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TURNING GIRLS INTO WOMEN: RE-EVALUATING MODERN STATUTORY RAPE LAW*

*Michelle Oberman***

INTRODUCTION

During the spring of 1993, a group of teenage boys who called themselves the Spur Posse[1] combined adolescent competitiveness and sexual bravado to develop a "game" in which members of the group sought to have sexual relations with as many females as possible. Members scored one point for each sexual conquest--i.e., each time they achieved orgasm with a girl.[2]

The gang first made headlines when eight of its members were arrested on charges ranging from lewd conduct with a minor under the age of fourteen to rape by intimidation.[3] From a legal perspective, the astonishing thing about the Spur Posse case was not the fact that the

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[1] The group comprised 20 to 30 youths, mostly white, all residents of Lakewood, California. Seth Mydans, High School Gang Accused of Raping for 'Points', N.Y. TIMES, March 20, 1993, at A6. Although some had been arrested in the past for burglary, theft, and assault, id., the boys were widely reported as being "the popular guys." Jill Smolowe, Sex with a Scorecard, TIME, April 5, 1993, at 41.

[2] The goal was to score as many "points" as possible. Smolowe, supra note 1; Mydans, supra note 1 (quoting L.A. Sheriff's Dept. Lt. Joseph Surgent: "It didn't matter whether the girls consented or not. If they consented it was a point. If they didn't consent, it was a point.").

[3] Initially, the charges totalled 17 felony counts of lewd conduct, unlawful intercourse and rape of seven girls aged 10 to 16. Jean Seligmann, A Town's Divided Loyalties, NEWSWEEK, April 12, 1993, at 29. The ages of the arrestees ranged from 15 to 18. Mydans, supra note 1.

gang members wanted to have sex with more than one partner,[4] nor even that they actually had so many partners.[5] Rather, it was that after weeks of investigation, the Los Angeles County District Attorney's Office dropped all of the charges except one on the grounds that its "policy is not to file criminal charges where there is consensual sex between teenagers."[6]

While the District Attorney's office classified the sex these boys had as consensual, others went even further, endorsing it as healthy. Some parents of Spur Posse members bragged about their sons' escapades. One mother said, "What can you do? It's a testosterone thing."[7] One father referred to his son as a "virile specimen."[8] Another father was quoted as saying, "Nothing my boy did was anything that any red-blooded American boy wouldn't do. He has to defend himself from these girls. They are promiscuous."[9]

Although the criminal justice system labeled the sex "consensual," there was no evidence that the girls considered their experiences pleasant or recreational. Quite the contrary image seems to emerge from the media accounts, which describe rather violent encounters, rife with ambivalence and coercion, and seemingly void of mutual affection.[10] Yet, neither the District Attorney's statements nor

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[4] One young woman who attends Lakewood High School stated: "More than three-quarters of the guys in school will have sex with anything they can." David Ferrell, Eight High School Students Held in Rape, Assault Case, L.A. TIMES, March 19, 1993, at A1.

[5] These teenage boys had each engaged in sexual relations with anywhere from 20 to 73 different girls. Amy Cunningham, Sex in High School, GLAMOUR, Sept. 1993, at 253; Joan Didion, Trouble in Lakewood, THE NEW YORKER, July 26, 1993, at 46; Ferrell, supra note 4.

[6] Didion, supra note 5, at 54. Another writer stated that the D.A.'s policy was not to file charges in unlawful intercourse cases "if the minors involved are of roughly the same age and social experience." Jennifer Allen, Boys; Hanging With the Spur Posse, ROLLING STONE, July 8-22, 1993, at 55. At least one writer reported that the charges were dropped because the girls had consented in some of the sexual encounters, "and in the other cases, the D.A. felt he couldn't prove that the sex was not consensual." Cunningham, supra note 5.

[7] Smolowe, supra note 1.

[8] Allen, supra note 6, at 63.

[9] Michelle Stacey, Bad Boys: Why Groups of Boys Take Part in Sexual Assault, SEVENTEEN, Nov. 1993, at 124.

[10] The boys involved reportedly had a reputation for being "into violence," and, in fact, "represented themselves as a violent group." Id. (quoting Detective Doug Blades, of the L.A. County Sheriff's Department); Mydans, supra note 1 (quoting L.A. Sheriff's Dept. Lt. Joseph Surgent: "This group of boys had a reputation. The reputation was that it was a group to be reckoned with. Several of our victims have come forward and basically stated that they submitted to a sex act because they were afraid.").

the media provide any real insight into the girls' views of their experiences.[11] Rather than yielding a sense of what "consensual" sex meant to the girls involved, the Spur Posse stories contain only defensive justifications for the sexual episodes, such as the girls had consented,[12] or the girls were sluts and the boys could not be blamed, since "boys will be boys."[13]

The sexual activities described in the media accounts were not glorified games of "spin the bottle," nor even scenes of furtive intercourse with a boyfriend in the back seat of a car. Rather, they were stories of a fifteen-year-old boy who climbed through a bedroom window and demanded sex from an eleven-year-old girl;[14] of a group of boys lining up to have sex with one girl, whose clothes had been taken away from her by gang members demanding that she have sex with them, since she had had sex with another member;[15] and of boys who described their typical sexual encounter as "just throw a couple of pumps, and you're done,"[16] and who distinguished it from the kind of

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One female student said, "I have friends who were beaten up and raped by them. If a girl would not sleep with them, they would beat her up." Ferrell, supra note 4.

[11] While the Spur Posse members--including one of the boys who had been arrested--appeared on numerous television programs, initially only one of the victims--an 11-year-old--spoke out publicly. In a poignant expression of the double standard imposed on her as a victim, she noted that the public had blamed the victims of the Posse, calling the victims sluts; then she added, "It makes me kind of upset. I think there should be names for the boys." Somini Sengupta, Spur Posse Victim Speaks Out to Encourage Others, L.A. TIMES, April 28, 1993, at B3.

Later, other victims also appeared on television talk shows--in one case, in disguise--and some girls agreed to be quoted in press accounts of the incidents. Cunningham, supra note 5, at 255, 322.

[12] "When they're having sex, it's sex. It's rape afterward when they're embarrassed and they change their minds," said one of the Posse members. Ferrell, supra note 4.

[13] Mydans, supra note 1; see also Nancy Gibbs, How Should We Teach Our Kids About Sex?, TIME, May 24, 1993, at 60 (reporting that among 500 teenagers surveyed, two-thirds said that a boy who has sex increases his reputation, while a girl who has sex suffers a decline in her reputation). The boys became overnight media stars, and news stories about the incidents abounded. The Spur Posse made headlines in daily newspapers ranging from the Sacramento Bee to The New York Times; in national news magazines such as Time and Newsweek; in literary magazines such as The New Yorker, in women's magazines such as Glamour and Seventeen; and in popular publications such as Rolling Stone. In addition, the story was discussed on Cable News Network, National Public Radio, and Nightline, and the Spurs themselves appeared on television programs such as Dateline NBC and The Home Show, as well as talk shows hosted by Phil Donahue, Montel Williams, Maury Povich, Jenny Jones, and Jane Whitney. Cunningham, supra note 5, at 253.

[14] Seligmann, supra note 3.

[15] The girl's clothes were returned to her only after she began screaming for help. Cunningham, supra note 5, at 255.

[16] Allen, supra note 6, at 62.

sex one had with a girl one really liked: "Whores you just nut and you leave. Good girls that are fine and respectable, you give them the all-night thing, you please them and romance them . . . and eat them out and shit."[17]

Although it is conceivable that a teenage girl might "consent" to sexual intercourse in some circumstances, the seemingly facile conclusion that so long as she consents, any act of intercourse with her is freely chosen and, therefore, legally permissible is troubling. While girls may dress and act like sexy women, they are still girls.[18] And the

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[17] Allen, supra note 6, at 128. The Spur Posse incident took place in a Los Angeles suburb; incidents of gang-related sexual activity have been reported elsewhere. For example, in Montclair, N.J., six boys, ages 13 to 16, were arrested for allegedly sexually assaulting a seventh-grade girl; in Houston, two teenage girls were brutally raped and murdered by six members of a local gang (aged 14 to 18); in New York City, gangs of adolescent boys terrorized young girls at public swimming pools through an activity called "whirlpooling"--the boys lock arms, surround girls, and, under cover of churning water, grope the girls. In at least one instance, a girl's suit was ripped off and a boy inserted a finger into her vagina. Michele Ingrassia, Life Means Nothing, NEWSWEEK, July 19, 1993, at 14. In Glen Ridge, N.J., a group of boys sexually assaulted a mentally retarded girl--a crime that reportedly was "copycatted" in North Carolina. Stacey, supra note 9, at 124.

For more discussion regarding how sexual encounters among teens has changed over the past decades, see BETH L. BAILEY, FROM FRONT PORCH TO BACK SEAT (1988). See also Rena Pederson, Young Girls Targeted as Sex Objects, SAN DIEGO UNION-TRIBUNE, March 31, 1993, at B-7 (reporting the sexual assault of a 13- year-old girl on a crowded school bus in Texas, which was accomplished by one boy as six boys aged 12 to 14 held her down and other students on the bus laughed as she struggled); Judy Chicurel, He Loves Me Not; A Rise in High School Dating Violence Has Some Teenagers Asking: What is Love, NEWSDAY, March 12, 1992, at II-64 (reporting that national and regional studies indicate that violence by teenage boys has increased dramatically in the past decade, and attributing some girls' endurance of such abuse to a feeling of "neediness," which in turn may be due to many young people today growing up as "latchkey" children, lacking security and fulfilling family relationships).

[18] Often, people struggle over whether to call a 13-year-old female a girl or a woman. This struggle reflects the blurred line between girls and women. In part, this blurring is semantic. Those who recognize the harm that is done by labeling women as "girls" find that calling females "women" connotes a higher level of respect. Thus, they might call teenage girls "women" because they recognize that a "girl" might not be entitled to respect, and that teenage girls need both respect and dignity. Yet, "girl" is not simply a pejorative label; it also describes a young female. Thus, far from being merely a semantic issue, the struggle over how to label teenage girls reflects an understanding that they are vulnerable, in precisely the way adult women are vulnerable, to having their worth diminished.

This vulnerability relates directly to the issue of sexuality in a society which eroticizes girls and portrays them as legitimate targets of male sexual desire. See Nancy J. Perry, Why It's So Tough to be a Girl, FORTUNE, Aug. 10, 1992, at 82. The most common media messages regarding girls' sexuality are neither warnings about

fact that some girls might consent to sex which is inherently exploitive, such as that documented in the Spur Posse accounts, is not evidence of their competence to consent, nor of their "womanliness," but rather, of their immaturity and vulnerability to exploitation.[19]

A multiplicity of factors induce girls to consent to sex:[20] to feel liked or loved,[21] to feel closer to someone,[22] to become popular.[23] Desire often is not the motivating force in girls' sexual exploration.[24]

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the harms and risks inherent in teen sex (acquaintance rape, teenage pregnancy, and even HIV), nor praises about the virtues of virginity. Instead, as is revealed by even a perfunctory survey of teen magazines, let alone television programs, the dominant message urges girls to embrace and perfect the coy, passive-aggressive sex role which society has allocated to them. Id. More evidence of the sexualization of girls is seen in a recent study which correlates statistics from public records relating to births, pregnancies, and sexually transmitted diseases among teenage girls with age of male partners. The study demonstrates that 70% of the male partners are over age 20, and 15% are over age 25. See Mike Males, Adult Liaison in the "Epidemic" of "Teenage" Birth, Pregnancy, and Venereal Disease, 29 J. SEX RES. 525 (1992).

[19] Women generally do not consent to have sex with a group of men for recreation. When there is evidence of "consensual" assembly-line sexual activity, most often the women are receiving drugs or money in exchange for sex. The law does not privilege this conduct--generally speaking, the law criminalizes it as prostitution or rape. Compare Priscilla Alexander, Prostitution: A Difficult Issue for Feminists in FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY, 298, 299 (Mary Becker et al. eds., 1994) (discussing money as the paramount reason women become prostitutes, and discussing the distinctions between "forced" and "voluntary" prostitution) with Evelina Giobbe, Confronting the Liberal Lies About Prostitution, in FEMINIST JURISPRUDENCE, supra, at 303-04 (arguing that prostitution is not voluntary).

One recent ethnographic account of women "consenting" to sex with multiple partners is found in CARL S. TAYLOR, GIRLS, GANGS, WOMEN AND DRUGS (1993). This book presents a compilation of numerous interviews with girls and women in Detroit gangs; the stories they tell are rife with images of "crack whores"-- those who trade sex for drugs or money. Id. at 84-85.

[20] This article addresses adolescent sexuality in the context of the crime of statutory rape. Because statutory rape laws generally regulate conduct between males and underage females, references in this article to sexuality are to heterosexual activity, unless otherwise indicated.

[21] See infra text accompanying note 298 ("girls express longing for emotional attachment, romance, and respect"); Michelle Fine, Sexuality, Schooling, and Adolescent Females: The Missing Discourse of Desire, 58 HARV. EDUC. REV. 29 (Feb. 1988); Deborah Tolman, Doing Desire: Adolescent Girls' Struggles For/With Sexuality (1993) (unpublished manuscript, on file with the author).

[22] Cunningham, supra note 5, at 321 (quoting Pat Socia, a "sex educator").

[23] Karen J. Cohen, Young Girls With Nowhere to Go, STATE NEWS SERVICE, Dec. 29, 1993 (thinking back to her high school days and recalling the paths to high status: being "very, very popular," having a boyfriend, or "the dismal popularity shortcut of having a lot of sex with a lot of boys. A choice that I can't imagine enhances a young girl's self-esteem.").

[24] Fine, supra note 21.

Moreover, girls sexual partners are not necessarily restricted to teenage boys. Indeed, one recent study demonstrates that a considerable percentage of teenage girls' male partners may in fact be over the age of twenty.[25] In the not too distant past, these factors contributed to a general assumption that, in sexual matters, just as in other adult matters, girls could not take care of themselves--that because of their immaturity and some adults' skills in playing to girls' insecurities, adolescent girls needed society to help take care of them.

Nonetheless, over the past two decades, society has revised its thinking about girls' sexuality. The law reflects this revision through the current formulation and application of statutory rape laws. Since the early 1970s, through a variety of de jure and de facto reforms, society has displaced 700 years of law premised upon girls' inability to give legally valid consent to sex.[26] This change has been supported by a broad coalition of liberals, public health advocates, medical experts, feminists, judges, and legislators. For the most part, the law now gives its tacit blessing to "consensual" acts of sexual intercourse with minors.

"Consensual sex" is a legal term of art. When asked to define and identify consensual heterosexual sex, differentiating it from coerced sex, modern scholars divide themselves into various camps. Some believe that there can be no truly consensual sex in a society premised upon the sexual, social, and economic subordination of women.[27] Others acknowledge that a woman's sexuality is constructed,

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[25] Males, supra note 18.

[26] Rita Eidson, Comment, The Constitutionality of Statutory Rape Laws, 27 U.C.L.A. L. REV. 757, 762 n.35 (1980) (citing the Statute of Westminster I, 1275, 3 Edw. 1, c.13: "[T]he King prohibiteth that none do ravish, nor take away by force, any Maiden within Age.").

[27] See, e.g., Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. CAL.L.REV. 777, 814-15 (1988). The radical critique of consent posits that "the social meaning of 'consent' is inherently tied to a system of unequal sexual relationships in which the man actively initiates the sexual encounter and the woman is relegated to the more passive role of responding to initiatives. In the abstract, consent may be gender neutral. But as long as women do not in fact have the opportunity to initiate sexual relationships on equal terms with men, the concept of consent continues to suggest that women are appropriately the passive parties in sexual relationships."

Chamallas explains this view through the arguments posited by philosopher Carole Patemen and feminist legal scholar Catharine MacKinnon. Id. at 815 n.165 ("The conventional use of 'consent' helps reinforce the beliefs about the 'natural' characters of the sexes and the sexual double standard discussed in this article. Consent must always be given to something; in the relationship between the sexes, it is always women who are held to consent to men. The 'naturally' superior, active, and sexually aggressive male makes an initiative, or offers a contract, to which a 'naturally' subordinate, passive woman 'consents.' An egalitarian sexual relationship

but argue that even within the oppressive construct, women experience sexual desire and pleasure, which the law must work to identify.[28] Still others advocate adoption of a "rational criminal law of sex," which would abandon the conjunction of force and nonconsent in the law.[29]

At its core, this debate is about the validity of an individual's consent to sex, and the conditions under which that consent will insulate someone who engages in sex with that individual from later

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cannot rest on this basis; it cannot be grounded in 'consent.' Perhaps the most telling aspect of the problem of women and consent is that we lack a language through which to help constitute a form of personal life in which two equals freely agree to create a lasting association together. Expanding on the Patemen position, Catharine MacKinnon has argued that the failure to expose the 'presupposition' behind the conventional use of the term 'consent' is 'integral to gender inequality.' [citations omitted]. She sees consent as operating as 'women's form of control' in sexual encounters with men. The fundamental inadequacy of this form of control or power is that the 'model does not envision a situation the woman controls being placed in, or choices she frames, yet the consequences are attributable to her as if the sexes began at arm's length, on equal terrain, as in the contract fiction.'").

See also Tolman, supra note 21, at 3 ("[G]irls are taught to recognize and keep a lid on the sexual desire of boys but not taught to acknowledge or even to recognize their own sexual feelings.").

[28] Lynne Henderson, Getting to Know, 2 TEX. J. WOMEN & L. 56 (1993) [hereinafter Henderson] ("MacKinnon's denigration of women's ability to tell the difference between sex and rape leaves the current structures of heterosexuality unchallenged, unmodified, untouched. . . . The Dworkin and MacKinnon stories negate women's expressed wishes and experiences and ironically reinforce women's lack of control in heterosexual relations.").

See also Fine, supra note 21 (writing that the discourse surrounding sexuality in sex ed classes focus primarily on sexuality as violence, as victimization, and as individual morality, with desire vis a vis females hardly addressed); Lynne Henderson, Rape and Responsibility, 11 L. AND PHIL. 127 (1992) [hereinafter Henderson, Rape] (part of the goal of empowering women requires recognizing and articulating the "discourse of [sexual] desire" as experienced by heterosexual women); Tolman, supra note 21.

[29] Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 COLUM.L.REV. 1780, 1799, 1806 (1992). Dripps posits that pressures to have sex have varying grades of legitimacy--some pressures are perfectly moral, while others constitute serious crimes. Id. at 1788. Thus, he advocates extracting consent from rape law and replacing it with a variety of new statutory offenses that would focus on culpable conduct aimed at causing other individuals to engage in sexual acts. Id. at 1798.

For other proposed changes in the law of rape, see SUSAN ESTRICH, REAL RAPE (1987); Susan Estrich, 'Rape', 95 YALE L.J. 1087 (1986) (arguing that the proper focus of rape law should be on the man's mens rea as to consent in sexual interactions, and thus, negligence as to consent would be sufficient to establish culpability for rape); Lois Pineau, Date Rape: A Feminist Analysis, 8 L. AND PHIL. 217, 221 (1989) (suggesting the adoption of a "reasonable woman" standard for determining consent to sexual interactions, based on whether a reasonable woman under the same circumstances would consent to sexual intercourse).

criminal liability for that act. Considerable legal scholarship discusses the criminal justice system's struggle to differentiate consensual sex from nonconsensual sex (i.e. rape). Primarily, this work addresses the system's inability to identify nonconsensual sex in the absence of evidence of force.[30]

Far less scholarly attention has focused on the nature of a valid consent to sex. As an academic matter, this might seem a rather easy question. Those who are not legally competent cannot consent to sex, and thus, evidence that they consented will not provide a defense against a rape charge. However, as a practical matter, those who are not legally competent often are sexually active. The most challenging members of this category are teenage girls, over half of whom are sexually active.[31] Almost everyone would agree that age is relevant to an assessment of an individual's ability to consent to sex. A five-year-old's consent should not constitute a defense to a charge of rape against her.[32] However, when the alleged victim of a sexual assault is a consenting adolescent, the consensus falters, and society is forced to determine when a girl is old enough to say "yes" to sex.

As a result of moving to a consent-based standard in the enforcement of statutory rape laws, modern criminal law has turned girls from "jail bait" into "fair game" without considering the nature and meaning of consensual sexual activity for girls, or whether any of the factors that might induce consent should be legally impermissible. The presumption underlying modern law governing adolescent girls' sexuality is that girls are mature enough to make autonomous decisions regarding sexuality. However, the growing body of research on female adolescence calls into question the presumption that girls are fully capable of protecting themselves. That is, researchers consistently have found that for girls, adolescence is a time of acute crisis, in which self-esteem, body image, academic confidence, and the willingness to speak out decline precipitously.[33] Such evidence reveals a significant likelihood that girls are vulnerable in sexual encounters--vulnerable in precisely the manner which the common law of statutory rape anticipated and sought to remedy.

