

LAW'S LIMITS: REGULATING STATUTORY RAPE LAW

MICHELE GOODWIN*

This Article examines statutory rape cases of the last decade and submits that both the apparatus to police sexual violence against minors—statutory rape laws—as well as their application against consenting minors create legally untenable, absurd results that frequently impose legal and extralegal burdens on minors that may exceed that of adult, convicted rapists. No coherent framework has been offered by a politician that responds pragmatically to the empirical realities of adolescent sexuality. Neither federal nor state legislatures offer a coherent, well-articulated approach to militate against the harshest criminal punishments demanded by statutory rape provisions. Indeed, judges interpret and enforce statutory rape cases in a manner that entrenches stereotypes and biases. On the other hand, few scholars wrestle with the broader contemporary applications of statutory rape law despite recent decades of absurd results and disproportionately harsh penalties against teens.

Several concerns frame this Article: (1) the advent of extralegal punishments imposed on minors convicted of fornicating with minors, such as mandatory sex offender registration requirements; (2) the strict liability enforcement approach to such cases, which leaves room only for technical assessments (Did sex occur or not?) rather than critical, nuanced evaluation (Did the minors consent? Was there maturity and capacity to consent? Would the punishment imposed by the legislature lead to an absurd result or unjust outcome?); (3) the muddling and conflation of teen consensual intimacy with rape; (4) the collective failure of legislative, prosecutorial, and judicial branches of government to take account of the robust empirical literature that provides a different account of teen sexuality norms; (5) the failure to account for perverse social outcomes; and (6) the production of disparate criminal law norms that relate to race, class, and gender, produced by judges and other legal actors, such as police and prosecutors. The Article offers two novel ways forward to address teen sex and statutory rape.

Introduction.....	482
I. Statutory Rape Law: Perverse Outcomes and Legal Fictions....	488
A. State Interests: Negative Externalities and Perverse Outcomes	490
1. Statutory Rape Law as Welfare Reform	491
2. Statutory Rape Law Normalizing All Underage Sex as Rape.....	492
B. Racial Chaos and Gendered Norms	492

* Everett Fraser Professor of Law, University of Minnesota Law School; Professor of Medicine & Public Health, University of Minnesota; President, Defense for Children International–USA. I am grateful for the outstanding research assistance provided by Allison Whelan. My gratitude to the *Wisconsin Law Review* staff and editors. This Article and my work in comparative institutional analysis benefits from Neil Komesar’s intellectual generosity. © Michele Goodwin

1. Statutory Rape: A Story about White Women’s Vulnerability	493
2. Statutory Rape: A Story about Black Male Culpability	495
3. Statutory Rape: A Story about Child Support and Economic Interests.....	499
4. Clashing Stories, Conflicting Norms, and Fallible Outcomes	499
C. Punishing Children as Adults: The Supply and Demand for Criminal Law	500
1. Statutory Rape Law: A Story about Pedophiles, Not Children	503
2. Statutory Rape Law: Punishing Consenting Teens Like Violent Adults.....	505
II. Adolescent Sex: Capacity and Autonomy.....	509
A. Children and Capacity to Consent	510
B. Sex Distinctions: Girls and Inherent Vulnerability.....	514
III. Modern Story of Teens and Sex.....	516
A. Teen Sex	517
B. What We Think We Know about Teens and Sex	522
IV. A Turn to Comparative Institutional Analysis.....	525
A. Comparative Institutional Analysis	526
B. Teen Sex and the Criminal Law Approach.....	530
1. Three Reasons to Use an Alternative Approach	530
2. Problems with the Criminal Law Default	531
C. Alternatives to Criminal Law	533
1. Market.....	535
2. Alternative Courts.....	537
Conclusion	540

INTRODUCTION

For all the recent controversy about rape,¹ its legal² and political³ definitions, politicians ignore the uneven, punitive punishments resulting

1. See, e.g., John Eligon & Michael Schwartz, *Senate Candidate Provokes Ire with ‘Legitimate Rape’ Comment*, N.Y. TIMES (Aug. 19, 2012), http://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html?_r=0 (discussing Representative Todd Akin’s comment that in cases of what he called “legitimate rape,” women’s bodies somehow “block[] an unwanted pregnancy”); Tom LoBianco, *Ind. GOP Senate Hopeful Mourdock Criticized over Rape, Pregnancy Comments*, WASH. TIMES (Oct. 24, 2012), <http://www.washingtontimes.com/news/2012/oct/24/ind-gop-senate-candidate-mourdock-criticized-over-/?page=all> (reporting on Indiana Senate candidate Richard Mourdock’s comment that when a woman becomes pregnant after being raped, “that’s something God intended”).

from statutory rape laws' harsh application against minors who fornicate with minors. Indeed, no coherent framework has been offered by a politician that responds pragmatically to the empirical realities of adolescent sexuality.⁴ Neither federal nor state legislatures offer a coherent, well-articulated approach to militate against the harshest criminal punishments demanded by statutory rape provisions.⁵ Judges interpret and enforce statutory rape cases in a manner that entrenches stereotypes and biases. On the other hand, few scholars wrestle with the broader contemporary applications of statutory rape law despite recent decades of absurd results and disproportionately harsh penalties against teens.⁶ Several concerns frame this Article: (1) the advent of extralegal punishments imposed on minors convicted of fornicating with minors, such as mandatory sex offender registration requirements; (2) the strict liability enforcement approach to such cases, which leaves room only for technical assessments (*Did sex occur or not?*) rather than critical,

2. For a compilation of state rape statutes, see AM. PROSECUTORS RESEARCH INST., STATE RAPE STATUTES, http://www.arte-sana.com/articles/rape_statutes.pdf (last visited Jan. 19, 2013).

3. By "political" definitions of rape, I mean those given by politicians, such as Todd Akin and Richard Mourdock. See Eligon & Schwirtz, *supra* note 1; LoBianco, *supra* note 1.

4. Legislation carving out "Romeo and Juliet" exceptions takes up some of the concerns expressed in this Article, but such legislative tools are inadequate as they establish narrow safe-harbors that apply to older teens and not pre- and early teens. See generally Douglas J. Besharov & Karen N. Gardiner, *Trends in Teen Sexual Behavior*, 19 CHILD. & YOUTH SERV. REV. 341, 345 chart 2 (1997) (reporting empirical data from their study, which found that roughly a quarter of girls reported engaging in sexual intercourse before age fifteen).

5. One author suggests that the aggressive criminal law policing of mundane family tasks has on its own reshaped family law. See Camille Gear Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law*, 101 CALIF. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001053.

6. More dynamic contemporary works focus on queer youth. See Michael J. Hidgon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 198 (2008); Michael H. Meidinger, *Peeking under the Covers: Taking a Closer Look at Prosecutorial Decision-Making Involving Queer Youth and Statutory Rape*, 32 B.C. J.L. & SOC. JUST. 421 (2012). Earlier works, such as CAROLYN COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* (2004), provide pivotal accounts of statutory rape law in the United States, particularly through the 1990s. Cocca emphasizes the role of law in shaping cultural narratives about gender and sexuality. *Id.*; see also MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920* (1995) (noting that early statutory rape laws disproportionately penalized immigrant girls and women engaging in consensual sex); SHARON ULLMAN, *SEX SEEN: THE EMERGENCE OF MODERN SEXUALITY IN AMERICA* (1997); Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039 (2008) (providing a rich historical account of statutory rape law).

nuanced evaluation (*Did the minors consent? Was there maturity and capacity to consent? Would the punishment imposed by the legislature lead to an absurd result or unjust outcome?*); (3) the muddling and conflation of teen consensual intimacy with rape; (4) the collective failure of legislative, prosecutorial, and judicial branches of government to take account of the robust empirical literature that provides a different account of teen sexuality norms; (5) the failure to account for perverse social outcomes; and (6) the production of disparate criminal law norms that relate to race, class, and gender, produced by judges and other legal actors, such as police and prosecutors.

Important scholarship implicating the racial impacts of rape convictions generally,⁷ and statutory rape law specifically,⁸ tend to provide a microscopic analysis that fails to adjust the lens to cover the broader socioeconomic considerations and the core, underlying issue: policing sex among adolescents. Equally, the historic feminist concerns about rape and sexuality⁹ tend to root toward a victim framework,¹⁰ which suggests that adolescent girls lack agency¹¹ as well as the intellectual, moral, and physiological capacities to consent and much less desire sexual contact.¹² Such frameworks tend toward feminist essentialism.¹³

Nor have scholars broadly taken up the constitutional implications of punishments so cruel and sanctions so severe and unusual that they

7. See Donald H. Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH. & LEE L. REV. 43 (1965).

8. See, e.g., Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 318–19 (2003) (noting that the probability of being charged and convicted for violating age of consent laws is influenced, in part, by race).

9. Victorian feminists supported statutory rape laws because they viewed “youthful sexual activity as a tragic first step in the transformation of girls from chaste maidens to ‘fallen women.’” Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 28 (1994).

10. Jane E. Larson, “*Even a Worm Will Turn at Last*”: *Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1, 4 (1997) (discussing how reformers sought to increase the age of consent to protect young women from “sexual danger, abuse, and violence that lay underneath cherished myths about love and romance”).

11. Second-wave feminists noted this problem and how such frameworks could perpetuate stereotypes that restrict the “sexual autonomy of young women.” Oberman, *supra* note 9, at 29.

12. *Id.*

13. The idea of essentialism is that women and men have certain given and universal characteristics as a result of their biology. See Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 275 (1999).

disparately and permanently (for life) brand children for engaging in activities that are otherwise legal for adults.¹⁴ Thus, important contributions to a rapidly changing sphere of law tend to offer incomplete analyses or unworkable frameworks to address not only contemporary intimacies among adolescent children, but also the severe criminal law punishments. Unfortunately, this gap in legal analysis, with real-world consequences, persists mostly unnoticed.

Consider an unfortunate, illustrative example, typical of the kind undergirding the salience of this Article, involving a minor known only as “J.L.” In 2011, J.L. was adjudicated a delinquent, charged with first-degree rape, and convicted under the South Dakota statutory rape statute.¹⁵ The court record does not indicate J.L. having any prior convictions or other violations of the law that might suggest a propensity for crime, violence, or danger to the community. Ironically, the first-degree rape conviction did not stem from a violent, coercive sexual encounter with an adolescent, rape of an adult woman, or forced sex with a child or infant. Rather, according to the South Dakota Supreme Court, J.L., a fourteen-year-old, “engaged in consensual sexual intercourse with his girlfriend, who was twelve” and only fifteen months his junior.¹⁶ In the state of South Dakota, J.L.’s conviction will result in legal and extralegal penalties far more severe than that of an adult rapist who commits a sexually violent act against a college peer, a random woman, or during the commission of another crime.

In a telling commentary, relegated to a footnote, the South Dakota Supreme Court offers a muted reference to the harsh penalties J.L. and other minors who engage in consensual¹⁷ sex with minors will encounter. The court evinces, “[i]t appears that J.L. will be required to register as a sex offender for life.”¹⁸ In other words, J.L.’s “mark” as a sexual predator burdens him with the same potent and socially stigmatic punishment as that of a convicted, middle-aged pedophile who rapes a minor.

14. Michele Goodwin, *Cruel and Unusual Punishments: Consenting Minors and Statutory Rape* (unpublished manuscript) (on file with author).

15. *People ex rel. J.L.*, 2011 SD 36, ¶ 1, 800 N.W.2d 720; see S.D. CODIFIED LAWS § 22-22-1(1) (2006) (defining rape as “an act of sexual penetration . . . if the victim is less than thirteen years of age”).

16. *People ex rel. J.L.*, 2011 SD 36, ¶ 2.

17. Throughout this Article, the term “consensual” sex is applied according to its conventional definition, rather than its legal definition. As the Supreme Court of Utah opined in *State ex rel. Z.C.*, “[c]hildren under the age of fourteen cannot legally consent to intercourse or sexual touching in” their state. 2007 UT 54, ¶ 1 n.1, 165 P.3d 1206. Because such a policy creates a legal fiction, the term “consensual” will be used in this Article for its social meaning.

18. *People ex rel. J.L.*, 2011 SD 36, ¶ 11 n.4; see § 22-24B-2.

On the one hand, had J.L.'s girlfriend been an adult and a nonconsensual sexual act occurred, he could qualify for release from the sex offender registry list after only ten years,¹⁹ rather than the life-term that now serves as his punishment. According to South Dakota criminal statutes, consensual sex between minors may result in a more severe punishment than nonconsensual sexual encounters either between adults or between a teenage male and an adult woman.²⁰ On the other hand, were J.L. a girl, it is likely that no statutory rape offense would have *legally* occurred, as the South Dakota statutory rape law requires “sexual penetration” of a person “less than thirteen years of age.”²¹

Absurdly, unlike most adult rapists convicted of first-degree sexual assault,²² J.L. will never qualify for removal from the sex offender registry list; beyond possible incarceration until age twenty-one, he is forever restricted from living near any schools, playgrounds, parks frequented by children, or daycare centers.²³ J.L.'s conviction dooms him to bear the mark of sexual predator on websites, government documents, and possibly a future driver license.²⁴ The “mark” will follow him throughout the United States, as most states require sexual predators relocating from other jurisdictions to register within three days of arrival.²⁵ Failure to comply with such laws can result in criminal prosecution and felony convictions. In other words, J.L. will forever be burdened by reporting requirements and living restrictions until he dies.

19. See sources cited *supra* note 18.

20. See sources cited *supra* note 18.

21. § 22-22-1(1). Further, the sexual encounter came to the attention of authorities because the girlfriend became pregnant. *People ex rel. J.L.*, 2011 SD 36, ¶ 2.

22. Research demonstrates that adult males are more likely to rape adult women than children. Roughly nine out of ten rape victims are female, over fifty-five percent are over the age of eighteen, and approximately eighty-five percent are over age twelve. See *Who Are the Victims?: Breakdown by Gender and Age*, RAPE, ABUSE & INCEST NAT'L NETWORK, <http://www.rainn.org/get-information/statistics/sexual-assault-victims> (last visited Feb. 24, 2013). On the other hand, teens are more likely to engage in consensual sex with other teens. See Christine E. Kaestle et al., *Sexual Intercourse and the Age Difference between Adolescent Females and Their Romantic Partners*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 304, 306 (2002) (finding that the majority of adolescent females ages fourteen and up had a sexual partner who was no more than three years older than them). Given this, one possible outcome might be that teens disproportionately and unjustly suffer the legal and extralegal consequences of “illegal” intimacy.

23. §§ 22-24B-22, -23. South Dakota's sex offender registration requirements can be found at § 22-24B.

24. See §§ 22-24B-8, -21.

25. For a compilation of state registration requirements upon arrival in each state, see *Registration Requirements: Survey #2 Results*, INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION, <http://www.interstatecompact.org/LinkClick.aspx?fileticket=y6mLHaH-9gE%3D&tabid=105&mid=431> (last visited Feb. 24, 2013).

This Article examines statutory rape cases of the last decade and submits that both the apparatus to police sexual violence against minors—statutory rape laws—as well as their application against consenting minors create legally untenable, absurd results that frequently impose legal and extralegal burdens on minors that may exceed that of adult, convicted rapists. Fundamentally undergirding such an inquiry and analysis are questions about fairness and equity that implicate the Due Process Clause²⁶ and the Eighth Amendment to the United States Constitution, which protects against “cruel and unusual” punishment.²⁷ Concurrent projects in this domain take up the constitutional law issues and critique the punishments imposed on juveniles who engage in consenting sex as failing to pass constitutional muster. This Article advances a different approach: it examines the legal process and the laws or rules and outcomes it produces in the statutory rape context as applied to minors.

This Article is about reforming the way scholars, legislators, prosecutors, and judges think about this legal process and its means and ends.²⁸ For example, statutory rape cannot be properly contextualized or understood by focusing exclusively on the plain language (or meaning) of statutes “that focus attention solely on goals and values.”²⁹ Nor does the approach, which focuses only on the invidious or odious nature of the current system, offer a helpful response or framework forward. The former would lead to an overly expansive view of every document generated by government, imposing on courts the requirement that laws must always be maintained.³⁰ The latter exposes a highly imperfect system but offers no way forward. At best, proponents of the latter seek to either do away with legal rules found to be too burdensome or objectionable, or make demands on courts to adopt new methods of analysis. Neil Komesar refers to this type of shuffling as driving a “continuous and costly cycling among highly imperfect alternatives.”³¹ Importantly, rule of law processes are often interdependent, and as such the legislative process is codependent on the judicial process. Often these

26. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

27. U.S. CONST. amend. VIII.

28. See NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 9 (2001) (“Law and rights cannot be understood by methods of legal analysis that focus attention solely on goals and values or at most discuss the horrors of present systems. . . . Different tools must be employed—different questions asked—to understand what law and rights are, what they can be, and what they ought to be.”).

29. *Id.*

30. *People ex rel. J.L.*, 2011 SD 36, ¶ 9 n.2, 800 N.W.2d 720 (citing *Argus Leader v. Hagen*, 2007 SD 96, ¶ 14, 739 N.W.2d 475).

31. See KOMESAR, *supra* note 28, at 9.

systems depend on other institutional actors, such as agencies and law enforcement.

