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FROM JAILBIRD TO JAILBAIT: AGE OF CONSENT LAWS AND THE CONSTRUCTION OF TEENAGE SEXUALITIES

KATE SUTHERLAND*

I. INTRODUCTION

The legal regulation of teenage sex in the United States is pervasive. A variety of federal, state and municipal laws directly prohibit sexual activity and expression on the part of teenagers. For example, age of consent laws render teenagers below a certain age incapable of consent to sexual activity with adults, and sometimes with peers. Further, an extensive body of law governs the conduct of adults who would interact sexually with teenagers. For example, going beyond age of consent laws, there are statutes that criminalize sex between teachers and students, and statutes that criminalize the provision of sexually explicit magazines to minors.

But the reach of legal regulation extends much further than this. Law has a broad distributive impact; that is, law forms a backdrop to negotiations about sex and sexual expression among teenagers, and also between teenagers, parents, school officials and various other actors.[1] There are many contexts in which law does not operate to mandate or prohibit, but rather allocates decision-making power among these different constituencies. Such power underpins much unofficial regulation, for example within families. It also generates vast bodies of official regulations, for example dress codes formulated and enforced by school administrations.

Finally, there are many contexts in which a state presence is not immediately apparent. State actors may refrain from regulating where they could, or fail to enforce where they have regulated, thereby leaving the terrain to be sorted out according to existing power relations. These instances of non-intervention do not signal an absence of law; rather, they can be characterized as

* Assistant Professor, Osgoode Hall Law School, Toronto, Canada. I would like to thank Annie Bunting, Duncan Kennedy, Carol Steiker, and Leti Volpp. My conversations with each of them about the legal regulation of teenage sex inspired and challenged me at various points in the evolution of this article.

1. I am inspired here by Duncan Kennedy's analysis of the role of law in setting the ground rules for negotiation between capital and labor. See the essay entitled *The Stakes of Law or, From Hale and Foucault*, in DUNCAN KENNEDY, SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY (1993).

conscious decisions on the part of lawmakers.[2] For example, harassment of gay high school students may be tolerated or even encouraged where state legislatures have chosen not to enact anti-discrimination laws that include sexual orientation as a prohibited ground.

Age of consent laws clearly fit within the first of the three categories that I have outlined above. They provide a very obvious example of direct state intervention in the sexual lives of teenagers. But age of consent laws also fit within the second and third categories. This body of law operates in complex and contradictory ways that generate a range of distributive effects. For example, the roles that parents and welfare officials play in enforcement decisions have an impact on broader struggles between teenagers, parents, and state officials over teenage sexual activity and sexual values. In those contexts where age of consent laws do not apply or where they are not enforced, teenage sex will be left in the realm of existing power relationships where factors such as age, sex, race, and class come to the forefront. Given the multiple levels upon which they operate, age of consent laws provide an excellent vehicle for exploring the role of law not simply in the repression of teenage sex, but also in the constitution of teenage sexualities.

II. AGE OF CONSENT LAWS

A Survey of Consent Laws in the U.S.

The age of consent for sexual intercourse ranges from 12 to 18 under various state laws, the most common age of consent being 16.[3] The age of consent for various forms of "sexual contact" is frequently lower than that for sexual intercourse.[4] Many states now stress the number of years that separate the parties; that is,

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2. Kennedy explains:

> The invisibility of legal ground rules comes from the fact that when lawmakers do nothing, they appear to have nothing to do with the outcome. But when one thinks that many other forms of injury are prohibited, it becomes clear that inaction is a policy, and that the law is responsible for the outcome, at least in the abstract sense that the law 'could have made it otherwise.'

Id. at 91.

3. For a survey of the relevant legislation, from which much of the following description is drawn, see RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS (1996).

4. ALA. CODE § 13A-6-69 (2002) (age of consent for sexual activity is 16); TEX. PENAL CODE ANN. § 21.11 (2003) (age of consent for sexual activity is 17); VA. CODE ANN. § 18.2-63 (2003) (age of consent for sexual activity is 15). *But see* WASH. REV. CODE ANN. § 9A.44.093 (2003) (age of consent for sexual activity is 18).

the statutes criminalize sexual interaction between adults and adolescents that would not be criminal between adolescents of similar ages.[5] Some statutes explicitly refer to capacity to consent. For example, the New York statute says that persons under 17 are deemed incapable of consent to a sexual act.[6] The Wisconsin statute says that a person at least 16, but under 18, is *rebuttably* presumed incapable of consent.[7] In every state, married couples are exempt from the application of age of consent laws regardless of age.[8]

The justification usually put forward for age of consent laws is the protection of young persons from sexual exploitation by adults.[9] This is borne out to some extent by the way courts have approached cases involving consensual sex between adults and minors. In *Jones* v. *Florida*, a 19-year-old man and a 20-year-old man were prosecuted for having sex with their underage girlfriends, both 14.[10] The girls declared their consent, sitting in the courtroom holding hands with the accused throughout the trials. They did not desire the prosecutions. Their families initiated the proceedings: in one case a sister, in the other a mother. Nonetheless, the court found the statute constitutional, precluding the application of the privacy rights of minors given the state's compelling interest in "preventing sexual exploitation early in life."[11] Justice Kogan there prefaced his opinion by stating: "I am deeply troubled that an uncritical acceptance of the notion of youths 'consenting' to sexual activity will merely create a convenient smoke screen for a predatory exploitation of children and young adolescents."[12]

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5. POSNER & SILBAUGH, *supra* note 3.

6. N.Y. PENAL LAW § 130.05(3)(a) (2003).

7. WIS. STAT. §§ 948.01, 948.02 (2003).

8. Note, though, that in order to marry, minors must obtain the consent of a parent or be legally emancipated. *See* Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 481 (2000).

9. Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15 (1994); Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251 (1998). This has, of course, not always been the official line on why we need age of consent laws. Over time different, and often contradictory, justifications have been proffered. Several excellent historical studies of age of consent laws have been published in recent years. *See* CONSTANCE A. NATHANSON, DANGEROUS PASSAGE: THE SOCIAL CONTROL OF SEXUALITY IN WOMEN'S ADOLESCENCE (1991); MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920 (1995); Jane E. Larson, *"Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1 (1997); Rachel Devlin, *Female Juvenile Delinquency and the Problem of Sexual Authority in America, 1945-1965*, 9 YALE J.L. & HUMAN. 147 (1997).

10. Jones v. State, 640 So. 2d 1084 (Fla. 1994).

11. *Id.* at 1091.

12. *Id.* at 1088.

The facts of age of consent cases involving adult defendants rarely evoke Nabokov's *Lolita*, however.[13] Studies show that the majority of those prosecuted for age of consent violations are in their teens or early twenties.[14] For example, in 1999, 58% of defendants prosecuted in California were under the age of twenty.[15] In a recent Wisconsin trial, 18-year-old Kevin Gillson was prosecuted after his 15-year-old fiancée became pregnant. [16] Despite a public outcry, he was convicted and his name was entered in a national registry of sex offenders.[17] The terms of the two years of probation to which he was sentenced barred him from contact with his fiancée. "Thanks to the court system," she said, "I have lost the love of my life and the father of my unborn baby."[18]

In line with this trend, age of consent statutes are also used to prosecute consensual sex between two persons both under the age of consent. In Florida, such prosecutions were held to be unconstitutional on the basis that they violate the privacy rights of minors.[19] However, other states have applied age of consent laws in such circumstances. For example, the California Court of Appeal recently found that minors have no privacy right to consensual sex and upheld the conviction of a 16-year-old boy for having sex with his consenting 14-year-old girlfriend.[20] In an Arizona case, a 16-

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13. Nabokov's celebrated novel centers on a sexual relationship between the 37-year-old Humbert and his 12-year-old step-daughter Dolores. VLADIMIR VLADIMIROVICH NABOKOV, LOLITA (1955).

14. Cited in Oliveri, *supra* note 8, at 479.

15. *Id.* (citing GOVERNOR'S OFFICE OF CRIMINAL JUSTICE PLANNING, STATE OF CALIFORNIA, STATUTORY RAPE VERTICAL PROSECUTION: THIRD YEAR REPORT 4 (1999)).

16. State v. Gillson, 587 N.W.2d 214 (Wis. App. 1998).

17. Editorial, *An Excessive Sex Abuse Law Series*, ST. PETERSBURG TIMES, May 18, 1997, at 2D [hereinafter *Excessive*]. Governor Tommy Thompson signed into law a bill to allow judges discretion in avoiding this type of injustice. *See* Stan Milam & Lawrence Sussman, *Thompson Signs 'Kevin Gilson' Bill: Law Allows Judges to Exclude Names of Teens from Sex Offender Registry*, MILWAUKEE J. SENTINEL, Apr. 18, 1998, at 1.

18. Quoted in Catherine Elton, *Jail Baiting: Statutory Rape's Dubious Comeback*, NEW REPUBLIC, Oct. 20, 1997, at 12.

19. B.B. v. Florida, 659 So. 2d 256 (Fla. 1995) (the accused and his consenting partner were both 16 years old).

20. In Re T.A.J., 73 Cal. Rptr. 2d 331 (Ct. App. 1998). Justice Ruvolo stated:

> Although minors have privacy rights under article I, section 1, of the California Constitution, they do not have a constitutionally protected interest in engaging in sexual intercourse. While we do not ignore the reality that many California teenagers are sexually active, that fact alone does not establish that minors have a right of privacy to engage in sexual intercourse. We accept the premise that due to age and immaturity, minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences. While they may have the ability to respond to nature's call to exercise the gift of physical love, juveniles may yet be unable to accept the attendant obligations and responsibilities. For all of these reasons we conclude

year-old was convicted of sexual abuse for touching the breasts of a 14-year-old with her consent.[21] Similarly, in another Arizona case, a 13-year-old boy was convicted for having consensual sexual relations with a 15-year-old girl.[22] Even where such prosecutions have been found by courts to be unconstitutional, both underage parties to a consensual sexual encounter may still be judged "unruly children" in a juvenile proceeding.[23]

This takes us to the position of underage girls within age of consent laws. The protectionist rhetoric wears thin rather quickly. Under the age of consent laws in some states, the girl who consents may be prosecuted for aiding and abetting the offender. Or, as noted above, she may be criminally punished for her consensual sexual activities under the rubric of status offenses, so named because they are offenses only by virtue of the age of the person who commits them. Status offenses include curfew violations, running away from home, truancy, and a series of ever more nebulous categories like "incorrigibility," "unmanageability," and being "beyond control," a "wayward child," or, "in danger of leading an idle or immoral life."[24]

Finally, girls who refuse to testify against their lovers may be jailed for contempt of court. This was the fate of 16-year-old Amanda Winkler, albeit briefly. She was jailed for seven hours after refusing to testify against 21-year-old Jamie Winkler.[25] He was facing charges for a sexual liaison between them that occurred four days before her sixteenth birthday elevated her to the age of consent.[26] They subsequently married with the consent of her grandparents, but this did not deter authorities from proceeding. Deputy prosecutor David Wall said that he had little discretion given the accused's prior criminal history. Jamie Winkler ultimately pled guilty to a reduced charge.[27]

Even as such consensual cases generate convictions, non-consenting complainants may find themselves outside the law's protective net if they are not considered worthy. By 1998, all U.S.

