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NO PENIS, NO PROBLEM

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Cover Page Footnote

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NO PENIS, NO PROBLEM

*Kay L. Levine**

For eight months in 1999, a special education teacher in Montrose, New York had sex with several teenaged students during private, in-home tutoring sessions.¹

In December of 1998, a thirty-year old church choir supervisor in Shrewsbury, Massachusetts had a sexual relationship with a fourteen year-old member of the choir.²

In Gwinnett County, Georgia, in 1998, a thirty-six year-old school bus driver exchanged alcohol for sex with a fourteen year-old classmate of the driver's daughter.³

In 2002, the forty-six year-old music director of a private school in a Boston suburb had sex with a fourteen year-old at the school.⁴

In 1998, in Antioch, California, a foster parent-foster child relationship led to the birth of a baby boy.⁵

INTRODUCTION

Sex between adults and teenagers is not a new phenomenon. Stories of adults molesting or seducing adolescents have littered the inside pages of

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1. Al Baker, *Teacher Accused of Raping 3 Teenagers from Her School*, N.Y. TIMES, Aug. 23, 2000, at B5.

2. Jules Crittenden, *Woman Charged in Rape of Choirboy*, BOSTON HERALD, Sept. 24, 2000, at 14.

3. R. Robin McDonald, *Rape Case Against Bus Driver Unrelated to Gwinnett Job; School Employee on Unpaid Leave*, ATLANTA J. CONSTITUTION, Sept. 23, 1998, at 04E.

4. David Weber, *Newton Private School Teacher Denies Charge She Raped Boy*, BOSTON HERALD, Aug. 8, 2002, at 10.

5. Charlie Goodyear, *Jailed Mom Gives Birth to Baby by Teen Lover*, S.F. CHRON., Oct. 16, 1998, at A21.

newspapers for the past several decades, although the behavior itself can be traced back much farther than that. But the anecdotes mentioned above are not just examples of typical cases. In each of these instances, the sex occurred between an adult woman and an adolescent boy.

Certainly the paradigmatic example of the female child sexual abuser is Mary Kay Letourneau, the elementary school teacher in Washington State who became infatuated with one of her pre-teen students, and eventually fathered two children with him.⁶ But while the media portrayed her as an anomaly, Ms. Letourneau is merely the most visible member of a class of criminals—adult women who have sexual encounters or relationships with boys, in violation of statutory rape laws in every state in the United States.

Is this a new form of crime? Is the female statutory rapist a new breed of criminal, and the boy a new type of victim? One might think so, given the gendered history of the statutory rape law itself and the academic legal literature on the issue. Legal scholars writing for the past fifty years—a time period that brackets the Supreme Court's decision in *Michael M. v. Superior Court of Sonoma County*⁷—implicitly and nearly universally assume that statutory rape defendants are male and their victims female.⁸ Moreover, gendered assumptions about the statutory rape drama seem to comport with the obvious facts of life. Society is, after all, dominated by unwritten scripts that tell males and females how to behave sexually and how to respond to stress or fear,⁹ and these schemas tend to illuminate acts of male perpetration and female victimization while keeping underground the existence of female-perpetrated abuse and male victimization.¹⁰

6. See, e.g., Patrice O'Shaughnessy, *Teacher Guilty in Boy's Rape Hopes for Reunion: Woman Faces 5-7 Years of Prison First*, TIMES-PICAYUNE (New Orleans, LA), Feb. 25, 1998, at D11.

7. 450 U.S. 464 (1981).

8. Legal institutions traditionally have been just as blind to adults' sexual exploitation of teens in the same-sex context, but that topic is beyond the scope of this paper.

9. See, e.g., Myriam S. Denov, *The Myth of Innocence: Sexual Scripts and the Recognition of Child Sexual Abuse by Female Perpetrators*, 40 J. SEX RES. 303, 308-309 (2003); E. D. Nelson, *Females Who Sexually Abuse Children: A Discussion of Gender Stereotypes and Symbolic Assailants*, 17 QUALITATIVE SOCIOLOGY 63, 63-66 (1994); see *infra* notes 112-41 and accompanying text for further discussion of sexual scripts.

10. Although sexual relationships between older females and younger males have been featured in movies (consider *THE GRADUATE* (Embassy Pictures Corp. 1967), *SUMMER OF '42* (Warner Bros. 1971), *TADPOLE* (Miramax Films 2002), and *IN THE BEDROOM* (Miramax Films 2001)), the mainstream public and the justice system seem to dismiss these encounters as too rare or controversial to merit sustained attention in the real world. See Alistair Harkness, *Here's To You, Mrs. Robinson*, SCOTSMAN, June 13, 2003, at 18; Karen S. Peterson, *Sex Between Adults and Children*, USA TODAY, Apr. 17, 2002, at 1D; Bruce Westbrook, *Bebe Neuwirth on the Defensive*, HOUSTON CHRON., Aug. 1, 2002, at 19.

While this article focuses on the academy's treatment of statutory rape, I discuss

Scientists working in the fields of psychiatry and psychology, however, have uncovered evidence that tells a different story. They have found a surprisingly high percentage of female sex abusers in the population and have documented an extensive array of child sexual abuse committed by women against boys, abuse that includes rape, child molestation, and even incest.¹¹ In so doing, they have started to identify the motivations that underlie this behavior and to assess boys' experience of sexual victimization, which, contrary to popular belief, can be every bit as traumatic as that suffered by girls.¹²

Today, twenty-five years after *Michael M.*, the academy's failure to notice female sexual exploitation of male minors puts us at risk of unwittingly reinforcing a gender regime in which the rights of both males and females are decimated by biology. Given the scientific data, legal scholars must resist the temptation to rely on the highly gendered notions of age-differential sexual experiences that have animated scholarship in the past. We can and should use studies of female sexual abusers to inform our understanding of female-perpetrated statutory rape and to suggest ways to alter the criminal justice system's responses to both victims and defendants involved in these crimes. To continue to pretend that women are not capable of seducing or manipulating boys to have sex, or to conclude that women who behave this way are too rare to merit attention, will enslave us to the unfortunate habits and stereotypes of the past and cause us to abandon an entire class of victims who deserve better.

The argument proceeds in two parts. Part I documents the statutory rape law's gendered essence, explaining the formal law's traditional gendered classification scheme, the Supreme Court's approval of that approach, and the literature and enforcement policies that have reinforced this division between the sexes over time. A careful review of the history and literature shows that the law itself has fitted us with blinders, compelling us to focus exclusively on harms caused to girls by adult men and to ignore the possibility of female-perpetrated statutory rape of boys, even in the years since the law became officially gender-neutral. Part II begins with a discussion of the societal scripts that constrain our ability to accurately interpret the behavior of both genders when it comes to sex. It then introduces the psychiatric and psychological literature about female sexual abusers and male sexual abuse victims. The evidence we can extract from

prosecutorial handling of these issues in a different work. See Kay Levine, *Boy Toys and Hoochie Mamas: Is Statutory Rape an Equal Opportunity Crime?* (work in progress, on file with author).

11. See *infra* Part II.

12. *Id.*

these studies—about the frequency of female abusive behavior, the nature of such behavior, and the likely motivations of both victims and perpetrators—should inform how we handle these issues in statutory rape literature in the future.

PART I: THE GENDERED HISTORY OF STATUTORY RAPE

Our highly gendered way of thinking about the participants in statutory rape derives, first and foremost, from the statutes that defined the crime for much of its history. In light of the gendered language embedded in the traditional statutory definition of ‘age of consent’ sex crimes, the equal protection arguments this language generated, and the patterns of enforcement for the past century, it is no surprise that lawyers almost instinctively regard statutory rape as a crime committed by men against girls.

Criminologists and historians have consistently documented that, since at least the 1700s, violent and property crimes are an overwhelmingly male phenomenon.¹³ While scholars have debated the source of this gender disparity in crimes whose formal definitions are gender neutral,¹⁴ the issue remained hidden in the statutory rape caseload until the end of the twentieth century. Why? Because for much of its history, statutory rape, commonly defined as sex with a person under the legal age of consent, was statutorily constructed in gendered terms.¹⁵

13. See Malcolm M. Feeley & Deborah Little, *The Vanishing Female: The Decline of Women in the Criminal Process, 1687-1912*, 25 LAW & SOC’Y REV. 719, 740-50 (1991) (detailing and challenging the assumption that crime has always been a predominantly male behavior). For a critique of how the assumption that crime is predominantly committed by males has shaped criminal justice policy, see CAROL SMART, WOMEN, CRIME AND CRIMINOLOGY (1977) and Celia Wells, *The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection*, 2004 CRIM. L. REV. 503, 504 (remarking that for much of our history, “criminology and penology were relatively blind to the fact that not everyone is male”).

14. See, e.g., David O. Friedrichs, *White Collar Crime and the Class-Race-Gender Construct*, in RACE, GENDER AND CLASS IN CRIMINOLOGY: THE INTERSECTION 141 (Martin Schwartz & Dragan Milovanovic eds., 1996); G. David Curry, *Female Gang Involvement*, 35 J. RES. CRIME AND DELINQUENCY 100, 102-18 (1998); Carl Keane, et al., *Drinking and Driving, Self-Control, and Gender: Testing a General Theory of Crime*, 30(1) J. OF RES. CRIME AND DELINQUENCY 30, 32-46 (1993); Darrell J. Steffensmeier, *Sex Differences in Patterns of Adult Crime, 1965-77: A Review and Assessment*, 58 SOC. FORCES 1080, 1098-1103 (1980).

15. See Rita Eidson, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757, 762-66 (1980); *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 64 (1952) [hereinafter *Forcible and Statutory Rape*]; Marsha Greenfield, *Protecting Lolita: Statutory Rape Laws in Feminist Perspective*, 1 WOMEN’S L. J. 1, 4 (1977).

The epitome of the gendered statutory rape law is the California statute that was challenged and upheld by the United States Supreme Court in *Michael M. v. Superior Court of Sonoma County*¹⁶ in 1981:

Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female who is not the wife of the perpetrator where the female is under the age of 18 years.¹⁷

As the California statute demonstrates, statutory rape was traditionally understood as a crime that could happen only to females; indeed, the “female” victim specification appears twice in just a few lines. The law further gendered the putative actors by requiring that the victim not be the *wife* (an exclusively female status) of the perpetrator, who, by definition, must be male.¹⁸ Given these statutory elements, any gender disparity in the defendant population stemmed directly from the crime’s structure; law enforcement or reporting bias was not an issue.

In the 1950s, the state legislatures’ approach to defining statutory rape came under attack in the legal academy.¹⁹ Early critics identified the sexist notions embedded in the rationales that supported the enactment of statutory rape laws.²⁰ Later, as constitutional law scholarship expanded to include Fourteenth Amendment substantive due process and equal protection analysis, scholars began to frame the earlier ideological arguments as constitutional violations. In so doing, they argued that gendered statutory rape laws violated a minor female’s right to privacy and unfairly discriminated on the basis of gender. The privacy argument was largely abandoned in later years, at least in part because the equal protection argument took center stage when it was tested before the Court in *Michael M.* From the beginning, the male perpetrator-female victim dyad inherent in the statutes’ terms formed the core of these debates.

Even after states excised gendered language from their statutes and thereby eliminated the law’s formal distinction between the sexes, legal scholars continued to write about statutory rape as a male-on-female phenomenon. In their view, the absence of the formal legal requirement did little to change the dynamic of the problematic relationship, and these

16. 450 U.S. 464 (1981).

17. CAL. PENAL CODE §261.5 (1981). This statute was amended in 1993 to incorporate gender-neutral language.

18. Modern “defense of marriage” laws preserve and support this presumption, as they insist that only a man and a woman can form a spousal relationship; hence, only a man can have a wife. See 28 U.S.C.A. §1738(C) (2005); GA. CODE ANN. §19-3-3.1 (2005).

19. See, e.g., *Forcible and Statutory Rape*, *supra* note 15.

20. *Id.*; see generally Greenfield, *supra* note 15 (providing a feminist critique of the rape laws).

scholars continued to assume that the “statutory rape problem” meant men taking unfair advantage of girls. This view was amply supported by the history of statutory rape enforcement, which, even in the present, gender-neutral era, has largely focused on male defendants.

The following pages provide a brief history of the legal issues presented by statutory rape law in the United States, both before and after the parties’ respective sexes defined the crime itself. The evidence contained herein shows a persistent tendency by legal institutions both to construct and to interpret statutory rape in highly gendered ways.

A. Statutory Rape’s Gendered Origins

Legal academics have recounted the history of statutory rape law’s creation in decidedly gendered tones. The emphasis on sex-differential treatment animates the scholarly discussion of both the law’s origins and the constitutional violations it triggers. In foregrounding these arguments I do not mean to imply that the gendered cast is faulty or contrived—my own research into the history of statutory rape suggests that it is highly accurate²¹—but rather to highlight that the male perpetrator/female victim model has dominated the academy’s consideration of statutory rape from the beginning.

From the legal scholarship in this area, one learns that statutory rape laws were created in a patriarchal society where the nuclear family was the primary social unit.²² In this traditional social structure, women either were denied legal personhood completely (causing them to be viewed as property of their fathers or husbands²³) or were granted limited rights as protectors of the family unit.²⁴ A young girl’s worth depended on her ability to secure a marriage that would promise her economic security.²⁵ Her ability to marry, in turn, depended on her sexual purity. Thus, a girl’s virginity was her greatest possession, her bargaining tool in securing a socially acceptable future.²⁶ An “unwise” disposition of a girl’s sexual ‘treasure’ was thought to harm both her own value and the entire social

21. Kay Leslie Levine, *Prosecution, Politics and Pregnancy: Enforcing Statutory Rape in California* (2003) (unpublished Ph.D. dissertation, Univ. of Calif. at Berkeley) (on file with author).

22. See, e.g., Greenfield, *supra* note 15, at 8-9.

23. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN’S RTS. L. RPTR. 175, 176-77 (1982).

24. See Martha Chamallas, *Consent, Equality and The Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 781 (1988) (discussing the traditional view of sexual conduct); Williams, *supra* note 23, at 177.

25. See Greenfield, *supra* note 15, at 5.

26. *Id.*

structure in which she existed.²⁷ Statutory rape laws operated to prevent this result wherever possible.

Two undesirable consequences flow from valuing a young girl's chastity in this fashion. First, when legal practices incorporate and reinforce social norms that treat women as little more than possessions of men, the laws respond perversely to protect the male property interest, rather than to compensate for the harm suffered by the female. In other words, gendered laws identify and punish those who, by taking a daughter's virginity, devalue a father's possession; they largely ignore the feelings of the daughter herself.²⁸ Moreover, the idea that a girl's value depends on her sexual purity leads to the conclusion that a girl who has engaged in consensual non-marital intercourse has "devalued" herself.²⁹ This conclusion, in turn, fosters the belief that unmarried women fall into two separate categories: those who are sexually pure and those who are not.³⁰ A dichotomy of this sort not only harms the individual woman who seeks the law's assistance but also perpetuates pervasive stereotypes of all women as either "innocent victims" or "temptresses."³¹ According to this view, the law must care for and defend "innocent victims" (chaste females), but "temptresses" (unchaste females) do not deserve the "benevolent protection" of the criminal law.³²

Legal scholars have also convincingly argued that gendered statutory rape laws evidence a double standard of sexual morality. Simply stated, the law's protection of females and not of males reflects the belief that female sexual morals should be restricted more than male sexual morals.³³ Furthermore, the sexual double standard and gendered laws validate and reinforce each other, because both rest on and preserve "pernicious sex role stereotypes."³⁴ This argument comprises several components. First, the protection of only women legitimates the notion that young women are, "by nature noble and pure and therefore to be protected from immoral

27. See *Forcible and Statutory Rape*, *supra* note 15, at 76.

28. *Id.* at 72-74.

29. Eidson, *supra* note 15, at 768.

30. See MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920, at 78 (1995).

31. Eidson, *supra* note 15, at 768.

32. *Id.*

33. Greenfield, *supra* note 15, at 8.

34. *Id.*; Eidson, *supra* note 15, at 761. This same argument motivated the social purity reformers at the turn of the twentieth century in their pursuit of higher age of consent laws. ODEM, *supra* note 30, at 9; Steven Schlossman and Stephanie Wallach, *The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era*, 48 HARV. EDUC. REV. 65, 80-94 (1978).

activity.”³⁵ According to this model, because young women are passive and ignorant, they are more vulnerable to emotional, physical, and social harm resulting from sexual intercourse.³⁶ Secondly, by qualifying only young females for victim status, gendered statutory rape laws presume that minor females, unlike minor males, are incapable of understanding the nature and consequences of sexual intercourse. Gender-based statutory rape laws thus embody and reinforce a stereotypical idea that girls are intellectually deficient and incompetent in a way that boys are not.³⁷ If one accepts this stereotype, the government must enact and enforce statutory rape laws against men in order to fulfill its protectorate obligations to girls.³⁸ Boys need no such protection from women.

