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Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape

MICHELLE OBERMAN†

INTRODUCTION

A 1995 study revealed that, by the age of sixteen, 50% of U.S. teenagers have had sexual intercourse.¹ This result, which echoes the findings of many similar studies, reveals a serious problem for criminal justice. The age of consent to sexual contact under the vast majority of state statutes is sixteen or older, and thus, each incident of sexual intercourse among this population is illicit—each constitutes a separate instance of statutory rape.² The numbers are staggering. Utilizing U.S. Census Bureau figures, the 50% fig-

† Professor of Law, DePaul University College of Law. I am grateful to many wonderful people who have taught me about the real world as it pertains to girls, statutory rape and the law: The Ad Hoc Illinois Task Force on Statutory Rape (and particularly Polly Poskin and Lyn Schollett, of the Illinois Coalition Against Sexual Assault), participants at the “3R conference” in Visalia, California, May, 2000 (and particularly Bill Yoshimoto), participants at the Urban Girls Conference, in Buffalo, N.Y., April, 2000, and participants and Krista Sorvino, the organizer of the DePaul Law Review’s 10th Annual Symposium, on Statutory Rape Realities, March, 2000. Several readers lent generous comments and support to an early draft: Katharine Baker, Mary Becker, Lynne Henderson, Polly Poskin, Jane Rutherford and Lyn Schollett. And my research assistants, Sarah Alipourian, Ardyth Eisenberg, Erin Kinahan, and Mark Partin have worked so hard and so willingly that I pray to be given the opportunity to reciprocate—so long as it doesn’t involve any Bluebooking! Thanks also to Dean Teree Foster and DePaul for generous support. This article is for my little girls, Hanna and Noa, who need a bigger, better, and safer world in which to grow up.

1. Charles W. Warren et al., *Sexual Behavior Among U.S. High School Students, 1990-1995*, 30 FAM. PLAN. PERSP. 170, 171 (1998).

2. See Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 62 (1997). Statutory rape is a strict liability crime imposed on those who engage in sexual activity with certain groups of minors. This article will refer to the crime as “statutory rape,” rather than the broader “criminal sexual misconduct,” under which many states presently include the offense formerly known as statutory rape.

ure implies that there are *at least* 7.5 million incidents of statutory rape per year.³

For any number of reasons, it would be unimaginable to attempt to prosecute every instance of sexual contact with minors. In addition to the sheer magnitude of such an undertaking, and the futility of attempting to prosecute teenagers for an activity that almost half of them are engaging in, to a certain extent adolescent sexual behavior is usual and expected, and perhaps even part of healthy growth and development. It is difficult to view this conduct as criminal when society permits teenagers to obtain their own reproductive health care, including contraception and treatment for sexually transmitted diseases, free from parental notification or consent. Moreover, although rates of sexual intercourse clearly are higher today than they were forty years ago, there is little reason to believe that the high rates of adolescent sexual activity reflect a new trend.⁴ In fact, teenage pregnancy rates were higher in the 1970s and 1980s than they are today.⁵ Thus, it seems that for many years, a large number of adolescents have engaged in illicit sexual conduct, and that the criminal justice system has looked the other way.

But the fact that a behavior is typical does not necessarily dictate that it should be completely unregulated. After all, there are many examples of laws that penalize conduct that is commonplace, such as speeding or smoking marijuana. Furthermore, there are considerable risks inherent in adolescent sexual conduct, and a myriad of ways in which minors, because of their inexperience, are vulnerable to exploitation and coercion in their sexual interactions. Scholars from various fields have documented these risks, and explored the harms suffered by victims of coer-

3. This estimate is admittedly low, taking into account *only* the fifteen million U.S. residents who are between the ages of thirteen and sixteen, and assuming that 50% of them have had intercourse once. Obviously, many young people have intercourse earlier than age thirteen, and many more have intercourse more than once. It is also worth noting that the definition of statutory rape varies across jurisdictions. Thus, sexual intercourse between two minors is a crime in some, but not all, jurisdictions. See *infra* notes 205-08 and accompanying text.

4. See Tom Kean & Isabel Sawhill, Editorial, *More Teens Just Say 'No'*, WASH. POST, Sept. 5, 2000, at A25; Erin McClam, *Teen Births Drop to Lowest Level in 60 Years*, RECORD (Bergen County, N.J.), Aug. 9, 2000, at A3.

5. See McClam, *supra* note 4, at A3; Kristen Luker, *Dubious Conceptions: The Controversy Over Teen Pregnancy*, in THE AMERICAN PROSPECT 73 (1991).

cive or abusive sexual conduct.⁶ Perhaps the most obvious, though by no means the most grave, of these risks is unintended pregnancy. It is this factor that has prompted federal and state governments, beginning in the mid-1990s, to encourage the vigorous enforcement of statutory rape laws.⁷

In 1990, Professor Michael Males published a small study that indicated that a startlingly high number of babies born to young teen mothers were fathered by adult men.⁸ When the Alan Guttmacher Institute replicated this study across a larger population base, the results were even more powerful: 29.2% of babies born to girls under age sixteen were fathered by men over age twenty-one, and the younger the girls, the older the average age of the father.⁹

6. See generally ELIZABETH DEBOLD ET AL., *MOTHER DAUGHTER REVOLUTION* 180-81 (1993); NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* (1991); Antonietta Caffaro-Rouget et al., *The Impact of Child Sexual Abuse on Victims' Adjustment*, 2 *ANNALS OF SEX RESEARCH* 29, 29-47 (1989); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 *S. CAL. L. REV.* 777 (1988); David M. Fergusson et al., *Childhood Sexual Abuse, Adolescent Sexual Behaviors and Sexual Revictimization*, 21 *CHILD ABUSE & NEGLECT* 789, 789-803 (1997); Michelle Fine, *Sexuality, Schooling, and Adolescent Females: The Missing Discourse of Desire*, 58 *HARV. EDUC. REV.* 29 (1988); Carol R. Hartman & Ann Wolbert Burgess, *Sexual Abuse of Children: Causes and Consequences*, in *CHILD MALTREATMENT: THEORY AND RESEARCH ON THE CAUSES AND CONSEQUENCES OF CHILD ABUSE AND NEGLECT* 95-128 (Dante Cicchetti & Vicki Carlson eds., 1989); Barbara Krahe et al., *Childhood Sexual Abuse and Revictimization in Adolescence*, 23 *CHILD ABUSE & NEGLECT* 383, 383-94 (1994); Annette Lawson, *Multiple Fractures: The Cultural Construction of Teenage Sexuality and Pregnancy*, in *THE POLITICS OF PREGNANCY* 101 (Annette Lawson & Deborah L. Rhode eds., 1993); Alice Mayall & Steven R. Gold, *Definitional Issues and Mediating Variables in the Sexual Revictimization of Women Sexually Abused as Children*, 10 *J. INTERPERSONAL VIOLENCE* 26, 26-29 (1995); R.L. Palmer et al., *Childhood Sexual Experiences with Adults Reported by Female Psychiatric Patients*, 160 *BRIT. J. PSYCHIATRY* 261, 261-65 (1992); Catherine Stevens-Simon & Susan Reichert, *Sexual Abuse, Adolescent Pregnancy, and Child Abuse: A Developmental Approach to an Intergenerational Cycle*, 148 *ARCHIVES PEDIATRICS AND ADOLESCENT MED.* 23 (1994); Deborah L. Tolman, *Doing Desire: Adolescent Girls' Struggles for/with Sexuality* 8 *GENDER & SOCIETY* 326 (1994).

7. See *infra* notes 97-111 and accompanying text.

8. See Mike Males, *Adult Liaison in the "Epidemic" of "Teenage" Birth, Pregnancy, and Venereal Disease*, 29 *J. SEX RES.* 525, 527-44 (1992).

9. See Jacqueline E. Darroch et al., *Age Differences Between Sexual Partners in the United States*, 31 *FAM. PLAN. PERSP.* 160, 163 (1999); see also Rigel Oliveri, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 *STAN. L. REV.* 463, 504-05 (2000) (asserting that the vague term "teen" has led to subsequent qualifications of these findings and that recent nationwide studies have found that nearly two-thirds of all teen mothers are eighteen to nineteen years old and, thus, are adults).

Those who were familiar with the problems stemming from teen pregnancy immediately understood the far-reaching implications of this information. Girls who have their first children as teens are less likely to complete high school, less likely to marry, less likely to be able to support their families, and more likely to require public assistance at various points in their lives than are girls who postpone childbearing until after their teenage years.¹⁰ Thus, at the aggregate level, the men who fathered these children may be seen as costing states untold millions of dollars.¹¹

It was against this backdrop that interest in statutory rape was rekindled. After all, this research indicated that many babies born to underage girls were, in essence, "criminal evidence." Their very conception was the result of a criminal act. At its core, the revival of interest in statutory rape that began in the late twentieth century reflects a concern with teen pregnancy and the harm it causes to the social fabric and, in particular, to the public coffers.¹²

The recent governmental push to reinvigorate the enforcement of statutory rape laws forces the question of the extent to which the criminal law can and should regulate adolescent sexual behavior. Contemporary society's relatively promiscuous climate makes it extremely difficult to articulate the appropriate role for the criminal justice system in approaching adolescent sexual interactions. It is unimaginable that statutory rape laws could be fully enforced. And yet, if they are to be enforced selectively, which cases most merit punishment? In part, the challenge derives from the lack of a guiding principle for distinguishing between problematic adolescent sexual behavior and normal adolescent sexual exploration.

Given these circumstances, selective enforcement of statutory rape laws is inevitable. At present, however, the laws are being selectively enforced in the absence of any coherent rationale. This article will explore and attempt to

10. Patricia Donovan, *Can Statutory Rape Laws Be Effective In Preventing Adolescent Pregnancy?*, 29 FAM. PLAN. PERS. 30, 34 (1997).

11. It remains to be seen how this set of assumptions may be affected by current "welfare reform" provisions providing lifetime limits on government assistance and mandating that recipients find employment. See Nancy E. Hoffman, *Workfare Implications for the Public Sector*, 73 ST. JOHN'S L. REV. 769, 771-74 (1999).

12. See *supra* note 10 and accompanying text (discussing the shifting rationales for enforcing statutory rape laws).

repair the fault lines in the construction and implementation of contemporary statutory rape laws. Part I provides an overview of some of the problems occasioned by adolescent sexual activity, making the case for legal oversight and intervention. Part II describes and critiques contemporary statutory rape enforcement patterns. Specifically, I identify three case-selection “strategies” currently employed by criminal justice authorities, and explain how, in some cases, they operate to the victim’s detriment. Part III explores various reforms to the common law construction of statutory rape—reforms that have been adopted into law by various jurisdictions, as well as those that have been suggested by other commentators. Finally, I conclude the article by proposing a reformulation of statutory rape law that more closely approximates the goal of protecting a vulnerable population from sexual exploitation and coercion.

I. CONTEMPORARY ADOLESCENT SEXUALITY: NONVOLUNTARY INTERCOURSE AND THE CASE FOR LEGAL OVERSIGHT

One problem with statutory rape laws in a society in which adolescent sexuality is pervasive is that they sound almost prudish. By definition, statutory rape penalizes sexual encounters that do not constitute forcible rape, and that one might therefore presume to be wholly consensual. Most statutory rape laws are drafted with sufficient breadth to encompass all sexual contact with minors under a given age, and therefore penalize even the most innocent and mutually desired expressions of adolescent sexuality. If one operates under the assumption that all sexual encounters can be neatly divided into two categories—rape and sex—and one considers sex to be presumptively good, then statutory rape laws certainly seem retrograde, intrusive, and unduly paternalistic.¹³

This dichotomous view of sex has been completely repudiated by a host of significant authorities.¹⁴ Instead, it

13. See Catharine A. MacKinnon, *Reflection on Sex Equality Under Law*, 100 YALE L.J. 1281, 1300 (1991). *But cf.* Lynne Henderson, *Just What Part of No Don't You Understand?*, 2 TEX. J. WOMEN & L. 41, 57 (1993) (presenting a description of a continuum between rape and sex).

14. See Henderson, *supra* note 13, at 57. See generally Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 266-68 (2000) (describing how a woman “consent[s]” to unwanted sex and therefore becomes a “giving self” in

seems far more likely that sexual encounters range across various points on a spectrum between mutually desired, pleasurable, fully consensual sex, and forcible rape.¹⁵ We know that, for adults, some sexual encounters may be beautiful and mutually desired. But it is evident that many adult sexual encounters fall short of this ideal. For teens, we know far less. There is a remarkable paucity of research describing what might be termed "consensual" sexual relationships among adolescents. Aside from several chronicles describing the loss of virginity among teens, we know little about the substance of adolescent sexual relationships. These chronicles tell multiple girls' (and some boys') stories of sexual encounters that, in the vast majority of cases, do not constitute rape.¹⁶ Nonetheless, the stories are far from uniformly positive accounts of sexual encounters arising out of mutual desire and/or love. Instead, they give testament to a widespread sense of confusion and ignorance among girls about their own pleasure, and their right to self-respect and the respect of their partners.¹⁷ The best of these stories involve girls who had the good fortune to find a

order to avoid pain and suffering).

15. Henderson, *supra* note 13, at 57-63.

16. See SHARON THOMPSON, GOING ALL THE WAY: TEENAGE GIRLS' TALES OF SEX, ROMANCE, AND PREGNANCY 17-46 (1995) (noting the initial sexual experiences of various teenage girls and how, although most of them felt they were old enough and ready to handle sex, virtually all ended-up psychologically devastated and abandoned once the boy ended or left the "relationship," and that, therefore, the girls did not claim to feel violated or raped, but rather that they feared pregnancy or being dumped); see also NAOMI WOLF, PROMISCUITIES: THE SECRET STRUGGLE FOR WOMANHOOD 208-11 (1997). For an examination of girls' experiences of their own adult-teen relationships, see Lynn M. Phillips, *Unequal Partners: Exploring Power and Consent in Adult-Teen Relationships* (unpublished manuscript, on file with the author).

17. For example, Tracy, a high-school student at the time, grappled with whether to have sex with eighteen-year-old Don. Don had a "girlfriend" named Julie, with whom he was having sex. Thompson noted Tracy's confusion over her "love" for Don and the possibility of him leaving her if she did not have sex with him. Regardless of her friends telling her to "drop him," Tracy for some reason could not do it regardless of her knowing that Don was having sex with Julie. THOMPSON, *supra* note 16, at 20-25. In contrast, Deborah Tolman argues that girls clearly feel sexual feelings and desires, and are quite aware of these feelings and how to deal with them. She studied thirty high school girls, and found that two-thirds of these girls claim to have sexual feelings and desires. Furthermore, the girls acknowledge the existence of their sexual feelings and the possible dangers surrounding such feelings. Deborah L. Tolman, *Doing Desire: Adolescent Girls' Struggles for/with Sexuality*, 8 GENDER & SOC'Y 326, 328 (1994).

partner who was gentle and trustworthy, and who used contraception. But the majority of the stories fall short of this ideal, and instead reflect the narrator's sense of disappointment, if not betrayal, and a lack of control over the timing and circumstances of sex.¹⁸

Even if we presume, for the sake of argument, that adolescents are like adults in that they can, and perhaps often do, experience mutually desired, pleasurable sex, there is considerable evidence of sexual encounters with adolescents that falls into the gray area, short of mutually desired, pleasurable sex, yet also short of rape. Indeed, it seems that for teens, factors such as immaturity, sexual naivete, and vulnerability to coercion combine to insure that many sexual encounters fall far short of the ideal.

A. *Rape Law and the Problem of Nonvoluntary Sex Among Teenagers*

Many authors, including myself, have written about the various factors that make teenage girls susceptible to coercion and abuse in sexual encounters. The vulnerability inherent in adolescence, including severely diminished self-esteem, ambivalence about one's changing body, and a marked reluctance to assert one's self, leads teenagers to consent to sexual contact that may not be fully, or even partially, desired.¹⁹ Investigators studying adolescent sexuality have identified a multiplicity of factors beyond sexual desire and love that lead teenagers to consent to sex. Among these are fear, confusion, coercion, peer pressure, and a desire for male attention.²⁰

18. See THOMPSON, *supra* note 16, at 29. For the most part, the girls express their sense that, while sex "just happened," they were at least partly to blame. Their curiosity about sex caused them to let sex happen, and even if the encounter was disappointing, insulting, or painful, they often express some relief at leaving behind their virginity and the haunting insecurity that they would never be found desirable by a male.

19. See Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 53-59, 63-70 (1994). In recent years, several authors have suggested that the socialization process may be as difficult, although with different manifestations, for adolescent boys as it is for adolescent girls. See, e.g., CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS* 17-44 (2000); MARY BRAY PIPHER, *REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS* 203-31 (1995); WILLIAM S. POLLACK, *REAL BOY'S VOICES* 12-24 (2000).

20. See *infra* note 33 and accompanying text; see also Oberman, *supra* note

Adolescence is, by definition, a time of transition. As teenagers navigate the transition from childhood to adulthood, they learn by experimentation, by mistake, and by observation. Because of their inexperience, they are necessarily prone to misjudgment. Nowhere is this tendency toward misjudgment more pernicious than in the area of sexuality, in which adolescents' age-appropriate naivete renders them uniquely susceptible to coercion and abuse. The law of statutory rape reflects an attempt to protect teenagers from themselves, as well as from those who would prey upon their vulnerability. It also represents a necessary complement to conventional rape law, which offers little protection to the teenager who, due to fear, confusion, coercion, or inexperience, has "consented" to unwanted sex. The following subsection will provide a brief overview of the law governing forcible rape. This will constitute a foundation from which to explore the reasons why many problematic sexual encounters involving teens are not governed by the law of forcible rape.

1. *A Brief Summary of the Law Governing Forcible Rape.* As numerous scholars have demonstrated, over long centuries, the law governing rape developed more with an eye toward protecting men from false accusations of rape, than with a goal of protecting women from sexual assault.²¹ Contemporary rape scholarship amply depicts the manner in which rape victims historically have been "subjected to institutionalized sexism, which began with their treatment by the police, continued through the legal system, much influenced by notions of victim precipitation, and ended with the acquittal of many de facto rapists."²² At common law, rules such as the requirement that the victim's testimony be corroborated by other evidence, that the victim resist her attacker, and practices such as permitting the defense to question the woman about her sexual habits, often led to unjust acquittals.²³

Beginning in the 1970s, most states undertook a com-

19, at 54-55 (describing the tactics used by a gang of teenage boys to pressure girls into consenting to sex).

21. See David Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1196 (1997).

22. SUZANNA ADLER, *RAPE ON TRIAL* 17 (1987).

23. See Bryden & Lengnick, *supra* note 21, at 1196-97.

prehensive reform of their rape laws, aiming to eliminate barriers to effective prosecution and conviction for rape, and to protect women from the abuses associated with rape prosecution, as well as from rape itself. Most states, for example, eliminated the corroboration and the resistance requirements, along with the "cautionary" instruction regarding the ease of making false accusations.²⁴ Rape shield laws severely limit the relevance of a woman's sexual history. In many states, the term "rape" itself was replaced by "criminal sexual assault," in order to "emphasize that rape is a crime of violence and not due to an uncontrollable sexual passion."²⁵

In spite of these changes, there is ample evidence that these reforms have had little or no effect on the outcomes of rape cases, or the proportions of rapists who are prosecuted and convicted.²⁶ Victim blaming remains a significant problem, particularly in acquaintance rape cases. According to Professors Bryden and Lengnick, two prominent criminologists specializing in the study of rape:

[A]ctors in the criminal justice system—police, prosecutors, juries, judges and even victims themselves—tend to be sympathetic towards some types of rape victims but skeptical towards others. The traditional image of a rapist is a knife-wielding stranger But most rapes are perpetrated by acquaintances of the victim: lovers, dates, co-workers, neighbors, relatives and so on. The rapist usually does not injure his victim. In these typical cases, attention usually focuses on the woman's character. If her pre-rape behavior violated traditional norms of female prudence or morality,

24. See *id.* at 1198. But see Thomas Morris, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L.J. 154, 154-55 (1988) (stating that more than half the states allow cautionary instruction for a variety of purposes).

25. Patricia Searles & Ronald J. Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN'S RTS. L. REP. 25, 25-26 (1987). Nearly all states have eliminated the requirement that a complainant's testimony be corroborated in instances of forcible rape, although some states retain a corroboration requirement for statutory rape. See Ronald J. Berger, *The Dimensions of Rape Reform Legislation*, 22 L. & SOC'Y REV. 329, 332 (1988). As of 1988, more than half the states continue to allow a cautionary instruction in forcible rape trials. Morris, *supra* note 24, at 154-55. See generally STANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 402 (1989); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 812-905 (1986).

26. JEANNE C. MARSH ET AL., *RAPE AND THE LIMITS OF LAW REFORM* 21-23 (1982).

many people blame her instead of the rapist.²⁷

In an effort to combat this problem and to insure that rape is taken seriously, scholars have proposed new reforms. Among these is the effort to rewrite laws in a way that makes central the issue of consent (or nonconsent), as opposed to force.

