one commentator aptly describes as "[t]he profoundly dysfunctional criminal regulation of sexual harm."[80]

Turning to the second over-criminalization harm, the broad net of excessive criminal law gives incredible discretion to police and prosecutors. This discretion leads to arbitrary, even discriminatory, enforcement.[81] As one leading scholar describes it, overcriminalization leads to "excessive unchecked discretion in enforcement authorities, . . . inevitable disparity among similarly situated persons [because of inevitable under-enforcement, and] potential for abuse by enforcement authorities."[82] Prosecutorial discretion is particularly powerful; the wide net of criminal laws gives them incredible charging leverage.[83] This, combined with overly harsh potential sanctions, means that almost all of those selected for arrest and prosecution will end up pleading guilty to something.[84] The modern plea bargaining system compounds this by rendering charging decisions—and any impermissible discretion used to decide them—largely invisible.[85] Indeed,

78. *See* Beale, *Overcriminalization*, *supra* note 20, at 759, 765 (stating that such use "may invite prosecutorial conduct that is at best arbitrary and at worst discriminatory").

79. *See generally* Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135 (2004) (outlining harms including prosecution on illegitimate grounds, inequity, and a lack of procedural justice).

80. Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform,* 102 CAL. L. REV. 1553, 1621 (2014).

81. *See* Beale, *Overcriminalization*, *supra* note 20, at 758 (arguing that vague and overbroad statutes lead to such discretion).

82. *Id.* at 749. As I outline further below, excessive discretion and selective enforcement are also central concerns underlying the harms the vagueness doctrine strives to address.

83. *See* Kadish, *supra* note 77, at 905 (arguing that such discretion is "*de facto* if not *de jure*").

84. *See id.* at 905 n.2 (stating that this may result from the judge's discretion to accept a plea deal for a lesser offense).

85. *See* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2180 (2014) (describing the modern plea bargain system as being controlled by "elite actors" who make "behind-the-scenes decisions"). The juvenile justice system, with its closed courts and lack of juries,

Stuntz aptly characterized prosecutors as today's "real lawmakers."[86]

Third, excessive and unfair punishment warps the criminal law's expressive value and erodes its legitimacy.[87] It is undisputed that the criminal law plays an important expressive role in designating societal norms.[88] The inconsistent, particularly selective, enforcement endemic to overcriminalization sends inconsistent messages—is marijuana possession actually to be condemned? Or is it only wrong if you are one of the very small fraction of those violators who are prosecuted, chosen largely based on your neighborhood or race?[89] Compounding this dynamic, the law's loss of legitimacy itself has a crimogenic effect.[90]

Despite this cogent outline of harms, the over-criminalization dialogue still has gaps. It has largely focused on federal criminal law.[91] Although commentators have begun to explore overcriminalization in the states, the widespread and harsh punishment of juveniles has not been explicitly connected to the

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has always been even more invisible. *See infra* Part III.A.2 (describing prosecutorial discretion in the context of gender and sexuality).

86. *See* Stuntz, *Pathological Politics*, *supra* note 20, at 506 (noting that the definition of crimes and their defenses empower prosecutors).

87. *See id.* at 520 (noting this "may be the most important" consequence of overcriminalization); *see also* HUSAK, OVERCRIMINALIZATION, *supra* note 11, at 31 (stating that the overcriminalization's combination of "unchecked discretion coupled with all-encompassing offenses is destructive of the rule of law").

88. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 420 (1999) (arguing that "we can't identify criminal wrongdoing and punishment independently of their social meanings").

89. As Doug Husak has shown, these prosecutions are highly racially and geographically variable. *See* HUSAK, OVERCRIMINALIZATION, *supra* note 11, at 29–32 (describing the significant role that race and geography play in marijuana possession prosecutions).

90. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 106 (2006) (noting that the law's legitimacy "can be eroded by unsatisfactory experiences with police officers or judges").

91. *See generally* Beale, *Overcriminalization*, *supra* note 20; Haugh, *supra* note 71. *See also* James R. Copland & Isaac Gorodetski, *Manhattan Moment: Overcriminalization Is Also a Problem in the States*, WASH. EXAMINER, (Oct. 31, 2014), http://www.washingtonexaminer.com/manhattan-moment-overcriminalization-is-also-a-problem-in-the-states/article/2555492 (last visited Mar. 2, 2017) (stating that little effort has been made to quantify the reach of criminal law at the state level) (on file with the Washington and Lee Law Review).

broader over-criminalization phenomenon.[92] I argue below that the origins and structure of juvenile court have created a particularly robust form of overcriminalization, whose harms are magnified by the diminished culpability and increased vulnerability of minors. As such, juveniles merit inclusion in the larger dialogue. Moreover, these same characteristics render minors an appealing group for reform, who could function as a wedge for broader decriminalization efforts.

### *B. Overcriminalization of Juveniles*

#### *1. Deep "Parental" Discretion*

The juvenile court was deliberately structured to have an immense sweep and vast discretion—laying the groundwork for overcriminalization and concomitant selective enforcement.[93] Discretion was and remains deliberately paternalistic.[94] Because the (male) judge was like a father, acting in a child's best interests, the due process protections of the criminal justice system were deemed unnecessary.[95] As one early observer of the court opined: "Why is it not just and proper to treat these juvenile offenders . . . as a wise and merciful father handles his own child whose errors are not discovered by the authorities?"[96]

Prosecutorial discretion likely outweighs even judicial discretion, and this discretion is heightened in the closed and

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92. *See, e.g.*, Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1057 (2015) (exploring decriminalization as a form of relief for overcriminalization). Numerous scholars have aptly critiqued the juvenile justice system, critiques I build on here, but they have not been in conversation with overcriminalization scholars.

93. ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 139 (expanded 40th anniversary ed. 2009); *see also* MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO xxviii (2003) (juvenile court "aimed not merely to punish offenders but to assist and discipline entire urban populations").

94. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 110 (1909) (stating that a state acts for "the welfare of its children").

95. *See id.* ("[T]he legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state . . . .").

96. *Id.* at 107.

rarely scrutinized juvenile context.[97] As one scholar describes it, "prosecutors operate in virtual secrecy with unreviewable charging authority, especially in juvenile courts where court records and proceedings are confidential."[98] Virtually no guidelines exist, including for significant decisions such as whether to try a minor as an adult.[99] Both historically and recently, discretion often operates as a one-way ratchet for punitive interventions.[100]

The one significant check on prosecutorial discretion—juries—is missing from the juvenile system.[101] Sara Sun Beale

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97. *See, e.g.*, Beale, *You've Come a Long Way*, *supra* note 67, at 515–16 (arguing that while the Warren Court adopted race-neutral procedural mechanisms, it did not impose any restrictions on prosecutorial discretion).

98. Henning, *supra* note 67, at 350; *see also* Angela J. Davis, *Prosecution and Race: The Power, and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 14 n.7 (1998).

99. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 5 (Sept. 2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf (reporting that "prosecutorial [transfer] laws are usually silent regarding standards, protocols, or appropriate considerations for decision-making" and conceding the lack of process renders it "possible that prosecutorial discretion laws in some places operate like statutory exclusions, sweeping whole categories into criminal court with little or no individualized consideration.").

100. Historically, discretion was rarely used to release children, instead leading to long or indeterminate sentences in reformatories that were far more punitive than rehabilitative. *See* MEDA CHESNEY-LIND & RANDALL G. SHELDEN, GIRLS, DELINQUENCY AND JUVENILE JUSTICE 127 (4th ed. 1992) (noting that "the laws 'transformed routine discretion into formal policy'") citing JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981, 94 (1993). The Supreme Court acknowledged the punitive reality of the juvenile justice system sixty years later in *In re* Gault. *See* 387 U.S. 1, 14–16 (1967) ("In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles."). Gerald Gault was sentenced to just under six years in an institution for making prank phone calls. *See id.* at 29 (stating that if Gerald had been over eighteen, "the maximum punishment would have been a fine of $5 to $50, or imprisonment in jail for not more than two months."). Today, the punitive trend continues with tens of thousands of juveniles being tried as adults every year. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 99, at 13 (noting that in 2005, approximately 23,000 juvenile cases prosecuted in adult criminal court).

101. In *Schall v. Martin*, the Supreme Court denied juveniles the right to a jury trial. *See* 467 U.S. 253, 263 (1984) (noting that the Constitution does not require the elimination of all difference in treatments of juveniles). Today, only ten states grant juveniles that right. *See Juvenile Right to Jury Chart*, NAT'L JUVENILE DEF. CTR. (July 17, 2014), http://njdc.info/wp-content/uploads/2014/01/Right-to-Jury-Trial-Chart-7-18-14-Final.pdf (listing the

argues that the lack of a right to jury trial, and relatedly to a jury trial free of race-based peremptory challenges, has resulted in even greater prosecutorial discretion over minors than in the adult criminal system.[102] Using the recent Louisiana Jena 6 case as a case study, Beale demonstrates how the lack of checks on prosecutorial discretion and disparate treatment resulted in vastly different charging of White and Black youths for school-related fighting.[103] Only large-scale protests and media attention to the case led the prosecutors to change their strategy.[104]

Such scrutiny of the punishment of juveniles is unfortunately very rare. Stephanos Bibas and others have pointed out the important role that criminal trials played historically as "educational social theater," and lamented the lack of public insight into the criminal justice system in today's plea bargaining world.[105] The juvenile justice system, which in most jurisdictions does not have juries and/or is closed to the public, has always been opaque and largely unknown to the general public.[106] This arguably has resulted in even more misguided and selectively enforced policies in this realm.[107]

### *2. Broad Disciplinary Scope*

The scope of punitive interventions for juveniles also parallels that of adults.[108] From the start, "[b]road and vague

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states which grant this right and detailing the circumstances in which the right is awarded).

102. *See Beale*, *You've Come a Long Way*, *supra* note 67, at 528–33 (describing cases where racial overtones lead to prosecutorial discretion).

103. *See id.* at 514 (describing, *inter alia*, "particularly the adequacy of the remedies to challenge prosecutorial discretion and disparate treatment by the prosecution").

104. *See id.* at n.4 (listing various media sources describing protests and the changing narrative).

105. *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE xv (2012) ("When values conflict, trials help to air and reconcile them.").

106. *See* B. Finberg, *Right to Jury Trial in Juvenile Court Delinquency Proceedings*, 100 A.L.R.2d 1241 § 2[a] (1965) (delineating states in which this right was denied).

107. *See* BIBAS, *supra* note 105, at 69–72, 109–14 (advocating that "criminal procedures . . . should have rich moral and political goals").

108. Juveniles, like adults, are subject to incarceration and probation,

definitions of delinquency were favored" to bring more youth under the court's jurisdiction.[109] The ongoing robust use of status offenses—non-criminal acts such as truancy, running away, and disobedience to parents—demonstrates that this jurisdiction remains robust.[110] Paternalism justifies harsh state interventions including "extraordinary power" to incarcerate minors.[111] Although most criminal law theorists criticize paternalistic justifications for criminal sanctions, they continue to be routinely used in the punishment of juveniles.[112] To relate just one example, minors who are too young to consent and who are designated victims under trafficking laws continue to be prosecuted and incarcerated under prostitution laws, often justified as for their own protection.[113] Paternalism greatly expands the breadth of state intervention by obscuring the harms of punishment and justifying virtually any act for a young person's "own good."

This paternalistic scope was coupled with increasingly harsh sanctions during the 1980s and 1990s, leading one commentator to term the system "the worst of both worlds."[114] The criminalization and incarceration epidemic had both roots in and

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sometimes for longer periods than in the criminal system. *See* FELD, JUVENILE JUSTICE, *supra* note 64, at 69–71 (quoting Martin R. Gardner, who argues that detention is sometimes categorized as "treatment" or "involuntary therapy").

109. Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of a Century of Juvenile Justice*, *in* A CENTURY OF JUVENILE JUSTICE 142 (2000).

110. *See* Cynthia Godsoe, *Contempt, Status and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1098 (2014) [hereinafter Godsoe, *Contempt*] (discussing status offender jurisdiction and reporting 2009 data of "316,300 arrests of minors for just three categories of status offenses—running away, curfew violations, and liquor law violations").

111. Guggenheim, *supra* note 21, at 470.

112. *See generally* HUSAK, OVERCRIMINALIZATION, *supra* note 11, at 88 (analyzing and challenging the theories of Herbert Morris and Jean Hampton on the paternalistic justifications of criminal punishment).

113. *See* Godsoe, *Punishment as Protection*, *supra* note 50, at 1314 (critiquing this practice and describing it as "dysfunctional").

114. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 110 (1999) [hereinafter FELD, BAD KIDS]. This situation has led Feld and others to call for the abolition of the juvenile court. *See generally* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM L. & CRIMINOLOGY 68 (1997) [hereinafter Feld, *Abolish the Juvenile Court*].

effects on juveniles.[115] The crackdown on crime arose in part based on fears of a coming generation of "superpredators,"[116] fears that were empirically unsound but remarkably resonant with the public.[117] A few highly publicized cases of juvenile violent crime, coupled with media and political rhetoric about remorseless "little monsters," led every state to overhaul its juvenile system, facilitating the prosecution of minors as adults and mandating harsher penalties.[118]

### *3. Racial and Gendered Control*

Scholars have developed a robust literature in recent years describing the use of criminal sanctions, or the threat thereof, to control poor and marginalized communities.[119] This mission is heightened in the case of youth—future citizens deemed more malleable than adults. Indeed, the juvenile court was created in large part to regulate and "Americanize" low-income immigrant youth.[120] Befitting these origins, the juvenile justice system has always been disproportionately composed of race, class, and gender minorities.[121] As Barry Feld put it: "[T]he juvenile court

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115. Like the broader criminal crackdown, the reforms aimed at increasing punishment of juveniles were highly racialized. *See, e.g.*, Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative 'Backlash'*, 87 MINN. L. REV. 1447, 1459 (2003) ("Progressive reformers intended the juvenile court to discriminate.").

116. Beale, *You've Come a Long Way*, *supra* note 67, at 514.

117. *See* FELD, BAD KIDS, *supra* note 114, at 189–208 (noting that politicians "demonized young people in order to muster support for policies").

118. Beale, *You've Come a Long Way*, *supra* note 67, at 535; *see also* Guggenheim, *supra* note 21, at 524 (describing the state court prosecution of older minors as adults under the banner of police powers).

119. *See generally* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); JONATHAN SIMON, GOVERNING THROUGH CRIME (2007); LOIC WACQUANT, PUNISHING THE POOR (2004).

120. *See* PLATT, *supra* note 93, at 139 ("It was not by accident that the behavior selected for penalizing . . . was primarily attributable to the children of lower-class migrant and immigrant families."); Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 339 (1999) [hereinafter Feld, *The Transformation of the Juvenile Court—Part II*] (using a "coercive mechanism to distinguish between 'our children' and 'other people's children'").

121. *See, e.g.*, Henning, *supra* note 67, at 383–409 (discussing the intersection of race and class in the early juvenile court and its ongoing presence

[was] deliberately designed . . . to discriminate against 'other people's children'. . . ."[122] Racial disproportionality is present at every stage of the process, from arrest to sentencing.[123]

Instilling middle-class gender and sexuality values was also a key purpose of the original juvenile court.[124] Girls were almost always brought into the system for premarital sexual conduct or parental defiance, as opposed to boys who were brought in for actual criminal behavior, such as theft.[125] The juvenile justice system remains highly gendered today, with girls disproportionately entering the system for "victimless" sex offenses such as prostitution, and boys for same-sex conduct.[126]

The regulation of adolescent sexuality has long relied largely on fear and sensationalism rather than empirical data.[127] One scholar aptly compares Foucault's seminal critique of anti-masturbation materials to current frenzies about sexual predators of children.[128] Foucault noted that the ironic effect of

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in today's system).

122. Feld, *The Transformation of the Juvenile Court—Part II*, *supra* note 120, at 331.

123. *See* Beale, *You've Come a Long Way*, *supra* note 67, at 542 (noting racial disproportionality was true "in all relevant offense types and all age categories").

124. *See* PLATT, *supra* note 93, at 3–4, 36–39 (stating that sexuality was one of various key factors)*;* Lisa Pasko, *Damaged Daughters: The History of Girls' Sexuality and the Juvenile Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1099, 1100 (2010) (describing one motivating factor as "prevent[ing] their straying from the path of sexual purity"). Indeed, the juvenile court's creation was driven in large part by a desire to regulate the sexual activity of working class girls and young women. I have previously described the long history of regulation of female sexuality via the criminal and status offender laws. *See generally* Godsoe, *Contempt*, *supra* note 110; Godsoe, *Punishment as Protection*, *supra* note 50.

125. Girls in the system were almost exclusively working-class, and often racial and ethnic minorities. Steven Schlossman & Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65, 71 (1978).

126. *See* MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES 1885–1920, 176–78 (1995) (providing statistics for both boys and girls). This is consistent with my argument that today minors, particularly males, are criminalized disproportionally for same-sex sexual activity. *Infra* Part III.A.2.

127. *See* Pasko, *supra* note 124, at 1113 (stating that when "girls . . . expressed their LBQ orientation, staff treated them with distrust, fear, negative remarks, and occasional punishments").

128. *See* Amy Adler, *To Catch a Predator*, 21 COL. J. GENDER & L. 130, 150

moralistic and unscientific policies, such as a ban on masturbation, was to sexualize children while also "din[ning] it into parents' heads that their children's sex constituted a fundamental problem."[129] This fear and disgust also influence the punitive treatment of minors themselves, mostly boys, who are designated sex offenders. In his seminal study of legal responses to adolescent sexual offending, Frank Zimring reveals that policies towards the treatment of minor sex offenders ignore empirical and scientific evidence and depend largely on stereotypes.[130] I argue further below that these are primarily gender and sexuality stereotypes.[131]

### *4. Lessened Culpability and Increased Harm*

The overcriminalization of juveniles is particularly concerning because they are both less culpable and more vulnerable than adults.[132] The Supreme Court's recognition of juveniles' difference has been one of its only areas of criminal justice reform in recent decades.[133] Relying in part on neuroscience, the Court recognized that adolescents are more impulsive and less able to control their behavior based on attenuated consequences: "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[134] The Court reaffirmed this principle as recently as October 2015, reiterating that

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(2012) (noting that "predator's sexual fantasies" have become part of the mainstream media).

129. *See id.* at 150–51 (quoting Foucault and analyzing the spectacle around narratives of predators and pedophiles).

130. *See* FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING xiii (2004) [hereinafter ZIMRING, AMERICAN TRAVESTY] (describing policy development as "less sympathetic to scientific perspectives").

131. *Infra* Part III.A.2.

132. *See* Roper v. Simmons, 543 U.S. 551, 571 (2005) (drawing a comparison between juveniles and mentally handicapped persons).

133. *See id.* (same).

134. *Id.* at 571; *see also* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) ("Because 'the heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong with a minor as an adult.'" (citations omitted)).

"children are constitutionally different from adults" for punishment purposes and opining that "[minors] who commit even heinous crimes are capable of change."[135] Marty Guggenheim has persuasively argued that this line of cases indicates that "[j]uveniles have a substantive right to be treated differently when states seek to punish them."[136]

Compounding the harm is minors' vulnerability.[137] By definition, they are still developing, and as a result, they are at greater risk than adults of harms from court involvement and particularly incarceration, including sexual assault and psychological trauma.[138] This potential trauma has led numerous states and, most recently, President Obama to ban solitary confinement for minors.[139] The stigma and separation from families and schools are also particularly harmful for young people.[140] As with all overcriminalization, the harms extend beyond the criminal realm.[141] For instance, prosecution of

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135. *See* Montgomery v. Louisiana, No. 14–280, slip op. at 15, 21 (U.S. 2016) (quoting *Miller*, 132 S. Ct. at 2464) (mandating that states retroactively apply the prohibition on mandatory life without parole sentences for juveniles).

136. Guggenheim, *supra* note 21, at 457. Recent state and local initiatives also recognize the lower culpability of young offenders. One prominent example is the New York State special pardon program for persons who committed a non-violent offense at age 16 or 17. Governor Cuomo began the initiative to "acknowledge that people can and do move beyond the mistakes of their youth[,]" and avoid "giving a life sentence of stigmatization to kids[.]" In 2016, over 100 people were pardoned under the program. *Crack Down on Wage Theft,* N.Y. STATE (Jan. 8, 2017), https://www.governor.ny.gov/news/governor-cuomo-offers-executive-pardons-new-yorkers-convicted-crimes-ages-16-and-17 (last visited Feb. 27, 2017) (on file with the Washington and Lee Law Review).

137. *See* Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 333 (2007) ("Empirical evidence suggests that the compounded harms are alarmingly real.").