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[30] See, e.g., Steven Schulhofer, Taking Autonomy Seriously: Rape Law and Beyond, 11 L. AND PHIL. 35 (1992); Dripps, supra note 29; Henderson, supra note 28.

[31] Stanley K. Henshaw, Abortion Trends in 1987 and 1988: Age and Race, 24 FAMILY PLANNING PERSPECTIVES 85, 86 (March/April 1992) (reporting that among women aged 15-19, 53% have had sexual intercourse).

[32] But see RICHARD GREEN, SEXUAL SCIENCE AND THE LAW (1992) (arguing sex among children and with children should be legalized).

[33] See infra notes 224 to 252 and accompanying text (discussing research into girls' psycho-social development).

This Article challenges the assumptions underlying modern statutory rape law by contrasting them both with other legal paradigms governing adolescents, and also with the current psycho-social literature regarding adolescence. Section I analyzes modern statutory rape law, and documents and evaluates the decriminalization of sexual activity involving minor girls. Section II explores the treatment of minors in other areas of the law, evaluating the extent to which the law has increased minors' rights and obligations in other civil law contexts. This analysis reveals surprising inconsistencies in the law's treatment of minors. While the law continues to intervene to protect minors in decision-making involving contracts and medical treatment, in most cases the law holds minor girls to an adult standard when evaluating their decisions regarding sexual activity. Section III describes current research in adolescent development, and specifically addresses limitations on girls' capacity for autonomy and consent in sexual interactions. The final section builds on this evidentiary basis, arguing that in light of girls' vulnerability to coercion, law makers must revive and reconfigure the crime of statutory rape.

I. LEGAL REGULATION OF TEEN SEXUALITY

The Los Angeles District Attorney's office issued the following statement in an attempt to justify its decision not to file charges in the Spur Posse Case: "After completing an extensive investigation and analysis of the evidence, our conclusion is that there is no credible evidence of forcible rape involving any of these boys. . . . The arrogance and contempt for young women which have been displayed, while appalling, cannot form the basis for criminal charges."[34] This explanation is puzzling, because the boys' behavior was not only arrogant and contemptful, but it also violated California's law against sexual intercourse with a minor.[35] Under that law, those boys who were

[34] Didion, supra note 5, at 54 (emphasis added).

[35] CAL. PENAL CODE § 261.5 (West 1994). This statute defines "unlawful sexual intercourse with a minor" as follows:

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a 'minor' is a person under the age of 18 years.

(b) Any person who engages in an act of unlawful intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) Any person who engages in an act of unlawful intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

not more than three years older than their victims were guilty of misdemeanors, and those who were more than three years older were guilty of either a misdemeanor or a felony. The District Attorney's office dismissed these violations, stating that, " a lthough there is evidence of unlawful sexual intercourse, it is the policy of this office not to file criminal charges where there is consensual sex between teenagers . . . ."[36]

The notion (implicit in the District Attorney's statement) that girls legally consent to sexual activity marks a dramatic shift in the legal regulation of teenage girls' sexuality. Consensual sex with an underage female was unheard of at common law.[37] Anyone who had sexual contact with an underage female committed a criminal offense, regardless of whether she consented to the contact.[38] The current departure from the common law not only decriminalizes that behavior, but also confronts girls with the same limitation that women who attempt to prosecute rape already face--the victim must show evidence of force.[39]

Various scholars have demonstrated that, because of the evidentiary ambiguities inherent in a search for nonconsent, the search for nonconsent is essentially indistinguishable from a search for evidence of force.[40] As a result, consent does not reflect the descriptive

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(d) Any person over the age of 21 years who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years.

In 1993, the statute defined unlawful sexual intercourse as that taking place with a female less than 18 years of age.

[36] Didion, supra note 5, at 54 (quoting statement released by Los Angeles District Attorney's office).

[37] Eidson, supra note 26; see also infra notes 58 to 83 and accompanying text (discussing the history of statutory rape laws).

[38] Eidson, supra note 26, at 757.

[39] Schulhofer, supra note 30. See also Commonwealth v. Berkowitz, No. 89 M.D. 1992, 1994 WL 224779, at *2 (Pa. Oct. 27, 1994) ("As to complainant's testimony that she stated 'no' throughout the encounter with the Appellee, we point out that, while such an allegation of fact would be relevant to the issue of consent, it is not relevant to the issue of force."). See also GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 217 (1989) (discussing themes of male innocence and female guilt as it affects juries' and legal actors' interpretations of rape, vis a vis victims' use of drugs, birth control pills, and explicit language, and noting that all these factors influence jurors' verdicts).

[40] See, e.g., Dripps, supra note 29, at 1788 ("Contemporary rape statutes . . . favor . . . a binary classification of sex into consensual and nonconsensual cases. The law then superimposes the requirement of force on the nonconsensual cases to identify cases of rape.").

factual inquiry by which the system differentiates sex from rape, but, more precisely, represents a normative categorization. Essentially, " c onsent is only the label we attach to cases of conduct deemed legitimate."[41] Because, until quite recently, all sexual conduct with unmarried teenage girls was criminal, the very notion that sexual contact with them might be deemed consensual and thus legitimate, raises two relevant legal questions: First, how did society come to believe that there are conditions under which it is permissible for anyone to have sexual intercourse with a teenage girl? And second, how should the legal system define and identify those conditions?

A. A Brief History of Statutory Rape

Statutory rape, which is "at least as ancient as the 4000-year-old Code of Hammurabi" was codified in English law in 1275.[42] Essentially, statutory rape criminalizes acts which would not otherwise be classified as rape.[43] Initially, the age of consent was twelve; in 1576, the age was lowered to ten.[44]

Statutory rape laws were absorbed into the American legal system via the English common law.[45] Early American lawmakers set the age of consent at ten,[46] but over the course of the nineteenth century, the states gradually raised the age, some to as high as eighteen or twenty-one.[47] Some states provided increased penalties for adult men who had sex with pre-pubescent girls, and lesser penalties when the male was younger than the female.[48]

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[41] Dripps, supra note 29, at 1787; Schulhofer, supra note 30, at 94 ("[N]onconsensual intercourse is not now considered criminal; the existing framework requires proof of force.").

[42] Eidson, supra note 26, at 762.

[43] Schulhofer, supra note 30, at 94.

[44] Id.; see also James McCollum, Case Development, 25 HOWARD L.J. 341, 342 (1982).

[45] Frances Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 TEX.L.REV. 387, 403 (1984); Eidson, supra note 26, at 762; McCollum, supra note 44, at 359 n.170 (noting that statutory rape laws were developed because "it was believed that certain men would sexually misuse immature girls if laws were not enacted to protect young females.").

[46] Olsen, supra note 45, at 403.

[47] Id.; McCollum, supra note 44, at 356 n.148 (noting that Tennessee set the age of consent at 21, and adding that currently the age ranges from 11 in Arkansas, South Carolina, Washington, and New York, to 18 in Alaska, Arizona, California, Florida, Idaho, Illinois, Oklahoma, and Wisconsin).

For a review of statutory rape cases, particularly in California, see McCollum, supra note 44.

[48] Olsen, supra note 45, at 404; Eidson, supra note 26, at 764-66.

Statutory rape laws were gender-specific, criminalizing sexual relations with young females, but not with young males. Commentators note that the laws reflected the historical legal perception of women and girls as "special property in need of special protection."[49] American courts in the 19th century originally adopted statutory rape as a strict liability offense, in accordance with English law.[50] It did not matter whether the victim looked older than the age of consent, that she consented, or even that she initiated sexual contact. If she was underage, the law was violated. However, since a statutory rape offense could as easily have been charged as a fornication offense,[51] the age limits in statutory rape laws were viewed as determinative of the level of punishment rather than of liability for the sexual encounter.[52] Therefore, the notion of age as a "sentence enhancer" is integral to the common law construction of statutory rape.

At common law, men accused of statutory rape often asserted two claims in an effort to exculpate themselves: that the accused was reasonably mistaken as to the victim's age,[53] that the victim was

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[49] McCollum, supra note 44, at 355-56 (stating, "This concept of a woman as property was further clarified by Sigmund Freud. He stated that 'the demand that the girl bring with her into marriage with one man no memory of sexual relations with another is after all nothing but a logical consequence of the exclusive right of possession over a woman which is the essence of monogamy.'" (citing 4 FREUD, COLLECTED PAPERS 217 (1925)); Rita Eidson explains, "The preferred rationale for protecting only females and punishing only males has evolved from early exaltation of female chastity and the special need to protect the 'weaker sex' to more recent arguments that gender-based statutory rape laws are appropriate because of the unique physical characteristics of females." Eidson, supra note 26, at 760.

[50] Matthew T. Fricher and Kelly Gilchrist, Comment: U.S. v. Nofziger and the Revisions of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirement of Federal Criminal Law, 65 NOTRE DAME L. REV. 803, 813 (1990).

Every jurisdiction maintains some version of the common law crime of rape, which included sexual relations with a girl under the age of ten. MODEL PENAL CODE § 213.1 commentary at 323 (1980).

[51] Fricher and Gilchrist, supra note 50, at 814.

[52] *Id.*

[53] Statutory rape is considered a general intent crime, and as such, no "mistake of fact" defense is available. See State of Idaho v. Stiffler, 788 P.2d 220 (Idaho 1990) (applying common law rule to bar defendant from claiming that he reasonably believed that the victim was not 15, but 18). But see People v. Hernandez 393 P.2d 673 (Cal. 1964) (modifying rule to permit defense where defendant held "reasonable belief" that female had reached the age of consent); Robert R. Strang, Note, She Was Just Seventeen . . . and the Way She Looked Was Way Beyond (Her Years): Child Pornography and Overbreadth, 90 COLUM.L.REV. 1779, 1783 (1990) (noting that although courts traditionally have allowed mistake of fact defenses, courts have not allowed the defense to be raised in cases such as bigamy and statutory rape); Bruce R. Grace, Note, Ignorance of the Law as an Excuse, 86 COLUM.L.REV. 1392, 1395 (1986) ("often, for the crime of statutory rape, no mens rea is required . . . thus

"promiscuous," or both.[54] The first of these claims was unsuccessful, for it was not until 1964 that an American court permitted a mistake of fact defense in a statutory rape case.[55] Judges believed that when a defendant intended to commit an "immoral" act, such as fornication, or abducting a young woman against her father's will, his "guilty mind" should preclude any mistake defense.[56] But the defendant's moral culpability which usually barred the defense of mistake, became irrelevant where the victim was morally blemished herself, by having engaged in prior sexual activity. The "promiscuity defense" exculpated the accused if he could demonstrate credible evidence that the minor had behaved promiscuously in the past.[57] This defense harkens back to the notion of females as "special property"--i.e., as long as the property is "undamaged"--i.e. chaste, special protection is necessary. Thus, by extending legal protection only to virgins, early statutory rape law served as a tool through which to preserve the common morality rather than to penalize men for violating the law. As a result, it was legal for

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disallowing the defense of mistake of fact as to the girl's age. . . . As the view that any sexual relationship outside of marriage is always immoral becomes less widely accepted, this exception to the general rule that mistake of fact is a defense has fallen into disfavor," and comparing People v. Ratz, 115 Cal. 132 (1896), which disallowed the defense, with Hernandez, 393 P.2d at 673); Laurie L. Levenson, Good Faith Defenses: Reshaping Strict Liability Crimes, 78 CORNELL L. REV. 401, 469 n.329 (1993) (noting that courts allowed the mistake of fact defense in Perez v. State, 803 P.2d 249 (N.M. 1990), which held that a defendant should be allowed to present the defense, particularly when the victim affirmatively represents that she is of age, as in Hernandez, 393 P.2d 673 (Cal. 1964)).

[54] See infra notes 122 to 158 and accompanying text.

[55] The leading English case that influenced the American system to disregard mistake as a valid defense is Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875). In Prince, the court rejected a reasonable mistake of age defense where the defendant was charged with unlawfully taking a girl under the age of 16 out of the possession of the father against his will. American courts adopted the Prince position until the decision in Hernandez, 393 P.2d at 673. See supra note 53 and accompanying text.

[56] WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 411 (2d ed. 1986). It is interesting to note that had the defendant in Prince mistakenly believed that the girl's father had consented to his "taking" her, the defendant would have had a valid defense because he would not know his act was wrong in itself. Id.

[57] At common law, evidence of a victim's prior sexual conduct was instrumental in resolving three issues: The victim's consent; impeachment of the complainant's credibility; and physical evidence of intercourse. James A. Vaught and Margaret Henning, Admissibility of Rape Victims Prior Sexual Conduct in Texas: A Contemporary Review and Analysis, 23 ST. MARY'S L.J. 893, 910 (1992). See also ROLLIN M. PERKINS AND RONALD N. BOYCE, CRIMINAL LAW 207- 08 (3d ed. 1982). For more on the current state of the law regarding the promiscuity defense, see infra notes 122 to 158 and accompanying text.

a man to have intercourse with a non-virgin, because society did not consider his behavior morally offensive.

B. The Reform of Statutory Rape Law

The contrast between the promiscuity defense and most states' persistent refusal to allow a "mistake of fact" defense shows that the purpose of statutory rape law was to protect virginity, rather than to punish men who coerce sex from young girls. The result of this age-based construction of the law, which only perceives as victims those girls who have not yet been "violated," is that a male who has intercourse with a seventeen-year-old female virgin commits a crime, even if he reasonably believed her to be an adult. But if that man has sex with a thirteen-year-old non-virgin, who could not possibly be mistaken for an adult, he has not broken the law.

In spite of these paternalistic aims, feminists have a long history of supporting statutory rape laws, and have successfully lobbied for changes in the law throughout the nineteenth and twentieth centuries. To understand the modern reforms in statutory rape law, it is imperative to analyze the roles played by feminist reformers.

1. Nineteenth and Twentieth Century Feminists' Advocacy on Statutory Rape

By the mid-1800s, statutory rape laws were supported by Victorian feminists as well as "repressive moralists."[58] Victorian feminist support grew out of concern over what some have labeled "social purity."[59] While this cause may sound moralistic and repressive to modern ears, and while much of the rhetoric reflected an "obsessive concern with the social and sexual habits of the poor,"[60] the social purity movement pursued goals which easily fall within a modern feminist and progressive agenda. In large part, the Victorian feminists of the late nineteenth century sought methods for limiting the spread of venereal disease and for "protect ing the young, particularly young females, from sexual abuse."[61] To this end, statutory rape laws were seen as "preventive approaches to moral reform."[62] Early feminist support of laws raising the age of consent for girls represented an

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[58] Olsen, supra note 45, at 403.

[59] JUDITH R. WALKOWITZ, PROSTITUTION AND VLCTORIAN SOCIETY 246 (1991). The social purity movement was a general assault on working class "immorality," characterized by activities which sought to educate the working class on the value of chastity and sexual repression. See id. at 242-43.

[60] *Id.* at 251.

[61] *Id.* at 246.

[62] *Id.*

important broadening of the Victorian feminist agenda, which formerly had focused, in matters of sexual abuse, on "limited efforts to reform and rescue the experienced prostitute."[63]

Victorian feminists saw youthful sexual activity as a tragic first step in the transformation of girls from chaste maidens to "fallen women," or, more immediately, child-prostitutes.[64] Thus, Victorian feminists mobilized in an effort to strengthen statutory rape laws. One such mobilization took place in 1885, when approximately 250,000 people gathered in London's Hyde Park to demand passage of a bill raising the age of consent for girls from thirteen to sixteen.[65] The alliance in favor of reform included feminists, as well as moralists drawn from such wide-ranging constituencies as Anglican bishops and Socialists.[66] As Professor Fran Olsen notes, the law was "intended to be an attack on male sexual aggression and on the double standard of sexual morality."[67] The House of Lords opposed the bill. Its members "openly supported the double standard," because they "wanted young women of the lower classes to remain sexually available to them."[68]

Feminist support for these reforms raised eyebrows among some of the supporters' progressive contemporaries. For example, when the coalition of feminists and "moralists" successfully secured the passage of the Criminal Law Amendment Act of 1885, raising the age of consent for girls, one observer commented, "It is . . . strange that many of the very women who have braved insult and calumny in demanding these rights were among the first and loudest supporters of the measure for their furthest restriction."[69]

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[63] *Id.* For a similar discussion regarding American women's parallel efforts circa the mid-nineteenth century, see BARBARA MEIL HOBSON, UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION 49-76 (1987).

[64] See generally WALKOWITZ, supra note 59; REGINA KUNTZEL, FALLEN WOMEN, PROBLEM GIRLS (1993).

[65] WALKOWITZ, supra note 59, at 246.

[66] *Id.* at 246-47.

[67] Olsen, supra note 45. Olsen explains the double standard as encouraging sexual activity among unmarried men but discouraging it among unmarried women. Id. at 402 n.70, 405.

[68] *Id.* at 403; WALKOWITZ, supra note 59, at 250 ("[V]ery few of their Lordships . . . had not when young men, been guilty of immorality. [One member of the House of Lords] hoped they would pause before passing a clause within the range of which their sons might come.").

[69] WALKOWITZ, supra note 59, at 247.

2. Late Twentieth Century Feminists' Ambivalence About Statutory Rape Laws

In the late twentieth century, feminists themselves became troubled by this apparent inconsistency, and many voiced concern that statutory rape laws amounted to state repression of female sexuality.[70] This concern, among others, led feminists in the 1970s to oppose gender-based statutory rape laws, arguing that they perpetuated offensive gender stereotypes and restricted the sexual autonomy of young women.[71]

This feminist "about-face" reflected the influence of the late 1960's and early 1970's sexual liberation movement, which coincided with the fledgling women's liberation movement, and gave the era's activists, including its feminists, a decidedly "pro-sex" character.[72] In 1966, William Masters and Virginia Johnson published The Human Sexual Response, which was widely popularized, and marked a dramatic change in the depiction of female sexuality.[73] With its emphasis on women's capacity for sexual gratification through clitoral stimulation, the book endorsed a new vision of sex. In their insightful study of the sexual revolution, Barbara Ehrenreich, Elizabeth Hess, and Gloria Jacobs reflect on the fusion of these two movements: "Masters and Johnson potentially offered a new social meaning for sex, one that was more consistent with women's emerging sense of independence."[74]

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[70] Olsen, supra note 45, at 404. See also Eidson, supra note 26, at 761 ("Critical analysis . . . reveals no close correlation between statutory rape laws and female vulnerability to vaginal injury or unwanted pregnancy. Moreover, young males are also in danger of sexual exploitation by adults. . . . [Gender] classifications in statutory rape laws are based on pernicious sex-role stereotypes, rather than physical differences between males and females.").

[71] Olsen, supra note 45, at 404. See also McCollum, supra note 44, at 348-51 (discussing recent cases involving gender-based statutory rape laws); Id. at 350 (discussing Navedo v. Preisser, 630 F.2d 636 (8th Cir.1980), in which the court struck down a gender-based statutory rape law because the state had presented no credible evidence that the gender-specific law supported the state purpose of preventing female trauma and teen pregnancy); Alice Susan Andre-Clark, Note, Whither Statutory Rape Laws: Of Michael M., The Fourteenth Amendment, and Protecting Women from Sexual Aggression, 65 S. CAL.L.REV. 1933 (1992) (asserting that the Equal Protection Clause does not permit gender-specific statutory rape laws).

[72] BARBARA EHRENREICH ET AL,, RE-MAKING LOVE 73 (1986). ("[T]he sexual liberationist thrust of the [women's] movement protected it from the well-worn psychoanalytic slur linking feminism to frigidity. . . .You could not say, 'All they need is a good lay.' Feminists were doing very well in that department, thank you . . . .").

[73] "Between 1966 and 1970, articles about and occasionally by Masters and Johnson appeared in almost every mass circulation magazine, from Redbook to the Saturday Review; their book and a popularization by Ruth and Edward Brecher had become best-sellers." EHRENREICH ET AL., supra note 72, at 65.

[74] *Id.*

The sexual revolution of the 1960s and 1970s was premised largely upon a belief that sex was inherently good, that nothing about sex hurts, and that women's sexuality was fundamentally like men's sexuality. These beliefs are reflected in a popular book of the era: Everything you always wanted to know about sex* but were afraid to ask.[75] The book begins with the proclamation that:

> [H]uman beings were designed by their Creator to copulate. An active and rewarding sexual life . . . is indispensable if one is to achieve his full potential as a member of the human race. Those whose sexual behavior is shrouded in ignorance and circumscribed with fear have little chance of finding happiness in their short years on this planet.[76]

Yet, the liberated sexuality encouraged by this best-selling sex manual was phallocentric,[77] heterosexist,[78] and predicated upon women's subordinated status. For example, in the chapter on prostitution, the author claims that wider accessibility to legalized prostitution would reduce crimes of sexual violence:

If a dollar or so buys a willing companion, raping a stranger doesn't make sense. Peeping, exhibitionism, child molestation, incest, all feed on undischarged sexual tensions. In countries where prostitution is tolerated, these crimes hardly exist.[79]

Then, having dismissed the "taboos" surrounding prostitution, he suggests that prostitution's prevalence is entirely the fault of married women.

