HARM AND REMEDY FOR YOUTH OF THE #METOO ERA

Legal approaches to sexual and gender-based harms between minors are both ineffective and under-examined. Despite the #MeToo movement, the flashpoint confirmation hearing of Supreme Court Justice Kavanaugh involving alleged high school peer sexual assault, and heightened public awareness, fundamental issues regarding individuals under age eighteen remain ignored, over-simplified, or misunderstood. While the fields of children’s rights, family law, and criminal justice consistently wrestle with the continuum of human maturity and capacity in setting legal boundaries and rules, under-theorizing the #MeToo matter for youth will continue to perpetuate harm, toxic masculinity, and complicity in rape culture.

This Article bridges the gap between empirical reality and legal response in a crisis that cannot be understated. As many as 81% of students between grades eight and eleven report having ever experiencing school sexual harassment, and girls ages twelve to seventeen have the highest rate of sexual assault victimization among other female populations. These figures are undoubtedly low as much victimization goes unreported, particularly among males, communities of color, and certain under-served populations. Engaging the consciousness of the #MeToo movement—one of newfound courage and tenacity among survivors—this article calls for a paradigm shift while deconstructing, reimagining, and reorganizing the problematic legal landscape regarding sexual and gender-based harms between youth.

This Article asserts that status quo responses miss concerns unique to minors and


3. See infra notes 102–16 and accompanying text.
simultaneously over-criminalize, infantilize, and neglect youth. At best, the status quo approach fails to address underlying causes of rape culture and other harms. At worst, it deprives survivors of true remedies and recourse while unfairly branding children with life-long punishment. Sexting among youth is a pervasive habit that presents an archetypal case study. Myriad sexting scenarios can lead to a blunt legal response that fails to recognize the inaccuracy of victim-offender binaries in the digital age.

After critiquing and deconstructing the existing criminal law approach, this article recommends a paradigm shift that more aptly situates the “Me” in #MeToo concerning minors. Creating an informed, interdisciplinary typology of instances of sexual and gender-based harm among youth, this Article ultimately proposes a tiered response system defaulting to public health education and harm-reduction, which only resorts to criminal legal intervention in the most severe situations. Although egregious events may require legal redress, a large portion of incidents involve issues beyond the narrow scope of law and impact youth who seek nonlegal or farther-reaching remedies.

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INTRODUCTION

Seventeen-year-old Dayvon is a talented arts and design student who excels academically, participates in extra-curricular activities, and explores his hobby of being a stylist for friends—particularly during prom season. Fifteen-year-old Kevin began dating Dayvon several months ago and enjoys helping Dayvon create fashion shows and dance videos. Some of the videos and photos these teens consensually create portray their romantic relationship and each of them in states of dress and undress. After monitoring Kevin’s social media accounts (those that he is aware of), Kevin’s dad sees images of Kevin and Dayvon. Enraged, Kevin’s dad reports Dayvon to police as a “sexual predator” who is seducing & digitally exploiting his son.

Despite their real-life romantic relationship’s status as legal—between two consenting minors under age eighteen—both youth face criminal charges because visual images and online posting are involved. Dayvon is charged with creation, possession, and distribution of child pornography, as well as exploitation of a minor. In addition to facing the collateral consequences of felony prosecution and lifelong sex offender status, Dayvon experiences gender-based harassment and violence in his community as a result of the case. Heartbroken and devastated, Kevin also experiences harassment, bullying, and abuse at school while suffering severe beatings from his parents and extended family. Prosecutors weigh their options of charging Kevin with the same crimes as Dayvon, with lesser offenses, or declining to prosecute Kevin because his extended family is pressuring them to view Kevin as an innocent, corrupted victim. Although Kevin becomes depressed and emotionally unstable, his family refuses counseling. Kevin’s parents begin researching boot camps and conversion therapy to transform him into a heterosexual young man. Meanwhile, within the high school that Dayvon and Kevin attend, nearly 80 percent of their peers have experienced frightening incidents they themselves would label sexual harassment. Most students are reluctant to discuss these incidents with adults and fear a backlash within their school culture. Few parents, teachers, counselors, or administrators raise concerns about seeing commonplace sexual harassment in the school, chalking it up to be the typical “roughhousing” or misplaced “flirting” they recall from their own adolescence.

