JUVENILES, SEX OFFENSES, AND THE SCOPE OF SUBSTANTIVE LAW

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I. INTRODUCTION

Substantive criminal law is an important factor in determining whether a juvenile will be tried as a juvenile or transferred to adult court. In particular, the gravity of the offense with which the juvenile is charged is a key component of most states' discretionary waiver statutes,[1] and it disproportionately

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1. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 147 (2010) ("Approximately 75% of the States use some form of the *Kent* criteria . . . [including] the type of offense the youth has been charged with . . . ." (footnotes omitted)); *see*, *e.g.*, ARIZ. REV. STAT. ANN. § 8-327(D)(1) (2007); NEV. REV. STAT. § 62B.390(1) (2011), *amended by* 2013 Nev. Stat. ch. 483, § 1.3. Following the Supreme Court's suggestion in the Appendix to *Kent v. United States*, "the seriousness of the alleged offense to the community and whether the protection of the community requires waiver" is often the first factor courts consider in making transfer decisions. Kent v. United States, 383 U.S. 541, 566 (1996); *see* Jeffrey J. Shook, *Prosecutorial Decisions to Treat Juveniles as Adults: Intersections of Individual and Contextual Characteristics*, 47 CRIM. L. BULL. 341, 341 (2011) (noting that changes to state transfer provisions "have generally served to . . . move waiver criteria toward offense-based characteristics").

Between 1985 and 2009, over one-quarter of a million juveniles were transferred to criminal courts. Rick Ruddell & G. Larry Mays, *Transferring Pre-Teens to Adult Criminal Courts: Searching for a Justification*, 63 JUV. & FAM. CT. J., Fall 2012, at 22, 22. Forty-four states and the District of Columbia have traditional "judicial waiver" provisions, under which the juvenile court judge may exercise her discretion to transfer a juvenile to adult criminal court. U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK—JUVENILE JUSTICE SYSTEM STRUCTURE & PROCESS: PROVISIONS FOR IMPOSING ADULT SANCTIONS 2011 (2012) [hereinafter OJJDP, PROVISIONS FOR IMPOSING ADULT SANCTIONS], *available at* http://www.ojjdp.gov/ojstatbb/structure_process/qa04115?

influences judges when deciding whether to transfer juveniles.[2] Furthermore, the majority of jurisdictions have enacted statutory exclusion statutes whereby juvenile courts lose jurisdiction over juveniles charged with certain serious offenses.[3]

As a general matter, sex offenses are considered serious crimes, and a number of serious sex offenses are criminalized because of the victim's age. For example, sexual activity that would be considered consensual, and thus legal, between two adults is prohibited as statutory rape if one of the participants is below the age of consent. Similarly, although private possession of pornographic images featuring adults is protected by the First Amendment, the Supreme Court has exempted child pornography from this protection. Furthermore, the criminal penalties associated with statutory rape and child pornography are often quite severe. These severe penalties reflect a policy determination on the part of legislatures that when sexual activity is illegal, either in whole or in part, because of the age of one of the participants—a category of crimes that we refer to as "age-determinative sex offenses"—participation in that activity is a serious crime.[4]

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qaDate=2011. Five of the remaining states have mandatory exclusion statutes, discussed *infra* in note 3 and accompanying text, and the final state, Nebraska, provides for concurrent jurisdiction with the juvenile court and the district court for felonies. NEB. REV. STAT. ANN. §§ 43-247 (LexisNexis 2012), *amended by* 2013 Neb. Laws 255, *and* 2013 Neb. Laws 561. In addition to judicial waiver, fifteen states authorize prosecutorial waiver, under which discretion to file the charges in juvenile or adult court is vested in the prosecutor. Arya, *supra*, at 109–10; Ruddell & Mays, *supra*, at 28; *see*, *e.g.*, ARK. CODE ANN. § 9-27-318(c) (2011); MASS. GEN. LAWS ANN. ch. 119, § 54 (West 2013). Finally, some states retain transfer laws, rather than exclusion laws, and include "mandatory transfer" requirements under which the petition is filed in the juvenile court, but the judge must transfer the minor to the adult criminal court if the minor is of a certain age and is alleged to have committed a certain offense, which is, generally, murder. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-127 (West 2009); OHIO REV. CODE ANN. § 2152.12 (West 2005 & Supp. 2013).

2. Dia N. Brannen et al., *Transfer to Adult Court: A National Study of How Juvenile Court Judges Weigh Pertinent* Kent *Criteria*, 12 PSYCHOL. PUB. POL'Y & L. 332, 341, 346 (2006) (surveying juvenile court judges and finding that, despite claiming projections about "treatment amenability" as the most helpful in making transfer decisions, judges, in fact, made decisions based on perceived dangerousness, including the offense charged); *see also* Roper v. Simmons, 543 U.S. 551, 553, 573–75 (2005) (holding that executing juvenile offenders violates the Eighth Amendment and noting that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments").

3. OJJDP, PROVISIONS FOR IMPOSING ADULT SANCTIONS, *supra* note 1 (noting that twenty-nine states now have statutory exclusion, also called "legislative waiver," laws); Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 500 (2012) ("[M]any juveniles who are manifestly less culpable than adults nonetheless must be prosecuted as adults because of the seriousness of the crime charged."); *see, e.g.*, ALA. CODE § 12-15-102(6) (2013); FLA. STAT. ANN. § 985.557(2)(c)–(d) (West 2008 & Supp. 2013); 705 ILL. COMP. STAT. 405/5-130(1)(a) (2007 & Supp. 2013); Miller v. Alabama, 132 S. Ct. 2455, 2474 (2012) ("[M]any States use mandatory transfer systems: A juvenile of a certain age who has committed a specified offense will be tried in adult court, regardless of any individualized circumstances. Of the 29 relevant jurisdictions, about half place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer to juvenile court.").

4. *See, e.g.*, Daryl J. Olszewski, Comment, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693, 698 (2006) (noting that Wisconsin punishes statutory rape very harshly—as severely as it does armed robbery).

The question we seek to answer in this Article is whether the justice system ought to distinguish between adult and juvenile offenders for these age-determinative sex offenses when assessing the seriousness or gravity of these crimes. We believe it should. In particular, this Article argues that when the juvenile is in the same peer group as the victim—that is to say, the age difference between the victim and the offender is not large—substantive criminal law should recognize that an age-determinative sex offense is not nearly as serious as it would be if committed by an adult. Indeed, many of the reasons for enacting prohibitions against age-determinative sex offenses simply do not exist if the offender is a peer of the victim. The justice system may nonetheless wish to prohibit juveniles from engaging in that activity. For example, the State has an interest in limiting (if not eliminating) underage sexual activity. But that goal could be accomplished without treating juveniles who engage in underage sexual activity the same as adults who seek out underage partners for such activity. The latter situation is clearly more serious than the former, and the content and scope of criminal law ought to be changed to account for that difference.

This Article proceeds in three parts. Part II notes that justice system intervention is already different for juveniles than for adults. Through the use of so-called status offenses, the juvenile justice system permits the State to intervene in the lives of juveniles on the basis of activity that would not be illegal if committed by adults. For example, although criminal law would not punish an adult for truancy or running away, juveniles regularly find themselves detained by the juvenile justice system for such activity.[5]

While Part II demonstrates that the justice system's reach is, in some situations, broader for juveniles than for adults, Part III argues that the justice system's reach ought to, for some crimes, be narrower for juveniles than for adults. In particular, Part III argues that substantive criminal law unwarrantedly treats juveniles the same as adults when it comes to age-determinative sex offenses. Using the specific examples of statutory rape and child pornography offenses, this Part demonstrates why the age of the offender is a major factor in the gravity of certain sex offenses.[6]

Part IV sets forth our proposal. We propose that, just as the law has been broadened to account for the unique state interest in prohibiting juveniles from engaging in status offenses, so too should the scope of the law—specifically criminal law—be narrowed to account for the lessened seriousness of certain sex offenses when committed by juvenile offenders. As this Part notes, a few

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5. *See infra* notes 24–26 and accompanying text.

6. These are not the only age-determinative sex offenses. *See* Michael Kent Curtis & Shannon Gilreath, *Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature After* Lawrence v. Texas, 43 WAKE FOREST L. REV. 155, 156 (2008) (noting that so-called "crime against nature" statutes may be used "to prosecute teenagers who voluntarily engage in oral or anal sex with each other," even though such statutes were held unconstitutional as applied to consenting adults in *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003)).

recent decisions have pushed back against treating juveniles the same as adults who have committed age-determinative sex offenses. This Article does not propose a judicial solution; instead, it proposes a legislative one. As the recent debates over criminalization of teen sexting and the proliferation of so-called Romeo-and-Juliet exceptions to statutory rape laws demonstrate, there is room in the public debate for a more nuanced understanding of juveniles and sexual activity. This Part argues that recent reforms have not gone far enough. It then offers specific recommendations that exempt juveniles from generally applicable age-determinative sex offenses and suggestions about how to craft laws that are designed to address the more limited and less serious harm associated with juveniles who engage in such activity.

The problem this Article identifies is not merely hypothetical. There is ample evidence that juveniles are committing age-determinative sex offenses, as well as evidence that criminal justice intervention in the lives of juveniles for this activity may be increasing.[7] This evidence leads us to conclude that there is a significant need for legislative reform in this area.

