Marquette Law Review

Volume 89
Issue 3 *Spring 2006*

Article 9

2006

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Daryl J. Olszewski, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 Marq. L. Rev. 693 (2006).
Available at: https://scholarship.law.marquette.edu/mulr/vol89/iss3/9

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STATUTORY RAPE IN WISCONSIN: HISTORY, RATIONALE, AND THE NEED FOR REFORM

I. INTRODUCTION

Wisconsin middle and high schools are filled with serious sex offenders and their victims. Yet likely these offenders are unaware they are guilty of serious felonies and few victims are aware of their victimization. Wisconsin's statutory rape[1] laws are unusual[2] in that they prohibit not only sexual conduct between an adult[3] and an underage partner but also criminalize all sexual conduct involving underage persons, even when that conduct involves peers and is fully consensual.[4] In the State of Wisconsin, any time a person under the age of sixteen engages in an act that is more sexually intimate than a kiss,

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1. Statutory rape is generally understood to mean "[u]nlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person's will. Generally, only an adult may be convicted of this crime. A person under the age of consent cannot be convicted." BLACK'S LAW DICTIONARY 1288 (8th ed. 2004). The term is used in this Comment to refer to consensual sexual contact that is prohibited because of a participant's age. *See* Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J. L. & PUB. POL'Y 373, 433-34 (2003).

2. *See* Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1254 (1998) ("Although some states continue to have bright line age-of-consent statutes on the books, most states have recognized that such laws are ill-adapted to the contemporary complexity of sexual relationships."); *see also supra* note 1 (definition of statutory rape); *infra* note 93 and accompanying text (explaining that Wisconsin is one of only five states that does not incorporate an age-gap into its statutory rape laws).

3. This Comment carefully utilizes words that carry a connotation of age. "Child" generally refers to the age classification encompassed in section 948.02(1) of the Wisconsin Statutes and means all those under the age of thirteen, except when utilized in reference to a statute, such as "second degree sexual assault of a child" or in reference to "child molestation." "Adolescent" refers to the age classification encompassed in section 948.02(2) of the Wisconsin Statutes and refers to those who are at least thirteen but under sixteen. "Young adult" refers to the classification encompassed in section 948.09 of the Wisconsin Statutes and refers to those who are at least sixteen but not yet eighteen. "Juvenile" is used to refer to all those under the age eighteen, "adult" is used to refer to all those above the age of eighteen, and "underage" is used to refer to persons below the age of consent.

4. "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." WIS. STAT. § 948.02(1) (2003–2004). "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony." § 948.02(2). "Whoever has sexual intercourse with a child who is not the defendant's spouse and who has attained the age of 16 years is guilty of a Class A misdemeanor." § 948.09.

a serious felony is committed.[5] Should both partners be underage, then by the same act each is simultaneously a victim and a perpetrator.[6]

Statutorily mandating adolescence devoid of all sexual intimacy is unrealistic and an imprudent legislative decision. Wisconsin should reform its laws, as has nearly every other state,[7] taking into account the vast difference between a stereotypical case of child molestation and a consensual peer relationship, and should focus upon protecting children and adolescents from coerced sexual conduct.

This Comment begins in Part II with briefly tracing the history of statutory rape laws generally, and then Part III surveys the development of the law in Wisconsin. Part IV outlines the four most commonly cited rationales for maintaining statutory rape laws, and Part V explains how these rationales are either inherently irrational or unsatisfied by Wisconsin's law. Part VI offers alternatives to Wisconsin's scheme. Part VII details the components of a better statutory rape law for Wisconsin, explains how statutory rape reform would require the reform of a variety of related statutes, and finally suggests the development of parental restraining orders as a novel alternative to traditional statutory rape laws.

II. HISTORY OF STATUTORY RAPE LAWS

Statutory rape laws originated in thirteenth-century England and at that time prohibited sexual relations between adults and girls under the age of twelve.[8] In the late sixteenth century, the age of consent was lowered to ten.[9] These initial prohibitions were gender specific, restricting only a male's sexual relations with young females, and sought to "protect a father's interest

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5. This is a result of the broad definition of "sexual contact." Sexual contact is defined, in part, as the following:

> Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.

§ 948.01(5)(a). "Intimate parts" is defined as "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." § 939.22(19).

6. This is a consequence of the use of the gender and age neutral word "whoever." § 948.02.

7. *See infra* note 93 and accompanying text.

8. Michelle Oberman, *Gender Issues and the Criminal Law: Turning Girls Into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 24 (1994).

9. *Id.*

in his daughter's chastity."[10] Traditionally, a non-virgin was not as desirable for marriage and an unmarried daughter was a financial liability for her father.[11]

The ten-year-old age of consent was initially adopted in the United States, but in the late nineteenth century, led in large part by the Women's Christian Temperance Union and similar groups, campaigns were launched to increase the age of consent in an effort to further protect girls from male sexual aggression.[12] States gradually increased the age of consent, in some cases as high as twenty-one.[13]

In the 1970s, a new generation of feminists recognized that gender specific statutory rape laws perpetuated negative stereotypes regarding the vulnerability of women.[14] However, rather than seeking the abolition of statutory rape laws, those feminists generally called for reforms to make the laws gender neutral and thus remove the implication that only females are inherently vulnerable, but rather all juveniles are in need of protection.[15]

III. HISTORY OF WISCONSIN'S STATUTORY RAPE LAWS

Wisconsin adopted a gender neutral statutory rape law in 1976 as part of a larger reform to remove gender biases from Wisconsin laws.[16] Prior to 1976, all sexual intercourse with underage females was criminal, but severity of punishment depended upon the age of both the victim and the perpetrator.[17] Sexual intercourse between an adult male and a female under the age of twelve was punished most severely, with a possibility of thirty years in prison.[18] If the female was at least twelve years old but under sixteen, the maximum penalty for an adult male was fifteen years in prison.[19] Finally, if a female was under eighteen, the male may have been imprisoned for as long as five years.[20] This lowest level of punishment could also apply to juvenile males who had sexual intercourse with underage females, regardless of the

10. Michelle Oberman, *Regulating Consensual Sex With Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 754 (2000).

11. *Id.* at 754-55.

12. Jane E. Larson, *Even a Worm Will Turn at Last: Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1, 3-4 (1997).

13. Oberman, *supra* note 8, at 24.

14. Oberman, *supra* note 10, at 757.

15. *Id.*

16. Act of June 28, 1976, ch. 421, §§ 470-71, 1975 Wis. Sess. Laws 1361, 1386.

17. *See* WIS. STAT. § 944.10 (1973–1974).

18. § 944.10(3).

19. § 944.10(2).

20. § 944.10(1).

female's age; age of the female was only relevant if the male was an adult.[21]

With the 1976 reform, Wisconsin punished statutory rape no longer as a "Crime[ ] Against Sexual Morality"[22] as the state had done previously, but now as a form of sexual assault.[23] For example, a person was guilty of first degree sexual assault if he raped a woman at gunpoint or if he had sexual contact with a twelve-year-old.[24] Similarly, second degree sexual assault included a person who violently raped as well as a person who had sexual contact with any person under the age of eighteen.[25]

Wisconsin greatly weakened its statutory rape laws in the 1976 reform. First, sexual intercourse with a child would now bring a maximum of only fifteen years in prison for the youngest victims[26] whereas previously the maximum was thirty.[27] Second, although it was assumed that a minor could not consent, this presumption could be rebutted if the victim was at least fifteen years old.[28] Thus, persons fifteen to eighteen years old were granted a degree of sexual autonomy but still protected from coerced sex that did not otherwise rise to the level of sexual assault.[29] In one respect, however, the statutory rape laws were strengthened in that not only was sexual intercourse prohibited but also sexual contact.[30]

This reformed law was gender neutral, for the first time punishing the acts of both males and females.[31] But arguably more significant, this law was also age neutral, thus criminalizing the conduct even when both partners were

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21. *See id.* Subsection (1) contains no requirement that the male be over eighteen whereas that requirement is included in subsections (2) and (3). *See* § 944.10.

22. WIS. STAT. ch. 944 (1973–1974).

23. Act of Mar. 26, 1976, ch. 184, 1975 Wis. Sess. Laws 582 (codified at WIS. STAT. § 940.225 (1975–1976)).

24. *See* WIS. STAT. § 940.225(1)(b), (d) (1975–1976).

25. *See* § 940.225(2)(a), (e).

26. § 940.225(1).

27. WIS. STAT. § 944.10(3) (1973–1974).

28. WIS. STAT. § 940.225(4)(a) (1975–1976).

29. Consensual sexual intercourse among all non-married persons could still have been prosecuted as the misdemeanor of fornication. WIS. STAT. § 944.15 (1975–1976).