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[75] DAVID REUBEN, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX*BUT WERE AFRAID TO ASK (1969).

[76] *Id.* at 4.

[77] For example, see EHRENREICH ET AL., supra note 72, at 48-49, quoting Dr. David Reuben on the subject of curing female "frigidity":

No woman deserves to be labeled sexually frigid unless her sexual partner provides her with at least enough mechanical stimulation to trigger the orgasmic response. How much stimulation is that? For the average couple, about eight minutes of actual intercourse or seventy-five to eighty pelvic thrusts.

[78] Lesbians are discussed only in passing, in the chapter on prostitution. "Lesbians are handicapped by having only half the pieces of the anatomical jigsaw puzzle. Just as one penis and one penis equals nothing, one vagina plus another vagina still equals zero." REUBEN, supra note 75, at 269. "Basically, all homosexuals are alike--looking for love where there can be no love and looking for sexual satisfaction where there can be no lasting satisfaction." *Id.* at 272.

[79] *Id.* at 249. In a later passage, the author describes a prostitution-related activity known as a three-way girl. "Three (or more) men hire a three-way girl. They have oral, anal, and vaginal intercourse with her simultaneously. It's great for the girl who usually charges triple her usual fee plus as much more as she can get. Of course, three-way girls have to charge more--they wear out faster." *Id.* at 254.

> Most . . . customers . . . are married. Theoretically they have access to complete sexual gratification with their wives. Realistically, if they did, they wouldn't need [a prostitute] . . . At least seventy-five to eighty-five percent of the clients want to have their penises sucked. Most of them feel compelled to explain to the girl that the only reason they like it is that their wives refuse to do it.[80]

Because the sexual revolution did not address women's subordinated status, the changes it brought about were incomplete and only partially satisfactory.[81] On the one hand, the sexual liberation movement served to greatly expand societal notions of sexuality. And by embracing its agenda, feminists broadened their constituency and voiced the needs felt by women from all parts of society.[82] On the other hand, however, "orgasms, now that anatomy had been clarified, were easier to achieve than equality."[83] Moreover, the era's feminists pursued sexual liberation for women as part of a movement which ignored the fused nature of gender and status.

3. Modern Configuration of Statutory Rape Laws

The confluence of the feminist movement and the sexual liberation movement helped to shape the reform of statutory rape laws. The feminists further influenced those reforms by collaborating with law-and-order groups to bring about comprehensive reforms of laws governing criminal sexual misconduct.[84] This odd coalition aimed to eliminate barriers to effective prosecution and conviction for rape, and to protect rape victims both from the abuse inherent in the rape trial process, and from the types of sexual assaults which were entirely legal under old rape laws.[85] Rape law reform encompassed a broad range of issues, such as prohibiting the introduction of rape victims' sexual histories, eliminating the resistance requirement, and broadening the

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[80] *Id.* at 248-49.

[81] See EHRENREICH ET AL., supra note 72, at 198 ("Having come this far in our sexual revolution . . . we seem to find cause less for celebration than for ambivalence and anxiety"); "If sex is 'free,' then so, potentially, are men; and women are left to fend for themselves in an economy that still drastically undervalues women's labor . . [W]omen are more vulnerable than men to the hurts and dislocations of a society that is sexually more free than it is just or caring." Id. at 199-200.

[82] *Id.* at 71.

[83] *Id.*

[84] Leigh Bienen, Rape III--National Developments in Rape Reform Legislation, 6 WOMEN'S RTS. L. REP. 17O, 171 (1980). As a result, the authors say, by 1980, every state had considered, and most had passed, "some form of rape reform legislation." Id.

[85] See Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 COLUM.L.REV. 1 (1977) (describing the harms the legal system inflicted on rape victims during prosecutions of their alleged attackers).

law to permit prosecution for acquaintance rape, object rape, and marital rape.[86]

Because of the breadth and significance of the reforms in rape law, reforms in statutory rape law were merely an afterthought. Unlike the law governing forcible rape, statutory rape did not seem to cry out for revision. Moreover, because statutory rape laws criminalized sexual acts which could be mutually desired or pleasurable, they seemed anachronistic to those who favored "sexual liberation." As Fran Olsen notes, "On the one hand, [the laws] protect females; like laws against rape, incest, child molestation, and child marriage, statutory rape laws are a statement of social disapproval of certain forms of exploitation. . . . On the other hand, statutory rape laws restrict the sexual activity of young women and reinforce the double standard of sexual morality."[87]

All of these factors combined to effect a dramatic revision of statutory rape statutes across the country. Presently, all but fifteen jurisdictions have made the crime of statutory rape entirely gender-neutral (i.e. applicable to a person of either gender who has sex with a minor of either gender).[88] Others elected to abolish the crime altogether, by decriminalizing sex among teenagers.[89] Among the states that have adopted gender-neutral statutory rape laws, most

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[86] Chamallas, supra note 27, at 799.

[87] Olsen, supra note 45, at 401-02. This tension was described by Julie Hamos, one of the five feminist attorneys who drafted the present Illinois Criminal Sexual Assault Act, 720 ILCS 5/12-12 (Michie 1993). She recalls that the group began by repealing the old rape law in its entirety. The team then began to create various categories of offenses, which ultimately were classified into four categories: criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, or aggravated criminal sexual abuse. When it came time to analyze the old statutory rape law, the group felt ambivalent about its reenactment. Rather than focus on a gendered notion of power in sexual relations, they decided to isolate and criminalize sexual conduct which they felt raised a presumption of coercion. This conduct was then incorporated into the criminal sexual assault and abuse laws using gender- neutral language which penalized sexual conduct to varying degrees of severity, depending on the age range between the victim and the accused. Interview with Julie Hamos, president, Julie Hamos and Associates, in Chicago, Illinois (Jan. 24, 1994).

[88] In Michael M., the court noted that over two-thirds of the states had made their statutory rape laws gender-neutral. Michael M., 450 U.S. at 492. At the present time, only Alabama, Arkansas, Delaware, Georgia, Idaho, Kentucky, Louisiana, Missouri, New Hampshire, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, and Texas retain gender-specific language in their statutory rape laws, under which perpetrators are referred to as males.

[89] Olsen, supra note 45, at 404.

impose liability only if an age gap of two to five years exists and the "victim" is under the statutory age of consent.[90]

Despite the widespread reforms in rape law, one vestige of the common law statutory rape offense which the reformers did not eradicate was the common law defense of promiscuity. As noted, at common law, the accused was permitted a complete defense if he could demonstrate credible evidence of prior promiscuous behavior on the part of the minor.[91] The Model Penal Code's statutory rape provision preserves this defense, noting in the commentary that prior sexual promiscuity "rebuts the presumption of naivete and inexperience" that justifies the criminal nature of statutory rape.[92]

Initially the promiscuity defense reflected the law's desire to preserve and reward a girl's virginity,[93] or as one modern court put it, "to preserve the purity of females under eighteen years of age."[94] While the term "promiscuous" is somewhat vague,[95] judicial opinions on the subject often contrasted "promiscuity" with "chastity."[96] Not all states chose to classify any victim who was no longer a virgin as promiscuous. Yet, many jurisdictions did, and some even codified this presumption. For example, the 1975 version of Florida's sexual battery statute, which criminalized sexual conduct with a person under the age of eighteen, permitted a defense of consent, so long as the victim was not under the age of twelve.[97] However, Section 794.05 obviated consent as a defense if the child was "under eighteen, unmarried, and previously was chaste."[98]

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[90] FEMINIST JURISPRUDENCE, supra note 19, at 262.

[91] Alston v. Texas, No.2-90-110-CR, 1991 Tex. App. LEXIS 2366, (Tex. App. 2d Dist. Oct. 25, 1991). See also William Wayne Kilgarlin and Banks Tarver, The Equal Rights Amendment: Governmental Action and Individual Liberty, 68 TEX.L.REV. 1545, 1555 (1990) ("the [promiscuity] defense is available to an adult male accused of statutory rape of a female"); Chamallas, supra note 27, at 789 n.56.

[92] MODEL PENAL CODE § 213.6(3) at 419-20 (1980).

[93] Eidson, supra note 26, at 760; McCollum, supra note 44, at 355-56.

[94] Pawson v. Texas, No. 367-90, 1993 Tex. Crim. App. LEXIS 163, at * 14 (Ct. of Crim. App. of Tex. 1993).

[95] See, e.g., Rankin v. Texas, 821 S.W.2d 230, 234 (Tex. 1991) (stating that the promiscuity defense contemplates sexual activities that occurred prior to the alleged offense, and that a "single other instance of a sexual act does not constitute promiscuity within the meaning of the statute. . . . Promiscuity connotes a variety of consensual sexual conduct with a variety of partners, continuing over a reasonable period of time.").

[96] See, e.g., Alston, 1991 Tex. App. LEXIS 2366, at *16; Pawson, 1993 Tex. Crim. App. LEXIS 163.

[97] FLA. STAT. CH. 794 (1975).

[98] *Id.*

Modern courts not only continue to honor the promiscuity defense, but do so even when the facts indicate that the victim's past sexual activity reflects a degree of parental abuse and neglect. For example, in Hernandez v. Texas[99] the court permitted the defendant to raise a promiscuity defense even though certain evidence showed that "the complainant's mother 'sold' the complainant to the defendant , who also 'sold' the complainant to other men."[100]

Not all jurisdictions maintain the promiscuity defense, and among those that do, not all equate promiscuity with non-virginity. Yet even in those cases which attempt to differentiate promiscuity from non-virginity, the ambiguous nature of the term "promiscuous" results in an intrusive and value-laden inquiry into the victim's sexual past.[101]

The court in Alston v. Texas recognized this. In that case, the defendant attempted to invoke the promiscuity defense by introducing testimony indicating that the sixteen-year-old complainant was not a virgin. In evaluating the lower court's exclusion of the evidence, the appellate court criticized the vague nature of the promiscuity defense:

> While we may generally assume that "promiscuity" implies more than one sex act with one partner, the court of criminal appeals specifically rejected the Austin Court of Appeals' suggestion that "promiscuity" means a "variety of consensual sexual conduct with a variety of partners," . . . . In Boutwell, the court of criminal appeals opined that, under sections 21.09 and 21.10 (citations omitted), a defendant is entitled to have "any evidence which is relevant to the issue of 'promiscuity' submitted to the jury" . . . . "Promiscuity," being a somewhat relative term, is subject to varying interpretations depending on many social factors. Different juries in different counties may hold very different beliefs concerning sexual morality. That difference could result in the same acts committed with the same teenager being punishable as a felony in one case and not punishable at all in another. . . . In statutory rape cases we should not make the moral status of the victim subject to community standards and define the crime on that basis.[102]

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[99] 861 S.W.2d 908 (1993).

[100] *Id.* at 910 (McCormick, J., concurring).

[101] Note that the promiscuity-related interrogation of the complainant seems quite similar to the treatment which complainants formerly received in rape cases--treatment which was abolished by rape shield laws. Of course, some might argue that, unlike forcible rape, evidence of past sexual behavior should be relevant to culpability in statutory rape cases. Such an argument necessarily reflects a view that past sexual activity is grounds for denying some minors the protection of the law. This opinion goes to the heart of the question of which population merits the protection of statutory rape laws.

[102] Alston, 1991 Tex. App LEXIS 2366, at *16.

Despite its critical insights, the court in Alston did not reject the promiscuity defense. The court noted that, "The social policy behind the present system is apparently the desirability of protecting the chastity of sexually inexperienced teenagers against the more worldly advances of experienced adults. Apparently, an adult is permitted to have consensual sexual contact with promiscuous teenagers and not with inexperienced ones."[103] The court ultimately concluded that the policy was sound, and that it should be the court's task to determine the probative value of evidence offered to show prior promiscuous behavior.[104]

The promiscuity defense reflects a normative position on the interface of sex, vulnerability, and coercion. This is evidenced by the fact that homosexual conduct is not subject to it.[105] As the court in Alston noted:

> Peculiarly enough, the promiscuity defense is only valid when the alleged victim is of the sex opposite than that of the accused. Since homosexual sex is itself considered a criminal act in Texas, the legislature apparently decided that the fact that a minor had already promiscuously engaged in homosexual sex should not exempt him from protection against the sexual advances of older homosexuals. See Boutwell v. State, 719 S.W.2d 164, 167 (Tex. Crim. App. 1985). . . . The peculiar situation created is that where someone accused of having heterosexual sex with a teenager who was promiscuous has a complete defense, a person accused of having homosexual sex with a similarly promiscuous teenager not only does not have a complete defense, he . . . remains liable for felony punishment under section 21.11 or 22.011(a)(2).[106]

This divergent standard indicates society's willingness to exonerate men who select "loose" girls as sexual targets, but not those who select "loose" boys.[107] At a more abstract level, it reveals not only society's views about "normal" and "deviant" sexual references of the perpetrators, but also a sense of society's concept of sexual victimhood.

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[103] *Id.* at *17, *18.

[104] *Id.*

[105] *Id.* at *15.

[106] *Id.*

[107] The United States is not alone in its ambivalence about young homosexuals' capacity to consent. In February 1994, the British Parliament rejected a move to lower the age of consent for homosexual men so that it would be consistent with heterosexuals and lesbians. In defending his vote against the measure one MP said, "I don't want to see old men queuing up outside schools in my constituency." Apparently the men do not have to wait in line for female partners. The age was ultimately lowered from 21 to 18. See N.Y. TIMES, Feb. 21, 1994, at A6; ECONOMIST, Jan. 29, 1994, at 60.

At its core, the promiscuity defense reflects a belief that, by virtue of multiple sexual partners, girls become less vulnerable to coercion, and in essence, gain the capacity to consent to sex. As one court put it, the defense exists because "there is no longer any compelling need for protective measures for the sexually experienced child."[108] The substantiated and dubious nature of this proposition[109] points to a more general and crucial failing of the reformed statutory rape laws: Despite the reformers' concern for girls' equality, safety, and well-being, the laws are riddled with questions arising from the unresolved debate over the true meaning of coercion in sexual relations.[110]

Such tension is inevitable, as Professor Olsen observed, because statutory rape laws force society to choose between two mutually exclusive goals:

> Every effort to protect young women against private oppression by individual men risks subjecting women to state oppression, and every effort to protect them against state oppression undermines their power to resist individual oppression. Further, any acknowledgment of the actual difference between the present situation of 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. [111]

Seen from this vantage point, the statutory rape debate becomes yet another incarnation of the ongoing debate between liberal and radical feminism.[112] Those drafting the revisions were divided as they

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[108] Pawson v. Texas, No. 367-90, 1993 Tex. Crim. App. LEXIS 163, at *14 (Ct. of Crim. App. of Tex. 1993). See also Vaught & Henning, supra note 57.

[109] Not only is there no reason to believe that more partners make a girl less susceptible to coercion, but in fact, the truth may be precisely the reverse. Recent medical research shows that a high percentage of girls who experience early teenage pregnancy have a history of childhood sexual trauma. Catherine Stevens-Simon & Susan Reichert, Sexual Abuse, Adolescent Pregnancy, and Child Abuse: A Developmental Approach to an Intergenerational Cycle, 148 ARCHIVES OF PEDIATRICS AND ADOLESCENT MEDICINE 23 (Jan. 1994). Thus, there is reason to suspect that girls who demonstrate sexual promiscuity may in fact be survivors of childhood rape and incest, and thus may be exceptionally vulnerable to abuse in sexual situations.

[110] See Chamallas, supra note 27, at 814-15 n.165.

[111] Olsen, supra note 45, at 412.

[112] "Liberal" feminists generally call for equal treatment where men and women are similarly situated; "radical" feminists argue that men and women are inherently different but nonetheless deserve equal treatment under law. See Catharine MacKinnon, FEMINISM UNMODIFIED at 32-45, in FEMINIST JURISPRUDENCE, supra note 19, at 72-73 ("under the sameness standard, women are measured according to

struggled to reconcile these competing notions. Some saw a continuing need for these laws, arguing that teens--especially female teens--simply are not equipped to handle the pressures and consequences of sex; others disagreed, asserting that teen girls and boys are equally capable of making informed choices in regard to their sexuality.[113] Ultimately, the new laws favored standards of abstract equality. This preference has had a profound effect on the way in which the law is presently enforced.

C. Modern Enforcement of Statutory Rape Laws

Rape law in general, and statutory rape laws in particular, are notorious as areas of the law in which "the law on the books . . . differs markedly from the law in action."[114] Statutory rape law enforcement, both historically and presently, has been sporadic.[115] As is the case with many crimes, prosecutors--and some judges[116]--differentiate between "good" and "bad" statutory rape cases.[117] The broad outlines of these categories are discernable from both the prosecutorial and the judicial perspective.

1. Prosecutorial Use of Statutory Rape Law

Statutory rape laws, although infrequently invoked, maintain a unique and useful role within the structure of modern criminal sexual misconduct laws. For instance, a statutory rape violation is an easily documented offense if the victim is underage, and the perpetrator is a

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our correspondence with man . . . Under the difference standard, we are measured according to our lack of correspondence with him").

[113] This ambivalence persists and is prevalent in the debate among modern feminists. See, e.g., Sex-Bias Topics in the Criminal Law Course: A Survey of Criminal Law Professors, 24 U. MICH.J.L. REF. 189 (1990) ("Other feminists are opposed to or ambivalent about strengthening statutory rape statutes because such protection also precludes a young woman from entering a consensual sexual relationship, to which she may be competent to consent. These feminists view statutory rape laws as more controlling than protective--and of course part of the law's historic role was protecting the female's chastity as valuable property.").

[114] Chamallas, supra note 27, at 778 (citing Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 493 n.8 (1981), in which the Court noted that, "from 1975 to 1978, only 413 men were arrested for statutory rape, despite 50,000 pregnancies among underage women during 1976 alone.").

[115] *Id.*

[116] See infra notes 129 to 158 and accompanying text.

[117] Lisa Frohmann, Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections, 38 SOCIAL PROBLEMS 213 (May 1991).

certain number of years older than her, he is guilty.[118] This additional conviction can add several years to a convicted rapist's sentence.[119] Additionally, statutory rape laws permit prosecutors to seek convictions in cases in which there is insufficient evidence to sustain a heightened criminal sexual assault charge (e.g. felony rape) because prosecutors lack proof that intercourse was nonconsensual.[120] In these situations, prosecutors can use modern statutory rape laws to seek convictions which simply would not be obtainable under rape law generally.[121]

Given that statutory rape laws are drafted as strict liability offenses, it is curious to find their application so narrowed. Unlike forcible rape, wherein the crime requires evidentiary proof which may be somewhat elusive or subject to debate, statutory rape theoretically only requires evidence of sexual conduct involving individuals of certain ages. Yet, as revealed by the promiscuity defense, statutory rape laws have never provided every minor protection from coercive sexual advances by adults. Rather, the law traditionally has protected only those minor girls who are deemed to require or merit protection--i.e., the "good" girls.

A recent, highly publicized example of this is a New York case in which thirty-seven-year-old auto-body repairman Joey Buttafuoco pleaded guilty to the statutory rape of sixteen-year-old Amy Fisher.[122] Though Buttafuoco could have been sentenced up to four years in jail, he was sentenced to six months in jail, five years probation, and a $5000 fine.[123] At his sentencing, Buttafuoco depicted Fisher as a devious, experienced woman, calling his relationship with her "strictly lustful sex," and stating, "She's no sweet little girl. She's a calculated

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[118] See MODEL PENAL CODE § 213.3 commentary at 385 (1980); see also FEMINIST JURISPRUDENCE, supra note 19, at 292 (discussing the changes in statutory rape law and noting that in many states the age range is five years).

[119] Telephone interview with Thomas Reick, Director, Felony Division, Cook County State's Attorneys Office (Feb. 1994).

[120] See Dripps, supra note 29, at 1788; Schulhofer, supra note 30, at 94.

[121] Telephone interview with Thomas Reick, supra note 119; see also Frohmann, supra note 117, (noting factors contributing to a willingness to prosecute in criminal sexual assault cases).

[122] After she had been arrested for shooting Buttafuoco's wife in the head, Amy Fisher told police that she had an affair with Buttafuoco. She is currently serving a 5 to 15 year prison sentence for first-degree assault. Joey Buttafuoco Gets 6-Month Jail Sentence; Amy Fisher Makes Statement in Court, HOUSTON CHRONICLE, Nov. 16, 1993, at A9 [hereinafter Joey Buttafuoco].