138. *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DETAINED YOUTH PROCESSED IN JUVENILE AND ADULT COURT: PSYCHIATRIC DISORDERS AND MENTAL HEALTH NEEDS 8 (Sept. 2015), http://www.ojjdp.gov/pubs/248283.pdf (reporting the high prevalence of mental illness among youth in the system); BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH 2008–2009, at 3 (Jan. 2010), http://www.bjs.gov/ content/pub/pdf/svjfry09.pdf (reporting sexual victimization of youth).

139. *See generally supra* note 28 and accompanying text**.**

140. *See* Catherine L. Carpenter, *Against Juvenile Sex Offender Registration*, 82 U. CIN. L. REV. 747, 770 (2014) [hereinafter Carpenter, *Against Juvenile*] (noting that this can create a "long and punitive shadow").

141. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV 809, 866 (2015)

children for statutory rape chills young people from seeking reproductive health care because it requires mandated child abuse reporters to report even voluntary sexual activity between minors.[142]

### *C. Child Victims*

The same Progressive reformers who created the juvenile court advocated for age-of-consent laws as part of their "purity" campaign both for the good of young women and the good of the nation.[143] Statutory rape originally served to preserve girls' chastity for marriage, conceived of as a property crime with a girl's father as the victim.[144] This protection was class and race specific.[145] As Justice Brennan described it: "[B]ecause their chastity was considered particularly precious, [white, middle-class] young women were felt to be uniquely in need of the State's protection."[146] Since then, statutory rape has been tasked with preventing sexually transmitted infections,[147] protecting society against the costs of young motherhood,[148] and facilitating prosecutions of non-consensual or forcible rape.[149]

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(showing that non-felony arrests and arrests that do not result in conviction "magnify the effects of underlying and problematic police practices based on racial profiling").

142. *See In re* G.T., 758 A.2d 301, 304 (Vt. 2000) (attributing this to the lack of confidentiality requirements).

143. *See* ODEM, *supra* note 126, at 171–82 (describing various cases in which courts followed this agenda).

144. *See* Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 802 (2000) [hereinafter Oberman, *Protection, Patriarchy*] ("These gender-specific [statutory rape] laws reflected an effort to protect a father's interest in his daughter's chastity.").

145. *See* Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 76 (1952) (noting that race influenced prosecutors approach to a case).

146. Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464, 494–95 (1981) (Brennan, J., dissenting).

147. *See* People v. Gonzales, 561 N.Y.S.2d 358, 361 (Westchester Cty. Ct. 1990) (arguing that it is "proper" to take such infections into account).

148. *See*, *e.g.*, State v. LaMere, 655 P.2d 46, 49–50 (Idaho 1982) (discussing unwanted pregnancy).

149. *See* Levine, *Intimacy*, *supra* note 46, at 708–09 (discussing the

The most common contemporary rationale for statutory rape laws is the protection of minors from the harms of sex with adults, particularly girls from sexual exploitation by older men.[150] In her valuable empirical study of prosecutorial discretion in adult-minor statutory rape cases, Kay Levine has documented how some prosecutors choose which cases to pursue based on their assessment of the relationship as a culpable "predator" and non-culpable "peer."[151] This rationale, however, has not been applied to protect all types of girls nor punish all adults. Illustrating this is the widespread acceptance of certain older man-teenaged girl couples; celebrities including David Bowie and R. Kelly have had sex with minors and never faced prosecution.[152] The law's ambivalence about child-adult sexual activity is also reflected in the fact that marriage continues to serve as a defense to statutory rape in most jurisdictions.[153] As Stephen Schulhofer, a leading scholar of sex crimes, concludes, the term "statutory

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California statutory rape law). This remains one of its main purposes today. *Infra* Part III.A.2.

150. *See, e.g.*, People v. Douglas, 886 N.E.2d 1232, 1243 (Ill. App. Ct. 2008) ("[T]he State has a legitimate interest in protecting children of tender years from sexual involvement and in putting on the adult the burden of determining the age of the child."); Commonwealth v. Albert, 758 A.2d 1149, 1153 (Pa. 2000) (stating that a statutory rape statute "properly . . . [puts] the onus of sexual responsibility . . . on the older more mature individual in the relationship").

151. Levine, *Intimacy*, *supra* note 46, at 715–16.

152. *See generally* Vicky Bowles, *David Bowie Sexual Assault Case Goes Before Grand Jury*, UPI (Nov. 11, 1987), http://www.upi.com/Archives/1987/11/11/David-Bowie-sexual-assault-case-goes-before-grand-jury/8094563605200/ (last visited Feb. 14, 2017) (on file with the Washington and Lee Law Review); Tyler Kingkade, *Remember All the Gross Accusations Against R. Kelly?*, HUFFINGTON POST (Dec. 23, 2015, 2:32 PM), http://www.huffingtonpost.com/entry/r-kelly-sex-abuse-allegations_us_56797582e4b06fa6887eb270 (last visited Feb. 14, 2017) (on file with the Washington and Lee Law Review). Commentators continue to minimize and joke about the many celebrities who commit statutory rape. *See, e.g.*, Ruth Graham, *The Jokes About Rob Lowe's 16-Year-Old Sex Partner at His Comedy Central Roast Were Kind of Gross*, SLATE (Sept. 6, 2016, 4:06 PM), http://www.slate.com/blogs/xx_factor/2016/09/06/the_jokes_about_rob_lowe_s_16_year_old_sex_partner_at_his_comedy_central.html (last visited Feb. 14, 2017) (on file with the Washington and Lee Law Review).

153. *But see* Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1266 n.38 (2009) (noting that twenty-four states and the District of Columbia have abolished the defense).

rape" implies "that consensual sex [between a teenager and an adult] is not really rape."[154]

Statutory rape remains a strict liability crime in most jurisdictions, and it brings severe penalties including, in many states, sex offender registry.[155] Children even younger than fourteen have to comply with the same burdens as adult offenders, despite markedly lower recidivism rates.[156] The particularly harsh consequences of sex offender registration include intrusion into the private life of the offender, far-reaching notification to communities, residency restrictions, and GPS tracking.[157]

Originally, the age of consent was very low, usually ten years old.[158] The current upper age of consent varies from thirteen to eighteen, but is sixteen years old in over half the states.[159] Most states also have a lower age of consent, ten to thirteen on average, below which the offense is more severe.[160] Thirty-two states always criminalize sex with children younger than a minimum age ranging from age nine to sixteen, regardless of the age of the other party.[161] The legislative history is largely silent on peer statutory rape, but over the last twenty years a large majority of states have added age gap or "Romeo and Juliet" laws rendering the offense or punishment less severe for those close in

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154. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 102 (1998).

155. The federal Sex Offender Registration and Notification Act (SORNA) can require the automatic lifetime registration of juvenile offenders. *See* Carpenter, *Against Juvenile, supra* note 140, at 751–52, 781–85 (listing various offenses that can cause lifetime registration).

156. *See id.* at 750 (describing how a Minnesota trial court ordered lifetime registration for an eleven-year-old child).

157. *See id.* at 781 (noting that the frequency of these consequences increased over the last decade).

158. *See* COCCA, JAILBAIT, *supra* note 19, at 23–24 tbl.1.1 (2004) (referring to statistics for the year 1885).

159. *Infra* Appendix A.

160. *Id.*

161. *Id.* The ALI is revising the highly influential Model Penal Code's (MPC) sex offense provisions, which have not been fully revised since 1962. The MPC significantly improves the statutory rape provisions but does not, in my opinion, go far enough. It still criminalizes sexual penetration with a minor under twelve if the actor is more than two years older. *See* MODEL PENAL CODE § 213 (AM. LAW INST., Discussion Draft No. 2, 2015).

age.[162] These provisions exonerate from liability, mitigate, or serve as an affirmative defense to statutory rape when the two parties are within a certain age range. [163] Although these provisions significantly reduce peer liability, only five states completely decriminalize consensual peer sex.[164] Moreover, several states do not include oral and anal sex in their age gap exemptions.[165]

About half of high school students report that they have had intercourse.[166] More specifically, recent data shows that 16% of students have had sex by age fifteen, the age of a typical ninth grader, but by the time these students reach age eighteen, the age of a typical twelfth grader, 61% will be sexually active.[167] A much smaller proportion—less than 2% but still constituting millions of children—have had intercourse by the time they turn twelve.[168] An additional 8.1% of girls and 12.5% of boys age fifteen to seventeen have had oral sex but not intercourse. [169]

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162. *Id.* Age gap laws generally decriminalize the conduct for a certain swath of peers, while Romeo and Juliet laws make it an affirmative defense. Here, I will refer to both types of statutes as age gap provisions.

163. *Id.* The age gap provisions of some states allow for mitigation of the crime only, while other states' provisions mitigate under certain circumstances and decriminalize under others.

164. *Id.*

165. *Infra* notes 223–226; *infra* Appendix A.

166. *See* CDC, *supra* note 7, at 24, 113–14 (providing the prevalence of sexual intercourse by both grade level and state).

167. *See* GUTTMACHER INST., *supra* note 7, at 1 (continuing to say that "on average, young people have sex for the first time at about age 17").

168. *See id.* (noting little difference between genders).

169. CASEY E. COPEN ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS. PREVALENCE AND TIMING OF ORAL SEX WITH OPPOSITE-SEX PARTNERS AMONG FEMALES AND MALES AGED 15–24 YEARS: UNITED STATES, 2007–2010, 5 fig.2 (2012), http://www.cdc.gov/nchs/data/nhsr/nhsr056.pdf.

Percent of Teens Sexually Active by Grade and Age

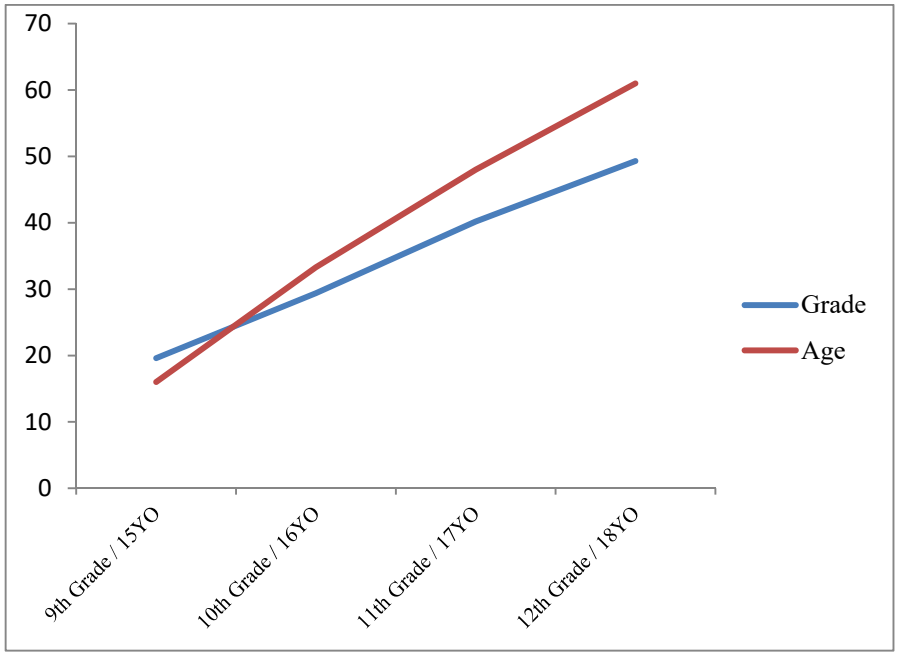


Figure 1[170]

Although statutory rape is no longer a crime against a girl's father, parents continue to play a very significant role.[171] In contrast to most crimes, law enforcement investigations virtually never lead to prosecutions. Instead, most prosecutions are triggered by parental reports.[172] As a result, statutory rape laws

170. *See supra* notes 155–158 (providing the data used in this graph).

171. *See* COCCA, JAILBAIT, *supra* note 19, at 124 (explaining that without parental intervention, the often consensual encounters would be more difficult to prosecute).

172. *See id.* (observing also that teens often refuse to testify about consensual activity); *see also In re* D.B., No. 2009 CA 00024, 2009 WL 5062017, at *1 (Ohio Ct. App. Dec. 22, 2009) (explaining that the victim's father sought counseling from the local children's services, which then contacted the sheriff's department); *In re* G.T., 758 A.2d 301, 303 (Vt. 2000) (noting that the mother came home to see the offender quickly get off of the victim). In *In re G.T.*, the prosecutor acknowledged that statutory rape cases usually arise from complaints by parents. 758 A.2d at 306 (adding that prosecutors prefer the easy-to-prove strict liability crime of statutory rape to other sex offense charges). On the flip side, "Connecticut considered imposing criminal penalties against parents who fail to seek prosecution" in some statutory rape cases. NOY

"are enforced largely by how angry the parents of [one] party are"[173] or "as a means of policing their children's sexuality."[174]

Statutory rape remains very gendered.[175] The vast majority of defendants remain male, and the victims remain female.[176] Prosecutors and courts continue to be concerned primarily with protecting certain girls, rather than protecting all girls and boys from adult exploitation.[177] Like other constructions of normative sexuality, statutory rape is also highly racialized.[178]

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S. DAVIS & JENNIFER TWOMBLY, U.S. DEP'T OF JUSTICE, STATE LEGISLATORS' HANDBOOK FOR STATUTORY RAPE ISSUES 4 (2000).

173. John Gramlich, *New Laws Take 'Romeo' Into Account*, PEW CHARITABLE TR. (July 16, 2007), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2007/07/16/new-laws-take-romeo-into-account (last visited Feb. 14, 2017) (on file with the Washington and Lee Law Review).

174. *See* COCCA, JAILBAIT, *supra* note 19, at 137 (stating also that some parents may be trying to "protect [their children] from potentially coercive relationships"). A recent typical example involved two teenagers, with the girl's father threatening her boyfriend "to stay away from his daughter or he would press charges." David Erickson, *18-Year-Old Missoula Man Arrested for Statutory Rape of 15-Year-Old*, MISSOULIAN (June 22, 2016), http://missoulian.com/news/ local/year-old-missoula-man-arrested-for-statutory-rape-of-/article_40508bf6760 e-5c95-b734-dc1095ef638e.html (last visited Feb. 14, 2017) (on file with the Washington and Lee Law Review). The boy was eventually arrested. *Id.*

175. As one scholar describes it, "we [cannot] extricate the male-on-female image" from the offense. Kay L. Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357, 404 (2006) [hereinafter Levine, *No Penis, No Problem*].

176. *See* FED. BUREAU INVESTIGATION, U.S. DEP'T OF JUSTICE, SEX OFFENSES REPORTED VIA NIBRS IN 2013, at 11 (2015), https://www.fbi.gov/about-us/cjis/ucr/nibrs/2014/resource-pages/nibrs-report_sexoffenses_2013_12-1-15.pdf (identifying "female" and "male" as the most common attributes of victims and offenders, respectively). Studies consistently find that over 90% of reported victims are female and offenders are male. *See, e.g.*, *id.* (noting that 91% of victims were female, and 91% of offenders were male); TROUP-LEASURE & SNYDER, *supra* note 6, at 1 (reporting that 95% of cases involve female victims and male defendants).

177. *See, e.g.*, Hernandez v. State, 754 S.W.2d 321, 326 (Tex. App. 1988) ("The purpose of the newer statutory rape statute was to prevent imposition upon females under the age of seventeen by older and presumably more experienced males.").

178. *See, e.g.*, Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 645 (2010) (noting that rape narratives come from "a racist and sexist mythology specific to American history"); *see also* Godsoe, *Perfect Plaintiffs*, *supra* note 50, at 145–48 (describing the strategy of positing white, desexed plaintiffs to make same-sex palatable to the mainstream).

### *D. Juvenile Sex Offenders*

Despite the stated purpose of protecting minors from predatory adults, each year hundreds of minors are prosecuted for peer statutory rape.[179] Many more are investigated, arrested, or charged with related crimes.[180] Even very young children are prosecuted. As noted earlier, in 2012, forty children under ten-years-old and 461 children between the ages of eleven and sixteen were adjudicated guilty of statutory rape.[181] A 2005 Department of Justice report confirms that minors are prosecuted for statutory rape, finding that the ages of the victims and offenders were highly correlated. [182]

Many scholars considering statutory rape support its ongoing use in peer cases.[183] Several overlook peer cases, even while recommending significant reforms to statutory rape.[184] Other

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179. *See* FED. BUREAU OF INVESTIGATION, *supra* note 24 (totaling the number of statutory rape offenders by age, sex, and race).

180. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORT (2012), https://www.fbi.gov/about-us/cjis/ucr/nibrs/2012/data-tables (last visited Feb. 14, 2017) (including forcible rape, forcible sodomy, sexual assault with an object, forcible fondling, and incest) (on file with the Washington and Lee Law Review).

181. *Id.*; *see, e.g.*, 3 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 285 n.48 (15th ed. 2015) (collecting cases involving juvenile defendants).

182. TROUP-LEASURE & SNYDER, *supra* note 6, at 3 (organizing study results by offender and victim age). This was particularly true in opposite-sex cases, which constitute the vast majority of cases. *See id.* (averaging the age differences in opposite-sex cases to show that male offenders were approximately six years older than their victims and female offenders were about nine years older than their victims)..

183. *See infra* Part III.A (discussing the problems with continued use of statutory rape laws in peer cases because of the ability of prosecutors to label the parties "victim" or "offender" based largely on their own discretion, and the use of these statutes to police gender and sexuality among minors). One exception may be Frank Zimring who has remarked that "[t]he fourteen-year-old caught petting with a fourteen-year-old girlfriend should not be regarded as a felon . . . . [T]he felonization of adolescent sex is based on an invalid analogy with adult behavior and is an obvious candidate for reform." ZIMRING, AMERICAN TRAVESTY, *supra* note 130, at 125. Zimring does not, however, discuss peer statutory rape in detail, and although he appears to support some decriminalization in this area, the scope in terms of age and forum (i.e. alternative courts) does not appear to be as comprehensive as my proposal. *See id.* at 125–27 (focusing only briefly on suggested reforms for nonpredatory peer sex).

184. *See, e.g.*, Catherine L. Carpenter, *On Statutory Rape, Strict Liability,*

scholars justify peer statutory rape to level the playing field for girls in nominally consensual encounters, or to facilitate the prosecution of consensual or forcible rape, rationales addressed in further detail below.[185] State laws and the Model Penal Code (MPC) proposal also maintain peer statutory rape in some form.[186] The peer cases outlined below, and their vague designations of victims and offenders, underlie my critique of these rationales and my call for the full decriminalization of peer adolescent sexuality.[187]

Just as they are overlooked in legal scholarship, the constitutional and normative problems with these cases have garnered scant attention from courts. Three high state courts, however, recently limited peer statutory rape, expressing deep concern about the prosecutions.[188] The Vermont, Utah, and Ohio Supreme Courts all struck delinquency adjudications where the minors deemed offenders were also within the law's zone of protection.[189] A Ninth Circuit judge also critiqued the prosecution

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*and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 383 (2003) (arguing that statutory rape as a strict liability offense is not justified by the public welfare offense model due to, *inter alia*, the diminished riskiness of sexual activity post-*Lawrence* and the harshness of statutory rape punishments); Russell L. Christopher & Kathryn H. Christopher, *The Paradox of Statutory Rape*, 87 IND. L.J. 505, 505 (2012) (considering the potential statutory rape liability of an adult raped by a sexually aggressive juvenile); Elizabeth Nevins-Saunders, *Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape*, 85 N.Y.U. L. Rev. 1067, 1067 (2010) (arguing that prosecuting mentally retarded defendants for a strict liability crime like statutory rape is unjust).

185. *See* COCCA, JAILBAIT, *supra* note 19, at 72–73 (identifying feminist concerns about statutory rape laws).

186. *See infra* Appendix A (providing the minimum age of offenders under the MPC and state statutory rape laws).

187. *See In re* D.B., 950 N.E.2d 528, 533 (Ohio 2011) ("[W]hen two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down."); *In re* Z.C. 165 P.3d 1206, 1213–14 (Utah 2007) (concluding that charges against both parties in a sexual encounter between two minors leads to "an absurd result not intended by the legislature"); *In re* G.T., 758 A.2d 301, 309 (Vt. 2000) (invalidating the Vermont statutory rape statute in cases where the offender is also a victim because they fall under the age of consent).

188. *See* cases cited *supra* note 187 (introducing the three cases discussed in this Section).

