Utah Law Review

Volume 2019 | Number 1 Article 3

3-2019

#MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes

Leslie Y. Garfield Tenzer

#METOO, STATUTORY RAPE LAWS, AND THE PERSISTENCE OF GENDER STEREOTYPES

Leslie Y. Garfield Tenzer*

INTRODUCTION

In the late 1970s and early 1980s, feminists pushed for reform of statutory rape laws.[1] At that time, states' laws limited prosecution for sexual intercourse with a female below a certain age to males. The only victims of statutory rape were female.[2] Feminists advocated that legislatures should rewrite gender-specific sexual assault laws in gender-neutral terms.[3] They hoped that formal equality in statutory rapes laws would lead to the recognition that both males and females have sexual agency and greater equality in society as a whole.[4]

In October 2017, a social movement erupted out of the unacceptable exercise by men of their power over female subordinates.[5] The #MeToo movement exposed

---

 Professor of Law, Elisabeth Haub School of Law at Pace University. I gratefully acknowledge the thoughtful advice and keen insights of Professors Bennett L. Gershman, Audrey Rogers, Darren Rosenblum, Wendy Tenzer and participants of the Elisabeth Haub School of Law Faculty Colloquium Series, along with the research assistance of Emily Golban-Moghaddam and Marcy Robles. I would especially like to thank my research assistant, Nicolette Pellegrino, for her professionalism and extreme dedication to this project, Professor Don Doernberg for lending his sharp pencil and considerable time and Professor Bridget Crawford for her invaluable editorial assistance and her immeasurable support, encouragement, and advice.

[1] *See* CAROLYN COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 12 (2004).

[2] *See id.* at 9–10.

[3] Jill Filipovic, *Rewriting our rape laws in light of Steubenville*, AL JAZEERA (Mar. 27, 2013), https://www.aljazeera.com/indepth/opinion/2013/03/201332711439106890.html [https://perma.cc/XX67-HZWW] ("Shifts in rape law came with shifts in women's rights. Feminist activists pushed for legal reform in the 1970s and 80s, and by the turn of the century irrelevant evidence was largely barred and definitions of rape were updated to include male victims, penetration of orifices other than the vagina, weapons other than a penis, rapes preceded by threat or coercion and rapes that otherwise weren't forcible."); *see* Maya T. Prabhu, *Atlanta senator pushes for gender-neutral language in state rape law*, ATLANTA J.-CONST. (Jan. 25, 2018), https://politics.myajc.com/news/state--regional-govt--politics/atlanta-senator-pushes-for-gender-neutral-language-state-rape-law/JLWqKfQbUz3KJoi7CTrqyM/ [https://perma.cc/G95W-FZF6] (introducing Bill 145 to update "archaic state law defining who is a victim of rape to represent all survivors and victims of assault").

[4] *See* Katherine K. Baker & Michelle Oberman, *Women's Sexual Agency and the Law of Rape in the 21st Century*, 69 STUD. L. POL. & SOC'Y 63, 88 (2016).

[5] *See* Christie D'Zurilla, *In saying #MeToo, Alyssa Milano pushes awareness campaign about sexual assault and harassment*, L.A. TIMES (Oct. 16, 2017), http://www.latimes.com/entertainment/la-et-entertainment-news-updates-metoo-campaign-me-too-alyssa-milano-1508173882-htmlstory.html [https://perma.cc/F7M3-A86G]. Actress

the widespread prevalence of sexual harassment, sexual abuse, and sexual violence that women experience in the workplace. The goal of the #MeToo movement is to raise awareness of the prevalence of this type of predatory behavior.[6] In other words, the #MeToo movement strives for a workplace in which women and men are equals.

The #MeToo movement's objective is not dissimilar to the goal of proponents of gender-neutral statutory rape laws, which seek to have men and women treated equally. Unfortunately, these two movements have another similarity. Both the #MeToo movement and the practical enforcement of gender-neutral laws create a victimology paradigm. Recognizing inequality among genders requires conceding perceived female frailties.[7]

At the present moment, the #MeToo backlash[8] has yet to manifest itself in any concrete legal form. As court cases and other legal actions move forward, #MeToo

---

Alyssa Milano initiated the #MeToo movement when she tweeted: "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet." *Id.* One day after Milano's hashtag, Mashable.com reported that over 109,000 people had tweeted the #MeToo hashtag. *See* Alison Main, *The #MeToo hashtag was used in an enormous number of tweets*, MASHABLE (Oct. 16, 2017), https://mashable.com/2017/10/16/me-too-hashtag-popularity/#JGmEcIvfciqc [https://perma.cc/YD5J-QWJU]. Tarana Burke is credited with starting the MeToo movement. Cristela Guerra, *Where did "MeToo" initiative really come from? Activist Tarana Burke, long before hashtags*, THE BOS. GLOBE, (Oct. 17, 2017), https://www.bostonglobe.com/lifestyle/2017/10/17/alyssa-milano-credits-activist-tarana-burke-with-founding-metoo-movement-years-ago/o2Jv29v6ljObkKPTPB9KGP/story.html [https://perma.cc/P84Q-MBRZ]. Burke first used the phrase "MeToo" in 2007 as part of her own efforts to help victims of sexual harassment. *Id.* Alyssa Milano credited Burke with originating the use of MeToo as a means of calling attention to sexual abuse. *Id.*

[6] Sophie Gilbert, *The Movement of #MeToo*: *How a hashtag got its power,* THE ATLANTIC (Oct. 16, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/ [https://perma.cc/S77Z-72L2].

[7] *See* Daphne Merkin, *Misgivings About #MeToo*, N.Y. TIMES, Jan. 6, 2018, at A19; *see also* John Bowden, *Elaine Chao: Women can't let harassment hold them back*, THE HILL (Dec 5, 2017), http://thehill.com/homenews/administration/363359-elaine-chao-advises-women-who-experience-sexual-harassment-to-let-it [https://perma.cc/AX4Z-S29R] (quoting Transportation Secretary Elaine Chao as saying: "[women] gotta let it go, [b]ecause otherwise, it's too corrosive, it's too negative, and it does you a double injury because it holds you back."); Nicole Hemmer, Opinion, *The Pre-emptive #MeToo Backlash*, U.S. NEWS & WORLD REP. (Jan. 16, 2018), https://webcache.googleusercontent.com/search?q=cache:evosqd_ywSAJ:https://www.usnews.com/opinion/thomas-jefferson-street/articles/2018-01-16/aziz-ansari-and-the-pre-emptive-metoo-backlash+&cd=1&hl=en&ct=clnk&gl=us&client=safari [https://perma.cc/BS7D=RLX9] (criticizing those suggesting a backlash against #MeToo).

[8] *See, e.g.*, Rose Troup Buchanan, *Here's What Happens When #MeToo Backlash Is Weaponized*, BUZZFEED (May 31, 2018) https://www.buzzfeed.com/rosebuchanan/foro coches-la-manada-doxing?utm_term=.uxPO7EyE9#.gq4RxvDvk [https://perma.cc/5JPU-RWHR] (observing the "toxic online reaction" to those legitimately sharing #MeToo moments); Bari Weiss, Opinion, *Guilty of Not Being a Mind Reader*, N.Y. TIMES, Jan. 17, 2018, at A19 (suggesting that the #MeToo hashtag has been overly used and is disempowering to women); Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, THE

supporters may expect to encounter some unintended consequences in the quest for gender equality. In the case of gender-neutral statutory rape laws, the best of feminist intentions, in fact, have resulted in a retreat to a time when girls were considered incapable of protecting themselves, at best, and, at the worst, parental property. Consider the following.

Bill, an eighth-grade boy, and Carol, a seventh-grade girl, engaged in consensual sex. They had been dating for eighteen months. When Carol's parents learned of the encounter, they called the sheriff's department. Officers arrested Bill and charged him with a sexual-conduct misdemeanor. Carol faced no charges.[9]

Under Kentucky's law, the sheriff's department could have charged Carol with the crime, which is a part of the universe of sex crimes defined under the umbrella of statutory rape.[10] Kentucky removed gender-specificity from its sexual assault laws, meaning Carol's female status no longer automatically labeled her as the victim.[11] The gender-neutral language of Kentucky's statutory criminal misconduct code ultimately gives prosecutors full discretion in characterizing one party as a victim and the other as the perpetrator, although both engaged in the same wrongful conduct.[12]

All states and the federal government have enacted a collection of crimes aimed at punishing sex between two persons when at least one is under the age of consent.[13] These crimes, which states collectively refer to as "statutory rape laws,"[14] have grown organically from the social and legal distinctions made between boys and girls. Early common law characterized sex with an underage female as harm to the father's property; loss of virginity decreased the child's value as a bride.[15] The crime gave fathers retribution against males who took away their daughter's chastity.[16] Such a wrong deserved punishment.[17]

NEW YORKER (Jan. 24, 2018), https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash [https://perma.cc/TK43-PUNG]; Caitlin Flanagan, *The Humiliation of Aziz Ansari*, THE ATLANTIC (Jan. 14, 2018), https://www.theatlantic.com/amp/article/550541/?__twitter_impression=true [https://perma.cc/6XFW-TBB9].

[9] B.H. v. Commonwealth, 494 S.W.3d 467, 468 (Ky. 2016); *see also* Bruce Schreiner, *Kentucky Court Rules In Underage Sex Case Involving Teens*, SAN DIEGO UNION-TRIB. (Mar. 17, 2016, 10:31 AM), http://www.sandiegouniontribune.com/sdut-kentucky-court-rules-in-underage-sex-case-2016mar17-story.html [https://perma.cc/HXK7-JHFF] (stating that fifteen-year old Bill and thirteen-year-old Carol "had sex on two occasions . . . .").

[10] For purposes of this article, "statutory rape" is defined as non-forcible voluntary sex.

[11] *See infra* Table A.

[12] This Article only concerns itself with consensual sex: intercourse where both parties are below the age of consent and knowingly agree to engage in the prohibited conduct.

[13] *See infra* Table A.

[14] *See infra* Table A. Few states include the term "statutory rape" in their terminology.

[15] *See* Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875) (stating that the defendant was convicted of taking an unmarried girl out of possession of her father).

[16] *See, e.g.*, Seagar v. Sligerland, 2 Cai. R. 219 (N.Y. 1805) (stating that where a daughter is violated by force, a father "is entitled to compensation for the loss of her service").

[17] Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for*

However, the gender-centric nature of statutory rape remained well after the notion of females as property waned. Later, legislatures and courts cited prevention of teenage pregnancy,[18] reduction of numbers of "welfare moms,"[19] and a general desire to preserve young girls' virtues[20] as justification for criminalizing consensual sex with female minors.

As recently as 1981, the Supreme Court, in *Michael M. v. Superior Court of Sonoma County*, [21] endorsed unequal treatment between the sexes concerning statutory rape. A plurality of the court held that California's gender-specific statutory rape law sought to protect harm that unevenly fell on females who, in their opinion, bore the brunt of unwanted pregnancies and non-marital children.[22] The State's justification was constitutionally permissible; it did not violate the Equal Protection Clause of the Fourteenth Amendment.[23]

While the *Michael M.* Justices endorsed a gendered norm, their opinion further fueled the gender-neutral statutory rape laws movement, which had already begun to take form.[24] In response to *Michael M.*, feminists, including Frances Olsen and Ann Freedman, asserted that gender-based laws of the *Michael M.* type furthered the stereotype of females as victims and unfairly oppressed women as they sought equal status with men.[25] Legislatures, that had not previously done so, reacted to *Michael M.'s* endorsement of inequality. By 2000, all state legislatures had removed gender distinctions from sexual assault crimes.[26] Ideally, the goal of these laws was to treat females and males equally, reduce the stigma of women as victims, alleviate a sense of female oppression, and remedy other persistent historical gender stereotypes.[27]

Statutory Rape, 48 BUFF. L. REV. 703, 755 n.157 (2000) ("[S]tatutory rape laws were an outgrowth of biblical precepts, by which virginity was so highly prized that the crime of rape was punished by forcing the rapist to marry the victim.") (citing Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 465 (1995)).

[18] *See, e.g.*, Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 470 (1981) ("Here, for example, the individual legislators may have voted for the statute for a variety of reasons. Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of 'chastity,' and still others about promoting various religious and moral attitudes towards premarital sex.").

[19] Caitlyn Silhan, *The Present Case Does Involve Minors: An Overview of the Discriminatory Effects of Romeo and Juliet Provisions and Sentencing Practices on Lesbian, Gay, Bisexual, and Transgender Youth*, 20 TUL. J.L. SEXUALITY 97, 106 (2011).

[20] Heidi Kitrosser, *Meaningful Consent: Toward a Generation of Statutory Rape Plans*, 4 VA. J. OF SOC. POL'Y. & L. 287, 311 (1997).

[21] 450 U.S. at 495.

[22] *Id.* at 470–71.

[23] U.S. Const., amend XIV. *See infra* Part II.

[24] *See infra* Part I.C.

[25] *See* COCCA, *supra* note 1, at 73. *See also infra* Part I.C (discussing the feminist critique of *Michael M.*).

[26] *See infra* Table A.

[27] Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come*, 84 J. CRIM. L. & CRIMINOLOGY 554, 554–55 (1993).

Unfortunately, the aspired-to reality is far from the ideal. Today, prosecutors are three times more likely to charge males with statutory rape than they are to charge females with the same crime.[28] Parents of females alert authorities about the prohibited sexual activity of their daughters at a rate that is largely disproportionate to that of parents of males.[29] The change to gender-neutral language, as it pertains to prohibited sexual intimacy between consenting teens, is semantic at best but more likely has created an unfortunate return to the female victimology paradigm that proponents of gender-neutral statutory rape laws sought to erase.

The equality language of gender-neutral statutes plays a significant role in the unfairness of its application. The unintended consequence of the shift to gender-neutral statutory rape laws is the loss of labeling for the purpose of status. Traditional statutory rape laws defined the female as "victim" and the male as "defendant."[30] The shift to gender-neutral language places the burden on prosecutors to choose which partner to charge with statutory rape in cases of mutual consent to the same prohibited conduct. Some statutes offer guidance to prosecutors, but others give prosecutors unlimited discretion concerning which party to charge.[31]

Statutory rape laws fall into one of two categories: (1) thirty-four states have enacted what this Article refers to as *age-differential statutes*;[32] and (2) the remaining sixteen states have enacted what this Article refers to as *arbitrary prosecution statutes*.[33] In jurisdictions with age-differential statutes, prosecutors may only charge the perpetrator if he or she is older than the minor victim by a legislatively-mandated number of years.[34] Prosecutors in these states, therefore, are

---

[28] *See infra* notes 193–205 and accompanying text. Males comprise over 75% of all statutory rape prosecutions under age 16. KARYL TROUP-LEASURE & HOWARD M. SNYDER, U.S. DEP'T OF JUSTICE, STATUTORY RAPE KNOWN TO LAW ENFORCEMENT (2005), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/208803.pdf [https://perma.cc/D5MC-JP5C].