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there is no privacy right among minors to engage in consensual sexual intercourse.

Id.

21. Matter of Pima County Juvenile Appeal No. 74802-2, 790 P.2d 723 (Ariz. 1990).

22. Gammons v. Berlat, 696 P.2d 700 (Ariz. 1985).

23. In Re Frederick, 622 N.E. 2d 762 (Ohio Com. Pl. 1993).

24. MEDA CHESNEY-LIND & RANDALL G. SHELDEN, GIRLS, DELINQUENCY, AND JUVENILE JUSTICE 30 (2d ed. 1997).

25. Debera Carlton Harrell, *Age of Innocence? Line Between Consent and Crime Can Be Fuzzy One*, SEATTLE POST-INTELLIGENCER, Dec. 1, 1997, at A1.

26. *Id.*

27. *Id.*

jurisdictions had repealed the once common defense of promiscuity.[28] However, a perception of promiscuity still may undermine a complainant's credibility, leading prosecutors not to proceed, or judges and juries not to convict. Sacramento County Deputy District Attorney Anthony Pongratz explained: "Some people think, 'Why are we prosecuting this poor 23-year-old guy just because he met some tramp?'"[29]

Violation of age of consent laws is a strict liability offense in most states, so one would expect that obtaining a conviction in cases of non-consensual sex would be relatively easy. This appears not to be so. For example, in 1996, prosecutors declined to pursue charges against 19-year-old Brian after he impregnated 15-year-old Jennifer. On the night in question, Brian attended a party at Jennifer's home while her parents were away. Jennifer recalls getting drunk and sick. She was grateful to Brian for having helped her into bed until she later discovered she was pregnant. She remembers very little else about the evening. On a strict liability standard, this ought to have been a clear-cut case given Jennifer's age and the solid evidence of the act of intercourse provided by the baby. However, a prosecutor decided the case would be too difficult to win given the fact that Jennifer had been drunk.[30]

Where age of consent laws do not apply, girls who have suffered sexual assault will face even greater hurdles in proving their charges. The sexual assault laws in most states require proof of both non-consent and of force, so in many circumstances they offer no recourse to those who have suffered sexual violence.[31] This is particularly true in the "date rape" situations that are precisely the contexts in which girls and young women are most often

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28. Tennessee and Texas repealed their promiscuity defenses in 1994. *See* TENN. CODE ANN. § 39-13-506(b) (repealed 1994); TEX. CODE ANN. § 21.10 (repealed 1994). As late as 1996, however, the Texas Court of Criminal Appeals held that exclusion of testimony regarding a 14-year-old girl's history of promiscuity was grounds for overturning a conviction where the alleged offense took place in the year prior to the coming into force of the 1994 amendments to the law. *See* May v. State, 919 S.W.2d 422 (Tex. App. 1996). For a history of Texas's promiscuity defense, see Maryanne Lyons, Comment, *Adolescents in Jeopardy: An Analysis of Texas' Promiscuity Defense for Sexual Assault*, 29 HOUS. L. REV. 583 (1992). Mississippi, the final holdout, repealed the requirement that victims of age of consent violations be "of previously chaste character" in 1998. MISS. CODE ANN. § 97-3-67 (repealed 1998).

29. Cited in Marie McCullough, *Statutory-Rape Laws Lack Conviction*, YORK DAILY REC., May 4, 1997, at 1.

30. Heather Dickinson, *Civil Penalty Toughens Statutory-Rape Laws*, ORANGE COUNTY REG., Sept. 30, 1996, at B6.

31. STEPHAN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 254 (2000).

victimized.[32] The likelihood of having charges laid and of securing convictions is frequently hampered by the operation of stereotypes based on sex, class, race, and disability.[33]

The vast majority of those charged with violations of age of consent laws are male. Indeed, some statutes are explicitly drafted to exclude the possibility of a female accused and in the 1981 *Michael M.* case the Supreme Court upheld the constitutionality of such sex-specific statutes.[34] The Court there stated that sex-specific statutes can be justified on the basis that a primary goal of age of consent laws is the protection of young women from the consequences of teenage pregnancy.[35]

Nevertheless, most states have now amended their age of consent laws to make them gender neutral, including California where the *Michael M.* case originated.[36] This move does not appear to have generated a dramatic increase in charges against girls or women who are sexually involved with males under the age of consent.[37] This state of affairs raises questions about the extent to which parents, police and prosecutors adhere to the idea that males, even very young males, are always initiators of sex with full capacity to consent.

Women Defendants

This is not to say that women are never charged and convicted for liaisons with underage boys. In recent years, a series of such cases has generated considerable media attention.[38] Nearly all of

32. Roger Levesque reports: "One recent national project found that 92% of adolescent sexual assault victims were attacked by someone they knew, and more than half actually were raped while on a date." ROGER J.R. LEVESQUE, ADOLESCENTS, SEX, AND THE LAW: PREPARING ADOLESCENTS FOR RESPONSIBLE CITIZENSHIP 232 (2000). *See also* Py Bateman, *The Context of Date Rape*, *in* DATING VIOLENCE: YOUNG WOMEN IN DANGER 94-99 (Barrie Levy ed., 1998).

33. Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663 (1999); Sarah Gill, Essay, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN'S L.J. 27 (1996).

34. Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

35. *Id.*

36. Nicole A. Rapp, Note, *Teenage Sex in California: Thirteen Years After* Michael M., 15 J. JUV. L. 197, 201-02 (1994).

37. *Id.*

38. Cases reported in the media include:

1. Kathleen Kennedy, thirty-seven, was sentenced to two and a half years in prison for having sex with a 13-year-old boy. The boy was the son of a friend and was staying with Kennedy for two weeks to allow him to finish out the last two weeks of the school year after his family had moved to another town. Judy Rakowsky, *Woman Gets 2 1/2 Years for Sex with Boy, 13*, BOSTON GLOBE, Jan. 4, 1997, at B2.

these cases have involved teachers who became sexually involved with substantially younger male students.

The highest profile example is that of Mary Kay Letourneau, a Seattle teacher who had a sexual relationship with Vili Fualaau, formerly a student in her sixth-grade class.[39] When their relationship became sexual, she was thirty-five and he was thirteen. Letourneau pled guilty to two counts of child rape. Justice Linda Lau sentenced her to a seven-and-a-half year prison term, but suspended all but six months of that sentence on condition that Letourneau enter a sex-offender treatment program, take medication for her bipolar disorder, and refrain from contact with Fualaau.[40] Shortly after her release, she was found in his company and the prison sentence was reinstated. She had one child with Fualaau prior to sentencing and conceived a second during her brief release.

Letourneau maintains that she is in love with Fualaau and that they intend to marry when she has completed her sentence.[41] Fualaau said: "She wasn't taking advantage of me or talking me into something I didn't want. I loved Mary. She and I had a deep, spiritual relationship."[42] Commentators variously regard Letourneau as a sexual predator, mentally ill, or a champion of forbidden love. Fualaau is seen by some as lucky, by others as a victim.[43]

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2. Rebecca Ann Schroeder, twenty-eight, was charged for twice performing oral sex on the 13-year-old brother of her roommate. She said she loved the boy and wanted to marry him when he was old enough. In his statement to police, the boy said: "I'm mad because I can't be with her anymore. I love her." Associated Press, *28-year-old Woman Wants to Marry 13-year-old Boy*, GRAND RAPIDS PRESS, Mar. 27, 1998, at D4.
3. Teacher's aide Nancy Alexander-Anderson, forty-nine, plead guilty to child rape for her relationship with a 15-year-old student. Editorial, *FWay School Officials Botched Aide Sex Case*, NEWS TRIB., Aug. 23, 2000, at B8.
4. Social studies teacher Kristi Van Buren, thirty-seven, was arraigned on sexual assault charges for having sexual relationships with two students aged 17 and 18. Matthew Hay Brown et al., *Women Abusers Seek More Than Sex: Motives Differ From Men's, But Damage to Students is the Same, Experts Say*, HARTFORD COURANT, Feb. 5, 2001, at A1.
5. Middle school teacher Beth Friedman, forty-two, was charged for having sex with a 14-year-old former student. Rekha Basu, *Let's Finally Put a Common Presumption to Rest*, SUN-SENTINEL, Aug. 28, 2001, at 1B.

39. The facts are described in State v. Letourneau, 997 P.2d 436 (2000).

40. Tim Klass, *Teacher Gets Jail For Abuse: She Bore Teen's Child, Draws 6-Month Term*, DETROIT FREE PRESS, Nov. 15, 1997, at 6A.

41. *Id.*

42. Cited in Andy Geller, *"I'll Wait For Mary Kay,"* N.Y. POST, Apr. 4, 1998.

43. Julie Muhlstein, *Letourneau, Tucker: Pretty Women, Ugly Crimes*, HERALDNET, Feb. 4, 1998.

In cases where the age differences are less and the power imbalances less clearly defined, charges have been laid and convictions have been obtained, but sentences tend to be light and public disapproval of the action of authorities is often strong. In June 2000, 24-year-old Rachel Glau was sentenced to two years' supervision for engaging in "sexual contact" with a 16-year-old boy.[44] Glau was a teacher, but her underage partner was not one of her students; he was a fellow employee of the Crystal Lake Park District during the summer that their sexual relationship began. The boy, his mother, and more than twenty of the parents of Glau's first grade students wrote to the state attorney's office asking that the charges be dropped.