Primary among these advocates is Professor Stephen Schulhofer, whose book, *Unwanted Sex*, chronicles the failures of rape law reform, and posits an alternative vision of rape law—one predicated upon honoring sexual autonomy.²⁸ Specifically, Professor Schulhofer argues that current formulations of rape law leave many women “unprotected against coercive sexual abuses that any decent society should consider morally wrong and legally intolerable.”²⁹ Instead of focusing on whether force was used to procure consent, Schulhofer advocates a law that would ask “whether each participant in a sexual encounter had a meaningful opportunity to choose, and whether a meaningful choice was in fact made, before sexual penetration occurred.”³⁰ But, as Professor Katharine Baker’s powerful work on rape cautions, it is unwise to be overly sanguine about the potential benefits of rape law reform without an accompanying reform of society’s underlying attitudes toward the crime of rape.³¹ Professor Baker’s study of acquaintance rape ties the failure of rape law reforms to the fact that we live in a society that has yet to fully internalize the normative prohibition against the act of forcing a woman to have sex against her will:

Criminally punishing nonconsensual sex has proved difficult . . . precisely because the legal proscription on nonconsensual sex competes with the masculinity norm, biological theory and popular belief, all of which re-enforce and legitimate the notion that men crave sex regardless of consent. Given this tension between the law and other well-established norms, it should come as little sur-

27. Bryden & Lengnick, *supra* note 21, at 1204 (internal citations omitted).

28. STEPHEN SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998).

29. *Id.* at x.

30. *Id.* at 103.

31. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 675-84 (1999) [hereinafter Baker, *Sex, Rape, and Shame*]; see also Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 606-08 (1997) [hereinafter Baker, *Once a Rapist?*].

prise that a sizable number of men have yet to internalize the moral wrong of nonconsensual sex. And even those men who have internalized the abstract wrong . . . have difficulty concretely identifying what nonconsensual sex is. This difficulty stems both from well-established sexual behavior roles that shun explicit communication and from our continuing reluctance to explicitly discuss, both societally and individually, what consent is. Finally, the constitutional protections afforded defendants make convictions particularly difficult to secure in cases, like date rape, in which consent is the only issue.³²

The implications of the limited success of rape law reforms are particularly dire for young women. The following subsection will explore the problem of nonvoluntary sex among teenagers, demonstrating the ways in which they simply are not protected by contemporary rape laws.

2. *Teenagers and the Problem of Nonvoluntary Sex.* In general, the central inquiry in a rape case asks only whether intercourse was forced upon the victim; whether she consented to sex, rather than whether she consented to sex for reasons that seem problematic. An ideal of mutually desired, pleasurable sex presupposes that both parties consent to the sexual encounter out of reasons of sexual desire and/or love. Social science research indicates that teenage girls consent to sex for a variety of reasons that lie well beyond sexual desire and love. As I have noted elsewhere:

The stories girls tell about the "consensual" sex in which they engage reflect a poignant subtext of hope and pain. Girls express longing for emotional attachment, romance and respect. At the same time, they suffer enormous insecurity and diminished self-image. . . . Teenage girls recognize that they are, or at least that they should be, objects of desire. . . . Girls want boyfriends, relationships, or somebody who will hold them and tell them that they are wanted. Girls negotiate access to the fulfillment of these emotional needs by way of sex.³³

In a sense, this is not terribly different from what we know about adult women, who consent to sex for reasons that may range from erotic desire to a sense of economic dependence, spousal obligation, or a wish to avoid a part-

32. Baker, *Sex, Rape, and Shame*, *supra* note 31, at 693-94.

33. Oberman, *supra* note 19, at 65-66 (footnotes omitted).

ner's anger.³⁴ Upon closer examination, however, there is at least one important difference between girls and women when it comes to consensual sex: the sexual bargains struck by girls often are so painfully one-sided that it is difficult for adults to understand what prompted the girl to consent.³⁵ In this sense, the sexual bargains girls make are more like the commercial bargains they might make, were they permitted to act in the marketplace.³⁶ The combination of girls' age-appropriate naivete and insecurity and the norms of male sexual initiative make bad bargains inevitable.

There is an abundance of research that helps us to understand girls' vulnerability in sexual situations. First, there is a wealth of information demonstrating the psychic toll of adolescence on girls. Even though current studies suggest that girls are succeeding academically, and even outpacing boys in areas other than math and science, no one suggests that girls' emotional development into women is anything but difficult.³⁷ Between the ages of fifteen and nineteen, girls manifest disproportionately high rates of depression and anxiety.³⁸ They experience considerably higher rates than the rest of the population of disorders such as anorexia and bulimia.³⁹ Although teenage boys are more likely to commit suicide, teenage girls attempt suicide at

34. See Mary E. Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165, 198-200 (providing a rich discussion of the many reasons women consent to heterosexual sex, and the problems inherent in "autonomy denying" sex).

35. See *infra* notes 52-54, 62-63, 72, 76-77, and accompanying text; see also *State v. Oliveria*, No. 03C01-9611-CR-00417, 1997 WL 600574 (Tenn. Crim. App. 1998) (involving a twenty-five-year-old man who maintained sexual relationships with two sixteen-year-old girls, promising both of the girls that he would marry them after they finished high school. During the course of these relationships, he married another woman, having intercourse with one of the victims the day after his wedding).

36. The common law recognizes the potential for exploitation in the commercial setting, and protects minors from bad bargains by permitting them to void their contracts. See, e.g., Oberman, *supra* note 19, at 43-46.

37. See PIPHER, *supra* note 19, at 203-31; POLLACK, *supra* note 19, at 12-24; SOMMERS, *supra* note 19, at 17-44.

38. See U.S. PUB. HEALTH SERV., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 152-53, 162 (1999).

39. See *id.* (stating that eating disorders "usually arise in adolescence and disproportionately affect females" and that "[a]bout 3 percent of young women have one of the three main eating disorders: anorexia nervosa, bulimia nervosa, or binge-eating disorder").

twice the rate of teenage boys.⁴⁰ This discrepancy, in an era when it is frighteningly easy for teens to acquire the means to kill themselves, speaks to a certain passive-aggressive effort on the part of these girls to communicate their desperation. Obviously, these troubling statistics describe only the extremes, and most girls do not experience such marked distortions in their sense of self or well-being. Nonetheless, their very extreme nature helps to illuminate the problems of self-doubt, insecurity and depression that are so commonplace among girls that we scarcely notice them.⁴¹

When it comes to issues of sexuality, in spite of several decades of sexual "liberation," including effective contraception and legalized abortion, this remains a society rife with sexual double-standards. As in the past, boys and men are expected, if not encouraged, to engage in sex whenever the opportunity presents itself, and their reputation is enhanced to the extent that they are seen as sexually experienced.⁴² Girls, on the other hand, have inherited the highly stigmatized norms governing female sexuality.⁴³ "Slut" has not become an accolade, and to date, there are no male counterparts for this derogatory term for a sexually active female. Although the "majority of Americans no longer view premarital intercourse as wrong, and the media bombards teens with scenes of sexual involvement and innuendo,"⁴⁴ there are few positive role models for teenage girls seeking

40. See *id.* at 152.

41. See Oberman, *supra* note 19, at 55-56 ("The most pervasive finding of the 'post-Gilligan' psychologists who have dedicated their research to the study of girls' development is that among girls, adolescence is a time of acute crisis, in which self-esteem, body image, academic confidence and the willingness to speak out decline precipitously.")

42. See Baker, *Sex, Rape, and Shame*, *supra* note 31, at 693 ("Having sex demonstrates one's heterosexuality which demonstrates one's masculinity and masculinity brings with it the esteem of one's peers."). Baker cites numerous studies demonstrating the continued vitality of this norm, and provides a rich discussion of the impact of this norm on the problem of acquaintance rape. *Id.*

43. Robin Warshaw & Andrea Parrot, *The Contribution of Sex-Role Socialization to Acquaintance Rape*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 75 (Andrea Parrot & Laurie Bechhofer eds., 1991) ("From their socialization in childhood and adolescence, [boys and girls] develop different goals related to sexuality. . . . [M]en are supposed to single-mindedly go after sexual intercourse with a female, regardless of how they do it [W]omen should passively acquiesce or use any strategy to avoid sexual intercourse.")

44. Deborah L. Rhode, *Adolescent Pregnancy and Public Policy*, in THE POLITICS OF PREGNANCY 301, 316 (Annette Lawson & Deborah L. Rhode eds., 1993).

to explore, express, or experience their own sexuality. Instead, girls aim to be found attractive by males, and they tend to view sexual pleasure, for the most part, as something that their partners derive from them, or that they give to their partners.⁴⁵ To the extent they deviate from this pattern, they jeopardize their feminine identity, and their relationship to men. As the author of one study of acquaintance rape cases observes:

Th[e] overriding theme of female silence as the mark of a good woman expresses itself in numerous variations in our general culture and in our conceptions of rape. A woman need not literally be silent. She may speak if her voice soothes, entertains, informs or otherwise helps to serve male needs. What she may not do is express her own needs or views⁴⁶

As I said at the outset of this section, adolescence is, by definition, a transition to adulthood that is traversed through trial and error experimentation. The bad bargains girls strike in their forays into sexual activity are a direct result of society's archaic double-standards encouraging them to be flattered and compliant when a male finds them desirable, coupled with the self-doubt and insecurity that marks their stage of development.

There is ample evidence of these bad bargains in contemporary social science literature. Several recent studies suggest that a considerable proportion of adolescents experience sexual intercourse under conditions that are less than mutually desired and pleasurable. The first among these is a study of 2933 women between the ages of fifteen and twenty-four, which asked women to estimate the extent to which their first sexual intercourse had been desired.⁴⁷ The survey used a Likkens scale of one to ten, in which one meant they really did not want it to happen, and ten meant

45. See Oberman, *supra* note 19, at 64.

46. Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 440 (1996).

47. See Joyce Abma et al., *Young Women's Degree of Control Over First Intercourse: An Exploratory Analysis*, 30 FAM. PLAN. PERSP. 12, 12-18 (1998). Another study found that females were more likely to feel bad and used after their first experience with intercourse. However, no difference was found between males and females in regards to feeling guilty after intercourse. Maria Donald et al., *Gender Differences Associated with Young People's Emotional Reactions to Sexual Intercourse*, 24 J. YOUTH & ADOLESCENCE 453, 462 (1995).

they really wanted it to happen.⁴⁸ Instead, they sought the women's subjective assessment of voluntariness when asking them to classify their sexual encounters. Twenty-five percent of the women reported that, while their first sexual intercourse had not been forced, neither had it been wanted. Interestingly, the younger the woman's age at first intercourse, the more likely she was to report it as unwanted. Of those who were age fifteen at first intercourse, 28% assigned a ranking of four or below on the scale of voluntariness. Indeed, 25% of those whose age at first intercourse was less than fourteen described their first intercourse as completely "nonvoluntary," as did 10% of those who were fifteen.

A related study reveals startlingly high rates of "forced" sexual encounters among adolescents. Specifically, this study found that the earlier one begins having sex, the more likely one is to have experienced force or coercion in a sexual context. Indeed, 74% of those who had intercourse before age fourteen and 60% of those who had sex before age fifteen report having had a forced sexual experience.⁴⁹

Some "consensual" sexual encounters with young people so clearly violate cultural norms that it is easy for us to recognize them as coercive and nonvoluntary. For instance, few would argue that the law should countenance a "consensual" sexual relationship between a step-father and his step-daughter, or between a mother's live-in boyfriend and her teenage daughter, or between a junior high school teacher and his or her pupil. But the problem of less than fully voluntary sexual encounters extends well beyond the cases of obvious abuse of authority and overreaching. The following section will illustrate this problem through the presentation of several cases.

B. *Nonvoluntary Sexual Contact among Adolescents: Case Studies*

There are a variety of factors that contribute to the

48. See Abma, *supra* note 47; see also ROGER J.R. LEVESQUE, ADOLESCENTS, SEX, AND THE LAW: PREPARING ADOLESCENTS FOR RESPONSIBLE CITIZENSHIP 232-33 (2000) (noting that a full 92% of adolescent sexual victimizations take place in acquaintance situations, and that adolescents overwhelmingly tend not to report this victimization to authorities because "they blame themselves or do not regard the crime as a "real rape").

49. Donovan, *supra* note 10, at 30.

problem of nonvoluntary, yet “consensual” sex among adolescents. I selected the following cases to illustrate five common themes that may be observed in nonvoluntary sexual encounters with teens. These factors or themes are not necessarily discrete. Rather, they may all be at play in various guises in each of the following cases. I have listed the cases in order, ranging from what I perceive to be the most to the least overly coercive encounters.

1. *Intimidation and “Consensual” Sex.* At least twice in recent years, the national media have become fascinated by cases involving predominantly white, middle-class teenage boys who procure sex from teenage girls through the use of peer pressure and coercion. In the early 1990s, there was the Spur Posse.⁵⁰ More recently, there was a scandal involving several wealthy Grosse Pointe, Michigan high school seniors, and some freshmen girls.⁵¹ The girls, ages fourteen and fifteen, were targeted early in their freshman year, and did not have prior relationships with the boys. The boys, who were in the “popular” crowd, invited the girls to one of the boy’s homes, where they were given soft drinks spiked with alcohol. The boys then undressed and “asked” the girls to perform fellatio on them. Even if one believes the boys’ accounts of these encounters, it is difficult to classify them as mutually desired, pleasurable, and wholly

50. Oberman, *supra* note 19, at 15-18. In 1993, a group of teenage boys called the Spur Posse developed a “game” in which members of the group sought to score points by having sexual encounters with as many females as possible. Members scored points for each time a girl gave them an orgasm. These teenage boys each had sexual relations with anywhere from twenty to seventy-three different girls. Many of these girls came forward and claimed they were raped by members of the Spur Posse. The Spur Posse had made headlines in national newspapers from the *Sacramento Bee* to *The New York Times*; in national news magazines such as *Time* and *Newsweek*; in literary magazines such as *The New Yorker*, in women’s magazines such as *Glamour* and *Seventeen*; and in popular publications such as *Rolling Stone*. Furthermore, the story was discussed on National Public Radio, Nightline, and the members themselves appeared on Dateline NBC, The Home Show, as well as talk shows hosted by Phil Donahue, Montel Williams, Maury Povich, Jenny Jones, and Jane Whitney. *Id.*; see also Amy Cunningham, *Sex in High School*, GLAMOUR, Sept. 1993, at 253; Joan Didion, *Trouble in Lakewood*, NEW YORKER, July 26, 1993, at 46; David Ferrell, *8 High School Students Held in Rape, Assault Case*, L.A. TIMES, Mar. 19, 1993, at A1.

51. Joe Swickard, “Wrong, Wrong, Wrong”: *Jail-Bound Grosse Pointe Teen Admits “Mistake,” But Says Girls Share Blame*, DETROIT FREE PRESS, Oct. 15, 1998, at 1A.

consensual. The imbalance of power is profound. The girls were not only younger, lacking in social experience as well as social status, but they were alone inside of one of the boy's homes, and they did not drive. These encounters did not occur in the context of safe, let alone loving relationships. The boys appropriated the girls perhaps because their very youth and naivete made them unlikely to resist their advances. It is hard to imagine that those involved would describe these encounters as meriting a "ten" or even a "seven" on a one-to-ten scale of voluntariness.

Several months after these encounters, one of the female victims went to the authorities with her complaint. The Grosse Pointe case resulted in a conviction and brief sentence for one of the perpetrators.⁵² The other two boys were sentenced to misdemeanor charges in plea bargains that placed them in jail for sixty to ninety days, followed by probation. The girl who made the complaint was the target of venomous attacks from classmates, all replayed by the media, and from the perpetrator himself. Throughout the case, the perpetrator continued to refer to their contact as "consensual," or, when he was obligated to express some remorse in an effort to secure a lenient punishment, as evidence of a youthful mistake made *both* by himself and by his victim.⁵³

A more complicated version of this " 'consensual sex' by intimidation" dynamic may be observed in a recent Chicago case.⁵⁴ On a cold Monday morning in January 2000, a father appeared at an elementary school in Humbolt Park, a poor, predominantly African American and Latino neighborhood, to inquire whether his twelve-year-old daughter was present that day. He stated that he had not seen her since Friday morning when she left for school. When his daughter was brought to the principal's office, she related the following story:

Sandra (a pseudonym) and her eleven-year-old girl-

52. *Id.* Grosse Pointe High School student body president, Daniel Granger, led his friends in the assaults. In his statement to the court, he claimed his actions were wrong, but that the girls were equally to blame. Granger was sentenced to four-and-a-half months in jail, followed by nineteen-and-a-half months probation and 200 hours community service.

53. *Id.*

54. Telephone Interview with Lisa Lopez Palmer, Rape Victim Advocate, Metro Chicago YWCA (Jan. 12, 2000).

friend were hanging out at the park on Friday evening when two male teenagers, both affiliated with a gang, approached them. The boys were older teens, and they offered to take the girls to a nearby motel room. The girls accepted the offer, and they stayed in the motel room until Monday morning, when they went to school. During the course of the weekend, both girls had sexual intercourse with these two boys, and later, with ten of their friends. In all, by Monday morning, each girl had experienced intercourse with at least twelve different partners.

Upon hearing this story, the principal contacted a Chicago Police Officer. He arrived and interviewed the girls together, in front of the school officials and Sandra's father. Although he pressed the girls to name their partners, neither girl would cooperate. Later, the girls were interviewed separately by detectives. Both girls insisted that they had wanted to have sex with these boys, and that they did not want to get them in trouble.

Before the police officer left the school, Sandra's father asked whether there would be further criminal investigation, and whether charges would be filed against the boys (and possibly men) who had done this to the girls. Illinois outlaws any sexual contact with someone age twelve or under, regardless of the age of the perpetrator.⁵⁵ The police officer said that any further action was unlikely, because the girls' refusal to cooperate made it impossible for the police to proceed.

In considering this case, it is critical to explore the girls' resistance to cooperating with the police, and to consider what these girls might have risked had they identified their partners. First of all, they may not have seen themselves as victims. Their willingness to go along with these guys may have stemmed from curiosity, from fear, from a sense of flattery at having been the target of male sexual interest, or from a combination of the three. Even if, in retrospect, they were feeling abused, self-identifying as a victim requires public acknowledgment of extremely personal feelings of shame and humiliation, and the risk of social ostracism from being identified as dirty. Additionally, because of the power of the gangs in their neighborhood, these girls risked being viewed as police collaborators, and they may have justifiably feared for their personal welfare, and that of

55. See 720 ILL. COMP. STAT. 5/12-14.1 (2000).

their families.

Nonetheless, it is absurd to consider these encounters consensual. It is critical to note that, despite the racial and class differences, the wealthy white Grosse Pointe boys and the poor Latino gang-bangers both selected their victims because of, not in spite of, their ages. Despite the fact that both the victims *and* the perpetrators in each of these cases were teenagers, these cases involved predatory sex. Both sets of perpetrators chose their victims because they were younger, less certain of themselves, and far less likely to be sexually experienced than are older girls. As such they were more easily intimidated into consenting to sex, which meant the boys could get the sex they wanted without having to use physical force.⁵⁶

2. *Acquiescence and "Consensual sex."* This case is drawn from an appellate court opinion. The facts provide a textbook illustration of an adolescent girl who acquiesces rather than attempting to resist a sexual encounter:

On February 28, 1996, S.Q., then 13 years old, arrived home from school and began doing her homework and watching t.v. in her living room. Appellant, [Joshua Hemme,] age 19, called and wanted her to come over. She did not want to because she had a lot of homework, but he kept asking, so she asked her stepfather if she could go over to Appellant's house and he said yes. S.Q. had been seeing Appellant's younger brother Adam and had been to the Hemmes' house before. When S.Q. arrived, Appellant took her into the basement, where the recreation room and Adam's bedroom were located. At Appellant's request, she sat on the bed. Appellant asked S.Q. if she was scared to have sex. She responded that she was not scared, but did not really want to. Appellant took off S.Q.'s clothes and threw them away from the bed. He put his head between her legs and started to perform oral sex. He pushed S.Q.'s head to his penis and she performed oral sex on him. Appellant then got on top of her and had sexual intercourse. He asked her if it hurt and she said yes, but Appellant kept going.

When they heard Appellant's mother arrive home, S.Q. wiped the

56. Note also that an additional attribute of this very young victim is that she is less likely to be infected with any sexually transmitted diseases. Larry Clark's 1995 film, *KIDS* (Shining Excalibur 1995), was a particularly grim portrayal of this phenomenon. It featured a band of teenage boys who preyed upon young female virgins in an effort to avoid HIV and other STDs.

semen off of her leg and got dressed. She went out into the recreation room area and began to play Nintendo. Appellant began fingering her vagina and asked her to have sex again. She said no. Appellant kept asking. Eventually, S.Q. sat on the bed, Appellant pulled down her pants, and Appellant yelled at her to scoot up and put her legs around his neck. Appellant had sexual intercourse with her again. S.Q. put her clothes on and Appellant took her home in his van.⁵⁷

These facts vividly illustrate the gray area between consent and rape. Had he been charged with rape, one can imagine that the appellant would have argued that S.Q. either consented to, or failed to voice her opposition to both sexual acts, and that there was no force involved in these acts of intercourse. On the other hand, this case involved a thirteen-year-old virgin who was being pushed around by her "boyfriend's" older brother. This man pestered and cajoled her into coming over to his home, whereupon he ignored her bravado-filled response that she was not "scared to have sex," but simply "didn't want to." This man, with whom she had no prior relationship, took off her clothes and began performing sex acts upon her, even after she told him it hurt. "No" should mean "No" here, and S.Q.'s plain statement that she did not want to have sex makes this encounter a rape. However, for the reasons cited in the previous subsection, her acquiescence likely would undermine the chances that Hemme could be convicted for such a rape.⁵⁸ But even if one agrees that her failure to object more persistently insulates the defendant from charges of forcible rape, his sexual conduct was morally reprehensible.

