Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law

Michelle Oberman

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol50/iss3/2

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact.wsulliv6@depaul.edu, c.mcclure@depaul.edu.
INTRODUCTION

After almost a decade of researching, writing, and thinking about the topic of statutory rape, it is clear to me that everyone approaches this issue informed by an often-unarticulated paradigmatic vision of adolescent sex. These paradigms shape the way in which one views the legitimacy of statutory rape laws. Many different associations are triggered by the words, “teen sex.” Some hear “teen sex” and imagine Romeo and Juliet, the prom king and queen, or themselves in a rosily-rendered, pimple-free, back-seat tryst. Others hear “teen sex” and imagine a high school quarterback pressuring the head cheerleader to “go all the way.” Many people seem to fall somewhere in-between, thinking “teen sex,” and recalling awkwardness, yearning, embarrassment, and the slow, fumbling journey toward pleasure. However, one constant remains. In a society where half of all teenagers are sexually active, and where the media is saturated with highly-sexualized images of young people, the associations with the words “teen sex” do not tend to be extremely negative. Few people hear “teen sex” and imagine a mother’s live-in boyfriend climbing into bed with her thirteen year-old daughter. Even fewer think of a high school football team lining up to take turns having intercourse with a drunken ninth grade girl. Nevertheless, upon hearing about such encounters, virtually no one is shocked. Stories of sexual abuse and exploitation in teenagers’ sexual encounters are as familiar to us as stories of romance.

Unsurprisingly, people react to the notion of statutory rape with some skepticism and ambivalence. After all, statutory rape laws ostensibly render the act of “consensual” sexual contact a crime. It seems that many people hear statutory rape and roll their eyes, think-

* I would like to thank Katharine Baker for her friendship, and for always being busy but always having time. Thanks also to Sarah Alipourian for her stellar research assistance. Portions of this essay also appear in a lengthier article on contemporary patterns in statutory rape enforcement. See Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 48 BUFF. L. REV. 703, 703-84 (2000).
ing about the futility of trying to regulate the hormonal urgings of those caught in the throes of puberty. Virtually no one endorses statutory rape laws without some hesitation or qualification. At the same time, however, virtually no one recommends abolishing the crime of statutory rape outright. In spite of the rosy recollections, it seems obvious that young people are vulnerable to abuse and exploitation in their sexual encounters, and that the law must play some role in regulating and protecting against that abuse.

This essay will explore and attempt to clarify the uneasy role of statutory rape laws in contemporary society. Part II identifies contemporary ambivalence as an outgrowth of the twin set of underlying purposes. One purpose is protective and unquestionably legitimate, while the other purpose is patriarchal and undeniably pernicious. Each of these purposes has motivated statutory rape laws throughout common law history. In Part III, I discuss the manner in which these twin purposes continue to shape contemporary statutory rape laws. Finally, in Part IV, I suggest a manner for resolving our ambivalence toward these laws by reclaiming them as legitimately protective, and reshaping them to address the unique vulnerabilities young people face in their sexual encounters.

II. THE TWIN RATIONALES FOR STATUTORY RAPE LAWS: A BRIEF HISTORY

There are good reasons for the ambivalent responses triggered by statutory rape laws. The history of these laws reveals two intertwined underlying purposes. First is the uncontroversial impulse to protect those who are too young to protect themselves from exploitation. The second purpose, which is far more sinister, is securing male control over women's and girls' bodies and sexuality. It is this latter factor, surprisingly persistent throughout the common law history of statutory rape, which has saddled these laws with negative connotations and led to considerable ambivalence regarding their relevance to contemporary society.

A. Common Law History of Statutory Rape: The Protective Impulse and the Patriarchal Impulse

First codified into English law in 1275, statutory rape criminalized

1. In this essay, I use the term “patriarchal” to refer to the impulse to secure for men the possession of women's sexuality.
sexual relations with females under the age of twelve. This law was consistent with other laws throughout medieval Europe. For example, Roman law imposed capital punishment upon anyone who "ravished a boy or a woman or anyone through force." The law penalized with equal severity the seduction of minors which was accomplished by mere persuasion rather than force. English law also was consistent with other common law efforts to protect children from exploitation or harm. For example, at common law, criminal, contract, and tort law protected minors by limiting the extent to which they could be held accountable for their actions.

Perhaps the best view that children are not fully equivalent to adults under the law emanates from criminal law. Early common law provisions governing criminal liability refer to the "rule of sevens." According to this principle, children under the age of seven are completely blameless for their actions, even if they are criminal in nature. Children between the ages of seven and fourteen may be held only partially accountable for their criminal acts, and may not be punished as severely as adults. Only children over the age of fourteen are held responsible for their actions, and may be punished. The justification underlying the "rule of sevens" is predicated upon a rudimentary understanding of competence, and the belief that children acquire competence gradually over the course of their mental development into adults.

The laws governing contracts and torts provide closer analogies to statutory rape laws because they are predicated upon an assessment of a minor's capacity to consent to an adult activity. The common law rules governing contracts restrict minors' liability by permitting them to void or disaffirm their contracts. Minors are considered incapacitated under the law, but the law recognizes that they may nonetheless engage in commercial transactions. Therefore, the traditional common law rule protects minors by permitting them to honor their obli-

3. JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 14, 47 (1987).
4. Id. An unsuccessful attempt to seduce a minor was punished only by exile, rather than death. Id.
6. Id.
gations if they choose to do so, while allowing them to avoid deals that they later regret.\textsuperscript{8}

In much the same spirit, tort laws long have protected minors under the laws of battery. For instance, tort law limits minors's capacity to consent to being touched by another person. As a result, when a doctor treats a minor without first obtaining the minor's parental consent, such treatment may constitute a battery.\textsuperscript{9} Although there are narrow exceptions to this rule in cases where public policy justifications permit minors to consent, the general principle is that the law limits the autonomy of young people, barring them from making medical decisions without adult guidance.\textsuperscript{10}

Although statutory rape laws may be viewed as consistent with a set of laws that aims to protect minors from exploitation, at their inception they served an additional and quite distinct function. These gender-specific laws reflected an effort to protect a father's interest in his daughter's chastity.\textsuperscript{11} Under customary dowry practices, a non-virgin was considered less desirable for marriage, and therefore less likely to bring financial reward to her father upon marriage. Indeed, if she failed to marry, a daughter represented a lifelong financial burden to her father. From this perspective, statutory rape laws were an outgrowth of biblical precepts, by which virginity was so highly prized that a man who took a girl's virginity without her father's permission was considered to have committed a theft against the father.\textsuperscript{12} The father could demand compensation either in the form of payment, or by forcing the rapist to marry the victim.\textsuperscript{13} In sum, historically speak-

\begin{itemize}
\item \textsuperscript{10} See Oberman, \textit{supra} note 8, at 46-53 (discussing mature minor laws and cases ranging from contraception and abortion to sterilization).
\item \textsuperscript{11} Rita Eidson explains, “The preferred rationale for protecting only females and punishing only males has evolved from early exaltation of female chastity and the special need to protect the ‘weaker sex’ to more recent arguments that gender-based statutory rape laws are appropriate because of the unique physical characteristics of females.” Eidson, \textit{supra} note 2, at 761. See also James McCollum, \textit{Constitutional Law - Statutory Rape - Gender-Based-Classification Regarding Statutory Rape Law is Not Violative of the Equal Protection Clause of the Fourteenth Amendment}, 25 HOW. L.J. 341, 355-56 n.147 (1982).
\item \textsuperscript{12} See \textit{Gen.} 34:1-31.
\item \textsuperscript{13} Florence Rush, \textit{The Best Kept Secret: Sexual Abuse of Children} 1, 20 (1980). Rush quotes the Bible:
\begin{quote}
When a man comes upon a virgin who is not pledged in marriage and forces her to lie with him and they are discovered, then the man who lies with her shall give the girl's father fifty pieces of silver and she shall be his wife because he has dishonored her.
\end{quote}
\end{itemize}

\textit{Id.} (citing \textit{Deut.} 22:29).
ing, statutory rape laws aimed to protect the father's property interest in his daughter, and were an embodiment of the legal perception of women and girls as “special property in need of special protection.”