189. *See supra* note 187 (outlining the analysis of the courts). These courts cite at least four rationales for their reversal of peer statutory rape prosecutions:

of minors for consensual sexual experimentation.[190] Capturing the two central concerns of overcriminalization and selective enforcement, the courts found harms both where one child was designated the victim and one the offender and where the children were both labeled victim and offender in concurrent cases.[191]

Although each case involved two minors in consensual sexual conduct, the facts in each differ. *In re G.T.*,[192] the earliest case, concerned a fourteen-year-old boy, G.T., was adjudicated delinquent for statutory rape after intercourse with a twelve-year-old neighbor.[193] Both minors were under the age of consent of sixteen.[194] M.N., the girl, and G.T. were friends, but had no sexual contact until one night in October 1995.[195] The Court provides considerable detail about that encounter. M.N. was a virgin.[196] That night, while watching a movie at M.N.'s house, G.T. kissed M.N.[197] He then "pulled [her] legs out straight, pulled her shorts down, pulled his pants down, and got on top of her. He continued kissing her with his hands on her shoulders."[198] M.N. then felt "what she believed was [his] penis in her vagina. G.T. asked if it hurt, but did not stop when M.N. said it hurt. Although

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inconsistent legislative intent with other statutes to protect children; the harsh consequences of strict liability and sex offenses; overcriminalization; and discriminatory or selective enforcement. *See, e.g.*, *In re D.B.*, 950 N.E.2d at 533 (discriminatory or selective enforcement); *In re Z.C.*, 165 P.3d at 1208 (inconsistent legislative intent); *In re G.T.*, 758 A.2d at 306 (overcriminalization and harsh consequences of strict liability). This Article centers on the latter two.

190. *See* United States v. J.D.T., 762 F.3d 984, 1008 (9th Cir. 2013) (Berzon, C.J., concurring) (pointing to the offender's age, the consequences of sexual offender registration laws, and lack of statutory guidance for the prosecution of a child offender as sufficient reasons to find that he was not a delinquent).

191. *See In re D.B.*, 950 N.E.2d at 529–30 (labeling one party the victim and the other the offender); *In re Z.C.*, 165 P.3d at 1207 (prosecuting both parties); *In re G.T.*, 758 A.2d at 302 (pursuing charges against only one party).

192. 758 A.2d 301, 302 (Vt. 2000).

193. *Id.* at 302.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

she was not afraid of him, M.N. was not sure what G.T. would have done if she had pushed him off of her."[199]

M.N.'s mother and boyfriend "unexpectedly" returned home and saw G.T. "scramble up off" M.N.[200] "They ordered him out of the house," whereupon "M.N. began crying and ran upstairs," later telling her mother what had happened.[201] Despite the implication in this account of non-consensual or even forcible rape, G.T. was only charged with statutory rape.[202] The Court found that applying the statute to punish a child within the statutory zone of protection reached an absurd result not intended by the legislature.[203] One justice dissented—the only dissent in the three cases.[204] He argued that this was really a case of forcible rape, but because "[t]he prosecutor may have had difficulty proving" this, the statutory rape charges were properly brought and sustained.[205]

Both a thirteen-year-old girl and a twelve-year-old boy were prosecuted in *In re Z.C.*[206] for "consensual intercourse."[207] The Utah statute defines children as those under fourteen.[208] The girl, Z.C., became pregnant, which likely underlay in part the prosecution.[209] The juvenile court adjudicated both children delinquent for felony child sex abuse, but imposed different punishments on them.[210] The boy was put on probation and Z.C.

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199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *See id.* at 309 ("We agree . . . that the statute is intended as a shield for minors and not a sword against them.").

204. *Id.* at 309 (Johnson, J., dissenting).

205. *Id.* at 309–10. As discussed infra Part IV.A.1.2, the argument that statutory rape laws should be maintained to facilitate prosecution in "real," i.e. forcible and non-consensual rape, cases continue to have great resonance for prosecutors and policymakers.

206. 165 P.3d 1206 (Utah 2007).

207. *See id.* at 1207 n.1 (explaining that the court uses the term "consensual" although the age of consent is fourteen). Peer statutory rape is disproportionally enforced when a teenaged girl becomes pregnant. *See* discussion *infra* note 266.

208. *Id.* at 1208.

209. *Id.* at 1207.

210. *Id.*

was given what the appellate court deemed a "relatively light punishment," which included obeying her parents, writing an essay regarding her baby and the effects of her action on the baby, having no unsupervised contact with the boy, providing a DNA sample, and paying the DNA processing fee.[211] Only Z.C. appealed.[212] The Court held that applying the statute to treat the girl simultaneously as a victim and as an offender was absurd and not intended by the legislature.[213] Accordingly, it vacated Z.C.'s delinquency adjudication and declined to reach her constitutional claim of equal protection.[214]

*In re D.B.*[215] differs from the prior cases because it involved two boys.[216] The Ohio statute at issue defines sexual activity with a child younger than thirteen years old as rape, a first-degree felony.[217] D.B., a twelve-year-old at the time, was charged with nine counts of rape for encounters with M.G., an eleven-year-old boy, and one count for an incident with A.W., another twelve-year-old boy.[218] After D.B. moved to dismiss the complaint, the prosecutor dropped the charge related to A.W. and amended the indictment to allege that D.B. raped M.G. with force or the threat of force.[219] The trial court found no force and dismissed these counts. [220]

The testimony at trial was somewhat contradictory but the encounters were unequivocally consensual. Indeed M.G. explicitly testified that he consented verbally to anal and oral sex with D.B.[221] He also testified that, although D.B. was considerably

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211. *Id.*

212. *Id.*

213. *Id.* at 1208.

214. *Id.*

215. 950 N.E.2d 528 (Ohio 2011).

216. *Id.* at 529. I argue in Part III.A.2 that youth are disproportionately prosecuted for statutory rape for same-sex, particularly male-male, sex. *Infra* Part II.A.2.

217. *Id.*

218. *Id.* at 529–30.

219. *Id.* at 530.

220. *Id.*

221. *See* Merit Brief of Appellant D.B., *In re* D.B., 950 N.E.2d 528 (Ohio 2011) (No. 2010-0240), 2010 WL 3468429, at *4 (noting that M.G. would often receive video games or the use of D.B.'s pool in exchange for sex).

bigger than him, D.B. did not use his size to intimidate M.G.[222] M.G. did say that the boys would wrestle each other, but admitted it was "just for fun."[223] A.W. testified that he had witnessed D.B. and M.G. engage in anal sex after D.B. "bribed" M.G. with video games and the boys wrestled each other, an activity M.G. admitted "was for fun."[224] M.G. and A.W. testified that D.B. always initiated the sex and that D.B. bargained for it.[225] A.W. also specified that the two boys never engaged in sexual conduct until M.G. agreed to the activity and that he never heard D.B. threaten M.G.[226] M.G. first suggested that he give something to D.B. in exchange for video games. When D.B. suggested anal sex, M.G. told him that he would "do it if [he] could play [D.B.'s] video games."[227] The boys' sexual activity came to light when A.W. told his mother.[228] Even after D.B. was charged, the three boys remained friends, with A.W. and M.G. sending D.B. text messages.[229]

The trial court adjudicated D.B. delinquent of statutory rape based on its finding of "extensive cajoling, bribery, intimidation, to the point where[,] . . . eventually. . . it looks like [M.G.] gave in and did consent."[230] It also considered significant that the sex "was [D.B.]'s idea," that D.B. was one year older and bigger, and that "every single time it was about [D.B.] being sexually gratified. It wasn't about M.G."[231] The court sentenced D.B. to five years of incarceration, suspended the incarceration and placed D.B. on probation for an indefinite duration.[232] It also ordered him to attend counseling and sex offender treatment.[233]

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222. *Id.*

223. *Id.*

224. *In re D.B.*, 950 N.E.2d at 530.

225. *Id.*

226. *Id.*; Merit Brief of Appellant D.B., *supra* note 221, at *3.

227. *Id.* at *3–4.

228. *See id.* at *3 (discussing A.W.'s testimony that he agreed to "do it," but that his mother interrupted before they could begin).

229. *See id.* at *4 (explaining how A.W. and M.G. would send D.B. messages through their video game systems).

230. *See id.* at *5 (first alteration added).

231. *Id.* at *5 (quoting Transcript of Record at 202–03, *In re* D.B., No. 2009 CA 00024, 2009 WL 5062017 (Ohio Ct. App. 2009)).

232. *In re* D.B., 950 N.E.2d 528, 530–31 (Ohio 2011).

233. *Id.* at 531 (mandating sex offender counseling); Merit Brief of Appellant

At the time of the final appeal, DB had been on probation and in treatment for over two and a half years.[234]

The courts all reversed the guilty adjudications, but took two different approaches to the scope of peer statutory rape.[235] The *Z.C.* court did not prohibit any peer statutory rape prosecutions, narrowly confining the holding to "situations where no true victim or perpetrator can be identified."[236] The other two courts banned all prosecutions of children within the age of statutory protection, recognizing that the victim-offender overlap renders unworkable the fair prosecution of minors for statutory rape.[237]

The reasoning of these cases demonstrate that at least some courts are becoming frustrated with the use of peer statutory rape to police adolescent sexuality, and recognize the difficulties, or impossibility, of appropriately designating victims or offenders.[238] As such, they offer a way forward for addressing this problematic and ultimately unjust doctrine.[239]

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D.B., *supra* note 221, at *7 (requiring sex offender treatment).

234. Merit Brief of Appellant D.B., *supra* note 221, at *7.

235. *See In re D.B.*, 950 N.E.2d at 534 (reasoning that application of the statute to offenders under thirteen makes the statute unconstitutionally vague); *In re* Z.C., 165 P.3d 1206, 1213–14 (Utah 2007) (explaining that charging both parties leads to an absurd result because the statute requires both a perpetrator and a victim); *In re* G.T., 758 A.2d 301, 309 (Vt. 2000) (rendering the statute inapplicable when the offender is also a victim).

236. *In re Z.C.*, 165 P.3d at 1213. In limiting the holding to narrow circumstances, the court mentioned considering age as well as greater physical maturity. *See id.* (excluding cases involving situations where there is "an identifiable distinction between the perpetrator and the victim"). Even these factors, however, do not fully address the selective enforcement problems. *See infra* notes 263–269 (identifying cases in which courts selectively used these criteria or identified the difficulty in applying them to specific cases).

237. *See In re D.B.*, 950 N.E.2d at 534 (recognizing the difficulty of fair enforcement because the statute promotes arbitrary and discriminatory application); *In re G.T.*, 758 A.2d at 309 (pointing to the potential for discriminatory enforcement and interference of the privacy rights of defendants and victims as reasons to invalidate the law).

238. *See In re Z.C.*, 165 P.3d at 1213–14 (noting that consensual encounters between children under the age of consent may create difficulty distinguishing between perpetrator and victim).

239. *See In re G.T.*, 758 A.2d at 309 (charging the state legislature to clarify whether minors can be both a victim and offender in a consensual sexual encounter).

## *III. Vaguenets*

This Part describes vaguenets—broad and under-defined laws with inevitable selective enforcement—illustrating their characteristics and harms via an examination of peer statutory rape. It argues that selective enforcement for peer statutory rape tracks gender and sexuality norm violations, and that the broad sweep of the law punishes widespread, mostly harmless conduct. It then offers the vagueness doctrine as a potential fix.

In his seminal analysis of vagueness, Anthony Amsterdam identified three bedrock principles of our legal system protected by the doctrine—notice, fair enforcement, and sufficiently narrow criminalization.[240] As the Ohio Supreme Court recognized in *D.B.*, vaguenets, particularly peer statutory rape, present exactly these harms.[241] Overcriminalization takes a different form now than at the time of Amsterdam's analysis; contemporary reformers focus equally if not more on prosecutorial discretion than on police discretion.[242] They are concerned with dismantling the broad carceral state rather than more narrowly voiding individual statutes chilling certain people from exercising their rights.[243] Nonetheless, the vagueness doctrine's historic application as a tool to address substantive equality and liberty concerns can be refashioned for modern overcriminalization.[244] Although contemporary scholars have largely underestimated it, hints in recent cases support this use to undergird decriminalization efforts.[245]

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240. *See* Amsterdam, *The Void-for-Vagueness Doctrine*, *supra* note 35, at 76–81 (discussing courts' approaches to unclear laws that may not sufficiently define proscribed behavior and thus lead to unequal application).

241. *See In re D.B.*, 950 N.E.2d 528, 534 (Ohio 2011) (holding that the statute in question violated the vagueness doctrine by failing to sufficiently guide the court in distinguishing between victims and offenders).

242. *See* HUSAK, OVERCRIMINALIZATION, *supra* note 11, at 27 (reasoning that prosecutorial discretion creates injustice).

243. *See id.* at 18 (arguing that overcriminalization contributes to high rates of incarceration).

244. *See, e.g.*, *In re D.B.*, 950 N.E.2d at 534 (applying the doctrine to statutory rape).

245. *See supra* note 235 (giving three examples discussed in detail throughout this note).

### *A. An Example: Peer Statutory Rape*

I use the term "vaguenet" to describe broad and under-defined laws that invite selective enforcement.[246] They criminalize harmless conduct, or conduct bringing some harm, where the costs of criminalization outweigh the benefits.[247] The scope of covered conduct means that underenforcement is inevitable, as is a vast gap between the law on the books and the law in action.[248] Like police investigatory dragnets found to violate the Fourth Amendment, the vaguenet laws sweep in much innocent conduct in an effort to root out societal undesirables.[249] In short, these laws allow enforcement authorities to pick and choose from a huge pool of potential offenders, hiding their normative commitments behind the vast breadth of the statute.[250]

Peer statutory rape is a particularly stark example of a vaguenet given the immense number of law-breakers, the gap between empirics and morality about adolescent sex, the lack of a *mens rea* requirement in most jurisdictions, and the severe sanctions and stigma accorded sex offenders.[251] This Section begins with a brief outline of the victim-offender overlap, which compounds the problem.

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246. *See* Buell, *The Upside of Overbreadth*, *supra* note 8, at 1526 (discussing how statutory overbreadth may lead to discriminatory enforcement).

247. *See id.* at 1493 (using the example of drug dealing to argue that while overcriminalization may be necessary to reach all instances of criminal behavior, there may be means better suited to address the target behavior—i.e. treatment or other health and welfare policies).

248. *See id.* at 1525 n.113 (clarifying that the issue is not only overenforcement against particular classes, but also the failure to enforce the law equally among other social groups).

249. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 44–48 (2000) (concluding that vehicle checkpoints to find illegal drugs lacked individualized suspicion and thus violated the Fourth Amendment). For a thorough analysis of the problems with dragnets, see Christopher Slobogin, *Government Dragnets*, 73 L. & CONTEMP. PROBS. 107, 110 (2010) (recommending, *inter alia*, that dragnets be more narrowly approved based on their proportionate "hit rate" or their necessity to prevent "significant, specific, and imminent harm").

250. *See* HUSAK, OVERCRIMINALIZATION, *supra* note 11, at 17–32 (outlining how the wide breadth of discretion results in injustice).

251. *See supra* Part II.B (discussing overcriminalization of juveniles in the context of peer statutory rape and the high discretion held by prosecutors and judges that leads to selective enforcement).

### *1. The Victim-Offender Overlap*

Criminologists describe the intertwined and mutually causal relationship between victimization and offending as the "victim-offender overlap."[252] Surprisingly, this theoretical model has not been applied to peer statutory rape or other crimes for which the same conduct could be construed to render an individual either a victim or an offender.[253] Yet these mutual liability crimes, like peer statutory rape, invoke perhaps the purest type of victim-offender overlap—the victims are potential offenders and the offenders victims for the same incident.

The overlap between victim and offender is 100% in peer statutory rape cases.[254] The Supreme Court has stated that "so far as possible the line [between legal and illegal] should be clear."[255] Where the victims and offenders are unclear, this line is nonexistent.[256] In any given case, criminal law experts and laypeople alike cannot answer simple questions such as "Who will be charged? Who caused the harm here? And who was harmed?"[257]

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252. *See* Reingle, *The Victim-Offender Overlap*, *supra* note 16, at 1 (eschewing the frequently used dichotomy of victim or offender in a theoretical and empirical discussion of why these categories are not mutually exclusive). The lines between victims and offenders are blurry in other ways as well. One significant example is mitigation at sentencing for the victim's role in an offense. After a recent comprehensive survey of state sentencing schemes, Carissa Hessick and Doug Berman demonstrate that at least eighteen states consider victim wrongdoing as a mitigating factor. *See* Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 191 (2016) (providing examples of the statutory language recognizing this mitigation).

253. *See* Christopher J. Schreck & Eric A. Stewart, *The Victim-Offender Overlap and Its Implications for Juvenile Justice*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 47, 47–51 (Barry C. Feld & Donna M. Bishop eds., 2012) (discussing the limited application of the theory due to its recent rise to prominence).

254. *In re D.B.,* 950 N.E.2d 528, 534 (Ohio 2011). Recall that my definition of peer statutory rape requires that both parties be under the age of consent.

255. United States v. Lanier, 520 U.S. 259, 265 (1997) (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)).

256. *See In re* D.B., 950 N.E.2d at 534 (concluding that the Ohio statute criminalizing peer statutory rape is "unconstitutionally vague").

257. *See* HUSAK, OVERCRIMINALIZATION, *supra* note 11, at 29 (making this argument about marijuana possession enforcement).

The revised MPC draft acknowledges this problem in narrowing potential liability for minors for peer sexual activity: "Although hard lines [such as age cut-offs] . . . can create uncomfortable cliffs of liability, they are necessary to ensure that equally arbitrary liability does not attach to *only one of two* same-aged minor participants in nominally consensual activity."[258] This risk underlies my more radical proposal, outlined in detail below, to completely decriminalize peer sex below the age of consent.

### *2. Policing Gender & Sexuality*

The incredible breadth of statutory rape laws and the millions of sexually active minors give vast discretion to prosecutors and parents to pick and choose whom to punish.[259] All three peer state high court opinions outlined above critiqued this.[260] The *Z.C.* court opined that in most peer statutory rape cases "where no true perpetrator or victim exists . . . the State may not *create* a perpetrator and a victim through selective prosecution."[261] The *G.T.* court also expressed "serious concerns" about the breadth of prosecutorial discretion, noting that prosecutors essentially have "the power to define the crime" through their enforcement.[262] A federal judge similarly critiqued the "infinite discretion . . . to assign victim and offender status" in peer statutory rape cases.[263] Because almost all sexually active minors will never be charged, authority figures define statutory rape more than perhaps any other crime.[264]

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258. MODEL PENAL CODE § 213.5 statutory commentary (AM. LAW INST., Discussion Draft No. 2, 2015) (emphasis added).

259. *See In re D.B.*, 950 N.E.2d at 532–33 (warning that without guidelines for the application of criminal law, statutes may lead to abuse of prosecutorial discretion).

260. *See generally id. See also In re* Z.C., 165 P.3d 1206, 1212 n.9 (Utah 2007); *In re* G.T., 758 A.2d 301, 306 (Vt. 2000).

261. *In re Z.C.*, 165 P.3d at 1213 n.10 (emphasis added).

262. *In re G.T.*, 758 A.2d at 316–17.

263. United States v. JDT, 762 F.3d 984, 1012 (9th Cir. 2013) (Berzon, C.J., concurring).

264. *See* COCCA, JAILBAIT, *supra* note 19, at 124 (noting that most teen sexual activity is consensual, so that most cases are reported to prosecution by parents, health care providers, and teachers).

The factors used to distinguish between victims and offenders are not defined by statute, but rather by prosecutors and parents.[265] There appear to be no guidelines for addressing these cases; indeed, the prosecutors in the cases discussed here concede this.[266] The ad hoc factors they use to distinguish victims and offenders in peer cases are unrelated to the targeted harm, sexual exploitation of minors by adults.[267] Prosecutors and courts in the cases discussed here designate offenders based on their "common sense," who "initiated" the sexual activity,[268] and "whether the conduct was factually voluntary."[269] The latter factor is, of course, legally relevant only to a non-consensual or forcible rape prosecution, not one for statutory rape.[270]

Even age and maturity are not necessarily definitive criteria as they are often selectively used and, in the latter case, very difficult to measure.[271] Courts do sometimes accord liability to the

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265. *See, e.g.*, *In re* B.A.H., 845 N.W.2d 158, 166 (Minn. 2014) (mentioning several factors influencing prosecutorial discretion, including the common practice of rewarding a party's cooperation). This not only risks creating a parental "race to the courthouse" when two minors engage in sex, but also distorts how cooperation is supposed to work. The cooperator generally receives a lower sentence, not a designation as a victim. *See id.* ("Prosecutors routinely . . . offer less-culpable perpetrators reduced charges in return for cooperation.").

266. *See, e.g.*, *In re* G.T., 758 A.2d 301, 306 (Vt. 2000) (discussing prosecutorial selective enforcement). Even in the rare instances where prosecutors' offices develop some official guidelines, these also disproportionately target racial minorities and lower-income people. *See* Rigel Oliveri, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 503 n.193 (2000) (contending that statutory rape laws may be selectively applied to punish minorities or teenage mothers); *see also id.* at 503 (criticizing an Idaho prosecutor who targeted unwed pregnant teens who applied for public assistance in order to deter teen pregnancy).