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7. JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 459 (6th ed. 2012); Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 703 (2000); *see also* Curtis & Gilreath, *supra* note 6, at 186 (reporting data from the United States Centers for Disease Control). Recent studies suggest that half of all American teenagers have had sex by the age of sixteen. *See* Curtis & Gilreath, *supra* note 6, at 186. The vast majority of these teenagers are engaging in illegal activity because the age of consent in all but a few states is sixteen or older. Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 62 (1997). Although many prosecutors tend to bring statutory rape charges only when the offender is significantly older, see *infra* note 89, there is evidence showing a large number of prosecutions of teenagers. *See* Steve James, Comment, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*, 78 UMKC L. REV. 241, 247–48 (2009) (collecting sources).

Although not as high as the figures for statutory rape, there is also evidence that a significant number of juveniles view and possess child pornography. Angela Carr, N.Z. DEP'T OF INTERNAL AFFAIRS, INTERNET TRADERS OF CHILD PORNOGRAPHY AND OTHER CENSORSHIP OFFENDERS IN NEW ZEALAND (2004), *available at* http://www.dia.govt.nz/Pubforms.NSF/URL/InternetPt3.pdf/$file/InternetPt3.pdf. For example, according to a report published by the New Zealand Department of Internal Affairs, the largest single age group viewing child pornography is young people aged fifteen to nineteen. *Id*. (also noting that "the most common (mode) age of offenders was 17 years"). Figures from the United States are significantly lower. *See* Janis Wolak, David Finkelhor & Kimberly Mitchell, *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 SEXUAL ABUSE 22, 28–29 (2011) (reporting that in 2006, 5% of arrests in a study of child pornography possessors were of individuals under the age of eighteen); MARK MOTIVANS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUST. STAT. BULL., BUREAU OF JUSTICE STATISTICS BULLETIN: FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS 5 (2006), *available at* http://bjs.gov/content/pub/pdf/fpcseo06.pdf (reporting that less than 3% of federal child pornography prosecutions were for individuals under the age of twenty-one).

As for production of child pornography, preliminary studies indicate that approximately 20% of teenagers have engaged in "sexting." *See A Thin Line: 2009 AP-MTV Digital Abuse Study*, A THIN LINE (2011), http://www.athinline.org/MTV-AP_Digital_Abuse_Study_ Executive_Summary.pdf; *Sex and Tech: Results from a Survey of Teens and Young Adults*, NAT'L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY 1 (2009), http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf. Another study confirmed an increase in "'youth-produced' sexual images, pictures taken by minors, usually of themselves, which met legal definitions of child pornography." Janis Wolak, David Finkelhor & Kimberly J. Mitchell, *Trends in Arrests for Child Pornography Production: The Third National Juvenile Online Victimization Study* (NJOV-3), CRIMES AGAINST CHILDREN RES. CENTER 1 (Apr. 2012), *available at* http://unh.edu/ccrc/pdf/CV270_Child%20Porn%20Production%20Bulletin_4-13-12.pdf. That same study

II. STATUS OFFENSES AND THE JUVENILE JUSTICE SYSTEM

The juvenile justice system was created over a century ago.[8] The goal was to provide children, who were understood to be different from adults, with an opportunity for rehabilitation, rather than punishment.[9] When a juvenile commits what would be classified as a crime if committed by an adult, that conduct is labeled "delinquent," and the juvenile justice system responds.[10]

The juvenile justice system also intervenes when a juvenile is alleged to have committed a "status offense"—conduct that would not qualify as a crime if committed by an adult, but is nonetheless illegal for minors.[11] State laws vary, but status offenses typically include truancy, incorrigibility or

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reported more than one hundred arrests for teen sexting where no coercion, pressure, or other aggravating factor was present. *Id.* at 1–2.

8. JUVENILE CRIME, JUVENILE JUSTICE 157 (Joan McCord et al. eds., 2001); Julie J. Kim, Note, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 WASH. U. L. REV. 843, 846–47 (2010).

9. HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 86 (1999); *see also* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909) ("The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude.").

Most states set the age of majority at eighteen, but "juvenile" is not universally defined as up to eighteen years of age; New York, for example, subjects all offenders to adult criminal court once they turn sixteen years old. N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2008 & Supp. 2013) ("'Juvenile delinquent' means a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law."). Ten other states classify juveniles as adults once they reach seventeen years old. U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK—JUVENILE JUSTICE SYSTEM STRUCTURE & PROCESS: UPPER AGE OF ORIGINAL JUVENILE COURT JURISDICTION, (2011), *available at* http://www.ojjdp.gov/ojstatbb/structure_process/qa04101.asp?qaDate=2011.

10. *See, e.g.*, TEX. FAM. CODE ANN. § 51.03(a) (West 2012) (defining delinquent conduct as conduct "that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail," in addition to violating a court order or other specified code provisions). That response is sometimes rehabilitative and sometimes punitive. Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 3 (2009). Increasingly, the response of the juvenile justice system is to treat the juvenile as an adult and subject him or her to the adult criminal justice system with its criminal penalties and consequences. Christopher Mallett, *Death Is Not Different: The Transfer of Juvenile Offenders to Adult Criminal Courts*, 43 CRIM. L. BULL. 523, 541 (2007).

11. JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 2 (Nancy E. Dowd ed., 2011); Soma R. Kedia, *Creating an Adolescent Criminal Class: Juvenile Court Jurisdiction Over Status Offenders*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 543, 543 (2007); Kim, *supra* note 8, at 843; David Aaron Michel, Note, *The CHINS Don't Stand a Chance: The Dubious Achievements of Child in Need of Services ("CHINS") Jurisdiction in Massachusetts & A New Approach to Juvenile Status Offenses*, 20 B.U. PUB. INT. L.J. 321, 323 (2011). State definitions vary somewhat, but most are similar to the federal definition in the Juvenile Justice Act: "A juvenile offender who has been charged with or adjudicated for conduct which would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult." 28 C.F.R. § 31.304(h) (2012); *see, e.g.*, ARIZ. REV. STAT. ANN. § 8-201 (2007 & Supp. 2012); GA. CODE ANN. § 15-11-2 (West 2013); MASS. GEN. LAWS ANN. ch. 119, § 21 (West 2013); N.Y. FAM. CT. ACT § 712 (McKinney 2013); VA. CODE ANN. § 16.1-228 (West 2013).

ungovernability, running away, curfew violations, and other behaviors that may include conduct such as smoking, underage alcohol consumption, or wearing baggy pants, for example.[12] Incorrigibility is sometimes referred to as being unruly, being disobedient, or habitually disobeying one's parents; this category can include engaging in sexual behavior, as well as staying out late or associating with negative influences.[13] Status offense statutes and standards can be quite vague.[14]

Absent violation of the criminal law, state control over minors is typically justified by "society's special concern for children"[15] and states' interests in protecting minors.[16] Status offense legislation is intended to be child-focused and supportive,[17] and it is designed to inculcate norms and to keep children out of the adult criminal justice system.[18] Some evidence suggests that minors who commit status offenses are more likely to become delinquent, so these rationales appear legitimate.[19]

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12. *See, e.g.*, Kedia, *supra* note 11, at 545–49; Kim, *supra* note 8, at 848–49. The U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention breaks down the categories of offenses: running away, truancy, curfew law violations, ungovernability/incorrigibility, and underage liquor violations. CHARLES PUZZANCHERA ET AL., U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE COURT STATISTICS 2009, at 70–91 (2012), *available at* http://www.ojjdp.gov/pubs/239114.pdf; U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK—JUVENILE JUSTICE SYSTEM STRUCTURE & PROCESS: STATUS OFFENSES SPECIFIED IN STATUTE, 2012 (2013), *available at* http://www.ojjdp.gov/ojstatbb/structure_process/qa04121.asp?qaDate=2012. A number of other behaviors may be considered status offenses, including possessing tobacco, etc. PUZZANCHERA ET AL., *supra*, at 71.

13. Kim, *supra* note 8, at 849. Although legislatures and juvenile courts consider incorrigibility as a status offense, child psychology views it as a normal part of growing up. JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM, *supra* note 11, at 2–3 ("Whether the conduct is a conventional crime or a status crime, its frequency, according to representative national data from a broad cross-section of teenagers, reflects a simple fact: for many kids, they are simply being teenagers."); Randy Frances Kandel & Anne Griffiths, *Reconfiguring Personhood: From Ungovernability to Parent*; *Adolescent Autonomy Conflict Actions*, 53 SYRACUSE L. REV. 995, 1016–18 (2003) ("The terms 'ungovernability' and 'habitual disobedience' virtually define adolescence as it is culturally understood and celebrated in the United States, and as it is defined in core Western psychological theory as a time of rebellion, turmoil and increasing conflict with parents. The heart of the problem is that adolescence and the teenage years are a time when it is both normal and normative to be deviant . . . ." (footnotes omitted)).

14. Kedia, *supra* note 11, at 558.

15. Kent v. United States, 383 U.S. 541, 554 (1966); *see also, e.g.*, Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1514 (2012) (discussing the juvenile justice system's interest in protecting the best interest of youth).