The corollary to the idea that girls need the state’s protection is the notion that young boys are by nature sexual aggressors:³⁹ males will corrupt and exploit young females unless they are deterred by serious criminal sanctions.⁴⁰ These complementary male and female sexual stereotypes are problematic because they tend to be self-fulfilling prophecies:⁴¹ “traditional statutory rape laws may be aggravating the danger that females will acquiesce to sexual exploitation.”⁴²

Some feminist legal scholars have framed the argument against gendered statutory rape laws in the language of political theory: gendered laws represent the government’s attempt to oppress women as women. In other words, statutory rape laws demonstrate “the inability of society’s lawmakers to accept female sexuality.”⁴³ As Marsha Greenfield has explained, the simple need to control women is “endemic to our socio-economic system,” and our society fears that “giving females freedom to engage in sexual activity would probably destroy society as we know it.”⁴⁴ In response to that fear, the government “withholds from the ‘underage’ female the legal right to define her sexuality” and “punish[es] the male for violating the state’s power to control the female’s sexual activity.”⁴⁵ In

35. Greenfield, *supra* note 15, at 9.

36. Eidson, *supra* note 15, at 769.

37. *Id.*

38. *Id.* at 766-67.

39. *Id.* at 769.

40. *Id.*

41. *Id.* at 770; *see also* Williams, *supra* note 23, at 190 (arguing that women are victims of physical aggression because they have not been permitted to act as anything other than victims).

42. Eidson, *supra* note 15, at 770.

43. Greenfield, *supra* note 15, at 8.

44. *Id.*

45. *Id.* at 10.

fact, the gendered law renders the minor girl literally incapable of having lawful sexual intercourse until she reaches the statutory age.⁴⁶ The same is not true of minor boys, who are authorized to have lawful intercourse as long as their partners are not underage girls. Such presumptions reinforce the male sense of sexual adventure without consequence while stifling adolescent girls' sexual freedom or women's sense of their power in society.

These ideological points have also generated constitutional arguments, as gendered statutory rape laws implicate the standards and principles underlying the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection argument was featured most prominently in the claims articulated by the petitioner in *Michael M. v. Superior Court of Sonoma County*,⁴⁷ where a male juvenile accused of the statutory rape of a female peer challenged the state's ability to prosecute him under the then-gendered California statute.⁴⁸ Petitioner Michael M. alleged that the California statutory rape law unlawfully discriminated on the basis of gender because, when both the male and female sexual partners were younger than 18, it presumed that the male was the aggressor.⁴⁹ This classification, he argued, perpetuated outdated notions of the customary roles of the sexes and reinforced stereotypes of women as helpless and naïve and of men as sexual aggressors.⁵⁰ Michael further asserted that the state's purported justification for the statute, teenage pregnancy prevention, was a sham; he claimed that the teenage pregnancy rationale deflected attention from the statute's actual purpose—to maintain sexual stereotypes.⁵¹

Giving great deference to the State of California and to the Supreme Court of California in his plurality opinion, Chief Justice Rehnquist

46. *Id.* at 2.

47. 450 U.S. 464 (1981).

48. *Michael M.* involved a 17½ year-old male who was charged with violating the California unlawful sexual intercourse statute. *Id.* at 466. According to the charges, Michael M., the petitioner, had sexual intercourse with Sharon, who was 16½ years old at the time of the encounter. *Id.* The facts indicate that around midnight on the night in question, Michael and two friends met with Sharon and her sister at a bus stop. *Id.* at 466, 484 (Blackmun, J., concurring). At some point Michael and Sharon moved away from the group and began to kiss. *Id.* at 467, 484 (Blackmun, J., concurring) (citing unnumbered footnote transcript of preliminary hearing testimony). When Sharon rejected further sexual advances from Michael, he "slugged" her in the face two or three times. *Id.* at 485 (Blackmun, J., concurring). After this beating, Sharon agreed to have sex with him. *Id.* at 467, 485 (Blackmun, J., concurring). That act of intercourse led to the juvenile court prosecution of Michael for unlawful sexual intercourse with a minor. *Id.* at 466.

49. *Id.* at 475.

50. Brief of Petitioner at 7, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, No. 79-1344 (1981).

51. *Id.* at 24.

accepted as true the stated purpose of the gendered statute: to prevent teenage pregnancy.⁵² He then concluded that the State had a “strong interest” in preventing teenage pregnancy and that the interest was “sufficiently related to the State’s objectives to pass Constitutional muster.”⁵³ In addition, the Court ruled acceptable a gender classification that was “not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.”⁵⁴ The plurality accepted the California Supreme Court’s finding that young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse, because only women can get pregnant and because women suffer the consequences of teenage pregnancy disproportionately to males.⁵⁵ Thus, the United States Supreme Court claimed, the gendered statutory rape law did not discriminate on the basis of gender; it simply recognized that men and women are different and treated them as such.⁵⁶

In the years following *Michael M.*’s release, legal scholars condemned the Court’s decision and lobbied for the repeal of gendered laws.⁵⁷ They criticized Chief Justice Rehnquist for “[accepting] the utterly dubious proposition put forward by the State of California that the purpose of the statutory rape statute was to prevent teenage pregnancies[.]”⁵⁸ Critics further argued that statutory rape laws are based on “stereotypes concerning male sexual aggression and female sexual passivity, despite Chief Justice Rehnquist’s express denial of that possibility.”⁵⁹ They

52. *Michael M.*, 450 U.S. at 470. In response to Michael’s claim that the actual purpose of the statute was more invidious, Chief Justice Rehnquist declared that the State’s asserted justification for the statute can be rejected only if it “could not have been the goal of the legislation.” *Id.* (citing *Weinberger v. Wisenfeld*, 420 U.S. 636, 648 n.16 (1975)). He reasoned that teenage pregnancy prevention is at least one purpose of the gendered statute, and thus avoided directly addressing the claim that teenage pregnancy prevention actually veils the statute’s more insidious purposes. *Id.* at 470-71.

53. *Id.* at 473.

54. *Id.* at 469.

55. *Id.* at 473.

56. *Id.* at 476.

57. See, e.g., James McCollum, *Case Development, Constitutional Law—Statutory Rape—Gender-Based Classification Regarding Statutory Rape Law is Not Violative of the Equal Protection Clause of the Fourteenth Amendment: Michael M. v. Superior Court*, 25 HOW. L. J. 341, 356 (1982); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 390 (1984); Williams, *supra* note 23; Alice S. Andre-Clark, Note, *Whither Statutory Rape Laws: Of Michael M., the Fourteenth Amendment, and Protecting Women from Sexual Aggression*, 65 S. CAL. L. REV. 1933, 1936 (1992); Lisa Fuentes, Note, *The 14th Amendment and Sexual Consent: Statutory Rape and Judicial Progeny*, 16 WOMEN’S RTS. L. REP. 139, 139 (1994).

58. Williams, *supra* note 23, at 181.

59. *Id.* at 186. James McCollum has asserted that the “history of California’s gender-

contended that gender stereotypes animated the Court's approval of such statutes.⁶⁰ For example, in describing the opinion of the lower court, Chief Justice Rehnquist noted that "males alone can physiologically cause the result which the law properly seeks to avoid (i.e. pregnancy)" and that "gender classification was readily justified as a means of identifying the offender and the victim."⁶¹ According to Wendy Williams, the first statement is based on a sexist biological concept that women are not necessary for conception, but serve only as incubators. The second statement—that criminalizing only men properly identifies perpetrators—implies that only men can be statutory rapists and only women can be victims.⁶² Nothing about this construction is inherent in the concept of "sexual intercourse with a minor"; it results only from the statute's gender-specific terms (the same terms that allegedly violate the Equal Protection Clause).

Overall, scholars have argued that the Court's decision in *Michael M.* was not only circular but also dangerous. Williams viewed *Michael M.* as evidence that society's quest for gender equality had hit a brick wall of culture, that deeply-embedded cultural notions of what is quintessentially male and female will not yield to constitutional requirements.⁶³ James McCollum echoed this concept, although he optimistically noted that the *Michael M.* decision was only a "temporary road block towards alienating unnecessary gender discrimination."⁶⁴ By refusing to acknowledge the sexist implications in gendered statutory rape laws, and by upholding the law in spite of these implications, the Supreme Court implicitly "sanctioned the subtle gender discrimination which exists in our culture."⁶⁵

B. Gender Bias in Modern Discussions

Despite a flurry of scholarly critiques, at the time *Michael M.* was

based statutory rape law did not support the state's assertion that pregnancy prevention was the actual purpose of the statute[.]" as the pregnancy prevention justification did not come to light until 128 years after the statutory rape statute was enacted. McCollum, *supra* note 57, at 358-59. McCollum criticized the Court for its hypocrisy, contending that "Rehnquist was apparently aware of the problems behind California's represented state purpose" yet chose to support it without any investigation into its validity. *Id.* at 360.

60. *Id.* Williams noted, for example, that even though consent and coercion are irrelevant in statutory rape cases, the Court still provided the details of this particular case that "cast Michael and Sharon as prototypes of the sexually aggressive male and the passive female." *Id.*

61. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 468 (1981).

62. Williams, *supra* note 23, at 187.

63. *Id.* at 185; *see also* Olsen, *supra* note 57, at 183.

64. McCollum, *supra* note 57, at 356.

65. *Id.* at 364.

decided it had very little practical impact⁶⁶ because most states had already adopted gender-neutral language in their statutory rape laws. Even California removed gender-specific language from its statute in 1993,⁶⁷ as legislators realized that outrageous sexual conduct by women (factually documented and widely publicized) could not be prosecuted under the existing law.

Once the laws became gender neutral, statutory rape did not lose its allure in the legal academy as a topic worthy of investigation and comment. Most scholarly works about statutory rape produced since the early 1990s have sought to unearth or to explain reasons why teens become sexually involved with adults, all with any eye towards suggesting how the law might better take account of these realities. But a review of recent literature about statutory rape reveals that most scholarly writers continue to presume heterosexuality in the caseload, analyzing cases of male perpetrators and girl victims almost entirely to the exclusion of any other sex or age combination.⁶⁸

For example, some scholars recount stories of girls who date adult men for their cars, apartments, and movie tickets. Others detail how young girls seeking replacements for their fathers become easy prey for older men.⁶⁹ Some suggest that female teens are frustrated by the lack of maturity in their adolescent male peers; older men offer more adult conversations and

66. The symbolic impact of the decision is another matter, however. The Supreme Court's approval of a gender-based classification scheme that rested on outdated stereotypes and dubious assumptions about pregnancy likely contributed to and reinforced the societal scripts about gender and sex roles that will be discussed below. *See infra* notes 123-143 and accompanying text.

67. *See* Susannah Miller, Note, *The Overturning of Michael M.: Statutory Rape Becomes Gender-Neutral in California*, 5 UCLA WOMEN'S L. J. 289, 292 (1994).

68. This article stems from a much broader project that investigates the enforcement of statutory rape over time. Levine, *supra* note 21. As part of that larger work, I sought to collect every article written about statutory rape in the legal and social science literature in the United States, and I believe I largely succeeded. Hence, although I can't claim scientifically that I have captured the universe, I believe my files reflect the large majority of academic writing on the subject of statutory rape. In this library, there are only a handful of articles that even acknowledge that current statutory rape law extends beyond male perpetrators with girl victims to situations such as female perpetrators with boy victims or same-sex statutory rape. As the following discussion shows, however, even this quantity suggests a falsely elevated level of interest in the non-paradigmatic statutory rapes; very few authors engage in any treatment of the issue beyond passing mention.

69. *See generally, e.g.*, Lynn M. Phillips, *Recasting Consent: Agency and Victimization in Adult-Teen Relationships*, in NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT 82 (Sharon Lamb ed., 1999); Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15 (1994) [hereinafter Oberman, *Turning Girls Into Women*].

more freedom from their parents' homes.⁷⁰ Authors likewise contend that older men who seek out younger partners view teenage girls as easily impressed with their often limited financial status (these men may have more money than teenage boys, but not enough to impress the average adult woman), asserting that easily impressed often translates into easily manipulated into sex.⁷¹ While these understandings of statutory rape's antecedents are not inherently narrow, they do reflect a particular view of how adult-teen relationships form—older men turn to younger women for easy sex and adoration, while younger women turn to older men for financial benefit and improved social status.⁷² Girls, in short, trade sex for status and security because they don't know any better, and men offer the promise of status and security in exchange for sex because girls will fall for it.

Having documented that these are the circumstances under which statutory rape occurs, authors typically call for policy reform that will respond to the needs and problems presented by each of these populations. Some suggest statutory rape enforcement should give way to self-esteem training and job training for female teens, so that they will no longer be susceptible to the wiles of older men. Proponents of this view contend that the criminal law has only made a mess of things: telling girls they have no sexual agency further disempowers them and often triggers resentment rather than gratitude.⁷³ Others argue that we cannot afford to go back to treating statutory rape as a non-crime, because girls will be used and

70. Terry Leahy, *Sex and the Age of Consent: The Ethical Issues*, 39 SOC. ANALYSIS 27, 39 (1996); Phillips, *supra* note 69, at 99-103.

71. See Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 771 n.218 (2000) [hereinafter Oberman, *Regulating Consensual Sex*]; see also Leahy, *supra* note 70, at 39 (providing evidence that teens who become involved with adults know exactly what they are doing and often behave in instrumental ways to get what they want from the relationship); Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109 (2004).

72. In fact, when the ABA Center for Children and the Law commissioned a study on statutory rape, the end product explicitly adopted—in the title of the report—a gendered construct of the crime. See SHARON G. ELSTEIN & NOY DAVIS, *SEXUAL RELATIONSHIPS BETWEEN ADULT MALES & YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES* 5, 39 (1997). The following year, a practice guide authored by one of the same researchers made the same assumption about the caseload. See SHARON G. ELSTEIN & BARBARA E. SMITH, *VICTIM-ORIENTED MULTIDISCIPLINARY RESPONSES TO STATUTORY RAPE: TRAINING GUIDE* (1998).

73. See generally, e.g., PAMELA HAAG, *CONSENT: SEXUAL RIGHTS AND THE TRANSFORMATION OF AMERICAN LIBERALISM* (1999); Patricia Donovan, *Can Statutory Rape Laws be Effective in Preventing Adolescent Pregnancy?*, 29 FAM. PLAN. PERSP. 30 (1997); Mike A. Males, *Poverty, Rape, Adult/Teen Sex: Why 'Pregnancy Prevention' Programs Don't Work*, 75 PHI DELTA KAPPAN 407 (1994).

abused by predatory older men with no recourse—this is, after all, the traditional way men have treated unmarried young women. According to this camp, only the criminal justice system has the “teeth” to promote and enforce responsible sexual behavior in the male population, and it would be an injustice for the criminal courts to abdicate their responsibility to teen girls in favor of softer (i.e. education or public health oriented) policy responses.⁷⁴ Regardless of which angle the author adopts (favoring strict enforcement or promoting alternative responses), these works hold one major premise in common—statutory rape is a problem experienced by adolescent girls and caused by men—and it is this premise that drives the policy proposal.

For the most part, works that do consider cases of statutory rape by women on boy victims simply nod to the gender-neutrality of today’s statutory rape laws in the midst of analyzing the laws’ impact on problems typically considered to be women’s issues, particularly teenage motherhood and female sexual consent.⁷⁵ In fact, some authors seem to assume that the law’s gendered treatment may be justified, as the threat posed by female sexual abuse appears minimal. A 1996 article hypothesizes that it may actually be societally correct for women rarely to be prosecuted for sex with minor males because “men and women stand on very different footings with respect to physical and social power.”⁷⁶ An empirical study of child/adult relationships similarly posits that boys may feel less of a threat of physical coercion, which may provide them at least a feeling of more control over their relationships and make them less likely to feel victimized.⁷⁷ Indeed, the fact that a woman is simply disproportionately

74. See, e.g., Elstein & Davis, *supra* note 72, at 40; Elstein & Smith, *supra* note 72, at 17; Oberman, *Regulating Consensual Sex*, *supra* note 71, at 775-84; Oberman, *Turning Girls Into Women*, *supra* note 69, at 78-79. Phillips acknowledges the sexual agency points mentioned above, but her bottom line is that teens cannot accurately gauge the benefits and burdens of adult sexual relationships and usually come to regret them later in life; hence, the criminal law should remain involved. Phillips, *supra* note 69, at 99-103.