[123] Daniel Wise, Victim Impact Statements Seen Having Little Effect, NEW YORK LAW JOURNAL, Nov. 22, 1993, at 1. With time off for good behavior, Buttafuoco could be released after serving four months. Peter Marks, Buttafuoco Is Sentenced to 6 Months for Rape, N.Y. TIMES, Nov. 16, 1993, at B1.

attempted murderess."[124] Fisher's statement to the court at Buttafuoco's sentencing[125] revealed a different image:

> Your Honor, when this relationship began, I was not just a 16-year-old teen-ager taken to bed by a man twice my age. I was a 16-year-old teen-ager shown a world that I was not ready for, a world of elaborate spending and fast boats. This man took me to expensive restaurants and cheap motels. . . . I am sad to say that he taught me well. He taught me to disrespect myself and to deceive my parents. . . . If Mr. Buttafuoco had permitted me to cross the bridge between adolescence and adulthood unmolested, I would not be where I am today.[126]

Despite the age disparity and the disturbing implications of Fisher's testimony, Buttafuoco received a minimal sentence.[127]

As the Buttafuoco case illustrates, modern statutory rape law does not take into account the relative power of the parties engaged in sexual conduct, and how that affects the capacity of each party to consent to sex. Instead, a girl's ability to "invoke" the law turns on whether she can demonstrate her own "innocence."[128] Moreover, this "innocence" hinges on evidence of her prior sexual activity, rather than on an analysis of the particular incident of sexual conduct which gave rise to the criminal charges. By attributing sexual empowerment to girls who have engaged in sex, the law turns a blind eye to actual evidence of coercion and tainted consent. Instead, judges justify the failure to convict by casting non-virgin girls into stereotypical roles of sluts or temptresses. Three examples of this practice follow, one involving intercourse between teenage peers; one involving sexual contact between a step-father and his step daughter; and one involving intercourse between an older man and a thirteen-year-old girl.

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[124] Joey Buttafuoco, supra note 122.

[125] New York state law requires that in all felony cases victims be permitted to speak at the defendant's sentencing. Wise, supra note 123.

[126] Joey Buttafuoco, supra note 122.

[127] See Wise, supra note 123 ("For all the hoopla over Amy Fisher's appearance last week at the sentencing . . . her appearance was ordinary in one important respect: it did not make much difference in the jail term Mr. Buttafuoco drew.").

[128] Of course, this is highly ironic, as the girl is the victim of a crime, and the state is charged with enforcing the law. Another view of this is that the state's willingness to enforce the law will turn on its perception of the victim's innocence. See Frohmann, supra note 117.

2. *Appellate Court Decisions*

Perhaps the best known modern statutory rape case is Michael M. v. Sonoma County Superior Court,[129] in which the United States Supreme Court upheld a gender-based statutory rape law. In that case, a seventeen-year-old male who had sex with a sixteen-year-old female challenged California's statutory rape law (forbidding intercourse with any female under the age of eighteen) on equal protection grounds.[130] The majority opinion does not discuss the parties or the facts surrounding their sexual encounter. Instead, it focuses on the statute as a weapon in the battle against the epidemic of teenage pregnancy.[131] Justice Blackmun's concurring opinion provides some factual analysis in extensive quotes from the trial transcript.[132] After reviewing the transcript, Blackmun suggests that the facts of the case make it "an unattractive one to prosecute,"[133] since the victim was not "an unwilling participant in at least the initial stages of the intimacies that took place,"[134] the teenagers had consumed alcoholic beverages,[135] and the two were close in age.[136]

Many legal scholars have taken exception to Blackmun's assessment.[137] Noting that the record provides ample evidence that this was not consensual sex under any definition,[138] Professor Olsen concludes, "The only consistent explanation for Blackmun's distaste for

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[129] 450 U.S. 464 (1981).

[130] Cited by the Court as CAL. PENAL CODE ANN. § 261.5 (West Supp.1981) (defining unlawful sexual intercourse as "an act of sexual intercourse with a female not the wife of the perpetrator, where the female is under the age of 18 years"). Michael M, 450 U.S. at 466.

[131] *Id.* at 466-76.

[132] *Id.* at 481 (Blackmun, J., concurring).

[133] *Id.* at 485 (Blackmun, J., concurring).

[134] *Id.* (Blackmun, J., concurring).

[135] *Id.* (Blackmun, J., concurring).

[136] *Id.* (Blackmun, J., concurring). It is unclear whether Blackmun was endorsing the practice of not prosecuting such cases, or merely acknowledging it, but the fact that he uncritically categorizes this case as "unattractive" sends a signal to prosecutors which legitimates the practice of reserving prosecution for cases involving "attractive"--read "chaste"--victims.

[137] See, e.g., Olsen, supra note 45, at 415-17; Henderson, Rape, supra note 28, at 146-48; Chamallas, supra note 27.

[138] Olsen points to evidence quoted by Justice Blackmun that the victim had told the defendant to stop, then, after the defendant slugged her in the face several times, permitted him to "do what he wanted." Olsen, supra note 45, at 416, citing Michael M., 450 U.S. at 485.

Even if such coercive measures could be deemed valid means of procuring consent, the statutory rape law was, by definition, still violated: Females under age 18 were per se incapable of consenting to sex. A 16-year-old's "consent"--particularly under such circumstances--should not have validated the act.

the prosecution seems to be that Sharon did not fit the 'chaste and naive' image associated with statutory rape victims."[139] This explanation is particularly disturbing since the victim's sexual history was not at issue in the case: The defendant did not raise a promiscuity defense to the charges brought against him. Instead, he challenged the law's constitutional validity, arguing that it serves to protect the "virtue and chastity of young women," and, thus rests on "archaic stereotypes."[140] Justice Blackmun's comments arguably reflect not only his rejection of that argument, but also his vision of how one might differentiate, on sparse information, a virtuous girl from an unvirtuous one.[141]

Similar views are seen in more recent cases from various state courts.[142] For example, in Pawson v. Texas,[143] a step-father was convicted of sexually assaulting his fourteen-year-old step-daughter. The indictment alleged that after the girl returned home one evening, her step-father ordered her to undress and go into her bedroom so that he could "check her."[144] "He had me take off my clothes and lay on the bed, and he checked my genital . . . he took his hand and he was rubbing on it. And he stuck his fingers in it and was rubbing around saying that he was checking for something."[145] Because the victim was not a virgin, the promiscuity defense might have precluded a conviction for statutory rape. Therefore, the state charged the defendant with sexual assault, which required only that the sexual contact occur without consent.[146]

The Court of Appeals rejected the verdict and remanded for a new trial. It held that by precluding Pawson from raising promiscuity as a defense, the state "effectively robbed appellant of any recourse . . .

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[139] Olsen, supra note 45, at 417.

[140] Michael M., 450 U.S. at 472 n.7.

[141] Despite the fact that the petitioner had not raised a promiscuity defense, Justice Blackmun identified the "[p]etitioner's and Sharon's nonacquaintance with each other before the incident; their drinking; their withdrawal from the others of the group; their foreplay . . ." as factors particularly relevant to the petitioner's case. Id. at 483-84.

[142] See, e.g., Pawson v. Texas, No. 367-90, 1993 Tex. Crim. App. LEXIS 163 (Ct. of Crim. App. of Tex. 1993); McBrayer v. State, 467 So. 2d 647, 648 (Miss. 1985) reh'g denied. A somewhat more candid, but similar approach was taken in a recent British case. Judge Ian Starforth Hill reluctantly sentenced a man to two years' probation for having attempted to rape a nine-year-old girl. In handing down the sentence, the judge referred to the nine-year-old victim as "flirtatious" and "no angel." 4 Ms., Jan./Feb. 1994, at 50.

[143] 1993 Tex. Crim. App. LEXIS 163.

[144] *Id.* at *5 (Clinton, J., concurring).

[145] *Id.* at *5, *6, (citing transcript I SF 129-35) (Clinton, J., concurring).

[146] *Id.* at *3 (Clinton, J., concurring).

to parental discretion as a justification for his conduct."[147] Judge Clinton, in his concurrence, elaborated on this parental authority theory, noting that the step-father's "suspicions seem well-founded; his stepdaughter admitted to certain prior acts of sexual intercourse."[148] Then, in a bizarre twist, he added, "with the exception of evidence that the defendant had a belt in his hand, there appears no other evidence by which the State could prove that the penetration of complainant's sexual organ with his finger was accomplished without her consent."[149]

This hypothesis reveals the judge's assumptions about the balance of power between the parties. His theory suggests that what might constitute sexual abuse of a child becomes simply "parental discipline" when the child is a non-virgin.[150] Alternatively, the judge's theory might reflect his assumption that because she was not a virgin, she most likely knew where her step-father was putting his finger. Therefore, her failure to cry out or leave could be taken to indicate her consent to the act. In either case, Judge Clinton's reasoning rests on his assumption that non-virgin teenage girls simply do not need or merit the protection of statutory rape laws.

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[147] Id. at *7 (citing V.T.C.A. PENAL CODE § 22.011(d) (1) (Supp.1988)) (Clinton, J., concurring). The court never explains how probing a 14-year-old girl's vagina fits within any definition of parental discretion. Nor does the court explain what the step-father expected to find. One assumes he was looking for her hymen, although it is not clear why anyone would trust him to identify it accurately. According to at least one gynecologist, the hymen can be affected by tampon insertion and athletic activities; additionally, "palpation is extremely difficult in relation to visualization"--that is, without proper training, it would be almost impossible for the lay person to distinguish an intact hymen and one post-coitally. Finally, one can engage in sexual intercourse and not rupture the hymen at all. Telephone interview with Dr. D.J. Buckley Jr., M.D., March 1994.

[148] *Id.* at *6 n.3 (Clinton, J., concurring).

[149] *Id.*

[150] For an interesting colloquy on this matter, see Hernandez v. Texas, 861 S.W.2d 908, 909 (1993) ("It is quite possible to prosecute and convict someone of sexually assaulting a promiscuous 14- through 16-year-old child . . . by proving lack of consent. . . . It is also quite possible to prosecute and convict someone of sexually assaulting a 14- to 16-year-old child who consents to the sexual contacts . . . however, in such a situation, the Legislature has explicitly provided the statutory promiscuity defense."); Id. at 911 (McCormick, J., dissenting) ("I fail to see the relevance of evidence of a complainant's promiscuity in a sexual assault prosecution . . . unless the defendant makes the complainant's consent an issue in the case. . . . [O]ne consequence of the majority's interpretation of [the statute] is that in a future prosecution . . . a defendant, who engages in sexual conduct with a 14-year-old, nonconsenting, promiscuous child, will be entitled to an acquittal, because consent will be irrelevant. These children will become 'fair game' for older, more experienced adults.").

An even more explicit endorsement of this position is found in McBrayer v. Mississippi,[151] in which a forty-six-year-old defendant sought to introduce evidence that his "consenting" thirteen-year-old victim had been sexually intimate with two other men. The trial court did not permit the defendant to raise the promiscuity defense because he was charged with the unlawful fondling of a child under the age of fourteen, and not statutory rape.[152] The court found that the promiscuity defense was only available to those accused of statutory rape.[153] The Mississippi Supreme Court reversed the conviction, reasoning that if the statutory rape laws did not punish the act of intercourse with an unchaste child under the age of fourteen, it was illogical to punish "foreplay."[154]

Courts routinely inquire into statutory rape victims' chastity, however virtually none of the cases discuss the circumstances of the victim's prior sexual activity--even though judges who differentiate between virgins and non-virgins should view this information as highly relevant. For example, recent medical evidence indicates that early teenage pregnancy, and therefore, by definition early teenage sexual activity, is highly prevalent among survivors of sexual abuse.[155] Thus, far from establishing "worldliness," a girl's prior sexual experience may be evidence of her past and present vulnerability to abuse.

Despite the fact that statutory rape laws are premised upon the belief that young girls are too easily coerced to effectively consent to sex,[156] they largely ignore the sources of girls' vulnerability, and the relative power of the parties having sex with them. The law of statutory rape, both on the books and in the courtroom, turns a blind eye to what Professor Stephen Schulhofer has called "the kinds of pressures and constraints that intrude on autonomous choice and render consent ineffective."[157] Instead, the law focuses on factors more readily identified, such as age differences, and whether the victim was a "virgin" or "promiscuous." This approach is compelling only if a girl,

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[151] McBrayer v. State, 467 So. 2d 647, 648 (Miss. 1985), reh'g denied.

[152] *Id.* at 647; MISS. CODE ANN. § 97-5-23 (West Supp. 1984). The court noted that this statute "makes unlawful the fondling of a child under 14 by any person over 18 'for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires. . . .' Nothing in the child fondling statute requires that the victim have been of a previously chaste character." McBrayer, 467 So. 2d at 642. The statutory rape law was MISS. CODE ANN. § 97-5-21 (West Supp. 1984)-- consent was not a defense. McBrayer, 467 So. 2d at 647.

[153] McBrayer, 467 So. 2d at 648.

[154] *Id.* at 648.

[155] Stevens-Simon & Reichert, supra note 109.

[156] See supra note 26 and accompanying text.

[157] Schulhofer, supra note 30, at 77.

by virtue of becoming sexually active, suddenly gains all of the power and control necessary to give a meaningful consent (or refusal) to sex.[158]

II. ALTERNATE LEGAL PARADIGMS GOVERNING MINORS' CAPACITY TO CONSENT

The modern application of statutory rape laws reflects a belief that some minors possess sufficient maturity to consent to sexual activity. However, this expanded vision of an adolescent's capacity has not led to a reform of laws governing adolescents' rights to engage in other adult activities. For example, both contract law and tort law remain protective of minors, limiting the extent to which they will suffer the consequences of their actions.[159] Under contract law, minors may void contracts into which they have entered; under tort law, the mature minor doctrine provides a means by which minors may obtain treatment for a limited number of serious medical conditions, without first seeking parental consent.

A. Minors' Rights Under Contract Law: The Persistence of Infancy

It is a fundamental tenet of common law that incapacitated persons--those who lack the power to participate meaningfully in the bargaining process--may void their contracts.[160] The law recognizes two categories of persons who are protected by this rule: minors and the mentally infirm.[161] While the law relating to the mentally infirm has evolved in tandem with contemporary medical understanding of mental

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[158] Of course, if this tautology were really true, (girls are powerless until they lose their virginity, at which point, they become fully empowered), it might be better to encourage girls to lose their virginity by age 10, so that they might better protect themselves from the hazards of adolescent sex.

[159] Because this paper addresses the crime of statutory rape, it might seem that criminal law provisions permitting juvenile defendants to be charged as adults would constitute an appropriate frame of reference. While serious questions exist regarding the wisdom and justice of such policies, as an analogy to the problems raised in this Article, this issue ultimately yields little insight. The focus of the inquiry is on the competency of minors to consent to sex, a legal adult activity, rather than on the competency and culpability of minors who have committed a crime. Of course, the two issues converge when a defendant in a statutory rape case is a minor, but since this Article addresses competency among the victims, not the perpetrators of statutory rape, this convergence falls beyond the scope of all but the concluding section, which considers punishment and remedies.

[160] See 8 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 51 (1926); see also JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 8-1 (3d. ed. 1987).

[161] CALAMARI & PERILLO, supra note 160, at 305.

incapacity,[162] the law regarding minors' incapacity to contract has remained constant.

The common law rule provides that a minor's contract will be voidable at the minor's instance.[163] In essence, this means that a contract formed with a minor will be valid and binding only insofar as, and for as long as, the minor agrees to be bound by it. If for any reason minors choose to void, or "disaffirm," a contract, they may do so, pleading "infancy" as a defense against an action for breach.[164] This rule applies not only to wholly executory contracts, but also when a contract has been fully performed, as when a minor has paid for and received goods.[165] Under the traditional rule, where the contract has been partially or fully performed, the disaffirming minor's only obligation is to return anything that was conferred by performance.[166] Moreover, when minors have damaged or even destroyed the property received, they need only return what remains. Today, some version of this rule remains in force in all jurisdictions.[167]

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[162] See, e.g., Ortelere v. Teachers Retirement Bd., 25 N.Y.2d 196, 250 N.E.2d 460 (N.Y. 1969); Faber v. Sweet Style Mfg. Corp., 40 Misc. 2d 212, 242 N.Y.S.2d 763 (N.Y. 1963).

[163] See generally 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.4 (1990).

[164] *Id.*

[165] CALAMARI & PERILLO, supra note 160, at 311 (noting that disaffirmance is allowed so long as the disaffirmance does not result in a benefit to the minor and a prejudice to the other party) (citing Adamowski v. Curtiss-Wirth Flying Serv., 15 N.E.2d 467 (Ma. 1938)).

[166] *Id.* at 315.

[167] The most common exception to the common law rule holds minors liable for the reasonable value of "necessaries" which were purchased by the minor--e.g., food, clothing, shelter. FARNSWORTH, supra note 163, at 237. A minor has no obligation to make a full restitution of benefits received under a disaffirmed contract. Id. at 234-35.

Additionally, some jurisdictions have statutorily modified the common law rule. The most common reform has been to lower the age limit from 21 to 18, mirroring the lowering of the voting age. Id. at 230. Another less common example is the statutory rescission of minors' power to avoid contracts for student loans and insurance. See, e.g., KY. REV. STAT. ANN. § 304.14-070 (Michie/Bobbs-Merrill 1988); N.Y. EDUC. LAW § 281 (MCKINNEY 1988).

But see Shields v. Gross, 448 N.E.2d 108 (N.Y. 1983), reh'g denied 450 N.E.2d 254 (N.Y. 1983) (holding that a minor may not disaffirm a contract to which her parent has consented, even where, as here, that consent is unlimited and therefore fails to protect the child's best interests. The contract at issue involved the rights to nude photographs of model Brooke Shields when she was ten years old. Her mother had consented to unrestricted use of the photographs in exchange for $450. Six years later, Brooke Shields sought to enjoin the future use of the photos; the court denied relief).

Over the years, the voidability of minors' contracts has been the source of some judicial consternation. As Justice Davies of the Court of Appeals of the State of New York wrote in 1865:

> A protracted struggle has been maintained in the courts, on the one hand to protect infants or minors from their own improvidence and folly, and to save them from the depredations and frauds practiced upon them by the designing and unprincipled, and on the other to protect the rights of those dealing with them in good faith and on the assumption that they could lawfully make contracts.[168]

A century later, Chief Justice Kenison of the Supreme Court of New Hampshire felt compelled to justify his enforcement of the rule as follows:

> A stranger must think it strange that a minor in certain cases may be liable for his torts and responsible for his crimes and yet is not bound by his contracts. . . . However, the common law conception that a minor does not possess the discretion and experience of adults and therefore must be protected from his own contractual follies generally holds sway today.[169]

Nonetheless, despite judicial ambivalence and occasional scholarly criticism,[170] the common law rule stands today.[171]

The continued adherence to this protective tradition, in an era in which minors routinely are accorded the rights and duties of adults,[172] is

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[168] Henry v. Root, 33 N.Y. 526, 536 (1865).

[169] Porter v. Wilson, 209 A.2d 730, 731 (N.H. 1965).

[170] See FARNSWORTH, supra note 163, at 228 ("[T]he law has tenaciously adhered to an arbitrary standard--the attainment of a prescribed age at the time of the making of the contract--ignoring the obvious differences in maturity among individuals of the same age."); see also Robert Edge, Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy, 1 GA.L.REV. 205 (1967); Walter D. Navin, Jr., The Contracts of Minors Viewed from the Perspective of Fair Exchange, 50 N.C.L.REV. 517 (1972).

[171] In one recent case, Dodson v. Shrader, 824 S.W.2d 545 (Tenn. 1992), the court permitted a minor to void a purchase of an automobile, but required him to pay for depreciation due to willfully and negligently incurred damages. Interestingly, the court struggled over the unfair result dictated by a strict application of the common law rule. Thus, in a move designed to mollify and modernize the harsh results of the common law rule, the court required the minor to pay restitution. In spite of its discomfort with the result, the court never considered abolishing the old rule in order to bind the minor to his contract.

[172] Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (affording minors privacy rights, including rights attendant to procreation--or prevention of procreation); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (the right to speak freely); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (the right to be free of racial discrimination;

puzzling. Easy arguments may be made for viewing the rule as anachronistic, because it seems to reflect a view of minors which is entirely at odds with the expanded perception of adolescent capacity that characterizes modern statutory rape law.[173]

Its persistence might best be understood by noting that, in addition to reflecting a normative commitment to the idea that minors deserve protection from their commercial follies, permitting minors to void their contracts is preferable to the only realistic alternative: a rule enforcing contracts made by those minors who demonstrate sufficient legal capacity to contract. The latter would require that, upon reaching some stage of maturity, the general principle of contractual capacity would be triggered, and the minor would be legally bound to the contract. As such, the rules of contract law would be applied to minors on a case-by-case basis, and a person evaluating whether to enter into a contract with a minor would be forced to engage in an assessment of the minor's capacity to understand the proposed deal (or, more to the point, how a court might assess that capacity).

This type of evaluation is fraught with subjectivity and uncertainty, particularly since the method by which maturity is to be assessed is utterly unclear.[174] Moreover, the contracting party would face the ever-present risk that a seemingly fair contract entered into with a seemingly mature minor would, in retrospect, be found voidable. As a result, abolishing the presumption of incapacity might have the perverse effect of limiting, rather than expanding minors' ability to contract, because a prudent merchant would be unwilling to deal with minors except on the terms to which the minor is presently subjected--e.g., requiring an adult co-signer.[175]

HOMER H. CLARK JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 310 (1988) (the right to own property). In addition, minors are held liable for their torts, and are deemed capable of forming criminal intent. *Id.* at 312. Finally, minors may be statutorily emancipated, thus able to enjoy rights that otherwise are reserved for adults. *Id.* at 327-28; see also Carol Sanger & Eleanor Willemsen, Minor Changes: Emancipating Children in Minor Times, 25 U. MICH. J. L. REF. 239 (1992) (discussing emancipation of minors and arguing that often the process is used by parents to their benefit and the minor's detriment).