In a recent Canadian case, Heather Ingram, a 30-year-old high school teacher, was sentenced to 10-months of house arrest for engaging in a sexual relationship with a 17-year-old student.[45] The student, who now lives with Ingram, says he initiated the relationship. "The idea that Heather exploited me is crazy . . . . I consider Heather my girlfriend."[46] His mother told the court: "I welcome Heather into the family as my adult son's choice of partner . . . . [My son] is a dynamic, independent, strong-willed adult who has been making his own decisions since he was 14. He is not vulnerable and he is not a victim and could never be coerced."[47]

Clearly a reluctance to view boys as sexually exploitable by women remains. This attitude can be read as according greater respect to the autonomy and rational decision-making powers of boys than to those of girls. On the other hand, it may represent adherence to sexual stereotypes about male desire that ultimately deny boys protection against non-consensual heterosexual encounters. In the face of such stereotypes, psychologists suggest that it is very difficult for boys to acknowledge that they have been victimized.[48] They may feel that they should have enjoyed the experience or that they should have been strong enough to escape any unpleasant situation.[49] According to Mike Lew, a therapist of male survivors of sexual abuse, when boys do report non-consensual

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44. Bill Cole, *Are Penalties Lighter For Female Sex Offenders? Officials Say Teacher's Sentence Influenced by Victim's Family*, CHI. DAILY HERALD, June 11, 2000, at 7.

45. Gloria Galloway, *Women Make News With School Affairs But Is the Offence as Grave When the Teacher's a Female and the Student's a Boy?*, TORONTO STAR, Mar. 3, 2001, at B8.

46. Quoted in *Id.*

47. Quoted in Nancy Moote, *"No Regrets" as Teacher Pleads Guilty to Sex With Teen*, COAST INDEP., Apr. 23, 2000.

48. Karen Avenoso, *Older Woman, Young Boy Rape Case Looked at Differently by Some*, BOSTON GLOBE, July 9, 1996, at 15.

49. *Id.*

encounters, they are typically met with disbelief, minimization or jokes.[50]

Selective Prosecution

Whether we are speaking of intergenerational affairs or relationships between teenage peers, police and prosecutors have considerable discretion as to whether such cases should be investigated and prosecuted. Clearly, given the statistics on the rate of sexual activity among teenagers,[51] only a small number of those who engage in forbidden sexual acts are ever subject to criminal charges. What circumstances are likely to give rise to prosecution of consensual sex involving teenagers?

Cases are usually brought to the attention of the criminal justice system by parents or by welfare officials.[52] This leads to very selective enforcement. Richard Delgado asserts:

> Unable to prosecute the whole country, law enforcement officials apply the law principally against two groups: men, frequently older, who have sex with girls from "good homes;" and minority men, who are punished if they commit the crime of having sex with white women or impregnate a woman of color under circumstances that add to the welfare rolls.[53]

The California Alliance for Statutory Rape Enforcement's most-wanted list provides some evidence to back up Delgado's claim about the likelihood of minority men being targeted for prosecution.[54] Of the thirty-five people featured on the list in March 2003, thirty-two were men.[55] All thirty-two of these men

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50. Cited in Robin Estrin, *Female Sex Abusers Not Common, Rarely Reported*, NEW STANDARD, July 15, 1996, *at* http://www.s-t.com/daily/07-96/07-15-96/c05wn074.htm.

51. A 1995 study concluded that 50% of U.S. teenagers have had sexual intercourse by the age of sixteen, the most common age of consent across the country. Cited in Michelle Oberman, *Regulating Consensual Sex With Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 703 (2000).

52. A recent ABA report based on interviews with 48 prosecutors indicated that close to two-thirds of the reports of age of consent violations are coming to police from parents. See SHARON G. ELSTEIN & NOY DAVIS, SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES 26 (1997).

53. Richard Delgado, *Statutory Rape Laws: Does it Make Sense to Enforce them in an Increasingly Permissive Society? No: Selective Enforcement Targets 'Unpopular' Men*, ABA J., Aug. 1996, at 87.

54. San Bernardino County District Attorney, Statutory Rape Prosecution, Wanted for Criminal Statutory Rape, *at* http://www.wetip.com/sbstat/sbstagr.htm (last visited Mar. 25, 2003) [hereinafter Wanted for Criminal Statutory Rape].

55. *Id.*

were identified as Hispanic or black.[56] The available evidence of the centrality of concern for welfare funds to decisions to prosecute is more ample. An application for public assistance made by a pregnant teenager is a common trigger of prosecution.[57] This is partly related to the fact that a pregnancy provides solid proof of the sexual activity upon which a charge must be based. In recent years, however, enforcement of age of consent laws has been explicitly linked to welfare reform and thereby to the fiscal interests of the state.[58]

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), passed by Congress in 1996, emphasized the reduction of teen pregnancy as an important goal.[59] To this end, the Act required the Attorney General to establish and implement a program that "educates State and local criminal law enforcement officials on the prevention and prosecution of statutory rape."[60] Further, it offered a "sense of the Senate that States and local jurisdictions should aggressively enforce statutory rape laws."[61]

States were quick to respond by implementing a variety of measures. Some states reformed their laws by raising the age of consent[62] or by increasing the penalties imposed on offenders.[63] Many more states pledged to step up enforcement of their existing laws.[64] While these measures have led to a general increase in the frequency of prosecutions under age of consent laws, the fact that this development was prompted by a concern about teenage

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56. *Id.*

57. Quentin Hardy, *Idaho County Tests A New Way to Curb Teen Sex: Prosecute - Pregnant Girls and Boyfriends Get Hauled Into Court; Welfare Is the Real Issue*, WALL ST. J., July 8, 1996, at A1.

58. *Id.*

59. Oliveri, *supra* note 8, at 463.

60. *Id.* at 472.

61. *Id.* (quoting PRWORA, Pub. L. No. 104-193, § 906(a), 110 Stat. 2105, 2349 (1996)).

62. For example, Georgia raised its age of consent from 14 to 16. *Id.* at 474. Lawmakers in other states, for example Washington, have proposed such increases but the amendments have not passed: Editorial, *Consent Age Needs Detailed Discussion*, SEATTLE POST-INTELLIGENCER, Dec. 4, 1997, at A10. In June 2001, Governor Ben Cayetano vetoed a bill that would have raised the age of consent from 14 to 16 in Hawaii. He asserted that Hawaii's sexual assault laws are sufficient to combat nonconsensual sexual activity and expressed concern that the bill would have unfortunate harsh results that would not serve the interests of teenagers and young adults. *See* Office of the Governor of Hawaii, *Governor Vetoes Age-Of-Consent Bill, 19 Others*, News Release, June 21, 2001.

63. For example, Delaware doubled the prison time to which offenders are subject in cases where an adult has sex with a minor under the age of 14 or at least ten years younger than him. *See* McCullough, *supra* note 29.

64. For example, Louisiana, Virginia, California, Connecticut, and New York. See *id.* at 475.

mothers swelling the welfare rolls suggests that low-income teenagers will bear the brunt of that increased enforcement.

Glaring evidence of the connection some public authorities make between age of consent prosecutions and the reduction of welfare dependency is provided by a practice that recently came to light in California's Orange County. Over a two year period, social workers persuaded fifteen teenage girls (some as young as 13) to marry the men who impregnated them (some as old as 30) in order to escape the legal consequences of their sexual activity.[65] In each case, the marriage was authorized by a juvenile court judge.[66] These girls, deemed too young to choose sex, were nevertheless judged mature enough to choose marriage.

All but one of the girls involved were Latina, and some community workers defended the facilitation of these marriages on the basis that they were consistent with Mexican cultural values.[67] Larry Leaman, head of the Orange County Social Services Agency, said he believed that the age of consent to marry in Mexico is twelve.[68] In actual fact, it is eighteen.[69] Nina Perales asserts that rather than demonstrating cultural sensitivity, this invocation of Mexican traditions relied on cultural essentialism and stereotypes.[70]

In a similar case in Texas, 22-year-old Pedro Sotelo escaped prosecution for having sex with 14-year-old Adela Quintana when a family court judge ruled that their relationship constituted a common law marriage.[71] Although it was Texas law that provided this loophole, representations about Mexican culture persuaded the court and child welfare officials that the result was appropriate.[72] Perales notes that: "A great deal of the cultural information advanced in the public debate over Adela related her early sexual maturity and that of other Mexican women. These comments expanded on descriptions of rural Mexican life to invoke the

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65. Vincent Schodolski, *Pregnant Teens Urged to Marry Adult Partners*, TORONTO STAR, Sept. 21, 1996, at H3.

66. Kelly C. Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens By Their Statutory Rapists*, 61 ALB. L. REV. 237 (1997).

67. *Id.*

68. Cited in Nina Perales, *Cultural Stereotype and the Legal Response to Pregnant Teens*, *in* MOTHER TROUBLES: RETHINKING CONTEMPORARY MATERNAL DILEMMAS 88 (Julia E. Hanigsberg & Sara Ruddick eds., 1999).

69. *Id.*

70. *Id.* at 90.

71. *Id. See also* Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000).

72. Perales, *supra* note 68, at 87.

stereotype of the young Latina as full-bodied and oversexed."[73] She concludes that such images and stereotypes operate to render Adela and other young Latina girls "unexploitable by definition."[74]

That the economic interests of the state may trump concern for minors involved in intergenerational affairs is further borne out by a look at cases in which minor boys have fathered children with older women. In 1995, thirty-four-year-old Ricci Jones was convicted of unlawful sexual intercourse with a minor for her affair with 15-year-old Nathaniel J.[75] When she gave birth to a daughter and made an application for Aid to Families with Dependent Children, however, the San Luis Obispo County District Attorney's office sought child support and welfare reimbursement from Nathaniel J.[76] In determining that the County's action against Nathaniel J. did not violate public policy, the California Court of Appeal relied in part on the consent of which the "unlawful sexual intercourse" provision deemed him incapable.[77] Justice Gilbert asserted: "The law should not except Nathaniel J. from this responsibility because he is not an innocent victim of Jones's criminal acts. After discussing the matter, he and Jones decided to have sexual relations."[78]

Courts in other jurisdictions have held on similar facts that consent to intercourse is irrelevant to child support proceedings.[79] For example, Chief Justice Holmes of the Supreme Court of Kansas stated: "This State's interest in requiring minor parents to support their children overrides the State's competing interest in protecting juveniles from improvident acts, even when such acts may include criminal activity on the part of the other parent."[80]

Lack of cooperation on the part of minors provides problems for the prosecutors of age of consent violations, particularly when there is no pregnancy to provide evidence of the sexual activity on which the charges are based. This does not stop some prosecutors from proceeding, however. Rick Trunfio, an assistant district attorney in Syracuse, New York, remains undeterred in such circumstances. "That's what subpoenas are for," he said.[81] He has been known to

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73. *Id.*
74. *Id.*
75. County of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d. 843, 844 (Cal. App. 1996).
76. *Id.*
77. *Id.* at 844-45.
78. *Id.* at 845.
79. *See* Hermesmann v. Seyer, 847 P.2d 1273 (Kan. Sup. Ct. 1993); In re Paternity of J.L.H., 441 N.W.2d 273 (Wis. App. 1989).
80. *Id.* at 1279.
81. Quoted in Elton, *supra* note 18.

subpoena the diaries and love letters of girls involved in intergenerational affairs as well as the girls themselves.[82] Wisconsin prosecutors have employed similar methods.[83]

The way Massachusetts' authorities dealt with Michael Kennedy's alleged affair with his children's 14-year-old babysitter raises questions about the class dimensions of the foregoing. Kennedy did not deny the relationship, but he asserted that it had not become sexual until the girl turned sixteen.[84] After a ten-week investigation, Norfolk County District Attorney Jeff Locke announced that the case would not proceed because the babysitter, by then a 19-year-old college student, had refused to cooperate.[85] There was no talk of subpoenaing her diaries. This result may simply be attributable to differences in prosecutorial policy from state to state. It may have marked a reluctance to prosecute a member of the Kennedy family. But it is possible that the refusal to proceed demonstrated a deference to the privacy of this girl that likely would not have been shown had she not been from a wealthy and prominent family herself.

