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# **Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class**

Dr. Anna High<sup>\*</sup>

*This article considers the question of whether statutory rape laws can and should be used against members of the class they were designed to protect. Many commentators have argued that meaningfully consensual sex among similarly situated and sufficiently mature teenagers should be beyond the scope of strict liability rape laws, but the question becomes more fraught in the context of the “contested outer limits” of adolescent sexuality—sexual contact among children and adolescents that offends social norms, leads to harmful outcomes or appears to be exploitative. What are the implications of using statutory rape laws against minors to target “bad sex”?*

*I contend that even in relation to “bad sex,” there are serious policy and constitutional objections to the use of statutory rape laws against a member of the class they are designed to protect. In jurisdictions without all-encompassing age-gap provisions, the response to sex among adolescents needs to be reformulated to ensure that the use of statutory rape laws against minors is confined to cases involving wrongful, as opposed to mere bad, sex, and is predicated on a clear and objective definition of exploitation, as opposed to mere fornication, as the punitive target.*

## **I. INTRODUCTION**

The problem of when and how to use the law to regulate youthful sexual encounters is both urgent and analytically complex. Juveniles today are immersed in an online world that grants unprecedented access to sexual imagery and discourse.

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Sexual development is a significant and natural aspect of the transition to adulthood, but society and the law rightly recognize that children and teenagers are a relatively vulnerable and immature population. Statutory rape laws<sup>1</sup> respond to this tension with a generalization, setting an age of consent at which adolescents are deemed mature enough to make safe and meaningfully consensual decisions about sex. These laws create a protected class whose sexual autonomy and privacy interests are restricted in order to protect them from power imbalances and harmful decision-making.<sup>2</sup>

Statutory rape laws have undergone a number of waves of reform, including a movement towards gender-neutrality and abandonment of traditional chastity requirements.<sup>3</sup> In a significant reform trend, many jurisdictions have adopted an age-gap approach to statutory rape, excluding sex between close-in-age minors from the reach of statutory rape laws, even as those minors are deemed legally incapable of consenting to sex with adults.<sup>4</sup> However, not all sex among minors is covered by such so-called “Romeo and Juliet”<sup>5</sup> exceptions. Accordingly, it is often the case that where two minors engage in sexual contact, each has technically committed statutory rape.<sup>6</sup> This raises a potential problem: can and should statutory rape laws be used against members of the class they were designed to protect?

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1. Criminalized sexual activity with a person under a specified age or within a specified age range is generally known as statutory rape, a strict liability offense, as distinct from common-law forcible rape—although the term statutory rape “is not used in statutes, and technically it has no legal meaning.” Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 62 (1992).

2. *See infra* Part II.

3. *See generally* CAROLYN COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 12-23 (2004) (explaining the first wave of reform at the turn of the twentieth century and the second wave of reform in the 1970s and 1980s).

4. *Id.* at 21-23.

5. Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL’Y & L. 505, 527 n.79 (2008) (“Special, lenient exemptions for sex among teenage peers are commonly referred to as ‘Romeo and Juliet’ laws, in recognition of the fact that to stand in the way of a relationship that might blossom into true love would indeed be a tragedy of Shakespearean proportions.”).

6. *See, e.g., In re T.W.*, 685 N.E.2d 631, 635 (Ill. App. Ct. 1997); *Pappas v. Zorzi*, No. 11 C 6239, 2013 WL 6254292, at \*5 (N.D. Ill. Dec. 3, 2013).

To date, most scholarship on the use of statutory rape laws against minors has focused on an abstract “charmed circle”<sup>7</sup> of “good” adolescent sex—meaningfully consensual sex among similarly situated<sup>8</sup> and sufficiently mature teenagers who are arguably entitled to some measure of sexual privacy and autonomy—and seems to accept that the use of statutory rape laws against the protected class to target minor-minor sex beyond that circle is less objectionable. This article shifts the focus to the “contested outer limits”<sup>9</sup> of juvenile sexuality—to sexual contact among children and adolescents that offends social norms, leads to harmful outcomes, or appears to be exploitative. To explore those outer limits, this article adopts Professor Alan Wertheimer’s distinction between “good” sex (sex considered morally worthy or at least tolerable); “bad” or morally unworthy sex; and “wrongful” or morally impermissible sex.<sup>10</sup> I contend that there are serious constitutional and policy objections with strict liability statutory rape laws that can be applied to sexual contact between members of the same protected class, even in cases where the intended punitive target is “bad sex” (involving, for example, immature adolescents or harmful outcomes such as pregnancy) or “wrongful sex” (involving exploitation of a minor-victim by a minor-predator).<sup>11</sup> Those objections call for statutory and policy reforms in our approach to sex among adolescents.

In Part II, by way of background, I discuss competing sex-negative and sex-positive discourses on adolescent sexuality; the contested nature of the normative boundaries between good, bad and wrongful adolescent sex; and how age of consent laws and age-gap reforms attempt to account for these complexities.

In Part III, I consider criminal or juvenile statutory rape proceedings against members of the protected class, which

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7. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 281 (Carole S. Vance ed., 1993); see *infra* note 19 and accompanying text (arguing that “modern Western societies appraise sex acts according to a hierarchical system of sexual value” and diagramming a “charmed circle” of good, normal and natural sexuality).

8. That is, adolescents who are of a similar age and, generally, not in a relationship that is presumed to involve a status-based power differential such as coach/player, teacher/student.

9. Rubin, *supra* note 7.

10. ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 5-6 (2003).

11. *Id.*

generally take one of two forms: proceedings against both minors under the theory that each is both victim and offender in relation to the same act; or one-sided proceedings against the “true offender.” In either case, there are serious policy and constitutional problems with using statutory rape laws against a member of the class such laws are designed to protect. First, the idea that minors can mutually victimize one another is illogical; statutory rape proceedings against minors for consensual sex with minors are in fact a punitive response to sex *per se*, not victimization. This conflates two discrete ethical breaches—fornication and exploitation—and risks both diluting the moral authority of statutory rape laws and unfairly labeling mere fornicators as sex abusers.

Even in cases involving good-faith attempts to use statutory rape laws discerningly to target sex involving victimization of a vulnerable minor by a predatory minor, selective enforcement of statutory rape laws against the “true offender” where both minors are legally violators is predicated on an undefined notion of exploitation. This gives rise to the potential for discriminatory enforcement and over-criminalization of adolescent sex, based on prosecutorial beliefs about the normative boundaries of good, bad and wrongful sex.

In Part IV, I discuss how the legal response to sex among adolescents should be reformulated. Because modern statutory rape statutes properly presuppose an exploitative victim-offender binary, their use should be confined to cases involving wrongful, as opposed to merely bad, sex. To that end, the enforcement of statutory rape laws against minors should be predicated on a clear and objective definition of exploitation, which is best achieved by *per se* rules about the validity of consent based on presumed age-based power differentials. To the extent that such measures may fail to fully capture all instances of arguably wrongful sex—such as sex that is problematically coercive but not demonstrably nonconsensual—sex abuse statutes may need to be (1) strengthened to ensure that fault-based rape laws adequately target coercive but non-forcible sex among juveniles, and (2) supplemented with juvenile-specific offenses targeting problematic sexual behavior warranting reformatory intervention.

## II. THE COMPLEXITY OF ADOLESCENT SEXUALITY

### A. Contested Boundaries of Good, Bad and Wrongful Adolescent Sex

American culture is relatively non-permissive with respect to juvenile<sup>12</sup> sexual activity.<sup>13</sup> Public discourse on sex with and among adolescents often focuses on their presumed immaturity and inexperience, their susceptibility to sexual manipulation and coercion, and adverse outcomes, such as pregnancy and emotional and physical injury.<sup>14</sup> A significant majority of adults

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12. The focus of this article is the use of statutory rape laws against minors those laws are designed to protect; accordingly, references to juveniles can be taken to mean all young persons below the legal age of consent, which is sixteen or older in most states. Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 703 (2000) [hereinafter *Regulating Consensual Sex*].

13. STEVI JACKSON, CHILDHOOD AND SEXUALITY, 49, 105 (1982); Floyd M. Martinson, *Sexual Development in Infancy and Childhood*, in JUVENILE SEXUAL OFFENDING: CAUSES, CONSEQUENCES, AND CORRECTION 36, 36 (Gail Ryan & Sandy Lane eds., 2d ed. 1997) (“Sexuality is seldom treated as a strong or healthy force in the positive development of a child’s personality in the United States.”); Kate Millett, *Beyond Politics? Children and Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 217, 218-20 (Carole S. Vance ed., 1993); Rubin, *supra* note 7, at 268-75; LAURA J. ZILNEY & LISA ANNE ZILNEY, PERVERTS AND PREDATORS: THE MAKING OF SEXUAL OFFENDING LAWS 177 (2009) (“America is a sex-negative country . . .”); Peggy Orenstein, *When Did Porn Become Sex Ed?*, N.Y. TIMES (Mar. 20, 2016), [http://www.nytimes.com/2016/03/20/opinion/sunday/when-did-porn-become-sex-ed.html?\\_r=2](http://www.nytimes.com/2016/03/20/opinion/sunday/when-did-porn-become-sex-ed.html?_r=2) [<https://perma.cc/B3MN-76K2>].

14. “Though the public knows teens are having sex, and supports sex education in the schools, this is not an endorsement of sex for teens. They want teens to wait.” MEG BOSTROM, FRAMEWORKS INSTITUTE, THE 21ST CENTURY TEEN: PUBLIC PERCEPTION AND TEEN REALITY 21 (2001), [http://frameworksinstitute.org/assets/files/PDF/youth\\_public\\_perceptions.pdf](http://frameworksinstitute.org/assets/files/PDF/youth_public_perceptions.pdf) [<https://perma.cc/2W3T-VTAQ>]. Policy measures aimed at promoting abstinence still abound in America. *Id.* at 20 (reporting that 58% of schools teach that “young people should wait to have sex, but if they don’t they should use birth control and practice safer sex” and 34% teach that “young people should only have sex when they are married”). See, e.g., Ron Stodghill II, *Where’d You Learn That?*, TIME, June 15, 1998, at 15 (“We should not confuse kids’ pseudo-sophistication about sexuality and their ability to use the language with their understanding of who they are as sexual young people or their ability to make good decisions.”); COCCA, *supra* note 3, at 32 (noting the “moral panic” of Americans in the 80s/90s about “children having children”); R. KACHUR ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, ADOLESCENTS, TECHNOLOGY AND REDUCING RISK FOR HIV, STDs AND PREGNANCY 7 (2013) (“[Teens] remain a vulnerable population when it comes to sexual risk.”); Laina Y. Bay-Cheng, *The Trouble of Teen Sex: The Construction of Adolescent Sexuality Through School-Based Sexuality Education*, 3 SEX EDUC. 61, 61 (2003) (arguing that school-based sexuality education “attends exclusively to the dangers and risks associated with teen sex”); Elizabeth Hollenberg, *The*

believe that premarital sex among teens is wrong,<sup>15</sup> and this moral disapproval has been consistently high since the 1980s.<sup>16</sup> In one sense, then, we might say that there is no such thing as “good” adolescent sex—according to majority American social norms, sex among unmarried adolescents is *per se* morally unworthy and undesirable.<sup>17</sup> However, a competing discourse of sex positivity acknowledges the sexual dimension of development, and recognizes that mutually agreed upon adolescent sexual encounters can in certain contexts be a normal and healthy aspect of the transition to adulthood, and are not *per se* morally problematic, undesirable or unsafe.<sup>18</sup>

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*Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL’Y REV. 267, 268 (1999) (discussing the political narrative of the “teenage mother as child victim”); Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 468-72 (2000) (discussing the mid-1990s welfare reform movement’s focus on the problem of teen pregnancy); *A History of Federal Funding for Abstinence-Only-Until Marriage Programs*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., <http://www.siecus.org/index.cfm?fuseaction=page.viewpage&pageid=1340&nodeid=1> [<https://perma.cc/SG53-BCUZ>]. *But see infra* note 35.

15. *General Social Survey 2006*, THE ASS’N OF RELIGION DATA ARCHIVES, <http://www.thearda.com/Archive/Files/Descriptions/GSS2006.asp> [<https://perma.cc/DV9G-AQ2M>] (noting 71.4% of survey participants responded that premarital heterosexual sex among fourteen- to sixteen-year-olds is “always wrong,” compared to 25.6% responding to adult premarital sex as “always wrong”).

16. BOSTROM, *supra* note 14 (reporting on National Opinion Research Center’s General Social Surveys, which show that the “always wrong” response to teens having sex before marriage has “hovered in the high 60s throughout the 1980s and 1990s, reaching a high of 71% in 1998, and a low of 66% in 1986.”). *But see* COCCA, *supra* note 3, at 30-32 (noting potential problems with the wording of the General Social Survey teen sex question, but concluding that the surveys still overwhelmingly condemn adolescent sex).

17. COCCA, *supra* note 3, at 33.

18. Bay-Cheng, *supra* note 14, at 65 (noting that “a growing number of experts in the field of adolescent sexuality . . . argue for the presentation of sexuality as a positive and healthy aspect of life . . . and for the need to help adolescents determine not only when to say ‘no,’ but when to say ‘yes,’ as well”); *see* WERTHEIMER, *supra* note 10, at 217, 220 (noting that “there is considerable controversy with respect to the harmfulness of youthful sex,” discussing arguments that consensual sex by minors is “no big deal,” and noting that at least some of the harm of adolescent sexual activity is “socially constructed” and derives from social norms about the impropriety of early sexual relations); JUDITH LEVINE, *HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX* (2002) (arguing that sexual pleasure is not inherently unsafe for children and teens); ZILNEY & ZILNEY, *supra* note 13, xiv (2009) (adopting a “sex-positive viewpoint, meaning that sex is good—and good for you—and that society must learn to deal with it in a more open, forthright manner”); Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL’Y & L. 287, 322-23 (1997) (discussing positive aspects of adolescent sexuality).

To explore the intersection of these two perspectives, Professor Sutherland adopts Gayle Rubin's hierarchical approach to sexuality, which posits a "charmed circle" of sexuality that is privileged by society and deemed "normal, natural, blessed"; and "outer limits" of sex that is considered "abnormal, unnatural, damned."<sup>19</sup> Sutherland considers how factors such as gender, class, race, sexual orientation, outcomes (pregnancy, sexually transmitted disease), and age impact social tolerance for adolescent sexuality.<sup>20</sup> Sutherland's analysis points to a useful starting point for the current article: the normative boundary between morally "good" and morally "bad" adolescent sex is both dynamic and contested.

Of course, some types of sexual interactions are near-universally condemned as not only *bad* or morally unworthy, but as incontrovertibly *wrongful* or morally impermissible—most obviously, sex involving intentional manipulation, coercion, or exploitation of the young and vulnerable.<sup>21</sup> As Floyd Martinson notes, "[a]lthough we do not yet have societal agreement about what constitutes age-appropriate child sexual behavior, we do have a universal norm that infants and children should not be sexually abused."<sup>22</sup> But even here, there is not always a clear dividing line between sexual activity and sexual abuse, acceptable persuasion and impermissible coercion, consent and nonconsent, or childhood incapacity and coming-of-age competence.<sup>23</sup> This causes analytical complexity when it comes to regulating juvenile sexual behavior.

## B. Age of Consent and Age Span Rules as Bright-Line Proxies for Contested Boundaries

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19. Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 335 (2003); see also Rubin, *supra* note 7, at 280-81.

20. Sutherland, *supra* note 19, at 353 ("The center of the charmed circle would be made up of heterosexual sex between white, middle-class teenage peers who are engaged in monogamous relationships. Various sexual acts short of intercourse would be okay between younger teenagers, while intercourse would be okay for those who have attained a certain age and have taken appropriate precautions to avoid pregnancy and STD's.").

21. See *infra* Part IV.A, for a discussion on the meaning of sexual exploitation.

22. Martinson, *supra* note 13, at 53.

23. Oliveri, *supra* note 14, at 485 (noting that the sexual encounters of adolescents often take place in "the gray area between consent and coercion").