[173] The rule allowing voidability of minors' contracts is overinclusive, since some minors are more capable than others of managing their affairs. In addition, the rule creates an arbitrary line, since many adults are not sufficiently sophisticated to protect themselves against bad deals.

[174] See infra notes 177 to 217 and accompanying text (regarding the ambiguities inherent in determinations of minor's maturity and their rights to make health care decisions).

[175] EDWARD J. MURPHY & RICHARD E. SPEIDEL, CASES ON CONTRACTS (4th ed. 1991).

The rule permitting voidability offers certainty to those who would deal with minors. Presently, anyone who makes a contract with a minor is on notice: the deal is never final until the minor, upon reaching the age of majority, ratifies it. This rule does not seem to have had an enormous chilling effect on those who do business with minors,[176] because minors usually honor their contracts.

In addition to the efficiency arguments which justify permitting minors to void their contracts, there is an obvious policy component to the rule. The primary effect of applying a "mature minor" standard in contracts cases would be to provide a route to victory for creditors suing minor defendants for breach of contract. Given a choice between holding young persons liable for unwise deals, to which they consented perhaps in part out of youthful ignorance, and protecting creditors who may knowingly have taken advantage of the minors, the law chooses to protect minors. This is more than mere deference to precedent; it is a substantive policy preference. Implicit in the rule permitting minors to void their contracts is a judgment that commercial transactions are not uniformly positive for both parties involved. On some occasions, one party's profit may be gained at the other party's expense. But, should that other party be a minor, she will not be held accountable. Minors are legally unavailable for commercial exploitation.

B. Mature Minor Laws

During the same two decades in which reformers rewrote rape laws, minors' rights to autonomous and confidential decision-making in the health care arena grew exponentially. At first blush, the expanded control which adolescents gained over reproductive health care decisions appears to reflect precisely the same faith in minors which inspired the statutory rape reforms. Yet, a close examination of the line of cases which govern minors' rights to consent to treatment, contraception, abortion, and sterilization, reveals that the changes in these rights have been driven not by a sense that minors are mature enough to make such decisions, but rather, by a belief that certain forms of treatment are so important that the law should facilitate access to them.

The common law position regarding health care treatment for minors was that, until reaching the age of majority, minors lacked the

[176] Edge, supra note 170 (arguing that the voidability rule should be abolished, but actually proving that large portions of the market presently are dedicated to minors as customers and clients in spite of the rule).

legal authority to consent to their own care.[177] Thus, any treatment rendered to a minor absent parental consent could subject the health care provider to an action by the parents for assault and battery.[178] The policy underlying this rule is reflected in Chief Justice Burger's opinion in Parham v. J.R.:[179]

> Our jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.[180]

The principal exception to this rule was that, in the case of emergency, a doctor could treat a child of any age, even without parental consent.[181] In such cases, the guardian's consent was implied on the theory that any delay would jeopardize the minor's health.[182] The other long-standing exception to this rule relates to emancipated minors--i.e., minors who are not living at home, who are not economically dependent on their parents, and whose parents have surrendered parental duties.[183] In the past, this category consisted primarily of married minors and minors serving in the military.[184] More recently, the emancipation doctrine has been used by parents who wish to divorce themselves of financial obligations to their children.[185]

1. Minor Treatment Statutes

Beginning in the late 1960s, evidence of the growing prevalence of sexually transmitted diseases among teenagers led a number of states to pass "minor treatment statutes."[186] Legislatures passed these laws in

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[177] Zaman v. Schultz, 19 Pa. D & C 309 (1933); see also ANGELA RODDEY HOLDER, LEGAL ISSUES IN PEDIATRICS AND ADOLESCENT MEDICINE 124-25 (1986).

[178] HOLDER, supra note 177, at 124-25.

[179] 442 U.S. 584 (1979).

[180] *Id.* at 602-03.

[181] Luka v. Lowrie, 136 N.W. 1106, (Mich. 1912); Sullivan v. Montgomery, 279 N.Y.S. 575 (N.Y. 1935).

[182] See HOLDER, supra note 177, at 125-26.

[183] See supra note 172.

[184] See, e.g., Bach v. Long Island Jewish Hospital, 267 N.Y.S.2d 289 (N.Y. 1966); Swenson v. Swenson, 227 S.W.2d 103 (Mo. 1950).

[185] See Sanger & Willemsen, supra note 172.

[186] Linda S. Ewald, Medical Decision-Making for Children: An Analysis of Competing Interests, 25 ST. LOUIS U. L.J. 689 (1982).

response to the fear that teens would not seek treatment for communicable diseases such as herpes and gonorrhea if they had to tell their parents, or if their parents had to consent to treatment.[187] Currently, all jurisdictions have laws which permit unemancipated minors ranging in age from fourteen to seventeen to consent to care for sexually transmitted diseases.[188] Additionally, many states' minor treatment statutes permit minors to consent to treatment for alcohol and substance abuse treatment,[189] and to psychiatric care.[190] Interestingly, commentators and supporters interpret these statutes as an extension of the emergency treatment exception to the common law, rather than as a reflection of the minors' maturity and capacity to consent to their own care.[191]

2. Mature Minor Exceptions

Minor treatment laws enhance a minor's power to consent in only a narrow set of statutorily specified situations. As a result, minors are frequently seeking non-emergency medical treatment to which they are not statutorily permitted to consent. In recent decades, courts have recognized a "mature minor" exception, which is invoked by judges to grant minors permission to obtain medical treatment without the consent or notification of a guardian.[192] Even with the mature minor

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[187] HOLDER, supra note 177, at 130.

[188] *Id.*

[189] See, e.g., 410 ILCS 210/4 (Michie 1993), allowing a minor age 12 or older to seek confidential treatment for sexually transmitted diseases and for alcohol or chemical dependency.

[190] See, e.g., MICH. COMP. LAWS § 330.1498(d)(3) (1992) (allowing a minor 14 years of age or older to be hospitalized for "emotional disturbance").

[191] See, e.g., HOLDER, supra note 177, at 130 ("the condition clearly constitutes a medical emergency, since to allow the young person to remain untreated would spread the disease."); see also AMA NEWS, April 17, 1967, at 4 ("It is . . . better if the physician can persuade the minor to inform his parents and thereby provide the necessary consent, but where this is impossible and it appears that without the physician's promise of confidentiality the youth will probably delay seeking treatment, the youth's health is paramount to any other consideration.").

[192] One health law scholar, analyzing mature minor cases, has identified the following factors which support the minor's right to consent:

1. The treatment was undertaken for the benefit of the minor rather than a third party.

2. The particular minor was near majority (or at least in the range of 15 years of age upward) and was considered to have sufficient mental capacity to understand fully the nature and importance of the medical steps proposed.

3. The medical procedures could be characterized by the court as less than "major" or "serious."

Walter Wadlington, Minors and Health Care: The Age of Consent, 11 OSGOOD HALL L.J. 115 (1973).

doctrine's explicit reference to "maturity," however, an examination of the settings in which the doctrine has been invoked reveals that a minor's level of sophistication is rarely a factor.

As early as 1956, case law made reference to a minor's maturity in defeating a parental battery action against a physician who rendered treatment to a minor child.[193] However, these were exceptional cases, and it was not until the mid-1970s, when minors sought legal access to contraception, that the mature minor rule gained widespread recognition.[194] As was the case with minor treatment laws, this push to expand minors' rights was cast not in terms of the minor's actual maturity, but instead, as a response to a public health threat--the increase in teen sex, and the consequent risks of venereal diseases, pregnancies, and illegitimate births.[195]

Further, those opposed to allowing minors access to contraception did not base their opposition on an argument that minors were too immature. Instead, they claimed that such access would promote the rise of immoral sexual activity, and "destroy parental control of the adolescent girl."[196]

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[193] Lacey v. Laird, 139 N.E.2d 25 (Ohio 1956); Younts v. St. Francis Hosp., 469 P.2d 330 (Kan. 1970); Bach v. Long Island Jewish Hosp., 267 N.Y.S.2d 289 (N.Y. 1966).

[194] In the late 1960s and early 1970s, a variety of professional associations, including the American Bar Association, the American Medical Association, the American College of Obstetrics and Gynecology, and the American Academy of Pediatrics, issued calls for the recognition of minors' rights to obtain contraception. HOLDER, supra note 177, at 269; 1968 Report of the Family Law Section of the American Bar Association, Report, Family Planning and the Law, 1 FAM. L.Q. 103 (1967); Proceedings of the AMA House of Delegates 5556, June 20-24, 1971; see also Elizabeth Jordan, A Minor's Right to Contraceptives, 7 U.C. DAVIS L. REV. 270 (1974).

[195] For example, the ABA's report couched its recommendations in light of the evidence showing a rising number of "illegitimate" births. 1968 Report of the Family Law Section of the American Bar Association, Report, Family Planning and the Law, 1 FAM. L.Q. 103 (1967). The AMA's recommendation that teenage girls be given access to contraception was offered "in the interests of reducing the incidence of teenage pregnancy . . ." Proceedings of the AMA House of Delegates 5556, June 20-24, 1971. As Holder states, "All authorities in the field seem to agree that the public interest in holding down the costs of welfare as well as the interests of the individual teenage girls requires that 'something be done' about the number of girls in their early teens who have babies." HOLDER, supra note 177, at 268.

[196] HOLDER, supra note 177, at 270. One outspoken opponent of minors' access to contraception was then-governor of California, Ronald Reagan, who vetoed legislation granting teenagers access to medically prescribed contraception. In justification, Reagan stated, "Birth control should begin with--prior to marriage--saying no . . . . [This bill] represented the unwarranted intrusion into the prerogatives of parents . . . and would endanger the traditional vital role of the family structure in

Ultimately, the United States Supreme Court decided the debate over whether communities should permit teenage girls to obtain contraception without parental consent. In Carey v. Population Services, International,[197] the Court held that minors have a right to privacy in regard to procreational matters, and that that right outweighs any state interest in discouraging sexual activity by barring access to contraception.[198] The majority viewed the case as following naturally from its earlier decisions permitting married and unmarried women access to contraceptives.[199] Although the Court frequently refers to the State's policy of discouraging illicit early sexual activity, at no point in the line of cases permitting minors access to reproductive health care is there any substantive discussion of a minor's maturity or capacity to contend with the consequences of sexual relationships.[200]

3. Mature Minors and Abortion

By the time the debate over contraception reached the Court, a far more contentious battle was raging over minors' access to abortion.

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our society . . ." Neil Bodine, Minors and Contraceptives: A Constitutional Issue, 3 ECOLOGY L.Q. 859, 860 (1973).

[197] 431 U.S. 678 (1977).

[198] *Id.* at 692.

[199] *Id.* at 685 (citing Griswold v. Connecticut, 381 U.S. 479 (1965) and Eisenstadt v. Baird, 405 U.S. 438 (1972)) ("[I]n a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive.").

[200] Perhaps equally surprising, the decisions make no mention of statutory rape laws which, in the vast majority of jurisdictions, criminalize sexual contact with minors.

Permitting health care providers to deliver contraception to minor females may put the providers between the proverbial rock and the hard place. Girls who seek contraception while they are under the statutory age of consent, provided that they are sexually active, are, by definition, victims of statutory rape. Thus, the provider has medical information which relates to criminal activity. While medical information ordinarily must be kept confidential, state laws mandate that providers report to criminal justice authorities information which relates to the commission of a crime. See e.g., 20 ILCS 2630/3.2 (Michie 1993) (stating, "It is the duty of any . . . physician . . . to notify the local law enforcement agency . . . when it reasonably appears that the person requesting treatment has received (1) an injury resulting from the discharge of a firearm; or (2) any injury sustained in the commission of or as a victim of a criminal offense."). A recent California case, People ex rel. Eichenberger v. Stockton Pregnancy Control Med. Clinic, 249 Cal. Rptr. 762 (1988), illustrates this predicament. In the Stockton case, the court held that health care, educational, and other professionals are not required to report the pregnancy or incidence of sexually transmitted diseases in a girl under age 14 if her partner is the same age, but the professionals must report such occurrences if the partner is "a person of a disparate age." *Id.* at 230.

Almost immediately following the Supreme Court's decision in Roe v. Wade,[201] state legislatures began passing measures restricting access to abortion. Foremost among these were efforts to require parental intervention in the case of minors who sought abortions. The Massachusetts legislature, one of the first to enact such a law, passed a provision requiring a minor girl seeking an abortion to obtain the consent of both parents.[202] The Supreme Court found the statute unconstitutional in two rulings, Bellotti I[203] and Bellotti II,[204] and instituted what became known as the "judicial bypass"[205] requirement.[206]

In a long series of decisions following the Bellotti cases, the Court has elaborated on the dilemma of the minor who seeks to obtain an abortion without first consulting her parents.[207] In these cases, the Court has both recognized the importance of a judicial bypass requirement for "mature" minors, and has held fast to parents' fundamental rights to influence the decisions of "immature" minors.[208] Nowhere, however, has the Court provided guidelines for determining whether or not minors are mature.

In conducting a judicial bypass hearing, the judge must assess whether the minor is sufficiently mature to make her own decision regarding the abortion. Initially, courts held that a minor is entitled to a court order permitting an abortion, if she understands her situation, understands the abortion procedure and its risks, and articulates a desire

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[201] 410 U.S. 113 (1973) (recognizing women's fundamental right to abortion).

[202] Bellotti v. Baird, 428 U.S. 132, 134 (1976).

[203] *Id.*

[204] Bellotti v. Baird, 443 U.S. 622 (1979), reh'g denied.

[205] The judicial bypass is a general rule that, while a state may require parental notification or even parental consent of one or both parents prior to a minor's obtaining an abortion, the minor must be permitted an opportunity to bypass that requirement in a judicial hearing.

[206] In the Bellotti cases, the Court held that a state seeking to require parental consent might do so only if it also provided an additional forum (the so-called "judicial bypass") in which the minor would be permitted to demonstrate either that she was sufficiently mature to make the abortion decision on her own, or that, despite her immaturity, (or perhaps because of it) it was in her best interests to undergo the procedure.

[207] See H.L. v. Matheson, 445 U.S. 959 (1980); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983); Hodgson v. State of Minn., 497 U.S. 417 (1990); Planned Parenthood Assoc. of Kansas City v. Ashcroft, 462 U.S. 476 (1983).

[208] Parents' fundamental right to rear their children in the manner they see fit was recognized in Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

to have an abortion.[209] Subsequent decisions have not elaborated on this language. In fact, the Supreme Court's decisions ignore the issue of how minors are supposed to demonstrate their maturity. Moreover, in the event that a judge finds a minor to be insufficiently mature, the cases require that the judge grant consent for an abortion if it is "found to be in the minor's best interests."[210]

While bypass hearings are largely a "rubber stamp" process,[211] the vague standards permit considerable judicial latitude.[212] Even though courts have spent more than a decade struggling with whether and when a minor is mature enough to consent to an abortion, the bulk of the legal analysis and focus is cast "not in terms of protecting minors, but in recognizing independent rights of parents."[213]

4. Mature Minors and Consent to Sterilization

Despite a plethora of cases which purport to turn on minors' maturity, the case law granting reproductive rights to minors, like the mature minor doctrine generally, rests not on an assessment of maturity, but rather, on a calculus which permits minors autonomy only when the treatment is relatively low risk, or when denying access may cause the minor to suffer permanent harm. The state and federal restrictions on a minor's right to obtain a surgical sterilization provide ample evidence of this standard. In the late 1970s, various disclosures of sterilization abuses--particularly the involuntary sterilization of minor girls who were treated at federally funded health facilities[214]--resulted in the promulgation of federal regulations precluding the use of federal funds for the sterilization of any person under twenty-one years

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[209] Belotti II, 443 U.S. at 643 (1979), reh'g denied. HOLDER, supra note 177, at 288-89. For examples of early judicial bypass cases, see In re Mary Moe, 446 N.E.2d 740 (1983); Orr v. Knowles, 337 N.W.2d 699 (1983).

[210] Belotti II, 443 U.S. at 630. The Court, moreover, instructed, "The judge 'must disregard all parental objections, and other considerations, which are not based exclusively' on that standard." Id.

[211] Hodgson v. State of Minn., 497 U.S. 417, 477 (1990) (Marshall, J., dissenting) (noting that "only an extremely small number of petitions are denied," and that most hearings last less than 15 minutes).

[212] See, e.g., Ex parte: State of Alabama re: In re Anonymous, a minor, 531 So.2d 901, 903 (Ala. 1988) (denying a request for judicial by-pass to a pregnant 12-year-old girl who was in state custody and sought an abortion. Her mother was institutionalized for psychiatric care, her father's whereabouts were unknown, and the judge noted only that, "from court-room observation, child is immature and not able to make competent decision in this matter . . . . As child is only 12 years old and the prognosis for delivery is fair, an abortion is not in the best interest of the minor.").

[213] Belotti v. Baird, 393 F.Supp. 847, 856 (D.Mass. 1975).

[214] See, e.g., Relf v. Weinberger, 372 F.SUPP. 1196 (D.C. 1974), vacated 565 F.2d 722 (D.C. 1977).

of age.[215] Several young women, all of whom were dependent on federal sources for their health care, challenged these regulations. The plaintiffs, all mothers under the age of twenty-one, wanted to be sterilized. Courts rejected their challenge, holding that the limitation was both constitutional and reasonable.[216]

Given that the prevailing age of majority is eighteen, the fact that the sterilization regulations set the minimum age at twenty-one means that at least some of the girls and women affected by the regulations are fully competent to consent to all other medical treatments except sterilization. Thus, the sterilization regulations reflect a belief that prior to age twenty-one, an individual lacks sufficient maturity to make a medical decision which is essentially irreversible. What drives the sterilization rule is a conviction that this particular decision should be made only by those whose maturity and capacity is unquestionable. The sterilization laws are but the most protective example of a general rule that limits the autonomy of young people, barring them from making medical decisions without adult guidance. The laws permitting minors access to emergency care, contraception, and abortion are narrow exceptions to this rule, and are justified by virtue of necessity, not by the actual maturity of minors.[217]

Modern statutory rape laws, therefore, emerge as puzzling exceptions to the legal system's general skepticism about minors' capacity to consent. While the civil law either limits minors' ability to consent to activities which may be risky, or curtails the negative consequences which it anticipates will follow from minors' poor exercise of judgment, the modern application of statutory rape laws focuses on cases of non-consensual sex. Thus, the criminal law seems to suggest that at least some minors are capable of rendering a meaningful consent to sex. Since this perception conflicts not only with the civil law view of minors, but also the entire common law tradition, one would expect to find evidence which demonstrates that minors are uniquely capable of wise decision-making in sexual

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[215] 42 C.F.R. § 50.203 (1992).

[216] Peck v. Califano, 454 F.Supp. 484 (D.Utah 1977); Voe v. Califano, 434 F.Supp. 1058 (D.Conn. 1977). See also California Med. Ass'n. v. Lackner, 177 Cal. Rptr. 188 (Cal. 1981).

[217] The one instance in which the law does grapple with the meaning and implications of a minors' maturity arises when minors refuse treatment. See, e.g., In re E.G., 549 N.E.2d 322 (Ill. 1989), which involved a 17-year-old Jehovah's Witness suffering from leukemia. The court upheld her right to refuse treatment on the basis of deeply-held, family-shared religious convictions. Even though the decision ostensibly deferred to the mature minor's autonomy, by situating its decision in the context of her family's religion, the court tacitly required that the minor act in consonance with her parents' wishes.

encounters. However, a review of the current psycho-social literature on adolescent development, particularly adolescent sexual development, indicates that minor girls are in fact uniquely vulnerable to coercion and exploitation in their sexual decision-making.

III. A CONTEMPORARY UNDERSTANDING OF FEMALE ADOLESCENCE AND SEXUALITY

One way to begin an exploration of girls' vulnerability in sexual decision-making is to revisit the Spur Posse incident.[218] The investigating prosecutors found that, with the exception of the ten-year-old girl whose terror led her to acquiesce to sexual intercourse when her assailant climbed through a bedroom window, the alleged victims had "consented" to sexual intercourse with the gang members. This finding raises a troubling question: Why would a girl consent to sex with a boy who only wanted to score a "point" from her? While the prosecutors did not raise this question, reporters were curious about it, and asked the boys how they managed to lure so many girls into having sex with them. The boys responded that they were particularly good at an activity they called "hooking"--their name for the practice of attracting girls through flattery. The boys described their "hooking" techniques as consisting of approaching a girl and telling her something along the lines of the following: "Oh--I'm in love," or "Let's just cuddle," or "Want to go for a walk?"[219]

No one asked the girls why they consented. Perhaps it was assumed to be obvious--sex is pleasurable, and girls, like boys, engage in sex because it feels good. Yet this analysis is belied by the boys' own descriptions of their behavior or sexual "technique" in these encounters.[220] Moreover, there is considerable research which indicates that girls do not indulge in casual sexual intercourse to appease their

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[218] See supra notes 1 to 34 and accompanying text.