267. *See, e.g.*, *In re B.A.H.*, 845 N.W.2d at 166 (considering who instigated or took a more dominant role and whether either party has a criminal history or cooperates with prosecutors).

268. *See, e.g.*, *id.* (permitting prosecutors to base their discretion on common sense); *In re* D.B., 950 N.E.2d 528, 530 (Ohio 2011) (factoring into the prosecution A.W.'s testimony that D.B. always initiated sexual conduct).

269. United States v. JDT, 762 F.3d 984, 998 (9th Cir. 2013).

270. *See In re D.B.*, 950 N.E.2d at 530 (recounting the lower court's dismissal of forcible rape charges for voluntariness, while retaining statutory rape charges).

271. *See id.* at 529 (prosecuting a twelve-year-old who engaged in sexual relations with an eleven-year-old and another twelve-year-old); Oliveri, *supra* note 266, at 480 (observing that some immature adult males may relate better

younger child.[272] For instance, in one case of consensual same-sex conduct, the court mentioned age as a factor in designating one boy, TC, the offender. TC was five years older than one child, but the court was silent as to the fact that he was one year younger than another boy he had sex with—a boy who was designated a victim.[273] Courts have also considered maturity, but differ on whether this includes physical maturity, emotional maturity, or both.[274] Moreover, it is unclear how different types of maturity should be assessed.[275]

I contend that the most frequent factor used in peer statutory rape cases is conformity to gender and sexuality norms. Statutory rape embodies gender and sexuality values more than perhaps any other crime.[276] Its enforcement continues to "be more about . . . sexuality than about age," . . . "both safeguarding and punishing adolescent sexuality."[277] Parents tend to report most often, and, concomitantly, prosecutions proceed most often, against minors who do not conform to gender and sexuality or other norms.[278]

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to mature teens than women closer to their own ages).

272. *See In re* E.R., 197 P.3d 870, 871 (Kan. Ct. App. 2008) (involving a twelve-year-old adjudicated delinquent for sexually fondling a fourteen-year-old).

273. *See In re* TC, 214 P.3d 1082, 1085 (Haw. Ct. App. 2009) (noting the defendant was twelve while one victim was seven, but only stating that the second victim was under fourteen). Developmental disabilities can also render chronological age a poor proxy for maturity. *See* Nevins-Saunders, *supra* note 184, at 1076 (arguing that prosecutors should have to establish the *mens rea* of defendants with mental retardation to show they understand that people below the age of majority cannot legally consent to sex). In this case, for instance, TC was "underdeveloped both mentally and emotionally" and was a special education student. *In re TC*, 214 P.3d at 1085.

274. *See* Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1146–56 (2012) (highlighting concepts of maturity among different cultures).

275. *See id.* at 1156–64 (suggesting a more uniform approach to reconcile differing conceptions of maturity).

276. *See* Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464, 476 (1981) (upholding a statutory rape law that only criminalized sex with minor females, not males).

277. COCCA, JAILBAIT, *supra* note 19, at 27–28.

278. *See* Jerome Hunt & Aisha C. Moodie-Mills, *The Unfair Criminalization of Gay and Transgender Youth: An Overview of the Experiences of LGBT Youth in the Juvenile Justice System*, CTR. FOR AM. PROGRESS (June 29, 2012), https://www.americanprogress.org/issues/lgbt/report/2012/06/29/11730/the-unfair-criminalization-of-gay-and-transgender-youth (last visited Feb. 14, 2017)

Josh Bowers has aptly described criminal laws as "shells" that prosecutors may fill with their own content.[279] Statutory rape law is vulnerable to being filled with the deeply gendered narratives or scripts underlying accounts of sex and rape.[280] A caveat is warranted. I do not contend that all or even many prosecutors deliberately discriminate against peers in statutory rape cases on gender or sexuality lines. Rather, I argue that the immense pool of offenders, the parent-driven complaint process, and the controversial nature of adolescent sexuality make it very likely that the categorization of offenders and victims is heavily influenced by normative views on sexuality.

This Section discusses two ways in which statutory rape polices gender and sexuality norms: first, minors are disproportionately prosecuted for same-sex sexual activity, and second, the designation of victims and offenders reinforces aggressive male and passive female gender roles.

### *a. Same-Sex Conduct*[281]

Despite the advent of marriage equality, lesbian, gay, bisexual, and transgender (LGBT) people continue to be discriminated against, and disproportionately prosecuted and punished.[282] Joey Mogul has documented the criminalization of LGBT people, particularly around sexual conduct and

(noting the overrepresentation of LGBTQ youth in the juvenile justice system) (on file with the Washington and Lee Law Review).

279. *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1659–60 (2010) (describing prosecutors' "almost unfettered discretion").

280. *See* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1259 (2011) (arguing that the criminal justice system fails to recognize or punish the rape of male victims).

281. I focus here on same-sex sexual conduct, rather than minors who self-identify as lesbian, gay, or bisexual, because of the fluidity of gender identities and sexual desire, something particularly prevalent among contemporary adolescents. *See* Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 541–43 (2013) (reporting this fact and critiquing the law's failure to recognize this fluidity).

282. *See* JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE 72–81 (2011) (describing generally the treatment of LGBT people in criminal courts).

underenforced crimes—crimes like peer statutory rape.[283] LGBT minors are also disproportionately represented in the juvenile and criminal justice systems and punished for sexual conduct.[284]

Statutory rape is no exception. First, the statutory scheme in several states punishes same-sex sexual activity more harshly.[285] Second, although there is no comprehensive means of tracking same-sex versus opposite-sex cases, experts agree minors are likely more often prosecuted for the former. Carolyn Cocca, author of the only book-length study of American statutory rape, concludes that "[t]here is some evidence that prosecutors under the laws have disproportionately targeted [same-sex] relationships."[286] Illustrative of this is one recent Massachusetts case involving thirteen-year-old and fifteen-year-old boys.[287] The younger boy's parents told their son that homosexuality was "morally wrong" and "pressure[d]" the police to prosecute.[288]

At least two states explicitly exclude same-sex adolescents from their mitigating age-gap provisions, and several more states have separate laws criminalizing sodomy with minors which do not contain age-span provisions. Texas and Alabama explicitly exclude lesbian and gay minors from the provision benefitting other minors.[289] The Texas statute offers an affirmative defense

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283. *See id.* at 64–68 (uncovering sexual bias against LGBT people by those in the criminal justice system).

284. *See* Hunt & Moodie-Mills, *supra* note 278 (reporting that in 2012, LGBT youth represented five to seven percent of the nation's youth population and thirteen to fifteen percent of those in the juvenile justice system).

285. *See* Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 227 (2008) (noting that states such as Texas do not have a Romeo and Juliet exception, which means that "an eighteen-year-old male who has consensual sex with a sixteen-year-old male would be guilty of a felony"); *see also id.* (describing how California and Alabama distinguish between sexual intercourse and sodomy, resulting in much harsher penalties for sex between adolescents of the same sex).

286. COCCA, JAILBAIT, *supra* note 19, at 10; *see also* Higdon, *supra* note 285, at 241–46 (describing a statutory-rape case in which an eighteen-year-old did not qualify for the Romeo and Juliet exception because he engaged in oral sex with another male).

287. *See* Commonwealth. v. Washington W., 928 N.E.2d 908, 913–14 (Mass. 2010) (concluding that the older boy had met the high bar of a reasonable showing of selective prosecution based on sexual orientation).

288. *Id.* at 911 n.2.

289. *See generally* ALA. CODE § 13A-6-62 (1975); TEX. PENAL CODE ANN.

to statutory rape where the defendant "was not more than three years older than the victim and of the opposite sex."[290] The second group of states, including California, Kentucky, and Missouri, do not offer the defense either.[291] Although this may be due to a legislative oversight rather than deliberate differentiation, these exclusions, nonetheless, leave adolescents engaging in same-sex activity more vulnerable to prosecution and punishment than their peers and send a message about the perceived deviancy of gay and lesbian sex.[292]

Even in the bulk of states with gender-neutral statutes, minors are likely more vulnerable to prosecution for same-sex activity due to ongoing discomfort and even disgust with same-sex sex, particularly by parents.[293] Analogously to the perception of youth of color as engaging in "more dangerous behavior" than white youth despite the data, adults continue to deem same-sex sexual activity more abnormal or harmful than opposite-sex sexual activity.[294] Demonstrating this, a recent report found that LGBT youth are significantly more likely to be disciplined for public displays of affection at school than their heterosexual peers.[295]

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§ 21.11 (West 2009).

290. TEX. PENAL CODE ANN. § 21.11 (West 2009) (emphasis added).

291. *Compare* CAL. PENAL CODE § 286 (West 2013), *with* CAL. PENAL CODE § 261.5(b) (West 2011).

292. At least one high court has found these discrepancies to violate equal protection. *See* State v. Limon, 122 P.3d 22, 40 (Kan. 2005) (holding that a statute that punished opposite-sex statutory rape much less severely than same-sex statutory rape violated federal and state equal protection provisions).

293. *See* AMY A. ADELE HASINOFF, SEXTING PANIC: RETHINKING CRIMINALIZATION, PRIVACY, AND CONSENT 14 (2015) (opining that these parents, and those upset about the race or class of their children's partners, "are responsible for a substantial proportion of statutory rape prosecutions").

294. *See* Henning, *supra* note 67, at 416 (remarking that racial disproportionality in the juvenile justice system is partially driven by racial bias that results in the increased visibility and appearance of dangerousness among adolescents in poor communities of color).

295. *See* Vickie L. Henry & Michelle Wiener, *It's Not Your Imagination: LGBTQ Youth Are Disproportionately Punished in School*, GLAD (Apr. 7, 2015), http://www.glad.org/youth/post/its-not-your-imagination-lgbtq-youth-are-disproportionate ly-punished (last visited Oct. 16, 2016) (noting that LGBTQ youth are up to three times more likely to become involved in the juvenile or criminal justice system as a result of school discipline and that 28% report unequal discipline for public displays of affections).

Several recent cases illustrate this pattern. In 2012, an eighteen-year-old Florida high school student was prosecuted for sex with her fourteen-year-old girlfriend, a student at the same school.[296] The younger girls' parents initiated the prosecution as soon as they learned of the relationship, despite their daughter's protestations that it was consensual.[297] The older girl, Kaitlyn Hunt, was expelled from high school and faced up to fifteen years in prison. She ultimately accepted a plea deal including four months incarceration and two years house arrest.[298] Although the prosecutor argued that Kaitlyn's sexual orientation had "nothing to do with" her prosecution—and that the Florida law criminalizes adolescent sex of any "combination"—there is no doubt that the vast majority of sexually active adolescents escape prosecution.[299] Deeply religious parents and sexual activity deemed abnormal in their community likely played a role in the initiation of the case.

Male gay sex has always been less palatable to the mainstream than lesbian sex, so it is perhaps not surprising that a number of the scant-reported peer statutory rape cases involved two or more boys.[300] Indeed, *D.B.*, the most recent in the trio of decisions limiting peer statutory rape, involved a twelve-year-old boy adjudicated delinquent for anal sex with an eleven-year-old boy, a case that was initiated by the eleven-year-old's father.[301] The harsh treatment of same-sex conduct is also reflected in a recent Minnesota case where a fourteen-year-old was sentenced to "indefinite probation," completion of a residential treatment

296. *See generally* Daniel Arkin, *Florida Mom Alleges Anti-Gay Bias After Daughter Expelled, Arrested*, NBC NEWS, http://usnews.nbcnews.com/_news/2013/05/20/18376456-florida-mom-alleges-anti-gay-bias-after-daughter-expelled-arrested (last visited Feb. 14, 2017) (on file with the Washington and Lee Law Review).

297. *Id.*

298. Sara Ganim, *Gay Florida Teen Accepts Plea Deal, Prosecutor Says*, CNN (Oct. 3, 2013), http://www.cnn.com/2013/10/02/justice/florida-gay-teen-kaitlyn-hunt-case/ (last visited Feb. 14, 2017) (on file with the Washington and Lee Law Review).

299. *Id.*

300. *See generally* WILLIAM ESKRIDGE, DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003 (2008) (discussing the history of anti-sodomy laws and demonstrating that lesbian sex has been criminalized and punished far less than male gay sex).

301. *In re* D.B., 950 N.E.2d 528, 530 (Ohio 2011).

program, and registration as a sex offender for anal sex with boy one year younger than him.[302]

The judge in another recent case called the ten-year-old defendant "the poster child for delinquency" for engaging in consensual same-sex activity.[303] The prosecutors did not specify why they chose to prosecute this peer case, but did concede that they knew of no other statutory rape prosecution where the defendant was under age twelve.[304] The Ninth Circuit affirmed the boy's delinquency adjudication for oral and anal sex with three boys, where all four boys were under the age of consent.[305]

### *b. (Racialized) Gender Norms*

As it did historically, statutory rape polices masculine and feminine roles. Minor males are prosecuted significantly more frequently than females.[306] Boys are sometimes prosecuted even when they are the younger or the less mature party.[307] This

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302. *See generally In re* B.A.H., 845 N.W.2d 158, 162 (Minn. 2014). *See also In re* TC, 214 P.3d 1082, 1098 (Haw. Ct. App. 2009) (denying the argument that the state improperly targeted the older boy because he engaged in same-sex acts by concluding that the "[s]tate's exercise of prosecutorial discretion in this case was not constitutionally infirm").

303. United States v. JDT, 762 F.3d 984, 992 (9th Cir. 2014).

304. *See id.* at 995–96 (contending that "Congress did not intend for the statutory-rape provision to be used to prosecute a 10-year-old prepubescent boy for knowing conduct, and that the trial prosecutor arbitrarily disregarded Congress' intention").

305. *Id.* at 984. A writ of certiorari was declined November 2, 2015. The government dropped the allegations against two of the boys after trial. *Id.* at 988. As noted earlier, the concurrence expressed concern with the trial court's reasoning and peer statutory rape prosecutions. *Id.* at 1008–15 (Berzon, C.J., concurring).

306. *See* BRITTANY L. SMITH & GLEN A. KERCHER, CRIME VICTIMS INSTITUTE, ADOLESCENT SEXUAL BEHAVIOR AND THE LAW 13 (2011), http://www.crimevictimsinstitute.org/documents/Adolescent_Behavior_3.1.11.pdf (describing cases from around the country). *See generally* TROUP-LEASURE & SNYDER, *supra* note 6, at 4. Most of the recent reported cases of opposite-sex peer conduct also illustrate this pattern—either the boys are prosecuted or, less frequently, both boys and girls. *See, e.g.*, Brief for Appellate at *1, Jordan F. v. Arizona, No. CV-09-0266-PR, 2009 WL 5149184 (Ariz. Sept. 18, 2009) [hereinafter Brief for Appellate] (describing the prosecution of one boy for in-school sexual encounters between multiple girls and boys).

307. To take just one example, a twelve-year-old boy was prosecuted for "sexually fondling a fourteen-year-old girl who was a willing participant." *In re*

paradigm reflects both the increased blame placed on boys for consensual sexual behavior and the heightened protection granted to at least some girl victims.

A recent case illustrates that this gender bias can determine the designation of victims and offenders from the very start of a case.[308] During "free time" in one Arizona middle school class, a group of similarly aged students—four boys and three girls—sat and studied together.[309] The students began playing a "game that consisted of limited acts of mutual sexual contact whereby the boys would touch the female students' fully clothed breasts, and the female students touched the boys' genitals over *and under* the clothing."[310] All parties played willingly.[311] When a teacher learned about "the game" from one of the participating female students, Jordan, a thirteen-year-old African-American boy, "was handcuffed and arrested at school."[312] A "massive investigation" was launched, almost exclusively focused on the boys.[313] Jordan was ultimately charged with felony sexual abuse for touching a girls' breast over her shirt.[314]

In affirming Jordan's guilty adjudication, the appellate court acknowledged that "female students may have engaged in sexual contact" with Jordan and another boy at school—something the girls had admitted—but reiterated that prosecutors have "wide latitude [to] determin[e] who to [charge]."[315] The court relied on the fact that the boys purportedly engaged in more contact with

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E.R., 197 P.3d 870, 871 (Kan. Ct. App. 2008). A Kansas appellate court reversed the delinquency adjudication, interpreting that state's statute to require "the offender to be older than the victim." *Id.* at 871–72.

308. *See generally In re* Jordan F., No. 1 CA-JV 08-0191, 2009 WL 2525311, at *1–3 (Ariz. Ct. App. Aug. 18. 2009), *petition for reh'g denied*. Another boy was charged with various sex offenses and a third boy was investigated but not charged. *Id.* at *1 n.1.

309. *See* Brief for Appellate, *supra* note 306, at *4 (describing that the free time was meant for students to study in group sessions).

310. *Id.* at *4–5.

311. *See id.* at *5 (noting that one of the participants in this game alleged that Jordan touched her chest).

312. *Id.* at *5–6.

313. *Id.* at *5.

314. *See In re* Jordan F., 2009 WL 2525311, *1–3 (Ariz. Ct. App. Aug. 18. 2009) (affirming the lower court's decision).

315. Brief for Appellate, *supra* note 298, at *1.

more people than the girls ("more victims") because there was one more boy than girl in the group.[316] It ignored the key facts that the "game" of sexual touching was mutually consensual and that some of the girls may have engaged in more invasive touching—inside the pants rather than over the shirt.[317]

This fact pattern is not atypical; in another recent case, the Supreme Judicial Court of Massachusetts held that a boy had met the high bar of demonstrating a reasonable showing of discrimination where only the boy was prosecuted after he and three girls below the age of consent had "mutually consensual oral sex."[318] Emphasizing that "prosecutorial discretion is not boundless," the court ordered the state to turn over discovery related to its relative prosecutions of boys and girls.[319] The boy was fourteen and in high school, two of the girls were twelve-years-old and one eleven, all middle school students—small age and maturity differences that the court did not find definitively supported the prosecutor's refusal to charge the girls.[320]

Nonetheless, the prosecutor argued that even if the discovery showed that males were disproportionately charged with peer statutory rape, the documented link between rape and gender would "say little or nothing about the selectivity of a decision to charge a male with rape versus a female" because perhaps males are more likely to rape.[321] This circular argument makes no sense where all the parties are below the age of consent and thus equally liable under the statute. Essentially the link between masculinity and offending exists because the prosecutor has

316. *See id.* at *5 (arguing that the "State's investigation focused almost exclusively on Jordan, with over [thirty] student interviews focused on Jordan's conduct, compared to [four] interviews relating to the females' conduct").

317. *See id.* (noting the thirty interviews investigators conducted related to Jordan and four interviews related to the three girls' conduct).

318. Commonwealth. v. Bernardo B., 900 N.E.2d 834, 844 (Mass. 2009). The prosecution also noted that the boy was "a football player," a fact presumably enhancing his masculinity and related offender status. *Id.* at 849.

319. *See id.* (including principles of equal protection in its analysis, which prohibit the discriminatory application of impartial laws).

320. *See id.* at 846–49 (noting that the two-year age difference is not inconsequential because it is a factor in determining "whether [the boys'] behavior was so dissimilar from that of the girls in nature, kind, and degree").

321. *Id.* at 846.

defined peer statutory rape to manifest that link, i.e. prosecuting only boys.

Gendered roles are sometimes translated into inculpating factors in both same-sex and opposite-sex encounters. As discussed earlier, in *D.B.*, the trial court contrasted the offender/boy, who initiated the sexual contact purportedly for his sole gratification, with the passive, feminized boy as the victim, despite the boys' close age proximity and evidence that the sex was consensual.[322] Another court described consensual anal sex between two similarly aged boys as "reflecting an almost archetypal perpetrator and victim of sexual conduct."[323] The court designated as the offender the boy who initiated conduct, even noting critically that this boy provided lubricant.[324] The more passive boy, who resisted the purported offender's suggestions until ultimately capitulating (playing coy?), was designated the victim.[325] The prosecutors in an opposite-sex case followed the same narrative in designating the boy an offender and all of the consenting girls as victims.[326] What brought the boy offender status? That he "pushed relentlessly for what he wanted" and "all of the sex acts involved [him] obsessively seeking his own passion and pleasure."[327]

On the flip side, less feminine behavior can erode victim status. I have previously described this dynamic in the context of prostitution versus trafficking; the same binary of "good girls" and "bad girls" colors statutory rape law.[328] Girls who do not reflect the chaste feminine ideal may themselves be punished, or exploitation they suffer may go unrecognized.[329] In the relatively

322. *In re* D.B., 950 N.E.2d 528, 108 (Ohio 2011).

323. *In re* B.A.H., 845 N.W.2d 158, 166 (Minn. 2014).