This Article proceeds in four parts. Part I examines the current statutory rape system, providing an overview of its application against minors. It provides a summary of the principles that underlie statutory rape law. Part II empirically situates the project, debunking legislative assumptions about the nature, frequency, and expression of teen sexuality. Part III uses case studies to analyze the conflicting, inconsistent, and frequently incoherent outcomes that dominate statutory rape enforcement and interpretation. Adjudicating statutory rape cases is an interinstitutional process. In other words, the rules crafted by courts are not inspired by endogenous ideas exclusively. The judicial process is informed by two independent but overlapping feeder processes: the work of prosecutors and the crafting of legal rules by legislatures. That said, the primary function of courts is to “ensure independent, open, fair and efficient resolution of disputes.”³² An important question remains: What about when courts get it wrong or legal institutions fail? Part IV argues for recourse to institutional analysis.

I. STATUTORY RAPE LAW: PERVERSE OUTCOMES AND LEGAL FICTIONS

In theory, contemporary statutory rape law (SRL) achieves three important socio-legal goals: deterring child molestation by imposing strict liability disincentives, delaying the “sexual debut” of minors,³³ and reducing teen pregnancy. In a recent decision, the Utah Supreme Court wrote that “sexual abuse of a child is one of the most heinous crimes recognized by our penal code.”³⁴ Indeed, the magnitude of the crime is reflected by the fact that it is punished as a felony.³⁵ No exceptions are made for minors adjudicated “delinquent” for committing sexual abuse against a child.³⁶

In Utah, which serves as a relative example, a child who commits “more than five ‘separate acts’ of sexual touching,” even without sexual penetration, could be convicted for “aggravated sexual abuse of a child.”³⁷ In South Dakota, a minor can be adjudicated a delinquent and

32. See *Supreme Court, Function*, WIS. CT. SYS., <http://www.wicourts.gov/courts/supreme/about.htm#case> (last updated Mar. 7, 2012).

33. Matthew D. Henry & Scott Cunningham, *Do Statutory Rape Laws Work?* 18–19 (Cleveland State Univ. Econ. Dep’t, Working Paper Series No. 14, 2010), available at <http://www.csuohio.edu/class/economics/WorkingPapers/WorksPDFs/14.pdf>.

34. *State ex rel. Z.C.*, 2007 UT 54, ¶ 18, 165 P.3d 1206.

35. See UTAH CODE ANN. §§ 76-3-406, -5-404.1(4)–(5) (LexisNexis 2012).

36. §§ 76-3-406, -5-404.1(4)–(5).

37. See *State ex rel. Z.C.*, 2007 UT 54, ¶ 18 n.7 (citing § 76-5-404.1(4)(g)).

guilty of first-degree rape for one act of sexual penetration, regardless of consent if the other participant is less than thirteen years of age.³⁸ Wisconsin's statutory rape law reads similarly.³⁹ These matters are particularly thorny in their application against children because legally a child cannot consent to sexual intercourse.⁴⁰ In some states, including Utah, adolescent fondling constitutes sexual abuse of a child just as attempts to touch the buttocks, breasts, or "intent to arouse or gratify the sexual desire."⁴¹ Even consenting children will always be deemed "victims" in states that take this approach.

In practice, when statutes impose elevated charges of aggravated sexual assault based on the abuse of a "child," certain presumptions are imbedded in that characterization that may or may not comport with actual fact. In reality, lawmakers rely on false assurances that SRLs achieve their desired goals of protecting children from unwanted sexual contact. In fact, states employ legislative fact to reach the conclusion that all children are necessarily victims in child sex abuse and statutory rape cases.

Child sex abuse, including statutory rape, "presupposes that a single act of" sexual intimacy with a minor, "involves a victim, whom the statute endeavors to protect, and a perpetrator, whom the statute punishes for harming the victim."⁴² Courts recognize the problematic application of these rules against minors, but typically defer to the legislature, because the plain meaning and wording of the statutes appear clear and unambiguous even if very harsh, asymmetrical consequences result. The problems associated with such an approach deserve highlighting. For example, such consequences apply unevenly between males and females, disparate racial prosecutions may result based on who prosecutors choose to target and for what reason, and the criminal penalties levied

38. S.D. CODIFIED LAWS § 22-22-1 (2006) provides that minors are incapable of consenting to sexual intercourse.

39. "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." WIS. STAT. § 948.02(1) (2011-12).

40. See UTAH CODE ANN. § 76-5-406(9).

41. § 76-5-404.1(1)-(2). Also see Wisconsin's law:

Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.

WIS. STAT. § 948.01(5)(a). "Intimate parts" is defined as "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." § 939.22(19).

42. *State ex rel. Z.C.*, 2007 UT 54, ¶ 18 (citing UTAH CODE ANN. § 76-5-404.1(b)-(d), (f), (h), (i)).

against consenting children increasingly mirror the sanctions imposed on coercive adults.

A. State Interests: Negative Externalities and Perverse Outcomes

Modern demand for SRLs and their expansion derives from an expanded cohort of state and societal interests. These interests, including the goals to reduce teen pregnancy,⁴³ deter and punish the sexual exploitation of children,⁴⁴ decrease the incidence of sexually transmitted diseases among youth,⁴⁵ and promote abstinence,⁴⁶ are coupled with states' financial interests in reducing welfare rolls⁴⁷ and the societal and institutional costs associated teen parentage.⁴⁸ Kay Levine's chronicle of statutory rape law proves instructive on this point, as she notes economic concerns also relate to the involvement and costs of social services and efforts to collect child support.⁴⁹ As she explains, California's Statutory Rape Vertical Prosecution Program (SRVPP) emerged as an aggressive, well-funded, criminal law response to an economic problem: teenage pregnancy.⁵⁰ Republican Governor Pete Wilson dramatically increased state funding for statutory rape investigations and prosecutions, spending

43. The United States Supreme Court recognized the state's interest in protecting young women from the consequences of teenage pregnancy in *Michael M. v. Superior Court Sonoma Cnty.*, 450 U.S. 464, 470 (1981). This argument was often articulated in the mid-1990s after a series of studies came out indicating that adult men fathered a startlingly high number of babies born to young teenage mothers. See David J. Landry & Jacqueline Darroch Forrest, *How Old Are U.S. Fathers?*, 27 FAM. PLAN. PERSP. 159, 160 (1995); Mike Males & Kenneth S.Y. Chew, *The Ages of Fathers in California Adolescent Births, 1993*, 86 AM. J. PUB. HEALTH 565, 567 (1996); see also Patricia Donovan, *Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?*, 29 FAM. PLAN. PERSP. 30, 34 (1997).

44. See Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 737 (2000).

45. See ELLEN REESE, *BACKLASH AGAINST WELFARE MOTHERS: PAST AND PRESENT* 18 (2005).

46. Women who are victims of child-adult sex are more likely to become infected with a sexually transmitted disease. See Christopher R. Browning & Edward O. Laumann, *Sexual Contact between Children and Adults: A Life Course Perspective*, 62 AM. SOC. REV. 540, 550 (1997).

47. See GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942*, at 145 (1995) (explaining that racial panic and stereotype shaped mid-twentieth century legislative agendas related to legislating sex, noting policy makers believed "'racial misbehavior', . . . irremediable biological inferiority, and . . . the subordination of motherhood to sexuality among Black women" led them to unchaste lives).

48. Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 468 (2000).

49. See Levine, *supra* note 6.

50. *Id.* at 1083-84.

“\$8.4 million annually . . . [to establish] special prosecution units devoted exclusively to the handling of statutory rape cases.”⁵¹ Thousands of defendants were arrested, tried, and convicted for statutory rape offenses within the first two years of the program: a four-fold increase from the year prior to the program’s launch.⁵²

1. STATUTORY RAPE LAW AS WELFARE REFORM

California’s wide-sweeping program coincided with a national agenda on welfare reform. Congress made clear its position that “[s]tates and local jurisdictions should aggressively enforce statutory rape laws”⁵³ in part because of the economic considerations. After all, who should bear the cost of supporting children subsidized by government: tax payers or their biological parents? These concerns, at face value, appear neutral, uncontroversial, and valid to legislators and even some scholars, which suggests that the means, no matter how pernicious, make sense. This project, however, investigates the means, unpacking why even the ends may neither justify nor effectively map onto the means, particularly as SRL prosecutions tend toward overinclusivity. After all, not all consensual sexual acts between teens result in pregnancy and, even when impregnation and childbirth results, the criminal law may not serve as the tool to produce Pareto superior outcomes economically or socially.⁵⁴

For example, government advocates of SRLs link statutory rape and welfare reform, arguing that “[m]en 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.”⁵⁵ Thus, government policies favoring prosecution in such cases predicate on “a belief that the threat of punishment will discourage these men from having (unprotected) intercourse with teenage girls.”⁵⁶ However, SRLs

51. *Id.* (noting that SRVPP efforts resulted in thousands of arrests, prosecutions, and convictions for statutory rape in California).

52. *Id.* at 1084.

53. *See* 42 U.S.C. § 14016(a) (2006).

54. “Pareto superior outcomes” involve allocations that maximize the well-being of one individual without reducing the well-being of another. *See* Francesco Parisi, *Positive, Normative and Functional Schools in Law and Economics*, 18 *EURO. J. L. & ECON.* 259, 267 (2004).

55. Oberman, *supra* note 44, at 734; *see also* Oliveri, *supra* note 48, at 468.

56. Oberman, *supra* note 44, at 734–35. However, the problem with focusing on statutory rape incidents that result in pregnancy is that it “ignores many of the ways in which sexual encounters with minors that do not result in pregnancy may nonetheless be harmful.” *Id.* at 738. Moreover, as a policy matter, an adult father who is prosecuted will probably not be in a position to make a substantial contribution to the child’s support. Therefore, whether the impregnated teenage mother or the child is categorically better off

attach the type of penalties that produce economic and social externalities that undermine states' economic and social agendas given their costs associated with prosecution, incarceration, and family deterioration.

2. STATUTORY RAPE LAW NORMALIZING ALL UNDERAGE SEX AS RAPE

The problem is that statutory rape codes create per se rule violations with respect to *all* sexual intercourse, and in some states, even sexual touching involving consenting minors breaches the law whether or not the “victim” becomes pregnant.⁵⁷ In other words, sex with a person under the age of majority or age of consent (depending on the specific state legislation) is a crime. Therefore, a twelve-year-old boy who engages in consensual sex with a thirteen-year-old classmate will be adjudicated and penalized under the same law and within the same legal process as a forty-year-old football coach who molests a middle school cheerleader. In fact, the punishment deemed appropriate for a twelve-year-old might exceed that of the coach if the “victim” of sexual contact is thirteen years old or younger. Such disparities can be characterized as the contemporary outgrowths of renewed legislative and prosecutorial interest in taking a tough and uniform approach on statutory rape.⁵⁸ This “tough” approach, however, undermines judicial authority and discretion, reifying a formalism that fails to account for context, age, capacity, injury, consent, and social costs.

B. Racial Chaos and Gendered Norms

The brilliant novelist Ralph Ellison once wrote that the United States is “bound up” with a chaos that pertains to race, sex, economic opportunity, national identity, and criminality.⁵⁹ Sociologists, legal

in cases where the father is punished deserves scrutiny. For example, Michelle Oberman offers a critique against SRLs as a tool to reduce welfare dependency rather than as a means to protect adolescents. *Id.*

57. See, e.g., FLA. STAT. ANN. § 800.04(5)(a) (West 2013) (defining “lewd or lascivious molestation” as including intentional touching of the “breasts, genitals, genital area, or buttocks, or the clothing covering them” of a person under sixteen); IND. COD. ANN. § 35-42-4-9 (LexisNexis 2009) (making it a Class D felony for a person eighteen or older to “perform[] or submit[] to any fondling or touching” of or by a person between fourteen and sixteen years of age); UTAH CODE ANN. § 76-5-404.1(2) (LexisNexis 2012) (including touching of the “anus, buttocks, or genitalia of any child [or] the breast of a female child” under the age of fourteen in the definition of “aggravated sexual abuse of a child”).

58. Oliveri, *supra* note 48, at 465, 468, 474–77.

59. RALPH ELLISON, *Change the Joke and Slip the Yoke*, in SHADOW & ACT 45, 48 (1964).

scholars, and others record a history that further explains Ellison's literary point.⁶⁰ They write that the black body assumes metaphoric status in the United States, perceived in various eras as hypersexualized, prowling, deviant, eager to pounce on vulnerable white women, and in need of legal control.⁶¹ Films such as *The Birth of a Nation* capitalized on that fear, birthing its own white supremacist movement that inspired the ranks of the Ku Klux Klan to swell in membership.⁶² Sandra Gunning explains that the black body has served as a crucial and overly determined metaphor in an evolving national discussion on sex.⁶³ She cites as her evidence the pernicious history of lynching in the United States, race riots led by poor whites, and the confluence of these events surrounding white women and sexual freedom.⁶⁴ As Senator Benjamin Tillman extolled on the United States Senate floor in 1907:

I have three daughters, but, so help me God, I had rather find either one of them killed by a tiger or a bear and gather up her bones and bury them, conscious that she had died in the purity of her maidenhood, than have her crawl to me and tell me the horrid story that she had been robbed of the jewel of her womanhood by a black fiend.⁶⁵

1. STATUTORY RAPE: A STORY ABOUT WHITE WOMEN'S VULNERABILITY

Historically, SRL was rooted in assumptions about white women's vulnerability, chastity, and agency.⁶⁶ Coverture laws in the United States and abroad underscored the proposition that white women's and girls'

60. See, e.g., SANDRA GUNNING, *RACE, RAPE, AND LYNCHING: THE RED RECORD OF AMERICAN LITERATURE, 1890–1912* (1996); DOROTHY ROBERTS, *KILLING THE BLACK BODY* (1997); Dennis D. Waskul & Phillip Vannini, *Introduction: The Body in Symbolic Interaction*, in *BODY/EMBODIMENT: SYMBOLIC INTERACTION AND THE SOCIOLOGY OF THE BODY* 1, 11 (Dennis Waskul & Phillip Vannini eds., 2006); Anthony Paul Farley, *The Black Body as Fetish Object*, 76 *OR. L. REV.* 457 (1997).

61. See GUNNING, *supra* note 60.

62. MELVYN STOKES, D.W. GRIFFITH'S *THE BIRTH OF A NATION* 8–9, 231–35 (2007) (analyzing *THE BIRTH OF A NATION* (1915)).

63. GUNNING, *supra* note 60, at 3.

64. *Id.* at 4–6.

65. 41 *CONG. REC.* 1441 (Jan. 21, 1907) (statement of Sen. Benjamin Tillman).

66. See RUTH M. ALEXANDER, *THE "GIRL PROBLEM": FEMALE SEXUAL DELINQUENCY IN NEW YORK, 1900–1930*, at 41–48 (1995) (discussing progressive reforms used to encourage female morality, including vagrancy laws); ODEM, *supra* note 6, at 8–10 (noting statutory rape laws were enacted to protect “white, working-class daughters”).

sexuality deserved, if not required, protection.⁶⁷ In part, this fear was not unfounded as early case law exposes the sexual depravity targeted at girls even during the United States colonial period.⁶⁸ However, protecting the chastity and virtue of white women and girls also served the function of protecting white male reputation and property as the sexuality of women and girls could not be separated from the latter's overall legal status as property.⁶⁹ In other words, SRL engendered and anchored the story of "virtuous young women,"⁷⁰ while also protecting the interests of fathers and husbands.⁷¹

Accordingly, the chastity of young women *needed* the state's protection because a woman's virginity was an object of social, economic, and personal value.⁷² Early-to-mid-twentieth century case law echoed this reasoning,⁷³ though the law's protection was generally available only to those young women who were not sexually experienced prior to the conduct in question.⁷⁴ By extending protection primarily to white virgins, early SRL "served as a tool through which to preserve the common morality rather than to penalize men for violating the law."⁷⁵

Nearly fifty years ago, Donald Partington published "The Incidence of the Death Penalty for Rape in Virginia," which told the troubling story connecting selective prosecution, jury bias, judicial discretion, race, rape, and the death penalty.⁷⁶ As he explained in 1965: "Since 1908, when the electric chair was installed in the Virginia State Penitentiary, forty-one men have been executed for rape, thirteen for attempted rape, one for

67. See Michele Goodwin & Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors' Access to Assisted Reproductive Technology*, 34 HARV. J.L. & GENDER 503, 516–21 (2011).

68. See, e.g., *King v. Heinrichs*, 3 Haw. 40 (1967) (detailing the rape of a ten-year-old girl); *Commonwealth v. Roosnell*, 8 N.E. 747 (Mass. 1886) (detailing the rape of a nine-year-old girl); *Commonwealth v. Bennet*, 4 Va. 235 (1820) (detailing the rape of a ten-year-old girl); *Ligon v. Ford*, 19 Va. 10 (1816) (detailing the rape of a fourteen-year-old boy).

69. Oberman, *supra* note 44, at 754–55; see also J. Shoshanna Ehrlich, *From Age of Consent Laws to the "Silver Ring Thing": The Regulation of Adolescent Female Sexuality*, 16 HEALTH MATRIX: J.L.-MED. 151 (2006).

70. Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287, 311 (1997).

71. Oberman, *supra* note 44, at 754–55.

72. *Id.*; see also Ehrlich, *supra* note 69, at 156–60.