75. See, e.g., Donovan, *supra* note 73, at 32 (noting that “[t]oday... most laws are gender neutral”); Elizabeth Hollenberg, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL’Y REV. 267, 270-71 (1999) (noting that although analysis of age-disparate relationships generally focuses on cases of older men with minor females, rarely a minor male will “become[] involved with a substantially older woman”); Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL’Y & L. 287, 334-36 (1997) (entitling one section of her article, “(Hesitantly) Embracing the Trend Toward Gender Neutral Provisions”).

76. Richard Delgado, *Statutory Rape Laws: Does it Make Sense to Enforce Them in an Increasingly Permissive Society? No: Selective Enforcement Targets “Unpopular” Men*, 82 A.B.A. J. 87, 87 (1996).

77. See Leahy, *supra* note 70, at 27-30; see also Lewis Bossing, *Now Sixteen Could Get*

older often does not alone suffice to “victimize” a boy, even if her behavior is egregious.⁷⁸

When the reasons for including boys under the protection of statutory rape law are discussed at all, commentators offer process and outcome justifications⁷⁹ that resemble those used to explain the treatment of girl victims; they generally neglect to consider the needs and responses of boys themselves. Kelly Connerton, for example, questions the ability of a minor of either sex to provide meaningful consent to sex, writing that “[b]oth sexes need protection from abuses” due to immaturity and the resulting lack of ability to make adult decisions, particularly when the minor is in a relationship with an adult rather than with a partner of a similar age.⁸⁰ Similarly, Lewis Bossing notes that, like girls, “male minors are also at risk for some harms associated with sexual conduct,” including sexually transmitted diseases, self-esteem problems, psychological harm, and teenage parenthood.⁸¹ A handful of others have highlighted rare cases in which the perpetrator is considered to have disproportionate power over the boy,⁸² or in which the female defendant becomes pregnant by her male victim, and the investigation and prosecution of the case produces outrageous and unintended results.⁸³ Yet these instances are put under the

You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement, 73 N.Y.U. L. REV. 1205, 1237-38 (1998) (noting that in the gay community, it is argued that relationships between older men and minors is a typical way of helping the minor form his or her personal and sexual identity).

78. See Carolyn E. Cocca, *The Politics of Statutory Rape Laws: Adoption and Reinvention of Morality Policy in the States, 1971-1999*, 35 POLITY 51, 53-58 (2002) (relating a supporting anecdote: after a case in which a gendered statutory rape law allowed dismissal of charges against a forty year-old woman who had sex with eight males aged fourteen to sixteen, the stepmother of one of the victims lobbied to have the law changed and failed to win NOW’s support because “the problem of women raping men is not the major problem”).

79. By outcome justifications, I mean that statutory rape is a crime because sex with minors produces harmful consequences—transmission of STDs, unwanted pregnancies, and the like. By process justifications, I mean statutory rape is a crime because the adult uses exploitative processes to seduce the teen, a behavior that the law regards as harmful even if the teen suffers no harmful outcome from the sex itself.

80. See, e.g., Kelly C. Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by their Statutory Rapists*, 61 ALB. L. REV. 237, 254 (1997).

81. Bossing, *supra* note 77, at 1205 n.2, 1239.

82. See, e.g., Bossing, *supra* note 75, at 1234 n.138; Cocca, *supra* note 78, at 55; see also, e.g., Chelsea J. Carter, *DA Launches Web Site Aimed at Tracking Down Statutory Rapists*, S.D. UNION TRIB., July 18, 2000, at A4 (quoting a local District Attorney who referenced the popular Mary Kay Letourneau story as shorthand for the issue of female-perpetrated statutory rape).

83. See, e.g., Ken Tennen, *Wake Up, Maggie: Gender-Neutral Statutory Rape Laws, Third-Party Infant-Blood Extraction, and the Conclusive Presumption of Legitimacy*, 18 J.

microscope because they are regarded as oddities—unusual events in the vast landscape of statutory rape that are interesting enough to trigger a student comment, but not sufficiently important to change the landscape itself.

C. (En)Gendering the Enforcement of Statutory Rape

As one considers the gendered nature of statutory rape, it is important to look beyond the statutory language itself, and even beyond the academy's legal arguments, to identify the implications and underpinnings of this phenomenon. We should also look to enforcement policies for clues about the relationship between statutory rape and gender roles. Since the mid-to-late 1800s, enforcement of the statutory rape law has served multiple policy objectives, all of which stemmed from and reinforced the conventional male perpetrator/female victim paradigm.

As noted above,⁸⁴ statutory rape laws were originally enacted to protect a father's interests in his daughter's marriageability. Given the tightly restrictive gender roles and marriage standards of the nineteenth century, a law seeking to protect only females made sense. But the law also drew

JUV. L. 1, 12 (1997); John A. Greenbaum, Note, *Holding a Male Statutory Rape Victim Liable for Child Support*, 98 DICK. L. REV. 549, 556 (1994). Tennen expressed concern with the pregnancy consequences of adult female/boy victim relationships. See Tennen, *supra*. Historically, in order to maintain the integrity of the family and to prevent a child from being declared illegitimate, the law presumed that any child born to a married woman was fathered by her husband. *Id.* at 9. But as states begin to prosecute more women for statutory rape and if an infant itself may be evidence of a woman's crime, Tennen predicts that courts will face a new question: how should we balance the privacy right of an infant (who is, by law, presumably the issue of its mother's husband) against the public's interest in effectively prosecuting the infant's mother for victimizing another child? *Id.* at 28. Tennen concludes that in cases in which the woman and her husband have decided to welcome the infant as their own, state intervention to establish that the baby was actually fathered by a statutory rape victim would both damage the family unit and leave the child more vulnerable to becoming a ward of the state; therefore, the interests of the infant should prevail over the state's interest in prosecution. *Id.* at 32-33. Greenbaum exposed a different problem that may stem from impregnation of the female statutory rapist by her young partner: adjudicating the respective parents' financial support obligations for any offspring carried to term and not put up for adoption. See Greenbaum, *supra*. Here again, traditional views of statutory rape and family law create challenges for consistently and logically applying the laws to protect boys. Family court judges commonly assume that boys' sexual participation would be impossible in the absence of factual consent. The issue of legal consent, the *sine qua non* of criminal statutory rape law, does not arise in family court, where support obligations rest solely on factual responsibility for conceiving a child: "once the issue of paternity [is] decided, a father [has] a clear duty to support his child." *Id.* at 549, 553, 554. As a result, family courts have required boy statutory rape victims to financially support the children that, according to the criminal courts, they could not legally have consented to conceive. *Id.* at 553.

84. See *supra* notes 21-51 and accompanying text.

distinctions *between* women (and between men) based on these gendered scripts: the courts held that only chaste and virtuous females qualified for true victim status, and only their seducers merited punishment. Because girls who appeared willing or experienced had “devalued” themselves, their male partners were not criminally liable because they could not have caused any real harm. This separation of girls into deserving and undeserving victims thus reflected and reinforced notions of proper womanhood, while the separation of men into deserving and undeserving defendants reflected and reinforced expectations of male sexuality.

The gendered nature of the statutory rape law affected enforcement policy in the mid-twentieth century as well, when statutory rape was linked with welfare collection efforts for the first time. In the years following World War II, the Aid to Dependent Children program authorized by the Social Security Act (later called Aid to Families with Dependent Children, or AFDC), originally intended to help widows and orphans, came to serve mostly abandoned or never-married mothers.⁸⁵ When faced with escalating costs of child support for these families, many states developed a keen interest in finding and holding accountable the father of any child whose mother filed a claim for government assistance. In 1950, in an effort to secure support from absent fathers, Congress passed the Notification of Law Enforcement Officers amendment to the Social Security Act, which required public welfare departments to notify law enforcement officials whenever they granted aid to a deserted or abandoned child.⁸⁶ Welfare agencies placed the burden on welfare seekers, forcing an exchange of paternity information for benefits. Once unwed mothers were forced by welfare agencies to identify their baby’s father in order to receive aid, it was but a short step to the sharing of that information with criminal justice authorities when the mother was underage.⁸⁷ In the context of assisting unwed teenage mothers with the collection of child support (or, more

85. MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* 322 (1988); GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942*, at 151 (1995).

86. ABRAMOVITZ, *supra* note 85, at 322.

87. This jump to the criminal justice system was not, of course, limited to cases involving mothers under the age of eighteen. If notified of a welfare application filed by an adult woman whose children had been abandoned by their father, the government would criminally prosecute the “deadbeat dad” for failure to pay child support. For example, Miguel Vega Andrade was prosecuted for non-support in Pasadena, California in 1963; as a term of his probation, he had to marry the mother of his children and undergo a vasectomy. Julius Paul, *The Return of the Punitive Sterilization Proposals: Current Attacks on Illegitimacy and the AFDC Program*, 3 *LAW & SOC’Y REV.* 77, 79 n.3 (1968). Andrade’s case indicates that involuntary sterilization remedies for welfare abuse were not limited to “misbehaving” women; they were also imposed on “irresponsible” men.

accurately, securing for the government reimbursement for welfare payments previously made or preventing the need for future payments),⁸⁸ welfare agencies and policymakers called upon the statutory rape laws to better their chances of success. Either the threat of prosecution for statutory rape, or actual prosecution resulting in probation terms that mandated compliance with family court support orders, served to extract child support from men who fathered babies with teenage mothers.⁸⁹

Just as the statutory rape law's gendered language made sense at the turn of the century to support fathers of unmarried daughters, at mid-century the gendered language made sense as it served the policy purpose of welfare control. Because only men could father (and later abandon) children to young women who filed for government assistance, only men deserved to be prosecuted for statutory rape, and only men needed to be deterred from producing children they could not support. The "just desserts" formula was applied to females as well: if a woman was not willing to reveal the name of her baby's father, she would not receive government assistance. Despite the coercive nature of this program, the statutory rape law positioned the government to act on behalf of the female and against the male, in compliance with and in furtherance of the conventional gender regime.

A version of the unwed pregnancy-welfare story animated the revival of the statutory rape laws in the mid-1990s, when the federal and state governments voiced increasing concern over the burgeoning welfare rolls. Many policymakers and pundits had long placed the blame for this escalation of costs squarely on the shoulders of the unwed teen mother, who was painted as a lazy, hapless, irresponsible female who would rely on welfare for the rest of her life.⁹⁰ But when new social science evidence

88. When an AFDC mother applied for child support, the father of her children made payments directly to the state to reimburse already dispensed welfare payments. The mother received only fifty dollars from any payment made by the father of her children. This policy has led many scholars to argue that child support enforcement has two tracks: in non-AFDC families, enforcement prioritizes the children's well-being, while for AFDC families, enforcement is intended to assist the government. See, e.g., JYL JOSEPHSON, GENDER, FAMILIES AND STATE: CHILD SUPPORT POLICY IN THE UNITED STATES 34-36 (1997). For extensive discussion of child support policy in the twentieth century, see KATHY EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 102-04 (1997) and FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 103-04 (Irwin Garfunkel et al. eds., 1998).

89. Not everyone was convinced that forced child support was the ticket to happiness, however. One female reformer argued that a cash relationship "between biological father and mother recalls prostitution . . . traditionally men expect to pay in cash for illicit [sic] sex affairs." Mink, *supra* note 83, at 146 (quoting Marguerite Marsh, *Common Attitudes Toward the Unmarried Father*, 1940 NAT'L CONF. SOC. WORK PROC. 277, 277-79).

90. See, e.g., STUART M. BUTLER & ANNA KONDRATAS, OUT OF THE POVERTY TRAP: A CONSERVATIVE STRATEGY FOR WELFARE REFORM 157 (1987); IRWIN GARFINKEL, THE ROLE

appeared to demonstrate that most of the babies born to teen mothers were fathered by adult men,⁹¹ a new scapegoat emerged—the adult male who irresponsibly impregnated and then deserted the teen girl. Invoking rhetoric strongly reminiscent of the welfare platforms of the 1950s and early 1960s, state officials looked to their sex crime codes to generate what they hoped would be a sea change in teen birth and welfare rates. Statutory rape laws emerged as the answer, even though all of the states had by that time stripped their statutes of gender-based language.

The gender neutral language of the revised statutes did not stand in the way of the laws' use for this new purpose of reducing welfare rolls. According to then Governor of California Pete Wilson, renewed and vigorous enforcement of the statutory rape law would serve three important purposes for welfare policy: (1) deter men from having intercourse with underage females by increasing their fear of apprehension and punishment; (2) thereby reduce the number of underage females becoming pregnant and consequently reduce the number of underage females seeking AFDC; and (3) identify the fathers of underage pregnant teens and thereby force those men to pay child support. This marriage of welfare and moral regulation led to a host of new programs, including the formation of special statutory rape prosecution units in local district attorney's offices across the state.⁹² But more importantly (for our purposes here), this story about teen births and welfare presumed that only one type of statutory rape was important for the criminal law to identify and to punish: statutory rape committed by an older male against a teenage girl. Sexual contacts between adult women and teen boys (or between partners of the same sex), because they could not result in an abandoned teenage mother who might need welfare, simply fell outside of the domain and purpose of the statutory rape law. This was

OF CHILD SUPPORT IN ANTIPOVERTY POLICY 713 (Inst. for Res., Discussion Paper 1982). This welfare myth was later convincingly dispelled by other scholars. See MARIAN WRIGHT EDELMAN, *FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE* 71 (1987); KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* 1-13 (1996); Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L. J. 274, 289-90 (1991).

91. See David J. Landry & Jacqueline D. 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 AMER. J. PUB. HEALTH 565, 565-66 (1996). However, the significance of these reports was challenged by findings from other studies. See, e.g., Jacqueline E. Darroch et al., *Age Differences Between Sexual Partners in the United States*, 31 FAM. PLAN. PERSP. 160, 163 (1999); Laura D. Lindberg et al., *Age Differences Between Minors Who Give Birth and Their Adult Partners*, 29 FAM. PLAN. PERSP. 61, 61-63 (1997); Rebekah Saul, *Using—and Misusing—Data on Age Differences Between Minors and Their Sexual Partners*, 2 THE GUTTMACHER REPORT ON PUBLIC POLICY 10-11 (1999). These scholars amassed data to show that the percentage of much older fathers was considerably smaller than these early studies predicted.

92. Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1134 (2005).

true despite the gender neutral language of the formal law.

After several years, California and its sister states abandoned the teen pregnancy-welfare justification for statutory rape enforcement, adopting instead a much broader rationale based on the exploitation of minors. The theory of exploitation goes something like this: despite the bravado they display while among friends or their near-constant consumption of sexualized images and idols, many teens aren't mature enough to give meaningful consent to sexual contact.⁹³ While this lack of maturity can certainly be exploited by their peers, as a society we must ensure that lecherous adults won't take advantage of that vulnerability. "Taking advantage" may mean exploiting economic power (the adult expecting sex in exchange for use of a car, or in return for gifts), physical power (the adult using physical size to implicitly intimidate the teen) or relationship power (the adult manipulating a trust- or authority-based relationship with the teen). The concept of criminal exploitation is thus deeply rooted in our concerns about unequal bargaining power⁹⁴—because kids lack experience and maturity, they are at a distinct disadvantage when negotiating sexual relationships with more experienced and mature partners.

In accordance with the current exploitation theory of harm, the potential coverage of the statutory rape law has silently expanded⁹⁵ to encompass non-pregnancy-inducing sex between adults and minors, including sexual behavior short of intercourse, acts between older women and teen boys, and acts with same-sex partners. This expansion is possible because, in contrast to the teen pregnancy story, there is nothing inherently gendered in the concept of exploitation: women have the ability to exploit boys or girls, just as men have the ability to exploit boys or girls. The state is thus now able to identify and punish a much greater variety of harmful sexual

93. As Frank Zimring argues in the context of teen pregnancy, many adolescents have a very limited worldview and not much experience, and they therefore literally don't know what they might be missing when they make decisions that might result in the forfeiture of opportunities later on. Franklin E. Zimring, *The Jurisprudence of Teenage Pregnancy*, in EARLY PARENTHOOD AND COMING OF AGE IN THE 1990S, 27-30 (M. Rosenheim and F. Testa eds., 1992).