The conundrum facing youth like Dayvon, Kevin, and their high school peers remains unresolved. Once the legal system intervenes, the risks of emotional trauma and even life-threatening situations increase for such youth regardless of whether a punitive, criminalized impulse prevails or a paternalistic, surveillance-focused child welfare orientation succeeds for either or both parties. The current legal landscape involving alleged sexual and gender-based harms between minors relies on a criminal law paradigm that is ill-suited for modern youth. Status quo responses are theoretically and conceptually ineffective for identifying harm and victimization. Current responses simultaneously over-criminalize developing youth sexuality, infantilize young people, and neglect serious concerns falling outside the criminal frame. Incidents are widely de-contextualized and misunderstood.

This Article argues that similar to a vast majority of incidents currently miscategorized as criminal or impermissibly risky, Dayvon and Kevin’s situation should be left squarely outside the

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4 Scenario is based upon actual events, although certain details have been changed to protect the identity of minors and their families.

scope of legal intervention. Instead, widespread, proactive education should combat pervasive sexual harassment and gender-based harm throughout their peer group. Separation from the criminal law framework is crucial if legal (and extra-legal) interventions aim to diminish sexual and gender-based harms overall while deterring offenders. Scores of typical, sometimes risky or boundary-crossing occurrences require distinction from more rare, extremely harmful, dangerous, malicious, and egregious situations. Further, the fundamental goal of any response should be to eradicate the rape culture and toxic masculinity that underlie individual incidents. 6

Focusing exclusively on incidents that occur between persons under age eighteen, this Article ultimately contends that consciousness raising of the #MeToo era forces a vital paradigm shift away from the criminal framework towards a tiered response system prioritizing education and only turning to criminal justice in extreme situations. Although discussion of SGBV among and by adults is beyond the scope of this article, persuasive scholarship contends that the criminal paradigm is likewise ineffective for remedying and preventing most such harms, just as it neglects survivor voices and damages communities with hyper-incarceration. 7 The current legal landscape fails to recognize the “Me” in #MeToo where individuals under age eighteen are concerned. A reimagined, more effective approach should address the distinct developmental status and cultural reality of youth, incorporating interdisciplinary expertise and reorienting concepts of harm, departure from the criminal framework towards a tiered response system prioritizing education and only turning to criminal justice in extreme situations. Although discussion of SGBV among and by adults is beyond the scope of this article, persuasive scholarship contends that the criminal paradigm is likewise ineffective for remedying and preventing most such harms, just as it neglects survivor voices and damages communities with hyper-incarceration. 7 The current legal landscape fails to recognize the “Me” in #MeToo where individuals under age eighteen are concerned. A reimagined, more effective approach should address the distinct developmental status and cultural reality of youth, incorporating interdisciplinary expertise and reorienting concepts of harm,
remedy, and recourse.

Part I briefly describes the backdrop of the #MeToo movement and the ongoing tendency to omit youth issues from related public discourse and reform efforts. Despite the statistical prevalence and prominence of sexual and gender-based harms among minors, as well as the flashpoint confirmation hearing of Supreme Court Justice Brett Kavanaugh involving alleged high school sexual assault, youth voices and considerations are conspicuously absent. Part I concludes that increased consciousness surrounding sexual and gender-based harms in the #MeToo era presents a prime opportunity to focus on youth if the overall goal is social and cultural transformation, including the eradication of rape culture, toxic masculinity, and individual incidents of harm and violence. All such phenomena emerge prior to adulthood while also surrounding individual actors from childhood onward.

Part II deconstructs the current legal landscape regarding sexual and gender-based harms among youth, which relies upon a pervasive yet inappropriate criminal law paradigm. This section describes three core features of the problematic status quo approach: (1) adult-focused responses that apply a blunt, generalized legal tool and oversimplify a complex, nuanced incident unique to youth identity development and culture; (2) infantilizing responses that fail to recognize and support emerging youth sexuality in favor of paternalism, surveillance, or repression; and (3) non-existent or inadequate responses to critical instances of harm that are unique to minors. Part II examines sexting among youth as an archetypal, pervasive behavior consistently met with all three problematic approaches.