16. Kim, *supra* note 8, at 848. The Supreme Court has acknowledged, with regard to fourteen-year-olds, states' general interest in protecting minors from sexually explicit speech. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) ("We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language.").

17. Claire Shubik & Jessica Kendall, *Rethinking Juvenile Status Offense Laws: Considerations for Congressional Review of the Juvenile Justice and Delinquency Prevention Act*, 45 FAM. CT. REV. 384, 389 (2007).

18. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 8, at 157 ("[T]he main reason for the establishment of the juvenile court was 'to prevent children from being treated as criminals'" (quoting M. Van Waters, *The Juvenile Court from the Child's Viewpoint*, *in* THE CHILD, THE CLINIC, AND THE COURT 217, 217 (1971))); Kim, *supra* note 8, at 848.

19. U.S. DEP'T OF EDUC., MANUAL TO COMBAT TRUANCY 1 (July 1996), *available at* http://www2.ed.gov/pubs/Truancy/index.html (noting that "[t]ruancy is a gateway to crime").

Within the broader criminal justice system, adults can be penalized for their conduct only when it violates a particular criminal prohibition. A number of activities are beyond the scope of criminal law: associating with particular individuals,[20] engaging in consensual sexual activity,[21] drinking alcoholic beverages,[22] smoking cigarettes, running away from home, skipping school, disobeying one's parents, and a myriad of other activities that may not be socially beneficial in all contexts, but are, nonetheless, not criminal. Although status offense conduct is not classified as criminal, the State retains and regularly exercises power over juveniles engaged in this behavior to a degree associated with the commission of criminal offenses.[23]

Despite the federal Juvenile Justice Delinquency Prevention Act, which was in part designed to eliminate detention for status offenses,[24] jurisdictions have used a number of formal and informal mechanisms to detain a large number of juveniles for committing status offenses.[25] Most significantly, in 1980, Congress passed the "Valid Court Order" exception to the general prohibition on detention for status offenses, permitting states to detain minors when they violate a valid court order, even when that order originated because of a mere status offense.[26] Furthermore, although juvenile delinquents have

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20. NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 466 (1958).

21. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

22. This is true for adults over the legal drinking age of twenty-one. *See, e.g.*, 23 U.S.C. § 158(a)(1)(A) (2006); COLO. REV. STAT. § 18-13-122(2)(a) (2012); 235 ILL. COMP. STAT. 5/6-20(e) (2005 & Supp. 2013).

23. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 8, at 160 ("From their inception, juvenile courts had authority not only over children and adolescents who committed illegal acts, but also over those who defied parental authority or social conventions by such acts as running away from home, skipping school, drinking alcohol in public, or engaging in sexual behavior.").

24. 42 U.S.C. § 5601 (2002), *amended by* Pub. L. 113-38, 127 Stat. 527 (2013); 42 U.S.C. §§ 5602–03 (2002); 42 U.S.C. § 5633(a)(11)(A) (2002) ("[J]uveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult . . . shall not be placed in secure detention facilities or secure correctional facilities . . . ."). This requirement "recognize[s] both the inequity of incarcerating juveniles for non-criminal behavior and the harm that resulted from widespread use of this sanction. Instead of detaining or confining juveniles for non-criminal activities such as running away from home or truancy, states were encouraged to address these problem behaviors through mental health services, community-based programs, and family-focused interventions." Stephanie Bontrager Ryon et al., *Changing How the System Responds to Status Offenders: Connecticut's Families with Service Needs Initiative*, 63 JUV. & FAM. CT. J., no. 4, 2012 at 37, 37.

25. *See, e.g.*, Ryon et al., *supra* note 24, at 38 (stating that, in 2006 and 2007, one-third of the cases in Connecticut's juvenile probation unit were status offenses, "and many of these youth were formally disposed through the courts and/or placed in secure detention for non-delinquent activities"); *see also* Kandel & Griffiths, *supra* note 13, at 1040 ("As the term of an ungovernability placement is renewable and ultimately indeterminate and follows the old juvenile justice rule of 'best interests,' mere naughtiness, renamed as 'ungovernability' and/or 'psychopathology' may lead to a longer institutionalization than criminality . . . ." (footnote omitted)); Kedia, *supra* note 11, at 543, 560.

26. Juvenile Justice Amendments of 1980, Pub. L. No. 96-509, 94 Stat. 2750 (codified as amended at 42 U.S.C. § 5633(a)(11)(A)(ii) (2006)). Hence, if a minor violates a valid court order—which can happen by virtue of running away from the placement, in essence, committing another status offense—that act now qualifies as a violation of a court order and subjects the minor to secure detention. *See also* JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 8, at 161 (discussing the effects of the Juvenile Justice and Delinquency Prevention Act).

more procedural rights than they did a century ago,[27] status offenders are not generally entitled to the same procedural protections, and a substantial number of children are still detained by virtue of an underlying status offense.[28]

Petitioned status offense rates rose between 1995 and 2009.[29] As of 2009, status offenses accounted for approximately 9% of all the cases against minors in the juvenile justice system.[30] Most significantly, between 1995 and 2009, status offense cases that involved detention increased by 45%.[31] And in 2003, status offenders accounted for 20% of all youth in custody.[32] In 2010, almost 15,000 juvenile offenders were housed in residential placement for committing a status offense (approximately 20% of the total, or 3,016 juveniles) or a technical violation (approximately 80% of the total, or 11,604 juveniles), which is, generally, violation of a valid court order.[33] One study found that almost 80% of all status offenders in residential facilities were in secure, locked placements.[34]

III. AGE-DETERMINATIVE SEX OFFENSES AND THE GRAVITY OF CRIME

As the previous Part explains, substantive law sometimes treats juveniles differently than adults. In particular, the scope of justice system intervention is broader for juveniles in that there are a number of activities that can result in state-imposed sanctions, including detention, for juveniles while similar activity by adults would not. But while status offenses are one example of substantive law distinguishing between juveniles and adults, age-determinative sex offenses

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27. *See, e.g.*, *In re* Winship, 397 U.S. 358, 367 (1970) (requiring proof beyond a reasonable doubt in delinquency proceedings); *In re* Gault, 387 U.S. 1, 41 (1967) (requiring some procedural protections for delinquent minors within the juvenile court system); Kent v. United States, 383 U.S. 541, 552–53 (1966) (requiring procedural protections when the State seeks to transfer a minor to adult criminal court).

28. Kedia, *supra* note 11, at 559; Kim, *supra* note 8, at 860 (noting that although the Valid Court Order exception to the JJDPA "punishes status offenders in basically the same way as juvenile delinquents, status offenders continue to be denied the due process rights provided to those facing delinquency charges").

29. PUZZANCHERA ET AL., *supra* note 12, at 73.

30. *Id.* at 72 (stating that in 2009, there were 142,300 petitioned status offenses and 1,504,100 delinquency cases). Between 1995 and 2005, there was a 29% increase in the number of status offenses that were processed by juvenile courts. Ryon et al., *supra* note 24, at 43.

31. PUZZANCHERA ET AL., *supra* note 12, at 83 (demonstrating that as a percent of the total number of petitioned status offense cases, the detention rate in 1995 was 7% and in 2009 was 8%).

32. Am. Bar Ass'n, Ctr. for Children & the Law, *JJDPA Fact Book: Juvenile Status Offenses Fact Sheet*, ACT 4 JUV. JUST. 1, http://act4jj.org/sites/default/files/ckfinder/files/factsheet_17.pdf.

33. U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK—JUVENILE JUSTICE SYSTEM STRUCTURE & PROCESS: CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT (2011), *available at* http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/selection.asp.

34. Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. SOC. JUST. 555, 561–63 tbl.1 (2009) (noting that on a given day in 2006, of the 5,025 juvenile status offenders in residential placement nationally, 3,972 of them were in locked facilities). "Secure" facilities, as used in the Juvenile Justice Act, "includes residential facilities which include construction features designed to physically restrict the movements and activities of persons in custody such as locked rooms and buildings, fences, or other physical structures. It does not include facilities where physical restriction of movement or activity is provided solely through facility staff." 28 C.F.R. § 31.304(b) (2012).

are an example of substantive law unthinkingly treating juveniles the same as adult offenders.

This Part defines the term "age-determinative sex offenses." It then explains why such offenses are less serious when committed by juveniles, rather than adults. The difference in offense seriousness is of particular importance to juvenile offenders because the seriousness of the offense with which they are charged is one of the most important factors in determining whether a juvenile will be tried in juvenile court or will be transferred and tried as an adult.[35]

A. Age-Determinative Sex Offenses

Sex offenses are generally defined as crimes involving unlawful sexual conduct.[36] Sex offenses include rape and other sexual assaults, prostitution, and incest.[37] What we term "age-determinative sex offenses" are those sex offenses that are defined in terms of the age of the victim. In particular, an age-determinative sex offense is an activity that either is classified as more serious because of the age of a participant, or is illegal only because of a participant's age. The two major categories of age-determinative sex offenses are (1) child pornography offenses and (2) various forms of unlawful sexual conduct with a minor, which we refer to as statutory rape offenses.[38]

Some child pornography offenses are age-determinative sex offenses because similar activity involving adults is classified as a less grave offense. For example, if an individual is convicted of producing obscene materials involving adults, then he or she may be subject to criminal penalties. A conviction for producing obscene materials involving children—that is, producing child pornography—triggers much more severe penalties.[39]

Other child pornography offenses are age-determinative because similar activity involving adults is not illegal. For example, the private possession of

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35. *See supra* notes 1–3 and accompanying text.