Under the facts recited by the court, it is hard to argue that this encounter should be legally permissible. And indeed, the court upheld Mr. Hemme's conviction. What is perhaps more interesting about the case is to consider the response it might have generated had these parties not been separated by an age difference of six years. Under Missouri law, this encounter would not have been criminal had the victim been age fourteen, rather than thirteen.⁵⁹ Nonetheless, everything we know about adolescent devel-

57. *Missouri v. Hemme*, 969 S.W.2d 865, 867 (Mo. 1998).

58. See *supra* notes 21-31 and accompanying text.

59. See MO. REV. STAT. § 566.032 (1999) (defining statutory rape in the first degree as encompassing any person who has sexual intercourse with a person under age fourteen).

opment suggests that the same encounter could have occurred. Perhaps with one more year of life experience, the victim would have felt better able to resist Hemme's sexual advances, but that seems unlikely. Indeed, it seems quite plausible to imagine the same encounter occurring even if Hemme himself had been younger, just say age sixteen to S.Q.'s thirteen. The problem at issue in this case is not merely the age difference between the parties, but rather, the girl's inability to protect herself against being coerced to participate in unwanted sexual encounter.

3. *Adolescent Naivete and "Consensual" Sex.* One of the most troubling aspects of the relatively promiscuous present climate regarding adolescent sexuality is the demise of foreplay. In the 1950s, "petting was the most common adolescent sexual experience for girls."⁶⁰ Petting is a sexual learning experience, a way to discover how to feel pleasure. Petting continued to be a common adolescent sexual practice through the 1960s and 1970s, but in the late 1970s and early 1980s, many teenagers came to think of petting, including foreplay, as "kid stuff."⁶¹ For many young people today, sexual intercourse is simply what you do when you like someone. This trend is evidenced by the decline in average age at first intercourse, which many experts believe will continue to fall in coming years.⁶² As one psychologist reports about her early teenage female clientele, "They went to a party, met a cute guy, he seemed to like them, they hooked up and did what they assumed everyone was doing. Then, they feel awful."⁶³

60. Sharon Thompson, *Putting a Big Thing into a Little Hole: Teenage Girls' Accounts of Sexual Initiation*, 27 J. SEX RES. 341, 357 (1990).

61. *Id.*

62. Dr. Richard Gallagher, of New York University's Child Study Center notes, "I see no reason not to believe that soon a substantial number of youths will be having intercourse in the middle-school years. . . . It's already happening." Anne Jarrell, *The Face of Teenage Sex Grows Younger*, N.Y. TIMES, April 2, 2000, § 9, at 1. In a 1992 survey, 70% of teens reported being sexually active by twelfth grade (seventeen to eighteen years old). See Elizabeth C. Cooksey et al., *The Initiation of Adolescent Sexual and Contraceptive Behavior During Changing Times*, 37 J. HEALTH & SOC. BEHAV. 59 (1996) (citing Centers for Disease Control, *Sexual Behavior Among High School Students*, 267 JAMA 628 (1992)). Finally, a 1995 study found that the median age of sexual initiation was 16.5 years. See Warren et al., *supra* note 1, at 171; see also *supra* note 4 and accompanying text.

63. Jarrell, *supra* note 62, § 9, at 1 (quoting Dr. Marsha Levy-Warren).

The following story, summarized from a 1996 Florida case,⁶⁴ illustrates precisely the casual and mechanical nature that these sexual encounters represent. Driven by a "crush," the thirteen-year-old victim naively responds to an older male's momentary sexual attention by consenting to sexual contact and intercourse:

The victim, age thirteen, was playing on backyard trampoline when she was approached by two boys, ages sixteen and seventeen, one of whom she had previously "dated." The boys asked her if they could perform cunnilingus on her. She hesitated. They persisted until she acquiesced. As she was pulling her pants down, a third male, age nineteen, approached and asked to join in. She reported feeling uncomfortable, but said she complied because she liked the nineteen-year-old, and felt special because he was older and was interested in her. The two original boys performed cunnilingus, but stopped after she indicated that she wasn't enjoying it. The nineteen-year-old then began manipulating her genitals. One of the other boys asked her to perform fellatio. She fondled him instead. He then requested intercourse, but was unable to achieve an erection. The nineteen-year-old then ordered the other two to leave, and asked the victim to have intercourse. She consented. He proceeded with anal intercourse, while she was kneeling on the trampoline. She screamed in pain, and attempted to leave. The nineteen-year-old then lowered her to the ground and entered her vaginally. One of the other boys had left a condom behind, which the nineteen-year-old did not use.

Despite the fact that Florida law penalizes *all* sexual contact with one under age eighteen as a "sexual battery," the sixteen- and seventeen-year-old males were not prosecuted. The nineteen-year-old, who could have been charged with a capital felony for his acts, was convicted only of committing a lewd act on a minor. In addition, the trial court granted him a downward departure sentence, on the basis that the "victim was engaged in *consensual* acts with others immediately prior to having *consensual* sex with the defendant."⁶⁵

The fact that the defendant was not charged with rape is not a fluke. Many have written about the difficulty of get-

64. *State v. Smith*, 668 So.2d 639, 640-41 (Fla. Dist. Ct. App. 1996).

65. *Id.* at 642 (emphasis added) (vacating the trial court's downward departure sentence and remanding for resentencing within guidelines).

ting judges, juries, and prosecutors to take seriously the crime of rape when it occurs between acquaintances.⁶⁶ Prosecutors, worried about whether they might succeed in obtaining a conviction against a defendant when the victim initially consented to some sexual contact, often opt for the easier route of a statutory rape charge.⁶⁷ And the trial court's response to this victim—viewing her as a “loose” girl who had consented to sexual contact with all three boys, rather than as the victim of unwanted anal penetration, and a subsequent vaginal rape—validates the prosecutors' fears. Just as was seen in the Michael M. case, judges tied to the view that every sexual encounter is either sex or rape may be unable to recognize the considerable violence that may accompany an adolescent's consent to sex.⁶⁸

This failing has disastrous consequences for young girls who are the victims of unwanted sexual contact. Even if she had consented to intercourse under such humiliating circumstances, an older girl or an adult woman might have managed to escape after the anal rape, or at least might have clearly articulated her objection to the perpetrator's actions. (Of course, it seems preposterous to imagine a more experienced girl or woman consenting to intercourse under these circumstances.) On the contrary, the thirteen-year-old was more passive, as is typical of early adolescents. The extent to which she was inclined to confuse male sexual attention with true affection, her willingness to consent to intercourse in order to honor that male attention, and her failure to object more vociferously to conduct that was no longer

66. See the sources cited in notes 31, 41, and 47, *supra*, for a discussion of the barriers to conviction in acquaintance rape settings. Note that this appears to be a problem in the context of statutory rape, as well. For example, on the program of the annual 3Rs conference, sponsored by the California Statutory Vertical Rape Prosecution Program, was a workshop session presented by Rori Robinson, J.D., San Diego County District Attorney, entitled, “Convincing a Judge Your Victim is a Victim.” Rori Robinson, *Convincing a Judge Your Victim is a Victim*, address at the 3Rs Conference of the California Statutory Vertical Rape Prosecution Program, in Visalia, Calif. (May 3, 2000).

67. In my informal discussions with California prosecutors at the 3R conference, it was clear this practice was commonplace, if troubling. Hence, the conference organizer's focus on helping judges, juries, and victims to recognize the harm in statutory rape.

68. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981); see also Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 415-17 (discussing the violence and coercion in this case).

desired all reflect her relative youth and powerlessness.⁶⁹ In this case, her age-appropriate naivete rendered this victim legally rapable.⁷⁰

4. *Silence and "Consensual" Sex.* A key problem in discerning consent to sex among teenagers stems from the confusion that informs sexual encounters involving inexperienced partners who are relative strangers. Societal norms discourage explicit communication about or during sexual intimacy.⁷¹ In addition to this, societal norms encourage male aggression and female passivity.⁷² The following case illustrates the perplexing sort of sexual interaction that can take place at the intersection of these various factors. The story is drawn from an appellate court opinion.⁷³ Both the victim and the defendant were high school students. The victim, age fourteen, was the manager of the school football team, and the defendant, age sixteen, was a football player.

On September 21, 1994, the victim attended football practice and performed her usual duties. . . . At the end of practice, the defen-

69. See Oberman, *supra* note 19, at 65-66.

70. A second profoundly disturbing example of adolescent naivete and "consensual" sex is seen in the stories of two HIV-infected sexual predators, Nushawn Williams, of New York, and Darnell "Boss Man" McGee, of East Saint Louis who passed on their HIV infection to scores of women through heterosexual encounters. Given what is known about adolescents' limited capacity to protect themselves from abusive or high-risk situations, it is not surprising that many of these men's victims were teenagers. And indeed, newspaper articles noted that many of Williams' twenty-eight partners, and Boss Man's seventeen partners were under age sixteen. See *HIV-Positive Man Charged*, TORONTO STAR, Aug. 20, 1998, at A14; *Man with HIV is Charged with Having Sex with Teen*, ORLANDO SENTINEL, Aug. 20, 1998, at A16; *Vengeful Woman Tried to Spread HIV*, CHARLESTON DAILY MAIL, July 31, 1998, at P3A; Hannah Wolfson, *HIV-Positive Tennessee Woman May Have Found "Revenge" With 50 Men*, CHICAGO TRIB., July 31, 1998, at C2; Hannah Wolfson, *HIV-Positive Woman "Getting Revenge"*, CHATTANOOGA FREE PRESS, July 31, 1998, at C6; Hannah Wolfson, *Woman, 29, Accused of Spreading HIV*, BUFFALO NEWS, July 31, 1998, at 9A. Unfortunately, none of those writing about these cases noted that these men might have sought out these very young partners because they were easier prey. No one mentioned that these encounters were illegal and exploitative, regardless of the men's HIV status.

71. See Baker, *Sex, Rape, and Shame*, *supra* note 31, at 688-89 (discussing negative reaction to Antioch College's Sexual Offense Policy, which required a person to obtain the verbal consent of his or her sexual partner prior to moving to a higher level of sexual intimacy in an interaction).

72. See SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL EQUALITY* 163 (1993).

73. *State v. Jason B.*, 702 A.2d 895 (Conn. App. 1997) (citation omitted).

dant offered the victim a ride to her home The defendant also agreed to drive another player on the football team to his home.

The defendant drove toward the home of the other player During the ride, the defendant and the other player made some remarks about the victim's breasts. The defendant also said he intended to have the victim perform oral sex on him.

After leaving the other player at his home, the defendant drove around for a short while and finally entered a cemetery driveway. He drove to the rear of the cemetery and parked the car. He and the victim kissed for awhile, and then he unzipped his pants. At trial, the victim testified that the defendant forced her to perform fellatio, but the trial court concluded that the state failed to sustain its burden of proving beyond a reasonable doubt the element of compulsion.⁷⁴

This story contains within it at least two potentially "true" stories.⁷⁵ From the defendant's perspective, one might imagine a degree of puzzlement that the victim complained about their encounter. Conceivably, he may have believed that their interaction was completely consensual, and took place in accordance with the unwritten rules governing sexual interactions among his peers. He was two years ahead of her in school and a football player. As such, he might have imagined that a younger girl would be flattered by the fact that he noticed her, let alone offered to drive her home. When she agreed to ride home with him, and sat quietly while he and his teammate made sexual remarks, perhaps he presumed she understood that he was interested in her sexually. She did not object when, rather than driving her home, he drove around looking for a place to "park." Nor did she complain when they began kissing. In fact, she said nothing when he unzipped his pants and had her perform fellatio on him. So, from his point of view, this might have seemed like a perfectly consensual encounter.

From the victim's perspective, the encounter apparently read quite differently. Her silence in the car, when the boys

74. *Id.* at 896-87.

75. As Kim Scheppelle notes, "Given the current state of divergent perceptions of men and women, the . . . troubling question for law is not the question of truth and falsehood, but instead the question of which true version of a particular story should be adopted as the official version of what happened." Kim Lane Scheppelle, *The RE-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1111 (1987) (emphasis omitted).

joked about her breasts, may have reflected her extreme discomfort. There were two of them, both bigger than her, one assumes, and in addition, what could she have said that would not have opened her to further stigma and humiliation? When the defendant started driving around, rather than taking her directly home, several things may have been going through her mind. She may have been interested in the prospect of a romantic relationship with him. After all, his status as an older student and a football player might have made him seem appealing to her. So, perhaps she was hopeful that they would park somewhere and talk, getting to know one another. On the other hand, she might have been silent because she was scared, uncertain where he was taking her, and frightened by the plans he had announced to his teammate. If so, the situation might have seemed to be rapidly escalating out of her control, and if she had never before been in a such a situation, she would have had little sense of how best to defuse the danger that she was in.

Nor was her passivity once the defendant initiated physical contact necessarily indicative of consent. It is quite possible for women to "freeze" out of fear. Indeed, in one study of acquaintance rape, author Eugene Kanin identified five cases in which the women were "actually immobilized with fear," and therefore could not even communicate their nonconsent.⁷⁶ As in the other cases discussed in this section, what made this victim vulnerable to unwanted sex was nothing other than her age and gender-appropriate behavior.

5. *The Legacy of Child and Adolescent Sexual Abuse and "Consensual" Sex.* In reflecting upon stories describing nonconsensual sexual encounters with adolescents, it is relatively easy to imagine the acute consequences for the victim. There is an almost palpable feeling of pain and humiliation, as well as a profound sense of injustice. What is less obvious is the chronic harm that may result from such interactions.

Considerable research on the consequences of sexual abuse suggests that young victims of nonconsensual sexual encounters face a heightened risk of depression and other

76. See Eugene Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 97 (1984).

psychosocial disorders, promiscuity, and revictimization as a result of their experience.⁷⁷ It is estimated that as many as 63% of female adolescent sexual assault victims experience some form of psychosocial complications.⁷⁸ These complications may include depression, guilt, shame, phobias, and eating disorders.⁷⁹ Indeed, 67% of female victims of interfamilial abuse and 49% of victims of nonfamilial abuse report experiencing some or all of these symptoms.⁸⁰ Additional research suggests lower self-esteem, higher rates of emotional distress, and considerably elevated rates of suicide and self-harm among survivors of sexual victimization.⁸¹

A second consequence of the sexual victimization of young people is compulsive or addictive behavior. Numerous studies document a tendency toward sexual promiscuity among survivors of childhood sexual exploitation.⁸² Experts believe that this promiscuity results from an early exposure to adult sexual activity, and the blurring of sexual and emotional boundaries, such that the young person learns to

77. For the most part, the studies investigating the long-term effects of sexual victimization are somewhat general in scope. That is, they focus on sexual abuse, which is broadly defined to include girls who are victims of forcible rape, incest, and other forms of coerced sexual encounters. See, e.g., ALAN W. MCEVOY & EDSSEL L. ERICKSON, *YOUTH AND EXPLOITATION* (1990); Erica R. Gold, *Long-Term Effects of Sexual Victimization in Childhood: An Attributional Approach*, 54 J. CONSULTING & CLINICAL PSYCHOL. 471 (1986). Although there is some lack of precision in the definition of terms such as "abuse," this body of research reflects a collective exploration of the long-term effects of exploitative sexual encounters on young people. As such, its general conclusions are useful to those seeking to estimate the impact of nonconsensual sexual encounters on adolescents.

78. Angela Browne & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 PSYCHOL. BULL. 66, 67 (1986).

79. *Id.*

80. *Id.*

81. See Gold, *supra* note 77, at 473; Browne & Finkelhor, *supra* note 78, at 70. Indeed, one study found that 54% of sexually abused girls suffered from panic attacks, 72% reported difficulty sleeping, and 64% felt isolated and stigmatized. John Briere, *The Effects of Childhood Sexual Abuse on Later Psychological Functioning: Defining a "Post-Sexual-Abuse Syndrome"* (paper presented at the Third National Conference on Sexual Victimization of Children, Washington, D.C., 1984), cited in Browne & Finkelhor, *supra* note 78, at 70.

82. Alice Mayall & Steven Gold, *Definitional Issues and Mediating Variable in the Sexual Revictimization of Women Sexually Abused as Children*, 10 J. INTERPERSONAL VIOLENCE 26, 38 (1995); Robert J. Timms & Patrick Connors, *Adult Promiscuity Following Childhood Sexual Abuse: An Introduction*, 8 PSYCHOTHERAPY AND THE PROMISCUOUS PATIENT 19 (1992).

seek emotional support and a feeling of self-worth by way of sexual behavior.⁸³ Commentators suggest that little of this "hypersexuality" is gratifying for these women. Instead, the women report intensified feelings of anxiety, guilt, and shame.⁸⁴ Additionally, survivors of abusive encounters may develop a "sexual script" and come to model future sexual interactions based on their early, exploitative experiences.⁸⁵ Thus, victims may come to eroticize the power differentials inherent in the exploitative relationship she survived. This may help to explain Diana Russell's finding that between 38% and 48% of survivors of child sexual abuse had physically abusive husbands, compared with 17% of women who were not child sexual abuse victims.⁸⁶ Finally, research suggests that a startlingly high percentage of adult female prostitutes are survivors of childhood sexual abuse. One study of 136 prostitutes found that 55% had their first sexual encounter as children, with someone ten or more years their senior.⁸⁷ Sixty-five percent of these women reported having been forced into sexual activity before age sixteen.⁸⁸

Inherent in the foregoing is the problem of revictimization. Survivors of early and exploitative sexual relations are at increased risk for further abuse as they move through adolescence and into adulthood. This revictimization may take the form of sexual assault. A 1992 study reported that 44% of women who were abused before the age of eighteen were revictimized at least once in adulthood.⁸⁹ Other manifestations of the vulnerability of survivors of sexual exploitation are the elevated rates of sexually transmitted diseases and pregnancy experienced by this population. One study found that women who were victims of adult-child sex were 3.4 times more likely than non-victims to have eleven or more sexual partners after eighteen years of age, and 1.6 times more likely to become infected with a sexually trans-

83. Timms & Connors, *supra* note 82, at 20.

84. *Id.*

85. Christopher R. Browning & Edward O. Laumann, *Sexual Contact Between Children and Adults: A Life Course Perspective*, 62 AM. SOC. REV. 540, 543 (1997).

86. Browne & Finkelhor, *supra* note 78, at 70 (citing DIANE RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* (1999)).

87. *Id.* at 71.

88. *Id.*

89. Gail E. Wyatt et al., *Differential Effects of Women's Child Sexual Abuse and Subsequent Sexual Revictimization*, 60 J. CONSULTING AND CLINICAL PSYCHOL. 167, 169 (1992).

mitted disease.⁹⁰ Additionally, at least one study has shown that a high percentage of girls who experience early teenage pregnancy have a history of childhood sexual trauma.⁹¹

As compelling as this body of research is, it is sometimes difficult to know the extent to which an individual's present life choices may be shaped by these pathologies. For example, consider the following story:

A fifteen-year-old Latina came to Children's Memorial Hospital in Chicago, seeking an abortion. Her physician elicited the following information from her: The girl lives with her twenty-year-old boyfriend, her thirty-five-year-old mother, her siblings, ages fourteen and eleven, and the girl's own children, ages three and eighteen months. All of them live in her boyfriend's apartment. No one in the family has legal documentation permitting them to reside in this country. The boyfriend works full-time, and is supporting the girl and her entire family. The girl had her first child at age twelve, as a result of a rape by a forty-year-old man who was then living nearby her family. Her second child is also result of a nonconsensual sexual encounter with a different forty-year-old man who was living with the family.

The girl describes her current boyfriend as "nice," and claims that the pregnancy was the result of consensual intercourse. She is the primary caretaker of her children, and she routinely cares for her siblings, as well.⁹²

The relationship between this girl and her twenty-year-old partner clearly violates Illinois law, which defines as a class two felony any sexual contact between adults and minors between the ages of thirteen and sixteen.⁹³ At first blush, the law seems like overkill. The girl describes the relationship as consensual, and given her remarkable undertaking in parenting both her siblings and her own children, she seems to be sufficiently mature to make decisions about her sexuality. Upon closer examination, however, the case presents some troubling indications that this girl may be quite vulnerable. First of all, she is pregnant and wishes

90. Browning & Laumann, *supra* note 85, at 550.

91. Catherine Stevens-Simon & Susan Reichert, *Sexual Abuse, Adolescent Pregnancy, and Child Abuse: A Developmental Approach to an Intergenerational Cycle*, 148 ARCHIVES OF PEDIATRICS AND ADOLESCENT MED. 23 (1994).

92. Interview with Cindy Mears, M.D., Chicago, Ill., Children's Memorial Hospital, in Chicago, Ill. (March 17, 2000).

93. 720 ILL. COMP. STAT. ANN. 5/12-16(4)(d) (West 1993).

to terminate her pregnancy. This means that, at the very least, she has had intercourse without effective contraception, despite her desire to avoid becoming pregnant. Obviously, not all unwanted pregnancies result from coercive sexual encounters, but the fact of an unwanted pregnancy raises the possibility that her partner is not taking into account her desire to avoid pregnancy when they engage in sexual relations.

More importantly, we know that she is a survivor of at least two sexually abusive encounters—encounters that she terms “rapes.” This means that she may be particularly susceptible to exploitative relationships as she moves into adulthood. At this point, it is impossible to know whether her current relationship is abusive, but we can be sure that there is an extraordinary amount of pressure on her to remain in the relationship. Were she to reject him, her family would be homeless, left without support, and placed at risk of deportation. Taken together, these concerns suggest the importance of evaluating the extent to which her current relationship truly is consensual.