Part III identifies the fundamental flaw of the criminal law paradigm concerning sexual and gender-based harms among minors—failure to view youth through an interdisciplinary lens. As long as a mismatch exists between empirical reality and formalized legal responses, real

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9 See Heather Hlavka, Youth and Sexual Harassment: From #MeToo to #MeTooK12, THE GENDER POLICY REPORT (Jan. 9, 2018), https://genderpolicyreport.umn.edu/youth-and-sexual-harassment-from-metoo-to-metook12/ [https://perma.cc/8MP5-4M8G] (explaining how “family loyalty and . . . fear about being disbelieved, treated negatively, blamed for the assault, or dismissed” give “young people . . . little incentive to go to adults . . . despite evidence that they endure substantial rates of sexual harassment and violence,” causing youth voices to be absent from discussions about sexual violence); Joanne N. Smith, #MeToo Isn’t Just for Adults, ESSENCE MAGAZINE (May 7, 2019), https://www.essence.com/op-ed/metoo-isnt-just-for-adults/ [hereinafter Smith, #MeToo Isn’t Just for Adults] [https://perma.cc/QX2R-KVRP] (“There is still a tremendous lack of attention paid to the group of people that represents both the population that is most vulnerable to sexual violence, and our greatest hope for transforming the culture that begets that violence.”); Haley Swenson, Why Teenage Girls Don’t Report Sexual Assault, SLATE MAGAZINE (Sept. 27, 2018 at 2:20 P.M.), https://slate.com/human-interest/2018/09/why-teenage-girls-dont-report-sexual-assault.html [https://perma.cc/P24C-VTQU] (interview with Professor Hlavka discussing the barriers for young women to report rape and sexual assault).

remedies, interpersonal and public safety, and prevention will remain elusive.

Part IV reconceptualizes the matter of sexual and gender-based harm among minors by creating a typology of incidents and initiating a more informed, interdisciplinary, tiered response framework. A paradigm-shift requires decriminalization of much typical youth behavior, extralegal gatekeeping, scrutiny of needs and risk, and a focus on education and prevention as opposed to punishment and surveillance of youth and families. Part IV begins a brief discussion of promising public health and prevention programs while proposing a threshold for criminal legal intervention and civil remedies, including actions against private entities and technology platforms.

In arguing to replace the criminal law paradigm for sexual and gender-based harms among minors with a more interdisciplinary, youth-focused approach, this Article asserts that young people’s own experiences, agency, and leadership should be centered in conjunction with intergenerational efforts and identity-affirming, capacity-building resources from adults whenever feasible. Adolescents in particular are in a prime position to drive civic discourse and reform on the matter of sexual and gender-based harm and rape culture. As daily, seemingly non-violent cultural phenomena validate and perpetuate sexual violence and harassment, the normalized nonchalance and ignorance surrounding these incidents reinforce or worsen the status quo. Despite decades of concerted legal advocacy and reform, rape culture, harassment, violence, and gender inequity persist. Not only do minors have firsthand perspective about rape culture in the digital age, but they can hold a mirror up to adults charged with protecting and educating them, towards the goal of articulating a realistic and transformative vision. Importantly, youth facing sexual and gender-based harm often seek solutions beyond the role and scope of the law and can best comprehend the limits of legal or formal intervention where adults fall short.

Regarding terminology, a minor, youth, or child will be defined herein as a person under age eighteen, per the American Psychological Association’s standards and as the most commonly applied legal age of majority. This Article engages ongoing scholarship and precedent regarding the continuum of human maturity and the plethora of ages at which youth may exert certain legal rights and privileges—boundaries that often appear arbitrary or variable among the states.