36. *See* BLACK'S LAW DICTIONARY 1188 (9th ed. 2009) (defining "sexual offense" as "[a]n offense involving unlawful sexual conduct, such as prostitution, indecent exposure, incest, pederasty, and bestiality").

37. *See id*.

38. The term "statutory rape" is ordinarily used to refer to "sexual intercourse with a person under the age of consent," BLACK'S LAW DICTIONARY 1374 (9th ed. 2009) (appearing in the entry for "rape"), while the term "unlawful sexual conduct with a minor" encompasses both intercourse and non-intercourse sexual activity, *id.* We use the term "statutory rape" to refer to all forms of unlawful sexual conduct with a minor. Although the term "statutory rape" is less precise, it is more widely recognized. *See* James, *supra* note 7, at 244 (noting that although "the terms 'age of consent' and 'statutory rape' appear in few of the state statutes criminalizing this activity, these are the common terms used when discussing this area of the law").

39. For example, while Texas punishes promotion or possession with intent to distribute obscenity as a "state jail felony," the punishment "is increased to the punishment for a felony of the third degree" if the obscene material depicts a minor. TEX. PENAL § 43.23(b), (h) (West 2011); *see also* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 857–64 (2011) (demonstrating the recent increase in sentencing severity associated with child pornography offenses).

child pornography is illegal in all fifty states,[40] while the private possession of adult pornography is protected by the First Amendment.[41] Similarly, consensual sexual activity between adults is protected by the Constitution,[42] while sexual activity with a person under the age of consent is criminalized as statutory rape "regardless of whether it is against that person's will."[43]

B. Gravity and the Age of the Offender

To understand why age-determinative sex offenses are less serious when committed by a juvenile, rather than by an adult, it is useful to analyze different offenses separately. First, consider the production of child pornography. The production of child pornography is a serious crime because it involves the sexual exploitation or abuse of the child depicted.[44] Even assuming that the

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40. ALA. CODE § 13A-12-192 (2013); ALASKA STAT. § 11.61.127 (2012); ARIZ. REV. STAT. ANN. § 13-3553(A) (2010); ARK. CODE. ANN. § 5-27-602 (2006); CAL. PENAL CODE § 311.11(a) (West 2008); COLO. REV. STAT. § 18-6-403(5) (2012); CONN. GEN. STAT. § 53a-196 (2007); DEL. CODE ANN. tit. 11, § 1111 (West 2007); FLA. STAT. ANN. § 827.071(5) (West 2006 & Supp. 2013); GA. CODE ANN. § 16-12-100 (West 2013); HAW. REV. STAT. § 707-752 (West 2013); IDAHO CODE ANN. § 18-1507A (2004 & Supp. 2013), *repealed by* 2012 Idaho Sess. Laws ch. 264, § 3; 720 ILL. COMP. STAT. ANN. 5/11-20.1(a)(6), (c) (West 2002 & Supp. 2013); IND. CODE ANN. § 35-42-4-4(c) (West 2013); IOWA CODE ANN. § 728.12 (West 2013); KAN. STAT. ANN. § 21-3516(a) (West 2013); KY. REV. STAT. ANN. § 531.335 (West 2013); LA. REV. STAT. ANN. § 14:81.1(A)(2), (E)(3) (2012 & Supp. 2013); ME. REV. STAT. ANN. tit. 17-A, § 284 (2013); MD. CODE ANN., CRIM. LAW § 11-208 (West 2013); MASS. GEN. LAWS ANN. ch. 272, § 29C (West 2013); MICH. COMP. LAWS ANN. § 750.145c(4) (West 2013); MINN. STAT. ANN. § 617.247(4) (West 2013), *amended by* 2013 Minn. Sess. Law Serv. ch. 96; MISS. CODE ANN. § 97-5-35 (2006); MO. ANN. STAT. § 573.037 (West 2013); MONT. CODE ANN. § 45-5-625 (2013); NEB. REV. STAT. ANN. § 28-1463.05 (LexisNexis 2012); NEV. REV. STAT. § 200.730 (2011); N.H. REV. STAT. ANN. § 649-A:3 (2013); N.J. STAT. ANN. § 2C:24-4(5)(b) (West 2013); N.M. STAT. ANN. § 30-6A-3(A) (West 2004 & Supp. 2013); N.Y. PENAL LAW §§ 263.11, 263.16 (McKinney 2008); N.C. GEN. STAT. ANN. § 14-190.17A (West 2013); N.D. CENT. CODE ANN. § 12.1-27.2-04.1 (West 2013); OHIO REV. CODE ANN. § 2907.323 (West 2006 & Supp. 2013); OKLA. STAT. tit. 21, § 1021.2 (2002); OR. REV. STAT. ANN. §§ 163.686–.687 (West 2013); 18 PA. CONS. STAT. § 6312(d) (2013); R.I. GEN. LAWS ANN. § 11-9-1.3 (West 2013); S.C. CODE ANN. § 16-15-410 (2012); S.D. CODIFIED LAWS § 22-24A-3 (2013); TENN. CODE ANN. § 39-17-1003(a) (West 2013); TEX. PENAL CODE ANN. § 43.26(d) (West 2010 & Supp. 2012); UTAH CODE ANN. § 76-5a-3 (West 2013); VT. STAT. ANN. tit. 13, § 2825(c) (West 2013); VA. CODE ANN. § 18.2-374.1:1 (West 2013); WASH. REV. CODE § 9.68A.070 (2010 & Supp. 2013); W. VA. CODE ANN. § 61-8C-3 (West 2013); WIS. STAT. § 948.12(3)(a) (2005 & Supp. 2012); WYO. STAT. ANN. § 6-4-303(b), (d) (West 2013).

41. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969).

42. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices . . . . The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."); *see also*, *e.g.*, William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1012 (2005) ("The Supreme Court ruled in *Lawrence v. Texas* that states could not constitutionally criminalize private oral or anal sex between consenting adults." (footnotes omitted)); Arnold H. Loewy, *Statutory Rape in a Post* Lawrence v. Texas *World*, 58 SMU L. REV. 77, 79 (2005) (identifying the State action the Court addressed, and held constitutionally prohibited, as "the right to regulate private sexual behavior between consenting adults in the privacy of one's home").

43. BLACK'S LAW DICTIONARY 1374 (9th ed. 2009).

44. *See* Osborne v. Ohio, 495 U.S. 103, 107–09 (1990); New York v. Ferber, 458 U.S. 747, 758 (1982); *see generally* Carissa Byrne Hessick, *The Limits of Child Pornography*, 98 IND. L.J. (forthcoming 2014), at 17–27, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2238125## (defining child pornography and identifying the harm associated with child pornography).

child depicted was not physically forced or threatened to appear in the pornographic work, the child's depiction is nonetheless considered exploitative because the child could not have consented to appear.[45] Because children below the age of majority cannot consent to sexual activity, child pornography is a much more serious crime than the production of obscene materials featuring adults; the adults depicted could consent to participate in the creation of the pornographic work.[46]

In contrast to the stereotypical production of child pornography by an adult offender, consider the recent cases involving arrests and prosecutions of teenagers for creating and sharing pornographic images of themselves, a practice often referred to as "sexting."[47] These cases have been the subject of much criticism, especially in situations in which government officials have either threatened or brought child pornography charges.[48]

One can easily see why teen sexting is considered to be a far less grave transgression than adult-produced child pornography. Although teen sexting images fall within most statutory definitions of child pornography,[49] teen sexting images usually are not created under circumstances that are exploitative or abusive. News accounts indicate that many teens create these images of themselves without prompting by a third party, and thus, the photographs are not the product of coercion.[50] And even if the teens creating these images of themselves are "too young to consent to sexual activity, the concept of consent

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45. *See* Hessick, *The Limits of Child Pornography*, *supra* note 44, at 22–24. Furthermore, adolescents' lack of experience in estimating the potential for negative consequences "increases their vulnerability." JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 8, at 15.

46. Of course, many have argued that the adult actors who appear in obscenity are being exploited. *See* Nadine Strossen, *A Feminist Critique of "the" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1137–40 (1993) (collecting sources). Such arguments employ the term "exploitation" in a much more expansive way—as "taking advantage of something" or "taking unjust advantage of another for one's own benefit," rather than as "the presence of an abusive condition, such as force, coercion, or lack of consent." *Compare* BLACK'S LAW DICTIONARY 660 (9th ed. 2009), *with* Hessick, *Limits of Child Pornography*, *supra* note 44, at 24.

47. *See, e.g.*, Emily Shaaya, *States Address the Disconnect: Teens in a Sext-Crazed Culture*, CRIM. JUST., Summer 2012, at 18, 20–22 (collecting cases); *'Sexting' Overreach*, CHRISTIAN SCI. MONITOR (Apr. 28, 2009), http://www.csmonitor.com/Commentary/the-monitors-view/2009/0428/p08s03-comv.html ("At least 20 prosecutions have been undertaken or threatened in recent months—some involving criminal child-pornography laws that could list convicted teens as sex offenders.").