Complicating matters in this case is the issue of the girl’s immigration status. By notifying authorities of the girl’s relationship with her older partner, the physician may be protecting her from exploitation and providing her with an opportunity to get support and assistance in reclaiming her autonomy. At the same time, however, such a report will most certainly jeopardize the ability of the girl and her family to stay in the United States. The fact that the girl’s two babies were born in this country does not give her the right to stay in the country. Instead, she likely would be deported, along with her mother, her siblings, and her minor children.⁹⁴ In this light, one can see the unenviable di-

94. The issue of the children’s citizenship, and, therefore, of their right to stay in this county, or to return upon reaching the age of majority, is a hotly contested one. The U.S. Constitution would seem to provide citizenship to every person born in this country. U.S. CONST. amend. XIV, § 1. Nonetheless, the U.S. Supreme Court has yet to rule on whether this provision extends to the offspring of parents who are undocumented, and therefore illegally in this country. For an analysis of the two diverging positions on this issue, compare Charles Wood, *Losing Control of America’s Future: The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J. L. & PUB. POL’Y 465 (1999) (noting that Supreme Court has never held that U.S.-born offspring of illegal aliens are indeed entitled to citizenship, and arguing that such an interpretation of current law is unwarranted) with Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54 (1997) (defending the Constitution’s birth-

lemma that the physician faced in considering whether to pursue the issue of the legality of the girl's relationship.

These stories, in conjunction with the academic and popular literature depicting the gray area that lies between mutually desired, pleasurable sex and rape for adolescents, help to make the case for statutory rape laws. This population simply is too vulnerable to coercion and abuse to be expected to protect themselves from predatory sexual advances. But with approximately half of the population under age sixteen engaging in sexual activity, the problem of prioritizing cases for punishment is daunting. The following section will identify and explore three current strategies for selecting cases.

II. CONTEMPORARY SOLUTIONS TO THE PROBLEM OF ENFORCING STATUTORY RAPE LAWS IN A PROMISCUOUS ERA.

The problem with statutory rape law enforcement is not that it is difficult to prove. Indeed, statutory rape laws are fine examples of strict liability offenses. In most jurisdictions, all that is needed to determine culpability is evidence that the victim's age falls within the framework protected under state law, and that sexual contact occurred. The defendant's state of mind, including the extent to which he believed his partner was older than she was, generally is irrelevant.⁹⁵ Relatively speaking, these are easy crimes to prove. What is difficult about statutory rape is selecting which rapes, of the millions that take place every year, merit prosecution.

Beginning in the 1990s, the criminal justice system launched a "reinvigorated" attack on the crime of statutory rape. Efforts to prosecute statutory rape cases have focused on three general categories of these crimes: cases resulting in pregnancy, cases that are easily identified, and cases that involve conduct that is construed as prurient, predatory or a violation of social norms. The following subsections will discuss and critique each of these approaches to statutory rape law.

place rule against calls for its amendment and against arguments in favor of a parentage rule).

95. Phipps, *supra* note 2, at 126.

A. Cases Involving Pregnancy.

Given that the resurgence of interest in statutory rape primarily results from studies involving teen pregnancy, it is unsurprising that pregnancy has become a primary focus for case selection among law enforcement officials.⁹⁶ The effort to prosecute statutory rape cases that result in a pregnancy may be observed at both the federal and the state levels of government.

1. *Federal Encouragement of Statutory Rape Prosecutions.* At first blush, the federal government's inclusion of the following provision in its comprehensive welfare reform act of 1996 seems rather curious: "States and local jurisdictions should aggressively enforce statutory rape laws."⁹⁷ What is a statutory rape provision doing buried within a law that abolishes the former federal program, Aid to Families with Dependent Children, and replaces it with block grants to states? But in conjunction with the evidence that men over the age of twenty father a significant percentage of babies born to teenage mothers, this aspiration makes perfect sense. Men who father babies with teenagers and then leave them tend to cost governments money. Teenage mothers are disproportionately more likely than other mothers to rely upon public assistance, requiring both federal and state revenues for support.⁹⁸ Thus, the government policy favoring prosecution in such cases is predicated upon a

96. See *supra* notes 5-11 and accompanying text for a discussion of the teen pregnancy studies that have inspired the reinvigorated enforcement of statutory rape laws.

97. 42 U.S.C. § 14016 (2000).

98. Note that majority of births in various studies are to teen girls who are technically adults, ages eighteen to nineteen. Thus, statutory rape laws do not even apply to them. Still there are 105,159 births every year to girls under the age of seventeen, the vast majority of which result from illicit sexual intercourse. And note that teen pregnancy isn't all that bad, and it's hard to miss the underlying racism that fuels concern over teen pregnancy and unmarried mothers as an issue. See Elizabeth Hollenberg, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y REV. 267 (1999); Deborah Jones Merritt, *Ending Poverty by Cutting Teenaged Births: Promise, Failure, and Paths to the Future*, 57 OHIO ST. L.J. 441 (1996); Alice Susan Andre-Clark, *Whither Statutory Rape Laws: Of Michael M., The Fourteenth Amendment, and Protecting Women from Sexual Aggression*, 65 S. CAL. L. REV. 1933, 1956 (1992).

belief that the threat of punishment will discourage these men from having (unprotected) intercourse with teenage girls.

Evidence of the federal government's position on statutory rape enforcement may be seen in the Temporary Assistance to Needy Families Act,⁹⁹ which provides specific eligibility criteria for states that wish to participate in this program. Among these is a requirement that each recipient state establish programs that study the link between statutory rape and teen pregnancy.¹⁰⁰ Although most states have yet to develop comprehensive programs for reinvigorating statutory rape enforcement,¹⁰¹ the federal government's declaration of support for aggressive prosecution reveals a belief that these issues are interconnected, and that some of the problems caused by teen pregnancy would be ameliorated by the enforcement of statutory rape laws.

2. *State Law Enforcement.* Like the federal government, state efforts to reinvigorate the enforcement of statutory rape laws tend to reflect a preoccupation with pregnancy. For states concerned with saving money otherwise spent on public assistance, however, there is a subtle conflict of interest inherent in the aggressive prosecution of these crimes. To the extent that the state is successful in securing convictions and prison terms against men who have impregnated teenage girls, they severely limit the capacity of these men to contribute financial support to their children. Thus, recent practices often reflect a selective targeting of cases for statutory rape prosecutions, even among those cases resulting in pregnancy. The threat of prosecution for statutory rape has been used as a means of securing paternal child support, as a means of encouraging marriage between pregnant teens and their older partners, and also as part of a campaign to discourage men from entering sexual relationships with minors.

These various strategies for combating teen pregnancy by the use of statutory rape laws are evident in California's approach to this crime. Of all United States jurisdictions,

99. 42 U.S.C. § 603 (1996).

100. JODIE LEVIN-EPSTEIN, CENTER FOR LAW AND SOCIAL POLICY, STATE TANF PLANS: OUT-OF-WEDLOCK AND STATUTORY RAPE PROVISIONS (1997).

101. *Id.*

California has by far the most sophisticated and aggressive mechanism for statutory rape law enforcement. Beginning in December 1995, California has allocated \$8.4 billion annually to a project known as statutory rape vertical prosecution (SRVP).¹⁰² Part of a larger vertical prosecution program designed to assist states attorneys by permitting them to retain the same cases from the initial filing of a complaint all the way through the appeals process, SRVP has increased convictions dramatically. Counties that, until recently, saw approximately twenty-five statutory rape prosecutions in an average year began reporting close to 200.¹⁰³ In 1998, the most recent year for which statistics are available, the \$8.4 million budget yielded 5500 cases referred for prosecution, and a rate of six convictions per day.¹⁰⁴

A close look at the profiles of those charged and convicted of statutory rape reveals a pattern to the enforcement of these laws. California law bars sexual intercourse by anyone with a minor who is under the age of eighteen.¹⁰⁵ In spite of this, some California counties, such as San Diego, only accept cases for prosecution when there is both a large age difference between the parties and a pregnancy has resulted.¹⁰⁶ Riverside County District Attorney Dennis Stout says that most of his office's statutory rape cases involve a pregnancy, because the SRVP Program grants "were intended as a way to crack down on teen pregnancy."¹⁰⁷

Perhaps the most blatant example of the selective enforcement of statutory rape laws, and of a state's pursuit of its fiscal self-interest in determining whom to prosecute, is the former practice of Orange county social workers. During 1996-1997, the county social workers routinely advised pregnant teenagers who had sought out their services that

102. See CALIFORNIA OFFICE OF CRIMINAL JUSTICE PLANNING, STATUTORY RAPE VERTICAL PROSECUTION: THIRD YEAR REPORT 1 (1999) [hereinafter OCJP REPORT].

103. *Id.* at 16.

104. *Id.* at 3.

105. CAL. PENAL CODE § 261.5(a) (West Supp. 2000).

106. Patricia Donovan, *Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?*, 29 FAM. PLAN. PERSP. 30, 33 (1997) (noting that the San Diego District Attorney's Office prosecutes only those cases "in which a pregnancy has occurred and the man is at least six years older than the underage woman").

107. Tina Dirmann, *Sex Crimes: Special Target*, RIVERSIDE PRESS-ENTERPRISE (Riverside, Cal.), July 3, 1997, at B1.

the law required them to refer their male partners for prosecution under statutory rape laws.¹⁰⁸ However, they advised the girls, this referral would not be made in the event that the girls married the fathers of their babies. Once this policy became public, embarrassed officials recanted their position and this advice was suspended.¹⁰⁹

Further evidence of the focus on teen pregnancy and fiscal concerns in enforcing statutory rape laws is the January, 1998 law which precludes new mothers from receiving public assistance for their infants until they identify their baby's father.¹¹⁰ Ostensibly, this requirement permits the state to seek contribution to child support, but in the climate of aggressive enforcement, it is obvious that these names also provide an excellent resource to states attorneys seeking potential statutory rape defendants.¹¹¹ Most certainly, it also deters a number of girls from seeking public assistance altogether.

3. *The Problem with Focusing on Pregnancy.* There are several problems with a focus on teen pregnancy as a justification for enforcing statutory rape laws. Although an unplanned, unwanted pregnancy clearly is one possible harm that is inherent in sexual encounters with minors, the tendency to emphasize this harm eclipses the many other harms that are far more central to any legitimate justification for contemporary statutory rape laws. Statutory rape laws are predicated upon the belief that certain individuals are so vulnerable to sexual exploitation that they are incapable of consenting to sex. It is a crime to procure sexual gratification from someone who is too young to ascertain her own best interests in the sexual encounter,

108. See Kelly Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens By Their Statutory Rapists*, 61 ALB. L. REV. 237, 240 (1997).

109. Interview with California district attorneys at the 3R's Conference in Visalia, Cal. (May 3, 2000) (noting that several California district attorneys from predominantly rural communities suggested that this practice still occurs, particularly when dealing with Mexican-American perpetrators and victims).

110. See Cheryl Wetzstein, *Reduced Teen Pregnancy Linked to Rape Enforcement*, WASH. TIMES, April 7, 2000, at A2.

111. Indeed, this is already happening in at least some counties. In some California district attorneys' offices, for example, up to half of the statutory rape docket comes from cases referred by the local family support division. Interview with Rori Robinson, San Diego County District Attorney, at 3R conference in Visalia, Cal. (May 3, 2000).

and to make an informed and voluntary consent to sexual activity. Statutory rape is criminal because, even though it might look different from the classic model of stranger rape, it is no less an appropriation of another's physical, moral and psychic autonomy.

Enforcing statutory rape laws by focusing on the event of pregnancy seems to imply that society is particularly concerned about *unprotected* sex with minors. Provided that one uses contraception, it seems there is no real problem with such sexual contact. To be sure, the failure to use contraception, and particularly condoms, exposes teenagers to many additional risks, such as pregnancy, sexually transmitted diseases and even HIV. Yet the focus on pregnancy ignores many of the ways in which sexual encounters with minors that do not result in pregnancy may nonetheless be harmful. Witness the exploitation, abuse and harm evident in the research and cases discussed in Part I of this article, none of which involved pregnancy.¹¹²

Finally, as a policy matter, the focus on pregnancy makes little sense. A father who is incarcerated, and who emerges from prison with a criminal record, is not likely to be in a position to make a substantial financial contribution to the child's support. Thus, neither the mother, nor the baby, is necessarily benefited by harsh punishments for this category of perpetrator. Therefore, the only justification for targeting statutory rape cases resulting in pregnancy is to deter other men from engaging in intercourse with young women. This requires a heightened awareness of the risk of pregnancy and subsequent prosecution among men. But the chance of getting pregnant from any single sexual encounter is so small—25%—that it is unrealistic to expect men who are not in fairly long-term relationships with young girls to take seriously this risk.¹¹³ In other words, there cannot conceivably be a deterrent effect for those men who, seeking only their own immediate sexual gratification, are most predatory with respect to naïve and vulnerable young women.

112. See *supra* notes 17-43 and accompanying text.

113. See generally EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* 52 (1996).

B. *Aggressive Enforcement in Easily-Identified Cases*

An alternative solution to the problem of selecting statutory rape cases for prosecution involves pursuing the cases that are most easily identified. With over half of all teenagers engaging in sexual activity, it should not be terribly difficult to identify cases for prosecution. Indeed, it seems likely that a nightly sweep of the “parking” locales in any given city, suburb or country town would yield ample work for the local district attorneys office. This method of selecting cases would be relatively neutral in terms of its impact upon young people of varying race, ethnicity and socio-economic class status. (Of course, it might disproportionately overlook the poorest youths, who presumably have less access to cars).

Instead of this approach, states interested in identifying cases of statutory rape have begun to focus on adolescents’ interactions with state agencies or health care providers. For example, sexually active adolescents often seek reproductive health care for reasons that implicate sexual activity, such as contraceptive needs or the treatment for sexually transmitted diseases. If health care providers could obtain the names and ages of their minor patients’ sexual partners, that information would constitute a reasonable basis for launching a statutory rape investigation against those identified. Additionally, one could identify potential defendants by asking underage women who seek public assistance to report the names and ages of their partners. Perhaps unsurprisingly, given the atmosphere of “reinvigorated” enforcement of statutory rape laws, several jurisdictions have attempted to employ these approaches to generating new cases. Perhaps equally unsurprisingly, these new cases tend to identify predominantly poor, minority girls and their partners, this population being disproportionately likely to seek the assistance of state agencies or government-sponsored health care.

1. *Health Care Providers as Mandated Reporters.* The extent to which health care providers are obligated to report adolescent sexual activity that violates the law is highly ambiguous, at best. First of all, there is considerable tension between health care providers’ competing obligations of patient confidentiality and their duties to report criminal activity. Health care providers are bound by

common law to hold confidential all information obtained in the course of treating a patient.¹¹⁴ Nonetheless, state laws in virtually every jurisdiction require health care providers to report instances of suspected child abuse, and many jurisdictions require health care providers to report patients whom they suspect were involved in criminal activities, whether as victims or as perpetrators.¹¹⁵ Thus, to the extent that statutory rape is seen either as child abuse, or as an instance of a criminal activity, a health care provider may have a duty to report the case to a state agency. Some states' laws explicitly include statutory rape as a reportable offense for health care providers.¹¹⁶ Others explicitly exclude statutory rape.¹¹⁷ The majority of laws offer no guidance on the matter. As a result, a health care provider faces a Hobson's choice: making a report may open her to liability for breach of confidentiality, yet failing to report may subject her to state sanctions for violating a statutory obligation.¹¹⁸

A second area of confusion for health care providers involves determining which state entity is the appropriate recipient of any report they decide to make. State child welfare agencies might seem like natural choices, as they are expert in handling problems of abuse or coercion in vulnerable populations. But the reality is that these agencies are

114. See *Horne v. Patton*, 287 So. 2d 824 (Ala. 1974) (holding that the physician was liable for breach of confidentiality based on the theory of breach of implied contract); *Martin v. Baehler*, No. CIV.A.91C-11-008, 1993 WL 258843 (Del. Super. Ct. 1993) (holding that the physician was liable for breach of confidentiality when physician's employee disclosed patient's pregnancy to her grandmother, mother, and step-father); *MacDonald v. Clinger*, 446 N.Y.S.2d 801 (N.Y. App. Div. 1982) (holding that the psychiatrist was liable for breach of confidentiality when he disclosed intimate details about his patient, discovered in therapy sessions, to his patient's wife).

115. See, e.g., COLO. REV. STAT. ANN. § 12-36-135 (West 1996) (physicians must report to the police or sheriff gunshot wounds, powder burns, injury caused by a knife); N.J. STAT. ANN. § 26:4-15 (West 1996) (physician must report a patient with a communicable disease to the State Department of Health within 12 hours); see also Illinois' Elder Abuse Demonstration Project Act, 320 ILL. COMP. STAT. ANN. 15/3-4 (West 1993).

116. Patricia Donovan, *Caught Between Teens and the Law: Family Planning Programs and Statutory Rape Reporting*, 1 GUTTMACHER REP. ON PUB. POL'Y 5, 5-6 (1998).

117. *Id.*

118. See Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 451, 463 (2000).

over-burdened, if not overwhelmed, by issues involving the abuse and neglect of small children. As such, the issue of statutory rape may seem to them to fall outside of the agency's purview.¹¹⁹ This leaves the health care providers with the option of calling the police. This alternative may seem to punish not only the alleged perpetrator, but also the victim, who is a patient who considers herself to have had a confidential conversation with a health care provider about a relationship she may perceive as consensual. Given these options, one can readily understand why health care providers might elect to ignore statutory rape laws when treating adolescent patients.¹²⁰

2. *State Agencies as Sources of New Cases.* A more subtle, but also more pervasive means by which states may use teenage "victims" to generate a new docket of statutory rape cases is through coordination with various state social service agencies. This strategy may be observed at work in the California SRVP program. In some districts, as many as half of the statutory rape cases prosecuted every year were originally referred to the district attorneys' offices by the local family support division.¹²¹ Recall that teen mothers applying for public assistance are required to cooperate by identifying their baby's father in order to qualify for such assistance.¹²²

The strategy of using other state agencies as sources of

119. In order to explore this issue for myself, I spent the better part of a day calling various Cook County agencies to inquire whether they had anyone on staff with whom I could discuss statutory rape cases and reporting policies. After failing to find anyone at the State Department of Children and Family Services who even understood what sort of cases I was referring to, I finally spoke with Debbie Palmer-Thomas, the head of the Help Unit at Cook County Juvenile Court. This unit fields all reports of abused and neglected children, and as such, would know about cases involving reports of juvenile victims of sexual abuse or exploitation. Ms. Palmer-Thomas indicated that, in her decade of work with the agency, the issue of statutory rape has arisen no more than a handful of times, and that the agency has no particular protocol in place for investigating allegations of statutory rape. Telephone Interview with Debbie Palmer-Thomas, Juvenile Court, Chicago, Ill. (Aug. 25, 2000).

120. See ILLINOIS PLANNED PARENTHOOD COUNCIL, *POLICY ON SEXUAL ABUSE* (1996) (embracing the notion that a strict obligation of confidentiality governs interactions between patients and Planned Parenthood health care providers).

121. Interview with Rori Robinson, San Diego County District Attorney, at 3Rs conference in Visalia, Cal. (May 3, 2000).

122. See generally Cheryl Wetzstein, *Reduced Teen Pregnancy Linked to Rape Enforcement*, WASH. TIMES, Apr. 7, 2000, at A2.

statutory rape reports is not limited to welfare agencies. Reports may come from state departments of social services or child protective services, particularly as children progress from early childhood into adolescence.¹²³

3. *Problems with Focusing on the Readily-Identified cases.* The shortcomings of this approach to selecting cases for prosecution are quite obvious. A policy that forces adolescents who access health care or public services to name their sexual partners raises the personal costs of obtaining these critically important services for this population. Because these minors do not necessarily see themselves as victims, they may be entirely uncooperative with those seeking to prosecute their partners. Moreover, to the extent that these reports are filed by authority figures that they trusted as confidential allies, a system of mandated reporting threatens to rupture the preexisting relationship.

Nor are the teenagers necessarily foolish for their reluctance to cooperate with a statutory rape prosecution. Indeed, from the victim's perspective, it is not always clear that she is more protected by the filing of a report than by the confidential attention of a service provider. This is so because the vagaries of selecting cases for prosecution dictates that many, if not most reports will not progress into full-blown prosecutions. Nonetheless, the fact that a report was made will set into motion a series of potentially negative consequences for the victim.

For example, consider the case of the pregnant fifteen-year-old whose entire undocumented family was living with her twenty-year-old boyfriend.¹²⁴ Although the relationship clearly violated Illinois law, it was not necessarily an attractive case for prosecution. The young woman was not likely to be a cooperative witness, as she reported "liking" her partner, and she recognized her family's dependence upon him for housing. Additionally, the fact that she al-

123. This may be true more in theory than in practice. In Illinois, for example, such inter-agency cooperation is rare. Ms. Debbie Palmer-Thomas, who runs the Help Unit at Juvenile Court, notes that she has made only one such report in her seventeen years working with wards through the Illinois Department of Children and Family Services. Telephone Interview with Deborah Palmer-Thomas, Director of the Help Unit at Juvenile Court in Chicago, Ill. (Aug. 25, 2000).