94. See, for example, the United Nation's definition of sexual exploitation of children: "The basis of the exploitation is the unequal power and economic relations between the child and the adult. The child is exploited for his/her youth and sexuality." VIIT MUNTARBHORN, *SEXUAL EXPLOITATION OF CHILDREN 1* (1996) (quoting Kevin Ireland, *Wish You Weren't Here, The Sexual Exploitation of Children and the Connection with Tourism and International Travel* (Save the Children Fund UK, Working Paper No. 7, at 2 (1993)). The United Nations groups the sexual use of children for profit by a third party within this category of exploitation. *Id.*

95. I use the term "silently" here to connote a process that has been largely underground—nothing in the statute's wording has changed. The expansion is the result of new interpretation and new application, nothing more.

behavior than it did before.

The exploitation rationale, however, has done little to alter the way most criminal justice officials think about statutory rape. An examination of the Statutory Rape Vertical Prosecution (SRVP) Program Guidelines in place in California in 1997 and in 2001 provides a striking example of the modern tendency to pay lip service to gender neutrality in statutory rape law while leaving the historically girl-focused victim structure and application of the laws in place.⁹⁶ The SRVP Program, enacted under the California State Budget Act of 1996 to initiate vertical prosecution of cases of unlawful sexual intercourse (statutory rape),⁹⁷ did not originally reflect the law's gender-neutrality and has changed only marginally in this respect.⁹⁸ The SRVP Program tracked only cases of male perpetrators and minor female victims until 2001, when the Guidelines were finally amended to require counties to track instances of female perpetrators and minor male victims and cases of same-sex statutory rape.⁹⁹ In 2001, an evaluation of the program by the Governor's Office of Criminal Justice Planning indicated a further stride toward gender-neutrality when the office noted as one of the program's significant challenges the inability of some judges to see boys as victims.¹⁰⁰

Despite these indications that California may have been moving toward the gender-neutral application of its statutory rape law, all other elements of the 2001 SRVP Program, including its objectives, funding, recommendations for future studies, and even the language used in its Guidelines, remained targeted almost exclusively at cases in which an adult male is the perpetrator and a minor female is the victim.¹⁰¹ The Program literature acknowledged that California's statutory rape laws are gender-neutral and that both men and women could be prosecuted for the crime, but it provided rationales only for prosecuting adults who prey on girls.¹⁰²

96. See generally OFFICE OF CRIMINAL JUSTICE PLANNING, STATE OF CALIFORNIA, STATUTORY RAPE VERTICAL PROSECUTION (SRVP) PROGRAM, PROGRAM GUIDELINES (1997) [hereinafter SRVP PROGRAM GUIDELINES (1997)]; GOVERNOR'S OFFICE OF CRIMINAL JUSTICE PLANNING, STATE OF CALIFORNIA, SRVP PROGRAM, PROGRAM GUIDELINES (2001) [hereinafter SRVP PROGRAM GUIDELINES (2001)].

97. SRVP PROGRAM GUIDELINES (1997), *supra* note 96, at Foreword.

98. Compare SRVP PROGRAM GUIDELINES (1997), *supra* note 96, with SRVP PROGRAM GUIDELINES (2001), *supra* note 96.

99. Compare SRVP PROGRAM GUIDELINES (2001), *supra* note 96, at Appendix D with SRVP PROGRAM GUIDELINES (1997), *supra* note 96, at Appendix C.

100. PROGRAM EVALUATION DIVISION, GOVERNOR'S OFFICE OF CRIMINAL JUSTICE PLANNING, STATE OF CALIFORNIA, SRVP PROGRAM, AN EVALUATION OF THE STATUTORY RAPE VERTICAL PROSECUTION PROGRAM 37 (2001) [hereinafter SRVP EVALUATION].

101. See generally SRVP PROGRAM GUIDELINES (2001), *supra* note 94.

102. SRVP EVALUATION, *supra* note 100, at 7.

The Program's pilot cities were chosen based on the raw number of births to unwed teens fathered by males aged twenty-one and older,¹⁰³ and the State continued to allocate SRVP funds on similar grounds throughout the program's history.¹⁰⁴ Consistent with its stated goals and funding rationale, the 2001 SRVP Program evaluation's single research recommendation was to study whether the program-generated increase in statutory rape prosecution caused a drop in teen pregnancy rates.¹⁰⁵ Finally, the language used in SRVP Program publications reflects the underlying gender bias by typically assuming that the offender is male and the victim is a minor female.¹⁰⁶

In sum, the vast majority of the writing on statutory rape produced since the early 1990s continues to reflect highly gendered concepts of what statutory rape is. This bias might be understandable if there was no data establishing patterns of female abuse and male victimization. After all, if no one has documented this phenomenon, it might be acceptable to conclude that it is too rare to make much difference to the law.

There is, however, no such vacuum; a small but rich literature about female sexual abusers and male victims of molestation exists in the fields of psychology and psychiatry. Scholars working in those traditions have uncovered behavioral patterns that can illuminate our understanding of statutory rape between women and boys; they have also identified societal norms that appear to affect the relevance of gender to assessments of culpability. In light of these findings, legal scholars and policymakers can no longer afford to restrict their views of statutory rape to the conventional gender dyad.

PART II: FEMALE SEXUAL ABUSE OF BOYS: LESSONS FROM THE CLINICAL LITERATURE

In the fields of psychiatry and psychology, scholars and clinicians alike traditionally regarded criminal sexual behavior as the exclusive province of males.¹⁰⁷ Community perceptions supported this view; members of the

103. *Id.* at 10.

104. *Id.* at 12-13; SRVP PROGRAM GUIDELINES (2001), *supra* note 96, at 12. For example, in 2001, funds were awarded to California counties based on, among other things, the birth rates to unwed teenage mothers twelve to seventeen years of age whose children were fathered by adult males over twenty-one years of age. *Id.*

105. SRVP EVALUATION, *supra* note 100, at vi.

106. *See, e.g., id.* at iii, 67 (noting that when a child is involved, typically the offender must establish paternity); *id.* at 33 (noting that offenders are encouraged to support the "mother and child"); *id.* at 35 (relegating "all" offenders into two categories: either a "father" or a "non-father"); *id.* at 80 (generally referring to victims as "her").

107. *See, e.g.,* David Finkelhor, *Abusers: Special Topics*, in A SOURCEBOOK ON CHILD

public as well as professionals who rallied against sexual abuse by men frequently dismissed sexual acts committed between women and boys as benign forms of sex education or experimentation. A growing literature, is, however, beginning to document the experience of sex crimes committed by females against boys and men.¹⁰⁸ Recent studies have explored the range of female sex offenders and offenses, paying particular attention to the experience of boys' sexual victimization by older women and the reasons that give rise to female-perpetrated sexual assaults.¹⁰⁹ Both of these strands of literature can help us to think about and respond appropriately to statutory rapes committed by women against boys.

The prevalence of sexual abuse by women is an issue of some debate. Sex offender data gathered by law enforcement agencies indicate that the percentage of all sex offenders who are women is quite small; in 2000, for example, females accounted for one percent of those arrested for rape and eight percent of those arrested for other sex offenses (not including prostitution).¹¹⁰ Data gathered from random samples of women, though,

SEXUAL ABUSE 119 (1986) (arguing that there is a male monopoly in the perpetration of child sexual abuse); JAMES L. MATHIS, CLEAR THINKING ABOUT SEXUAL DEVIATIONS: A NEW LOOK AT AN OLD PROBLEM 53, 53-54 (1972) ("reported cases of female pedophilia are so uncommon as to be of little significance"); KIERAN O'HAGAN, WORKING WITH CHILD SEXUAL ABUSE: A POST-CLEVELAND GUIDE TO EFFECTIVE PRINCIPLES AND PRACTICE 113 (1989) ("The examples of mothers sexually abusing their own children . . . can be safely interpreted as aberrations, having little or no significance for the training of professionals in working with child sexual abuse."); Kurt Freund et al., *Pedophilia and Heterosexuality vs. Homosexuality*, 10 J. OF SEX & MARITAL THERAPY 193, 194 (1984) ("Pedophilia either occurs exclusively in men, or is extremely rare in women."). For a critique of this viewpoint see, for example, Craig M. Allen, *Women as Perpetrators of Child Sexual Abuse: Recognition Barriers*, in THE INCEST PERPETRATOR: A FAMILY MEMBER NO ONE WANTS TO TREAT 108 (Anne Horton et al. eds., 1990); Art A. O'Connor, *Female Sex Offenders*, 150 BRIT. J. PSYCHIATRY 615, 620 (1987).

108. Relatively little research has been done on female sex offenders, and most of what exists has been published in the last twenty-five years. Moreover, because the population of female sex offenders remains largely hidden from public view, the data sets tend to be small and lacking in geographic diversity. Most authors, therefore, are able to draw only tentative conclusions about this population, and most urge further study before policy reforms of any kind are adopted.

109. See generally ADELE MAYER, WOMEN SEX OFFENDERS (1992); C. Lawson, *Mother-Son Sexual Abuse: Rare or Underreported? A Critique of the Research*, 17 CHILD ABUSE & NEGLECT 261 (1993); Donna M. Vandiver & Jeffrey T. Walker, *Female Sex Offenders: An Overview and Analysis of 40 Cases*, 27 CRIM. JUST. REV. 284 (2002) [hereinafter Vandiver & Walker, *Female Sex Offenders*].

110. U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2000 (2001). In 2001, the numbers were similar: women comprised 1.2 percent of rape arrests and eight percent of arrests for all other sex offenses. U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2001 (2002); see also LAWRENCE A. GREENFIELD, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 2 (U.S. Dep't of Justice Feb. 1997) (reporting that female sex

suggest that abusive behavior is far more common than the sex offender arrest percentages reveal. For example, in a large survey of college-aged women,¹¹¹ almost all of the respondents had at some point initiated sexual contact with a male, and their initiatives often were not benign. More than thirty percent of the subjects admitted getting their partners drunk or stoned to have sex, just under thirty percent admitted having taken advantage of a teenager, twenty-eight percent admitted having threatened physical force, and about twenty-five percent admitted having obtained sex by abusing their position of authority.¹¹²

Efforts to calculate the percentage of female sexual perpetrators based on victim reports have resulted in similarly divergent findings. For example, in a 1981 National Incidence Study, thirteen percent of female sex abuse victims and twenty-four percent of male sex abuse victims reported being abused by a woman.¹¹³ Conversely, a study by the American Humane Association that same year reported that only six percent of female victims and fourteen percent of male victims identified a female perpetrator.¹¹⁴ But more recent research indicates that the

offenders commit one percent of all incidents of sexual abuse); A. NICHOLAS GROTH & J.H. BIRNBAUM, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* 189 (1979) (reporting that an estimated ninety-one percent of victims of rape and sexual assault were female and nearly ninety-nine percent of the offenders they described in single victim incidents were male); Mary Ellen Fromuth & Victoria E. Conn, *Hidden Perpetrators; Sexual Molestation in a Nonclinical Sample of College Women*, 12 J. OF INTERPERSONAL VIOLENCE 456, 459 (1997) (reporting that four percent of a random sample of 546 college women admitted to sexually molesting a younger child during their lifetimes).

111. Peter B. Anderson, *Women's Motives for Sexual Initiation and Aggression*, in *SEXUALLY AGGRESSIVE WOMEN: CURRENT PERSPECTIVES AND CONTROVERSIES* 79 (Peter B. Anderson & Cindy Struckman-Johnson eds., 1998). His sample was composed of 461 undergraduate women volunteers in New York, New Jersey, and New Orleans. All students were enrolled in courses on human sexuality. *Id.* at 87.

112. *Id.* at 88-89. Note that twenty percent admit having used physical force to get sex, and nine percent admit using a weapon.

113. NATIONAL CENTER FOR CHILD ABUSE AND NEGLECT (NCCAN), *STUDY FINDINGS: NATIONAL STUDY OF INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT* (1981). In this study, the twelve percent of perpetrators who were women sexually molested approximately 36,000 children. This percentage was generally confirmed by 1998 data collected by the United States Department of Health and Human Services (HHS) Administration on Children, Youth and Families. Based on reports obtained from Child Protective Service agencies around the country, HHS found that approximately twelve percent of children subject to sexual abuse were victimized by females. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILD MALTREATMENT 1998: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM* (2000).

114. AMERICAN HUMANE ASSOCIATION, *NAT'L STUDY ON CHILD NEGLECT AND ABUSE REPORT* (1981). When scholars David Finkelhor and Diana Russell reanalyzed the data from both of these studies to identify those cases in which the female was the perpetrator, rather than simply an enabler, the percentages of female abuse dropped significantly. David

percentage of abuse committed by females may be substantially greater. In two different studies, sixty percent of male sexual abuse victims reported abuse by females.¹¹⁵ In a third study, forty percent of child sexual abuse incidents occurring in a daycare setting involved females,¹¹⁶ and forty-three percent of college men in a fourth study reported having had a sexually coercive experience with a woman since the age of sixteen.¹¹⁷

The reliability of these percentages is subject to further challenge because the overall number of reported cases remains small, and the amount of crime that goes unreported and undetected is largely unknown. Sexual victimization by women is, in other words, potentially far more prevalent than the numbers indicate. Instances of female abuse of children may remain underground because women are expected to have frequent and extensive bodily contact with children. These opportunities allow them to mask abuse as innocent behavior, such as bath time ritual or cuddling.¹¹⁸ Additionally, inappropriate sexual acts by women may not be reported because such behavior is considered to be less serious when committed by a woman;¹¹⁹ only females who have committed the most serious forms of

Finkelhor & Diana Russell, *Women as Perpetrators: Review of the Evidence*, in CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 171 (David Finkelhor ed., 1984).

115. MATTHEW P. MENDEL, THE MALE SURVIVOR: THE IMPACT OF SEXUAL ABUSE 21 (1995)); Gregory S. Fritz, et al., *A Comparison of Males and Females Who Were Sexually Molested as Children*, 7 J. OF SEX AND MARITAL THERAPY 54, 56 (1981) (4.8 percent of men in their sample of American college students reported being sexually molested by older persons during their preadolescent years, and sixty percent of the perpetrators were older women). Some authors have suggested that these figures may be artificially high and that replication is required before we accept this finding. See, e.g., Bill Watkins & Arnon Bentovim, *The Sexual Abuse of Male Children and Adolescents: A Review of Current Research*, 33 J. CHILD PSYCHOL. & PSYCHIATRY 197, 205 (1992) (discussing the two studies).

116. DAVID FINKELHOR ET AL., NURSERY CRIMES: SEXUAL ABUSE IN DAYCARE 40 (1988). In a retrospective study with adolescent males receiving treatment by the New Jersey Medical School's Department of Pediatrics, researchers learned that eleven of twenty-five male victims of sexual abuse had been molested by females. See generally Robert Johnson & D. Schrier, *Past Sexual Victimization by Females in an Adolescent Medicine Clinic Population*, 144 AM. J. PSYCHIATRY 650 (1987).

117. Cindy Struckman-Johnson & David Struckman-Johnson, *The Dynamics and Impact of Sexual Coercion of Men by Women*, in SEXUALLY AGGRESSIVE WOMEN: CURRENT PERSPECTIVES AND CONTROVERSIES 121 (Peter B. Anderson & Cindy Struckman-Johnson eds., 1998).

118. Kenneth Plummer, *Pedophilia: Constructing a Psychological Baseline*, in ADULT SEXUAL INTEREST IN CHILDREN 221 (M. Cook & K. Howells eds., 1981); see also GROTH & BIRNBAUM, *supra* note 108; BLAIR JUSTICE & RITA JUSTICE, THE BROKEN TABOO 102-03 (1979) (noting that women may sleep in bed with their sons beyond the point where such behavior is age-appropriate); ALIX KIRSTA, DEADLIER THAN THE MALE: VIOLENCE AND AGGRESSION IN WOMEN (1994) (noting the tendency to conflate female abuse with loving expressions of caring and intimacy).