Same-Sex Sexual Activities

Thus far my discussion of age of consent laws has focused on heterosexual sex. In those states where sodomy laws criminalize consensual adult sex between members of the same sex, such activity involving teenagers is similarly judged.[86] Where there are no sodomy laws, same-sex sexual activity, whether between adults and minors or between teenage peers, may contravene age of consent laws. Very few such laws are restricted in application to heterosexual penetrative sex. Many statutes make reference to various sex acts including oral-genital contact and anal intercourse.

Obiter comments in the case of *In the matter of Lori M.* make clear that the reach of such statutes encompasses lesbian sex.[87] The case did not focus on age of consent laws, but rather involved

82. *Id.*

83. Sandy Nowack, *A Community Prosecution Approach to Statutory Rape: Wisconsin's Pilot Policy Project*, 50 DEPAUL L. REV. 865, 892 (2001).

84. *Prosecutor Halts Kennedy Sex Probe*, N.Y. TIMES, July 8, 1997.

85. *Id.*

86. At least 15 states maintain sodomy laws. Four of these are restricted to same-sex sodomy. The others cover anal and/or oral sex between heterosexual couples as well as gay and lesbian couples, but enforcement efforts more often focus on gay and lesbian couples. ACLU Website, Lesbian and Gay Rights, Crime and Punishment in America: State-by-State Breakdown of Existing Laws and Repeals, *at* http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=5028&c=41 (last visited Mar. 25, 2003).

87. In the Matter of Lori M., 496 N.Y.S.2d 940 (Fam. Ct. 1985).

determination of whether 15-year-old Lori M. should be adjudicated as a person in need of supervision because of her association with a 21-year-old lesbian named Ellen. The court found in Lori's favor but nonetheless issued the following warning:

> Although the respondent is free to choose her sexual orientation without interference from this Court, she is not free to act entirely as she wishes. Section 130.40 of the Penal Law provides, *inter alia*, that it is a Class E felony for someone twenty-one years of age or older to engage in deviate sexual intercourse with a person less than seventeen years of age. Notwithstanding the level of maturity reached by Lori, the Legislature has undertaken to proscribe such conduct in absolute terms insofar as children under seventeen are concerned. Accordingly, Lori is admonished in the strongest terms to avoid engaging in any conduct violative of the Penal Law of this State.[88]

The penalties for engaging in same-sex sexual activity in contravention of age of consent laws may be much harsher that those imposed for heterosexual sex. This latter point is amply illustrated by the case of 18-year-old Matthew Limon.[89] Shortly after his eighteenth birthday, Limon performed consensual oral sex on a nearly 15-year-old boy who was a fellow resident at a school for developmentally disabled youth.[90] Limon was convicted of sexual contact with a minor and sentenced to 17 years in prison.[91] Had Limon's partner been a 14-year-old female, Kansas' "Romeo and Juliet" law would have rendered the act a lesser crime for which the maximum sentence is one year.[92] With the support of the American Civil Liberties Union (ACLU), Limon is appealing his 17 year sentence.[93]

Beatrice Dorn, legal director of the Lamda Legal Defense and Education Fund, asserts that where the age gap between the parties is narrow, charges for violations of age of consent laws are much more likely to be filed when the partners are of the same sex.[94] In these circumstances, once again, it is often outraged

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88. *Id.* at 942-943.

89. ACLU Press Release, *"Romeo and Juliet Law" Gives Gay Teen 16 Years More In Prison than Heterosexual Would Serve*, Sept. 28, 2001, *available at* http://archive.aclu.org/news/2001/n092801a.html.

90. *BTW*, 9 HARV. GAY & LESBIAN REV. 6 (2002).

91. *Id.*

92. *Id.*

93. *Id.*

94. Donna Minkowitz, *On Trial: Gay? Straight? Boy? Girl? Sex? Rape?*, OUT,

parents who bring cases to the attention of the authorities. "[P]arents go nutso when they find out their kid has been having gay sex."[95]

Even if their sexual activity does not fall afoul of age of consent laws, gay and lesbian teenagers remain vulnerable as status offenders. In a 1996 article, Colleen Sullivan describes several cases in which gay and lesbian teenagers were declared "persons in need of supervision" as a result of their parents' disapproval of their sexuality.[96] Through this route, teenagers may end up in foster homes, group homes, or even secure facilities.[97]

Limitations of State Deference to Parents

In the foregoing, I have stressed the role of parents in the enforcement of age of consent laws. It should be noted, though, that the deference the state shows to parents in this context has limits. For example, in November 1997, Kathy Maness was charged under an Illinois statute for failing "to take reasonable steps to prevent the commission or future occurrence of criminal sexual abuse" of her child. [98] The sexual abuse in question involved consensual intercourse between Maness's 13-year-old daughter Lynlee Jo Otten and Lynlee's 17-year-old boyfriend Leonard Owens.

Lynlee and Leonard had been dating for several months when they began having intercourse. When the defendant mother became aware of the sexual nature of their relationship, she expressed her disapproval to the couple and discussed the implications of sexual intercourse with them. Unable to persuade her daughter to stop, Maness obtained birth control pills for her and allowed Leonard to stay over night at their home on several occasions. Manness said that "Leonard was a nice boy and was better than most of the younger boys Lynlee was hanging around with" and further that "it was safer for Lynlee to be having sex with [Leonard] at home than [with] somebody else out of the home environment."[99]

The Illinois Supreme Court ultimately dismissed the charges against Maness on constitutional grounds.[100] However, parental liability laws similar to the Illinois statute have proliferated across

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Oct. 1995, at 99, 145.

95. Cited in *id.*

96. Colleen A. Sullivan, *Kids, Courts and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 LAW & SEXUALITY 31, 32-34 (1996).

97. *See generally id.*

98. People v. Maness, 732 N.E.2d 545 (Ill. Sup. Ct. 2000).

99. *Id.* at 482.

100. *Id.* at 488.

the country and they may be used to punish parents for failing to control the sexual activities of teenagers as the community or the state sees fit.[101] Contributing statutes that render parents as well as other adults criminally liable for "contributing to the delinquency of a minor" may be put to similar use.[102]

III. THE POWER OF LAW

Juridico-Discursive and Disciplinary Models of Power

Michel Foucault contrasts two models of power: juridico-discursive and disciplinary. Drawing from his various texts, I've created the following table to illustrate his schema of power:[103]

JURIDICO-DISCURSIVE POWER	DISCIPLINARY POWER
Linked to monarchy, sovereignty, state apparatuses, and law.	Not identified with an institution or an apparatus, but used in such institutions as schools, prisons, factories, hospitals and so on.
Possessed like a commodity that can be transferred wholly or partially through a legal act.	Always in circulation, never appropriated or localized in anybody's hands.
Exercised from the top down in the same way at all levels, in a uniform and comprehensive fashion.	Operates through a multiplicity of minor processes, of different origin and scattered location that overlap, repeat, imitate, support one another, distinguish from one another, converge and gradually produce the blueprint of a general method.
Sudden, violent, discontinuous.	Subtle and continuous.
Defines subjects according to universal norms, specifies forbidden and permitted acts according to general categories, then condemns according to this binary.	Techniques include comparison, differentiation, hierarchization, homogenization, and exclusion.
Law, taboo, and censorship.	Normalization.

101. Susan S. Kuo, *A Little Privacy, Please: Should We Punish Parents for Teenage Sex?*, 89 KY. L.J. 135, 142 (2000).

102. *Id.* at 154.

103. In particular, I have relied upon: DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1975) [hereinafter DISCIPLINE AND PUNISH]; THE HISTORY OF SEXUALITY: AN INTRODUCTION, VOLUME I (1976); *Two Lectures*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977 (1980).

Crystallized in the state apparatus, the formulation of the law, and various social hegemonies.	Through process of ceaseless struggle and confrontation, it is transformed, strengthened or reversed.
Individuals are inert or consenting targets of power.	Individuals are simultaneously vehicles of and effects of power.
Effects obedience – subjects are repressed by the social order.	Constitutes subjects – subjects are fabricated in the social order.

The role of law in Foucault's schema has been a vexing question for legal scholars.[104] One interpretation is that his work is descriptive of a historical movement from one form of power to the other, suggesting that even in the legal arena juridico-discursive power has been completely supplanted by disciplinary power. An alternative interpretation is that Foucault's work asserts that the two models co-exist but that law is confined to the juridico-discursive strand while institutions such as the hospital, the school, and the factory, operate within the disciplinary category.

I do not believe that the first view is an accurate representation of the current make-up of legal power. Perhaps naked state coercion is not as much in evidence as it once was, but the repressive power of law remains alive and well in the present day. Nevertheless, I do not find the second interpretation of Foucault articulated above to be a convincing alternative to the first. I do not accept that the operation of legal power is confined to the juridico-discursive realm. As Duncan Kennedy asserts: "If one understands law as contradictory in all the areas in which Foucault thinks it is coherent, his model of conflict between legal and disciplinary power falls apart. The disciplinary is always already an element in legal power."[105] Within law, juridico-discursive power operates alongside disciplinary power; law is simultaneously repressive and constitutive.