324. *Id.*

325. *Id.*

326. Commonwealth. v. Bernardo B., 900 N.E.2d 834, 844 (Mass. 2009).

327. *Id.*

328. Godsoe, *Punishment as Protection*, *supra* note 50, at 1367.

329. *See* COCCA, JAILBAIT, *supra* note 19, at 11–15, 164 (outlining the historic promiscuity defense). Although jurisdictions have abolished the promiscuity defense, the behavior of victims continues to be scrutinized. For instance, in a recent civil case, the L.A. school district argued that a fourteen-year-old Latina girl was "partly to blame" for the statutory rape by her adult math teacher because "she lied to her mother so that she could have sex with her teacher." Kate Picker, *School District: Student Is Partly to Blame for Sex*

rare instances when a girl is prosecuted for opposite-sex peer statutory rape, it is often because her pregnancy renders her less victim-like and more culpable. This was, for instance, the situation in *Z.C.* where both Z.C. and her male partner were charged.[330]

These victim and offender roles are highly racialized. One scholar has aptly described statutory rape as "a story about white women's vulnerability" and about "black male culpability."[331] As such, it conforms to the historic and ongoing construction of Black men as overly violent and sexual, and "inherent[ly] deviant" with an "allegedly insatiable appetite for white women."[332] Richard Delgado also charts the racialized contours of statutory rape. He describes the crime as primarily applied against "two groups: men . . . who have sex with girls from 'good homes,' and minority men, who are punished if they commit a crime of having sex with white women or impregnate a woman of color [who receives public benefits]."[333] One highly publicized case illustrates this dynamic: Genarlow Wilson, a Black seventeen-year-old, was convicted of aggravated child molestation and sentenced to ten years in prison without parole for engaging in consensual oral sex

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*with Teacher*, TIME MAG. (Nov. 14, 2014), http://time.com/3586324/school-district-student-is-partly-to-blame-for-sex-with-teacher (last visited Mar 2, 2017) (on file with the Washington and Lee Law Review). An analogous approach to adolescent female sexuality is found in sexting prosecutions. Girls who violate feminine-role models, for instance by photographing themselves in provocative or nude poses, are often sanctioned more severely than youth who harm other people, for instance by sharing the photos without permission. *See* HASINOFF, *supra* note 285, at 46 (collecting cases).

330. State *ex rel* Z.C., 165 P.3d 1206, 1211 (Utah 2007).

331. *See* Goodwin, *Law's Limits*, *supra* note 46, at 493–95 ("For example, Virginia, Georgia, Mississippi, Alabama, and Louisiana enacted race-specific rape law, which specifically mandated tougher sentencing against Black males convicted of raping white women."). I have previously described the deeply entrenched "social taboo" of this race and sex pairing. *See* Godsoe, *Perfect Plaintiffs*, *supra* note 50, at 141 (noting that the opposite pairing—white man and Black woman—was implicitly condoned and underlay in part the success of the miscegenation challenge in *Loving v. Virginia*).

332. PATRICIA HILL COLLINS, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER AND THE NEW RACISM 161 (2004); *see also id.* at 153–54 (describing how Black male athletes "mark the boundary between admiration and fear, speak to the tension linking Western efforts to control [b]lack men, and [b]lack men's resistance to this same process").

333. Richard Delgado, *No: Selective Enforcement Targets 'Unpopular' Men*, A.B.A. J. 1, 86 (1996).

with a fifteen-year-old white girl.[334] Most commentators felt that the couple's racial makeup fueled the prosecution, and following significant public outcry, Wilson was released from prison early.[335]

The scant data confirms that Black and Latino men and youths are likely disproportionately prosecuted for statutory rape.[336] In the most recent year for which data are available, 2012, 1,100 of the 5,358 offenders were Black, or about 20.5% versus about 13% of the population.[337] One stark, if isolated example is the 2003 statutory rape "most wanted" list of one California county on which all of the thirty-two young "wanted" men were either African-American or Latino.[338] Indeed, fears of racial disproportionality led some African-American legislators to recently oppose increased federal penalties for statutory rape.[339]

Relatedly, male victims continue to go unrecognized.[340] Indeed, female adult statutory rape of adolescent men was the

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334. Wilson v. State, 631 S.E.2d 391, 392 (Ga. Ct. App. 2006); *see also* MICHELE A. PALUDI, THE PSYCHOLOGY OF TEEN VIOLENCE AND VICTIMIZATION 58–59 (Michele A. Paludi ed., 2011) ("In adult court, Wilson was convicted of aggravated child molestation, registered as a sex offender, and sentenced to ten years in jail, the mandatory minimum sentence under Georgia law.").

335. *See* Michael Kent Curtis & Shannon Gilreath, *Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature After* Lawrence v. Texas, 43 WAKE FOREST L. REV. 155, 175–79 (2008) (finding the punishment to be grossly out of proportion to the severity of the crime). This case also illustrates the disproportionate punishment for some types of sex—whereas Georgia law at the time made oral sex with a minor a felony, vaginal intercourse with a minor was a misdemeanor. Shortly after the Wilson case, the state legislature amended the statute to reduce oral sex to a misdemeanor. *See generally* GA. CODE ANN. §16-6-2(d).

336. *See* Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 323 (2003) (citing a study that showed out of the thirty-five people who were prosecuted, thirty-two were men who identified themselves as Hispanic or black).

337. *See generally* UNIFORM CRIME REPORT, *supra* note 24. The DOJ does not appear to collect statistics about Latinos for statutory rape. More generally, there is a scarcity of detailed data on statutory rape offenders and victims.

338. *See* Sutherland, *supra* note 336, at 328 (compiling numbers from San Bernardino County District Attorney, Statutory Rape Prosecution, and Wanted for Criminal Statutory Rape).

339. *See* COCCA, JAILBAIT, *supra* note 19, at 47 (speaking to a concern that minorities would be disproportionately prosecuted).

340. *See* Levine, *No Penis, No Problem*, *supra* note 175, at 358 (noting that societal gender roles "tend to illuminate acts of male perpetration and female

subject of two popular Saturday Night Live skits within the last year alone.[341] The following reaction to a recent case of an adult teacher having sex with minor boys also demonstrates the devaluation of male victims:

> A beautiful woman "rapes" teenage boys! Now, please, can someone who knows more about this explain this to me? As I remember, boys that age are always ready for sex . . . No one was raped here! It was all just about conquest. Those boys are laughing and bragging about it, and I would bet my house on that![342]

Finally, the punishments imposed on girls versus boys reveal gendered patterns. The boys in the statutory rape cases discussed herein, such as Z.C.'s partner, typically receive incarceration or probation, as well as sex offender "treatment" and sometimes registration.[343] In contrast, Z.C. received a much lighter if more paternalistic punishment: She was ordered to, *inter alia*, obey her parents, and to write an essay regarding her child and her actions on the child.[344]

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victimization while keeping underground the existence of female-perpetrated abuse and male victimization").

341. *See* Zeba Blay, *"SNL" Did a Sketch About Rape Again and It Still Wasn't Funny*, HUFFINGTON POST (Jan. 25, 2016), http://www.huffingtonpost.com/entry/ snl-did-a-sketch-about-rape-again-and-it-still-wasnt-funny_us_56a64641e4b076 aadcc736e5 (last visited Mar. 2, 2017) (discussing two skits on SNL about a 'hot' female teacher having sex with a minor teenaged boy) (on file with the Washington and Lee Law Review). Although some, like this writer, criticized the skit, other commentators found it funny or harmless. *See* Michael Sleazak, *Ronda Rousey Hosts SNL: Watch Video of the Best and Worst Sketches*, TVLINE (Jan. 23, 2016), http://tvline.com/2016/01/23/ronda-rousey-hosts-saturday-night-live-snl-recap-video (last visited Mar. 2, 2017) (quoting a commentator Patrick: "The statutory rape trials are hilarious . . . Keep em[sic] coming") (on file with the Washington and Lee Law Review).

342. Sharon Teal Coray, *In Teacher Sex Case, Blame the Boys, Too*, SALT LAKE TRIB. (July 15, 2015), http://www.sltrib.com/opinion/2727266-155/letter-in-teacher-sex-case-blame (last visited Mar. 2, 2017) (on file with the Washington and Lee Law Review).

343. *In re* Z.C., 165 P.3d 1206, 1210 (Utah 2007). Boys in same-sex cases seem to garner particularly harsh sentences. For instance, one fourteen-year-old was sentenced to "indefinite probation," completion of a residential treatment program, and registration as a sex offender. *In re* B.A.H., 845 N.W.2d 158, 162 (Minn. 2014).

344. *In re Z.C.*, 165 P.3d at 1210.

### *3. Punishing Normal*

Cases such as *Z.C.*, where both minors were charged, starkly demonstrate the harms of overcriminalization. As the court there put it: "In this situation, there is no discernible victim that the law seeks to protect, only culpable participants that the law seeks to punish."[345] The system thus operates as a one-way ratchet—sweeping in many more offenders than victims. Recall the opening example of the middle school "sex party" where all the young people were arrested and charged.[346]

The stigma of statutory rape adjudication and its harsh punishments compound the harms of its broad sweep. The *Z.C.* court distinguished statutory rape and its harsh consequences from other mutual liability crime, such as fornication, and questioned labeling and punishing such behavior as "child rape."[347] The harsh penalties also informed the *G.T.* court's scrutiny.[348] The *G.T.* court characterized peer statutory rape as nonsensically rendering "*every* sexually active child under fourteen years of age a child abuse victim, perpetrator, or both."[349]

Even where prosecutors do not charge all of the parties, the threat of it is omnipresent. As noted earlier, almost half of high school students have had sexual intercourse, 20% as early as ninth grade, and millions of minors have had intercourse or oral

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345. *Id.* at 1212.

346. *See Four Brown Deer, supra* note 2 (believing that the teens should be charged with first and second degree sexual assault of a child).

347. *See In re Z.C.*, 165 P.3d at 1210 (writing that the legislature passed a bill that amended the diversion statute to avoid "the application of the child sex abuse statute").

348. *See id.* at 1213 (admonishing the prosecutor because labeling someone a child abuser "can have serious consequences that were not intended by the legislature"); *see also* United States v. JDT, 762 F.3d 984, 1008–11 (9th Cir. 2014) (Berzon, C.J., concurring) (outlining the harsh consequences of statutory rape conviction including possible sex offender registration, even for juveniles); *see also* Goodwin, *Law's Limits*, *supra* note 46, at 487 (noting that the "untenable, absurd results" of statutory rape laws applied against minors "frequently impose legal or extralegal burdens on [them] that may exceed those of adult, convicted rapists").

349. *In re* G.T., 758 A.2d 301, 304 (Vt. 2000) (emphasis added). The dissenting judge overlooked the punitive nature of the juvenile justice system, supporting the delinquency sentence because of the system's purported rehabilitative role. *Id.* at 310 (Johnson, J., dissenting).

sex by the age of thirteen.[350] Given this reality, it is impossible for peer statutory rape laws to be enforced at anywhere near the level of prevalence of the offense. The statute itself offers no hint as to who will or should be prosecuted. This line between deviant and normal adolescent behavior will likely turn on illegitimate criteria, such as race.[351]

Criminalization is especially pernicious here because it punishes behavior that is both widespread and developmentally normal for adolescents. The two concepts are related; one indication of normality is how typical a practice is. Dictionaries define normal as "conforming to a standard; usual, typical, or expected" and "usual or ordinary: not strange."[352] The high prevalence of peer adolescent sex certainly renders it "typical or expected."

Medical experts also tell us that peer child and adolescent sexuality is normal and not usually harmful.[353] The medical literature confirms that it is developmentally normal for minors to experiment with sexual touching, oral sex, and even sexual intercourse at a wide range of ages.[354] Many young children masturbate, and kiss and touch the genitals of other children.[355]

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350. CDC, *supra* note 7.

351. *See* Henning, *supra* note 67, at 427 (noting that criminalization of typical adolescent behavior, such as "a typical school-yard fight [being] labeled as felony assault and students who play 'catch' with a teacher's hat [being] charged with robbery[,]" is highly racialized).

352. *Normal*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/normal (last visited Mar. 2, 2017) (on file with the Washington and Lee Law Review); *see also Normal*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/ normal (last visited Mar. 2, 2017) (on file with the Washington and Lee Law Review).

353. Dictionaries also define normal as "mentally and physically healthy." *Normal*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/normal (last visited Mar. 2, 2017) (on file with the Washington and Lee Law Review).

354. Physical puberty has been starting earlier, particularly for girls, with pubertal onset ranging from seven to thirteen-years-old for girls and nine to fourteen-year-old boys. Experts also confirm that "[s]exual development begins well before adolescence," but note that most children under fourteen may not be physically or emotionally ready for oral sex or intercourse. CLEA MCNEELY, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, THE TEEN YEARS EXPLAINED 62 (2009), http://www.jhsph.edu/research/centers-and-institutes/center-for-adolescent-health/_includes/_pre-redesign/Interactive%20Guide.pdf (describing different age groups and each groups inclinations towards sexual activities).

355. *See id.* (describing the ages of eleven to thirteen as the usual start of

According to experts, this consensual sexual play is "not uncommon" and should not usually be a cause for concern.[356]

Another report outlines the increasingly large number of minors engaging in sexual activity with another adolescent from age ten and up: "Sexual fantasy and masturbation episodes *increase* between the ages of 10 and 13 . . . [and] by the age of 12 or 13, some young people may pair off and begin dating and experimenting with kissing, touching, and other physical contact, such as oral sex."[357] By ages 14 to 16, "both genders experience a high level of sexual energy," and by 16 many have "willingly experienced" intercourse.[358] Emphasizing that "[s]exuality is a vital part of growing up," researchers emphasize that there is a very wide range of "normal adolescent behavior" around sexuality.[359]

Definitions of sexual disorders reinforce the normalcy of sexuality among a wide age range of minors. Tellingly, the definitive definition of mental disorders excludes anyone younger than sixteen-years-old from being defined as a pedophile (or in common parlance "child molester").[360] Even those sixteen or older must be more than five years older than the child, and the Diagnostic and Statistical Manual of Mental Disorders (DSM) urges caution in diagnosing as pedophiles even individuals "in late adolescence (i.e. over sixteen) involved in an ongoing sexual relationship with a twelve- or thirteen-year-old."[361]

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such sexual activity).

356. *See* NAT'L CHILD TRAUMATIC STRESS NETWORK, SEXUAL DEVELOPMENT & BEHAVIOR IN CHILDREN 1–3 (2009), http://www.nctsn.org/sites/default/files/assets/pdfs/sexualdevelopmentandbehavior.pdf (reporting that most sexual play is an expression of children's natural curiosity).

357. MCNEELY, *supra* note 354, at 62 (emphasis added). The increase at age ten and up indicates the medical reality that children have sexual thoughts and contact exploration in early childhood.

358. *Id.* at 63.

359. This includes same-sex exploration for children who are not gay. *Id.* at 68.

360. AM. PSYCHIATRIC ASS'N, *supra* note 49, at 697.

361. *Id.* For more on the disconnect between the legal and scientific definitions, see Margo Kaplan, *Taking Pedophilia Seriously*, 72 WASH. & LEE L. REV. 75, 76 (2015) (arguing that "if we are to conceptualize pedophilia as a mental illness or disorder, we must rethink how the law approaches it").

One court reversing a peer statutory rape adjudication specifically noted the widespread incidence of childhood experimentation and adolescent sex, remarking that such laws "seem deliberately to overcriminalize" and cast doubt on the legitimacy of the criminal law by punishing "*moral[y] neutral, if not innocen[t]*" behavior.[362] The court quoted Sanford Kadish's seminal article on discretion in opining that such broad and under-enforced laws "raise basic issues of a morally acceptable criminal code."[363] Similarly, a Ninth Circuit judge considering a ten-year-old's adjudication for anal and oral sex with younger children expressed concern with punishing "playing doctor."[364]

Proposed revisions to the influential MPC also cite the widespread nature of child and adolescent sexual exploration as a basis for a significant reduction of peer statutory rape liability:

> Many of the behaviors covered by the contact provision are considered rites of passage during youth and puberty, and reflect ordinary acts of sexual exploration as one matures. Indeed, very young children may voluntarily undertake behavior that would technically meet the definition of sexual contact out of pure, even if ill-advised, sexual curiosity . . . . In sum, these provisions reflect the judgment that while certain kinds of sexual exploration are appropriate for even young children, that exploration should generally be restricted within the peer-group range. [365]

Accordingly, the MPC drafters recommend a swath of decriminalization because, while "[i]t may not be ideal that a very young child engages in kissing, stripping, or 'petting' before the age of twelve, so long as it is nominally consensual and engaged in with age-appropriate partners, it should not be a subject for penal law."[366]

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362. *In re* G.T., 758 A.2d 301, 306–07 (Vt. 2000) (emphasis added).

363. *Id.* at 307 (quoting Kadish, *supra* note 77, at 910).

364. *See* United States v. JDT, 762 F.3d 984, 1013 (9th Cir. 2014) (Berzon, C.J., concurring) ("But when two children under twelve years old engage in sexual conduct with one another, the statute provides no guidance as to who is the offender and who is the victim.").

365. MODEL PENAL CODE § 213.5 statutory commentary 27–28 (AM. LAW INST., Discussion Draft No. 2, 2015).

366. *Id.* at 27. I am not agreeing or disagreeing with the assessment that this conduct is "not ideal" or "ill-advised."

Concern about the criminalization of widespread behavior, and the lack of "true" victims also led an unusual decriminalization proponent—a victims rights' organization—to call for significant limitations on statutory rape prosecutions.[367] The Crime Victims Institute noted that "[g]iven the changing mores in this country and the increasing acceptance by teenagers of early sexual intimacies, more and more young people are finding themselves facing sexual assault charges, whether or not either partner feels victimized."[368]

In short, peer statutory rape functions to punish certain minors for mostly harmless and widespread conduct. As such, it reflects the excessive discretion, criminal law, and threat to the rule of law characteristic of vagueness.

### *B. A Potential Fix: Vagueness Doctrine*

#### *1. Limiting Excessive Discretion*

The Supreme Court has identified overly broad enforcement discretion as the primary concern of the vagueness doctrine.[369] As the Court stated in *Kolendar v. Lawson*:[370] "the more important aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement."[371] Otherwise, sanctions center on "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections."[372] This limitation protects against due process violations of arbitrary and discriminatory enforcement and enforces the separation of powers by preventing the legislature from "delegat[ing] basic policy matters to [courts or the executive branch] for resolution on an ad hoc and

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367. *See* CRIME VICTIMS INSTITUTE, *supra* note 306, at 18–30 (describing cases from a variety of states).

368 *Id.* at 1.

369. Vagueness is intertwined with overbreadth but extends beyond the First Amendment context. *See, e.g.*, TRIBE, *supra* note 9, at 859–61, 1030–31 (describing the "interplay of overbreadth and vagueness").

370. 461 U.S. 352 (1983).

371. *Id.* at 358.

372. *See id.* (voiding for vagueness a California anti-loitering statute).

subjective basis."[373][A1][GL2] Put another way, the legislature may not delegate "the power to define punishable conduct" to the police or others.[374]

Recent decisions emphasize that this concern with excessive discretion extends beyond law enforcement to include prosecutors[375] and even judges.[376] Vagueness is concerned with both arbitrary and discriminatory enforcement, but particularly enforcement based upon illegitimate criteria, or what I term here selective prosecution. As Justice Jackson presciently warned seventy years ago:

> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants . . . . With the law books filled with a great assortment of crimes[,] . . . it is a question of picking the man [rather than the offense] . . . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense—that the greatest danger of abuse of prosecuting power lies.[377]

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373. *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (noting that vague laws delegate the basic policy matters and bring the "attendant dangers of arbitrary and discriminatory application"); *see also* Big Mama Rag Inc. v. United States, 631 F.2d 1030, 1036 (D.C. Cir. 1980) (voiding a regulation for vagueness where a key term was defined so broadly that state officials had no "objective standard by which to judge which" groups applied and "the evaluation is made solely on the basis of one's subjective notion of what is 'controversial'").

374. *See* Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of Vagueness*, 101 VA. L. REV. 2051, 2053 (2015) (terming this the antidelegation requirement of vagueness doctrine).

375. *See* Brief Amicus Curiae of Pacific Legal Foundation & Cato Institute in Support of Neither Party at 2–3, Skilling v. United States, 561 U.S. 358 (2010) (No. 08-1394) (raising concerns that prosecutors inappropriately choose cases against individuals the prosecutor thinks should be punished rather than choosing cases that are most harmful or best reflect the statutory definition of the offense).

376. *See* Johnson v. United States, 135 S. Ct. 2551, 2557 (2015) (noting that the decision whether the residual clause covers a crime requires judges to picture the kind of conduct that the crime involves in "the ordinary case").

377 *See* Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1941) (concluding that this makes law enforcement personal and subject to political pressures). "Unpopular persons" are often racial minorities and/or low-income people. *See generally* Davis, *supra* note 98 (arguing that prosecutorial discretion targets racial minorities and similar unpopular individuals in society).