119. Jacquie Hetheron, *The Idealization of Women: Its Role in the Minimization of Child*

sexual abuse are likely to be charged,¹²⁰ and juries may be less likely to convict females for lesser sex offenses.¹²¹ Finally, cultural constructions of normal behavior can blind us to actions that do not conform to expected roles. Jennings writes:

Viewing females as perpetrators of sexual abuse challenges traditional cultural stereotypes. Females are thought of as mothers, nurturers, those who provide care for others; not as people who harm or abuse them. Since, historically, females have been viewed as non-initiators, limit-setters, and anatomically the receivers of sexuality, it is difficult for some to imagine a female sexually abusing others.¹²²

In other words, a woman's traditional roles as mother-caretaker and sexually passive wife render her nearly invisible as a sexual criminal.¹²³

Sexual Abuse by Females, 23 CHILD ABUSE & NEGLECT 161, 162-64 (1999); Jacquie Hetherington & Lynn Beardsall, *Decisions and Attitudes Concerning Child Sexual Abuse: Does the Gender of the Perpetrator Make a Difference to Child Protection Professionals?*, 22 CHILD ABUSE & NEGLECT 1265, 1278 (1988) (finding that social workers and police officers view incarceration as more appropriate for male abusers than for female abusers, and that many did not consider female-perpetrated abuse to be as serious as male-perpetrated abuse).

120. CRAIG ALLEN, WOMEN AND MEN WHO SEXUALLY ABUSE CHILDREN: A COMPARATIVE ANALYSIS (1991). For example, in Faller's 1995 study of seventy-two female sex offenders, even though sixty-eight of the seventy-two women were referred to law enforcement or child protective services, legal action in the juvenile court was initiated in only thirty-four (fifty percent) of the reported cases and only three women had criminal charges filed against them. Kathleen Faller, *A Clinical Sample of Women Who Have Sexually Abused Children*, 4 J. CHILD SEXUAL ABUSE 13, 24 (1995) [hereinafter Faller, *Clinical Sample 1995*]; see also William C. Holmes & Gail B. Slap, *Sexual Abuse of Boys: Definition, Prevalence, Correlates, Sequelae, and Management*, 280 J. OF THE AM. MED. ASS'N 1855, 1857 (1998) (summarizing studies that document low rates of criminal justice system responsiveness to female-perpetrated sexual abuse as compared to male-perpetrated abuse).

121. David Finkelhor, *Removing the Child: Prosecuting the Offender in Cases of Sexual Abuse—Evidence from the National Reporting System for Child Abuse and Neglect*, 7 CHILD ABUSE & NEGLECT 195, 203 (1983); MAYER, *supra* note 109, at 6. Leniency seems to apply in sentencing, too. In the research conducted by Brown and her colleagues, only five of the twenty female offenders studied received prison sentences, as did forty-six of eighty-one female offenders documented by O'Connor. See M.E. BROWN ET AL., WOMEN WHO RAPE 9 (1984); O'Connor, *supra* note 107, at 615-20. Vandiver and Walker point out, though, that many female sex offenders have no prior criminal history, which could account for leniency at sentencing. Vandiver & Walker, *Female Sex Offenders*, *supra* note 109, at 297.

122. Kathryn T. Jennings, *Female Child Molestation: A Review of the Literature*, in FEMALE SEXUAL ABUSE OF CHILDREN: THE ULTIMATE TABOO 220 (Michele Elliott ed., 1993).

123. JACQUI SARADJIAN & HELGA HANKS, WOMEN WHO SEXUALLY ABUSE CHILDREN: FROM RESEARCH TO CLINICAL PRACTICE 2 (1996) (arguing that the construction of women as asexual caregivers may lead to more psychological trauma for victims); Deborah S. Boroughs, *Female Sexual Abusers of Children*, 26 CHILD. & YOUTH SERVICES REV. 481, 481

The rigidity of these traditional roles also limits the class of people whom we believe capable of committing sexual crimes against children. Feminists brought the issue of child sexual abuse to the public's attention in the 1970s and 1980s as part of a larger campaign to expose institutions and mechanisms of male dominance. In so doing, they cast the problem as "a phenomenon of men using their power and authority over children, usually girl children, in a male supremacist society."¹²⁴ Given this gender-based construction of the child molester, instances of abuse perpetrated by females, rather than *against* females, became hard for people to see (let alone for feminists to handle).¹²⁵ Indeed, one famous commentator asserted, "What harm can be done without a penis?"¹²⁶

(2004); Denov, *supra* note 9, at 308. Cindy Struckman-Johnson and Peter B. Anderson, psychiatrists who have done extensive research on sexually aggressive women, report that both the public and other professionals have a tendency to transform women's sexual aggression into romance. Their audiences believe that women can "express their sexuality," be "seductive" or "playful," or even be "too horny for their own good," but they have difficulty accepting women as sexually aggressive in a criminal way. Cindy Struckman-Johnson & Peter B. Anderson, "Men Do and Women Don't": Difficulties in Researching Sexually Aggressive Women, in *SEXUALLY AGGRESSIVE WOMEN: CURRENT PERSPECTIVES AND CONTROVERSIES* 15 (Peter B. Anderson & Cindy Struckman-Johnson eds., 1998).

124. Anne Banning, *Mother-Son Incest: Confronting a Prejudice*, 13 *CHILD ABUSE & NEGLECT* 563, 564 (1989) (citing THE NEW SOUTH WALES PROTECTION COUNCIL, *CHILD SEXUAL ASSAULT: NO EXCUSES, NEVER, EVER* (1985) and E. WARD, *FATHER-DAUGHTER RAPE* (1984)). For further discussion on feminist theory and child sexual abuse, see Allen, *supra* note 107, at 111; Nelson, *supra* note 9, at 66 (reporting that a famous psychiatrist once asserted that a certain female day care provider could not be a sex abuser because she was a woman). For a summary of relevant feminist literature, see Mike Freel, *Child Sexual Abuse and the Male Monopoly: An Empirical Exploration of Gender and a Sexual Interest in Children*, 33 *BRITISH J. SOCIAL WORK* 481, 483-84 (2003) and O'HAGAN, *supra* note 107, at 22-24, 98-99.

125. See Michele Elliott, *What Survivors Tell Us—An Overview*, in *FEMALE SEXUAL ABUSE OF CHILDREN: THE ULTIMATE TABOO* 12 (Michelle Elliott, ed. 1993) (arguing that feminist organizations believed that discussing female sexual abuse would draw attention away from their construction of child sexual abuse as a manifestation of male power); see also Charlotte Kasl, *Female Perpetrators of Sexual Abuse: A Feminist View*, in *THE SEXUALLY ABUSED MALE: PREVALENCE, IMPACT, AND TREATMENT, VOL. 1*, at 259 (Mike Hunter ed., 1990) (noting the widely held perception that talk of female perpetrators would, in essence, let men off the hook). Women may also be reluctant to acknowledge the existence of female perpetrators because to do so destroys idealized myths about who women are and makes them vulnerable to attacks by men. See Kasl, *supra*, at 261. Other feminists have decried this approach as "demeaning reductionism," Hetheron, *supra* note 119, at 165, arguing that it is sexist, not feminist, to need women to be innocent and sexually passive. Val Young, *Women Abusers—A Feminist View*, in *FEMALE SEXUAL ABUSE OF CHILDREN: THE ULTIMATE TABOO* 100-12 (Michelle Elliott, ed. 1993). This approach, by subordinating the interests of children to those of women, also puts children at risk of sexual abuse and leaves victims of female-perpetrated abuse with nowhere to turn. Hetheron, *supra* note 119, at 165 (citing KIRSTA, *supra* note 118).

126. MATHIS, *supra* note 107, at 54; see also KIRSTA, *supra* note 118, at 344-77 (noting that many believe women's physiology renders them incapable of abusive acts, a

Males too are constrained by gender roles and expectations. Some male victims of sexual abuse do not recognize their experiences as abusive at the time,¹²⁷ while others who do are disinclined to report for fear of being disbelieved or ridiculed.¹²⁸ Gender scholars have argued that the male body is frequently understood as “impenetrable,” and males are encouraged to present themselves as invulnerable in order to live up to this expectation.¹²⁹ Boys may be confounded by their own bodies as well. Many people believe that if a boy physiologically responds to sexual overtures, he must be a willing and happy participant; according to this view, the very existence of a completed sexual act between a boy and a woman serves as proof that the boy was not coerced or abused. This perception holds regardless of scientific data establishing that male sexual responsiveness can be stimulated by fear or anger.¹³⁰

Societal attitudes about the inoffensiveness of sexual contact between women and boys have been documented by psychologists in the United States.¹³¹ For example, Sylvia Broussard and her colleagues asked 360

phenomenon she calls “[n]o penis, no problem”).

127. See Sylvia R. Condy et al., *Parameters of Sexual Contact of Boys with Women*, 16 ARCHIVES SEXUAL BEHAV. 379, 387 (1987); see also Myriam S. Denov, *The Long-Term Effects of Child Sexual Abuse by Female Perpetrators: A Qualitative Study of Male and Female Victims*, 19 J. INTERPERSONAL VIOLENCE 1137, 1141-43 (2004).

128. See Elliott, *supra* note 125, at 11 (reporting that seventy-eight percent of child molestation victims who called the children’s charity hotline were not believed when they first named a woman as their sexual abuser); M. Nasjleti, *Suffering in Silence: The Male Incest Victim*, 59 CHILD WELFARE 269, 269-75 (1980); Emanuel Peluso & Nicholas Putnam, *Case Study: Sexual Abuse of Boys by Females*, 35 J. AM. ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY 51, 51-54 (1996); Philip M. Sarrel & William H. Masters, *Sexual Molestation of Men by Women*, 11 ARCHIVES SEXUAL BEHAV. 117, 121 (1982) (discussing a case study where a man who was abused by women was fearful of telling anyone of his experience because they would think him “less of a man”).

129. Catherine Waldby, *Destruction: Boundary Erotics and Refiguration of the Heterosexual Male Body*, in SEXY BODIES: THE STRANGE CARNALITIES OF FEMINISM 266, 268 (E. Grosz and E. Probyn eds., 1995); Michael Thomson, *Masculinity, Reproductivity and Law* (Emory Univ. Law School, Feminism and Legal Theory Project presentation, Working Paper, 2005) (on file with author).

130. Peluso & Putnam, *supra* note 128, at 51-54; Sarrel & Masters, *supra* note 128, at 127-29. The corollary to the Mathis quote mentioned in note 126 might be, “What harm could have been done given that the penis cooperated?”

131. We should hesitate before generalizing the findings of these studies to the U.S. population as a whole. Many of these works were based on research with undergraduate college students as research subjects, and this group may not be representative of other segments of society in their views about sexual relationships between adults and minors. Additionally, the authors of one study speculate that some male research subjects may, based on their own prior sexual experiences, become too personally involved in stories about boys having sex with older women to judge the seriousness of the vignettes objectively. Jodi A. Quas et al., *Effects of Victim, Defendant, and Juror Gender on Decisions in Child Sexual Assault Cases*, 32 J. APPLIED SOC. PSYCHOL. 1993, 2011 (2002).

undergraduates to interpret one of several stories involving sexual contact between a fifteen year-old teenager and a thirty-five year-old neighbor, where the sex of the youth and the sex of the neighbor varied depending on the story.¹³² The researchers also varied the response of the youth to the sexual overtures made by the adult; in some stories the youth was encouraging, in some the youth was passive, and in others the youth resisted. Respondents interpreted an encouraging response by a male victim to a female perpetrator as the most realistic of the four gender-dyad scenarios.¹³³ Aside from their assessments of realism, respondents regarded the sexual encounter as less harmful to encouraging males than to encouraging females.¹³⁴ When the story involved a female adult and a male teenager (as compared to the other combinations), respondents were the least likely to interpret the behavior as child sexual abuse.¹³⁵ Broussard and her colleagues concluded that the viewpoints expressed by their subjects might indicate a widespread belief that “sexual interaction between a fifteen year-old male and a thirty-five year-old female is an acceptable means of providing sex education for boys.”¹³⁶

This finding holds true even when the adult at issue is a teacher.¹³⁷ Katherine Dollar and her associates asked a large sample of undergraduates to read one of four vignettes about a sexual encounter between a twenty-nine year-old teacher and a sixteen year-old student, where the sex of each participant varied depending on the vignette. In the scenario, the teacher takes a special interest in a student who has a history of substance abuse, sexual activity, and running away from home, and the teacher initiates the sexual encounter.¹³⁸ The female teacher/male student dyad was viewed by

The male research subject who himself experienced early sex might strongly identify with the youth in the scenario and refuse to identify his own prior experience as criminal. *Id.* (citing C.R. Bingham and L.J. Crockett, *Longitudinal Adjustment Patterns of Boys and Girls Experiencing Early, Middle, and Late Sexual Intercourse*, 32 DEVELOPMENTAL PSYCHOL. 647 (1996) (reporting that more than one-third of American males report having had sexual intercourse before their fifteenth birthday)).

132. Sylvia Broussard et al., *Undergraduate Students' Perceptions of Child Sexual Abuse: The Impact of Victim Sex, Perpetrator Sex, Respondent Sex, and Victim Response*, 6 J. FAM VIOLENCE 267, 269-72 (1991).

133. *Id.* at 273.

134. *Id.* at 273. This same result occurred with passive teenagers, but only when the perpetrator was female. *Id.* Harm in this context means: “was the youth traumatized?” *Id.* at 275.

135. *Id.* at 274; see also Hetherington & Beardsall, *supra* note 119, at 1278.

136. Broussard et al., *supra* note 132, at 275.

137. See, e.g., Katherine Dollar et al., *Influence of Gender Roles on Perceptions of Teacher/Adolescent Student Sexual Relations*, 50 SEX ROLES 91, 387 (2004); Quas et al., *supra* note 131, at 2011.

138. Dollar et al., *supra* note 137, at 93. Quas and her colleagues used the same approach

participants as the most consistent with the norms of the student's peer group, meaning that the student would be the most likely to brag to friends about the encounter and the friends would be the most likely to think the experience was "cool" when the encounter occurred between a boy and his female teacher.¹³⁹ In their interpretation of the vignette, respondents also more frequently believed that the male teacher (compared to the female teacher) took advantage of the student's personal problems and youth,¹⁴⁰ and most felt that, compared to her male colleague, the female teacher should not be punished.¹⁴¹ The researchers interpreted these findings as evidence that people view woman-boy sexual encounters as a "more normal part of growing up than the other gender combinations"¹⁴² and tend to "minimize the effect of the inherent power difference" between a female teacher and male student, relying instead on gendered scripts to assess the appropriateness of the situation.¹⁴³

For all of these reasons—real and imagined—female sex offending is likely to go unrecognized, undiscovered and unreported. Our knowledge about female sex offenders and the abuse they perpetrate is thus somewhat limited, although new studies are being conducted all the time. But even with our imperfect knowledge of the scope of the problem, conservative estimates suggest that 1.5 million girls and 1.1 million boys are victims of female sexual abuse each year in the United States.¹⁴⁴ In short, even if we

with 266 undergraduate students; their scenario involved a thirty-six year-old teacher and a fifteen year-old student (in varying gender combinations), and the respondents were told to think of themselves as jurors in a mock trial of the defendant. Quas et al., *supra* note 131, at 2000.

139. Dollar et al., *supra* note 137, at 95, 98. Respondents also indicated that this gender dyad would be the least likely to cause the teen psychological harm or sexual orientation confusion. Dollar and her colleagues warn that this understanding may perpetuate and reinforce a boy's reluctance to view a relationship with an adult woman in a negative light, as well as his reluctance to report the relationship to authorities. *Id.* at 99-100.

140. *Id.* at 97. These results were even more pronounced when the respondent's gender was taken into account. For example, male respondents viewed a scenario involving a female teacher as being a more positive sexual experience and as having a more positive effect on future sexual attitudes than a scenario involving a male teacher. *Id.* In the Quas study, male respondents were less likely to render a guilty verdict in the female teacher-male student scenario than in any other gender-dyad scenario. Quas et al., *supra* note 131, at 2004.

141. Dollar et al., *supra* note 137, at 98. Note that in the Quas study, jurors were more confident in the male teacher's guilt than in the female teacher's guilt on the same facts, and jurors assigned greater responsibility for the sexual encounter to teens who were seduced by women than to those seduced by men. Quas et al., *supra* note 131, at 2004, 2007.

142. Dollar et al., *supra* note 137, at 96.

143. *Id.* at 99.

144. Allen, *supra* note 107, at 119-20 (computing figures for 1988 using population estimates and prevalence rates calculated by Finkelhor and his colleagues, David Finkelhor

remain unsure about the exact contours of the population, these figures signify that female sexual abuse is a significant issue facing past, present, and future generations of children. Criminal justice scholars and professionals must therefore learn as much as possible about these offenders in order to identify crimes and to design effective responses that adequately protect victims.

