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The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload

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**THE INTIMACY DISCOUNT:
PROSECUTORIAL DISCRETION, PRIVACY, AND EQUALITY
IN THE STATUTORY RAPE CASELOAD**

Kay L. Levine *

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INTRODUCTION

Conventional wisdom suggests that the legislature passes new criminal statutes to allow the state to punish offensive or dangerous behavior. But beyond this instrumental objective lurks a symbolic crusade:¹ the criminal law signals what moral and behavioral standards are generally expected and reminds us that the state is prepared to impose penalties for deviance. To produce the broadest impact on behavior and to send the strongest message to the community, the law must incorporate sweeping prohibitions that few are prepared to enforce in a literal fashion. The likelihood of differential enforcement thus produces concern about disparate treatment. Criminal justice actors (including police, prosecutors, judges, and juries) face specific cases with great variation; the general rules drafted by legislatures provide only initial guidelines for how these cases should be handled.

With those concerns in mind, legal scholars and social scientists have paid particular attention to discretionary judgments made by prosecutors, elected or appointed officials whose charging and plea bargaining decisions often are made behind closed doors and remain insulated from legislative or judicial oversight.² Moreover, with plea bargaining largely replacing posttrial conviction and sentencing as the means by which the criminal justice system takes jurisdiction over the lives of offenders, the reach of prosecutorial power to dictate the outcome of cases has become particularly salient.³ Studies undertaken in recent decades have identified various structural factors that correlate with particular approaches to filing and plea bargaining—factors that include the size of the jurisdiction, the resources available, and the political bent of the elected district attorney.⁴ Other scholars have sought to pinpoint case-based variables that might account for differential treatment, including the defendant's prior record, the level of violence involved, and the existence of a

¹ JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* 11 (2d ed. 1986); see also KAI T. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 187 (1966).

² See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 12–13 (1969).

³ See, e.g., Frank J. Remington, *The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices*, in *DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* 73, 75 (Lloyd E. Ohlin & Frank J. Remington eds., 1993); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2002).

⁴ See, e.g., JOAN E. JACOBY, *THE PROSECUTOR'S CHARGING DECISION: A POLICY PERSPECTIVE* 1 (1977); PAMELA J. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* 101–05 (1978); Leonard R. Mellon, Joan E. Jacoby & Marion A. Brewer, *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 62 (1981).

prior relationship between the defendant and the victim, otherwise known as intimacy.⁵ It is this final variable—intimacy—that forms the core of my investigation here.

According to Donald Black, one can predict and explain the outcome of legal proceedings by gauging the relational distance between the parties involved in a dispute; as intimacy between the parties grows, the likelihood diminishes that law will treat the dispute as serious.⁶ Law, in essence, “decreases at the extremes of intimacy.”⁷ Most prior work on intimacy sought to prove this thesis by quantitatively assessing the effect of an intimate versus stranger relationship on case outcomes or dispositions generally,⁸ with most scholars concluding that Black’s theory holds true: intimacy tends to benefit the defendant, at least for some crimes and at some stages of the criminal process.⁹

This Article takes a somewhat different approach to Black’s theory of relational distance, weaving together the literatures on prosecutorial discretion and the role of intimacy to explore *how* the beneficial effect of intimacy comes to pass. It addresses the various ways in which prosecutors understand, characterize, and construct intimacy and then use those constructions to guide

⁵ W. BOYD LITRELL, BUREAUCRATIC JUSTICE: POLICE, PROSECUTORS, AND PLEA BARGAINING 129–41 (1979); VERA INST. OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY’S COURTS 133 (rev. ed. 1981); see also David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 259–60 (1965).

⁶ DONALD BLACK, *THE BEHAVIOR OF LAW* 44 (1976).

⁷ *Id.*

⁸ E.g., Myra Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking Over Time*, 38 L. & SOC’Y REV. 105, 105 (2004). See generally HENRY P. LUNDGAARDE, *MURDER IN SPACE CITY: A CULTURAL ANALYSIS OF HOUSTON HOMICIDE PATTERNS* (1977); JANICE JOANNE PALMER, *SENTENCING IN THE CONTEXT OF DOMESTIC VIOLENCE: A COMPARATIVE ANALYSIS BETWEEN DISPOSITIONS IN DOMESTIC VERSUS NON-DOMESTIC ASSAULT CASES* 11–12 (1999); Kathleen J. Ferraro & Tascha Boychuk, *The Court’s Response to Interpersonal Violence: A Comparison of Intimate and Nonintimate Assault*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 209 (Eve S. Buzawa & Carl G. Buzawa eds., 1992); Elizabeth Rapaport, *The Death Penalty and the Domestic Discount*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 224 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

⁹ E.g., Kenneth Adams, *The Effect of Evidentiary Factors on Charge Reduction*, 11 J. CRIM. JUST. 525, 535 (1983); Dawson, *supra* note 8, at 105; William B. Waegel, *Case Routinization in Investigative Police Work*, 28 SOC. PROBS. 263, 270 (1981); Kristen M. Williams, *The Effects of Victim Characteristics on the Disposition of Violent Crimes*, in CRIMINAL JUSTICE AND THE VICTIM 177, 181 (William McDonald ed., 1976). But see Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcomes*, 28 CRIMINOLOGY 451, 468 (1990); Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 670 (2001).

filing decisions. In contrast to studies that employ quantitative techniques to gauge the relevance of intimacy in charging decisions, this work evaluates prosecutorial perceptions and behavior by analyzing qualitative evidence derived from interviews with deputy district attorneys. It focuses exclusively on those prosecutors currently or recently employed in California's specialized statutory rape units, as that assignment requires a prosecutor to parse the minute details of defendant-victim relationships in order to tailor charging documents to individualized situations. By illuminating how prosecutors think about and control legally relevant notions of intimacy, this Article aims to supplement the findings of quantitative scholars and to add nuance and texture to our current understanding of how intimacy matters in criminal justice proceedings. It also attempts to shed light on the ways prosecutorial discretion works to control the reach of controversial criminal laws.

Prosecutorial understanding and construction of intimacy implicates both collective and individual assessments about offender behavior. Data from the statutory rape study reveal that county prosecutors have collaboratively developed an informal set of norms to guide case handling in their respective jurisdictions. This body of norms I call the *predator-peer distinction*, as it sets forth guidelines for distinguishing between serious (exploitative) and nonserious (intimate) statutory rape offenders. Yet the collective understanding of what makes an intimate or exploitative statutory rape does not merely constitute a hazy backdrop to daily case management practices; prosecutors across the state regularly invoke its tenets when they make decisions about how to handle a case. Offenders identified as exploitative predators suffer harsh treatment early and often; those regarded as peers receive leniency and quick dispositions. Classification thus has an enormous impact on case outcome.

The principal identifying feature of the "peer" cases is the existence of an intimate relationship between the defendant and the victim. But not just any form of intimacy will do. Preexisting friendship and even sexual intimacy, traits that other scholars have used to code intimacy in criminal cases,¹⁰ are insufficient to trigger the discount that accompanies the "peer" label. This is because every case in the statutory rape caseload involves some level of acquaintance and sexual involvement.¹¹ Prosecutors instead assess intimacy in terms of the quality and duration of the relationship that existed prior to the

¹⁰ See, e.g., Dawson, *supra* note 8, at 105.

¹¹ The statutory rape caseload does not include forcible sex crimes of any kind.

onset of sexual activity; they look for signs of commitment, family support, and marriage potential.

This construction of peer status conflates two distinct notions of intimacy: intimacy-as-privacy and intimacy-as-equality. Under the former, the criminal law should not intrude or punish harshly because these are private relationships, outside the bounds of the law's concern. Under the latter paradigm, the criminal law should not intrude or punish harshly because the relationship poses no real threat of the harm to the participants. Prosecutors following the intimacy-as-privacy model focus on the permanence of the relationship, the potential for marriage, and the financial responsibility demonstrated by the (male) defendant. The intimacy-as-equality notion suggests that discounts should be given on the basis of the victim's continued education, the teen's access to the adult's financial resources, or other signals of substantive equality in the relationship.

Yet these two paradigms do not share the spotlight equally; among my respondents the privacy model appears dominant. For some prosecutors it forms the initial threshold for leniency consideration, such that a defendant must establish his commitment to the victim before the relationship will be scrutinized for signs of equality. Other prosecutors look no further for evidence of nonexploitation once their commitment concerns are satisfied. I argue that privileging the intimacy-as-privacy paradigm leads to two troubling trends, as men who pursue sex inside the confines of committed relationships are considered less inherently criminal than those whose sexual activities do not express long-term romance. In taking this approach, prosecutors may be ignoring harms that can occur inside the context of relationships, but they also may be reinforcing (subtly or not so subtly) outmoded relationship norms by refusing to acknowledge the possibility of non-exploitative sex outside of commitment. To correct for this imbalance, prosecutors should acknowledge that exploitation and relationship status are not inescapably intertwined. Nonexploitative sex can occur in nonrelationship contexts, and relationships can be the site of harm. In short, I support a shift in emphasis to the intimacy-as-equality paradigm, such that factors of nonexploitation, rather than outward signs of traditional commitment, justify grants of leniency.

Looking beyond the mechanics, I further contend that the intimacy discount poses serious consequences for the criminal law. Because the intimacy discount results in the quick removal of nonserious cases from the dockets, the full reach of what some consider a controversial law remains hidden from

public and judicial view. In essence, discounting for intimacy in a weak prosecution ensures that the statutory rape law itself will never come under fire for having authorized the prosecution in the first place.

This Article proceeds as follows. It begins in Part I by presenting the structural and case-based factors that scholars have identified as relevant to prosecutorial decision-making in the United States. Part II considers the existing social science research documenting the relationship between intimacy and criminal justice treatment. Part III explains the empirical study of California prosecutors on which this Article's data and conclusions are based. After introducing California's statutory rape prosecution program in Part IV, the Article describes in Part V how the program's underlying rationale led to the development and deployment of prosecutorial assessments of intimacy and exploitation in the statutory rape caseload. Part VI describes prosecutorial motivations behind the intimacy discount, while Part VII concludes by reflecting on the implications of the intimacy discount, both for the populations it affects and for the longevity of a controversial criminal law.

I. PROSECUTORIAL POWER TO DETERMINE CRIMINAL CHARGES

Enforcement of a criminal law begins with the terms of the criminal statute. Those terms are then adjusted, given meaning, and take effect through a series of filters, all of which fall under the heading of discretion. Various criminal justice actors—police, prosecutors, judges, and juries—have the ability to refine the scope of the formal law through their actions and omissions, and scholars have investigated the myriad uses of discretion in the criminal justice system for many decades.¹² Here, I focus exclusively on the discretionary practices of prosecutors, which have become increasingly salient in light of legislative constraints on the decision-making abilities of other court actors.

The first filter exercised by prosecutors operates at the *macro* level of discretion: the ability of the state, through rhetoric and resources, to define the purpose of the statute and the harm it seeks to prevent.¹³ The macro level of discretion forms in the prosecutorial community collective understandings of the distinctions between, and the appropriate responses to, "real" and

¹² See, e.g., DAVIS, *supra* note 2, at 3–4; Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 543 (1960); Remington, *supra* note 3, at 76; Waegel, *supra* note 9, at 263.

¹³ Kay Leslie Levine, *Prosecution, Politics and Pregnancy: Enforcing Statutory Rape in California* 213 (Dec. 2003) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

"technical" crimes.¹⁴ The second filter implicates *micro* levels of discretion,¹⁵ a diffuse grouping that encompasses office policy, resource allocation, and the multitude of decisions prosecutors must make in each case against the backdrop of discretion exercised by other criminal justice actors.¹⁶ Prosecutors' discretionary decisions thus simultaneously take account of and reflect statewide, office-wide, or personal objectives, the resources available, and the precise mixture of compassion and severity deemed suitable for the particular offender.

In the years since the American Bar Foundation (ABF) first documented that prosecutors typically assess both case facts and office resources in order to achieve a substantively just outcome in each case,¹⁷ scholars have sought to illuminate how this balance between severity and compassion is struck. The ABF study spawned two principal accounts of the sources of prosecutorial discretion: structural factors (which consider the county or the office as the unit of analysis) and individual factors (which take the case as the unit of analysis).¹⁸ Notably, both strands of this work have taken place largely in a politico-legal environment that prioritizes uniformity and procedural justice and seeks to limit, or even to eliminate, discretion by establishing mandatory minimum sentencing laws, determinate sentencing schemes, mandatory arrest policies, and the like.¹⁹ Additionally, although progress was made in the 1960s toward clarification of the substantive criminal law to reduce ambiguity in the

¹⁴ VERA INST. OF JUSTICE, *supra* note 5, at xiii. For a discussion of this phenomenon in the police community, see Waegel, *supra* note 9, at 263.

¹⁵ Levine, *supra* note 13, at 214.

¹⁶ Previous research about prosecutorial discretion focused almost exclusively on what I have termed the *micro* level of decision making by individual prosecutors and individual offices. *Id.* In my dissertation, I explore in more detail the significance of the *macro* level of discretion. *Id.* at 217-41.

¹⁷ See FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 3-8 (1970).

¹⁸ Many additional works have exposed the dangers posed by prosecutorial discretion, warning that hidden, unprincipled decision making fosters discrimination against vulnerable populations and vests too much power in officials who have little or no accountability to the public. DAVIS, *supra* note 2, at 188-91; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522-23 (1981).

¹⁹ It appears that this trend was (at least in part) the wholly unintentional result of the publication of the ABF studies. After policymakers read the reports of discretion documented by the ABF researchers, they ignored the advice put forth in the studies (to improve documentation of discretionary decisions and to force the exercise of discretion out into the open) and instead adopted a contrary approach. They enacted laws that both "eliminate[d] discretion where it [was] most visible and surreptitiously fostered discretion in invisible settings." Remington, *supra* note 3, at 96. *But see* Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 175-76 (1987).

law's mandates,²⁰ escalating fears about crime have led to the proliferation of new criminal statutes, resulting in a complex network of laws that duplicate, overlap, and conflict with each other.²¹ Hence, despite efforts by legislators to impose constraints on decision making and to improve the clarity of the formal law, researchers have discovered that discretion remains alive and well in the criminal justice system. It simply has shifted from the courtrooms to the backrooms, as prosecutors strive to moderate the effects of mandatory policies they view as inappropriately harsh and to identify among competing alternatives the particular statute most suited to any given factual situation.

A. *The Importance of Structural Factors*

Much of the research in the past thirty years has identified those structural factors—on an office or jurisdictional level—that foster prosecutorial inconsistency, leniency, or willingness to plea bargain cases. Almost every aspect of the prosecutor's office, and of the criminal justice system in which she works, has been thrown into the mix.

Importance has been attached to (1) the absence of a law and order mentality among noncareer prosecutors; (2) unpredictability based on incomplete or fragmented information; (3) perceived inconsistency between the law's requirements and common sense notions of justice; (4) the absence of clear office standards for filing; and (5) uncertainty regarding the impact of criminal prosecutions on crime rates.²² The personnel organization in the prosecutors' office, the relationship between the prosecution and the defense bar (particularly the public defense bar), and the role of the judiciary in making things happen (such as twisting some arms during plea negotiations) have also

²⁰ In the wake of the ABF reports, various criminal justice scholars called upon legislatures to clarify the terms of the substantive criminal law as a way to reduce prosecutorial and judicial discretion. For example, Remington and Rosenblum wrote:

Where the substantive law is ambiguous there is an opportunity, indeed a necessity, for the exercise of discretion by enforcement agencies and courts as to what conduct ought to be subjected to the criminal process. . . . If the goal is legislative pre-eminence in the decision as to what conduct is criminal, then there is a need to devise ways of minimizing ambiguity in legislative formulations.

Frank J. Remington & Victor G. Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L. REV. 481, 485.

²¹ Stuntz, *supra* note 3, at 518-19.

²² Lief Hastings Carter, *The Limits of Order: Uncertainty and Adaptation in a District Attorney's Office* 18-28 (Sept. 19, 1972) (unpublished Ph.D. dissertation in Political Science, University of California, Berkeley) (on file with Doe Library, University of California, Berkeley).

been identified as salient factors,²³ along with the size of the caseload handled by the office and the prosecutors' trust in the local police officers' abilities to prescreen cases.²⁴ Other traits scholars have considered significant include the urban, suburban, or rural character of the jurisdiction (which generally correlates with the crime rate), the funding received by the prosecutor's office (which generally affects allocation of resources), and the socioeconomic traits and value systems of the underlying community (which generally shape public opinion and therefore affect prosecutorial priorities).²⁵

The importance of structural factors was recently reinforced by legal scholars Ron Wright and Marc Miller.²⁶ After examining the aggressive pre-filing screening policy employed by the New Orleans District Attorney's Office, Wright and Miller argue that such policies are the key to reduced discretion in other phases of case management.²⁷ For these authors, prosecutors' ability and willingness to scrutinize police reports *before* they become case files is the safest and swiftest way to ensure fair treatment of defendants' and states' interests in the courtroom.²⁸

B. The Importance of Case-Based Factors

The second strand of discretion scholarship, using the individual criminal case as its unit of analysis, has identified case-based variables that affect case outcome, presumably by distinguishing the "serious" crimes (those prosecutors pursue vigorously) from the "non-serious" (those prosecutors treat as trivial). For example, researchers from the Vera Institute of Justice found that differential treatment among felony arrestees in New York City was largely due to significant disparities in case facts and criminal records, rather than to inefficiency or political favoritism in the prosecutor's office.²⁹ The Vera researchers observed that when New York City prosecutors used case facts and

²³ UTZ, *supra* note 4, at xiii-xiv.