Statutory rape laws respond to this complexity with a generalization, by setting an age at which adolescents are deemed sufficiently mature to make safe and meaningfully consensual decisions about sex, and at which point sexual activity is no longer *per se* legally impermissible. The age of consent thereby functions as a bright-line proxy for the boundary between wrongful sex, involving a presumptively incompetent and exploited juvenile, and good or at least morally permissible sex.<sup>24</sup> This approach involves a legal fiction, because the childhood-adulthood transition is a continuum, not a switch,<sup>25</sup> and all adolescents traverse the transition, from vulnerability and immaturity to autonomy and competence, at different speeds, meaning “any one teen . . . might not fit into the model.”<sup>26</sup>

A more nuanced approach is to recognize that the competence of juveniles to meaningfully and responsibly consent to sex and resist sexual manipulation and coercion is dependent not only on the juvenile’s age, but also on contextual factors such as the relative ages of the sexual partners and the nature of the sexual activity in question. For example, in *Consent to Sexual Relations*, Professor Wertheimer notes the argument that:

[Y]oung females are more competent to navigate the world of adolescent/adolescent relationships than the world of adolescent/adult relationships . . . . [I]t is possible that the decision-making of young females is more likely to be distorted by transference or respect for authority or status seeking when they are

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24. See generally WERTHEIMER, *supra* note 10, at 215-22 (discussing age as a proxy for the emotional and cognitive capacities that are relevant to the validity of consent); Millett, *supra* note 13, at 222 (“[C]onditions between adults and children preclude any sexual relationship that is not in some sense exploitative.”).

25. Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J.L. & FEMINISM 279, 305 (2010) (“[T]here is enough sociological evidence that [a neurological moment when young people fully understand sex, their sexual choices, and the ramifications of sex acts] is illusory . . .”).

26. Oliveri, *supra* note 14, at 485; Fischel, *supra* note 25, at 305 (noting that “education, safer sex education, resources, gender, regional location, family dynamics, and politics all mediate, dampen, empower, or in other ways give shape to a young person’s sexual agency and her ability to consent.”); see also Susan S. Kuo, *A Little Privacy, Please: Should We Punish Parents for Teenage Sex?*, 89 KY. L.J. 135, 163 (2000) (noting that the divergence in ages of consent from state to state is “evidence of this lack of consensus over the point at which a sexual relationship becomes harmful to one or both teens and the relative arbitrariness of any number.”).

contemplating relationships with older males, or that the risks consequent to adolescent/adolescent relationships are small compared with adolescent/adult relationships.<sup>27</sup>

In this vein, most jurisdictions have abandoned the single age of consent approach<sup>28</sup> in favor of age-gap reforms, which eliminate strict liability for certain degrees of sexual contact between minors within certain specified age differentials.<sup>29</sup> This approach attempts to leave space for normal adolescent sexuality and some degree of sexual autonomy and privacy, while also safeguarding against age-disparity-based power imbalances that may impact young people as they navigate their sexual development.<sup>30</sup>

The age-gap approach indicates a shift in the legal response to adolescent sexuality, away from proscribing all adolescent sex *per se*.<sup>31</sup> Instead, the focus turns to the prevention of potentially exploitative sexual relations, with age disparity functioning as a workable if imperfect proxy of inequality and thus coercion.<sup>32</sup> This does not necessarily indicate moral

27. WERTHEIMER, *supra* note 10, at 218-19; *see also* Fischel, *supra* note 25, at 301 (noting “relations of power and dependency in young people’s lives that constrain consent’s transformative force . . .”); Am. Acad. of Family Physicians et al., *Protecting Adolescents: Ensuring Access to Care and Reporting Sexual Activity and Abuse*, 35 J. ADOLESCENT HEALTH 420, 422 (2004) (noting that an adolescent’s age and disparity in years between an adolescent and her sexual partner are key factors in determining whether health care providers should report the relationship to authorities as abusive); Michelle Oberman, *Girls in the Master’s House: Of Protection, Patriarchy and the Potential for Using the Master’s Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 813 (2001) [hereinafter *Master’s House*] (noting that “[i]t may be accurate to assume that the wider the age gap between partners, the greater the chance of coercion.”).

28. *See generally* Susan M. Kole, Annotation, *Statute Protecting Minors in a Specified Age Range from Rape or Other Sexual Activity as Applicable to Defendant Minor Within Protected Age Group*, 18 A.L.R.5th 856 (1994) (discussing how only twelve states have a single age of consent, below which an individual cannot consent to sexual intercourse under any circumstances, and above which it is legal to engage in sexual intercourse with another person above the age of consent).

29. *See, e.g.*, TEX. PENAL CODE ANN. § 21.11(a)-(b) (West 2015) (stating “Indecency with a Child” as sexual contact with someone less than seventeen years of age and where the defendant is 3 or more years older than the victim).

30. COCCA, *supra* note 3, at 60 (“Age spans assume that an age difference in the teen years is rife with the potential for manipulation or abuse.”).

31. Fischel, *supra* note 25, at 311.

32. *Id.* (noting age-span reforms “aim at eliminating coercion, not sex”); COCCA, *supra* note 3, at 19 (“Age acts as a proxy for a power differential that is suspect of coercion.”); WERTHEIMER, *supra* note 10, at 218 (noting that wide age spans may not be

approval of premarital sex among close-in-age teenagers, but a prioritization of coercive sexual relations rather than sex *per se* as the primary punitive target of statutory rape laws.<sup>33</sup> This reform trend is congruent with evidence more generally of growing societal acceptance of the reality of adolescent sexuality. For example, most states have decriminalized or ceased prosecuting fornication,<sup>34</sup> and there is increasingly strong support for school-based sex education that goes beyond the “abstinence only” message.<sup>35</sup>

### III. The Use of Statutory Rape Laws Against Members of the Protected Class

Sex involving adolescents has been described as a “prominent bogeyman,” in that rates are lower than is commonly believed.<sup>36</sup> Nonetheless, intercourse and other sexual acts are common among American youth, including among those who

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“inherently coercive, [but] they might be a good proxy for coercion that is difficult to observe directly . . .”).

33. See Fischel, *supra* note 25, at 341.

34. COCCA, *supra* note 3, at 170 n.39 (noting that “[m]ost states have taken their fornication statutes off the books.”). But see JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127, 171 (2014) (noting that although fornication is “not routinely prosecuted,” such laws can still be enforced and “[j]uveniles are particularly vulnerable . . . because courts are more willing to overrule their asserted privacy rights . . .”); Sara Boboltz, *8 Laws to Keep Women in Line That are Somehow Still on the Books*, HUFFINGTON POST (Mar. 14, 2014, 11:54 AM),

[http://www.huffingtonpost.com/2014/03/14/state-laws-women\\_n\\_4937387.html](http://www.huffingtonpost.com/2014/03/14/state-laws-women_n_4937387.html)

[<https://perma.cc/6WUG-3AWF>] (noting Massachusetts, Virginia, Georgia, Idaho, Mississippi, North Carolina, Utah, and South Carolina still have fornication offenses on the books).

35. Susan N. Wilson, *Sexuality Education: Our Current Status, and an Agenda for 2010*, 32 FAM. PLAN. PERSP. 252, 253 (2000) (reporting that “80-90% of Americans say they favor courses that teach contraception and disease prevention in addition to abstinence; that 70% oppose federal funding for programs that prohibit teaching about condoms and contraceptives; [and] that 69% say teaching abstinence until marriage is ‘just not realistic’”). In April 2015, seventy-five billion dollars in federal funding for school sexual abstinence education programs was passed. Medicare Access and CHIP Reauthorization Act, Pub. L. No. 114-10, § 214(a)(2), 129 Stat. 87, 152 (2015). However, President Obama has cut funding for abstinence-only funding in his 2017 budget due to a lack of proven effectiveness. *President Obama Cuts Funding for All Abstinence-Only Sex Education*, N.Y. TIMES: WOMEN IN THE WORLD (Feb. 18, 2016), <http://nytlive.nytimes.com/womenintheworld/2016/02/18/president-obama-cuts-funding-for-all-abstinence-only-sex-education/> [<https://perma.cc/8ZMG-LKNR>].

36. Lawrence B. Finer & Jesse M. Philbin, *Sexual Initiation, Contraceptive Use, and Pregnancy Among Young Adolescents*, 131 PEDIATRICS 886, 887 (2013).

are legally unable to consent: ages of consent vary across jurisdictions from ten to eighteen, with sixteen being the most common;<sup>37</sup> and about twenty percent of fifteen-year-olds have had sex.<sup>38</sup> Where a minor's sexual partner is also a minor but sufficiently close in age, age-span provisions may eliminate liability for statutory rape, thereby removing conventionally consensual sex among peers from the reach of the law.<sup>39</sup> However, such "Romeo and Juliet" provisions<sup>40</sup> often do not apply to sex among minors under a certain age;<sup>41</sup> may reduce but not eliminate liability;<sup>42</sup> and are not found in all jurisdictions.<sup>43</sup>

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37. See Nicole Phillis, *When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality*, MICH. J. GENDER & L. 271, 312-13 (2011).

38. Finer & Philbin, *supra* note 36, at 888 (reporting that 19% of fifteen-year-old females have had sex; figures for young males are slightly higher); see Paul R. Abramson & Annaka Abramson, *Smells Like Teen Spirit: The Conundrum of Kids, Sex, and the Law*, in CHILDREN, SEXUALITY, AND THE LAW 6, 10-12 (Sacha M. Coupet & Ellen Marrus eds., 2015) (discussing the difficulties of obtaining reliable data pertaining to juvenile sexual activity).

39. See Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J.L. & PUB. POL'Y 373, 390 (2003). Nonconsensual sex could, of course, still be prosecuted by proving forcible rape. State *ex rel. Juv. Dep't of Multnomah Cty. v. Kitt*, 879 P.2d 1348, 1349 (Or. Ct. App. 1994) (finding that age-span statutes provide "a defense when the alleged lack of consent is based solely on incapacity due to the victim's age" and "is inapposite when there is an actual lack of consent").

40. There is technically a difference between age-span provisions, which decriminalize sex between close-in-age minors, and "Romeo and Juliet" clauses, which provide an affirmative defense if the victim and offender are sufficiently close in age. See Danielle Flynn, *All the Kids Are Doing It: The Unconstitutionality of Enforcing Statutory Rape Laws Against Children & Teenagers*, 47 NEW ENG. L. REV. 681, 687-91 (2013). The terms are used interchangeably herein.

41. In twenty-seven states, statutes specify a "minimum age of consent" below which an adolescent cannot legally engage in sexual intercourse regardless of the age of the defendant. ASAPH GLOSSER ET AL., U.S. DEP'T OF HEALTH & HUM. SERVS., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 7 (2004). See also Kitrosser, *supra* note 18, at 314 (noting that "[a]ge span provisions are generally limited to adolescents . . . [and do not apply to] sexual activity with children below a certain pre-adolescent age."); S.D. Codified Laws § 22-22-1(1).

42. See, e.g., GA. CODE ANN. § 16-6-3(c) (West 2016) (noting statutory rape is considered a misdemeanor if the victim is fourteen or fifteen years of age and the defendant is no more than three years older).

43. GLOSSER ET AL., *supra* note 41. See, e.g., WIS. STAT. ANN. § 948.02(2) (2015) (noting individuals under the age of sixteen are deemed incapable of consent under all circumstances); NEW HAMPSHIRE REVISED STATUTES § 632-A:3 (a child under sixteen years of age is unable to consent to sexual intercourse with anyone other than his or her spouse).

In jurisdictions without applicable age-span provisions, and in the absence of a specified minimum age of defendant to confine the use of statutory rape laws to adult defendants,<sup>44</sup> minor-minor sexual activity can result in criminal prosecution or delinquency adjudication against one or both of the minors involved. This Section critically evaluates this use of statutory rape laws as a sword against a member of the class the laws were designed to shield.

A number of commentators have persuasively argued that statutory rape proceedings are a disproportionate and unjust response to conventionally consensual<sup>45</sup> sex among similarly situated adolescents, and that reforms should be implemented to exclude such sex from the scope of criminal and juvenile law.<sup>46</sup>

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44. See, e.g., NEV. REV. STAT. ANN. § 200.364(6) (West 2015) (defining statutory sexual seduction as sex with someone less than 16 years of age where the defendant is at least eighteen years of age); *In re G.T.*, 758 A.2d 301, 309 (Vt. 2000) (holding that Vermont's statutory rape laws are only applicable in cases where the defendant is at least sixteen years of age). But see NEV. REV. STAT. ANN. § 201.230(1)(b) (West 2015) (defining lewdness with a child as committing lewd or lascivious acts—not amounting to penetration—with someone less than fourteen years of age “with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires” of the defendant or the victim; there is no minimum age of defendant).

45. I use the term “conventionally consensual” to refer to voluntary and welcome participation in sexual activity (compared to mere acquiescence), despite a lack of capacity to legally consent to sex. Voluntariness or actual consent is no defense to statutory rape, as minors are deemed legally unable to consent to sex. See generally Jennifer Ann Drobac, *Consent, Teenagers, and (un)Civil(ized) Consequences*, in CHILDREN, SEXUALITY, AND THE LAW (Sacha M. Coupet & Ellen Marrus eds., 2015) (discussing the legal significance of voluntariness in relation to civil sexual harassment cases involving minor plaintiffs).

46. See, e.g., Meredith Cohen, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws*, 16 J.L. & POL'Y 717, 755-56 (2008); Fischel, *supra* note 25, at 300-08; Flynn, *supra* note 40, at 713; Jordan Franklin, *Where Art Thou, Privacy?: Expanding Privacy Rights of Minors in Regard to Consensual Sex: Statutory Rape Laws and the Need for a “Romeo and Juliet” Exception in Illinois*, 46 J. MARSHALL L. REV. 309, 326-31 (2012); Michele Goodwin, *Law's Limits: Regulating Statutory Rape Law*, 2013 WIS. L. REV. 481, 530-31; Steve James, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*, 78 UMKC L. REV. 241, 256-61 (2009); Suzanne Meiners-Levy, *Challenging the Prosecution of Young “Sex Offenders”: How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 508-14 (2006); Siji A. Moore, Note, *Out of the Fire and Into the Frying Pan: Georgia Legislature's Attempt to Regulate Teen Sex Through the Criminal Justice System*, 52 HOW. L.J. 197, 229-30 (2008); Daryl J. Olszewski, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693, 710 (2006); Lisa Pearlstein, Note, *Walking the Tightrope of Statutory Rape Law: Using International Legal Standards to Serve the Best Interests of Juvenile Offenders and Victims*, 47 AM. CRIM. L. REV. 109, 126 (2010); Phipps, *supra* note 39, at 437-38; Emily J. Stine, *When Yes Means No, Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders*, 60 DEPAUL L. REV. 1169, 1195-1207 (2011).

Such arguments are often premised on claims about constitutional privacy and substantive due process rights as they pertain to consensual sex among older teenagers.<sup>47</sup> But the further we move away from the “charmed circle” of meaningfully consensual sex among similarly situated and sufficiently mature teens, the more controversial the issue of juvenile sex becomes. And the “protected class” question—whether laws designed as a shield can and should be used as a sword against that protected class—has received far less scrutiny in relation to “bad” and “wrongful” sex: sex involving children at the cusp of adolescence, sex that results in pregnancy or infection, and sex at the blurred margins between consent and nonconsent, voluntariness and coercion. This Section discusses constitutional and policy objections to the use of statutory rape laws against the protected class, even in cases where the objective is to protect minors from harmful sex or sexual exploitation.

#### A. Prosecuting Juvenile Sexual Partners for Consensual “Bad Sex” Obscures Fornication and Exploitation

When Z.C. was thirteen years old, she had sex with a twelve-year-old boy and became pregnant.<sup>48</sup> Utah takes a two-tier approach to statutory rape, meaning age-span provisions were only applicable to adolescents fourteen years and older.<sup>49</sup> There were no Romeo and Juliet provisions applicable to offenders under the age of fourteen (“children” under the statutory scheme). The state filed delinquency proceedings against both children for sexual abuse of a child.<sup>50</sup> The boy was adjudicated delinquent; Z.C. chose to fight the delinquency petition on constitutional grounds.<sup>51</sup>

As the Utah Court of Appeals noted, the proceedings against Z.C. and her sexual partner were ironic, in that they were deemed by law to be too young to consent to sex, yet were also

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47. See, e.g., Arnold H. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77, 80-88 (2005); Oliveri, *supra* note 14, at 486-89.

48. State *ex rel.* Z.C., 165 P.3d 1206, 1207 (Utah 2007).

49. *Id.* at 1208.

50. *Id.* at 1207; UTAH CODE ANN. § 76-5-404.1(1)(b), (2) (West 2016) (prohibiting sexual contact with a child under the age of fourteen).