In short, broad, vague laws invite prosecutions for reasons other than the underlying harm.

Underenforcement is an inevitable product of overcriminalization[378] and compounds selective prosecution, creating what one scholar has termed "vagueness in practice."[379] Given a law that "covers something that (almost) everybody does[,]" prosecutors can pick and choose whom to charge, including those chosen based on another agenda.[380] A central principle of our system is that, so far as possible, the law on the books matches the law on the streets.[381] Broad and vague laws criminalizing widespread behavior render unclear the line between legal and illegal. In the modern world, criminal statutes no longer function to define prohibited conduct, but rather serve "as items on a menu from which the prosecutor may order as she wishes."[382] Inevitable underenforcement means that a prosecutor will choose to let many people violate the law, while sanctioning others for the same conduct. She may pick and choose this way while hiding substantive commitments, given the huge net of vague and broad laws.

Racially biased enforcement is a particularly pernicious form of selective prosecution. Several of the Supreme Court vagueness decisions are in part efforts to limit racially discriminatory enforcement by state and local police.[383] Tellingly, the defendants

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378. *See* Natapoff, *Underenforcement*, *supra* note 11, at 1747 (discussing how underenforcement occurs when "the class of offenders is large").

379. *See* Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW U. L. REV. 655, 660–61 (2006) (noting that low compliance rates "ultimately degrade into a 'sporting chance' view of enforcement"); *see also* HUSAK, OVERCRIMINALIZATION, *supra* note 11, at 27 (recognizing that "[t]he number and scope of criminal laws guarantee that neither police nor prosecutors will [be able to] enforce statutes as written").

380. *See* Beale, *Overcriminalization*, *supra* note 20, at 765, 758 (discussing morals legislation and also noting that such broad and underenforced statutes "invite use as a pretext"). Professor Beale points out that prosecutors often charge crimes such as fornication and adultery in addition to more serious, and much harder to prove, offenses such as rape. I discuss this practice in the statutory rape context further at *infra* notes 458–466.

381. *See* Amsterdam, *The Void-for-Vagueness Doctrine*, *supra* note 35, at 89–90 (discussing the importance of uniform enforcement and the difficulties presented by subjective and vague laws).

382. William Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

383. *See* Jeffries, *supra* note 36, at 197 (noting that the Supreme Court

arrested in Florida in *Papachristou v. City of Jacksonville*[384] included two interracial couples, and the loitering ordinance in Chicago in *Chicago v. Morales*[385] resulted in over 30,000 arrests, the vast majority of them African-American and Latino young men. As Dorothy Roberts concludes, overly broad and vague laws serve as "an invitation to police abuse," which is particularly problematic given that "police have a tendency to enforce the law against groups that they despise."[386] This renders the enforcement of such statutes not standardless, but worse, driven by impermissible standards.[387]

Discretion is an enormous problem in peer statutory rape given that virtually no guidelines exist for picking among the millions of potential cases. The few criteria offered are highly subjective and open to multiple interpretations that depend upon the prosecutor's or judge's opinions about adolescent sex and gender roles rather than a legislative definition or actual culpability. For instance, the "predator"/"peer" distinction one study identified turned exclusively on a prosecutor's personal assessment of a potential offender's likelihood to marry their underaged "victim"—a highly subjective and gendered criterion and one that, at the time, excluded same-sex relationships.[388] Similar to order-policing categories such as "visibly lawless" people, "common sense" offenders is a prosecutorial construct

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views racially discriminatory enforcement as a serious "danger").

384. 405 U.S. 156 (1979).

385. 527 U.S. 41 (1999).

386. *See* Dorothy E. Roberts, *Foreword: Race, Vagueness and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 782 (1999) (finding that ambiguous allocations of police discretion "unjustly burden members of unpopular or minority groups"); *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1979) (recognizing that "[t]hose generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts").

387. *See* Post, *Reconceptualizing Vagueness*, *supra* note 13, at 496 (arguing that "competent members of upstanding [white, "bourgeois"] Jacksonville society could with confidence determine who was targeted by [the vagrancy ordinance at issue in *Papachristou*] and who was not").

388. *See* Levine, *Intimacy*, *supra* note 46, at 712–14, 722–23 (discussing the absence of guidelines for prosecutors and the resulting policymaking power they exercise).

rather than a legitimate definition of the offense.[389] This presents the same problems that recently led the Supreme Court to strike the Armed Career Criminal Act as void-for-vagueness in *Johnson v. United States*.[390] Like the assessment of crimes by sentencing judges in *Johnson*, prosecutors' and judges' assessment of elements such as a "material gap in maturity," or even coercion, are speculative and, in the latter case, not connected to the statutory elements of the offense.

### *2. Limiting Excessive Criminal Law*

Vague laws contribute to the mutually reinforcing harms of selective enforcement and overcriminalization. The Supreme Court has not explicitly connected the two until recently and even now does so obliquely. Early vagueness cases, however, hint at a concern with overcriminalization, particularly from the point of view of chilling constitutional rights.

Two of the Court's most recent vagueness cases more directly reflect a concern with the broad overcriminalization of the modern "carceral" state.[391] In both *Skilling v. United States*[392] and *Yates v. United States*,[393] amici filed briefs arguing that the laws at issue were overly broad and vague, and the defendants raised these issues at oral argument.[394] Interestingly, although

389. *See* Roberts, *supra* note 386, at 803–05 (making this argument about the category of "visibly lawless" people the police attempted to use to justify loitering arrests in *Morales* and noting the connection to racial stereotypes).

390. *See* 135 S. Ct. 2551, 2556–57 (2015) (finding that imposing an increased sentence under the vague residual clause of the Armed Career Criminal Act violates the Constitution's due process guarantee).

391. Neither decision, however, explicitly turns on overcriminalization.

392. 561 U.S. 358 (2010).

393. 135 S. Ct. 1074 (2014).

394. In both cases, amici filed briefs. *See* Brief Amicus Curiae of Pacific Legal Foundation & Cato Institute in support of Neither Party at 2–3, Skilling v. United States, 561 U.S. 358 (2010) (No. 08-1394) (noting that "[t]here is perhaps no statute more vague than the 'honest services fraud' statute"); *see also* Brief for Eighteen Criminal Law Professors as Amici Curiae Supporting Petitioner at *6, Yates v. United States, 135 S. Ct. 1074 (2014) (No. 13-7451) [hereinafter Brief for Eighteen Criminal Law Professors] ("Redundancy, however, is but one troubling consequence of the ever-growing criminal code. Vagueness is another.").

both cases concerned sweeping statutes, the statutes addressed white collar offenses rather than the street crimes at issue in earlier vagueness cases.

Skilling was prosecuted for committing "honest services fraud" while the Chief Executive Officer at Enron. His counsel argued that, taken to its logical conclusion, the government's interpretation of "honest services fraud" would criminalize any lie in the workplace.[395] Chief Justice Roberts distinguished breadth from vagueness, but as I argue below, this may be a distinction without a real difference.[396] The Court still used the vagueness doctrine—or rather the doctrine of constitutional avoidance grounded in concerns about unconstitutional vagueness—to directly address Skilling's claim of statutory overbreadth. It construed the statute to have a very limited scope and to criminalize only bribery and kickbacks, not any workplace dishonesty.[397]

The *Yates v. United States*[398] decision did not explicitly mention vagueness, but the issue was raised in briefing and oral argument.[399] Todd Haugh has described how overcriminalization concerns permeated the case.[400] Yates, a fisherman, appealed his conviction under the Sarbanes-Oxley Act for throwing undersized grouper overboard after receiving a civil citation from a Fish and Wildlife agent. The Act punishes the destruction of evidence and was enacted in the wake of huge accounting scandals such as

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395. *See* Transcript of Oral Argument at 26, Skilling v. United States, 561 U.S. 358 (2010) (No. 08-1394) (arguing the prosecution's proposed interpretation of the statute would "convert almost any lie in the workplace into an honest services fraud prosecution").

396. *See id.* at 28 (citing Chief Justice Robert's point that the arguments failed to address why the statute is vague, rather than broad). The vagueness inquiry often includes an assessment of the statute's breadth. *See infra* notes 406–408 (questioning sweeping, broad laws because of their tendency to target "undesirables").

397. *See Skilling*, 561 U.S. at 368 (finding that the alleged misconduct entailed no bribe or kickback and therefore could not be reached by the statute).

398. 135 S. Ct. 1074 (2014).

399. *See*, *e.g.*, Brief for Eighteen Criminal Law Professors, *supra* note 394, at 11, 15 (describing the federal criminal code as "overbroad" and containing many "unclear" laws).

400. *See* Haugh, *supra* note 71, at 1193–95 (noting that the numerous *amici* and the questions asked by the Justices were all tied to the overcriminalization issue).

Enron and WorldCom (hence the "white collar" label despite the facts of *Yates*).[401] Yates' conviction could bring up to twenty years' incarceration. Indeed, the government in *Yates* recommended a sentence of about two years, although the judge disagreed and sentenced him to thirty days.

Although the odd facts of the case led to frequent bursts of laughter during the Supreme Court oral arguments,[402] there is no doubt that the breadth of the Act and its harsh sentences illustrate over-criminalization at its worst. One amicus brief explicitly connected the breadth and vagueness of the federal code to over-criminalization and unchecked prosecutorial power, arguing for a strict construction of criminal statutes to begin to address this crisis.[403] Several Justices indicated at oral argument that they would not consider vagueness because it was not raised in the court below; both Justices Breyer and Scalia, however, noted the connection between the "incredibly expansive" statute's breadth and prosecutorial overcharging. [404]

The majority opinion does not mention vagueness or overcriminalization, but these concerns undoubtedly influenced the awkward decision, which narrowly construed the statute to prohibit only the destruction of records and reversed Yates' conviction.[405] As Justice Kagan notes in her dissent: "the real issue" in *Yates* was the "deep[] pathology" of "overcriminalization and excessive punishment."[406] She goes on to lament the "broad

401. *See generally* United States v. Andersen, 374 F.3d 281 (5th Cir. 2004) (affirming Arthur Andersen's conviction) *rev'd*, 544 U.S. 696 (2005).

402. *See* Haugh, *supra* note 71, at 1194 (noting that these facts led to frequent laughter from the gallery).

403. *See* Brief for Eighteen Criminal Law Professors, *supra* note 394, at 10, 18 (arguing that the Court "should address problems of redundancy and vagueness by construing criminal statutes strictly as required by fundamental, constitutionally driven interpretive principles").

404. *See* Transcript of Oral Argument at 17, 29, 36, Yates v. United States, 135 S. Ct. 1074 (2014) (No. 13-7451) (questioning a vagueness argument when only the statute's breadth appeared too "expansive").

405. *See Yates*, 135 S. Ct. at 1079 (construing the term "tangible object" to not include fish).

406. *See id.* at 1100–01 (Kagan, J., dissenting) (arguing that the Court should not be rewriting the law, even if it is overly broad as enacted by Congress).

and undifferentiated" criminal statutes that "give prosecutors too much leverage and sentencers too much discretion."[407]

Similarly, the immense net of peer statutory rape sweeps in a huge amount of normal, non-culpable conduct. Of course, normal is not the same as normative, and the criminal law can aspire to deter bad behavior, even if widespread. I argue, however, that in this instance the costs of criminalization far outweigh the benefits. The realities of the juvenile justice system mean that those few minors charged with peer statutory rape, almost always a strict liability crime, have few resources to defend themselves against a potential sex offender adjudication. Yet many offenders may have done little more than displease the parents of their consensual peer partner.

### *3. Curbing the Punitive State*

Vagueness doctrine is a valuable tool to limit the harms of overcriminalization, but it has been overlooked in recent debates. Many courts and scholars contend that vagueness turns on the specificity of statutory language.[408] Perhaps because of this narrow articulation of the doctrine, contemporary scholars have largely ignored it as a meaningful check on the criminal justice system's abuses.[409] Indeed, the brief consideration Stuntz gives vagueness in his seminal account of over-criminalization suggests that vague laws themselves—*not* the vagueness doctrine—can help curb the criminal justice system's excesses, and he argues that the vagueness of criminal laws historically "left room for juries and trial judges to decide cases based on their own moral intuitions[,]" intuitions which sometimes benefitted defendants

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407. *See id.* at 1101 (noting that such statutes are certainly "bad law").

408. *See, e.g.*, United States v. JDT, 762 F.3d 984, 1000–02 (9th Cir. 2014) (reviewing the specific language in an aggravated sexual abuse statute); Solan, *supra* note 31, at 143 (focusing on a judge's analysis when a statute is linguistically unclear). Unclear or under-defined language certainly contributes to both the notice and selective enforcement harms against which the doctrine protects. I argue here, however, that that is not the whole story.

409. Although overlooked by scholars, advocates have been robustly using vagueness arguments, including in some of the peer statutory rape cases discussed here, such as *D.B.* and *J.D.T.*

against the state power.[410] Important to this claim, admittedly, is that the laws were vague and narrow, as opposed to the laws that are both vague and broad like those I discuss here.[411] Even with this distinction, however, I argue that Stuntz's account underestimates vagueness doctrine's usefulness.[412]

Scholars have persuasively demonstrated that courts repeatedly void statutes for vagueness even where the statutory language is very clear. [413] Indeed, the scope and malleability of vagueness doctrine arguably render it a substantive rather than procedural review.[414] It accordingly gives courts tremendous power to overturn legislative or executive branch judgments, leading Amsterdam to term the doctrine a "means to an end."[415] Building on this work, Jeffries, Post, and other scholars in the 1980s and 1990s argued that the doctrine's contextual analysis enabled courts to eliminate laws that violate underlying rule of law values.[416]

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410. *See* STUNTZ, COLLAPSE, *supra* note 32, at 157 (emphasizing the prosecutorial and judicial discretion inherently involved in vaguely written statutes); *see also id.* at 303 (praising the "usually fuzzy boundaries" of criminal liability, which allowed "judges and juries to exercise judgment when applying those boundaries to individual cases").

411. *See id.* at 257 (noting that the twentieth century saw an erosion of narrowness and vagueness in American criminal law).

412. Also undermining this point is the current world of disappearing juries, wherein prosecutorial delineation of boundaries is the key, if not sole, determinant of liability.

413. Professors Low and Johnson provide a recent and valuable account. *See* Low & Johnson, *supra* note 374, at 2076–78 (demonstrating that vagueness reasoning was used to strike down an ordinance written in "crystal clear" language); *see also* Johnson v. United States, 135 S. Ct. 2551, 2556 (2015) (ascertaining the vague definition of "violent felony" in the statute).

414. *See* Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting) (referencing Frankfurter's famous description of the doctrine's "indefinite" nature).

415. *See* Amsterdam, *The Void-for-Vagueness Doctrine*, *supra* note 35 (titling the introductory section of his Note "A Means to An End"). Amsterdam was a key lawyer in the successful challenges to race-based enforcement of vagrancy laws.

416. *See* Jeffries, *supra* note 36, at 196–201 (describing the void-for-vagueness inquiry as "evaluative rather than mechanistic"); Post, *Reconceptualizing Vagueness*, *supra* note 13, at 498 (noting that *Papachristou* suggests that judgments that appeal for validation to middle class mores are deemed "unconstitutionally arbitrary, vague, and unenforceable").

Central to this substantive vagueness inquiry are the scope and purpose of the criminal law at issue.[417] Vagueness differs from First Amendment overbreadth analysis, but the scope of the statute at issue has been a key factor in notable vagueness cases. In *Papachristou v. City of Jacksonville*,[418] the Court noted vagrancy's scope: "Here the net cast is large . . . to increase the arsenal of the police."[419] Similarly in *Chicago v. Morales*,[420] the Court noted the immense sweep of the loitering statute and its coverage of potential harmless activity.[421]

A wide scope alone is not fatal to the vagueness inquiry. Also significant are the purposes to which state enforcement agents will put that sweep to target unpopular individuals, and these two seminal decisions both voiced the Court's suspicion that these broad criminal statutes were intended to entrap only certain kinds of people, including those who protest against authority.[422] This suspicion is similar to Justice Frankfurter's condemnation of vagrancy laws, because they were designed without boundaries "to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution."[423] This is true even where those caught might be potential or actual offenders of underlying harm, like the gang members the *Morales* loitering statute aimed to curb.[424] As long as the broad net allows the state to sweep in too

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417. *See* GOLUBOFF, VAGRANT NATION, *supra* note 14, at 135 (quoting Amsterdam as saying that vague laws were the "weapons of the establishment for keeping the untouchables in line").

418. 405 U.S. 156 (1979)

419. *See id.* at 165 (finding that due process implications are equally applicable to the particular vagrancy statute at issue).

420. 527 U.S. 41 (1999).

421. *See id.* at 52 (noting that the loitering ordinance "broadly [and with an unclear scope] covers a significant amount of additional activity").

422. *See Papachristou*, 405 U.S. at 166–67 (finding that "[w]here the list of crimes is so all-inclusive and generalized . . . those convicted may be punished for no more than vindicating affronts to police authority"); *Morales*, 527 U.S. at 55 (concluding that the statute was too vague and went far beyond simply regulating "business behavior" and "contain[ing] a scienter requirement").

423. *See* Winters v. New York, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting) (arguing that "the "vagrancy statutes" and laws against "gangs" are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided").

424. The statute's covert enforcement purpose need not be explicitly enumerated by the legislature, indeed this might be impossible to prove, but the contextual analysis under vagueness doctrine allows for these inferences to be

much innocent conduct, and do so on ill-defined and subjective grounds, it is vulnerable to voiding. Just as procedural investigation dragnets are unconstitutional, so are substantive criminalization dragnets.

Through this lens, the vagueness doctrine allows courts to monitor and curb the criminal law's use for racialized social control. Demonstrating this point, scholars have persuasively argued that historic vagueness decisions arguably reflect a judicial view that some values or norms "are not the kind of social order, which the state may constitutionally authorize and impose."[425] For instance, a central concern underlying the *Papachristou* decision was that non-conformity with middle class norms about interracial dating is an illegitimate basis for criminal sanctions.[426] Legal historian Risa Goluboff confirmed this through archival research; prior versions of Justice Douglas' draft opinion in the case included Ninth Amendment and substantive due process liberty and equality analysis.[427]

The Court in *Papachristou* might have aimed to explicitly limit what conduct could be criminalized as much as the permissible specificity of statutory language to do so. But it did not. Despite being the "poster child" for such limitations, the Court chose the safer route of vagueness doctrine and "*Papachristou* and its ilk became outliers rather than trailblazers."[428] *Papachristou*, however, may still prove more than an outlier; its purposeful constraint on state criminalization echoes still.[429] The opinion closes with ringing language about the

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made.

425. *See* Post, *Reconceptualizing Vagueness*, *supra* note 13, at 507 (arguing that the cases limit state control rather than turning on the "abstract clarity of legal rules").

426. *See id.* (noting the judicial discretion and control affected by resort to the vagueness doctrine).

427. *See* Goluboff, *Dispatch*, *supra* note 37, at 1365–70 (remarking that the early draft "reads as something of an anthem for the sixties' celebration of pluralism as both equality and personal liberty").

428. *See id.* at 1376 (finding that *Papachristou* did not lead to a new constitutional jurisprudence of criminal law).

429. My argument here is greatly informed by the analysis Low and Johnson present in their recent article. *See generally* Low & Johnson, *supra* note 374 (presenting a new framework for considering vagueness and more broadly legality principle cases). Although I do not adopt their vocabulary, my argument is consonant with their underlying point that vagueness allows for a

underlying values of our system: "Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application."[430]

This legacy, and its "mirroring" of substantive due process, so troubles Justice Thomas that he recently suggested the doctrine may be invalid altogether. He spent most of a recent concurrence describing how substantive due process has consistently "lurk[ed] in the background" of vagueness decisions.[431] Other commentators have more favorably noted the greater concern about over-criminalization suggested by *Johnson*. The spring 2015 opinion rejected the idea that a statute is void only if it is vague in all applications; instead, a law can be void-for-vagueness even if some conduct clearly falls within the statutory language.[432] As Carissa Byrne Hessick points out, this broad read of the doctrine will likely render vagueness challenges more successful in the future.[433] Coupled with the consideration of over-criminalization and statutory breadth in *Skilling* and *Yates*, *Johnson* seems to indicate a renewed scrutiny of state coercion under the doctrine's cover.[434]

This state coercion takes a different form than the vagrancy and loitering laws of the late twentieth century. Historically, vagueness has been used primarily to void these and other statutes prohibiting minor "street cleaning" offenses,[435] yet it may

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consideration of other, sometimes constitutional, values in construing or voiding criminal law.

430. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1979) (concluding that equal application of the law holds American society together).