²⁴ JACOBY, *supra* note 4, at 2, 4; Mellon, Jacoby & Brewer, *supra* note 4, at 60-65; see also Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1443 (2004).

²⁵ See, e.g., JACOBY, *supra* note 4, at 1; Mellon, Jacoby & Brewer, *supra* note 4, at 52-53. On the importance of public opinion to prosecutorial strategies, see Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 335 (1990). Worden argues that the chief prosecutor's understanding of the public's perception of the crime problem in the jurisdiction affects the frequency of plea bargaining in his office. *Id.*

²⁶ Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 117 (2003).

²⁷ *Id.*

²⁸ *Id.*

²⁹ VERA INST. OF JUSTICE, *supra* note 5, at 19-20.

criminal background to distinguish between "real" crimes (those that occur between strangers) and "technical" crimes (those that occur between acquaintances or relatives) it was part of a larger effort to assess the overall seriousness of the crime and the actual harm suffered by the victim.³⁰

The creation of typologies is not a phenomenon peculiar to New York City. Prosecutors in other jurisdictions have been shown to engage in "principled charging" strategies to affix the proper crime label to the situation and to the desired punishment, using common sense notions to assess the facts of the case, the defendant's character, and the purposes of punishment.³¹ Rather than criticizing prosecutors for this differential treatment, some researchers conclude that principled charging "appear[s] to be a reflection of the system's effort to carry out the *intent* of the law—as . . . participants perceive it—though not necessarily the letter of the law."³²

Sociologists of law challenge the supposed neutrality or benefit of these screening practices, casting them instead as mechanisms of social control. Scholars working in this tradition argue that criminal justice officials, especially police and prosecutors, develop certain expectations about the "true" nature of an offense based on the characteristics of the persons involved in its commission³³ and then use those expectations to justify their filing decisions. Neither are these expectations neutral; they are influenced by community attitudes and concerns.³⁴ As Dawson astutely observes, criminal justice

³⁰ *Id.*

³¹ See, e.g., LITRELL, *supra* note 5 (New Jersey county prosecutors); UTZ, *supra* note 4 (California county prosecutors); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 261-72 (1980) (federal prosecutors); O'Neill, *supra* note 24 (federal prosecutors).

³² VERA INST. OF JUSTICE, *supra* note 5, at xxv.

³³ HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE*, 157-59 (1963); BLACK, *supra* note 6, at 15-16; Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 L. & SOC'Y REV. 531, 532 (1997); Sudnow, *supra* note 5, at 256-64.

³⁴ Frohmann, *supra* note 33, at 535-36; see also DOUGLAS W. MAYNARD, *INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION* 119-39 (1984); Ronald A. Farrell & Victoria L. Swigert, *Adjudication in Homicide: An Interpretive Analysis of the Effects of Defendant and Victim Social Characteristics*, 23 J. RES. CRIME & DELINQ. 349, 349-69 (1986). James Vorenberg argues that prosecutors exercise the least discretion "over those crimes that most frighten, outrage, or intrigue the public . . . particularly when the circumstances make the crime unusually heinous." Vorenberg, *supra* note 18, at 1526. As the heinousness of the crime decreases, public attention wanes, and prosecutors have more leeway in making case management decisions. See also Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 11-12 (1971) (arguing that where a public consensus about full enforcement is lacking, as in morality-based offenses, prosecutors exercise significant discretion). Note that the prosecutors studied by the Vera Institute regularly made predictions about the ability of judges, juries, and probation officers to understand the

officials in furtherance of the social control agenda may thus invoke "stereotypes or common sense assumptions about crime and criminals that lead them to focus on some offenses and offenders more than others."³⁵ In short, distinctions between crimes and criminals are not innate, but rather result from internal (personal and office-wide) and external (community) prioritization of certain types of harm. "Real" and "technical" crimes are creatures of prosecutorial and community construction.

II. THE INTIMACY EFFECT IN CRIMINAL CASE PROCESSING

As criminal justice scholars have dissected the prosecutorial calculus used to distinguish "real" from "technical" crimes, one factor that has emerged as salient is the existence of a preexisting relationship between the defendant and the victim.³⁶ This "relationship" can take many forms, as the crime might occur between people who are strangers, acquaintances, friends, family members, or lovers. Relationships are thus defined by the degree of intimacy that existed between the parties prior to the crime in question. Much of the available literature suggests that as the relationship between the parties moves toward the intimate end of the spectrum, criminal justice actors are more likely to regard the crime as technical rather than real, which produces a more lenient disposition. In the words of Donald Black, relational distance between the parties predicts and explains the outcome of legal proceedings: law increases as intimacy decreases, reaching its highest level when applied to disputes between strangers.³⁷

Intimacy's relevance to culpability appears straightforward. Conventional wisdom suggests that crimes between strangers occur for mercenary or nonpersonal motives and often involve high levels of violence or damage.³⁸

nature of the harm in any given case, and that these predictions affected their filing decisions. VERA INST. OF JUSTICE, *supra* note 5, at 135.

³⁵ Dawson, *supra* note 8, at 106; see also BLACK, *supra* note 6, at 105-21.

³⁶ VERA INST. OF JUSTICE, *supra* note 5, at xii. Some scholars refer to this as the distinction between primary and nonprimary crimes; the former are acts of passion committed against family and acquaintances, while the latter are premeditated acts committed against strangers. See, e.g., Robert Nash Parker & M. Dwayne Smith, *Deterrence, Poverty, and Type of Homicide*, 85 AM. J. SOC. 614, 615 (1979).

³⁷ BLACK, *supra* note 6, at 41, 44.

³⁸ LUNDSGAARDE, *supra* note 8, at 124-25; Richard Block, *Victim-Offender Dynamics in Violent Crime*, 72 J. CRIM. L. & CRIMINOLOGY 743, 751-52 (1981); see also VERA INST. OF JUSTICE, *supra* note 5, at 36-42; Marc Riedel, *Stranger Violence: Perspectives, Issues, and Problems*, 78 J. CRIM. L. & CRIMINOLOGY 223, 250-54 (1987); Dean G. Rojcek & James L. Williams, *Interracial vs. Intra-racial Offenses in Terms of Victim/Offender Relationship*, in HOMICIDE: THE VICTIM/OFFENDER CONNECTION 249, 257 (A. Wilson ed.,

Persons who victimize strangers thus are perceived and portrayed as predators: they threaten or attack at random, which makes them more of a threat to the community in the future.³⁹ In contrast, crimes between family members, friends, or acquaintances—otherwise known as intimates—are typically understood as driven by strong emotions and as embedded in preexisting complex relationships among the parties involved.⁴⁰ Moreover, the victim who knows her assailant may be perceived as having somehow incited the assailant's behavior, which under the legal doctrine of provocation may lessen the assailant's culpability.⁴¹ These stereotypes suggest that persons who victimize intimates, as compared with those who victimize strangers, cause less (undeserved) harm to their victims and will be less likely to commit future criminal actions against random people.⁴² The intimate assailant may continue to be a threat to his intimate partner, friends, or family members, but he presents little or no danger to the rest of us.⁴³ For these reasons, the law takes

1993).

³⁹ Riedel, *supra* note 38, at 233.

⁴⁰ Colin Loftin, *Assaultive Violence as a Contagious Social Process*, 62 BULL. N.Y. ACAD. MED. 550, 550-55 (1986); Michael G. Maxfield, *Circumstances in Supplementary Homicide Reports: Variety and Validity*, 27 CRIMINOLOGY 671, 685-87 (1989); Parker & Smith, *supra* note 36, at 15. In the words of the Vera researchers, "criminal conduct is often the explosive spillover from ruptured personal relations among neighbors, friends and former spouses." VERA INST. OF JUSTICE, *supra* note 5, at 135. However, these are stereotypes and not hard-and-fast rules: not all homicides between acquaintances are impulsive or precipitated by the victim, and not all homicides between strangers occur for instrumental purposes. CAROLYN BLOCK, *LETHAL VIOLENCE IN CHICAGO OVER SEVENTEEN YEARS: HOMICIDES KNOWN TO THE POLICE 14* (1985); Scott H. Decker, *Exploring Victim-Offender Relationships in Homicide: The Role of Individual and Event Characteristics*, 10 JUST. Q. 585, 609 (1993).

⁴¹ Terance D. Miethe, *Stereotypical Conceptions and Criminal Processing: The Case of Victim-Offender Relationship*, 4 JUST. Q. 571, 574 (1987); Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 L. & SOC'Y REV. 367, 380 (1991); see also VERA INST. OF JUSTICE, *supra* note 5, at 139; Block, *supra* note 38, at 757; Riedel, *supra* note 38, at 233; Williams, *supra* note 9, at 181. For a precise definition of the provocation doctrine, see Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 425-32 (1982). For example, if the defendant's assault on the victim was to pay the victim back for stealing his stereo, or for raping his sister, or for selling bad drugs, or for catching him in bed with the defendant's wife, the defendant's motivation for the crime may be enough to get a prosecutor to reduce the charges. But only the last of these scenarios would be sufficient to legally trigger the partial defense of provocation during a homicide trial. Note that Martha Myers' study of jury behavior found no evidence of leniency toward defendants who victimized persons who might be considered deserving or partially responsible for injuries inflicted upon them. Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 L. & SOC'Y REV. 781, 793 (1979).

⁴² Ferraro & Boychuk, *supra* note 8, at 209.

⁴³ Even some of the newly drafted sex offender classification schemes adopt and reinforce this stereotype of the benign intimate offender. In New Jersey, for example, those convicted of incest are classified as less serious offenders than those convicted of sex crimes with nonrelatives, despite evidence suggesting that women and children are most at risk in their own homes. Roseann M. Corrigan, *Talking to Strangers: Feminism, Sexual Predators, and Rape Law Reform* 82-84 (May 2004) (unpublished Ph.D. dissertation, Rutgers University) (on file with the author). For a contrary finding based on examination of child molestation

little interest in crimes that occur between those who know each other, preferring instead to remain outside "the sanctuaries of intimacy."⁴⁴

For example, scholars have identified a dichotomy in traditional criminal justice constructions of rape and rapists.⁴⁵ In his study of rape law in Great Britain, Rumney concluded that while policymakers instructed courts and prosecutors to assess the gravity of an individual offense of rape according to three factors (the degree of harm to the victim, the level of culpability of the offender, and the level of risk posed by the offender to society), courts commonly treated a previous sexual relationship between defendant and victim as a mitigating factor at sentencing. This sentencing approach invokes and reinforces the "sanitary" stereotype of marital rape previously identified by Finkelhor and Yllo: for most people, the rape of one's spouse involves "little graphic violence, little pain, little suffering."⁴⁶ Clarke and his colleagues, in their survey of public attitudes toward date and acquaintance rape, found that people commonly assume that rape by a husband or boyfriend is the outcome of other events in the relationship and signals the poor quality of the relationship, an assumption that attributes some degree of responsibility to both partners.⁴⁷ Following this stereotype, rape between intimates should be treated as a less serious offense than rape between strangers. Recently, however, several courts have recognized that sex forced upon an intimate partner can cause harm that equals, if not surpasses, the harm experienced by the victim of a stranger rape, due to the breach of trust involved in the violation.⁴⁸

cases, see Roger J. R. Levesque, *Sentencing Sex Crimes Against Children: An Empirical and Policy Analysis*, 18 BEHAV. SCI. & L. 331, 337-41 (2000).

⁴⁴ BLACK, *supra* note 6, at 42.

⁴⁵ See ALAN CLARKE, JO MORAN-ELLIS & JUDITH SLENEY, ATTITUDES TO DATE RAPE AND RELATIONSHIP RAPE: A QUALITATIVE STUDY 64 (2002); DAVID FINKELHOR & KATHY YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 13-16 (1985); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1092 (1986); Philip N.S. Rumney, *Progress at a Price: The Construction of Non-Stranger Rape in Millberry Sentencing Guidelines*, 66 MOD. L. REV. 870, 873, 878-81 (2003). See generally BARBARA STANKO, INTIMATE INTRUSIONS: WOMEN'S EXPERIENCE OF MALE VIOLENCE (1985); G. Tendayi Viki, Dominic Abrams & Barbara Masser, *Evaluating Stranger and Acquaintance Rape: The Role of Benevolent Sexism in Perpetrator Blame and Recommended Sentence Length*, 28 L. & HUM. BEHAV. 295 (2004).

⁴⁶ FINKELHOR & YLLO, *supra* note 45, at 14.

⁴⁷ CLARKE, MORAN-ELLIS & SLENEY, *supra* note 45, at 10.

⁴⁸ See, e.g., Rumney, *supra* note 45, at 872, 881. Similar ideas have transformed criminal justice treatment of domestic violence cases in recent decades. While violence between intimate partners was conventionally understood as just one component of a relationship into which the state should not intervene, now prosecutors, judges and juries understand these actions as crimes that merit significant punishment. See *infra* note 50 and cites therein for more information.

As the rape literature demonstrates, the existence of an intimate relationship can do more than simply generate abstract presumptions about the nature of the offense and the risk to the community posed by the defendant. It also may affect the outcome of the defendant's criminal case: scholars have identified an intimacy discount for some crimes at some stages of the justice process.⁴⁹ For example, assaults or homicides that are characterized as domestic violence have traditionally resulted in more lenient criminal justice treatment than those that are characterized as instances of stranger violence.⁵⁰ The beneficial impact of intimacy appears to shrink, however, when the crimes are property-based rather than personal or violent.⁵¹

When researchers control for the effects of other legal variables (including prior record and seriousness of the offense) and for the effects of extralegal variables (such as race, age, and class), the monolithic effect of intimacy disappears. While some studies have found no correlation between intimacy and criminal case disposition,⁵² others have identified a close association

⁴⁹ In many of these studies, intimacy was used as a control variable in regressions testing the effects of race, gender, and class on criminal justice dispositions. Dawson, *supra* note 8, at 107. Notable exceptions to this trend include Miethe, *supra* note 41, at 571-78, Leonore M.J. Simon, *Legal Treatment of the Victim-Offender Relationship in Crimes of Violence*, 11 J. INTERPERSONAL VIOLENCE 94, 106 (1996) [hereinafter Simon, *Relationship*], and Leonore Simon, *The Effect of the Victim-Offender Relationship on the Sentence Length of Violent Offenders*, 19 J. CRIME & JUST. 129-48 (1996) [hereinafter Simon, *Sentence Length*].

⁵⁰ See VERA INST. OF JUSTICE, *supra* note 5, at 135; Ferraro & Boychuk, *supra* note 8, at 209; Rapaport, *supra* note 8, at 226; Waegel, *supra* note 9, at 181; Williams, *supra* note 9, at 270. I emphasize here that this was the traditional stance toward spousal abuse. In recent years criminal justice officials have taken a much less charitable view of domestic violence, adopting mandatory arrest policies, no-drop prosecution policies, specialized aggressive prosecution units, and incarceration and mandatory counseling for those convicted of these offenses. See, e.g., CAL. PENAL CODE § 273.81 (1999) (establishing procedures for specialized units or prosecutors for domestic violence cases in state's attorneys/district attorneys offices); FLA. STAT. § 741.2901(1) (2004). For information about new aggressive approaches to prosecuting domestic violence, see KERRY HEALEY, CHRISTINE SMITH & CHRIS O'SULLIVAN, NAT'L INST. OF JUSTICE, *BATTERER INTERVENTION: PROGRAM APPROACHES AND CRIMINAL JUSTICE STRATEGIES* (1998); Bettina Boxall & Frederick M. Muir, *Prosecutors Taking Harder Line Toward Spouse Abuse*, L.A. TIMES, June 11, 1994, at A1; Naomi Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse*, in WOMAN BATTERING: POLICY RESPONSES 95 (M. Steinman ed., 1991); Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465 (2003); Casey G. Gwinn & Sgt. Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297 (1993); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998).