124. See *supra* note 42 and accompanying text.

ready had two children might not have made her a particularly "attractive" victim for a jury, should the state have elected to prosecute. However, it is quite possible that, had her physician notified the police about the case, her family, including her twelve- and eleven-year-old siblings, as well as her two infants, would have become homeless, and all of them could have faced deportation.¹²⁵ Any opportunity to help the girl, whether through attempting to provide her access to social services, counseling, or simply necessary health care, would have been lost.¹²⁶

As is the case with a focus on pregnancy, the attempt to generate cases by forcing adolescents to reveal their partners is unlikely to reach many of the most coercive instances of statutory rape. From a public health and a public policy perspective, this approach is quite pernicious. Adolescents will not access services that they believe are not confidential.¹²⁷ By placing a price on adolescents' access to necessary public services, whether health care or child support, this policy has the effect of deterring teens from seeking those services. And, as anyone who has even a passing awareness of public health knows, it is the height of foolishness to deter a teen from seeking contraception, treatment for sexually transmitted diseases, prenatal care, or food for their infant. Finally, this approach threatens to have a particularly harsh impact upon poor and minority girls, who are more likely to seek services from public agencies and health care providers who work for those agencies.

C. *The "That's Sick" Test: Cases Involving Significant Age Disparity or Obvious Exploitation.*

Perhaps the most common means of narrowing the po-

125. See generally Christine J. Hsieh, *American Born Legal Permanent Residents? A Constitutional Amendment Proposal*, 12 GEO. IMMIGR. L.J. 511, 514-16 (1998).

126. A recent article by a young survivor of an abusive relationship with an older man perfectly captures this dilemma. See Elvira Dzurlic, *I Thought It Was Love*, FOSTER CARE YOUTH UNITED, May/June 2000, at 10-12; Elvira Dzurlic, *I Thought It Was Love, But the Courts Called It Abuse*, FOSTER CARE YOUTH UNITED, July/Aug 2000, at 36-37 (describing the way in which she experienced a loss of control once she divulged to police the name of the man who had sexually and physically abused her over the course of a two-and-one-half-year relationship).

127. ELIZABETH M. OZER ET AL., NATIONAL ADOLESCENT HEALTH INFO. CTR., *AMERICA'S ADOLESCENTS: ARE THEY HEALTHY?* (1998).

tential docket of statutory rape prosecutions involves focusing on the most obviously exploitative scenarios in which statutory rape violations occur. These include incestuous or quasi-incestuous encounters, relationships between young people and those in a position of trust or authority, and sexual activity between young people and significantly older partners. I call this category of cases the "That's Sick" category, as they seem relatively impervious to claims that the relationship was consensual or loving.

Evidence of this practice emerges somewhat by default, in that the presumption of age disparity or overreaching seems to accompany many contemporary discussions regarding the importance of enforcing statutory rape laws. For instance, in 1998, the American Bar Association's Center on Children and the Law issued a widely heralded report on the contemporary significance of statutory rape.¹²⁸ Despite the fact that statutory rape laws usually outlaw sexual contact with individuals under the age of consent, regardless of the age difference or relation between the accused and the victim, this report did not even purport to cover all cases that might be governed by statutory rape laws. Instead, the ABA's report, entitled "Sexual Relationships Between Adult Males and Young Teen Girls," addressed only a small portion of those cases.¹²⁹ By narrowing their focus to relationships between girls ages ten to fifteen and men age twenty and older, the report labels these relationships as abnormal, while granting tacit legitimacy to all other illegal relationships with underage partners.

Current state practices support the implied message of the ABA report that statutory rape laws are primarily useful to protect teenage girls from relationships with older men. This tendency may be observed both by specific examples from various states, and also by a survey of recent statutory rape case law.

128. See SHARON G. ELSTEIN & NOY DAVIS, AMERICAN BAR ASS'N CTR. ON CHILDREN AND THE LAW, SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES 1-5 (1997).

129. See *id.* at vi. The limited research focus was based on advice obtained at a one-and-one-half-day conclave attended by some thirty experts in the fields of child sexual abuse, teenage pregnancy, law enforcement, prosecution, adolescent health, and mental health. The discussion topics at the conclave consisted of societal norms and mores, and the impact of child sexual abuse, race and class, sexuality, gender, and media messages. *Id.*

1. *State Practice.* Some states have been relatively explicit about their decision to focus on statutory rape cases involving broad age disparities. For instance, the focus on cases involving age disparity is a standard part of California's statutory rape vertical prosecution program. Although California law bans sexual contact with any person under age eighteen, the average age of those charged with the crime is twenty to twenty-four, and the average victim's age is fourteen to fifteen.¹³⁰

Another example of prioritizing cases involving age disparity is seen in a recent Florida statute. In 1996, Florida demonstrated its interest in targeting both older perpetrators and teenage pregnancy by passing a statute making it a felony for a perpetrator age twenty-one or older to impregnate a girl under the age of sixteen.¹³¹ Here again, one sees the influence of the "predator" studies on public policy. The harm of pregnancy to a teenage girl is essentially the same, regardless of her partner's age, yet the state primarily is interested in punishing those men who are considerably older than their teenage partners.

Finally, some states have mounted publicity campaigns designed to discourage sexual relations between older perpetrators and younger victims. For instance, beginning in 1996, Connecticut mounted a \$250,000 advertising campaign as part of its statewide effort to reinvigorate statutory rape enforcement.¹³² Billboards, radio and television advertisements portrayed men in prison, with slogans such as, "Rob the cradle and get yourself a brand new crib."¹³³ The program ostensibly was designed as an effort "to remind men that sex with a girl under sixteen is a crime and, ultimately, to reduce the state's alarming teenage pregnancy rate."¹³⁴ Although praiseworthy in that it targets the general population, rather than some (vulnerable) subset, this program has not been terribly successful. Only one prosecutor and one investigator were devoted to the statewide program. As a result, there were merely twenty-two convictions in its first two years of operation. These cases

130. See OJJP REPORT, *supra* note 102, at 4.

131. See FLA. STAT. ANN. § 827.04(1)(3) (West 2000).

132. See Matthew Daly, *Statutory Rape Unit Ineffective, Critics Say Much-Touted Program is Understaffed, Results in Few Convictions*, HARTFORD COURANT, Apr. 10, 1998, at A1.

133. *Id.*

134. *Id.*

included at least five in which the victim was a male, several cases in which the victim was a girl under age ten who was molested by an adult, and fewer than a dozen cases involving teenage girls whose partners were over age twenty.¹³⁵

2. *A Survey of Appellate Cases.* One way to gain a sense of which perpetrators are the targets of contemporary statutory rape prosecutions is to examine recent case law. To the extent that a disproportionate number of cases involve gross age disparities or overreaching, one might suspect that prosecutors are selectively enforcing the law.

Although it sounds rather straightforward, obtaining this information actually is somewhat challenging. The ideal way to ascertain selective enforcement would be to observe police investigators and states attorneys responses to statutory rape reports, noting which cases they pursue, and the basis for their decisions. Although such an undertaking would provide the best information about statutory rape enforcement at the local level, it is so massive as to be beyond the scope of this article.

Another more feasible method for observing statutory rape law in practice is through appellate cases.¹³⁶ A survey of appellate cases only yields information about those statutory rape cases that proceeded to trial and resulted in convictions, which were then appealed. Assuming that statutory rape is similar to other criminal charges in that most criminal defendants plead guilty to some lesser charge, rather than face trial, this group of cases likely represents only a small percentage of actual statutory rape cases.¹³⁷

135. *Id.*

136. In defense of this methodology, Professor Victoria Nourse notes:

One might argue that appellate cases will inevitably skew results because the facts are told from the prosecution's view when the claim on appeal is insufficient evidence to support the jury's verdict. That is only one, however, of the many types of claims raised on appeal in my data set. Other claims, based on evidentiary objections or the propriety of particular wording of instructions, view the evidence from precisely the opposite direction. There is no reason to believe that there is a single set of biases reflected in the report of factual material.

See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1351 n.112 (1997).

137. In 1997, only 12% of sexual abuse cases tried in U.S. District Courts went to trial. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 422 (1998).

These cases may be atypical in that the fact that they proceeded to trial and appeal, rather than pleading out, and might indicate that there were relatively strong legal or factual issues in controversy. Bearing in mind these considerations, the implications of which I will explore when I analyze the survey results, these cases may be read together to reflect the general patterns of statutory rape prosecutions.

Working with the Westlaw database, I searched for all cases between the dates of January 1, 1996, and March 31, 1996, in which defendants were charged with statutory rape. Because some states no longer use the term "statutory rape," I also searched one state database, Illinois, using the terms "criminal sexual assault" and "criminal sexual abuse" which were substituted for "statutory rape" when the state reformed its rape laws in the early 1980s.¹³⁸ I identified 272 cases in the national search, and 125 cases using Illinois language and the Illinois database. I included only cases that involved direct appeals relating to a conviction for statutory rape. I excluded cases in which the victim was underage, and the defendant was convicted of forcible rape, rather than statutory rape.

After reading the cases, I classified them according to one of four prevailing fact patterns. The four categories are "overreaching," consensual relationships, acquaintance rape scenarios, and forcible rape scenarios. Twenty-four cases were excluded from my national survey and forty-nine from my Illinois survey due to insufficient facts. For the most part, these excluded cases read like the overreaching cases, but did not specify the age of the perpetrator, and so could not be classified as overreaching.¹³⁹

138. Because I aim only to generate a broad-brush picture of modern statutory rape law, I elected to search only one state using alternative language. Because I found no major differences between Illinois' results and those generated under the general "statutory rape" search, I felt it unnecessary to attempt to replicate the search using all of the modern permutations that denote "statutory rape."

139. There were a handful of cases relating to statutory rape that I excluded from this study because they did not involve direct appeals of cases involving actual victims. They bear mention here, nonetheless, as they seem to be reflective of new trends relating to statutory rape law. For example, there were several cases involving challenges regarding the applicability of state Sex Offender Registration Acts to statutory rape convictions. *See, e.g., Akella v. Mich. Dep't of State Police*, 67 F. Supp. 2d 716 (E.D. Mich. 1999). There were also several cases involving "cybersex" police sting operations in which adults were convicted of having attempted to solicit sex with a minor over the internet. *See,*

I then classified the case according to one of four fact pattern categories. The categories are as follows: consensual relationships, acquaintance rape, stranger rape, and overreaching and/or age range of more than ten years. A final category of cases were those in which the record contained too few facts to permit classification.

The most striking finding to emerge from this survey is the disproportionately high number of cases that involved overreaching and/or relationships in which the perpetrator was ten or more years older than the victim. Included in this category were relationships that involved perpetrators who were either in positions of authority and/or had a familial connection to the victim. Typical examples of these include: stepfathers, mother's boyfriends, teachers and coaches. The decade-long age span is sufficiently broad that it represents the most serious crime in those jurisdictions that classify the degree of severity of statutory rape crimes according to the age gap between victim and perpetrator. I set the ten-year age-span because I believed it to be sufficiently broad that it dispelled claims that the relationship was truly consensual.¹⁴⁰ Initially, I imagined that this age range was absurdly broad, and that it therefore would generate a large category of "consensual" cases involving relationships between those who were less than ten years apart. I was wrong. Indeed, the overreaching category represented a full 81% of the cases drawn from the national sample, and 91% of the Illinois cases.

The rest of the cases were almost evenly divided among the remaining categories. The next category, which I called the "acquaintance rape" cases included 7% of the national cases and 3% of Illinois cases. These cases involved victims and perpetrators who were acquaintances, and sexual encounters that were reminiscent of acquaintance rape in that the perpetrator generally claimed that the victim consented to intercourse, while the victim claimed that she was forced to submit. The frequency with which the "acquaintance rape" scenario is prosecuted as statutory rape is unsur-

e.g., *United States v. Burgess*, 175 F.3d 1261 (11th Cir. 1999). Finally, there were civil lawsuits addressing the issues of paternity and child support obligations for offspring borne as a result of statutory rape. *See, e.g.*, *Hamm v. Office of Child Support Enforcement*, 985 S.W.2d 742 (Ark. 1999).

140. Recall that the average age of consent is sixteen. Thus, these cases involve girls fifteen and under, and partners who are ten years or more their senior. *See Phipps, supra* note 2, at 61.

prising. As was previously noted, prosecutors disfavor acquaintance rape cases because they are considered to be difficult to win.¹⁴¹ As a strict liability crime, statutory rape provides an attractive alternative to a conventional rape prosecution.

The next category was termed “forcible or stranger rape.” 4% of the national cases and 5% of the Illinois cases involved facts that were consistent with forcible stranger rape, in that the parties were not acquainted at all prior to the sexual contact. Generally, these defendants were charged with rape and other crimes, in addition to statutory rape.

Finally, only 7% of the national cases and 1% of Illinois cases were classified as “consensual,” in that both the victim and the perpetrator claimed to have been engaged in a consensual, romantic relationship, and the perpetrator was within ten years of the victim’s age. A variety of factors led me to anticipate that this category would reflect the bulk of statutory rape cases. First of all, this fact pattern is consistent with the popular understanding of statutory rape—the state intervening in a teenage romance. Second, I imagined that the number of cases would be enhanced due to the breadth of the age range I was using, in addition to the overwhelming number of such relationships occurring at any given time in a society in which half of all adolescents are sexually active. Apparently, I was wrong on both counts.

It is worth considering the extent to which a survey of appellate cases may present a distorted picture of actual statutory rape enforcement patterns. One might have hypothesized that certain fact patterns, such as consensual relationships, would be underrepresented in a sample of reported cases. A purely consensual relationship would be unlikely to be the subject of a complaint to police. Ms. Alison Perona, a senior state’s attorney and trial supervisor in Chicago, notes that statutory rape complaints tend to arise out of “consensual relationships” only in the event of an unplanned pregnancy, a sexually transmitted disease, physical violence, and/or parental intervention.¹⁴²

Even if a “consensual” relationship is reported to crimi-

141. See *supra* note 66 and accompanying text.

142. Interview with Alison Perona, Cook County Assistant State’s Attorney and Trial Supervisor, in Chicago, Ill. (Mar. 28, 2000).

nal justice officials, there are many reasons why it may be less likely to result in criminal action. First, there is an apparent consensus among prosecutors against enforcement of statutory rape laws in cases of "consensual sexual relationships" among peers.¹⁴³ This is explicitly acknowledged by some state criminal justice officials, and is plainly evidenced by the numerous enforcement strategies that focus exclusively on older perpetrators. Additionally, prosecutors' desire to obtain "big win" convictions—felonies, with incarceration for the convicted felon—may also motivate them to target older perpetrators.¹⁴⁴ Many states' statutory rape statutes are graduated, in that the severity of the statutory rape offense varies according to the age of the perpetrator, or the age difference between the parties. For example, Illinois law specifies that the maximum charge applicable to a defendant under age eighteen who was involved in a "consensual" sexual relationship is "criminal sexual abuse," a misdemeanor.¹⁴⁵ Finally, these cases will be underrepresented among a pool of reported statutory rape cases because the younger defendant, if charged, may be more likely to plead to a lesser offense, rather than proceed to trial. There may be years between the time when charges are filed and a trial completed, and the paucity of disputed factual or legal issues, plus the time factor may induce these defendants to plead guilty, or, if tried and convicted, to drop their right to appeal.¹⁴⁶

Ms. Perona readily endorsed the implications of this survey, noting that not only are cases involving overreaching or gross age disparities more likely to be reported, but also, they are much more likely to be prosecuted. As with all statutory rape cases, provided that sexual contact can be proved, there are few remaining disputed issues of fact or law. Prosecutors like this category of cases, according to Perona, because the defendants are not likely to be sympathetic to judges or juries, and provided that the victim is cooperative and believable, convictions are easily obtained.

143. See Oberman, *supra* note 19, at 16.

144. Interview by Ardyth Eisenberg, research assistant to author, with Mitchell Kline, former Assistant State's Attorney and Current Staff Attorney for State Industrial Commission, in Chicago, Ill. (July 7, 1999); see also Elstein & Davis, *supra* note 128, at 25-29.

145. See 720 ILL. COMP. STAT. ANN. 15/12-5 (West Supp. 2000).

146. Interview with Alison Perona, Cook County Assistant State's Attorney and Trial Supervisor, in Chicago, Ill. (Mar. 28, 2000).

These cases also are more likely to proceed to trial (and appeal) because the defendants have so much at stake: their jobs, their licenses, and their reputations often are on the line.

In light of the foregoing, it seems fair to conclude that statutory rape laws currently are enforced at the margins, rather than in the main. The bulk of the statutory rape docket consists of cases in which society is likely to view the predator as “sick,” rather than simply lovelorn, and cases that arguably could be tried as forcible rape.¹⁴⁷

3. *The Problem with the “That’s Sick” test.* In contrast to the other means of selecting statutory rape cases for prosecution, the “that’s sick” test presents few real problems. By definition, these cases do not reflect “trivial” infringements of the law, but rather, those involving serious problems of overreaching and coercion. Thus, those concerned that the criminal justice system is squandering resources by attempting to regulate “puppy love” need not fear.¹⁴⁸

All else being equal, the greater the age gap between the parties to a sexual encounter, the greater the risk of a significant power disparity between the parties. But this enforcement pattern is not wholly unproblematic for those who ostensibly fall under the law’s protective arm. As is the case with the focus on pregnancy, the tendency to target cases involving overreaching or wide age ranges turns a blind eye to the coercion and abuse that may infect sexual encounters among peers. To illustrate, consider the fact that none of the cases discussed in Part I of this article involve age disparities of ten years. Remember that statutory rape laws reflect a belief that, under a certain age, minors are incapable of providing meaningful consent to sexual activity, regardless of their partner’s age. By reinterpreting and narrowing the scope of crimes prosecuted under statu-

147. My informal discussions with states attorneys from California, Wisconsin, Illinois and elsewhere affirm this conclusion. The law as presently enforced tends to focus on what prosecutors, and perhaps judges and juries view as the “truly inappropriate” cases.

148. For a vivid and passionate defense of the view that the over-regulation of adolescent sexuality may harm minors, see JUDITH LEVINE, HARMFUL TO MINORS: HOW SEXUAL PROTECTIONISM HURTS CHILDREN (Forthcoming, 2001) (esp. ch. 4, titled “Crimes of Passion: Statutory Rape and the Denial of Female Desire”).

tory rape laws, the executive branch has cheated girls out of the protection ostensibly provided them by these statutes. In so doing, the executive branch has undermined the intentions of legislatures to treat girls differently from adult women for purposes of consenting to sexual activity.

In more practical terms, the focus on extreme age differences or overreaching assumes that problematic sexual encounters can be identified by objective factors such as age difference. This reflects an underlying assumption that, so long as it was not forced, sex among peers causes no real injury to victim. This latter assumption saddles statutory rape law with all of the problems of prosecuting acquaintance rape. Prosecutors concerned with rationing scarce criminal justice resources, as well as with securing convictions, will bring their own perceptions of consensual sex and/or their sense of a prospective jury's perceptions of "harmful" sex, to bear in determining when and whether a prosecution should take place. In order to vindicate the wrong that was done to her, a victim (or her parents) must persuade the prosecutor not simply that she experienced sexual contact that is illegal under state law, but also that the perpetrator was somehow "sick" or perverted.

D. *Who is Left out of Contemporary Statutory Rape Enforcement Patterns?*

Read together, these three enforcement strategies leave an entire realm of victims wholly unprotected. Omitted from protection are those who do not get pregnant, and those whose partners do not violate the objective criteria of very broad age disparity or occupy a position of trust. To be sure, some of those omitted from protection may be engaged in mutually desired, pleasurable sexual relations. It is certain, however, that there are others who are being exploited because they cannot or do not meaningfully consent to sex.

Harms from nonvoluntary sexual experiences can be significant.¹⁴⁹ Research demonstrates that those who experience nonvoluntary intercourse are likely to have a higher number of sexual partners as they move through adolescence.¹⁵⁰ Along with this come higher rates of sexually transmitted diseases, higher pregnancy rates, and a higher

149. See *supra* notes 77-91 and accompanying text.

150. Timms & Connors, *supra* note 82, at 19.

likelihood of experiencing a subsequent nonvoluntary sexual encounter.¹⁵¹ In addition, those who experience nonvoluntary intercourse often suffer from the harms generally associated with victims of sexual abuse. These include a diminished capacity for academic work, heightened vulnerability to mauls, impaired mental health status, heightened alcohol abuse and suicidal ideation.¹⁵² Most significantly, there is no indication that these negative effects are associated exclusively or predominantly with young people who had intercourse with older partners or who experienced a pregnancy. Instead, the harms are an outgrowth of the nonvoluntary or coercive nature of the sexual encounter.

In light of these harms, existing mechanisms for selecting statutory rape cases for prosecution are flawed. As is the case with all overly broad statutes, statutory rape laws invite prosecutorial discretion. Ordinarily, this discretion is exercised in a manner designed to effectuate, insofar as possible, the statute's spirit or intent. If this is the case, then the three enforcement strategies discussed reflect a curious set of priorities motivating these cases. Contemporary statutory rape enforcement priorities reveal concerns about state welfare rolls and prurient sexual mores, but lack a general appreciation of the harm at stake when underage individuals are the targets of sexual advances. Indeed, to the extent that states pursue the strategy of prosecuting the "easily identified cases," the enforcement of these laws may be downright harmful to the protected population.

The following section responds to the dilemma of enforcing statutory rape laws in a promiscuous era by proposing several practical solutions. These solutions have the benefit of affording broad protection from sexual exploitation to the entire population of underage persons, while simultaneously taking into account the difficulties these cases often pose to law enforcement officials.

151. See Jacqueline L. Stock et al., *Adolescent Pregnancy and Sexual Risk Taking Among Sexually Abused Girls*, 29 FAM. PLANNING PERSPECTIVES 200-03, 227 (1997); see also M. Joycelyn Elders & Alexa E. Albert, *Adolescent Pregnancy and Sexual Abuse*, 280 JAMA 648, 649 (1998).