Clearly, repressive power continues to be exercised through age of consent laws. Eighteen-year-old Matthew Limon has been

104. See, for example, ALAN HUNT & GARY WICKHAM, FOUCAULT AND THE LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE (1994); KENNEDY, *supra* note 1; Hugh Baxter, *Bringing Foucault into Law and Law into Foucault*, 48 STAN. L. REV. 449 (1996); Jerry D. Leonard, *Foucault: Genealogy, Law, Praxis*, 14 LEGAL STUD. F. 3 (1990); Nikolas Rose & Mariana Valverde, *Governed By Law?* 7 SOC. & LEGAL STUD. 541 (1998); Susan S. Silbey, *Making A Place for Cultural Analyses of Law*, 17 LAW & SOC. INQUIRY 39 (1992); Jonathan Simon, *"In Another Kind of Wood": Michel Foucault and Sociolegal Studies*, 17 LAW & SOC. INQUIRY 49 (1992); Victor Tadros, *Between Governance and Discipline: The Law and Michel Foucault*, 18 OXFORD J. LEGAL STUD. 75 (1998).

105. KENNEDY, *supra* note 1, at 118.

confined to prison for 17 years for a single act of oral sex with a consenting 14-year-old boy.[106] Sixteen-year-old Amanda Winkler was jailed for contempt of court for refusing to testify against her lover when he was tried for having consensual sex with her.[107] Kevin Gillson was put on probation for having consensual sex with his fiancée and the requirement that he register as a sex offender has forever affected his career path.[108] Teenage boys are jailed as juvenile delinquents for consensual sex with girls. Teenage girls are confined to secure facilities as status offenders for conduct regarded as promiscuous by parents or state officials. So too are gay, lesbian, and bisexual teenagers for same-sex sexual activity.

Undoubtedly many others suffer the coercive and repressive power of law without actually being subjected to punishment for transgressions. Here I am speaking of those who wish to engage in forbidden acts but desist. A teenage girl may not pursue a sexual relationship with an older man out of fear of the potential consequences for herself or for him. Or, she may pursue such a relationship, but the object of her desire may turn her down, again for fear of the consequences. A gay teenager may refrain from engaging in sexual activity lest his parents find out and report his lover to the police or set the wheels in motion to have him declared "a person in need of supervision."

While the impact of the repressive power of law is severe, its reach is limited. Most teenagers are sexually active but few come into direct conflict with the law as a result. This is not to say, however, that law has no impact on "normal teenage sex." This is where the disciplinary power of law comes to the forefront. Legal regulation in its disciplinary guise has a role in constituting teenage sex and sexuality. Legal regulation outlaws the fringes and gives shape to the middle. Here law operates not by taboo and censorship, but by normalization.

Law and Social Construction

Mary Jo Frug suggests that laws which prohibit or promote certain forms of sex, and laws that regulate the physical and economic conditions in which sex takes place, combine to construct a normative version of female sexuality that is monogamous, heterosexual, and passive.[109] Employing her methodology in the

106. *BTW*, *supra* note 90.
107. Harrell, *supra* note 25.
108. *Excessive*, *supra* note 17.
109. MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 125 (1992).

realm of the legal regulation of teenage sex, what does the overall picture look like when we attempt to fit together a patchwork of legal prohibitions and permissions emanating from age of consent laws? What sort of sexual subjects emerge?

On their face, age of consent laws suggest that the only appropriate teenage sexuality is an absence of sexuality. They form a legislated latency period, sexuality held in abeyance until the age of majority is reached. Age of consent laws that deny any capacity to consent even between teenage peers convey this message with particular force.

However, the notion that no sexual activity is appropriate during the teenage years is dramatically undercut by elements of legal regulation that can be characterized as mandating a certain level of sexual activity or at least a certain type of sexual expression. Although age of consent laws are founded on a presumption of the inability of persons below a certain age to consent to sex, enforcement patterns frequently suggest otherwise. For example, some jurisdictions have policies of not prosecuting consensual sex between peers. However, the operative definition of "consensual" may allow for considerable violence and coercion. The implicit message is that the consent of certain girls to certain boys is presumed on the basis of class and racial stereotypes.

The laughing off of complaints by male victims is a complement to this. Here the presumption is that boys always want heterosexual sex and cannot be sexually exploited by women. Prohibitions of gay and lesbian sex, whether under age of consent laws and sodomy laws or under the rubric of status offenses, may also compel heterosexual activity as a cover. This web of regulation effectively mandates a certain amount and type of sexual activity on the part of both teenage boys and girls.

For the most part, though, the enforcement patterns of age of consent laws operate neither to prohibit nor to mandate sexual activity on the part of teenagers. Rather, they can be described as extending legal permissions for sexual activity, though these permissions are always conditional. They permit sexual activity provided it comports with particular societal or parental values.

The selective enforcement of age of consent laws leaves considerable space for teenage sex, provided that it does not transgress boundaries based on age, sex, class, and race. Heterosexual sex between white, middle class peers is unlikely to generate state intervention. This is "normal" teenage sexuality. Sex between a white middle class girl and a working-class boy or a black boy, or an older man is likely to generate parental outrage

that will trigger state intervention. Sex between a poor or working-class girl of color and a teenage boy or even an older man is unlikely to generate state intervention unless the welfare rolls are threatened by a resulting pregnancy. Teenage sex is perhaps a privilege of those who are able to avoid, or are wealthy enough to bear, the consequences. Sex between a teenage boy and an older woman, provided that their age difference is not too dramatic, is a rite of passage. He is Benjamin Braddock to her Mrs. Robinson. Sex between two boys or two girls, on the other hand, is likely to generate parental outrage and state intervention.

Other aspects of age of consent laws make space for the development of particular versions of teenage sexuality. One such version of approved teenage sexuality is that of a graduated, age-appropriate sexuality. In this version, it is expected that teenagers will experiment with a variety of sexual acts as they move through puberty and into adulthood, beginning with less consequential activities like kissing and petting, and culminating in vaginal intercourse at the age of majority. This view clearly emerges from age of consent laws in the many states that set the age of consent lower for various forms of sexual contact than for intercourse.[110]

Another version of approved teenage sexuality is that of a responsible sexuality, one that takes care to avoid the spreading of disease and the expenditure of public funds. The centrality of concern for welfare funds to enforcement of age of consent laws bolsters this vision of a teenage sexuality that is to be controlled rather than repressed altogether.

For the most part, age of consent laws permit a teenage sexuality within limits defined by parents. Here the contours of approved sexual activity are vague, as they depend upon the values of the parents in question. This model can be said to channel teenage sexuality toward the values of parents, thereby reproducing the existing social order. For the most part, teenagers can engage in sexual activity without fear of prosecution under age of consent laws or of sanctions for status offenses so long as their parents approve or at least overlook such activity.

The surveillance of parents of teenagers sets limits on parental discretion however. If parents do not channel their children's sexuality appropriately in so far as the community and the state are concerned, those parents may be brought into line. The state may

110. ALA. CODE § 13A-6-69 (2002) (age of consent for sexual activity is 16); TEX. PENAL CODE ANN. § 21.11 (2003) (age of consent for sexual activity is 17); VA. CODE ANN. § 18.2-63 (2003) (age of consent for sexual activity is 15). *But see* WASH. REV. CODE ANN. § 9A.44.093 (2003) (age of consent for sexual activity is 18).

determine that there are some things no child should be permitted to do regardless of the wishes of parents. Further, the state may step in to regulate teenagers against the wishes of parents when their sexual activity is perceived as a threat to the public purse.[111]

A Blueprint of Normal Teenage Sexuality

The foregoing exercise casts into sharp relief the complex and contradictory ways in which age of consent laws operate. The same or similar rules can be invoked to convey very different messages. This reflects divergences in regulation from one jurisdiction to the next, enforcement patterns that depart from the letter of the law, and the operation of legal power through institutions and actors who use it in service of divergent ideological projects.

These mixed messages do not, however, add up to anarchic confusion. In fact the composite picture that they form illustrates disciplinary power in action much as Foucault has described it in other contexts: "a multiplicity of often minor processes, of different origin and scattered location, which overlap, repeat, or imitate one another, support one another, distinguish themselves from one another according to their domain of application, converge and gradually produce the blueprint of a general method."[112]

Age of consent laws contribute to the production of a blueprint of normal teenage sexuality that resides at the intersection of competing conservative and liberal orthodoxies. This vision of normal teenage sexuality is not codified in law so as to produce a list of forbidden acts (not normal) and a list of permitted acts (normal) that teenagers are universally compelled to observe. Rather, the diffuse body of sexual regulation, of which age of consent laws are a part, operates to compare, differentiate, hierarchize, homogenize, and exclude. Its effect is not simply repressive but constitutive.

With increasing sexual activity tolerated among teenagers, a simple dividing line between sex (bad) and no sex (good) does not suffice. The line has perhaps never been that stark, at least for boys whose heterosexual adventures have often been winked at. For girls, the virgin-whore dichotomy has flattened out into a continuum; rather than attempting to keep to the virgin side of the dichotomy, girls expend considerable energy to attain a safe middle ground between virgin and whore. Distinctions are drawn between

111. *See supra*, notes 52-85.

112. DISCIPLINE AND PUNISH, *supra* note 103, at 138.

good and bad sex based upon which sexual acts are engaged in, at what ages, between which partners, and in what circumstances.

Hierarchies of Sexual Value

In her articulation of hierarchies of sexual value, Gayle Rubin divides sexuality into "the charmed circle" of good, normal, natural, blessed sexuality, and "the outer limits" of bad, abnormal, unnatural, damned sexuality.[113] The charmed circle includes: heterosexual, married, monogamous, procreative, non-commercial, in pairs, in a relationship, same generation, in private, no pornography, bodies only, and vanilla. The outer limits include: homosexual, unmarried, promiscuous, non-procreative, commercial, alone, in groups, casual, cross-generational, in public, pornography, with manufactured objects, and sadomasochistic.[114]

Nearly all teenage sex falls within the outer limits in Rubin's schema on the basis of the distinction drawn between married and unmarried sex alone. Nevertheless, much of it also falls squarely into the "major area of contest" category that straddles Rubin's subsequent exploration of the dividing line between "good sex" and "bad sex."[115] Drawing upon the distinctions, hierarchies, and exclusions that are generated by the legal regulation of teenage sex, it is possible to diagram the charmed circle and outer limits of teenage sexuality, and to thereby explore the dividing line between good teenage sex and bad teenage sex.