[29] *See* SHARON G. ELSTEIN & NOY DAVIS, A.B.A. CTR. ON CHILDREN AND THE LAW, SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES 22 (1997), *available at* http:// www.americanbar.org/content /dam/aba/migrated/child/PublicDocuments/statutory_rape.authcheckdam.pdf [https://perma .cc/M7RP-TADL].

[30] *See, e.g.*, Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 466 (1981) (defining at the time CAL. PENAL CODE § 261.5 as "[u]nlawful sexual intercourse as 'an act of sexual intercourse accomplished with a *female not the wife of the perpetrator*, where the *female is under the age of 18 years*.' The statute thus *makes men alone criminally liable for the act of sexual intercourse*." (emphasis added)); *cf.* CAL. PENAL CODE § 261.5(a) (2018) ("Unlawful sexual intercourse is an act of sexual intercourse accomplished with a *person* who is not the spouse of the *perpetrator*, if the person is a minor." (emphasis added)).

[31] *See infra* Table A.

[32] *See infra* Table A; *infra* Part II.A.

[33] *See infra* Part II.B.

[34] *See infra* Table A; *infra* Part II.A; BRITTANY LOGINO SMITH & GLEN A. KERCHER, CRIME VICTIM'S INSTITUTE, ADOLESCENT SEXUAL BEHAVIOR AND THE LAW 8–10 (2011), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjo27q725TXAhXp6oMKHSmvBGcQFggtMAE&url=http%3A%2F%2Fwww.crimevictimsinstitute.org%2Fdocuments%2FAdolescent_Behavior_3.1.11.pdf&usg=

limited in prosecuting for statutory rape to instances where the perpetrator is at least three years—and in some states as much as five years—older than the victim.[35] The justification for age-differential statutes is a recognition that underage minors sometimes choose to engage in consensual sexual intimacy. In jurisdictions with arbitrary prosecution statutes, the states have adopted laws that are silent about whom to charge.[36] These states have remedied the unequal treatment between genders but fail to remove from culpability teens who wish to explore sexual intimacy with a partner.

Age-differential prosecution statutes provide some limitations on prosecutors since the prosecutor does not have the power to charge the younger of two consenting teens even though both chose to engage in the legally-prohibited act. Arbitrary prosecution statutes, however, allow prosecutors to charge either party when two minors consent to the same sexual misconduct. Consequently, arbitrary prosecution statutes grant prosecutors a level of discretion that potentially thwarts the announced objectives of equality under the law.[37] Age differential legislation places limited boundaries on whom the prosecution can charge, but like arbitrary prosecution statutes, prosecutors enforce the law against males at a significantly higher rate than against females.[38]

To be sure, there are benefits to gender-neutral statutory rape laws. These statutes have expanded the prosecutor's arsenal to allow prosecution for occurrences of sexual violence against men and inappropriate relations between adult females and minor males.[39] But in the case of prosecution between "minors" who have chosen to engage in sexual relations, the victim tends to be the party whose parents reach out to the police.[40] More often than not, a parent of a middle-class female seeks retributive justice, leaving the male to suffer the consequences of the mutual

---

AOvVaw14QKlR8PdpLAYyHyNE_0N1 [http://perma.cc/49XC-B4VM]; *see also* HANNAH CARTWRIGHT, GLOB. JUSTICE INITIATIVE, LEGAL AGE OF CONSENT FOR MARRIAGE AND SEX FOR THE 50 UNITED STATES (2011), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&cad=rja&uact=8&ved=0ahUKEwji15mN2pTXAhWo34MKHevSB50QFghpMAo&url=https%3A%2F%2Fglobaljusticeinitiative.files.wordpress.com%2F2011%2F12%2Funited-states-age-of-consent-table11.pdf&usg=AOvVaw1DlBi9K_nDtEISv0kk0dgm [https://perma.cc/5TKN-E28T].

[35] *See infra* Table A.

[36] *See infra* Table A.

[37] *See infra* Part II.

[38] *See, e.g.*, Helen Smith, *How the law punishes boys who are raped: Column*, USA TODAY (Sept. 3, 2014), https://www.usatoday.com/story/opinion/2014/09/03/child-support-statutory-rape-justice-law-men-column/15044791/ [https://perma.cc/YL6D-MJF2] (discussing double standard).

[39] *See generally* Iowa v. Romer, 832 N.W.2d 169 (Iowa 2013) (convicting a high school teacher of sexual exploitation after having sexual relations with a 15-year-old student); Kansas v. Edwards, 288 P.3d 494 (Kan. Ct. App. 2012) (convicting a teacher under statute prohibiting teacher from having consensual relations with a student); Oberman, *supra* note 17.

[40] *See* Oberman, *supra* note 17, at 749–50.

decision[41] and further perpetuating the stereotype of the female as the victim and the male as the aggresor.[42] Parents' power to influence prosecution decisions by calling attention to authorities and using the social or political capital to urge prosecutors to file charges, coupled with prosecutorial discretion in charging decisions, have essentially returned females to the more vulnerable status that gender-neutral laws sought to eradicate.

This Article illustrates how movements for increased equality between men and women can fail to meet their stated goals. Using the example of statutory rape laws, this Article explains how the legislative shift from gender-specific to gender-neutral terminology, brought on in part by feminists seeking an egalitarian society, has failed to achieve the goal of increasing equality between males and females and, in many ways, led to a return to the historical paradigm of girls as both powerless and property.

This Article proceeds in five parts. Part I reviews the history of the legal and social movement from gender-specific to gender-neutral statutory rape laws. This Part includes an exploration of critical scholarship responding to the Supreme Court's *Michael M.* decision. Part II explains the limitations of gender-specific legislation. This Part illustrates that there are two categories of gender-neutral statutory rape jurisdictions: age-differential statutes and arbitrary prosecution statutes. This Part also explores challenges to these statutes, particularly arbitrary prosecution statutes, on equal protection grounds. Part III provides empirical data that men are prosecuted at a rate four times greater than females and catalogs the overwhelming disparity between the prosecution of teenage males for consensual statutory rape and prosecution of teenage females for the same crimes. Part IV tests the outcomes of statutory rape prosecutions and considers whether the move to gender-neutral rape laws has achieved feminists' goals such as removing female stereotypes and granting females more power over their own sexuality. Ultimately, this Article highlights how cultural movements can have long-simmering, unintended consequences, and the pernicious effects of the legislative shift to gender-neutrality stands as a cautionary tale to the #MeToo movement and its fight for workplace equality. This Article concludes with hope, offering a solution for change in the future.

---

[41] *See infra* notes 189–192 and accompanying text. This article is limited to instances of heterosexual statutory rape for purposes of proving the gender divide. To be sure, homosexual statutory rape as applied to teens engaged in consenting sexual intimacy is equally problematic. *See generally* Commonwealth v. Washington W., 928 N.E.2d 908 (Mass. 2010) (charging a 15-year-old juvenile with statutory rape after father of complainant learned of the incidents); State v. Limon, 122 P.3d 22 (Kan. 2005) (overturning statutory rape law that punished same sex couples more harshly than heterosexual couples).

[42] *See generally* Kari Paul, *Rigid gender stereotypes tied to increased depression, violence and suicide in children*, MARKETWATCH (Sept. 20, 2017), https://www.marketwatch.com/story/rigid-gender-stereotypes-tied-to-increased-depression-violence-and-suicide-in-children-2017-09-20 [http://perma.cc/7BPC-SFUK] (noting in a 15 country study the reinforcement of gender stereotypes from childhood where "boys were taught to be the aggressors in romantic and sexual relationships.").

I. GENDERED STATUTORY RAPE LAWS

Since their inception, until a little less than a half-century ago, statutory rape laws permitted prosecution of males only. Gendered statutory rape laws originated with the codification of sex crimes in England.[43] The Statute of Westminster prohibited sex with a female under 12.[44] Girls under twelve were considered unable to consent to sexual intercourse.[45] Colonial America adopted English codification of sex with a minor but viewed the violation as a property crime.[46] Male vaginal penetration decreased a female's dowry.[47] Long after the concept of females as property receded, gender-specific statutory rape laws remained to protect women and the state from unwed pregnancies and perceived burdens on the welfare system.[48] As recently as 1981, the Supreme Court upheld the unequal treatment of men and women for purposes of statutory rape laws.[49] In *Michael M. v. Superior Court of Sonoma County,* the Court ruled that the need for protection of decidedly female interests justified California's gender-specific statutory rape laws.[50] Response to the decision was harsh. Feminist groups called on states to reject the ruling and instead adopt gender-neutral statutory rape laws to remove socially entrenched notions of females as weak and oppressed.[51]

---

[43] COCCA, *supra* note 1, at 10–11.

[44] *Id*. at 10.

[45] *Id.*

[46] Lewis Bossing, Note, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205, 1220 (1998) ("At Common Law, rape was seen as a property crime, where a woman's 'honor,' 'purity,' or 'virginity' were stolen from her husband or father."); *see also* Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 494–95 (1981) (describing the policy that underlined colonial statutory rape by saying, "because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the state's protection").

[47] Alice Schlegel, *Status, Property, and the Value on Virginity*, 18 AM. ETHNOLOGIST 719 (Nov. 1991).

[48] *Michael M.*, 450 U.S. at 479–81.

[49] *Id.* at 475–77.

[50] *See generally* Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464 (1981) (holding that a statutory rape law did not violate the Equal Protection Clause because it was sufficiently related to the State's strong interest in preventing teenage pregnancy).

[51] Maria Louise Payne, *Constitutionality of Statutory Rape:* Michael v. Superior Court of Sonoma County, 17 TULSA L. REV. 350, 370–71 (1981).

A. Statutory Rape: A Brief History

Statutory rape is sexual intercourse with a person under the age of lawful consent.[52] Unlike nonconsensual intercourse,[53] the state can charge an alleged perpetrator with statutory rape regardless of consent.[54] The law applies with force against one party, even though both parties committed the same act and intended to engage in the forbidden conduct.[55]

Punishment for consensual intercourse with a woman dates back at least to 1285.[56] From the thirteenth century through much of the twentieth, the law prohibited only sexual intercourse with a female.[57] The Statute of Westminster, declared girls under the age of twelve incapable of consenting to sex,[58] apparently choosing that age as the age of puberty.[59] Prepubescents could not bear children, and there was no procreative value to sexual encounters. Consequently, legislatures felt legitimized in protecting these young girls' interests in chastity and future marriageability.[60]

Drawing the age line at puberty was a function of delineating between an age when girls could and could not procreate.[61] Statutory rape laws are inextricably tied

---

[52] Although many states do not use the term "statutory rape" in their statutes, it has come to mean sexual relations with a minor under the age of consent. For purposes of this article, "statutory rape" means sexual intercourse with a person under the age of consent.

[53] DEP'T OF JUSTICE, AN UPDATED DEFINITION OF RAPE (2012), https://www.justice.gov/archives/opa/blog/updated-definition-rape [http://perma.cc/33RC-KYWR] ("The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.").

[54] Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 335 (2003).

[55] *Id.* at 334–36.

[56] COCCA, *supra* note 1, at 10–11 (noting that prior to the Statute of Westminster, the female's consent barred a rape conviction).

[57] COCCA, *supra* note 1, at 9 ("The laws originally were gender-specific: They punished a male who had sexual intercourse with a female, who was not his wife, under the age of consent . . . .").

[58] Luisa A. Fuentes, *The 14th Amendment and Sexual Consent: Statutory Rape and Judiciary Progeny*, 16 WOMEN'S RTS. L. REP. 139, 139–40 (1994); *see also* Holly Brewer, *The Historical Links Between Children, Justice, and Democracy*, 28 HAMLINE J. PUB. L. & POL'Y 339, 340 (2006) ("The first statutory rape law passed under Queen Elizabeth, concerned only girls and set the age below which consent was irrelevant at 10.").

[59] Marsha Greenfield, *Protecting Lolita*: *Statutory Rape Laws in Feminist Perspective*, 1 WOMEN'S L.J. 1, 4 (1977).

[60] *See* State v. Rundlett, 391 A.2d 815 (Me. 1978) (noting the legislative intent behind the statutory rape laws of some other states is to preserve chastity); MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT SEXUALITY IN THE UNITED STATES 1885–1920, at 13 (1995) (noting the legislative reaction to laws that allowed girls as young as ten "to be legally capable of giving 'consent' to her own corruption . . . .").

[61] *Rundlett*, 391 A.2d at 820; *see also* Michael Castleman, *Age of Consent: How Old Is Old Enough for Sex?*, PSYCHOLOGY TODAY (Feb. 1, 2017), https://www.psychologytoday.com/us/blog/all-about-sex/201702/age-consent-how-old-is-old-enough-sex [http://perma.

to marriage. "A young girl's worth depended upon her ability to secure a marriage that would promise economic security[,] and her ability to marry depended on her sexual purity."[62] Statutory rape laws existed to deter both parties from ruining the "pure" girl and securing retribution against the male who robbed a father of that value.[63]

Over time, the notion of girls (and all children) as property waned. States shifted their justification of statutory rape laws from girls as property to girls as "girls," weaker than boys and unable to protect themselves from harm.[64]

States also were concerned with the anatomical uniqueness of females—the ability to become pregnant and carry babies to term.[65] Thus, while many American states cited protecting girls' chastity as justification for statutory rape statutes,[66] legislative intent broadened to other social, emotional, and even financial harms that could result, all of which centered on young girls' need of protection, including from unwanted pregnancies[67] and the need to prevent an increase in welfare mothers.[68]

---

cc/47WX-AXDB] (noting that under the traditional biblical view, "sex is legitimate only for procreation."); *cf.* Jordan Franklin, *Where Art Thou, Privacy? Expanding Privacy Rights of Minors in Regard to Consensual Sex: Statutory Rape Laws and the Need for a Romeo and Juliet Exception*, 64 J. MARSHALL. L. REV. 309, 312 (2012) ("The low age of consent, and gender specific language, reflected the historical ideology of women, as in need of male protection and possessions.").

[62] Kay L. Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357 (2006); *see also* Greenfield, *supra* note 59, at 4–5.

[63] Levine, *supra* note 62, at 107; *see* Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 494–96 ("Until very recently, no California court or commentator had suggested that the purpose of California's statutory rape law was to protect young women from the risk of pregnancy. Indeed, the historical development of § 261.5 demonstrates that the law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse. Because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the state's protection. In contrast, young men were assumed to be capable of making such decisions for themselves; the law therefore did not offer them any special protection." (citation omitted)); *see generally* Maryanne Lyons, Comment, *Adolescents in Jeopardy: An Analysis of Texas' Promiscuity Defense for Sexual Assault*, 29 HOUS. L. REV. 583, 616 (1992) (exploring Texas statutory rape law and its relation to early common law).

