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Protecting Youth From Themselves: The Overcriminalization of Consensual Sexual Behavior Between Adolescents

Jean Strout, Divya Vasudevan, and Riya Saha Shah

INTRODUCTION

Sexual exploration is a key component of adolescence. This is obvious to anyone who has been a teenager, and it is illustrated every day in movies and music portraying the teenage experience. Our shared social knowledge is also supported by research: the Centers for Disease Control and Prevention recently found that 42 percent of female teens and 44 percent of male teens reported being sexually active. Even greater numbers of teenagers engage in sexual activity other than intercourse.

It is also clear that much of the sexual contact between adolescents is the result of choice, not coercion. Young people are certainly vulnerable to sexual abuse, particularly at the hands of adults. Yet, sexual exploration is also a normative and vital part of adolescent development.

The cultural and psychological reality of teen sexuality is in stark contrast with the criminalization of sexual contact between minors. Most states have laws that expose children to criminal liability for participating in consensual sexual activities with a partner of the same age or similar age. While the legal definition and colloquial understanding of “consent” is constantly in flux, there is no dispute that consent can exist between two adults. However, by statutory prescription, many minors are denied this type of agency and nuance due solely to their ages. Children can face prison sentences, sex offender registration, and other serious consequences for

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6 We recognize that there can be grave differences in interpretation of consent and this article does not delve into the possible conflict between parties when consent is assessed. Rather, for the purposes of this article, “consensual sexual contact” between minors is legal consent that would be found if the participants were both adults.
behaviors that, between consenting adults, would be far outside the purview of law enforcement.\textsuperscript{7} If consensual sexual contact between juveniles is ubiquitous and part of the normal process of growing from a child into an adult, why do we criminalize it?

The answer lies in the ongoing legal and cultural struggle to find the right compromise between promoting independence and protecting youth. The current legal framework strikes an unjust and illogical balance between these impulses: statutory rape laws designed to protect children from adults can also punish youth who engage in ordinary adolescent exploration,\textsuperscript{8} and the application of strict liability forecloses the court’s ability to meaningfully distinguish between exploitative practices and normal adolescent sexual expression. The potential impact of these statutes is enormous in both scope and severity: many American youth will engage in sexual contact before the age of majority,\textsuperscript{9} and if these behaviors lead to justice system involvement, youth may face lifelong consequences.

This article will explore how laws that were intended to protect children from abuse and exploitation have arrived at this absurd result. We will begin by discussing the different legal frameworks states use to regulate children’s behavior, including the origin of the \textit{parens patriae} or “parent of the nation” doctrine. We then trace the history of statutory rape laws, the application of the strict liability standard, the different statutory formulations employed by the states, and the short- and long-term consequences of a sex offense adjudication. Finally, we explore successful and unsuccessful challenges to statutory rape law applied to minors, and set forth a fair and nuanced legal framework for addressing these behaviors going forward.

\section{How the Law Treats Children}

The view of children under the law has evolved tremendously in the twentieth and twenty-first centuries. The shift from viewing children as “miniature adults” began with the founding of the very first juvenile court in Illinois in 1899,\textsuperscript{10} and is most recently reflected in a series of Supreme Court decisions delineating the constitutionally-relevant differences between children and adults.\textsuperscript{11} Today, both science and the law recognize that childhood and adolescence are comprised of multiple unique developmental stages.\textsuperscript{12} This has complicated decision-making for lawmakers: adults, and the institutions they control, have a responsibility to simultaneously support the development of youth and to protect them from others and from their own immature decisions. We want children to grow up to be independent, fully realized human beings, which requires us to allow them to make decisions on their own terms; however, we also want to keep children safe and avoid dangerous risks. The tension between the various areas of law affecting children evinces these competing impulses.

\textsuperscript{7} See \textit{infra} Section II.D.
\textsuperscript{9} CHILD TRENDS DATA BANK, ORAL SEX BEHAVIORS AMONG TEENS 2, \textit{supra} note 3, at 2.
\textsuperscript{12} See Montgomery, 136 S. Ct. at 726; Miller, 567 U.S. at 471-72; J.D.B., 564 U.S. at 271-72; Graham, 560 U.S. at 74; Roper, 543 U.S. at 570-71.
It is tempting to strive for consistency, where all adult activities are treated equally and are accessible at age eighteen. However, adolescent development is too nuanced for that type of blanket treatment. As psychologist Dr. Laurence Steinberg explains:

...to the extent that we wish to rely on developmental neuroscience to inform where we draw age boundaries between adolescence and adulthood for purposes of social policy, it is important to match the policy question with the right science. For example, although the APA was criticized for apparent inconsistency in its positions on adolescents’ abortion rights and the juvenile death penalty, it is entirely possible for adolescents to be too immature to face the death penalty but mature enough to make autonomous abortion decisions, because the circumstances under which individuals make medical decisions and commit crimes are very different and make different sorts of demands on individuals’ abilities.

Even without the benefit of developmental neuroscience, legislatures have recognized for years that minors are prepared for different “adult” activities at different ages as is evident in state laws. States have generally approached standards for youth who engage in or seek to engage in activities we would consider “adult” in three ways. First, the state can grant the child the right to engage in the behavior despite her age. For instance, many states recognize the decision-making abilities of youth through “mature minor” rules that grant adolescents the authority to make critical decisions about contraceptive care, prenatal care, mental health counseling, and other types of medical care. Second, the state can prohibit the activity until the child reaches the age of majority — or, in the case of drinking alcohol, even older. Common examples include restrictions on voting, joining the military, and entering into contracts. In these areas, the state has made the public policy judgment that youth are not developmentally equipped to engage in specified activities.

In recognition of the developmental differences of youth, states have also developed a third, hybrid standard: they recognize that the minor is engaging in an adult activity, but they treat the minor more protectively than they would an adult. Minors are allowed to drive automobiles, but they generally face testing and probationary requirements that adults do not. In many states, minors may obtain abortions without parental consent, but may be required to go through a judicial bypass process when adults would not. Minors can engage in work, but there are limits to the type of work and the number of hours, and youth often must obtain permits from the state.

The hybrid standard is evident in the way criminal statutes are applied to children. For instance, in several states, youth can be tried as adults in the criminal justice system and be sentenced to die in prison. However, before arriving at that decision, sentencing courts must weigh a number of factors related to youth:

First, children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.

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13 Laurence Steinberg, Should the Science of Adolescent Brain Development Inform Public Policy?, 64 AM. PSYCHOL. 739, 744 (2009); cf. Roper, 543 U.S. at 620 (Scalia, J., dissenting) (questioning why the age for abortion without parental involvement “should be any different” given that it is a “more complex decision for a young person than whether to kill an innocent person in cold blood”).
14 Bossing, supra note 4, at 1230.
Second, children ‘are more vulnerable to negative influences and outside pressures,’ including from their family and peers; they have limited ‘control over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievable depravity.’\(^\text{16}\)

These are compelling reasons to treat adolescents differently from adults under the law, even when they engage in behaviors considered to be “adult.” However, problems arise when the state exercises too much power over children. One example is the overexpansion of the doctrine of *parens patriae*.

**A. Protection vs. Punishment: Parens Patriae and Status Offenses**

Before the establishment of a separate juvenile court, children accused of crimes were either deemed incapable of developing the intent to engage in crime or processed identically to adults. The first juvenile court, established in Cook County, Illinois in 1899, shifted the country’s perception of youth who commit crimes.\(^\text{17}\) This separate justice system was created to provide a more protective process where youth would avoid the stigma of criminality.\(^\text{18}\) However, over time, a central tension emerged in this legal system: the courts assumed responsibility for a paradoxical combination of prosecuting and protecting youth. Without the full due process protections afforded adults, the courts also had to secure youth’s individual constitutional rights in legal proceedings.\(^\text{19}\) This conflict is epitomized by the role of State as *parens patriae* — a Latin term meaning “parent of the nation” — where the State can step into the role of the parent in order to protect children.\(^\text{20}\)

Historically, the State’s *parens patriae* power was only invoked upon the death of the child’s natural parent, or upon a showing that the parent was unfit or unable to care for his or her child.\(^\text{21}\) The most common exercise of *parens patriae* power occurs in child welfare cases, where the State steps in to protect the child from a parent unwilling or unable to fulfill the protective role.