Hereinafter, the terms gender-based violence (GBV), gender-based (or gendered) harms, sexual harassment, sexual harms, sexual victimization, and sexual and gender-based violence (SGBV) will be used flexibly as umbrella terms for a class of harmful threats or acts perpetrated against a person’s will and directed at an individual or group based on actual or perceived biological sex, gender identity and/or expression, sexual orientation, and/or lack of adherence to varying socially constructed gender norms. When relevant, particular categories of SGBV

11 See, e.g., Gronszhans, supra note 6; Allegra McLeod, Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform, 102 CAL. L. REV. 1553, 1620 (2014) (“Rather than simply a problem of under-reporting, certain youth subcultures normalize significant sexual harm, even rape”); see also Schultz, supra note 6, at 1736 (“Although evidence of nonsexual misconduct sometimes meets the causation hurdle—particularly, conduct that on its face reveals a derogatory attitude toward women on the job—other nonsexual conduct of the type that is so commonly directed at women by their male coworkers fails to register as gender-based.”).


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between youth will be discussed specifically herein, with the aim of aptly identifying harm, pursuing commensurate responses, fostering prevention and youth development, protecting vulnerable persons, and combatting broader rape culture.

Stemming from deeply embedded notions of gender roles and power imbalances that often incorporate other forms of oppression, SGBV can come in the form of physical, emotional, psychological, or sexual control and abuse, while also involving technological tools or the denial of access to services and economic resources. As a violation of human rights and a denial of human dignity, SGBV hurts fundamental human development, impacting individuals, families, and communities while also having broader economic and public health costs. While women and girls are most at risk of experiencing SGBV, it in fact reaches individuals of all gender identities and forms of gender expression.

I. #METOO WITHOUT YOUTH

The #MeToo phenomenon continues to impact civic and scholarly discourse, pop culture, and reform efforts, which is a testament to how cathartic and long-awaited this collective truth-

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13 See Susan F. Hirsch, Introduction to The Public Nature of Private Violence: The Discovery of Domestic Abuse 3, 4 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (addressing how the law and other social institutions serve to perpetuate gender-based violence by “encod[ing] foundations in statutes and precedents”); Robin West, Caring for Justice 7–9 (1999) (noting that “women, as a group, have been subordinated in this culture” and “undervalued” as well as informally excluded from the “law’s protective domain” through undercompensation for harms disproportionately suffered by women); Davis, supra note 12, at 558 (“Gender oppression is always felt more acutely when intertwined with discrimination based on race, ethnicity, nationality, disability status, sexual orientation, gender identity, or other status. Viewing gendered violence through the lens of socially constructed narratives addresses its underlying causes: the structural inequality reflected in, and perpetrated by, such violence.”); McLeod, supra note 11, at 1563 (“... sexual violence is normalized and embedded in conceptions of inviolable family privacy, in unequal gender relations, and in institutional hierarchies that maintain the secrecy, stigma, and shame associated with sexual abuse”); see, e.g., Kimberlé Williams Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, in The Public Nature of Private Violence, supra, at 93, 93–118 (highlighting the intersectionality of racism and patriarchy inherent in violence against women of color); Linda Hirshman & Jane E. Larson, Hard Bargains: The Politics of Sex 257–59, 272–76 (1999) (noting that “[l]aw, technology, ideology, and collective action all structure sexual bargaining,” the “one-on-one bargaining over the conditions of sexual access between women and men,” particularly in the case of sex between adults and children, which, like SGBV, is characterized “by the use of force as distortions of an ideal of equal bargaining power”); Robin L. West, When and Where They Enter, in Transcending the Boundaries of Law: Generations of Feminism and Legal Theory 213, 218 (Martha Albertson Fineman ed., 2011) (“When women consent to intimacy today, just as when women consented at mid-century to marriage, their consent might cover more than meets the eye... that a woman’s consent to intimacy is now blanketed in a way that was once true only of her consent to marriage.”).


15 UNHCR, supra note 14; U.S. Dep’t of State, supra note 12.

16 U.S. Dep’t of State, supra note 12.
telling must be. As survivors claim their experiences and assert their identity, the movement offers hope and fortitude to future generations. Perhaps surprisingly, however, neither public discourse nor scholarship have given much scrutiny to the unique circumstances of children and adolescents in the #MeToo era, despite this group being the most likely to experience sexual victimization and despite the longstanding work of #MeToo founder Tarana Burke which centers on the lives and advocacy of girls of color. Failure to address what #MeToo means to youth is a missed opportunity both in the literature and the socio-cultural reckoning.