[64] *See Michael M.*, 450 U.S. at 495.

[65] *See, e.g.*, Teenage Pregnancy Prevention Act of 1995, A.B. 1490, 1996 Reg. Sess. (Cal. 1996) (citing legislative concerns of pregnancy out of wedlock and welfare mothers).

[66] *Michael M.*, 450 U.S. at 494–95 (Brennan, J., dissenting); *see also* COCCA, *supra* note 1, at 11.

[67] Leslie G. Landau, *Gender-Based Statutory Rape Law Does Not Violate the Equal Protection Clause:* Michael M. v. Superior Court of Sonoma County, 67 CORNELL L. REV. 1109, 1116 (1982).

[68] *See* State v. La Mere, 655 P.2d. 46, 50 (Idaho 1982) ("The State points out that statistics obtained from the Idaho Department of Health and Welfare and the Planned Parenthood Association of Idaho, Inc. show that in 1980 Idaho women gave birth to 20,140 children. Of those children, approximately 13% were born to mothers who were 19 years of age or less. Abortion statistics indicate that in both 1979 and 1980 approximately 30% of the

From a more social perspective, states focused on the perceived weakness and fragility of girls, seeking to prevent victimization of immaturity[69] and implying that girls lacked the judgment or the responsibility necessary in sexual decision-making.[70]

B. The Legality of Gender-Specific Statutory Rape Laws

Well into the twentieth century, every state had gender-specific statutory rape laws. Gradually, states began to redraft statutes in gender-neutral terms.[71] Although many legislatures remained committed to their stereotypical beliefs that young women needed protection from sexual relations regardless of whether there was consent, they identified separate reasons for extending statutory rape laws to protect underage males. The idea that males would engage in sex with other males and that females could be held accountable for taking advantage of male youths prompted many state legislators to vote for neutral language.[72]

As legislatures tried to dismantle gender inequality, courts remained committed to upholding the constitutionality of gender-specific rape laws.[73] The decisions were particularly curious; many states with gender-specific statutory rape laws had neutralized most other state statutes.[74] In at least a handful of states, courts upheld gender-specific statutes.[75] In some instances, courts upheld the constitutionality of

---

legal abortions performed in Idaho were performed on girls who were between the ages of 10 and 19 years.").

[69] *Cf.* People v. Hernandez, 393 P.2d 673, 676–77(Cal. 1964) (regarding good faith belief of victim's age); *see* Oberman, *supra* note 17, at 737 ("Statutory rape laws are predicated upon the belief that certain individuals are so vulnerable to sexual exploitation that they are incapable of consenting to sex.").

[70] *See* COCCA, *supra* note 1, at 15.

[71] *See, e.g.*, KAN. STAT. ANN. § 21-3503 (1969); *see also* MICH. COMP. LAWS § 750.520d (1973); *see also* Payne, *supra* note 51, at 372–73.

[72] COCCA, *supra* note 1, at 66.

[73] *See, e.g.*, State v. La Mere, 655 P.2d 46, 49–50 (Idaho 1982) (holding Idaho law did not violate the Equal Protection Clause because the state had an important interest in preventing and reducing teen pregnancies); *but cf.* Meloon v. Helgemoe, 564 F.2d 602, 609 (1st Cir. 1977) (noting that, at that time, only New Hampshire's gender-specific statute had been ruled unconstitutional).

[74] *See* Barnes v. State, 260 S.E.2d 40 (Ga. 1979) (holding that a gender-specific statutory rape law was not invalid even though legislature had adopted other gender-neutral sexual assault laws). *Compare* Murphey v. Murphey, 653 P.2d 441 (Idaho 1982) (noting that Idaho adopted a gender-neutral divorce maintenance statute in 1980) *with* State v. Joslin, 175 P.3d 764 (Idaho 2007) (holding that state rape law, which punishes males, does not violate equal protection clause). *See also* Michael B. v. Sendi Diann W., 467 N.Y.S.2d 1009 (N.Y. Fam. Ct. 1983) (noting that New York amended the Family Court Act in 1977 to adopt gender-neutral language); People v M.K.R., 632 N.Y.S.2d 382 (N.Y. Just. Ct. 1995) (noting that New York adopted gender neutral language in its rape laws in 1987).

[75] *See La Mere*, 655 P.2d at 46.

the challenged statute even though the legislature adopted gender-neutral statutory rape laws after the defendant's conviction.[76]

For example, the Arizona Supreme Court rejected an equal protection challenge to the state's gender-specific rape laws, despite the legislature's adoption of a gender-neutral scheme the prior year.[77] The court found a compelling governmental interest in protecting teen girls from pregnancy, an injury that males cannot sustain.[78] Similarly, Nevada's Supreme Court considered whether Nevada's gender-specific statutory rape law served important governmental objectives and whether the law was substantially related to achievement of those objectives.[79] The court found a compelling state interest in preventing teen pregnancy.[80] It reasoned that "[p]regnancy carries with it attendant medical, psychological, sociological, and moral problems which a young female may not be able to maturely consider or even fully fathom or appreciate."[81] Since "female[s] can become pregnant while . . . male[s] cannot," the gender-based statute withstood constitutional scrutiny.[82]

In one case, a Texas court rested its denial of a federal equal-protection claim against Texas's gender-specific statutory rape law on state history, considering the constitutionality of a law that criminalized sexual intercourse with a female under seventeen.[83] Texas defined sexual intercourse as "any penetration of the female sex organ by the male sex organ."[84] The court opined that statutory rape laws had been on the books for many years and it was therefore "a little bit late" in the history of such laws to contend that they violated equal protection.[85]

One federal court found differently from the state courts that upheld gender-specific statutory rape crimes. In *Meloon v. Helgemoe,*[86] the First Circuit ruled that New Hampshire's statutory rape scheme violated the Equal Protection Clause of the Fourteenth Amendment.[87] After his arrest for statutory rape, the defendant

---

[76] *See, e.g.*, State v. Gray, 595 P.2d. 990 (Ariz. 1979) (upholding conviction from 1974, five years prior to the legislative change); *see also* People v. Dieudonne, 544 N.Y.S.2d 704 (N.Y. App. Term 1989) (noting that it is the legislature's role to adopt gender-neutral language in statutory rape laws).

[77] *Id.*

[78] *Id.* at 991–92; *see also* State v. Kelly, 526 P.2d 720, 723 (Ariz. 1974) (finding a state's interest in protecting teen pregnancies, which requires treating males and females differently, entirely reasonable in light of the fact that the psychological and sociological reasons to protect females do not exist for males); *see also In re* Interest of J.D.G., 498 S.W.2d 786, 791–92 (Mo. 1973) (stating the lack of a minimum male age requirement for prosecution of statutory rape does not violate the Equal Protection Clause, because only a female can suffer the adverse consequences of pregnancy while a male cannot).

[79] Olson v. State, 588 P.2d 1018, 1019 (Nev. 1979).

[80] *Id.*

[81] *Id*.

[82] *Id*.

[83] *Ex Parte* Groves, 571 S.W.2d 888, 892 (Tex. Crim. App. 1978).

[84] *Id.* (quoting TEX. PENAL CODE ANN. § 21.01(3)).

[85] *Id*. at 892.

[86] 564 F.2d 602(1st Cir. 1977).

[87] *Id.* at 608–09.

challenged the gender-specific law.[88] All other New Hampshire laws were gender-neutral[89] at the time of defendant's arrest. He argued first in state court and then in federal court[90] that the statute, which did not make it a crime for a woman to engage in consensual sexual intercourse with a male under the age of fifteen, violated equal protection.[91]

The First Circuit agreed and struck down the statute, finding New Hampshire's stated interest in preventing teen pregnancy and its assumption of the psychological strength of males and the psychological weakness of females failed to further a legitimate goal.[92] The New Hampshire law had the "mirror image effect . . . that by only penalizing one gender of offenders, males, for committing a heterosexual offense, the state necessarily left the potential victims of that offense of the same gender, young males, without protection."[93] Although decided at the federal level, the *Meloon* court made clear that its decision was only binding in cases that applied New Hampshire law.[94]

Four years after *Meloon*, the United States Supreme Court ruled in a case that directly addressed the issue of whether gender-specific statutory rape laws violated equal protection rights under the Fourteenth Amendment. In 1980, in the case of *Michael M. v. Superior Court of Sonoma County*, a male minor challenged California's gender-specific statutory rape law.[95] Contrary to *Meloon*, *Michael M.* upheld the right of states to treat males and females differently to punish for statutory rape, citing prevention of teen pregnancy and the state interest in minimizing children born out of wedlock as a compelling justification for the law.[96]

---

[88] *Id.* at 603.

[89] *Id.* ("All of the other New Hampshire laws regulating sexual behavior which were brought to the attention of this court, as they pertain to the conduct of consenting parties, are gender neutral and apply equally to men and women.").

[90] Following the decision of the Supreme Court of New Hampshire to uphold Meloon's conviction, Meloon filed a petition for a writ of habeas corpus in federal district court. *Id.*

[91] *Id.*

[92] *Id*. at 605 ("New Hampshire suggests four 'reasons' for its classification scheme: (1) part of the class of males under the age of 15, pre-pubescent males, are physiologically incapable of becoming victims of this consensual offense; therefore the class of victims vulnerable to women offenders is smaller than the class of victims vulnerable to male offenders; (2) adult males, due to a psychological disorder known as pedophilia or otherwise, are more likely to seek to commit the offense than adult women; therefore the class of potential male offenders is larger than the class of potential women offenders; (3) female children are more likely to suffer physical damage during the commission of the offense than are male children; thus the class of female victims is in danger of more severe injury than their male counterparts; (4) only female victims may become pregnant; thus again the class of female victims may suffer more severe repercussions from the offense than will their male counterparts.").

[93] *Id.* at 609.

[94] Meloon v. Helgemoe, 564 F.2d 602, 609 (1st Cir. 1977).

[95] Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 467 (1981).

[96] *Id.* at 470.

Just after midnight on June 3, 1978, while California's gender-specific law was still in effect, seventeen-and-a-half-year-old Michael approached Sharon, who was sixteen and a half at the time.[97] The two had been drinking.[98] Despite evidence at trial that Sharon said "no" to Michael's initial advances, and that Michael struck Sharon in the face, concurring justices based their decision on their interpretation or assumption that Sharon submitted to sexual intercourse with Michael.[99] The State of California charged Michael with "unlawful sexual intercourse with a female under the age of 18 years."[100] Michael challenged the statute arguing that it violated state and federal law because it discriminated based on gender.[101]

The trial court and the intermediate appellate court denied Michael's request for relief.[102] The California Supreme Court's narrow majority acknowledged that the statute discriminated based on sex but found that the discrimination survived intermediate-scrutiny review and was therefore constitutional.[103] The California Supreme Court noted that "Changeless physical law, [that only females can become pregnant] coupled with the tragic human cost of illegitimate teen pregnancies" supported the state's compelling governmental interest in retaining the gender-specific law.[104] Even if the court had believed differently, California Supreme Court Justice Richardson noted that only the legislature could enact a gender-neutral statute.[105]

The United States Supreme Court granted *certiorari*. California continued to defend its statute as necessary to prevent teenage pregnancy and the costs associated with unwanted births.[106] One of the defendant's principal arguments was that the

---

[97] *Id.* at 466.

[98] *Id.* at 466–67.

[99] According to Justice Blackmun, Sharon appeared "not to have been an unwilling participant in at least the initial stages of the intimacies that took place the night of June 3, 1978." *Id.* at 483. Scholars have questioned this finding of fact, suggesting that her reaction—though abstractly appearing consensual—was actually coerced. *See, e.g.*, Carol Sanger, *Girls and the Getaway: Culture, and the Predicament of Gendered Space*, 144 U. PA. L. REV. 705, 732 n.101 (1995) (citing Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 416–17 (1984) (disagreeing with the characterization of the sexual encounter in *Michael M.* as consensual and describing the *Michael M.* transcript as "a forceful indictment of our present gender system")).

[100] *Michael M.*, 450 U.S. at 466 (1981) (quoting CAL. PENAL CODE § 261.5 (West 1981) (prohibiting "an act of sexual intercourse accomplished with a *female not the wife of the perpetrator,* where the *female is under* the age of *18 years*") (emphasis added)).

[101] *Michael M.,* 450 U.S. at 466.

[102] *Id.* at 467.

[103] *Id.* (explaining that, despite the fact that the California Supreme Court incorrectly used a more difficult "strict scrutiny" standard for gender-based classification rather than the appropriate intermediate scrutiny test, the California Supreme Court nonetheless upheld the statute by finding a compelling state interest which justified gender classifications and that both the state and federal constitutional equal protection requirements were satisfied).

[104] Michael M. v. Super. Ct. of Sonoma Cty., 601 P.2d 572, 574 (1979).

[105] *Id*. at 577.

[106] Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 470 (1981).

statute impermissibly presumed that between two consenting teens under age eighteen, only the male could be the aggressor.[107] Justice Rehnquist, writing for the plurality, rejected the assertion. Casting *Michael M.*'s argument as one of age rather than gender, the Justice wrote: "the age of the man" is irrelevant because young men are just as capable as older men of causing pregnancy.[108] Concerning the gender divide, the plurality noted that the gender-specific statute was a permissible attempt by the legislature to prevent illegitimate teenage pregnancy.[109] The threat of prosecution provided an additional deterrent to young men from engaging in activity that would have a deleterious impact primarily on young women.[110]

Thus, the plurality found the statute constitutional, notwithstanding the fact that it differentiated between the sexes.[111] The biology of procreation demanded protection of underage girls.[112] Noting that intermediate scrutiny was the appropriate standard of review,[113] the Court ruled that the gender-specific statute was sufficiently related to the state's interest in preventing teenage pregnancy because "virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female."[114]

Justice Stewart, who concurred, approved of the state's legislative efforts to encourage males to share in the obligation of birth control. He joined Justice Rehnquist's finding that men and women, "are *not* similarly situated with respect to the problems and risks associated with [sexual] intercourse . . . ."[115] In his view, the law encouraged abstinence, operating as a self-imposed birth control method for men.[116]

---

[107] *Id.* at 475. The defendant also argued that (1) the statute is impermissibly under-inconclusive and must hold a female responsible, too, and (2) the statute is impermissibly broad because it criminalizes intercourse with prepubescent girls, who cannot get pregnant.