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\(^{\text{17}}\) Levick, *supra* note 10.


\(^{\text{21}}\) DeBacker v. Brainard, 396 U.S. 28, 36-37 (1969) (Douglas, J., dissenting) (explaining the State may act if the child’s parents or guardian “be unable or unwilling to do so.”); *see also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Vidal v. Girard’s Ex’rs, 43 U.S. 126, 167-68 (1844) (explaining that *parens patriae* allowed the State to take care of the “sick, the widow, and the orphan”); *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839) (explaining the State may act *parens patriae* where parents are “unequal to the task of education, or unworthy of it,” or “where they are incompetent or corrupt”); Schall v. Martin, 467 U.S. 253, 265 (1984) (emphasis added); *see also* Santosky v. Kramer, 455 U.S. 745, 767 n.17 (1982) (“Any *parens patriae* interest in terminating the natural parents’ rights arises only at the dispositional phase, after the parents have been found unfit.”).
Today, *parens patriae* has expanded to affect even children with fit caregivers. The use and abuse of the *parens patriae* power is evident in the history of “status offenses”: conduct by a minor that is unlawful solely because of the youth’s age. In other words, an adult who engaged in the same acts would not be committing a crime. Status offenses usually are nonviolent minor offenses against municipal ordinances or policy, including running away from home, chronic truancy, alleged out-of-control or incorrigible behavior, underage alcohol possession, and curfew violations.

In the beginning of the juvenile court’s history, status offenses were indistinguishable from other juvenile crimes. However, the term “status offender” was coined in the early 1960s to separate juveniles who had committed crimes from those who had broken rules that apply only to children. Policymakers hoped to decrease the stigmatization of status offenders by distinguishing them from delinquents. Advocates for children wanted to go further, arguing that the court-based system, which mirrored the juvenile delinquency system, did not address children’s best interests. The 1967 Presidential Commission on Law Enforcement and the Administration of Justice released a report finding that many status offenders were housed in jails and similar secure detention facilities. The Commission recommended that status offenders be removed from secure custody, reasoning that families and community-based organizations should be responsible for these youth. The Commission also suggested that lawmakers consider eliminating courts’ jurisdiction over status offenders altogether.

The Commission’s report sparked national consideration of how to deal with status offenders in court. Congress responded with the passage of the Juvenile Justice Delinquency and Prevention Act (“JJDPA”) in 1974. The JJDPA mandated the removal of status offenders from secure detention facilities and the creation of development programs that offer prevention, diversion, and local treatment opportunities for status offenders. Although the deinstitutionalization of status offenders was a primary component of the JJDPA, it still permitted courts to place youth in group homes and medium security detention facilities.

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23 Id.
25 Shubik & Kendall, supra note 24, at 385.
27 Id.
28 Id. at 85 (“Serious consideration, at the least, should be given to complete elimination of the court’s power over children for noncriminal conduct.”); Chris E. Marshall, et al., *The Implementation of Formal Procedures in Juvenile Court Processing of Status Offenders*, 11 J. CRIM. JUST. 195, 195 (1983).
comply would not receive federal funding under the Act.\textsuperscript{32} Many legal organizations at that time, including the American Bar Association, argued in favor of entirely service-based programs.\textsuperscript{33}

Since the JJDPA’s passage and multiple reauthorizations, several states have implemented policies removing status offenders from the court system. California and Illinois respond to status offense referrals through community and social services providers.\textsuperscript{34} Pennsylvania’s Juvenile Act incorporates status offenders under the definition of a dependent child in the child welfare system.\textsuperscript{35} Other states, like New York and Massachusetts, keep status offenders in the juvenile justice system, but emphasize pre-court diversion.\textsuperscript{36} Traditionally, diversion programs are intended to keep minors outside of the system and are focused on education and rehabilitation.\textsuperscript{37} Many other states identify status offenders as “in need of services” under a “person in need of supervision” (“PINS”), “child in need of supervision” (“CHINS”), or “juvenile in need of supervision” (“JINS”) definition.\textsuperscript{38} While these strategies are positive developments, none has entirely solved the dangerous commingling of protection, treatment, discipline, and punishment.

The State’s power under the \textit{parens patriae} doctrine to protect children is supposed to be used to “advance only the best interests of the incompetent individual and not [to] attempt to further other objectives, deriving from its police power, that may conflict with the individual’s welfare.”\textsuperscript{39} Because most juvenile systems purport to place more emphasis on “rehabilitation,”\textsuperscript{40} rather than punishment, of the child, there is no facial conflict between the State as parent and the State as arbiter of the juvenile’s constitutional rights. However, as is illustrated by the protracted conflict over status offenses, the ability of the State to serve both as the protector of children and the enforcer against children breaking laws is dubious at best. Although children have interests independent of and often mutually exclusive with the State’s, juvenile courts are faced with the impossible tasks of protecting both.\textsuperscript{41} “When it chooses to protect the State’s interest and infringe upon that of the minor, the Juvenile Court glosses over its choice by emphasizing the ‘parental’ nature of the State’s actions and the intrinsic incompetence of minors.”\textsuperscript{42}

The Supreme Court has noted that the “murky” doctrine of \textit{parens patriae}, which is not found in any other area of criminal jurisprudence, has “proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme”.\textsuperscript{43} This “unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and

\begin{footnotesize}
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  \item \textsuperscript{32} Funding at 40, supra note 30.
  \item \textsuperscript{33} Feld, supra note 31. at 168.
  \item \textsuperscript{34} Cal. Welf. & Inst. Code § 207 (2020); 705 Ill. Comp. Stat. 405/3-3 (1988).
  \item \textsuperscript{37} Elizabeth M. Ryan, Sexting: How the State Can Prevent A Moment of Indiscrption from Leading to A Lifetime of Untended Consequences for Minors and Young Adults, 96 Iowa L. Rev. 357, 380 (2010).
  \item \textsuperscript{38} Kedia, supra note 22, at 544-45.
  \item \textsuperscript{39} Developments in the Law: The Constitution and the Family, 93 Harv. L. Rev. 1198, 1199 (1980).
  \item \textsuperscript{40} President’s Comm’n on Law Enf’t & Admin. of Justice, supra note 26, at 79.
  \item \textsuperscript{41} Claudia Worrell, Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine, 95 Yale L.J. 174, 190-91 (1985).
  \item \textsuperscript{43} In re Gault, 387 U.S. 1, 16 (1967).
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procedure.”44 The State’s use of parens patriae gives it the power to both restrict due process rights and impose serious and punitive consequences under the guise of looking after the child’s interest in being rehabilitated. In other words, minors get the worst of both worlds: severe punishment and limited autonomy. The claim of acting in a child’s interest cannot justify curtailing the child’s rights.45 As a result, the parens patriae doctrine may not belong in the juvenile justice realm at all.