30. Sexual contact was defined as the following:

> any intentional touching of the intimate parts, clothed or unclothed, of a person to the intimate parts, clothed or unclothed of another, or the intentional touching by hand, mouth or object of the intimate parts, clothed or unclothed, of another, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification or if such touching contains the elements of actual or attempted sexual battery as defined in s. 940.20.

§ 940.225(5)(b).

31. The gender-neutral word "whoever" was used, § 940.225, in place of "any male," WIS. STAT. § 944.10 (1973–1974).

underage.[32] However, because the law allowed for a fifteen-year-old to consent,[33] mutual prosecution of peer partners was effectively impossible except when both partners were under the age of fifteen.

Penalties were enhanced in 1977 so that first degree sexual assault carried with it a potential punishment of up to twenty years in prison and second degree sexual assault carried with it a possibility of ten years in prison.[34]

In 1982, Wisconsin eliminated the possibility that a fifteen-year-old could consent to sexual activity and turned sexual contact or intercourse with an underage person into a strict liability crime.[35] At the same time, however, the legislature lowered the age of consent from eighteen to sixteen.[36] Thus, sexual contact or intercourse with a minor who was at least sixteen was no longer criminal because of the person's age. However, sexual intercourse involving a young adult, and in fact all non-marital sexual intercourse, remained punishable as the misdemeanor of fornication.[37] A year later, the legislature repealed its broad prohibition of all non-marital sexual intercourse but specifically re-criminalized sexual intercourse with a young adult as a misdemeanor, although a marriage exception was provided.[38]

In 1988, the legislature reorganized its statutory rape laws and compiled the scattered statutes into the newly created Chapter 948, "Crimes Against Children."[39] The laws remained substantively similar to earlier laws, but the legislature created a new crime punishing a person responsible for a child or adolescent's welfare for failing to prevent the sexual assault of that child or adolescent.[40]

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32. WIS. STAT. § 940.225 (1975–1976).

33. § 940.225(4)(a).

34. Act of Nov. 23, 1977, ch. 173, § 3, 1977 Wis. Sess. Laws 728, 729-30 (codified at WIS. STAT. §§ 939.50(3)(b)-(c), 940.225(1)-(2) (1977–1978)).

35. Act of Apr. 30, 1982, ch. 308, 1981 Wis. Sess. Laws 1243 (codified at WIS. STAT. § 940.225 (1981–1982)). The crime remains one of strict liability where mistake of age is no defense, even when the victim intentionally misrepresents her age, has what appears to be a state-issued identification card indicating she is nineteen, talks about how she is old enough to work as an exotic dancer, and appears to be at least nineteen. State v. Jadowski, 2004 WI 68, ¶6, 272 Wis. 2d 418, ¶6, 680 N.W.2d 810, ¶6.

36. Act of Apr. 30, 1982, ch. 308, 1981 Wis. Sess. Laws 1243 (codified at WIS. STAT. § 940.225(2)(e) (1981–1982)).

37. WIS. STAT. § 944.15 (1981–1982).

38. Act of May 5, 1983, No. 17, §§ 4-5, 1983 Wis. Sess. Laws 37, 37-38 (codified at WIS. STAT. §§ 944.15(2), 944.17(2)(b) (1983–1984). Originally, traditional sexual intercourse with a young adult was punished as a felony, while oral or anal intercourse was punishable as a misdemeanor, but the penalty for traditional sexual intercourse was amended to a misdemeanor about two months later. Act of July 1, 1983, No. 27, § 1790e, 1983 Wis. Sess. Laws 55, 554.

39. Act of Apr. 20, 1988, No. 332, § 55, 1987 Wis. Sess. Laws 1178, 1183-92 (codified at WIS. STAT. § 948.02(3) (1987–1988)).

40. *Id.*

This 1988 revision is largely where the law remains today. The only significant subsequent changes have been increases in the possible penalties. In 1994, the maximum penalty for first degree sexual assault of a child was doubled from twenty years to forty years.[41] In 1995, the penalty for second degree sexual assault of a child was doubled from a possibility of ten years to a maximum of twenty years.[42] Penalties were again increased in 1998 where first degree sexual assault of a child carried a maximum punishment of up to sixty years in prison and second degree carried a maximum of up to thirty years in prison.[43] Finally, in 2002, the punishment for second degree sexual assault of a child was again increased and now carries up to forty years imprisonment.[44] There has been a recent effort to further increase the penalty for first degree sexual assault of a child to allow for life imprisonment.[45]

IV. THE RATIONALE FOR STATUTORY RAPE LAWS

The motivation for statutory rape laws evolved from a desire to protect a father's financial interest in his daughter's chastity[46] into a desire to protect all juveniles from the sexual predations of adults.[47] In Wisconsin, however, the rationale underlying statutory rape laws has shifted again, as indicated by the fact that Wisconsin punishes all sexual contact involving children or adolescents and not just sexual intercourse between a child or adolescent and an adult.[48] Wisconsin's prohibition of all sexual conduct involving those under the age of sixteen[49] leads to the obvious question: Why would the legislature regard the prevention of adolescent sexual conduct as such a serious priority, equivalent in punishment to crimes such as armed robbery[50] or kidnapping?[51] Reasons most commonly cited for enforcing statutory rape laws are: (1) protect young people from coerced sexual activity; (2) enforce

41. Act of Apr. 6, 1994, No. 194, § 9, 1993 Wis. Sess. Laws 919, 920 (codified at WIS. STAT. § 939.50(3) (1993–1994)).

42. Act of Nov. 16, 1995, No. 69, §§ 4, 5, 12, 1995 Wis. Sess. Laws. 979, 981-82 (codified at WIS. STAT. §§ 939.50(3)(bc), 948.02(2) (1995–1996)).

43. Act of June 15, 1998, No. 283, §§ 322-23, 1997 Wis. Sess. Laws 2096, 2129 (codified at WIS. STAT. § 939.50(3)(b)-(c) (1997–1998)).

44. Act of July 26, 2002, No. 109, § 546, 552-53, 879, 2001 Wis. Sess. Laws 1327, 1532, 1552 (codified at WIS. STAT. §§ 939.50(3)(c), 948.02(2) (2001–2002)).

45. S.B. 490, 2003–2004 Leg., Reg. Sess. (Wis. 2003).

46. Oberman, *supra* note 10, at 754.

47. Larson, *supra* note 12, at 3-4.

48. *See* WIS. STAT. § 948.02 (2003–2004).

49. *Id.*

50. § 943.32(2).

51. § 940.31.

morality; (3) prevent teen pregnancy; and (4) reduce welfare dependence.

A. Protect Young People from Coerced Sexual Activity

Prevention of coerced sexual activity is perhaps the most often cited rationale for statutory rape laws.[52] Legislatures presume that the power disparity inherent in a relationship between a juvenile and an adult translates into a juvenile's inability to resist an adult's coercive influence.[53] An alternative but similar rationale justifies prohibiting peer conduct; a juvenile, because of his immaturity, is incapable of meaningful consent and thus any conduct involving a juvenile is inherently nonconsensual. It is this rationale that underlies other legal protections afforded juveniles such as the ability to avoid contracts.[54] Thus, a person who engages in sexual conduct with a juvenile is taking advantage of that juvenile's inherent vulnerability and should be punished, even when that person is himself equally in need of protection because of his immaturity.

B. Enforce Morality

Some people believe that any sexual conduct outside of marriage is inherently immoral. Juveniles, in nearly every situation, are prohibited from marrying and thus all sexual activity involving juveniles can be seen as immoral. Additionally, those who do not believe in such a staunch moralistic ideal may nevertheless believe that sexual activity involving juveniles is immoral and should be dissuaded on the basis that all sexual conduct requires a level of maturity that juveniles are incapable of possessing. Essentially, a person may believe that sexuality is inextricably tied to morality and juveniles lack sufficient capacity to make the decision to engage in such conduct. Thus, as is true with so many other undesirable activities, dissuasion is attempted by criminalization.

C. Prevent Teen Pregnancy

If underage sexual intercourse is illegal, then any time an underage girl

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52. *See, e.g.*, Oberman, *supra* note 10, at 757.

53. *See, e.g.*, *id.* Wisconsin, like many other states, has laws punishing as a separate and more serious crime sexual relationships between juveniles and persons in a relationship of trust or authority, such as teachers, where a power disparity is most likely to occur. *See, e.g.*, WIS. STAT. § 948.095 (2003–2004). Those laws are not addressed in this Comment.