The center of the charmed circle would be made up of heterosexual sex between white, middle-class teenage peers who are engaged in monogamous relationships. Various sexual acts short of intercourse would be okay between younger teenagers, while intercourse would be okay for those who have attained a certain age and have taken appropriate precautions to avoid pregnancy and STD's.

While sexual activity between minority and poor teenagers, even cutting across generational lines, has long been tolerated and, indeed, expected, it remains resolutely outside the circle. It is tolerated and expected not because it is judged "normal" but because it is judged "normal for them" in accordance with sexualized race and class stereotypes. The perceived excesses of these communities have served to define the boundaries of the

113. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER 267, 281 (Carole S. Vance ed., 1993).

114. *Id.*

115. *Id.* at 282.

circle. Tolerance of such activity has further abated, however, given the current emphasis on protection of state funds from the procreative activity of minority and poor teenagers.

Teenage sex which crosses race, class and age lines falls outside of the circle, but different combinations of partners and identities will dictate a place closer or farther from the boundary. There is greater tolerance of relationships in which the class or race status of the male is considered to be higher than that of the female, say a white boy and a black girl, than for the reverse, say a black boy and a white girl. There is greater tolerance for cross-generational sex between women and boys than between men and girls.

Same-sex teenage sex falls outside of the circle but, again, different manifestations of it may fall farther outside than others. A chaste gay or lesbian sexual identity falls closer to the boundary than a relationship on the principle that gay and lesbian sexual activity, if engaged in at all, ought to be reserved for adults. Monogamous gay and lesbian relationships are closer to the boundary than casual and promiscuous encounters. Finally, protected sex is closer to the boundary than unprotected sex.

IV. TEENAGE LEGAL CONSCIOUSNESS

Though large numbers of teenagers engage in sexual activity that violates at least the letter of the law of many jurisdictions, very few are likely to end up in a courtroom answering for their transgressions. In what sense does the law impact on the sex lives of those teenagers who are never hauled into a police station, a courtroom or a jail cell?

In a recent book, Patricia Ewick and Susan Silbey ask: "How do people experience and interpret law in the context of their daily lives?"[116] Turning their question to my own more narrow purposes, I ask: How do teenagers experience and interpret law in the context of their sexual lives? Once again, age of consent laws provide an excellent lens through which to examine teenage awareness of state regulation of their sex lives.

In the flurry of activity post-1996 to strengthen and to heighten enforcement of age of consent laws, state officials began with the assumption that neither prospective adult perpetrators of statutory rape nor prospective teenage victims were aware of the existence of

116. PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 33 (1998).

age of consent laws. As a consequence, several states mounted extensive advertising campaigns.

In television and radio ads that aired in California, a young man said, "Nobody told me that sex could be against the law. Statutory rape? Never heard of it."[117] An authoritative voiceover intoned, "Sex with a minor is a major crime . . . . If you're an adult and have sex with a minor – someone under 18 – you'll do major time."[118] The ad ended with the sound of a jail door slamming shut.[119] In New York's Monroe County, more than 100 billboards were erected proclaiming the question: "What Kind of Man Sleeps With a Teenage Girl?" and answering, "Criminal," or "Rapist."[120] In smaller letters at the bottom edge of the billboards an explanation appeared: "Sex with girls under 17 is RAPE."[121] In Connecticut, billboard, television, and radio ads depicted men in prison with slogans such as: "Rob the cradle and get yourself a brand new crib."[122] In Georgia, when the age of consent was raised from 14 to 16, wallet-sized reminders were distributed to more than 400,000 men.[123] "SEX" was printed in bright red letters on the front of the card; information about disease, pregnancy, child support and prison sentences for age of consent violations was provided on the back.[124] Lastly, California's Education Code requires that school sex education programs advise students that it is a violation of criminal law for anyone to have sexual intercourse with a person under the age of 18.[125]

Several states also mounted innovative campaigns to enlist the help of the public in the prosecution of age of consent violations. In Arizona's Pinal County, motorists who were pulled over were given copies of a glossy pamphlet along with their tickets. The pamphlet read, in part: "Fathers, mothers, grandparents, aunts, uncles, cousins and friends of female children who are being victimized have got to decide whether these acts are going to be tolerated or

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117. Cheryl Wetzstein, *California Fights Statutory Rape With Media, Cops: Welfare Act Drove Stiffer Enforcement*, WASH. TIMES, Sept. 17, 1997, at A2.

118. *Id.*

119. *Id.*

120. Patrick Graham, *Adolescent Girls See Hunk, But Police See a Child Molester: Arizona Pamphlet Enlists Motorists Against Predatory Male Adults*, HOUS. CHRON., Aug. 31, 1997, at 39.

121. *Id.*

122. Oberman, *supra* note 9, at 745.

123. Associated Press, *State's SEX Cards Remind of Rape Law: Age of Consent 16, not 14, Men Told*, FLORIDA TIMES-UNION, Jan. 11, 1998, at B1.

124. *Id.*

125. Michael John James Kuzmich, *Chapter 55: Tying Up Loose Ends in California's Statutory Rape Law*, 30 MCGEORGE L. REV. 585, 588-89 (1999).

not. Predatory males should be punished for their behavior. The legal system needs community support to carry out punishment."[126]

Claudia Swing, an investigator with California's San Bernardino County District Attorney's office, responded to the challenge of uncooperative minors and tight-lipped family members and neighbors by turning to the Internet. She created the first website in the nation to name statutory rape suspects.[127] The website features pictures of several suspects along with details about their alleged crimes and last known whereabouts.[128] In addition to its appearance on the Web, the most-wanted list has been aired on local cable channels and has been posted in liquor stores, libraries, and malls.[129]

Even without this recent barrage of media messages about statutory rape, I am inclined to think that age of consent laws have a place in teenage consciousness. Teenagers are acutely aware of all the ages that mark rites of passage. They keep careful track of the age at which they can obtain drivers' licenses and the age at which they can legally drink alcohol. While the average teenager is unlikely to have a detailed knowledge of the age of consent law in place in his or her state, he or she is quite likely to be aware of the existence of a legal age of consent to sex. My assumption here is bolstered by the assertion of Mike Hardcastle, an Internet teen advice columnist, that 30% of the questions he receives relate to the age of consent for sex.[130]

Further confirmation can be found in the longstanding currency of the slang term "jailbait" in popular culture, from its use as the title of a 1982 Aerosmith single to its use as the title of MTV's 2000 made-for-cable movie, this time embellished with an exclamation point: "Jailbait!" In the former, Steven Tyler snarls: "Hello baby, yeah it's me/ There'll be no judge, no third degree/ Oh, jailbait/ Oh, j-j-j-jailbait."[131] The latter, which attracted 2.2 million viewers when it first aired in April 2000, centers on the adventures of 18-year-old Adam Fisher, the most popular senior in Gaitlin High. His

126. Graham, *supra* note 120.

127. Tim Grenda, *'Most Wanted' Hunted on Web: S.B. County is Tracking Statutory Rape Suspects the Way Some DAs Find Child Support Deadbeats*, PRESS-ENTERPRISE, July 18, 2000, A01.

128. See website, Wanted for Criminal Statutory Rape, *supra* note 54.

129. Grenda, *supra* note 127.

130. Teen Life Q&A Special: FAQ on the AOC: The Most Frequently Asked Questions Teens Have About the Age of Consent, *at* http://teenadvice.about.com/library/weekly/aa090701a.htm (last visited March 25, 2003).

131. The song, written by Steven Tyler and Jimmy Crespo, was the first track on Aerosmith's 1982 album, *Rock in a Hard Place*.

steady girlfriend Amber is a virgin who is waiting until marriage to have sex. Rather than waiting with her, Adam has sex with 15-year-old sophomore Gynger in the bathroom of the local Little Chicken Restaurant. When Gynger gets pregnant, Assistant District Attorney Lydia Stone prosecutes. She is running for mayor and she decides to make an example of Adam as a campaign issue by seeking the maximum sentence of 40 years imprisonment.

The movie is billed as a comedy, but it has pretensions of simultaneously serving as a cautionary tale about the consequences of teenage sex. Its first airing was followed by a question and answer session with "Dr. Drew," the sex advice guru of MTV's "Loveline" program. And for a time, an age of consent chart was posted on MTV's website.

An additional source of information for teenagers about age of consent laws is the media coverage of high profile cases, some of which I discussed earlier. The prosecution of Joey Buttafuoco for the statutory rape of Amy Fisher was extensively covered in the news and on infotainment shows like "Hard Copy" and "A Current Affair." So too was the case of Mary Kay Letourneau and Villi Fualaau. And of course, each case generated a plethora of made-for-TV movies. Such sources may not provide a very accurate picture of how age of consent laws are ordinarily applied; but these media depictions of law provide building blocks for the formation of a teenage legal consciousness.[132]

Through such sources teenagers learn something of the legal framework within which their own sexual activities take place. They get a sense of when state power can be brought to bear to curtail their consensual sexual activities. They also get a sense of when the law is not likely to protect them from non-consensual sexual interactions. For example, teen-orientated TV dramas such as the once popular "Beverly Hills 90210" inevitably devote at least an episode to the issue of date rape. While, once again, such depictions of law are not altogether accurate, messages about who is and is not likely to be judged deserving of legal protection come through loud and clear.

Popular culture mediums such as movies, TV shows, popular music, teen magazines, and websites are more likely sources of familiarity with the criminal law than police officers, lawyers, and judges. When it comes to forms of sexual regulation carried out by

132. *See* Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185 (1987) (provides a broad discussion of the effect of such mediated images on American culture).

parents and school authorities, however, most teenagers experience these very directly in their daily lives. They very quickly learn what the rules are and what the consequences of breaking them are, either through their own run-ins with authority figures or through observing the experiences of their peers.

Teenagers evidence awareness of law and of themselves as legal subjects in their interactions with one another and with the aforementioned authority figures. They sometimes invoke law in the service of conformity when attempting to bring their peers into line. At other times they invoke legal rights to protest rules they consider to be unfair. For example, a 15-year-old student phrased her objection to Tudor Grange School's ban on hugging as follows: "Most of us in Year 10 are just 12 months away from the legal age of consent and I don't see why holding hands is offensive."[133]

Teenagers are aware of themselves as targets of regulation, and they are aware of themselves as legal actors whether in conforming or resisting roles. Law operates simultaneously as "an interpretive framework and a set of resources with which and through which the social world . . . is constituted."[134] It serves as a source of the sexual morality by which teenagers govern their own sexual behavior and police that of their peers.