A. Backdrop: #MeToo Momentum

Although the U.S., and indeed international community, is experiencing a period of consciousness-raising and outrage around sexual assault and gender-based harms, public awareness is focused primarily on adults. On January 21, 2017, an estimated 4.2 million people nationwide, both women and people of all gender identities, marched to demonstrate opposition to President Donald Trump and his administration’s values and policies. Decrying misogynist rhetoric and a regressive agenda on gender justice and other issues, the largest coordinated protest in U.S. history highlighted the interrelatedness of the many problems facing women and the demand for policies that acknowledge the needs of a diverse population. A flurry of revelations about high-profile sexual predators including Hollywood mogul Harvey Weinstein in October 2017, longtime celebrity Bill Cosby, actor Kevin Spacey, and others, increased sentiments of resonance about ongoing abuses and a refusal to be further silenced. The movement has emboldened the accusers of R&B artist R. Kelly to join forces and expose decades of his

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19 Chenoweth & Pressman, supra note 18; Frothingham & Phadke, supra note 18.

predatory behavior towards young girls.\(^\text{21}\) Most recently, the movement achieved a “watershed moment” in the February 2020 conviction of Weinstein for rape and criminal sexual assault, “a crucial test in the effort to hold influential men accountable for sexual misconduct.”\(^\text{22}\)

Social media and online publications have helped to expand a running narrative of disgust and resolve, as women, girls, and those throughout the gender identity spectrum can now instantaneously bear witness to each other internationally, sharing strategies for coping and fostering progress.\(^\text{23}\) By June 25, 2018, 414 high-profile executives, business leaders, and other individuals had been accused of sexual harassment or assault, only seven of them female.\(^\text{24}\) As of that date, 190 such accused individuals had resigned or been fired from their jobs, and another 122 were put on leave or suspended.\(^\text{25}\) Survivors and allies are taking the time and space to speak of the trauma of gender-based harms in major public fora where such issues have previously gone widely unremarked, including university commencement addresses and the Oscar Awards.\(^\text{26}\)

#MeToo became a viral hashtag on the social media website Twitter in less than six months, expressing unity and momentum around exposing rampant sexual and gender-based


\(^{23}\) See Fabrizio Botti et al., FOUNDATION FOR EUROPEAN PROGRESSIVE STUDIES, The #MeToo Social Media Effect and Its Potential for Social Change in Europe (Oct. 2019), https://www.feps-europe.eu/attachments/publications/metoo_web_s.pdf [https://perma.cc/LH2H-QDTJ] (discussing the reach of the #MeToo campaign into Europe and its potential for eliminating sexist and sexual violence as a bottom-up movement); Catharine A. MacKinnon, Where #MeToo Came From, and Where It’s Going, THE ATLANTIC (Mar. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/ [https://perma.cc/R6DY-S2K8] (“#MeToo has been driven not by litigation but by my mainstream and social media, bringing down men (and some women) as women (and some men) have risen up ... #MeToo, Time’s Up, and similar mobilizations around the world—including #NiUnaMenos in Argentina, #BalanceTonPorc in France, #TheFirstTimelGotHarassed in Egypt, #WithYou in Japan, and #PremieiroAssedio in Brazil among them—are shifting gender hierarchy’s tectonic plates.”); Katie Thomson, Social Media Activism and the #MeToo Movement, MEDIUM (June 12, 2018), https://medium.com/@kthomson.11/social-media-activism-and-the-metoo-movement-166f452d7fd2 [https://perma.cc/2QD9-358E] (“#MeToo is an extraordinary example of a successful social media activist campaign... [It] was monumental because it not only broke the silence around the constant harassment women face daily, but also created a safe space for survivors to be able to tell their stories and receive support and solidarity rather than shame and backlash.”); Meighan Stone & Rachel Vogelstein, Celebrating #MeToo’s Global Impact, FOREIGN POLICY (Mar. 7, 2019, 7:40 PM), https://foreignpolicy.com/2019/03/07/metooimpactinternationalwomens-day/ [https://perma.cc/K7HT-NRTT] (detailing the global successes of #MeToo through resignations of high-profile officials, athletes, and writers, court victories in prosecution of rape and sexual misconduct, and legislative changes to criminal codes and workplace protections).