[219] Cunningham, supra note 5, at 254; see also Michele N-K Collison, 'A Sure-Fire Winner Is to Tell Her You Love Her; Women Fall for It All the Time', THE CHRONICLE OF HIGHER EDUC. Nov. 13, 1991, at A1 (discussing a recent study of college-aged men that found most admitted to having used similar lines on women in order to obtain consent. Sample lines included: "You can trust me--I wouldn't hurt you," and "I never met anyone like you before." One student opined, "A sure-fire one is to tell a woman that you love her. Women fall for it all the time.").

[220] See Allen, supra note 6, at 55 (reporting the Spurs' references to sex as "slam, nut, pump, hit"); Id. at 62 ("It kinda gets boring sometimes, you know, just like going over to a girl's house when you don't even care about her, no feelings, and you just throw a couple of pumps and you're done, and you just go back home."); *Id.* at 128 ("Whores you just nut and you leave."); Didion, supra note 5, at 50 ("[I]t's no romance, you know, it's just--wham. You know, three and out.").

sexual desires, and in fact, often report experiencing limited pleasure in their sexual encounters.[221]

The ritual of "hooking," or obtaining a consent to sex through flattery, is but one marker of the complex negotiative process underlying sexual interactions. Boys seek sexual access to girls, and their reputation is enhanced if they succeed in obtaining it.[222] Yet girls consent to sex only in small part, if at all, out of sexual desire. While it is clear that girls trade bodily autonomy, dignity, and reputation[223] for the attention and affection of boys, why they do so, especially under circumstances in which they receive such limited attention and affection as the Spur Posse boys provided, remains uncertain.

To the adult, this trade-off seems foolish at best, and dangerous at worst. To evaluate the legitimacy of the criminal law's determination to permit males to engage in consensual sex with minor females, it is necessary to understand the reasons why girls consent to sex. This understanding requires an exploration of current research on girls' psycho-social and sexual development.

A. Girls' Psycho-Social Development

The publication of psychologist Carol Gilligan's IN A DIFFERENT VOICE,[224] a study of girls' psychological development, sparked the development of a considerable body of research which has led to greater insight into the socialization process by which girls become women. Although some commentators have raised legitimate criticisms of Gilligan's work,[225] it remains clear that, when she focused her research lens on girls, part of what Gilligan revealed was a vast, unknown continent in human understanding. Since its publication in 1982, the book has spawned a veritable cottage industry of academic works in a host of fields.[226]

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[221] See infra notes 291 to 293 and accompanying text.

[222] See supra note 13 and accompanying text (noting that nearly two-thirds of teenagers surveyed believe that a boy who engages in sex increases his reputation, but girls who do so suffer a decline in reputation).

[223] Id.; see also supra notes 11-13 and accompanying text (noting that sexually active girls are often called "sluts," but no such term exists for boys).

[224] CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

[225] FEMINIST JURISPRUDENCE, supra note 19, at 52; Id. at 63 n.2.

[226] Legal literature provides just one example of Gilligan's pervasive impact. See, e.g., FEMINIST JURISPRUDENCE, supra note 19; Kenneth Karst, Woman's Constitution, 1984 DUKE L.J. 447; Patricia Cain, The Voices of Women: Feminist Legal Scholarship, 77 IOWA L. REV. 19 (1991); Pamela Karlan and Daniel Ortiz, In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda, 87 NW. U. L. REV. 858 (1992); Tracy Higgins and Deborah Tolman, Law, Cultural Media[tion], and the Missing Discourse of Desire 33 n.60 (unpublished

The most pervasive finding of the "post-Gilligan" psychologists who have dedicated their research to the study of girls' development is that among girls, adolescence is a time of acute crisis, in which self-esteem, body image, academic confidence, and the willingness to speak out decline precipitously.[227] This result has been observed and measured in a variety of settings.

In 1990, the American Association of University Women (AAUW) surveyed girls and boys, evaluating gender-specific responses to adolescence.[228] In one survey, which explored self-image and perceptions of one's abilities, the AAUW researchers found that among elementary-school-age children, 60% of girls and 69% of boys felt happy with themselves.[229] By high school only 29% of the girls, in contrast with 46% of the boys, reported feelings of high self-esteem.[230] The AAUW Report revealed that although both boys and girls experience difficulty in adolescence, adolescent girls consistently feel worse about themselves.[231] The most precipitous drop came between grade school and junior high.

Considerable evidence links self-esteem to diminished academic performance. The AAUW survey reported that girls' greater

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manuscript, on file with the author); Carrie Menkel-Meadow, Mainstreaming Feminist Legal Theory, 23 PAC. L.J. 1493 (1992); Carrie Menkel-Meadow, Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law, 42 U. MIAMI L. REV. 29 (1987); Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 U.C.L.A. L. REV. 754 (1984).

Ramifications of Gilligan's perceptions are reflected even in modern fiction. See, e.g., Margaret Atwood's CAT'S EYE, which, as a work of fiction, never "cites" Gilligan, but displays a profound understanding of the cruelty and competition of girls' cliques, within which girls both act out their loss of power, and mimic the tension they observe in women's relationships with one another in a patriarchal society; ELIZABETH DEBOLD ET AL, MOTHER DAUGHTER REVOLUTION 43 (1993) (describing and explaining this phenomenon).

[227] WELLESLEY CENTER FOR RESEARCH ON WOMEN, THE AAUW REPORT: HOW SCHOOLS SHORTCHANGE GIRLS (Washington, D.C.: American Ass'n for University Women, 1992) [hereinafter WELLESLEY AAUW REPORT] AT 11-13. SEE ALSO LYN MIKEL BROWN & CAROL GILLIGAN, MEETING AT THE CROSSROADS: WOMEN'S PSYCHOLOGY AND GIRLS' DEVELOPMENT (1992); MARY PIPHER, REVIVING OPEHILA: SAVING THE SELVES OF ADOLESCENT GIRLS (1994).

[228] WELLESLEY AAUW REPORT, Supra Note 227; See Also GREENBERG-LAKE ANALYSIS GROUP, SHORTCHANGING GIRLS, SHORTCHANGING AMERICA: A NATIONWIDE POLL TO ASSESS SELF-ESTEEM, EDUCATIONAL EXPERIENCES, INTEREST IN MATH AND SCIENCE, AND CAREER ASPIRATIONS OF GIRLS AND BOYS AGES 9-15 (Washington, D.C.: American Ass'n of University Women, 1991) [hereinafter GREENBERG-LAKE STUDY].

[229] WELLESLEY AAUW REPORT, supra note 227, at 12.

[230] *Id.*

[231] *Id.* at 11.

academic achievement in grade school begins to reverse itself in early adolescence, because their declining sense of self begins to inhibit their classroom performance.[232] The most commonly cited example of this is girls' math anxiety: "Many girls consider mathematics to be their favorite subject in elementary school, only to lose interest in adolescence--and more important, they come to believe that they are not good at it."[233] Further empirical research reveals a fear of success.[234] One way in which this fear manifests itself is in girls' reports of their professional aspirations at varying ages. While girls often aspire to occupations which carry significant power and authority when they are young, they lower their sights as they progress through adolescence.[235]

Psychologists have attempted to describe the psychological changes which accompany these external markers of distress.[236] Their primary research method consists of extensive on-sight interviews, conducted at varying intervals over long periods of time.[237] The results of their studies have been published in scholarly journals,[238] as well as in the popular press.[239] Although these studies are both numerous and diverse, several consistent themes emerge from them.

First, the literature describes adolescence as a time during which girls confront "the wall"--a barrier created by a patriarchal culture which values women less than men, and which objectifies and commodifies women in sexual or reproductive terms.[240] Girls approach

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[232] *Id.* at 16; see also DEBOLD ET AL., supra note 226, at 10.

[233] DEBOLD ET AL.,., supra note 226, at 8. Additionally, detailed evidence from schools indicates that girls are treated quite differently from boys. Girls are silenced in schools by not being called on as often, and teachers encourage boys more and take them more seriously. Id.

[234] FEMINIST JURISPRUDENCE, supra note 19, at 97 ("There is some evidence that women regard success as inconsistent with femininity and that 'the anticipation of success, especially in interpersonal competitive situations, can be regarded as a mixed blessing if not an outright threat.'") (quoting Martina S. Horner, Toward an Understanding of Achievement-Related Conflicts in Women, THE PSYCHOLOGY OF WOMEN: ONGOING DEBATES 169, 183 (Mary R. Walsh ed., 1987)).

[235] FEMINIST JURISPRUDENCE, supra note 19, at 679.

[236] DEBOLD ET AL.,., supra note 226, at 57-61.

[237] *Id.*

[238] FEMINIST JURISPRUDENCE, supra note 19; DEBOLD ET AL., supra note 226.

[239] GILLIGAN, supra note 224; DEBOLD ET AL.,., supra note 226.

[240] See Carol Gilligan, Teaching Shakespeare's Sister: Notes from the Underground of Female Adolescence, in MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL 6-29 (Carol Gilligan et al. eds., 1990). See also DEBOLD ET AL., supra note 226, at 11 (summarizing this analogy as follows: "To get through the wall, girls have to give up parts of themselves to be safe and accepted within society. Once through the wall, it becomes hard to recognize its structure as anything but 'reality.' . . . [G]irls give up relationships--with

the wall gradually. In childhood, girls typically express themselves with what psychologist Annie Rogers calls " the courage to speak one's mind by telling all one's heart."[241] They speak directly, confidently expressing their thoughts, feelings, and desires.[242] Yet, as girls' bodies begin to change, their self-images change.[243] Perhaps the most significant external manifestation of girls' contact with the wall is their increasing unwillingness to speak their opinions or voice their desires. The phenomenon is psycho-social. Girls equate compliance and cooperation with "niceness," and they perceive that being nice is central to being "feminine."[244]

Aside from diminished self-esteem and a desire to be perceived as "feminine," the reaction to the physical process of becoming a woman also contributes to girls' insecurity. Most girls view the physical changes of adolescence--the complete alteration of the body's shape--not as an empowering experience, but as a loss of control.[245] As they reach puberty, girls become objects of male desire, and the experience of seeing and valuing (or devaluing) themselves through the eyes of others is a traumatic one.[246] Girls are portrayed as legitimate targets of male sexual desire. This is largely evidenced in both advertising and television programming. ournalist Marilyn Duff traced the modern history of this phenomenon, beginning with Hollywood's commercial exploitation of young girls as sexual objects.[247] The 1956 release of Elia Kazan's "Baby Doll," and subsequent movie hits such as "Lolita" in 1962, "Taxi Driver" in 1976, "Pretty Baby" in 1978, and "Manhattan" in 1979 illustrate this phenomenon. Duff comments:

In the ensuing years, films aimed at kids and adults alike have showcased this sexuality of children. . . . But films get plenty of help from other media in exploiting children. . . . This year's fashion showings in Paris scandalized the audience by having very young girl models parade the runway in see-through minis with no underwear.

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themselves and their own knowledge, desires, and needs--to secure relationships as prescribed in patriarchal culture.").

[241] *Id.* at 94 (quoting ANNIE G. ROGERS, THE DEVELOPMENT OF COURAGE IN GIRLS AND WOMEN 43, 30 (1989)).

[242] *Id.*

[243] *Id.*

[244] DEBOLD ET AL., supra note 226, at 53, 93-94; DANA CROWLEY JACK, SILENCING THE SELF: WOMEN AND DEPRESSION (1991); WELLESLEY AAUW REPORT supra note 227, at 12.

[245] DEBOLD ET AL., supra note 226, at 50.

[246] *Id.* at 48 ("Girls are powerless to stop themselves from entering the culture as women, and this experience is deeply traumatic.").

[247] Marilyn Duff, Media Rob Children of Innocence, ST. LOUIS POST-DISPATCH, Dec. 27, 1993, at 13B.

And pre-teen sections of major department stores offer spandex miniskirts, underwear as outerwear, net stockings and bustiers that would warm the heart of the most experienced hooker.[248]

Additionally, Duff cites TV sit-coms, such as "Married . . . With Children," which "features a promiscuous teen daughter as an ongoing 'gag'," and MTV rock videos, which "frequently use children and teens in scenes of violence or sex," as evidence that "[[t]he image of children's innocence is being systematically stamped out in the minds of adults as well as children themselves."[249]

These factors work to jeopardize girls' ability to protect themselves from unwanted physical contact. As boys and girls enter adolescence, playful means of expressing admiration or curiosity evolve into ominous "games" of sexual harassment. Boys stop playing games like "cooties," and begin to engage in brassiere-snapping, "titty twisting," and worse.[250] As one researcher notes:

> Given the kinds of sexual harassment and power plays common in the school playground, it should not surprise us that as she develops her social (gender) identity, a young teenage woman is less likely to experience herself as an active agent with a body that belongs to her, inseparable from herself, fundamental to her very existence, than is a young man of a similar age.[251]

Thus, one of the most insidious aspects of girls' psycho-social development is that they become less certain of their physical

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[248] *Id.*

[249] *Id.*; see also Marion Hume, When Fashion is No Excuse At All, THE INDEPENDENT, May 26, 1993, at 22 (criticizing VOGUE magazine for running a series of photographs of 19-year-old model Kate Moss looking like: "[A] prepubescent child wearing the semi-see-thru sexy underwear of a knowing adult," and comparing the Moss ads to ads featuring more womanly looking models: "The crucial difference is that [those adult-looking models] have the bodies of women, and thus, one could infer, the minds too. Moss might be a smart young businesswoman in control of her destiny, her earnings, and her relationships, but that is not what the pictures show. Instead, they add to the invidious process of robbing children of their innocence.").

[250] One 12-year-old girl recently described an activity that the boys at her school call "pantsing." A boy approaches a girl, usually from behind, and tugs her pants down to her ankles. When performed "successfully," the attack leaves the girl humiliated and paralyzed, unable to pursue her aggressor, or even to walk until she gets her pants up again. Telephone interview with E. (Dec. 1993). See also DEBOLD ET AL., supra note 226, at 50 (noting that well over one-third of school-age girls reported being harassed every single day in school, and 80% reported having been touched, pinched or grabbed).

[251] Annette Lawson, Multiple Fractuers: The Cultural Construction of Teenage Sexuality and Pregnancy, in THE POLITICS OF PREGNANCY 101, 104 (Annette Lawson & Deborah L. Rhode eds., 1993).

boundaries and less able to declare their own limits, at precisely the time at which they begin to explore their own sexuality. The implications of this convergence of bodily maturity and moral dispossession are particularly disturbing because male sexual initiative remains a societal norm.[252]

B. Sex and the Teenage Girl

Several years ago, the federal government determined that the lack of knowledge regarding teenage sexual practices was impeding government efforts to formulate sex-education programs, to devise policies targeted at lowering rates of sexually transmitted diseases (including HIV), and to counter the trend toward teenage motherhood.[253] As a result, the government proposed a multi-million dollar study to survey adolescent sexual practices. However, shortly before the scheduled start-up date, conservative Congressional leaders sharply criticized the study, claiming that it condoned sexual activity among teenagers.[254] Ultimately, the study was cancelled.[255] Thus, understanding teenage sexuality requires researchers to rely upon scattered information, such as surveys, narrow academic studies, and teens' own stories.

1. Statistical Data on Sexual Activity

A dramatic shift in societal norms regarding female sexuality has occurred in the past several decades. Numerous studies confirm that growing numbers of teenage girls are engaging in sexual activity, and more than half have intercourse before their eighteenth birthday.[256] These studies also demonstrate that teenage girls are more likely to be

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[252] See supra notes 186 to 191 and accompanying text; see also NAOMI WOLF, THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN (1991).

[253] Dan Weikel, Dannemeyer Raps Bush on AIDS Stance, L.A. TIMES, Feb. 15, 1992, at A23.

[254] *Id.*

[255] *Id.* Sen. Jesse Helms (R-N.C.) and Rep. William E. Dannemeyer (R-Fullerton, Calif.) "[used] their clout to block federally backed educational programs designed to promote safe sex practices and research into sexual behavior that might contribute to the transmission of AIDS." *Id.*

[256] ALAN GUTTMACHER INSTITUTE, SEX AND AMERICA'S TEENAGERS (1994). 82% percent of all teenagers are sexually experienced. *Id.* Among women aged 15- 19, 53% had had sexual intercourse. Henshaw, supra note 31, at 86. Other sources report even higher incidents of sexual activity: three-quarters of American teens having had sex by the time they reach age 20; of sexually active girls, 61% have had multiple partners, up from 38% in 1971; and among 15-year-olds, one-third of boys and 27% of girls have had sexual intercourse. Gibbs, supra note 13, at 60.

sexually active at younger ages than teens in years past.[257] As sexual activity among adolescents has increased, the statistical variation along gender, class, and race lines[258] has nearly disappeared. Today, teenage girls are almost as likely as teenage boys to be sexually active before marriage,[259] and the gap between whites and minorities is rapidly closing.[260] Evidence from the 1953 Kinsey Report, which indicated that individuals from higher class backgrounds engaged in premarital sex less often and later than individuals from lower class backgrounds, is no longer accurate.[261]

As the number of sexually active teenagers grows, the age at which young people first marry is also increasing.[262] Thus, as sociologist Kristin Luker noted in a recent article,[263] "as the age at first marriage has risen and the age at first intercourse has dropped, teen sexuality has changed."[264] Luker posits that, because most people perceive their relationships as impermanent,[265] teenage sex is inherently based "in pleasure, note procreation, and in short-term relationships rather than as a prelude to marriage."[266] This insight resonates with the Spur Posse portrayal of casual sexual encounters, and explains why the boys did not need to promise marriage to induce consent. It does not, however, reveal anything about why the girls "consented," nor whether they found the sex to be pleasurable.

2. Double-Standards and the Double-Bind in Action

Despite the fact that "a majority of Americans no longer view premarital intercourse as wrong, and the media bombards teens with

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[257] One survey reported that the rate of sexual activity outside of marriage for teenage girls in the 1950s was 38.9%; by the 1970s this had increased to 68.3%. S.L. Hofferth et al., Premarital Sexual Activity Among United States Teenage Women of the Past Three Decades, 19 FAMILY PLANNING PERSPECTIVES 46-53 (1987).

[258] Kristen Luker, Dubious Conceptions; The Controversy Over Teen Pregnancy, THE AMERICAN PROSPECT, Spring 1991, at 73.

[259] *Id.* at 78.

[260] Higgins and Tolman, supra note 226, at 11; Luker, supra note 258, at 75.

[261] Luker, supra note 258, at 78.

[262] *Id.* at 75 ("Since 1970 young women have increasingly postponed marriage without rediscovering the virtues of chastity."). Luker reports that the number of married teens has dropped from 12% in 1970 to 6% in 1984, while the number of sexually active unmarried teens increased from 25% in 1970 to nearly 50% in 1984.

[263] *Id.* at 78.

[264] *Id.*

[265] *Id.* at 79. Luker notes statistics on age at first marriage indicate that, by definition, teenagers engaged in sexual relationships are "too young to 'get serious'." *Id.*

[266] *Id.*

scenes of sexual involvement and innuendo,"[267] remarkably little has changed in the way that society regards sexually-active girls. Ironically, the double-standard by which society encourages male sexuality and stigmatizes female sexuality[268] persists even into an era in which most teenage girls are sexually active.[269] The effect on girls is to surround the issue of sexuality with enormous ambivalence and shame. This is evidenced in two contexts: first, in teenage girls' behavioral resistance to contraceptive use,[270] and second, in the marked absence of any affirmative "discourse of desire" among sexually active teenage girls.[271]

a. Teen Pregnancy and Abortions Rates

The statistics regarding teenage sexual activity might lead some persons to assume that the sexual double-standard is obsolete.[272] Plainly, the availability of effective contraceptive methods and legal abortion has contributed to the emergence of a more permissive norm regarding teenage female heterosexual activity. Yet, rates of teen pregnancies and abortion remain constant.[273] These rates provide ample evidence that girls are having intercourse without contraception even though they do not wish to conceive. This paradox hints at countervailing factors which militate against contraceptive use.

Despite the fact that contraception is indispensable for a female who wants to have intercourse but does not wish to conceive,

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

[268] See supra notes 11, 67 to 69 and accompanying text.

[269] Miriam Miedzian, Boys will be Boys: Breaking the Link Between Masculinity and Violence, TIME, Jan. 1994.

[270] Barbara Bennett, Generations, ST. LOUIS POST-DISPATCH, EVERYDAY MAGAZINE, May 6, 1991, at 4D (noting that many sexually active teenage girls do not use birth control because to do so would be to accept themselves as sexually active and therefore not a "good girl."). See also infra notes 272 to 276 and accompanying text.