B. Statutory Rape Law in the United States

Statutory rape laws remained largely unchanged over the course of the centuries. At the time these laws were absorbed into the American common law system, along with the rest of English common law, the age of consent was established at ten years of age. Beginning in the late Nineteenth Century, America witnessed a dramatic rise in the age of consent, such that, by the start of the Twentieth Century, the average age of consent was sixteen. The campaign to raise the age of consent, led by the Women's Christian Temperance Union and various early feminist leaders, reflects a new variation on the twin themes of protection and patriarchal control over girls' sexuality.

With regard to the protective impulse, Professor Jane Larson's chronicle of the late Nineteenth and early Twentieth Century campaigns to raise the age of consent, provides persuasive evidence of the ideals and aspirations that motivated the feminist reformers:

The age-of-consent initiative represented an aggressive move by the Women's Christian Temperance Union and its allies to change male sexual behavior and protect girls and women from laws and cultural values that threatened their well-being. Like the antipstitution and social purity movements with which they were closely linked, age-of-consent reformers saw sexuality as a vehicle of power that in complex ways kept women subordinated in society . . . .

Larson's history takes issue with those who have seen the age of consent initiative as indicative of Puritanical sexual mores. Rather, her work demonstrates the powerful feminist vision that guided reformers into claiming these ostensibly patriarchal statutory rape laws for their own. Specifically, she documents the manner in which the reformers reconceived statutory rape law as a mechanism to protect naive young women from coercive and exploitative sexual encounters.

[R]eformers asserted that the legal definitions of coercion and resistance in the existing law of forcible rape were unrealistic and harsh; that much so-called “consensual” sexual contact with young women and girls took place within the family, or in dating, or acquaintance

14. See McCollum, supra note 11, at 348-51.
15. Jane E. Larson, "Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America, 9 YALE J.L. & HUMAN. 1, 2 (1997). This remains the average age of consent today. There are some jurisdictions adopting higher ages, prohibiting consensual sexual relations with females under the age of eighteen. Id. at pg. 3, n.9.
16. Id. at 4.
relationships marked by violence, coercion, pressure, or fraud; that employers and professionals often abused their economic power or social authority to solicit sex. 17

In their explicit articulation of the abuses that occurred within the context of “consensual” sexual relationships with girls, these early feminists offered a powerful protective justification for statutory rape laws. This justification did not erase the fact that statutory rape laws were rooted in male desire to control access to female sexuality. Rather, the law continued to reflect and embrace both a protective and a patriarchal function.

During the Twentieth Century, it was more difficult than in the Thirteenth Century to discern the ways in which statutory rape laws served to control access to girls’ sexuality. Nonetheless, vestiges of this impulse continued to shape statutory rape laws. Although the dowry system no longer prevailed, there remained a deep concern with virginity and out-of-wedlock pregnancy. These issues derive from the sense that women belong under male control and supervision, and that once a woman has experienced sexual contact with one man, she will be less desirable to another.

For example, consider the implications of justifying statutory rape laws by way of the “treasure theory” of virginity, which grew out of Sigmund Freud’s writings on monogamy and marriage. Freud wrote that, “[t]he demand that the girl bring with her into marriage with one man no memory of sexual relations with another is after all nothing but a logical consequence of the exclusive right of possession over a woman which is the essence of monogamy.” 18 Thus, according to at least one scholarly writing, at mid-century, virginity was a woman’s treasure, and one who took it from her was therefore guilty of theft. 19 The reasoning was that the harm to the girl was irreparable. Therefore, the appropriate remedy was prosecution for statutory rape. 20

17. Id.; see also Judith R. Walkowitz, Prostitution and Victorian Society 246 (1991) (discussing the “social purity” movement and Victorian feminists’ concern with protecting young females from sexual abuse).


19. See James A. Durham, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 Yale L.J. 55, 76 (1952) (describing the “treasure theory” of statutory rape law whereby sexual indulgence of a girl is a “thing” of social, economic and personal value). Thus, consent of the girl serves as a form of “social currency” and statutory rape laws seek to make males who take advantage of “naive” minor girls responsible for the act. Id.

20. See Larson, supra note 15, at 2. This view of statutory rape law suggests that it operated in conjunction with the civil laws governing seduction and breach of promise to marry. These laws provided civil remedies to women who suffered harm in reliance upon promises of marriage. Id.
The depiction of female sexuality as a perishable resource that should be preserved and then bartered away in exchange for marriage is not inherent, as Freud concluded, in monogamy. After all, many monogamous couples consist of individuals who were sexually active with others prior to marriage. Rather, this depiction reflects a belief system under which men acquire women's sexuality through marriage, and perceive a non-virgin wife as an undesirable acquisition.

The latter assumption is underscored by the traditional common law defense to statutory rape: promiscuity. This defense, which is enforceable in several United States jurisdictions today, provides a complete defense against statutory rape charges for a defendant who can demonstrate evidence that the victim already was sexually active prior to his encounter with her.\(^2\) This defense reflects a complete disregard for the exploitative nature of a sexual encounter, and therefore the protective function of statutory rape laws. While enshrining virginity, this defense abandons those who have been subjected to prior sexual abuse and may be in tremendous need of the law’s protection.\(^2\) Indeed, a cynic might claim that the defense of promiscuity demonstrates that the protective norm is a sham, and that in fact, the true purpose of statutory rape laws is to reinforce the impulse to secure male control over and access to women’s bodies.

This view is amplified in the *Michael M. v. Superior Court of Sonoma County* case, which is the only United States Supreme Court case to directly consider the validity of statutory rape statutes.\(^2\) *Michael M.* involved an equal protection challenge to California’s statutory rape law, which made it a crime to have sexual contact with underage girls, but offered no protection to underage boys. There is a troubling gulf between the story that the victim tells, and the way in


\(^{22}\) These provisions are particularly troubling in light of research indicating that young people who are sexually promiscuous may in fact be survivors of childhood sexual abuse. See Catherine Stevens-Simon & Susan Reicher, *Sexual Abuse, Adolescent Pregnancy, and Child Abuse: A Developmental Approach to an Intergenerational Cycle*, 148 Archives of Pediatrics & Adolescent Med. 23 (Jan. 1994) (noting that a high percentage of girls who experience early teenage pregnancy have a history of childhood sexual trauma).

which the Court and the State of California, writing in defense of the law, perceive her story. As other scholars noted, the trial transcript reveals the victim's description of being coerced into sexual intercourse. The victim consented to kissing, but the defendant pressured her for sex. She repeatedly told the defendant to stop, but the defendant slugged her in the face several times, after which she permitted him to "do what he wanted."