B. Adding Sex to the Equation

The issue becomes further complicated in the context of sexuality, where there exist “conflicting and contradictory expectations in American society.”46 We want children to “develop a healthy sexual maturity,” and sexual experimentation is one aspect of the “trying on” of different personalities and behaviors that are necessary to the process of identity development.47 However, adults are also keenly aware that when young people engage in sexual exploration, their “lack of maturity and underdeveloped sense of responsibility”48 increase the risk that youth will find themselves in situations that they are not emotionally ready to navigate.49 For this reason, “[s]exuality is seldom treated as a strong or healthy force in the positive development of a child’s personality.”50 Adults are likely to become uncomfortable when adolescents engage in any sexual behavior, unable to fully differentiate between unhealthy or coercive sexual encounters and normal sexual learning experiences.51 As a result, “adults demand that adolescents develop a healthy sexual maturity without engaging in learning experiences that make that maturity possible.”52

These conflicted feelings toward adolescent sexuality are consistently reflected in jurisprudence criminalizing sex between young people. Sexual contact between two minors that would be considered consensual between adults should not be criminalized. Sexual acts that are illegal only because both participants are minors logically fall under the category of status offenses, which encompass acts that are only illegal when performed by children. However, states have largely rejected this framework, instead treating these acts as serious sex offenses under the juvenile justice or criminal justice systems when committed by minors. In fact, many states apply a particularly strict model designed to defend children from adults: statutory rape.

44 Id. at 18.
46 Floyd M. Martinson with Contemporary Additions by Gail Ryan, Sexuality in the Context of Development from Birth to Adulthood, in Juvenile Sexual Offending: Causes, Consequences and Corrections 31, 31 (Gail Ryan et al. eds., 3d ed. 2010) [hereinafter Martinson].
47 Jennifer Woolard, Toward Developmentally Appropriate Practice: A Juvenile Court Training Curriculum, in Adolescent Development 13, 15 (Katayoon Majd et al. eds., 2009).
49 See Martinson, supra note 46, at 31.
50 Id.
51 Id.
52 Id.
II. THE ORIGIN AND EVOLUTION OF STATUTORY RAPE LAWS

Nowhere is the tension between protecting and punishing children more obvious than in cases where minors are prosecuted for sexual contact with other minors. In the majority of states, statutory rape laws criminalize sexual activity based on the ages or age difference between the two participants; because of the way these statutes are written and interpreted, children, even those who are under the state’s statutory age of consent, can be prosecuted.

A. From Property to Pregnancy: History of Statutory Rape Law in the United States

The varied statutory rape laws now found across the United States can be traced back to England’s thirteenth-century legal code, which defined the age of consent as ten years old. These early laws protected only females, and sought to “protect a father’s interest in his daughter’s chastity.” “Under customary dowry practices, a non-virgin was considered less desirable for marriage, and therefore less likely to bring financial reward to her father upon marriage.” Sex with a young woman was illegal primarily because it interfered with her father’s property interest, not because the law sought to protect the woman from physical or emotional harm.

Statutory rape laws, therefore, “embod[y] the legal perception of women and girls as ‘special property in need of special protection.’” Historically, two defenses in statutory rape cases were permissible: 1) mistake of age, and 2) promiscuity. The promiscuity defense demonstrates that legal protection was only truly extended to girls believed to be virgins, revealing early statutory rape laws as a “tool” used to “preserve the common morality rather than to penalize men for violating the law.”

Statutory rape laws in the United States retained ten as the age of consent from English Law until the late nineteenth century. By the beginning of the twentieth century, the average age of consent in the United States was 16. While some scholars view this shift as indicative of dominant puritanical social mores regarding sex, one scholar, Jane E. Larson, asserts that the shift in laws emerged as a result of feminist reformers who reconceived statutory rape laws as a way to

54 Id. at 762.
55 Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 48 BUFF. L. REV. 703, 754 (2000).
57 Id. (“Indeed, if she failed to marry, a daughter represented a lifelong financial burden to her father.”). See also FLORENCE RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 20-21 (1980). Certain biblical precepts likely informed these cultural values, prizing a woman’s virginity so highly that a man who took a girl’s virginity without her father’s permission was considered to have committed a theft against the father. The father could demand compensation either in the form of payment, or by forcing the rapist to marry the victim. Id.
58 Girls in the Master’s House, supra note 56, at 803.
60 Id. at 121-22.
61 See Cohen, supra note 4, at 726.
62 Girls in the Master’s House, supra note 56, at 803.
protect young women against coercive and exploitative sexual encounters. These age-of-consent reformers, largely comprised of members of Women's Christian Temperance Union, viewed sexuality as a powerful force that kept women subordinated in society in a multitude of complex ways. These reformers recognized that many “consensual” sexual encounters involving young women occurred within either the family “or acquaintance relationships marked by violence, coercion, pressure, or fraud,” and “that employers and professionals often abused their economic power or social authority to solicit sex.”

The reformers saw a clear double standard in demanding that girls remain chaste before marriage, when the law viewed girls over age ten as “fair game” for seduction or violation. A young age of consent permitted harsh punishment for girls who either chose to have sex or succumbed to coercion. However, men were not expected to exercise the same sexual restraint. Such a double standard “held women responsible for policing sexual boundaries for both sexes.” Reformers highlighted the fact that “legal standards to shield children from commercial misjudgment or exploitation were markedly more protective (twenty-one years) than those . . . to protect girls from sexual misjudgment, exploitation, or violence (ten years).”

Second-wave feminists in the 1970s pushed for reform on separate grounds, asserting that statutory rape laws reinforced archaic gender stereotypes and curtailed the sexual autonomy of young women. These efforts embraced the protective rationale underlying statutory rape laws, but called for the abolition of gender-based distinctions in these laws. By 2004, all fifty states had gender-neutral statutory rape laws to protect young members of both sexes.

Statutory rape laws were “quietly, if sporadically, enforced” between the late 1970s until the 1990s, and were largely “ignored by legislators and policymakers.” While rape scholarship abounded in the 1970s and 1980s, statutory rape rarely emerged as a topic of public discussion. For example, “the series of cases granting minors access to contraception and related reproductive health care rights never discusses the fact that, in most jurisdictions, sexual activity with minors remained a violation of state criminal law.” Similarly, the national dialogue around unwed

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64 Id.
65 Id. at 4.
66 Id. at 8.
67 Id.
68 Id.
69 Larson, supra note 63, at 8.
70 Id. at 8-9.
71 *Girls in the Master's House*, supra note 56, at 807.
72 Id.
74 *Girls in the Master's House*, supra note 56, at 808.
75 Id. at 808.
motherhood and teen pregnancy that surfaced in the 1960s rarely connected these issues to statutory rape.\textsuperscript{77}

In the 1990s, two research studies ignited a national dialogue surrounding stricter statutory rape enforcement. The first was a study conducted by the Guttmacher Institute, finding that half of the fathers of babies born to mothers between the ages of fifteen and seventeen were twenty or older.\textsuperscript{78} The second touchstone study, conducted by the University of California, reported that two-thirds of school-aged mothers were impregnated by post-school-age fathers.\textsuperscript{79} These studies established a link between instances of statutory rape and rising teenage pregnancy rates, and enabled proponents of stricter enforcement to convince legislatures that such policies would decrease out-of-wedlock births.\textsuperscript{80}

The connection built between statutory rape and teenage pregnancy was inextricably tied to the belief that young mothers were creating a strain on the welfare system.\textsuperscript{81} Aggressive enforcement of statutory rape laws became a natural outgrowth of the national effort to reduce welfare costs.\textsuperscript{82} Congress enacted the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”), better known as welfare reform, which contained provisions directed at state statutory rape laws.\textsuperscript{83} Congress sought investigation of a possible link between “predatory older men” and teenage pregnancy, and advised states and local jurisdictions to “aggressively enforce statutory rape laws.”\textsuperscript{84}

A direct line can be drawn from modern statutory rape law to economics — whether the interest is in protecting the “value” of a girl to her father or future husband, or in preventing unwed mothers from burdening the government. However, statutory rape laws are now a widely known and accepted tool for protecting children from adults who seek to exploit them.\textsuperscript{85} The key assumption underlying these laws is that “the power disparity inherent in a relationship between a juvenile and an adult translates into a juvenile’s inability to resist an adult’s coercive influence.”\textsuperscript{86}

\textsuperscript{77} \textit{Girls in the Master’s House}, supra note 56, at 808.