⁵¹ Dartell Steffensmeier, Jeffrey Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black and Male*, 36 CRIMINOLOGY 763, 773 n.2 (1998). Intimacy's effect on case outcome also may vary with the violent crime under review. *Id.*

⁵² Celesta A. Albonetti, *An Integration of Theories to Explain Judicial Discretion*, 38 SOC. PROBS. 247, 247 (1991); Martha A. Myers, *Offender Parties and Official Reactions: Victims and Sentencing of Criminal Defendants*, 20 SOC. Q. 529, 529 (1979); Simon, *Sentence Length*, *supra* note 49; Spohn and Holleran, *supra* note 9.

between intimacy and leniency during a few (but not all) stages of the criminal process.⁵³ At least one scholar has theorized that these disparate results stem from inconsistent (or overly broad) definitions of intimacy: some studies place friends and other family members in the same "intimate relationship" grouping as spouses and lovers, despite the variation in sexual intimacy and physical proximity that these different relationships entail.⁵⁴ Distinguishing between types of relationships is consistent with Donald Black's original thesis, as he argued that the law's treatment of intimates "depends upon how intimate they are."⁵⁵ In other words, the law not only views spouses as fundamentally distinct from tribesmen or friends when it comes to violence, but also considers the length of the marriage when defining the true seriousness of violence between marital partners.⁵⁶

Intimacy between a defendant and victim may yield the most significant discount at the prosecutorial charging stage.⁵⁷ In cases where the defendant and victim know each other, the victim may refuse to cooperate with the prosecutor or may manifest a keen distrust for authority; these traits tend to render him an unreliable and unsympathetic witness.⁵⁸ Furthermore, crimes between nonstrangers often take on a "street justice" quality⁵⁹ that the criminal justice system is not equipped to address.⁶⁰ Where prosecutors can foresee problems of this sort, they develop preemptive strategies to dispose of the case at an early stage, which often means agreeing to minimal punishment.⁶¹

⁵³ See Dawson, *supra* note 8, at 108; Erez & Tontodonato, *supra* note 9, at 462; Waegel, *supra* note 9, at 270; Williams, *supra* note 9, at 197-201.

⁵⁴ Dawson, *supra* note 8 (criticizing Albonetti, *supra* note 52; Erez & Tontodonato, *supra* note 9; Myers, *supra* note 52; Simon, *Relationship*, *supra* note 49; Simon, *Sentence Length*, *supra* note 49). For views in accord with Dawson, see Decker, *supra* note 40, and Maxfield, *supra* note 40.

⁵⁵ BLACK, *supra* note 6, at 44.

⁵⁶ *Id.*

⁵⁷ Dawson, *supra* note 8.

⁵⁸ Block, *supra* note 38, at 757; Miethe, *supra* note 41, at 574.

⁵⁹ By "street justice," I mean actions that superficially appear to be random crimes but are actually a form of revenge for past wrongdoing. For a description of acquaintance robberies that are actually expressions of personal grievances, see Richard B. Felson, Eric P. Baumer & Steven F. Messner, *Acquaintance Robbery*, 37 J. RES. CRIME & DELINQ. 284, 286 (2000). While these behaviors may still technically violate the penal code's terms, their linkage to past behaviors and implicit indictment of the victims make them difficult to prosecute as crimes. Moreover, when victims lie to the police up front about what happened (hiding their revenge motive and prior relationship with the defendant), they lose credibility as witnesses.

⁶⁰ See VERA INST. OF JUSTICE, *supra* note 5, at 133-40; Block, *supra* note 38, at 757; Felson, Baumer, & Messner, *supra* note 59, at 284-305; Ferraro & Boychuk, *supra* note 8, at 213-20.

⁶¹ See Miethe, *supra* note 41, at 574-75; Rapaport, *supra* note 41, at 378-80.

One of the most illuminating studies of prosecutorial decision making and the impact of intimacy was conducted by sociologist Lisa Frohmann in the mid-1990s.⁶² Reporting the results of her ethnography of a Chicago-based sexual assault prosecution unit, Frohmann found that prosecutors justify charging decisions based on their predictions about the likelihood of juror empathy. Her subjects asserted that because jurors will fail to convict if they feel no empathy for the victim, cases involving unsympathetic victims should be rejected, subject to reduced charges, or plea bargained early on.⁶³ Victims of intimate or acquaintance crimes are often members of the class of "unsympathetic" victims. Frohmann highlighted the consequences of this approach: when prosecutors act based on their predictions about jury behavior, they are likely to reproduce and reinforce stereotypes about race-, class-, and gender-appropriate behavior, thereby leaving outside the law's protection many already vulnerable members of the population.⁶⁴

III. METHODOLOGY OF THE PRESENT STUDY

Previous works have established that prosecutors tend to account for intimacy between a defendant and victim in their case management strategies. The present study seeks to build on these findings by interrogating *how* intimacy matters to prosecutors who deal exclusively with crimes of an intimate nature. Using data derived from surveys and interviews with prosecutors currently or recently assigned to specialized units in county district attorney offices across California, this Article investigates prosecutorial construction and deployment of intimacy in statutory rape cases. To explore this general research question I use the prosecutor as the unit of analysis, as thoughts, strategies, and assumptions are specific to people rather than to cases. Moreover, this work seeks to interrogate the fluidity of prosecutorial constructs—how prosecutors move between ideas and strategies in order to meet their objectives in each case.

This research is drawn from a larger study on the shifting enforcement of statutory rape laws throughout California's history. Data collection began in the fall of 1999 when I interviewed members of the California Governor's Office of Criminal Justice Planning (OCJP), the agency charged with

⁶² Frohmann, *supra* note 33, at 535.

⁶³ *Id.* For similar conclusions about prosecutorial behavior, see VERA INST. OF JUSTICE, *supra* note 5, at 133-40.

⁶⁴ *Id.*

administering the Statutory Rape Vertical Prosecution Program (SRVPP), an aggressive statewide statutory rape prosecution effort started by former Governor Pete Wilson.⁶⁵ From the employees of OCJP I received the names of the county prosecutors responsible for the SRVPP in each of California's fifty-eight counties. In the spring of 2000, I mailed survey booklets to the identified statutory rape prosecutor in each county.⁶⁶ The survey asked each respondent to describe the structure and functioning of his or her office's statutory rape unit, including any policies or guidelines on filing and sentencing in these cases. Eighty percent of the counties responded to the survey. Survey responses were coded and analyzed using SPSS, a statistical software package that allows the researcher to identify the frequency of certain responses and the correlations that exist between variables.⁶⁷

I followed up the survey by conducting in-person interviews. In the three months between October 15, 2001 and January 15, 2002, I interviewed in person at thirty district attorneys' offices in thirty counties across the state; this represents slightly more than fifty percent of the counties in California and approximately two-thirds of the counties that completed the survey. The semi-structured interview consisted entirely of open-ended questions asked in a more or less standard order. I allowed each interview to follow its own course, and thus I varied the order of questions in response to topics or concerns raised by the participant. The interviews lasted anywhere from forty-five minutes to five hours, and the length of the interview was usually proportional to the number of participants.⁶⁸ The interviews were tape-recorded, transcribed, and

⁶⁵ For more information about the origins, workings, and effects of this program, see Levine, *supra* note 13, at 83-207. In 2003 the OCJP was dissolved; authority over the Statutory Rape Vertical Prosecution program was placed with the Office of Emergency Services as part of a consolidated vertical prosecution effort. For more information, see Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1139 n.33 (2005).

⁶⁶ At the time of my research, all but four counties had established specialized statutory rape units in their District Attorney's office. Because my original research interest concerned how prosecutors managed the statutory rape law, and because even those counties without specialized units were responsible for enforcing the law, I sent surveys to all counties, irrespective of participation in the program. I received survey responses from two of the nonparticipating counties and forty-four of the participating counties. My interviews occurred only in participating counties because none of the prosecutors in nongrant counties agreed to be interviewed.

⁶⁷ I include this information for background only; this Article exclusively considers qualitative data gathered from interviews with respondents. Interview transcripts are available from the author upon request.

⁶⁸ In some counties multiple participants started the interview together and finished together; in others, I would have a rotation of sorts, where one person would begin the interview, and then someone else from the office would join in, then the first person would leave for awhile, then a third person might join in, etc. I used a more formal sequential style of interviewing in offices where I learned that different attorneys who had held the statutory rape assignment at different times would not be comfortable discussing their individual approaches in front of colleagues who might have contrasting views.

later analyzed using NUD*IST, a qualitative analysis software program that allows the researcher to identify and code themes as they emerge from the interview transcripts. All counties have been given pseudonyms to protect the identity of the respondents.

Before analyzing prosecutorial constructions of intimacy, this Article first offers a brief overview of statutory rape law and recent enforcement trends in California. This material should place in context the data regarding prosecutors' perspectives on this crime and its participants, which in turn illuminates how prosecutors are able to influence case outcomes and public perceptions of what statutory rape is.

IV. THE REBIRTH OF THE STATUTORY RAPE LAW

To fully understand how prosecutors have altered the scope of the statutory rape law by discounting for intimacy, one must first become familiar with the socio-legal frameworks in which modern statutory rape prosecutors work.

The statutory rape (or age of sexual consent) law criminalizes sexual intercourse with unmarried minors under a given age; in California that age is eighteen.⁶⁹ The statutory rape law lies at the intersection of two more serious sexual offenses: child molestation and forcible rape. In California, child molestation is defined as any form of lewd conduct with a child under the age of fourteen,⁷⁰ while rape is defined as intercourse secured by force, intoxication, or manipulation of a person in one's care or custody.⁷¹ The law against statutory rape, formally known as the crime of unlawful sexual intercourse, is meant to target the sex partners of older teens (those between fourteen and seventeen) who engage in factually consensual sex (i.e., they do not employ "force" within the meaning of the rape law).

⁶⁹ Section 261.5 of the California Penal Code makes it a crime for a person to have sexual intercourse with a person under eighteen who is not that person's spouse. Section (b) of the statute indicates that this crime is a misdemeanor, punishable by up to one year in county jail. Section (c) specifies that if there is more than a three year age difference between the victim and the defendant, the crime is punishable as a misdemeanor or as a felony with a maximum term in state prison of three years. Section (d) applies if the victim is under sixteen and the defendant is over twenty-one; in that event, the crime is punishable as a misdemeanor or as a felony with a maximum state prison term of four years. CAL. PENAL CODE § 261.5(a)-(d) (West Supp. 2006).

⁷⁰ CAL. PENAL CODE § 288(a) (West Supp. 2006).

⁷¹ § 261.

From the 1970s through the early years of the 1990s, this law was regarded in most jurisdictions as a virtual dead letter, as prosecutors felt compelled to file only those cases reflecting egregious law violations or those bordering on forcible rape.⁷² Prosecution of statutory rape was so minimal during this period that victims rarely reported the crime, and law enforcement officers almost never forwarded police reports of statutory rape to prosecutors because they assumed no action would be taken. In this environment, the exercise of prosecutorial discretion at all levels rendered statutory rape almost invisible as a crime: few offenders merited criminal justice intervention, and few violations were severe enough to warrant remedial action.

In the mid-1990s, states across the United States took a closer look at their statutory rape laws as part of a broader campaign to reduce teenage pregnancy and welfare reliance.⁷³ In California, renewed interest in the statutory rape law at the state level forced local prosecutors to reevaluate their traditional approach to this law. Governor Pete Wilson launched the Statutory Rape Vertical Prosecution Program (SRVPP) in 1995,⁷⁴ announcing in a radio address to the public, “[If you] get a teenager pregnant . . . we’ll give you a year to think about it in county jail.”⁷⁵ A few prosecutors heard this remark directly; others learned of it through informal gossip networks or newspaper reports. But all of them had to decide what to make of it. The SRVPP literature prepared by the state Office of Criminal Justice Planning (OCJP) declared that adults who had sex with teenagers were now going to be prosecuted, but many local DAs were not prepared to give all of these offenders a “bullet”—criminal justice system slang for a year in jail. They

⁷² See Levine, *supra* note 13, at 84–89.

⁷³ California’s efforts to tie statutory rape enforcement to welfare cost reduction were on the front end of a national program to reform welfare provisions, and some other states took steps to enhance the enforcement of their own statutory rape laws. See SHARON GORETSKY ELSTEIN & NOY S. DAVIS, *SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES* 17–18 (1997); Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 *STAN. L. REV.* 463 (2000). Nonetheless, California’s approach far trumped the efforts of any of its sister states. Levine, *supra* note 13, at 102–103.

⁷⁴ Vertical prosecution departs from the conventional prosecution approach by concentrating prosecutorial resources. In traditional prosecution models, a criminal case will be handled by several different attorneys throughout its life: one prosecutor files the case, another conducts the preliminary hearing, a third takes the jury trial and sentencing after trial. Vertical prosecution drastically reduces the number of fingerprints on the case file by requiring one prosecutor to handle the case from filing through sentencing. RANDY BONNELL ET AL., *AN EVALUATION OF THE STATUTORY RAPE VERTICAL PROSECUTION PROGRAM* 15 (2001).

⁷⁵ Elizabeth Gleick, *Putting the Jail in Jailbait: To Fight Teen Pregnancy, California Will Start to Prosecute Statutory Rapists*, *TIME*, Jan. 29, 1996, at 33.

doubted that the county jails could handle this surge in population and did not believe that such a severe punishment was warranted in all cases.⁷⁶

Faced with this dilemma yet flush with resources (generously provided by the state via the SRVPP grants),⁷⁷ local prosecutors across the state set out to give the Governor's statement a reasonable meaning, to distinguish which potential cases were prosecution-worthy and which among those were "bullet-worthy." The animating philosophy of the program, while rhetorically powerful, did not provide much help. One prosecutor remembers it like this:

[T]he only instruction they had gotten from the legislature in the original law was [statutory rape] vertical prosecution and a sum of money. And . . . no direction had been given to OCJP and they started a program without any guidelines, so then they came to us to help them write the guidelines, so there was a lot of talk and interaction.⁷⁸

The creation of the SRVPP set in motion a policy of aggressive enforcement, but the shape and content of the guidelines that prosecutors would use to file cases was very much up for grabs.

When the original teen pregnancy/welfare agenda proved to be unworkable,⁷⁹ the SRVPP adopted a new rationale—protecting teens from sexual exploitation—and expanded its target population to include non-pregnant minors who had been sexually exploited by adults. Under the exploitation rationale, the immaturity and inexperience that are the hallmarks of adolescence render teenagers vulnerable to manipulation by adults.⁸⁰

⁷⁶ See Interview with Prosecutor 1, Ruby County, in Ruby County, Cal. (Dec. 11, 2001); Interview with Prosecutor 1, Carlisle County, in Carlisle County, Cal. (Oct. 22, 2001).

⁷⁷ The state gave county prosecutors more than \$8 million annually to root out and prosecute statutory rapists. BONNELL, ET AL., *supra* note 74, at i. No county received less than \$50,000 each year; some received more than \$300,000 each year. Funding remained at this level until fiscal year 2002–2003. See Levine, *supra* note 13, at 113.

⁷⁸ Interview with Prosecutor 1, Randall County, in Randall County, Cal. (Jan. 10, 2002).

⁷⁹ For a description of the reasons underlying this change in program rationale, see Levine, *supra* note 13, at 138–45.

⁸⁰ One prosecutor offered the following vignette (a quote from a statutory rapist's diary) to explain how exploitation works:

A fourteen year-old is not capable of consenting to what we are doing, I am taking advantage of a girl who just needs attention. In order for her to get my attention I made her compromise her moral standard and give up her body to get the needed attention from me. It seems like a good tradeoff. I'm getting an innocent virgin and she is getting self-esteem, self-confidence and assertiveness. She is better for having been molested by me. Molested is such a terrible sounding word; I can call it something else and make it sound nicer.

Statutory rape thus occurs when an adult, through economics, deceit, violence, or romance, cajoles an inexperienced and immature youth into participating in sexual acts to which the youth is not capable of consenting and whose consequences the youth is not capable of understanding. When sex is obtained in this fashion, it amounts to more than a violation of the teen's sexual autonomy; it constitutes a "theft of childhood."⁸¹

Once statutory rape was defined in those terms, intimacy emerged as the opposite of exploitation: the presence of intimacy implies that the defendant did not exploit the victim to get sex. The sexual act appears instead to be an organic part of an existing relationship that causes no actual harm to either the teenager or society. Sex under these circumstances lies outside of the concern of the criminal law.

That prosecutors linked statutory rape to the exploitation/intimacy paradigm was no accident. Exploitation became a salient and dangerous model of criminal behavior in the mid- to late-1990s, as the public and the justice system were barraged by stories of sexual abuse by priests and of sexual abductions of children by ex-convicts, and legislatures across the country debated the provisions of sex offender registry and notification programs. Still, the shift in the SRVPP's rationale from teenage pregnancy to sexual exploitation did more than just alter the rhetoric and association of statutory rape with abuse in the public forum. It forced prosecutors to grapple with the difficulties of enforcing an old statute in a new context.⁸²

These difficulties took many forms. In the first place, while the formal law provides a regulatory framework that criminalizes sexual activity with minors, the framework itself is broad and internally inconsistent. The California Penal Code is complex, poorly organized, and overstuffed with a myriad of sex crime

Interview with Prosecutor I, Sapphire County, in Sapphire County, Cal. (Nov. 15, 2001).

⁸¹ Interview with Prosecutor I, Bayside County, in Bayside County, Cal. (Jan. 11, 2002).