48. *See, e.g.*, Jennifer D. Hill, *The Teen Sexting Dilemma: A Look at How Teen Sexting Has Been Treated in the Criminal Justice System and Suggested Responses for Arizona*, 4 PHOENIX L. REV. 561, 581–84 (2010); Julia Halloran McLaughlin, *Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship*, 45 U. MICH. J.L. REFORM 315, 321–23 (2012); Julia Saladino, *Hold the Phone: The Incongruity of Prosecuting Sexting Teenagers Under the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003*, 10 WHITTIER J. OF CHILD AND FAM. ADVOC. 317, 317–19 (2011); Antonio M. Haynes, Note, *The Age of Consent: When is Sexting No Longer "Speech Integral to Criminal Conduct"?*, 97 CORNELL L. REV. 369, 370–71, 376 (2012); *'Sexting' Overreach*, *supra* note 47, at 8.

49. *See* Hill, *supra* note 48, at 581–84.

50. *See, e.g.*, Associated Press, *Girl Posts Nude Pics, Is Charged with Kid Porn*, NBC NEWS (Mar. 27, 2009), http://www.nbcnews.com/id/29912729#.U1nc1B2emHY.

(like any agreement) assumes two actors—the person seeking consent and the person giving consent."[51]

Another child pornography offense—the possession of child pornography—also appears far less grave when committed by a juvenile than by an adult. Historically, the primary justification for prohibiting possession of child pornography was that prohibiting possession would dry up the market for producing child pornography.[52] Despite this longstanding rationale, more recent efforts to increase the penalties associated with possessing child pornography rely on arguments about the threat that possessors pose to children. In particular, those who advocate increasing sentences for possession of child pornography argue that those who possess child pornography have also sexually abused children, or that they pose a greater risk of doing so in the future.[53] Simply put, the argument is that possessors of child pornography would not be interested in viewing such images unless they were also interested in engaging in sexual activity with minors.[54]

In contrast with adult possessors of child pornography, juvenile possessors of such images more closely resemble adult possessors of adult pornography. Both are viewing images as a means of personal arousal, and both are viewing images that depict individuals who could be considered members of their sexual peer group—individuals who are of an age that is considered compatible for a romantic or sexual relationship.[55]

Of course, some juvenile possessors of child pornography may not be viewing images that depict minors in their age group. If, for example, a fifteen-year-old possessed pornographic images that depicted a five-year-old, one could argue that his interest in such images demonstrated sexual attraction to inappropriately young individuals.[56] But if that same fifteen-year-old were viewing pornographic images of other fifteen-year-olds, then no such concern should arise.

There are, of course, other reasons to prohibit fifteen-year-olds from possessing child pornography. For one thing, possession arguably fuels the

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51. Hessick, *The Limits of Child Pornography*, *supra* note 44, at 39–40.

52. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 109–10 (1990). Eliminating production is desirable because, as noted above, production ordinarily depends on the exploitation and abuse of children. *See supra* note 44 and accompanying text.

53. *See* Hessick, *Disentangling Child Pornography from Child Sex Abuse*, *supra* note 39, at 870–83.

54. *See, e.g.*, TIM TATE, CHILD PORNOGRAPHY: AN INVESTIGATION 102 (1990) (recounting the views of an FBI agent and an Assistant U.S. Attorney that possessors of child pornography are men interested in having sex with children—men who are willing, if given the right opportunity, to have sex with children).

55. The juvenile possessors may also view the images as a source of information. *See* Strossen, *supra* note 46, at 1132 (citing Ann Snitow, *Retrenchment Versus Transformation: The Politics of the Antipornography Movement*, *in* WOMEN AGAINST CENSORSHIP 4, 107 (Varda Burstyn ed., 1985)).

56. As with the argument about adults who view child pornography, such an argument would assume that possessors of child pornography are interested in viewing such images because they are interested in engaging in sexual activity with individuals of an age similar to the age of the child depicted. There is reason to doubt the validity of that assumption. *See* Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1694–1716 (2012); Hessick, *Disentangling Child Pornography from Child Sex Abuse*, *supra* note 39, at 871–86.

production of such images.[57] For another, there is a state interest in shielding juveniles from even non-child pornography obscenity.[58] But the transgression of the juvenile offender viewing child pornography is not as serious as the adult viewing similar images.

For similar reasons, adults who engage in sexual activity with minors are engaging in more serious wrongdoing than juveniles who engage in the same activity.[59] The age of consent sets a limit on the ability to engage in sexual activity—a limit that is predicated on the theory that those below the relevant age are not capable of giving meaningful consent.[60] Age of consent laws and —by extension—statutory rape laws protect minors against the negative consequences of engaging in sexual activity, such as the possibility of disease or pregnancy.[61]

In addition to protection from those consequences, statutory rape laws protect minors from exploitation and coercion.[62] While adults may also decide to engage in sexual activity for less than positive reasons,[63] the decision appears to be even more fraught for minors.[64] As Michelle Oberman has explained:

> The vulnerability inherent in adolescence, including severely diminished self-esteem, ambivalence about one's changing body, and a marked reluctance to assert one's self, leads teenagers to consent to sexual contact that may not be fully, or even partially, desired. Investigators studying adolescent sexuality have identified a multiplicity of factors beyond sexual desire and love that

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57. *See supra* note 52 and accompanying text.

58. *See* Ginsberg v. New York, 390 U.S. 629, 634–36 (1968).

59. This distinction was recognized by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.").

60. *See* Phipps, *supra* note 7, at 33–34, 119–20.

61. *See* Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 470 (1981); State v. Jason B., 702 A.2d 895, 901 (Conn. App. Ct. 1997); Phipps, *supra* note 7, at 37–39; Olszewski, *supra* note 4, at 699–700. Congress specifically called on states to strengthen their statutory rape laws in order to prevent teenage pregnancy as part of the Welfare Reform Act of 1996, which states that "[i]t is the sense of the Senate that States and local jurisdictions should aggressively enforce statutory rape laws." *See* 42 U.S.C. § 14016(a) (2006). Furthermore, the Act directs the Attorney General to "establish and implement a program that . . . educates State and local criminal law enforcement officials on the prevention and prosecution of statutory rape, *focusing in particular on the commission of statutory rape by predatory older men committing repeat offenses, and any links to teenage pregnancy*." *Id.* § 14016(b)(2) (emphasis added).

62. *See* Oberman, *supra* note 7, at 704 ("[T]here are considerable risks inherent in adolescent sexual conduct, and a myriad of ways in which minors, because of their inexperience, are vulnerable to exploitation and coercion in their sexual interactions."); James, *supra* note 7, at 245 (noting that statutory rape laws are intended, *inter alia*, "to protect minors below a certain age from predatory[,] exploitative sexual relationships—for example, with much older partners" (quoting NOY S. DAVIS & JENNIFER TWOMBLY, AM. BAR ASS'N CTR. ON CHILDREN & THE LAW, STATE LEGISLATORS' HANDBOOK FOR STATUTORY RAPE ISSUES, CONTEXT AND QUESTIONS (2000), *available at* http://www.ojp.usdoj.gov/ovc/publications/infores/statutoryrape/handbook/cont.html) (internal quotation marks omitted)); Olszewski, *supra* note 4, at 699 ("Prevention of coerced sexual activity is perhaps the most often cited rationale for statutory rape laws.").

63. *See* Oberman, *supra* note 7, at 713–14.

64. Curtis & Gilreath, *supra* note 6, at 168 ("Persistently, but often very unwisely, minors have sex with other minors.").

> lead teenagers to consent to sex. Among these are fear, confusion, coercion, peer pressure, and a desire for male attention.[65]

Although exploitation and coercion can occur in any sexual encounter involving a minor, the most obviously exploitative situations involve a large age difference or a position of trust between the minor and the other participant. In those situations, the other participant is often viewed as a predator who specifically sought out an underage partner because of the power disparity.[66] Put differently, when an adult engages in sexual activity with a minor, we assume that the minor's decision to engage in that activity was the result of pressure, if not coercion, by the adult.[67]

That is not to say that coercion and pressure are never present when both participants are under the age of consent.[68] Indeed, the seminal modern Supreme Court case on statutory rape involved sexual intercourse that occurred only after (and presumably, only because) the juvenile defendant punched the victim in the mouth several times.[69] When sexual activity occurs only because of coercion or pressure applied by another, criminal justice intervention is appropriate, even if the two participants were members of the same age group. And it may be appropriate to presume such pressure or coercion—just as it is presumed for adults—when there is a significant age difference between juvenile participants.[70] But in the absence of such an age difference, or of evidence of coercion or pressure, there is no reason to classify sexual activity between juveniles as the same level of transgression as sexual activity between a minor and a much older individual.[71] That is because, "[a]ll else being equal,

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65. Oberman, *supra* note 7, at 709 (footnotes omitted).

66. *See* Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 716 (2006) ("'Predator' is the catch-all term for any type of lecherous adult who exploits adolescents to have sex."); Phipps, *supra* note 7, at 133 (characterizing "sexual activity between an adult and a child" as "the harmful conduct at issue" for statutory rape laws); *see generally* Oberman, *supra* note 7, at 744–51 (discussing the "that's sick" test in relation to significant age disparity and exploitation).