54. Oberman, *supra* note 8, at 43-44.

becomes pregnant or a juvenile male fathers a child, a crime has been committed. If juveniles are forbidden from having sex, they are essentially forbidden from becoming pregnant. Prohibitions of sexual activities short of reproductive sexual intercourse can be rationalized because they may lead to sexual intercourse. Prohibitions on sexual intercourse that does not result in pregnancy can be rationalized because of the inherent risk of pregnancy. As is true with any crime, if the intent is to deter the conduct, it is irrational to reward by not punishing an offender who does criminal acts but simply fails in accomplishing the final act.[55] Thus all sexual conduct is criminal rather than only a resulting pregnancy.

D. Reduce Welfare Dependence

Related to teen pregnancy is the issue of welfare dependence. Within The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[56] Congress directly connected welfare dependence with teenage pregnancy and then went the additional step in relating teenage pregnancy with statutory rape.[57] Relying upon two studies that concluded teenage pregnancies generally involve adult males, Congress concluded that aggressive enforcement of statutory rapes laws would reduce teen pregnancy and thus reduce welfare expenditures.[58] Therefore, Congress mandated the Attorney General to develop a program to encourage aggressive enforcement of statutory rape laws.[59]

V. WISCONSIN'S LAW IS INEFFECTIVE AND IRRATIONAL

The rationales listed above are either irrational or unsatisfied by Wisconsin's laws. All these public policy rationales could be better served by

55. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 381 (3d ed. 2001).

56. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.).

57. A problem in the law is that when Congress discussed teen pregnancy it meant "teen" pregnancy and included the pregnancies of eighteen- and nineteen-year-olds. CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 99 (2004). There is further evidence that Congress' data was manipulated to create the impression of an epidemic. *Id.* For example, Congress relied upon teen pregnancy rates rather than teen birth rates, included pregnancies among married teens, and used data from 1991, a year that demonstrated an anomalous increase in what was a steady decline of the teen birthrate from the 1950s to 2000. *Id.*

58. Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 472-73 (2000) (citing David J. Landry & Jacqueline Dorroch Forrest, *How Old Are U.S. Fathers?*, 27 FAM. PLAN. PERSP. 159, 160 (1995); Mike Males & Kenneth S.Y. Chew, *The Ages of Fathers in California Adolescent Births, 1993*, 86 AM. J. PUB. HEALTH 565, 567 (1996)).

59. 42 U.S.C. § 14016 (2005).

a modified law.

A. Wisconsin Fails to Protect Juveniles from Coerced Sexual Activity

Non-consensual sexual conduct is prohibited under Wisconsin law by a statutory chapter[60] entirely separate from the chapter regulating sexual conduct involving juveniles.[61] Absent the child sexual assault laws, juveniles, and all persons, are protected from non-consensual sexual contact.[62] Thus, when a juvenile is alleged to have been subjected to sexual intercourse without consent, the prosecutor has the option of pursuing charges under the non-consent statutes[63] or under the child sexual assault statutes.[64] In certain instances, the punishments under either charge may be the same.[65] But the prosecutor is given the advantage of being able to secure a conviction and significant punishment without having to prove the additional and often most difficult element of lack of consent when he pursues charges under the child sexual assault statutes[66] as opposed to the generally applicable sexual assault statutes.[67]

Juveniles are obviously afforded substantially more protection than are adults given that even when a prosecutor may have a difficult time proving a lack of consent, the perpetrator may still be prosecuted for the strict liability crime of child sexual assault. However, this additional protection comes at a price. Essentially, juveniles sacrifice all sexual freedom in exchange for enhanced legal protection from non-consensual sexual activity.

Although this may be seen as a necessary consequence of the legislature's desire to effectively protect juveniles, the laws are ineffective in protecting juveniles from non-consensual sexual conduct. The laws are effective in regulating sexual conduct involving only juveniles and adults or sexual conduct involving a juvenile of one age-group and a juvenile from another age-group. Juveniles who are coerced or pressured into sexual activity by

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60. WIS. STAT. § 940.225 (2003–2004).

61. § 948.02.

62. *Id.*

63. § 940.225.

64. § 948.02.

65. For example, both first degree sexual assault, § 940.225(1), and first degree sexual assault of a child, § 948.02(2), are Class B felonies, punishable by up to sixty years in prison, § 939.50(3)(b). Similarly, both second degree sexual assault, § 940.225(2), and second degree sexual assault of a child, § 948.02(2), are Class C felonies punishable by up to forty years in prison and a $100,000 fine, § 939.50(3)(c).

66. § 948.02.

67. § 940.225.

peers[68] are left unprotected. Worse than being unprotected, these victims may actually be made criminals for their participation in the act.

B. Morality Alone Is an Irrational Basis for Statutory Rape Laws

Because Wisconsin law punishes all sexual acts of children and adolescents, including consensual acts and non-reproductive sexual acts, morality is likely the foundational rationale for such a sweeping law.[69] However, the Supreme Court recently held, "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ."[70]

Wisconsin's child sexual assault statutes have survived past constitutional challenge,[71] and although the Wisconsin Supreme Court reaffirmed the constitutionality of the laws after *Lawrence v. Texas*, it did so without making any reference to *Lawrence*.[72] The argument could be made that criminalizing fully consensual adolescent sexual conduct is unconstitutional,[73] but the likely outcome is that such laws would survive constitutional challenge given a juvenile's diminished status and the State's compelling interest in protecting juveniles.[74]

However, Wisconsin's prohibition of young adult sexual intercourse is more vulnerable to constitutional challenge because it provides a marriage exception.[75] The criminality of identical conduct is dependent upon marital status, and the Supreme Court has explicitly rejected such distinctions based upon marital status.[76]

If morality is the rationale for the Wisconsin law, then the Wisconsin law

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68. For example, under Wisconsin's current law, two persons who are both at least thirteen but under sixteen or two persons who are both at least sixteen but under eighteen, could be considered peers.

69. *See* COCCA, *supra* note 57, at 34.

70. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

71. State v. Fisher, 565 N.W.2d 565, 568-70 (Wis. Ct. App. 1997).

72. State v. Jadowski, 2004 WI 68, ¶ 32, 272 Wis. 2d 418, ¶ 32, 680 N.W.2d 810, ¶ 32.

73. Arnold H. Loewy, *Statutory Rape in a Post* Lawrence v. Texas *World*, 58 SMU L. REV. 77, 84-88 (2005).

74. *Id.* at 88. In *Lawrence*, the Court specifically emphasized that the case did not involve minors, eliminating a possible rationale for Texas' regulation and therefore implying that states may legitimately regulate the consensual sexual acts of minors. 539 U.S. at 578. Additionally, the United States Supreme Court has approved statutory rape laws over equal protection objections even when such laws punish only the male partner in a consensual peer relationship. Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 475 (1981).

75. WIS. STAT. § 948.09 (2003–2004).

76. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

succeeds as written but fails in implementation. Only aggressive enforcement would accomplish this goal. Increased and aggressive prosecution is likely to be far more effective in deterring this immoral conduct than sporadic and ad hoc prosecutions. Not even all readily detectable crimes are prosecuted.[77] In the event of an underage girl becoming pregnant, that pregnancy is clear evidence that a crime has been committed.

The prosecutorial policies of different counties relating to statutory rape cases are difficult to collect, but the most recent report of such policies indicate vastly differing schemes.[78] One county prosecutes all crimes that the office becomes aware of, believing that it is the job of the legislature to reform an undesirable law.[79] Another county has implemented a general policy of prosecuting only cases where there is more than a three year gap in the partners' ages.[80] Another does not have a set policy but tries to analyze each case individually and assess the maturity of the participants.[81] And yet another county generally pursues misdemeanor charges that will be expunged after counseling is completed.[82]

These wildly different prosecutorial policies undermine what is written to be unambiguous. A clear prohibition becomes clouded in malleable variables and prosecutorial discretion. Sporadic prosecutions create the impression among juveniles, and in fact all citizens who are aware that such a prohibition exists, that the absolute prohibition is an historical remnant from a moralistic past, equivalent to other unutilized moralistic laws such as the criminal prohibition of adultery.[83] A strict prohibition is meaningless without enforcement, and only consistent enforcement will reinforce the moralistic message.

C. Wisconsin's Law Is Overbroad, and the State's Interest in Preventing Teen Pregnancy Would Be Better Served by a Narrower Law

If prevention of teenage pregnancy is the motivation for enforcing statutory rape laws, Wisconsin's law is obviously overbroad in its prohibition

77. *See* Jeff Cole, *DAs Vary Greatly on Underage Sex Cases*, MILWAUKEE J. SENTINEL, Apr. 30, 1997, at A1.