\textsuperscript{78} \textit{Laura D. Lindberg et al., Age Differences Between Minors Who Give Birth and Their Adult Partners} (1997), http://webarchive.urban.org/publications/1000209.html.


\textsuperscript{80} Rigel Oliveri, \textit{Statutory Rape Law and Enforcement in the Wake of Welfare Reform}, 52 STAN. L. REV. 463, 472 (2000) (noting that these two studies “galvanized the PRWORA’s focus on the connection between teen pregnancy and statutory rape”).

\textsuperscript{81} \textit{Id.} at 474.

\textsuperscript{82} Patricia Donovan, \textit{Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?}, 29 FAM. PLAN. PERSP. 30, 30 (1997); see also Oliveri, supra note 80, at 468 (discussing the widespread consensus that “ending welfare as we know it... would require aggressively tackling the problem of teen pregnancy”).

\textsuperscript{83} See Oliveri, supra note 80, at 468, 472.

\textsuperscript{84} 34 U.S.C. § 12392 (2017).

\textsuperscript{85} \textit{Girls in the Master’s House}, supra note 56, at 800. In 1998, a highly publicized study was released about women’s experiences during their first sexual encounters. Close to 3000 women were asked to assign a number to their first sexual experience: assigning one to indicate they really did not want to have intercourse, and ten to indicate that they really wanted it to happen. The study revealed that the younger a woman’s age at first intercourse, the more likely she was to report it as unwanted. In fact, twenty-four percent of women whose first sexual experience occurred when under the age of fourteen reported that the intercourse was not voluntary. Studies like these illustrate one of the key policy reasons that animate the creation of statutory rape laws. \textit{Id.} at 820.

In other words, a minor is legally incapable of consenting to sex with an adult. However, some states take a further step, finding that minors are inherently and categorically incapable of meaningful consent, rendering sexual contact with a partner of any age nonconsensual.\textsuperscript{87}

After centuries of push and pull from different political and economic forces, the end results are poorly drafted statutes that can interact in unintended ways. A person under 18 who has consensual sex with another minor is viewed as exploiting the partner’s “inherent vulnerability” and is viewed as deserving punishment, “even when that person is himself equally in need of protection because of his immaturity.”\textsuperscript{88} Paradoxically, a statute meant to protect minors from adults can result in punishing minors themselves. For instance, the same child who is deemed legally incapable of consent to sex with an adult can be convicted of preying on another minor.

**B. Strict Liability: You Should Know Better**

In order to effectively protect minors from sexual contact with adults, modern statutory rape laws implement a strict liability model.\textsuperscript{89} Under strict liability, there is no defense to the crime if the act occurred; a defendant charged with statutory rape cannot claim that he was mistaken as to the age of the child or that the child consented to sex. Statutory rape is an offense based solely on the ages of the victim and perpetrator. It is irrelevant whether the circumstances of the conduct would indicate consent if the sexual acts took place between two adults; by virtue of age or age difference, the younger party cannot consent.\textsuperscript{90}

It is a fundamental tenet of criminal law that a person should only be punished for acts accompanied by a guilty mind.\textsuperscript{91} There are hundreds of statutes and thousands of pages of case law and analysis directed at determining the different levels of “guilty mind,” and how to detect them. Strict liability, however, offers a narrowly defined exception to the rules of intent that otherwise permeate criminal law. Strict liability originated with the public welfare offense doctrine, which addresses laws intended to safeguard the lives and health of the community as a whole rather than protect an individual from direct harm.\textsuperscript{92} Traditional examples of public welfare offenses include sales or transport of illicit liquor, sales of impure or adulterated food, and traffic violations.\textsuperscript{93} Many states have now added certain crimes against children to the strict liability list.\textsuperscript{94}

The legitimacy of strict liability criminal statutes rests on four factors:

(1) the risk of illegality that a defendant assumes when engaging in an activity that is subject to strict regulation; (2) the importance of protecting public and societal interests in the community; (3) the relatively small penalty involved in conviction

\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{90} Id. at 335.
\textsuperscript{91} Id. at 322-23.
\textsuperscript{92} Id. at 323-24.
\textsuperscript{93} Id. at 327.
\textsuperscript{94} See, e.g., ALA. CODE §§ 6-5-70, 71 (2019); 18 PA. CONS. STAT. § 6310.1 (2019); ARK. CODE ANN. § 3-3-201 (2017); FLA. STAT. § 768.125 (2019) (all listing the prohibition on the sale of alcohol to minors as strict liability crimes);
under the offense; and (4) the insignificance of the stigma attached to the conviction.  

In the case of strict liability statutory rape, the importance of protecting youth is certainly a strong factor. However, the first, third, and fourth factors no longer support the imposition of strict liability in prosecuting minors for statutory rape.  

Once upon a time, “engaging in any sexual activity with a person who is not one’s spouse” was legally risky. Nearly any kind of sex outside of marriage subjected a person to a number of criminal regulations, such as those governing adultery, fornication, or sodomy. Because most states have removed such statutes from their books, and because of the privacy rationale set forth in Lawrence v. Texas, the notion that any sex outside of marriage is “risky business” is no longer a legally valid one. In addition, while an adult actor may understand and assume risk when engaging in certain activities, the law simply cannot expect the same capacity in a child. Indeed, the very notions about children’s capacities that underpin such statutes — that children do not have the same decision-making capacity and judgment as adults — illustrates why children cannot be thought to assume the risks necessary for the imposition of strict liability.  

The third and fourth factors suggest that capturing some truly unwitting defendants is acceptable because of the relatively modest punishment and stigma experienced when violating such crimes. However, statutory rape law is hardly an administrative or minor regulation of undesirable conduct. To the contrary, the penalties are severe and the stigma and collateral consequences flowing from a conviction under the statute are potentially long-lasting and life-altering. Sentences can include incarceration for upwards of ten years, and in some states, registration as a sex offender for life. While the regulation of statutory rape may have fallen in line with the public offense or strict liability framework in the past, the concept of statutory rape as a “regulatory” issue with nominal punishment makes little sense today.  

C. State-by-State Structure of Statutory Rape Laws  

Each state has its own way of structuring statutory rape laws, and its own designations as to what age a minor can consent to sex. All states define a general age of consent, at which consensual sex with any other person who has reached the age of consent is legal. The most common age of consent is sixteen, with seventeen and eighteen the next most common. However, from that point, the states diverge drastically. A few states maintain a simple but draconian code relying solely on the age of consent. For example, in Massachusetts, the age of consent is sixteen, and there are no exceptions. Two fifteen-year-olds having sex with each other

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95 Carpenter, supra note 89, at 359.
96 Id. at 365.
97 Id. at 362.
98 Id. at 364-65.
99 Id. at 321.
100 See infra at II.D.
103 MASS. GEN. LAWS ch. 265 § 23 (2008).
would both be committing a crime, and a sixteen-year-old would commit a crime for having sex with a fifteen-year-old. Sex with an individual under age sixteen could result in a conviction in the adult criminal justice system and a sentence of life imprisonment.\textsuperscript{104}