152. Elders & Albert, *supra* note 151, at 649.

III. REFORMULATING STATUTORY RAPE LAW FOR THE TWENTY-FIRST CENTURY

As I have argued throughout this article, the problem with overly broad statutory rape laws in an era in which a large portion of teens are sexually active lies in establishing meaningful enforcement guidelines. This requires a careful identification of the purposes statutory rape laws are intended to serve. As the following subsection demonstrates, the purpose or purposes underlying these laws have evolved over long centuries, from a mooring in patriarchal rights of fathers to the complex set of interests reflected in contemporary enforcement patterns. As is evident from these enforcement patterns, there is no single, coherent justification for statutory rape laws in contemporary society. And yet, there is abundant need for them, as is witnessed through their use in prosecuting cases of overreaching.¹⁵³

The following section therefore begins with a brief review of the shifting purposes served by statutory rape laws. I then undertake to articulate a contemporary rationale for these laws, and finally, I proceed with a discussion of the law reforms necessary to effectuate that rationale.

A. *The Rationale for Enforcement*

First codified into English law in 1275, statutory rape criminalized sexual relations with females under the age of twelve.¹⁵⁴ Although statutory rape laws may be viewed as consonant with a set of laws that aims to protect minors from exploitation,¹⁵⁵ at their inception they served an additional, and quite distinct function. These gender-specific laws reflected an effort to protect a father's interest in his daughter's chastity.¹⁵⁶ Under customary dowry practices, a non-virgin was considered less marriageable, and therefore less likely to bring financial reward to her father upon mar-

153. See *supra* note 140 and accompanying text.

154. See generally Nancy S. Erickson & Mary Ann Lamanna, *Sex-Bias Topics in the Criminal Law Course: A Survey of Criminal Law Professors*, 24 U. MICH. J.L. REFORM 189 (1990); Rita Eidson, Comment, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757, 762 n.35 (1980) (quoting the Statute of Westminster I, 1275, 3 Edw. 1, c.13, that "the King prohibiteth that none do ravish, nor take away by force, any Maiden within Age").

155. Oberman, *supra* note 19, at 42-45.

156. *Id.* at 25; see also Eidson, *supra* note 154, at 760-61.

riage. Indeed, if she failed to marry, a daughter represented a lifelong financial burden to her father.¹⁵⁷ Toward that end, statutory rape laws aimed to protect the father's property interest in his daughter, and were an embodiment of the historical legal perception of women and girls as "special property in need of special protection."¹⁵⁸

Statutory rape laws remained largely unchanged over the course of the centuries. By the time they were absorbed into the American common law system, along with the rest of English common law, the age of consent was set at ten. The rationale underlying statutory rape laws shifted dramatically when late nineteenth and early twentieth century feminists embraced them as part of their campaign to raise the age of consent. In her rich social history of the temperance movement, Professor Jane Larson chronicles the success of these early feminists, who targeted the rampant sexual abuse of young working class girls by men of higher social class.¹⁵⁹ Not only did these women successfully raise the age of consent from an average of twelve to an average of eighteen, but also, they helped strip statutory rape laws of their fundamentally patriarchal soul.¹⁶⁰

Professor Larson takes issue with those who have seen the age of consent initiative as indicative of puritanical sexual mores. Instead, her work demonstrates the powerful feminist vision that guided reformers into claiming these ostensibly patriarchal statutory rape laws for their own. Specifically, she documents the manner in which the reformers reconceived statutory rape law as a mechanism to protect naïve young women from coercive and exploitative sexual encounters:

[R]eformers asserted that the legal definitions of coercion and resistance in the existing law of forcible rape were unrealistic and harsh; that much so-called "consensual" sexual contact with young

157. From this perspective, statutory rape laws were an outgrowth of biblical precepts, by which virginity was so highly prized that the crime of rape was punished by forcing the rapist to marry the victim. See, e.g., Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 465 (1995).

158. See James McCollum, *Constitutional Law—Statutory Rape—Gender-Based Classification Regarding Statutory Rape Law Is Not Violative of the Equal Protection Clause of the Fourteenth Amendment*, Michael M. v. Superior Court, 25 HOW. L.J. 341, 355 (1982); see also Phipps, *supra* note 2, at 7.

159. See Jane E. Larson, "Even a Worm Will Turn at Last": *Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1 (1997).

160. *Id.*

women and girls took place within the family, or in dating, or acquaintance relationships marked by violence, coercion, pressure, or fraud; that employers and professionals often abused their economic power or social authority to solicit sex.¹⁶¹

By the twentieth century, the patriarchal impulse underlying statutory rape law was less obvious than it was in the thirteenth century. Although the dowry system no longer prevailed, there remained a deep concern with virginity, and also with out-of-wedlock pregnancy. Both of these issues derive from the sense that women belong under male control and supervision, and that once a woman has experienced sexual contact with one man, she will be less desirable to another.

For example, consider the patriarchal underpinnings of justifying statutory rape laws by way of the "treasure" theory of virginity, which grew out of Sigmund Freud's writings on monogamy and marriage. Freud wrote that "[t]he demand that the girl [shall] bring with her into marriage with one man no memory of sexual relations with another is after all nothing but a logical consequence of the exclusive right of possession over a woman which is the essence of monogamy"¹⁶² Thus, according to at least one scholar writing at mid-century, virginity was a woman's treasure, and one who took it from her was therefore guilty of a theft.¹⁶³ Because the harm to the girl was irreparable, the appropriate remedy was prosecution for statutory rape.¹⁶⁴

The depiction of female sexuality as a perishable resource that should be preserved and then bartered away in exchange for marriage is not inherent, as Freud concluded, in monogamy. After all, many monogamous couples consist of individuals who were sexually active with others prior to marriage. Instead, it reflects a patriarchal belief system

161. *Id.* at 4; see also JUDITH R. WALKOWITZ, *PROSTITUTION AND VICTORIAN SOCIETY* 246 (1991) (discussing the "social purity" movement and Victorian feminists' concern with protecting young females from sexual abuse).

162. 4 SIGMUND FREUD, *COLLECTED PAPERS* 217 (1925).

163. See James A. Durham, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 *YALE L.J.* 55, 76 (1952). See also Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 *VA. J. SOC. POL'Y & L.* 287, 311 (1997).

164. Note that this view of statutory rape law suggests that it operated in conjunction with the civil laws governing seduction and breach of promise to marry. These laws provided civil remedies to women who suffered harm in reliance upon promises of marriage. See Larson, *supra* note 159, at 3.

under which men acquire women through marriage, and perceive a non-virgin wife as an undesirable acquisition.

This somewhat antiquated and perverse cost-benefit approach to sexuality and statutory rape laws has little to do with protecting the vulnerable from abuse. Given the extent to which these justifications, with their commodified view of female virginity and sexuality, reeked of repressive social norms, it is easy to understand why supporters of women's rights might have felt unenthusiastic about statutory rape laws. It is therefore unsurprising that, beginning in the 1970s, second wave feminists began to voice the concern that statutory rape laws perpetuated offensive gender stereotypes and restricted the sexual autonomy of young women.¹⁶⁵ It is critical to note, however, that these feminist critiques reaffirmed the importance of the protective role played by statutory rape laws. Rather than repudiating statutory rape laws, they called for the abolition of *gender-based distinctions* in these laws.¹⁶⁶ Even at the height of the "sexual liberation" movement, feminists understood the critical importance of statutory rape laws in protecting young people from sexual coercion and exploitation.¹⁶⁷ For example, Professor Fran Olsen noted:

On the one hand, [statutory rape laws] protect females; like laws against rape, incest, child molestation, and child marriage, statutory rape laws are a statement of social disapproval of certain forms of exploitation On the other hand, statutory rape laws restrict the sexual activity of young women and reinforce the double standard of sexual morality.¹⁶⁸

As is evident in this brief history, there is a tension between the protective and the patriarchal impulses underlying statutory rape law. Nonetheless, for more than a hundred years now, statutory rape laws have been predicated upon the premise that girls need and deserve the chance to grow into women free from coercion and exploitation. Unfortunately, the law in practice has yet to take this obligation seriously, and girls remain largely unprotected from nonvoluntary sexual interactions.

Several commentators and some state legislatures have

165. See Oberman, *supra* note 19, at 28-29.

166. *Id.*

167. See *id.* at 31-32.

168. Olsen, *supra* note 68, at 401-02.

proposed reforms designed to remedy some of the problems with contemporary statutory rape laws. These reforms may be grouped into six general areas. The following subsection will survey each of these proposed reforms.

B. Proposed Statutory Rape Reforms

Since the mid-1990s, a surprisingly rich new literature discussing statutory rape laws has evolved.¹⁶⁹ This line of articles and books acknowledges all of the fundamental weaknesses in statutory rape laws, and sets about the task of proposing reforms designed to make these laws more compatible with contemporary sexual and social mores.

169. See, e.g., Anthony M. Amelio, *Florida's Statutory Rape Law: A Shield or a Weapon?: A Minor's Right of Privacy Under Florida Statutes § 794.05*, 26 STETSON L. REV. 407 (1996); Baker, *Once a Rapist?*, *supra* note 31; Vicki J. Bejma, *Protective Cruelty: State v. Yanez and Strict Liability as to Age in Statutory Rape*, 5 ROGER WILLIAMS U.L. REV. 499 (2000); Lewis Bossing, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205 (1998); Connerton, *supra* note 108; Meryl P. Diamond, *Assessing the Constitutionality of Capital Child Rape Statutes*, 73 ST. JOHN'S L. REV. 1159 (1999); Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409 (1998); Susan Fleischmann, *Toward a Fact-Based Analysis of Statutory Rape Under the United States Sentencing Guidelines*, 1998 U. CHI. LEGAL F. 425 (1998); Britton Guerrina, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251 (1998); Note, *Feminists Legal Analysis and Sexual Autonomy: Using Statutory Rape Laws as an Illustration*, 112 HARV. L. REV. 1065 (1999); Elizabeth Hollenberg, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y REV. 267 (1999); Kitrosser, *supra* note 163; Michael John James Kuzmich, *Chapter 55: Tying Up Loose Ends In California's Statutory Rape Law*, 30 MCGEORGE L. REV. 585 (1998); Larson, *supra* note 159; LEVESQUE, *supra* note 48; Roger J.R. Levesque, *Dating Violence, Adolescents, and the Law*, 4 VA. J. SOC. POL'Y & L. 339 (1997); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Oliveri, *supra* note 9; Bridgette M. Palmer, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 GA. ST. U. L. REV. 843 (1999); Robert L. Phillips, *Peer Abuse in Public Schools: Should Schools Be Liable for Student to Student Injuries Under Section 1983?*, 1995 BYU L. REV. 237 (1995); Phipps, *supra* note 2; Elizabeth J. Reed, *Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity*, 83 VA. L. REV. 799 (1997); SCHULHOFER, *supra* note 28; Ken Tennen, *Wake Up, Maggie: Gender-Neutral Statutory Rape Laws, Third-Party Infant-Blood Extraction, and the Conclusive Presumption of Legitimacy*, 18 J. JUV. L. 1 (1997); Alan Wertheimer, *Forum on the Law of Rape: What Is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557 (2000).

This literature, in conjunction with the broader literature on rape law reform, generally, yields at least six parameters along which contemporary statutory rape laws might be revised. These include abolition, reducing the age of consent, permitting a mistake of fact defense, permitting consent as an affirmative defense, establishing aggravating factors, and narrowly tailoring enforcement and punishment patterns. To date, the latter two categories reflect the most widely accepted varieties of reform.

1. *Abolishing statutory rape.* Only a small fraction of contemporary scholars advocate the abolition, or even a significant narrowing of statutory rape laws. Some feminist scholars have noted their discomfort with statutory rape law's patriarchal roots, and the extent to which the paternalistic nature of these laws impede girls from exercising sexual autonomy. Nonetheless, because they recognize girls' significant vulnerability to sexual exploitation, none of the contemporary feminist commentators would abolish statutory rape.¹⁷⁰

Instead, calls for abolition come from those who are motivated by policy concerns relating to the impact that enforcing these laws has on the men who are targeted by the criminal justice system.¹⁷¹ These commentators note that statutory rape law is not enforced in a vacuum, and that a conviction for statutory rape may lead to extraordinarily harsh consequences. For example, in conjunction with state laws providing life sentences for three-time offenders, otherwise known as "three-strikes" laws, a statutory rape con-

170. Some commentators mistakenly read Professor Fran Olsen's original work on statutory rape as calling for abolition. Although Olsen acknowledges the law's paternalistic origins, she is quite clear about the need to retain some form of legal regulation of adolescent sexuality. See, e.g., Kitrosser, *supra* note 163, at 287-88. More recently, Professor Olsen has reaffirmed her support of statutory rape laws, jokingly arguing that the age of consent should be raised to forty. Fran Olsen, Remarks at the 2000 DePaul University College of Law Law Review Symposium (Mar. 11, 2000).

171. See Bossing, *supra* note 169 (objecting to statutory rape as a "crime of violence" for purposes of federal sentence enhancement); Richard Delgado, *Statutory Rape Laws: Does it Make Sense to Enforce Them in an Increasingly Permissive Society?*, 82 A.B.A. J. 86, 87 (1996); see also Oliveri, *supra* note 9, at 506 ("Thus, I have a second, more extreme proposal for reforming the enforcement of statutory rape laws: Eliminate them, at least in their current form and as they apply to the majority of offenders.").

viction may lead to a life sentence.¹⁷² Under federal immigration laws demanding deportation of immigrants convicted of "violent crimes," a statutory rape conviction has led to the deportation of a nineteen-year-old man.¹⁷³ And under most state laws requiring the registration of sex offenders, one convicted of statutory rape may be permanently labeled a "sex offender" and forced to register with local police when he moves.¹⁷⁴

In addition to legal consequences, incarceration as a punishment for statutory rape has some obvious and arguably undesirable policy consequences. For example, when the father of a baby born to an underage mother is incarcerated, he is no longer able to provide financial or emotional support to his child or its mother.¹⁷⁵ By enforcing statutory rape laws, society greatly impedes these men from forming relationships with their children. This policy is predicated upon the assumption that such men are uninterested, incapable or undeserving of relationships with their children—an assumption that is unfounded.

Despite their concerns, it is interesting and important to observe the relatively narrow extent to which these statutory rape critics would limit these laws. Rather than abolish them outright in all cases, these proposals advocate a more judicious employment of these laws. For example, Rigel Oliveri, in his article describing the harsh impact of these laws have on those who father babies born to teen mothers, unequivocally supports enforcing statutory rape laws in cases involving the 'real crimes.'¹⁷⁶ He perceives these as involving abusive and exploitative relationships, and objects to the use of pregnancy as a proxy for such relationships. Likewise, Lewis Bossing, whose article describes the harsh consequences of terming statutory rape a "vio-

172. See Bossing, *supra* note 169, at 1212.

173. Xiong v. I.N.S., 173 F.3d 601 (7th Cir. 1999); see also Bossing, *supra* note 169; Morawetz, *supra* note 169, at 1958.

174. See Ryan A. Boland, *Sex Offender Registration and Community Notification: Protection, Not Punishment*, 30 NEW ENG. L. REV. 183, 188-93 (1995).

175. The Family Resource Coalition of America reports that 56% of the male inmates are parents, and find their relationship with their children important. Also, the majority of inmates report being raised by parents in poverty, abuse, and addiction. They fear that they will resort to destructive methods to cope that will lead to recidivism. Therefore, these parents need assistance building and preserving a strong relationship with their children while they are incarcerated.

176. See Oliveri, *supra* note 9.

lent" crime, nonetheless accepts that it sometimes may be violent. Thus, he proposes that, at least in the context of three-strikes laws or deportation hearings, the underlying facts of each statutory rape case should be examined in order to discern the extent to which the interaction was truly violent.¹⁷⁷

2. *Lowering the Age of Consent.* Although they vary considerably, one can make the following generalizations about contemporary statutory rape laws. First of all, the vast majority of states have a two-tier system, reserving the most serious offense for those who have sexual contact with very young children. This category covers children up to a maximum of age thirteen, which is employed in fourteen states.¹⁷⁸ The remaining states set lower maximum ages. Of the second tier offenses, all but two states set the age of consent for penetration offenses at age sixteen or older. (The age of consent is seventeen in six states, and eighteen in twelve states.)¹⁷⁹

Perhaps the most obvious way to decrease the number of statutory rape violations occurring each year is to lower the age of consent, thereby reclassifying as permissible a host of sexual encounters currently regarded as illicit. To date, the only commentators to propose such a reform are the drafters of the ALI's Model Penal Code, and they do so with respect to those protected under the first-tier provisions noted in the preceding paragraph. Section 213.1 of the Model Penal Code defines rape as encompassing any male who has sexual intercourse with a female who is less than ten years old.¹⁸⁰ Girls ages ten to fifteen are protected under a more limited provision, which requires that the accused be at least four years older than the victim, and that the victim have no history of promiscuity.¹⁸¹

The official comments to this section justify limiting the law's protection to girls aged nine and under by virtue of the fact that 99% of girls in this age range are prepubescent. The commentators assert that "Those who engage in

177. See Bossing, *supra* note 169, at 1216-30.

178. Phipps, *supra* note 2, at 131.

179. *Id.*

180. MODEL PENAL CODE § 213.1 (1980).

181. *Id.* at 334-38 (unlike the majority of state laws, the Model Penal Code is gender-specific, and protects only girls); see MODEL PENAL CODE § 213.3 at 379, 384.

intercourse with adolescents are neither as dangerous nor as morally reprehensible as those who engage in such conduct with young children. In part this is true because the post-pubescent child is a more plausible, though certainly not an acceptable, target of sexual desire¹⁸²

The problems with this construction of statutory rape are numerous. Not the least of these is the fact that this standard focuses exclusively on policing male sexual desire, rather than on the needs of the population to be protected. The entire population of girls, pre- and post-pubescent is reduced to sexual objects, and classified according to the commentators' visions of appropriate sexual desirability. There is no reason to believe that reaching puberty correlates with a girl's ability to protect herself from a coercive sexual encounter. This effort to limit the reach of statutory rape laws accomplishes its goal without paying any heed to unique vulnerabilities of the subject population. As a result, it abandons a significant number of individuals who, lacking the capacity to protect themselves, desperately need its protection.

It is this latter point that may explain the general reluctance of commentators or policy-makers to adopt the Model Penal Code's proposal. If one takes seriously the obligation to protect those who cannot protect themselves from coerced sex, then it becomes clear that the minimum ages presently set may in fact be too low, rather than too high. As I have demonstrated elsewhere, in every other context, the law recognizes minors vulnerability to exploitation, and protects them from it by legal interventions.¹⁸³ A thorough review of the social science literature regarding minors' vulnerability to coercion and abuse in sexual encounters makes it readily apparent that minors remain

182. *Id.* at 379.

183. For example, in the health care setting, the law limits the extent to which minors can consent to their own health care treatment. These limits are drawn with an eye toward protecting minors' best interests, in that they permit access to treatment deemed necessary, or treatments that protect them from further harm, and yet, they limit access to virtually all "elective" health care treatment. In the case of contract law, a concern that minors may strike unwise deals has led the law to permit minors to engage in contracts, but also permits them to avoid any contracts that they no longer wish to honor. See Oberman, *supra* note 19, at 42-55. See generally Michelle Oberman, *Minor Rights and Wrongs*, 24 J. L. MED. & ETHICS 127 (1996) (for a more general discussion of the legal limitations on minors' autonomy) [hereinafter Oberman, *Minor Rights*].

vulnerable well into their teen years.¹⁸⁴ Indeed, there is no reason to believe that minors are any better at decision-making in the sexual context than they are in the commercial or the health care setting. Perhaps it is unsurprising then, that most proposals for reforming statutory rape laws are subtler than reducing the age of consent.

3. *Eliminating Strict Liability.* Somewhat related to the notion of lowering the age of consent is the idea of reforming statutory rape law either by adding a *mens rea* component or by permitting a mistake of fact defense. At common law, statutory rape was a strict liability offense. One who had sexual contact with a member of a protected class was liable, regardless of whether he knew the victim was underage. Indeed, the defendant was liable even if the victim led him to believe that she was old enough to consent, and even if the defendant was reasonable in believing that the victim was old enough.¹⁸⁵

The majority of contemporary statutory rape laws retain a strict liability construction; however, strict liability laws generally are disfavored by criminal law theorists, who criticize them for failing to distinguish between varying levels of criminal intent.¹⁸⁶ Thus, it is unsurprising that there have been proposals to eliminate the strict liability aspect of statutory rape. What is perhaps more surprising is that there have been so few such proposals.¹⁸⁷

The Model Penal Code proposes eliminating strict liability as it applies to females over age nine but under age sixteen.¹⁸⁸ According to section 213.6(1), girls in this age

184. See generally Oberman, *Minor Rights*, *supra* note 184.

185. See *State v. Stiffler*, 788 P.2d 220 (Idaho 1990); see also Bruce R. Grace, Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1395 (1986).

186. The Model Penal Code, for instance, suggests that "the imposition of strict liability with respect to the critical element of the offense has excited the ire of commentators and the attention of penal law reformers." MODEL PENAL CODE § 213.1, cmt. at 326.

187. See generally Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM L. & CRIMINOLOGY 815, 819 n. 21 (1996) (discussing the defense of age as a strict liability element). See also *People v. Hernandez*, 393 P.2d 673 (Cal. 1964). *Contra* Larry W. Myers, *Reasonable Mistake as to Age: A Needed Defense to Statutory Rape*, 64 MICH L. REV. 105, 108 (1966).