A. What Do We Know About Females Who Sexually Abuse Children?

Despite the questions about the true number of female sex abusers in the United States, scientists are learning more and more about those offenders who have surfaced (or, more accurately, been discovered). Documented offenders include girls as young as thirteen and women as old as sixty-five,¹⁴⁵ with a median age of twenty-six.¹⁴⁶ Although subjects display diverse marital patterns,¹⁴⁷ a consistently high percentage of offenders are Caucasian.¹⁴⁸

& Larry Baron, in their article, *High Risk Children*, in A SOURCEBOOK ON CHILD SEXUAL ABUSE (D. Finkelhor & Associates eds., 1986)). One doctor has estimated that fifty thousand Canadian children are sexually abused each year by women. See Jennings, *supra* note 122, at 242.

145. The outer edges of this range could be misleading, though, as researchers believe the onset of abusive behavior could predate the onset of adolescence. Moreover, very young offenders and very old offenders are less likely to be found in clinical or judicial facilities, as they are more likely to go unnoticed by official observers. Vandiver & Walker, *supra* note 107, at 288.

146. Kathleen Faller, *Women Who Sexually Abuse Children*, 2 VIOLENCE & VICTIMS 263, 269 (1987); Faller, *Clinical Sample 1995*, *supra* note 120, at 16; Catherine F. Lewis & Charlotte R. Stanley, *Women Accused of Sexual Offenses*, 18 BEHAV. SCI. & LAW 73, 76 (2000); E.L. Rowan et al., *Women Who Molest Children*, 35 BULLETIN AM. ACADEMY OF PSYCHIATRY 79, 79-83 (1990); Monique Tardif et al., *Sexual Abuse Perpetrated by Adult and Juvenile Females: An Ultimate Attempt to Resolve a Conflict Associated with Maternal Identity*, 29 CHILD ABUSE & NEGLECT 153, 160 (2005); Vandiver & Walker, *supra* note 109, at 288. *But see* BROWN ET AL., *supra* note 121, at 4 (slightly more than fifty percent of defendant offenders were between the ages of seventeen and twenty-four).

147. Faller's 1995 study contained the largest number of married subjects (thirty-eight percent). Faller, *Clinical Sample 1995*, *supra* note 120, at 17. Most individuals in the other studies were single. *See, e.g.*, BROWN ET AL., *supra* note 121, at 4 (eleven out of seventeen defendant/offenders were single); Lewis & Stanley, *supra* note 144, at 78 (only one-third of offenders were married); L.C. Miccio-Fonseca, *Adult and Adolescent Female Sex Offenders: Experiences Compared to Other Female and Male Sex Offenders*, 11 J. PSYCHOL. & HUM. SEXUALITY 75, 79 (2000) (reporting that only two out of eighteen, or eleven percent of female sex offenders studied, were married).

148. While few studies report the race of the offenders, approximately ninety-four percent of the offenders in Faller's studies, and sixty-six percent of those in the Lewis and Stanley study, were Caucasian. Faller, *Clinical Sample 1995*, *supra* note 120, at 16; Faller, *Women Who Sexually Abuse Children*, *supra* note 146, at 269; Lewis & Stanley, *supra* note 146, at 76. Among all adult female sex offenders in the Texas sex offender registry, eighty-eight percent are identified as Caucasian. Donna M. Vandiver & Glen Kercher, *Offender*

Beyond ascertaining demographic data, researchers initially sought to construct a profile of the female abuser based on behavioral characteristics common to all offenders.¹⁴⁹ For example, several studies observed that female sex offenders often know their victims—as a family member, friend, or acquaintance—before committing the offense.¹⁵⁰ Female perpetrators also appear to be psychologically unstable to varying degrees.¹⁵¹ Drug and alcohol abuse is common,¹⁵² as is some history of

and Victim Characteristics of Registered Female Sexual Offenders in Texas: A Proposed Typology of Female Sexual Offenders, 16 *SEXUAL ABUSE: J. RESEARCH & TREATMENT* 121, 121-37 (2004). In a recent study of forty female sex offenders in Arkansas, ninety percent were identified as Caucasian. Vandiver & Walker, *supra* note 109, at 294.

149. For example, Jennings reported that female sex abusers share the following traits: age range between sixteen and thirty-six, history of victimization, extreme dependency on or rejection by males, substance abuse and mental health problems. *See supra* note 122, at 225.

150. *See* BROWN ET AL., *supra* note 121, at 5 (the majority of defendant/offenders in Brown's study were a family member, friend, or acquaintance of the victim); RUTH MATHEWS ET AL., *FEMALE SEXUAL OFFENDERS: AN EXPLORATORY STUDY* 22 (1989) (Table 2 provides information on the victims of sexual abuse); BOBBIE ROSENCRANS, *THE LAST SECRET: DAUGHTERS SEXUALLY ABUSED BY MOTHERS* (1997) (focusing on the mother as the female offender); Fromuth & Conn, *supra* note 110, at 459 (reporting that sixty-nine percent of victims were family members); O'Connor, *supra* note 107, at 615, 620; Margaret Rudin et al., *Characteristics of Child Sexual Abuse Victims According to Perpetrator Gender*, 19 *CHILD ABUSE & NEGLECT* 963-73 (1995) (reporting that, in a study of just under 200 abuse victims, female perpetrators were more likely than male perpetrators to be caretakers). Moreover, like male sex offenders, women predisposed to sexually abuse children may seek out occupations that involve children. FINKELHOR ET AL., *supra* note 116, at 27-50 (discussing the incidence of female perpetrators in daycare settings); Kathleen Faller, *The Spectrum of Sexual Abuse in Daycare: An Exploratory Study*, 3 *J. FAM. VIOLENCE* (1988) [hereinafter Faller, *Daycare Study*] (detailing instances of sexual abuse in various daycare settings by daycare providers); Freel, *supra* note 124, at 490-03 (discussing the prevalence of child care workers who express a sexual interest in children).

151. As many as half of the eighty-one offenders in O'Connor's study were found to have some type of mental illness. O'Connor, *supra* note 107, at 619. Approximately thirty-two percent of the seventy-two people included in Faller's study reported some type of mental problems, including severe depression, thought disorders, and poor reality testing; three of the women experienced delusions. Faller, *Clinical Sample 1995*, *supra* note 120, at 22. Lewis and Stanley found three of fifteen female offenders to have a psychotic disorder or schizophrenia. *See supra* note 144, at 76. For more information about psychological and behavioral problems in the population of women sex offenders, see D. McCarthy, *Women Who Rape* (1981) (unpublished manuscript, cited in MATHEWS ET AL., *supra* note 150, at 6, 88). However, in the study conducted by Marvasti, the speculation that either the mother or the son must be psychotic was not implied. Jamshid Marvasti, *Incestuous Mothers*, 7 *AM. J. FORENSIC PSYCHIATRY* 63, 68 (1986); *see also* Condy et al., *supra* note 127, at 392 (reporting that females who have sexual contact with boys are likely "atypical persons," but further research is needed to clarify psychopathological traits); Priscilla E. Grier et al., *Comparative Study of Personality Traits of Female Sex Offenders*, 73 *PSYCHOL. REPS.* 1378, 1378 (1993) (reporting no significant difference in personality traits between eleven female sex offenders and eleven female non-sex offenders). Note that in many fields of criminal law, female offenders are commonly regarded as "sick" rather than evil (mad rather than

sexual abuse during childhood or early adulthood.¹⁵³ Some women abuse children in conjunction with a male accomplice,¹⁵⁴ and most abuse without violence.¹⁵⁵ Lastly, while many females are in denial about their

bad), which leads criminal justice officials to treat female criminals more leniently than their male counterparts. *See generally* Ania Wilczynski, *Mad or Bad? Child-Killers, Gender and the Courts*, 37 BRITISH J. CRIMINOLOGY 419 (1997).

152. For example, slightly more than half of the seventy-two subjects studied by Faller in 1995 were drug abusers. Faller, *Clinical Sample 1995*, *supra* note 120, at 22. Approximately the same percentage of the forty subjects she studied in 1987 had a history of substance abuse. Faller, *Women Who Sexually Abuse Children*, *supra* note 146, at 272. Of the ninety-three females abused by their mothers that Rosencrans studied, nineteen percent reported their mothers had a drug abuse problem and thirty-two percent of their mothers abused alcohol. ROSENCRANS, *supra* note 150, at 65. Scholars have warned that we should not draw too close of an association between substance abuse, chemical dependency, and sexual abuse. For example, Allen suggests that the percentage of offenders with substance abuse and psychological disorders noted in the clinical studies may overstate the prevalence of these behaviors in the female sex offending populations at large. He contends that women with behavioral or chemical dependency problems are far more likely to have difficulty keeping their abusive behavior under wraps, and thus are more likely to be involved in clinical studies based on either treatment populations or convicted populations. *See* Allen, *supra* note 107, at 115-21. Conversely, Saradjian & Hanks remind us that the vast majority of psychotic, alcoholic, or drug dependent women do not sexually abuse children. *See* SARADJIAN & HANKS, *supra* note 121, at 3.

153. Lewis & Stanley, *supra* note 146, at 76 (noting that eighty percent of perpetrators reported a history of abuse); F.A. Wolfe, *Twelve Female Sexual Offenders*, cited in MATHEWS ET AL., *supra* note 150, at 6, 102; Faller, *Women Who Sexually Abuse Children*, *supra* note 146, at 273; Fromuth & Conn, *supra* note 110, at 460 (seventy-seven percent of the admitted abusers in their study reported a history of child sexual abuse); Miccio-Fonseca, *supra* note 147, at 83 (seventy-two percent of female perpetrators); *see also* Tardif et al., *supra* note 146, at 158-59 (reporting in a study of twenty-eight females that both adult and juvenile offenders suffer from a history of victimization).

154. In Faller's 1987 study, co-offenders were involved in one-third of the incidents. Faller, *Women Who Sexually Abuse Children*, *supra* note 146, at 266. In the study by Rosencrans the percentage of daughters reporting abuse by someone in addition to their mothers reached seventy percent. ROSENCRANS, *supra* note 150, at 96; *see also* Vandiver & Walker, *supra* note 109, at 285, 290.

155. As to the typically nonviolent nature of female abuse, see Diana E.H. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, in HANDBOOK ON SEXUAL ABUSE OF CHILDREN: ASSESSMENT AND TREATMENT ISSUES 19, 29-33 (1988); Johnson & Shrier, *supra* note 116, at 651; Holmes & Slap, *supra* note 120, at 1858 (summarizing studies that show female perpetrators use persuasion rather than actual or threatened force in ninety-one percent of cases, including women who promise special favors in return for sexual contact). For a contrary perspective, see FINKELHOR ET AL., *supra* note 116, at 129 and Keith L. Kaufman et al., *Comparing Female and Male Perpetrators' Modus Operandi: Victims' Reports of Sexual Abuse*, 10 J. INTERPERSONAL VIOLENCE 322, 331 (1995) (reporting similar rates of violence in female and male perpetrated sexual abuse, a percentage higher than was previously thought); SARADJIAN & HANKS, *supra* note 121, at 135-40 (noting that fourteen of the thirty-six women studied admitted to gaining sexual arousal from the children's pain); Hetherington, *supra* note 119, at 165-66 (arguing that stereotypes of women as nurturers & cuddlers affect our ability to define female sexual abuse as aggressive, but that women are capable of

behavior,¹⁵⁶ at least one study found that females were more often than not the ones to report their abuse.¹⁵⁷

But as the body of relevant literature has grown, inconsistencies in the profile have become apparent, particularly concerning the motivations behind female sex abuse. Some scholars have argued that female sex abuse cannot be explained by the drive for power and authority (that commonly characterizes male-perpetrated abuse),¹⁵⁸ while others have asserted that female abusers are driven by a sense of dependency¹⁵⁹ or a need to act out their emotional feelings.¹⁶⁰ Alternatively, some have speculated that, given the prevalence of abuse history among many female offenders, female sex offending is motivated by a desire to reenact past abuse¹⁶¹ or to gain intimacy.¹⁶² Faced with these differences of opinion, researchers have abandoned the effort to craft a single profile and instead have constructed typologies based on clusters of traits and behaviors that appear to form a coherent pattern.

Loretta McCarty, for example, in her study of twenty-six incest mothers in Dallas, concluded that the offense pattern (solo offending or offending in conjunction with an accomplice) often correlates with other traits and childhood experiences.¹⁶³ She identified three types of women who commit incest: the Independent Offender, the Co-Offender, and the Accomplice. McCarty's Independent Offender, a woman of average intelligence, typically had a troubled childhood characterized by sexual abuse and early marriage. Though she is now living independently and is able to maintain stable employment, she is likely to abuse intoxicants and to be seriously emotionally disturbed. Her victim is most often her daughter, whom she views as an extension of herself. The Co-Offender's childhood was similar

sexual aggression).

156. MATHEWS ET AL., *supra* note 121, at 6 (summarizing Wolfe's findings).

157. Marvasti, *supra* note 151, at 68 (noting that except in one case, the women offenders, not the victims, reported the sexual incident after several months of psychotherapy).

158. *Id.*

159. PATRICIA A. DAVIN ET AL., FEMALE SEXUAL ABUSERS 96 (1999) (suggesting female co-offending behavior is an extension of the battered woman's syndrome); Lin Song et al., *Female Sex Offenders in Washington State* 6 (Washington State Inst. for Pub. Policy), Oct. 1993, available at <http://www.wsipp.wa.gov/rptfiles/femsoff.pdf> (discussing the 1987 study by Wolfe, *supra* note 153).

160. See MAYER, *supra* note 109, at 41 (discussing women who molest their daughters as a way to meet their own emotional needs).

161. SARADJIAN & HANKS, *supra* note 121, at 144.

162. Vandiver & Kercher, *supra* note 148, at 134.

163. Loretta M. McCarty, *Mother-Child Incest: Characteristics of the Offender*, 65 CHILD WELFARE 447, 448-55 (1986).

to that of the Independent Offender, although now she may be on her second or third marriage. She is of borderline intelligence and does not work outside the home. She has a strong need to be taken care of, which takes precedence over the needs of her children; her victim is likely to be either her son or daughter. The Accomplice was likely married at a young age, and she now possesses average intelligence and a job outside the home. Her apparent independence masks a strong need to be cared for, and she allows her husband to abuse their adolescent daughter in order to allow her marriage to endure.

Drawing on a sample of sixteen women in a long-term sex offender treatment program in Minneapolis, Ruth Mathews and her colleagues¹⁶⁴ identified variation in a population of sex offenders more diverse than the group of incestuous mothers studied by McCarty. All of the women in Mathews' study had psychological and behavioral problems, including passivity, male dependence, low self-esteem, chemical dependency, poor social skills, fear of rejection, shame, suicidal ideation, antisocial behavior, promiscuity, and extreme anger. Yet these characteristics were not evenly distributed across the population of subjects,¹⁶⁵ causing Mathews and her colleagues to catalogue three types of female sex offenders as a way to construct a matrix for the group: the Teacher/Lover, the Predisposed, and the Male-Coerced.¹⁶⁶ According to the authors, their typology derives from "three clusters of attributes involving the crimes that the women committed: their perceptions of the victims; the involvement of co-offenders; and psychological similarities and differences."¹⁶⁷ As the

164. See MATHEWS ET AL., *supra* note 150, at 11.

165. Demographically, Mathews' research subjects comprised the following characteristics: all but one were adults when they first became abusers, and all had been victims of prior sexual abuse. Fourteen were Caucasian, two were African American. Their incomes ranged from low to middle, although only one had a stable employment history. Educationally, the highest level of achievement was a high school diploma. *Id.* at 87.

166. In their discussion of Mathews' framework, Vandiver and Walker assert that Mathews and her colleagues developed a typology of five categories: the three mentioned above, plus Experimenter/ Exploiter and Psychologically Disturbed. See Vandiver & Walker, *Female Sex Offenders*, *supra* note 109, at 291; see also Vandiver & Kercher, *supra* note 148, at 123-24 (repeating the same characterization). Mathews and her colleagues make clear, however, that while previous literature suggested the existence of Experimenter/ Exploiter (young females who commit babysitter abuse) and Psychologically Disturbed individuals, their data (derived from work with adults) produced only three categories of female offenders, those described in the text. MATHEWS ET AL., *supra* note 150, at 32; see also Jane Kinder Matthews, *Working with Female Abusers*, in *FEMALE SEXUAL ABUSE: THE ULTIMATE TABOO* (1993). Mathews and colleagues do recognize the Experimenter/Exploiter category in a different work, based on their follow-up studies with adolescent offenders. Ruth Mathews et al., *Female Sexual Offenders*, in *THE SEXUALLY ABUSED MALE: PREVALENCE, IMPACT, AND TREATMENT*, VOL. 1, at 283-86 (Mic Hunter ed., 1990).