In most states, the statutory rape framework is more complicated. About half of states provide an exception to the age of consent for closely aged peers.\textsuperscript{105} Ten states permit a consent defense, but most also limit the defense to cases where the participants are very close in age.\textsuperscript{106} For instance, Oregon’s statute provides that “[i]n any prosecution . . . in which the victim's lack of consent was due solely to incapacity to consent by reason of being less than a specified age, it is a defense that the actor was less than three years older than the victim at the time of the alleged offense.”\textsuperscript{107} About a third of states have implemented grading systems where the severity of the penalty depends on the age of the victim or the age difference between the victim and the perpetrator.\textsuperscript{108} In most states, statutory rape law consists of a confusing patchwork of prohibitions, exceptions, and aggravating and mitigating conditions. For example, in Indiana, the degree of felony liability depends on the age of the child, the age of the victim, and the offense for which they were charged, with different penalties for individuals under age 14, and individuals above age 14 but under age 21.\textsuperscript{109} And in Pennsylvania, the law requires liability based on the age difference between the individuals; sexual intercourse constitutes felony statutory sexual assault when it occurs between a minor under 16 years old and a person at least four years older, but the statute differentiates the severity of the offense based on whether the age difference is four to eight years, eight to eleven years, or more than eleven years.\textsuperscript{110}

The multiple statutes governing sexual acts involving minors create a confusing patchwork, with holes and contradictions. In addition, states use varied language in their statutory proscriptions of sex with a minor. Though some state laws use the term “statutory rape”, other statutes include crimes against children in general rape and sexual assault statutes, or refer to “child abuse” or “sexual abuse,” “sexual exploitation” of minors,” “child molestation,” “indecent

\textsuperscript{104} Id.
\textsuperscript{105} Age of Consent by State Population, supra note 102.
\textsuperscript{107} Or. Rev. Stat. § 163.345.
\textsuperscript{109} Ind. Code § 35-42-4-3 (2019).
\textsuperscript{111} N.Y. Penal Law §§ 130.25-35, 40-50, .55-.65 (2019).
\textsuperscript{112} Colo. Rev. Stat. § 18-6-403 (2019).
\textsuperscript{113} Wash. Rev. Code §§ 9A.44.083, .086, .089 (2020).
liberties with a child.”114 “Lewd and lascivious acts” with a child,115 or “carnal knowledge” of a minor.116 Many states use more than one of these terms in different sections of the criminal code.

There are two situations where a minor might be prosecuted for sexual contact with another minor that would be considered consensual if it took place between two adults. In the first type, one minor is below the age of consent and the other minor is at or above the age of consent. The statute clearly delineates that the child below the age of consent is the “victim” and the older child is the “perpetrator.” For instance, the Massachusetts statute that sets the age of consent at sixteen permits prosecution of a sixteen-year-old who has consensual intercourse with a fifteen-year-old; by imposing strict liability, the statute prevents any meaningful examination of the underlying relationship.117 The older juvenile is equated with the coercive adult and prosecuted solely by virtue of his or her age; the younger juvenile is rendered a victim, unable to give consent even to a trusted partner.

In the second type, both participants in the sexual activity are under the age of consent. In these cases, prosecutors or law enforcement officials have leeway to decide who is the “victim” and who is the “perpetrator.” Sometimes, these roles are clear. When they are not, the assumptions and prejudices of the adults involved determine how the case proceeds. One child may be identified as the “perpetrator” because of his or her race, gender, sexual identity, sexual experience, or some other factor; the decision of which child to prosecute is informed by the individual biases of the adults involved, such as parents, police, and prosecutors.118 Therefore, strict liability laws criminalizing sex between two minors create an ideal climate for discriminatory enforcement.

Making matters worse, this “decision-maker bias” results in disproportionate targeting of the populations of youth that are already the most vulnerable.119 “The lack of a clear distinction between consensual and nonconsensual illegal sexual behavior results in an often arbitrary distinction between perpetrators and victims, with the majority of perpetrators being low-income boys, most of whom are already being observed by the juvenile justice system and thus subject to extra scrutiny.”120 As in the criminal and juvenile justice systems as a whole, youth of color are disproportionately charged with these sex offenses.121 Perhaps because even young boys are perceived as more sexually aggressive than young girls, they may be overidentified as the “perpetrator” in cases of heterosexual sexual contact.122 Youth who are already involved in the child welfare or juvenile justice system are more likely to have their sexual activities surveilled,

115 FLA. STAT. § 800.04.
117 Pearlstein, supra note 16, at 110.
121 Rebeeca L. Fix et al., Disproportionate Minority Contact Comparisons Across Juveniles Adjudicated for Sexual and Non-Sexual Offenses, SEXUAL ABUSE: J. OF RES. & TREATMENT 1, 2 (2015).
122 Anna High, Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class, 69 ARK. L. REV. 787, 815 n.123 (2016).
leading to higher rates of prosecution for sexual activities that would go unnoticed among non-system-involved children.\(^\text{123}\) Moreover, youth who identify as LGBTQ+ are more likely to be prosecuted for sexual offenses.\(^\text{124}\) LGBTQ+ youth can also receive harsher consequences for the same sexual behavior as their heterosexual peers.\(^\text{125}\) In some states, including Texas, where the landmark United States Supreme Court decision \textit{Lawrence v. Texas}, 539 U.S. 558 (2003) held that criminalizing same sex conduct was unconstitutional, there are laws that criminalize same-sex sexual contact between minors but not sexual contact between minors of different sexes.\(^\text{126}\)

\textbf{D. Consequences for Youth Prosecuted for Sex Offenses}

Courts and legislatures have found that the need to protect youth from sexual exploitation justifies an enormous range of criminal and civil penalties. In the context of youth prosecutions for consensual sex, courts impose vastly disproportionate consequences. Some of the most severe civil consequences stem from the Sex Offender Registration and Notification Act (“SORNA”), Title I of the Federal Adam Walsh Child Protection and Safety Act. SORNA contains broad provisions that mandate the registration and management of sex offenders, and teens convicted as adults face severe consequences that are subject to the same registration requirements as adults.\(^\text{127}\)

Children who are required to register as sex offenders face a variety of legal burdens and restrictions depending on the state in which they live. These may include registering with the police wherever the child lives, works, or goes to school;\(^\text{128}\) public access to the child’s photograph, address, offense, and other personal information;\(^\text{129}\) prohibitions on living in public housing\(^\text{130}\) or within a certain distance of schools and day cares;\(^\text{131}\) notification to the community that the child

\(^\text{123}\) Id. at 809 n.89; Suzanne Meiners-Levy, \textit{Challenging the Prosecution of Young “Sex Offenders”: How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice}, 79 TEMP. L. REV. 499, 502 n.2 (2006) (“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.”).

\(^\text{124}\) Id. at 502 n.2 (citing Colleen A. Sullivan, \textit{Kids, Courts and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems}, 6 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 31, 38-43 (1996) (finding gay and lesbian youth more likely to have contact with legal system due to social ostracism, family conflicts, and criminalization of certain gay acts)).


\(^\text{127}\) RAISED ON THE REGISTRY, \textit{supra} note 101, at 40.

\(^\text{128}\) Id.

\(^\text{129}\) Id.

\(^\text{130}\) Id. at 66.

\(^\text{131}\) Id. at 47.
is a sex offender;132 and permanent exclusion from any jobs working with children.133 Children registered as sex offenders also face discrimination and even violence from those who learn of their status.134 Based on these irreparable harms, Human Rights Watch issued a report on juvenile sex offender registration policies recommending that state and federal laws be amended to explicitly exempt “all persons who were below the age of 18 at the time of their offense (youth sex offenders) from all sex offender registration.”135 Given the harsh and unanticipated results when teens are labeled sex offenders, it is vital to find an appropriate and measured legislative solution.

Even youth who avoid the “sex offender” label will face severe consequences based on their adjudication or conviction for a statutory rape crime. These youth will face barriers to employment, housing, and education, and will endure lifelong stigma136 — all without regard to whether the sexual activity underlying the conviction was consensual, or even normative, behavior.