78. *Id.*

79. *Id.*

80. *Id*; Associated Press, *Dane County DA is Going After Statutory Rape, But the Younger Person in the Sexual Relationship is Sometimes Dismayed*, MILWAUKEE J. SENTINEL, Jan. 24, 2000, at 2B.

81. Cole, *supra* note 77.

82. *Id.*

83. *See* WIS. STAT. § 944.16 (2003–2004).

of non-reproductive sexual conduct. Although the argument could be made that all intimacy should be prohibited out of the fear that it may lead to sexual intercourse, applying a single standard to all intimate conduct is potentially counterproductive to a goal of dissuading intercourse. Juveniles may internalize the message conveyed in the statutes: all intimate conduct is equivalent to sexual intercourse. When vastly different conduct is regarded as equivalent, an adolescent has no motivation to restrain his conduct to the benign side of the sexual conduct spectrum. Obviously the touching of a breast does not carry with it the same possibility for consequences as does sexual intercourse. Yet the statutes treat these acts identically.[84] If the public policy goal is to reduce teen pregnancy, then oral sex does not carry the same consequences as does traditional sexual intercourse, but yet again these acts are treated as legally equivalent.[85] If the legislature feels that criminalization of conduct is necessary to reduce teen pregnancy rates, then a more rational approach would be to simply criminalize traditional sexual intercourse and leave non-reproductive sexual conduct as legal alternatives.[86]

A more direct approach, criminalizing only impregnation,[87] rather than all sexual intercourse, would seem to be a more rational action, but such criminalization is, in fact, contrary to public policy. If partners are aware that the father shall be punished for the impregnation, there emerges a motivation to prevent but also conceal the pregnancy. Stories of young frightened mothers concealing pregnancies and upon birth, abandoning the child, are disturbingly common,[88] and there certainly does not need to be another

84. *See* § 948.02.

85. The touching of a breast is prohibited as "sexual contact," § 948.01(5)(a), and therefore applies only to those under the age of sixteen, § 948.02. However, oral sex falls under the definition of "sexual intercourse," § 948.01(6), and is therefore criminalized for all persons under the age of eighteen, §§ 948.02, 948.09.

86. *See* Oberman, *supra* note 10, at 723 ("Petting is a sexual learning experience, a way to discover how to feel pleasure."). Michigan is an example of a state that explicitly incorporates a learning curve into its statutory rape laws. MICH. COMP. LAWS ANN. §§ 750.520a-e (West 2004). Peer sexual contact is legal provided the partners are at least thirteen years old. § 750.520e. However, sexual intercourse remains illegal, § 750.520c, until partners reach age sixteen, § 750.520d.

87. Florida is a state that has taken this direct approach and punishes the impregnation of a child by an adult as a separate and more severe crime than mere sexual intercourse. FLA. STAT. ANN. § 827.04(3) (West 2003).

88. *See, e.g.*, Tom Kertscher, *Punishment Varies in Newborn Deaths*, MILWAUKEE J. SENTINEL, Sept. 20, 2004, at A1; Tom Held & Tom Kertscher, *Student Left Newborn to Die in Toilet*, MILWAUKEE J. SENTINEL, Jan. 16, 2003, at 1B (reporting that a seventeen-year-old concealed her pregnancy, gave birth at home, placed the child in a tote bag, and gave the child to her eighteen-year-old boyfriend to get rid of; the boyfriend placed the child in the waste pit of an outdoor portable toilet, and despite twenty degree temperatures, the child survived after being discovered by a passerby); Ed Treleven, *Girl Charged in Newborn's Suffocation*, WIS. ST. J., June 15, 2002, at A1 (reporting that a mother found her eighteen-year-old daughter's dead baby after the daughter gave birth at home, wrapped the baby in a rug, placed the rug in a plastic bag and threw the bag out; a

incentive for such actions. Similarly, the desire to avoid criminal consequences may pressure mothers into otherwise unwanted abortions.

Further, when the threat of prosecution fails in deterring impregnation, actual prosecution is problematic. A father has an obligation to support his child.[89] Should the father not support the child, the child is more likely to become a state charge, thereby compounding the problem of welfare dependence. When a father, as a consequence of becoming a father, also becomes a felon, his ability to provide for that child is greatly minimized.[90] And obviously, should the father be incarcerated, he would not be in a position to financially support a child let alone be a part of the raising and nurturing of that child.[91] Prosecution merely compounds the problem that criminalization intended to prevent.

D. Wisconsin's Law Is Ineffective in Preventing Welfare Dependence

Sexual activity results in welfare dependence only when pregnancy occurs and thus welfare dependence is inextricably linked to teen pregnancy. Nearly all strategies that decrease teen pregnancy would also accomplish the goal of decreasing welfare dependence. However, the prosecution of all juvenile sexual conduct as a means for dealing with welfare dependence is unnecessarily overbroad. As explained above, far from all prohibited juvenile sexual conduct results in pregnancy. Of that small percentage where pregnancy results, not all pregnancies result in welfare dependence. However, like specifically criminalizing pregnancy, criminalizing welfare dependence has significant problems. Criminalizing the pregnancy of a juvenile raises public policy concerns whereas criminalizing procreation resulting in welfare dependence raises constitutional concerns.[92] Over-

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twenty-year-old jail inmate was identified as the father, and because the girl was seventeen when she got pregnant, the father was investigated for sexual assault); Katharine Seelye, *Ideas & Trends; Concealing a Pregnancy To Avoid Telling Mom*, N.Y. TIMES, June 15, 1997, at D5.

89. WIS. STAT. § 948.22 (2003–2004).

90. *See* Bruce E. May, *Real World Reflection: The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 193 (1995).

91. In the high profile Wisconsin case of Kevin Gillson, *see infra* note 118, the prosecution can at least be indirectly connected to causing the end of the relationship. Lawrence Sussman, *Gillson in Touch With Girlfriend, Son*, MILWAUKEE J. SENTINEL, Apr. 20, 1998, at A1. Gillson garnered statewide sympathy in his willingness to quit school to support his new family and the partners' mutual desire to marry. *Id.* Although he was sentenced to only probation, the terms of that probation kept Gillson from visiting his child when the child and the mother moved temporarily to Colorado. *Id.* Even when the mother and child moved back to Wisconsin, Gillson could see them only with the permission of his probation officer. *Id.*

92. *See, e.g.*, State v. Oakley, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200, *cert. denied*,

inclusiveness in criminalizing more than simply welfare dependence is inevitable, and therefore the problem of welfare dependence is best remedied through solutions aimed directly at the inextricably linked problem of teen pregnancy.

VI. ALTERNATIVES TO THE WISCONSIN SCHEME

The most historically consistent rationale for statutory rape laws is to protect juveniles, generally from the coerced activity that they are not mature enough to refuse. Moral reasons, although significant to many, are not alone a rational basis for such an intrusive and punitive law. If teen pregnancy is a contributing factor to welfare dependence, then both these problems are best addressed by dealing with the problem of teen pregnancy through alternative means than criminalizing all sexual conduct among juveniles. Therefore, the Wisconsin Legislature should reform and refocus its statutory rape laws and focus upon the single rationale of protecting juveniles from coerced sexual conduct.

A. Strategies for Preventing Coerced Sexual Conduct

1. Age-Gap Provisions

It is intuitive that the risk of coercion is substantially decreased when partners are close in age, and therefore nearly all states have included an age-gap provision in their statutory rape laws. Sexual conduct involving persons close in age is either non-criminal or punished at a substantially reduced level in forty-five states, the District of Columbia, and under federal law.[93] Only