67. In these circumstances, severe penalties are appropriate. For example, in *United States v. Hammond*, 698 F.3d 679 (8th Cir. 2012), the Eighth Circuit upheld a 240-month sentence for a twenty-one-year-old who solicited an eleven-year-old girl to have sex, despite the defendant's belief that the victim was thirteen and that he, therefore, did not intend to solicit sexual conduct with a person under twelve. The court held that the defendant was not entitled to a downward variance; as the district court noted, at the defendant's age, the difference between an eleven-year-old and a twelve-year-old was "small" and the sentence appropriate considering the "seriousness of Hammond's offense, the need to protect the public, and the need to deter future crimes." *Id.* at 681.

68. *See* Oberman, *supra* note 7, at 717–33 (collecting case studies).

69. Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 483 n.* (1981) (Blackmun, J., concurring).

70. *See* Olszewski, *supra* note 4, at 706 ("It is intuitive that the risk of coercion is substantially decreased when partners are close in age . . . ."); *see also infra* text accompanying note 88.

71. *See* James, *supra* note 7, at 256 ("[T]he risk of coercion and exploitation is not as great between people close in age."); Olszewski, *supra* note 4, at 694 (noting "the vast difference between a stereotypical case of child molestation and a consensual peer relationship").

the greater the age gap between the parties to a sexual encounter, the greater the risk of a significant power disparity between the parties."[72]

IV. PROPOSED LEGISLATIVE CHANGES TO AGE-DETERMINATIVE SEX OFFENSES

As currently formulated, substantive American law has adopted a double standard with respect to juveniles. It is widely accepted that, in some respects, the scope of justice system intervention ought to be broader for juveniles than for adults, leading every state to retain some control over status offenders. But many states fail to appropriately narrow the scope of their substantive criminal law when the gravity of a crime is lessened because it is committed by a juvenile. To borrow an expression, we do not think that the American justice system should be permitted to have its cake and eat it too. If juveniles can be held responsible for status offenses that would not constitute a crime if they were adults, then criminal codes ought to be closely examined to determine whether juveniles ought to be adjudged delinquent or transferred to adult court simply because they have engaged in activity that would be criminal if committed by an adult. Put simply, because our justice system already adjusts the scope of substantive law for juveniles, then it ought to be not only broader, but also narrower, when appropriate. And, as the previous Part demonstrates, we argue that this narrowing is appropriate for age-determinative sex offenses.

Law review articles often propose judicial solutions to legal problems. The thesis of this Article—namely, that juveniles ought not be treated the same as adults with respect to certain sex offenses—has found some success in the courts. The Ohio Supreme Court, for example, upheld an as-applied challenge to its state statutory rape statute.[73] The statute classified sexual conduct with an individual under thirteen years old as a first-degree felony.[74] The state supreme court held the statute unconstitutional when applied to another individual under the age of thirteen.[75] Noting that the statute did not indicate which participant ought to be treated as the offender, or which as the victim, when both participants were under the age of thirteen, the court reasoned that the statute failed to provide sufficient guidance to law enforcement to avoid arbitrary and discriminatory enforcement.[76] Thus, it concluded that the State's decision to charge a twelve-year-old with statutory rape for engaging in sexual conduct with an eleven-year-old violated the Equal Protection Clause, and that the

72. Oberman, *supra* note 7, at 751.

73. *In re* D.B., 129 Ohio St. 3d 104, 2011-Ohio-2671, 950 N.E.2d 528, 534.

74. OHIO REV. CODE ANN. § 2907.02(A)(1)(b) (West 2006), *validity called into doubt by* Graham v. Florida, 130 S. Ct. 2011 (2010), *and held unconstitutional as applied in D.B.*, 950 N.E.2d at 528.

75. *D.B.*, 950 N.E.2d at 534.

76. *Id.* at 533.

vagueness in the statute that permitted such arbitrary enforcement violated Due Process.[77]

But challenges by juveniles to prosecutions for age-determinative sex offenses have been far from universally successful. A Florida court, for example, rejected a juvenile's challenge to her adjudication of delinquency for producing child pornography, even though the images were quite similar to the teen sexting images discussed above.[78] The delinquency adjudication in that case stemmed from an incident in which two minors took nude pictures of themselves engaged in sexual behavior.[79] Both of the minors were charged with "producing, directing or promoting a photograph or representation that they knew to include the sexual conduct of a child."[80] The juvenile argued that because of the "lack of a significant age difference or of any allegation that the pictures were shown to a third party," the statute was unconstitutional as applied to her because it infringed on her state constitutional right to privacy.[81] The privacy argument was based on a previous decision, *B.B. v. State*, which held that a prosecution of a juvenile for statutory rape violated the state constitutional guarantee of privacy.[82] After noting that "the law relating to a minor's right of privacy to have sex with another minor is anything but clear,"[83] the court expressed doubt that the images would necessarily remain private, given the volatile nature of adolescent relationships.[84] The court went on to note that, even assuming the juvenile had a privacy interest in filming her sexual activity, the State had a compelling interest not only in protecting children from sexual exploitation by adults, but from "anyone who induces them to appear in a sexual performance . . . . The State's interest in protecting children from exploitation in this statute is the same regardless of whether the person inducing the child to appear in a sexual performance and then promoting that performance is an adult or a minor."[85]

As a general matter, courts will allow a government wide latitude "to protect the physical, mental, and moral well-being of its youth."[86] Thus, relying on judges to narrow the scope of criminal law for juveniles is likely to be met with, at most, limited success. Rather than proposing a judicial solution to the problem, we propose a legislative solution. In particular, we propose that states

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77. *Id.* at 532–34.

78. A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007); *see supra* notes 47–48 and accompanying text.

79. *A.H.*, 949 So. 2d at 235.

80. FLA. STAT. ANN. § 827.071(3) (West 2006 & Supp. 2013); *A.H.*, 949 So. 2d at 235.

81. *A.H.*, 949 So. 2d at 236.

82. B.B. v. State, 659 So. 2d 256, 260 (Fla. 1995).

83. *A.H.*, 949 So. 2d at 237.

84. *Id.* at 237–38.

85. *Id.* at 238 (quoting State v. A.R.S., 684 So. 2d 1383, 1387 (Fla. Dist. Ct. App. 1996)).

86. Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 472 n.8 (1981) (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 72–74 (1976)); Ginsberg v. New York, 390 U.S. 629, 639–40 (1968); Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

revise their criminal codes to ensure that juveniles are not automatically charged the same as adults under age-determinative sex offender statutes.

Our legislative solution comes with two caveats. First, we recognize that jurisdictions may wish to maintain the ability to charge juveniles with age-determinative sex offenses when their behavior targets other minors who are significantly younger than their peer group. As the analysis in Part III noted, the difference in gravity between adult offenders and juvenile offenders of age-determinative sex offenses depends upon the similarity in ages between juvenile participants.[87] If a fifteen-year-old possessed pornographic images that depicted a five-year-old, then the same concerns about sexual attraction to inappropriately young individuals that exist for adult possessors may also be present. And in the context of statutory rape, it may be appropriate to presume pressure or coercion, just as it is presumed for adults, when a fourteen-year-old engages in sexual activity with a ten-year-old.[88] In these two examples, the seriousness of the juveniles' behavior may be more similar to that of adult offenders than juvenile offenders whose behavior targets individuals within their peer groups.

While we think it would be appropriate for the State to reserve the ability to charge juveniles who target minors who are significantly younger, the relevant age differences should be specified beforehand, and no charges should be made against juveniles whose behavior does not meet that age difference. Currently, some jurisdictions have a de facto system of charging age-determinative sex offenses only when a significant age difference exists.[89] Rather than rely on prosecutorial discretion in such situations, we argue that it is more appropriate for the legislation itself to set these parameters of age difference. Such legislative clarity would help avoid arbitrary enforcement,[90] and it would avoid giving prosecutors unwarranted leverage to obtain plea agreements.[91]

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87. *See supra* text accompanying notes 52–56.

88. *See* Olszewski, *supra* note 4, at 711.

89. "[T]here is an apparent consensus among prosecutors against enforcement of statutory rape laws in cases of 'consensual sexual relationships' among peers. This is explicitly acknowledged by some state criminal justice officials, and it is plainly evidenced by the numerous enforcement strategies that focus exclusively on older perpetrators." Oberman, *supra* note 7, at 750; *see also* Levine, *supra* note 66, at 716 (documenting a "predator-peer distinction" in the handling of statutory rape cases by prosecutors; classification of offender as a peer turns not simply on age, but also on the existing relationship between victim and offender).

90. *See In re* D.B., 129 Ohio St. 3d 104, 2011-Ohio-2671, 950 N.E.2d 528, 534 (raising this concern).