In spite of facts indicating force, the defendant was prosecuted for statutory rape. More startling still, in spite of the evidence of violence, Justice Blackmun terms the incident as an "unattractive case for prosecution," given that the victim was not an "unwilling participant in at least the initial stages of the intimacies that took place." California also ignored the coercive nature of this encounter, and instead, defended the statute against the equal protection challenge by claiming that the law served to combat the problem of teenage pregnancy. The Court accepts this argument, and its opinion rests upon the view that it is important and desirable to discourage sexual activity among young people and that boys and girls are not similarly situated when it comes to sexual encounters. According to the logic of Justice Blackmun's opinion, by virtue of their biology, girls who engage in sexual relations with males run the risk of pregnancy. As a result, they have a natural disincentive when considering whether to have sex. Boys, on the other hand, risk nothing. Thus, the Supreme Court reasons that California's decision to protect girls, but not boys, in effect "evens the score," providing a disincentive for all males who contemplate sexual relations with an underage girl.

This somewhat antiquated and perverse cost-benefit approach to sexuality and statutory rape laws has almost nothing to do with protecting the vulnerable from abuse. Despite the fact that the case clearly demonstrated the need to protect girls from physical violence and coercion in sexual encounters, the opinion overlooks these harms and embraces statutory rape laws for another reason: underage sex produces out-of-wedlock babies. As I will discuss in the following section, contemporary statutory rape laws and policies demonstrate a disturbingly wide consensus that the purpose of these laws is to combat teen pregnancy and out-of-wedlock births. Moreover, these events are viewed as abhorrent, not because they represent a curtailment of a

26. Id. at 485.
27. Id. at 473.
young mother's autonomy and opportunities for advancement and independence, but rather, because these events are bad for the economy.\textsuperscript{28}

Given the extent to which these justifications, with their commodified view of female virginity and sexuality, reek of repressive social norms, it is easy to understand why supporters of women's rights might feel unenthusiastic about statutory rape laws. It is therefore unsurprising that, beginning in the 1970s, second wave feminists began to voice the concern that statutory rape laws perpetuated offensive gender stereotypes and restricted the sexual autonomy of young women.\textsuperscript{29} It is critical to note, however, that these feminist critiques reaffirmed the importance of the protective role played by statutory rape laws. Rather than repudiating statutory rape laws, they called for the abolition of gender-based distinctions in these laws.\textsuperscript{30} Even at the height of the "sexual liberation" movement, feminists understood the critical importance of statutory rape laws in protecting young people from sexual coercion and exploitation.\textsuperscript{31} For example, Professor Fran Olsen noted that:

\begin{quote}
On the one hand, [statutory rape laws] protect females; like laws against rape, incest, child molestation, and child marriage, statutory rape laws are a statement of social disapproval of certain forms of exploitation. . . . On the other hand, statutory rape laws restrict the sexual activity of young women and reinforce the double standard of sexual morality.
\end{quote}

As is evident in this brief history, there is a tension between the protective and the patriarchal impulses underlying statutory rape laws. At the start of the Twenty-First Century, there is little evidence to indicate that this tension will be resolved soon. Rather, as the following section illustrates, the past ten years have witnessed a resurgence

\begin{footnotes}
\item[28] See infra notes 34-58 and accompanying text for a detailed discussion.
\item[29] Olsen, \textit{supra} note 24, at 404. \textit{See also} Eidson, \textit{supra} note 2, at 761 ("Critical analysis . . . reveals no close correlation between statutory rape laws and female vulnerability to vaginal injury or unwanted pregnancy. Moreover, young males are also in danger of sexual exploitation by adults . . . . [Gender] classifications in statutory rape laws are based on pernicious sex-role stereotypes, rather than physical differences between males and females."); see also McCollum, \textit{supra} note 11, at 348-51 (discussing Navedo v. Preisser, 630 F.2d 636 (8th Cir. 1980), in which the court struck down a gender-based statutory rape law because the state had presented no credible evidence that the gender-based statutory rape law supported the state purpose of preventing female trauma and teen pregnancy); Alice Susan Andre-Clark, \textit{Note, Whither Statutory Rape Laws: Of Michael M., The Fourteenth Amendment, and Protecting Women from Sexual Aggression}, 65 S. CAL. L. REV. 1933, 1992 (1992) (asserting that the Equal Protection Clause does not permit gender-specific statutory rape laws).
\item[31] Oberman, \textit{supra} note 8, at 31-32.
\item[32] Olsen, \textit{supra} note 24, at 401-02.
\end{footnotes}
of interest in statutory rape laws, bolstered in part by the emergence of a third underlying purpose served by these laws.

III. The Statutory Rape Renaissance: The Protective and the Patriarchal Functions of Contemporary Statutory Rape Laws

From the end of the Nineteenth Century, when the widely successful campaign to raise the age of sexual consent concluded, until the 1990s, statutory rape laws were quietly, if sporadically, enforced, and for the most part were ignored by legislators and policymakers. For example, the series of cases granting minors access to contraception and related reproductive health care rights never discusses the fact that, in most jurisdictions, sexual activity with minors remained a violation of state criminal law. During the 1970s and 1980s, an era marked by an abundance of rape law scholarship, rape scholars said little about these laws. Despite an outpouring of public concern about unwed motherhood and teen pregnancy beginning as early as the 1960s, little was said to tie this concern to statutory rape, until the mid-1990s.

Suddenly, in the last years of the Twentieth Century, a resurgence of interest in statutory rape emerged. It is in the policies and rhetoric surrounding contemporary statutory rape law that one finds the surprisingly familiar incarnations of the patriarchal and protective functions of this law. However, these vestiges of concern over securing male control over girls' sexuality and protecting girls from harm are overshadowed by two powerful new functions driving the enforcement of statutory rape laws. The first function relates to the issue of teenage pregnancy, and the second to the problems inherent in enforcing conventional rape laws.

A. Part One: The Teen Pregnancy Predator Factor

In the 1990s, a series of studies indicated that adult men fathered a startlingly high number of babies born to young teen mothers. For those acquainted with the problems stemming from teen pregnancy, the implications of this information were far-reaching. Girls who bear their first children as teens are less likely to complete high school, less

33. Justice Blackmun's assessment that the Michael M. case was an unattractive one to prosecute provides evidence of this laissez-faire attitude toward enforcing statutory rape laws. Despite the fact that the victim was underage and therefore clearly protected by California law, and also despite the evidence of force used to procure her consent indicating that this may have been a rape, Justice Blackmun and the state of California seemed apologetic and defensive about enforcing the law in this case. See supra note 26 and accompanying text.
likely to marry, less likely to be able to support their families, and more likely to require public assistance at various points in their lives, than girls who postpone childbearing until after their teenage years.\textsuperscript{34} Thus, at the aggregate level, the men who father these children are costing states untold millions of dollars.

It was against this backdrop that interest in statutory rape was rekindled. After all, this research indicated that many babies born to underage girls were, in essence, criminal evidence. The act by which they were conceived was a crime. Federal and state governments launched policies encouraging the prosecution of statutory rape, particularly in cases in which an older man had impregnated a teenage girl.\textsuperscript{35} Additional emphasis was placed on cases involving wide age gaps between the victim and perpetrator, and relationships that could otherwise be construed as prurient, predatory, or a violation of social norms.

Contemporary statutes and the enforcement priorities established by federal and state governments reflect both the protective and the patriarchal impulses that traditionally have informed statutory rape laws. The age of consent remains relatively high, varying from fourteen to eighteen across the United States, with the overwhelming majority of jurisdictions barring sexual contact with a child of either gender under the age of sixteen.\textsuperscript{36}

The problem of enforcing statutory rape laws is more complicated now than it was a century ago, largely due to the fact that over fifty percent of adolescents are sexually active.\textsuperscript{37} As a result, there are potentially millions of statutory rapes every year, and it is difficult to determine which cases merit prosecution. The focus on cases involving pregnancy and a wide age discrepancy between victims and perpe-


\textsuperscript{35} See Michelle Oberman, \textit{Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape}, 48 Buff. L. Rev. 703, 745 (2000) (describing several of these policies).


trators reflects an effort to articulate law enforcement guidelines in the face of a law that is so widely disobeyed.