51. State *ex rel.* Z.C., 165 P.3d at 1207.

deemed “able to form the intent to commit what would be a felony if committed by an adult.”<sup>52</sup> Nonetheless, the court reluctantly upheld the delinquency petition, finding that the lack of any age-span provision or mitigating factors applicable to “children” was rationally related to the legitimate legislative objective of “protecting the health and safety of young children, not only from older predators, but also from each other.”<sup>53</sup> Z.C. appealed to the Utah Supreme Court.<sup>54</sup>

The sexual contact in question was described, on appeal, as mutually welcome. In other words, although both Z.C. and her partner were legally unable to consent to intercourse, the sex was found to be conventionally consensual.<sup>55</sup> But are twelve- and thirteen-year-olds really capable of consenting to sex, with all its emotional and developmental implications, in a meaningful way? The fact that pregnancy resulted would seem to indicate a lack of appreciation on the children’s part of the possible ramifications of their choices (although the same could be said of many intimate relationships among adults). Even apart from outcomes such as pregnancy, sexual activity among children aged thirteen, twelve or even younger evokes a different moral response to sex between, for example, two emotionally mature sixteen-year-olds who take responsible protective measures and look out for one another’s needs and interests. Clearly our tolerance for young love has its limits—at some point, Romeo and Juliet are considered too young for voluntary sex to be healthy, normal, socially desirable or safe. As Professor Wertheimer argues:

Even if B’s consent is given completely willingly and even if there is no deception, B’s token of consent is morally transformative only if she is suitably competent, that is, only if she has the requisite emotional and cognitive capacities . . . . [W]e can understand the need for these requirements in terms of both autonomy and utility. An agent’s age is autonomous or self-directing when she is motivated by her appreciation of the *reasons* provided by her

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52. *State ex rel. Z.C. v. State*, 128 P.3d 561, 566, n.6 (Utah Ct. App. 2005); UTAH CODE ANN. § 76-5-404.1(2) (requiring “intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person”).

53. *State ex rel. Z.C.*, 128 P.3d at 566.

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

55. *Id.* at 1207, n.1.

situation. One who lacks certain cognitive or emotional capacities is not capable of making decisions consistent with those reasons . . . . [S]he may be unable to make choices that are consistent with her deepest values or preferences because those have not been formed . . . . From a utilitarian or “mutual benefit” account of consensual transactions . . . when an agent’s cognitive and emotional capacities are impaired, we have less reason to assume that her decision will promote her interests.<sup>56</sup>

In other words, sexual contact among children and young adolescents may be voluntary, but at some point of juvenility, it is not properly considered “good” sex. In that light, delinquency proceedings, such as those brought against Z.C., may be an effective means of responding to concerning sexual behavior with guiding and reformative supervision.

However, there are strong principle and policy objections to using statutory rape laws against consenting minors even in relation to “bad sex” where those minors are uncomfortably young or where sex results in bad outcomes such as impregnation of a thirteen-year-old.<sup>57</sup>

### 1. *Harmful Sex Is Not Necessarily Wrongful Sex*

First, as a preliminary point, I contend that if the sexual activity is noncoercive, mutually consensual, or voluntary, and occurs in a context of equality, it is not properly characterized as exploitative.<sup>58</sup> In other words, it does not involve victimization and there is no victim-offender binary. Of course, children who become sexually active with other children at a young age may experience direct or indirect harm—negative physical, psychological or emotional outcomes—as a result.<sup>59</sup> In this sense, we might consider them to be victims of the sexual activity or “victims of harm,” but they are not, in the absence of

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56. WERTHEIMER, *supra* note 10, at 215.

57. *State ex rel. Z.C.*, 165 P.3d at 1212-13.

58. *See infra* Part IV.A.1 (discussing exploitation as comprised of elements of inequality, coercion and (non)consent).

59. *Jones v. State*, 640 So. 2d 1084, 1086 (Fla. 1994) (“[S]exual activity with a child opens the door to sexual exploitation, physical harm, and sometimes psychological damage . . .”).



exploitation, victims of another's abuse or wrongdoing.<sup>60</sup> In other words, the fact that one or both children experience *harm* does not render the other a wrongful *aggressor* or victimizer.

It is no answer to say that each is both victim and perpetrator in relation to the same act, or that each is a victim of the other.<sup>61</sup> This either conflates "victim of harm" with "victim of wrongdoing," or implies that there is such a thing as mutual sexual exploitation, which defies common sense.<sup>62</sup> Further, as the Z.C. court reasoned, "it would be unthinkable to file even 'civil' juvenile court proceedings against a true victim of such a heinous crime."<sup>63</sup> In other words, even if children under a certain age are considered to lack the competence to meaningfully consent to sexual conduct, such that their voluntary sexual activity with one another can never be considered truly consensual, this presumed victimhood should also preclude treatment as victimizer.<sup>64</sup>

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60. WERTHEIMER, *supra* note 10, at 96 (noting the distinction between "A's act harms B" and "A's act exploits B"); R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13, 17 (2001) (arguing that "harm as a setback to interests . . . need not be wrongful"); *see infra* notes 146-151 and accompanying text (discussing the question of pregnancy, sexually transmitted disease, or loss of virginity as victimization).

61. *See, e.g., In re T.W.*, 685 N.E.2d 631, 635 (Ill. App. Ct. 1997) (finding that "where . . . two minors engage in a consensual sexual act, the [statutory rape] statute may validly be applied to prosecute both minors on the basis that each is the victim of the other"); *State v. Colton M.*, 875 N.W.2d 642, 647 (Wis. Ct. App. 2015) (finding that "a juvenile under the age [of consent] could be both a victim and an offender under the [statutory rape] statute").

62. *B.B. v. State*, 659 So. 2d 256, 261 (Fla. 1995) (Kogan, J., concurring) (noting that a reading of a statute that indicates both minors have committed the crime "effectively means each child was both aggressor and victim in a single act, which stretches credence to the breaking point"); *In re Frederick*, 622 N.E.2d 762, 765 (Ohio Ct. Com. Pl. 1993) (finding it would be absurd to charge two minors with the rape of the other).

63. *State ex rel. Z.C.*, 165 P.3d 1206, 1212 n.8 (Utah 2007) (concluding that "the State's double prosecution of these children is best characterized as charging both as perpetrators for the same act").

64. *Queen v. Tyrrell* [1894] QB 710 at 710 (Eng.) (holding that a person for whose protection an offence has been created cannot be convicted of aiding and abetting a person who commits the offence against her), *cited in* Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151, 171 (2009) (arguing that "the class of persons a statute is meant to protect should not be subject to punishment under the statute"). *Cf. In re T.W.*, 685 N.E.2d at 636 (holding that T.W., a minor, who had conventionally consensual sex with another minor "relinquished his right to protection and was subject to prosecution [for statutory rape]" once he "assumed the status of an accused").

## *2. Statutory Rape Laws Should Be Confined to Wrongful Sex to Preserve Their Moral Authority and to Avoid Labeling Fornicators as Abusers*

The use of age of consent laws against two conventionally consenting minors is thus properly characterized as a punitive response to sex *per se*, not abusive sex.<sup>65</sup> As the Utah Supreme Court said in dismissing Z.C.’s delinquency petition, where a sex abuse statute is applied to two consenting minors, “there is no discernible victim [of abuse] that the law seeks to protect, only culpable participants that the State seeks to punish.”<sup>66</sup> Such applications are objectionable for two reasons. First, sexual exploitation and fornication are distinct ethical breaches.<sup>67</sup> The former involves victimization and violates an uncontested moral norm: do not abuse the relative vulnerability of another for your own sexual gratification.<sup>68</sup> By contrast, fornication is a victimless<sup>69</sup> and contested moral breach.<sup>70</sup> As society becomes more accommodating of adolescent autonomy and privacy interests, statutory rape laws are typically understood and justified as a necessary incursion on those interests in order to protect young persons from sexual

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65. COCCA, *supra* note 3, at 167 (arguing that the prosecution of same-age consensual adolescent relationships “illuminates what may be the substantive purpose of statutory rape laws . . . often obscured with rhetoric about protecting the young and vulnerable, and that is to discourage nonmarital sexuality”); FISCHER, *supra* note 25, at 300 (“Criminalizing sexual activity among minors condemns sex, not coercion . . .”).

66. State *ex rel.* Z.C., 165 P.3d at 1212 (finding that the application of the statute to Z.C. for mutually welcome sex with another child produced an absurd result not intended by the legislature). Of course, the question of whether sex is meaningfully consensual is not always straightforward. See *infra* Part II.B (discussing the use of statutory rape laws against minors to target exploitative sex involving coercion or nonconsent and the issue of borderline/gray cases).

67. State *ex rel.* Z.C., 165 P.3d at 1212 (noting that fornication “differ[s] from sexual assault crimes . . . in both the theory and degree of punishment. Rather than punishing an actor who has perpetrated a crime against a victim, these laws demonstrate the legislature’s disapproval of the acts of both participants for violating a moral standard . . . . Because these crimes do not involve a victim, they involve a lesser degree of punishment”).

68. UTAH CODE ANN. § 76-5-404.1(2) (West 2016).

69. Compare victim in the sense of “victim as one who is wronged” and “victim as one who is harmed.” As discussed above, fornication may result in harm to one or both of the minors involved; this does not mean one or both minors were exploited or wronged.

70. See *supra* notes 12–18. Although a majority of Americans consider premarital teenage sex to be morally wrong, this rhetoric intersects with sex positivity discourse, and there is increasing recognition that sex can be a healthy aspect of maturation into adulthood.

exploitation.<sup>71</sup> To use such laws to target fornication implies moral equivalence between fornication and exploitation, sex *per se* and sexual abuse, bad (morally unworthy) sex and wrongful (morally impermissible) sex. This dilutes the stigma and moral authority of statutory rape laws.<sup>72</sup> In other words, the role of sexual abuse laws is properly protective, rather than proscriptive of a moral standard. Statutory rape laws should therefore be confined to targeting the specific ethical breach of exploitation, not merely sex that a prosecutor (rightly or wrongly) considers morally unworthy.<sup>73</sup>

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71. See, e.g., FRANKLIN ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING, 126 (2004) (arguing that the “justification for adult punishment—the exploitation of the young—is missing from settings in which both participants are young”); Sutherland, *supra* note 19, at 315 (noting that “[t]he justification usually put forward for age of consent laws is the protection of young persons from sexual exploitation by adults”); Cohen, *supra* note 46, at 723 (“[S]tatutory rape laws are absolutely imperative to protect minors from sexual predators.”); see WERTHEIMER, *supra* note 10, at 96. Prosecutors typically confine statutory rape proceedings to cases involving suspected exploitation, nonconsent, or coercion. Cf. *In re T.W.*, 685 N.E.2d 631, 637-38 (Ill. App. Ct. 1997) (finding that closeness in age of minor statutory rape defendant and his consenting partner did not override legislature’s purpose in enacting the statute, which was to protect thirteen- to sixteen-year-olds from engaging in premature sexual behavior regardless of their partners’ age); *In re James P.*, 115 Cal. App. 3d 681, 685 (1981) (explaining that the statutory rape statute was “enacted primarily to protect children from those influences which would tend to cause them to become involved in idle or immoral conduct”).

72. Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 910 (1962) (arguing that laws that “purport to bring within the condemnation of the criminal statute kinds of activities whose moral neutrality, if not innocence, is widely recognized . . . raise basic issues of a morally acceptable criminal code”); *In re Frederick*, 622 N.E.2d 762, 763 (Ohio Ct. Com. Pl. 1993) (finding that prosecution of fourteen-year-old juvenile for consensual sex with twelve-year-old “victim” would “belittle[] the legitimate suffering of other rape victims”). A similar argument could be made in relation to prosecuting consensual “sexting” among teenagers as child pornography. See Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 24-25 (2009).

73. My argument does not necessarily implicate statutory rape as applied to adult-minor sex—where conventionally consensual adult-minor sex is deemed exploitative due to the fact that one participant is an adult, a legal fiction that is widely accepted as an important means of protecting minors from predatory adults—but it is congruent with calls for close-in-age exceptions in relation to such sexual encounters to try to exclude non-abusive sex from the scope of statutory rape prosecutions generally. For discussions on whether statutory rape law as applied to adult-minor sex should be reformed to incorporate a consent-based standard that better confines the focus to coercive, as opposed to consensual sex, see generally Kitrosser, *supra* note 18, arguing that simple age-based restrictions on sex with minors obfuscate any meaningful inquiry into consent, coercion, and power imbalances; Lewis Bossing, Note, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73

Second, there are serious consequences for juvenile offenders who are labeled “child abuser” as opposed to “fornicator.” As the court in *Z.C.* noted, “labeling [a minor] with the moniker of ‘child abuser,’ even within the juvenile court system, can have serious consequences” including life-long sex offender registration, severe social stigmatization, and loss of reputation.<sup>74</sup> Accordingly, the use of sex abuse statutes

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N.Y.U. L. REV. 1205 (1998) (arguing that courts should consider whether a teen gave meaningful consent to an adult sex partner by analyzing the nature of the relationship between the parties and the nature of the sexual encounter). Cf. Oliveri, *supra* note 14, at 482; Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 68-70 (1994) [hereinafter *Turning Girls Into Women*].

74. State *ex rel. Z.C.*, 165 P.3d 1206, 1213 (Utah 2007). See also *People ex rel. J.L.*, 800 N.W.2d 720, 725 (S.D. 2011) (Meierhenry, J., concurring) (noting the severe consequences of labeling a fourteen-year-old who had consensual sex with his twelve-year-old girlfriend a sex offender for life, and arguing that those consequences “are far afield from the intended purpose of a juvenile petition of ‘affording guidance, control, and rehabilitation’” and that “[b]randing this child a rapist and life-long sex offender almost assures he cannot succeed as a productive juvenile or adult”); *In re B.A.M.*, 806 A.2d 893, 895 (Pa. Super. Ct. 2002) (noting the penalties for violation by a juvenile of a statutory rape statute “are severe . . . and the nature of the crime is one which, at the very least, reflects badly on the character of the offender”); Catherine L. Carpenter, *Against Juvenile Sex Offender Registration*, 82 U. CIN. L. REV. 747 (2014) (arguing that juvenile sex offender registration is cruel and unusual punishment); PHIL RICH, UNDERSTANDING, ASSESSING, AND REHABILITATING JUVENILE SEXUAL OFFENDERS 24 (2d ed. 2011) (“When it comes to labeling a child or adolescent as a sexual offender or its softer counterpart, a sexually abusive youth, we should be careful. The very same behaviors in adults and juveniles may be distinguished from one another by situation, circumstances, and developmental age and experience, as well as by intent, depth of comprehension, and . . . moral implication.”); HUMAN RIGHTS WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE U.S. (2013),

[http://www.hrw.org/sites/default/files/reports/us0513\\_ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf)

[<https://perma.cc/KK86-GQJW>]; ILL. JUVENILE JUSTICE COMM’N, IMPROVING ILLINOIS’ RESPONSE TO SEXUAL OFFENSES COMMITTED BY YOUTH: RECOMMENDATIONS FOR LAW, POLICY, AND PRACTICE 38-50, 72-76 (2014). For a discussion of whether juveniles should ever be subject to sex offender registration is beyond the scope of this article, see generally CAMILLE GIBSON & DONNA M. VANDIVER, JUVENILE SEX OFFENDERS: WHAT THE PUBLIC NEEDS TO KNOW 70-71, 184-92 (2008); Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163 (2003) (arguing that sex offender registration “magnif[ies] the harm without actually mitigating the occurrence of abuse”); Elizabeth J. Letourneau & Michael F. Caldwell, *Expensive, Harmful Policies That Don’t Work or How Juvenile Sexual Offending is Addressed in the U.S.*, 8 INT’L J. BEHAV. CONSULTATION & THERAPY 23 (2013) (recommending that sexual offender registration be revised to exclude juveniles); *In re J.B.*, 107 A.3d 1, 19-20 (Pa. 2014) (finding that mandatory lifelong sex offender registration as applied to juveniles is unconstitutional); *In re C.P.*, 967 N.E.2d 729, 732 (Ohio 2012) (finding lifetime registration for juveniles constitutes cruel and unusual punishment).

as a response to mere fornication is disproportionate and arguably constitutes cruel and unusual punishment.<sup>75</sup>

In short, if the criminal law seeks to proscribe a moral standard by targeting non-exploitative but potentially harmful or morally proscribed behavior, such as consensual fornication among younger minors, protective sexual abuse offenses, which presuppose a perpetrator and a victim,<sup>76</sup> are not the appropriate tool.<sup>77</sup>

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75. *B.B. v. State*, 659 So. 2d 256, 262 (Fla. 1995) (Grimes, C.J., dissenting) (“If B.B. is adjudicated delinquent of a second-degree felony, he may have an argument that the particular sanction imposed upon him for having sex with another sixteen-year-old is cruel and unusual punishment.”); *In re Pima Cty. Juvenile Appeal No. 74802-2*, 790 P.2d 723, 732 (Ariz. 1990) (noting petitioner’s policy argument that “it is unfair to brand innocent teenage behavior as criminal” and acknowledging that the “present statute could lead to a harsh result in a given case”); see also Flynn, *supra* note 40, at 694-97.