537 U.S. 813 (2002); Zablocki v. Redhail, 434 U.S. 374 (1978); Skinner v. Oklahoma, 316 U.S. 535 (1942).

93. 18 U.S.C. § 2241(c) (2000); ALA. CODE § 13A-6-62(a)(1) (LexisNexis 2005); ALASKA STAT. §§ 11.41.434(a), 11.41.436(a), 11.41.438(a), 11.41.440(a)(1) (2004); ARIZ. REV. STAT. ANN. § 13-1407F. (West 2001 & Supp. 2005); ARK. CODE ANN. §§ 5-14-110(a)(2)(B), 5-14-125(5)(B)(i), 5-14-126(2)(B), 5-14-127(a) (2006); CAL. PENAL CODE § 261.5 (West 1999 & Supp. 2006); COLO. REV. STAT. ANN. § 18-3-402(1)(d) (West 2004); CONN. GEN. STAT. §§ 53a-70(a)(2), 53a-71(a)(1) (West 2001 & Supp. 2005); DEL. CODE ANN. tit. 11, §§ 770(a)(2), 771(a)(1), 772(a)(2)g, 773(a)(5) (2001 & Supp. 2004); D.C. CODE §§ 22-3008, 22-3009 (2001 & Supp. 2005); FLA. STAT. ANN. § 794.05(1) (West 2000); GA. CODE ANN. § 16-6-3(b) (2003); HAW. REV. STAT. ANN. §§ 707-730(1)(c)(i), 707-732(1)(c)(i) (LexisNexis 2003 & Supp. 2005); IDAHO CODE § 18-1508A(1) (2004); 720 ILL. COMP. STAT. 5/12-14.1(2)(c) (West 2002); IND. CODE ANN. § 35-42-4-9 (LexisNexis 2004); IOWA CODE ANN. §§ 709.4 2.c., 709.12 4. (West 2003); KY. REV. STAT. ANN. §§ 510.050(1)(a), 510.060(1)(b), 510.130(1)(b) (Lexis Nexis 1999 & Supp. 2005); LA. REV. STAT. ANN. § 14:43.1.A. (West 1997 & Supp. 2006); ME. REV. STAT. ANN. tit. 17-A, §§ 254, 255-A, 260 (1983 & Supp. 2005); MD. CODE ANN., CRIM. LAW §§ 3-304(a)(3), 3-306(a)(3), 3-307(a)(3)-(5), 3-

Kansas, Massachusetts, South Carolina, Vermont, and Wisconsin do not utilize some form of an age-gap provision in their statutory rape laws. Age-gaps of three or four years are most common, although some states have adopted age-gaps as small as two years or as large as six years.[94]

2. Victim Cooperation Requirement

A weakness in the age-gap approach is that peer relationships can be coercive. Another idea for dealing with this problem is making victim cooperation a prerequisite for prosecution.[95] All underage sexual activity would be criminal, but prosecution occurs only if a party wants the prosecution. However, such a law contains its own glaring weaknesses. There must be a means for discerning which partner was the presumptive victim. For example, in Wisconsin, if both partners are underage, both actors are simultaneously victims and perpetrators. Therefore, the addition of a victim cooperation requirement in Wisconsin would effectively decriminalize all underage sexual conduct without providing juveniles any protection from coerced sexual conduct. Female would not cooperate with a prosecution against Male because Male would then be motivated to cooperate in a prosecution against Female. Therefore, even if Male felt he was unfairly coerced by Female, Male would be unable to pursue criminal prosecution because Female could vindictively pursue prosecution against Male. Both parties would have no incentive to cooperate because cooperation would

308(a) (Lexis Nexis 2002 & Supp. 2005); MICH. COMP. LAWS. ANN. § 750.520e(1)(a) (West 2004); MINN. STAT. ANN. §§ 609.342-345 (West 2003 & Supp. 2006); MISS. CODE ANN. § 97-3-65(1) (2000 & Supp. 2005); MO. ANN. STAT. §§ 566.034, 566.064 (West 1999); MONT. CODE ANN. §§ 45-5-502(3), (5)(b), 45-5-503(3)(a) (2005); NEB. REV. STAT. § 28-320.01(1) (1995); NEV. REV. STAT. ANN. §§ 200.368, 200.364 3.(b) (LexisNexis 2001 & Supp. 2003); N.H. REV. STAT. ANN. §§ 632-A:4 I. (1996 & Supp. 2005); N.J. STAT. ANN. § 2C:14-2 (West 2005); N.M. STAT. ANN. § 30-9-11 F. (LexisNexis 2003); N.Y. PENAL LAW §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50 (Consol. 2000 & Supp. 2005); N.C. GEN. STAT. §§ 14-27.2(a)(1), 14-27.4(a)(1), 14-27.7A (2003); N.D. CENT. CODE §§ 12.1-20-03, 12.1-20-07 (1997 & Supp. 2005); OHIO REV. CODE ANN. § 2907.04 (LexisNexis 2003); OKLA. STAT. ANN. tit. 21, § 1112 (West 2003); OR. REV. STAT. § 163.345 (2003); 18 PA. CONS. STAT. ANN. §§ 3122.1, 3126(a)(8) (West 2000); R.I. GEN. LAWS § 11-37-6 (2002); S.D. CODIFIED LAWS § 22-22-7 (2004); TENN. CODE ANN. § 39-13-506(a) (2003 & Supp. 2005); TEX. PENAL CODE ANN. §§ 21.11(b), 22.011(d) (Vernon 2003 & Supp. 2000); UTAH CODE ANN. §§ 76-5-401(3), 76-5-401.1(2), 76-5-402.2(2) (2003); VA. CODE ANN. § 18.2-63 (2004); WASH. REV. CODE §§ 9A.44.073(1), 9A.44.076(1), 9A.44.079(1), 9A.44.083(1), 9A.44.086(1), 9A.44.089(1) (West 2004); W. VA. CODE ANN. §§ 61-8B-3(a)(2), 61-8B-5(a)(2), 61-8B-7(a)(3), 61-8B-9(b) (LexisNexis 2005); WYO. STAT. ANN. §§ 6-2-303(a)(v), 6-2-304(a)(i) (2005).

94. COCCA, *supra* note 57, at 38 tbl.2.1. This author incorrectly identifies Wisconsin as having a four year age-gap, perhaps counting the four year age-gap provision included in its sex offender registration laws as a four year age-gap under its statutory rape laws. *See infra* notes 118-19.

95. Oberman, *supra* note 10, at 778-82. *See also* GA. CODE ANN. § 16-6-3(a) (2003) (requiring victim cooperation for prosecution).

motivate the prosecuted party to seek prosecution against the alleged victim.

Although the victim cooperation requirement combined with a means of identifying the presumptive victim and perpetrator seems initially attractive because it appears to criminalize only sexual conduct that is not fully consensual, there remain fundamental flaws in this approach. First, if an underage person is truly being coerced, then he or she is unlikely to be able to break free from this coercive grasp to report the abuse. Thus, a cooperation requirement may fail to protect juveniles in situations where the coercion is most real and severe. Second, it also allows for vengeful prosecutions. The scorned lover is able to look back on the relationship and rather than simply being upset by the pain of lost love or a mistaken sexual relationship, the regretting partner is able to get revenge upon his or her former partner by bringing the full force of the criminal law upon them. Consent to sexual activity should not be determined in hindsight, but prosecutors would have no effective means for discerning which complaints are motivated by vengeance and which complaints are motivated by victimization. A law requiring victim cooperation as a prerequisite would essentially tell actors that sexual activity with younger persons is an activity done at their own peril. At the younger person's whim, the older person may face criminal prosecution for a serious sexual assault when their only misconduct was offending their underage partner.

B. Strategies for Reducing Teen Pregnancy and Welfare Dependence

The risk of welfare dependence is inextricably tied to teen pregnancy, and over the past decade educational efforts aimed at making young people aware of the proper use of contraceptives and the potential consequences of sexual intercourse have greatly decreased teen pregnancy rates.[96] Criminalization, although an intuitive companion to the new push towards abstinence-only education, is counterproductive in reducing welfare dependence when it fails to deter pregnancy.[97] Education rather than criminalization should be the means by which teen pregnancy and welfare dependence are controlled.

Teen pregnancy was regarded as an epidemic in the early 1990s, but since that time, with little notice, there has been substantial improvement.[98] The national teen pregnancy rate has dropped thirty percent from 1991 to 2002.[99]

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96. Nina Bernstein, *Behind Fall in Pregnancy, a New Teenage Culture of Restraint*, N.Y. TIMES, Mar. 7, 2004, at A1.

97. *See supra* Part V.C.

98. Ceci Connolly, *More U.S. Teens Delay Having Sex, Study Finds*, WASH. POST, Dec. 11, 2004, at A1.

99. *Id.*

Explanations commonly cited by experts for this reduction include the fear of AIDS, AIDS-prevention programs, new forms of birth control, changes in welfare policies, increased child support enforcement, the rise of religious conservativism among teens, and new sex education programs that stress both abstinence and contraception.[100] Despite these various explanations, the answer can essentially be summed up as "less sex, more contraception."[101] Conspicuously absent from most any list of expert explanations for the incredible drop in teen pregnancy is increased criminalization. The fact that states that decriminalize peer sexual conduct and states that criminalize such conduct observed similar reductions in teen pregnancy rates indicates that criminalization may be entirely irrelevant to reducing teen pregnancy rates and, rather, the above listed explanations are responsible for the reduction.[102]

A simple, yet likely, explanation for the decrease in teen pregnancy rates is that young people are more aware of the consequences of becoming pregnant and are consciously choosing to prevent pregnancy. Therefore, it is possible to conclude that efforts have succeeded in educating young people of not only the risks associated with sexual intercourse (accounting for the decrease in sexual activity) but also how to prevent pregnancy should they decide to have sexual intercourse (accounting for the increased use of contraceptives).