[271] See infra notes 288 to 301 and accompanying text.

[272] See supra notes 256 to 261 and accompanying text (discussing increasing sexual activity among teen girls).

[273] Henshaw, supra note 31, at 96 ("Although overall abortion rates have declined slightly in recent years, both abortion rates and birth rates have increased markedly since 1984 among minority women aged 15-30."). Henshaw also reported that while the incidence of sexual intercourse increased from 45% to 53% between 1982 and 1988 among white female teens aged 15-19, the pregnancy rate among those teens decreased; among minority women of that age, the pregnancy rate increased "even though the proportion of sexually active women remained virtually unchanged." Id. at 86.

contraception is simply not considered by teenagers to be a part of "sex."[274] As one commentator notes:

> Sex is often presented as a goal in and of itself, with little discussion of its risks or of responsible contraceptive behavior. . . . Female adolescents remain subject to a double standard that makes spontaneous intercourse seem acceptable but suggests that adequate preparation is evidence of promiscuity.[275]

Contraception has a stigma attached to it. It implies that the girl not only anticipated sex, but was prepared for sex, which, in the language of the double-standard, makes her "easy."[276] Thus, for a sexually active teenage girl, the double-standard produces a double-bind when it comes to contraception.[277] If she does not use contraception, a girl risks conceiving and having to make the painful, costly, and enormously difficult decisions surrounding an unplanned pregnancy; if she is prepared to use contraception, she violates the double-standard, requiring her to play a passive role in spontaneous sexual encounters.[278]

Further, the option of sexual abstinence is not necessarily viable. Girls who resist sex are stigmatized by their peers as "frigid, cocktease, and lesbian."[279] Thus, girls experience a double-bind situation in which "options are reduced to a very few and all of them expose one to penalty, censure or deprivation."[280]

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[274] Fine, supra note 21, at 31.

[275] Rhode, supra note 267, at 316.

[276] DEBOLD ET AL., supra note 226, at 53. A girl or a woman who carries contraception is perceived as having consented to sex. This assumption is so profoundly rooted that a grand jury refused to issue a rape indictment against a man who broke into a woman's house and demanded sex from her at knifepoint. Their reasoning? Defense counsel speculated that because the victim asked the assailant to wear a condom, consent to intercourse could be implied. Ross E. Milloy, Furor Over a Decision Not to Indict in a Rape Case, N.Y. TIMES, Oct 25, 1992, § 1, at 30.

A second grand jury did indict the man, and he was later found guilty of aggravated sexual assault. He was sentenced to 40 years in prison. Rapist Who Agreed to Use Condom Gets 40 Years, N.Y. TIMES, May 15, 1993, § 1, at 6.

[277] For more on the double-bind generally, see Marilyn Frye, The Double-Bind, THE POLITICS OF REALITY (1973).

[278] As a result of this perception, the average sexually active teenage girl has been having intercourse for six months by the time of her first visit to a clinic for contraception. The percentage of teenagers using contraception at first intercourse is less than 50%. Henshaw, supra note 31, at 86.

[279] MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 3 (1983).

[280] *Id.* at 2.

b. Fear and Desire in Teenage Sexuality

Given the combined effects of girls' loss of voice, of the double standard's conscription of girls into a passive role in sexual encounters, and of the association between sex and risks of unwanted pregnancy, it is not surprising that girls seldom articulate positive feelings about sexual desire. Recently, researchers have begun talking to teenage girls about their sexual experiences and have documented a phenomenon they term the "missing discourse of desire."[281] Actually, the discourse is absent on two levels: First, in the messages society conveys regarding girls and sexuality,[282] and second, in the girls' self-reported experiences of sexual pleasure and desire.[283]

The information girls receive about sex is fused with messages of fear and danger. As psychologist Deborah Tolman notes, "Even adults who are willing or able to acknowledge that girls experience sexual feelings often struggle with the fact that desire is dangerous for girls. Full knowledge of their sexual feelings will get girls into situations where they will be vulnerable--to rape or violation, to pregnancy, to AIDS . . . ."[284] This fusion of sex and fear emerges as a key theme in Michelle Fine's study of sex education classes in New York City public school classrooms. That study documents the discourse of victimization and danger that permeates the sex education curriculum.[285]

The dangers associated with sexual activity are real, and they tend to fall unequally on girls.[286] Debold summarizes the interconnection between sex and violence for girls as follows:

> For most girls, their awareness of and exposure to physical danger becomes acute in adolescence (although many girls have learned hard lessons about violence, particularly sexual violence, at a very young age). Of girls who have been sexually abused, the greatest

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[281] Fine, supra note 21; Higgins and Tolman, supra note 226.

[282] See supra note 18.

[283] See infra notes 291 to 296 and accompanying text.

[284] Tolman, supra note 21, at 26.

[285] Fine, supra note 21, at 32. ("To avoid being victimized, females learn to defend themselves against disease, pregnancy, and 'being used'. . . . The language, as well as the questions asked and not asked, represents females as the actual and potential victims of male desire.").

[286] DEBOLD ET AL., supra note 226, at 50 ("As girl's bodies awaken to the powers and pleasures of adult sexual feeling, girls desire to experience something deeply moving, to be deeply moved. But the sexualized images of women around them, the stories of violence and rape, the difference between men's and women's physical power, and the comments and stares of boys and men all come together to make very different sense of the world. . . . Adolescent girls are simply not safe in their bodies, and most of the danger has to do with sex.").

> number were eleven years old when such abuse first occurred. While one in three girls acknowledges an unwanted sexual contact before age 18 with an adult male, three-fourths of that unwanted contact occurs during adolescence. In fact, psychiatrist Judith Herman writes that rape might be thought of as girls' "social rite . . . of initiation into the coercive violence at the foundation of adult society." As many as one-third of all high school and college-age girls are involved in violence in an intimate or dating relationship.[287]

This emphasis on danger, together with society's insistence that girls are "responsible" for maintaining control over sexual interactions by saying "no," by using contraception,[288] and by bearing full responsibility for any pregnancy that results from sexual intercourse,[289] fails to yield an image of "a good and normal" sexually active teenage girl.[290]

As a result, it is not surprising that girls do not speak openly of sexual desire. A girl who embraced those desires would risk being labelled promiscuous. Still, since a large number of girls are sexually active, it is conceivable that in a safe setting, and perhaps by general references, rather than personal illustrations, girls would express sexual desire. However, this is not the case.[291] Instead, girls seem to view pleasure as something which their partners derive from them,[292] or as something that results from their giving pleasure to others.[293]

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[287] *Id.* at 51.

[288] Henderson, Rape, supra note 28.

[289] Interestingly, discussions regarding teen pregnancy refer to girls, rarely, if ever, to boys. See Males, supra note 18.

[290] Tolman, supra note 21, at 8.

[291] Researcher Sharon Thompson began exploring this issue in 1984, and has completed the most comprehensive empirical study of this issue to date. Her works consist of interviews with over 400 girls about their experiences of sexuality, romance, contraception, and pregnancy. Her findings indicate that, despite the fact that the girls were sexually experienced, their descriptions of their experiences did not describe any personal sexual pleasure or sexual desire. Tolman, supra note 21, at 3, 5; Fine, supra note 21, at 36-37.

[292] Id.; Katha Pollitt, Not Just Bad Sex, THE NEW YORKER, 1994, at 220, 224 (discussing Katie Roiphe's referring "with approval [to] a friend who tells off obscene phone callers by informing them that she was her high school's 'blow-job queen.' Not to detract from that achievement, but one wonders at the unexamined equation of sexual service and sexual selfhood. Do campus bad girls still define their prowess by male orgasms rather than their own?").

[293] It seems that "pleasing others often translates into having sex." Perry, supra note 18.

This phenomenon--that girls' pleasure lies in giving pleasure to others--is consistent with the socialization of girls to think of others first, to be peacekeepers, etc. See generally DEBOLD ET AL., supra note 226.

To explore this issue more thoroughly, psychologist Deborah Tolman conducted a series of in-depth interviews with a broad cross-section of sexually active teenage girls.[294] Tolman found that two-thirds of the girls interviewed expressed sexual desire, but fused that desire with fear of the repercussions which sexuality might bring--i.e., diminished reputations, male violence in intimate relationships, pregnancy, and disease.[295] Girls internalize messages of fear, responsibility, and shame so effectively that they seldom report experiencing pleasure in their sexual encounters. As Tolman concludes: "By dousing desire with fear and confusion or simple, 'uncomplicated' denial, silence and dissociation, these girls . . . make individual psychological moves whereby they distance or disconnect themselves from discomfort and danger."[296]

An important tension is inherent in these findings. That tension grows out of an inability to know whether girls simply do not experience sexual desire and pleasure, or rather, that they cannot articulate those experiences. If the former is true, troublesome implications arise regarding the established definition of consensual, non-procreative sex, which is premised on a notion of mutual pleasure. While this uncertainty is unlikely to be resolved, a thriving discourse is emerging about the various other reasons which lead girls to consent to sex. Moreover, even assuming that girls do experience sexual pleasure and desire, these are only two of a multiplicity of factors which induce their consent to sex.

The stories girls tell about the "consensual" sex in which they engage reflect a poignant subtext of hope and pain.[297] Girls express longing for emotional attachment, romance, and respect.[298] At the same time, they suffer enormous insecurity and diminished self-image.[299] These two factors are clearly interrelated--the worse girls feel about themselves, the more they look to males for ratification of the women that they are becoming.[300] The importance of being attractive to males takes on a central role in many girls' lives. This may be evidenced by

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[294] Tolman, supra note 21, at 5-6 (noting that the girls in the study were heterosexual and lesbian, white and of color, middle-class and working class).

[295] *Id.* at 25.

[296] *Id.* at 27.

[297] I thank Jane Larson for her insight in helping me to clarify these ideas.

[298] See DEBOLD ET AL., supra note 226, at 69-75.

[299] *Id.*

[300] *Id.* at 201 ("Girls' feelings of powerlessness trigger their psyches to protect them. With their newfound intellectual capacities, they begin to see themselves as they imagine others see them and internalize what they perceive to be male standards of beauty. Many girls react by looking at and judging themselves in the same way that boys look at and judge them.").

seemingly innocuous behaviors such as increased bathroom time in the morning before school, and wearing make-up and padded bras, but it is also seen in the epidemic of dieting among girls, and the devastating toll taken by the eating disorders that result from distorted body image.[301] Teenage girls recognize that they are, or at least that they should be, objects of desire. The romantic aspirations which girls report reflect these insecurities. Girls want boyfriends, relationships, or somebody who will hold them and tell them that they are wanted.

Girls negotiate access to the fulfillment of these emotional needs by way of sex.[302] A girl who wants males to find her attractive, who wants acceptance and popularity, might reasonably consent to sex with a popular boy, with multiple popular boys, or with any partner who can persuade her that she is attractive and desirable.[303] Males recognize, and occasionally exploit, girls' insecurity. Thus, it is no coincidence that the ubiquitous "pick up" line almost always plays to a female's desire for acceptance.[304]

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[301] One study of pre-teenage girls has revealed that 80% of the 10- and 11-year-old girls surveyed said they diet to lose weight. Jeannine Stein, Why Girls as Young as Nine Fear Fat and Go on Diets to Lost Weight, L.A. TIMES, Oct. 29, 1986. In another study, it was reported that two-thirds of girls aged 13 to 18 were trying to lose weight. J.C. Rosen and J. Cross, Prevalence of Weight Reducing and Weight Gaining in Adolescent Girls and Boys, 26 HEALTH PSYCHOLOGY, 131-47 (1987). Approximately 3% to 8% of women between 13 and 30 have an eating disorder. Carole Sugarman, A Wide Variety of Eating Disorders, WASH. POST, May 3, 1994, at Z16.

[302] See, e.g., Tolman, supra note 21, at 11 (discussing Rochelle, who avoided boys early on, in order to avoid getting a bad reputation, but began to feel she "had to get a boyfriend" during her sophomore year in high school. "I felt as though I had to conform to everything he said. . . . When the sex came . . . I did it without thinking . . . I wish I would have waited. . . . I just did it because, maybe because he wanted it, and I was always like tryin' to please him. . . . he was real mean, mean to me, now that I think about it. I was like kind of stupid, cause like I did everything for him and he just treated me like I was nothing and I just thought I had to stay with him because I needed a boyfriend so bad to make my life complete.").

[303] Evidence of this is seen in the fact that anorexic and bulimic girls, whose illness often prevents them from sustaining a relationship with a single partner, are notoriously sexually promiscuous. One of the symptoms used to diagnose an eating disorder is evidence of promiscuity, as it indicates the patients' obsessive need for others to confirm their attractiveness.

[304] A recent study asked college-aged males about the various ways they persuaded females to engage in intercourse with them. Flattery ranked high among strategies which ranged from plying with alcohol to telling a girl that he loved her ("women fall for it all the time"); to telling a girl that they can be trusted ("You can trust me. I wouldn't hurt you.") and that the girl is unique and special ("I've never met anyone like you before.") Collison, supra note 219.

That desire explains the success of the Spur Posse boys in their game of "hooking" female partners.[305] The Spur Posse boys were the most popular students at Lakewood High School. Even though they described "hooking" as mere banter and may have assumed that the girls knew that they were just joking-- that they just wanted to have intercourse with them in order to earn a point-- the girls wanted the attention of these popular boys. At some level, the girls' self-esteem was contingent on these boys finding them desirable. At another level, each of the girls believed the boys were sincere.[306]

The intercourse which results from these various persuasive techniques is generally not considered rape. In some cases, it might resemble what Robin West has called "giving self," wherein a woman diffuses the danger she perceives in a potentially violent heterosexual encounter by "giving him what he wants."[307] In other cases, a male may commit "sexual fraud," by inducing consent by misrepresenting his intentions.[308]

Even if they defy legal categorization, construing these sexual encounters as anything but scary, painful, shaming, and/or unpleasurable for the minor girls involved requires people to strain their imaginations, and invoke false stereotypes such as the "passive female" who secretly longs for her male partner to overwhelm her.[309] Ultimately, a girl who succumbs to any of these inducements is harmed by the sexual encounter. She is exploited and shamed, has a diminished sense of self and a damaged reputation.[310] And yet, decriminalizing statutory rape eclipses these harms and legitimizes these tactics.

Girls exchange sex for intangible offerings of acceptance and ratification. These bargains seem foolish to adults, who recognize the sentiments expressed in pick-up lines or "hooking" games as ephemeral at best, and at worst, utterly insincere. Yet, girls routinely accept these

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[305] See supra notes 1 to 34 and accompanying text.

[306] A recent national poll provides dramatic evidence of this point: 71% of the girls surveyed reported being in love with their latest sexual partner, while only 45% of the boys said the same. Half of Sexually Active Teens Tell Survey: Wish I'd Waited, CHI. TRIB., May 18, 1994, at N4.

[307] Robin West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 WIS. WOMEN'S L.J. 81, 103 (1987). Note that this language mirrors that used by the victim in Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981).

[308] See Jane E. Larson, Women Understand So Little . . . 93 COLUM.L.REV. 374 (1993).

[309] Henderson, supra note 28, at 65.

[310] See supra notes 282 to 296 and accompanying text.

terms, hoping that sex will bring them the romantic attention which they crave.[311]

The sexual bargains struck by girls are not irrational. They watch the women around them, and observe the message that society promotes and that most women's behavior exemplifies: romantic partnerships with men mark the only official route to self-fulfillment and happiness for women.[312] Nevertheless, these bargains are undeniably bad ones for many girls. In exchange for risking injury to their bodily integrity, their dignity, and their frail sense of self-worth, girls seldom get the emotional support they seek. In fact, the bargain often diminishes them.

A girl's perceived sexual availability is intricately tied to her social status. A girl who is viewed by her peers as a slut will be exiled to the fringes of her peer group.[313] While there is no precise definition of a slut (a gendered term for which there is no male equivalent),[314] the term generally refers to a girl who is sexually accessible to many males, and whose popularity is linked to her sexual accessibility. A girl who is labelled a slut has a "bad reputation," does not merit others' respect, and has an internalized sense of worthlessness which places her at a higher risk not only for pregnancy, but also for a variety of self-destructive behaviors, including becoming a high school drop-out, becoming involved in drugs and crime, and ultimately, being unemployed and dependent on state support as an adult.[315] Obviously, not all promiscuous teenage girls suffer these consequences, but one of the most terrible and confusing aspects of female teenage sexuality is the absence of guidelines that inform girls which behavior will lead to their being ostracized, and which behavior their peers will tolerate.[316]

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[311] Tolman, supra note 21.

[312] Some call this phenomenon the "tyranny of coupledom." For more on the subject, see generally, JUDITH LEVINE, MY ENEMY, MY LOVE: MAN-HATING AND AMBIVALENCE IN WOMEN'S LIVES (1992); STEPHANIE COONTZ, THE WAY WE NEVER WERE (1992); Judith Stacey, The New Family Values Crusaders, THE NATION, July 25, 1994, at 119.

[313] A friend recounted a story of a woman who was a member of her sorority at a large midwestern university. According to rumors, the woman became intoxicated at a fraternity party and had sex that night with as many as 15 of the brothers. The sorority responded to the rumor by shunning the woman and kicking her out of the house. Interview with MaryBeth S., in Chicago, Ill. (Jan. 1994).

[314] Sengupta, supra note 11.

[315] See generally Ruth Colker, An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age and Class, 1991 DUKE L.J. 324 (1991); Luker, supra note 258.

[316] Even for girls who steer clear of the stigma of being labelled a slut, sexual activity may carry some amorphous long-term risks. Consider the interrelation of the AAUW study on girls' diminished academic achievement and girls' desires for

C. Consent as a Non-Sequitur

The implications of these findings are profoundly disturbing in light of the present legal presumption of non-intervention in cases in which girls have "consented" to intercourse. In attempting to reconcile the research about adolescent girls with the modern incarnation of statutory rape laws, it seems that the law plays into adolescent girls' vulnerabilities. Evidence that girls consent to sex for foolish and mistaken reasons (e.g., that sex will earn them male approval and acceptance) should lead to the conclusion that girls lack the capacity for meaningful consent. The new social "norm" of non-abstinence may accurately reflect society's perception that girls are legitimate targets of male sexual desire,[317] but this does not demonstrate that girls are now sexually "liberated." Even if girls can experience, but cannot acknowledge, sexual pleasure and desire, the factors they do acknowledge as inducing their consent to sex should lead to a reconsideration of the definition of "consensual" as it applies to teenage girls.

The need for this reevaluation is vividly demonstrated by examining the divergent accounts of the sexual encounter described in the Michael M. case.[318] Justice Blackmun viewed the couples' interaction as plainly consensual. As evidence, he pointed to "their drinking; their withdrawal from the others of the group; their foreplay,

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romance. See WELLESLEY AAUW REPORT, supra note 227. Girls widely report feeling that being too smart will interfere with their ability to attract a boyfriend. See id. Once involved in a "serious" relationship, girls respond by lowering their professional goals and expectations, and focusing their energy on romance. By tracing the effect of romance on girls' and women's educational career choices, a recent study of college students demonstrates that even girls who enter college intending to pursue a professional career tend to abandon those plans in order to secure a relationship with a man. DOROTHY HOLLAND & MARGARET EISENHART, EDUCATED IN ROMANCE (1990).

[317] See supra note 18 and accompanying text (regarding media's erotic portrayal of girls). See also Perry, supra note 18 (reporting that "sexist attitudes remain a major risk factor for girls," according to Dr. James Garbarino, president of the Erikson Institute for Advanced Study in Child Development. Garbarino added that many boys feel that if a girl is dressed seductively, she has lost the right to say no. Perry adds, "Sex spices everything from rock videos and talk shows to PG-13 movies and fast-food commercials. . . . Having been told repeatedly that they're sex objects, girls become even more subject to the usual teen anxieties about appearance [and many girls become anorexic or bulemic or undergo liposuction or other surgery]." Kristen Gold, of the Ms. Foundation for Women, says, . . . "'It's not, if you study you can do this. It's if you mutilate yourself, you too can look like this. We make their focus pleasing other people and physical beauty.' Pleasing others often translates into having sex.")

[318] Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981).

in which she willingly participated and seems to have encouraged, and the closeness of their ages."[319] Then, Blackmun cited what he believed was her admission of "consent": "I was trying to get up and he hit me back down on the bench and then I just said to myself, 'Forget it,' and I let him do what he wanted to do."[320]

Many commentators take issue with Blackmun's interpretation of the couple's interaction. Lynne Henderson argues that Blackmun's analysis:

> reinterprets [the story] in a way to make what looks like force and nonconsent into a case of male innocence and female responsibility . . . . This is not a forcible rape, despite the fact that the defendant hit the victim in the chin--force--and ignored her no--nonconsent . . . . [Blackmun] transforms what we called "making out" when I was a teenager into 'foreplay,' and, as we all know, 'foreplay' is the term for what you do before you have heterosexual intercourse.[321]

In confining its inquiry to an assessment of whether "consent" was given, modern statutory rape law loses sight of the considerable coercion, violence, and ambivalence in "consensual" teen sex. Even between age-mates in a situation of apparent social equality, power may be so vastly imbalanced that evidence of verbal consent does not reveal the true nature of a teenage sexual encounter.