73. See, e.g., *People v. Hernandez*, 393 P.2d 673, 674 (Cal. 1964) (noting rationale for statutory rape laws lies in "social, moral and personal values"); *Ledbetter v. State*, 199 S.W.2d 112, 113 (Tenn. 1947) (stating that Tennessee's statutory rape law was intended to "protect the purity of young women").

74. See Kitrosser, *supra* note 70, at 312–13.

75. Oberman, *supra* note 9, at 26.

76. Donald H. Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH. & LEE L. REV. 43 (1965).

rape and robbery, and one for attempted rape and highway robbery. All of these men were Negroes.”⁷⁷ Yet, during that same period of time, over 1200 white men were convicted of committing rape, attempted rape, and statutory rape, although none suffered the fate of their black male counterparts.⁷⁸ Such statistics reveal the powerful purchase of race not only in the sentencing of rape cases, but also exposes social and cultural cognitive biases about sex and race in the United States.

2. STATUTORY RAPE: A STORY ABOUT BLACK MALE CULPABILITY

Partington exposed an open secret: race matters in the prosecution of sexual offenses. For example, Virginia, Georgia, Mississippi, Alabama, and Louisiana enacted race-specific rape laws (as did other states), which specifically mandated tougher sentencing against black males convicted of raping (or attempting to rape) white women.⁷⁹ Notably, some rape laws excluded black women as potential victims: *by law they were “unrapable.”*⁸⁰ Such rape codes later became race neutral through amendment or repeal, but the die was cast to some extent as extralegal consequences (i.e. lynching and public torture) suffered by black males became socially and legally normalized, and racial stereotypes aggravating white fear remained. Emmett Till’s murder serves as a most salient legal example; in 1955, his assailants, Roy Bryant and J.W. Milam, were acquitted of the fourteen-year-old’s murder.⁸¹ Local law enforcement, including the town’s sheriff, H.C.

77. *Id.* at 43.

78. *Id.* Historically, Virginia distinguished penalties for rape by race. The 1860 *Code of Virginia* provided:

If any white person carnally know a female of the age of twelve years or more, against her will, by force, or carnally know a female child under that age, he shall be confined in the penitentiary not less than ten nor more than twenty years.

If a free negro commit any offense listed in the above section or attempt by force or fraud to have carnal knowledge of a white female, he shall be punished, at the discretion of the jury, either with death, or by confinement in the penitentiary not less than five nor more than twenty years.

Id. at 50. The rape codes were subsequently amended. *Id.* Yet race disparities in sentencing persisted for more than a century after. *Id.* at 50–52.

79. *See, e.g., id.* at 50 (describing such a statute enacted in Virginia).

80. *See* GUNNING, *supra* note 60, at 10; Steven Schlossman & Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65 (1978) (documenting the disparate treatment of girls and racial prejudices that pervaded sex codes).

81. EMMETT TILL MURDER.COM, <http://www.emmettillmurder.com/> (last updated Oct. 15, 2012) (providing general information of the murder and excerpts of the trial transcript).

Strider, rallied for the assailants and celebrated their acquittal because, as they explained, the teenager had to be punished for whistling at a white woman.⁸² Milam and Bryant's confession to the crime, published in *Look*, illumed a 1950s cultural reality:

Well, what else could we do? He was hopeless. I'm no bully; I never hurt a nigger in my life. I like niggers—in their place—I know how to work 'em. But I just decided it was time a few people got put on notice. As long as I live and can do anything about it, niggers are gonna stay in their place. . . . And when a nigger gets close to mentioning sex with a white woman, he's tired o' livin'. I'm likely to kill him. Me and my folks fought for this country, and we got some rights. I stood there in that shed and listened to that nigger throw that poison at me, and I just made up my mind. "Chicago boy," I said, "I'm tired of 'em sending your kind down here to stir up trouble. Goddam [sic] you, I'm going to make an example of you—just so everybody can know how me and my folks stand."⁸³

The tragedy of Till's death placed an international lens on the chaos of race and sex in the United States, in part because Mamie Till Mobley, Till's mother, permitted photographers to capture images of her son's brutalized and tortured body, which suffered under unrestrained attack inflicted by Milam and Bryant until the boy's face lost any semblance of proportion, shape, or recognition.⁸⁴ The *Look* article further exposed deeply entrenched views about black male sexuality and many readers commended the editors for their courage in publishing the article. Particularly interesting were the letters to the editor following the article's publication. Two in particular stand out:

Roy Bryant and J. W. Milam did what had to be done, and their courage in taking the course they did is to be commended. To have followed any other course would have

82. See *The Murder of Emmett Till*, PBS, http://www.pbs.org/wgbh/amex/till/peoplevents/p_strider.html (last visited Mar. 27, 2013) ("After the verdict was announced, Strider publicly congratulated the defendants."). Strider was particularly outspoken in his racist beliefs, telling reporters: "We never have any trouble until some of our Southern niggers go up North and the NAACP talks to 'em and they come back home. If they would keep their nose and mouths out of our business we would be able to do more when enforcing the laws of Tallahatchie County and Mississippi." *Id.*

83. See William Bradford Huie, *The Shocking Story of Approved Killing in Mississippi*, *LOOK*, Jan. 24, 1956, at 46, 50 (quoting J.W. Milam).

84. Douglas O. Linder, *The Emmett Till Murder Trial: A Chronology*, U. MO.-KAN. CITY, <http://law2.umkc.edu/faculty/projects/ftrials/till/emmettillchrono.html> (last visited Feb. 18, 2013).

been unrealistic, cowardly and not in the best interest of their family or country.

—Richard Lauchli, Collinsville, Illinois⁸⁵

I want to cancel my subscription to your magazine at once. I will not have my home contaminated with . . . filthy, dishonest articles

—Mrs. W.R. Prevost, Utica, Mississippi⁸⁶

The Till case marks a bygone era where overt forms of racial anxiety emerged more frequently than not in the South. Yet, residue from that legacy surfaced to the national fore in the 2004 Georgia Supreme Court decision in *Dixon v. State*⁸⁷ and more recently in *Humphrey v. Wilson*,⁸⁸ which cemented Genarlow Wilson's conviction for engaging in oral sex with a classmate.⁸⁹ Wilson's conviction resulted in a mandatory ten-year prison sentence.⁹⁰

The *Wilson* and *Dixon* cases serve as representative examples. Both cases involved black male high school honor students who engaged in consensual sexual contact with fifteen-year-old white, female classmates.⁹¹ One powerful critique of statutory rape prosecutions is that the cases are subject to police and prosecutorial discretion, which often disfavors black males, and judges may be less sympathetic to black male defendants accused of sexually violating white women.⁹² Ironically, during the time of Wilson's trial, a parallel case involving Kari McCarley, a white high school teacher, occupied another chamber in the same judicial building.⁹³ McCarley's case reached a dramatically different result, however, as Douglas County Judge Robert James Baker sentenced the twenty-seven-year-old schoolteacher to three years of probation and ninety days in jail.⁹⁴ Her statutory-rape victim whom she had sex with on several occasions was a seventeen-year-old male student who attended the school where she taught.⁹⁵

85. *Killers' Confession*, PBS, http://www.pbs.org/wgbh/amex/till/sfeature/sf_look_letters.html (last visited Feb. 19, 2013).

86. *Id.*

87. 596 S.E.2d 147 (Ga. 2004).

88. 652 S.E.2d 501 (Ga. 2007).

89. *Id.* at 502.

90. *Id.* at 502–03.

91. *Wilson*, 652 S.E.2d at 502; *Dixon*, 596 S.E.2d at 148; Chanda R. Thomas, *Why Is Genarlow Wilson in Prison?*, ATLANTA, Jan. 2006, at 64, 67–69.

92. *See, e.g.*, Partington, *supra* note 76, at 56–57.

93. Thomas, *supra* note 91, at 144.

94. *Id.*

95. *Id.*

The racialized roots of rape law in the United States materialize in norms other than *who* is targeted for prosecution. For example, Linda M. Williams recounts in *Race and Rape: The Black Woman as Legitimate Victim* that the American legal system “treats white and black rape victims differently,” acknowledging sexual harms committed against the former while denying the same to the latter.⁹⁶ Williams refers to this as “neutralizing” the sexual assaults targeted at black women.⁹⁷ Levine echoes this point when she describes the SRL campaign in California and other states as also being rooted in an economic interest—rather than purer criminal justice concerns for black women.⁹⁸ She recounts that by “linking race to illegitimacy in [legislative] discussions about welfare, . . . policymakers recast their concern,” associating the economic costs of unmarried sex and teen pregnancy with rape.⁹⁹ The concern was twofold, according to Levine: lawmakers feared “the African-American population would inflict unnecessary suffering on White-American society” through overpopulation, thereby “swamping the nation with crime, disease, mental disability, and assorted other evils or character defects,” and draining economic resources.¹⁰⁰

Thus, race and sex intersected in the promulgation of SRL by mid-century in ways that on the one hand perpetuated racial stereotypes dating back to and rooted in slavery about black men as irresponsible, degenerate, and hypersexualized,¹⁰¹ or as Senator Tillman proselytized to members of Congress, whites in the south lived in fear among “a black flood of semi-barbarians.”¹⁰² On the other hand, black women became the convenient scapegoats for economic crises experienced in states like California, their fertility became subject of state intervention across a set of spheres, and rape codes were strategically deployed to answer the problem.¹⁰³ For this reason, in California, welfare agencies became principal reporters for statutory rapes.¹⁰⁴

96. LINDA MEYER WILLIAMS, NAT'L INST. OF MENTAL HEALTH, RACE AND RAPE: THE BLACK WOMAN AS LEGITIMATE VICTIM (1986) (on file with author).

97. *Id.* at 8–10.

98. Levine, *supra* note 6, at 1066–68.

99. *Id.* at 1067.

100. *Id.*

101. See GUNNING, *supra* note 60, at 3–6.

102. See 41 CONG. REC. 1441 (Jan. 21, 1907) (statement of Sen. Benjamin Tillman).

103. See Levine, *supra* note 6, at 1068–69.

104. *Id.* at 1068.

3. STATUTORY RAPE: A STORY ABOUT CHILD SUPPORT AND ECONOMIC INTERESTS

In 1963, about seventy-five percent of California's statutory rape complaints "concerned African-American defendants."¹⁰⁵ According to Levine, the investigations and prosecutions of black men became directly linked to welfare-initiated complaints by social workers.¹⁰⁶ As a result, blacks were more often arrested and charged than whites for SRL violations, and importantly, those arrests offer a false analysis about crime generally and rape specifically—as that data has tended to be paraded to show that black males commit more crimes of sexual aggression than other ethnic groups, black girls are more likely to be the victims of unwanted sex intimacy,¹⁰⁷ children from single parent homes are more likely to be the victims of statutory rape,¹⁰⁸ and poverty is a risk factor and indicator in statutory rape cases.¹⁰⁹

The race-focused agenda of SRL promulgation and enforcement, begs the questions: *How can researchers understand whether the data gathered over the last century about SRL and race offers anything valid? What valid information does the data provide?* The data may be technically accurate, but it is also dirty. Several problems underscore the relevance of these questions. For example, rape is a crime of coercion, violence, and opportunity. The word evokes a visceral response in men and women that includes loathing and disgust toward the perpetrator, as well as compassion and concern for victims. Rape evokes these emotions precisely because we understand it to be a crime of force against another, less powerful person.

4. CLASHING STORIES, CONFLICTING NORMS, AND FALLIBLE OUTCOMES

Nevertheless, California data suggests that some fraction of SRL arrests, charges, and prosecutions had little to do with the sexual victimization of anyone. The data suggests that some percentage—and without examining court records it is difficult to know—of black male "rapists" were not rapists at all. By instantiating welfare case managers as the front end interpreters of SRL, the state ensconced its economic

105. *Id.* at 1068–69.

106. *Id.*

107. See Kristin Moore & Jennifer Manlove, *A Demographic Portrait of Statutory Rape*, CHILD TRENDS (2005), <http://www.childtrends.org/files/conferenceonsexualexploitationofteenspresentation.pdf> (unpublished presentation to Conference on the Sexual Exploitation of Teens, Washington, D.C.).

108. *Id.*

109. *Id.*

responsibility to children in criminal law enforcement. In other words, it associated failure to pay child support with sexual violation and made that a crime.¹¹⁰ Given that approach, the outcomes were unsurprising to those skeptical about states' methods to address the issue, because that type of process produces other externalities, including reifying racial stigmas and stereotypes within the broader society and also law enforcement. Dirty data poses other problems too to the extent that cognitive biases emerge based on how people read and understand crime statistics. For example, race-based prosecutions provide the false assurance that statutory rape is a crime committed primarily by racial minorities.

Deputizing case managers as interpreters of SRL may lead to other unintended, fallible outcomes and produce conflicts of interests not only for consenting sex partners, but also for victims of rape. In California, it likely created disincentives for mothers needing child welfare assistance to apply if they feared criminal implications for their boyfriends, because receiving welfare benefits required "naming" the father. The California process introduced quid pro quo exchange and untenable bargaining and bartering to receiving basic dietary necessities for babies. In this process, quite possibly rape victims received the short end of the stick to the extent that cases were easily conflated and the primary interest of the state was economic and not in caring for the victim by providing counseling and support services.

Some teen recipients receiving welfare benefits may have been rape victims; that is not implausible. It may be likely. Instances involving adult men in their twenties and thirties fathering children born to teenage mothers build a stronger case of legitimate prosecutions of statutory rape. An excavation of that data, buttressed against the California rape statistics sheds a different light on statutory rape in California. In other words, girls deemed "legal" victims by technical application of the law, may have been the consensual participants in sexual acts much like "victims" in the Dixon, Wilson, J.L., and other cases.

C. Punishing Children as Adults: The Supply and Demand for Criminal Law

Victoria Nourse recently commented that there is an "oversupply" of criminal law.¹¹¹ Her observation bears pragmatic consideration, as SRL represents one area where too much law may undercut justice,

110. Levine, *supra* note 6, at 1067.

111. Victoria Nourse, *Schedule*, *Wisconsin Law Review Symposium: October 19–20, 2012*, U. WIS. L. SCH. (Oct. 19, 2012), <http://law.wisc.edu/lrs/schedule.html>.

promote perverse social norms, and produce a false sense of security among parents who believe their children are safer because of such laws. Indeed, policy makers and child welfare advocates interested in reducing the incidence of child abuse and prosecuting pedophiles ought to be concerned about the rise in children convicted as rapists and registered as sex offenders.¹¹² States now apply SRLs in an unprecedented manner against youth involved in consensual sex. One author frames the scope of the problem in this way:

Wisconsin middle and high schools are filled with serious sex offenders and their victims. Yet likely these offenders are unaware they are guilty of serious felonies and few victims are aware of their victimization. Wisconsin's statutory rape laws are unusual in that they prohibit not only sexual conduct between an adult and an underage partner but also criminalize all sexual conduct involving underage persons, even when that conduct involves peers and is fully consensual.¹¹³

Several interdependent, overlapping forces contribute to this new era. For example, timing matters: high profile child abductions,¹¹⁴ spurring the advent of aggressive sex offender laws,¹¹⁵ reforms in

112. Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act, H.R. 3355, 103d Cong. § 170101 (1994).

113. Daryl J. Olszewski, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693 (2006).

114. These include the stories of Jacob Wetterling, Adam Walsh, Megan Kanka, and Jeffrey Dahmer's many victims. See *How We Began and the Need for Transition*, JACOB WETTERLING RES. CTR., <http://www.jwrc.org/WhoWeAre/History/tabid/128/Default.aspx> (last visited Feb. 15, 2013) (discussing Jacob Wetterling, an eleven-year-old boy abducted by a masked gunman in 1989 and Wetterling has never been found); *Jeffrey Dahmer*, BIOGRAPHY, <http://www.biography.com/people/jeffrey-dahmer-9264755?page=1> (last visited Feb. 16, 2013) (detailing the life and victims of serial killer Jeffrey Dahmer); *Man Charged in 7-Year-Old Neighbor's Killing*, N.Y. TIMES, Aug. 1, 1994, <http://www.nytimes.com/1994/08/01/nyregion/man-charged-in-7-year-old-neighbor-s-killing.html?ref=megankanka> (reporting that a convicted sex offender was charged with murder for strangling seven-year-old Kanka, his neighbor); Pierre Thomas & Scott Michels, *Case Closed: Police ID Adam Walsh Killer*, ABC NEWS (Dec. 16, 2008), <http://abcnews.go.com/TheLaw/story?id=6471791&page=1> (discussing the 1981 abduction and murder of six-year-old Adam Walsh).

115. For example, the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act calls for states to implement a registry of sex offenders and those convicted of certain crimes against children. See TRACY VELÁZQUEZ, VERA INST., *THE PURSUIT OF SAFETY: SEX OFFENDER POLICY IN THE UNITED STATES* 3–4 (2008), available at http://www.vera.org/sites/default/files/resources/downloads/Sex_offender_policy_with_appendices_final.pdf. Amendments have been added to this Act, including a federal version of Megan's Law, passed in 1996, named after Megan Kanka, which requires states to establish a sexual offender community notification. *Id.* at 3.