These guidelines may be seen as reflective of the traditionally protective impulse underlying statutory rape laws. States advocating the vigorous enforcement of statutory rape laws in the event of pregnancy justify their stance with evidence regarding the diminished life options for teenage mothers. They hope that a high profile campaign against men who impregnate teenage girls will have a chilling effect on these relationships, and thus protect girls from unwanted pregnancy. Despite studies indicating that, for girls living in poverty, teenage childbearing has little to do with one's future earning potential, it seems intuitively sound to hope that, to the extent that a fourteen or fifteen year old delays childbearing, she will inherit a broader set of life options as an adult.

The protective impulse also is observed in cases involving wide age discrepancies. Most states define statutory rape in broad terms, prohibiting sexual contact with any underage person. However, many jurisdictions have established enhancements or statutory provisions that increase the severity of the statutory rape offense according to the age of the perpetrator, or the age difference between the parties. For example, Illinois law specifies that the maximum charge applicable to a defendant under the age of seventeen who has been involved in a consensual sexual relationship with a partner aged nine or older as "criminal sexual abuse," a misdemeanor. However, if the perpetrator is seventeen or older, and is at least five years older than the victim, he has committed aggravated criminal sexual abuse, a class two felony. Although not expressly articulated, the underlying theory for these increased sanctions presumes that a young person is more vulnerable to coercion when their sexual partner is considerably older. Under such circumstances, the law should not tolerate the young person's given consent.

38. Their relationship with the father of their child is not likely to endure. They also face higher risks than their non-parenting peers of dropping out of school and relying on welfare for support. See Donovan supra note 34, at 34.
39. See Peter Passell, Economic Scene: When Children Have Children, N.Y. TIMES, Sept. 4, 1991, at D2 (referencing work done by Arline Geronimous and Sanders Korenman for the National Bureau of Economic Research). Indeed, some go so far as to suggest that having babies may be a "sensible response" to poverty, as evidence indicates that poor black women are healthier and have lower rates of infant mortality while in their teens and early twenties than they do in their later reproductive years. William Booth, Teenage Pregnancy's Risks Reevaluated: Motherhood Can Be a Rational Response to Poverty, StudiesFind, WASH. POST, Feb. 18, 1990, at A8 (citing Arline Geronimous).
A critical eye may discern an additional motive behind these enforcement strategies: the familiar tendency to use statutory rape laws as mechanisms for maintaining male control over female sexuality by circumscribing sexual access to young women. The focus on pregnancy is far more complicated than a simple effort to protect young women from early, unwanted childbearing. In fact, it is apparent that the state’s primary concern with these cases is the harm that teen mothers cause to the social fabric and, in particular, to the public coffers. State laws and enforcement policies that target statutory rape in cases of pregnancy reveal the government to be interested in stopping teenage girls from bearing children because these girls tend to remain single, and are more likely than their peers to be poor and to require support from the state. Thus, the government is upset not because girls are being sexually exploited and abused by their partners, but rather because their partners fail to use contraception, and the result is that the girls bear children, thereby costing the state money.

Consider the federal government’s recent proclamation that states and local jurisdictions should aggressively enforce statutory rape laws. This belief appears within the comprehensive Welfare Reform Act of 1996, a law that abolishes the former federal program, Aid to Families with Dependent Children. Just beneath the superficial protective rationale for enforcing these laws lies the desire to control the reproductive behavior of poor women, and more particularly, poor women of color. At least as far back as the mid-1960s, welfare policy has been obsessed with the reproductive behavior of poor women of color. The policy underlying this new version of welfare is infected

42. It is true that women who bear children as teenagers are disproportionately more likely to rely upon public assistance, requiring both federal and state revenues for support. See Donovan, supra note 34, at 34. It is imperative to note, however, that the majority of births to teenage mothers involve mothers who are eighteen to nineteen years of age, and therefore, technically speaking, are adults. Thus, statutory rape laws do not even apply to them.

43. Along these lines, it is interesting to consider research suggesting that having children as a teen has little to do with one’s future earning potential. Instead, poverty, not teen pregnancy, causes decreased earning potentials among most teenage mothers. See Passell, supra note 39, at D2.


45. Daniel Moynihan’s 1965 report on The Negro Family linked the economic desperation of the “black community” to the inherent pathology of a matriarchal community. DANIEL P. MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 8-10 (1965). Moynihan’s pathologized vision of dominant role of the female in African-American culture came to be referred to as the “Welfare Queen.”
by the racist image of youthful “welfare queens,” who will breed children and then become dependant upon the state for support.\textsuperscript{46}

State enforcement patterns provide ample evidence of this impulse to control and constrict women’s lives, reproductive and otherwise. For instance, consider the former practice of Orange County social workers. During 1996 and 1997, the county social workers routinely advised pregnant teenagers who sought out their services that the law required them to refer their male partners for prosecution under statutory rape laws.\textsuperscript{47} However, they advised the girls that this referral would not be made in the event that the girls married the fathers of their babies. Once this policy became public, embarrassed officials recanted their position and this advice was suspended.\textsuperscript{48}

A January 1988 California law provides further evidence of the focus on teen pregnancy and fiscal concerns in enforcing statutory rape laws. This law precludes new mothers from receiving public assistance for their infants until they identify their baby’s father.\textsuperscript{49} Ostensibly, this requirement permits the state to seek the father’s child support contribution. Although the goal of securing child support from “deadbeat” dads is a laudatory one, in the climate of aggressive enforcement of statutory rape laws, it is obvious that these names also provide an excellent resource to states attorneys seeking potential statutory rape defendants. Most certainly, the requirement to name the father and run the risk that he will be prosecuted deters a number of girls from seeking public assistance altogether.

The prioritization of cases involving significant age disparity between victim and perpetrator, likewise, is driven by a subtle impulse to secure control over sexual access to girls. This concept can be observed, first of all, in the significant extent to which these priorities are fused, such that the emphasis on cases involving pregnancy is used in tandem with the emphasis on cases involving significant age disparity. For example, some states have enhanced their statutory rape laws by passing new statutes penalizing older men who impregnate underage

\textsuperscript{46} For a rich critique of welfare policies and the racist imagery that accompanies them, see Martha Minow, \textit{The Day, Berry, and Howard Visiting Scholar: The Welfare of Single Mothers and Their Children}, 26 \textit{CONN. L. REV.} 817, 836 (1994).

\textsuperscript{47} See Kelly Connerton, Comment, \textit{The Resurgence of the Marital Rape Exemption: The Victimization of Teens By Their Statutory Rapists}, 61 \textit{ALB. L. REV.} 237, 240 (1997).

\textsuperscript{48} In private discussions with California district attorneys from predominantly rural communities, several suggested to me that this practice still occurs, particularly when dealing with Mexican-American perpetrators and victims. (Per Comm., The 3Rs Conference, May 2000, Visalia, Calif.).

\textsuperscript{49} See Cheryl Wetzstein, \textit{Reduced Teen Pregnancy Linked to Rape Enforcement}, \textit{WASH. TIMES}, April 7, 2000, at A2.
In other states, prosecutors acknowledge that their top priority in statutory rape enforcement is on cases involving men in their twenties or older who have impregnated teenage girls.\textsuperscript{51} As such, the focus on age disparity may reflect the same underlying impulse toward controlling girls reproductive behavior discussed with regard to pregnancy.