III. KIDS IN THE COURTHOUSE: APPLYING STATUTORY RAPE LAWS TO MINORS

When courts are faced with a juvenile charged with statutory rape, there are obvious tensions. Children deserve protection from children who abuse them just as they do from adults; at the same time, both common sense and Supreme Court precedent mandate that children who commit crimes must be treated differently from adults.137 Courts are faced with interpreting poorly drafted statutes that criminalize the very class of people they were designed to protect: children.

Courts have taken two diverging approaches to statutory rape laws as applied to minors, set forth below. The first is a plain language approach, where courts apply the letter of the law to adolescent defendants, even when both the alleged victim and the defendant are under the age of consent. These courts conclude that minors need to be protected from sexual exploitation or harm, regardless of the age of the perpetrator, and defer to the legislature’s judgment in passing the statute. The second approach of state courts is to refuse to apply statutory rape laws to some minors, finding that it is absurd to apply the same statute to juvenile offenders as adult offenders. A variety of legal theories have been provided to support these holdings, including that statutory rape statutes are unconstitutionally vague; violate ideals of equal protection; are enforced arbitrarily and discriminatorily; violate core ideals of privacy; or provide disproportionate punishment for juveniles engaging in fairly commonplace behavior.

The plain language approach is exemplified by P.G. v. State, a case from the Texas Court of Civil Appeals of San Antonio. P.G. was a sixteen-year-old boy who was transferred to the adult justice system and convicted of sexual abuse of a child as set forth in Section 21.10 of the Texas Penal Code.138 On appeal, among other things, P.G. argued that the juvenile court petition failed to allege a criminal offense that he was capable of committing, contending that the legislature drafted Section 21.10 with the intention of protecting children against sexual assaults from adults only.139

132 Id. at 40.
133 RAISED ON THE REGISTRY, supra note 101, at 73.
134 Id. at 56.
135 Id. at 104.
136 See generally RAISED ON THE REGISTRY, supra note 101.
139 Id. at 639-40.
The P.G. court reasoned that because the consent of the victim serves as the distinguishing characteristic between ordinary sexual offense statutes\(^\text{140}\) and those applying to children,\(^\text{141}\) the “focus of these penal statutes is on the victim and his ability to consent.”\(^\text{142}\) Therefore, it would “frustrate the intent of the statutes” to allow minors charged with such crimes to escape punishment.\(^\text{143}\) “Children,” the P.G. court asserted, “are entitled to no less protection from other children who sexually abuse them than they are from adults who sexually abuse them.”\(^\text{144}\)

Hawaii’s Intermediate Court of Appeals followed Texas’ lead when examining two accusations of sexual misconduct made against a twelve-year-old defendant in *In the Interest of T.C., a Minor.*\(^\text{145}\) There were allegations that T.C. engaged in mutual masturbation, fellatio, and anal penetration with two other children, a seven-year-old and a thirteen-year-old.\(^\text{146}\) One of the victim children reported that “all of us” decided to engage in the sexual activity.\(^\text{147}\) According to T.C.’s mother, T.C. was “underdeveloped both mentally and emotionally” and had been in enrolled in Special Education classes since the first grade.\(^\text{148}\)

T.C. was charged with seven counts of Sexual Assault in the First Degree because he “knowingly engage[d] in sexual penetration with another person who was less than fourteen years old.”\(^\text{149}\) He was also charged with three counts of Sexual Assault in the Third Degree because he “knowingly subject[ed] to sexual contact another person who is less than fourteen years old or cause[d] such a person to have sexual contact with the person.”\(^\text{150}\) Following his adjudication, T.C. was subject to probation until age eighteen.\(^\text{151}\)

On appeal, T.C. asserted that the Hawaii sexual assault statutes were not intended to apply to children who are themselves under the age of fourteen.\(^\text{152}\) The court held that prosecution of a defendant who is himself a minor is not unconstitutional, nor is it against sound public policy.\(^\text{153}\) In doing so, the court upheld the plain language of the statute, and reasoned that appellant failed to present any Hawaii legislative history that could “support[...] a conclusion that only adults were

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\(^{142}\) *Id.*

\(^{143}\) *Id.*

\(^{144}\) *P.G.*, 616 S.W.2d at 640.


\(^{146}\) *Id.* at 1085.

\(^{147}\) *Id.* at 1084.

\(^{148}\) *Id.* at 1085.

\(^{149}\) In re T.C., 214 P.3d at 1087; HAW. REV. STAT. § 707-730(1)(b) (2019).

\(^{150}\) HAW. REV. STAT. § 707–732(1)(b) (2019).

\(^{151}\) In re T.C., 214 P.3d at 1087.

\(^{152}\) *Id.* at 1088. T.C. also asserted that he was treated differently than the other boys involved in the incidents; therefore the State’s selective prosecution of T.C. violated his constitutional protections of due process and equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, § 5 of the Hawai‘i Constitution, which is the corollary state due process constitutional guarantee. Furthermore, T.C. asserted that because the alleged acts of sexual contact were consensual, the adjudication violated TC’s constitutionally protected right to privacy, embodied in Article I, § 6 of the Hawai‘i Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution *id.* at 1095.

\(^{153}\) *Id.* at 1096.
intended to be prohibited from the proscribed sexual conduct.” The 2001 amendment to the statutes at issue prohibited “consensual sexual contact or sexual penetration with a fourteen- or fifteen-year-old only if the actor is five or more years older than the minor.” The court found the absence of similar language allowing consensual sexual conduct between two thirteen-year-olds to be conclusive: thirteen-year-olds were held to be categorically vulnerable to sexual exploitation, regardless of the age of the perpetrator.

In holding that defendant minors could rightfully be prosecuted under Hawaii’s Sexual Assault provisions, the court rejected the appellant’s public policy arguments acknowledging the importance of “youthful sexual experimentation.” The court relied on precedent from state and appellate courts, including P.G. v. State, in concluding that it would “frustrate the intent” of such statutes if it failed to prosecute children along with adults for engaging in sexually exploitative behavior.

Likewise, in a case before the Kentucky Supreme Court, fourteen-year-old B.H. was charged with sexual misconduct, a strict liability offense, for engaging in a consensual sexual relationship with his twelve-year-old girlfriend. B.H. and his girlfriend attended the same middle school, were only one school year apart, and had an ongoing romantic relationship. Although neither B.H. nor his girlfriend were legally able to consent to have sex under Kentucky law, only B.H. was charged with sexual misconduct for engaging in consensual sexual intercourse. B.H. pled guilty and was adjudicated delinquent, and the intermediate appellate court upheld the trial court’s ruling. B.H. appealed the Order adjudicating him delinquent, arguing that the sexual misconduct statute as applied to him is unconstitutional as he is a member of the class of individuals the statute was designed to protect. B.H. argued that the statute denied him fundamental fairness, due process, and his rights under the equal protection clause and should be void for vagueness. The Kentucky Supreme Court dismissed his claim on the ground that B.H. had unconditionally plead guilty to the charges. However, the concurring opinion noted that this was an “agonizing” case analogous to Romeo and Juliet.