The multi-layered impact of the legal regulation of teenage sex is beautifully illustrated by the successive billboard campaigns mounted by Monroe County's "Not Me Not Now" program between 1996 and 1999 in New York state.[135] The first set of billboards were as described above. They baldly announced that "Sex with girls under 17 is RAPE" and labeled men who sleep with teenage girls "criminals" and "rapists."[136] The only illustrations that appeared on the billboards were grainy black and white photographs of just the eyes of, presumably, perpetrators of statutory rape. Although the rectangles that frame the eyes give the effect of horizontal bars rather than vertical ones, the impression is one of confinement. The full weight of the repressive power of the law is invoked to strike fear in the hearts of those who would violate it.

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133. Steve Swingler, *No Terms of Endearment: School Bans Pupils Hugging or Touching*, EVENING MAIL, July 17, 1999, at 5.

134. EWICK & SIBLEY, *supra* note 116, at 23.

135. The "Not Me Not Now" program has since been licensed for use in various counties in Connecticut, Florida, Maine, New Hampshire, Ohio, and Virginia, so presumably the billboards will soon show up in those states as well. Not Me Not Now Website, *at* http://www.notmenotnow.org (last visited March 25, 2003).

136. Not Me Not Now Billboard, *available at* http://www.notmenotnow.org/2001/media.cfm?subsubpage=29&subpage=6 (last visited March 25, 2003).

The second set of billboards, erected in 1997, were aimed at the parents of potential victims of statutory rape. Each billboard featured a black and white photograph of a pregnant teenage girl. The girls were very young, very pregnant and had very glum expressions on their faces. One was soaring on a swing in a playground, while another perched on school bleachers conspicuously alone. These settings, together with the short socks, sneakers, pinafores and shorts in which they were clad served to emphasize their youth. The billboards read: "YOU DIDN'T BRING HER UP TO LET AN OLDER MAN BRING HER DOWN", with the following sentences emblazoned across the bottom in red: "SHE'S YOUR KID. PROTECT HER."[137] Here parents were exhorted to assist in upholding the law, and to use their own power over their children to accomplish the same ends.

The most recent set of billboards, erected in 1999, target teenagers themselves. These picture full color photographs of happy, laughing teenagers in brightly-lit leisure settings such as an outdoor basketball court or a beach. The message reads: "Because my dreams won't wait."[138] Beneath the message the "Not Me Not Now" logo appears, and in tiny letters beneath that, the following line: "What smart kids say to sex."[139] There is no hint of law's repressive power here. It is left up to teenagers themselves to be smart and make appropriate choices, and the smart choice is to say "no."

The "virginity rules" campaign in Texas similarly attempts to enlist teenagers in governing their own sexual behavior. The billboards erected there show groups of happy, healthy teenagers – safety in numbers presumably – alongside a logo that spells out "virginity" in large white letters with the words "SAVE IT" superimposed in red.[140] In the top right hand corner of each billboard, an engagement ring and a wedding ring appear accompanied by messages such as, "I will when 'I do,'" or "*True* Sexual Freedom."[141] Along the bottom edge each billboard proclaims, "It's YOUR right . . . decide now."[142]

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137. Not Me Not Now Billboard, *available at* http://www.notmenotnow.org/2001/media.cfm?subsubpage=31&subpage=6 (last visited March 25, 2003).

138. Not Me Not Now Billboard, *available at* http://www.notmenotnow.org/2001/media.cfm?subsubpage=57&subpage=6 (last visited March 25, 2003).

139. *Id.*

140. Virginity Rules Billboard, *available at* http://www.virginityrules.com/billboards/marshall.html (last visited March 25, 2003).

141. Virginity Rules Billboard, *available at* http://www.virginityrules.com/billboards/true_sexual_freedom.html (last visited March 25, 2003).

142. *Id.*

In fact, under Texas age of consent laws, teenagers do not have the right to decide whether or not to engage in sex in all circumstances.[143] Nevertheless, by presenting sex as a personal decision, the billboards imply that the state will not step in and dictate what teenagers can and cannot do. Rather, teenagers are invited to make their own choice and, again, the right choice is not very subtly indicated.

V. GOVERNING THE SELF

Adolescence is often treated as synonymous with "raging hormones." This characterization makes adolescence appear to be biologically determined rather than culturally constructed.[144] However, the notion of a natural, albeit turbulent, biological transition from childhood to adulthood does not fit very well with the descriptions teenagers provide in ethnographic studies about the effort they expend during adolescence toward developing their sexual identities.

Simone de Beauvoir famously said that "one is not born but becomes a woman."[145] The work that adolescent girls put into developing proper feminine bodies and identities has been well documented. For example, in *The Body Project*, historian Joan Jacob Brumberg traces the shifting preoccupations of American girls over the past 150 years from the corsets and "good works" of the nineteenth century to the plucking, waxing and dieting of the present day.[146]

The transition of boys into adulthood is often presumed to take a more natural path.[147] The sort of male adolescent behavior that provokes concern is usually violence-related fitting rather well into the "raging hormones" theory. The struggles of girls with, for example, anorexia demand a different sort of analysis. But when boys are questioned about what it takes to become a man, they too emphasize work and effort rather than a straightforward biological transformation.

In 1987-88, Blye Frank questioned a group of teenage boys about definitions of masculinity, who measured up to such

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143. *See* TEX. PENAL CODE ANN. § 21.11 (2003).

144. NANCY LESKO, ACT YOUR AGE!: A CULTURAL CONSTRUCTION OF ADOLESCENCE 3 (2000).

145. SIMONE DE BEAUVOIR, THE SECOND SEX (1989).

146. JOAN JACOBS BRUMBERG, THE BODY PROJECT: AN INTIMATE HISTORY OF AMERICAN GIRLS (1998).

147. This may be in part due to the failure of dominant strands of feminism to deconstruct masculine sexuality with the same thoroughness as they have feminine sexuality.

definitions, and why. The list of markers of masculinity that the group came up with was not particularly surprising, summed up by an interviewee named Trent as follows: "Some guys use cars, some guys use weights, some guys do it through what they eat, how they stand, the deep voice. Some guys see how much alcohol they can drink, and some use girls. There are a lot of different ways to keep at the top."[148]

What was eye opening was the way the interviewees described their relationship to the ideal. It was not a simple matter of fitting the description or not; they spoke about the effort required to attain or maintain the ideal. Their responses were peppered with such statements as:

> "You have to keep trying" (Jim); "You've got to be always meeting the standard. It's never finished" (Evan); "You're always working on it, so if you fall down in one area, you try to make up for it in another" (Thomas); "You have to make strategies"(Luke); "You have to work at it all the time" (Trent); "It isn't like it just happens. It takes a lot of time to be sure that you are always doing it right" (Trent).[149]

In *The Use of Pleasure*, Foucualt breaks morality into two elements: codes of behavior and forms of subjectivation. The two are always intertwined, though in some systems of morality the former is emphasized, in others, the latter. Where the former is emphasized, subjectivation may take a quasi-juridical form "where the ethical subject refers his conduct to a law, or set of laws, to which he must submit at the risk of committing offenses that may make him liable to punishment."[150] Where the latter is emphasized, however, the subject is required to "act upon himself, to monitor, test, improve, and transform himself."[151]

In the realm of sexual regulation, teenagers are not simply pawns of the state, schools, or parents. They are players who participate in the contest, sometimes resisting law and sometimes conforming to it, leaving their imprint one way or the other.

The complex and contradictory nature of the legal regulation of teenage sex leaves teenagers considerable space within which to maneuver. This space does not offer freedom from regulation, however, so much as freedom to self-regulate. It offers teenagers an

148. Blye Frank, *Queer Selves/Queer in Schools: Young Men and Sexualities*, *in* SEX IN SCHOOLS: CANADIAN EDUCATION AND SEXUAL REGULATION 44, 50 (Susan Prentice ed., 1994).

149. *Id.* at 49-50.

150. *Id.* at 29-30.

151. *Id.* at 28.

opportunity to engage in the sort of subjectivation described by Foucault in the above quotation, acting upon themselves, monitoring, testing, improving, and transforming themselves.

Teenagers engage in what Foucault calls *ethical work*: work "that one performs on oneself, not only in order to bring one's conduct into compliance with a given rule, but to attempt to transform oneself into the ethical subject of one's behavior."[152] In so doing, they take an active role in their own constitution as sexual subjects. Many teenagers, male and female, carefully govern their appearances, their thoughts, their talk, their behavior, and their sexual activities in this way. They do so not simply to avoid falling afoul of the law, though undoubtedly some have this motive. They do so because they have embraced and helped to create the dominant legal/moral code. They work to form themselves into the sort of sexual subjects that do not exceed the boundaries of normal sexuality.

Despite substantial variation between individuals and groups, there does appear to be a dominant sexual morality against which teenagers judge themselves and one another. I have distilled the following tenets of this dominant sexual morality from a range of surveys and ethnographic studies.[153] Teenagers are relatively liberal about unmarried vaginal intercourse, so long as it occurs in long-term, monogamous relationships. For the most part, they maintain a double standard with respect to one-night stands. These are okay for boys, but not for girls. Attitudes to sexual activity other than vaginal intercourse are mixed. Some such sexual practices are judged an appropriate prelude to the more

152. MICHEL FOUCAULT, THE USE OF PLEASURE: THE HISTORY OF SEXUALITY 27 (1990).

153. *See* DONNA EDER, SCHOOL TALK: GENDER AND ADOLESCENT CULTURE 114 (1995); SUE LEES, RULING PASSIONS: SEXUAL VIOLENCE, REPUTATION AND THE LAW (1997); MAIRTIN MAC AN GHAILL, THE MAKING OF MEN: MASCULINITIES, SEXUALITIES AND SCHOOLING 92 (1994); MIKE A. MALES, THE SCAPEGOAT GENERATION: AMERICA'S WAR ON ADOLESCENTS 46 (1996); SUSAN MOORE & DOREEN ROSENTHAL, SEXUALITY IN ADOLESCENCE 5, 8, 11, 12 (1993); PEGGY ORENSTEIN, SCHOOLGIRLS: YOUNG WOMEN, SELF-ESTEEM, AND THE CONFIDENCE GAP 51 (1995); DAVID PLUMMER, ONE OF THE BOYS: MASCULINITY, HOMOPHOBIA, AND MODERN MANHOOD 145 (1999); LYNN E. PONTON, THE SEX LIVES OF TEENAGERS: REVEALING THE SECRET WORLD OF ADOLESCENT BOYS AND GIRLS 133 (2001); LEORA TANENBAUM, SLUT!: GROWING UP FEMALE WITH A BAD REPUTATION 3 (2000); SHARON THOMPSON, GOING ALL THE WAY: TEENAGE GIRLS' TALES OF SEX, ROMANCE AND PREGNANCY 217 (1995); RENEE T. WHITE, PUTTING RISK IN PERSPECTIVE: BLACK TEENAGE LIVES IN THE ERA OF AIDS 82 (1999); Kathleen Holland Bollerud et al., *Girls' Sexual Choices: Looking For What Is Right: The Intersection of Sexual and Moral Development*, *in* MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL 274 (Carol Gilligan et. al. eds., 1990); Lisa Remez, *Oral Sex Among Adolescents: Is it Sex or Is It Abstinence?*, 32 FAM. PLANNING PERSP. 298 (2000); Karen S. Peterson, *Interracial Dating: For Today's Teens, Race 'Not an Issue Anymore'*, USA TODAY, Nov. 3, 1997, at 01A.