76. *State ex rel. Z.C.*, 165 P.3d at 1211 (“[L]ike all forms of sexual assault, child sex abuse presupposes that a single act of abuse involves a victim, whom the statute endeavors to protect, and a perpetrator, whom the statute punishes for harming the victim.”).

77. *Id.* at 1212, n.9 (noting that delinquency proceedings against Z.C. under statutory rape provisions “begs the question of why the prosecutor could not have accomplished the intended result by basing the delinquency petition on a victimless offense that more accurately fits the conduct at issue”); *In re B.A.M.*, 806 A.2d at 897-98 (finding statutory rape statutes were “designed to protect children from exploitation by their elders,” that it would be absurd to prosecute consensual sexual activity between minors, and that the “law was not intended to render criminal *per se* the experimentation carried on by young children, even where the acts may evoke disapprobation or censure”); cf. *State v. J.A.S.*, 686 So. 2d 1366, 1368-69 (Fla. Dist. Ct. App. 1997) (holding minors could be prosecuted for statutory rape in relation to consensual sex and that “[t]he crux of the state’s interest in the minor-to-minor situation is in protecting the minor from the sexual activity itself for reasons of health and quality of life”); *In re Pima Cty. Juvenile Appeal No. 74802-2*, 790 P.2d at 729 (“We are persuaded that the state has a significant interest in proscribing sexual conduct between minors.”); *In re Hildebrant*, 548 N.W.2d 715, 716 (Mich. Ct. App. 1996) (finding that prosecution of fourteen-year-old girl for conventionally consensual sex with her thirteen-year-old adopted brother did not violate the policy behind the statutory rape-type statute, which “has its basis in the presumption that the children’s immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct”); *In re T.W.*, 685 N.E.2d 631, 637 (Ill. App. Ct. 1997) (finding the purpose of the statutory rape statute was “to protect children . . . from the consequences of premature sexual experiences”); *Cote H. v. Eighth Jud. Dist. Ct.*, 175 P.3d 906, 909 (Nev. 2008) (finding that liberally construing statutory rape statute to permit minors under the age of consent to be adjudicated delinquent is consistent with that statute’s purpose “to protect minors from others’ lewd acts”); *In re P.M.*, 592 A.2d 862, 863 (Vt. 1991) (declining to read a minimum age limit for perpetrators into the statutory rape law). A legal age of consent may be intended to serve an aspirational or morally-prescriptive function, sending a message that sexual activity among juveniles below a certain age is not socially acceptable. Kadish, *supra* note 72, at 914 (“[O]ne of [the] central purposes [of criminal law is] as a solidifier and communalizer of moral values.”). This function could equally be served by fornication laws that criminalize all consensual sex among minors. The question of whether this is an appropriate function of criminal and juvenile law is beyond the scope of this article—although I take the position that potentially harmful sex among minors that

### 3. *Prosecutorial Discretion Is Not an Adequate Means of Confining Statutory Rape to Wrongful Adolescent Sex*

Cases involving statutory rape proceedings in relation to sex among conventionally consenting, similarly situated minors appear to be rare, although at least one court has said that statutory rape laws can be used against both minors for consensual sex “on the basis that each is a victim of the other.”<sup>78</sup> More commonly, and given the prevalence of sexual activity among American teenagers below the age of consent,<sup>79</sup> prosecutorial discretion is exercised to exclude sexual activity among adolescents from the reach of legal regulation unless it appears to be exploitative.<sup>80</sup> However, there are numerous

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does not involve exploitation is best addressed with non-criminal policies or diversion programs, rather than by criminalizing fornication among adolescents, for at least two practical reasons. First, there is the difficulty of enforcing fornication laws uniformly (due to the sheer number of adolescents who are sexually active) and fairly. *See supra* note 38; *supra* notes 88-90 and accompanying text; Kadish, *supra* note 72, at 911-13 (discussing the potential for “arbitrary and abusive law enforcement” where legislation prohibits consensual extramarital sexual behavior). Second, there is the difficulty in defining a cut-off age at which juvenile privacy and autonomy interests should be trumped by the state’s interest in proscribing a moral standard and protecting juveniles from the harms of premature sexual activity. *See generally* B.B. v. State, 659 So. 2d 256 (Fla. 1995) (finding application of statutory rape law to sixteen-year-old for consensual sex with another sixteen-year-old was unconstitutional under constitutional right of privacy); Flynn, *supra* note 40, at 697 (“Since society has come to acknowledge the fact that teenagers engage in sexual activity, the punishment of such activity becomes not only moot, but also contrary to societal interests.”); Fischel, *supra* note 25, at 300 (“Criminalizing sexual activity among minors condemns sex, not coercion; dampens the sexual autonomy of young people; and disrespects their choices. If many or most young people are first having sex while below the age of consent, our social and legal obligation is not to penalize the sex—making it more difficult for teenagers to report coercion—but to protect young people’s choices, desires, and safety. We fail this obligation if we criminalize teenagers for having sex.”). For a discussion on the constitutionality of using fornication statutes to regulate teenage sex, see generally Martin R. Gardner, *The Categorical Distinction Between Adolescents and Adults: The Supreme Court’s Juvenile Punishment Cases—Constitutional Implications for Regulating Teenage Sexual Activity*, 28 BYU J. PUB. L. 1 (2013); Loewy, *supra* note 47.

78. *In re T.W.*, 685 N.E.2d at 635; see also Michael F. Caldwell, *What We Do Not Know About Juvenile Sexual Reoffense Risk*, 7 CHILD MALTREATMENT 291, 292 (2002) (noting that “adjudication of noncoerced peer teen sexual activity is apparently not widespread” but “is fairly common in at least one state [Wisconsin]”).

79. *See supra* notes 37-38.

80. *Regulating Consensual Sex*, *supra* note 12, at 750-51 (noting “an apparent consensus among prosecutors against enforcement of statutory rape laws in cases of ‘consensual sexual relationships’ among peers” and concluding that “statutory rape laws currently are enforced at the margins, rather than in the main. The bulk of the statutory rape docket consists of cases in which society is likely to view the predator as ‘sick,’ rather

problems with relying on prosecutorial discretion alone to so confine the scope of statutory rape laws. First, the *Z.C.* case and others show that prosecutorial discretion is not a fail-proof safeguard.<sup>81</sup> Second, even laws that are enforced infrequently may be used as threats against juveniles.<sup>82</sup> Third, the lack of clarity as to whether consensual sex among minors is a proper target of statutory rape laws produces uncertainty for both minors<sup>83</sup> and mandatory reporters,<sup>84</sup> and may produce a chilling

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than simply lovelorn, and cases that arguably could be tried as forcible rape”); Phipps, *supra* note 39, at 401 n.170 (“If there is no evidence of coercion or other wrongful conduct, prosecutors simply do not have the resources (or the inclination) to prosecute these cases [involving voluntary sex between teenagers.]”); *In re Pima Cty. Juvenile Appeal No. 74802-2*, 790 P.2d at 727 (“[T]he state conceded in oral argument that it does not attempt to apply § 13-1404 [prohibiting sexual contact with a person under fifteen years of age] to all juveniles who violate it, nor does it intend to.”); Gail Ryan, *Sexually Abusive Youth: Defining the Problem and the Population*, in *JUVENILE SEXUAL OFFENDING: CAUSES, CONSEQUENCES, AND CORRECTION* 3, 4 (2d ed. 1997) (“In most cases, activities with willing similar-aged peers were only charged as ‘statutory’ crimes if a complaint was made.”); *In re G.T.*, 758 A.2d 301, 306 (Vt. 2000) (noting that the state’s attorney “receives numerous complaints to prosecute teenagers under [statutory rape provision], usually from parents, but does so only when there is evidence of coercion or a lack of true consent”); Sandy Nowack, *A Community Prosecution Approach to Statutory Rape: Wisconsin’s Pilot Policy Project*, 50 DEPAUL L. REV. 865, 873-75 (2001); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 695 (2006).

81. *State ex rel. Z.C.*, 165 P.3d 1206, 1212 n.9 (Utah 2007) (“The primary fail-safe against the absurd application of criminal law is the wise employment of prosecutorial discretion, a quality that is starkly absent in this case.”); *see also In re B.A.M.*, 806 A.2d 893, 895 (Pa. Super. Ct. 2002) (finding application of a “deliberately protective [statutory rape statute] specifically intended by the Legislature to shield young children from sexual predation by older teenagers and adults” to eleven-year-old for sex with another eleven-year-old produced an absurd result); Megan Twohey, *Teens Who Have Sex Charged With Abuse: DAs Prosecuting Even When Both Consent*, MILWAUKEE J. SENTINEL, Mar. 8, 2004, at 1A; Jamaal Abdul-Alim, *Teens Have Right to Have Sex*, MILWAUKEE J. SENTINEL, Aug. 21, 2003, at 1B (reporting proceedings against two fourteen-year-old juveniles for attempted sexual assault, following the girl’s mother finding the pair in bed about to have sexual intercourse). For a fascinating socio-legal study of how prosecutors in California individually and collectively develop standards to define the meaning of exploitation in the statutory rape caseload, *see* Levine, *supra* note 80, at 713-32.

82. Oliveri, *supra* note 14, at 505.

83. Meiners-Levy, *supra* note 46, at 512 (arguing that given society’s acceptance of preteen and teenage sex, “there is little reason for a teenager to believe that sexual contact can lead to prosecution absent specific familiarity with the law”).

84. *In re G.T.*, 758 A.2d at 306; *see also* Planned Parenthood Affiliates of Cal. v. Van de Kamp, 181 Cal. App. 3d 245, 275, 280 (1986) (commenting *dicta* that it is “illogical” to definitively apply child abuse statute to voluntary sexual conduct among minors under the specified age limit and finding that reporting of voluntary non-abusive behavior of sexually active minors violates right to sexual privacy guaranteed mature minors by California Constitution).

effect in terms of teens' willingness to seek guidance about relationships, pregnancy, sexual health and child support from their elders.<sup>85</sup> Fourth, Professor Levine points out that to the extent that prosecutors attempt to use statutory rape laws sparingly—to target only cases involving exploitation—this insulates the law's technical condemnation of *all* sex involving minors, including non-abusive and meaningfully consensual sex among members of the protected class, from “meaningful public critique.”<sup>86</sup>

Finally, a criminal code that theoretically allows for the punishment of consensual sex between minors as statutory rape, but relies on prosecutorial discretion to ensure sex *per se* is not the punitive target, can too easily lead to selective punishment of juvenile fornication as statutory rape based on prosecutorial judgments about when consensual, non-abusive sex is morally unworthy.<sup>87</sup> Not only is “bad sex” not the appropriate target of statutory rape laws, but this also raises equal protection issues for juveniles whose sexuality lies outside the “charmed circle” of “normal, natural, blessed” sexuality<sup>88</sup>—for example, adolescents in institutional settings<sup>89</sup> or non-heterosexual youth<sup>90</sup>—and may accordingly be disproportionately targeted.<sup>91</sup>

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85. *Regulating Consensual Sex*, *supra* note 12, at 743 (arguing that “it is the height of foolishness to deter a teen from seeking contraception, treatment for sexually transmitted diseases, prenatal care, or food for their infant”).

86. Levine, *supra* note 80, at 744-45.

87. See Kadish, *supra* note 72.

88. See *supra* notes 19-20 and accompanying text.

89. ZIMRING, *supra* note 71, at 54 (noting that “consensual ‘status offenders’ are seldom prosecuted except in institutional settings such as group homes – a double standard with potentially lifelong legal consequences); Meiners-Levy, *supra* note 46, at 502 n.2 (“The children most likely to be targeted in prosecutions for consensual sexual encounters that violate the law because of the age of both the victim and the ‘perpetrator’ are children already involved in the juvenile justice or child welfare systems.”).

90. For discussion of bias against homosexual youths in Romeo and Juliet exceptions and statutory rape enforcement generally, see COCCA, *supra* note 3, at 10 (noting that there is “some evidence that prosecutions under the [statutory rape] laws have disproportionately targeted homosexual relationships”); Michael H. Meidinger, Note, *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) (arguing that queer youth may be more vulnerable to statutory rape prosecutions based on their “failure to fit social norms”); Caitlyn Silhan, Comment, *The Present Case Does Involve Minors: An Overview of the Discriminatory Effects of Romeo and Juliet Provisions and Sentencing Practices on Lesbian, Gay, Bisexual, and Transgender Youth*, 20 LAW & SEXUALITY 97, 109 (2011); Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195 (2008) (discussing statutory rape schemes that limit Romeo and Juliet



## B. Use of Statutory Rape Laws to Target Undefined Victimization (Wrongful Sex) Within the Protected Class Is Unduly Subjective

The Z.C. court limited its holding to “situations where no true victim or perpetrator can be identified.”<sup>92</sup> This points to the more common use of statutory rape laws against members of the protected class: one-sided prosecution of the “true offender.”

Sex among minors may involve predatory power dynamics or outright exploitation and abuse.<sup>93</sup> As sexual creatures, juveniles are capable of exploiting the relative vulnerability of others for their own sexual gratification.<sup>94</sup> Studies have shown that some child molesters begin abusing children as juveniles.<sup>95</sup> It is obviously important that the law responds to the grave harm inflicted on children who are sexually abused whether by adults or by other minors,<sup>96</sup> and to intervene with rehabilitative measures when a juvenile shows such predatory proclivities.<sup>97</sup> Even sex among adolescents that at first glance appears to be conventionally consensual may on closer examination involve elements of undue persuasion or emotional manipulation.<sup>98</sup> As

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exceptions to heterosexual conduct); Sutherland, *supra* note 19, at 327-28; Commonwealth v. Washington W., 928 N.E.2d 908 (Mass. 2010) (seeking discovery to prove selective enforcement of statutory rape laws based on sexual orientation); Fischel, *supra* note 25, at 301 (arguing that “insofar as age of consent statutes are and have been disproportionately enforced against black men and gay men, criminal law in the areas of sexual proscriptions and sentencing is more plausibly rendered as a conduit and codification of racism and homophobia”).

91. See *infra* notes 120-123 and accompanying text.

92. State *ex rel.* Z.C., 165 P.3d 1206, 1213 (Utah 2007); see also Commonwealth v. Bricker, 41 A.3d 872, 880 (Pa. Super. Ct. 2012) (clarifying that the holding in *In re B.A.M.*, if worded more precisely, “would have strictly [been] limited . . . to its facts wherein mutually agreed upon sexual activity between peers under the age of 13 is not a crime”).

93. Gail Ryan, *Sexually Abusive Youth: Defining the Population*, in JUVENILE SEXUAL OFFENDING: CAUSES CONSEQUENCES, AND CORRECTION 3-5 (Gail Ryan & Sandy Lane eds., 2d ed. 1997).

94. *Id.* at 4-7; GIBSON & VANDIVER, *supra* note 74, at 80-82.

95. Gail Ryan, *The Evolving Response to Juvenile Sexual Offenses*, in JUVENILE SEXUAL OFFENDING: CAUSES, CONSEQUENCES, AND CORRECTION 180 (Gail Ryan & Sandy Lane eds., 2d ed. 1997).

96. P.G. v. State, 616 S.W.2d 635, 641 (Tex. Civ. App. 1981) (“Children are entitled to no less protection from other children who sexually abuse them than they are from adults who sexually abuse them.”).

97. But see Ryan, *supra* note 95, at 180 (“Until recent years, juveniles engaging in behaviors that were clearly both sexual and criminal were often dismissed with a ‘boys will be boys’ attitude or a slap on the hand by parents, teachers, and judges alike.”).