In contrast, some state courts have used various constitutional arguments to support a holding that statutory rape statutes cannot be applied to children under the age of consent. For instance, the Supreme Court of Ohio struck down a statutory rape provision for being unconstitutionally vague and violating principles of equal protection. D.B. was twelve years old when charged with nine counts of rape arising from non-forcible, consensual conduct occurring between him and an eleven-year-old boy and one count of rape arising from conduct that occurred

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154 Id. at 1095.
155 Id. at 1096 (citing HAW. REV. STAT. §§ 707–730(1)(c), 707–732(1)(c)).
156 Id. at 1097.
157 Id.
158 Id. See also In re Pima Cty. Juvenile Appeal No. 74802–2, 790 P.2d 723, 729 (Ariz. 1990) (en banc); In re James P., 171 Cal. Rptr. 466, 466 (1981).
160 Id. at 475 (Minton, J., concurring).
162 See B.H, 494 S.W.3d at 475 (Minton, J., concurring).
163 In re D.B., 950 N.E.2d 528, 534 (Ohio 2011).
164 Id. at 529-30.
with another twelve-year-old boy.\textsuperscript{165} D.B. was convicted under R.C. 2907.02(A)(1), which stated that “[n]o person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when . . . [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person.”\textsuperscript{166}

D.B. asserted that the application of the strict liability rape statute violated his federal and state rights to due process and equal protection.\textsuperscript{167} D.B. argued that the statute was vague as applied to children under the age of thirteen and was enforced in an arbitrary manner.\textsuperscript{168} D.B. further argued that statutory rape provision was unconstitutional as applied to him because it failed to specify which actor was the victim and which was the offender.\textsuperscript{169}

The court agreed. The court held that the statute was unconstitutionally vague in violation of the due process clause when applied to sexual contact between two children under the age of thirteen.\textsuperscript{170} Further, the arbitrary and discriminatory enforcement of the statute against only one party under the age of thirteen was found to violate the Constitution’s equal protection guarantee that similarly situated persons be treated alike.\textsuperscript{171}

When analyzing vagueness, the court emphasized “the requirement that a legislature establish minimal guidelines to govern law enforcement.”\textsuperscript{172} While it is clear that an adult is prohibited from having sex with a minor under the age of thirteen, when “each child is both an offender and a victim . . . the distinction between those two terms breaks down.”\textsuperscript{173} In encouraging the prosecution of one child and not the other for the same conduct, R.C. 2907.02(A)(1)(b) was found to promote arbitrary and discriminatory enforcement and therefore identified as unconstitutionally vague.\textsuperscript{174} The court was careful to note that while the statute was unconstitutional as applied to a child under the age of thirteen who engages in sexual conduct with another child under the age of thirteen, a child under the age of thirteen could be found guilty of rape if additional elements are shown, including: the offender “substantially impairs the other person’s judgment or control” (§2907.02(A)(1)(a)); the other person’s “ability to resist or consent is substantially impaired because of a mental or physical condition” (§ 2907.02(A)(1)(c)); or the offender “compels the other person to submit by force or threat of force” (§ 2907.02(A)(2)).\textsuperscript{175} While none of those issues were present in D.B.’s case, the court provided these contours, which could help guide future Ohio decisions involving similar facts and to distinguish non-forcible, consensual conduct.\textsuperscript{176}

\begin{footnotesize}
\begin{enumerate}
\item[165] \textit{Id.} at 530.
\item[166] \textit{Id.} at 531-532. (quoting \textsc{Ohio Rev. Code Ann.} § 2907.02(A)(1) (effective Mar. 22, 2019 to Mar. 21, 2020)).
\item[167] \textit{Id.} at 532.
\item[168] \textit{Id.}
\item[169] \textit{In re D.B.}, 950 N.E.2d at 533.
\item[170] \textit{Id.} at 534.
\item[171] \textit{Id.}
\item[172] \textit{Id.} at 532 (quoting Smith v. Goguen, 415 U.S. 1242, 1248 (1974)).
\item[173] \textit{Id.} at 533.
\item[174] \textit{Id.}
\item[175] \textit{In re D.B.}, 950 N.E.2d at 533–34.
\item[176] \textit{Id.} at 534. The court also found that D.B.’s right to equal protection under the laws was violated because he was arbitrarily prosecuted under the statute. \textit{Id.} at 532.
\end{enumerate}
\end{footnotesize}
The Supreme Court of Arizona took a similar tack in *State v. Getz*, upholding the validity of a consent defense involving a sixteen-year-old defendant accused of touching and having oral contact with a fourteen-year-old girl’s breasts.177 The trial evidence revealed that the girl consented to the acts.178 The court’s decision turned on its interpretation of two Arizona statutes governing sex offenses against minors.179 The statute under which Getz was convicted clearly stated that sexual contact with a fourteen-year-old is prohibited only when conducted without the consent of the minor; in addition, the statute defining a lack of consent did not include age as a factor.180 However, the affirmative defense statute explicitly negated consent as a defense where the minor victim was fourteen or older unless the defendant did not know and could not reasonably have known the victim’s age.181

The defendant argued that reading these two statutes together would render the law under which he was convicted unconstitutionally vague.182 In essence, each statute makes an opposing statement about whether consent can be used as a defense if the victim-participant is fourteen or older.183 Upon review, the Court stated that it hoped to provide “guidance concerning the proper interpretation of these confusing statutes and the equally confusing case law they have produced.”184

While engaging in statutory interpretation, the Court noted that “[c]riminal offenses must be defined sufficiently to give fair notice to a person of ordinary intelligence ‘that his contemplated conduct is forbidden by the statute.’”185 The court noted that a person of “ordinary intelligence” would logically come to the conclusion that a person above age fourteen could consent to sexual contact.186 If the legislature wished to make such conduct a crime, it could easily have done so by changing the age of consent in the statute. The Court therefore held that the state must prove lack of consent if the victim is age fourteen or over, and that the defendant was entitled to judgments of acquittal on sexual abuse charges.187

While not a statutory rape case, Georgia’s *In re J.M.* case provides instruction concerning the interplay between sexual activity among minors and the right to privacy.188 J.M., a sixteen-year-old boy, had consensual sex with a sixteen-year-old girl in her bedroom.189 When the girl’s mother walked in and discovered them having sexual intercourse, J.M. jumped out of the bedroom window and ran.190 The juvenile court found that J.M. had violated Georgia’s fornication statute, which states that “[a]n unmarried person commits the offense of fornication when he voluntarily

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178 Id. at 504.
179 Id. at 505.
180 Id. at 506.
181 Id.
182 Id. at 504.
183 State, 944 P.2d at 504-06.
184 Id. at 504.
185 Id. at 507-08.
186 Id. at 507.
187 Id. at 508.
188 In re J.M., 575 S.E.2d 441, 442 (Ga. 2003).
189 Id.
190 Id. at 442.
has sexual intercourse with another person and, upon conviction thereof, shall be punished as for a misdemeanor.”¹⁹¹ He was adjudicated delinquent after being found guilty of violating this law.²⁰²

The Georgia Supreme Court overturned J.M.’s conviction, finding his conduct to be protected by Georgia’s constitutional right to privacy.¹⁹³ The court found that regulating the private sexual conduct of persons deemed capable of consent by the legislature was an insufficient State interest to overcome the right to privacy guaranteed by the state constitution.¹⁹⁴ The court identified several factual details supporting its finding that J.M.’s encounter should be treated as a private one, such as the fact that both parties willingly engaged in sex; the location of the encounter (the female partner’s bedroom); and the fact that she showed the intent to keep their encounter private when she locked the door and placed a stool in front of it.¹⁹⁵

The State of Georgia argued that the government’s interest in regulating the conduct of minors should overcome any privacy concerns.¹⁹⁶ However, the Court reasoned that it is not the label of “minor” or “adult” that determines the right to privately engage in sexual conduct.¹⁹⁷ In a previous case, the Georgia Supreme Court held that “the Georgia Constitution protects from criminal sanction private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent.”¹⁹⁸ The court noted that under Georgia’s laws, persons who are at least sixteen years old are capable of consenting to sex.¹⁹⁹ Therefore, regulating the behavior of two consenting individuals promotes an “insufficient state interest to overcome Georgia’s constitutional protections of privacy.”²⁰⁰

State courts have failed to come to any consensus about the application of statutory rape laws to minor defendants. The courts cannot agree on whether this practice is legal or constitutional, let alone the appropriate basis for upholding or striking it down. Rather than leave this issue to the piecemeal approach of state courts, state legislatures must step forward and craft sensible laws that protect all children by holding minors responsible for only behavior that is truly abusive, not for normal sexual exploration or consensual contact between youth.