Modern statutory rape law imposes a binary analysis on the sexual encounter. It classifies intercourse as either consensual sex or rape. However, from the girl's vantage point, her consent may have been so fraught with ambivalence that it was meaningless. This search for evidence of nonconsent (or force) causes the finder of fact to turn away from the story told by the girl in order to evaluate the story from a "neutral" vantage point.

As a result, the legal system never comes to terms with the ambiguity inherent in the sexual choices made by teenage girls. While commentators fault traditional statutory rape law for only defending girls' chastity, they can just as easily fault the current, binary classification for failing to insure that girls freely choose to consent. If girls' autonomy is to be taken seriously,[322] the law must evaluate the sexual decisions they make, and formulate a legal response which enhances the likelihood that those decisions are autonomous ones.

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[319] *Id.* at 484-85.
[320] *Id.* at 485.
[321] Henderson, supra note 28, at 147; Olsen, supra note 45.
[322] See Schulhofer, supra note 30.

IV. RETHINKING STATUTORY RAPE LAW

"What the law owes us is a celebration of our autonomy . . . ."[323]

The question arising from the preceding section is whether the criminal law protects minors from the harms they might suffer upon engaging in "adult" sexual activity. In choosing not to enforce the law in cases of "consensual" sex among minors, the criminal justice system posits that minors engaging in adult activities must do so on adult terms. This contrasts dramatically with both contract and tort law, in which a general presumption that minors lack full legal capacity, coupled with awareness that minors inevitably will engage in adult activities, leads to provisions designed to limit the harm minors might suffer due to their lack of discretion.

Clearly, permitting minors to void their contracts reflects societal views on the nature of commercial transactions, and permitting minors to consent to certain medical treatment reflects societal views on the desirability of that treatment. Similarly, the present construction of statutory rape laws reflects an underlying assumption about the nature of sexual relations. In classifying sexual relations as either consensual or forcible, and then defining as permissible all sexual interactions which are free from evidence of force, the law endorses sexual relations as presumptively positive for girls as well as for women. And yet, evidence shows that girls' sexual encounters, like medical treatments and commercial transactions, are not uniformly positive. On some occasions, a girl may consent to sex which is exploitative, degrading, demeaning, and harmful to her. But the law does not recognize it as rape.

The harm which results from a minor's bad decision in a sexual encounter may be infinitely more damaging to her than a bad business deal. Yet, the law, as presently construed, does not protect minors from the harmful consequences of their attempts at adult sexual behavior.

The failure to craft a legal safety-net for girls may stem from the general difficulty of differentiating permissible sexual encounters from impermissible ones. This is evinced by Antioch College's proposed stage-based system for ascertaining consent in sexual interactions. That system requires initiators of sexual activities to ask for their partner's verbal consent for each act of intimacy, and it was born of an acknowledgement that there is little consensus on what

[323] ESTRICH, supra note 29, at 102.

constitutes consensual sex and what becomes rape.[324] Ironically, the flurry of critical media response to the proposal, generally arguing that it threatens to take all the fun out of sex, provides ample evidence of the entrenchment of the hazy spectrum that separates consensual sex from rape.[325]

One response to the harms girls suffer is to view the sexual encounters as rites of passage. For example, Camille Paglia and Katie Roiphe might argue that women should accept the above incidents of sexual coercion, and let men be men.[326] This response reflects the perverse phenomena of adult women who have become convinced that they can preserve their own sexual liberation only by diminishing the importance or denying the reality of the harms others suffer within that system. However, the girls who consent to exploitive sex suffer real harm, and recognizing their experiences as harmful is only the first step toward crafting a legal remedy which would acknowledge those harms and insofar as possible, prevent their recurrence.

It is possible to view the injuries some girls suffer as civil wrongs, for which they are entitled to compensation. For example, if a boy lies to a girl to procure her consent, he has committed sexual fraud.[327] As such, the girl should have a cause of action, sounding in tort, under which she can sue him. Yet, this may provide a hollow victory if the boy is insolvent. Moreover, the risk of being sued for sexual fraud is marginal, and most likely would not be a significant deterrent. Additionally, the relatively unformed nature of sexual fraud as a cause of action means that, in practice, a plaintiff's ability to recover may turn on her ability to invoke a jury's sympathy. Therefore, the tort may help only those girls who are able to cast themselves as "innocent," and may do little to help a girl who was flirtatious, drunken,

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[324] See Jason Vest, The School That's Put Sex to the Test at Antioch, a Passionate Reaction to Consent Code, WASH. POST, Dec. 3, 1993, at G1; Jennifer Wolff, Sex by the Rules, GLAMOUR MAGAZINE, May 1994, at 256-59, 290.

[325] Margarette Driscoll, Have We Gone Too Far?, THE TIMES, Oct. 24, 1993; Mary Matalin, Stop Whining!, NEWSWEEK, Oct. 25, 1993, at 62 ("This policy is premised on the overhyped problem of campus date rape . . . . Well, get these moody [campus feminists] a prescription of Motrin and water pills, quick."). For a critique of the "pro-sex" feminist movement, see Katha Pollit, Gender Wars, THE NATION, March 21, 1994, at 369. (In discussing pro-sex feminists such as Katie Roiphe, Camille Paglia, and others, Pollit asks, "But really, is it feminism's job to save the penis? Can't men do anything for themselves? . . . Who, exactly, are all those women--call them 'who me?' feminists--who've given up sex (and men!)?").

[326] See generally CAMILLE PAGLIA, SEXUAL PERSONAE: ART AND DECADENCE FROM NEFERTITI TO EMILY DICKINSON (1991); KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS (1993).

[327] Larson, supra at 308.

or promiscuous. More importantly, a girl can invoke a cause of action for sexual fraud only if the boy lied to her. Yet, because of girls' psychosocial vulnerability, the process of successfully negotiating sexual access to girls is often too subtle to be considered "fraud."

The criminal law has been the standard solution to the problem of girls' sexual exploitation, and it avoids many of the shortcomings inherent in the civil law approach. Nevertheless, it raises many more problems of its own. The binary division between consensual sex and rape is a false dichotomy,[328] and, as noted, the application of that dichotomy to minors eclipses devastatingly harmful interactions. Adult men and women know that sex is far more nuanced than the dichotomy implies, yet they hesitate to reconceive the paradigm, or even to articulate what is ambiguous about it. They are afraid that by acknowledging the gray area between fully consensual sex and rape, the zone in which girls experience many of their sexual encounters, they will jeopardize their own access to sexual pleasure. Rather than hold girls hostage in the gray zone, society must acknowledge girls' vulnerability by criminalizing predatory sexual behavior against them. This requires legislatures to remedy the inadequacies of statutory rape laws.

The common law formulation of statutory rape, with its restrictive focus on guarding girls' virginity, did virtually nothing to ensure girls' sexual autonomy.[329] Rather, the law functioned as a tool by which a girl's parents could impose a distance between their daughter and her suitors.

The new generation of statutory rape laws, with complex age-span provisions designed to identify potentially coercive interactions, does little to remedy the problems inherent in the common law. The age-based standards by which the laws identify presumptive coercion represent little more than adult perceptions of power and vulnerability in adolescent relations. Moreover, the attempt to identify differing degrees of sexual coercion by age or family relation seems to endorse the notion that fully consensual intercourse between teenagers is the norm, and is not legally problematic. Thus, law enforcement officials, most of whom are male, become self-appointed judges of whether a girl voluntarily consented to intercourse. Further, the promiscuity defense is alive and well in many jurisdictions.

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[328] Henderson, supra note 28. Henderson posits a spectrum of sexual interactions ranging from rape to pleasurable, mutually-fulfilling sex.

[329] Olsen, supra note 45, at 404 (noting that traditional statutory rape laws were another mechanism of "social control of women, not of men," reinforcing "the sexual stereotypes of men as aggressors and women as passive victims," thus perpetuating the "double standard of sexual morality.").

The legal status quo, coupled with the emerging norm of premarital non-abstinence and the eroticization of girls, renders girls more vulnerable to sexual exploitation than they have been at any other point in history. Girls need the law to secure their sexual autonomy. And statutory rape laws, both as traditionally conceived and as presently construed, miserably fail this task.

The problems inherent in any attempt to reform statutory rape laws to reinforce and enhance girls' autonomy are complicated and elusive. Thus, rather than proposing a solution, this final section attempts to identify and classify those problems, and places them into three categories: the "philosophical" problems, the legal standard setting problems, and the enforcement problems.

A. Philosophical/Definitional Problems

Any attempt to reshape statutory rape laws to properly consider girls' autonomy will court "essentialist" disaster.[330] Moreover, because most girls are sexually active, and the circumstances under which they engage in sex vary, statutory rape laws have the potential to treat those girls as if they were suffering from "false consciousness." Laws which fail to both define coercive and non-coercive sex, and differentiate between them, ignore the fact that girls can identify and experience both pleasure and love in their intimate relationships.

This problem may be an example of the unfortunate, but inevitable, risk of any legal effort to regulate minors' sexuality. As such, one possible solution is a bright-line rule based on age. For example, legislatures could enact modern versions of the common law rule in which no girl under a statutorily determined age could give a valid consent to sex--whether she was promiscuous or not. The risks of error--that a court could convict a man of statutory rape even though the victim freely consented to intercourse--might be preferable to the risk that courts would use the mere evidence of a girl's consent to legitimate virtually all sexually predatory behavior.

A more nuanced approach would work to directly identify forms of sexual coercion. The normative stance of the present law is blunt and inaccurate: age-based presumptions, coupled with the false notion that "experienced" girls can take care of themselves, make a poor proxy for coercion. Lawmakers need to examine the legitimacy of

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[330] Regina Austin, Sapphire Bound!, 1989 WIS.L.REV. 539 (1989); Angela Harris, Race and Essentialism in Feminist Legal Theory, FEMINIST JURISPRUDENCE, supra note 19, at 118-35 (defining essentialism as "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.").

the factors that lead a girl to say "yes" to sex.[331] This process could be facilitated by referencing the rich body of scholarship analyzing power differentials in sexual contexts ranging from forcible rape to seduction.[332]

Currently, the law prohibits intercourse with minors by virtue of age-range, and proximity of family relation. A revised statute could identify additional sexual scenarios as presumptively suspect or even illegal by definition. For example, legislators could enact a rule barring sexual encounters between several males and one minor female. Likewise, the law could require greater scrutiny of evidence that a minor girl consented to sex. For example, courts could require a critical examination of the method by which consent was procured, disallowing forms of behavior deemed coercive.

B. Problems in Setting a Legal Standard

When a legislature crafts a law to both effectuate girls' autonomy and protect them from sexual coercion, it must consider notice issues, privacy issues, and equal protection issues. First, the attempt to revise statutory rape laws to identify coercion raises troublesome due process concerns because of the ambiguity inherent in many sexual encounters. Unless the law carefully delineates impermissible sexual acts, those who have intercourse with minor girls may not know that they are

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[331] In this regard, the work of anthropologist Peggy Reeves Sanday is instructive. Sanday's study of "fraternity" sexual activity reveals a complex set of male behaviors surrounding efforts to obtain a female's consent to intercourse. PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, & PRIVILEGE ON CAMPUS (1990). One particularly disturbing passage reports the following conversation among fraternity brothers discussing "party sex":

"Sometimes a woman has to resist your advances to show how sincere she is. And so, sometimes you've gotta help them along. You know she means no the first time, but the third time she could say no all night and you know she doesn't mean it."

"Yeah, no always means no at the moment, but there might be other ways of . . ."

"Working a yes out?"

"Yeah!"

"Get her out on the dance floor, give her some drinks, talk to her for awhile."

"Agree to something, sign the papers . . ."

"And give her some more drinks!"

"Ply her with alcohol."

Id. These behaviors lie somewhere along the spectrum leading to rape, and, because of lower self-esteem, less alcohol tolerance, insecurity, vulnerability to peer pressure, etc., minor girls may be even more likely than college students to be seduced by them.

[332] See, e.g., Schulhofer, supra note 30; Henderson, supra note 28; West, supra note 307; Larson, supra note 308. Schulhofer, Henderson, West, and Larson have each worked to identify markers along spectrum differentiating rape from intercourse which was freely and fully consented to.

violating it.[333] Second, efforts to criminalize certain instances of sexual interactions with minor girls may jeopardize minors' rights to privacy, which currently permit them to obtain reproductive health care. And while minors' rights to privacy, which permit them access to contraception and abortion, arise not out of deference to minors' maturity, but rather, out of policy determinations favoring access to these medical needs,[334] laws which treat minors as insufficiently mature to consent to sex might easily become ammunition for those wishing to restrict minors' access to reproductive health care.

Moreover, carefully drafted and seriously enforced statutory rape laws might conflict with minors' confidentiality rights in the health care setting. Already a delicate balancing act is required to encourage sexually active minors to take precautions to avoid unwanted pregnancy and disease, without necessarily encouraging them to become sexually active. The threat of criminal sanctions might disrupt this balance by discouraging minors from seeking reproductive health care and counseling. They may fear that their health care providers will report them to the police, and in fact, they may be right. Health care providers have broad access to information regarding minors' sexual activity. Thus, the law must clarify the extent to which that information will be kept confidential, and when, if ever, a health care provider should report possible violations of statutory rape laws to state officials.[335]

Finally, there is the question of gender-specific laws. While the Supreme Court, in Michael M.,[336] upheld a gender-specific statutory rape law against an equal protection challenge, most states' laws are gender-neutral. This makes it difficult to determine victim and perpetrator, especially in cases involving two teenagers, because they will not necessarily follow from gender. Instead, the law requires that a judge pay close attention to the context of the sexual encounter in order to discern the potential for vulnerability and coercion. A judge who has

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[333] See Kolender v. Lawson, 461 U.S. 352, 357 (1983) (explaining that the Constitution "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). See also, Papachristou v. Jacksonville, 405 U.S. 156 (1972); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Constr. Co., 269 U.S. 385 (1926).

[334] See supra notes 177 to 217 and accompanying text.

[335] Presently, Planned Parenthood and other clinics serving teens generally do not notify the criminal justice system of statutory rape law violations. For example, when a 12-year-old girl comes to a clinic seeking contraception, and reports that her current partner is 20 years old, the providers treat this information as confidential. See supra note 200 and accompanying text.

[336] 450 U.S. 464 (1981).

difficulty empathizing with the perspective of a fourteen-year-old girl, for example, may find it hard to distinguish the victim from the perpetrator, and may therefore prefer to view both parties as accomplices, or simply refuse to apply the law.[337] The principal arguments against gender-specific laws are that they are archaic, and that they unfairly stigmatize girls.[338] A variation of this argument perceives boys as having been socialized to pursue sex in a predatory and competitive manner. Accordingly, the law should be sensitive to this socialization. Even if coercive male initiative is wrong, it is ironic, if not unfair, to punish boys with criminal convictions for doing what society, the media, their parents--in short, all the forces in their universe--have taught them to do. This insight does not vitiate the criminal nature of the act of coercing sex from girls, but it compels a broader view of the changes needed to promote the autonomy and safety of both boys and girls.

C. Enforcement and Enforceability Problems

Inherent in each of the above issues are questions about the enforcement of statutory rape laws. Given the contrast between the law in theory and the law in practice, it is irresponsible to posit legal change without identifying the likely beneficiaries and victims of that change. This inquiry raises the questions of who will invoke statutory rape laws, and to whom the laws will apply.

Professor Fran Olsen concluded that, under the common law formulation of statutory rape, girls were powerless to stop their parents from pursuing statutory rape prosecutions.[339] As a remedy, she suggested that girls retain a power of "voidable consent," whereby only girls can choose to bring charges for statutory rape, and they can do so

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[337] A slight variation of this problem has been documented by Ann Cuda, counsel for Chicago NOW, who completed a 1992 study of sexual violence crimes in the Cook County criminal justice system. Her study contrasts grand jury indictments in sexual assault reports (64%) with findings of probable cause in preliminary hearings (28%), documenting a disturbing pattern of "no cause" dismissals in preliminary hearing cases. She notes that the high rates of dismissal in preliminary hearings may reflect the fact that the states' attorneys are disinclined to prosecute cases which are difficult to win. Therefore, the theory goes, the states attorneys elect to take the more challenging cases to preliminary hearing, rather than to the grand jury, knowing the judge will likely dismiss the charges. Most troublesome is the fact that these "difficult cases" dismissed by the judge are disproportionately those in which the victims are young, minority women and girls. Interview with Ann Cuda, in Chicago, IL. (January 1994).

[338] See Olsen, supra note 45.

[339] *Id.* at 404.

even if they consented to intercourse.[340] While this approach mirrors the common law tradition of contract and has the advantage of empowering girls (or at least of putting their would-be "suitors" on notice), it is problematic. As noted, the criminal law requires that persons be put on notice about what activities are criminal.[341] A law that permits a girl to determine, after the fact, whether an instance of sexual intercourse was criminal, fails to define the scope of the criminal act, except insofar as it puts on notice anyone who would engage in sex with a minor that the act may later be deemed a crime.

More importantly, even if the law was constitutional, those same factors which impair girls' autonomy in sexual decision-making impede their ability seek legal redress for the wrongs they have suffered. The typical minor victim's response to rape is shame and self-doubt, and a reluctance to speak to anyone about it. If the typical victim of statutory rape is a girl who consented to intercourse with a male who later made her feel inadequate by either hurting or rejecting her, it seems unlikely that she would have the self-confidence to tell the police. If the point of revising statutory rape laws is to take into account girls' vulnerability, placing the laws' enforcement on the girls' shoulders makes little sense.[342]

Conversely, statutory rape laws could be drafted to permit the victims the right to prevent criminal charges from being filed. This would permit parents and other authority figures to seek criminal sanctions, but would give the victim the power to prevent retaliatory prosecutions. However, depending on her relationship with her parents, she may feel unable to challenge their determination to press charges. It also allows the defendant the opportunity to pressure the girl into dropping the charges.[343] Nevertheless, it recognizes the girl's

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[340] *Id.* at 408.

[341] See supra note 333 and accompanying text.

[342] At the same time, it is important to consider the possibility of revenge-based prosecutions. A law permitting the victim to press charges at her discretion must determine a method for discerning the veracity of the claimed injury. Still, there is little reason to believe that girls will be more likely to fabricate statutory rape crimes if they alone are given this discretion than they are under the present system. The act of coming forward and acknowledging that one is a victim of statutory rape would hardly provide an easy way for a girl to "save face" with her angry parents. More likely, it would entail a time-consuming public disclosure of a humiliating event, and would subject her to the critical scrutiny of her friends and family.

[343] Additionally, it is somewhat reminiscent of the situation in domestic violence cases, wherein the victim often refuses to cooperate in the prosecution of her batterer. This occurs in large part because the victim perceives herself as emotionally, as well as financially, dependent upon the batterer. It has led several jurisdictions to adopt "mandatory arrest" laws which require arrests whenever police find evidence of

moral agency, and empowers her, rather than treat her as the object of a crime.

The second enforcement issue regarding the scope of these laws relates not only to the question of who retains power to press charges, but also to the issue of judicial sensitivity. If statutory rape laws require judges to evaluate cases for evidence of coercion, rather than apply bright-line rules, then judges must be acutely aware of the pressures that coerce girls into consenting to sex. These pressures are obvious in some cases, but not all. For instance, Michael M. was reviewed by several courts, and none of the judges recognized that the defendant used force to procure sex.[344] This is cause for concern. To the extent that the law is open-ended, judges evaluate cases by relying on their own sense of a victim's morality and blameworthiness.[345] This may be an argument in favor of laws which specifically name presumptively coercive sexual encounters.

V. CONCLUSION

No legal solution will eliminate the risks inherent in sexual activity and permit girls to "come of age" safely. Psychologists, sociologists, sex educators, and children's advocates are in better positions than lawyers to understand and recommend solutions to the problems of girls' vulnerability and the imbalance of power in sexual encounters. Yet, for the foreseeable future, the legal system will have to provide remedies in cases involving coercive sexual encounters with girls. As a result, the law must carefully analyze these sexual interchanges. The law of criminal sexual assault must have as its goal the promotion of sexual autonomy.[346] To preserve girls' sexual autonomy, the law cannot privilege consent obtained through coercion and a girl's naivete. Thus, the deceptively facile determination that a girl verbally consented to a sexual encounter is only a starting point for inquiring into whether the encounter was, in fact, consensual. By expanding its inquiry into these issues, the criminal justice system will begin to fulfill its unique and essential role in creating a safer world for girls to grow up in.

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violence in responding to a domestic call for help. See FEMINIST JURISPRUDENCE, supra note 19.

[344] Michael M. v. Superior Court of Sonoma County, 601 P.2d 572 (Cal. 1979), aff'd, 450 U.S. 464 (1981).

[345] See LAFREE, supra note 39.

[346] Schulhofer, supra note 30.