⁸² As I explain elsewhere, California's statutory rape law has served a variety of purposes since its enactment more than 150 years ago. Historical data demonstrate that the statutory rape law was first constructed as a tool to protect the interests of fathers in their daughters' marriageability. It then was used by the Sexual Purity reformers to eradicate the sexual double standard and by the Progressives to curb the spread of venereal disease. In the mid-twentieth century, statutory rape enforcement was linked to welfare policy as a way to enhance the collection of child support payments from wayward fathers. Finally, there was a resurgence of interest in statutory rape enforcement as a mechanism to combat pregnancy and welfare reliance by minors in the late twentieth century. That policy led to the creation of the SRVPP in 1995. Levine, *supra* note 13, at 61-115; see also Kay L. Levine, *No Penis, No Problem*, 33 *FORDHAM URB. L.J.* 357, 373-79 (forthcoming 2006).

laws that often have overlapping provisions.⁸³ The prohibition against statutory rape is only one of many California laws proscribing sexual contact with minors; others include oral copulation, digital penetration, sodomy, and annoying a child. Many of these laws were enacted long after the statutory rape law⁸⁴ and contain terms that conflict with those embodied in the statutory rape law.⁸⁵ Before the onset of the SRVPP, most prosecutors had little experience identifying when to enforce particular age of consent crimes in particular situations, and the state-authored SRVPP offered them precious few guidelines for navigating the tricky currents of the Code. One prosecutor recalls: "Really there were not guidelines, there was nothing. Because even the . . . legislation doesn't give us any guidance. Which is one of the ways in which we're able to fudge around with it a bit."⁸⁶ In the absence of state instruction, local prosecutors were left not just to handle individual cases but also to more generally set policy, or "to fudge around . . . a bit," as to which crimes deserved the most attention and resources.

⁸³ As one country prosecutor noted:

[Y]ou really need to look at the penal code in particular the sex crimes as being a matrix of crimes that are interconnected. And you really have to understand how it all intertwines not only between the particular types of sexual conduct, and whether it be age related or orifice related, but also how it relates in terms of punishment, how it relates in terms of society and how it relates in terms of accomplishing your job as a prosecutor.

Interview with Prosecutor 1, Carlisle County, in Carlisle County, Cal. (Oct. 22, 2001). See Appendix A for a table of California sex crimes statutes that might be relevant to a prosecutor whose victims are under the age of eighteen.

⁸⁴ California first criminalized sexual intercourse with a minor under the age of consent in 1850, as part of its general rape statute. The prohibitions on other forms of sexual activity with minors were enacted in the mid to late part of the twentieth century. See, e.g., CAL PENAL CODE §§ 286, 288(a)-(b), 289 (West Supp. 2006) and accompanying legislative histories.

⁸⁵ For example, a misdemeanor or felony conviction for any of the nonintercourse age of consent crimes (like oral copulation or sodomy) requires the offender to register for life as a sex offender. Such registration is not required for a conviction of the statutory rape law itself, even for a felony violation. CAL. PENAL CODE § 290 (West Supp. 2006); Appendix A.

Many prosecutors express frustration with this paradox. Consider the following from the Jacoby County prosecutor:

[There is] mandatory registration for [oral copulation and digital penetration] which is so strange. Because one of the things that stat rape prosecution is supposed to prevent is teen pregnancy. Why are we treating more harshly the nonrisky behaviors? You think someone would prefer their child not engage in, if they're going to have sex at least they engage in behavior that's not going to get them pregnant.

Interview with Prosecutor 1, Jacoby County, in Jacoby County, Cal. (Dec. 19, 2001).

⁸⁶ Interview with Prosecutor 1, Ruby County, in Ruby County, Cal. (Dec. 11, 2001).

Additionally, despite its rhetorical power, the sexual exploitation rationale is plagued by ambiguity: nowhere does the formal statutory rape law mention exploitation, and nowhere is this term defined, at least not in such a way as to bind prosecutors to its terms.⁸⁷ Exploitation is a complicated and somewhat abstract phenomenon, vulnerable to the "I know it when I see it" type of definition. The notion of intimacy suffers from the same type of fuzziness: colloquial understanding of intimate relationships might not suffice in the criminal justice arena, and criminal justice officials may find themselves (or others may find them) ill-equipped to assess the "true" level of intimacy in any of the relationships that form the basis of reported cases.

In short, when the state revived its statutory rape law via the SRVPP, it gave prosecutors a new agenda, a new set of offenders to target, and new forms of remedies to explore. It also provided prosecutors the funds to initiate and to maintain an aggressive enforcement regime to root out and punish sexual exploitation of minors. Yet it gave them little guidance as to how to achieve these goals in any principled fashion. In the pages that follow, the Article draws on interview data to explain how prosecutors took it upon themselves to distinguish among various crimes and fact patterns involving sexual encounters with teenagers⁸⁸ and to evaluate whether and how exploitation or intimacy between a defendant and victim should affect the defendant's culpability.

V. CONSTRUCTING EXPLOITATION AND INTIMACY IN STATUTORY RAPE CASES

Given no instruction from Sacramento regarding how to operationalize the sexual exploitation/intimacy rationale or how to handle the conflicts and overlaps in the formal law, local prosecutors had to invent their own standards to define the meaning of exploitation and intimacy in the statutory rape caseload. The prosecutors with whom I spoke reveal that this development was both individual and collective.

⁸⁷ CAL. PENAL CODE § 261.5 (West Supp. 2006).

⁸⁸ California's formal statutory rape law prohibits anyone—adult or child—from having sex with a minor. While in some jurisdictions prosecutions have been brought against juveniles in juvenile court, the SRVPP rhetoric and resources are focused on adult defendants. BONNELL ET AL., *supra* note 74, at i. This stems from the exploitation rationale's emphasis on the gap in maturity and experience separating the defendant and victim. However, this near exclusive focus on adult defendants suggests that one teenager cannot exploit another, an assumption that is plainly false.

On an individual level, prosecutors in each office began to see a variety of cases falling under the rubric of unlawful sexual activity with minors. The facts of these cases varied: defendants in their 20s, 30s, and 40s (or even 50s and 60s) having sex with neighborhood teens; camp counselors, foster parents, or clergy having sex with youth under their control; high school sweethearts; adults exchanging drugs or alcohol for sex with teens; teenage prostitutes and their pimps; culturally married partners; prom dates. The list goes on and on. Through "talk and interaction"⁸⁹ with victims, families, victim/witness advocates, public health officials, and social workers, many prosecutors began to develop a working knowledge of the ways in which adults engage teens in romantic or sexual contacts and the diverse menu of harms associated with these activities.

This "talk and interaction" also occurred among prosecutors from various counties. When the SRVPP was launched in 1995, a group of prosecutors established themselves as an advisory committee; representatives from six to eight different counties met several times a year (along with representatives from OCJP) to formulate an agenda for the program and to decide what types of data should be collected to document the program's efforts. The advisory committee was primarily responsible for setting statewide priorities and limitations on which types of cases should be handled within the SRVPP units. On a larger scale, beginning in 1997 all California prosecutors and personnel working with teen victims of abuse met annually at a conference entitled "Return to Respect and Responsibility" (or 3R, as it is affectionately known). At the 3R conference prosecutors, investigators, medical professionals, and social workers shared stories of the teens they had seen and the types of exploitation they had witnessed in their caseloads.

By sharing this knowledge, and through the regular distribution of written materials by OCJP and the California District Attorney's Association, California's prosecutors together developed an informal set of norms to guide prosecution policy in many cases.⁹⁰ Those norms identify which cases reflect serious exploitation and thus merit full prosecution (the current definition of "bullet-worthy" or "state prison worthy" cases); they also distinguish which

⁸⁹ Prosecutor 1, Randall County, in Randall County, Cal. (Jan. 10, 2002).

⁹⁰ Robert Emerson has explained that under a variety of organizational circumstances, social control agents process and respond to cases not as individual phenomena but rather in relation to or as part of some larger, organizationally determined whole. They evaluate caseloads and collections of cases to establish priorities, which in turn are used to set general policies. Robert M. Emerson, *Holistic Effects in Social Control Decision-Making*, 17 L. & SOC'Y REV. 425-55 (1983).

cases exhibit true intimacy between the defendant and victim. Cases falling into this latter category are considered mere technical violations of the law and therefore deserve limited criminal justice attention in most counties. In drawing boundaries of this sort between technical and serious violations of the law, California prosecutors implicitly adopted the approach that was used in New York City more than two decades earlier⁹¹ and that was recommended by certain Kansas prosecutors in a study of prosecutorial responses to anticipated vigorous enforcement of that state's statutory rape law.⁹²

While prosecutors use the terms aggravating and mitigating to specify factors that affect the seriousness of a case, I refer to this collective body of knowledge in the statutory rape caseload as the *predator-peer distinction*. Predators are seen as posing a significant danger to teens and to society. They abuse positions of trust, intoxicate or provide drugs to their victims, sleep with many teenagers in a short period of time, or abandon their pregnant partners. A peer, in contrast, is involved with a teenager in a relationship that manifests stability and responsibility and receives the support of the teenager's family. This construction of peer status draws together two distinct notions of intimacy: intimacy-as-privacy and intimacy-as-equality. Intimacy-as-privacy appears to be the conception of intimacy found in the sociolegal literature that assesses both the theoretical and actual relationship between case outcome and offender/victim relationship.⁹³ In the statutory rape caseload, the privacy paradigm emerges in comments about relationship permanence, marriage potential, and financial responsibility; it signals that when sex occurs in the confines of a private relationship, the law should not meddle. The intimacy-as-equality model is a more recent development, likely derived from feminist jurisprudence warning of the dangers that lurk in the so-called private sphere and the law's responsibility to protect vulnerable partners and family members from intra-family harm.⁹⁴ The equality model suggests that we should look beyond the parties' status and instead assess the substantive nature of the

⁹¹ VERA INST. OF JUSTICE, *supra* note 5, at 133-40.

⁹² Henry L. Miller et al., *Issues in Statutory Rape Law Enforcement: The Views of District Attorneys in Kansas*, 30 FAM. PLAN. PERSP. 177, 177-81 (1998). These institutionalized and collective prosecutorial practices resemble the case routinization patterns observed by William Waegel in his study of police detectives. Waegel, *supra* note 9, at 268. Waegel found that the police quickly categorize information about the victim, the offense, and possible suspects as a way to shorthand their assessment of the proper way to handle a case; while this initial assessment can be changed later on, the categories that it produces and reinforces are instantly recognizable to other officers and to the detective's superiors.

⁹³ See *supra* Part II and works cited therein.

⁹⁴ See, e.g., Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 151, 161-64 (David Kairys ed., 1990).

relationship. For statutory rape prosecutors, this means examining such factors as the teenager's continued education, access to financial resources, and procreative control.

A word of caution here. My use of the term "distinction" should not be misinterpreted—these labels really represent the ends of a continuum on which all statutory rapists fall.⁹⁵ Not every defendant can be identified as a predator or a peer, but these extreme types of defendants in the caseload illuminate prosecutorial understandings of the best and the worst that a statutory rape (and rapist) can be and still fit within the terms of the statute.

As this Article discusses in more detail below, the predator-peer distinction shapes almost every aspect of case and caseload management in most counties.⁹⁶ What is most notable about this trend is not its development—indeed it was inevitable given the wide boundaries of the statute, the Governor's overbroad and simplistic "year in county jail" rhetoric, and the exploitation rationale for the statute's enforcement—but rather its prevalence: evidence of the predator-peer distinction emerged in *every* county in which interviews were conducted, not just in those where prosecutors identified themselves as lenient or moderate in their approach. The pages that follow provide a brief description of prosecutors' constructions of exploitation and predatory behavior and then offer a detailed explanation of how prosecutors understand and shape the boundaries of intimacy in peer relationships.⁹⁷

A. *Who is a Predator?*

"Predator" is the catch-all term for any type of lecherous adult who exploits adolescents to have sex. Predators are by their very nature dangerous creatures who have caused significant harm in the past and who pose a risk of future serious illegality. As one prosecutor explained: "[t]hey prey on one victim and when that victim becomes either noncompliant with what their demands are or unwilling to further their relationship by committing to being a permanent partner with the defendant, [he] will move on to other children and subject them to the risk."⁹⁸ The very label "predator" signifies that the defendant is a

⁹⁵ Here my research subjects diverge from the police detectives studied by Waegel; he found that "[the] features of the [police] interpretation process mean that [their] assessments . . . take on more of the character of a dichotomy than a continuum." Waegel, *supra* note 9, at 272.

⁹⁶ See *infra* Part V.B.

⁹⁷ For more information about prosecutorial constructions of predation, supplemented by quotes from my interview subjects, see Levine, *supra* note 13, at 229–37.

⁹⁸ Interview with Prosecutor 1, Hazel County, in Hazel County, Cal. (Dec. 27, 2001).

continuing threat to society because he tends to harm those weaker than himself. Under this formulation, predatory exploitation merits significant incarceration because the offender must be punished and society needs to be protected from future danger.⁹⁹ The indicia of predation or exploitation can be found in any of the following: (1) the actions of the defendant that generated the sexual encounter; (2) the defendant's status; or (3) the harmful outcome of the sexual relationship.

Prosecutors¹⁰⁰ first denote predation according to behavioral categories, where the defendant has engaged in dangerous action (beyond the sex itself) that victimizes and/or manipulates the teenager. My interviewees identify four principal types of behavior predation: abusing a position of trust, having multiple sex partners, intoxicating one's sex partners, and using force/violence to obtain sex.

The offender who abuses a position of trust or authority in order to find sexual partners might be a clergyman, teacher, coach, camp counselor, foster parent, police officer, or other professional working in close proximity with youth.

One case [involved] an individual who impregnated a teenager—she was sixteen or older—but she was developmentally delayed and he met her in his capacity as a Pop Warner coach and got her pregnant and he is married himself and had children. That is the kind of situation where I am going to push for state prison.¹⁰¹

For prosecutors, abuse of authority predation is probably the most heinous, as the harm caused to the victim is not only physiological but also emotional—the relationship can shatter the teen's ability to develop trust or respect for authority in the future, and it likely destroys her self-esteem. Moreover, prosecutors believe that exploiting a position of trust to gain sexual favors is a habit that is not easily broken; despite claims that "this is a one-time transgression and we truly love each other," it is likely that the offender has taken advantage of other victims in the past and will do so again in the future.

⁹⁹ One prosecutor describes exploitation as "something worthy of locking somebody up in jail." Interview with Prosecutor 1, Macon County, in Macon County, Cal. (Oct. 17, 2001).

¹⁰⁰ In the following pages I discuss themes that recurrently emerged in my interviews with California prosecutors. I do not suggest that all, or even most prosecutors, subscribe to each of the points of view discussed, only that enough of them mentioned these issues to make them worthy of observation and analysis.

¹⁰¹ Interview with Prosecutor 1, Cherokee County, in Cherokee County, Cal. (Jan. 8, 2002).

A second but related form of behavior-predator is the multiple-victimizer, the offender who has sex with multiple teenagers within a short period of time.

[F]irst and foremost—I would be looking for persons that appeared to be predators in that they are identifying underage girls as their most likely partners. And they are going it with . . . many many women, many many girls. . . . Guys who just have a yen for underaged girls or [it's] the easier route for them or whatever. . . .¹⁰²

Prosecutors perceive the multiple-victimizer as an adult who simply uses young teens for sex and then discards them once she is finished.¹⁰³ Oftentimes the multiple-victimizer has located her victims by using the internet or by signing in to on-line teenage chat rooms. Using these forms of technology to find teenage sex partners, and perhaps to build some sort of relationship before revealing adult status, is considered a particularly offensive type of exploitation.

An offender who gives his teen sex partners drugs or alcohol, and/or who has sex with an intoxicated teenager, also qualifies as a behavior-predator because he uses his access (as an adult) to intoxicating substances to entice adolescents into sexual experiences. One prosecutor explained her experience with such matters: "I have had cases that have gone to trial with fifteen year-old girls and forty-five year-old men and they are enticing them with drugs and alcohol. I just don't see that as a level playing field."¹⁰⁴ This predator is dangerous because he exploits an already uneven "playing field," "using his age as an advantage" to befriend teens who want things they cannot get legally.¹⁰⁵ Although prosecutors emphasize that the intoxicator is dangerous because he exposes teens to illegal substances, he is actually just one of a species of predators who endanger adolescents by exposing them to a criminal or hazardous lifestyle; adults who encourage teens to steal or to carry weapons for them are considered equally predatory.

Fourthly, offenders who use force or violence in the context of their romantic relationships are considered behavior-predators. One prosecutor noted that "[s]ometimes things are more aggravated. It is almost like a borderline stalking. I probably couldn't prove rape but definite coercion

¹⁰² Interview with Prosecutor 1, Gamet County, in Gamet County, Cal. (Nov. 2, 2001).

¹⁰³ For a similar finding in child molestation cases, see Levesque, *supra* note 43, at 337-38.

¹⁰⁴ Interview with Prosecutor 1, Emmanuel County, in Emmanuel County, Cal. (Jan. 15, 2002).

¹⁰⁵ See Interview with Prosecutor 1, Macon County, in Macon County, Cal. (Oct. 17, 2001).

things."¹⁰⁶ Quasi-forcible rapes have long been the mainstay of statutory rape prosecutions. Now, under the exploitation framework, sex that occurs under conditions of violence—either through stalking, direct threats, or as part of continuing abusive relationship—aptly demonstrates the principle of vitiated consent. Coerced sex is, by definition, predatory sex.

Predation is not just a behavior, however. Some prosecutors identify predation based on the defendant's status, age, or background. For example, the offender who is much older than the victim—more than ten years older and likely more than twenty years older—appears predatory because it is inconceivable that he could develop genuine romantic feelings for such a young partner.