98. See Oberman, *supra* note 73, at 70.

discussed above, such exploitative sex is properly considered wrongful or morally impermissible, as distinct from merely bad or morally unworthy.<sup>99</sup>

B.A.H. was fourteen when his male cousin and best friend, thirteen-year-old X.X., slept over.<sup>100</sup> The boys consumed alcohol at B.A.H.'s urging, and B.A.H. initiated a sexual encounter involving oral and anal intercourse.<sup>101</sup> Some time after X.X. told him to stop, B.A.H. stopped.<sup>102</sup> He told X.X. he would kill him if he told anyone about what had happened, which X.X. took to be "more like an exaggeration" based on B.A.H.'s fear of being outed as "bi."<sup>103</sup> Some months later when X.X. told his mother about the encounter, she took him to a counselor, a mandated reporter, who disclosed the allegations to the police.<sup>104</sup> B.A.H. was charged with statutory rape.<sup>105</sup> Both B.A.H. and X.X. were under the relevant age of consent, which was sixteen years.<sup>106</sup>

Many features of the encounter between B.A.H. and X.X. are troubling. B.A.H. was an (admittedly only slightly) older cousin of X.X., which may have influenced the power dynamics of their relationship—X.X. said that he "did not want to [do it]" but that [B.A.H.] convinced him "because [B.A.H.] [was] [X.X.'s] favorite cousin" and X.X. "didn't want to feel like . . . being mean."<sup>107</sup> In addition, B.A.H. supplied the alcohol that likely impacted the judgment, capacity, and inhibitions of both the boys; failed to stop at X.X.'s command; and threatened X.X. after the fact.<sup>108</sup> Even on the brevity of facts found in the judgment, a reasonable observer might infer victimization of X.X. by B.A.H.; that this was not "just sex," but sex that crossed the line from fornication to abuse. Indeed, the court found that

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99. See Martinson, *supra* note 13 and accompanying text.

100. *In re B.A.H.*, 845 N.W.2d 158, 161 (Minn. 2014).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *In re B.A.H.*, 845 N.W.2d at 161; MINN. STAT. ANN. § 609.342 (West 2016) ("A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual penetration . . . [C]onsent to the act by the complainant is [not] a defense.").

106. See MINN. STAT. ANN. § 609.342(b) (West 2016).

107. *In re B.A.H.*, 845 N.W.2d 158, 161 (Minn. 2014).

108. *Id.*

the encounter between B.A.H. and X.X. reflected “an almost archetypal perpetrator and victim of criminal sexual conduct,” and upheld B.A.H.’s delinquency adjudication.<sup>109</sup> Nonetheless, there are serious problems with applying strict liability statutory rape laws to sexual contact between members of the same protected class, even in cases like that of B.A.H. where the intended punitive target is wrongful exploitation of a minor by a minor.

### 1. *The Punitive Target Is Not Defined*

The objectionable conduct as defined by a statutory rape statute is sex with a minor.<sup>110</sup> When an adult has sex with a minor, the adult alone has engaged in the prohibited conduct and the minor is deemed a victim.<sup>111</sup> When two minors engage in sexual contact, each has satisfied the elements of statutory rape and each is legally a violator, whether or not there was *de facto* exploitation or harm.<sup>112</sup> In cases like B.A.H., prosecutorial discretion is exercised to target victimization of the “true” victim by the “true” offender and the statute is enforced accordingly.<sup>113</sup> The difficulty with this approach is that it is vague and subjective, because in the context of sex among members of the protected class, victimhood is not defined.

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109. *Id.* at 166.

110. 65 AM. JUR. 2D *Rape* § 13 (2001) (“The elements of statutory rape are merely sexual intercourse with a person under the statutory age of consent.”).

111. There may be cases of adult-minor sexual contact where the minor, deemed by statutory rape law to be a victim, is in fact the “true offender” vis-à-vis the separate offense of forcible rape. See Russell L. Christopher & Kathryn H. Christopher, *The Paradox of Statutory Rape*, 87 IND. L.J. 505 (2012) (discussing how an adult rape victim, raped by a sexually aggressive minor below the age of consent, is exposed to statutory rape liability).

112. The State in *B.A.H.* conceded that both boys were similarly situated in relation to the statute. *In re B.A.H.*, 845 N.W.2d at 165. This would not be true in a case where one minor was a completely passive participant, due to the absence of a voluntary act.

113. The court found the decision to charge B.A.H. and not X.X. was rational because the encounter between B.A.H. and X.X. reflected “an almost archetypal perpetrator and victim of criminal sexual conduct.” *Id.* at 166. See also *id.* at 167 (Page, J., concurring) (“[The argument that X.X. also committed criminal sexual conduct] cannot go unchallenged because it harkens back to a day when sexual assault victims were considered as culpable as the perpetrators of such assaults.”); State *ex rel. Z.C.*, 165 P.3d 1206, 1213 (Utah 2007) (finding that statutory rape law as applied to thirteen-year-old female juvenile who engaged in “mutually welcome” sexual intercourse with twelve-year-old boy, produced absurd result not intended by legislature, but confining holding to “situations where no true victim or perpetrator can be identified”); *In re D.B.*, 950 N.E.2d 528, 533 (Ohio 2011) (noting “the temptation for prosecutors to label one child as the offender and the other child as the victim” in relation to sex within the protected class).

Instead, it is left to prosecutors to define the punitive target of statutory rape laws as applied to sex among minors, be it nonconsensual sex, coercion, incest, loss of virginity, impregnation, fornication, or some other notion of bad or wrongful sex. Accordingly, prosecutorial beliefs about the normative boundary between good, bad and wrongful sex can significantly influence the regulation of sex among adolescents and whose conduct is legally sanctioned.<sup>114</sup> Phipps gives the following illustration:

[O]ne county prosecutor may believe that all voluntary sex between teenagers is wrong and vigorously prosecute all cases brought to her attention. A prosecutor in an adjoining county, however, might create a per se rule that any time a victim says “no,” such cases are always prosecuted. And yet another county prosecutor may decide to prosecute only cases in which the female makes a prompt outcry and immediately tells a third party that sex was coerced. Thus, rather than deciding which offense to apply to

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114. Kadish, *supra* note 72, at 909-11 (cited in *In re G.T.*, 758 A.2d 301, 306-07 (Vt. 2000).

[S]tatutes which seem deliberately to over-criminalize, in the sense of encompassing conduct not the target of legislative concern . . . are in effect equivalent to enactments of a broad legislative policy against, for example, undesirable gambling, leaving it to the police to further that policy by such arrests as seem to them compatible with it. From one point of view such statutes invite a danger cognate to that of defining a crime by analogy, augmented by the fact that it is the policeman who is defining criminal conduct rather than a court. That no actual abuse has been demonstrated in police administration of an overdrawn statute, such as gambling, would not seem to answer the moral and precedential objections to this tactic . . . .

*Id.*; Michelle Oberman, *Two Truths and a Lie: In re John Z. and Other Stories at the Juncture of Teen Sex and the Law*, 38 LAW & SOC. INQUIRY 364, 395 (2013) (“[D]istrict attorneys’ offices serve as factories in which the criminal law meets the reality of limited resources and the ‘real’ crimes become articulated.”); *In re P.M.*, 592 A.2d 862, 867 (Vt. 1991) (Dooley, J., dissenting) (arguing that whether behavior contravenes a statutory rape provision should turn on “the *type of conduct* involved, not on an ad hoc balancing of the relative positions of the parties or on indicia of some unspecified level of exploitation”); Phipps, *supra* note 39, at 417 (arguing in relation to statutory rape provisions that “[i]f something other than the act of sexual intercourse is the objectionable conduct (e.g., use of coercion), then that conduct must be defined . . . [or the] crime becomes pliable and ever-changing”); Oliveri, *supra* note 14, at 503-04 (discussing the risk of statutory rape laws being used “as a vehicle for a particular prosecutor’s political or social agenda,” and giving examples of the use of anti-fornication and cohabitation laws to target welfare recipients and welfare fraud).

given conduct, the prosecutor would be . . . defining crimes on a case-by-case basis rather than on the basis of objective criteria established by a state legislature.<sup>115</sup>

Thus, even assuming good-faith efforts are made to exclude mere fornication from the scope of statutory rape laws as applied to minor defendants, the true crime of “victimization” or “exploitation” is not defined. In other words, as applied to minor-minor sex, statutory rape statutes are so over-inclusive that it is left to prosecutors to define the scope of illegal minor-minor exploitation.<sup>116</sup> Should pregnancy always be considered to constitute victimization of a female by a male?<sup>117</sup> What about when a parent complains about their child’s loss of chastity, or involvement with a same-sex peer?<sup>118</sup> Such a flexible approach to minor-minor sex is objectionable as a matter of policy, because the question of how society should respond to adolescent sexuality, and the proper limits of law’s tolerance thereof, is a complex and controversial policy matter that should not be left to prosecutorial predilection but should be confronted, as far as possible, with statutory clarity.<sup>119</sup>

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115. Phipps, *supra* note 39, at 413.

116. *Id.*

117. COCCA, *supra* note 3, at 9-10 (“[I]n cases in which a female becomes pregnant, she is assumed to be the victim.”); *see id.* at 26, 93-128 (discussing the historical use of statutory rape laws “to target men for the impregnation of young impoverished women”); Oliveri, *supra* note 14, at 493; Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 119 (1997) (arguing that the selective use of statutory rape to target pregnancy “risks overlooking the harm caused to the many children who do not become pregnant, as well as overlooking all harm to boys and pre-pubescent girls”).

118. Oberman, *supra* note 114, at 378 n.33 (noting that in cases involving two minors, “practically speaking, the law distinguishes victim from perpetrator by virtue of reporting: The victim is the one whose parents first complain to the police.”); Sutherland, *supra* note 19, at 322 (noting that statutory rape cases involving consensual sex among teenagers “are usually brought to the attention of the criminal justice system by parents or by welfare officials”).

119. A similar criticism can be made in relation to cases of adult-minor statutory rape and the use of prosecutorial discretion to refrain from prosecuting cases that appear to involve conventionally consensual sex. This discretionary approach to statutory rape enforcement generally is not without its controversy. Sutherland, *supra* note 19, at 332 (noting it depends on an “operative definition of ‘consensual’ [that] may allow for considerable violence and coercion. The implicit message is that the consent of certain girls to certain boys is presumed on the basis of class and racial stereotypes”). However, this is beyond the scope of this article. *See generally Master’s House*, *supra* note 27 (discussing juvenile sexual activity and statutory rape laws in today’s society). *Cf.* Phipps, *supra* note 39 (analyzing and responding to various articles written by Oberman regarding the regulation of minors’ sexual activity).

## 2. Undefined Punitive Target May Lead to Discriminatory Prosecutions of Unpopular Minors and Over-Criminalization

This vagueness<sup>120</sup> also raises equal protection and fairness concerns, in that factors such as gender, sexual orientation, race, economic class, social background, parental involvement/complaints, and prior sexual experience may improperly influence enforcement decisions due to assumptions about what type of sex is harmful, who is harmed by sex, and who is an aggressor.<sup>121</sup> Those assumptions “will not always be borne out by the facts,”<sup>122</sup> and could potentially reflect bias, for example, against boys, gay or queer youth, previously unchaste minors, or interracial couples.<sup>123</sup>

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120. I am not making a due process void-for-vagueness argument; I am in agreement with courts that have found statutory rape laws define the legally prohibited conduct clearly, even as applied to sex among minors. *See, e.g., In re B.A.H.*, 845 N.W.2d 158, 164 (Minn. 2014); *L.L.N. v. State*, 504 So. 2d 6, 8 (Fla. Dist. Ct. App. 1987); *In re John C.*, 569 A.2d 1154, 1157 (Conn. App. Ct. 1990); *cf. In re D.B.*, 950 N.E.2d 528, 534 (Ohio 2011) (holding that a statutory rape provision, as applied to a child under the age of consent, is unconstitutionally vague). Rather, my argument is that as far as they can be applied to members of the protected class, the use of statutory rape laws to target the true/factual victim is premised on a vague and subjective notion of victimhood, which raises policy and equal protection concerns.

121. Phipps, *supra* note 39, at 413 (arguing that “[a]n obvious implication of such overly broad discretion is that it would unnecessarily open the door to improper considerations in the charging decision.”).

122. *B.B. v. State*, 659 So. 2d 256, 261 (Fla. 1995).

123. *See, e.g., Sutherland, supra* note 19, at 332-36 (discussing how factors such as gender, class, race and sexual orientation impact social tolerance for adolescent sexuality and the enforcement patterns of statutory rape laws); ANN J. CAHILL, RETHINKING RAPE 173 (2001) (“[A]ssumptions concerning the sexual aggressiveness of men and the sexual passivity of women.”); *B.B. v. State*, 659 So. 2d at 261 (Kogan, J., concurring) (“Attempting to brand one as the aggressor and the other as the victim raises very serious questions of equal protection, especially where prosecutors always assume that one type of child—such as ‘the boy,’ or the one who is ‘unchaste’—must be the aggressor . . . some children—even boys—fall into a tragic cycle of sexual exploitation by others, which robs them of virginity but certainly does not indicate they are aggressors. And I am utterly unwilling to say that repeat victims of sexual exploitation must be considered aggressors merely because of prior victimization by third parties.”); *Gammons v. Berlat*, 696 P.2d 700 (Ariz. 1985) (finding thirteen-year-old boy, but not consenting fifteen-year-old female partner, subject to criminal statutory rape proceedings, when both under age of consent); Kay L. Levine, *No Penis, No Problem*, 33 *FORDHAM URB. L.J.* 357, 376-79 (2006) (discussing evidence of bias against male perpetrators in statutory rape cases generally); Oberman, *supra* note 114, at 382 (arguing that “the two-dimensional script rendering all boys predators cannot be any more accurate than the script that divides girls into virgins and whores”); Goodwin, *supra* note 46, at 530-31 (noting evidence of bias against black males in statutory rape cases generally); Higdon, *supra* note 90, at 224 (discussing the use

Moreover, because statutory rape is a strict liability offense, if a prosecutor designates a minor the “true offender” based on perceived victimization, such as in the case of *B.A.H.*, it does not need to prove that the sex was in fact abusive, coercive, or otherwise harmful.<sup>124</sup> Accordingly, the minor is not given an opportunity to answer the implied but undefined charge of victimization, even in the face of severe potential lifelong penalties and stigma that can follow a statutory rape conviction or adjudication. This could result in mere fornicators being unfairly labeled child abusers, an over-criminalization problem that, as discussed above, arguably dilutes the moral authority of statutory rape laws and produces unjust consequences for minors.<sup>125</sup>

### 3. *G.T. v. Vermont*

The Supreme Court of Vermont pointed to these problems in the case of *G.T. v. Vermont*, which involved a similar fact pattern to *B.A.H.*,<sup>126</sup> in holding that Vermont’s statutory rape law could not be applied to members of the protected class.<sup>127</sup> The *G.T.* court criticized the prosecutor’s approach, which is reportedly common,<sup>128</sup> of bringing statutory rape proceedings against a juvenile only when it believes the juvenile has committed rape. This approach ensures the prosecutor:

[D]oes not have to prove the presence of the exact elements it found to justify the prosecution. Thus, the prosecutor determines what crime the juvenile has committed, but charges in such a way as to ensure that the juvenile never has the opportunity to show that he or she did not commit the crime found by the prosecutor . . . [T]he selective enforcement of the underlying statute has the hallmarks that other courts have relied upon to find discriminatory prosecution.<sup>129</sup>

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of statutory rape laws to marginalize and stigmatize LGBT teens); Fischel, *supra* note 25, at 301.

124. *United States v. Caceres-Olla*, 738 F.3d 1051, 1055 (9th Cir. 2013).

125. *See supra* Part III.A.2.

126. *See infra* notes 176-179 and accompanying text.

127. *In re G.T.*, 758 A.2d 301, 309 (Vt. 2000).

128. *See supra* note 80.

129. *In re G.T.*, 758 A.2d at 306.

Consider a hypothetical: Ellis, aged twelve and Riley, aged eleven (four months younger than Ellis) have sex at Riley's suggestion.<sup>130</sup> Riley has been socialized to believe it is normal and acceptable to try to persuade someone to "give out." Ellis was hesitant at first but eventually acquiesced, because Ellis has been socialized to believe that failure to do so will lead to social stigma and exclusion.<sup>131</sup> Riley has already been sexually active with other peers, partly in an attempt to mask the pain of being sexually molested as a young child;<sup>132</sup> Ellis was a virgin. Ellis contracts a sexually transmitted disease from Riley, and the parents get involved. Ellis' parents insist that their child would never willingly have sex at such a young age, and press for statutory rape proceedings to be brought against Riley.

Is there a victim-offender binary here that warrants a finding of abuse, or is this mere fornication, albeit troubling in terms of the children's young age and the harmful sexual health outcome? There are no easy answers or bright lines when it comes to the "murky middle" between healthy and normal (consensual, safe, mature) juvenile sex and outright rape. But in relation to a strict liability sex abuse statute that defines the objectionable conduct as sex with a minor (as opposed to, say, coercion, transmission of disease, impregnation or sex with a

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130. Consensual sexual activity is rare but not non-existent among ten, eleven and twelve-year-olds. Finer & Philbin, *supra* note 36, 888 (reporting that 3.7% of American children have had sex by their thirteenth birthdays, although noting that sex in this age bracket is more likely to be nonconsensual).