91. A widely publicized example of such unwarranted leverage comes from *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009), a threatened sexting prosecution that was the subject of a federal lawsuit. The case arose when school district officials in Pennsylvania discovered photographs of "scantily clad, semi-nude and nude teenage girls" on several students' cell phones and the officials turned the photographs over to the local district attorney. *Id*. at 637. The district attorney threatened to prosecute the minors depicted in the photographs and the minors who possessed the cell phones on which the images were stored with possession, dissemination, or both, of child pornography. *Id.* at 637–38. When a parent questioned "why his daughter—who had been depicted in a photograph wearing a bathing suit—could be charged with child pornography," the district attorney "replied that the girl was posed 'provocatively,' which made her subject to the child

Second, our analysis explains why age-determinative sex offenses are not as serious when committed by juveniles, rather than adults, but it does not necessarily suggest that juvenile justice intervention is entirely inappropriate when juveniles engage in such behavior. Limiting teenage pregnancy and the transmission of sexually transmitted diseases, for example, are legitimate governmental interests that may justify a state attempting to deter sexual activity by minors.[92] And while teen sexting, unlike traditional child pornography, is not the product of sexual exploitation or abuse,[93] states may nonetheless wish to prohibit such activities given the reputational and emotional consequences that may occur if the images are more widely distributed.[94]

Even if criminal justice intervention is warranted in such situations, we believe it is more appropriate for the states to enact legislation separate from their generally-applicable criminal statutes.[95] As others have observed, the "criminal justice system is not the appropriate venue for confronting the problem of teenagers sexting each other."[96]

Among the number of possible solutions, two emerge as most likely to be successful. First, the legislature could grant the juvenile court exclusive jurisdiction over specified, consensual age-determinative sex offenses and

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pornography charge." *Id*. at 638. The district attorney also claimed authority to prosecute as child pornography a photo of two minor girls "from the waist up, each wearing a white, opaque bra," in which one girl was talking on the telephone and the other was "using her hand to make the peace sign." *Id.* at 639. While some might dispute whether a provocatively posed girl wearing a bathing suit may be characterized as a "lewd exhibition of the genitals," which was prohibited by the relevant state statute, the photograph of the two girls wearing opaque bras certainly falls outside the statutory definition: The photograph only showed the girls from the waist up, and thus their genitals were outside the frame of the picture. 18 PA. CONS. STAT. § 6312(g) (2013); *Miller*, 605 F. Supp. 2d at 645–46 (noting the argument by plaintiffs that photographs "do not even remotely meet" the statutory definition and declining to decide that claim, but noting that "plaintiffs make a reasonable argument that the images presented to the court do not appear to qualify in any way as depictions of prohibited sexual acts").

92. *See* Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 472 n.8 (1981); Carey v. Population Servs., Int'l, 431 U.S. 678, 691–97 (1977); Curtis & Gilreath, *supra* note 6, at 190; Olszewski, *supra* note 4, at 711.

93. *See* Hessick, *The Limits of Child Pornography*, *supra* note 44, at 39–40; *supra* notes 49–51 and accompanying text.

94. *See, e.g.*, A.H. v. State, 949 So. 2d 234, 237–38 (Fla. Dist. Ct. App. 2007); Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues – Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486, 539–42 (2010); Mike Celizic, *Her Teen Committed Suicide Over 'Sexting'*, TODAY (Mar. 6, 2009, 9:26 AM), http://today.msnbc.msn.com/id/29546030/ns/today-parenting _and_family/t/her-teen-committed-suicide-over-sexting/#.ULJhCuQ0WSo.

95. The National Juvenile Justice Network also recommends that states "reexamine their sexual offense laws with regard to youth in order to ensure that only truly harmful behaviors are classified as sex offenses. Normative adolescent behavior and sexual exploration should not be pathologized and inappropriately punished." *Policy Platform: Sex Offender Registration and Notification Laws*, NAT'L JUV. JUST. NETWORK 1 (July 2012), http://www.njjn.org/uploads/digital-library/Sex-Offender-Registries-policy-platform_FINAL_07-31-12.pdf.

96. Henry F. Fradella & Marcus A. Galeste, *Sexting: The Misguided Penal Social Control of Teenage Sexual Behavior in the Digital Age*, 47 CRIM. L. BULL. 438, 440 (2011).

preclude waiver to adult criminal court.[97] States already have statutes granting jurisdiction to specific courts for various offenses, and the existing statutory exclusion statutes in the majority of states provide a helpful scheme: rather than specifying that only adult criminal court has jurisdiction over offenders of a certain age who have been charged with a certain crime, these statutes would specify that the juvenile court would be the only court with jurisdiction over certain age-determinative sex offenses when the person charged is less than four years younger or older than the other participant(s) and the conduct is consensual.[98] The statute could have an "opt-out" provision allowing the accused to reject juvenile court jurisdiction and have the case transferred instead to the adult criminal court.

Under this model, the offense could be classified either as a status offense or a delinquent offense, and that classification could depend on the relative ages of the accused and the other participants, among other factors. For example, if the participants were less than two years apart, the offense could be categorically classified as a status offense. If the participants were between two and four years apart, the state could classify the age-determinative sex offense as a delinquent offense. Under either scenario, the statute could expressly preclude sex offender registration requirements, and any necessary amendments to the registration statutes should also be made.

Alternatively, within the criminal law statutes that create and define crimes, states could expressly designate age-determinative sex offenses—when committed by a person in the same peer group as the victim—as status offenses and preclude criminal jurisdiction in any court. Illinois, for example, attempted to meet this objective by declaring sexting as a status offense.[99] An offender becomes a "minor in need of supervision."[100] The Illinois statute states: "A minor shall not distribute or disseminate an indecent visual depiction of another minor through the use of a computer or electronic communication device."[101] A minor who violates this prohibition may be "adjudged a minor in need of

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97. *See supra* note 9 and accompanying text. Although the age of original juvenile court jurisdiction is below eighteen, the legislature could increase the age for original jurisdiction in these cases. *See supra* note 9. The vast majority of states have already extended the age of juvenile court jurisdiction beyond the age specified for original jurisdiction. U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK—JUVENILE JUSTICE SYSTEM STRUCTURE & PROCESS: EXTENDED AGE OF JUVENILE COURT JURISDICTION, 2011 (2012), *available at* http://www.ojjdp.gov/ojstatbb/structure_process/qa04106.asp?qaDate=2011. Extending original jurisdiction would allow the juvenile court to monitor both parties, including, for example, a twenty-year-old who is involved with a seventeen-year-old, presuming sexual conduct with a seventeen-year-old is generally prohibited in that jurisdiction. *See id.*

98. U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK—JUVENILE JUSTICE SYSTEM STRUCTURE & PROCESS: STATUTORY EXCLUSION OFFENSE AND MINIMUM AGE CRITERIA, 2011 (2012), *available at* http://www.ojjdp.gov/ojstatbb/structure_process/qa04112.asp?qaDate=2011.

99. *See* 705 ILL. COMP. STAT. 405/3-40 (2007 & Supp. 2013).

100. *Id.*

101. *Id.* at 405/3-40(b).

supervision."[102] The statute, however, falls short of solving the problems of uncertainty and excessive prosecutorial leverage: by its terms, the statute expressly does not "prohibit a prosecution for disorderly conduct, public indecency, child pornography, . . . or any other applicable provision of law."[103] By not amending the underlying substantive criminal law that makes the production and distribution of child pornography a crime for juveniles, dual jurisdiction exists, and juveniles in Illinois remain subject to the full reach of the punitive criminal law.

Under the first approach, state statutes might resemble Alaska's statutory exclusion provision, although they are within the criminal code. Rather than requiring that certain offenses be categorically handled by the adult criminal court, under our model statute, they would be categorically handled by the juvenile court:

> Exclusive Jurisdiction[104]
> (a) When a person is charged with an age-determinative sex offense, specifically with child pornography in violation of § abc or sexual conduct with a minor in violation of § xyz, this chapter does not apply and the person shall be referred to the exclusive jurisdiction of the Juvenile Court if both of the following criteria are met:
> (1) the age difference between the person and the victim is not more than four years; and
> (2) the charged offense does not require proof of coercion or abuse of a trust relationship.
> (b) The Juvenile Court's jurisdiction extends beyond age 18 for purposes of resolving cases referred under this section.
> (c) The person charged shall have the right to decline referral to the Juvenile Court, at which point a prosecution for violation of the Criminal Code may proceed in Criminal Court.

Under the second approach, state statutes might be amended based upon the following model:

> Sexual battery[105]
> (1) As used in this chapter:
> (a) "Sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide

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102. *Id.* at 405/3-40(c). Potential penalties include being "ordered to obtain counseling or other supportive services to address the acts that led to the need for supervision" or being "ordered to perform community service." *Id.* at 405/3-40(d).

103. *Id.* at 405/3-40(e).

104. This section is based on ALASKA STAT. § 47.12.030 (2012), "Provisions inapplicable," under the article "Juvenile Delinquency."

105. This statute is based on Florida's sexual battery statute, FLA. STAT. § 794.011 (West 2007 & Supp. 2014), with modifications.

> medical purpose. Willingness or consent of the victim is not a defense to prosecution under this subsection.
> (b) "Victim" means a person who has been the object of a sexual offense.
> (2) (a) Except as provided in this sub-section, sexual battery upon a victim less than 16 years of age is a Class C Felony, and sexual battery upon a victim less than 13 years of age is a Class B Felony.
> (b) A person who commits sexual battery upon a victim less than 16 years of age but more than 13 years of age does not violate this statute but instead commits a status offense subject exclusively to the jurisdiction of the juvenile court, provided the conduct was not induced by threat or force and the difference in age between the person and the victim is less than three years.
> (c) A person who commits sexual battery upon a victim less than 13 years of age does not violate this statute but instead commits a status offense subject exclusively to the jurisdiction of the juvenile court, provided the conduct was not induced by an express threat or force and the difference in age between the person and the victim is less than two years.
> (d) Juvenile Court jurisdiction extends beyond age 18 for purposes of resolving cases referred under this section.