The plurality dismissed both arguments. It noted that accepting that a gender-neutral statute could frustrate the state's interest in effective enforcement because a girl would be less likely to report violations if she knew she also could be prosecuted. *Id.* at 473–74; since the area is already "fraught with prosecutorial difficulties," *id.* at 474, the plurality rejected this argument. It rejected the second argument as well, characterizing it as "ludicrous." *Id.* at 475.

[108] *Id*. at 475.

[109] *Id.* at 470.

[110] *Id.* at 474.

[111] Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 472–73 (1981).

[112] *Id.* at 473.

[113] *Id*. at 468–69. *But see* Landau, *supra* note 67, at 1115 (disputing the Court's position on equal protection).

[114] *Michael M.*, 450 U.S. at 473. The court further explained that "teenage pregnancies, which have increased dramatically over the last two decades, have significant social, medical, and economic consequences for both the mother and her child, and the State. Of particular concern to the state is that approximately half of all teenage pregnancies end in abortion. And of those children who are born, their illegitimacy makes them likely candidates to become wards of the State." *Id*. at 470–71.

[115] *Id.* at 479 (Stewart, J., concurring).

[116] *Id*. at. 480. In addition, Justice Blackmun agreed with the holding as a constitutional

Four Justices dissented from the opinion.[117] Justices Marshall and White joined Justice Brennan in disagreeing with the plurality.[118] In their opinion, females had great incentive to decide whether to engage in sex "because their chastity was considered particularly precious . . . . [Y]oung men were assumed to be capable of making such decisions for themselves; the law, therefore, did not offer them any special protection."[119]

Justice Stevens wrote a separate dissent. He argued that laws prohibiting consensual intercourse between teens, even nondiscriminatory laws, would not serve to achieve the states' interest in preventing teenage sex.[120] He dismissed as "fanciful" Justice Rehnquist's assumption that the risk of pregnancy had effectively deterred young women from "participation in the risk-creating conduct" and that women, therefore, did not need the additional deterrence of criminal liability.[121] The dissenting Justices collectively implied there was a puritan ethos behind statutory rape laws and such an ethos was no longer a permissible justification for punishing Michael.[122]

The Court's decision in *Michael M.* threatened to stall statutory rape reform. By 1981, most states and the Supreme Court had ruled against equal-protection challenges to gender-specific sexual assault legislation, upholding a state's right to adopt gender differential statutes.[123] In each instance, the courts cited several concerns, including a state's interest in preventing teenage pregnancies and the burdens these pregnancies placed on the states to support unwed mothers.[124] The need to minimize "the negative psychological effect" that statutory rape unduly has on females who, they presumed, bore an uneven responsibility for the children born out of wedlock, also justified the courts' decisions.[125]

Rather than fortifying states' rights to have gender-specific statutory rape laws, decisions upholding a state's right to treat males differently than females to punish statutory rape, most notably *Michael M.*, fortified the gender-neutral reform

---

matter but felt that in this specific fact pattern, statutory rape should not be prosecuted at all. *Id*. at 483–85.

[117] Justice Brennan wrote a dissent, which Justices White and Marshall joined. Justice Brennan observed that the California "law was initially enacted on the premise that young women, in contrast with young men, were . . . legally incapable of consenting to an act of sexual intercourse." Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 494 (1981).

[118] *Id.*

[119] *Id*. at 494–96 (Brennan, J., dissenting). Brennan's dissent further argued that the "sexual stereotypes" that justified the gender-specific law's initial passage were "outmoded" and thus could no longer be used to justify the gender-specific language of the statute; consequently, the law should cease to exist. *Id.* at 496.

[120] *Id*. at 497–99.

[121] *Id*. at 498.

[122] *See id*. at 495 (noting that a female's "chastity was considered particularly precious").

[123] *See supra* Part I.B.

[124] *Id.*

[125] *See* Carolyn Cocca, *Prosecuting Mrs. Robinson? Gender, Sexuality, and Statutory Rape Laws,* 16 MICH. FEMINIST STUD. 61, 65–66 (2002).

movement. Some scholars asserted that state legislatures should adopt a broader view of equal protection than courts had, at least as a policy matter, viewing the laws from sociological and political contexts.[126] Moreover, non-government actors, particularly members of the feminist movement, raised their voices to call attention to the inherent injustice, negative consequences, and threatened continued stereotypes that would result from decisions upholding gender-specific laws.[127] Arguably, legislatures' and feminists' mutual rejection of court decisions upholding gender-specific legislation ultimately resulted in national gendered statutory rape law reform.

C. A Feminist Push for Statutory Rape Reform

Curiously, *Michael M.* retreated from what had become a trend towards recognizing formal equality between men and women.[128] In previous years, the Court had stricken legislative discrimination by sex in cases concerning the right to buy beer,[129] the right to dispose of property,[130] and laws favoring men over women for appointments as administrators of decedents' estates.[131] But while *Michael M.'s* ruling seemed a retreat from gains in the women's equality movement, it spurred new momentum for feminists who, by the end of the 1970s, were beginning to reflect on their achievements.[132]

---

[126] *See* Rebecca J. Laurer, *Fourteenth Amendment—Statutory Rape: Protection of Minor Female and Prosecution of Minor Male*, J. CRIM. L. & CRIMINOLOGY, 1374, 1390 (1981) ("Once an age of consent is determined by a legislature, statutory rape laws should apply equally to males and females below that age unless the state can prove that the sexes are similarly situated with regard to the risk of injuries, both physical and psychological, that can result from engaging in sexual intercourse.").

[127] *See, e.g.*, Cocca, *supra* note 125, at 68 ("[Liberal feminists] felt that young males should not be neglected as victims, and that the gender-specific laws formally inscribed the stereotypes of male-as-aggressor and female-as-victim in the realm of sexuality and therefore had to go.").

[128] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); *see also* Craig v. Boren, 429 U.S. 190 (1976); *see also* Fred Barbash, *Burger Court May Be onto True Mission: After 12 Years Seeking a Mission, the Burger Court May Have One*, WASH. POST, July 3, 1981, at A1.

[129] *See generally* Craig v. Boren, 429 U.S. 190 (1976) (reversing the district court's outcome and holding beer purchase discrimination on the basis of sex was not substantially related to the achievement of a legitimate government objective).

[130] DEFINING DISCRIMINATION AGAINST WOMEN, THE ADVOCATES FOR HUMAN RIGHTS (Dec. 2014), http://www.stopvaw.org/defining_discrimination_against_women_3 [https://perma.cc/6XTQ-7CV7].

[131] *See generally* Reed v. Reed, 401 U.S. 71 (1971) (holding unconstitutional preferential treatment of males versus females as estate executor's solely on the basis of sex).

[132] There was a strong feminist movement in the 1960s, which strongly influenced the future discussions surrounding the topic of rape. Public conversation regarding rape was historically non-existent but was exposed by the feminist movement, leading to political activism. *See generally* ESTELLE B. FREEDMAN, REDEFINING RAPE: SEXUAL VIOLENCE IN

Feminist lobbying groups, most notably the National Organization for Women, conducted a state-by-state effort to change sexual misconduct laws.[133]

At the same time, legal scholars produced a series of critical works seeking nationwide uniformity in statutory rape law reform.[134] Post-*Michael M.*, legislative adoption of gender-neutral statutory rape laws took on a new purpose. Not only did these laws aim at punishing same-sex pedophiles or female teachers who seduce their male students, but they also sought to meet the most foundational goals of formal-equality feminists: the equal treatment of both sexes under the law.[135]

Frances Olsen, for example, argued that *Michael M.* "mask[s] and legitimiz[es] conditions of social existence that are hurtful and damaging to women."[136] By restricting the sexual activity of young women, the Court reinforced the "double standard of sexual morality."[137] Michelle Oberman argued that the ruling reinforced the outdated stereotype[138] of women in need of protection.[139] Luisa Fuentes discussed that it would give power to the inferiority rhetoric, suggesting that only men can be coercive.[140]

THE ERA OF SUFFRAGE AND SEGREGATION 279 (2013); *see, e.g.*, Constance Grady, *The waves of feminism, and why people keep fighting over them, explained*, VOX (July 20, 2018 9:57 AM), https://www.vox.com/2018/3/20/16955588/feminism-waves-explained-first-second-third-fourth [https://perma.cc/H8WR-3AKA] (discussing in part the "second wave" of feminism and rape).

[133] David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 320 (2000).

[134] *See, e.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Anne E. Freedman, *Sex Equality, Sex Differences and the Supreme Court*, 92 YALE. L.J. 913 (1983).

[135] *See infra* Part IV; *see also* Frances Olsen, *Statutory Rape a Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 398 (1984) (highlighting that feminists want "equal treatment," not "special" treatment); Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Laws*, 85 J. CRIM. L. & CRIMINOLOGY 15, 29 (1994) [hereinafter Oberman, *Turning Girls into Women*] (stating that second-wave feminists thought laws that characterized females as victims violated female autonomy and represented repressive and puritanical control of female sexuality); Martha M. Ertman, *Legal Tenderness: Feminist Perspectives on Contract Law*, 18 YALE J.L. & FEMINISM 545, 555 (2006) (noting that some second-wave feminists wanted to abolish statutory rape entirely and "first-wave feminism sought political citizenship for women through reforms such as female suffrage, and second-wave feminists similarly fought to reform rape law and secure reproductive freedoms"); *see generally* Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007) (discussing equality and inequality in different contexts). *But see* Note, *Feminist Legal Analysis and Sexual Autonomy: Using Statutory Rape Laws as an Illustration*, 112 HARV. L. REV. 1065, 1080 (1999) ("Feminists from the substantive equality school favor statutory rape laws under existing conditions because these laws at least protect the most vulnerable women from the harms of sexual activities.").

[136] Olsen, *Turning Girls into Women*, *supra* note 135, at 427.

[137] *Id.* at 417.

[138] Oberman, *Turning Girls into Women*, *supra* note 135, at 68–70.

[139] *Id*. at 120 ("Commentators note that the laws reflected the historical legal perception of women and girls as 'special property in need of special protection.'").

[140] Fuentes, *supra* note 58, at 146.

Gender-specific laws, scholars also argued, robbed women of their sexuality. Frances Olsen asserted that *Michael M.* reinforced the oppressive restriction upon a minor female's freedom to make independent sexual decisions and violated a minor's right to privacy and consent to sexual intercourse as freely as her male counterpart.[141] Others suggested that the decision unfairly deprived girls of the right to own their sexuality, a matter that was particularly shameful since states granted boys that right.[142] Nationwide adoption of gender-neutral statutory rape laws, feminist scholars argued, would prevent government intrusion into female sexual decision-making and remove traditional stereotypes of females as the weaker sex.[143] These, and other scholarly voices, joined the national feminist movement's call for formal equality within state statutory rape laws.

D. State-by-State Reform

A handful of state legislatures adopted formal equality for their statutory rape laws during the first half of the 1970s.[144] These states were persuaded by the argument that minor males needed protection from predatory adults, both male and

---

[141] Olsen, *supra* note 135, at 405; *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 740 n.7 (1982) (citing Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981) (invalidating statute "that gave husband, as 'head and master' of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent"); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 147 (1980) (invalidating law under which the benefits "that the working woman can expect to be paid to her spouse in the case of her work-related death are less than those payable to the spouse of the deceased male wage earner"); Stanton v. Stanton, 421 U.S. 7, 14–15, 17 (1975) (invalidating statute that provided a shorter period of parental support obligation for female children than for male children); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) (invalidating statute that failed to grant a woman worker "the same protection which a similarly situated male worker would have received"); Frontiero v. Richardson, 411 U.S. 677, 683 (1973) (invalidating statute containing a "mandatory preference for male applicants"); Reed v. Reed, 404 U.S. 71, 74 (1971) (invalidating an "arbitrary preference established in favor of males" in the administration of decedent's estates).

[142] Fuentes, *supra* note 58, at 151 ("If sex is viewed as a privilege, for a state to say that a girl of a certain age is neither legally nor factually capable of consenting to that act while boys are able to consent to sex at any age with any woman that girl has been deprived of a right that her male counterpart has been allowed to engage in."); Deborah Tolman, *Doing Desire: Adolescent Girls' Struggles for/with Sexuality*, 8 GENDER & SOC'Y 324, 325 (1994) ("[G]irls are taught to recognize and keep a lid on the sexual desire of boys but not taught to acknowledge or even to recognize their own sexual feelings.").

[143] *See, e.g.*, Ann E. Freedman, *Sex Equality, Sex Differences and the Supreme Court*, 92 YALE L.J. 913, 943–45 (1983) (critiquing the concept of "real" sex differences).

[144] Statutory rape reform began in 1973 in Michigan when legislatures drafted and later passed the Michigan Criminal Sexual Conduct Act, the first "victim-oriented and -initiated" rape statute; Christina M. Tchen, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1537–38 (1983); *see also* MICH. COMP. LAWS §§ 750.520 (a)–(o) (1982); NEB. REV. STAT. § 28–319 (1979); N.J. REV. STAT. § 2C:14–2 (1982).

female.[145] *Michael M.*, however, shifted the discourse from practical to political. Initially, the argument that gender-neutral laws would extend the prosecutors' reach to underage male victims of sexual abuse persuaded state legislators of the need for change.[146] Few, if any, seemed concerned with formal equality arguments.

As the sexual revolution coincided with the women's rights movement, gender-neutrality seemed to take on a political tone. Lawmakers saw the political clout in advocating for a law that treated both sexes as possible victims.[147] In adopting gender-neutral legislation, lawmakers rejected both Supreme Court and state court endorsements of gender-specific statutes and instead sought to demonstrate their commitment to the formal equality school and the women's equal rights movement as a whole.[148]

Gender-neutral rape laws seemed an easy fix for those advocating formal equality. By merely exchanging "male" for "person," "female" for "minor" and even "vagina" for "genital," the language easily transformed into gender-neutral laws.[149]

By the late 2000s, every state in the country had removed the legislative distinction between males and females for purposes of statutory rape.[150]

II. PRACTICAL CONSEQUENCES OF THE SHIFT TO GENDER-NEUTRAL STATUTORY RAPE LAWS

Apart from the political attractiveness of gender-neutral statutory rape laws, they had practical advantages when considered from the prosecutors' perspective. Specifically, the laws allowed prosecutors to bring cases against three new categories of defendants: (1) women who engaged in sex with males under the age

---

[145] *See, e.g.*, Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977) (invalidating New Hampshire's rape law in part because males can be victims of the crime); People v. Yates, 637 N.Y.S.2d 101, 104 (N.Y. App. Div. 1995) (observing that New York courts have held that males may experience trauma from sexual assault); State v. Stevens, 510 A.2d 1070, 1072 (Me. 1986) (noting that Maine's rape law is gender-neutral "in light of the evil the Legislature sought to remedy").

[146] *See* Cocca, *supra* note 125, at 65.