431. *See* Johnson v. United States, 135 S. Ct. 2551, 2572 (2015) (Thomas, J., concurring) (discussing *Morales* as an example of a decision whereby the Court uses indefinite concepts to invalidate democratically enacted laws).

432. *See id.* at 2556 (majority opinion) (distinguishing which crimes will fall under the now unconstitutional residual clause in the Armed Career Criminal Act).

433. *See* Hessick, *supra* note 42, at 310 (noting that Johnson may encourage constitutional challenges to vague criminal statutes from both the judge's and the litigant's perspectives).

434. *See Armed Career Criminal Act*, *supra* note 42, at 309 (noting that underlying the case was the fundamental overcriminalization question of what judges should do "when a flawed statute is sending offenders to prison for [significant terms]").

435. *See* Jeffries, *supra* note 36, at 215–16 (documenting the easy use of

apply equally to more punitive or serious crimes, as the *D.B.* and other decisions discussed above show. Just as the historic offenses were "weapons of the establishment to keep the untouchables in line,"[436] much of the criminal justice system operates as an establishment tool to enforce social control. This is particularly true of widely under-enforced and largely harmless vaguenet crimes like peer statutory rape. Repurposed for modern times, the doctrine, in letter or spirit, may constitute what Stuntz sought after all—a quasi-constitutional limit on the substantive criminal law.[437]

Like vagrancy and loitering cases, peer statutory rape is used to impose mainstream morals on adolescents considered "socially undesirable." Selectively punishing this widespread and largely harmless conduct violates rule of law values and skews the expressive message of the criminal law, "provid[ing] a misleading [and too strict] impression of social norms."[438] A norm of adolescent sexual abstinence is far too aspirational, and the punishment of "untouchables" too harsh, for it to be enforced via the criminal law.

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This Part has argued that broad and under-defined laws like peer statutory rape reflect the pathology of over-criminalization. It also offers the vagueness doctrine, in letter or spirit, as a valuable tool for addressing the harms of overcriminalization and selective enforcement on illegitimate grounds. [439]

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such laws to "informal social control of undesirables").

436. GOLUBOFF, VAGRANT NATION, *supra* note 14, at 135 (quoting Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 233 n.4 (1967)).

437. *See generally* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996) (arguing that the Warren Court revolution in criminal procedure had the unintended consequence of neglecting limits on the substantive criminal law, leaving overcriminalization to flourished unchecked).

438. *See* ZIMRING, AMERICAN TRAVESTY, *supra* note 130, at 54 (arguing that criminalizing largely harmless conduct is burdening our system and addressing that burden will be vital for successful reform efforts).

439. As Jeffries pointed out, vagueness can provide good political cover for underlying equality and liberty values. *See* Jeffries, *supra* note 36, at 218 (noting the doctrine's "practical" use for enforcing these values in a "less threatening way").

## *IV. A Decriminalization Proposal*

In this Part, I propose the full decriminalization of peer statutory rape or any sexual contact between two minors below the age of consent. I first address the strongest rationales for retaining peer statutory rape: to address the power imbalances between young women and young men in negotiating sexual activity, termed here the "feminist" rationale, and to serve as a "safety net" to prosecute non-consensual or forcible rape, termed here the "pragmatic" rationale.[440] I contend that these rationales risk entrenching gender stereotypes and covering for the system's failure to adequately address non-consensual and forcible rape.

Next, using peer statutory rape as a model, I posit a new category of "offender-less harms," societal problems for which no one should be criminally sanctioned. The problems outlined above—punishing widespread "normal" conduct and selective enforcement on illegitimate grounds—make the criminal justice system too blunt a tool for addressing issues like peer adolescent sexuality.[441]

### *A. Rationales for Retaining Peer Statutory Rape*

#### *1. Feminist*

Statutory rape has long been a hotly contested subject for feminists.[442] One group argues that the laws serve to control girls

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440. These objections are related, as feminists who want to protect young girls against coercion and vulnerability may also argue that the failures to adequately prosecute non-consensual and forcible rape indicate the continuing need for statutory rape laws. Indeed, Michelle Oberman makes both arguments. *See* Oberman, *Protection, Patriarchy*, *supra* note 144, at 820 (describing statutory rape laws as "an important tool for prosecutors").

441. The decriminalization of peer statutory rape is also consistent with the acknowledgment that juveniles are different than adults. *See supra* notes 124–133 and accompanying text (discussing how children and adolescents are more impulsive, less culpable, and more vulnerable than adults, which can have more lasting consequences in the event of criminal convictions).

442. Feminism has many variations. I use it here broadly to describe a theory about the subordination of female to male and a struggle against that subordination. *See* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 17–20 (2006) (outlining these debates)*; see also* Frances Olson, *Statutory Rape*: *A Feminist Critique of Rights Analysis*, 63 TEX. L. REV.

more than protect or help them, and that equality requires treating boys and girls equally.[443] Another group contends that sex continues to be used to subjugate young women and that consent is meaningless against the backdrop of patriarchal society.[444]

Current discussions present a more nuanced view of adolescent sexuality and incorporate the realities of the increasing sexualization of girls even at very young ages. Michelle Oberman is the leading expert warning against abandoning statutory rape, arguing that adolescent girls are more vulnerable than boys and that consent is complicated by entrenched gender roles.[445] She correctly points out that while young people are incapable of consent in other contexts, such as business deals, they are presumed to be autonomous actors in the sexual realm.[446] This gap she argues, ignores the emotional, social, and other harms that can result from teenage sexual activity.[447] Oberman thoughtfully notes the problems with gender-specific laws and does not endorse them, but nonetheless posits statutory rape laws as a still valuable tool to protect girls from peer exploitation and promote their autonomy.[448] To summarize, she defends selective enforcement, but on the grounds of coercion and with reforms.

These are valid points; many adolescent girls remain more vulnerable to sexual exploitation and less autonomous than their male peers. Nonetheless, I argue that the cost of punishing peer

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387 (1984) (same).

443. *See, e.g.*, Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMENS RTS. L. REP. 175 (1982) (criticizing traditional gender roles).

444. *See generally* Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) (positing the intertwined nature of sexual violence and women's subordination).

445. *See* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 718–33 (2000) [hereinafter Oberman, *Regulating Consensual Sex*] (outlining case studies of non-voluntary adolescent sexual activity including intimidation and peer pressure, acquiescence, naiveté, silence, and prior victimization).

446. *See* Oberman, *Turning Girls into Women*, *supra* note 46, at 71.

447. *Id.*

448. *See id.* at 78–79 (noting that no legal solution can eliminate the risks inherent in sexual activity for girls).

adolescent sexuality nonetheless outweigh its benefits for several reasons.[449] First, the concerns about female vulnerability obscure the vulnerability of male and non-normative girl victims. As outlined above, statutory rape historically protected only white, middle class, chaste girls.[450] It continues to ignore untraditional, particularly male, victims.[451] These are not problems that can be fixed through tinkering with enforcement protocols. They are literally built into the law—peer statutory rape's gendered history, breadth, and inevitable underenforcement mean that the law will inevitably be applied in a biased manner.[452]

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449. I argue this despite considering myself to be a feminist. *See* Oberman, *Regulating Consensual Sex*, *supra* note 445, at 759 (noting that "no feminist commentators would abolish statutory rape"). A third and related argument for decriminalizing peer adolescent sex is that the threat of statutory rape prosecution hinders the ability of all adolescents to mature and develop their sexual autonomy. I agree with this argument but focus here on the particular arguments about female adolescent sexuality.

450. *See generally* Olson, *supra* note 442 (discussing how feminists have criticized this aspect of the *Michael M.* decision where the Justices did not recognize the case as forcible rape, despite the evidence of physical violence and non-consent, because the complainant "did not fit the 'chaste and naïve' image associated with statutory rape victims"). I have also criticized this obscuration of the forcible, non-consensual rape in *Michael M.* as part of a project rewriting opinions from a feminist perspective. Cynthia Godsoe, *Dissenting Opinion in* Michael M. v. Sonoma Cty, 450 U.S. 464 (1981) 262, 2n *Feminist Judgments*: *Rewritten Opinions of the United States Supreme Court* (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., Cambridge Univ. Press 2016) ("None of [the justices] noted this pattern; indeed one suggests that Sharon's abuse was in part her fault. This attitude speaks volumes about our failure to recognize the ongoing gender hierarchy in sexual relations and helps to explain why rape remains the most underreported and under-convicted crime.").

451. *See* Brenda Smith, *Boys, Rape, and Masculinity: Reclaiming Boys' Narratives of Sexual Violence in Custody*, 93 N.C. L. REV. 1559, 1572 (2015) (arguing that the normal conception of masculinity in society undermines efforts to address male victims).

452. Scholars have called for decriminalization or decarceration based on similar arguments about the inevitability of racial bias. *See, e.g.*, Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 262–66 (2007) (asserting that racial bias is foundational to the U.S. criminal justice system and calling for the abolition of law enforcement policies that promote "mass imprisonment, capital punishment, and police terror"). Because control of marginalized groups is a key function of the criminal justice system, racial, sexual, and gender minorities will continue to be disproportionately targeted. *See id.* at 265 ("Given the function of crime control in most societies, as a key component of social policy aimed at governing marginal groups, we can expect that racial bias is inevitable as long as white supremacy reigns in the United

Second, enshrining female vulnerability in the law has expressive costs as well. The dual purposes of protection and patriarchy are difficult, if not impossible, to uncouple.[453] Focusing on female victimhood and vulnerability risks perpetuating socially constructed gender differences, and ultimately, inequality.[454]

### *2. Pragmatic*

Probably the most frequent argument in support of peer statutory rape is its use to prosecute "real" rape, i.e. forcible or non-consensual rape.[455] There is no doubt that despite advances in the prosecution and punishment of rape in recent decades, it remains a very difficult crime to prosecute. Reporting, charging, and conviction rates are among the lowest for any crime. This reflects the evidentiary challenges in proving non-consensual

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States."). Oberman also seems to acknowledge the complex or dual nature of protectionist rationales for statutory rape by noting the crime's dual historical purposes, one "protective and unquestionably legitimate . . . the other patriarchal and undeniably pernicious." Oberman, *Protection, Patriarchy, supra* note 144, at 800.

453. *See generally* Godsoe, *Punishment as Protection*, *supra* note 50 (examining the tension between punishment and protection for underage prostituted girls who are below the age of consent yet are frequently prosecuted for prostitution rather than treated as victims under statutory rape and trafficking laws).

454. Scholars have described these problems in the dynamic of abortion and rape, as well as the victim narrative's contributions to overcriminalization. *See, e.g.*, Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1123 (2010); Aya Gruber, *Rape, Feminism and the War on Crime*, 84 WASH. L. REV. 581 (2009).

455. As noted earlier, the only statutory rape case to reach the Supreme Court, between two peers, was actually a forcible rape case. *See* Michael M. v. Superior Court of Sonoma Cty, 450 U.S. 464, 481 n.13 (1981) (Stewart J., concurring) (detailing how the victim in this case said "no" and was struck in the face repeatedly). Statutory rape is also used to prosecute other sex crimes against young people, including child pornography and trafficking. *See, e.g.*, Ariel Rothfield, *Kansas City Man Charged with Statutory Rape of Teenage Runaway*, KHSB (Nov. 17, 2016) (last visited Mar. 1, 2017) (reporting that the defendant could have been charged with child pornography or sex trafficking that bring much higher penalties) (on file with the Washington and Lee Law Review). This is problematic for the same reasons as its use to punish non-consensual rape.

rape.[456] Even more significantly, it demonstrates the ongoing gendered and highly charged nature of the crime, and the ongoing gatekeeping by law enforcement and prosecutors based on illegitimate factors such as a victim's chastity and force, and the assessment by juries and judges of cases according to preexisting rape "scripts."[457]

Michelle Anderson, Bennett Capers, and others have pointed out that rape victims continue to be scrutinized and non-normative victims to face particular challenges.[458] Accordingly, things have changed surprisingly little since 1977 when Roman Polanski was famously prosecuted only for statutory rape after he drugged and had non-consensual sex as rape of a thirteen-year-old girl.[459] Many prosecutors' offices have policies prioritizing prosecution of coercive cases, and forcible or non-consensual rape cases are routinely reduced to statutory rape cases where the victim is underage.[460] A very recent example of this use of statutory rape to punish non-consensual rape is the high profile prosecution of a Saint Paul's boarding school student. He was acquitted on non-consensual felony rape charges and convicted only of misdemeanor statutory rape charges.[461]

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456. *See* Katherine K. Baker, *Why Rape Should Not (Always) Be A Crime*, 100 MINN. L. REV. 221, 235–44 (2015) (documenting these difficulties while also noting the constructions of rapists and victims that permeate adjudications of the offense).

457. *See* Anderson, *supra* note 178 (describing the narratives that posit interracial stranger rape as the only true rape, diminishing the harm of the much more common intraracial acquaintance rape).

458. *See id.* at 644 ("[R]ape law often condemns females who are not chaste and excuses males who act with sexual entitlement."); Capers, *supra* note 280, at 1288 n.195–98 (discussing how the failure of cases to adhere to normative rape scripts can lead courts to reverse convictions).

459. *See generally* SAMANTHA GEIMER, THE GIRL: A LIFE IN THE SHADOW OF ROMAN POLANSKI (2014) (providing the victim's autobiography).

460. *See* Levine, *Intimacy*, *supra* note 46, at 719 ("Quasi-forcible rapes have long been the mainstay of statutory rape prosecutions."); *see also* Monica Vaughan, *Rape Case Becomes Misdemeanor in Yuba County*, APPEAL-DEMOCRAT NEWS (Jul. 21, 2015), http://www.appeal-democrat.com/news/rape-case-becomes-misdemeanor-in-yuba-county/article_15de2322-3019-11e5-a766-db3999ad1044.html (last visited Mar. 6, 2017) (describing a case of forcible rape, which was reduced to statutory rape) (on file with the Washington and Lee Law Review).

461. Jess Bidgood, *Owen Labrie of St. Paul's School is Found Not Guilty of Main Rape Charge*, N.Y. TIMES (Aug. 28, 2015), http://www.nytimes.com/2015/08/29/us/st-pauls-school-rape-trial-owen-labrie.

A number of the statutory rape prosecutions discussed above include facts that indicate forcible or non-consensual rape, such as *G.T.*, and/or originally included other rape charges that were dismissed or dropped, as in *D.B.* Although this widespread practice is undoubtedly a valuable prosecution tool, it perpetuates a failure to adequately address forcible and non-consensual rape.[462] These crimes usually carry greater penalties than statutory rape, as well as more societal stigma. Allowing prosecutors to take the easy route of proving a strict liability crime such as statutory rape significantly negates their incentives to prove the real offense.

More broadly, the transparency and legitimacy of the criminal system require that harms be appropriately recognized and addressed. Costs to pre-textual prosecutions, even those used to address hard-to-convict offenders, include inequity, a lack of procedural justice, and the erosion of the rule of law.[463] In sum, using the overinclusive strict liability tool of statutory rape obscures the scope of other types of rape and, relatedly, the system's failure to punish it.

### *B. Offender-less Harms*

Having concluded that the two strongest rationales for peer statutory rape cannot justify its costs, in this Section, I call for full decriminalization. There is a growing recognition among both scholars and policymakers that not all societal problems can or should be addressed via the criminal law. As a result, there have been numerous proposals to decriminalize certain offenses. These have focused almost exclusively on "victimless" crimes such as drug offenses.[464] Although there has been some diversion of

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html?_r=0 (last visited Mar. 6, 2017) (on file with the Washington and Lee Law Review).

462. Relatedly, I have argued here that prosecutors do not wield discretionary tools wisely. Their decisions to charge or accept a plea to statutory rape rather than more severe forms of rape will likely be influenced by many of the same illegitimate criteria described above.

463. *See* Litman, *supra* note 79, at 1149–58 (discussing the inequity introduced by prosecutorial biases when prosecutions are based on alternative or pretextual charges rather than the charge that best fits the crime).

464. Victimless crimes are defined as "those where individual adults engage

violent offenses to specialized courts, criminal sanctions remain the backdrop.[465]

I posit here a new category of offender-less harms, societal harms for which no one should be criminally sanctioned. Sexual activity between two consenting peers presents an archetypal instance of an offender-less harm. The overcriminalization and related selective enforcement concerns detailed above underlie this proposal. Although scholars have recommended reforming statutory rape, I am alone in advocating for a complete decriminalization of consensual sexual activity between minors. This recommendation also goes further than the proposed MPC or the current law in almost every state.[466] Let me be clear about what I am not arguing. I am not calling for the abolition of statutory rape; there needs to be a line where the coercive potential of a sexual relationship with an adult is criminalized. Nor am I arguing for the abolition of other peer sexual crimes such as non-consensual or forcible rape.

One of the most difficult issues in thinking about peer statutory rape is whether adolescent peer sex is harmful. Sex among preteens and teenagers remains a very sensitive issue for many adults. Indeed, when discussing this piece with other legal scholars, one of the most frequent questions I was asked was "would you want your child aged [12 or 14] to be having sex?" This is the wrong question to be asking in terms of the law, particularly the criminal law.[467] The criminal law should not be used to enforce parental norms, particularly in such an underinclusive and biased way. Supporting this argument is Bernard Harcourt's persuasive argument that the criminal justice system has abandoned a meaningful harm principle,

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in conduct that inflicts only harm to self or to other consenting adults, but not on third parties. These victimless crimes include prostitution, pornography, sadomasochism, gambling, and most notably, drug crimes." HUSAK, OVERCRIMINALIZATION, *supra* note 11, at 154.

465. For instance, defendants diverted to domestic violence courts usually have to plead guilty before they are diverted.

466. *See infra* Appendix A (outlining the treatment of statutory rape exceptions under the Model Penal Code and the laws of the states).

467. This is less true of other areas of the law, such as family law. For instance, a parent's attitude towards their child's sexual development could be relevant to a custody determination where courts use a "best interests of the child" standard.

rendering virtually any act "harmful" to society and thus criminally prohibited.[468]

Moreover, as the medical evidence outlined above demonstrates, most consensual peer sexual activity is not harmful.[469] There are of course some physical risks, particularly from intercourse, including pregnancy and sexually transmitted diseases. There are, however, much more direct and less harmful ways to address these risks, including education and contraception. Scholars and policymakers point to the increased likelihood of non-consensual sex at this age,[470] but criminalizing all peer sexual activity for this reason is both overbroad and, as I noted above, non-consensual sex is already criminalized.

Even conceding potential harm in some cases, the recognition that the criminal law should not be used to impose moral standards further militates against the use of peer statutory rape to enforce aspirational sexuality standards.[471] To be clear, I am not arguing here that minors have a protected liberty interest in intimate (sexual) relations.[472] *Lawrence v. Texas*[473] explicitly excludes minors from its holding and the state does, and should, have greater reach to regulate conduct of minors than adults. Nonetheless, the law's treatment of minor sexuality should be informed by changing norms and real world prevalence, rather

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468. *See* Bernard Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 109–10 (1999) (discussing the collapse of meaningful "harm principle" in criminal law as alleged social harms are increasingly invoked in the place of morals in the regulation of vice). This dynamic has contributed to the overcriminalization phenomenon.

469. *See supra* notes 346–355 and accompanying text (outlining research on the normalcy and medical acceptance of adolescent and pre-adolescent sexual activity).

470. *See, e.g.*, Oberman, *Turning Girls into Women, supra* note 46, at 71 ("On some occasions, a girl may consent to sex which is exploitative, degrading, demeaning, and harmful to her. But the law does not recognize it as rape.").

471. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

472. Some courts have articulated this right in peer statutory rape cases. *See In re* G.T., 758 A.2d 301, 309 (Vt. 2000) ("[T]o avoid the real possibility of discriminatory enforcement and interference with the privacy rights of defendant and the asserted victim, we construe subsection (a)(3) as inapplicable in cases where the alleged perpetrator is also a victim under the age of consent.").

473. 539 U.S. 558 (2008).

than outdated or ideal notions. One state high court recognized this in finding that penalizing statutory rape sodomy more harshly than statutory rape vaginal intercourse failed even rational review.[474] The court discounted the State's arguments that gay sex leads to a higher rate of sexually transmitted infections because there was no scientific basis for their arguments, and held that "moral disapproval of a group cannot be a legitimate governmental interest."[475] The fact that the state regulation here is punitive of the minors themselves further delegitimizes a moralistic impetus.

Decriminalization brings some hard cases. I discuss two here briefly, but still argue for full decriminalization. The first is a case involving a minor close to the age of consent and a young adult, for instance a fifteen-year-old and an eighteen-year-old. This pattern is very common and is best addressed by the MPC proposal, and the age gap laws in numerous states, that penalize liability only within a certain range of the minor's age.[476] If that were three or four years, then there would be no prosecution here or in fact for anyone below twenty. The age of consent still matters because the seventeen to twenty-year-olds are not victims but this would take into account the continuum of development, both physical and emotional, rather than focusing entirely on a bright-line rule age of consent.