significant act of intercourse. Others are judged to be "kinky" and inappropriate regardless of context. There is a substantial degree of tolerance for forced sex in particular circumstances.[154]

As noted previously, girls are not restricted to a virgin-whore dichotomy; rather, they have to negotiate a continuum between too much sex and not enough. They must be sexual enough to establish heterosexuality, but not so sexual that they are deemed sluts. Boys seem to have a starker choice in either attaining or falling short of masculinity. They must display their heterosexuality aggressively lest they be labeled sissy, faggot or queer. To the extent that their heterosexual behavior is constrained, it is in relation to particular partners; they may govern themselves more carefully in relation to "nice" girls.

Both girls and boys are expected to be attentive to the economic consequences of their acts. They must take care not to produce a child that is dependant on the state. On this point, however, though boys are expected to bear the consequences when a pregnancy results by paying support to the children that they father, the primary responsibility for preventing such pregnancies in the first place seems still to rest with girls.

As to choice of partners, the choice of a same-sex partner generates strong disapproval. The choice of an older partner, provided the age gap is not too great, is generally not controversial. Finally, while teenagers are quite liberal about interracial dating in the abstract, they are much less so when it comes to crossing particular racial lines. The division between black and white teenagers, for example, remains deeply entrenched.

In accordance with this dominant morality, many teenagers end up governing themselves essentially along the same lines as the state would. Most of the major elements of state regulation and of self-regulation match up, and the areas that are contested in law are also those that are contested between teenagers.

For example, many teenage girls express a conviction that there is a "right" age at which to embark on intercourse and that in the preceding years it is appropriate to engage in a sequence of sexual activities of increasing significance. Though the age that they judge to be the right one may not precisely overlap with the age of consent in their jurisdiction, the values that underpin each match up.

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154. A recent study found that 32% of girls said that forced sex was okay if pair had been a couple for a long time while 40% of boys said that forced sex was okay if guy had spent a lot of money on girl in date. BRUMBERG, *supra* note 146, at 190.

Some girls elect to avoid any sexual activity on the theory that it will lead inevitably to intercourse. Ellen described her discomfort at one persistent boy: "I didn't like it. You know, well, I didn't want it to happen . . . sex, or kissing, or whatever, my feelings, cause, you know, it wasn't the right time, you know."[155]

Other girls embrace the idea that it is appropriate to lead up to intercourse gradually by first engaging in a range of sexual activities that they view as less significant. Renée White says of one of her interview subjects: "Gerry strongly believes that 'making out' has to occur for some time before she would consider 'going further, as far as actual sex.'"[156]

Some girls divide sexual activities into categories: those that they feel are appropriate in casual relationships and others that they reserve for long-term, committed relationships. Deborah Haffner, President of SEICUS, interviewed several 11th and 12th grade girls and found that "they view oral sex as 'something you can do with someone you're not as intimate with, while intercourse is, by and large, reserved for that special person.'"[157] They consider oral sex to be safer and less consequential, both physically and emotionally, than intercourse.

Still others do not regard oral sex as sex at all.[158] Some abstinence-only sex education programs present abstinence primarily as a mode of birth control, thereby feeding into the prevalent notion that vaginal intercourse is the only act that truly constitutes "sex." Thus some teenage girls engage in all activities short of vaginal intercourse while still thinking of themselves as abstinent.[159]

On the other hand, for some, "being called a 'virgin' or appearing virginal is an insult that is akin to being called immature or unworldly by one's peers. It is commonly viewed as a negative

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155. Deborah L. Tolman, *Adolescent Girls' Sexuality: Debunking the Myth of the Urban Girl*, *in* URBAN GIRLS: RESISTING STEREOTYPES, CREATING IDENTITIES 256, 262 (Bonnie J. Ross Leadbeater & Niobe Way eds., 1996).

156. WHITE, *supra* note 153, at 92.

157. Quoted in Remez, *supra* note 153, at 442.

158. A 1991 survey of college undergraduates found that 59% did not believe that oral sex qualifies as sex, and 19% thought the same of anal sex. A 1999 survey of 15-19 year-olds conducted by Seventeen magazine found that 49% considered oral sex to be "not as big a deal as sexual intercourse" while 40% said it didn't count as sex at all. Both surveys cited in Remez, *id.* Some of White's interview subjects expressed this view as well. WHITE, *supra* note 153, at 88.

159. A study of college undergraduates found that 61% classed mutual masturbation as abstinent behavior, 37% said this of oral sex, and 24% thought the same of anal intercourse. Indeed, a recent survey of sex educators revealed that even they remained divided on the question of which sexual behaviors, if any, fall within the category of abstinent. Remez, *id.*

personality trait, as a quality that is intrinsic to one's identity or as a burden."[160] The trick then is not to avoid intercourse until marriage. It is to figure out when the time is right. Most often this judgment is based on attaining a certain age and being involved in a serious relationship.

Harriet, a high school senior, opined:

> I think that it is right if it is the right time – I think then you should make your decision, but I think [only] if two people care about each other, regardless of age, unless you are very, very young, or preadolescent. I think when you are sixteen or seventeen, I think you can make your own decisions and take responsibility for it. And I think if you choose to have a relationship that is going to be close and caring, I think that sex will probably have a major part in it. And I think it is important to both individuals if they care about each other. But just for the heck of it – I don't think it is right.[161]

Melissa, a popular high school senior in Sheepshead, stated the case more bluntly:

> There's a cut off point there. I think if you go to bed with somebody because it's love and you're going out with a guy for awhile, I think then its all right. But, um, people who just go to bed with other people just for, uh, something to do, you know, like, uh, on a date or something, that's a whore.[162]

Some girls may nevertheless feel an obligation to satisfy their casual dates. This creates tension as the "good girl" impulse to please fights with the "good girl" determination not to have sex outside a committed relationship. Melissa spoke of feeling guilty for saying "no" to her dates when she did not want to have sex with them because, "you feel like you ruined his night, you know?"[163]

Even within relationships, many girls make distinctions between natural and unnatural or normal and kinky sexual acts. They engage in the former and avoid the latter. In the course of her fieldwork in the community of Sheepshead, Joyce Canaan was told the story of Debbie, "the whore of Sheepshead High," over and over again by different groups of teenagers, many of whom had no

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160. WHITE, *supra* note 153, at 88.

161. Bollerud *et al*, *supra* note 153, at 277.

162. Joyce Canaan, *Why a "Slut" is a "Slut": Cautionary Tales of Middle-Class Teenage Girls' Morality*, *in* SYMBOLIZING AMERICA 184, 193 (Hervé Varenne ed., 1990).

163. *Id.* at 203.

connection to one another.[164] Debbie was initially described as very pretty and popular with a nice figure and nice clothes. But, one of her classmates averred, appearances can be deceptive: "She comes across to anyone that just meets her for the first time as a real innocent, sweet kid; I mean, like, harmless to anybody. But the story behind her is like a really disgusting one. The kid's into like a lot of kinky things."[165]

In the most frequently repeated story, Debbie and her boyfriend Jack were said to have ordered fries from the take-out window at Burger King, then gone to Jack's house where he dipped the fries in Debbie's vagina and ate them. Similar stories circulated involving Chicken McNuggets and Cool Whip. As well, Debbie and Jack reputedly engaged in acts of bondage.

It is not clear whether any of these stories were true; Canaan heard the stories second-hand but never met or spoke to the infamous Debbie. It is clear, however, that Debbie served as a cautionary tale in her community. The Debbie stories provided other girls with a means of drawing lines between acceptable sex and unacceptable sex, normal sex and kinky sex. One girl said: "It's out of the normal for me . . . it's gross . . . I look at these people . . . and I, you know, it makes me want to throw up. There's something wrong there."[166] Most Sheepshead girls worked hard not to step "out of the normal."

Through processes like those described above, teenagers construct "normal" sexual identities that keep them within the charmed circle of "good" teenage sex. I am not suggesting that they develop carbon copy sexualities that mirror those of one another as well as the requirements of law in every detail. Rather they develop codes of sexual ethics in accordance with which they strive to constitute themselves as ethical subjects. They work hard at becoming/remaining "normal" and thereby take an active role in their own constitution as sexual subjects.

VI. CONCLUSION

The blueprint of normal teenage sexuality that emerges from age of consent laws, in combination with a myriad of other forms of legal regulation of teenage sex, bears a striking similarity to the sexual morality expressed by many teenagers. This does not

164. *Id.*
165. *Id.*
166. *Id.* at 193.

suggest a straightforward causal relation in the order of law crystallizing a moral code that teenagers dutifully follow. Some would say that social norms are a source of legal norms, not the reverse. But, as Duncan Kennedy asserts: "The legal system creates as well as reflects consensus (this is true both of legislation and adjudication). Its institutional mechanism 'legitimates,' in the sense of exercising normative force on the citizenry."[167]

Law is obviously not the only force at work here. Family, religion, culture, and mass media also serve to influence teenage attitudes and behavior. But law is thoroughly interwoven with these institutions. All these forces work together, not as a grand conspiracy, but in ways that overlap, support and sometimes contradict one another in the production of a normative version of teenage sexuality.

Law continues to exert repressive power in this context. Some teenagers conform to outside dictates against the desires that they experience simply to avoid the consequences. But law does not simply operate to repress the pre-existing sexual desires of teenagers thereby bringing them into social conformity. Law plays a role in the bringing into being of those desires and in the constitution of the framework within which teenagers negotiate them.

167. KENNEDY, *supra* note 1, at 107.