I'm looking to see, the biggest category[y] I think is most determinative is the age. If there is a great disparity in age, then the greater the disparity, the greater the exploitation. Again I cannot figure out why [an adult] male cannot seem to find an age appropriate girlfriend and has to go down to a fifteen or sixteen year-old to fall in love with for whatever reason.¹⁰⁷

Prosecutors contend that this type of status-predator exploits an enormous gap in age, maturity, and experience to satisfy his sexual desires with an easily manipulated partner. Offenders with prior criminal histories also rank as status-predators, most likely because they have already achieved the status of "bad guy" in the criminal justice system, or perhaps because they should know better than to break another law.¹⁰⁸

Finally, some prosecutors identify predatory behavior according to the consequences of the sexual encounter. Did the sex result in transmission of an

¹⁰⁶ Interview with Prosecutor 1, Inman County, in Inman County, Cal. (Jan. 9, 2002).

¹⁰⁷ Interview with Prosecutor 1, Diamond County, in Diamond County, Cal. (Oct. 15, 2001).

¹⁰⁸ Prior criminal background (especially for prison offenses) was commonly cited by prosecutors as the factor most likely to persuade a judge of the case's seriousness; this is consistent with the observations of other scholars, who have documented the strong positive correlation between prior record and severity of sentence. See, e.g., Levesque, *supra* note 43, at 337–38; Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 342–46 (1997). The rationale for the tariff imposed for prior criminal history in statutory rape cases is unclear. On the one hand, ex-convicts might be committing more (or more serious) criminal violations than the average statutory rapist; on the other, the higher penalty might reflect a common judicial sentence enhancement for people with existing criminal records. Alternatively (or additionally), for offenders who are still on parole or formal probation, any new criminal violation can trigger a parole or probation violation punishable by up to a year in state prison. For a discussion of prosecutors' use of violation hearings to supplement or replace prosecution on new charges, see Rodney F. Kingsnorth, Randall C. MacIntosh & Sandra Sutherland, *Criminal Charge or Probation Violation? Prosecutorial Discretion and Implications for Research in Criminal Court Processing*, 40 CRIMINOLOGY 553, 555–56 (2002).

STD? Did it result in a pregnancy? Has the adult avoided responsibility for the baby, causing the victim to rely on welfare support? Has the victim dropped out of school? One of my interviewees put it thusly: "Quite frankly I think you have to create more punitive problems for people who create public assistance birth."¹⁰⁹ Another lamented, "[T]he fourteen year-old will be living with her thirty year-old defendant/boyfriend/husband/father [of her child] and her life will be ruined. There will be no high school graduation for her, no college, no education whatsoever."¹¹⁰ Under this consequentialist view, the danger in an adult-teen liaison inheres not so much in the process by which the adult obtained sex, but rather in the ways in which the teen's life (or California's financial resources) might be forever altered following the sex. Prosecutors do not limit their consideration of relevant consequences to the physiological realm: adults who interfere with a teen's education or who sidestep their financial obligations to children they sire also deserve to be punished as predators.

In sum, prosecutors identify predators in a variety of ways: by the manipulative tactics they use to procure the sex, by their irresponsible behavior following the sex, or by their deviant (preexisting bad guy) status. Two additional points about predators are worthy of mention. First, it seems that prosecutors ascribe a heightened level of criminal intent to the predators in the statutory rape caseload; their comments reveal a common belief that adults who commit these extreme forms of statutory rape know they are violating the law and deserve to be punished heavily for this intentional transgression.¹¹¹ The garden variety statutory rapist, by contrast, might assert a plausible claim for mitigation (although not a recognized legal defense) based on inadvertence or obliviousness.

Additionally, the predator category is sexless: predators can be male or female. California changed its statutory rape law to incorporate sex-neutral language in the early 1990s. Although the vast majority of statutory rape cases

¹⁰⁹ Interview with Prosecutor 1, Franks County, in Franks County, Cal. (Oct. 29, 2001).

¹¹⁰ Interview with Prosecutor 1, Lisle County, in Lisle County, Cal. (Jan. 8, 2002).

¹¹¹ For example, one prosecutor asserts:

The first thing I do is I look at the birth dates because the larger . . . the expanse between the two, the more obvious [it] would be to me that the defendant knows what he is doing is wrong and knows that he can be prosecuted for it. . . . [A]s a rule, twenty-one and fifteen, that is a large enough gulf that anyone should know, any guy knows, and he is making decision to pursue a relationship that is patently against the law . . .

Interview with Prosecutor 1, Garnet County, in Garnet County, Cal. (Nov. 2, 2001).

involve male defendants and female victims,¹¹² the predatory designation is not reserved exclusively for male defendants. In fact, most of the stories I was told about female defendants involved some aspect of exploitation, specifically abuse of trust positions or intoxication;¹¹³ there were very few "garden variety" or intimate statutory rapes committed by women. Such was not the case for male defendants, many of whom were classified as low level violators.

B. *Who is a Peer?*

While the mantra of the predation category is exploitation, the theme that emerges in the "peer" statutory rape cases is intimacy. Prosecutors interrogate the dynamics of the alleged relationship to look for indicia of commitment, stability, and support.

[S]o much in these cases was a matter of what are the dynamics of the case. How did they come together? Why are they together? Are they still together? If there was a pregnancy was he doing the right things and accepting his responsibilities as a father? All of those things; what was his attitude toward the whole thing? What was her attitude? Did the parents know or not know what was going on?¹¹⁴

The peer statutory rape designation depends on how prosecutors interpret certain behavioral and status cues,¹¹⁵ including how the defendant and victim became involved, why they are still together, whether the defendant acted responsibly before and after sex, and the attitude of both participants and their families. According to this formula, intimacy inheres not in sexual encounters between two people who know each other, but only in responsible sexual relationships between two people who are close in age, obviously committed to each other, and likely to remain together in the future. As the prosecutor from Hazel County described, "it is a situation where the participants have shown a *permanency* They have shown a *real desire to be together*. They have

¹¹² Fewer than four percent of the defendants in filed cases are women. See Levine, *supra* note 13, at 172-91 for additional discussion of the composition of the defendant population. Many of my interviewees asserted that the caseload gender imbalance originates at the reporting stage: the vast majority of statutory rapes involving nonpredatory female adults likely never make it across the prosecutors' desk.

¹¹³ To learn about the handling of female sex offenders in the statutory rape literature, see generally Levine, *supra* note 82.

¹¹⁴ Interview with Prosecutor 1, Randall County, in Randall County, Cal. (Jan. 10, 2002).

¹¹⁵ Here I have limited the discussion to a gender-specific format, wherein the defendant is presumed male and the victim female. This is for convenience only, and to reflect the predominant case paradigm in peer relationship cases. Readers should be aware that males and females can be found in both the defendant and victim populations in the statutory rape caseload.

*held themselves out as people who are in a permanent relationship.*¹¹⁶ Another prosecutor likewise stated:

[F]or instance if the parties come in and say they are going to get married. If they come and actually show us and the follow through with that, that can be the cause for [leniency] . . . [W]here it is not advisable or for other reasons where marriage really isn't something that can be foreseen, then the . . . party takes responsibility financially. That is something else we try to encourage. If somebody is willing to step up and be responsible, then we won't make the law go against them on it.¹¹⁷

In contrast to the subdivided population of predators, the peer relationships share a core set of traits. Intimacy depends first and foremost on the defendant's ability to commit to his sex partner for the long-term. His commitment, where feasible, will result in marriage; at the very least it includes public manifestation of couplehood and financial responsibility for children conceived as a result of the relationship. In other words, once a relationship achieves a level of stability approximating marriage, the behavior inside the relationship should be free from government intervention and oversight. My data thus support Black's theory that the *level* of intimacy, not just the mere existence of a relationship, is often relevant to the law's treatment of a relational matter.¹¹⁸ As Black reports that the length of a marriage affects the court's treatment of domestic violence or divorce, so too does the length and projected stability of a relationship influence statutory rape consideration. This is the core of the intimacy-as-privacy paradigm.

But for a few prosecutors, the privacy model does not comprise the entire inquiry. Proof of such measures may be necessary, but they are not sufficient to establish true intimacy worthy of a discount. Once these prosecutors are convinced that the relationship is stable, they next assess the defendant's status vis-à-vis the victim and attempt to measure the quality of the relationship itself. This involves inquiries such as: Is the defendant an appropriate partner for the victim? Is the victim reasonably safe and happy in the relationship? The prosecutor from Violet county explained: "we look at a lot of facets . . . if there is a child and he is *paying for the child* and is *being a responsible parent* . . .

¹¹⁶ Interview with Prosecutor 1, Hazel County, in Hazel County, Cal. (Dec. 27, 2001) (emphasis added).

¹¹⁷ Interview with Prosecutor 1, Franks County, in Franks County, Cal. (Oct. 29, 2001) (emphasis added).

¹¹⁸ BLACK, *supra* note 6, at 44.

[the] girl is back in school . . . what her grades are like"¹¹⁹ Another interviewee described a situation she encountered:

[T]hey had a *joint checking account* and she was able to do whatever she wanted with his money. . . . He seemed like a *very decent guy* *He was going to be there for her so she could go to college* and help her pay for everything and *be a good father*.¹²⁰

These prosecutors find true intimacy only in relationships between two people of similar ages who are supportive of each other emotionally and financially. Occasionally prosecutors use the term "Romeo and Juliet" to describe such relationships, invoking the romantic notion of two co-equals whom outside forces inappropriately seek to keep apart.¹²¹ To judge the victim's happiness and security, prosecutors may invoke tangible measures, such as whether she is continuing her education (and, in the case of Violet County, achieving actual success in school) and whether she has access to the defendant's finances. Moreover, when the parents support the relationship, prosecutors feel more comfortable concluding that the relationship is healthy and positive, particularly for the female.¹²² One prosecutor noted that "oft times they are in the courtroom with the victim and oft times one or more family members from both sides are going to be there with all of them and you just get a different feel for what is going on."¹²³ Another explained:

They may have already had a relationship in Mexico. Their parents may be completely on-board with this. They may be twenty and fifteen. They were dating for several years in Mexico. They come

¹¹⁹ Interview with Prosecutor 1, Violet County, in Violet County, Cal. (Dec. 14, 2001) (emphasis added). Compare this comment to an expression from the Emmanuel County prosecutor, who said: "I have had similar situations where the girl is seventeen and she has had a baby and he is not treating her very nice or he has not got a job or is not paying child support. I'll often tell them this [prosecution] is a way to keep him motivated." Interview with Prosecutor 1, Emmanuel County, in Emmanuel County, Cal. (Jan. 15, 2002).

¹²⁰ Interview with Victim Advocate 1, Bennett County, in Bennett County, Cal. (Nov. 15, 2001) (emphasis added).

¹²¹ See, e.g., Interview with Prosecutor 1, Inman County, in Inman County, Cal. (Jan. 9, 2002); Interview with Prosecutor 1, Aguilar County, in Aguilar County, Cal. (Nov. 8, 2001). Likewise, the Hazel County prosecutor says the SRVPP is not meant to address "relationships between a boyfriend/girlfriend where the girlfriend happens to be seventeen and the boyfriend happens to be eighteen . . . [where] you do not have aspects of violence, coercion, physical injury or something else that makes your sixth sense go up." Interview with Prosecutor 1, Hazel County, in Hazel County, Cal. (Dec. 27, 2001).

¹²² See, for example, comments by Prosecutor 1, Randall County, in Randall County, Cal. (Jan. 10, 2002) (commenting that if the parents knew what was going on and regarded the boyfriend as a good supporter of their daughter, he was inclined to be more lenient in prosecution). I also heard many stories of parents who were happy to have someone else take care of their troubled or trouble-causing daughter; where prosecutors sense this is the real reason for parental "support" of the relationship, the intimacy label does not attach.

¹²³ Interview with Prosecutor 1, Franks County, in Franks County, Cal. (Oct. 29, 2001).

here; she may be pregnant when she arrives. . . . *What is the good versus the harm that is going to come out of putting this guy in jail for an act that has long since been committed and has long since been ratified or validated by other circumstances?*¹²⁴

The existence of a cultural community norm sanctioning adult-teen relationships seems highly relevant to many prosecutors: where the community to which the defendant and victim belong encourages and supports the relationship (and may have already hosted a cultural marriage ceremony), the formal law's requirements appear less compelling. Taking into account these cultural, familial, and circumstantial considerations,¹²⁵ many prosecutors conclude that intimate peer sexual relationships, while they technically violate the law, do not merit (or would not benefit from) criminal justice intervention. To paraphrase from Donald Black, law presumably has no place at the extremes of intimacy.¹²⁶

In sum, the statutory rape law and the exploitation framework promoted by the SRVPP are both too broad and too general to be of much use in the day to day world of statutory rape prosecution. To correct for this overbreadth, California prosecutors have developed a workable understanding of predators and peers, of exploitation and intimacy, that seems to transcend jurisdictional boundaries.¹²⁷ Predators are those offenders who cause significant physical, psychological, or emotional harm to their victims and who pose a significant risk of future criminality. Predatory behavior runs the gamut from abuse of trust positions to intoxication to multiple victimization to financial irresponsibility; all of these behaviors are seen as actively (rather than presumptively) exploitative of teenagers and dangerous for society more generally. A peer, in contrast, has built an intimate relationship with someone who happens to be a minor, a relationship that manifests stability and responsibility and receives the support of the teenager's family.

¹²⁴ Interview with Prosecutor 1, Garnet County, in Garnet County, Cal. (Nov. 2, 2001) (emphasis added).

¹²⁵ *Id.*

¹²⁶ BLACK, *supra* note 6, at 44. Note that this focus on family and community ratification may actually be a reflection of (or reversion to) the privacy model, as it suggests that the law should stay out of what is essentially the family's business and should support the family's internal choices.

¹²⁷ This predator-peer spectrum generally resembles the distinction between "real" and "technical" crimes identified by other scholars in studies of other prosecutors. See, e.g., LITRELL, *supra* note 5, at 51-54; VERA INST. OF JUSTICE, *supra* note 5, at xxiii. These studies differ from the statutory rape study in important ways. First, other works typically assess prosecutorial constructions of a broad range of crimes, rather than within-crime variation of the sort studied here. Moreover, other scholars have generally limited their research and findings to one particular office; because I looked at a statewide program I was able to identify patterns that emerged in multiple offices simultaneously.

Yet two distinct notions of intimacy appear to be embedded in the peer label. One—the intimacy-as-privacy model—privileges traditional conceptions of acceptable sexual relations, such that sex is acceptable only when conducted in the context of marriage or, at least, in a context leading toward marriage. The other, the intimacy-as-equality model, reflects more progressive conceptions of acceptable sexual relations and insists that sex is acceptable when conducted between social equals who operate within a framework of respect. Under the privacy paradigm, intimate sexual relationships are simply not the law's business. Under the equality paradigm, intimate sexual relationships, and those who engage in them, pose no threat to the community and cause no actual harm to teenagers. Currently, the privacy model appears dominant,¹²⁸ and the consequences of this dominance will be discussed in Part VII.

In devising the predator-peer distinction, statutory rape prosecutors have implicitly adopted the strategy used by other criminal justice actors, such as police officers, to manage large caseloads comprised of similar events. Stereotypes and typologies have been shown to guide police responses to skid row residents¹²⁹ and homicide suspects.¹³⁰ These "routinization schemes" enable professionals to categorize the populations they manage and to apply standard modes of treatment to each classification.¹³¹

C. Deploying the Intimacy Discount Through Instrumental Filing

The constructions of intimacy and exploitation explained in the previous section help prosecutors to classify statutory rapes, and statutory rapists, on a theoretical level. But these understandings would hold little significance if they left no imprint on prosecutorial strategy. In fact, prosecutors regularly invoke the tenets of the predator-peer distinction when filing statutory rape cases.¹³²

¹²⁸ I base this claim on the sheer number of times the commitment theme arose in my interviews, in comparison to the number of times the substantive equality theme became apparent.

¹²⁹ Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 705-06 (1967).

¹³⁰ Waegel, *supra* note 9, at 273.

¹³¹ Waegel, *supra* note 9, at 273; *see also* Sudnow, *supra* note 5, at 260-61.

¹³² Elsewhere I describe the extent to which prosecutors must account for judicial or juror response when making later case management decisions, but those issues are largely irrelevant when prosecutors make instrumental filing decisions at the outset. *See* Levine, *supra* note 13, at 245-47. I note here that while I did not code for prosecutor gender, my rough observations suggest that this variable has no impact on the robustness of this paradigm. Male prosecutors appeared just as likely as females (and vice versa) to describe peers and predators in their caseload and to discount or to aggressively prosecute according to these

This Article focuses exclusively on filing because it is the most important prosecutorial function in the statutory rape caseload. As I have argued elsewhere,¹³³ most of the statutory rape cases contain no disputes about legally relevant facts (i.e., the occurrence of sexual intercourse, the victim's age, and the marital status of the defendant and victim). Many police reports even include admissions of guilt by the defendant and, if the victim is carrying or parenting a child, DNA evidence of the defendant's paternity. Moreover, the intent requirement is minimal; as long as the defendant knowingly engaged in sex and was at least negligent as to the victim's age (i.e., he did not reasonably believe her to be eighteen or older), the state will easily prove he possessed the criminal intent required for conviction. The straightforward quality of these cases (from a purely legal standpoint) means that the defense often has no legal argument to make; the odds of conviction after trial are stunningly high. As a result, the vast majority of defendants in the statutory rape caseload plead guilty in advance of trial; according to some prosecutors, the percentage is as high as ninety-nine percent. But more importantly, the defendant typically has little leverage at the plea negotiation stage, which means he will likely be forced to plead guilty to whatever crimes the prosecutor designates.¹³⁴ In the end, the specific crimes charged by the prosecutor matter immensely, because they generally determine the crimes to which the defendant will be pleading guilty and on which he will be sentenced.