SRL,¹¹⁶ tough-on-crime political campaigns,¹¹⁷ and welfare reform¹¹⁸ emerged to set a new family law agenda rooted in economic sanction and criminal punishment.¹¹⁹ Such policies continue to overlap and reveal what Levine describes as a multiple-headed hydra or “crime with multiple personalities,” manifesting in myriad ways and “many times in the past 150 years.”¹²⁰ The impact of these various campaigns on their target agendas vary at the state level. However, the collective force of SRLs’ effects on children engaging in consensual sex is undeniable.¹²¹ That is, the severity of the punishments levied against minors who engage in consensual sex *exceed* the criminal sanctions imposed a generation prior,¹²² because extralegal efforts intended to “catch,” punish, and shame adult predators now ensnare children who consent to sex.¹²³

Inherent in the framing of SRLs are legal suppositions about minors’ lack of capacity to provide consent for sex, which fail to comport with empirical data about adolescent sexuality and their capacity to formulate decisions of magnitude.¹²⁴ In other words, SRLs are rooted in the assumption—and bias—that sex with a minor is always coercive and the outgrowth of manipulation and deception, regardless of circumstance. The presumption is rarely open to rebuttal and, more importantly, reflects a destructive social fiction.

Consider the case *In re Ryan G.*,¹²⁵ which involved a thirteen-year-old boy who engaged in consensual sex with a twelve-year-old, seven months his junior.¹²⁶ In that case, the Ohio Court

116. Oliveri, *supra* note 48, at 468.

117. *Id.* at 474–77.

118. *Id.* at 468–71.

119. See Levine, *supra* note 6, at 1044 (noting that “[t]he statutory rape codes have been used at various times to reinforce fathers’ interests in their daughters’ marriageability, to protect young women’s chastity from seductive men, to control promiscuous or disease-laden adolescent females, to enhance child support collection efforts, to reduce teenage pregnancy, and to identify and punish sexual exploitation of teenagers”); Rich, *supra* note 5.

120. Levine, *supra* note 6, at 1044.

121. Olszewski, *supra* note 113.

122. Kay Levine’s research confirms this point, explaining that “[d]uring the latter decades of the twentieth century, the justice system’s interest in statutory rapes (and in their participants) waned considerably.” Levine, *supra* note 6, at 1070. According to the sturdiest evidence available in one data set, Levine found that in California “there were fewer than 500 arrests (on average) for statutory rape each year between 1982 and 1990.” *Id.* at 1071. By contrast, “these figures remained well below the statewide averages of thirty years earlier.” *Id.*

123. *Id.* at 1069–70.

124. *Id.* at 1084–85.

125. 6th Dist. No. E-01-027, 2002-Ohio-1520.

126. *Id.* ¶¶ 2–3.

of Appeals affirmed a lower court's discharge of the defendant's motion to dismiss:

[A]ppellant contends that . . . the legislature could not have intended that a juvenile is guilty of rape when he engages in consensual sex with another juvenile of roughly equal age but under the age of thirteen. However, the terms of the statute are clear, and the statute does not carve out an exception for consensual sex between parties of roughly equal age. Further, we cannot say as a matter of law that this result is unjust or absurd.¹²⁷

In fact, because prosecutors charged only one of the minors in that case (avoiding the conflict of both being victims and perpetrators of statutory rape), the court of appeals did not concur with the defendant that the result was absurd.¹²⁸ Other courts find that ruling persuasive.¹²⁹

1. STATUTORY RAPE LAW: A STORY ABOUT PEDOPHILES, NOT CHILDREN

Increasingly, the legislative and philosophical core of SRLs focuses on protecting vulnerable children from the manipulations of adults. Relevantly, at what costs do present policing efforts bring about reform? The elegant scholarship of Michelle Oberman and others make a plausible, if not compelling, case about protecting children from the untoward reaches of adults in positions of authority as well as strangers.¹³⁰ These concerns will continue to exist and thus vigilant efforts by states to “catch predators” who prey on children are neither the subject nor critique found in this Article.

In the last decade, state and federal lawmakers offered responses to high-profile sexual molestations of children by enacting new laws and revising preexisting legislation.¹³¹ Even nightly news programs take up this legal and social agenda by producing and telecasting programs, including *To Catch A Predator* on the National Broadcasting Channel

127. *Id.* ¶ 15.

128. *See People ex rel. J.L.*, 2011 SD 36, ¶¶ 7–8, 800 N.W.2d 720 (citing *In re Ryan G.*, 2002-OH-1520).

129. *Id.*

130. Oberman, *supra* note 9; Oberman, *supra* note 44.

131. In 2006, for example, Congress passed the Sex Offender Registration and Notification Act (SORNA), also known as the Adam Walsh and Child Protection Safety Act, which calls for increased registration requirements for the states. Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified at 42 U.S.C. §§ 16911–62 (2006)).

(NBC).¹³² The reality television/news program exploits Internet chat rooms and other online spaces, holding out fictitious girls (adult actresses and their production staff) as “bait” for shark-like male predators hovering in these spaces, eager to ply pubescent girls with alcohol and have sex.¹³³ Beyond questionable entertainment value, these telecasts influence legal outcomes.¹³⁴ In one rather large sting coordinated by NBC and local law enforcement involving over two dozen arrests, twenty-eight men pled guilty to lewd and lascivious conduct with a minor without going to trial.¹³⁵ The sensationalism of televised programs coupled with real-life aggravated sexual assaults committed by pedophiles capture the public’s fear and anxiety, which now results in intensive lobbying and “tough on crime” legislative and enforcement efforts. Not surprisingly, the onslaught of efforts to “catch a predator” produces unintended externalities that extend beyond efforts to entrap, arrest, and convict sexually deviant middle-aged men for lascivious intentions involving teenage girls, because the strict liability approach “catches” nonviolent, consenting teens. In fact, this new policing produces a satellite of restrictions, marking where and even how “offenders” will live, representing a departure from enforcement efforts of the past.

Aggressive state efforts to catch, punish, and forcefully monitor adults who commit violent, heinous sexual crimes against children overinclude to the extent that these regulations ensnare consenting adolescents, nonviolently exploring their sexuality.¹³⁶ *State ex rel. Z.C.*¹³⁷ provides a sharp example. In that case, Utah prosecutors brought charges against both children—the thirteen-year-old girl and the twelve-year-old boy—for consensually engaging in sex with each other.¹³⁸ Thus, while the image of a statutory rapist embedded on the public’s imagination (as well as that of legislators) might resemble the haggard image of a child

132. It is unclear whether such programs respond to demand or produce demand by cleverly manipulating public sentiment.

133. See Damien Gale, *Sailor Acquitted of Being a Paedophile after To Catch a Predator TV Show ‘Entrapped’ Him*, DAILY MAIL (London) (Aug. 18, 2011, 6:01 AM), <http://www.dailymail.co.uk/news/article-2027147/Joseph-Roisman-acquitted-paedophile-To-Catch-A-Predator-entrapment.html#ixzz2I584x7rA>.

134. See *id.*

135. See *id.* Joseph Roisman, the one defendant who demanded a trial, was acquitted as Judge Arthur Wick explained that prosecutors failed to prove the defendant possessed specific intent to have sex with a minor. *Id.*

136. See *In re Ryan G.*, 6th Dist. No. E-01-027, 2002-OH-1520; *People ex rel. J.L.*, 2011 SD 36, 800 N.W.2d 720; *State ex rel. Z.C.*, 2007 UT 54, 165 P.3d 1206.

137. 2007 UT 54, 165 P.3d 1206 (Utah 2007).

138. *Id.* ¶ 1.

abductor and murderer, like Ottis Toole,¹³⁹ defendants increasingly subject to the law's mandatory penalties are adolescents as young as eleven.

2. STATUTORY RAPE LAW: PUNISHING CONSENTING TEENS LIKE VIOLENT ADULTS

In recent years, all fifty states adopted mandatory reporting laws, requiring convicted sex offenders to register their addresses, places of employment, and other sensitive information.¹⁴⁰ Most states extend these requirements to minors. In some states, sex offenders must also regularly submit to lie detector tests,¹⁴¹ pay fees that cover the administrative costs of such programs,¹⁴² and relocate.¹⁴³ These matters have not only been left to the states—Congress too has responded to demand for more law in this domain, enacting the Sex Offender Registration and Notification Act (SORNA)¹⁴⁴ to provide a “comprehensive set of minimum standards for sex offender registration,” close “potential gaps and loopholes that existed under prior law,” and generally strengthen “the nationwide network of sex offender registration and notification programs.”¹⁴⁵

139. Ottis Toole, a serial killer, was identified as Adam Walsh's killer. *The Twisted Life of Serial Killer Ottis Elwood Toole*, FOXNEWS.COM (Dec. 16, 2008), <http://www.foxnews.com/story/0,2933,468144,00.html>.

140. U.S. DEP'T OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION 3, available at http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf (last visited Feb. 25, 2013).

141. See, e.g., WIS. STAT. § 51.375(2)(a) (2011–12); MINN. STAT. ANN. § 6093.3456(a) (West 2007).

142. See Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 TEMP. POL. & CIV. RTS. L. REV. 1, 8 (2004).

143. This is because there are often restrictions on where a sex offender can live, often prohibiting registrants from living in close proximity to anyplace where minors routinely gather, such as schools, parks, and playgrounds. See, e.g., ALA. CODE § 15-20A-11 (LexisNexis 2011); GA. CODE ANN. § 42-1-15 (Supp. 2012).

144. Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified at 42 U.S.C. §§ 16911–62 (2006)).

145. See SORNA, OFFICE OF JUST. PROGRAMS, <http://www.ojp.usdoj.gov/smart/sorna.htm>. Additionally, SORNA:

- Extends the jurisdictions in which registration is required beyond the 50 states, the District of Columbia, and the principal U.S. territories, to include also federally recognized Indian tribes.
- Incorporates a more comprehensive group of sex offenders and sex offenses for which registration is required.
- Requires registered sex offenders to register and keep their registration current in each jurisdiction in which they reside, work, or go to school.

TABLE 1
STATES' REQUIRED SEX OFFENDER REGISTRATIONS FOR MINORS¹⁴⁶

State	Required Juvenile Registration	Number of Juveniles Registered
Alabama	Yes	1594
Alaska	No	N/A
Arizona	Yes	Not Tracked
Arkansas	Yes	Not Tracked
California	Yes	Not Tracked
Colorado*	Yes	Not Disclosed
Connecticut	No	N/A
Delaware	Yes	Not Tracked
Florida	Yes	127
Georgia	No	N/A
Hawaii	No	N/A
Idaho	Yes	116
Illinois	Yes	1962
Indiana	Yes	Not Tracked
Iowa	Yes	295
Kansas	Yes	Not Tracked
Kentucky	No	NA
Louisiana**	Yes	91
Maine	No	N/A
Maryland	Yes	Unknown
Massachusetts	Yes	Not Tracked
Michigan	Yes	4392
Minnesota	Yes	2417

-
- Requires sex offenders to provide more extensive registration information.
 - Requires sex offenders to make periodic in-person appearances to verify and update their registration information.
 - Expands the amount of information available to the public regarding registered sex offenders.
 - Makes changes in the required minimum duration of registration for sex offenders.

Id.

146. NICOLE PITTMAN & QUYEN NGUYEN, A SNAPSHOT OF JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS: A SURVEY OF THE UNITED STATES (2011); Lauren N. Williams, *Kids on the Sex-Offender Registry: A Marie Claire Survey*, MARIE CLAIRE, Aug. 1, 2011, at 102, available at <http://www.marieclaire.com/world-reports/news/teens-on-sex-offender-registry>.

Mississippi	Yes	Not Tracked
Missouri	Yes	156
Montana	Yes	103
Nebraska	No and Yes (Minors who were convicted and are registered in other states must register upon relocation to the state. Juveniles convicted in Nebraska not required).	N/A
Nevada	No	N/A
New Hampshire	Yes—If required by court	Not Tracked
New Jersey	Yes	Not Tracked
New Mexico	No	N/A
New York	No	N/A
North Carolina	Yes	14
North Dakota	Yes	106
Ohio	Yes	1251
Oklahoma	Yes	Unknown
Oregon	Yes	2690
Pennsylvania	No	N/A
Rhode Island	Yes	152
South Carolina	Yes	923
South Dakota	Yes	69
Tennessee	No	N/A
Texas	Yes	3853
Utah	No and Yes (Required to register if offender entered the youth corrections system and remained there within thirty days prior to his or her twenty-first birthday)	N/A
Vermont	No	N/A
Virginia	Yes	Not Tracked
Washington**	Yes	424
West Virginia	No	N/A
Wisconsin	Yes	1515
Wyoming	No	N/A

*Colorado does not release numbers related to registered juveniles.

**This number does not include registered “offenders” who registered as juveniles, but who are now adults.

As demonstrated in the Table 1 above and Graph 1 below, most states require juveniles convicted of statutory rape to register as sex offenders. States that require registration do not distinguish between juvenile and adult registrants. Politicians argue that the registration process serves to warn communities about predators living among potentially vulnerable, “at-risk” children. According to this logic, all children who live in the vicinity of a sex offender are inherently “at risk” of sexual victimization.

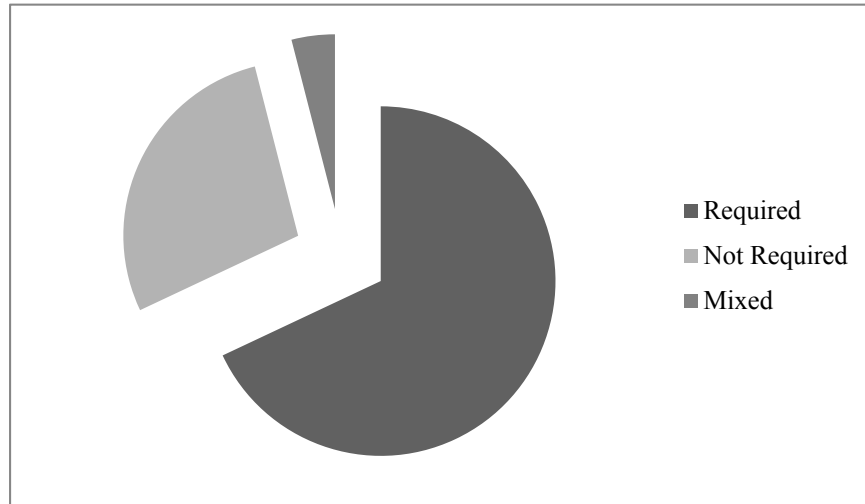
However, these laws do not distinguish consensual sex among minors from the heinous acts of adult rapists. Notice that SORNA and the legislation that inspired it, the Adam Walsh Child Protection and Safety Act, are legislative responses to carefully crafted activism and public awareness campaigns responding to the abduction of a seven-year-old boy by a middle-aged adult—possibly Otis Toole, who admitted to the crime,¹⁴⁷ or the notorious serial killer, Jeffrey Dahmer, who was placed at the abduction scene.¹⁴⁸ In either case, Toole and Dahmer (both now deceased)¹⁴⁹ are remembered as heinous, serial murderers—a far cry from preteens engaging in consensual sex.

147. Dan Harris & Claire Pederson, *Adam Walsh Murder: John and Reve Walsh Re-Live the Investigation*, ABC NEWS (Mar. 2, 2011), <http://abcnews.go.com/US/adam-walsh-murder-john-reve-walsh-live-investigation/story?id=13037931>.

148. David Smiley & Arthur Jay Harris, *Adam Walsh Murder Revisited: The Case against Jeffrey Dahmer*, MIAMI HERALD, Mar. 28, 2010, at A1.

149. Harris & Pederson, *supra* note 147; Don Terry, *Jeffrey Dahmer, Multiple Killer, Is Bludgeoned to Death in Prison*, N.Y. TIMES, Nov. 29, 1994, <http://www.nytimes.com/1994/11/29/us/jeffrey-dahmer-multiple-killer-is-bludgeoned-to-death-in-prison.html>.

GRAPH 1
STATES REQUIRING SEX OFFENDER REGISTRATION FOR MINORS¹⁵⁰



II. ADOLESCENT SEX: CAPACITY AND AUTONOMY

In a provocative set of articles and opinion editorials, former Washington, D.C. prosecutor Professor Paul Butler urges that juries should not convict defendants charged with certain drug related offenses. In the *New York Times*, he wrote, “[i]f you are ever on a jury in a marijuana case, I recommend that you vote “not guilty”—even if you think the defendant actually smoked pot, or sold it to another consenting adult.”¹⁵¹ He reminds readers and future jurors, “[a]s a juror, you have this power under the Bill of Rights; if you exercise it, you become part of a proud tradition of American jurors who helped make our laws fairer.”¹⁵² Butler’s controversial stance is in part rooted in his experience as a prosecutor where he observed abuses in prosecutorial discretion that often resulted in disparate punishments against Blacks and prioritizing convictions or “wins” over constitutional priorities, such as justice and fairness.

Similar claims and concerns about the abuse of prosecutorial discretion can be made in the case of statutory rape prosecutions involving consenting preteens and teens, because prosecuting SRL offenses are the low-hanging fruit for prosecutors. Indeed, keeping

150. *See supra* Table 1.