Of course, we would be remiss if we did not acknowledge that a number of jurisdictions have adopted legislation aimed at the problem of treating juveniles the same as adults with respect to age-determinative sex offenses. Some states have reduced the negative consequences of age-determinative sex offenses by eliminating mandatory reporting of certain sex offenses when the perpetrator is under a certain age. For example, Delaware generally requires school officials to report "unlawful sexual contact in the third degree" when it occurs on school grounds, even though it is a misdemeanor offense and can be violated by merely touching the buttocks of another person.[106] However, no reporting is required when the misdemeanor offense is committed by a minor under the age of twelve, as long as it is not a violent felony.[107] Similarly, Michigan crafted an exception to its sex offender registration statutes for committing either sodomy or gross indecency with a minor if the conduct was consensual, and either (1) the victim is older than thirteen but younger than sixteen, and the accused and the victim are no more than four years apart; or (2) the victim is sixteen or seventeen, and the victim is not under the accused's custodial authority.[108]

106. DEL. CODE ANN. tit. 11, § 767 (2007); DEL. CODE ANN. tit. 14, § 4112 (2007 & Supp. 2012).
107. DEL. CODE ANN. tit. 14, § 4112(6).
108. MICH. COMP. LAWS ANN. § 28.722(b)(v), (vi) (West 2013).

More significantly, a number of jurisdictions have adopted so-called "Romeo and Juliet" provisions—sometimes also referred to as "age gap considerations"—which are statutory modifications to age of consent laws "that either make sexual conduct between persons close in age non-criminal or punish it at a substantially reduced level."[109] While Romeo and Juliet provisions are common,[110] different jurisdictions have taken different approaches to drafting such provisions.[111] Some states require a specific age difference in order for criminal liability to attach. For example, in Texas, it is an affirmative defense to criminal liability for statutory rape if the defendant was not more than three years older than the victim.[112] Other states combine an age difference requirement with a requirement that the offender must have reached a certain age for criminal liability to attach. For example, in New Mexico, liability for "[c]riminal sexual penetration in the fourth degree" does not attach unless the defendant was at least four years older than the victim and was at least eighteen years old at the time of the offense.[113] And in Florida, the crime of sexual battery upon a person less than twelve years of age is reduced if the offender is less than eighteen years old.[114]

A number of states have also recently enacted legislation aimed at teen sexting that provide alternative, lesser charges than child pornography laws.[115] For example, Nevada enacted a statute specifically aimed at sexting, which provides that a juvenile who "knowingly and willfully use[s] an electronic communication device to transmit or distribute a sexual image of himself or herself to another person" shall be classified as "a child in need of supervision" for the first offense and shall be adjudicated delinquent for a "second or subsequent violation."[116] The statute has similar provisions aimed at distribution and possession of sexting images.[117] The Nevada statute has a number of positive features. For one thing, the statute makes clear that sexting is a far less serious offense than the production of child pornography: a violation of the sexting statute results only in a finding that the child is in need of supervision,[118] but a violation of the state statute criminalizing the production of child pornography is a category A felony, punishable by up to life in

109. James, *supra* note 7, at 256.

110. *See* Phipps, *supra* note 7, at 62 (noting that Romeo and Juliet provisions are "present in most states"); James, *supra* note 7, at 256 (noting that only five states do not have age-gap provisions); Olszewski, *supra* note 4, at 706–07 (same).

111. *See* Phipps, *supra* note 7, at 62–66 (providing a helpful overview of Romeo and Juliet provisions).

112. TEX. PENAL CODE ANN. § 21.11(b)(1) (West 2011).

113. N.M. STAT. ANN. § 30-9-11(G)(1) (West 2004 & Supp. 2013).

114. *Compare* FLA. STAT. ANN. § 794.011(2)(a) (West 2007) (making a crime by a perpetrator older than eighteen years of age a capital felony), *with id.* § 794.011(2)(b) (making a crime by a perpetrator younger than eighteen years of age a life felony).

115. *See* Shaaya, *supra* note 47, at 18.

116. NEV. REV. STAT. § 200.737(1), (4) (2011).

117. *Id.* § 200.737(2)–(3).

118. *Id.* § 200.737(4).

prison.[119] For another, the statute specifically exempts juveniles from registration and community notification requirements that otherwise apply to sex offenders and those convicted of child pornography offenses.[120]

In short, the prevalence of Romeo and Juliet provisions, as well as the recent spate of sexting legislation, suggest a public willingness—or at least not complete unwillingness—to treat juvenile offenders differently than adults who commit age-determinative sex offenses. But the existing legislation does not go far enough.

Romeo and Juliet provisions, for example, have several shortcomings. Perhaps the most obvious is that not all jurisdictions have adopted such provisions.[121] Even among those jurisdictions that have adopted them, some are far too narrow. For example, Arizona's provision allows no more than a two-year age difference between the victim and offender and requires that the defendant be under the age of nineteen or attending high school.[122] Under this provision, a high school senior who has been engaged in a sexual relationship with a high school junior could see that relationship become criminal when she graduates and turns nineteen, even though the relationship would have been permitted up until that time. That the relationship would have been permissible at one time and then becomes impermissible as both parties get older suggests that the legislature may not have been careful enough when drafting the statute.

Despite the recent passage of teen sexting legislation, the laws governing child pornography prosecutions and juvenile offenders are in need of further reform. First, only a minority of jurisdictions have adopted such legislation.[123] And even among those that have adopted new laws, not all jurisdictions have ensured that child pornography charges are not legally viable in cases of sexting. For example, much like Illinois, Nevada took the affirmative step of creating a new crime with lower penalties aimed at teen sexting;[124] however, the state did not amend its general child pornography production laws to exempt juveniles from prosecution under the general—and more serious—child pornography statute.[125] Such a statutory scheme permits prosecutors to choose whether to charge teens under the new sexting statute or under the broader child pornography statute.[126] In contrast, Utah amended its general law on the

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119. NEV. REV. STAT. §§ 200.710, 200.750

120. NEV. REV. STAT. § 200.737(4)(a)(2).

121. *See supra* note 110.

122. ARIZ. REV. STAT. ANN. § 13-1407(F) (2010).

123. *See* Shaaya, *supra* note 47.

124. *See infra* notes 125–29 and accompanying text.

125. NEV. REV. STAT. § 200.710 (2011) (defining the offense in terms of whether it has been committed by "a person," and making no mention of age).

126. *See, e.g.*, Nelson v. State, 612 S.W.2d 605, 607 (Tex. Crim. App. 1981) (rejecting the argument of the defendant, who was convicted of raping his daughter, that he should have been prosecuted for the less serious offense of incest, rather than the offense of raping a child); *see also* Hill, *supra* note 48, at 593 (noting that proposed sexting legislation in Arizona "does not remove the possibility that a prosecutor may use Arizona's child pornography laws to charge teens who are engaged in sexting. Even though it gives

distribution of pornographic materials to distinguish between offenders based on their age,[127] and Nebraska framed its legislation as an affirmative defense to child pornography charges.[128] These alternative approaches ensure that prosecutors cannot use the greater penalties associated with child pornography offenses as leverage in plea negotiations or otherwise.[129]

V. CONCLUSION

The law distinguishes between juveniles and adults in a myriad of ways, including the juvenile court's jurisdiction over minors who have committed status offenses, but no underlying crime.[130] These differences range from "relatively mundane age restrictions on driving, voting, and alcohol consumption, to monumental differences in the application of certain constitutional rights. These differences are particularly salient in the context of criminal law and the juvenile court."[131]

When committed by juveniles, age-determinative sex offenses ought to be treated like status offenses; if an adult engaged in the same behavior with a peer, the conduct would not be criminal. By statutorily considering the age of the other participant, substantive criminal law can more properly address the issue of teenage sexuality without subjecting children to laws designed to protect them from adult predators.

Even though states are often justified in discouraging sexual behavior by juveniles and in asserting some level of control if and when that behavior does occur, the response ought to parallel the response to other status offenses. The proposals in this Article attempt to provide such a parallel response.

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prosecutors and law enforcement officials the option of charging teens with lesser offenses, it does not change or amend the definition of child pornography." (footnote omitted)).

127. UTAH CODE ANN. § 76-10-1204 (West 2013) (establishing that an offender who violates the statute is guilty of a third degree felony if she is eighteen or older, a Class A misdemeanor if she is sixteen or seventeen, and a Class B misdemeanor if she is younger than fifteen).

128. *See* NEB. REV. STAT. ANN. § 28-813.01(3) (West 2013).

129. *See supra* notes 90–92 and accompanying text.

130. Michel, *supra* note 11, at 322 (noting that these differences in treatment are "due to fundamental differences in development, maturity, and cognition" that have "a long history of acceptance by courts, legislators, and society as a whole").

131. *Id.*