The most difficult scenario involves a very young child and an older child also below the age of consent. This could take the form of a fifteen-year-old and a nine-year-old, or a ten-year-old and a four-year-old. There are likely significant physical and emotional differences between these two minors, which may result in an increased risk of exploitation by the older child. Nonetheless, the medical evidence, for instance the preclusion of a diagnosis of pedophilia below age sixteen, as well as the wide range of normal sexual development militate, towards decriminalization of this

474. *See* State v. Limon, 122 P.3d 22, 35 (Kan. 2005) ("[U]nless the justifications for criminalizing homosexual activity between teenagers more severely than heterosexual activity between teenagers are somehow different than the justifications for criminalizing adult homosexual activity, those justifications must fail.").

475. *Id.*

476. *See infra* Appendix A (outlining the treatment of statutory rape age gap exceptions under the Model Penal Code and the laws of the states).

situation as well. Moreover, carving out exceptions for peers below the age of consent would risk the selective enforcement and over-criminalization outlined above. This is not to say that parents cannot access other resources, such as mental health treatment, to address this conduct. At least one court has followed this reasoning and interpreted the *D.B.* decision to dismiss a delinquency petition as vague as applied to the case of an eleven-year-old who had oral sex with a four-year-old, both under the thirteen-year-old age of consent.[477]

One final point merits consideration. Why is full decriminalization—including quasi-criminal systems such as status offender system—required? Put another way, why are proposals like the MPC draft that significantly curtail peer liability not sufficient? Michele Goodwin recently explored addressing statutory rape outside the criminal justice system through alternative courts or private sector markets.[478] Many of the rationales motivating Goodwin's proposal are the same as those expressed here, including harsh punishment, and disproportionate prosecutions of class, gender and, particularly, racial minorities.[479] Her proposal, however, is narrower than mine in two significant ways. First, she focuses primarily on adolescents rather than all minors—for instance not considering those under the lower age of consent of ten or twelve.[480] Second, Goodwin also posits alternative courts as a potential remedy to peer statutory rape problems, praising the fact that judges in these courts "are not bound by legislative mandates" and can

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477. *In re* D.R., Case No. 12 MA 16, 2012 WL 5842773 at *20 (Ohio Ct. App. Nov. 14, 2012) ("As applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13, R.C. 2907.02(A)(1)(b) is unconstitutionally vague because the statute authorizes and encourages arbitrary and discriminatory enforcement." (citing *In re* D.B., 950 N.E.2d 528 (Ohio 2011))).

478. *See* Goodwin, *Law's Limits*, *supra* note 46, at 530–39 (exploring various market initiatives to alter adolescent behavior in other areas, as well as the potential benefits of using of alternative courts instead of traditional criminal prosecution).

479. *Id.* at 483, 526, 513–23 (discussing disparate rates of adolescent sexual activity according to various demographic factors).

480. My analysis also differs considerably in focusing on the vague designation of victims and offenders and positing vagueness doctrine as a valuable tool for courts to reform this area.

thus "prioritize a focus on the children involved . . . and maximizing welfare."[481]

I am much more skeptical of broad mandates and judicial discretion, particularly for those tasked with children's best interests.[482] Juvenile court was the original alternative court and, as outlined above, its broad sweep and lack of constraints have led experts to call for its abolition.[483] In at least one peer statutory rape case, the judge relied on the juvenile court's mandate for "rehabilitative or educational" interventions to adjudicate a young boy guilty and sentence him to probation including restrictive special conditions.[484] Alternative courts may bring milder sanctions than the criminal justice system but risk net-widening and potentially compounding the selective enforcement and policing of widespread behavior.[485] These concerns underlie recent efforts to reform or eliminate status offense jurisdiction. Status offenses have been robustly used to justify virtually unchecked intervention into the lives of minors and families, and to harshly punish girls in particular for non-normative sexual behavior.[486] Concern over the ongoing widespread incarceration of minors for status offenses has led to

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481. Goodwin, *Law's Limits*, *supra* note 46, at 539.

482. I have previously critiqued this discretion. *See generally* Godsoe, *Punishment as Protection*, *supra* note 50; Godsoe, *Contempt*, *supra* note 110 (discussing discretionary courts' imposition of disparate punishment across social groups and arbitrary classifications of girls as victims or offenders).

483. *See, e.g.*, Feld, *Abolish the Juvenile Court*, *supra* note 114.

484. *In re* TC, 214 P.3d 1082, 1087, 1097–98 (Haw. Ct. App. 2009).

485. *See* Goodwin, *Law's Limits*, *supra* note 46, at 537–40 (positing alternative courts, including girls' courts, as a potential option for state oversight of teen sex). My argument is also informed by, but goes further than, that of Carissa Hessick and Judith Stinson that juveniles be sanctioned less severely than adults for age-determinative sex offenses, including the possible use of status offense jurisdiction rather than criminalization. *See generally* Carissa Byrne Hessick & Judith M. Hinson, *Juveniles, Sex Offenses, and the Scope of Substantive Law*, 46 TEX. TECH L. REV. 5 (2013) (arguing that juvenile perpetrators of age-determinative sex offenses lack the characteristics of adult offenders that enhance adult culpability).

486. *See* Barry C. Feld, *Violent Girls or Relabeled Status Offenders*, 55 CRIME & DELINQ. 241, 242 (2009) (examining the criminalization of status offenses to justify court intervention into the lives of girls); *see also* Godsoe, *Contempt*, *supra* note 110, at 1109–10 (outlining recent cases adjudicating girls as status offenders because of dating and sexual behavior of which their parents did not approve).

proposed amendments to federal legislation governing juvenile justice to eliminate this practice.[487]

In sum, the problems with peer statutory rape are built into the law. Eliminating discretion in one place usually causes it to reappear elsewhere; the question thus becomes who should exercise it and how to channel and curb the inevitable discretion.[488] I argue here that no state actor should have the discretion to punish consensual peer sex. Only full decriminalization will eliminate these problems.

## *V. Conclusion*

Over-criminalization is an enormous problem. Here, I have addressed just one of its many forms. Decriminalizing peer statutory rape may only affect a few hundred minors every year—a drop in the bucket of our immense carceral state. For those children, however, the stakes are immensely high. Hopefully, this proposal will spur conversation about the broader over-criminalization of juveniles, and encourage reformers and scholars to revisit vagueness as a potential tool.

This examination of the vaguenet of peer statutory rape also raises questions about one of the most deeply entrenched legal classifications—victim and offender. Almost always assumed as a factual or statutory given, this binary is in fact partially socially constructed through the law's enforcement. Like Michel Foucault's category of the "disorderly," the victim and offender categories are more subjective, and more problematic, than conventional wisdom acknowledges.[489]

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487. *See, e.g.*, S. 1169, 114th Cong. (2015). The proposed legislation has brought widespread criticism of the incarceration of at-risk or acting out minors. *See, e.g.*, Editorial, *Kids and Jails: A Bad Combination*, N.Y. TIMES (Dec. 28, 2014), http://www.nytimes.com/2014/12/29/opinion/kids-and-jails-a-bad-combination.html (last visited Nov. 4, 2016) (lauding proposed reform to the Juvenile Justice and Delinquency Prevention Act targeted to reduce incarceration of minors) (on file with the Washington and Lee Law Review).

488. *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 593–94 (1997) (noting the shortcomings of vagueness doctrine).

489. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

Other crimes reflect the complexity of this designation. I will flag just two here. First are so-called mutual liability crimes. One example is the category of intimate partner violence, which is sometimes designated 'mutual combat' where both parties are prosecuted. Second is conduct governed by overlapping and sometimes contradictory statutes. A person can be charged with prostitution under one law and be a trafficking victim under another. These examples call for scrutiny of who makes the designation—Police? Prosecutors? Judges or juries?—and on what grounds. They also raise questions about the antipodal nature of these designations—should they function as an all-or-nothing on/off switch as they currently do? Or might a continuum of victimhood and criminal liability work better? I do not purport to answer these questions here. Instead, I raise them to encourage further critical thinking, for accurately and transparently deciding who has been harmed and who deserves punishment lie at the heart of any fair and legitimate criminal justice system

*Appendix A*

| | **Age of Consent** | **RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce** | **Age Gap or Age Range** | **Circumstances Under Which Sexual Intercourse is Always Criminalized** | **Minimum Age of Offender** | **Youngest Age of Victim Prosecuted More Severely or Differently** |
|---|---|---|---|---|---|---|
| **Model Penal Code** | 16 | Yes | < 4 years | None | None | Under 10 |
| **Federal** | 16 | Yes | < 4 years | Always criminal if victim is under 12. | None | Under 12 |
| **Alabama** | 16 | Yes, but only for vaginal intercourse. | < 2 years | None for vaginal intercourse; sodomy is always criminalized, at least as a misdemeanor. | 16 | Under 12 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Alaska** | 16 | Yes | Intercourse is not criminal if the victim is 13-15 and the offender is less than 4 years older; or if the victim is under 13 and the offender is less than three years older. | None | None | Under 13 |
| **Arizona** | 18 | Yes | < 2 years | Always criminalized when victim is under 15. | None | Under 15 |
| **Arkansas** | 16 | Yes | < 3 years | None | None | Under 14 |

| | **Age of Consent** | **RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce** | **Age Gap or Age Range** | **Circumstances Under Which Sexual Intercourse is Always Criminalized** | **Minimum Age of Offender** | **Youngest Age of Victim Prosecuted More Severely or Differently** |
|---|---|---|---|---|---|---|
| **California** | 18 | Yes, for vaginal intercourse. | < 3 years | Always criminalized when victim is under 18 years of age; if age gap is within 3 years, the charge is reduced to a misdemeanor. | None | Under 14 |
| **Colorado** | 17 | Yes | < 4 years when victim is under 15; or < 10 years when victim is older than 15. | None | None | Under 15 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Connecticut** | 16 | Yes | ≤ 2 years if victim is under 13; or ≤ 3 years if victim is older than 13. | None | None | Under 13 |
| **Delaware** | 18 | Yes | < 30 years older if victim is older than 16. | Always criminal when victim is under 16; the age gaps cannot acquit the offender of Rape in the Fourth Degree. | None | Under 12 |
| **Florida** | 18 | No | None | Always criminal under 16 | None | Under 12 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Georgia** | 16 | Yes | < 4 years | Always criminal when victim is under 16; if the age gap applies, the crime is reduced to a misdemeanor. If the victim is under 10, then no reduction. | None | Under 10 |
| **Hawaii** | 16 | Yes | < 5 years | Always criminal under 14. | None | Under 14 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Idaho** | 18 | Yes, focuses on age of offender. | Intercourse is not criminal if victim is under 16 and offender is under 18; or if victim is 16 or 17 and offender is < 3 years older. | None | 18 | Under 16 |
| **Illinois** | 17 | Yes | < 5 years if victim is 13-16 years old. | Always under 17; if the age gap exception applies, then reduced to misdemeanor. | None | Under 9 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Indiana** | 16 | Yes | ≤ 4 years when offender is not older than 20 and is in a relationship with victim. | Always criminal under 14. | None | Under 14 |
| **Iowa** | 16 | Yes | < 4 years | Always criminal under 13. | None | Under 12 |
| **Kansas** | 16 | No | --- | Always criminal under 16. Kansas also criminalizes all sodomy, although held unconstitutional as applied between two adults. | None | Under 14 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Kentucky** | 16 | Yes, but depends on age of offender. | If offender is under 18, intercourse with a victim 12-15 will be charged as a misdemeanor; if offender is 19 or 20 intercourse with a victim 14 or 15 will be charged as a misdemeanor. | Always criminal as a misdemeanor when victim is under 16, as per § 510.140 because statutorily they are not capable of consenting due to age. | None | Under 12 |

| | **Age of Consent** | **RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce** | **Age Gap or Age Range** | **Circumstances Under Which Sexual Intercourse is Always Criminalized** | **Minimum Age of Offender** | **Youngest Age of Victim Prosecuted More Severely or Differently** |
|---|---|---|---|---|---|---|
| **Louisiana** | 17 | Yes, but depends on age of offender. | Intercourse is not criminal if offender is over 17 and victim is 13-16 but less than 2 years younger. Offender must be 17 to be convicted of a crime, unless the victim is under 13. | Always criminal under 13. | None. | Under 13 |
| **Maine** | 16 | Yes | < 5 years | Always criminal under 14. | None | Under 12 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Maryland** | 16 | Yes | Intercourse is not criminal if victim is 14 or 15 and offender is under 21; or if victim is under 14 and offender is less than 4 years older. | None | None | Under 13 |
| **Massachusetts** | 16 | No | N/A | Always criminal under 16. | None | Under 12 |
| **Michigan** | 16 | No, the only RJ/age gap law applies to sexual contact and not penetration. | N/A | Always criminal under 16. | None | Under 13 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Minnesota** | 16 | Yes | Intercourse is not criminal if victim is 13-15 and offender is less than two years older. | Always criminal under 13 and all acts of sodomy are criminalized to some extent. | None | Under 13 |
| **Mississippi** | 16 | Yes | Intercourse is not criminal if victim is under 16 and offender is less than 3 years older; or if victim is under 14 and offender is less than 2 years older. | None | None | Under 14 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Missouri** | 17 | Yes | Intercourse is not criminal if the offender is under 21 and victim is 14 or older. | Always criminal under 14. | None | Under 12 |
| **Montana** | 16 | No | N/A | Always criminal under 16. | None | Under 12 |
| **Nebraska** | 17 | These laws require the offender to be at least 19. | Intercourse is not criminal unless the offender is 19 years old. | None | 19 | Under 12 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Nevada** | 16 | Yes; these laws only criminalize sexual intercourse with a victim under 14. | Intercourse is not criminal if the victim is under 14 and offender is under 18 and is less than 2 years older. | None | None | Under 14 |
| **New Hampshire** | 16 | Yes | < 4 years | Always criminal under 16. Offender will be charged with a misdemeanor if the victim is 13-15 and the age gap applies. | None | Under 13 |
| **New Jersey** | 16 | Yes | < 4 years | Always criminal under 13. | None | Under 13 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **New Mexico** | 17 | Yes | Intercourse is not criminal when the offender is under 18 and less than four years older than the victim. | Always criminal under 13. | None | Under 13 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **New York** | 17 | Yes; these laws mostly focus on the age of the offender. | Intercourse is not criminal if offender is over 18 and less than 4 years older. In all other cases where the victim is 11 or older, the offender must be 18 to be convicted. | Always criminal under 11. | None | Under 11 |
| **North Carolina** | 16 | Yes | < 4 years to decriminalize, other gaps can reduce the crime. | None | 12 | Under 13 |
| **North Dakota** | 18 | Yes | < 3 years | Always criminal under 15. | None | Under 15 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Ohio** | 16 | Yes, but these laws focus on age of offender. | Intercourse is not criminal if offender is under 18 and victim is 13 or older. | Always criminal under 13. | None | Under 10 |
| **Oklahoma** | 16 | Yes, but these laws focus on the age of the offender. | Intercourse is not criminal if offender is under 18. | None | 18 | Under 14 |
| **Oregon** | 18 | Yes | < 3 years | Always criminal under 12; if victim is under 15 the offender will be charged with a misdemeanor. | None | Under 12 |
| **Pennsylvania** | 16 | Yes | < 4 years | Always criminal under 13. | None | Under 13 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Rhode Island** | 16 | Yes, but these laws focus on the age of the offender. | Intercourse is not criminal if the offender is under 18 and victim is 14 or older . | Always criminal under 14. | None | Under 14 |
| **South Carolina** | 16 | Yes, but these laws focus on the age of the offender. | Intercourse is not criminal if offender is under 18 and victim is 14 or older. | Always criminal under 14. | None | Under 11 |
| **South Dakota** | 16 | Yes | < 3 years | Always criminal under 13. | None | Under 13 |
| **Tennessee** | 18 | Yes | < 4 years | Always criminal under 13. | None | Under 3 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Texas** | 17 | Yes | ≤ 3 years, however, under § 21.11 offenders who commit sodomy can only use this defense if the offender and victim are of the opposite sex. | Always criminal under 14. | None | Under 6 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Utah** | 18 | Yes | Intercourse is not criminal if the victim is 16 or 17 and the offender is less than 7 years older; intercourse is reduced to a misdemeanor if the victim is 14 or 15 and the offender is less than 4 years older. | Always criminal under 14; if victim is 15 or younger, the offense can be reduced to a misdemeanor. | None | Under 14 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Vermont** | 16 | Yes, but these laws focus on the age of the offender. | Intercourse is not criminal if the offender is under 19 and the victim is 15 or older; or if the offender is under 18 and the victim is under 13. | None | 18 | Under 13 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Virginia** | 18 | Yes | < 3 years | Always criminal under 15; if victim is under 13 the offense is always a felony Offender must be 12 or older to be convicted of a felony; under 12 can be convicted of a misdemeanor. There is no presumption that an offender must be over 12 to commit the crime of sodomy. | None | Under 13 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Washington** | 16 | Yes | Intercourse is not criminal if the offender is less than 2 years older than a victim who is under 12; or less than 3 years older than a victim under 14; or less than 4 years older than a victim under 16. | None | None | Under 12 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **West Virginia** | 16 | Yes, but these laws focus on the age of the offender . | Intercourse is not criminal if victim is under 16 and offender is over 16 but less than 4 years older. | None | None | Under 12 |
| **Wisconsin** | 18 | No | N/A | Always criminal under 18; if victim is 16 or 17 the crime can be reduced to a misdemeanor. | None | Under 12 |

| | Age of Consent | RJ Law, Age Gap or Age of Offender Requirement Present to Decriminalize or Reduce | Age Gap or Age Range | Circumstances Under Which Sexual Intercourse is Always Criminalized | Minimum Age of Offender | Youngest Age of Victim Prosecuted More Severely or Differently |
|---|---|---|---|---|---|---|
| **Wyoming** | 16 | Yes, but the laws focus on the age of the offender. | Intercourse is not criminal if victim is over 13, the offender is under 17 and less than 4 years older; or if the victim is under 13, the offender over 16 and less than 3 years older. | None | None | Under 13 |

*Appendix B*

This Appendix includes the totals from the analysis of peer statutory rape laws:

| | | |
|---|---|---|
| States that do NOT have any provisions that decriminalize juvenile intercourse or reduce charges: | 6 | Florida, Kansas, Massachusetts, Michigan, Montana, Wisconsin |
| States that treat sodomy differently: | 5 | Alabama: Always criminalized, but can be reduced to a misdemeanor.<br>California: Romeo and Juliet exception never applies.<br>Kansas: Criminalizes all sodomy, but this law was held Unconstitutional between two adults.<br>Virginia: The presumption that a person under 12 cannot commit rape does not apply to sodomy.<br>Minnesota: Criminalizes all sodomy to some extent. |
| States that completely decriminalize regardless of the age of the victim when the Romeo and Juliet or Age Gap provision(s) applies: | 16* | MPC, Alaska, Arkansas, Colorado, Connecticut, Idaho, Maryland, Mississippi, Nebraska, Nevada, North Carolina, Oklahoma, Vermont, Washington, West Virginia, and Wyoming.<br>* Alabama criminalizes all sodomy and is not included in this count although its age gap provision applies to vaginal intercourse at any age. |
| States that do have Romeo and Juliet or Age Gap provisions but still criminalize juvenile sex under a certain age: | 29 | Federal, Arizona, California, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia. |
| States that require the offender to be of a minimum age in order to be prosecuted: | 6 | Alabama, Idaho, Nebraska, North Carolina, Oklahoma, Vermont. |

*Note: "State" includes the 50 contiguous United States as well as Federal law and the MPC.

Age of Consent

| | Age 16 | Age 17 | Age 18 |
|---|---|---|---|
| Number of States: | 33 | 8 | 11 |

*Note: these totals include states with RJ/Age Gap law and those without them.

Victim Age Under Which States Always Criminalize Intercourse:

| | 18 | 17 | 16 | 15 | 14 | 13 | 12 | 11 |
|---|---|---|---|---|---|---|---|---|
| Number of States: | 2 | 1 | 9 | 3 | 8 | 9 | 2 | 1 |

*Note: these totals include states with RJ/Age Gap law and those without them.

Youngest Victim Age Intercourse Statutes Identify to be Criminalized Differently:

| | 16 | 15 | 14 | 13 | 12 | 11 | 10 | 9 | 6 | 3 |
|---|---|---|---|---|---|---|---|---|---|---|
| Number of States: | 1 | 3 | 10 | 15 | 15 | 2 | 3 | 1 | 1 | 1 |

*Note: these totals are based on statutes that refer to intercourse and do not take into account statutes that criminalize only sexual contact.