Recently there has been increased effort to reform this two-pronged approach into a unilateral effort aimed simply at deterring sexual intercourse.[103] This abstinence-only approach has been widely criticized but commended by conservatives intent upon dissuading any sexual conduct outside of marriage and believing that instruction on contraceptive use implies approval of sexual conduct.[104] Criminalization is a logical companion to abstinence-only education in that it gives teeth to the message of abstinence and provides an additional reason for young people to fear sexual conduct.

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100. Bernstein, *supra* note 96.

101. *Id.*

102. For example, Wisconsin's teen birth rate dropped from about 44 per 1000 teens in 1991 to 32 per 1000 in 2002. Nat'l Ctr. for Health Statistics, Dept' of Health & Human Servs., *Births: Final Data for 2002*, NAT'L VITAL STAT. REP., Dec. 17, 2003, at 9 tbl.B. The demographically similar state of Iowa, a state that has a four year age-gap for fourteen- and fifteen-year-olds, IOWA CODE ANN. § 709.4 (West 2005), observed a nearly identical drop from about 43 to 33, Nat'l Ctr. for Health Statistics, *supra*, at 9 tbl.B. A comprehensive study investigating a correlation between a state's criminalization of peer sexual conduct and a drop in teen pregnancy is beyond the scope of this Comment because doing so would involve accounting for a vast number of variables such as demography and the actual application and prosecution strategies of the various states.

103. The Bush administration has more than doubled the amount of federal spending on abstinence-only education programs to more than $170 billion for 2005. Brian Wingfield, *Study Faults Abstinence Courses*, N.Y. TIMES, Dec. 3, 2004, at A22.

104. *Id.*

And unlike the risks of pregnancy or disease, there is no means by which to effectively remove the risk of criminal consequences.

Criminalization is largely ineffective in deterring sexual conduct and counterproductive to reducing welfare dependence should pregnancy result.[105] Although teen pregnancy rates have decreased, the ineffectiveness of the criminal law in deterring juvenile sexual conduct is evidenced by the concurrent increase in oral sex among juveniles.[106] In Wisconsin, and most states, oral sex is regarded as legally identical to traditional sexual intercourse.[107] If it was respect for the law motivating the decrease in teen pregnancy, the concurrent increase in oral sex would not occur. Rather, the evidence suggests that alternative explanations than criminalization are responsible for the decreases in teen pregnancy.[108]

VII. A BETTER STATUTORY RAPE LAW

Wisconsin's statutory rape laws are in need of reform to better protect juveniles and to apply the criminal law to punish undesirable conduct in proportion to the social harm it causes. Child molestation has a distinct connotation as opposed to statutory rape, yet Wisconsin law does not reflect this distinction. It is possible to aggressively and harshly punish child molestation, thus fully protecting juveniles, while relaxing statutory rape prohibitions. Child sexual assault statutes should exist primarily to protect juveniles from the sexual predations of older persons. The reduction of teen pregnancy rates and its collateral impact upon welfare dependence are better accomplished through means other than criminalizing adolescent and young adult sexual conduct. Although juvenile sexual conduct is not to be encouraged, the current prohibitions and punishments are unnecessarily harsh and overreaching and fail to take into account contemporary reality.

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105. *See supra* Part V.C.

106. Bernstein, *supra* note 96.

107. Sexual intercourse is defined as the following:

> vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

WIS. STAT. § 948.01(6) (2003–2004).

108. *See* Bernstein, *supra* note 96.

A. Regulation of Children

All sexual conduct between children and adults is prohibited[109] and should remain so. Sexual conduct involving a child and an adult is the essence of child molestation and should remain harshly punished. In regards to peer conduct, unlike other juveniles, children should not be granted the freedom to engage in conduct with peers. Yet children should not face the serious sanctions that an adult would. Should two peer children, for example two twelve-year-olds, engage in some form of sexual conduct, an alternative means of restraining their conduct should be available and should be one that does not necessarily bring with it the full force of a delinquency adjudication. Provided the children are close in age and the conduct consensual then serious criminal or juvenile sanctions are inappropriate. Substantially reduced sanctions are appropriate simply as a means for allowing the State to intervene in the relationship if parents have been unsuccessful in controlling their children and perhaps order counseling or other intervention as the situation may warrant. For partners outside that limited age range, significant sanctions are appropriate given the possibility for the older person, whether also a juvenile or an adult, to coerce the child.

B. Regulation of Adolescents

Wisconsin's law prohibiting and harshly punishing all sexual conduct involving adolescents[110] is in need of substantial reform. Adolescents are recognized as legally capable of making adult decisions in a variety of situations.[111] Yet adolescents do not possess the maturity of an adult. An adult may be able to take advantage of an adolescent's immaturity and thus there is a need to protect an adolescent from such predations. But on the opposite end, an adolescent is capable of making many mature decisions

109. *See* § 948.02(1).

110. *See* § 948.02(2).

111. For example, a child as young as ten may be tried as an adult for murder, § 938.183(1)(am), indicating that the legislature believes that such a child may possess the mental competence to make the very adult decision to take a life. Similarly, any juvenile who is at least fifteen years old may be tried as an adult for any crime. § 938.18(1)(3). Thus, it is possible that two fifteen-year-olds could be prosecuted as adults for their consensual sexual relationship. This is obviously paradoxical; the juveniles face punishment because one law treats them as incapable of making an adult decision to engage in sexual conduct, yet they are facing substantial punishment because a separate law treats them as fully competent to make the decision to engage in that conduct. The paradox is even more profound when involving seventeen-year-olds. Seventeen-year-olds are always regarded as adults when criminal defendants. § 938.02(1). Therefore, two seventeen-year-olds prosecuted for a consensual act of sexual intercourse, § 948.09, are not only simultaneously victims and offenders but also simultaneously adults and juveniles.

including decisions regarding sexuality.[112] Although many may cringe at the thought of formally extending sexual decision-making authority to adolescents, the reality is that adolescents are making these decisions every day. Regardless of criminalization, adolescents do engage in sexual conduct.[113] The issue raised here is whether that conduct should be criminal.

Consensual conduct involving underage partners close in age should be non-criminal. The legislature should reform Wisconsin's statutory rape laws and incorporate an explicit age-gap, as nearly every other state has done.[114] Many local prosecutors have informally adopted such policies,[115] and although these policies may be effective in preventing some actors from acquiring felony convictions for their consensual conduct, the fact that other actors face the full force of the law for conduct that may be ignored in another county only compounds the injustice.

If the legislature is, for whatever reason, reluctant to formally recognize the sexual autonomy of adolescents,[116] then at the very least, such consensual conduct should be criminalized in a new and appropriately titled section entirely separate from those sections associated with child molestation, thereby removing much of the unnecessary and unjustified stigma that may follow an offender.[117]

An eighteen-year-old who impregnates his fifteen-year-old girlfriend[118]

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112. If teens were incapable of making mature decisions, then there would be little faith in restraining teenage sexuality through educational efforts. Educational efforts are predicated upon the belief that juveniles are competent to make appropriate decisions.

113. High school students, like it or not, *are* sexually active. Thirty-three percent of ninth-graders report having had sexual intercourse, and by twelfth grade, that number jumps to sixty-two percent. Ctrs. for Disease Control, *Youth Risk Behavior Surveillance—2003*, MORBIDITY & MORTALITY WEEKLY REPORT, May 21, 2004, at 71 tbl.42.

114. *See supra* note 93 and accompanying text.

115. Cole, *supra* note 77.

116. For a discussion of reasons why a state may be reluctant to extend such decision-making authority to juveniles, see Phipps, *supra* note 1, at 375.

117. *See supra* Part V.C.; *see generally* Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996).