151. Paul Butler, *Jurors Need to Know That They Can Say No*, N.Y. TIMES, Dec. 21, 2011, at A39.

152. *Id.*

statutory rape as a strict liability offense means that the cases are more easily documented and prosecuted than typical rape cases.¹⁵³ That is, prosecutors need only prove the age of the parties and that the sexual activity in question occurred (this task is easiest when a pregnancy has occurred). By contrast, for a traditional rape charge, prosecutors must prove that intercourse was nonconsensual. At least one commentator has pointed out that the relative ease with which prosecutors can obtain convictions for statutory rape might lead to a decision not to charge more serious or equally serious crimes such as forcible rape or domestic violence that are more difficult to prosecute.¹⁵⁴

A. Children and Capacity to Consent

The most common and compelling justification for the enactment of SRLs is that children under a certain age are unable to consent to sexual relations in a meaningful and informed manner.¹⁵⁵ Empirical studies support this presumption to the extent that they provide sturdy evidence about brain development in adolescents. In other words, some studies demonstrate that parts of the brain responsible for “mature reasoning and self-control” do not fully develop until late adolescence.¹⁵⁶ Legislators turn to such data to make the case that adolescents are incapable of engaging in adult-like reasoning. Recent United States Supreme Court decisions trend in a similar direction.

In *Roper v. Simmons*,¹⁵⁷ the Supreme Court categorically rejected the death penalty as an option in the criminal sentencing of juveniles.¹⁵⁸

153. Oberman, *supra* note 9, at 37.

154. See Oliveri, *supra* note 48, at 502 (“Because statutory rape is a strict liability, age-based offense, prosecutors already may view it as an easy way to secure a conviction for a man who has committed other crimes that are harder to prove.”).

155. See Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1260 (1998).

156. Dorothy Otnow Lewis et al., *Ethics Questions Raised by the Neuropsychiatric, Neuropsychological, Educational, Developmental, and Family Characteristics of 18 Juveniles Awaiting Execution in Texas*, 32 J. AM. ACAD. PSYCHIATRY & L. 408, 409 (2004). Researchers Laurence Steinberg and Elizabeth Cauffman argue that while adolescents may engage in adult-like decision making, they often do not reach the “right” results. Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 251 (1996). According to Steinberg and Cauffman, adolescents’ decisions in a given situation differ from adults because of peer pressure and different perceptions of risk and time. *Id.* at 251, 266. Adolescents recognize the risks associated with their conduct but, unlike adults in comparable situations, often believe that other factors outweigh those risks. *Id.* at 259.

157. 543 U.S. 551 (2005).

Writing for the majority, Justice Anthony Kennedy opined that a “lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”¹⁵⁹ In a case heard three years earlier, *Atkins v. Virginia*,¹⁶⁰ the Court reached a similar conclusion about the mentally incompetent. There too, the Court ruled that executing the mentally incapacitated violated the Eighth Amendment prohibition of cruel and unusual punishment.¹⁶¹ As Justice John Paul Stevens wrote, “[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”¹⁶² Justice Stevens concluded that the American public, including legislators, scholars, and judges, thoroughly deliberated the issue and the “consensus” of those deliberations informed the Court’s rejection of the death penalty for the mentally delayed.¹⁶³

In other contexts, the law recognizes the “incapacities” of minors. For example, in the commercial context, children may disaffirm a contract because they are presumed to lack the capacity to contract.¹⁶⁴ Campaigns to reduce youth smoking and alcohol consumption suggest more than a medical concern prompts policy makers to engage in such debates. Legislators build the case in those domains that youth may be vulnerable to the persuasive coercion of sophisticated industries that target them. Ultimately these concerns center on whether youth can make sound decisions that may affect their health and well-being.

However, the legal capacity record is uneven at best when evaluating age correlation with adult activity. Marriage, which is implicitly considered an “adult or adult-like” activity, provides an interesting point of study. The age of consent for marriage was particularly low—as young as seven years old in Delaware in the late

158. *Id.* at 568. Prior to *Roper*, defendants could be executed on a case-by-case basis for committing crimes while age sixteen or above. *Id.* at 561; *id.* at 623–24 (Scalia, J., dissenting).

159. *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

160. 536 U.S. 304 (2002).

161. *Id.* at 321.

162. *Id.* at 306.

163. *Id.* at 306–07.

164. See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 4.2–4.4 (1990); Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law*, 10 U.C. DAVIS J. JUV. L. & POL’Y 275, 287–88 (2006). On a case-by-case basis, courts have deemed that minors have the capacity to contract in order to facilitate situations where a young actor is attempting to work out a deal with a studio or a young athlete is attempting to sign on to a professional sports team. *Id.* at 290.

1800s.¹⁶⁵ The age of consent for sex in most U.S. states in the 1880s hovered around ten years old.¹⁶⁶

Beyond sex, from medical decision making, including obtaining reproductive health care,¹⁶⁷ to driving cars and engaging in dangerous activities (e.g., hunting,¹⁶⁸ piloting,¹⁶⁹ driving boats¹⁷⁰), courts recognize that children possess the capacity to engage in adult-like activities and the law regulates that. This record exposes the muddled legal doctrine and jurisprudence connecting age to capacity. In fact, researchers, including Jean Piaget, have found that children develop adult-like reasoning abilities by age fifteen.¹⁷¹

However, I think the wrong question is being asked. The question should not be in the case of minors who consent with minors to have sex, whether they think like adults or have the capacity to do so. Rather, borrowing from tort law, the better questions relate to the reasonableness of their actions within their cohort. Does one adolescent think like other reasonable adolescents? How do adolescents think? From a public policy standpoint, these are empirical questions answered by a fact-based

165. See *Purity Congress Meets: A Great Gathering for Moral Work in the City of Baltimore*, N.Y. TIMES, Oct. 15, 1895, <http://query.nytimes.com/mem/archive-free/pdf?res=9B01EEDC113AE533A25756C1A9669D94649ED7CF>.

166. Stephen Robertson, *Age of Consent Laws*, CHILD. & YOUTH HIST., <http://chnm.gmu.edu/cyh/teaching-modules/230> (last visited Feb. 18, 2013) (“In the U.S., each state determined its own criminal law and age of consent ranged from 10 to 12 years of age. U.S. laws did not change in the wake of England’s shift. Nor did Anglo-American law apply to boys.”).

167. See Oberman, *supra* note 44, at 704.

168. The majority of states allow minors to hunt; some require junior licenses or adult supervision. See *Fishing, Hunting & Wildlife: Minimum Hunting Age Statutes*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/env-res/minimum-hunting-age-statutes.aspx> (last updated July 2011). In Minnesota, for example, a twelve-year-old can hunt big game if they have a hunter education certificate (no supervision appears to be required if the minor has this certificate). *Id.*

169. At sixteen, teens are eligible for a student pilot certificate to fly an aircraft, with which they can fly solo. *Become a Pilot—Student Pilot’s Certificate Requirements*, FAA, http://www.faa.gov/pilots/become/student_cert/ (last modified Jan. 29, 2010). At fourteen, a teen is eligible for a student certificate to pilot a glider or a balloon. *Id.*

170. In Michigan, for example, minors twelve years old and older can operate certain watercrafts with appropriate certification, training, and supervision. MICH. DEP’T NATURAL RES., THE HANDBOOK OF MICHIGAN BOATING LAWS AND RESPONSIBILITIES 26–27 (2013), available at http://www.boat-ed.com/assets/pdf/handbook/mi_handbook_entire.pdf. At sixteen, they can operate a boat or personal water craft without supervision. *Id.* In Minnesota, twelve to seventeen-year-olds with a watercraft operator’s permit may operate watercrafts (except personal watercrafts) over twenty-five horsepower without supervision. *Boat Safety*, MINN. SAFETY COUNCIL (2013), <http://www.minnesotasafetycouncil.org/facts/factsheet.cfm?qs=CE40426F010C13B422950D0A0E9BB1D0>.

171. JEAN PIAGET & BÄRBEL INHELDER, THE PSYCHOLOGY OF THE CHILD 130–51 (Helen Weaver trans., 1969); Cunningham, *supra* note 164, at 282.

inquiry and not per se rules. Data from recent empirical studies provide sturdy ground for rethinking how the question regarding adolescent consent to sex should be regarded in the law.

One health care study conducted by Lois Weithorn and Susan Campbell found that fourteen-year-olds make health-related decisions in the same way as young adults.¹⁷² Specifically, they compared the decision-making ability among young adults, adolescents, and children, and found that, in contrast to the nine-year-olds, the fourteen-year-old adolescents reasoned about medical decisions largely the same way as the young adults. According to their results, children as young as nine appeared able to participate meaningfully in their health care decisions.¹⁷³ The investigators stated that their findings are consistent with Jean Piaget's cognitive development theory, which asserts that by early teen years minors have acquired formal operational thinking that allows them to reason hypothetically.¹⁷⁴ The authors concluded that their results support recognizing adolescents' rights to self-determination in health care situations.¹⁷⁵ Weithorn and Campbell's findings confirm earlier research that "there is little evidence that minors of age 15 and above as a group are any less competent to provide consent than are adults."¹⁷⁶

This research exposes tensions within the medical-legal domain. If children lack the capacity of adults, why punish them as or like adults for consensual sexual contact? And, if children possess adult-like reasoning capacities, why criminally prosecute and punish them for engaging in activities otherwise legal for adults?

At best, however, law is inconsistent in its treatment of children. In other words, in many areas of life, where important decisions are to be made about health and safety, young adolescents are permitted to make adult decisions.¹⁷⁷ For instance, the Supreme Court held that requiring a minor girl to obtain the consent of both parents prior to obtaining an abortion is unconstitutional.¹⁷⁸ The Court declared that while a state may require parental notification or even parental consent of one or both

172. See Rhonda Gay Hartman, *Adolescent Autonomy: Classifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1320 (2000) (citing Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1589 (1982)).

173. Weithorn & Campbell, *supra* note 172, at 1595–96.

174. *Id.* at 1590, 1595–96.

175. *Id.* at 1595–96.

176. See Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOL. 412, 423 (1978).

177. See Cunningham, *supra* note 164, at 319, 354.

178. *Belotti v. Baird*, 443 U.S. 622, 651 (1979); *Belotti v. Baird*, 428 U.S. 132, 133–34 (1976).

parents prior to a minor's obtaining an abortion, the minor must be permitted the opportunity to bypass that requirement in a judicial hearing, known as the "judicial bypass."¹⁷⁹ In that hearing, the minor would be permitted to demonstrate either sufficient maturity to make the abortion decision on her own, or that, despite her immaturity, it was in her best interests to undergo the procedure.¹⁸⁰

Similarly, during the 1960s, states enacted "mature minor laws" that permit adolescents to consent to medical procedures.¹⁸¹ Currently, all jurisdictions permit unemancipated minors ranging in age from fourteen to seventeen to consent to care for sexually transmitted diseases.¹⁸² Additionally, many states' minor treatment statutes permit minors to consent to treatment for alcohol and substance abuse and to psychiatric care.¹⁸³

B. Sex Distinctions: Girls and Inherent Vulnerability

Some of my colleagues working in feminist jurisprudence might take issue with the underlying theory of this Article and possibly its claims. For example, even if sympathetic to the Article's factual and empirical presentations, some may compellingly argue that girls nevertheless need protection of the kind only provided by SRL. In other words, a minor's consent cannot be taken at face value even if it involves sexual intimacy with another minor. Or that to the extent that girls claim *voluntary participation* in sexual activity, whether through sex, sexting, or other intimate conduct, their reasoning capacities to make such important decisions are diminished by "false consciousness," because girls are unable to cognitively internalize sexual coercion, exploitation, social oppression, and societal insubordination within the larger society.

Thus, some commentators argue that statutory rape laws are necessary because the state has a responsibility to protect young women from sexual exploitation. This protection is necessary, according to Oberman, because young women are inherently more vulnerable to coercion during their adolescent years.¹⁸⁴ These assertions are based on research showing 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."¹⁸⁵ Oberman distinguishes

179. *Belotti*, 443 U.S. at 643–44; Oberman, *supra* note 9, at 51.

180. *Belotti*, 443 U.S. at 643–44.

181. Oberman, *supra* note 9, at 46–53.

182. *Id.* at 48.

183. *See, e.g.*, 410 ILL. COMP. STAT. ANN. 210/4 (West 2011).

184. Oberman, *supra* note 9, at 53.

185. *Id.* at 55–56.

legal rules that permit adolescent access to contraception from their ability to consent to sexual activity, arguing “laws permitting minors access to emergency care, contraception, and abortion are narrow exceptions . . . justified by virtue of necessity, not by the actual maturity of minors.”¹⁸⁶ Oberman and others claim that fear, confusion, peer pressure, and a desire for male attention are factors that make teenage girls particularly susceptible to coercion and abuse in sexual encounters.¹⁸⁷ Ultimately, “[e]vidence that girls consent to sex for foolish and mistaken reasons (e.g., that sex will earn them male approval and acceptance) should lead to the conclusion that girls lack the capacity for meaningful consent.”¹⁸⁸

Such persuasive arguments deserve attention in light of data that confirm the vulnerability of all youth to peer pressure. The modern-day social consequences of peer pressure may be quite severe, leading to self-inflicted harms from cutting to suicide and this should not be overlooked. However, the most nuanced answers to those dynamics, which may disproportionately impact girls (e.g., bulimia, anorexia, body image anxiety), demand more thought than the enactment and enforcement of SRLs. Punishing boys (or girls) for the dynamics that arise based on factors in the home, school, extended family, and local communities misplaces responsibility and frequently amounts to targeting scapegoats. In fact, figuring our way out of this quagmire requires more heavy lifting than strict liability legislative rules.

The challenge for feminists of varying camps will be avoiding double standards, pretense, and hypocrisy within the movements for rights, equality, justice, and fairness with regard to sex. In other words, false consciousness and broad-scale female vulnerability arguments deny the agency of young women, creating a strange double-bind that on one end demands that girls and young women be taken seriously across various social, economic, academic settings, and even sexual contexts, and on the other end firmly entraps them in victimology. For example, such a view accords greater respect to the “autonomy and rational decision-making powers” of young males than that of young females.¹⁸⁹ This lopsided treatment manifests most starkly in cases involving male victims of statutory rape who are forced to pay child support from the resulting pregnancy.¹⁹⁰

186. *Id.* at 53.

187. *See* Oberman, *supra* note 44, at 709.

188. Oberman, *supra* note 9, at 69.

189. Sutherland, *supra* note 8, at 321.

190. *See, e.g., State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273 (Kan. 1993); *In re J.S.*, 550 N.E.2d 257 (Ill. App. Ct. 1990). Moreover, several states retain statutory rape statutes that apply only to the conduct of males. *See generally* Ellen London, Comment,

Scholars urging reform in SRL caution that casting girls as victims of their sex deprives young women “control over [their] own sexual autonomy.”¹⁹¹ Importantly, such views do not comport with contemporary trends, where adolescent girls proactively demonstrate their capacity to confront bias, overcome discrimination, dominate in sports, govern organizations, manage businesses, and excel academically. In other words, framing girls as incapable and victims ignores the many ways in which girls engage in intentional activities that deceive, corrupt, harm, and manipulate others.

Problematically, a cohort of feminists would like to cling to both concepts of girls—as vulnerable victims in need of more protection than their parents can offer, ergo the demand for state protection to protect them from themselves—and the conception of girls as credible—a class deserving serious consideration and respect in all manners ranging from opportunities in sport and education to the workplace, but not sex. Yet this is a mishmash ill served for the law to work out. Inevitably, the double-edged sword is inescapable and women’s credibility will be implicated. In other words, the lack of capacity argument and the age of consent theory are dangerous trump cards, because even in cases involving consent that might be initiated by girls, they will always escape punishment.

III. MODERN STORY OF TEENS AND SEX

Of the many stories that can be told about SRL, one of the most relevant relates to its public fictions and hidden truths relating to teen sexuality. One example of its public fiction relates to welfare reform. At the height of welfare reform efforts in 1995, the Alan Guttmacher Institute released a study on teen pregnancy, which included statistics that were used by advocates of stricter enforcement of statutory rape laws.¹⁹² The report stated that sixty-five percent of teen mothers birthed children by men who were twenty or older.¹⁹³ SRL proponents championed this data as evidence that statutory rape was a major cause of teenage pregnancy.¹⁹⁴

In light of what appeared to be sturdy, compelling data connecting teen pregnancy with illegal sex, SRL proponents argued for stricter enforcement of rape codes, urging that such measures would prevent

A Critique of the Strict Liability Standard for Determining Child Support in Cases of Male Victims of Sexual Assault and Statutory Rape, 152 UNIV. PA. L. REV. 1957 (2004).

191. Oliveri, *supra* note 48, at 484; *see also* Guerrina, *supra* note 155, at 1261.

192. Landry & Forrest, *supra* note 43.

193. *Id.* at 160.