[147] *See* Phillip N.S. Rumney, *In Defense of Gender Neutrality Within Rape*, 6 SEATTLE J. SOC. JUST. 481, 483 (2007).

[148] *See infra* Table A; Note, *Feminist Legal Analysis and Sexual Autonomy: Using Statutory Rape Laws as an Illustration*, 112 HARV. L. REV. 1065, 1079 (1999); *see also* Susannah Miller, *The Overturning of* Michael M.*: Statutory Rape Law Becomes Gender-Neutral in California*, 5 UCLA WOMEN'S L.J. 289, 294–95 (1995) (asserting that two cases in which adult females seduced minor males served as the catalyst for California's adoption of gender-neutral statutory rape laws).

[149] *See, e.g.*, CAL. PENAL CODE § 261.5 (1991) ("Unlawful sexual intercourse is an act of sexual intercourse accomplished with a *female not the wife of the perpetrator*, where the *female is under the age of 18 years*.") (emphasis added); *cf. id.* § 261.5(a) (2017) ("Unlawful sexual intercourse is an act of sexual intercourse accomplished with a *person* who is not the spouse of the *perpetrator*, if the person is a minor.") (emphasis added).

[150] Cocca, *supra* note 125, at 62; *see also infra* Table A (listing state statutes effective as of 2017 or 2018).

of consent; (2) males who engaged in sex with males under the age of consent; and (3) same-sex teens.

The expanded definition of "perpetrator," coupled with the increased rate at which teens were having sex,[151] opened a floodgate for new prosecutions. Census bureau figures from 1995 estimated that there were at least 7.5 million identifiable cases of statutory rape per year around the time the laws changed. Many of these cases were instances of consensual sex.[152] Only certain types of cases, however, went to trial: (1) cases involving pregnancy;[153] (2) cases easily identifiable through the local neighborhood sweeps, parental complaints or required health care reporting; [154] and (3) cases concerning "significant age disparity or obvious exploitation."[155]

Broadening statutory rape laws to include both sexes expanded prosecutors' reach to cases they had not previously been able to prosecute. The inherent problem with gender-neutrality, however, as it relates to consensual sex between two minors, is identifying neutrality (i.e., who is the victim and who is the perpetrator). Prosecutors could easily label the perpetrator in instances involving pedophiles and persons in a position of authority, such as schoolteachers.[156] A problem arose with respect to underage teens engaged in consensual sexual relations. In such instances, some legislation gave prosecutors unlimited discretion in characterizing victim and perpetrator although both parties engaged in the same unlawful behavior.[157]

---

[151] Forty percent of high school students have had sexual intercourse. SEXUAL RISK BEHAVIORS: HIV, STD, & TEEN PREGNANCY PREVENTION, CTRS. FOR DISEASE CONTROL AND PREVENTION (last updated, June 14, 2018), https://www.cdc.gov/healthyyouth/sexual behaviors/ [https://perma.cc/SYR9-U6UA]; *see also* Laura Kann et al., *Youth Risk Behavior Surveillance—United States, 2013*, 63 MORBIDITY & MORTALITY WKLY. REP. 1 (June 13, 2014), http://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf [https://perma.cc/Y2N2-ZBJZ].

[152] Oberman, *supra* note 17, at 704 n.3 ("This estimate is admittedly low, taking into account only the fifteen million U.S. residents who are between the ages of thirteen and sixteen, and assuming that 50% of them have had intercourse once. Obviously, many young people have intercourse earlier than age thirteen, and many more have intercourse more than once. It is also worth noting that the definition of statutory rape varies across jurisdictions. Thus, sexual intercourse between two minors is a crime in some, but not all, jurisdictions.").

[153] *See* Oberman, *supra* note 17, at 734.

[154] *Id.* at 739.

[155] *See id.* at 743.

[156] *Id.* at 767.

[157] *See, e.g.*, Missouri v. Stokely, 842 S.W.2d 77, 81 (Mo. 1992) (upholding male defendant's conviction of rape after having consensual sex with 13-year-old girl as prosecution was not discriminatory and the statute was not unconstitutionally vague); *cf.* Russell Christopher & Kathryn Christopher, *The Paradox of Statutory Rape*, 87 IND. L.J. 505, 506–09 (2012) (discussing the case of *Henyard v. State* and noting while Ms. Lewis was a victim of a "nightmarish rape" she also technically committed statutory rape as statutory rape is a strict liability crime and defendant Small was 14-years-old); *see also id.* at 545–49 (discussing the pitfalls of prosecutorial discretion in the context of overbroad statutory rape statutes).

Based on a review of present laws, I propose that for prosecutorial purposes, American statutory rape laws can be divided into two categories: (1) *age-differential prosecution*, in which the legislation directs the prosecutor to bring charges against the older of the two consenting minors; and (2) *arbitrary prosecution*, in which the legislation is silent as to which party prosecutors should charge, allowing the prosecution to charge either party for the same wrongful conduct. The former provides some guidance on prosecutors bringing charges against those engaged in a consensual prohibited sexual activity. The latter grants prosecutors an inappropriate amount of discretion which, in practice, undermines the statute's gender-neutrality.[158]

A. Age-Differential Prosecution Jurisdictions

Age-differential prosecution statutes make it a crime to engage in sexual intercourse with a minor who is a certain number of years younger than the perpetrator.[159] In Mississippi, the perpetrator is any consenting teen at least three years older than the victim.[160] Colorado law requires the perpetrator to be at least four years older than the victim.[161] In Texas, the perpetrator has an affirmative defense if he or she is no more than three years older than the victim and the victim is at least fourteen.[162] Thirty-four states have adopted age-differential provisions into their statutory schemes.[163] Statutory rape charges do not lie unless the perpetrator's age exceeds the victim's by a statutorily-defined number of years.[164]

---

[158] *See infra* Part IV.B.

[159] Over thirty U.S. states have adopted "Romeo and Juliet" laws, which reserve the harshest punishment for statutory rape to older adults. Romeo and Juliet laws provide an affirmative defense, and in some jurisdictions a partial defense for a perpetrator of statutory rape when both actors are below the legal age of consent, are of a certain age, and at least a certain number of years apart in age. *See* Caitlyn Silhan, Comment, *The Present Case Does Involve Minors: An Overview of the Discriminatory Effects of Romeo and Juliet Provisions and Sentencing Practices on Lesbian, Gay, Bisexual, and Transgender Youth*, 20 L. & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 97, 107 (2011). Congress explicitly created "Romeo and Juliet" laws to serve as an exception to statutory rape laws for youth who engage in sexual activities. *See* Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 FIRST AMEND. L. REV. 98, 128–29 (2010) ("[The] 'Romeo and Juliet' exemption used by the federal child sex offender registry provides that the defendant may seek removal from the sex offender list only if the defendant is no more than four years older than the 'victim' of the offense.").

[160] MISS. CODE ANN. § 97-3-95 (2017).

[161] COLO. REV. STAT. § 18-3-402 (2018).

[162] TEXAS PENAL CODE ANN. § 22.011 (2017). That the actor was the spouse of the child is also a defense. *Id.*

[163] *See infra* Table A.

[164] A problem still arises when the parties are less than the age-differential designated in the statute.

Age-differential prosecution statutes appear designed to deter the older partner, who, legislatures presume, should have a greater understanding of the consequences of sexual intercourse with a minor. But state-announced legislative intents suggest that the laws are still designed to protect minors from bad choices and not necessarily intended to form the basis for criminal charges against one of two consenting teens. For example, Connecticut makes it a crime for a person to engage in sexual intercourse with another person who is "13 years of age or older but under 16 years of age, and the actor is more than two years older than such person."[165] When faced with interpreting its state's age-differential statute, the Connecticut Supreme Court observed that the purpose of age-gap statutes is to protect victims under sixteen "who do not have the full measure of maturity to make an intelligent choice regarding sexual intercourse, from being taken advantage of by someone who, because he or she is significantly older, may be able to persuade the victim to engage in physically consensual intercourse." [166] Consequently, the court upheld a male minor defendant's conviction even though he was just two years and three months older than the victim, which the defendant had unsuccessfully argued made him two full years older than the victim.[167]

B. Arbitrary Prosecution Jurisdictions

Arbitrary prosecution jurisdictions are problematic for many reasons. Gender-neutral statutes that do not include age-differential provisions are wholly silent concerning which party is the victim and which is the perpetrator, resulting in what the Utah Supreme Court called "absurd results."[168] The court noted, the law has yielded the unintended consequence of making a party to the consensual sexual conduct both victim and perpetrator. [169] Accused perpetrators in arbitrary prosecution statute jurisdictions have challenged these statutes with some frequency, arguing that they grant prosecutors a constitutionally unreasonable amount of discretion to choose whom to prosecute.[170]

Courts have reviewed these challenges with mixed results. The Supreme Court of Vermont, reviewing the conviction of a fourteen-year-old boy who engaged in "mutual consensual sex," found its legislature could not have intended for its gender-neutral statutory rape law to create the harsh and unreasonable results that it yielded.[171] Conviction under the statute demanded that the state label the fourteen-year-old defendant as a life-long child abuser.[172] Furthermore, according to the

---

[165] Connecticut v. Jason B., 702 A.2d 895, 897 (Conn. App. Ct. 1997) (citing CONN. GEN. STAT. § 53a-71 (1994) (alteration in original)).

[166] Connecticut v. Jason B., 729 A.2d 760, 769 (Conn. 1999).

[167] *Id*. at 777.

[168] Utah *ex rel.* Z.C., 165 P.3d 1206, 1208–09 (Utah 2007).

[169] *Id.* at 1212.

[170] *See id.*; *see also In re* G.T., 758 A.2d. 301, 309 (Vt. 2000); *Jason B.,* 702 A.2d at 897.

[171] *In re G.T.*, 758 A.2d. at 305.

[172] *Id.*

state's statute theory of the case, two people under the age of sixteen who engage in consensual mutual acts with each other are both guilty of statutory rape.[173] The legislature, according to the court, did not intend this result.[174] The State's construction of 13 V.S.A. Section 3252(a)(3), the court held, involves a breadth of prosecutorial discretion that raises serious concerns about whether the resulting prosecutions are consistent with equal protection of the law.[175] For these reasons, the law was inapplicable to the defendant given his potential status as both perpetrator and victim.

The Utah Supreme Court found that its state gender-neutral statutory rape laws led to "absurd results" when prosecutors charged a thirteen-year-old girl with sexually abusing a twelve-year-old male after the twelve-year-old's mother found the defendant and her partner engaged in "mutually welcome sexual intercourse."[176] The Utah Court ruled in much the same way as the Vermont Court did in *In re G.T.* Under the language of the statute, the prosecutors could label the minor-defendant as both perpetrator and victim, a consequence that, the court found, the legislature had not intended.[177] The Vermont and Utah courts both overturned the defendants' convictions.[178] According to each court, overturning the statutes was a legislative prerogative.[179] Several years after these decisions, both states amended their laws to include an age-differential element.[180]

Arbitrary-prosecution jurisdictions grant prosecutors unfettered discretion to decide who to designate an offender in a consensual statutory rape case.[181] By failing to provide any guidelines, arbitrary prosecution statutes yield illogical outcomes. Minors, such as a thirteen-year-old girl, can be charged with a crime under a statute that the legislature enacted to protect her. As the next Part of this Article establishes, the legal authority to select whom to prosecute has failed to correct gendered stereotypes that fueled the move from gender-specific to gender-neutral statutes.

---

[173] *Id.*

[174] *Id.*

[175] *Id.* at 306.

[176] Utah *ex rel.* Z.C., 165 P.3d 1206, 1208 (Utah 2007).

[177] *Id*.

[178] *In re G.T.*, 758 A.2d. at 309; Utah *ex rel.* Z.C., 165 P.3d at 1208.

[179] *In re G.T.*, 758 A.2d. at 309 ("The legislature has the power to specifically address the issue before us by amendment to the statute."); *see generally* Utah *ex rel*. Z.C., 165 P.3d 1206 (Utah 2007) (emphasizing that their holding is based on the conclusion that the legislature could not have possibly intended the present application of the law).

[180] The Utah Legislature amended its sexual abuse statute in 2016 to include an age differential. *See* 2016 Utah Laws 372. Vermont amended its law in 2006. *See* 2006 Vt. Acts & Resolves 192.

[181] *See, e.g.*, Utah *ex rel.* Z.C., 165 P.3d 1206, 1208 (Utah 2007) (reversing the convictions of a 13-year-old girl and 12-year-old boy who engaged in consensual sex with each other resulting in pregnancy, where both were charged and convicted of sexual abuse of a child under UTAH CODE § 76-5-404.1).

III. THE FACTS OF THE MATTER

While courts and scholars raise significant, legitimate concerns over the justness of both age-differential and arbitrary prosecution statutes, one or the other remains in effect in every state.[182] Where instances of consensual sexual misconduct are concerned, arbitrary prosecution statutes function as a powerful weapon in the prosecutor's arsenal. Courts recognize that charges brought against both underage minors for the same violation of statutory rape crimes violates equal protection.[183] Consequently, prosecutors must choose which party to charge. Arbitrary prosecution statutes, therefore, grant prosecutors discretion as to which party to charge when two persons are involved in the same criminal behavior.[184] Given that more than 50% of teens questioned report they have engaged in some sexual behavior and 43% have experienced intercourse before graduating from high school, states could prosecute an abundance of minors for statutory rape.[185] Police are not spending their time searching for these children.[186] And while there is not extensive data on statutory rape, those data suggest that enforcement, more often than not, begins with a complaint by an adult legally related to one of the minors who had consented to the intercourse with another minor.[187]

In other words, parents are the most likely sources for alerting the authorities about statutory rape arising out of teenage consensual sexual intercourse. For heterosexual couples, the female's parent is most often the complainant.[188] According to an ABA report, the female partner's parent alert authorities in 70% of reported statutory rape cases stemming from consensual sex.[189] Case law supports

---

[182] *See infra* Table A. Note some states have a combination of arbitrary and age-differential prosecution statutes for different offenses.

[183] *See Utah ex rel. Z.C.*, 165 P.3d at 1208; *In re G.T.*, 758 A.2d. at 308; *see also In re* D.B., 950 N.E.2d 528, 534 (Ohio 2001), *cert denied*, 565 U.S. 1100 (2011) ("Application of the statute . . . to a single party [where both parties engaged in same unlawful act] violates the Equal Protection Clause's mandate that persons similarly circumstanced shall be treated alike.").

[184] *See, e.g.*, Utah *ex rel.* Z.C., 165 P.3d at 1208.