IV. GETTING IT RIGHT: ALTERNATIVES TO STRICT LIABILITY AND PROSECUTION

Statutory rape laws were developed to protect children from unwanted and harmful sexual activity. However, using these laws to criminalize normative sexual exploration among consenting teens harms rather than protects these youth. The legislature and courts should establish a new

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¹⁹² In re J.M., 575 S.E.2d at 442.
¹⁹³ Id. at 443. (explaining that Georgia’s Constitution guarantees its citizens a “right of privacy,” interpreted as the “protection for the individual from unnecessary public scrutiny,” the individual right “to be free from the publicizing of one’s private affairs with which the public has no legitimate concern,” and “the right to define one’s circle of intimacy.”)
¹⁹⁴ Id.
¹⁹⁵ Id. at 443.
¹⁹⁶ Id. at 444.
¹⁹⁷ Id. at 443.
¹⁹⁸ Id. at 442 (paraphrasing Powell v. State, 510 S.E.2d 18, 23-24 (Ga. 1998)).
¹⁹⁹ In re J.M., 575 S.E.2d at 443.
²⁰⁰ Id.
framework for understanding teen sexuality and the law, which incorporates research-based conclusions about youth behavior and development.

For true reform, strict liability prosecution must be eliminated for minors. Obviously, not all sexual contact between minors is consensual, just as not all sexual conduct between adults is consensual solely because they are legally capable of consent. There are cases where one minor inflicts forcible or coercive sexual contact upon another minor. In those cases, prosecutors have the option of bringing charges under traditional rape statutes. However, statutory rape is a strict liability crime: both consent and use of force are irrelevant to guilt, and therefore there exist no defenses to prosecution. Strict liability statutes provide a workaround to prosecute children when intent or lack of consent cannot be proven. The use of strict liability in these cases is particularly dangerous because it makes convictions easy to obtain while simultaneously rendering context irrelevant.

It may be uncomfortable for adults to contemplate consensual sex among young people. More importantly, the legal system continues to struggle with defining and applying definitions of consent. However, these reasons do not justify casting a wide net and pulling minors into the justice system. A nuanced investigation of consent should help ensure prosecutions that only target truly abusive and dangerous behavior. Statutes that mandate an in-depth analysis of consent, rather than relying on strict liability, more effectively protect youth from both sexual harm and inappropriate prosecution.

Once strict liability is abolished as to young people, statutory rape laws should be structured as follows as applied to youth:

A. Create Presumptions of Non-Consent

Many statutory rape laws treat all children under the state’s designated age of consent identically. In a state that sets the age of consent at sixteen, a fifteen-year-old adolescent will be treated the same as a two-year-old toddler. While the punishment imposed may vary based on the age of the child “victim,” the two children are both legally unable to consent to sexual activity. States can use a tiered system where youth close to the age of consent have a rebuttable presumption of non-consent, while younger children are categorically unable to consent. For instance, in the above example, a tiered statute might provide that children thirteen and under

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201 When a child’s behavior is identified as coercive or forcible, the focus should be on rehabilitation instead of punishment. Research shows that juveniles who exhibit such behaviors are capable of correcting their behavior. Turning Girls into Women, supra note 59, at 177. One such study found that “[a]pproximately eighty-five to ninety-five percent of the juvenile offenders enrolled in treatment programs ... are rehabilitated through psychological treatment.” Id. Alternatives to incarceration would include cognitive behavior treatments, community-based treatment programs, and treatment at residential facilities for juvenile sex offenders who pose a danger to the community. Id. at 121. A system should exist that assesses offenders prior to adjudication so that the appropriate recommendations are made to the court prior to the sentencing phase. Underage sex offenders would then be sent to treatment centers instead of prisons. This would decrease the likelihood of recidivism.


203 Id.
cannot consent but allow the defense to rebut the presumption of non-consent in the case of fourteen- and fifteen-year-olds.

**B. Create Presumptions Against Prosecution of Young Children**

It is paradoxical to write a statute that finds that a minor is simultaneously too young to have the capacity to consent to sex and old enough to be charged with a sex crime. States should draft laws that create a presumption that children below the age of consent are unable to be charged with a sexual crime. In Virginia, the law creates a rebuttable presumption that a child between the ages of ten to twelve is not capable of committing a crime (although it does not, strangely enough, address capacity as to children younger than ten). California creates a presumption against finding a child younger than fourteen capable of committing a crime, absent proof that he knew of the wrongfulness of the act. These presumptions do not prevent criminal liability in appropriate cases, but require an additional showing of intent.

**C. Employ Romeo & Juliet Provisions**

Many states have enacted “Romeo and Juliet” provisions that exclude from prosecution sexual contact between individuals who would otherwise fall under the statute but are close in age to one another. These statutes can even extend to adults in case where a young person just over the age of majority engages in sex with a minor just under eighteen. In the context of juvenile prosecutions, these laws either reduce or eliminate the penalties for a minor who engages in sex with another minor, where the “offender” is also underage.

Romeo and Juliet provisions appear as either affirmative defenses or separate statutory exceptions. Such provisions strike a balance between preserving the protective impulse informing strict liability provisions and acknowledging that teens do engage in consensual sex with one another. For example, Oregon allows consent as a defense to statutory rape when the two youths are close in age: if “the victim’s lack of consent was due solely to incapacity to consent by reason of being less than a specified age, it is a defense that the actor was less than three years older than the victim at the time of the alleged offense.” For example, in Georgia, an individual who is 18 years of age or younger, but not more than four years older than the victim, shall be guilty of misdemeanor rather than felony statutory rape. And, in Indiana, it is a defense to sexual misconduct with a minor age 14 to 16 if the offender is under age 21, not more than four years older than the victim, was in a dating relationship with the victim, and there are no aggravating factors. An appropriate Romeo and Juliet standard will eliminate needless, wasteful, and ultimately unproductive prosecution of teenagers engaging in consensual sex, while at the same time allowing for the identification of adolescents who are engaging in coercive, predatory, or abusive behavior.

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204 VA. CODE ANN. § 18.2-61 (2019).
205 CAL. WELF. & INST. § 602 (West 2019).
207 OR. REV. STAT. § 163.345.
208 GA. CODE. ANN. § 16-6-3(c) (West 2020).
209 IND. § 35-42-4-9.
### D. Listen to the Science on Adolescent Development and Consent

There is ongoing scientific research into the normative sexual behavior of children and adolescents. As our understanding of healthy sexuality and consent evolves, these lessons should be incorporated into laws about the age of consent. The minimum age of consent should be chosen in recognition of emerging research on adolescent psychology and sexuality, and the recommendations of psychologists, sociologists, sex educators, and children’s advocates should be considered in evaluating consent in sexual encounters.\(^{210}\)

### CONCLUSION

Punishing consensual sexual activity between youth can result in disproportionate and inappropriate punishment for behavior that should not be criminalized. While “sex offender laws were designed to protect children from predators — pedophiles, rapists and the like,” they have the unintended consequence of punishing youth who engage in ordinary adolescent exploration.\(^{211}\) State courts have been left to address the application of statutory rape laws as best they can, with widely divergent results. It is time for state legislators to step forward and adopt an alternative legal framework to address sexual contact among children — a framework that will protect youth both from sexual abuse and from a justice system unprepared to cope with normative adolescent sexual behavior.

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\(^{210}\) *Turning Girls into Women*, *supra* note 59, at 177.

\(^{211}\) *Munoz, supra* note 8.