Of course, the tendency to restrict the application of statutory rape laws to cases involving wide age disparities, regardless of pregnancy, may speak to a legitimate concern with the imbalance of power in such relationships. It may be accurate to assume that the wider the age gap between partners, the greater the chance of coercion. At the same time, however, it also is clearly true that there is considerable opportunity for coercion in sexual encounters between peers. As the Michael M. case powerfully demonstrates, this coercion may be so commonplace, and so deeply scripted into contemporary norms of sexual interaction, that it is all but invisible. As such, the exclusive focus on cases involving wide age disparities may serve as a grossly underinclusive proxy for estimating the risk of exploitation and coercion in sexual encounters. In short, to the extent that statutory rape law is enforced predominantly or exclusively in cases involving wide age disparities, an important category of victims is left unprotected.\textsuperscript{52}

There is a tangible benefit inherent in the decision to proscribe only encounters that violate an objective standard of age span, rather than focusing on the actual terms of consent in adolescent sexual encounters. Such a law is much easier to enforce, and convictions are more readily obtained. Rather than having to consider the nature of the sexual encounter, evaluating the victim's capacity to protect herself and the quality of the consent she gave, the law requires only an objective determination of the ages of the two parties.

At the same time, however, one might observe that such a policy is shaped, at least in part, by the familiar practice of securing male control over access to female sexuality. In essence, age range provisions


\textsuperscript{51} For example, some California counties, such as San Diego, only accept cases for prosecution when there is a large age difference between the parties and a pregnancy has resulted. See Rigel Oliveri, Statutory Rape Law and Enforcement in the Wake of Welfare Reform, 52 Stan. L. Rev. 463, 493 n.151 (2000).

\textsuperscript{52} A thorough review of the social science literature regarding minors' vulnerability to coercion and abuse in sexual encounters makes it readily apparent that minors remain vulnerable well into their teen years. See Oberman, supra note 35 at 703-84 (reviewing this literature). To the extent that statutory rape law ignores this vulnerability by treating minors as fully capable of consenting to sex with "peers," it is starkly at odds with the law governing minors in virtually every other context. See supra notes 6-10 and accompanying text.
enable statutory rape laws to function not so much to protect the underaged and vulnerable, as to determine who may have legitimate sexual access to underage and vulnerable sex partners. This view of statutory rape emerges in stark view in the Model Penal Code.

The American Law Institute’s Model Penal Code (Model Penal Code) has a lengthy provision governing statutory rape. In section 213.1, the drafters adopt an objective approach to the dilemma of statutory rape laws in a relatively promiscuous society. First, they propose lowering the age of consent, thereby reclassifying as permissible a host of sexual encounters currently regarded as illicit. Section 213.1 of the Model Penal Code limits the strict liability version of statutory rape to victims aged nine and under.\textsuperscript{53} Girls ages ten to fifteen are protected under a more limited provision, which requires that the accused be at least four years older than the victim, and that the victim have no history of promiscuity.\textsuperscript{54}

The official comments to this section justify limiting the law’s protection to girls aged nine by virtue of the fact that ninety-nine percent of girls in this age range are prepubescent. The commentators assert that “[t]hose who engage in intercourse with adolescents are neither as dangerous nor as morally reprehensible as those who engage in such conduct with young children. In part, this is true because the post-pubescent child is a more plausible, though certainly not an acceptable, target of sexual desire . . . .”\textsuperscript{55}

The problems with this construction of statutory rape are numerous. One problem is the fact that this standard focuses exclusively on policing male sexual desire, rather than on the needs of the population to be protected. The entire population of girls, pre- and post-pubescent, is reduced to sexual objects, and classified according to the commentators’ visions of appropriate sexual desirability. There is no reason to believe that reaching puberty correlates with a girl’s ability to protect herself from a coercive sexual encounter. This effort to limit the number of sexual encounters that trigger statutory rape violations may be efficient, but it is wholly unprincipled, paying no heed to unique vulnerabilities of the subject population. As a result, it abandons a significant number of individuals who, lacking the capacity to protect themselves, desperately need its protection.

Indeed, the Model Penal Code goes further in its effort to protect what its drafters perceive as legitimate sexual initiative. It proposes

\textsuperscript{53} MODEL PENAL CODE § 213.1 (1980)

\textsuperscript{54} Id. at § 213.3. Unlike the majority of state laws, the Model Penal Code is gender-specific and protects only girls.

\textsuperscript{55} Id.
eliminating the traditional strict liability construction of the law, whereby one who has sexual contact with a member of a protected class is liable, regardless of whether he knew the victim was underage.\textsuperscript{56} Rather, the Model Penal Code proposes eliminating strict liability as it applies to females over the age of nine but under the age of sixteen.\textsuperscript{57} Section 213.6(1) prohibits sexual contact between girls in this age range and men who are four or more years older. However, men who engage in sexual activities with these girls are exonerated to the extent that they can establish that they reasonably believed the girl was at least sixteen. The Model Penal Code justifies this change along the same lines of logic articulated with regard to lowering the age of consent. The Model Penal Code adopts the perspective of the reasonable perpetrator and notes that it is quite plausible that some eleven year-old girls might be mistaken for sixteen year-olds.\textsuperscript{58} The implication of this observation is that ten year-old girls who look older must also be ready for sex, and therefore, undeserving of the law's protection.\textsuperscript{59}

\textbf{B. Part Two: The Problem of Acquaintance Rape}

Numerous scholars have demonstrated the way in which, for centuries, the law governing rape has served more to protect men from false
accusations of rape, than to protect women from sexual assault.\textsuperscript{60} The resulting barriers to conviction in cases of rape are notorious. Less notorious is the way in which statutory rape laws provide prosecutors with an alternate, easier route to conviction in rape cases. After briefly summarizing the traditional and contemporary obstacles to conviction in rape cases, this section will illustrate the way in which statutory rape laws serve as a back up to the laws penalizing forcible rape.

Rape victims historically have been “subjected to institutionalized sexism, which began with their treatment by the police, continued through the legal system, much influenced by notions of victim precipitation, and ended with the acquittal of many de facto rapists.”\textsuperscript{61} Beginning in the 1970s, this status quo was challenged by a coalition of law reformers, including feminists and law enforcement officials.\textsuperscript{62} Nonetheless, despite three decades of activism and law reform, there is ample evidence that the changes in the common law provisions governing rape laws have had “little or no effect on the outcomes of rape cases, or the proportions of rapists who are prosecuted and convicted.”\textsuperscript{63}

The problem of securing just convictions in rape cases stems at least in part from the fact that society tends to view rape victims with skepticism, particularly to the extent that they knew their alleged attacker.\textsuperscript{64} Added to this problem is the pervasive tendency to excuse

\textsuperscript{60} David Bryden & Sonja Lengnick, \textit{Rape in the Criminal Justice System}, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1196 (1997).

\textsuperscript{61} SUZANNA ADLER, \textit{RAPE ON TRIAL} 17 (1987).