[185] CTRS. FOR DISEASE CONTROL AND PREVENTION, SEXUAL RISK BEHAVIORS (2018), https://www.cdc.gov/healthyyouth/sexualbehaviors/index.htm [https://perma.cc/SYR9-U6UA]; JOYCE C. ABMA & GLADYS M. MARTINEZ, SEXUAL ACTIVITY AND CONTRACEPTIVE USE AMONG TEENAGERS IN THE UNITED STATES, 2011–2015, NATIONAL HEALTH STATISTICS REPORTS, NO. 104 (2017).

[186] *See* KARYL TROUP-LEASURE & HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, STATUTORY RAPE KNOWN TO LAW ENFORCEMENT (2005), https://www.ncjrs.gov/pdffiles1/ojjdp/208803.pdf [https://perma.cc/D5MC-JP5C]. The report acknowledges that most statutory rapes go unreported and thus "the incidence of statutory rape in the United States is relatively unknown." *Id.* The findings that follow are based on an analysis of the NIBRS master files containing reports from law enforcement agencies in 21 states for the years 1996 through 2000.

[187] *See, e.g.*, *Utah ex rel. Z.C.*, 165 P.3d at 1208; *see also In re G.T.*, 758 A.2d. at 308.

[188] ELSTEIN & DAVIS, *supra* note 29, at 22.

[189] *Id.*

this finding.[190] For example, in *B.H. v. Commonwealth*, Kentucky police arrested fifteen-year-old defendant, Bill, after twelve-year-old Carol's mother reported him to the police.[191] The victim's mother discovered nude photos on her daughter's phone and called the police and then successfully urged them to bring charges against the boy.[192]

In 2005, the United States Department of Justice's Office of Justice Programs issued its report on Statutory Rape Known to Law Enforcement (DOJ Report).[193] The report analyzed the FBI's National Incident-Based Reporting System master files for the years 1996–2000.[194] According to the DOJ Report, females comprise 95% of all statutory rape victims.[195] More than 99% of the perpetrators in these cases are males.[196] Eighteen percent of these male offenders are under eighteen years old.[197] Twenty-nine percent of the female victims reported that they were in a relationship with the offender, and 62% said that they knew the offender.[198] The data yielded an interesting correlation between the age of the victim and the age of the offender. Given that the age of majority in many states is between 17 and 18, almost 20% of these offenders could most likely fall into the category of victim.[199] Under such circumstances, it is the prosecutor that assigned them offender status.[200]

---

[190] *See, e.g.,* B.H. v. Commonwealth, 494 S.W.3d 467 (Ky. 2016); *see also* Ohio v. Williams, 93 N.E.3d 449 (Ohio Ct. App. 2017) (stating that mother called the police after learning from friends that her daughter had pressured but consensual sexual relations); *In re* Marasol F., 2013 WL 5503192 (Cal. Ct. App. Oct. 4, 2013) (stating that father called police after he learned that daughter had sex that she claimed was consensual); Gonzalez v. State, 2009 WL 311448 (Tex. Ct. App. Feb. 10, 2009) (stating that parent called police after learning defendant had consensual sex with 16 year old daughter).

[191] *B.H.*, 494 S.W.3d at 468.

[192] *Id.*

[193] *See* TROUP-LEASURE & SNYDER, *supra* note 186, at 1. The report remains widely cited and is the most comprehensive of its kind. *See id.*; *see, e.g.*, Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, n.6 (2017); Linda L. Schlueter, *40th Anniversary of* Roe v. Wade*: Reflections Past, Present and Future*, 40 OHIO N. U. L. REV. 105, n.1087 (2013).

[194] *See* TROUP-LEASURE & SNYDER, *supra* note 186, at 1 (containing reports from 21 states).

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.* at 2. In contrast, only 11% of forcible rape was classified as boyfriend and girlfriend. *See also* HOWARD SNYDER, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT AND OFFENDER CHARACTERISTICS, DEP'T OF JUSTICE 4 (July 2000), https://www.bjs.gov/content/pub/pdf/saycrle.pdf [https://perma.cc/GM94-K3RP] (females are six times more likely than males to be victims of a reported sexual assault).

[199] *See, e.g.*, ARIZ. REV. STAT. ANN § 13-1405 (2018) (defining a minor as under 18 years of age); CAL. PENAL CODE, § 261.5 (2018) (defining unlawful sexual intercourse as intercourse with a person under 18); 720 ILL. COMP. STAT. 5/11-1.50 (2018) (defining age of consent as 17); MO. REV. STAT. § 566.034 (2017) (defining age of consent as 17).

[200] *See* TROUP-LEASURE & SNYDER, *supra* note 186, at 1.

In 2012, the Federal Bureau of Investigation produced a report that looked at offenders by age, race, and ethnicity.[201] Seventy-five percent of statutory rape prosecutions under sixteen were male, slightly less than the DOJ findings.[202] Seventy-six percent of the offenders were white, 23% were black, and 6% were Asian-American/Native Alaskan.[203] Of the approximately ten million males under eighteen in 2000,[204] only 23% identified as white, 32% identified as black or African American, and 24% identified as Asian.[205] This comparison strongly suggests that authorities are alerted to potential statutory rape crimes by white males at a rate that is disproportionate to the general population.

These statistics, coupled with reported case law and anecdotal stories, suggest that parents, mostly white parents, initiate law enforcement involvement where consensual teenage sex is concerned. One study indicates that parents were responsible for alerting authorities to almost two-thirds of all reported statutory rape cases.[206] Parents often turn to the police when they discover their daughters have engaged in or are engaging in sexual relationships as a way to stop, what these parents perceive as, inappropriate behavior.[207] Those parents tend to come from educated, middle-class or upper-class families.[208] As Richard Delgado writes, a majority of these prosecutions stem from "good homes," perhaps because families of means are more comfortable involving the police's enforcement power.[209]

---

[201] The report identified groups as male, female, unknown, white, black, American Indian/Alaskan Native and Asian Pacific Islander. FBI UNIFORM CRIME REPORTING PROGRAM, U.S. DEP'T OF JUSTICE, SEX OFFENSE OFFENDERS, STATUTORY RAPE, SEND RACE BY AGE, 2012 (2012) (breaking down all statutory rape offenses in 2012 by age, race, and sex).

[202] *Id.*; *see* TROUP-LEASURE & SNYDER, *supra* note 186, at 3.

[203] FBI UNIFORM CRIME REPORTING PROGRAM, *supra* note 201.

[204] JULIE MEYER, AGE: 2000, CENSUS 2000 BRIEF, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2 fig.2 (2000), https://www.census.gov/prod/2001pubs/c2kbr01-12.pdf [https://perma.cc/7NWK-C6KF].

[205] *Id.* at 5 fig.4.

[206] ELSTEIN & DAVIS, *supra* note 29, at 22.

[207] In some instances, girls report common law rape after their parents find out they have engaged in what is in their family forbidden sexual contact. Once alone, the teenager admits to the prosecutor that she lied to her parents and that she never thought the lie would go this far. *See* Cheryl A. Whitney, *Non-Stranger, Non-Consensual Sexual Assaults: Changing Legislation to Ensure that Acts Are Criminally Punished*, 27 RUTGERS L.J. 417, 442–43 n.150 (1996).

[208] *See generally* Gary W. Harper, *Contextual Factors that Perpetuate Statutory Rape: The Influence of Gender Roles, Sexual Socialization and Sociocultural Factors*, 50 DEPAUL L. REV. 897 (2001).

[209] Michelle Oberman & Richard Delgado, *Statutory Rape Laws: Does It Make Sense to Enforce Them in an Increasingly Permissive Society*, 82 A.B.A. J. 86, 87 (1996).

Healthcare professionals also report cases of consensual statutory rape.[210] Most states have statutes requiring healthcare workers to report suspected incidents of sexual intercourse, thereby increasing prosecutors' ability to enforce statutory rape laws.[211] Some states limit reporting requirements to cases where the healthcare or other government official believes there is child abuse.[212] Most states, however, place a duty on the healthcare professional to report any sexual conduct by a minor, even if consensual.[213] Studies suggest that the majority of sexual misconduct incidents that healthcare officials report identify Caucasian females as the victim.[214] On the one hand, this may be explained by racial and ethnic disparity in access to healthcare.[215] Blacks, Latinos and other racial minorities tend to have fewer interactions with health care providers than whites.[216] On the other hand, it also suggests that the health care providers who tend to gather information about and report sexual misconduct are providers who serve white girls. Whether other providers fail to collect information or report about additional segments of the teen population is unknown.

The facts are clear. Teens have consensual sex. Legal authorities learn of few of these cases, but when they do, it is typically at the request of a parent or a health official. Parents of Caucasian females comprise an overwhelming majority of police complaints prosecution for consensual sexual misconduct.

---

[210] *See* Nancy Findholt & Linda C. Robrecht, *Legal and Ethical Considerations in Research with Sexually Active Adolescents: The Requirement to Report Statutory Rape*, 34 PERSP. SEXUAL & REPROD. HEALTH 259, 260 (2002), http://www.guttmacher.org/pubs/journals/3425902.pdf [https://perma.cc/5WXR-EQ7Y] (discussing difficulties of conducting social science research of teenage sexual activity when teenagers know they are engaged in illegal sexual relationships and that researchers have a legally-imposed duty to report the teenagers' sexual activity); *see, e.g.*, ALA. CODE § 26-14-3 (2018); OR. REV. STAT. § 419B.010 (2018); S.C. CODE ANN. § 63-7-310 (2018).

[211] *See generally* Abigail English & Catherine Teare, *Statutory Rape Enforcement and Child Abuse Reprint: Effects on Health Care Access for Adolescents*, 50 DEPAUL L. REV. 827 (2001) (discussing reporting requirements in different states).

[212] *See, e.g.*, S.D. CODIFIED LAWS § 26-8A-3 (2018); *see generally* ASAPH GLOSSER ET AL., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS (2004), https://aspe.hhs.gov/system/files/pdf/75531/report.pdf [https://perma.cc/QTB8-Y6SJ] (listing states and reporting requirements).

[213] *See* GLOSSER ET AL., *supra* note 212, at 11.

[214] NAT'L CTR. FOR HEALTH STATISTICS, CTR. FOR DISEASE CONTROL AND PREVENTION, NCHS DATA ON RACIAL AND ETHNIC DISPARITIES (2012).

[215] *Id.*

[216] RYAN CROWLEY, AM. C. OF PHYSICIANS, RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 3 (2010), https://www.acponline.org/acp_policy/policies/racial_ethnic_disparities_2010.pdf [https://perma.cc/BQ4P-Q7RM] ("Minorities have less access to health care than whites.").

IV. VICTIMIZATION OVER EQUALITY

Despite gender-neutral statutes, prosecutions for heterosexual consensual sexual intercourse fall heavily on the male partner. Consequently, females, who have made the same sexual decision, find themselves labeled the victim to the crime they committed with their sexual partner. This unevenness creates a type of victimology paradigm.

In 1995, Susannah Miller acknowledged the likelihood that gender-neutral statutes failed (or were failing) to achieve equality among the sexes.[217] Miller wrote, "while these stereotypes may no longer be embedded in the letter of the law, it remains to be seen whether such stereotypes will influence the enforcement of the law."[218] To be sure, the first part of Ms. Miller's statement rings true. Gender-neutral statutory rape laws have achieved the pre-*Michael M.* agenda of expanding the definition of wrongful sexual conduct with a minor to include predatory sex against males. *Michael M.* remains an outlier in the pursuit of gender equality. Since *Michael M.,* courts and legislatures have embraced a formalist approach to statutory rape laws.

The latter part of Ms. Miller's prophecy is equally valid. Enforcement of statutory rape laws in instances of consensual sexual intercourse remains largely uneven. States press charges against significantly more males, and parents of Caucasian females bring complaints at a higher rate than parents of color.[219] The current gender bias in prosecution is not much different from when these sections of the laws were gender-specific.[220] Parents continue to push for prosecution of males who engage in consensual sex with their female daughters, harkening back to the days when fathers treated their daughters as property whose value could be diminished by sexual activity.[221] Female teens continue to be objectified and, in many ways, limited in their sexual freedom.[222] Gender-neutral statutory rape laws have failed to achieve feminist objectives.

This next Part will demonstrate how prophetic Ms. Miller was. Both courts and legislatures have achieved laudable goals in removing the sexual differential in statutory rape laws. Enforcement of these laws, however, remains very much informed by a sexual stereotype of female as victim.

---

[217] Miller, *supra* note 148, at 297.

[218] *Id.*

[219] *See supra* note 205 and accompanying text.

[220] *See id.*

[221] *See* Cocca, *supra* note 125, at 63.

[222] *See, e.g.*, Suzannah Weiss, *5 Negative Effects of Objectifying Women, According to Science*, BUSTLE (Dec. 12, 2017), https://www.bustle.com/p/5-negative-effects-of-objectifying-women-according-to-science-2959186 [https://perma.cc/BZB9-5VUM] (noting that, according to psychiatrist Dr. Susan Edelman and author of *Be Your Own Brand of Sexy,* "[w]hen you're objectified, you can start to confuse your value with your sexuality").

A. The Good News: Gendered Language in Statutory Rape Laws Is Obsolete

Beyond the federal and state legislative shift to gender-neutral statutes of all kinds, courts, particularly the Supreme Court, have taken the lead in defining equality between the sexes. In *Phillips v. Martin Marietta Corp.,* the Supreme Court invalidated a workplace hiring policy against considering female applicants with pre-school children.[223] Following *Phillips*, the Court overturned a series of laws and policies that treated women worse than men.[224] Justice Brennan wrote that laws such as the one before the Court in *Califano v. Goldfarb*,[225] which rested on the assumption that wives were dependent on husbands' salaries but that husbands did not require the same support, were based "upon old notions and archaic and overbroad generalizations."[226]

Therefore, it was curious that four years after *Califano*, the Court upheld the statute in *Michael M*. According to the Court, pure biology distinguished the cases.[227] States had a compelling governmental interest in enacting and enforcing gender-specific statutory rape laws because of fertility; females needed protection against unwanted pregnancies and states sought relief from having to support mothers on welfare.[228] Most states in considering the justification of their gender-specific statutes emphasized this rationale.

---

[223] 400 U.S. 542 (1971).

[224] *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (striking down a federal statute that automatically granted male uniformed force members housing and other benefits but required female members to prove "actual dependency" on their husbands); Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (holding that policy that pays female "day inspectors" less than male "night inspectors" violates the Equal Pay Act); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (holding that gender distinction in Social Security Act unconstitutional).

[225] 430 U.S. 199 (1977); *see also* Califano v. Westcott, 443 U.S. 76, 89 (1979) (holding provision of unemployed-parent benefits exclusively to fathers unconstitutional); *Frontiero*, 411 U.S. at 690–91 (holding unconstitutional exclusion of married female officers in the military from benefits automatically accorded married male officers); Reed v. Reed, 404 U.S. 71 (1971) (holding unconstitutional a probate-code preference for a father over a mother as administrator of a deceased child's estate).