188. Interestingly, the drafters intimate that they would have liked to abolish strict liability altogether, but feared that its retention, in some modest form, was "probably politically unavoidable." MODEL PENAL CODE § 213.1 cmt. 6.

range are off limits to men who are four or more years their seniors. However, men who engage in sexual activities with these girls are exonerated to the extent that they can establish that they reasonably believed the girl was at least sixteen. The Model Penal Code justifies this change along the same lines of logic articulated with regard to lowering the age of consent. It adopts the perspective of the reasonable perpetrator, and notes that it is quite plausible that some eleven-year-old girls might be mistaken for sixteen-year-olds.¹⁸⁹ The implication of this observation is that those twelve-year-old girls who look older must also be ready for sex, and therefore undeserving of the law's protection.

Only one recent commentator agrees with this approach. Professor Stephen Schulhofer, in his book *Unwanted Sex*, proposes reforming the crime of sexual assault to require the element of *scienter*. Indeed, Schulhofer would go beyond the Model Penal Code, requiring the state to demonstrate that the defendant knew the victim's age in all statutory rape cases, including offenses involving very young victims.¹⁹⁰ Schulhofer never offers an explanation for

189. [I]t is at least conceivable that some girls under the age of twelve might act and appear to be as old as sixteen. Assigning punishment for rape to the male who has intercourse with such a child under the honest and reasonable misimpression that she is significantly older marks too great a departure from the general principle that the criminal law should require a subjective basis for liability.

MODEL PENAL CODE § 213.1 cmt.6 at 329.

[A] girl of 15 may appear to be 18 or even older. A man who engages in consensual intercourse in the reasonable belief that his partner has reached her eighteenth birthday evidences no abnormality, no willingness to take advantage of immaturity, no propensity to corruption of minors. In short, he has demonstrated neither intent nor inclination to violate any of the interests that the law of statutory rape seeks to protect. . . . Whether he should be punished depends on a judgment about continuing fornication as a criminal offense, but at least he should not be subject to felony sanctions for statutory rape.

MODEL PENAL CODE § 213.6 cmt. at 413.

190. See SCHULHOFER, *supra* note 28, at 283. The Model Criminal Statute for Sexual Offenses § 201 (b) states, in part, that "[a]n actor is guilty of sexual assault, a felony of the second degree, if he commits an act of sexual penetration with another person, when he *knows* that the victim is less than thirteen years old." Section 202 defines sexual abuse as an act of sexual penetration by one who *knows* he does not have the consent of the other person. Subsection (c) of the proposed statute notes that those who are over twelve but under sixteen are deemed unable to consent. Read in conjunction with the general provision, however, that only those who *know* their victims are under age will be found liable. See SCHULHOFER, *supra* note 28, at 283.

his reformulation of statutory rape law as a crime requiring a "knowing" state of mind.

The arguments against these proposals to eliminate strict liability parallel those raised in the context of lowering the age of consent. In permitting a mistake of fact defense, one necessarily loses sight of those who are to be protected by these laws. If one believes the underage population to be incapable of consenting to sexual contact, then they should not lose that status, regardless of how old they might look. Indeed, as one commentator observes, protests over the strict liability aspect of statutory rape are actually arguments about the appropriate age of consent, in that under a certain age, no one would entertain a mistake of fact defense.¹⁹¹ Victims should never be subjected to the process of objectification inevitable in evaluating a claim that they looked older than their years. Instead, society should establish an age framework restricting sexual access to minors and it should be adhered to regardless of how those protected by the statute might look or act. To the extent that the age of consent is determined by reference to maturation and adolescents' general capacity to resist coercion, the absence of a mistake defense should not be controversial.

4. *Consent as an Affirmative Defense.* A considerably more cautious, yet profoundly ambitious proposal to reconstruct statutory rape law is to permit the "victim's" consent to serve as an affirmative defense for those accused of the crime. Ideally, this approach would honor girls' autonomy, while simultaneously offering them the law's protection.

Heidi Kitrosser offers the most eloquent defense of this approach.¹⁹² Her proposal presupposes that rape laws should be predicated upon nonconsent, rather than force.¹⁹³ As discussed above, the traditional force-based definition of rape presents special difficulties for the alleged rape victim, particularly when she knew her assailant, and was therefore less likely to have screamed for help.¹⁹⁴

191. See generally Rhode, *supra* note 44, at 127.

192. See Kitrosser, *supra* note 163, at 330.

193. See *id.* at 328-29.

194. See *supra* notes 66-68 (discussing barriers to conviction in acquaintance rape cases).

The nonconsent standard has been adopted in only fifteen jurisdictions to date.¹⁹⁵ It defines consent as "some manifestation of cooperation in [the] act or [an] attitude pursuant to an exercise of free will."¹⁹⁶ Several jurisdictions have added the requirement that consent be manifested in "words or actions indicating freely given agreement to engage in sex."¹⁹⁷ In short, in order to prove a case of rape, the state need show only that the victim did not manifest consent to the alleged sexual contact. And with regard to underage victims, the state need not even show that.

Kitrosser elaborates upon her proposal as follows:

Under a model statutory scheme . . . rape or sexual assault of any minor below a given age could be proven without a force requirement and with the progressive definition of consent elaborated upon above. In addition, states would enact age span provisions to the effect that sexual activity between minors below a certain age with parties above a certain age, or between parties with a certain difference in age, constitutes rape or sexual assault. Defendants would be provided, however, with an affirmative consent defense. To successfully raise this defense,¹⁹⁸ a defendant would have to rebut the presumption of nonconsent.

What is perhaps most innovative about this proposal is that it aims to honor girls' sexual autonomy by permitting them to engage in consensual sexual relations. The consent-based standard attempts to draw a bright line distinction between sex and rape: in the absence of a clear manifestation of consent, it's rape. Unfortunately, in practice, this line remains murky. Research from jurisdictions that have adopted the nonconsent standard shows no significant difference in conviction rates. In acquaintance rape cases, juries remain overly cautious about convicting men of rape. Instead, they readily accept any ambiguity in the victim's actions, including her silence, as evidence that she "consented" to sex.¹⁹⁹

195. See Kitrosser, *supra* note 163, at 295.

196. See *id.* at 329; CAL. PENAL CODE § 261.6 (West Supp. 1999); COLO. REV. STAT. § 18-3-401(1.5) (West 1999).

197. See Kitrosser, *supra* note 163, at 329; MINN. STAT. ANN. § 609.341(4)(a) (West 1999); VT. STAT. ANN. tit. 13, § 3251(3) (1998); WASH. REV. CODE ANN. § 9A.44.010(7) (West Supp. 2000); WIS. STAT. ANN. § 940.225(4) (West 1999).

198. Kitrosser, *supra* note 163, at 331.

199. See *supra* notes 66-68 and accompanying text for a discussion of the barriers to conviction that result from these societal norms.

One can easily imagine the consequences of this approach, were it to be permitted in cases involving young victims. Owing to factors with which we are well acquainted, girls are less likely to take an active role in rejecting a sexual advance. And if their silence may be taken as consent, rather than honoring girls' autonomy, this "reform" would enslave them to male sexual predilections. Consider for a moment the girls depicted in the scenarios described in Part I of this article: certainly, the defendants in the Nintendo, the trampoline, and the football player cases all could argue that their victims "consented" to the sexual contact that occurred.

5. *"Target" Defendants: Refining Statutory Rape Law's Focus.* The most commonly proposed statutory rape law reform involves refining the law's focus to target certain categories of defendants, specifically those identified by what I have called the "That's Sick" test.²⁰⁰ Both commentators and criminal justice officials profess a heightened concern about two sets of statutory rape perpetrators: those who hold some position of authority over their victims and those who are considerably older than their victims.²⁰¹ The great virtue of these proposed reforms is that there is widespread agreement about the impropriety of such sexual relations. The proposed reforms generally take one of two forms. First, statutory rape laws could be rewritten to apply only to these categories of relationships. Alternatively, the common law's blanket prohibition on sexual contact could be retained, but with a relatively mild threshold penalty. Encounters that fall into either of the above categories, however, would be treated as "aggravating factors," and those convicted would be punished more harshly.

Many commentators agree that statutory rape laws are particularly crucial in policing the sexual overreaching involved in relationships between young people and those in positions of authority. These may include relatives or parental figures, teachers, coaches, and others.²⁰² These of-

200. See *supra* notes 128-29 and accompanying text.

201. See *supra* notes 76-81 and accompanying text; see also MODEL PENAL CODE § 213.3 (1980); MODEL PENAL CODE § 213.3 cmt. 3 at 387; SCHULHOFER, *supra* note 28, at 168-227.

202. Phipps, *supra* note 2, at 132 (noting the range among authority figures

fenders are viewed as perpetrating an additional betrayal beyond that of simply exploiting a young person for purposes of sexual gratification. They have abused their position of authority to manipulate the child into acceding to their sexual demands.²⁰³ Indeed, some commentators believe that the risk of coercion is sufficiently powerful that the age of consent for such relationships should be higher than the general age of consent. The Model Penal Code would penalize any intercourse between a guardian and one who is less than twenty-one, and Professor Stephen Schulhofer would ban sexual relationships between a teacher or supervisor and a student, provided that the student is under age eighteen.²⁰⁴

A considerable number of state statutory rape laws target relationships between older defendants and younger victims. Some states employ a simple adult/child distinction, penalizing sexual contact between anyone over age eighteen and anyone under age sixteen.²⁰⁵ These states give tacit consent to sexual relations among peers, or even among those whose ages are not particularly close, but who are under age eighteen. (For example, a relationship between a seventeen-year-old high school senior and a twelve-

targeted by statutes, with some states specifying only parental figures, while others extend the law to govern caretakers, teachers, and youth leaders).

203. See *id.* at 131 (noting the Model Penal Code's justification—not separate offense but aggravated illicit intercourse achieved by misuse of position of authority).

204. See SCHULHOFER, *supra* note 28, at 196; MODEL PENAL CODE, § 213.3 (1)(b).

205. *E.g.*, ALA. CODE § 13A-6-62 (1994); ALASKA STAT. § 11.41.436 (Michie 1998); ARK. CODE ANN. § 5-14-106 (Michie Supp. 1997); COLO. REV. STAT. § 18-3-403 (West 1999); CONN. GEN. STAT. ANN. § 53a-71 (West 1994); DEL. CODE ANN. tit. 11, § 773 (Supp. 1998); GA. CODE ANN. § 16-6-3 (1999); HAW. REV. STAT. § 707-730 (1993); IND. CODE ANN. § 35-42-4-9 (Michie 1998); IOWA CODE ANN. § 709.4 (West Supp. 1997); KAN. STAT. ANN. § 21-3504 (1995); ME. REV. STAT. ANN. tit. 17A, § 254 (West Supp. 1999); MD. CODE ANN. 27, § 464B (1996); MASS. GEN. LAWS ANN. ch. 265 § 23 (West 2000); MICH. COMP. LAWS ANN. § 750.520d (West Supp. 2000); MINN. STAT. § 609.344 (West 1987); MONT. CODE ANN. § 45-5-503 (1999); NEB. REV. STAT. § 28-319 (1995); NEV. REV. STAT. ANN. § 200.364 and 200.368 (Michie 1997); N.H. REV. STAT. ANN. § 632-A:3(II) (1996); N.J. STAT. ANN. § 2C:14-2 (West Supp. 2000); N.C. GEN. STAT. § 14-27.7A (1999); OHIO REV. CODE ANN. § 2907.04 (Anderson 1996); OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 2000); 18 PA. CONS. STAT. § 3122.1, 3125 (West Supp. 2000); R.I. GEN. LAWS § 11-37-6 (1994); S.C. CODE ANN. § 16-3-655 (Law. Co-op. 1985); S.D. CODIFIED LAWS § 22-22-1 (Michie Supp. 2000); VT. STAT. ANN. tit. 13, § 3252 (1998); WASH. REV. CODE ANN. § 9A.44.079 (2000); W. VA. CODE § 61-8B-5 (Michie Supp. 2000).

year-old sixth-grader might be permissible under this law.) Others build more complex matrices, in which identical conduct may be subjected to distinct criminal sanctions. For example, Illinois bans all sexual contact with those under age seventeen.²⁰⁶ If the perpetrator is within four years of the victim's age, however, this crime will be a misdemeanor, as opposed to a felony.²⁰⁷ The Model Penal Code would abolish statutory rape except in cases in which the victim is between the ages of ten and fifteen, and the perpetrator is at least four years older than the victim.²⁰⁸

These statutes reflect a belief that, the greater the age span, the less likely a young person is to be able to freely consent to a sexual relationship.²⁰⁹ This issue is discussed in the official comments to the Model Penal Code, which justifies the four-year age span by reference to the risk for exploitation:

It will be rare that the comparably aged actor who obtains the consent of an underage person to sexual conduct . . . will be an experienced exploiter of immaturity. The more likely case is that both parties will be willing participants and that the assignment of culpability only to one will be perceived as unfair.²¹⁰

This comment is more conjecture than it is fact, as the commentators offer no support for their assertion. Do they mean that it is rare for peers to exploit one another? If so, they are plainly wrong. There is a shocking level of violence, coercion, and harassment among students, much of which has been highlighted by recent litigation and research endeavors.²¹¹ Perhaps they mean that it is rare for criminal justice officials to learn of purely consensual cases. In that

206. 720 ILL. COMP. STAT. ANN. 5/12-16 (West 2000); accord LA. REV. STAT. ANN. § 14:80 (West Supp. 2000); MO. ANN. STAT. § 566.034 (1999); TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 2000).

207. See ILL. COMP. STAT. ANN. 5/12-16 (West 2000).

208. MODEL PENAL CODE §§ 213.3(1)(a), 213.1(1)(d).

209. See MINN. STAT. ANN. § 609.342-345 (Supp. 1997) (specifying that large age differences creates a presumption of coercion even among minors).

210. MODEL PENAL CODE § 213.3 cmt. 2 at 385-86. Indeed, the commentators note that they actually preferred a five-year differential, but chose the four-year figure to "reflect the prevailing pattern of secondary education." *Id.*

211. Commentators note that 85% of girls report being sexually harassed by peers at school. See Jeffrey A. Thaler, *Sexual Harassment at School: A Legal Primer*, 33 TRIAL 62 (1997); Deborah L. Rhode, *Sex in Schools: Who's Minding the Adults?*, 35 TRIAL 64, 68 (1999); Julie Gannon Shoop, *Beyond Horseplay: Students Sue Schools Over Sexual Harassment*, 30 TRIAL 12 (1994).

case, it seems all the more important to permit the law to accommodate those cases in which peers *actually do* behave in a sexually exploitative manner. It also is not clear to whom they are referring in their expressed concern that enforcing statutory rape laws among peers "will be perceived as unfair." If one imagines the prosecution of one member of a consensual relationship between two fifteen-year-olds, it is possible, though by no means certain, that both the lovers and society at large will see it as unfair.²¹² But recall that, absent a complaining party, or an adult's intervention, cases like this seldom are reported to criminal justice authorities. If one recalls instead the horrifically exploitative "consensual" sexual encounters between peers, such as those that occurred in Grosse Pointe, Michigan, one might reach a different conclusion.²¹³ As anyone who reflects momentarily upon their own adolescence should readily recall, peers may be differently situated with respect to their capacity to exploit others. To the extent that statutory rape law is designed to protect the vulnerable from exploitation, it is not at all clear why exploitation by peers is any less problematic than exploitation by adults.

Seen from this vantage point, the age-span statutes represent a convenient proxy for coercion in relationships. It is much more efficient to police against relationships that violate a given age-span than it is to inquire into the quality of consent given by the individual participants in a sexual relationship. And yet, if we take a closer look at the relationships involving couples who are separated by large age spans, we find that they are not all equally problematic. Indeed, some are specifically sought out by the young girl, who desires an older partner for reasons ranging from the sense of security and stability he is able to provide, to the expectation that he will make a better lover.²¹⁴ As others have observed, these girls merely are following the societal script of idealized romance, in which a younger, more vulnerable woman relies upon a sophisticated, powerful man to protect her.²¹⁵

211. There was considerable national controversy occasioned by the statutory rape conviction of Kevin Gilson, who, at age eighteen, had a long-term sexual relationship with his fifteen-year-old girlfriend. *Good Morning America* (ABC television broadcast, June 24, 1997) (transcript 97062403-j01).

213. See *supra* note 51 and accompanying text.

214. Phillips, *supra* note 16, at 17-22.

215. LEVINE, *supra* note 148.

There are those who work with girls involved in relationships with older men who indicate that, although they are concerned about the potential for overreaching and abuse in these relationships, these relationships often represent the most stable connection in the girls' lives.²¹⁶ This is not to say that these relationships are necessarily positive for these girls. These men may be no more likely to remain in long-term relationships with their younger partners than are younger men.²¹⁷ They may become more controlling and possessive of their younger partners, thereby limiting their life options.²¹⁸ The girls report "letting down their guard" more with older men, thus placing themselves at risk of pregnancy and sexually transmitted diseases.²¹⁹ But the girls themselves may have chosen these relationships to meet specific needs.

Although a broad age span may serve to trigger legitimate concerns about overreaching and exploitation, in the end, the age gap is merely a proxy for measuring coercion. It may be the best we can do in our effort to estimate the risk of coercion in a sexual relationship involving a young person, but in the end, it is only a proxy. Although the chances of coercion or abuse may be higher in relationships between much older men and younger girls, there is little reason to believe that such relationships represent the exclusive, or even the predominant setting in which such harms occur.

6. *Innovative Punishment Schemes.* One explanation for the resistance to enforcing statutory rape laws in the context of sexual encounters among peers is that, even though they might not always be purely consensual, both parties are young and relatively inexperienced. Just as girls

216. See Kanin, *supra* note 76.

217. Phillips, *supra* note 16.

218. *Id.* at 34. For example, one of the participants in Phillip's study, Nora, remembers feeling pressured into having sex at thirteen with her much older boyfriend. While she did not feel ready for a sexual relationship, she did not refuse him because of her fear of losing him. Other participants in the study reported that men are attracted to younger girls because they want to "shape" girls "so they will have someone to serve them." Sheryl stated that "because as long as a man is giving, like how when I was sixteen . . . , girls that age, as long as the older man is giving them money and buying them stuff and taking them out, a girl will do whatever they say . . ." *Id.* at 36.

219. *Id.* at 36.

are socialized to be eager, if coy, recipients of male sexual attention, boys are socialized to pursue sexual opportunities whenever they arise.²²⁰ Mistakes will happen. And it seems unduly harsh to punish a teenage boy with the lifetime stigma of a criminal record as a sex offender. To the extent that cases involving peers ever come to the attention of criminal justice authorities, officials might sympathize with the alleged perpetrator. Perhaps they secretly recall their own sexual histories with a sense of shame for mistakes they made, or relief that they were not caught. Perhaps they sympathize with the boys, who have been raised with the norms inherent in the predatory construction of male sexuality.²²¹ Or perhaps they simply do not think the boys' actions were all that wrong, or all that harmful.²²² Although none of the commentators addresses the issue of punishment, concern about the consequences of enforcing statutory rape laws surely constitutes one of the biggest factors in determining how a statutory rape complaint will be resolved. As such, it is a fruitful area for law reform.

To date, there is no comprehensive sentencing scheme for the crime of statutory rape. Thus, there is a broad range of penalties that may apply to the defendant convicted of this crime. In Illinois, for example a "consensual" encounter between a fourteen-year-old and nineteen-year-old might be punished with a misdemeanor and probation, or with a felony and significant prison sentence.²²³ In the latter case, the consequences for the nineteen-year-old may be far-reaching. He may have to register as a sex offender, he will lose his right to vote, his employment prospects will be impaired and, if he is an immigrant, he may be forced to leave the country.²²⁴

Of course, positing the prosecution of a "consensual" relationship between a nineteen-year-old and a fourteen-year-old is a red herring. It is crucial to recall the fact scenarios that underlie the vast majority of statutory rape cases. Chances are high that, if criminal charges have been filed in such a case, the facts indicate some coercion or exploitation, rather than a purely "consensual" relationship.

220. See Baker, *Sex, Rape, and Shame*, *supra* note 31, at 679-84.

221. See *id.*

222. See *id.*

223. 720 ILL. COMP. STAT. ANN. 5/12-15 (West Supp. 2000).

224. Boland, *supra* note 174, at 189-92; Xiong v. I.N.S., 173 F.3d 601, 607 (7th Cir. 1999).

Even the pregnancy and “easily identified” cases targeted by current statutory rape enforcement schemes predominantly involve defendants who are significantly older than their victims. And yet, even if one believes that the harm to victims in cases of nonvoluntary sex is grave, it is easy to understand the impulse toward lenience among criminal justice officials. In a society that glorifies young girls as legitimate objects of sexual desire, is the defendant truly to blame for his actions? More to the point, what is the precise goal of punishment in such a case? If he is sent to prison, is there any reason to believe that he will return to society better able to respect women’s sexual autonomy?²²⁵ And what will happen to the “victim” in this case? Will she receive the support she needs to come to terms with this prosecution, regardless of whether she intends to cooperate with the state? How long will it take for this case to come to closure? What is the impact upon her of a delay of perhaps two years before closure is reached?²²⁶

One jurisdiction presently is attempting to craft some answers to these sorts of questions. In a remarkably innovative program funded by a state grant, Ms. Sandra Nowack, the Dane County State’s Attorney in Madison, Wisconsin, has undertaken to resolve statutory rape cases in a collaborative manner. Until the start of her program, Dane County, like many others, tended to divide its statutory rape docket into more and less serious cases. There were two main categories of cases: those involving serious overreaching and/or abuse, and those involving sexual relations between underage victims and relatively young perpetrators.²²⁷ Her office generally prosecuted the former, but often left those investigated for the latter with a mere warning not to repeat their offense.