In theory, filing should be a fairly reflexive process: the prosecutor assesses the facts and determines which penal code sections are implicated by those facts. But the reality of filing is far more complex. Although the facts may be uncontested, determining which laws apply to these facts is a tricky matter. The matrix of sex crimes in the Penal Code leaves the prosecutor with a variety of options and she must choose carefully, as some of these crimes carry the

constructions. The urban, rural, or suburban nature of the jurisdiction, however, did appear to have some effect. *Accord* Mellon et al., *supra* note 4. Prosecutors working in urban, high-crime areas appeared to have a more sophisticated approach (than their colleagues in rural or suburban counties) to separating out the worst offenders and to give leniency to a larger group of peer defendants. While I did not question on this point specifically, I surmised that the crime rate in one's area creates a barometer of sorts that affects how prosecutors rate the seriousness of offenses. In areas that experience a lot of serious violent crime, even bad statutory rapes do not seem that bad, while in areas that experience relatively low levels of serious crimes, statutory rapes appear considerably more dangerous and prison-worthy. See R. Barry Ruback, Gretchen R. Ruth & Jennifer N. Shaffer, *Assessing the Impact of Statutory Change: A Statewide Multilevel Analysis of Restitution Orders in Pennsylvania*, 51 *CRIME & DELINQ.* 318, 323 (2005) (citing J.T. Ulmer & B. Johnson, *Sentencing in Context: A Multilevel Analysis*, 42 *CRIMINOLOGY* 137-77 (2004) for reasons that urban courts offer more leniency than rural courts in sentencing)).

¹³³ Levine, *supra* note 13, chs. 5 and 7; see also Levine, *supra* note 65.

¹³⁴ See Adams, *supra* note 9, at 536.

risk of significant prison time and/or lifetime sex offender registration for convicted defendants. The statutory rape prosecutor's case management decisions therefore begin with her understanding of what possibilities the Penal Code offers; she then assesses the merits of each individual case in light of the norms embodied in the predator-peer distinction.

Using an instrumental approach to filing, most statutory rape prosecutors conduct an ends-means analysis to determine which of the factually appropriate charges actually merit filing in light of the predicted impact(s) on society, the victim, and the defendant.¹³⁵ The cornerstone of the instrumental approach is the pre-filing assessment of the "right" case outcome; once the prosecutor determines what he wants to accomplish, he files charges intended to produce that outcome. One prosecutor described instrumental filing like this: "[f]igure out what your end result is and then file accordingly, because then you are always working toward something and you can have an evaluation of your case."¹³⁶ Another remarked: "you look at each case and figure out what it is you are dealing with and try to make the results match what you have got."¹³⁷

By filing highly-focused complaints, rather than packing the charging documents with every crime imaginable, the prosecutor can ensure that the defendant's eventual sentence comports with her view of the proper disposition. The "right" sentence is, in other words, the sentence the prosecutor feels the court should impose in light of the facts.

To succeed in this approach a prosecutor must conduct an extensive pre-filing investigation so that all relevant facts, both aggravating and mitigating, can be factored into her assessment of the "right" outcome. Other scholars have described this process as determining the "worth" of a case:¹³⁸ in the statutory rape context, the prosecutor wants to know everything about the case up front in order to identify exploitation, intimacy, or something in between. Although the initial evaluation can be modified if new facts come to light later

¹³⁵ Some prosecutors also described a more rigid, technical approach to filing, which is based on the notion that the prosecutor has an ethical obligation to file every charge supported by the facts; equities can be worked out later, preferably by the judge during sentencing. Reference to the technical filing approach was far less frequent among my interviewees than was reference to instrumental filing. See Levine, *supra* note 13, at 245-73.

¹³⁶ Interview with Prosecutor 1, Sapphire County, in Sapphire County, Cal. (Nov. 15, 2001).

¹³⁷ Interview with Prosecutor 1, Franks County, in Franks County, Cal. (Oct. 29, 2001).

¹³⁸ See, e.g., Frohmann, *supra* note 33, at 535-36; Wright & Miller, *supra* note 26, at 38; see also VERA INST. OF JUSTICE, *supra* note 5.

on (assessing appropriateness of outcome or case worth is a process, rather than a static fixture), prosecutors in the instrumental mode generally convey that they like to get it right the first time. Investigation at this stage often includes multiple interviews with the victim, separate interviews with the victim's family, thorough examination of the defendant's educational, work, military, and criminal background, and canvassing for third-party witnesses to the relationship (such as the victim's friends).

[B]efore we actually file on a lot of cases we have very in-depth interviews with complete understandings of the basic dynamics of the boy and the girl and if the families are intricately involved in it. A lot of times we go in [to court] knowing what the dynamic should be.¹³⁹

The Violet County prosecutor explained why this strategy is critical to understanding the case: "I mean you really have to go behind the complaint and talk to school counselors; teachers; nurses; and anybody that knows this kid to give you an insight into his personality and that will make the judges see the person in a different light."¹⁴⁰

Pursuant to this strategy, a prosecutor strives to unearth as much as she can about both victim and defendant before consulting the Penal Code; only after getting a handle on all of the broadly relevant facts will a prosecutor decide what the disposition should be. Additionally, most of my interviewees acknowledged that competing interests at stake in a prosecution affect the content of the charging document. Prosecutors must simultaneously take account of the evidence, the victim's feelings (about the crime and about having to testify), and the degree to which the defendant needs to be punished, rehabilitated, or left alone.

There are no absolutely immutable fixed facts in my experience dealing with these cases. You really have to look at these things and are you going to make the life of your victim better or worse by what you are doing, bearing in mind that your victim doesn't want you to do anything. I have always tried to avoid doing prosecution in such a way that we are going to make the lives of the people that we are supposedly protecting worse, and we can do that. . . . You have to do what is in the best interests of [the victim]'s safety, but sometimes we can, just because we can, screw people to the floor and be not very

¹³⁹ Interview with Prosecutor 1, Franks County, in Franks County, Cal. (Oct. 29, 2001).

¹⁴⁰ Interview with Prosecutor 1, Violet County, in Violet County, Cal. (Dec. 14, 2001).

mindful of the fact that you are actually complicating the lives of people who we are supposed to be protecting.¹⁴¹

Thus taking into account the range of applicable statutes, the facts and idiosyncrasies of the case, and the perceived needs of the community, the victim, and the defendant, the prosecutor will draw up the charging document, including only those crimes that will produce the desired punishment.

Given the importance of the charging document in determining the eventual case disposition, the intimacy discount is highly relevant at the filing stage. Drawing on the individual and collective constructions of intimacy described above, a prosecutor who finds credible evidence of an intimate relationship will be inclined to file the case lightly. "Filing lightly" has two aspects, either or both of which may be implicated: filing fewer charges overall and/or limiting filing to nonfelony charges only.

First, prosecutors discount for intimacy by limiting they number of charges they file against a defendant. More specifically, they file only the most relevant charge(s); auxiliary charges are rejected as unnecessary "dog piling."¹⁴² For example, in a case involving two intimates who engaged in intercourse and oral copulation, the prosecutor discounting for intimacy would file only the intercourse charge, constructing the oral copulation as foreplay rather than as a separate offense.¹⁴³ She would also decline to add charges of contributing to the delinquency of a minor or annoying/molesting a minor; though factually accurate, these additional counts are not needed to produce the desired outcome.

Under the instrumental filing approach, the number of charges filed is critical because it determines the number of charges to which the defendant will have to plead guilty (or of which he will be convicted), which in turn can have a significant impact on the sentence. Because in most statutory rape cases the defendant has no leverage to negotiate dismissals of charges the prosecutor wants him to admit, he is at the mercy of the prosecutor in terms of number and type of charges to which he must accede. Furthermore, a

¹⁴¹ Interview with Prosecutor 1, Garnet County, in Garnet County, Cal. (Nov. 2, 2001) (emphasis added).

¹⁴² Interview with Prosecutor 1, Garnet County, in Garnet County, Cal. (Nov. 2, 2001).

¹⁴³ Prosecutors inclined toward leniency also strive to avoid imposing mandatory lifetime sex offender registration where possible. Conviction for oral copulation with a minor requires the court to impose the registration requirement; conviction for statutory rape (intercourse) does not. See CAL. PEN. CODE § 290 (West Supp. 2006) for a list of mandatory registration crimes; all crimes not on that list are subject to discretionary imposition of registration requirements. § 290(e).

defendant who pleads guilty to (or is convicted of) two or more crimes can be sentenced to serve custody time either consecutively or concurrently.¹⁴⁴ Consecutive or concurrent custody is a term usually built into plea agreements; in the event the case includes a contested sentencing hearing it is a matter for the sentencing judge to decide. Hence, a defendant secures a significant advantage by pleading guilty to as few crimes as possible in order to limit his maximum custody exposure. If he admits only one crime, it eliminates altogether the possibility of either the prosecutor or the judge insisting on consecutive custody terms. But the defendant's ability to limit the number of his guilty pleas depends almost entirely on the prosecution's willingness to file a minimum number of counts. This willingness characterizes the instrumental filing approach inspired by the intimacy discount.

In addition to limiting the total number of charges filed, the intimacy discount further suggests that prosecutors ought to reserve felony charges for defendants identified as predators. According to this view, only those who engage in truly exploitative sex should face punishment in state prison, which is the hallmark of a felony: "[B]asically if the victim and defendant are less than five years apart, . . . and there is no violence involved, no pregnancy involved, no multi-victims involved, no manipulation or coercion involved, no position of trust, and the defendant does not have any criminal record, . . . [w]e do not file those as felonies."¹⁴⁵

In contrast, intimate peer defendants should be handled as misdemeanants or allowed to participate in diversion programs.¹⁴⁶

¹⁴⁴ If the defendant is sentenced to serve time on two crimes consecutively, he must complete the custody term on the first crime before the clock starts running on the second crime. If the sentences run concurrently, he serves time on both crimes simultaneously, which allows him to get out of jail or prison much earlier than a consecutive term would allow.

¹⁴⁵ Interview with Prosecutor 1, Lisle County, in Lisle County, Cal. (Jan. 8, 2002).

¹⁴⁶ Diversion programs fall into two categories: pre-plea diversion and post-plea deferred entry of judgment. Under the former, the case is continued (postponed) for the period of diversion, during which the defendant must attend counseling or educational classes and obey other orders of the court. If she successfully completes the requirements of the diversion program, the case is dismissed. If she does not successfully complete the requirements, the case resumes at the point of arraignment as if the diversion was never attempted. Under deferred entry of judgment, the defendant must plead guilty to the charge before receiving diversion and her sentencing is continued for the diversion period. If she successfully completes the requirements, she is allowed to withdraw her plea and the case is dismissed. If she is unsuccessful, the case resumes at the point of sentencing. Among counties that use these alternatives in statutory rape cases, deferred entry of judgment is far preferable to pre-plea diversion because the guilty plea taken before the grant of diversion serves to ensure the defendant's future cooperation. However, in this Article I use the term diversion for ease of reference. See Levine, *supra* note 13, at 261.

If he's done everything including be extremely forthright with law enforcement from the beginning and done everything right by the female, including child support regardless of whether his name is the father on the birth certificate or not, and he's supporting, either he's the sole supporter or he's a large percentage of the support the child is given, I'm not going to brand him with a felony and compromise his ability to earn a living to support the kid.¹⁴⁷

In declaring that he is not going to "brand" a respectable, responsible defendant with a felony conviction, the prosecutor from Fulton manifests his keen understanding of the impact of a felony record; he'll handle the case as a misdemeanor to allow the defendant to maintain some semblance of a normal life once the case is over. Prosecutors in some counties take the intimacy discount even further, contending that the statutory rape law itself should be enforced *only* with respect to felonies. If the case does not warrant felony status—i.e., if the defendant does not deserve significant custody time—these officials won't file any charges at all. For instance, the Aguilar prosecutor noted: "our prosecutions [have] to have something else in them—coercion, fear. . . . We don't have just statutory rape, which I would personally consider a joke myself."¹⁴⁸ The Ruby County prosecutor expressed a similar point-of-view: "[if] some eighteen year-old boy . . . goes to the junior prom with his girlfriend . . . and they have a healthy relationship is it our place to judge that? I mean I wouldn't want it for my kid, but is it our place from a legislative standpoint to judge that?"¹⁴⁹

These comments reveal that prosecutors' invocation of the predator-peer distinction stems at least in part from a desire to interpret conscientiously the statutory rape law's purpose. A violation of the age of consent law that does not cause actual harm to the victim, or that does not implicate exploitative behavior, is "a joke," outside the bounds of legislative concern or program resources. In the words of a prosecutor from Randall County, "[T]hat may be a very serious problem for their parents and for them and maybe even for society, but we are not going to make it a criminal problem."¹⁵⁰ Like the principled charging strategies of New York City prosecutors studied by the Vera Institute, discounting for intimacy "appear[s] to be a reflection of the system's effort to carry out the *intent* of the law—as . . . participants perceive

¹⁴⁷ Interview with Prosecutor 1, Fulton County, in Fulton County, Cal. (Nov. 28, 2001).

¹⁴⁸ Interview with Prosecutor 1, Aguilar County, in Aguilar County, Cal. (Nov. 8, 2001).

¹⁴⁹ Interview with Prosecutor 1, Ruby County, in Ruby County, Cal. (Dec. 11, 2001).

¹⁵⁰ Interview with Prosecutor 1, Randall County, in Randall County, Cal. (Jan. 10, 2002).

it—though not necessarily the letter of the law.”¹⁵¹ By deploying the intimacy discount in their filing decisions, prosecutors avoid making “criminal problems” out of technical law violations and family problems. They apply the full force of the criminal law only to those who cause actual harm.

These efforts appear necessary to correct for inherent deficits in the statutory rape law itself. For most conventional crimes, such as robbery, murder, or auto theft, the harm posed by the prohibited conduct is clear, and the criminal intent possessed by the offender sets him apart from members of the general public. The statutory rape law, in contrast, contains no inherent notion of harm¹⁵² and requires a low criminal intent threshold. To many people both inside and outside of the criminal courts, this contrast suggests that statutory rape is not a real crime and that criminal justice resources should not be allocated for such a minor concern. Prosecutors staffing the statutory rape units, cognizant of the crime’s reputation, must justify their use of resources and work to build statutory rape into a prosecution-worthy offense. By identifying case level factors that fill the gaps left by the statutory wording and by dedicating prosecutorial resources mostly to predators—those statutory rapists who most closely resemble real criminals—prosecutors attempt to duplicate traditional criminal law limitations that justify punishment in most instances.¹⁵³ In short, they are working hard to make statutory rape a real crime.

VI. PROSECUTORIAL MOTIVATIONS

The interview data reveal that prosecutors have developed an informal norm—the predator-peer distinction—to help them separate serious from non-serious cases. My research suggests that this practice emerged as result of overbroad and conflicting statutory mandates, aggressive but unworkable rhetoric from the Governor’s Office regarding the anticipated punishment for statutory rapists, and an ambiguous program rationale.¹⁵⁴ While these categories do not have rigid boundaries, prosecutors rely on them to guide their case management decisions. In many counties, ascription of predator/exploitation or peer/intimacy status has direct consequences for how

¹⁵¹ VERA INST. OF JUSTICE, *supra* note 5, at xxv (emphasis original).

¹⁵² See Levine, *supra* note 13, at 6.

¹⁵³ Special thanks to Ron Wright for bringing this point to my attention.

¹⁵⁴ To the extent that other crimes might be exposed to this same trajectory of events, I suspect prosecutorial discretion and the development of typologies would evolve to aid enforcement there as well. However, it is not my intent to prove that hypothesis here.

the defendant is treated by the prosecutor's office, because status is related to desired punishment and desired punishment often dictates prosecutorial strategy. More aggressive approaches that produce more severe punishments are reserved for predators, while peers receive lenient treatment either at filing, during sentencing, or both.

This Part explores the prosecutorial motivations behind these practices, particularly the recognition and use of intimacy between a defendant and victim to craft a more merciful disposition, what I have termed the intimacy discount. Understanding why prosecutors make certain decisions in certain cases, how they decide which cases to press and to bargain, how they treat victims and their families—all of these issues matter—not just to our understanding of how prosecutors do their jobs, but also to our eventual community understanding of the crime of statutory rape.