\textsuperscript{64} According to Professors Bryden and Lengnick, two prominent criminologists specializing in the study of rape:

[A]ctors in the criminal justice system - police, prosecutors, juries, judges and even victims themselves - tend to be sympathetic towards some types of rape victims but skeptical towards others. The traditional image of a rapist is a knife-wielding stranger . . . . But most rapes are perpetrated by acquaintances of the victim: lovers, dates, co-workers, neighbors, relatives and so on. The rapist usually does not injure his victim. In these typical cases, attention usually focuses on the woman's character. If her pre-rape
rapists by defining their behavior as normal.\textsuperscript{65}

The inevitable result, undisputed by those who study rape, is that it is difficult to secure convictions in cases involving allegations of acquaintance rape. This problem has particularly grave implications for girls; first because their youth and relative lack of experience makes them more vulnerable to coercive sex, and second, because they are less likely to resist such coercion in a way that the law might recognize. These points are illustrated by an actual case:

On February 28, 1996, S.Q., then 13 years old, arrived home from school and began doing her homework and watching t.v. in her living room. Appellant, Joshua Hemme, age 19, called and wanted her to come over. She did not want to because she had a lot of homework, but he kept asking, so she asked her stepfather if she could go over to Appellant's house and he said yes. S.Q. had been seeing Appellant's younger brother Adam and had been to the Hemmes[sic] house before. When S.Q. arrived, Appellant took her into the basement, where the recreation room and Adam's bedroom were located. At Appellant's request, she sat on the bed. Appellant asked S.Q. if she was scared to have sex. She responded that she was not scared, but did not really want to. Appellant took off S.Q.'s clothes and threw them away from the bed. He put his head between her legs and started to perform oral sex. He pushed S.Q.'s head to his penis and she performed oral sex on him. Appellant then got on top of her and had sexual intercourse. He asked her if it hurt and she said yes, but Appellant kept going.

When they heard Appellant's mother arrive home, S.Q. wiped the semen off of her leg and got dressed. She went out into the recreation room area and began to play Nintendo. Appellant began fingering her vagina and asked her to have sex again. She said no. Appellant kept asking. Eventually, S.Q. sat on the bed, Appellant pulled down her pants, and Appellant yelled at her to scoot up and

---

\textsuperscript{65} For example, Professor Katharine Baker argues that:

Criminally punishing nonconsensual sex has proved difficult . . . precisely because the legal proscription on nonconsensual sex competes with the masculinity norm, biological theory and popular belief, all of which re-enforce and legitimate the notion that men crave sex regardless of consent. Given this tension between the law and other well-established norms, it should come as little surprise that a sizable number of men have yet to internalize the moral wrong of nonconsensual sex. And even those men who have internalized the abstract wrong . . . can have difficulty concretely identifying what nonconsensual sex is. This difficulty stems both from well-established sexual behavior roles that shun explicit communication and from our continuing reluctance to explicitly discuss, both societally and individually, what consent is. Finally, the constitutional protections afforded defendants make convictions particularly difficult to secure in cases, like date rape, in which consent is the only issue.

put her legs around his neck. Appellant had sexual intercourse with her again. S.Q. put her clothes on and Appellant took her home in his van.\textsuperscript{66}

Based upon these facts, Joshua Hemme was tried and convicted of first degree statutory rape and first degree statutory sodomy.\textsuperscript{67} He was neither tried nor convicted of forcible sexual assault, because the ruling against him was predicated upon his claim that his sexual relations with S.Q. were consensual.

This case vividly illustrates both the manner in which a girl’s relative inexperience may render her vulnerable to coercion, and also the way in which her response to such coercion may make it harder to obtain a rape conviction. First of all, it is important to note the significance of S.Q.’s age and gender in making sense of the encounter with Hemme. S.Q. was studying at home when her boyfriend’s nineteen year-old brother called. As a seventh grader, she could not drive, nor even leave the house without parental permission. She declined Hemme’s initial request to visit, but ultimately was pestered and coaxed into coming over to his house. Once there, he immediately stated his desire to have sex, and then ignored her bravado-filled response that she was not “scared to have sex,” but simply “didn’t want to.”

A more experienced woman might have avoided this encounter by insisting on staying at home, or at the very least, by rejecting his demand for sex. Indeed, his demand for sex is plainly predatory and self-serving. S.Q. and Hemme had virtually no prior relationship, and no meaningful conversation laid the foundation for a romantic interlude. However, it is unsurprising that S.Q. felt unable to assert herself against Hemme. When it comes to issues of sexuality, in spite of several decades of sexual liberation, including effective contraception and legalized abortion, this remains a society rife with sexual double-standards. As in the past, boys and men are expected, if not encouraged, to engage in sex whenever the opportunity presents itself, and their reputation is enhanced to the extent that they are seen as sexually experienced.\textsuperscript{68} Girls, on the other hand, have inherited the highly stigmatized norms governing female sexuality.\textsuperscript{69} Girls are expected to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{66} \textit{State v. Hemme}, 969 S.W.2d 865, 865-68 (Mo. Ct. Ap. 1998).
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} “Having sex demonstrates one’s heterosexuality which demonstrates one’s masculinity and masculinity brings with it the esteem of one’s peers.” See Baker, \textit{supra} note 65, at 693 (citing numerous studies demonstrating the continued vitality of this norm and providing a rich discussion of the impact of this norm on the problem of acquaintance rape).
\item \textsuperscript{69} “From their socialization in childhood and adolescence, [boys and girls] develop different goals related to sexuality . . . . [M]en are supposed to single-mindedly go after sexual intercourse
\end{itemize}
\end{footnotesize}
be passive recipients of male sexual attention, and indeed are expected to work for and be flattered by such attention. As a result, they tend to view sexual pleasure, for the most part, as something that their partners derive from them, or that they give to their partners.

S.Q. may have felt flattered by Hemme's sexual interest in her, but she also clearly expressed her refusal to have sex with him. One might argue that her comment that she was not "scared to have sex," but simply "didn't want to" should suffice as a refusal, making the subsequent sexual contact a rape. Certainly, she stated "no" with sufficient clarity when Hemme asked her consent to a second encounter, thereby rendering that encounter a rape. Nonetheless, had Hemme been charged with rape, one can imagine that he would have argued that there was no force involved, and that S.Q.'s failure to make plain her opposition to both sexual acts indicated her consent.

Even if these factors are of limited legal relevance, they point to societal norms that likely would undermine the chances that Hemme could be convicted for such a rape. S.Q. likely would be blamed by a jury for her failure to object more vigorously to Hemme's advances. This would be particularly true with regard to the second encounter, when she returned to her Nintendo game, as opposed to, for example, becoming hysterical and demanding that Hemme take her home. Indeed, were a more experienced woman to find herself in S.Q.'s situation, she might well have left on her own after the first encounter, or at least have protested more vigorously, rather than silently enduring the second assault.


10. Oberman, supra note 8, at 67.
11. Id. at 64.
72. Many states have moved away from the traditional common law position requiring the state to prove force in addition to nonconsensual intercourse in order to secure a conviction. Instead, the state need only show enough force necessary to accomplish penetration. Indeed, some states have abandoned the force standard altogether, requiring only a showing that the penetration was nonconsensual. See Bryden, supra note 64, at 1199; see also Wis. Stat. §940.225(4) (1999) (defining consent as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.").
73. See Bryden, supra note 60 and accompanying text (describing the barriers to conviction in acquaintance rape settings).
74. Of course, it is quite possible for adult women to freeze out fear, rather than to vigorously protest unwanted sex. See e.g., Oberman, supra note 35, at 727-28 (describing a series of acquaintance rape cases in which the adult victims were "actually immobilized with fear" and therefore could not communicate their nonconsent).
However, S.Q.'s passivity was consistent with her age. In fact, one might argue that her self-doubt and insecurity were age appropriate. Beginning with Carol Gilligan, several scholars have documented the passivity associated with the onset of adolescence in girls, particularly in terms of their interactions with men. Research evaluating girls' development has found that during adolescence, girls' self-esteem, body image, academic confidence, and willingness to speak out declines sharply. Literature describes adolescence as a time during which girls manifest an increased unwillingness to speak their opinions or voice their desires. Girls tend to perceive being nice as central to being feminine, and they connect compliance and cooperation with "niceness."