131. On the impact of socialization on juvenile sexual behavior, see generally Oberman, *supra* note 73, at 55; Stodghill, *supra* note 14 (reporting a Rhode Island study of 1700 sixth- and ninth-graders that found 65% of boys and 57% of girls believe it is acceptable for a male to force a female to have sex if they've been dating for six months); CAHILL, *supra* note 123, at 185 (arguing that "the social structure imposed upon sexual interactions demands that girls . . . fend off the advances of sexually aggressive boys . . . who are in turn responding to social demands to enact such aggressive roles"); *Master's House*, *supra* note 27, at 820; *Regulating Consensual Sex*, *supra* note 12, 713-17 (arguing that "[t]he combination of girls' age-appropriate naivet[é] and insecurity and the norms of male sexual initiative make bad bargains inevitable" in regards to the problem of non-voluntary sex among teenagers).

132. See generally Gail Ryan, *Theories of Etiology*, in JUVENILE SEXUAL OFFENDING: CAUSES, CONSEQUENCES, AND CORRECTIONS 19, 25-26 (Gail Ryan & Sandy Lane eds., 2d ed. 1997) (noting that sexual victimization and exploitation may result in deviant sexual behavior in juveniles); *B.B. v. State*, 659 So. 2d 256, 261 (Fla. 1995) (noting the victim-victimizer cycle); ZILNEY & ZILNEY, *supra* note 13, at 113 (noting that "many juvenile offenders have experienced both physical and sexual abuse during childhood and adolescence" and arguing that many juvenile sexual offenders are "children at risk" rather than "risky children").



previously chaste minor), Ellis and Riley are similarly situated: each is legally a violator and each is supposed to be protected by statutory rape laws. Prosecutors seeking to target problematic minor-minor sex using statutory rape laws are left to define *factual/true* victimization in relation to sex within the protected class as they see fit. As Justice Dooley noted in his dissent in *P.M.*:

When a prosecutor, a trial court, and ultimately a majority of the members of this Court find the age differential between the participants sufficient or find the presence of “exploitation” (without defining that concept)—in short, when their sensibilities are sufficiently offended by the conduct—they are willing to find delinquency, but otherwise not. This is far too amorphous a standard on which to ground an adjudication of juvenile delinquency.<sup>133</sup>

In short, where statutory rape provisions that are broad enough to encompass victimless minor-minor sex are used to target perceived victimization among minors, the definition of

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133. *In re P.M.*, 592 A.2d 862, 867 (Vt. 1991); *see also In re D.B.*, 950 N.E.2d 528, 533-34 (Ohio 2011) (holding that a statutory rape provision, as applied to a child under age thirteen who engaged in sexual contact with another child under age thirteen, is unconstitutionally vague and violates equal protection as each child is a member of the class protected by the statute); *In re G.T.*, 758 A.2d 301, 309 (Vt. 2000) (construing statutory rape statute narrowly so as to be inapplicable where alleged perpetrator is also victim under age of consent; to construe broadly would be inconsistent with legislative policy, raise possibility of discriminatory enforcement, and implicate constitutional privacy concerns); *cf. State v. J.A.S.*, 686 So. 2d 1366, 1369 (Fla. Dist. Ct. App. 1997) (finding that decision by a prosecutor to charge only some offenders, where all were below the age of consent, is not a ground for a claim of denial of equal protection, because prosecutorial discretion can be exercised to determine relative culpability where there are multiple violators); *In re Hawley*, 606 N.W.2d 50, 52-53 (Mich. Ct. App. 1999) (finding that decision to charge fifteen-year-old male but not twelve-year-old female for same act of consensual sex, when each was under age of consent, did not violate equal protection because individuals were not similarly situated in view of the greater protection afforded by legislature to younger individuals); *In re B.A.H.*, 845 N.W.2d 158, 165-66 (Minn. 2014) (finding the State’s decision to charge fourteen-year-old minor but not his consenting thirteen-year-old partner with statutory rape, when both below age of consent, was rational and did not violate his constitutional rights to equal protection); *In re T.A.J.*, 62 Cal. App. 4th 1350, 1361 (1998) (holding that statutory rape statute may be constitutionally applied to member of the protected class; question of when, who, and under what circumstances minors should be charged under statutory rape law must reside within sound exercise of prosecutorial discretion); *In re T.C.*, 214 P.3d 1082, 1098 (Haw. Ct. App. 2009) (finding that twelve-year-old minor who had non-forcible sexual contact with seven-year-old child [where the age of consent is fourteen] failed to show that filing of petition against him, but not two other alleged participants, was based on arbitrary classification).

victimization and the indicia of victimhood are left to prosecutorial discretion and the law is inherently vague and pliable.<sup>134</sup> Given the complexity of the policy issues surrounding adolescent sexuality, the contested and evolving normative boundary between “good,” “bad” and “wrongful” adolescent sex, and the potential for discriminatory prosecutions of unpopular minors that subvert the purported gender/orientation/race/chastity/class-neutrality of statutory rape laws, greater statutory clarity is required. Policy decisions about when and how to use sex abuse laws against the class that has been deemed in need of protection should be clearly legislated. Otherwise, there is a risk of unfairly presuming victimization and legally creating a victim-offender binary through selective prosecution, when in fact the sex was not abusive.<sup>135</sup> This is concerning as a matter of equal protection, and also as a matter of policy for the potential to treat mere fornicators as abusers, possibly subject to registration as sex offenders, but without a right of reply.<sup>136</sup> In this way, a law designed as a shield for minors may utterly fail to protect its intended protected class from injustice and discrimination.

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134. Phipps, *supra* note 39, at 417-18; Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1043 (2008) (“[W]here the formal language of the statute is broad and there is no stable consensus as to the harm caused by the prohibited behavior, variation in enforcement over time is likely to thrive.”).

135. State *ex rel.* Z.C., 165 P.3d 1206, 1213, n.10 (Utah 2007) (warning against “creat[ion] [of] a perpetrator and a victim through selective prosecution”). Similar arguments have been raised in relation to the selective enforcement of statutory rape against adult defendants. See, e.g., Richard Delgado, *Statutory Rape Laws: Does it Make Sense to Enforce Them in an Increasingly Permissive Society?*, 82 A.B.A. J. 86, 87 (1996) (arguing that statutory rape laws cannot be enforced uniformly, and that enforcement patterns are influenced by class and race, thereby “providing a weapon against men from social groups we do not like”). Although in cases of adult-minor sex, there is only one legal violator, and it cannot be said that the law is being used as a sword against one it was designed to shield.

136. The issue of overbroad prosecutorial discretion, resulting in inconsistent and arguably unfair prosecutions of minors in the absence of factual victimization or abusive conduct, also arises in the related context of “sexting” and child pornography charges. See, e.g., Joanne Sweeny, *Do Sexting Prosecutions Violate Teenagers’ Constitutional Rights?*, 48 SAN DIEGO L. REV. 951, 988-90 (2011); Elizabeth C. Eraker, *Stemming Sexting: Sensible Legal Approaches to Teenagers’ Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 570-73 (2010); Wood, *supra* note 64, at 170-71. *But see* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL’Y & L. 1, 39 (2007) (arguing “sexting” constitutes “self-exploitation” to which prosecution is an appropriate response).

#### IV. REFORMULATING THE LEGAL AND POLICY RESPONSE TO SEX AMONG MINORS

Cases like *B.A.H.* illustrate that adolescent sex often takes place in “the gray area between consent and coercion.”<sup>137</sup> The legal response to sex among minors should account, as far as possible, for the lack of bright lines distinguishing morally permissible sex from morally impermissible sex, consent from coercion, and normal sexual exploration and experimentation from sexual exploitation;<sup>138</sup> and the spectrum from childhood vulnerability and immaturity to adulthood competence and autonomy.<sup>139</sup>

This lack of bright lines has been used in defense of a statutory scheme that prohibits all sex, consensual or otherwise, among minors and leaves it to prosecutors to determine which cases of minor-minor sex, where both minors are technical violators, involve sanctionable victimization by a “true” offender.<sup>140</sup> Prosecutorial discretion is certainly one answer to the complexity of adolescent sexuality, but I have argued herein that the risks of over-criminalization and subjective, discriminatory and inconsistent enforcement are too high, and

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137. Oliveri, *supra* note 14, at 485; *see also* Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 427 (1984) (arguing that “these two categories [equal consensual sexual intercourse on one hand, and bad, coercive sex imposed upon a female by a male aggressor on the other hand] constitute a continuum of sexual relations; there is no bright line between them”).

138. Martinson, *supra* note 13, at 51, 53 (noting “a marked trend toward greater heterosexual experience of preadolescents with their peers in the United States . . . children continue to engage in both autoerotic behaviors and sexual interactions with peers throughout childhood . . . it is apparent that children have always been sexual and continue to be sexual”); GIBSON & VANDIVER, *supra* note 74, at vii (noting that “much of the juvenile activities tagged as ‘sex offending’ are no more than fairly innocent developmental exploratory sexual activity”). *But see* Finer & Philbin, *supra* note 36, at 890 (noting that “sexual activity among the youngest adolescents is frequently of a different nature than that of middle and older teens, in that it is frequently nonconsensual”).

139. *See supra* notes 25-26 and accompanying text.

140. *See Master’s House, supra* note 27, at 825; *Regulating Consensual Sex, supra* note 12, at 729-30; *see, e.g., In re T.A.J.*, 62 Cal. App. 4th 1350 (Cal. App. Ct. 1998) (holding that statutory rape statute may be constitutionally applied to member of the protected class; question of when, who, and under what circumstances minors should be charged under statutory rape law must reside within sound exercise of prosecutorial discretion); *In re T.C.*, 214 P.3d 1082, 1097 (Haw. Ct. App. 2009) (finding that “the legislative intent was to maintain the . . . prohibition on [consensual sexual conduct between members of the protected class] and to rely on . . . the proper exercise of prosecutorial and judicial discretion, to avoid criminalizing or unjustly penalizing sexual activities between children”).

the consequences thereof for individual minors are grave.<sup>141</sup> Prosecutorial discretion “cannot be accepted as a substitute for a sufficient law.”<sup>142</sup> To better shield purported “true offenders” from unjust or discriminatory proceedings under the very laws designed for their protection, the use of statutory rape laws against minors should be predicated on a clear and objective definition of the punitive target of such laws.<sup>143</sup> At the same time, sexual assault laws generally should be strengthened to more adequately respond to cases of coercion and nonconsent among minors and to better ensure the protection of true victims.<sup>144</sup> Finally, sexual assault laws may need to be supplemented by other policy measures designed to target “bad” but not necessarily “wrongful” sex among minors.<sup>145</sup> I discuss each in turn.

### A. Clarifying the Punitive Target of Statutory Rape Law

There are many possible outcome-based indicia that could be used to clearly define and identify impermissible victimization in the context of sex among minors—for example, pregnancy,<sup>146</sup> transmission of disease, loss of chastity, or severe emotional disturbance. However, just because a minor-minor sexual encounter leads to a harmful outcome for one or both of the minors, this does not mean the sex was necessarily exploitative.<sup>147</sup> There is an important distinction between “A’s act *harms* B” and “A’s act *exploits* B.”<sup>148</sup> And as discussed in Part III, there are strong reasons of principle and policy for confining the use of statutory rape laws, with their weighty

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141. See *supra* Part III.A and Part III.B.

142. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952).

143. Phipps, *supra* note 39, at 413.

144. *Id.* at 427-40.

145. *Id.* at 439.

146. Defining pregnancy as exploitation is controversial, as it would arguably embed and propagate the idea that pregnancy is a harm done *to* girls *by* boys, denying both the sexual agency of girls and the parental responsibility of boys. Even if in practice the burden of child-rearing falls squarely on teen mothers rather than teen fathers. See Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 472-73 (1981) (criminalizing impregnation of a minor by another minor will do little to remedy that social injustice); Oliveri, *supra* note 14, at 492-96.

147. See *infra* Part IV.A.1.

148. WERTHEIMER, *supra* note 10, at 96.

stigma, lifelong consequences and moral gravity, to sex with a minor that is abusive and not merely harmful, sex that is wrongfully exploitative (morally impermissible) and not merely “bad” (morally unworthy).<sup>149</sup> This is not to discount the gravity of the potential harms of premature sexual activity on vulnerable and immature minors,<sup>150</sup> but rather to say that if the law seeks to target harmful outcomes even in the absence of exploitation, sexual abuse offenses are not the appropriate tool.<sup>151</sup> The difficulty with seeking to so confine statutory rape laws as applied to minors is in defining exploitation, which as Professor Levine notes is “a complicated and somewhat abstract phenomenon, vulnerable to the ‘I know it when I see it’ type of definition.”<sup>152</sup> Given these considerations, how should a clear legal line be drawn between “just sex,” albeit oftentimes harmful, and sexual exploitation when it comes to juvenile sexual encounters?

### 1. *Tripartite Definition of Exploitation: Inequality, Coercion and Nonconsent*

To answer this question, it is useful to turn to clinical research on juvenile sexual deviancy. Clinical experts on problematic juvenile sexual behavior point to a definition of sexual exploitation that draws on three elements: nonconsent, inequality, and coercion.<sup>153</sup> Forcible rape and other non-strict liability sexual assault offenses tend to focus on nonconsent, “[t]he strongest and clearest characteristic of sexual abuse.”<sup>154</sup> However, it is often difficult to determine the existence of meaningful, informed consent, especially when sex involves

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149. *Id.* at 220 (arguing that harmful sexual outcomes are “not a reason to regard the consent as invalid between the parties”).

150. *Id.* at 121 (arguing that consent “may change an act from lead to silver but not necessarily to gold”).

151. Flynn, *supra* note 40, at 696-97 and accompanying text. Gender-neutral, outcome-specific laws (e.g. targeting all fornication, or sex that results in pregnancy or sexual infection) would be a more principled method. See *In re Jessie C.*, 164 A.D.2d 731, 734 (N.Y. App. Div. 1991) (finding state failed to demonstrate that the prevention of early pregnancy can be better served by a gender-based law than by imposing a deterrent sanction upon both participants); Levine, *supra* note 80, at 713.

152. Levine, *supra* note 80, at 713.

153. Ryan, *supra* note 80, at 4 (“In any sexual interaction, the factors [that define the nature of the interaction and relationship, and define] the presence or absence of abuse or exploitation are consent, equality, and coercion.”); RICH, *supra* note 74, at 22.

154. RICH, *supra* note 74, at 23.

compliant children or easily influenced younger adolescents.<sup>155</sup> In the absence of clear evidence of nonconsent, it is necessary to consider inequality and coercion as indicators of abusive sexual encounters.<sup>156</sup>

Inequality and coercion are closely related, in that the former refers to differentials—of development, assertiveness, power, and authority—that are “often the tools of coercion: [for example] perceptions of power or authority [may be] exploited to coerce cooperation, while size differentials may coerce compliance.”<sup>157</sup> The challenge with crafting statutory rape laws that adequately and narrowly target abusive sexual encounters involving inequality and/or coercion among juveniles is in defining indicia of those elements clearly. As Dr. Phil Rich notes:

[I]n any relationship between an older and younger sibling or person, or a smarter and less smart, a bigger and smaller, or more powerful and less powerful person, inequality is present in the very fabric of the relationship; thus inequality itself cannot serve as *the* factor that is the agent of coercion or induces consent. It is the *quality* of the difference—how the juvenile uses it to gain advantage and the juvenile’s knowledge of the inequality—that makes it an element of abusive behavior, and not the inequality itself. Similarly, it is the type, intensity, and purpose of coercion that identifies its role as an avenue of abuse . . . [E]ven though we can point to sexual behavior as abusive in the absence of true consent and in the presence of inequality and coercion, it is also clear that it is the particular combination of circumstances and one or more of these elements that come together to produce abuse.<sup>158</sup>

One response to these challenges would be to simply specify that statutory rape laws may only be used against a

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155. *Id.*

156. *Id.* at 25 (“Clear and unmistakable lack of consent eclipses the need to assess for the presence of inequality or coercion as factors that define a sexual behavior as abusive.”).

157. Ryan, *supra* note 80, at 5; *see also* RICH, *supra* note 74, at 25 (noting that “[c]oercion is closely related to inequality, and implies power or control of some kind . . .”).