194. *See* COCCA, *supra* note 6, at 96; Donovan, *supra* note 43, at 30.

adult men from “prey[ing]” on minor women for fear of criminal prosecution and as a result there would be fewer teenage pregnancies, and thus lower state and federal expenditures on welfare and health care benefits.¹⁹⁵ On inspection, however, the statutory rape data was misleading. For example, sixty-two percent of the fifteen to nineteen-year-olds in the study were adult-age teenagers, eighteen- or nineteen-years-old.¹⁹⁶ The case built by lawmakers, based on that data, was a hollow house of cards. In other words, linking statutory rape to those pregnancies provided political leverage to maximize an economic agenda on welfare reform, however that strategy also misled the public.¹⁹⁷

Other fictions dominate social and legal notions about teen sex; some of those fictions are explained in Parts I and II. Part III briefly explores hidden truths about teen sexuality. It unpacks empirical data that recasts the story about teen sexuality, debunking myths about *virtuous young women*, while also taking account of trends in teen sex. It turns out that red, Republican-led states experience higher rates of teen sexuality than blue-state, Democratic jurisdictions. In those states, teens are more likely to become pregnant and give birth out of wedlock. Part III explains that youth sexuality is an undeniable aspect of American culture. Data collected by the Centers for Disease Control (CDC), reproduced here, provides a fairly sturdy empirical view into teen sexuality.¹⁹⁸ The data presented provides the most recent framing about teen sex. Subsection A presents the data and Subsection B scrubs the data, examining trends and providing an analytical account.

A. Teen Sex

The CDC annually surveys and monitors six categories of “health-risk” behaviors among youth through its Youth Risk Behavior Surveillance System (YRBSS).¹⁹⁹ Youth sexuality ranks among the categories investigated as do alcohol and drug use, exercise, tobacco use, asthma, obesity, and violence.²⁰⁰ Among U.S. high school students surveyed in 2011 (the most recent data set), 47.4% “had ever had sexual

195. Donovan, *supra* note 43, at 30.

196. COCCA, *supra* note 6, at 96.

197. Donovan, *supra* note 43, at 30.

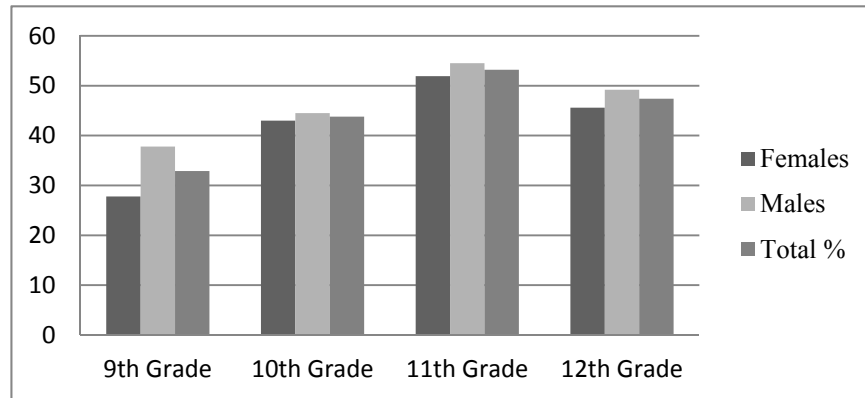
198. Danice Eaton et al., *Youth Risk Behavior Surveillance—United States, 2011*, MORBIDITY & MORTALITY WKLY. REP., June 8, 2012, at 1.

199. *Id.*

200. *Id.* YRBSS includes a national school-based survey conducted by CDC and state, territorial, tribal, and local surveys conducted by state, territorial, and local education and health agencies and tribal governments. *Id.*

intercourse.²⁰¹ Over 45% of female high school students have ever had sex and nearly 50% of high school males have experienced sexual intercourse.²⁰²

GRAPH 2
PERCENTAGE OF HIGH SCHOOL STUDENTS WHO HAVE EVER HAD SEX
BY GRADE²⁰³



The following graph and tables disaggregate this data by race, high school grade level, and by the percentage of individuals who had sex before the age of thirteen. To be clear, teens that have ever had sex are not “sexually active” teens per se, meaning that for this group, sex may have been a onetime, rather than regular occurrence. That said, the data provides a striking narrative about teen sexuality. Teen sexual experience is registered among all major ethnic groups in the United States. Nearly 30% of all Asian American high school teens have had sex: 26.5% of females and 32.3% of males.²⁰⁴ By contrast, 69% of Native American high school students have had sex: 69.2% of females and 68.7% of males.²⁰⁵

201. *Id.* at 110.

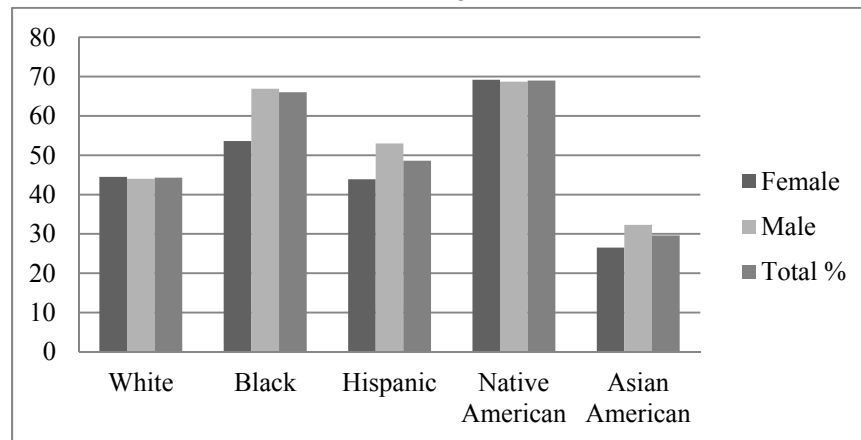
202. *Id.* Overall, 45.6% of female high school students and 49.2% of male high school students have engaged in sexual intercourse. *Id.*

203. *Id.*

204. *Youth Online: High School YRBS 2011 Results*, CDC, <http://apps.nccd.cdc.gov/youthonline/App/Results.aspx?TT=B&OUT=0&SID=HS&QID=H60&LID=LL&YID=2011&LID2=&YID2=&COL=S&ROW1=&ROW2=&HT=&LC T=LL&FS=&FR=1&FG=1&FSL=&FRL=&FGL=&PV=&TST=False&C1=&C2=&QP=G&DP=1&VA=CI&CS=Y&SYID=&EYID=&SC=DEFAULT&SO=ASC> (last visited Mar. 28, 2013) [hereinafter CDC Report] (data filtered to show data relating to “ever had sexual intercourse” and only Asian under race/ethnicity category).

205. *Id.* (data filtered to show data relating to “ever had sexual intercourse” and only American Indian or Alaska Native under race/ethnicity category).

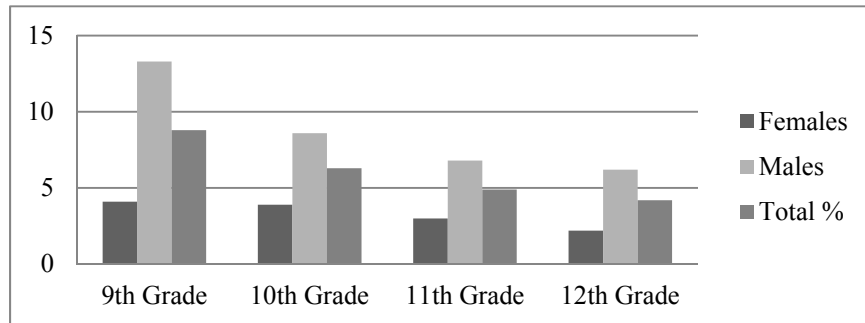
GRAPH 3
 PERCENTAGE OF HIGH SCHOOL STUDENTS WHO HAVE EVER HAD SEX
 BY RACE²⁰⁶



Pre- and early teens also report experiencing sexual intercourse. The percentage of high school students who report having sexual intercourse before thirteen is significantly lower by comparison to older teens. Yet, the data also indicates an upward pattern: high school teens are increasing their overall rate of early sexual intimacy. Notice in the data below that ninth grade males report having sex at more than twice the rate of their twelfth grade counterparts. Among females, similar trends are evidenced.

206. Eaton et al., *supra* note 198, at 110; CDC Report, *supra* note 204 (data filtered to show data relating to “ever had sexual intercourse,” and American Indian or Alaska Native and Asian under the race/ethnicity category). Among African Americans high school students, 53.6% of females and 66.9% of males reported having sex at least once. Eaton et al., *supra* note 198, at 110. This percentage is higher than among white high school students (44.5% of females and 44% of males report having had intercourse). *Id.*

GRAPH 4
 PERCENTAGE OF HIGH SCHOOL STUDENTS WHO HAD SEX BEFORE AGE THIRTEEN BY GRADE²⁰⁷



A breakdown of the data places this even more in context. Overall, 8.8% of high school ninth graders report having sex prior to age thirteen.²⁰⁸ This is twice the total percentage of high school seniors who report having sex; only 4.2% of twelfth graders had experienced sex by age thirteen.²⁰⁹ Nearly twice as many female ninth graders reported having sex prior to thirteen as compared to twelfth graders (4.1% and 2.2% respectively).²¹⁰

TABLE 2
 PERCENTAGE OF HIGH SCHOOL STUDENTS WHO HAD SEX BEFORE AGE THIRTEEN BY GRADE²¹¹

Grade	Female	Male	Total %
9th Grade	4.1	13.3	8.8
10th Grade	3.9	8.6	6.3
11th Grade	3.0	6.8	4.9
12th Grade	2.2	6.2	4.2

Trends among ethnic populations also emerge on close inspection.²¹² Notice that across all ethnic groups, with the exception of Native Americans, males report a first sexual experience prior to age thirteen at a rate twice or more than that of the female cohort within their

207. Eaton et al., *supra* note 198, at 110.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *See infra* Table 3.

ethnic community.²¹³ Hispanic males are more than three times more likely to have had sex prior to age thirteen than Hispanic females.²¹⁴ For white youth, the disparity is double. That is, white males report a first sexual experience prior to thirteen at twice the rate of females.²¹⁵ Among blacks, the gap is threefold; black females are three times less likely to have had sex before age thirteen than their male counterparts.²¹⁶ That trend is mirrored in Asian populations, although Asian American teens are the least likely among all groups to have had sex prior to thirteen.²¹⁷

Other trends are apparent. For example, black males are more likely to have had sex by age thirteen than any other ethnic population.²¹⁸ By comparison, they are nearly twice as likely as Hispanic males to have had sex by thirteen and nearly four times more likely than their white counterparts.²¹⁹ This data helps to answer some questions related to the prevalence and introduction of teens to sex. The gender aspect is worth deeper inspection and consideration as prosecutions for violation of SRL tend to focus on males. However, CDC records demonstrate younger patterns of male sexual activity that do not correspond with same age female sexual activity within their ethnic population.²²⁰ This raises questions about with whom the young men first encounter sex, the frequency of those sexual encounters, the age of the persons with whom they have sex, and whether the sexual encounter was consensual.

TABLE 3
PERCENTAGE OF HIGH SCHOOL TEENS WHO HAD SEX BEFORE THIRTEEN
BY RACE²²¹

Ethnicity	Female	Male	Total %
Hispanic	2.9	11.1	7.1
White	2.6	5.2	3.9
Black	7.0	21.2	13.9
Asian	1.5	6.6	4.2
Native American	9.4	11.9	10.7

213. *See id.*

214. *See id.*

215. *See id.*

216. *See id.*

217. *See id.*

218. *See id.*

219. *See id.*

220. *See id.*

221. Eaton et al., *supra* note 198, at 110; CDC Report, *supra* note 204 (data filtered to show data relating to “had sexual intercourse for the first time before age 13 years,” and American Indian or Alaska Native and Asian under race/ethnicity category).

Additional information can be gleaned and studied from the CDC data set. For example, geographic trends raise important questions for research in this field. Males in the southern states like Mississippi and South Carolina experience the highest rates of preteen sex (19.1% and 17.1%, respectively).²²² Preteen sex among girls does not map on the rate of boys. By comparison, in Mississippi and South Carolina, 4.8% and 3.9% of girls, respectively, experience sex before age thirteen.²²³

However, it would be a mistake to read the information gathered by the CDC to suggest that either early or frequent teen sex is a demographic issue contained to a specific ethnic population or region of the country. To the contrary, about 59% of high school students in Delaware report having sex, as did 51% of the high school students in Indiana, 45.1% in Maine, 47.9% in Wyoming, and 44.8% in North Dakota.²²⁴ These findings should complicate how we think about teen sex as it begs the question: What parents and legislators really know about teen sex?

B. What We Think We Know about Teens and Sex

That teens engage in sexually promiscuous acts, including full vaginal intercourse, is not unique to this modern era. Nor is legislative policing of that behavior a recent phenomenon. The data sheds light on hidden secrets of teen sex, which debunks suppositions embedded in SRL regulation, including conflicting narratives generally about frequency, demographics, and risky behavior associated with teen sexuality. The conflicting narratives relate to race, gender, class, and motivations for deploying SRL as a tool to get at teen sex.

Importantly, the CDC findings contradict how parents view and understand sexuality. An American Broadcasting Company (ABC) News survey investigating parental and teens attitudes on sex places this disconnect in context. About ninety percent of parents surveyed conveyed that they spoke with their teenagers about sex.²²⁵ By contrast, only forty nine percent believed that such a conversation ever took place.²²⁶ As one reporter wrote, “[c]learly, whatever the parents thought was a conversation about sex, the kids didn’t hear it that way.”²²⁷

222. Eaton et al., *supra* note 198, at 111.

223. *Id.*

224. *Id.*

225. See Gary Langer, *ABC News Poll: Sex Lives of American Teens*, ABC NEWS (May 19, 2006), <http://abcnews.go.com/Primetime/PollVault/story?id=1981945&page=1&page=1>.

226. *Id.*

227. *Id.*

A recent study conducted by Jacquelyn Tobey and others underscores this point.²²⁸ Tobey and her colleagues surveyed sex attitudes and communication in the Midwest.²²⁹ Their study included over 400 youth (African American, White, and Hispanic—its notable omissions were Asians Americans and, depending on the state, Native Americans).²³⁰ One finding that confirms general social assumptions: boys receive significantly less “sex talk” than girls.²³¹ Moreover, parents delay sex talk generally and engage in conversation after teens develop “promiscuous attitudes towards sex,” but inconsistently, if at all, before.²³²

Findings from Tobey’s study also debunk assumptions about race and parenting, and sex and alcohol/drug use. Despite the implicit story about race, sex, and parenting, which suggests African Americans fail to communicate “proper values” to their children, research corrects this misperception, offering a dramatically different account. African American parents hold more conservative views about sex than white parents, including on topics like premarital sex.²³³ African American fathers and mothers are more likely to communicate with their children about sex than their white counterparts.²³⁴ As Tobey notes, findings revealed that “African American adolescents . . . received significantly more communication from fathers than Caucasian adolescents, and Caucasian adolescents . . . received more communication from their fathers than Hispanic adolescents.”²³⁵ That said, fathers overall do not communicate with their children about sex at the rate of mothers.²³⁶ Communication matters as it may not only affect and shape attitudes about sex, but it may also provide counsel about risky behaviors that sometimes coincides with sex.

For example, data on alcohol or drug use associate with sexual intercourse among teens. White youth are more likely to use alcohol or

228. Jacquelyn Tobey et al., *Demographic Differences in Adolescents’ Sexual Attitudes and Behaviors, Parent Communication about Sex, and School Sex Education*, ELECTRONIC J. HUM. SEXUALITY (Dec. 3, 2011), <http://www.ejhs.org/volume14/Sexual%20attitudes.htm>.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *See id.*

234. *Id.*

235. *Id.*

236. *See* Ellen K. Wilson & Helen P. Koo, *Mothers, Fathers, Sons, and Daughters: Gender Differences in Factors Associated with Parent-Child Communication about Sexual Topics*, REPROD. HEALTH J. (Dec. 14, 2010), <http://www.reproductive-health-journal.com/content/7/1/31>.

drugs before sex than black and Hispanic teens.²³⁷ Nearly 30% of white males and about 19% of white females report using alcohol or drugs prior to sex.²³⁸ The CDC findings do not offer insight as to whether the use of alcohol prior to sex reduces the likelihood of condom use or leads to sex with more sexual partners in a particular setting or over time. For example, 46.4% of female high school students report that they did not use a condom during their last sexual intercourse.²³⁹ This percentage exposes a disparity in condom use between high school boys and girls. In that same grouping, 33% of high school males reported not using a condom during their most recent sexual encounter.²⁴⁰ In this cohort, Hawaii leads the nation: 56% of high school students did not use a condom during their last sexual encounter.²⁴¹ On average, close to 40% of U.S. teens did not use a condom during their last sexual encounter.²⁴² Qualitative data would help to fill in informational gaps in the study, including answering the question why girls across the U.S. ethnic spectrum are less likely to insist on condom usage during sex and why boys report greater frequency of condom usage. Again, given the significant disparities across similar grade and age, questions emerge about the sexual partners of these youth, the contexts in which they have sex, as well as their access to sexual education.

In other words, that 46.2% of black high school girls who have had sex report that a condom was not used during their last sexual encounter, but 24.6% black males report that they did not use a condom during their last sexual encounter,²⁴³ points to an information gap that deserves more significant study. For example, does the data point to power differentials in the sexual relationships structured between female teens and the persons with whom they have sex? Do female teens feel less empowered to demand that a condom be used during intercourse? Or is it, as early feminists warned, that coercive sex is masked by the false consciousness of consent?

A study published in the last decade may provide some insight on the gaps discovered in the CDC data between genders. Christine Kaestle's study on sexual intercourse and age differences between female adolescents and their sexual partners offers some answers.²⁴⁴

237. Eaton et al., *supra* note 198, at 28.

238. *Id.*

239. *See id.* at 114.