In their yearning for femininity, they may become compliant and cooperative when pressured for sex. In this light, one might readily understand the recent study which suggests that a considerable proportion of adolescents experience their first sexual intercourse under coercive conditions. In this study, 2,933 women, ages fifteen to twenty-four, were asked to estimate the extent to which their first sexual intercourse had been desired. The survey used a Likken's scale of one to ten, in which one meant they really did not want it to happen, and ten meant they really wanted it to happen. Twenty-five percent of the women reported that, while their first experience with sex had not been forced, neither had it been wanted. Interestingly, the younger a woman's age at first intercourse, the more likely she was to report it as unwanted. Indeed, twenty-four percent of those whose age at first intercourse was under fourteen described their first intercourse as completely nonvoluntary.

When observed from this vantage, statutory rape laws emerge as an important tool for prosecutors. Prosecutors may be reluctant to charge the acquaintance rapist with forcible rape and risk losing the case because of society's tendency to blame the victim. Rather, the prosecutor may charge the rapist with statutory rape, (wherein the only required proof is that there was sexual contact with an underage victim, and as a result), and thus be assured of a conviction. Statutory

76. Id.
77. For an example of society's tendency to blame the victim, see Baker, supra note 65, at 693-94. Note that this tendency to blame the victim appears to be a problem in the context of statutory rape, as well. For example, on the program of the annual 3Rs conference, sponsored by the California Statutory Vertical Rape Prosecution Program, was a workshop session entitled, "Convincing a Judge Your Victim is a Victim" (presented by Rori Robinson, J.D., San Diego County District Attorney) (May 2000, Visalia, Calif.).
rape laws therefore provide a de facto stop gap, permitting the law to punish those who commit the crime of rape, but who might escape punishment because of deep-seated societal norms that undermine convictions.

In fact, there are many statutory rape cases that follow this pattern.\(^7\)\(^8\) It seems evident that at least one contemporary function of statutory rape laws is to compensate for the failure of conventional rape law to provide adequate protection against coercion for the younger victims of sexual assault. This represents a protective and critically important aspect of statutory rape law. However, this element should not be embraced without serious reservations.

Recall once again S.Q.’s case. A prosecutor might reasonably fear that, were the case to be tried under current rape laws, the jury would blame S.Q. for failing to reject Hemme’s advances more forcefully, and the defendant likely would win. In that event, the victim would have been re-victimized by her ordeal, to no avail. However, if there were no prosecution at all, S.Q. and Hemme would be permitted to internalize terrible lessons about the boundaries of permissible sexual interactions. In particular, S.Q. would learn that sex is about male sexual gratification, and that the law is willing to view a scenario in which a thirteen year-old is carried away from a child’s video game, over her explicit verbal opposition, forcibly undressed, and penetrated, as consensual sex. Hemme would learn that it is acceptable to appropriate another human being and to use her explicitly for his own sexual gratification. In this light, one might sympathize with the prosecution’s decision to charge Hemme with statutory rape, for which he was convicted and sentenced to seven years.

Statutory rape laws provide society with a mechanism for setting limits around a population that is particularly vulnerable to sexual predation. Ideally, society aims to provide minors with the chance to reach adulthood safely, whereupon they will be sufficiently empowered and autonomous to assert their entitlement in order to experience sexuality on their own terms.

Of course, there is an inherent tradeoff in using statutory rape laws to punish acquaintance rapists who choose underage victims. Although a conviction might be more easily obtained, the punishment for statutory rape may be far less severe than is warranted by the

\(^7\) The *Michael M.* case is an obvious illustration of this pattern. *Michael M.*, 450 U.S. at 464. In addition, a survey of appellate cases revealed ample evidence of this phenomenon. See Oberman, *supra* note 35, at 731-33 (discussing this survey and the relevant case law).
crime of acquaintance rape. This practice is by no means limited to acquaintance rape, as the entire institution of plea-bargaining reflects a similar efficiency-based mechanism for obtaining convictions while avoiding the costs of a trial. However, in the instance of acquaintance rape, the practice of permitting statutory rape guilty pleas to substitute for acquaintance rape trials, undermines the seriousness of the offense of forced sex, and thus erodes the legitimacy of laws against rape.

Statutory rape is not a lesser included offense of forcible rape. Rather, as we have seen, it is an entirely distinct offense, designed to protect those who willingly consent to sex, but are too young to understand the nature and consequences of their consent. More than half of all rape victims are under the age of eighteen, and a significant proportion of these are raped by acquaintances. To the extent these perpetrators are charged with and convicted of statutory rape, rather than rape, they are getting off easy. Nevertheless, to the extent that we deprive prosecutors of the option of using statutory rape, we hold underage victims of acquaintance rape to the standards of adult victims, standards that assume a sense of maturity and self-possession that many adolescent girls lack.

This conundrum points to a tightly woven manifestation of both the protective and the patriarchal functions of statutory rape law. The protective desire to secure a conviction against one who coerces sex out of an underage partner is matched by the fact that the convictions secured are not condemnations of forcible, unwanted sexual encounters. Rather, these convictions condemn only the fact that the

79. Statutory rape often is a probationable offense. See e.g., 720 ILL. COMP. STAT. 5/12-15 (1998) (describing criminal sexual abuse as a Class A misdemeanor). But see 720 ILL. COMP. STAT. 5/12-16 (1998) (describing aggravated criminal sexual abuse, a Class II felony, punishable by three to seven years incarceration). Generally speaking, the latter crime requires evidence of force or threat of force, unless the victim is under twelve or over sixty, or unless there is an age difference of five or more years or a perpetrator who held a position of trust or authority over the victim.

80. Indeed, this is precisely what occurred in Hemme. Because he was charged with statutory rape, rather than rape, the law tacitly accepts that the sexual encounter between Hemme and S.Q. was consensual, rather than forcible. In Chicago, a public school teacher recently was permitted to plead guilty to battery after the parents of one of his twelve year-old students learned that he was having intercourse with their daughter. Despite the fact that this could have been charged as predatory criminal sexual assault, a Class X felony, punishable by six to thirty years mandatory incarceration (720 ILL. COMP. STAT. 5/12-14.1(a)(1) (1998)). He was sentenced to fifteen months probation for this offense. Mary A. Mitchell, Law Fails Girl Who Says Teacher Had Sex With Her, CHI. SUN TIMES, Oct. 31, 2000, at 14.

81. The United States Department of Justice estimates the total number of rapes nationwide annually at 311,110. The number of rapes of girls ages twelve to nineteen is estimated at 124,620 (on file with author).
girls were underage. As such, statutory rape laws leave intact, and ultimately legitimate, a system in which it is permissible to lie, trick, manipulate, pester, and occasionally force another into gratifying one’s sexual needs.  

Social scientists postulate that an individual’s early sexual encounters have a dramatic impact upon their later experiences of sexuality. In short, one’s early sexual experiences form a script from which one learns the dimensions of pleasure. To the extent that girls’ experiences involve manipulative encounters that are primarily about sexual gratification of their male partners, girls internalize a message of subordination. Girls learn that their own sexual pleasure is of secondary importance, and that it is legally permissible for men to lie and trick girls into consenting to sex. They learn that, to find pleasure in sex, they must adapt to male sexual initiative, and find pleasure through giving pleasure. Sex, for such girls, becomes phallocentric and denigrating, as well as scary. Ultimately, this may be quite convenient for men, as they are permitted to construct heterosexual sexual encounters on terms that are designed to provide them not only with sexual gratification, but also with pliant females, who are socialized to find pleasure in passivity.