158. RICH, *supra* note 74, at 25-26.

minor in cases involving evidence of exploitation as determined by clinical psychologists or other adolescent professionals with expertise in assessing and evaluating sexual behavior. This would arguably go some way to addressing the potential for error and bias in the identification of the “true offender” and “true victim” by prosecutors in cases where each minor is legally a violator, and allow a nuanced, case-by-case approach to sex within the protected class.<sup>159</sup> However, in the absence of a legal definition of exploitation, this is still a highly subjective and therefore manipulable approach that does not give adequate notice as to when minor-minor sex is prohibited and when it is permissible.

## 2. *Age-Disparity Approach to Sex Among Adolescents*

A clearer approach to defining the punitive target of strict liability rape laws as applied to the protected class is to use age differential as a non-rebuttable presumption for exploitation.<sup>160</sup> This can take one of two forms. The more common approach is to eliminate liability for statutory rape in cases of sexual contact between minors within a specified age-span.<sup>161</sup> An alternative age-based approach is to specify a single age of consent and a

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159. Ryan, *supra* note 80, at 3 (“Definition of the acts that constitute sexual abuse cannot be approached in terms of behavior alone. Relationships, dynamics, and impact must be considered as well.”).

160. Age-gap-based statutory rape provisions are generally supplemented with provisions that criminalize sex within certain status relationships—such as parent/child, teacher/student, coach/player—that are considered to involve an inherently coercive power differential. For the sake of simplicity, this article focuses on the former. For a discussion of statutory rape provisions that focus on positions of authority used to coerce a minor, see Kitrosser, *supra* note 18, at 334 arguing that “[p]er se criminalization for [certain] status relationships . . . is appropriate, given that . . . such relationships are of the type that inherently create a context of constructive force from which courts cannot, given a progressive understanding of consent and coercion, extract a vision of meaningful, uncoerced consent.”

161. See, e.g., WASH. REV. CODE ANN. § 9A.44.079(1) (West 2016) (stating that rape of a child in the third degree is sexual intercourse with someone less than sixteen years of age is illegal, with the following exceptions: if the victim is at least fourteen years of age and the defendant is less than four years older than the victim); WASH. REV. CODE ANN. § 9A.44.073(1) (West 2016) (stating that if the victim is at least twelve years of age and the defendant is less than three years older than the victim, the crime is rape of a child in the first degree); WASH. REV. CODE ANN. § 9A.44.076(1) (West 2016) (stating that if the victim is less than twelve years of age and the defendant is less than two years older than the victim, the crime is rape of a child in the second degree).

corresponding minimum age of defendant, such that minors below that minimum age cannot be liable for statutory rape.<sup>162</sup>

The age-span approach involves dividing the class protected by age-of-consent rules into age brackets or tiers, whereas the minimum age of defendant approach establishes a single protected class.<sup>163</sup> Both approaches narrow the focus of strict liability rape laws to sexual contact involving an age-gap as a proxy for exploitation—only sex across age-brackets, or adult-minor sex, is *presumptively* abusive.<sup>164</sup> Where sexual contact occurs *within* a protected class (that is, within the specified age-gap, in the case of age-span jurisdictions, or among any two minors, in the case of single age-of-consent jurisdictions), strict liability does not apply and exploitation must be targeted with the use of nonconsensual sexual assault crimes such as forcible rape.<sup>165</sup> In other words, statutory rape’s function is confined to that of a shield, not sword, with respect to members of the same protected class. This restores the internal moral logic of rape law generally, by precluding one-sided statutory rape prosecutions in which the true offender raises the equal protection argument that he is also a victim.<sup>166</sup> It also clarifies for juveniles, parents, and mandatory reporters alike that the law is concerned with abuse, as evidenced by an age disparity, and not mere fornication.

The age-based “shield not sword” approach also eliminates the incongruity, noted by the *Z.C.* court, of laws that deem minors to be too young to consent to sex, but also treat them as “able to form the intent to commit what would be a felony if

162. See, e.g., VT. STAT. ANN. tit. 13, § 3253a(a) (West 2016); *In re G.T.*, 758 A.2d 301, 309 (Vt. 2000) (holding a defendant must be above the age of consent to be liable for statutory rape).

163. See, e.g., NEV. REV. STAT. ANN. § 200.364(6) (West 2015); NEV. REV. STAT. ANN. § 201.230(1) (West 2015); *In re G.T.*, 758 A.2d at 309.

164. See *Master’s House*, *supra* note 27, at 813.

165. *In re G.T.*, 758 A.2d at 309.

166. For an example of such an argument being successfully made in relation to sex that appeared to involve a victim-offender binary, see *In re D.B.*, 950 N.E.2d 528, 533 (Ohio 2011) charging D.B. originally with both forcible rape and statutory rape, however the trial court could not find evidence of force during the sexual contact; *In re D.R.*, No. 12 MA 16, 2012 WL 5842773 (Ohio Ct. App. 2012) (involving an 11-year-old juvenile who allegedly engaged in sexual conduct with a four-year-old juvenile and finding neither can be charged with statutory rape following *In re D.B.*); cf. *In re B.A.H.*, 845 N.W.2d 158, 167 (Minn. 2014) (Page, J., concurring) (noting that argument that defendant’s partner X.X. was also guilty of statutory rape “harkens back to a day when sexual assault victims were considered as culpable as the perpetrators of such assaults”).



committed by an adult.”<sup>167</sup> By confining the scope of statutory rape laws to cases involving a predetermined age differential, the law effectively deems minors capable of consenting to sex with similar-aged or younger minors, but not adults or their elders, and the incongruity drops away.<sup>168</sup>

Age-disparity is a clear, practical and well-accepted means of defining exploitative sexual contact, focusing on a bright-line differential that relates to the inequality and coercion aspects of exploitation.<sup>169</sup> Age-based definitions of exploitation preclude discriminatory creation of an artificial or arbitrary victim-offender binary by selective enforcement against one of two legal violators, by deeming the elder the offender.<sup>170</sup> This gives greater protection to minors from unjust statutory rape proceedings based on gender, sexual experience, sexual orientation, and other factors.

However, the age-based approach does not preclude the possibility that cases involving mere fornication—sex that was not in fact exploitative—may be deemed criminal. For example, if two thirteen-year-olds embark on a consensual sexual relationship in a jurisdiction that sets a single age of consent/minimum age of defendant of fourteen, their sexual contact is beyond the scope of statutory rape until the point when one of the minors turns fourteen, at which point the sex is deemed nonconsensual and thus exploitative.<sup>171</sup> The age-gap

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167. *State ex rel. Z.C. v. State*, 128 P.3d 561, 566 n.6 (Utah Ct. App. 2005); UTAH CODE ANN. § 76-5-404.1(2) (West 2016) (requiring intent to cause substantial emotional or bodily pain to any person or intent to arouse or gratify the sexual desire of any person); *see also* *State v. J.A.S.*, 686 So. 2d 1366, 1369 n.2 (Fla. Dist. Ct. App. 1997) (upholding the prosecution of a minor for statutory rape but noting the “potential incongruity of punishing one under 16 who is supposed to be protected from the sexual advances of others because of his or her age and inability to fully consent to sex . . .”); Meiners-Levy, *supra* note 46, at 510 n.51 (“It is hard to imagine that when a legislature designs a criminal statute, providing that no child under a given age is capable of consent to sexual activity in any context, the legislators also envision that a child under that age would be subject to prosecution for sexual contact.”); *State v. Edward C.*, 531 A.2d 672, 673 (Me. 1987) (upholding prosecution of minor for statutory rape, but conceding that there was merit in defendant’s argument that purpose of the statute was to “criminalize the exploitation of children, not to penalize the children themselves”); *cf. In re T.W.*, 685 N.E.2d 631, 637 (Ill. App. Ct. 1997) (finding that once the minor defendant “assumed the status of an accused . . . he relinquished his right to protection [under the statute]”).

168. *J.A.S.*, 686 So. 2d at 1369.

169. *See supra* notes 153-157 and accompanying text.

170. *In re D.B.*, 950 N.E.2d at 533.

171. *See, e.g., In re J.L.*, 800 N.W.2d 720, 724 & n.4 (S.D. 2011) (finding that the application of the statutory rape statute [age of consent: thirteen] to juvenile, who engaged

approach is a preferable and more nuanced approach, in that it accounts for the possibility of meaningful consent between, say, an older adolescent and a younger adult; however it may still capture “just sex.” For example, it is conceivable that a mature and responsible thirteen-year-old might be able to give meaningful consent to sex with a sixteen-year-old, but in some age-span schemes this would constitute statutory rape.<sup>172</sup> A larger age-gap may better reflect the reality of adolescent sexual competence.

### 3. *Objection: Age-Based Definition of Exploitation Under-Protects Minors from Coercive Peers*

Age differentials are not perfect proxies for exploitation. It is possible for relationships involving a significant age gap to be non-exploitative; it is also possible for elements of inequality, coercion and nonconsent to be present in a same-age context. One criticism of an age-based approach to sex among minors is that it may under-protect adolescents, particularly girls, from non-forcible coercion by their peers, by confining the scope of statutory rape laws exclusively to sex involving a significant age-disparity or evidence of force.<sup>173</sup>

For example, in the case of *G.T. v Vermont*, G.T. was adjudicated delinquent for statutory rape.<sup>174</sup> The Supreme Court of Vermont overturned the adjudication, construing Vermont’s

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in consensual sexual intercourse with his twelve-year-old girlfriend when juvenile was fourteen-years-old, did not yield an absurd result, but calling to the attention of the Legislature the “other significant consequences” resulting from the statute, such that J.L. would be required to register as a sex offender for life). *But see* Phipps, *supra* note 117, at 121-22 (arguing that “once the premise of children’s capacity to consent is accepted and legislatures define the applicable ages, the ‘borderline’ cases [involving a defendant “barely” above the age of consent and a close-in-age consenting minor victim] must be accepted as within the appropriate range of behavior governed. Legal distinctions based on age that have significant consequences are commonplace and are enforced daily”).

172. *See, e.g.*, ALA. CODE § 13A-6-62(a)(1) (2016) (stating that second degree rape is engaging in sexual intercourse with someone of the opposite sex more than twelve years of age and less than sixteen years of age where the defendant is at least sixteen years of age and at least two years older than the victim); HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 65-77 (2007), <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us> [<https://perma.cc/48WU-9MSN>] (discussing cases of conventionally consensual adolescent sexual relationships that gave rise to statutory rape convictions and lifelong sexual offender registration).

173. *See, e.g.*, COCCA, *supra* note 3, at 57-59; Oberman, *supra* note 73, at 73.

174. *In re G.T.*, 758 A.2d 301, 302 (Vt. 2000).

statutory rape statute as inapplicable where the alleged perpetrator is also a victim under the age of consent.<sup>175</sup> According to the facts as found by the trial court, G.T., a fourteen-year-old, was watching a movie with his twelve-year-old female neighbor, when he “[s]urprised [her] by suddenly engaging in sexual intercourse with her even though the two had had no previous sexual contact.”<sup>176</sup> The girl did not resist, but when G.T. asked if it hurt and she said yes, he did not stop his conduct.<sup>177</sup> Given these facts, Justice Johnson in dissent argued that delinquency proceedings against G.T. were not inappropriate.<sup>178</sup> He further argued that the majority’s ruling abrogated statutory rape as a stopgap for cases where “[f]orcible rape will be difficult to prove, notwithstanding the presence of subtle coercion resulting from the age differential of the participants or other factors.”<sup>179</sup>

This argument assumes that prosecutors will only use statutory rape to target cases involving coercive or nonconsensual sex, and not, for example, other perceived harms such as consensual incest, queer sex, loss of chastity, or pregnancy; a questionable assumption.<sup>180</sup> Moreover, even assuming that statutory rape proceedings against minors are used

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175. *Id.* at 309.

176. *Id.* at 317.

177. *Id.* at 302.

178. *Id.* at 309.

179. *In re G.T.*, 758 A.2d at 316; *see also In re John C.*, 569 A.2d 1154, 1156 (Conn. App. Ct. 1990) (finding that to hold that statutory rape statute should not apply to minors themselves protected by the statute would “give minors license to sexually molest other minors”); COCCA, *supra* note 3, at 61 (arguing that age spans “leave a swath of vulnerable teens unprotected, open to coercion that is not recognized as meeting the legal definitions of forcible rape”); Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 337-38 (2003) (noting that statutory rape may serve as “‘the fallback position’ . . . . In these cases, defendant is only convicted of statutory rape because of the difficulty in proving beyond a reasonable doubt that the sexual intercourse was accompanied by force or threat of force, or other statutory determination of non-consent”); *Regulating Consensual Sex*, *supra* note 12, at 710 (arguing that statutory rape laws are “a necessary complement to conventional rape law, which offers little protection to the teenager who, due to fear, confusion, coercion, or inexperience, has ‘consented’ to unwanted sex”); *Master’s House*, *supra* note 27, at 815-23 (discussing the use of statutory rape laws “as a back up to the laws penalizing forcible rape”); Olsen, *supra* note 137, at 407 & n.94 (arguing that “statutory rape laws may prohibit certain instances of sexual assault that should be considered illegal, but cannot be prosecuted as forcible rape”); Levine, *supra* note 80, at 719 (“Quasi-forcible rapes have long been the mainstay of statutory rape prosecutions.”).

180. *See supra* note 121-123 and accompanying text.

restrictively to target non-forcible but morally impermissible “subtle coercion” among minors, this raises the question of how prosecutors should define coercion and what “other factors” should be relevant to the inquiry.<sup>181</sup>

Professor Oberman has written extensively on the dangers of sexual coercion among minors, coercion that can be exerted even between minors who are similar in age:

[T]his coercion may be so commonplace, and so deeply scripted into contemporary norms of sexual interaction, that it is all but invisible. As such, the exclusive focus on cases involving wide age disparities may serve as a grossly underinclusive proxy for estimating the risk of exploitation and coercion in sexual encounters. In short, to the extent that statutory rape law is enforced predominantly or exclusively in cases involving wide age disparities, an important category of victims is left unprotected.<sup>182</sup>

Oberman and other commentators point out that inequality and potential coercion are not solely a function of age, but can also be contingent on other factors, such as sexual experience and gendered social norms.<sup>183</sup> Consider gender. In its first iterations, statutory rape was primarily concerned with protecting the premarital chastity of girls.<sup>184</sup> Accordingly, until reforms in the 1970s and 1980s, statutory rape laws were gendered and required that the female victim be of previously chaste character.<sup>185</sup> Feminist-led modern reforms led to gender-neutralization of statutory rape statutes in all states by 2000,<sup>186</sup> but to what extent do male-aggressor/female-victim stereotypes continue to influence statutory rape enforcement? And how can the law guard against such stereotypes—to the extent that they may fail to adequately accommodate female sexual autonomy and protect boys from unfounded accusations and predatory females—while also acknowledging the possibility that the socialization of boys to pursue and girls to acquiesce can in

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181. *In re G.T.*, 758 A.2d 301, 316 (Vt. 2000).

182. *Master's House*, *supra* note 27, at 813.

183. *Id.* at 817-18; *Turning Girls Into Women*, *supra* note 73, at 68-70.

184. COCCA, *supra* note 3, at 11; *Master's House*, *supra* note 27, at 802; Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 462, 494-95 (1981).