167. MATHEWS ET AL., *supra* note 150, at 32.

Mathews typology has emerged as the dominant framework to describe the actions of adult female offenders,¹⁶⁸ it will be explained in more detail below.

The Teacher/Lover:

This woman falls in love with an unrelated adolescent male who becomes her sexual partner. She has no malice toward him; she sees him as her equal. She regards her sexual favors as acts of kindness that she bestows because she likes him, and she believes that adolescent males are ready and willing for sexual contact at any time. The Teacher/Lover may have a history of prostitution and chemical dependency, and likely has a history of being abused by adult men and past lovers. She is also likely to feel sexually frustrated and lonely, and she turns to the adolescent boy because she fears the brutality of adult men. She hopes the boy will love her, accept her, and be kind to her in ways that adult men have not been. She generally minimizes the negative impact of her behavior on the boy because she believes that he would not be sexual with her unless it was a positive experience for him, one that he desires.¹⁶⁹

The Intergenerationally Predisposed Female Offender:

This woman sexually abuses family members, likely her own children. She was sexually abused at a very young age, probably by more than one family member or trusted adult, and the abuse likely lasted into adolescence. As a result, she had a difficult time establishing positive relationships with men and likely became promiscuous as a teen even though she did not enjoy sex. As an adult she finds her family relationships painful and engages in compulsive behaviors or addictions. She is involved in unhealthy romantic relationships and dead-end jobs, which she often loses because of her drinking or emotional instability. She abuses children because she wants to hurt them as she was once hurt, or to

168. Other frameworks for organizing female sex offenders and offenses have been proposed. For example, in 1982 Sarrel and Masters articulated four categories of female sexual abuse: forced assault, babysitter abuse, incestuous abuse, and dominant woman abuse. See Sarrel & Masters, *supra* note 128, at 119-20. In 1985, Wolfe suggested that female sexual abusers come in four varieties: psychopathic, neurotic, over controlled, and normal criminal. Wolfe, *supra* note 153. Mayer proposed a typology of five categories of abusers: female rapist, female sexual harasser, mother molester, triads (those who act with accomplices), and homosexual offenders. MAYER, *supra* note 109, at 17-35. Note that none of these typologies, including the one put forth by Mathews and her colleagues, has been rigorously tested, and most are based on very small samples. Vandiver & Walker, *supra* note 109, at 291.

169. MATHEWS ET AL., *supra* note 150, at 32-33.

establish emotional contact that adults in her life refuse to provide. However, she is more likely than not to have been the one to report the abuse to authorities.¹⁷⁰

The Male-Coerced Female Offender:

This woman is passive and feels powerless in interpersonal relationships. She is likely the victim of childhood sexual abuse and now yearns for someone to protect her. As a result, she has become very dependent on men. She endorses a traditional lifestyle, married young, and has limited work history. Because she generally fears her husband's anger and predicts that she could not attract another husband, she works hard not to antagonize him and to preserve their relationship. She follows her husband's lead in terms of abusing children; he abused first and then brought her into it, usually unwillingly. She thinks of her initiation into the abuse with emotional turmoil, but she may abuse the child by herself (to prove something to herself or to her husband).¹⁷¹

The existence of these typologies finds strong support in the work of other scholars, particularly the Teacher/Lover category. Vandiver and Kercher, in their study of Texas female sex offenders, identified the "Heterosexual Nurturer," a woman approximately thirty years old, who has sexual contact with an adolescent male in her care, and who generally views the experience as mutually pleasurable and non-abusive.¹⁷² The authors suspect that the Heterosexual Nurturer may be quite common in the population of female sex offenders; they recognized approximately 150 such women on the Texas registry.¹⁷³ Other scholars have likewise noted that many women abusers know their teenaged victims and regard their abusive contact as positive, affectionate, and educational.¹⁷⁴ Mathews' other constructions also resonate with findings of fellow researchers. For example, in her work with women abusers, Faller concluded that her subjects rarely initiated the abuse and were likely to have been coerced or

170. *Id.* at 39-40.

171. *Id.* at 50-51.

172. Vandiver & Kercher, *supra* note 148, at 130-31. The authors write, "These females may be motivated by feelings of 'love' or a desire for intimacy to compensate for unmet emotional and social needs and may not appreciate the inappropriateness of the relationship." *Id.* at 133.

173. *Id.* at 130.

174. SARADJIAN & HANKS, *supra* note 121, at 137-38; Fromuth & Conn, *supra* note 110, at 460 (observing that only fourteen percent of the offenders studied admitted to sexually abusing a child); Johnson & Shrier, *supra* note 116, at 651 (discussing how female abusers were acquaintances of the victims).

persuaded to participate.¹⁷⁵ This description is consistent with the Male-Coerced category described by Mathews and her colleagues.¹⁷⁶ Lastly, the Predisposed Abuser resembles in some respects the Independent Offender described by McCarty,¹⁷⁷ although there are some differences, particularly in terms of the victim's gender.¹⁷⁸

Recently scientists have suggested ways to add texture to the Mathews framework. For example, Syed and Williams offer "angry-impulsive," "male-accompanied familial," and "male-accompanied non-familial" categories, based on their research with nineteen female sex offenders incarcerated in Canada.¹⁷⁹ Lawson has identified four types of abuse committed by mothers: subtle abuse, seductive abuse, humiliation, and overt sexual abuse.¹⁸⁰ From their study of female sex offenders listed on the Texas sex offender registry, Vandiver and Kercher divide female offenders into a variety of groups, including the Heterosexual Nurturer, three types of homosexual offenders, and one set of sexual predators. At least some of these labels describe women who commit a range of criminal offenses (of which sex crimes against children are only a portion), while others refer to women who offend in exclusively sexual ways.¹⁸¹

While the typologies described above are based on preliminary research and have not been extensively tested, a quick perusal of the statutory rape caseload in any jurisdiction surely would yield samples of women who fit these descriptions. The Teacher/Lover (Heterosexual Nurturer) category in particular seems to describe a significant portion of the women—including Mary Kay Letourneau and many of the women in the opening anecdotes—whose stories have surfaced in courts and newspapers around the country in the past decade.¹⁸² But irrespective of the profiles' ability to predict

175. Fallor, *Women Who Sexually Abuse Children*, *supra* note 146, at 274.

176. Other scientists suggest that this description should be expanded to reflect more diverse practices, because many of the females who co-offend with males are motivated by jealousy or anger but are not literally coerced. Pamela Nathan & Tony Ward, *Female Sex Offenders: Clinical and Demographic Features*, 8(1) *J. SEXUAL AGGRESSION* 5, 8-9 (2002).

177. McCarty, *supra* note 163, at 55.

178. The Independent Offender is likely to abuse her own daughter, while the Predisposed Abuser will victimize any available child. MATHEWS ET AL., *supra* note 150, at 88 (discussing McCarty's framework); *see also* Vandiver & Kercher, *supra* note 148, at 132 (describing an offender they call "young adult sexual exploiter," a category they acknowledge includes mothers who abuse their own children).

179. F. SYED & S. WILLIAMS, *CASE STUDIES OF FEMALE SEX OFFENDERS IN THE CORRECTIONAL SERVICE OF CANADA* (1996).

180. Lawson, *supra* note 109, at 265-66.

181. Vandiver & Kercher, *supra* note 148, at 130-32.

182. *See, e.g.*, Kevin Hoffmann, *Ex-Teacher Charged with Rape; She is Accused of Having Sex with Boy, 12, a Sixth-Grade Student*, PITTSBURGH POST-GAZETTE, Aug. 17, 1998, at A5 (describing affair between a recently-separated middle school teacher and her

scientifically the composition of offender populations, the mere existence of these frameworks in the scientific literature offers strong evidence that child sexual abuse is far from the exclusive province of males. Women are fully capable of sexually exploiting and sexually abusing children and of acting out emotional and psychological problems in a sexually aggressive way, and our criminal justice institutions need to take account of this fact. Nobody's interests are served by a continued refusal to recognize these behaviors as criminal violations.

B. What Do We Know About Boy Victims?

Beyond researching the demographics and motivations of the females who have sexually abused children, scholars have worked to document the reactions of the boys who have had sexual contact with older women. Boys are less likely than girls to recognize their experience as abusive, and are less likely to report it even when they do. Research shows, however, that many boys feel humiliated and angry when an older woman takes advantage of them sexually, and significant negative aftershocks, such as substance abuse, suicidal thoughts, sexual disorders, and violent behavior, are quite common in the population of male victims. Hence, the common assumption—among professionals and lay people alike—that sexual abuse of boys by women is less harmful than similar abuse of girls by men¹⁸³ has potentially dangerous implications for male victims, the services we provide them, and the justice system's treatment of the offenders.¹⁸⁴

Studies consistently find that boys who experience sexual contact with

student, where her love notes to him indicated that she couldn't "wait to be with him forever"); O'Shaughnessy, *supra* note 6, at D11 (reporting that Mary Kay Letourneau proclaimed that she was in love with her fourteen year-old former student); Kit R. Roane, *Woman, 35, Faces Charge of Rape of Boy*, N.Y. TIMES, Mar. 27, 1998, at B4 (describing a twelve month affair between a thirty-five year-old woman and a fourteen year-old boy, where the woman told the police that she loved the boy).

183. See, e.g., N. Eisenberg et al., *Attitudes of Health Professionals to Child Sexual Abuse and Incest*, 11 CHILD ABUSE & NEGLECT 109, 114 (1987) (finding that British nurses, health visitors, and medical students ranked all adult-child incestuous experiences involving a female adult perpetrator as less serious than identical acts committed by men); Hetherington, *supra* note 119, at 169-70 (describing failures of professionals to identify and take seriously abuse committed by women); Guy R. Holmes et al., *See No Evil, Hear No Evil, Speak No Evil: Why Do Relatively Few Male Victims of Childhood Sexual Abuse Receive Help for Abuse-Related Issues in Adulthood?*, 17 CLINICAL PSYCHOL. REV. 69, 80-82 (1997) (arguing that clinicians fail to suspect or question male clients about prior sexual victimization); Nelson, *supra* note 9, at 73-78 (describing police officers who were unable to appreciate that boys could suffer from sexual contact with an older woman).

184. Denov, *supra* note 127, at 1138; Hetherington & Beardsall, *supra* note 119, at 1281.

an older woman are hesitant to report the behavior.¹⁸⁵ This reluctance stems from several sources. As mentioned above,¹⁸⁶ some argue that society does not support boys who express vulnerability, interpreting it as a sign of weakness that contradicts expected norms of masculinity.¹⁸⁷ Moreover, a boy may feel that his heterosexuality is called into question if he complains about seduction by an older woman.¹⁸⁸ Lastly, the boy may not identify the experience as abusive, as he may interpret his physiological response as a sign that he wanted the sexual contact to happen.¹⁸⁹

Inability to recognize the sexual contact as abuse is likely tied, at least in some cases, to the boy's impression of the experience as it is happening. Among boys (and men) who have disclosed their involvement with older sex partners to law enforcement, clinicians, or researchers, there is considerable variation in the male's perception of the sexual experience.¹⁹⁰

185. See James M. Hepburn, *The Implications of Contemporary Feminist Theories of Development for the Treatment of Male Victims of Sexual Abuse*, 3 J. CHILD SEXUAL ABUSE 1, 2-3 (1994); Holmes et al., *supra* note 183, at 69; Sarrel & Masters, *supra* note 128, at 119, 121.

186. See *supra* notes 127-29 and accompanying text.

187. See, e.g., GROTH & BIRNBAUM, *supra* note 110, at 187-88; see also MIC HUNTER, ABUSED BOYS: THE NEGLECTED VICTIMS OF SEXUAL ABUSE (1989); MIKE LEW, VICTIMS NO LONGER: MEN RECOVERING FROM INCEST AND OTHER SEXUAL CHILD ABUSE (1991); EUGENE PORTER, TREATING THE YOUNG MALE VICTIM OF SEXUAL ASSAULT: ISSUES AND INTERVENTION STRATEGIES (Susan Keviston & Fay Honey Knopp eds., 1986).

188. Hepburn, *supra* note 185, at 4 (noting that sexual identity confusion can be even more pronounced when the boy's abuser is male, as the boy may misunderstand his physiological response and may assume that latent homosexuality triggered the interest of the adult male); see also Kasl, *supra* note 123, at 262-63 (noting that men may remain silent about experiences that threaten their core identity).

189. Sarrel & Masters, *supra* note 128, at 127 (finding that concern surrounding arousal caused male victims to feel guilty and to define the event as non-abusive). Other studies have made similar findings. See, e.g., Paul N. Gerber, *Victims Becoming Offenders: A Study of Ambiguities*, in THE SEXUALLY ABUSED MALE: PREVALENCE, IMPACT, AND TREATMENT, VOL. 1, at 173 (Mic Hunter ed., 1990) (referring to the "myth of complicity" that translates being abused into an inability to self-protect in situations where males experience arousal); MENDEL, *supra* note 115, at 18 (observing that many boys succumb to societal beliefs that males are, or should be, eternally willing to have sex, at least with female partners and hence believe they must have welcomed and enjoyed any sexual interaction with an older woman). For more on the male's socialization to welcome heterosexual sex, see Mary Ellen Fromuth & Barry R. Burkhart, *Childhood Sexual Victimization Among College Men: Definitional and Methodological Issues*, 2 VIOLENCE & VICTIMS 241, 248-50 (1987); Fran Sepler, *Victim Advocacy and Young Male Victims of Sexual Abuse: An Evolutionary Model*, in THE SEXUALLY ABUSED MALE: PREVALENCE, IMPACT, AND TREATMENT, VOL. 1, at 77 (Mic Hunter ed., 1990).

190. This variation is not limited to male victims. The long-term effects of child sexual abuse vary widely among women as well, because abuse experiences differ and the victim's response depends on his/her own personal resources and life circumstances. Clare Davenport et al., *Opinions of the Traumatizing Effects of Child Sexual Abuse: Evidence for Consensus*, 18 CHILD ABUSE & NEGLECT 725, 726-738 (1994). Degree of closeness between

Some studies have reported generally positive findings: some men who, as children, engaged in sexual activity with women have stated that they liked the experience and had no stress or emotional problems resulting from it.¹⁹¹ In fact, some boys regard their own seduction as an accomplishment, which later gives them confidence about their sexuality.¹⁹² This perspective may

victim and perpetrator has been correlated with the degree of trauma resulting from the experience. *Id.* Because women perpetrators often abuse males in their care, the risk of trauma for males abused in this circumstance is likely to be quite high. SARADJIAN & HANKS, *supra* note 121, at 194. Conversely, factors associated with positive responses include victim's age over twelve years and longer duration of sexual relationship. Holmes & Slap, *supra* note 120, at 1858.

191. Condy et al., *supra* note 127, at 387; Fritz et al., *supra* note 115, at 59 (reporting that non-incestuous experiences were often viewed by male victims as neutral or positive while females were more likely to view such experiences as negative); Holmes & Slap, *supra* note 120, at 1858 (reporting that some studies show negative responses to sexual abuse by only fifteen to thirty-nine percent of male victims, while others record negative responses from two-thirds of male victims); Andrea Nelson & Pamela Oliver, *Gender and the Construction of Consent in Child-Adult Sexual Contact: Beyond Gender Neutrality and Male Monopoly*, 12 GENDER & SOC'Y 554, 554 (1998) (reporting that boys generally interpreted sexual contact with women as consensual but regarded contact with adult men as abusive); Hollida Wakefield & Ralph Underwager, *Female Child Sexual Abusers: A Critical Review of the Literature*, 9 AM. J. FORENSIC PSYCHOL. 43, 50 (1991) (review of college survey studies shows that men are much less likely than women to perceive childhood sexual experiences as abusive); Jennings, *supra* note 122, at 222 (citing G. Fischer, Why More Males than Females Report Retrospectively Positive Feelings About and/or Regard as Inconsequential Child Sexual Abuse Experiences (paper presented in Toronto at the Ninth Annual Conference on the Treatment of Sexual Abusers, Their Families and Victims, Oct. 4-6, 1990); see also D.J. West, *Boys and Sexual Abuse: An English Opinion*, 27 ARCHIVES SEXUAL BEHAV. 539, 552 (1998), for a review of the literature documenting male reaction to abuse.