IV. RECLAIMING STATUTORY RAPE: CAN WE USE THE MASTER’S TOOLS TO DISMANTLE THE MASTER’S HOUSE?

Many years ago, Catharine MacKinnon suggested that the power imbalance between men and women rendered it impossible to discern the extent to which sex was fully consensual. Others soon distorted MacKinnon’s insight by claiming that she believed that there was no difference between sex and rape; that in fact, all sex was rape. Although this is an unfair reading of her argument, it is easy to understand why people reacted this way to her claim. Once one accepts the fairly obvious proposition that there is a power imbalance between


83. A particularly upsetting manifestation of this phenomenon is the problem of adolescent promiscuity in survivors of childhood sexual abuse. The child survivor learns to seek approval and love by providing others with sexual gratification. As a result, this population has disproportionately high rates of sexually transmitted diseases and pregnancy, as well as an increased likelihood of forming abusive relationships as adults. See Christopher R. Browning & Edward O. Laumann, Sexual Contact Between Children and Adults: A Life Course Perspective, 62 AM. SOC. REV. 540, 550 (1997); Stevens-Simon & Reichert, supra note 22, at 23.


men and women, and that this power differential permeates sexual encounters, just as it does virtually all other aspects of social interaction, one can no longer see the bright-line that ostensibly differentiates sex from rape. Once the bright-line distinction between sex and rape disappears, one must come to terms with the complicated set of sexual interactions that populate the range of encounters between forcible rape and mutually desired, pleasurable, and loving sex.

Many commentators have explored this range of encounters, making sense of the reasons behind these sexual interactions, and making cogent arguments about the extent to which they should be tolerated. Few, however, have pursued what I perceive as the real thrust, as it were, behind MacKinnon's initial observation. MacKinnon's critique was aimed at the manner in which women are socialized, as young girls, to accept and find pleasure in sexual subordination. The reason why we cannot be sure whether adult women freely choose to have sex with men is because, from the time they were infants, the entire force of their universe is bent upon insuring that they partner with men. Indeed, it is impossible to know what sexuality would look like in a world in which girls and boys are raised free from the expectations not only of heterosexuality, but also of the cultural norms that accompany our particular brand of heterosexuality: male initiation, female passivity and objectification, phallocentricity, etc.

There is a relatively simple explanation for the inattention to this aspect of the problem of discerning consensual sex. When the focus is girls, rather than women, even the histrionic claim that all sex is rape becomes completely uncontroversial. Indeed, this is the precise meaning of statutory rape laws. Until girls reach the statutorily prescribed age of consent, they are deemed incapable of consenting to sex. Therefore, any sexual contact with them is, by definition, nonconsensual, and tantamount to rape. In other words, at least insofar as it concerns underage girls, the law agrees with MacKinnon.

Therefore, one might expect feminists, and particularly those who understand sexuality to be a reflection of socially constructed norms favoring the subordination of women, to be outspoken advocates of statutory rape laws. To date, this has not been true. I believe this is largely due to the distrust that rightfully emanates from the patriarchal history of statutory rape laws. Even the proposal to use them in

the fight to protect girls from subordination calls to mind Audre Lorde's famous injunction that "The Master's Tools Will Never Dismantle The Master's House." 88

However, I believe that we have little choice but to use these laws. The underlying problem of socializing girls for subordination in their sexual encounters, as well as in general, is fundamental and deadly serious. Ultimately, this socialization process is critical to the replication of patriarchy. Unless new generations of girls can be sheltered, if not spared, from the effects of this subordination, their choices and their power as adults will be as narrowly circumscribed as were those of their older sisters. It is therefore central to the feminist task to determine how we should understand, honor, and protect girls' incipient sexuality.

Statutory rape laws are central to this task, but in order to use them, girls and women first must reclaim these laws. Toward this end, we must embrace the protective function of statutory rape laws, which, as we have seen, is at least as central as the patriarchal function. We must use the shelter of this protective arm to articulate a coherent vision of healthy sexual socialization as a critically important adolescent task in which one ideally enjoys room for experimentation, while at the same time remaining protected from coercion and exploitation.

The task of articulating the exact parameters of this ideal is beyond the scope of this essay, or indeed, of any one woman's vision of the ideal. It nonetheless marks a centrally important starting point in reconstructing statutory rape laws. At present, the laws on the books deny the reality of sexual socialization by virtue of their over-broad condemnation of all sexual contact with underage persons. In reality, however, we have seen that the laws as enforced have a normative vision of permissible sex and impermissible sexual contact. Sexual encounters, even if they are coercive or exploitative, may be permissible unless there is a wide age range between partners, or a resulting pregnancy. These laws must be reconfigured from their cores, beginning with a central definition of coercion and exploitation. If these laws are to protect girls' autonomy as they make the transition into women, they must address and outlaw the lies and manipulative tactics used to procure sex from girls under conditions that no experienced adult would tolerate.

In reforming these laws, it is important to remember that the law can play only a relatively small role in the work of creating a society

---

that honors girls' sexual autonomy. It will take a far more comprehensive approach than the penal system alone is capable of offering to begin the work of uprooting the offensive way in which girls and boys are sexually socialized. Obviously, effecting a change in the terms underlying sexual encounters, even if only for minors, will require collaborative educational efforts, encompassing parents, schools, the media, and society at large. To the extent that the law might play a role in such efforts, there must be a wider range of options for sanctions than we currently utilize. Youthful perpetrators of sexually coercive acts do not necessarily need criminal records. However, they do need to know that what they do is unacceptable and wrong. This could be accomplished with a range of sanctions, including suspended sentences accompanied by a requirement that one complete a probationary period that is well tailored to learning about the meaning and consequences of nonvoluntary sex.89

Of course, some might argue that the central purpose of statutory rape laws has been to secure for men the possession of women's sexuality, and that it is futile to attempt to disaggregate these laws from their central purpose. As we have seen, from the historical roots of statutory rape laws in a father's control over sexual access to his daughter, to the contemporary patterns in law enforcement, the patriarchal legacy of these laws is powerful.90 Nonetheless, those who would abolish statutory rape laws in an effort to expose the fallacy of their promise to protect underage victims would at the same time hold hostage millions of young girls' lives in this effort. As this essay demonstrates, the simple truth is that the problem with statutory rape laws has never been too much enforcement, but too little, or misplaced enforcement priorities. Therefore, for the sake of girls, and of the world they might help to create were they permitted to develop as whole human beings, it is obvious that we must reclaim these laws and rework them until they offer meaningful protection to those as yet incapable of protecting themselves.

89. For a fuller description of the law reforms I would propose in reformulating statutory rape law, see Oberman, supra note 35, at 703-84 (describing a variety of law reforms, and in particular, a Wisconsin pilot project in which eligible first-time offenders were offered a suspended sentence upon completion of a class designed to educate offenders about sexuality, autonomy and sexual violence). Another possibility discussed in the literature, and quite applicable here, might be the use of shame-based sanctions, designed to communicate a community norm that condemns exploitative sexual encounters. See Baker, supra note 65, at 698.

90. See supra notes 1-65 and accompanying text for the historical and the contemporary illustrations of patriarchal underpinnings of statutory rape law.