[226] *Goldfarb*, 430 U.S. at 211 (internal quotations omitted).

[227] Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 464–65 (1981) ("Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly 'equalize' the deterrents on the sexes.").

[228] Douglas McNamara, *Sexual Discrimination and Sexual Misconduct: Applying New York's Gender-Specific Sexual Misconduct Law to Consenting Minors*, 14 TOURO L. REV. 479, 495 (1998) ("[S]statutory rape laws protect society from unwanted teenage pregnancies.").

History reveals that *Michael M.* was an anomaly for the post-1970s Court. During the 2016–2017 term, in *Sessions v. Morales-Santana,*[229] the Court held unconstitutional a gender-differentiated statute that assumed the female was the more vested parent in a heterosexual relationship.[230]

In the majority opinion, Justice Ginsburg directly rejects the reasoning of *Michael M.*[231] The statute at issue, she wrote, reflects the "once habitual, but now untenable" assumption that an "unwed mother is the natural and sole guardian of a nonmarital child."[232] The majority opinion represents a radical shift from *Michael M.*, in which Justice Rehnquist wrote, "[a]t the risk of stating the obvious," the mother and her child bear the "significant social, medical, and economic consequences" of illegitimate pregnancies.[233]

Justice Ginsburg's opinion makes plain that any gender stereotypes perpetuated by gender-specific statutory rape laws should be rejected. Presumably, this would apply to gender-specific statutory rape statutes if one were to come somehow before the Court.[234] Justice Ginsburg observed, "new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and

---

[229] 137 S. Ct. 1678 (2017).

[230] 8 U.S.C. § 1409(c) (2012). The statute made it easier for a U.S. citizen mother living abroad to pass citizenship to a child born outside the United States as compared to a U.S. citizen father. An unmarried father could not pass along his U.S. citizenship to his child unless he lived in the United States for five years, at least two after the age of 14. *Id.* § 1401(g). An unmarried mother, however, could pass along her citizenship after living in the United States for a single year. *Id.* § 1409(c); CHAPTER 3 – UNITED STATES CITIZENS AT BIRTH (INA 301 AND 309), U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter3.html [https://perma.cc/2K57-6CJB] (last visited Nov. 26, 2018). Defendant, whose father was living abroad at the time the defendant was born, moved to the United States at the age of 13, failing to qualify him for citizenship under § 309(c). *Sessions*, 137 S. Ct. at 1687 (2017).

[231] *Michael M.*, 450 U.S. at 467 (noting the demand for a strict scrutiny, a level greater than the intermediate scrutiny, the *Michael M.* Court applied to the California gender-specific rape law).

[232] *Sessions*, 137 S. Ct. at 1691.

[233] *Michael M.*, 450 U.S. at 470. At the risk of stating the obvious, teenage pregnancies, which have increased dramatically over the last two decades, have significant social, medical, and economic consequences for both the mother and her child, and the State.

[234] *Sessions*, 137 S. Ct. at 1678 n.13 ("Even if stereotypes frozen into legislation have 'statistical support,' our decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." (citations omitted)). The concept is highly unlikely since every state now has gender-neutral laws. The Court, in striking down the decision, "leveled up," meaning that the rule of equality was that both fathers and mothers had to live in the U.S. for five years. As a result, while the law was a victory for equality, it was a loss for the plaintiff. *See* Linda Greenhouse, *Justice Ginsburg and the Price of Equality*, N.Y. TIMES (June 22, 2017).

unchallenged."[235] The government failed to produce an "exceedingly persuasive justification" for the gender-specific law, so the Court struck it down.[236]

"Protectiveness has often muffled the sound of doors closing against women, . . . cloak[ing] real prejudice."[237] Gender-specific statutory rape laws sprang from that protectiveness. *Morales-Santana* and the cases on which the Court relies in reaching its conclusion, reject protectiveness that comes at the expense of inequality, so much so that the Court was willing to "extend, rather than nullify" the greater of the two residency requirements.[238] Today, gendered "stereotypes [seem less] embedded in the letter of the law."[239]

B. The Bad News: Gender-Neutral Statutes Have Not Yielded Influenced Enforcement

Gender-neutral statutory rape laws have not yielded gender-neutral enforcement. The stereotypes lawmakers and feminists hoped to dismantle, remain deeply embedded in the present day. Males still are 75% of those characterized as statutory rape perpetrators, reinforcing the stereotype of male as the aggressor.[240] Parents continue to use enforcement to regulate their daughters' sexual experiences.[241] And while girls realize their sexuality to a greater degree than when the laws were gender-specific, [242] they remain encumbered by laws—

---

[235] *Sessions*, 137 S. Ct. at 1690 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015)).

[236] Court observers were nearly unanimous in characterizing *Morales-Santana* as a victory for equality because it recognized that males and females should be treated equally regardless of their ability to bear children, repudiating the stereotype upon which *Michael M*. and similar cases rested. But the victory for equality it was, in fact a loss for the plaintiff. The Court chose to extend the five-year residency requirement the law imposed on fathers to unwed mothers. Some lower courts have also taken opportunities to advance a retreat from gender stereotypes. *E.g.*, Nuxoll *ex rel.* Nuxoll v. Indian Prairie School Dist. # 204, 523 F.3d 668, 674 (7th Cir. 2008) (comparing the slogan a "woman's place is in the home" to "blacks have lower IQ than whites," noting both have equally damaging psychological consequences). In *Albinger v. Harris*, Justice Terry Trieweiler wrote, "gender discrimination is a bad thing." Albinger v. Harris, 48 P.3d 711, 722 (Mont. 2002) (Trieweiler, J. concurring in part and dissenting in part).

[237] BETTY FRIEDAN, THE FEMININE MYSTIQUE 141 (W.W. Norton & Co., Inc. ed., 1963).

[238] Sabrina Mariella, *Leveling Up over Plenary Power: Remedying an Impermissible Gender Classification in the Immigration and Nationality Act*, B.U. L. REV. 219, 223 (2016).

[239] Miller, *supra* note 148, at 297.

[240] *See supra* note 202 and accompanying text. A significant minority of society still believes a woman's place is in the home, necessitating a need for care and protection. *See generally* J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J.L. & PUB. POL'Y 521 (2011).

[241] *See supra* notes 206–209 and accompanying text.

[242] Oberman, *Turning Girls into Women*, *supra* note 135, at 21 ("[T]hose who are not legally competent often are sexually active. The most challenging members of this category

notwithstanding their gender-neutral language—that prohibit them from choosing at what age they may enjoy intimate sexual relations and the age of those with whom they can enjoy sexual intimacy.[243] Gender stereotypes continue to inform how "many people still order their lives."[244]

The uneven enforcement rate of gender-neutral statutory rape laws perpetuates the historical stereotypes on which gender-specific statutory rape laws rested. They were originally supposed to combat "the oppressive male initiative."[245] Today, the prosecution rate of gender-neutral statutory rape laws is approximately ninety-five males to one female.[246] These numbers reflect the reality of uneven application of gender-neutral laws. Enactment of gender-neutral laws has failed to abolish paternalistic protection and sexual inequality.[247]

State adoption of gender-neutral rape laws yields an unfortunate backlash. The uneven prosecution creates a reinforcement of the female teen as weak, as a victim, or as parental property. This backlash of gender-neutral rape laws represents a return to victimology as a consequence of reckoning. Daphne Merkin, writing for the *New York Times*, describes this phenomenon in reference to a piece on the #MeToo movement.[248] Merkin argues that the somewhat overly-broad definition of male

---

are teenage girls, over half of whom are sexually active.").

[243] *See* TROUP-LEASURE & SNYDER, *supra* note 186, at 1.

[244] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 (2017) ("Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives."). A 2008 study out of the University of Ohio found that 41% of persons in the workplace "agree (strongly or somewhat) that it's better for all involved if 'the man earns the money and the woman takes care of the home and children."' DiFonzo, *supra* note 240, at 558. Forty percent of the adult paid workforce still adhere to traditional gender roles. *Id.*

[245] *See* Olsen, *supra* note 135, at 404.

[246] *See* TROUP-LEASURE & SNYDER, *supra* note 186, at 1.

[247] In 2016, Peggy Orenstein offered a comprehensive study of the sexual identity of girls who, "were the real beneficiaries of the feminist movement." *Fresh Air: "Girls & Sex,"* NAT'L. PUB. RADIO (Mar. 29, 2016), http://www.npr.org/templates/transcript/transcript.php?storyId=472211301 [https://perma.cc/P8MD-F8NA] (discussing PEGGY ORENSTEIN, GIRLS & SEX: NAVIGATING THE COMPLICATED NEW LANDSCAPE (2016)). Orenstein asserts that despite girls experiencing greater public power after the post-feminist movement (power to speak up, achieve job equality), things have changed very little with respect to their private, sexual, life. *See id.* ("[O]ne of the things research shows about college-age women and college-age men is that women are more likely to use their partner's pleasure as a yardstick of their own satisfaction. So they'll say he was satisfied, so I'm satisfied, whereas men are more likely - not all men, but men are more likely to use their own satisfaction as a measure of their satisfaction.").

[248] Daphne Merkin, *Publicly We Say #MeToo. Privately We Have Misgivings*, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html [http://perma.cc/ML75-4SJD]. In October 2017, a social movement erupted out of the unacceptable exercise by men of their power over female subordinates. The #MeToo movement exposed the widespread prevalence of sexual harassment, sexual and sexual violence that women experience in the workplace. The goal of the #MeToo movement is to raise awareness of the prevalence of this type of predatory behavior by men and to rid the

aggression has resulted in a "victimology paradigm for young women, in particular in which they are perceived to be . . . as frail as Victorian Housewives." [249]

#MeToo and state adoption of gender-neutral statutory rape laws share the phenomenon of progressive movements resulting in a return of females to the "weaker" sex.[250] #MeToo, which began as a vehicle for exposing sexual abusers, has morphed into its current iteration of an advocacy group fighting political, legal, and cultural change.[251] Initiatives growing out of the #MeToo movement include a call for legislation to penalize companies that tolerate sexual harassment, the creation of a legal defense fund, and a drive to reach gender parity in the workplace.[252] Like the feminists of the 1970s and 1980s, the #MeToo movement seeks to achieve a fair gender equilibrium.[253]

Those who supported the change to gender-neutrality and members of the #MeToo movement start from a place of common purpose—gender equality. The unfortunate consequences of gender-neutral statutory rape laws as applied to perpetrators and victims stands as a cautionary tale to #MeToo, its sister group

---

work place of sexual harassment, abuse and violence. *See* Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html [https://perma.cc/J8VZ-GXE8]; Jessica Bennett, *The #MeToo Moment: When the Blinders Come Off*, N.Y. TIMES (Nov. 30, 2017), https://www.nytimes.com/2017/11/30/us/the-metoo-moment.html?mtrref=www.google.com [https://perma.cc/SY8B-6EYJ].

[249] Merkin, *supra* note 248.

[250] *Id.*; *see also* Bari Weiss, *Aziz Ansaris Is Guilty. Of Not Being a Mind Reader*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html [https://perma.cc/V3XJ-W26M] (suggesting that the #MeToo hashtag has been overly used and is becoming unempowering to women); Jia Tolentino, *The Rising Pressure of #MeToo Backlash*, THE NEW YORKER (Jan. 24, 2018), https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash [https://perma.cc/2WU9-V727].

[251] Chris Snyder & Linette Lopez, *Tarana Burke on why she created the #MeToo movement – and where it's headed*, BUS. INSIDER (Dec. 13, 2017), http://www.business insider.com/how-the-metoo-movement-started-where-its-headed-tarana-burke-time-person-of-year-women-2017-12 [https://perma.cc/HEM6-PNGG]; *see also* Megan Garber, *Is this the Next Step for the #MeToo Movement*, THE ATLANTIC (Jan. 2, 2018), https://www.theatlantic.com/entertainment/archive/2018/01/beyond-metoo-can-times-up-effect-real-change/549482/ [https://perma.cc/ZZN7-99K7].

[252] On January 1, 2018, in response to #MeToo, a collective of women in the acting and cosmetics industry announced an initiative to confront workplace sexual abuse and harassment. The movement, called #TimesUp, was started with $13 million dollars in seed money. Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html [https://perma.cc/PKV5-9PQA].

[253] Marsha Mercer, *#MeToo Movement Fuels a 1970s Comeback: The ERA*, THE HUFFINGTON POST (Mar. 1, 2018), https://www.huffingtonpost.com/entry/metoo-movement-fuels-a-1970s-comeback-the-era_us_5a9816cee4b062df100e868a [https://perma.cc/V979-5RBL].

#TimesUp, and future movements. There is a risk that current and future efforts will not empower women but will instead brand them as victims. When the male-female dynamic creates a victimization paradigm, it is unfortunate. When state legislation facilitates such victimization, it fails society and our girls.

Carefully crafted legislation and a recognition of the potential consequences that can result from even the best intended legislation can better assure parity among the genders. This next section offers recommendations for legislative reform aimed at curtailing the type of prosecutorial discretion that perpetuates negative female stereotypes. Rewriting those state laws that still allow for arbitrary prosecution will more effectively achieve the goals of feminists and Formal Equalitists who believed neutralizing gendered language would lead to a more balanced citizenry.

V. REMOVING SEXUAL STEREOTYPES: A CALL TO ABOLISH ARBITRARY PROSECUTION STATUTES

Abolishing arbitrary prosecution statutes and replacing them with age-differential prosecution statutes would better serve to achieve the feminist goal of equal treatment between genders. To be sure, statutory rape statutes are essential to police sexual predators. But these laws also permit enforcement of consensual sex between minors. In arbitrary prosecution states, the perpetrator is overwhelmingly male, and the "victim" is overwhelmingly female. This selective enforcement perpetuates stereotypes of males as aggressors and females as victims.

The switch to gender neutrality did little to alleviate the goals of feminists who saw eliminating the female as the presumptive victim of statutory rape laws as one avenue towards achieving societal equality. Members of the formal equality school held that treating males and females equally for purposes of punishing consensual statutory rape would de-stigmatize females and empower their sexuality. Unfortunately, the open-ended prosecutorial discretion available under some gender-neutral statutory rape laws, particularly in arbitrary prosecution jurisdictions, has resulted in a retreat to the "daughters as property" era.[254]

There is no shortage of scholarship calling for the abandonment of statutory rape laws, in part because of entirely unequal treatment. However, abolishing statutory rape laws would eliminate the possibility of punishing pedophiles and other sexual predators.[255]

---

[254] *See supra* notes 168–186 and accompanying text.