Note, however, that inability (or unwillingness) of men to recognize or to define these interactions as abusive has caused some discrepancy in victim-based reports of abuse prevalence. The wording of the question seems to make all the difference in the percentage of affirmative responses. For example, when Fromuth and Burkhart asked undergraduate men if they'd ever been sexually abused by a female, only four percent responded affirmatively, but when they asked the sample to report if they had any childhood sexual activity with a woman, the percentage jumped by twenty points. Fromuth & Burkhart, *supra* note 189, at 245-46. Crewdson reports that when a family services agency advertised to hear from men who had been sexually abused as children, they received very few responses; when they changed the phrase "sexual abuse" to "sexual experiences," more than 100 men responded (most of whom reported childhood sex with an adult woman). JOHN CREWDSON, BY SILENCE BETRAYED: SEXUAL ABUSE OF CHILDREN IN AMERICA 71 (1988).

192. West, *supra* note 191, at 546-47 (citing findings from D.J. West & T.P. Woodhouse, *Sexual Encounters Between Boys and Adults*, in CHILDREN'S SEXUAL ENCOUNTERS WITH ADULTS (C.K. Li et al. eds., 1993)); see also FRANK G. BOLTON ET AL., MALES AT RISK: THE OTHER SIDE OF CHILD SEXUAL ABUSE 17-19 (1989) (arguing that the boy, his friends, and society may define sexual experience with an older woman as an early introduction to sexual prowess and manhood). Male victims of abuse do perceive coercive experiences as traumatic, although a man is likely to consider the woman's sexual attractiveness when gauging how to respond to her advance. Condy et al., *supra* note 127, at 388; Struckman-Johnson & Struckman-Johnson, *supra* note 117, at 139 (noting that "a majority of men

reflect male approaches to sex more generally, because males are socialized to be more adventurous toward sex, more permissive about teenage sexual activity in particular, and more reticent in their expressions of guilt or anxiety over early sexual experiences.¹⁹³ A positive attitude has been documented even among men who were subject to incest as children.¹⁹⁴

But these findings do not tell the whole story. While childhood sexual contacts with older women may be experienced by some males as beneficial, natural, or positive,¹⁹⁵ other males suffer significant trauma from their early exposure to sex.¹⁹⁶ Moreover, some clinicians believe that male victims who insist that their experience was positive have actually brainwashed themselves as way to rationalize their victimization. In other words, the positive attitude they express toward early sex is nothing more than false consciousness.¹⁹⁷ The trauma experienced by male victims of abuse can be devastating. Consider the following admission by one abuse survivor,

I'm constantly haunted by [the sexual abuse]. It's not something that just goes away, and I don't know how to put it behind me. . . . It's constantly remembering all the beatings, the washing, the sucking . . . [It's] part of

report that they would be pleased to have a sexually desirable woman physically force them to have sex").

193. Struckman-Johnson & Struckman-Johnson, *supra* note 117, at 138 (proposing that "because men value and enjoy sex, they are predisposed to view a woman's aggressive advance as a positive sexual opportunity, not a violation of will"); West, *supra* note 191, at 546.

194. Elliott, *supra* note 125, at 10.

195. *Id.* (noting that a minority of thirty-two male victims of incest reported the experience was "wholly beneficial and natural").

196. MENDEL, *supra* note 115, at chs. 4-5. In addition to the four standard traumagenic effects suffered by female victims of sexual abuse (traumatic sexualization, betrayal, powerlessness, and stigmatization), male abuse victims confront sexual identity issues and experience conflicts concerning aggressive and antisocial behavior. PORTER, *supra* note 187; see also Anthony Urquiza & Maria Capra, *The Impact of Sexual Abuse: Initial and Long-Term Effects*, in *THE SEXUALLY ABUSED MALE: PREVALENCE, IMPACT, AND TREATMENT*, VOL. 1, at 106, 111 (Mic Hunter ed., 1990); David Finkelhor & Angela Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 55 *AM. J. ORTHOPSYCHIATRY* 530, 530 (1985) (identifying traumagenic theory of abuse victims' suffering); Holmes & Slap, *supra* note 120, at 1858 (in addition to psychological or psychiatric disorders, male victims also exhibit eating disorders, poor school performance, and legal troubles, and are more likely to run away from home). See Peluso & Putnam, *supra* note 128, at 52, for a case study of a teenage boy who suffered significant trauma after being seduced by the mother of a child for whom he babysat.

197. See generally, e.g., R.E. Freeman-Longo, *The Impact of Sexual Victimization on Males*, 10 *CHILD ABUSE & NEGLECT* 411 (1986); see also Nelson & Oliver, *supra* note 191, at 573 ("The social constructions of sexuality gave boys who had been sexually manipulated by women an alternate and status-enhancing interpretation of their experience."); Sepler, *supra* note 189, at 74-79.

my daily existence.¹⁹⁸

In fact, among victims who have been abused by both men and women, most report that the female abuse was worse—more harmful and more damaging—than the male abuse.¹⁹⁹ Men report responding to female victimization with substance abuse, self-injury, suicidal ideation and attempts, depression, rage, problematic relationships with women, self-concept and identity problems, and difficulties with sexuality.²⁰⁰ While scholars are cautious about attributing these problems directly to the female sexual abuse experienced by their subjects or clients, often the victims make this association. One man stated,

I started drinking and taking drugs when I was 12. That helped the pain go away No one would believe me about all of the physical and sexual abuse, so when I took drugs and alcohol, I didn't even have to believe it myself. It made it easier to deal with I buried [the sexual abuse] with booze and drugs.²⁰¹

Another described his desire to injure himself, to strip himself of outward signs of sexuality. "I battle with self-inflicted wounds When I was dealing with the sexual abuse, there were times when I was really considering cutting my penis off I didn't want to have a penis. I didn't want to be sexual."²⁰²

A combination of rage, distrust, and dysfunction in their relationships with women is a common theme among men who have been sexually abused. One author notes, "For many young men who were abused by friends or relatives, the sexual abuse itself has come to verify that intimate relationships and the vulnerability required to establish such attachments result in a loss of autonomy."²⁰³ For the victim of abuse, intimacy thus becomes the antithesis of autonomy. Moreover, male victims have a tendency to externalize their anger, rather than to reflect on and discuss

198. Denov, *supra* note 127, at 1143 (quoting Man #4).

199. *Id.* at 1143.

200. See MENDEL, *supra* note 115, at ch. 5; Denov, *supra* note 127, at 1144; Holmes et al., *supra* note 183, at 72 (citing clinical studies documenting short-term effects of sexual abuse on males); Peluso & Putnam, *supra* note 128, at 52-54.

201. Denov, *supra* note 127, at 1145 (quoting Man #4); *see also* Holmes & Slap, *supra* note 120, at 1858 (documenting a strong association between sexual abuse and later substance abuse by victims).

202. Denov, *supra* note 127, at 1146 (quoting Man #1). In Mendel's study, thirty-two percent of the male abuse survivors had attempted suicide, and almost half of those had tried more than once. MENDEL, *supra* note 115, at 145; *see also* Holmes & Slap, *supra* note 120, at 1858 (documenting a rate of attempted suicide 1.5 to fourteen times higher among sexually abused males than among non-abused males).

203. Hepburn, *supra* note 185, at 10.

their problems.²⁰⁴ For both of these reasons, male victims of abuse are at risk for becoming sex offenders themselves, acting out their need to exert power and control in their interactions with women.²⁰⁵ One victim admitted, “Because I was abused by a woman, I get these feelings where I want to fuck all the women that I can . . . I’ll be in charge and I’ll be in control this time.”²⁰⁶

Even among subjects who do not actually become rapists, sexual victimization by women often causes them to question their masculinity, their sense of control, and their competence as men, “I felt like I was a victim, and for a man to be a victim is an embarrassment A real man is not a victim, a real man is always in charge, always resists, and is always in control. A man who is a victim is a failure.”²⁰⁷

204. *Id.* at 8, 10-11. “In general one can expect that males will communicate less with words than with action [and] will respond to feelings of vulnerability with anger rather than depression[.]” *Id.* at 11. Hepburn contrasts the male response to trauma with that characteristic of most females. Females are more prone to work through trauma by reflecting and discussing their problems, while men become agitated and physically active in the face of emotional distress. *Id.* at 8 (citing findings of child development specialists in M.S. MAHLER ET AL., *THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT: SYMBIOSIS AND INDIVIDUATION* (1975)). Hepburn also contends that, because many men associate therapy with “feminine-like” levels of intimacy, they avoid it or resist it in order to protect their sense of masculinity. *Id.* at 9.

205. See *id.* at 4 (citing Carl M. Rogers & Tremaine Terry, *Clinical Interventions with Boy Victims of Sexual Abuse*, in *VICTIMS OF SEXUAL AGGRESSION: TREATMENT OF CHILDREN, WOMEN AND MEN* (I.R. Stuart & J.G. Greer eds., 1984)); John Briere et al., *Symptomatology in Men Who Were Abused as Children: A Comparison Study*, 58 *AM. J. ORTHOPSYCHIATRY* 457, 459-60 (1988) (noting the high rates of anger in the population of male abuse victims); see also West, *supra* note 191, at 550.

206. Denov, *supra* note 127, at 1148 (quoting Man #6). Other subjects report extreme discomfort with sex, even with their own wives later in life. *Id.* at 1150; see also MENDEL, *supra* note 115, at 12, 160, 203 (recounting the story of Ron, who believes that his sexual victimization at a young age “devalued sex [thereby making it] not a wonderful thing to do with someone”; the story of Chris, whose early sexual abuse made him feel very insecure as an adolescent and hesitant to date or become involved in a sexual relationship until his twenties; and the story of Pete, who says his capacity for sexual desire is virtually nonexistent); Holmes and Slap, *supra* note 120, at 1858 (reporting that sexually abused males are up to five times more likely than non-abused males to report “sexually related problems (including sexual dysfunction)”).

207. Denov, *supra* note 127, at 1149 (quoting Man #6). Another of Denov’s subjects echoed this theme, saying, “Because I’m a male, I should have been able to control women. As a man, I’m supposed to be the powerful one and the actions of women are not supposed to affect me. I’m always supposed to have the upper hand.” *Id.* (quoting Man #1). Mendel has observed, based on his clinical work with male abuse victims, “the experience of victimization is highly dissonant and threatening to males. Confronting and acknowledging sexual abuse poses a major threat to a male’s sense of masculinity.” See MENDEL, *supra* note 115, at 16. For example, Mendel’s subject Wayne stresses that “[t]he abuse tells me that I am not a man.” *Id.* at 205. The fact that they were hurt by women seems particularly shameful; some adult survivors of female abuse initially report that they were victimized by

To counter his sense of emasculation and to overcome his sense of shame and vulnerability, the male victim of abuse may overcompensate by becoming hypermasculine—engaging in aggressive sports, committing crimes, seducing women.²⁰⁸ According to James Hepburn, boys and men who have been abused “defend against their feelings of vulnerability through a comportment of self-reliance, detachment and self-denial,” counterphobic activities often linked to excessive activity, aggression and antisocial behavior.²⁰⁹ Ironically, such demonstrations of hypermasculine behavior may signal (to the boy, his friends, and his family) that the abuse is nothing to worry about. Professionals warn that reticence and protests are not signs of recovery, but rather reveal futile attempts at accommodation and denial.²¹⁰

Coupled with the data about the prevalence and behavior of female sexual offenders, these studies of male sex abuse victims should compel us to take seriously the threat of female sexual exploitation of male minors. Despite popular beliefs about male sexuality and in contravention of the macho myths of invulnerability, the evidence shows that boys can and do suffer significant trauma from sexual contact with adult women. While the trauma likely increases as the level of force increases, we should be hesitant to conclude that only physical force approximating rape causes boys to suffer. Societal pressures that encourage boys to have sex, that keep them from admitting that they don’t want to have sex, and that equate a man’s power with his ability to remain in control can leave male teenagers in an impossible bind: go along with the seduction and suffer emotionally, resist and risk looking like a sissy, or complain after the fact and risk disbelief or jokes about one’s masculinity. Faced with this set of choices, who can blame some boys for refusing to adopt the victim label, and for pretending instead that the sex was great and everything is fine?

men, because they fear facing ridicule or disbelief if they complain about sexual contact with a woman. Cianne Longdon, *A Survivor’s and Therapist’s Viewpoint*, in *FEMALE SEXUAL ABUSE: THE ULTIMATE TABOO* (Michelle Elliott, ed. 1993); Hetherington, *supra* note 119, at 163.

208. Jim Struve, *Dancing with Patriarchy: The Politics of Sexual Abuse*, in *THE SEXUALLY ABUSED MALE: PREVALENCE, IMPACT, AND TREATMENT*, VOL. 1., at 37 (Mic Hunter ed., 1990). This is consistent with the findings of gender scholars, that boys and men are strongly encouraged to comport with the societal stereotype of the impenetrable male. Actions or emotions that betray vulnerability can threaten a male’s sense of his masculinity. See *supra* note 129 and accompanying text.

209. Hepburn, *supra* note 185, at 8. Mendel likewise reports that, because our culture teaches boys to desire sexual interaction with women, a boy who labels such an experience abusive or traumatic may fear that he is gay. MENDEL, *supra* note 115, at 19 (citing Struve, *supra* note 208 and Nasjleti, *supra* note 128).

210. BOLTON ET AL., *supra* note 192, at 88-93; Hepburn, *supra* note 185, at 5.

But as scholars and students of the criminal justice system, our job is not to accept these protestations at face value just because the victim happens to be male. We certainly have adopted a more skeptical, proactive approach when it comes to girl victims and their claims of sexual agency. Many prosecutors spend hours convincing the seemingly independent girl of her own true victim status²¹¹ and much scholarship on statutory rape is devoted to explaining how adolescent girls really do lack the ability to make meaningful choices when confronted by adult offers for sex.²¹² Yet when it comes to boys, the standard line has been that these efforts are unnecessary, that boys can generally take care of themselves. The scientific data documenting the incidence of substance abuse, self-injury, and dysfunctional sexual futures among male victims of abuse strongly suggests otherwise. In short, what harm can be done without a penis? Plenty.

CONCLUSION

Over the past century and a half, the gendered essence of statutory rape has become deeply embedded in the purpose of the statute, extending its tentacles far beyond the statutory language, such that we can no longer extricate the male-on-female image from the formal law's requirements for prosecution.²¹³ The gender paradigm and the law thus have become mutually constitutive of each other, each supporting the other's continued existence while providing the other with meaning.

The reality of statutory rape is, however, far more complex than the traditional gender construct implies. Female sex abusers and male victims exist, in substantial numbers and varieties. It's time for our academic writings about statutory rape to catch up with the scientific literature about these populations and for our policy proposals to account for the full range of victim and defendant experiences.

But appreciating the breadth of the defendant population means more than simply "add women and stir"—women offenders' experiences and motivations are not simply opposite gender versions of those that form the standard paradigm of male-perpetrated sexual abuse. So too with increasing

211. Levine, *supra* note 92, at 1208.

212. See, e.g., Oberman, *Turning Girls Into Women*, *supra* note 69, at 78-79; Phillips, *supra* note 69, at 99-103.

213. See Nelson, *supra* note 9, at 71 ("My data suggest that the removal of gender bias from the statutory laws governing sexual offenses may not, in fact, necessarily remove the stereotype of female sexual passivity and the ethos of 'no harm done'."). Nelson reports that the actions of female perpetrators of sex offenses are trivialized by the perceptions and later actions of police. *Id.* at 73-78.

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our understanding of male victimization—boy victims are not just male versions of girl victims, and they deserve to be recognized as a population that has distinct needs and interests.

In sum, the legal academy has been somewhat complacent in its treatment of statutory rape in the years since the statutory overthrow of *Michael M.* After the *law* became gender-neutral, legal scholars too easily slipped into the language of gendered constructs when writing about the *crime*. These scholars have grafted the gendered history of the law into their discussions of the modern statutory rapist and victim, without questioning whether the crime of statutory rape is still the exclusive province of males. In so doing, they have implied that women are unlikely offenders, and that any harm suffered by males must be trivial. This “No Penis, No Problem” myth must be excised from how we think about the statutory rape drama in order for us to conceive and suggest reforms that are appropriate for the full spectrum of people involved in this crime.