118. This was the scenario in one of Wisconsin's highest profile statutory rape prosecutions. Kevin Gillson was eighteen when he impregnated his fifteen-year-old girlfriend. Jeff Cole, *Law Comes Down on Father-To-Be*, MILWAUKEE J. SENTINEL, Apr. 24, 1997, at A1. Gillson was quickly convicted of sexual assault. *Id.* Although this case was not especially unique, it motivated a relative uproar over Wisconsin's regulation of consensual teenage relationships. There was an effort to amend the state's laws to punish the consensual relationship between a person fourteen or fifteen years old and a person not more than two-and-a-half years older as only a misdemeanor. A.B. 605, 1997–1998 Leg., Reg. Sess. (Wis. 1997); David Callender, *Assembly OKs Easing Teen Sex Penalties*, CAPITAL TIMES, Feb. 6, 1998, at 1A. However, this effort eventually failed, and the law remained largely unchanged except for an amendment allowing for a sentencing judge to waive the sex offender registration requirement when the actor is under nineteen and is not more than four years older than the other partner. Act of Apr. 17, 1998, No. 130, § 6, 1997 Wis. Sess. Laws 1257,

must write upon most every job application that he was convicted of the felony of second degree sexual assault of a child. He may be forced to register as a sex offender.[119] Even if the offender is a juvenile, law enforcement may notify the community of the offender's identity and crime.[120] A conviction for sexual assault of a child connotes to many an act of predatory child molestation. An average citizen would not regard the consensual relationship between two fifteen-year-olds as equivalent to the coercive molestation of a fifteen-year-old by a fifty-year-old, yet Wisconsin law treats these acts as identical.

C. Regulation of Young Adults

Presently, when the conduct involves a young adult, only sexual intercourse is prohibited and it is punished as only a misdemeanor.[121] Although sexual intercourse is still prohibited, such conduct is punishable by a maximum of only nine months in jail whereas the same conduct occurring the day before the partner's sixteenth birthday was punishable by up to forty years in prison. By the younger partner turning sixteen, the couple can now engage in sexual contact without criminal consequences and should they engage in sexual intercourse, it is only a misdemeanor.[122]

However, if the sixteen-year-old's partner is younger and that couple engages in sexually intimate conduct, such conduct remains a felony. But unlike engaging in such conduct only a day earlier when both partners were under sixteen, now there is a readily identifiable perpetrator and victim. The sixteen-year-old is subject to felony prosecution while the younger partner is

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1258-59 (codified at WIS. STAT. § 301.45(1m) (2003–2004)); Stan Milam & Lawrence Sussman, *Thompson Signs Kevin Gillson Bill*, MILWAUKEE J. SENTINEL, Apr. 18, 1998, at A1. Gillson was sentenced to probation, and efforts to obtain a pardon stalled. Jeff Cole & Annysa Johnson, *Pardon for Gillson Viewed as Unlikely*, MILWAUKEE J. SENTINEL, Jan. 27, 2001, at 3B.

119. Until recently, all persons convicted of the sexual assault of a child were required to register as sex offenders, but the legislature recognized that the need to protect the community was minimized when the conviction emerged from the consensual relationship of peers and therefore permitted the sentencing judge to waive the mandatory registration requirement when the offender is not more than nineteen and the partners are less than four years apart in age. Act of Apr. 17, 1998, No. 130, § 2, 1997 Wis. Sess. Laws 1257, 1258-59 (codified at WIS. STAT. § 301.45(1m) (2003–2004)); Milam & Sussman, *supra* note 118.

120. Under a recent revision of the law, a juvenile's conviction may now be disclosed to the public if, in the opinion of law enforcement, "providing that information is necessary to protect the public." Act of May 2, 2005, No. 5 (to be codified at WIS. STAT. § 301.46(2m)(c)).

121. WIS. STAT. § 948.09 (2003–2004). However, recall that the definition of sexual intercourse is very broad, *see supra* note 107, and includes not only traditional sex but also oral sex and even vulvar penetration by a finger. *See* § 948.01(6).

122. *See* § 948.09.

at most subject to a misdemeanor. The parents of the younger partner or the younger partner himself may be motivated to pursue a felony prosecution if upset with the relationship. At worst, the younger partner would be subject to a misdemeanor but such a prosecution would be unlikely given the age disparity and the fact that the statutory structure implies that a person under sixteen should be a presumed victim in a relationship with a person over sixteen.

Although young adults are granted substantially more freedom than adolescents and face far less severe penalties, their conduct still carries a misdemeanor penalty for both partners. This law should also be reformed to allow for an age-gap provision similar to that proposed for adolescents.

D. Reformation of Other Laws

The sexual conduct of juveniles is regulated by many more laws than those that explicitly prohibit underage sexual conduct.[123] These additional prohibitions are often times more absurd than the general notion that criminal sanctions should be utilized to restrain all adolescents from engaging in any form of sexually intimate conduct. Additionally, a juvenile's sexual relationship may generate criminal liability not only for the participants, but also for certain individuals who become aware of the relationship.

1. Mandatory Reporting Laws

Because Wisconsin equates the consensual sexual conduct of adolescent peers with child molestation, when certain individuals become aware of that relationship, they too may be criminally liable if they fail to notify the police or fail to prevent the relationship.[124] When certain professionals, such as those working in health or education fields, become aware of a child or adolescent's sexual activity, they are required to report this knowledge to police or child welfare officials.[125] Recognizing that this mandatory reporting law had the potential to dissuade sexually active juveniles from obtaining necessary health care such as services relating to sexually transmitted diseases or pregnancy, the legislature reformed the law to allow an exception to the mandatory reporting requirements when a medical professional believes the conduct was consensual.[126] However, only medical professionals are exempt.

123. *See* §§ 948.02, 948.09.

124. *See* §§ 48.981, 948.02(3).

125. § 48.981.

126. Act of July 31, 1987, No. 27, § 941s, 1987 Wis. Sess. Laws 69, 246-47 (codified at WIS.

Educational professionals and even mental health professionals are still required to report when they reasonably suspect that an adolescent or child has engaged in sexual conduct.[127] Exemptions for educational professionals were originally included but were vetoed by the Governor.[128] This can lead to somewhat absurd results. The confused adolescent who believes she may be pregnant and is unsure of what to do next may confide in and seek the advice of a school counselor. However, the counselor is required to report his knowledge. Thus, the result is that unsophisticated adolescents are reported while those capable of directly seeking medical treatment will never have their conduct reported.

The teacher who overhears stories of weekend escapades or catches two enamored students under the bleachers is required to report this conduct to police or a social welfare agency.[129] Failure to report is punishable by up to a one thousand dollar fine and up to six months in jail.[130] Health care providers, although exempt, may report at their discretion, and some health care providers have adopted policies of reporting all known sexual conduct.[131]

Additionally, persons responsible for the welfare of an adolescent or child[132] are required to prevent the sexual conduct from occurring.[133] For example, should a mother become aware that her fifteen-year-old daughter is sexually active, although displeased with her daughter's choice, the mother may feel the obligation to prevent serious harm to her daughter and so takes her to a doctor for a birth control prescription and purchases and instructs her daughter on the proper use of condoms. However, because the parent is not intervening to prevent the sexual relationship, the mother is guilty of a felony

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STAT. § 48.981(2m) (2003–2004)). This exemption from mandatory reporting for health care providers is regarded by some as a model for the rest of the nation. Abigail English & Catherine Teare, *Statutory Rape Enforcement and Child Abuse Reporting: Effects on Health Care Access For Adolescents*, 50 DEPAUL L. REV. 827, 855 (2001).

127. *See* WIS. STAT. § 48.981 (2003–2004).

128. Act of July 31, 1987, No. 27, § 941s, 1987 Wis. Sess. Laws 69, 246-47 (codified at WIS. STAT. § 48.981(2m) (2003–2004)).

129. *See* § 48.981(2).

130. § 48.981(6).

131. Megan Twohey, *For Sexually Active Teens, Confidentiality No Guarantee*, MILWAUKEE J. SENTINEL, Apr. 6, 2004, at 1A.

132. "Person responsible for the child's welfare" is defined as the following:

> the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

§ 948.01(3).

133. § 948.02(3).

under Wisconsin law punishable by up to twelve-and-a-half years in prison and a twenty-five thousand dollar fine.[134] In modifying the adolescent sexual assault laws, the mandatory reporting laws must also be reformed to exempt instances involving adolescent peers.

2. Medical Exception

Although medical professionals are exempt from reporting consensual adolescent sexual activity to law enforcement, individual medical professionals could be prosecuted for performing routine medical procedures upon juveniles because of the broad definition of sexual intercourse.[135] Parents could even be prosecuted for allowing the procedure.[136] Wisconsin should incorporate an explicit medical exception into its statutory rape laws as many other states have.[137]

3. Other Controls on Juvenile Sexuality

Simply reforming the child sexual assault statutes to allow for an age-gap provision regarding the conduct of adolescents and young adults would be ineffective because the sexual conduct of adolescents and young adults is controlled by a variety of other statutes. The statutes are filled with a variety of apparent contradictions and absurdities, particularly when applied to young adults. For example, sexual intercourse with a young adult is a misdemeanor[138] whereas showing a young adult pornography is a felony.[139] Similarly, should a person cause a young adult to see or hear sexual conduct, a felony has been committed, whereas the young adult personally engaging in such conduct is only a misdemeanor.[140] Finally, if a person directs a young

134. *See* §§ 948.02(3), 939.50(3)(f).