[255] *See* Oberman, *Turning Girls into Women, supra* note 135, at 33. The FBI reported that almost 5,000 individuals over 16, a majority of whom were 20 years or older, committed statutory rape in 2012. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, SEX OFFENSE OFFENDERS, STATUTORY RAPE, SEX AND RACE BY AGE, 2012 (2012), https://ucr.fbi.gov/nibrs/2012/table-pdfs/sex-offense-offenders-statutory-rape-sex-and-race-by-age-2012/view [https://perma.cc/8QSN-G5PS] (breaking down all statutory rape offenses in 2012 by age, race, and sex). A 2013 comprehensive quantitative study reported that most of those surveyed favored sanctions for statutory rape violations in instances where one party to the sexual relations is an adult. *See* Erin B. Comartin, Poco D. Kernsmith & Roger M. Kernsmith, *Identifying Appropriate Sanctions for Youth Sexual Behavior: The Impact of Age,*

The retributive and deterrent values of punishing particular instances of statutory rape, which permit the prosecution to punish sexual predators, adults in inappropriate relations with minors, and the like, far outweigh the benefits of eliminating the crime of statutory rape. The fact that at least 44% of today's high-school students are enjoying intimate consensual intercourse demands some flexibility in the application of statutory rape laws to consensual sex between teens.[256] Because gender-specific laws still allow prosecutors to arbitrarily punish teens, the only logical solution to the problems that arise from selective prosecution of statutory rape laws is for states to switch from arbitrary prosecution to age-differential prosecution. The affirmative defense of a Romeo and Juliet law moderately benefits the identified perpetrator.[257]

Abolishing arbitrary prosecution statutes will, to a greater degree than age-differential statutes, abolish the discretion granted to prosecutors, as well as parents via prosecutors, in selecting which of the two wrongdoers of a couple engaging in statutory rape to punish.[258] To be sure, abolishing all gender-neutral statutory rape laws would abolish the issue of prosecutors having the option to choose which party

---

Gender, and Sexual Orientation, NEW CRIM. L. REV. 652, 653 (2014). "The public's beliefs about youth sexual behavior is in concert with the intended goals of the juvenile justice system, in that the suggested sanctions are focused on rehabilitation for 15-year-olds. However, the public is more supportive of severe sanctions for 18- and 22-year-olds, but also suggest counseling and probation. The significance of these findings informs policymaking in that they suggest a more balanced approach for sanctioning consensual sexual relationships between youths." *Id.*

[256] MARY ANN LAMANNA & AGNES RIEDMANN, MARRIAGES, FAMILIES, AND RELATIONSHIPS: MAKING CHOICES IN A DIVERSE SOCIETY 113 (11th ed. 2010). Many states have resolved the matter by adopting Romeo-and-Juliet laws. *See* Franklin, *supra* note 61, at 317–20. Romeo and Juliet laws acknowledge that minors of a certain age are likely to engage in sexual intercourse. These laws, like age-differential prosecution statutes, predicate responsibility on the age difference between the parties. *Id.* at 317. Unlike age-differential prosecution statutes, however, Romeo-and-Juliet laws lessen punishment for consenting minors who equally choose to engage in intercourse, not absolve them of culpability. *See id.* at 322. Because punishment still attaches, Romeo-and-Juliet laws continue the stigmatizing effect of unequal punishment for statutory rape. *See, e.g.*, FLA. STAT. § 943.04354 (2016); 720 ILL. COMP. STAT. § 5/11-1.50 (2011); *see also* Franklin, *supra* note 61, at 317–18. ("Shakespeare's tale of two young lovers torn apart because of a long-standing feud between their families is the 'ultimate tale of young love.' As the story goes, Romeo and Juliet were two teenagers madly in love who were forced to choose between their love and the family ties that kept them separate. Modern day may present yet another obstacle to their love since Juliet, only thirteen, would be unable to consent to sexual conduct with her love, Romeo, an older teen.").

[257] *See supra* note 118.

[258] Selection can reinforce stereotypes. *See* Marsha R. Greenfield, *Protecting Lolita: Statutory Rape Laws in Feminist Perspective,* 1 WOMEN'S L.J. 1, 1–2 (1976). With a rising number of youthful female offenders, removing arbitrary prosecution statutes will necessarily result in a more equal, or at least more representational reflection of females as victims and offenders. Equal treatment of females under statutory rape laws will, therefore, better achieve the goal of removing the "female as victim" stereotype.

to prosecute in instances where both minor parties freely chose to engage in sexual relations. Abolishment of the gender-neutral crimes would provide the benefit of remedying the reinforced stereotypes selective enforcement of these crimes has perpetuated. However, complete abolishment of the crime would eliminate the State's ability to prosecute "sick cases" such as pedophiles and adult perpetrators.[259]

Legislators are unlikely to eliminate statutory rape laws from their penal codes. These laws can exist, however, in a way, that better furthers the political spirit in which legislators adopted them. Arbitrary prosecution jurisdictions would be well advised to amend their statutes and to model them after age-differential laws of their sister states. In so doing, all states will strike a more even balance between allowing prosecution for "sick cases" and promoting equality among genders.

To the extent that abolishing arbitrary prosecution statutes will result in equal prosecution of males and females, underage females will have to take responsibility of the standards set for males in *Michael M.* Girls, as well as boys, will have to weigh whether engaging in sex is worth the risk of prosecution.[260] Assigning this cost-benefit responsibility to girls further confirms their power to make their own sexuality decisions. For that reason, abolishing arbitrary prosecution is a salutary move.

CONCLUSION

Despite the move to gender-neutral statutory rape laws, states continue to enforce consensual sexual intercourse between teenagers in much the same way as they did when the laws were gender-specific. Males face charges at a significantly higher rate than females; males are more likely to be cast as the perpetrators; females are more likely to be cast as the victims.[261] The move to gender-neutral statutory rape laws did little to remedy sexual stereotypes in arbitrary prosecution jurisdictions.

The benefits of including statutory rape laws in criminal codes far outweighs the burden. It would be unreasonable to remove such laws from state penal codes. But, with respect to consensual sexual relations between teenagers, enforcement perpetuates unwanted sexual stereotypes. The same can be said of the #MeToo movement. The collective voices are dampened by an undercurrent of critics whispering, "[y]ou must have been weak in the boardroom, the classroom, the soundstage."

To be clear, women are victimized, and both solidarity and gender neutrality are for the good. But when the law, as practiced, does not work well, it fails women and the movements that fight for their equality. Prosecution for consensual sexual relations among teens should be rare and should be subject to the bright line test of

---

[259] *See* Oberman, *supra* note 17, at 743–44.

[260] Conversely, given the societal norms of equal responsibility in parenting, boys will have to consider the consequences of consensual teenage sex, including unintended pregnancies.

[261] *See supra* Part III.

age-differential prosecution statutes. Only in this way will the law truly embrace formal equality, a long sought after, but still elusive goal.

TABLE A

Statutory Rape Laws by Jurisdiction[262]

State	Arbitrary Jurisdiction	Age Differential Jurisdiction
Alabama	X[263]	X[264]
Alaska	X[265]	X[266]
Arizona	X[267]	
Arkansas	X[268]	
California		X[269]
Colorado		X[270]
Connecticut		X[271]
Delaware	X[272]	X[273]
Florida		X[274]
Georgia	X[275]	
Hawaii	X[276]	X[277]
Idaho		X[278]

[262] Citations are to elements of the crime and do not include any affirmative defenses available to the defendant.

[263] ALA. CODE § 13A-6-61 (2018) (Rape; first degree).

[264] *Id.* § 13A-6-62 (Rape; second degree).

[265] ALASKA STAT. § 11.41.434 (2018) (Sexual abuse of a minor in the first degree).

[266] *Id.* § 11.41.436 (Sexual abuse of a minor in the second degree).

[267] ARIZ. REV. STAT. ANN. § 13-1405 (2018) (Sexual conduct with a minor; classification).

[268] ARK. CODE ANN. § 5-14-103 (2018) (Rape).

[269] CAL. PENAL CODE § 261.5 (West 2018) (Unlawful sexual intercourse with a minor); *see also id.* § 261.5(b), (c) (providing for prosecution of defendant in instances where defendant is three or more years older than the victim or three or more years younger than the defendant.).

[270] COLO. REV. STAT. § 18-3-402 (2018) (Sexual assault).

[271] CONN. GEN. STAT. § 53a-70(a)(2) (2018) (Sexual assault in the first degree: Class B or A felony).

[272] DEL. CODE ANN. tit. 11, § 770(a)(1) (2018) (Rape in the fourth degree; class C felony).

[273] *Id*. § 770(a)(2).

[274] FLA. STAT. § 794.05 (2018) (Unlawful sexual activity with certain minors).

[275] GA. CODE ANN. § 16-6-3 (2018) (Statutory rape).

[276] HAW. REV. STAT. § 707-730(b) (2018) (Sexual assault in the first degree).

[277] *Id.* § 707-730(c).

[278] IDAHO CODE § 18-6101 (2018) (Rape defined).

Illinois		X[279]
Indiana	X[280]	X[281]
Iowa		X[282]
Kansas		X[283]
Kentucky	X[284]	X[285]
Louisiana		X[286]
Maine	X[287]	X[288]
Maryland		X[289]
Massachusetts	X[290]	
Michigan	X[291]	
Minnesota		X[292]
Mississippi	X[293]	
Missouri	X[294]	X[295]
Montana		X[296]
Nebraska		X[297]
Nevada	X[298]	
New Hampshire		X[299]

[279] 720 ILL. COMP. STAT. 5/11-1.50 (2018) (Criminal sexual abuse).

[280] IND. CODE § 35-42-4-3 (2018) (Child molesting).

[281] *Id.* § 35-42-4-9 (Sexual misconduct with a minor).

[282] IOWA CODE § 709.4 (2018) (Sexual abuse in the third degree).

[283] KAN. STAT. ANN. § 21-5503 (2018) (Rape).

[284] KY. REV. STAT. ANN. § 510.110(1)(b)(2) (West 2018) (Sexual abuse in the first degree).

[285] *Id.* § 510.110(1)(c)(1).

[286] LA. STAT. ANN. § 14:80 (2018) (Felony carnal knowledge of a juvenile).

[287] ME. STAT. tit. 17-A, § 253(1)(B) (2018) (Gross sexual assault).

[288] *Id.* § 253(1)(A).

[289] MD. CODE ANN. CRIM. LAW § 3-304 (West 2017) (Rape in the second degree); *see also id.* § 3-307 (Sexual offense in the third degree).

[290] MASS. GEN. LAWS ch. 265, § 23 (2018) (Rape and abuse of child).

[291] MICH. COMP. LAWS § 750.520b (2018) (Criminal sexual conduct in the first degree).

[292] MINN. STAT. § 609.342 (2018) (Criminal sexual conduct in the first degree).

[293] MISS. CODE ANN. 97-3-95 (2018) (Sexual battery).

[294] MO. REV. STAT. § 566.032 (2018) (Statutory rape and attempt to commit, first degree, penalties).

[295] *Id.* § 566.034 (Statutory rape, second degree, penalty).

[296] MONT. CODE ANN. § 45-5-502 (2018) (Sexual assault); *see also id.* § 45-5-501(1)(a)(ii)(D) (stating that a victim is incapable of consent if under the age of 16). *But see id.* § 45-5-502(3) (describing mandatory prosecution if victim is less than 16 years old and if offender inflicts bodily harm).

[297] NEB. REV. STAT. § 28-319 (2018) (Sexual assault; first degree; penalty).

[298] NEV. REV. STAT. § 200.366 (2018) (Sexual assault: Definition; penalties; exclusions).

[299] N.H. REV. STAT. ANN. § 632-A:3 (2018) (Felonious Sexual Assault).

New Jersey	X[300]	X[301]
New Mexico	X[302]	
New York		X[303]
North Carolina		X[304]
North Dakota	X[305]	
Ohio		X[306]
Oklahoma		X[307]
Oregon	X[308]	
Pennsylvania		X[309]
Rhode Island		X[310]
South Carolina		X[311]
South Dakota		X[312]
Tennessee		X[313]
Texas	X[314]	
Utah		X[315]
Vermont		X[316]
Virginia		X[317]
Washington		X[318]
West Virginia	X[319]	

[300] N.J. STAT. ANN. § 2C:14-2(a)(1), (a)(2) (West 2018) (Sexual assault).

[301] *Id.* § 2C:14-2(b).

[302] N.M. STAT. ANN. § 30-9-11 (2018) (Criminal sexual penetration).

[303] N.Y. PENAL LAW § 130.25 (McKinney 2018) (Rape in the third degree).

[304] N.C. GEN. STAT. § 14-27.24 (2018) (First-degree statutory rape).

[305] N.D. CENT. CODE § 12.1-20-03 (2018) (Gross sexual imposition - Penalty).

[306] OHIO REV. CODE ANN. § 2907.04 (West 2018) (Unlawful sexual conduct with minor).

[307] OKLA. STAT. tit. 21, § 1114 (2018) (Rape or rape by instrumentation in first degree—Rape in second degree).

[308] OR. REV. STAT. § 163.355 (2018) (Rape in the third degree); *Id* § 163.365 (Rape in the second degree); *Id.* § 163.375 (Rape in the first degree).

[309] 18 PA. CONS. STAT. § 3122.1 (2018) (Statutory sexual assault).

[310] 11 R.I. GEN. LAWS § 11-37-6 (2018) (Third degree sexual assault).

[311] S.C. CODE ANN. § 16-3-655 (2018) (Criminal sexual conduct with a minor; aggravating and mitigating circumstances; penalties; repeat offenders).

[312] S.D. CODIFIED LAWS § 22-22-1 (2018) (Rape--Degrees--Felony--Statute of limitations).

[313] TENN. CODE ANN. § 39-13-506 (2018) (Mitigated statutory rape -- Statutory rape -- Aggravated statutory rape).

[314] TEX. PENAL CODE ANN. § 22.011 (West 2018) (Sexual Assault).

[315] UTAH CODE ANN. § 76-5-401.1 (West 2018) (Sexual abuse of a minor).

[316] VT. STAT. ANN. tit. 13, § 3252 (2018) (Sexual Assault)

[317] VA. CODE ANN. § 18.2-63 (2018) (Carnal knowledge of a child between thirteen and fifteen years of age).

[318] WASH. REV. CODE § 9A.44.073 (2018) (Rape of a child in the first degree).

[319] W. VA. CODE § 61-8B-5 (2018) (Sexual assault in the third degree).

Wisconsin	X[320]	
Wyoming		X[321]
Federal		X[322]

[320] WIS. STAT. § 948.02 (2018) (Sexual assault of a child).
[321] WYO. STAT. ANN. § 6-2-303 (2018) (Sexual assault in the second degree).
[322] 18 U.S.C. § 2243 (2018) (Sexual abuse of a minor or ward).