240. *See id.*

241. *See id.* at 115. Colorado teens report the most frequent use of condoms with 70.8% percent reporting the use of a condom during their last sexual encounter. *Id.*

242. *See id.*

243. *See id.* at 114.

244. Kaestle et al., *supra* note 22.

Kaestle and her coauthors note that among female adolescents with a romantic partner, 32.6% were in a relationship with someone who was two to three years older, 10.2% were in a relationship with someone who was four to five years older, and 5.3% were in a relationship with someone six or more years older.²⁴⁵ In essence, the greater the age difference, the more likely the female was to have had sexual intercourse with her partner.²⁴⁶ This study points to possible power gaps that trend along age differentials in sex. The data may also shed light on matters of trust—are girls more likely to be trusting of older sex partners?—and confidence—are teen girls less assured of themselves when having sex with older partners?

A final observation relates to the multiplicity of teen sexual partners. Just over 15% of high school students report having sex with four or more persons.²⁴⁷ Alabama leads the nation in teens who report having intercourse with four or more partners (22.8%) and several other states report similar findings, including Mississippi (22.1%) and South Carolina (21.3%).²⁴⁸ As stated earlier, these trends move upward; nearly 9% of ninth graders report having sex with four or more persons.²⁴⁹ Over 12% of tenth graders report having sex with at least four persons.²⁵⁰ By junior year, the percentage of high school students reporting sexual intercourse with at least four different persons climbs to 17.3%.²⁵¹ These data sets vary by geographic region and ethnic population. The relevant take away points to a consistent trend of teen sexual activity across ethnic populations in the United States. Coinciding with that sexual activity are risky behaviors that include multiple partners, the use of alcohol or drugs before sex, and the lack of condom usage. To the extent that early teen sexuality presents concerns, the important questions relate to whether the law has anything to say about it (or should) and, if so, what institutions are best suited to address these concerns.

IV. A TURN TO COMPARATIVE INSTITUTIONAL ANALYSIS

Part IV builds on three important institutional questions, applying a comparative institutional analysis (CIA) approach to this area of law: (1) whether the criminal law approach to monitoring and reducing the frequency of teen sexuality achieves Pareto superior outcomes; (2) if the

245. *Id.* at 306.

246. *Id.*

247. Eaton et al., *supra* note 198, at 112.

248. *Id.* at 113.

249. *Id.* at 112.

250. *Id.*

251. *Id.*

criminal law approach (and the criminal justice system as an institution) fails to achieve important justice outcomes in this domain, what approach should be taken (i.e. what are the alternatives); and (3) can markets play a role in reducing teen sex or promoting healthier sexual behaviors.²⁵²

A. Comparative Institutional Analysis

Statutory rape law and its application in the United States point to law's limits. Despite centuries-long campaigns to reduce and eliminate sexual activity among teens, law fails generally, the criminal law system particularly. As Part III detailed, American teens engage in sexual activity with some frequency—and risk—across all ethnic, geographic, and age demographics. This frequency includes a notable percentage of sexually active teens with multiple sexual partners (some with four or more partners), even by the ninth grade in high school. If law has something to say or do about this, what is it? What is the message? What are the tools? What are the goals?

Prior legal scholarship studying trends in SRL discussed in this Article provide compelling narratives that take up questions of sex and feminism, equality and racism, links between the subject and welfare reform, and even teen pregnancy trends. This project takes a different turn in that it seeks to engage in an institutional discourse, pursuing overlooked and unexamined questions. For example, is the legislature best suited to craft rules about teen sex or parents? Might specialized courts offer greater, more tailored capacity than courts of general jurisdiction to adjudicate SRL violations? Could there be value in utilizing “special” prosecutors whose roles specifically cater to working with youth? Finally, is there a role for markets in analyzing the significant economic implications of SRL prosecutions and the financial

252. THE OXFORD HANDBOOK OF COMPARATIVE INSTITUTIONAL ANALYSIS 5 (Glenn Morgan et al. eds., 2010) [hereinafter CIA HANDBOOK]. CIA has been applied to other spheres of law to analyze how to maximize efficiency and minimize externalities, including in the supply and demand for human organs, promoting cybersecurity, international law, and, very recently, by my student Jennifer Wong in an analysis on pathways to transgender inclusive health care coverage. See MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF HUMAN BODY PARTS (2006); Peter Swire, *Finding the Best of the Imperfect Alternatives for Privacy, Health IT, and Cybersecurity*, 2013 WIS. L. REV. 649; Jenni Wong, *Pathways to Transgender-Inclusive Healthcare Coverage: A Comparative Institutional Approach to Transgender Healthcare Rights*, J.L. & INEQUALITY (forthcoming 2013) (on file with author).

burdens borne by child-sex offenders? Ultimately, these are allocation of authority questions or what we could call “institutional choice.”²⁵³

Inevitably, one must decide who is best to decide questions about teen sex: judges, legislatures, parents, police, prosecutors, markets, or combinations of these “institutions.” By examining the advantages and disadvantages of the current criminal law approach, other institutional options necessarily emerge. In turn, a function of looking to alternative institutions involves examining these institutions’ strengths as well as weaknesses. In each case, options may be constrained or unfavorable to some degree. So, how will we choose if no alternative provides a perfect solution?²⁵⁴ Important guides in this project look to those institutions that protect children’s constitutional interests, promote child welfare, serve social justice purposes, and maximize economic and social welfare.

By contrast, the past several decades of SRL reform produced negative economic, political, and social justice externalities. These externalities could aptly be described as failures despite states’ SRL campaigns that might otherwise characterize criminal law enforcement efforts as successful—or neutral. Among these negative externalities or failures were states’ disparate targeting of Blacks for criminal sanction, connecting SRL to welfare reform, not as a means to actually reduce or eliminate rape or aid welfare recipients as *victims* of statutory rape, but rather for its political expedience. Indeed, the continued conflation of statutory rape with rape points to another institutional failure. This conflation disserves the victims it purports to help, misdirecting resources from the treatment and services that could otherwise be afforded to victimized children of sexual assaults committed by adults as well as their peers.

That is to say, this project takes seriously sexual violence against children and young adults. However, a society that conflates all youth sex will at times respond to nonconsensual sex or sexual violence as a minor inconvenience for victims: “boys will be boys” or, as Justice Kennedy intoned in a stinging dissent in *Davis v. Monroe County Board of Education*,²⁵⁵ equal access to an education is not denied to a girl “who

253. See NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3 (1994) (“The term ‘institutional’ reflects the reality that the decision of who decides is really a decision of *what* decides.”).

254. Ultimately, values influence how we evaluate and rank institutional choices. For some, constitutional values and principles should rank first, and thus institutional choices that recognize and promote constitutional protections would be ideal. For law and economists, achieving economic efficiency might rank above other considerations. And yet, for activists, achieving social justice might be the priority and thus institutional choice will reflect that priority.

255. 526 U.S. 629 (1999).

tires of being chased by the boys at recess [and] refuses to go outside.”²⁵⁶ Justice Kennedy and co-dissenters Justices William Rehnquist, Antonin Scalia, and Clarence Thomas offered a response to the majority rooted in prevalent (if antiquated) notions about youth violence and sexuality, scoffing at the notion that a Title IX remedy should be fashioned for a victim of peer sexual harassment in the school setting.²⁵⁷ In reaching their dissent, the Justices urged that there was no case for a jury when a victim of peer sexual harassment “cannot concentrate during class because she is worried about the recess activities [and] [w]hen she pretends to be sick one day so she can stay home from school.”²⁵⁸

Aspects of the dissent’s approach in *Davis* resemble the public outcry in the case euphemistically known as the Steubenville Rape Case, involving the rape of an intoxicated teenage girl by high school football players.²⁵⁹ For weeks after the case, the football players were publicly championed as the real victims because the sixteen-year old rape victim literally came “[a]cross the river” to attend the party and brought vodka.²⁶⁰ Media and political pundits suggested the rapists were as much victimized.²⁶¹ One former star athlete and coach remarked, “[w]hat else are you going to tell your parents when you come home drunk like that and after a night like that? . . . She had to make up something. Now people are trying to blow up our football program because of it.”²⁶² Despite video and photo evidence that Judge Thomas Lipps described as “profane and ugly”²⁶³—documenting the football players’ digital penetration of the unconscious girl and photos taken of her nude body²⁶⁴—the divided town urged that the real victims were the football players as the intoxicated girl told friends she wanted to ride in the car with the quarterback.²⁶⁵

The problem in the Steubenville case and many others is that a society that does not distinguish between consensual and nonconsensual teen sex will make wrong calls. Some of the judgment calls will be

256. *Id.* at 676.

257. *Id.*

258. *Id.*

259. Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES, Dec. 17, 2012, at D1.

260. *Id.*

261. *Id.*

262. *Id.*

263. Richard A. Oppel Jr., *Ohio Teenagers Guilty in Rape that Social Media Brought to Light*, N.Y. TIMES, Mar. 18, 2013, at A10.

264. *Id.*

265. Alexander Abad-Santos, *Steubenville Can’t Stop Feeling Sorry for the Steubenville Rapists or their Coach*, ATLANTIC WIRE (Mar. 28, 2013), <http://www.theatlanticwire.com/national/2013/03/steubenville-royal-mayo/63650/>.

underinclusive, treating rape as a social pastime or rite of passage. On the other hand, there will be overinclusive judgment calls that disregard even informed sexual consent, imposing unjustifiable criminal punishment. These disparate, vague, and uneven calls reflect longstanding institutional failures.

On inspection, these failures included the economic campaigns tied to welfare reform that produced thousands of arrests, convictions, and incarcerations. Some legislators viewed the march to jail and crack down on “sex-crime” as achieving success. However, when closely scrutinized, the war on sex is a failure too—to the extent that such campaigns dramatically deplete states’ coffers as hundreds of millions of dollars have been spent throughout the United States to track statutory rapists who were consensual sex partners. Instead, other costs emerged as policies driven by race-reified stereotypes at the expense of those they purported to help. A major failure of the U.S. criminal law regime has been its inability to calculate the broad costs for incidental gain. Other costs and externalities emerge on inspection, including possibly chilling mothers’ applications for material assistance for their babies, the incarceration of fathers, and the deterioration of fragile families. Thus, who benefits and who is harmed should be at the heart of every institutional analysis.

The most pernicious failures of SRL reform relate to the modern sex offender registration campaigns that unmindfully neglect to carve out exceptions for teens that engage in consensual sex. Descriptive accounts of these failures are scattered among swelling criminal law jurisprudence, where judges seemingly incapable of righting the legislative tide or steering the ship to safer, less turbulent waters defer to the legislature, entrenching a troubling formalism. Recent judicial opinions point to the absurd results culminating from legislation that provide no distinctions between a teenager’s consensual sex with a thirteen-year-old and that of a pedophile’s sexual violence.

Statutory rape regulations’ impact on teen abstinence, promoting it, ensuring it, and ensconcing it appears negligible at best; legal retribution does not provide the disincentives to consensual teen sex that legislatures presupposed. One explanation for this may be that consenting teens do not view themselves as violators of the law when they engage in voluntary sex. Thus, the foreseeability framework on which per se regulations or strict liability criminal laws depend gain no traction with youth who may understand the differences between yes and no, consent or not, but who may be ill-informed about the state’s agenda. Importantly, the requirement that the state imposes on youth differs from that required of others who engage in consensual sex, in that adults need not obtain *informed consent* for sex. However, states’ high-stakes sex

rules for sexually active teens mirrors or exceeds the expectations for informed consent.

In *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, Neil Komesar explains that flaws exist in each institutional alternative: courts, regulatory agencies, and markets.²⁶⁶ He critiques single institutional analysis as having “served one-sided calls for political intervention (in the case of welfare economics) or against political intervention (in the case of public choice).”²⁶⁷ Indeed, such is the case in statutory rape reform that primarily looks to the criminal law to shape new norms.

B. Teen Sex and the Criminal Law Approach

For all the criminal attention to teen sexuality, the question remains whether consensual teen sex is a bad thing or a matter for law to address. The first question rests with an important institution: the family. The latter gets at the heart of this Article and the concern about “too much law.” This Article posits three reasons for using an alternative to criminal law to shape consensual teen sexuality norms.²⁶⁸

1. THREE REASONS TO USE AN ALTERNATIVE APPROACH

Sex between consenting teenagers should not be considered a crime on moral grounds. Thus, my first objection and urging for an alternative approach are both rooted in a moral framework. Morality is frequently deployed to condemn teen sex, but it may also serve as a counterintuitive critique of criminal law frameworks to regulate teen sex. From the vantage point of one concerned about social justice and welfare, it is morally wrong to subject children to criminal punishment for which adults in similar circumstance are afforded privacy, which the United States Supreme Court declares to be grounded in the Constitution.

There are other reasons grounded in morality and social justice for rejecting a criminal law framework as a means of regulating and shaping teen consensual sexual conduct. The criminal law approach feeds on, perpetuates, and reifies racial stereotypes, thereby creating negative social impacts. As described earlier, black males are investigated, charged, arrested, and convicted of statutory rape at highly

266. KOMESAR, *supra* note 253.

267. *Id.* at 274.

268. The Article is agnostic on the use of statutory rape law in nonconsensual teen sex settings, because I generally advocate for rape reform law that would eliminate statutory rape law and promote the use of criminal law sanction for nonconsensual sex offenses in the form of a revised rape law.

disproportionate rates to other groups. The negative externalities that extend from disparate criminal policing of black males engaging in consensual sex include the interruption of their education, the disruption of their family life, and severe hampering of future opportunities. In this context, the harm inflicted by the state is grossly disproportionate to the behavior it seeks to stop.

Second, the criminal law inflicts a cruel and unusual punishment on consenting teens who engage in sexual activity. The criminal law is particularly blunt in these cases, where the more severe penalties attach to sex with persons under the age of thirteen. In cases presented in this Article, boys as young as thirteen (or slightly younger or older) may be more likely to have sexual intercourse with girls under age thirteen, but who are within a year or two of their age. Punishing these cases of “consensual” teen/preteen sex like those of pedophiles is not only legally unjustified, but also cruel and unusual.

Third, states simply cannot justify the economic expense associated with treating consensual teen sex as a crime, which because of sex offender registry requirements now necessitates constant state surveillance and monitoring. Each prosecution of consensual sex between youth diverts state resources, commanding money to police, prosecutors, and courts.

2. PROBLEMS WITH THE CRIMINAL LAW DEFAULT

When Victoria Nourse observes that an “oversupply” of criminal law exists, the suggestion is that criminal law is deployed to serve more functions and to do the heavy lifting in more contexts than it is otherwise “cut-out” to do.²⁶⁹ In other words, the criminal law too frequently serves as the legislative “go-to” or default method for resolving social concerns. The nation’s failed “War on Drugs” provides another potent example, both as a point of comparison and as an example of law’s failure. If the legislative priority is to reduce teen sex, whether the criminal law serves as the best institution for achieving that goal is an important, timely question. To understand whether the criminal law provides the best conditions for achieving that goal, one must look to the purpose and function of the criminal law.

According to Joel Feinberg, criminal law punishment serves as a “conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority . . . or of those ‘in whose name’ the

269. Nourse, *supra* note 111.

punishment is inflicted.”²⁷⁰ In other words, the criminal law facilitates retribution and, by its function and nature, leverages vengeance and revenge, arguably in the pursuit of justice. Sometimes criminal law punishment manifests in mild ways, such as through censure or civil penalties, which may spare a defendant incarceration, while at the same time permitting the expression of moral condemnation and disavowal. However, the application of the criminal law generally signals “community condemnation which accompanies and justifies its imposition.”²⁷¹ Thus, criminal law punishment has a direct legal aim, but also extralegal externalities.

Stigma, shame, and contrition are the intended byproducts of criminal law punishment.²⁷² These emotion-driven aspects of criminal law can promote public welfare and achieve utility when applied to universally condemned crimes or when guilt is not enough. The public nature of the court appearance, the subordination that attaches to incarceration, including psychological effects of residing behind bars, limited access to the outside world, and being confronted with those injured by the defendant’s conduct, are a part of the criminal law punishment process. Michel Foucault refers to this as the “spectacle” process.²⁷³ What has become euphemistically known as the “perp walk,” now made famous by former International Monetary Fund Chief Dominique Strauss-Kahn, provides a telling example of the spectacle process.²⁷⁴

However, this criminal condemnation process extends to extralegal punishments in some instances that bear on an ex-offender’s ability to fully rehabilitate, including restoration of voting rights, the ability to become gainfully employed, and whether one can reintegrate into

270. JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 98 (1970).

271. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958).

272. MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004). *But see* CHRISTOPHER LASCH, *A CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* 651 (1979) (arguing that Americans have “diffused shame over shameful failures,” and this degeneration produces a culture of narcissism, which feeds on itself and manifests in a lack of self-discipline and self-reliance).

273. MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 8–9 (Alan Sheridan trans., 1977).

274. *See, e.g.*, Adam Cohen, *DSK Fallout: Time for the Perp Walk to Take a Hike?*, *TIME* (July 11, 2011), <http://www.time.com/time/nation/article/0,8599,2082329,00.html>; Urvi Nopany, *Dominique Strauss-Kahn’s New York ‘Perp Walk,’* *TELEGRAPH* (London) (July 1, 2011, 7:59 PM), <http://www.telegraph.co.uk/finance/dominique-strauss-kahn/8611922/Dominique-Strauss-Kahns-New-York-perp-walk.html>.

society. Nearly a decade ago, Martha Nussbaum provided a powerful counternarrative to the facility and utility of shaming in the criminal law context.²⁷⁵ As Nussbaum pointed out, extralegal shaming manifests negative externalities that extend beyond the criminal justice system's reach to administer that type of punishment.²⁷⁶ In other words, shaming penalties may be enduring and applied in unanticipated ways by unanticipated actors and intuitions away and apart from the criminal justice system. These issues are particularly relevant in the statutory rape context.

Wendy Whitaker's statutory rape conviction provides a helpful point of analysis and demonstrates the concern expressed in this Article.²⁷⁷ During Whitaker's high school matriculation, she performed oral sex on a willing and interested classmate.²⁷⁸ Her decision may not have been wise, but did it rise to the level of criminal? Police, prosecutors, and a judge thought so. Were they right? Time and hindsight provide an advantageous perch from which to examine the shortcomings of the process that resulted in Whitaker's arrest, prosecution, conviction, and criminal sentence. Whitaker was later charged and convicted of statutory rape and required to register as a sex offender.²⁷⁹ Whitaker is unable to live in her family's home or near a school, church day care center, or park as a result of her conviction and registration.²⁸⁰ Whitaker's challenge is not one of reintegration; she has been completely barred from meaningful society. Her story, much like the others presented in this Article, illumines the absurd results of statutory rape regulation.

C. Alternatives to Criminal Law

Now that this Article has told you why there is too much criminal law governing teen sex, let me explain briefly why shaping new norms in teen sexual conduct is important. Promoting healthy sexual

275. NUSSBAUM, *supra* note 272.

276. *Id.*

277. See *Whitaker v. Perdue*, No. 4:06-cv-00140-CC (N.D. Ga. June 20, 2006) (Bloomberg Law); R. Robin McDonald, *Ga. Attorney General to Defend Sex Offender Law on Two Fronts*, DAILY REP. (Aug. 7, 2007, 12:00 AM), available at <http://www.law.com/jsp/article.jsp?id=1186412330969&slreturn=20130310123804>.

278. *Woman Who Had Consensual Sex as a Teenager No Longer Required to Register as a Sex Offender*, L. OFF. S. CENTER FOR HUM. RTS. (Sept. 17, 2010), http://www.schr.org/action/resources/woman_who_had_consensual_sex_as_a_teenager_no_longer_required_to_register_as_a_sex_; see also Complaint at 3–4, *Whitaker* (No. 4:06-cv-00140) (Bloomberg Law).

279. Complaint, *supra* note 278, at 3–4.

280. *Id.* at 4.

behavior in teens, including guiding the decision to refuse sex, is an important social goal. The goal does not rise to the level of criminal punishment; however, it does manifest as a serious health concern. Recent data reports the growing rate of sexually transmitted diseases among young people, including HIV/AIDS, herpes, and syphilis.²⁸¹ The CDC reports that in 2009, the most recent data available, teens and young adults “accounted for 39% of all new HIV infections” in the United States.²⁸²

The concern is particularly acute among gay, bisexual, and “men who have sex with men (MSM)” youth.²⁸³ Among this youth cohort, the risk of sexual disease transmission is particularly acute. Twenty-seven percent of new HIV infections in the United States were attributable to MSM in 2009.²⁸⁴ MSM accounted for 69% of all “new HIV infections among persons aged [thirteen to twenty-nine].”²⁸⁵ This age bracket takes in a broader population than this Article studies as it includes adults. That said, the point deserves further expression: “[a]mong young black MSM, new HIV infections increased 48% from 2006 through 2009.”²⁸⁶ In 2009, over 2000 cases of HIV were diagnosed among youth ages fifteen to nineteen.²⁸⁷ Over 6000 cases were reported in the next age bracket ages twenty to twenty-four.²⁸⁸

The risk of transmitting these diseases increases by the frequency of sex, failure to wear a condom, and by engaging in sexual intercourse with multiple partners. The public health concerns are real and deserve serious consideration. Given that the criminal law will not resolve these issues, alternatives should be sought among other possible institutional responses, including within alternative courts and markets. Other institutional solutions could also be sought—such as eliminating statutory rape law altogether in favor of parents taking on the role of institutionalizing rewards and “punishment” for their children’s adhering to or breaching values of the home. Under that approach, nonconsensual sex could be addressed under traditional rape frameworks with enhanced criminal penalties for sexual abuse against minors (similar to hate crime provisions).

281. DEP’T OF HEALTH & HUMAN SERV., CTR. FOR DISEASE CONTROL & PREVENTION, HIV AMONG YOUTH, (Dec. 2011), *available at* <http://www.cdc.gov/hiv/youth/pdf/youth.pdf>.

282. *Id.* (noting that Americans aged fifteen to twenty-nine accounted for 21% of the overall U.S. population in 2010).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

I. MARKET

In recent years, economists have evaluated how to change behavior. This includes thinking about ways to motivate people to do things that might be good for them, but that they are less likely to do on their own. Dieting and exercise is one example—as employers now offer wellness plans, which permit employees to earn money, reduce their insurance deductibles, and receive reduced-price memberships at health fitness facilities.²⁸⁹ The incentives in those contexts are intended to change behavior. Another recent approach involves paying low-income students for achieving high grades.²⁹⁰ The programs have been praised for their success.²⁹¹

Investigators who originally promoted the idea “paying students for good grades” as a point of study were mindful of the coercive force of money in these contexts. In fact, it is that very point that sparks criticism of the plan. In other words, elementary and middle school students should wish to learn for learning’s sake. Tempting students with money could create a false sense of security that completing one’s work—even well—will always result in bonuses.

Harvard economist Roland Fryer is one of the key researchers, testing an economic incentive model with children in “underperforming” schools. According to Fryer’s study, “Financial Incentives and Student Achievement: Evidence from Randomized Trials,” which involved randomized trials in over 250 urban schools “designed to test the impact of financial incentives on student achievement,”²⁹² results suggested that financial incentives increase achievement when “the incentives are given for certain inputs to the educational production function.”²⁹³ In Washington, D.C., paying middle school students significant amounts (sometimes as much as \$100 per month for “good grades” as well as attendance) resulted in higher reading test scores for Latino boys and children who previously experienced behavior problems.²⁹⁴

289. See, e.g., SABRINA CORLETTE, AM. CANCER SOC’Y, WELLNESS INCENTIVE PROGRAMS, available at <http://www.acscan.org/pdf/healthcare/implementation/background/WellnessIncentivePrograms.pdf> (discussing the types of wellness incentives allowed under the Patient Protection and Affordable Care Act).

290. Laura Fitzpatrick, *Should Students be Paid for Good Grades?*, TIME (Jan. 14, 2009), <http://www.time.com/time/nation/article/0,8599,1871528,00.html>.

291. See *id.*

292. Roland G. Fryer, Jr., *Financial Incentives and Student Achievement: Evidence from Randomized Trials 2* (Nat’l Bureau of Econ. Research, Working Paper No. 15898, 2010).

293. *Id.* at 6.

294. Bill Turque, *D.C. Students Respond to Cash Award, Harvard Study Shows*, WASH. POST, Apr. 10, 2010, at B1; see also Fryer, *supra* note 292, at 80–90.

The impacts of using an economic model to shift youth behaviors were significant according to Michelle Rhee, the former Chancellor of Washington, D.C., public schools.²⁹⁵ In some categories the outcomes were “shock[ing]” as some students advanced as much as five months in academic benchmarks.²⁹⁶ Yet, such programs have drawbacks too—they are necessarily coercive. But are such programs corrosive as well as coercive in that they may be interpreted as prioritizing economic gain or interest over promoting academic achievement for the sake or love of it? Such questions validly point to the challenges in an economic model. Fryer suggests that a “love of learning” and economic compensation for achievement need not be mutually exclusive.²⁹⁷ This is true. Economic bonuses for excellent job performance might seem to bear that out as much as merit and need-based scholarships that depend on student performance for continued tuition payment. Is there a real difference between scholarship programs that recognize student achievement or poverty and programs that explicitly pay for grades? Maybe not.

To paraphrase Komesar, no system is perfect; each is burdened by some institutional cost or deficit (e.g., structural capacity, economic, social justice); and the challenge is to manage finding the alternative that produces the most desirable outcomes for a given problem. Critics of CIA suggests that it is a theory prone to cherry picking precisely because it approaches each question as having an alternative.

So how might innovative economic reforms or incentives work to promote responsible sexual behavior in teens? In Fryer’s test, districts along with private support set aside funds to incentivize a variety of behaviors: in Dallas, the goal was to promote second-grade reading; in Chicago, the program targeted freshmen; in D.C., the Capital Gains Program set aside \$1.2 million to test the use of financial incentives to improve middle school test scores.²⁹⁸ Chancellor Rhee raved that the program was an economic benefit—after all millions had been spent previously by the district without that type of success.²⁹⁹

Markets might offer real alternatives to statutory rape prosecutions of teens who have consensual sex with teens. For example, states could set aside funds otherwise used to criminally target and prosecute teens for underage consensual sex and direct those funds to scholarship programs that provide dividends for reaching sex health benchmarks, whatever they may be. Benchmarks might include obtaining sexual health literacy and could also extend to abstinence contracts and safe sex

295. Turque, *supra* note 294.

296. *Id.*

297. Fryer, *supra* note 292, at 29–30.

298. Turque, *supra* note 294.

299. *Id.*

contracts. Sexual health literacy is fairly easy to test and thus would not be too complicated under such a system and the results might be lifesaving. Breaches of safe sex and abstinence contracts might be easy enough to detect due to pregnancy and transmission of sexually transmitted diseases. For such a system to work, other institutional involvement is key—schools, public health centers, parents, or social service programs could help monitor outcomes and facilitate the awarding of incentives.

2. ALTERNATIVE COURTS

Earlier, I expressed reasons why criminal law is an untenable framework for addressing teen sex norms. In this Subsection, I explain why specialized courts may serve as an alternative. In various regions of California, specialized “girls’ courts” have emerged to address the unique challenges experienced by young women who have breached the law, but deserve to be heard in an official setting that is organized on improving social outcomes for the young women who appear before them and focuses less on retribution than the typical criminal law or juvenile court system.³⁰⁰ Such courts are concerned with the full person and the satellite of externalities that result from prosecution and the judge’s decision making.³⁰¹ A similar approach might offer a way forward in the area of teen sex.

Alternative courts rely on judicial expertise and interest in a discreet area of law where policy concerns, social justice, and the law intersect. They function as alternatives to traditional courts, specializing in areas of law that range from traffic to drugs. As one Nevada drug court describes itself, the courts function as “problem-solving courts that help break the cycle of drug” dependence.³⁰² In other words, alternative courts engage in problem solving. In theory, judges work collaboratively with treatment, mental health, social services, child protective services, the bar, and law enforcement “to address the root causes of criminal

300. See, e.g., Thomas Carroll, *Gender and Juvenile Justice: New Courts, Programs Address Needs of Girls*, YOUTH L. NEWS (July–Sept. 2009), http://www.youthlaw.org/publications/yln/2009/july_september_2009/gender_and_juvenile_justice_new_courts_programs_address_needs_of_girls/; *Orange County Local Commission Launching Girls’ Court*, J. BRANCH CAL. (Sept. 2009), <http://www.courts.ca.gov/4451.htm>.

301. See, e.g., Carroll, *supra* note 300.

302. *Specialty Court Program Overview*, NEV. JUDICIARY, <http://www.nevadajudiciary.us/index.php/specialitycourts> (last updated Dec. 8, 2011).

activity.”³⁰³ The purpose is to “maintain a critical balance of authority, supervision, support, [] encouragement[,]” and help.³⁰⁴

Alternative courts are well positioned to take on the thornier cases involving youth sex, such as cases that involve consensual teen sex between youth several rather than two years apart. Equally, the courts could be prepared to hear cases that involve good faith—in such situations, a teen mistakenly believes, based on information conveyed, that a sex partner is older than he or she really is. A specialized court is better prepared to handle such cases.

Consider the case of Frank Rodriguez and Nikki Prescott. The couple met in a Texas high school and began dating shortly thereafter.³⁰⁵ Technically, Frank was an adult when they began dating as he was a nineteen-year-old high school senior, and Nikki was a fifteen-year-old freshman.³⁰⁶ They dated with the permission of Nikki’s mother and attended prom together.³⁰⁷ They began a sexual relationship, which Nikki claims she encouraged and her mother helped her to obtain birth control.³⁰⁸ After an argument with her daughter, Nikki’s mother contacted police and claimed that Frank sexually assaulted her daughter.³⁰⁹ The mother later recanted, but by that time, police claimed it was too late.³¹⁰

Charges were filed against Frank and he was prosecuted for sexually violating a minor.³¹¹ Under duress and threat of a twenty-year sentence, Frank pled guilty.³¹² Nikki was emphatic that all their sex was consensual and, at her urging, her mother was remorseful.³¹³ However, as a condition of Frank’s plea, he was required to register as a sex offender.³¹⁴ His status as a sex offender caused collateral damage in his life. He was required to relocate from his family because he had a twelve-year-old

303. *Id.*

304. *Id.*

305. *Stossel Show with John Stossel: Teens, Sex, and the Law* (FOX television broadcast Jul. 29, 2010), available at <http://www.youtube.com/watch?v=VKXOZQZGNfA&feature=youtu.be>.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. John Stossel et al., *The Age of Consent: When Young Love is a Sex Crime*, ABC 20/20 (Mar. 7, 2008), <http://abcnews.go.com/2020/Stossel/story?id=4400537&page=1#.UBHOLrTZCMo>.

313. *Id.* Nikki was also made to undergo a rape exam, even though she was adamant that she was not raped. *Id.*

314. *Id.*

sister at home.³¹⁵ He moved to a mobile home and lived by himself. He had to attend “sex offender rehabilitation classes.”³¹⁶ During this period, he was forbidden to have any contact with Nikki.³¹⁷ Barely two years later, on the day Nikki turned seventeen, she moved in with Frank—that was ten years ago.³¹⁸ The couple is now married with four daughters.³¹⁹ Until his seven years of probation were complete, Frank could not take his children to parks or playgrounds.³²⁰ Special permission had to be obtained to pick his daughters up from daycare.³²¹ According to Frank, “[i]t took my life . . . it’s just something I think about all the time, and am I in the wrong place at the wrong time? . . . That’s all it takes is one mistake and . . . that would be it.”³²² Frank has been told that it would be a waste of money to try to get off the registry in Texas.³²³

Alternative courts could offer an important way forward. Served by judges who are not bound by legislative mandates, such courts could prioritize a focus on the children involved, achieving social justice, and maximizing welfare all around. In such courts, context and narrative will matter in ways that courts hearing statutory rape cases treat as irrelevant. Such an approach would be a bold departure from the current criminal law framework.

As with any institutional approach, drawbacks are evident, and here they might be significant despite the dramatic shift from the current system. For example, alternative courts will not address the underlying problems in statutory rape law, including its strict liability legislative mandate that all sex between minors constitute rape. At best, alternative courts are a back end solution that may prevent a conviction and save a defendant from incarceration for engaging in what a court deems consensual intercourse with a peer. This is not to be taken lightly. However, what such courts will not prevent are arrests, prosecutions, and the externalities that emerge from being a subject of the criminal justice system, which might include losing a job, the withholding of a scholarship, and placing life and possible college attendance on hold. Even if spared potentially harsh sentences and registry on sex offender lists by alternative courts, a youth will be required to respond honestly on

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Stossel Show with John Stossel, supra* note 305.

323. *Id.*

college and job applications to the questions: Have you ever been arrested? If so, for what?

CONCLUSION

So why should we care that children have sex? On the one hand we care too much—so much so that the criminal law is the central form of regulating teen sex. This form of regulation is derived from statutes that treat all sexual behavior alike, even though consent and context may drastically vary. This Article articulates why the criminal law approach, filtered through the judiciary, leads to absurd results. These absurd results include the extralegal punishments inflicted on youth who are punished for participating in consensual sexual activity, such as lifelong registration as a sex offender. This Article argues that such outcomes are untenable because they are morally wrong and foster harms across a series of areas, including creating social status harms, by reifying racial stereotypes. The criminal law approach also leads to cruel and unusual punishments in an era where sex offender registries are increasingly the norm and a condition of release from prison. Such punishments are disproportionate and unjustified.

On the other hand, we care too little about teen sexuality. The notorious Steubenville, Ohio rape case bears this out, as do the high rates of HIV, sexually transmitted diseases, and syphilis infections among teens, and teens' relatively high use of alcohol and drugs prior to sex. Parents fail to talk to their children about sexuality when children most need to understand it: prior to commencing sexual experimentation. Fathers barely speak to their daughters about sex and these omissions may impact their daughters' sexual attitudes and behaviors. Governors and prosecutors sometimes show a selective care or interest in teen sexuality—when it involves specific ethnic populations or the poor. This failure to care enough is manifested in the criminal law approach to shaping teen sex norms, rather than the public health where it is most justified.

This Article offers a turn to comparative institutional analysis to find a way forward. It articulates two alternative approaches that are not mutually exclusive. It suggests that financial incentives and alternative courts might provide the best conditions under which new youth sexual norms may be shaped.