135. Refer to the definition of sexual intercourse, *supra* note 107.

136. *See* § 948.03.

137. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1407 A. (West 2001 & Supp. 2005); DEL. CODE ANN. tit. 11, § 770(b) (2001); FLA. STAT. ANN. § 794.05(1) (West 2000); LA. REV. STAT. ANN. § 14:43.1.B. (1997 & Supp. 2006) (also exempts the "normal sanitary care of an infant"); N.M. STAT. ANN. § 30-9-11 B (LexisNexis 2005); TEX. PENAL CODE ANN. § 22.011(d) (Vernon 2003 & Supp. 2005).

138. WIS. STAT. § 948.09 (2003–2004).

139. § 948.11(2).

140. § 948.055(2)(b). It is hard to understand how sexual intercourse with a young adult could ever not violate this statute. Absent physical disabilities or extraordinary measures, a young adult personally engaged in sexual intercourse is necessarily seeing or hearing the conduct. Therefore, under current Wisconsin law, sexual intercourse with a sixteen-year-old is arguably not a misdemeanor, § 948.09, but actually a class H felony, § 948.055(2)(b), punishable by up to a ten thousand dollar fine and six years in prison, § 939.50(3)(h).

adult to another room in which they intend to engage in sexual intercourse, this person is guilty of the serious felony of child enticement, punishable by up to twenty-five years in prison and a $100,000 fine,[141] whereas simply having sexual intercourse with the young adult is a misdemeanor.[142] It is hard to understand why the additional element of partners seeking privacy warrants the additional felony charge.

An inverse law, a requirement of privacy, may better protect juveniles from coerced sexual conduct. A juvenile may be more likely to resist the pressure of an individual peer than he would if faced with the simultaneous pressure from a group of peers. Therefore, the legislature may draft a statute that permits two peers to engage in sexual conduct but prohibit the conduct if others participate in or view the conduct.

The contradictions that exist in Wisconsin law must be remedied, allowing for age-gap provisions consistent with those in a reformed statutory rape law. Failure to reform these laws along with the child sexual assault laws would allow prosecutors to use the above listed laws, which the legislature likely never intended to be applicable, as a back door for regulating and seriously punishing the consensual acts of juvenile peers.

E. Parental Restraining Orders as a Statutory Rape Law Alternative

Parents who disapprove of their son or daughter's relationship are presently able to utilize the full force of the criminal justice system to disrupt that relationship, provided that relationship is any more physically intimate than that in a PG movie. In fact, under current law, parents are not only empowered but also rather required to intervene and prevent such a

141. *See* §§ 948.07(3), 939.50(3)(d). Although sexual intercourse with a young adult is not explicitly listed in the child enticement statute, the child enticement statute is still applicable in the prosecution of sexual conduct involving young adults. For example, the child enticement statute specifically prohibits causing a young adult to go to a secluded area for the purpose of "exposing genitals or pubic area," § 948.10. "[C]aus[ing] a child to expose genitals or pubic area or expos[ing] genital or pubic area to a child," *id.*, is necessary to most any act of sexual intercourse. Prosecutors have used a charging scheme similar to this in the high-profile sexual assault prosecution of former Green Bay Packer Mark Chmura. Lisa Sink & Linda Spice, *Chmura Accused of Child Enticement*, MILWAUKEE J. SENTINEL, June 24, 2000, at 1A. Chmura was prosecuted for non-consensual sexual intercourse with a seventeen-year-old and was charged with the additional crime of child enticement because he allegedly led the victim into a bathroom where the sexual assault occurred. *Id.* Although in the Chmura case the prosecutor alleged non-consensual sexual conduct, *id.*, a prosecutor's willingness to apply the child enticement statute when the alleged victim was seventeen indicates that it would be applicable even when the underlying charge is one of statutory rape. Chmura was subsequently acquitted. Shirley A. Wiegand, *Sports Heroes, Sexual Assault and the Unnamed Victim*, 12 MARQ. SPORTS L. REV. 501, 506 (2001).

142. § 948.09.

relationship.[143] Although parents will generally seek legal intervention only when doing so will result in the punishment of the partner and not their own son or daughter,[144] occasionally, parents utilize the law as an intervention tool of last resort even when it means that their own son or daughter will be subject to criminal sanctions.[145]

Reforming Wisconsin's statutory rape laws to fully decriminalize consensual conduct between adolescent peers would deprive parents of this interventional power. However, the legislature need not maintain criminal penalties in order to provide parents with legal means for preventing their son or daughter from engaging in sexual intercourse. A novel approach for allowing parental intervention would be the development of a sort of parental restraining order. Under this approach, a disapproving parent who is aware of or suspects sexual conduct may be able to seek a court order enjoining the relationship of their son or daughter. Because the legislature is constitutionally permitted to prohibit all juvenile sexuality, the process for a parent seeking to enjoin a particular sexual relationship need not necessarily follow the formal court procedure that is required for traditional restraining orders.[146] The process may be streamlined and relatively informal without raising due process objections because the legislature is simply empowering parents to control their sons and daughters. Punishments for violation of this injunction may vary depending upon the facts presented. When both partners are underage, a juvenile adjudication may be appropriate for a violation. If one party is an adult, then misdemeanor sanctions equivalent to those relating to the violation of any other protective order[147] may be appropriate for the adult while juvenile sanctions may be appropriate for the underage partner.

This intervention technique is superior to the broad and general prohibition against all adolescent sexual conduct because it is able to be applied in those situations where the threat of coerced conduct is the greatest. A parent is in the best position to determine if a relationship is harmful to

143. *See* § 948.02(3).

144. This would occur, for example, when a parent of a fifteen-year-old reports a relationship between the adolescent and an adult.

145. Recently, a mother caught her fourteen-year-old daughter naked in bed with a fourteen-year-old boy. Jamaal Abdul-Alim, *Teens Have Right to Have Sex, Lawyer Argues*, MILWAUKEE J. SENTINEL, Aug. 21, 2003, at 1B. Both fourteen-year-olds freely admitted that they intended to have sex and challenged the mother to call the police. *Id.* And so the mother did, resulting in juvenile charges being brought against both her daughter and the male partner. *Id.*

146. *See, e.g.*, Bachowski v. Salamone, 407 N.W.2d 533 (Wis. 1987).

147. For example, a person violating a domestic abuse restraining order may be imprisoned for up to nine months and fined up to $1000. WIS. STAT. § 813.12(8) (2003–2004). A violation of a harassment restraining order warrants imprisonment of up to three months and a fine of up to $1000. § 813.125(7).

their son or daughter, and this mechanism would provide a means of enforcing that belief when traditional parental disciplinary tools have failed. Additionally, the partners are provided notice that their conduct is prohibited and are given the opportunity to adjust accordingly, as opposed to the present system where many adolescents are completely unaware that their consensual sexual relationships are criminal.[148]

VIII. CONCLUSION

Statutory rape laws developed largely out of an interest to protect young people from the sexual predations of adults. Although Wisconsin's law accomplishes this goal, Wisconsin takes the additional step of criminalizing all adolescent sexual conduct. Adolescent abstinence may be ideal, but it is not best accomplished by criminalization and most certainly not by treating a consensual peer relationship as equivalent to a stereotypical case of child molestation. The many laws regulating the sexual conduct of young adult and adolescent peers should be reformed to include age-gap provisions, like those adopted in nearly every other state, thus decriminalizing or criminalizing at a substantially reduced level the consensual relationships of adolescent or young adult peers. Should the legislature decide to entirely decriminalize consensual peer relationships, the innovation of a parental restraining order would allow disapproving parents a means by which to legally intervene and prevent an otherwise legally permitted relationship.

Maintaining criminalization is unnecessarily burdensome to those persons and organizations obligated to report, investigate, or prosecute such conduct. Lax prosecution motivates disrespect for the law, but full prosecution of current laws has the potential of turning a majority of high school students into sex offenders. Wisconsin should reform its laws, refocusing upon protecting children from sexual exploitation and allow the regulation of consensual peer relationships to be a matter for individual parents, rather than government.

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148. Megan Twohey, *Teens Who Have Sex Charged With Abuse*, MILWAUKEE J. SENTINEL, Mar. 8, 2004, at 1A.