Beginning in 1999, Ms. Nowack’s office attempted to confront policy issues and provide clear direction to the community and investigative personnel. During the first part of the pilot project, Nowack and her investigative

225. For a painfully vivid study of sexual abuse and aggression in prison, see JAMES GILLIGAN, *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* 29-44 (1996). Indeed, it seems highly unlikely that a stay in the sexually violent climate that typifies our nation’s prisons will work to enhance a man’s capacity to honor women’s autonomy.

226. See *supra* note 146 and accompanying text.

227. Interview with Sandy Nowack, Dane County States Attorney, in Madison, Wis. (Sept. 20, 2000).

partner, Ray Maida, focused their energies on exploring the community's values pertaining to statutory rape cases. The team hosted neighborhood discussions and invited comment from diverse cultural groups. Almost immediately it became clear that the Dane County community wanted young offenders to be held accountable for illegal sexual behaviors, but citizens were not satisfied with dispositional options. Members of a cross-cultural and cross-discipline community advisory group told prosecutors that dispositions for first-time young offenders should feature education and prevention rather than mere punishment. Community members were concerned that young statutory rape offenders were being lumped together with predatory rapists and child molesters.

The Dane County project ultimately developed an alternative disposition program for younger offenders, whose crimes previously would have been ignored.²²⁸ Under this program, those convicted of statutory rape offenses are given the option of attending a nine-week class in sex education. If they complete the course, their conviction will not become a part of their criminal record. The course is taught by a variety of individuals from Dane County public agencies—health care providers, criminal justice officials, victim advocates, and health educators. It covers topics ranging from sexual physiology to child development to power and control in healthy relationships. Although it is too soon to measure the program's success in terms of preventing repeat offenses, the student evaluations to date have been extremely positive. This approach reflects a balance between the law's capacity to set an exceedingly harsh punishment for this crime, and the law's obligation to take seriously the harm that it is designed to remedy.

A second aspect of the Dane County program is even more innovative. Cases involving statutory rape are assigned to a special grant unit and are investigated using a strictly multidisciplinary model. Grant moneys equipped the team to focus solely on statutory rape offenses and to involve prosecutors early in the investigation stage. Team

228. The project was designed generally for offenders up to age twenty-one, where the age differences with the victim is less than five years. To be eligible, the offenders must have no other sexual assaults on their record and must admit the sexual contact. Offenders who used any type of threat or physical force are not appropriate for the program.

members are then in a position to establish relationships with the teens in a way which assures that the victims are heard. Prosecutorial decisions are then made on a case-by-case basis. Those charged with decision-making consider factors such as the impact of prosecution upon the victim, and the likelihood of rehabilitation of the perpetrator. The program emphasizes that services of a sexual assault advocate are to be consulted almost immediately. The individualized nature of this approach is likely to allay the concerns of those who see the standard punishment as too harsh a response to the crime of statutory rape.²²⁹

C. *Statutory Rape Laws as Insurance for a Safe Passage: A Proposal for Law Reform*

Although certain of the proposed reforms might make statutory rape law a more timely and efficient mechanism for identifying oppressive sexual interactions, none of these reforms offers a comprehensive approach toward accommodating the unique vulnerability of young people to sexual coercion. As a result, all of these proposals fall somewhat short of the promise that I believe underlies statutory rape laws: that girls (and boys) must be permitted to explore their incipient sexuality in an environment that is free from coercion, exploitation, and nonvoluntary sexual encounters. In the following pages, I propose a series of law reforms predicated upon this understanding of the crime of statutory rape.

1. *Punishment.* The fear that incarceration is too harsh a punishment for the crime of statutory rape, particularly for young offenders, inhibits the criminal justice system and society at large from identifying and condemning problematic sexual encounters. This is a terrible result, as it serves to permit, and thus to perpetuate coercive and exploitative sexual practices. In order to succeed, any comprehensive reform of statutory rape law must take into consideration this fear of overly harsh punishment. If not, the law will most assuredly be

229. See generally Oliveri, *supra* note 9, at 506-08 (suggesting that current statutory rape paradigm is too harsh and proposing a new system based on collaborative investigation and charging, along with punishment for those convicted of statutory rape).

underenforced. Thus, I begin my reform by urging criminal justice officials to employ the broad range of options available under the law in crafting punishments for those guilty of statutory rape. Rather than focusing exclusively on punishing offenders through incarceration, prosecutors and judges should utilize a broader and more creative range of sentences. Psychological evaluation of the defendant is critically important, in that one might advocate very different punishments for an individual who is a predatory sex offender, as opposed to one who is attracted to a particular underage teen.²³⁰ Less serious first-time offenders should be offered a chance, under the conditions specified below, for a suspended sentence, contingent upon their completion of a rehabilitative program. This might include counseling, or perhaps a class such as that used by the Dane County program.²³¹

The appeal of this approach to punishing statutory rape is that it is predicated upon a realistic understanding of adolescent sexuality. In an environment saturated with messages encouraging the sexual objectification of young women, it is easy to understand why boys and men might pursue their own sexual gratification at the expense of their partner. Because sex for adolescents is somewhat experimental in nature, it is important to acknowledge that mistakes will occur.

Let me be clear about what I mean by "mistakes." Most of the scenarios I described in illustrating the problem of nonvoluntary sex were not mistakes at all.²³² Instead, they reflect the calculated, deliberate appropriation of sex from a vulnerable partner. The only scenario that is even plausibly a mistake is the case involving the high school football player. In that case, the relative youth and inexperience of the boy, coupled with the culture of athlete-worship, may have led him to mistake the victim's silence as consent.

230. See SHARON G. ELSTEIN & BARBARA E. SMITH, VICTIM-ORIENTED MULTIDISCIPLINARY RESPONSES TO STATUTORY RAPE: TRAINING GUIDE 31 (2000) [hereinafter ELSTEIN & SMITH] (noting that the conditions and length of probation or prison might vary, and that counseling options might include sex offender treatment, batterer treatment, parenting classes, mental health counseling, etc.).

231. See *supra* notes 227-28 and accompanying text for a description of the Dane County, Wisconsin, class for those convicted of statutory rape.

232. See *supra* notes 54, 57, 64, 73, 92, and accompanying text (describing five different cases involving nonvoluntary sexual encounters).

Without having direct knowledge of the interaction between these teens, it is difficult to assess the extent to which his conduct was predatory, as opposed to negligent. Nonetheless, his conduct was in no way “innocent” or acceptable, and to treat it as such is morally and legally wrong. Indeed, one of the most powerful reasons for enforcing statutory rape laws is to set normative parameters around sex so that both girls and boys will learn to honor their own and others’ sexual autonomy. To the extent that society tolerates the actions of the football player, and all those who appropriate sex from another without consent, society sends a message that this behavior is sex, not rape. And girls will be taught the painful lesson identified by Catherine MacKinnon: in a rape culture, it may be impossible to distinguish sex from rape.²³³

Thus, to the extent that the law ignores the learning curve at work in adolescent sexual encounters, it may be too harsh. But the failure to condemn “mistakes” involving nonvoluntary sex with an underage partner is equally pernicious. Lenience in such cases only encourages girls to internalize a sexual script that fuses dominance and exploitation with sexual gratification. As such, it vitiates the promise and obligation of statutory rape laws: to make the world safe for boys and girls who are coming of age. Instead, the goal must be to establish clear lines and certain consequences for those who cross those lines. To this end, I turn to statutory reform.

2. *Statutory Reform.* At present, the laws in virtually all jurisdictions represent a two-tier approach to the crime of statutory rape. The laws recognize a certain category of very young minors to be completely incapable of consenting to sexual contact, and they provide harsh penalties for those who engage in sexual conduct with these minors. It is the second-tier cases, those involving older adolescents, which pose difficulties for the legal system. The challenge in reforming statutory rape law lies in determining how to protect adolescents as they move through their teenage years, enabling them to explore and grow sexually, without leaving them completely open to the harms of coercion, exploitation and abuse. Of course, these harms occur not

233. See CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171-83 (1989).

only in adolescence, but also well into adulthood. There is a rich literature discussing the ways in which women's consent to sexuality is a product of a coercive environment.²³⁴ The fact that adult women do not enjoy full sexual autonomy does not undercut the need for statutory rape laws, though. Rather, it underscores the importance of shaping laws that attempt to enshrine the values of safety and autonomy for young people making the transition from childhood to adulthood.

As discussed earlier, the most straightforward approach to reforming statutory rape laws in a promiscuous society involves reducing the age of consent, and thus decreasing the number of sexual encounters subject to state scrutiny as statutory rape violations.²³⁵ Although age may serve as a good proxy for the victim's capacity to avoid abusive sexual encounters, it is only a proxy. Thus, almost any age selected as a cut off point risks leaving a portion of the "over age" adolescent population completely vulnerable to exploitative sexual encounters, while at the same time burdening some of the "under age" population with unnecessary "protection" from desired sexual relationships.

I believe that a better approach to the dilemma lies in enlisting the law as a tool to be used by adolescents themselves as they navigate their sexual development. This general goal can be accomplished by retaining a relatively high age of consent, while simultaneously enlisting victim cooperation in determining the course that a criminal action will take. Specifically, I suggest that states set a minimum age of consent to sexual contact at no lower than sixteen. Under my scheme, the general rule would be that, for a first offense, the victim would be permitted to determine whether the perpetrator should receive an opportunity for a suspended sentence. As suggested above, the suspended sentence allows charges to be dismissed provided that the perpetrator completes a specified course of action. This might include mandatory counseling and/or a class. In the event that the victim fails to decide, the prosecutor would decide

234. See Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY, 298-99 (Mary Becker et al. eds., 1994); Evelina Giobbe, *Confronting the Liberal Lies About Prostitution*, in FEMINIST JURISPRUDENCE, *supra*, at 303-04; CARL S. TAYLOR, GIRLS, GANGS, WOMEN AND DRUGS 84-85 (1993); Fine, *supra* note 6, at 35; Tolman, *supra* note 17, at 325-28; Males, *supra* note 7, at 543.

235. Phipps, *supra* note 2, and accompanying text.

whether to offer a suspended sentence as opposed to conventional conviction and punishment.

There would be a set of exceptions to this rule, however, for a statutorily prescribed set of cases that I term “per se violations.” These per se violations would involve scenarios that are so rife with the potential for coercion, or so offensive to societal mores that prosecution should be encouraged even if the “victim” does not wish to cooperate. For example, a state should include in this category cases involving incest, abuse of authority, sexual encounters with those who are so young as to be indisputably incapable of consent, those who are repeat offenders, and cases involving multiple-offenders.

One might argue that victims should be given even more control over the prosecution of their sexual partners and that no prosecution should move forward without their assent. Indeed, as a practical matter, most prosecutions do not move forward without a victim’s cooperation.²³⁶ It strikes me that mandating victim cooperation would be problematic for several reasons. First, law enforcement authorities already assign statutory rape cases a much lower priority than other types of sexual assault.²³⁷ This general tendency to minimize the significance of this crime will be reinforced by a victim’s reluctance to participate in the prosecution of her partner, in effect giving the state permission to ignore the crime.

There are a host of reasons why victims might elect not to cooperate with prosecutors in statutory rape cases. Victims may be resistant to the notion that they are, in fact, victims. Thus, they may prefer to protect their lovers, rather than contributing in any way to their punishment.²³⁸

236. Interview with Sue Torrance, Deputy District Attorney, Alameda County, at 3R Conference, in Visalia, Cal., (May 2000).

237. See ELSTEIN & SMITH, *supra* note 230, at 1.

238. Consider the story of Jessica Woehl, described in Judith Levine’s essay on statutory rape. At age thirteen, Jessica met her twenty-one-year-old lover, Kier Fiore, in an online chat room. Within five days, Kier began courting her with gifts and visiting her at her home. After her parents forbade her from seeing him, Kier impersonated Jessica’s father, enabling her to leave school so that they could see one another during the day. Eventually, the couple devised a plan to run away together, and Kier picked Jessica up at the school bus stop and drove her over state lines. Months after Kier was arrested and convicted of felonious sexual assault with a minor, Jessica remained devoted to him. She remained so even after learning, through the media, of Kier’s history of abusive, controlling behavior against other women, including the mother of his five- and

This not surprising, as there is considerable research demonstrating that victims of childhood sexual abuse often-times feel love and attachment toward their abusers.²³⁹ Nonetheless, as the Office of Victims of Crime recently concluded, in its comprehensive study of victim-oriented responses to statutory rape, "statutory rape is against the law; it is a crime that creates a victim who needs help. . . . As victim advocates, we must keep in mind that although these victims often do not see themselves as victims they need protection from illegal sexual relationship."²⁴⁰

Ultimately, this approach represents a compromise based upon the lessons learned and analogies drawn from the prosecution of domestic violence. Historically and today, many jurisdictions required the cooperation of victims in order to prosecute the crime of domestic violence.²⁴¹ This requirement is a double-edged sword, in that it empowers the victim with a sense of control, while at the same time creating a significant obstacle to obtaining convictions against those who plainly have violated the law. Victims may feel pressured to let their abuser go, or may worry that they will be held accountable, and later harmed, should they decide to move forward with prosecution. In recent decades, various jurisdictions have attempted to reverse this problem by way of mandatory, or "no drop" prosecution. This approach has met with considerable success, reinforcing the seriousness of the crime of domestic violence for the abuser, the legal system, the victim and society as a whole.²⁴²

As has historically been true of domestic violence, society tends to minimize the seriousness of the crime of statutory rape. Because of their youth and their psychosocial vulnerability, victims of statutory rape need at least as much support as do the victims of domestic violence. Rape victim advocates, counselors who specialize in assisting vic-

two-year-old children. In a letter to him, she wrote:

My heart tells me to forget about it. That was the past, it wasn't me, he really loves me. Then my brain tells me . . . [h]e did it once, he'll do it again. Every minutes [sic] of my life, I get flash backs of our whole relationship. . . . I want to be with you so bad. I love you.

LEVINE, *supra* note 148, at 10.

239. See MCEVOY & ERICKSON, *supra* note 77, at 37.

240. ELSTEIN & SMITH, *supra* note 230, at iii.

241. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1859 (1996).

242. See *id.* at 1861-65.

tims throughout the process of investigating and prosecuting a sex crime, are critically important to victims of statutory rape. Those with experience prosecuting statutory rape testify to the importance of working with the victims:

Most prosecutors . . . reported that they discuss with the victim, often together with the victim advocate, what the victim wants to happen in the case. The prosecutor and advocate explain to the victim that the ultimate decision about prosecuting the case rests with the prosecutor. They tell the victim that if the adult threatens the victim or tries to dissuade the victim from pressing charges, the victim can honestly say it was the prosecutor's decision. It is hoped that this will protect the victim from harassment²⁴³

In addition to playing a role in determining the course of the prosecution, the victim should be provided with an opportunity to present a victim impact statement. Too often, it seems that those involved in these cases are unable to appreciate the harms experienced by the victim. A victim impact statement might give all parties to a criminal proceeding the opportunity to understand the gravity of these crimes from the victim's perspective.²⁴⁴

The virtues of this approach are considerable. First and foremost, by requiring the victim's cooperation in order to proceed, this solution leaves room for sexual exploration among adolescents, while not abandoning them entirely to potentially exploitative interactions. Additionally, it avoids the problems of misplaced focus on teen pregnancy as a proxy for nonconsensual relationships. It also would alleviate the pressure toward mandated reporting by health care and social service providers, in that the young person would be permitted to decide for herself whether the relationship in which she was engaged was consensual. Finally, this approach to statutory rape law would restrict the category of those perpetrators subjected to the harsh consequences of conviction for a sex offense (such as three strikes, mandatory registering, etc.) to those whose partners also viewed

243. ELSTEIN & SMITH, *supra* note 230, at 26.

244. Note that laws allowing victim impact statements are already in place in many jurisdictions. See, e.g., 725 ILL. COMP. STAT. 120/4(a)(4) (2000) ("Crime victims shall have the following rights: . . . (4) The right to make a statement to the court at sentencing."). See generally Susan Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996) (discussing and critiquing of the use of victim impact statements in criminal sentencing).

them as offenders.

In order to facilitate this reconfigured statutory rape law's ability to empower those it seeks to protect, there are several factors that must be incorporated into its enforcement. First, there must be a victim-counseling component added to the criminal investigative process, so that those who are the subjects of these encounters are adequately supported.²⁴⁵ Such counseling should include, but not necessarily be limited to, assisting these young people in recognizing exploitation and manipulation in sexual encounters, as well as in understanding their rights to autonomy, privacy and dignity. Counselors should address issues of decision-making, in order to enable these young people to reach the right decision for themselves regarding their desired resolution of this particular case. And they should address issues of sexual decision-making and mental health generally, offering additional resources to those who are in need of them. In the event that these cases move forward, counseling resources may be necessary over the course of the entire case. This is due to the fact that, in some jurisdictions, it may take as long as several years for a statutory rape case to proceed to trial.²⁴⁶ As a result, the victims are forced to relive the events of the encounter long after its occurrence.

Finally, it is imperative to recognize that one of the impediments to prosecution under this proposed reform of statutory rape law lies in the nature of adolescent development itself. Immaturity and a lack of experience not only render a girl vulnerable to coercion in a sexual encounter, it may also render her more likely to term the encounter "consensual." It may be years later before she recognizes as problematic a sexual relationship that she had at age thirteen. Thus, in order to adequately account for adolescent vulnerabilities, the law must accommodate delayed complaints by lengthy statutes of limitations on these crimes, and to the extent possible, by lifting informal prosecutorial guidelines regarding stale complaints.

At present, many states already permit victims a rela-

245. In the most comprehensive report on prosecuting statutory rape to date, Sharon G. Elstein and Barbara E. Smith devoted five pages to outlining the specific types of support necessary for these victims. See ELSTEIN & SMITH, *supra* note 230, at 26-31.

246. Interview with Alison Perona, Cook County Asst. State's Atty and Trial Supervisor, in Chicago, Ill. (March 28, 2000).

tively long period of time in which to file a criminal report for statutory rape. This is because in most states the statute of limitations does not toll until minors turn eighteen, at which time they often will have a year or more to file their complaint.²⁴⁷ Indeed, in Illinois, the law permits the filing of complaints for felonies at any time within the ten-year period after one turns eighteen.²⁴⁸

The bigger obstacle to delayed prosecution in statutory rape cases may be the problem of stale evidence. If a victim waits several years before deciding to file a complaint for statutory rape, chances are good that there will be no physical evidence of the crime. Moreover, any witnesses may be difficult to find, and their memories of the encounter or relationship may have dissipated. As a result, some states have laws that serve to inhibit the prosecution of sex crimes in the event of a "delayed outcry."²⁴⁹ In addition to statutory limitations, there are pragmatic ones. It is only natural that prosecutors would be unenthusiastic about undertaking a prosecution in which the only evidence is the victim's word that the crime took place, particularly where that "word" refers to an event that occurred, just say, five years ago. Nonetheless, I believe that such cases may be winnable. First of all, a full investigation may well yield witnesses in whom the victim confided at the time of the sexual encounter. Secondly, the victim may be a far more credible witness as an older teen or even an adult than she would have been as a younger girl.

Finally, even in the event that such cases are difficult to win, I nonetheless support their prosecution. A person who comes forward, even years later, with a complaint that her sexual autonomy was violated when she was a child deserves the support of the law. Sexual interactions are, by definition, serious undertakings. Anyone who engages in a

247. See, e.g., 720 ILL. COMP. STAT. 5/3-6 (West 2000).

248. Indeed, in Illinois, the law permits the filing of complaints for felonies at any time within the ten-year period after one turns eighteen. *Id.* The law requires that the victim report the offense by age twenty-one, unless the accused is a family member, in which case there is no need to report. In effect, this means that one who is the victim of an abusive relationship with her neighbor at age thirteen may wait until age twenty-one to make a report. The police will have until the victim is twenty-eight to decide whether to press charges. *Id.*

249. For example, consider 720 ILL. COMP. STAT. 5/3-6(h) (West 1999). Until it was amended in January, 2000, the law provided a five-year statute of limitations on criminal sexual assault, but only for a complainant who reports the offense within six months of its commission.

sexual encounter with an underage person should understand that he does so at the grave risk of miscommunication, injury and harm, and that the law will allow his partner ample time in which to consider whether the encounter was indeed consensual. If statutory rape laws are to facilitate and honor young people's rights to explore their incipient sexuality in an environment that is free from coercion, exploitation and nonvoluntary sexual encounters, we must honor those who come forward to complain about such encounters.

IV. CONCLUSION

We live in a society in which the majority of victims of forcible rape are girls less than eighteen years of age.²⁵⁰ We live in a society in which rape still goes largely unpunished when it occurs between acquaintances.²⁵¹ We live in a society permeated with imagery that glorifies male sexual initiative and sexuality, while objectifying adolescent beauty. We live in a society in which the combination of adolescents and sex seems inevitable, and inherently bound up with the risk of exploitation and coercion. And yet, in spite of all of this, we live in a society that has in place a legal solution that promises some protection to young people as they come of age sexually. Reconstituted and reinvigorated, statutory rape laws can help to illuminate the path toward sexual and personal autonomy.

250. According to the Department of Justice, rape is a widely underreported offense. As such, it is difficult to approximate the number of girls who are raped every year. The Department of Justice estimates the total number of rapes at 311,110. The number of rapes of girls between twelve and nineteen is estimated at 124,620.

251. See *supra* notes 26-33 and accompanying text.