Prosecutors making charging decisions find the intimacy discount valuable for three principal reasons: efficiency, credibility, and the achievement of substantive justice. First, the intimacy discount produces a tailored charging document rather than a bloated list of counts. Prosecutors assert that a defendant faced with a precise charging document is more likely to plead guilty at the earliest opportunity instead of fighting the charges, because he (and his attorney) regard the complaint as a fair representation of the behavior at issue. In other words, discounting for intimacy early on should produce quick case resolution.

I think a good prosecutor should make a judgment from the get go of what a case is worth and just file it that way. . . . [W]hen I make that decision you come in and you plead your guy immediately. And then if that's the case then we're both, things will work out perfectly.¹⁵⁵

By working hard at the outset to identify mitigating factors such as intimacy, and then affixing the proper charges to the defendant's conduct based on these factors, prosecutors save themselves, defendants, defense counsel, and judges a lot of time and effort.¹⁵⁶ Prosecutors thus regard the intimacy discount as both fair and efficient, an unusual combination in a criminal justice system that usually requires a tradeoff between these two values.¹⁵⁷

¹⁵⁵ Interview with Prosecutor 1, Carlisle County, in Carlisle County, Cal. (Oct. 22, 2001).

¹⁵⁶ See Wright & Miller, *supra* note 26, at 38.

¹⁵⁷ See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 199–243 (1979).

Secondly, judicious use of the intimacy discount improves the prosecutor's credibility with judges and with the defense bar. Prosecutors who seek only what is (widely understood as) appropriate, rather than all the formal law allows, are viewed as more knowledgeable, more self-restrained, and ultimately more trustworthy within the context of the adversary system.¹⁵⁸

Before I decided what I was going to file, what did I want the punishment to be? And then I was saying, "What am I going to file to accomplish that?" . . . And by doing that, when I went into the [plea bargain conference], the judge would say, "What do you want?" *I would tell him what I wanted and the judge got to know that I didn't overshoot my mark; I didn't ask for the moon when I knew I wasn't going to get the moon.*¹⁵⁹

Prosecutors express strong personal and professional attitudes about being perceived as overreaching or overzealous. They indicate that good prosecutors take care to build and protect a reputation for trustworthiness, because a lawyer's reputation affects his ability to garner support from the judiciary in controversial cases. By restraining himself and his litigation options by discounting for intimacy in appropriate cases, the prosecutor communicates that he can be trusted to determine the worth of a case without the usual adversarial safeguards. Faced with evidence of trustworthiness, judges are less likely to second-guess prosecutorial charging decisions in other cases, even where the defense alleges impropriety.¹⁶⁰

Thirdly, most prosecutors acknowledge that discounting for intimacy is likely to produce outcomes more consistent with substantive justice ideals. Appropriate use of leniency signals that the prosecutor has respect for the defendant's personal circumstances, understands the nature of the victim's involvement in a consensual act, and does not regard the justice system as simply a crime control mill.

My goal is not necessarily to mount up felony convictions for statistical purposes. It's to *see that the [county's] needs are met and justice is done* to try to accomplish the goals of the program while meeting the needs of the county and our society. *I think we have an obligation to defendants too to use our moral judgment as [to] what's cruel and unusual under the circumstances.*¹⁶¹

¹⁵⁸ See VERA INST. OF JUSTICE, *supra* note 5, at xii-xvii.

¹⁵⁹ Interview with Prosecutor I, Sapphire County, in Sapphire County, Cal. (Nov. 15, 2001) (emphasis added).

¹⁶⁰ See *supra* note 156 and accompanying text.

¹⁶¹ Interview with Prosecutor I, Carlisle County, in Carlisle County, Cal. (Oct. 22, 2001) (emphasis

We bang people daily in our jobs. That is what we do. I am a big proponent of accountability. . . . But . . . it is oftentimes more satisfying when you can actually sort of “help someone out a little bit.” There is satisfaction in giving a person some sort of a break or crafting something that isn’t going to just make a complete hash out of their life.¹⁶²

A prosecutor who sees herself as more than just an advocate for the state can use constructions like intimacy to help worthy defendants; she does not need to punish all defendants to the maximum extent authorized by the formal law. Many prosecutors seem to enjoy this aspect of the job; they understand their power to “mess[] with these people’s lives”¹⁶³ or to “bang people,”¹⁶⁴ but they derive satisfaction from exercising mercy in appropriate cases. Moreover, discounting for intimacy improves the image of the prosecutor publicly; it is strong evidence that she understands the precise role of punishment in the criminal law and is not out for blood in every case.¹⁶⁵

Indeed, use of the intimacy discount in nonserious cases may fuel the prosecutor’s power and authority to “hammer” defendants whom he regards as truly predatory. If the facts line up to support the predator/exploitation label, the prosecutor is likely to unleash the full force of the criminal law upon the defendant:

I may file [additional charges or allegations] if we really wanted to bang the bejesus out of somebody and there are cases that come along where I will read them and go, “Oh, this guy, this [is a] very bad man.” And then you start getting creative. I mean it is like a racehorse crim law exam. Find the folks in the pizza here . . .¹⁶⁶

[I consider myself] sort of a “velvet hammer.” [I] try and do it the easy way but if we have to we will do it the hard way and if I am the last one at the end of the line, that is what they are going to deal with.¹⁶⁷

Discounting for intimacy is a way to achieve—from the earliest possible moment—what the prosecutor perceives is substantive justice in each

added).

¹⁶² Interview with Prosecutor 1, Garnet County, in Garnet County, Cal. (Nov. 2, 2001).

¹⁶³ Interview with Prosecutor 1, Standard County, in Standard County, Cal. (Dec. 4, 2001).

¹⁶⁴ Interview with Prosecutor 1, Garnet County, in Garnet County, Cal. (Nov. 2, 2001).

¹⁶⁵ See Douglas Hay, *Property, Authority and the Criminal Law*, in ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17, 48–52 (Douglas Hay et al. eds., 1975).

¹⁶⁶ Interview with Prosecutor 1, Garnet County, in Garnet County, Cal. (Nov. 2, 2001).

¹⁶⁷ Interview with Prosecutor 1, Pearl County, in Pearl County, Cal. (Nov. 13, 2001).

individual case. The “velvet hammer” metaphor of the Pearl County prosecutor captures the equilibrium between mercy and aggression. The low-level peer defendant involved in an intimate sexual relationship will be charged minimally (in order to produce a low-level disposition with little or no custody time). This handling will stand in marked contrast to that received by the predatory/exploitative defendant: he will find himself charged with every crime possible and will likely face significant custody once convicted, treatment the Garnet County prosecutor calls “bang[ing] the bejesus” out of him. Moreover, because the prosecutor has shown (and has a reputation for showing) mercy to the peer defendant, other criminal justice actors—defense counsel, judges, probation officers, etc.—will more likely support aggressive prosecutorial treatment of the predator. The criminal law thus appears to be infused with justice, as defendants receive exactly what they appear to deserve and prosecutors receive the credit for proper balancing of interests.

The intimacy discount resembles the principled charging strategies documented by sociolegal scholars: it reflects prosecutorial consideration of not just case facts but also the equities of crime and punishment.¹⁶⁸ It also encompasses the “screening/bargaining tradeoff” identified by Wright and Miller, as careful evaluation in the early stages reduces the need for bargains or alterations later.¹⁶⁹ However, discounting for intimacy is more premeditated than these other approaches. The prosecutors I interviewed do not simply *predict* what might happen to the defendant at the sentencing hearing; they *decide* what they want to happen at sentencing and file accordingly. It is the criminal law equivalent of a self-fulfilling prophesy.

VII. THE COST OF THE INTIMACY DISCOUNT

Reflecting on the themes raised by my interviewees, there’s no doubt that prosecutorial recognition of intimacy serves important purposes. There are real differences between predators and peers in the nature of the criminal law violation they commit and in the types and degrees of harm inflicted on the victim, and the peer characteristics identified by prosecutors seem to comport with some common sense notions of factually (rather than just presumptively) nonexploitative or nonharmful behavior.¹⁷⁰ Moreover, to the extent that the

¹⁶⁸ See, e.g., LITRELL, *supra* note 5; VERA INST. OF JUSTICE, *supra* note 5; Frohmann, *supra* note 33.

¹⁶⁹ See Wright & Miller, *supra* note 26, at 31–32.

¹⁷⁰ Evidence from my interviews suggests that the peer status benefit does not seem to have been distributed in a racially-biased fashion. For comments about the racial composition of the statutory rape

criminal justice system is concerned about risk assessment or management and therefore apportions confinement based on the perceived level of risk posed by each defendant, the intimacy discount makes sense: Offenders who commit truly dangerous conduct and who cause substantial harm may pose a greater risk to the community than those who commit technical but non-harmful law violations. In short, it seems almost intuitive to regard peer statutory rapists as a special class of offender (a noncriminal's criminal, if you will) and to reserve the full force of the justice system for those whose transgressions cause real harm.

But examination of the implications of this practice cannot end there. The evidence I've collected suggests that prosecutors have been fairly strict in their assessment of who qualifies for the intimacy discount: they tend to reward those defendants, and only those defendants, who have sex within the confines of a committed relationship. For example, recall that the Hazel County prosecutor identified "[o]ne of the real concerns" in the caseload as "the lack of permanency of the Defendant and [his] lack of an ability to be in a permanent relationship by the victim."¹⁷¹ Others, like the Franks County prosecutor, emphasized that responsibility and commitment are the hallmarks of mitigation, prerequisites to the receipt of lenient treatment. These comments signal that the prior existence of a stable relationship and the continuance of the relationship beyond the sex convince prosecutors that the sex was not truly criminal; the absence of such facts points to real criminality. Commitment, in short, has become a proxy for non-exploitation.

To the extent that some prosecutors regard intimacy either exclusively or predominantly through the lens of privacy, the commitment mandate might be overinclusive, as teens in private relationships may be just as (if not more) susceptible to intimate partner violence than their adult cousins. There is much in the feminist literature to suggest that women and girls are harmed by loved ones all the time, in the privacy of their own homes.¹⁷² The rape studies discussed in Part II discuss a common stereotype, that intimate partner violence is less serious than stranger violence, but the law should not fall prey

caseload generally, see Levine, *supra* note 13, at ch. 5.

¹⁷¹ Interview with Prosecutor 1, Hazel County, in Hazel County, Cal. (Dec. 27, 2001).

¹⁷² See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515, 532 (1982); Lynn M. Phillips, *Recasting Consent: Agency and Victimization in Adult-Teen Relationships*, in *NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT* 82, 83 (Sharon Lamb ed., 1999); Taub & Schneider, *supra* note 94, at 121-22; Corrigan, *supra* note 43.

to such myths. It should resist, rather than reproduce, mistaken ideologies that perpetuate oppression of vulnerable members of society.¹⁷³

The commitment proxy may be underinclusive as well. Although prosecutors express a strong preference for permanent relationships and an inherent distrust of the sincerity of dating relationships between adults (even young adults) and teens,¹⁷⁴ non-relationship-based sexual encounters between teens and young adults might be non-exploitative experiences that produce no tangible or intangible harms to the teenaged partner.¹⁷⁵ Two people who know each other well, who share common interests, or who are casual friends may mutually decide to have sex; their goals may be as simple as physiological pleasure or momentary intimacy, and they may take measures to protect themselves from the risks of pregnancy and STD transmission. In other words, intimacy-as-equality can exist outside of a committed relationship.

¹⁷³ See Frohmann, *supra* note 33, at 532.

¹⁷⁴ In the words of the Diamond County prosecutor, "If there was a pattern of, sort of like dating where they were encouraging the minor to engage in sex and were saying you know, it's okay, I love you, all this kind of stuff, and then broke it off with [her], I'm looking [at] that [as a crime that needs to be punished]." Interview with Prosecutor 1, Diamond County, in Diamond County, Cal. (Oct. 15, 2001).

¹⁷⁵ See, e.g., Bruce Rind, Philip Tromovitch & Robert Bauserman, *A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples*, 124 *PSYCHOLOGICAL BULLETIN* 22 (1998); Robert Bauserman & Bruce Rind, *Psychological Correlates of Male Child and Adolescent Sexual Experiences with Adults: A Review of the Nonclinical Literature*, 26 *ARCHIVES OF SEXUAL BEHAV.* 105 (1997). Rind and his colleagues argue that the term "child sexual abuse" assumes rather than establishes harm, and it thus produces misguided policy. Rind, Tromovitch & Bauserman, *supra*, at 45. Many of the studies on which broad findings of harm are based used samples of young teens and children whose partners were at least 5 or 10 years older. *Id.* at 46. Scholars and clinicians too often lump together vastly different kinds of experiences under the heading of child abuse. *Id.* at 45. Additionally, studies show that "[a]dolescents are different from children in that they are more likely to have sexual interests, to know whether they want a particular sexual encounter, and to resist an encounter that they do not want." *Id.* Rind and his colleagues contend that, in order to have scientific validity, the term "child sexual abuse" should be reserved for early sexual episodes that are unwanted and experienced negatively; the term "adult-adolescent sex" should be used to describe a willing encounter between an adult and adolescent to which the adolescent reacts positively. *Id.* at 45-46. Other research indicates that adult-adolescent sex has been a commonplace, socially-sanctioned occurrence in other cultures and at other times in history; some cultures considered such practices within the normal range of human sexual behaviors. *Id.* at 46 (citing Vern L. Bullough, *History in Adult Human Sexual Behavior with Children and Adolescents in Western Societies*, in *PEDOPHILIA: BIOSOCIAL DIMENSIONS* (Jay R. Feierman ed., 1990)); DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1988); Paul Okami, "Slippage" in *Research on Child Sexual Abuse: Science as Social Advocacy*, in *THE HANDBOOK OF FORENSIC SEXOLOGY: BIOMEDICAL AND CRIMINOLOGICAL PERSPECTIVES* 559, 563 (James J. Krivacska, Psy. D. & John Money, Ph.D. eds., 1994). We should, in short, take care to investigate each case individually and resist the temptation to assume that all teenagers respond in the same way to sexual behavior with older partners.

In citing this research, I do not suggest that sexual contacts with adolescents cannot be harmful. There is plenty of evidence to the contrary. Rather, I believe that we should base decisions about criminal conduct on proven, rather than presumed, harm.

Nonetheless, prosecutors almost reflexively regard privacy as a prerequisite for intimacy and subordinate equality considerations to the status of context. The implications of this practice go beyond simply leaving the class of non-relationship-bound defendants out in the cold.¹⁷⁶ By offering leniency only to those offenders who have sex within the boundaries of a marriage-like relationship, prosecutors invoke, reproduce, and reinforce a sexuality norm that has long gone out of fashion.¹⁷⁷

I am not arguing that prosecutors are forcing victims into early marriages.¹⁷⁸ While some prosecutors indicate that a genuine (rather than sham) marriage between the parties can lessen the defendant's culpability,¹⁷⁹ much of the evidence actually points in the contrary direction:

Now we also said from the very beginning we did not want to be the holders of the shotgun at shotgun weddings That isn't our job. That is a whole other social judgment as to whether they should get married or not. Just because they have been sexually active doesn't necessarily mean they should get married.¹⁸⁰

[Marriage] aggravates [the case] based upon the principle that there is no reason for a girl to be married and still going to high school. And if this is true love like they claim that is then get married later and [it seems to me] the only reason they are getting married is to avoid a prosecution.¹⁸¹

¹⁷⁶ Significantly, the emphasis on family support and premarriage type commitments leaves no room for gay relationships, which often lack the support of the teen's family and cannot lead to marriage.

¹⁷⁷ In her study of prosecutors in a sexual assault unit, Frohmann observed that prosecutors construct and invoke "convictability" standards in their case management practices; in so doing, they reflect, reproduce, and reinforce existing community prejudices about worthy and unworthy victims. Frohmann, *supra* note 33, at 533.

¹⁷⁸ Before the SRVPP was fully underway, it was reported that social workers in one Southern California county were allowing adults to marry their teenaged (and sometimes preteenaged) girlfriends in return for a promise not to forward their case file to the District Attorney. See B. Drummond Ayres Jr., *Marriage Advised in Some Youth Pregnancies*, N.Y. TIMES, Sept. 9, 1996, at A12; Matt Lait, *Orange County Changes Policy on Underage Marriages*, L.A. TIMES, Jan. 24, 1997, at A3. The agency was publicly scolded and many prosecutors made a point of distinguishing themselves from this practice, which most regarded as abhorrent. See, e.g., Interview with Prosecutor I, Cobb County, in Cobb County, Cal. (Nov. 16, 2001).

¹⁷⁹ A handful of interviewees suggest that where the victim is pregnant and the defendant marries her, this display of responsibility and commitment to the unborn child should be rewarded. See, e.g., Prosecutor I, Interview with Prosecutor I, Garnet County, in Garnet County, Cal. (Nov. 2, 2001); Interview with Prosecutor I, Franks County, in Franks County, Cal. (Oct. 29, 2001); Interview with Prosecutor I, Carlisle County, in Carlisle County, Cal. (Oct. 22, 2001).

¹⁸⁰ Interview with Prosecutor I, Randall County, in Randall County, Cal. (Jan. 10, 2002).

¹⁸¹ Interview with Prosecutor I, Inman County, in Inman County, Cal. (Jan. 11, 2002).