185. COCCA, *supra* note 3, at 11, 15.

186. *Id.* at 22.

some cases result in gender-based power dynamics that are relevant to questions of consent and coercion among peers?<sup>187</sup>

The discretionary use of statutory rape laws in select cases of minor-minor sex is arguably a suitably nuanced means of protecting minors from coercive peers where it would be difficult to prove forcible rape.<sup>188</sup> It is important to acknowledge that many cases in which courts have reviewed one-sided statutory rape proceedings against minors did indeed involve troubling fact patterns showing evidence of pressure, bribery or coercion, and concurrent charges of forcible rape, but that could not be proven at trial.<sup>189</sup> However, as discussed above, the discretionary enforcement of statutory rape laws against “true offenders,” where both minors are legally violators, is rife with potential for discrimination and inconsistency based

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187. See, e.g., *In Re John L.*, 209 Cal. App. 3d 1137, 1139 (1989) (involving girls who agreed to sex with an older boy because they “wanted [him] to be [their] friend”); see also *Turning Girls Into Women*, *supra* note 73, at 58; *Master’s House*, *supra* note 27, at 813; Kitrosser, *supra* note 18, at 288-89 (arguing that “to the degree that a ‘formal equality’ approach [to statutory rape] ignores [the] social context [that deems male aggressiveness and female passivity the norm in sexual relations], it risks perpetuating inequality by refusing to see it”); Goodwin, *supra* note 46, at 515-16; CAHILL, *supra* note 123, at 171 (noting the relevance of “political and social structures that seriously limit women’s agency and autonomy” to the question of the conceptualization of consent); Sharon Thompson, *Search for Tomorrow: On Feminism and the Reconstruction of Teen Romance*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 350, 362 (Carole S. Vance ed., 1984) (“[T]he early stages of romance are still differentiated by gender. He: Will she let me? She: Does he care for me?”); Ken Tennen, *Wake Up, Maggie: Gender-Neutral Statutory Rape Laws, Third-Party Infant-Blood Extraction, and the Conclusive Presumption of Legitimacy*, 18 J. JUV. L. 1, 4 n.17 (1997) (discussing feminist objections to the gender-neutralization of statutory rape laws in the 1990s which “eliminate the right of a young, minor woman to be protected as the presumed victim”); Olsen, *supra* note 137, at 412 (“[A]ny acknowledgement of the actual difference between . . . males and females stigmatizes females and perpetuates discrimination. But if we ignore power differences and pretend that women and men are similarly situated, we perpetuate discrimination by disempowering ourselves from instituting effective change.”). While the incidence of female adolescents who sexually abuse remains unknown, it is not zero. Sandy Lane et al., *Special Populations: Children, Females, the Developmentally Disabled, and Violent Youth*, in *JUVENILE SEXUAL OFFENDING: CAUSES, CONSEQUENCES, AND CORRECTION* 322, 346-47 (Gail Ryan & Sandy Lane eds., 2d ed. 1997); ZILNEY & ZILNEY, *supra* note 13, at 103; GIBSON & VANDIVER, *supra* note 74, at 114-29 (discussing female juvenile sex offenders); *In re Anderson*, 688 N.E.2d 545, 546 (Ohio Ct. App. 1996).

188. Olsen, *supra* note 137, at 411-12 (arguing that age-gap exceptions “would not address the problem of male sexual aggression that characterizes society at large”); Ryan, *supra* note 80, at 4 (arguing that “as age differences narrow and the behaviors become less intrusive and/or less aggressive, the interaction and relationship between the two juveniles needs evaluation [to identify exploitation]”).

189. See, e.g., *In re D.B.*, 950 N.E.2d 528, 530 (Ohio 2011); *In re B.A.H.*, 845 N.W.2d 158, 161 (Minn. 2014); *In re G.T.*, 758 A.2d 301, 306 (Vt. 2000).

on prosecutorial beliefs about the normative boundary between bad and wrongful sex, with no right of reply,<sup>190</sup> thereby potentially under-protecting many members of the class that statutory rape laws are supposed to protect. Moreover, as Professor Oberman points out, prosecuting cases that are properly characterized as involving forced sex as mere statutory rape arguably “undermines the seriousness of the offense of forced sex, and thus erodes the legitimacy of laws against rape.”<sup>191</sup> Accordingly, rather than using statutory rape as a stop-gap for forcible rape, it is preferable to restrict the use of such laws against members of the class they protect, and instead consider how rape law generally can be strengthened and supplemented.

### B. Strengthening and Supplementing Rape Law

Premising statutory rape law on an age-based definition of exploitation does not require uncritical acceptance of voluntary sexual contact among juveniles as non-exploitative.<sup>192</sup> Rather, in cases of possible exploitation *within* a protected class, the burden should be on the state to prove exploitation that constitutes (non-strict liability) sexual assault or rape.<sup>193</sup> To the extent that the age-gap approach to statutory rape may leave some minors unprotected from coercive sexual encounters with

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190. *In re G.T.*, 758 A.2d at 306 (noting that by charging as statutory rape, the prosecutor “does not have to prove the presence of the exact elements it found to justify the prosecution”).

191. *Master’s House*, *supra* note 27, at 822.

192. *Cf. In Re John C.*, 569 A.2d 1154, 1156 (Conn. App. Ct. 1990) (upholding delinquency adjudication of minor defendant for statutory rape and stating that “we will not interpret the law to give minors license to sexually molest other minors”); *J.A.S. v. State*, 705 So. 2d 1381, 1386 (Fla. 1998) (recognizing the State’s compelling interest in protecting minors from older minors); *In re T.C.*, 214 P.3d 1082, 1097 (Haw. Ct. App. 2009) (noting that “the protection of all young children from sexual assault, regardless of the age of the offender, is not inconsistent with sound public policy”); *P.G. v. State*, 616 S.W.2d 635, 641 (Tex. Civ. App. 1981) (“Children are entitled to no less protection from other children who sexually abuse them than they are from adults who sexually abuse them.”); *In re Gladys R.*, 464 P.2d 127, 137 (Cal. 1970).

193. *In re G.T.*, 758 A.2d at 309 (“We also doubt that we impose upon prosecutors by forcing them to prove the crime they believe occurred, rather than allowing them to rely on the relaxed burden of proof under [statutory rape.]”); *see also Meiners-Levy*, *supra* note 46, at 510; Phipps, *supra* note 39, at 408 (noting that “statutes that objectively identify unacceptable behavior [such as age-gap statutory rape laws] in no way exclude the possibility of prosecuting cases of ‘problematic sexual encounters’ [involving coercion]”).

their peers,<sup>194</sup> this indicates that rape law generally may be deficient, and should be strengthened and supplemented. Indeed, as Oliveri notes, “continually falling back on statutory rape to compensate for deficiencies in other areas of criminal enforcement makes it less likely that these deficiencies will be examined and addressed.”<sup>195</sup>

Many sexual encounters among minors involve an incontrovertible victim-offender binary—most obviously, molestation of a pre-pubertal child by a post-pubertal teenager.<sup>196</sup> It should first be noted that such sexual contact would be clearly proscribed by statutory rape law under an age-span approach unless the minors were close in age. In that case, or in a single age of consent/minimum age of defendant jurisdiction such as Vermont, such an encounter should constitute (non-strict liability) rape due to the obvious incapacity of pre-pubertal children to understand, much less consent to, sex.<sup>197</sup> In jurisdictions where proof of force or resistance is still required, it would be possible to strengthen rape law’s response to pre/post-pubertal minor sex by legislating a non-rebuttable presumption of unlawful moral or psychological force in cases involving sexual encounters between a pre-pubertal and a post-pubertal minor.<sup>198</sup>

To the extent that rape law may still fall short of the goal of adequately protecting juveniles from coercive sex, especially coercion among those close in age, a great deal of relevant work has been done on how to strengthen rape law generally, such

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194. COCCA, *supra* note 3, at 61 (arguing that age spans “leave a swath of vulnerable teens unprotected, open to coercion that is not recognized as meeting the legal definitions of forcible rape”).

195. Oliveri, *supra* note 14, at 502-03.

196. Ryan, *supra* note 80, at 4 (“It is clear that an older adolescent’s sodomizing a small child is sexual abuse . . . .”); Phipps, *supra* note 39, at 430 (“[S]exual activity by a pre-pubertal child is . . . inherently harmful regardless of the child’s expression of willingness.”); Drobac, *supra* note 45, at 48 (discussing neurological development and the connection between puberty and the ability to formulate consent).

197. VT. STAT. ANN. tit. 13, § 3252(c) (West 2016).

198. See *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986) (finding that “forcible compulsion” includes “moral, psychological or intellectual force” and that the respective ages of the victim and defendant is relevant to determining whether requisite force was used); *State v. Eskridge*, 526 N.E.2d 304, 306 (Ohio 1988) (finding “subtle and psychological” force can satisfy the force requirement). It should be noted that “age is not . . . a reliable indicator of puberty, as physical and emotional development can occur over extended periods when pubertal processes are under way.” ZILNEY & ZILNEY, *supra* note 13, at 63.

that the law properly identifies and sanctions nonconsensual sex even in the absence of physical violence.<sup>199</sup> Professor Kitrosser points out that while there may be political resistance to expanding the definition of nonconsensual sex to include coercive but non-forcible intercourse generally, legislators may be more receptive to such reforms in the case of sex involving minors where “sympathy for [their] unique vulnerability . . . should provide an easier ‘sell’ for the argument that nonconsensual sex is in itself a sufficient violation to justify criminalization.”<sup>200</sup> Professor Schulhofer has proposed a model of affirmative consent that requires “positive willingness, clearly communicated” by words or conduct.<sup>201</sup> A number of jurisdictions have adopted an affirmative consent model,<sup>202</sup> and in recent years many schools and colleges have rolled out “yes means yes” policies, combined with educational initiatives aimed at establishing an affirmative consent culture.<sup>203</sup> Phipps notes that the affirmative consent model may be particularly useful in the context of adolescent sex, as it provides a clear rule that is easily understood by children and teenagers.<sup>204</sup>

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199. See Phipps, *supra* note 39, at 438-440; STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 15 (1998) (arguing that “[e]xisting criminal law resolves the dilemmas of sexual autonomy by making almost no effort to control abuses that are not physically violent”); GIBSON & VANDIVER, *supra* note 74, at 42-43 (reporting that “it has been well documented among juvenile sex offenders that force is rarely used; manipulation and verbal coercion are more likely”); Fischel, *supra* note 25, at 320 (discussing the need for “a more robust standard of consent” for adult-minor and minor sexual relations); Kitrosser, *supra* note 18, at 328-29 (discussing the need to criminalize nonconsensual sex “regardless of the presence or absence of force” particularly with regard to proving rape of a minor).

200. Kitrosser, *supra* note 18, at 329.

201. SCHULHOFER, *supra* note 199, at 271; see also Lois Pineau, *Date Rape: A Feminist Analysis*, in SEX, MORALITY, AND THE LAW 428, 438-41 (Lori Gruen & George E. Panichas eds., 1997) (proposing a presumption of nonconsent in the absence of communicative sex).

202. See, e.g., D.C. CODE ANN. § 22-3001(4) (West 2016); MINN. STAT. ANN. § 609.341(4)(a) (West 2016); WASH. REV. CODE ANN. § 9A.44.010(7) (West 2016); WIS. STAT. ANN. § 940.225(4) (West 2016); *In re M.T.S.*, 609 A.2d 1266, 1276 (N.J. 1992).

203. See Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1348 (2005).

204. Phipps, *supra* note 39, at 439; see also Fischel, *supra* note 25, at 308, 320-23 (discussing “affirmative consent as a hedge against the social structural vulnerabilities and forms of dependence particular to young people” and arguing that the affirmative consent standard should be incorporated vis-à-vis sex among minors and sex between minors and adults); Kitrosser, *supra* note 18, at 309, 329 (discussing affirmative consent as “a crucial step in the general law of rape, helping to dismantle the notion of ‘normal’ sex as that in



Admittedly, even an affirmative consent model will not catch every instance where acquiescence to sex is obtained by lies, manipulation, persuasion or subtle coercion, factors to which adolescents may be particularly vulnerable.<sup>205</sup> Indeed, as discussed above, there is good reason to suppose that a great deal of adolescent sexuality occurs in the context of certain social structures, including gender-based norms, which may lead minors to make harmful sexual decisions. In *B.A.H.*, for example, X.X. testified that he wasn't forced to have sex with his cousin, but that "he [B.A.H.] convinced me because he's my favorite cousin . . . ."<sup>206</sup> Is this impermissible coercion or permissible persuasion? It is possible, perhaps likely, that this was at least a "bad bargain" that caused emotional harm to X.X.<sup>207</sup> But given that the law also considers B.A.H. a vulnerable minor, himself liable to making harmful sexual decisions, I contend that in such borderline cases, non-punitive preventative sex education policies and rehabilitation measures are the fairest way to challenge unhealthy social norms about sexuality and to discourage "bad sex" among minor-peers, while recognizing the important distinction between naïve experimentation and sexual aggression and predation.<sup>208</sup> It would also be possible to craft supplementary juvenile-specific

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which a man is free to presume access to a woman's vagina unless she puts up a particularly loud fight or unless he employs unusually forceful means to gain access" and that such a standard "could play a particularly important role in catching many instances of coercion to which adolescent girls . . . may tend to be particularly susceptible").

205. Oberman, *supra* note 114, at 370 (arguing that "[s]ociety's inability to embrace a strong criminal law norm in response to coercive sexual encounters between acquaintances renders teens' sexual exploitation more a rite of passage than a crime"); Kitrosser, *supra* note 18, at 330 (discussing limits of the law in directly combating deeply internalized sexism that causes girls to make bad sexual bargains with boys); *Master's House*, *supra* note 27, at 822 (arguing that "to the extent that we deprive prosecutors of the option of using statutory rape, we hold underage victims of acquaintance rape to the standards of adult victims, standards that assume a sense of maturity and self-possession that many adolescent girls lack").

206. *In re B.A.H.*, 829 N.W.2d 431, 434 (Minn. Ct. App. 2013).

207. *Regulating Consensual Sex*, *supra* note 12, at 713-17 (on the problem of bad sexual bargains among teenagers); *see also* Thompson, *supra* note 187, at 352.

208. For an example of rehabilitative and educational measures in the context of sex among adolescents, see Nowack, *supra* note 80, at 894-95, discussing Dane County, Wisconsin's Responsible Sexuality Course. *See also* Goodwin, *supra* note 46, at 536-37 (discussing market incentives as a means of promoting healthy sexual behavior among teenagers, without resorting to criminal prosecutions for consensual sex); Stine, *supra* note 46, at 1223-26 (discussing mandatory sex education programs as an alternative to punishing teenagers for consensual sex).

(non-criminal) status offenses that target sexual encounters among juveniles that fall short of forcible or statutory rape, but are morally problematic or likely to be harmful to the minors involved. This could take the form of permitting delinquency adjudication for “anti-social juvenile sexual behavior,” bringing youths within the reach of rehabilitative juvenile institutions for clearly-defined problematic sexual behavior such as impregnating multiple partners, participating in group sex,<sup>209</sup> bribery or sex while voluntarily intoxicated. Such an offense should be focused on rehabilitation, re-education, and victim support,<sup>210</sup> with awareness that deviant or abnormal sexual behavior among minors may itself be an indicator of prior sexual trauma.<sup>211</sup> It would also be imperative that care is taken to ensure such measures are not enforced arbitrarily against “unpopular youths,” but rather based on clear evidence of deviancy and moral culpability; incorporating an intent requirement would be one way to address such concerns. In this way, the law can intervene and respond to cases that evince worrying coercive, predatory, or manipulative tendencies while maintaining a distinction between harmful sex and wrongful sex, *sex per se* and sexual abuse.<sup>212</sup>

## V. CONCLUSION

Adolescents are sexual creatures. Sexual development is an important aspect of the transition from childhood to

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209. See GIBSON & VANDIVER, *supra* note 74, at 45-46; Garfinkle, *supra* note 74, at 193 (noting evidence of the relative prevalence of group involvement in reported rapes by child and adolescent offenders); *Regulating Consensual Sex*, *supra* note 12, at 718.

210. See generally Philip A. Ikomi, *Once a Sex Offender, Always a Sex Offender?*, in JUVENILE SEX OFFENDERS: WHAT THE PUBLIC NEEDS TO KNOW (2008) (discussing the recidivism and treatment of juvenile sexual deviancy).

211. See *supra* note 132 and accompanying text.

212. State *ex rel. Z.C.*, 165 P.3d 1206, 1213 (Utah 2007) (quoting state legislator, “I think most of us would agree that when twelve and thirteen years olds get involved in this kind of behavior it’s certainly not something we want to allow or encourage. We also probably do not want to convict them both of ‘rape of a child . . . .’”); Phipps, *supra* note 39, at 434 (“Labeling voluntary activity between two teenagers as ‘rape’ or ‘child sexual abuse’ would strike most people as incongruent.”).

adulthood, and a transition that is unique to each adolescent. As society adjusts to the notion of adolescent sexual autonomy and privacy interests, there is an inevitable tension between recognizing those interests while safeguarding a relatively vulnerable and immature population from sexual power imbalances and pressures.

The balance struck in many jurisdictions is to set an age of consent that theoretically prohibits all sex among minors, but in practice is only enforced in cases involving “bad sex” as defined by prosecutors. This can result in proceedings against conventionally consenting minors for rape of each other, an absurd outcome that risks conflating mere fornication with abuse; or one-sided prosecutions of the “true offenders,” prosecutions that may be unjust and that have serious lifelong consequences. This approach introduces too much subjectivity and ambiguity into an area of law that needs to send clear and consistent messages to adolescents about the boundaries of good, bad and wrongful sex, and can too easily result in inconsistent and unprincipled legal regulation of adolescent sex. To ensure that strict liability rape laws shield all adolescents, from unprincipled and discriminatory statutory rape proceedings as much as from other predatory minors, the law must be premised on objective and clear criteria of exploitation and meaningful notions of consent.