One prosecutor went even further, opining that “[if the defendant] married the victim . . . I truly believe that’s setting up the domestic violence relationship. When [an overaged defendant] impregnates and has a child with an underage minor I’m not going to allow him to marry the victim just to get out of the crime.”¹⁸²

Prosecutors advance three reasons they should not be privileging marriage between statutory rapists and their victims: (1) “it’s not our job”—it is beyond the scope of the prosecutor’s job and expertise to give relationship advice or to push people into marriage; (2) “it’s a bad idea”—when statutory rapists marry their victims, the victim is likely to suffer a lifetime of unhappiness and abuse; (3) “it’s attempted manipulation”—a defendant’s sudden desire to marry his victim is a litigation ploy designed to foster leniency, not a sincere commitment. These themes were repeated in many of my interviews; prosecutors in small counties and large counties, rural and urban, generally (and often virulently) opposed the idea that marriage between defendants and victims was a good idea.

Yet while most prosecutors do not seem to be facilitating or even encouraging marriages between statutory rapists and their partners, the existing parameters of the privacy-based intimacy discount also do not recognize the potential validity and nonharmful quality of responsible, protected, substantively equal but nonrelationship-based consensual sexual encounters. The United States has experienced several paradigm shifts in the past two hundred years on the issue of appropriate sexual behavior. Our preindustrial society ancestors defined appropriate sex as procreative sex within the confines of marriage.¹⁸³ But with the development of modern romance and the nuclear family, our grandparents dropped the requirement of procreation and recognized that sexual activity with one’s spouse was appropriate sex, and our parents matured during a time when engaged couples, or couples on the verge of engagement, could have sex because the relationship was intended to lead to marriage.¹⁸⁴ After the sexual revolution, the link between marriage and sex dissolved further, as many people came to believe that responsible, protected sex (whether inside or outside a relationship) was acceptable, normal, and even fun.¹⁸⁵ Scholars have variously referred to this most recent shift as the

¹⁸² Interview with Prosecutor 1, Standard County, in Standard County, Cal. (Dec. 4, 2001).

¹⁸³ PAULA S. FASS, *THE DAMNED AND THE BEAUTIFUL: AMERICAN YOUTH IN THE 1920s*, at 262 (1977); cf. KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 11–14 (1984).

¹⁸⁴ See KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* 87 (1996).

¹⁸⁵ Some scholars have connected this model of sexual play to late-stage capitalism. See generally ANNE

“recreational model of sexual behavior,”¹⁸⁶ the “normalization” of sex,¹⁸⁷ “unbound eros,”¹⁸⁸ “the postmodern erotic revolution,”¹⁸⁹ and the “[f]un [e]thic.”¹⁹⁰ Against this backdrop of social history, the strong prosecutorial preference for sex within loving, permanent relationships—signaled by comments that emphasize the importance of “responsibility” and “commitment”—seems inconsistent with the current societal norm that validates factually-consensual, protected sex in other settings.

Prosecutors’ notions of acceptability in adult-teen sexual relationships are likely colored by the gender composition of the caseloads they handle: defendants are male and victims are female in at least ninety-five percent of the nonpredator cases.¹⁹¹ When viewed through a 1950s lens, sex between older men and younger females is a bad idea unless it is likely to lead to marriage.¹⁹² Outside of such a commitment (the “permanency” referenced by the Hazel County prosecutor), the female is likely to be used and discarded by the man once her sexual novelty is no longer appealing. This prediction is utterly divorced from the issue of consent; it is instead a presumption about vulnerabilities and options. It is assumed that the more vulnerable party—the woman—cannot understand the implications of giving away her virginity, that she would be swept away by passion and overcome by hormones, and that no woman in her right mind would choose to become sexually experienced without the promise of a long-term relationship. While the sexual revolution

ALLISON, NIGHTWORK: SEXUALITY, PLEASURE, AND CORPORATE MASCULINITY IN A TOKYO HOSTESS CLUB (1994); Monica Prasad, *The Morality of Market Exchange: Love, Money, and Contractual Justice*, 42 SOC. PERSP. 181 (1999). Prasad writes, “[I]n the more fervently free-market 1980s and 1990s, romantic love might sometimes be subordinated to, and judged unfavorably with, the more neutral, more cleanly exchangeable pleasures of eroticism.” Prasad, *supra*, at 206.

¹⁸⁶ Elizabeth Bernstein, *The Meaning of Purchase: Desire, Demand, and the Commerce of Sex*, 2 ETHNOGRAPHY 389, 397 (2001) (emphasis omitted), reprinted in Elizabeth Bernstein, *Desire, Demand and the Commerce of Sex*, in REGULATING SEX 101, 108 (Elizabeth Bernstein & Laurie Schaffner eds., 2005) (emphasis omitted).

¹⁸⁷ Manuel Castells, *The Net and the Self: Working Notes for a Critical Theory of the Informational Society*, 16 CRITIQUE OF ANTHROPOLOGY 9, 25 (1996).

¹⁸⁸ STEVEN SEIDMAN, ROMANTIC LONGINGS 126 (1991).

¹⁸⁹ Zygmunt Bauman, *On Postmodern Uses of Sex*, 15 THEORY, CULTURE & SOC. 19, 26 (1998).

¹⁹⁰ PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE 365 (Richard Nice trans., 1984).

¹⁹¹ For a discussion of the tendency of people to regard sex between adult women and teen boys as educational and nonharmful, see generally Levine, *supra* note 82 (and works cited therein).

¹⁹² ROBERT R. BELL, PREMARITAL SEX IN A CHANGING SOCIETY 66–73 (1966); LUKER, *supra* note 184, at 8; SHARON THOMPSON, GOING ALL THE WAY: TEENAGE GIRLS’ TALES OF SEX, ROMANCE, AND PREGNANCY 21 (1995).

largely changed these assumptions in the context of consenting adults, their imprint remains in prosecutorial understanding of adult-teen pairings.

Perhaps the postsexual revolution standard applies only when recreational sex occurs between consenting adults, and an adult forfeits his rights under this standard by choosing an underage partner. Yet the whole purpose of the exploitation rationale and the predator-peer distinction is to separate the formal law's *presumption* of harm from the substantive justice need to punish only those who cause *actual* harm. If there is no proof of actual harm, if the intimacy-as-equality paradigm would suggest a discount is in order, denying leniency for lack of a long-term commitment seems misguided. Prosecutorial practices that privilege privacy over equality thus appear to punish or reward the defendant for his relationship status, rather than for his attitude, actions, or behavior toward his partner.

In short, for statutory rape prosecutions, "relationship" appears to be the new "marriage."¹⁹³ Relationship-based privacy confers some measure of legitimacy on certain sexual acts that occur between adults and teens that technically run afoul of the criminal law. But this stringent intimacy standard does more than punish defendants who have sex outside of committed relationships with teen partners. It also denies their sexual partners the autonomy possessed by other teens: if a teenager wants to have sex but does not want to have a relationship, the formal law (operationalized by prosecutorial discretion) tells her she cannot do so. It regards her decision as presumptively coerced, or the product of false consciousness, despite any and all evidence to the contrary. It tells her that she must not have been in her right mind when she chose to follow this path. The prosecutorial preference for romantic sex (as opposed to recreational sex) thus teaches teens not that choosing sex is legally impossible, but rather that choosing nonrelationship sex is insane.

Such lessons are not lost on teenagers, who are fighting to emerge from adolescence into adulthood and seeking to express themselves along the way. One of the responsibilities of the law and of society is to promote policies that allow teens to grow up safely,¹⁹⁴ but surely there must be ways to ensure that the law does not also trample their ability to make decisions for themselves.¹⁹⁵

¹⁹³ For the precise wording of this phrase I thank K.T. Albiston.

¹⁹⁴ See Franklin E. Zimring, *The Jurisprudence of Teenage Pregnancy*, in *EARLY PARENTHOOD AND COMING OF AGE IN THE 1990s*, at 150, 157 (Margaret K. Rosenheim & Mark F. Testa eds., 1992).

¹⁹⁵ See PAMELA HAAG, *CONSENT: SEXUAL RIGHTS AND THE TRANSFORMATION OF AMERICAN LIBERALISM*

Prosecutorial policies that allow for and recognize the possibility of nonexploitative sex both inside *and* outside of committed relationships would go a long way toward respecting the autonomy rights of teenagers,¹⁹⁶ while still providing protection and strength to those who suffer at the hands of adults.

Looking more broadly, a final consequence of the intimacy discount concerns the community's understanding of the substantive law at issue and the ultimate longevity of that law. The cases that prosecutors choose to press and to publicize are likely to have an effect on the public's view of not only the crime but also the criminals who threaten the social order. The cases that prosecutors file but do not press—those disposed of quickly through plea bargains or diversion programs—rarely come to light. Consequently, practices that hide the official illegality of intimate, loving, committed (maybe even healthy) relationships between young adults and teens insure that the public will remain largely unaware of the formal law's reach into this area of behavior.

If the attention of the public and of the press is focused on egregious violations of the statutory rape law (such as those committed by teachers, ex-cons, pimps, and drug dealers), the public is likely to believe that the statute covers only serious instances of exploitative or harmful sexual contact between adults and adolescents. Fostering this belief among the public is, on the one hand, a way to heighten the legitimacy of both the SRVPP and the underlying statutory rape law: personnel and resources are assigned to the cases that most deserve them. But it also diverts attention away from the actual scope of the statute. If word does not spread about cases filed against nineteen year-olds

xiii-xx (1999); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 814-43 (1988).

¹⁹⁶ Teenagers should not become mere objects in this debate; their voices and sense of their own experiences matter. As Tobias Hecht, in his work *AT HOME IN THE STREET: STREET CHILDREN OF NORTHEAST BRAZIL* 188 (1998) has wisely observed, if one's goal in studying problems experienced by children is to "offer ideas on how to eradicate a problem, one can hardly view those people seen to embody the problem as autonomous beings in a social world." In other words, our sincere desire to help all teens avoid exploitation by adults may, if left unchecked, blind us to the ability of at least some teens to make mature and responsible choices.

Frances Olsen, in *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 429-32 (1984), opined that all teen victims of statutory rape should be given the choice about whether a prosecution should go forward. In her view, this is the only way for the criminal justice system to validate their choices and to respect their autonomy. I do not suggest we go that far—many teens who were manipulated into sex with an adult also might be manipulated into forgoing the prosecution. Rather, I suggest that prosecutors simply acknowledge that nonexploitative sex can occur in nonrelationship contexts and use the intimacy-as-equality paradigm, rather than privacy and relationship status, to justify grants of leniency.

who are romantically, safely, and sexually involved with sixteen year-olds, the public is likely to believe that the age of consent in California is something lower than eighteen, or that the statute is explicitly tailored to criminalize only truly predatory behavior. In either case, such beliefs presumably increase support for the statute.

Almost daily I have the experience of informing someone (who has been kind enough to inquire about my research) that the statutory rape law in California authorizes prosecutions of persons of any age who have sex with persons under the age of eighteen.¹⁹⁷ It is no exaggeration to say that the vast majority of my inquirers are shocked to learn of this threshold. "How can that be?" I am asked. "Cases with sixteen and seventeen year-old victims or twenty year-old defendants aren't really prosecuted, are they?" I shock my listeners further by declaring that such cases do exist, and they are not all that rare in the wake of the SRVPP. Explaining that many of those cases are treated as misdemeanors or result in lenient sentences is no consolation.

While my anecdotes do not rise to the level of scientific proof, they do signal that there is at least some level of discomfort with the actual breadth of California's statutory rape law, and my interviews with prosecutors indicate that this breadth is largely shielded from public view by prosecutorial practices.

[When I hear] "Why are you prosecuting this?" . . . I tried to make very clear . . . [the caseload] is way over fifty percent of older men with girls with babies. It is not the eighteen year-old or the sixteen year-old getting a girlfriend pregnant. It is older guys. Once people realize that, then public perception changes.¹⁹⁸

I do not mean to suggest that prosecutors are hiding the scope of the statute on purpose. In fact, it is far more likely that most prosecutors dispose of a sympathetic case with an eye towards securing a substantively just outcome for the defendant, and this is an honorable motive. But the fact remains: discounts for intimacy, cloaked in efficient dispositions, have kept the full extent of the statutory rape law out of the realm of public discourse and have thereby insulated the law from meaningful public critique.¹⁹⁹ As the prosecutor from

¹⁹⁷ The SRVPP does not fund prosecutions of juveniles for statutory rape, but the statute itself authorizes such prosecutions. *See supra* note 88. This is another example of prosecutorial discretion masking the true extent of the law's boundaries.

¹⁹⁸ Interview with Prosecutor 1, Cobb County, in Cobb County, Cal. (Nov. 16, 2001).

¹⁹⁹ *See* James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 652 ("Excessive reliance on discretion . . . hides malfunctions in the criminal justice system and avoids

Cobb County instructs, public perception of the law changes once people learn which defendants are the targets of the prosecutor's office. The very existence of a target population renders the parameters of the formal law invisible. Ironically, the prosecutor's discount for intimacy in a weak prosecution insures that the statutory rape law itself will never come under fire for having authorized the prosecution in the first place.²⁰⁰

CONCLUSION

In Fiscal Year 2002-03, California restructured the SRVPP to fit within a broader program of specialized prosecution efforts aimed at high priority crimes. As a result of this reorientation, today's SRVPP is only a portion of its former self: the state allocates about half as many funds to this program as it did during the program's heyday, and only about half of California's counties now receive these state funds each year. But even as the SRVPP has shrunk from its former position as the only fully-funded statewide vertical prosecution program, its lessons and effects continue to loom large, as many prosecutors insist that their counties will continue to aggressively enforce this crime.

The story of statutory rape's enforcement in late twentieth century California is, at the outset, an excellent example of the gap between the law in action and law on the books that sociolegal scholars identified almost half a century ago.²⁰¹ Faced with an overbroad statute and limited resources, statutory rape prosecutors choose which cases and defendants merit full enforcement, which warrant leniency, and which should receive something in between. In so doing, their practices create a divergence between the formal law and the enforced law that goes largely unrecognized, except by the populations most affected by it.

My data reveal that the enforcement process at the root of the gap is not unstructured or subject solely to the whim of the individual prosecutor. As

difficult policy judgments by giving the appearance that they do not have to be made.").

²⁰⁰ For an analogous argument in the context of limitations placed on the felony murder rule, see James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1465-69 (1994). Tomkovicz notes "[a]n unlimited felony-murder rule could make us confront a number of unsettling outcomes in individual cases . . . [Convictions in cases involving neither risky nor immoral felonies] would, by their nature, attract sufficient publicity to disconcert more than a few [people]. . . . The unfairness . . . could give felony-murder opponents the support that they lack and an impetus for abolition." *Id.* at 1466-67.

²⁰¹ See, e.g., Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

others have argued in the context of police detectives, prosecutors' discretion is not entirely unbounded; their choices are not completely free.²⁰² They operate in organizational settings and respond to collective understandings about which cases are prosecution-worthy and why. They use shorthand references and construct typologies of offenders to classify the populations with which they work and to manage a large caseload of similar events.

In the statutory rape caseload, the predator-peer distinction developed over time through statewide distribution of literature and annual meetings. It now transcends county boundaries and has taken root in jurisdictions across the state, affecting prosecutorial handling of cases at every level. But my data show that, despite the efficiency and substantive justice concerns that motivated its adoption, the predator-peer distinction bestows advantage on only a small subset of offenders. Only those defendants who sexually engage teens within committed, stable relationships are entitled to receive lenient treatment, what I have termed the intimacy discount. I have argued that prosecutors' construction of intimacy based primarily on privacy may be overinclusive—ignoring the harm that can be imposed by relationship partners—and underinclusive—as prosecutors appear to be relying on outdated stereotypes that exclude safe, nonexploitative, substantively equal but nonrelationship-based sexual practices from consideration.

Beyond the specific context of statutory rape, prosecutorial practices that allow the statute to hide behind enforcement patterns mask the true reach of the criminal law. While discretion refines and redefines the meaning of the law without requiring legislative intervention, it also keeps the full scope of the formal law sheltered from public view. Thus we can say that practices such as the intimacy discount prevent the law from becoming intolerable, but they also prevent the law from being recognized as intolerable.

Should we strive to correct this imbalance, to close the gap between the law on the books and the law in action in order to keep the formal law more squarely on display? Decades of scholarship suggest this would be a futile exercise, as no statute can be enforced to the literal extent of its terms. A gap will always exist, as the law will never treat all comers the same. Moreover, given the reluctance of legislatures to repeal or narrow criminal statutes, the only way to achieve closure would be to increase enforcement, which in the case of statutory rape would be a horrific result. Prosecutors should be

²⁰² Waegel, *supra* note 9, at 264.

encouraged to keep sympathetic cases out of the public domain, not to artificially inflate levels of enforcement to serve some abstract notion of fairness.

But when dealing with controversial or overbroad laws like statutory rape, we need to insist on more disclosure about the formal law itself in order to fully exercise our democratic choices. We should lobby for increased publicity about the scope of the formal law in order to put prosecutorial practices in perspective. Only with this kind of information can citizens and legislators fairly evaluate whether the statute warrants modification. Only with this kind of information can we ensure that our criminal laws retain their claims to legitimacy in a changing society.

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