\(^{24}\) Jeff Green, #MeToo Implicated 414 High-Profile Executives and Employees in 18 Months, TIME (June 25, 2018), http://time.com/5321130/414-executives-snared-metoo/ [https://perma.cc/XXL3-QTPT7].

\(^{25}\) Id.

violence, with #TimesUp soon following as part of a movement to advance the similar vision of “[f]airness, safety, [and] equity in the workplace.” While the current Me Too Movement has its own website and presence, highlighting the breadth and impact of sexual violence, activism surrounding the rallying cry “Me Too” is not new, but is echoing years after social activist Tarana Burke coined the phrase in 2006 to empower women who were victims of sexual abuse—primarily women and girls of color and from underserved communities.

As scholars and commentators increasingly criticize the absence of narratives and media space regarding females of color, the #MeToo discourse has gradually begun addressing how harms are compounded when race, ethnicity, and class intersect with SGBV. Likewise, a focus strictly on male perpetration and female victimhood can limit progress by ignoring the lesser understood victimhood of males and the role of toxic masculinity and rape culture in SGBV, regardless of a victim or perpetrator’s gender identity, gender expression, or sexuality.

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29 About – Me Too Movement, supra note 27; Julie Goldscheid, Sex Harassment — We Must Shift the Focus from Punishing the Offender to Providing Redress for the Victim, SAN FRANCISCO CHRONICLE (Feb. 7, 2018, 6:00 PM), https://www.sfchronicle.com/opinion/openforum/article/Sex-harassment-we-must-shift-the-focus-from-12560108.php [https://perma.cc/AE3R-82SZ]; Langone, supra note 28.

30 See Angela Onwuachi-Willig, What About #UsToo?: The Invisibility of Race in the #MeToo Movement, 128 YALE L.J.F. 105, 105–09 (2018) (“The recent resurgence of the #MeToo movement reflects the longstanding marginalization and exclusion that women of color experience within the larger feminist movement in U.S. society . . . despite the fact that women of color are more vulnerable to sexual harassment than white women and are less likely to be believed when they report harassment, assault, and rape.”); Tarana Burke, #MeToo Was Started for Black and Brown Women and Girls. They’re Still Being Ignored, WASHINGTON POST (Nov. 9, 2017, 8:04 PM), https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/ [https://perma.cc/EL84-4MJK] (discussing how women of color have historically—and continue to be—left out of conversations about sexual violence despite the fact that they, especially Native American women, experience higher rates of sexual violence); Valerie Morales, The Invisible Victims of #MeToo, HUFFPOST (Feb. 15, 2018), https://www.huffpost.com/entry/opinion-morales-metoo-black-brown-women_n_5a833de2e4bdfc06751f4396 [https://perma.cc/8UZG-HMYV] (criticizing the exclusion of women of color from the #MeToo movement); Liz Rowley, The Architect of #MeToo Says the Movement Has Lost Its Way, THE CUT (Oct. 13, 2018), https://www.thecut.com/2018/10/tarana-burke-me-too-founder-movement-has-lost-its-way.html [https://perma.cc/YQW-MJ8Z] (describing Burke’s concerns that the media has attempted to develop an “archetypal story of abuse” by focusing on the perpetrators in #MeToo narratives rather than survivors and, at the same time, her hope that the movement can “shift the narrative that it’s a gender war, that it’s anti-male, that it’s men against women, that it’s only for a certain type of person—that it’s for white, cisgender, heterosexual, famous women”).

31 See McGinley, supra note 6, at 100 (arguing that “[#MeToo’s] focus on women as victims and men as perpetrators . . . ignores the serious harassment by men of other men [and causes] courts [to] fail to recognize [same-sex


#MeToo consciousness-raising culminated in a distinct cultural achievement in late 2017 when Time Magazine named *silence breakers*—those who courageously came forward to share their stories of survival—as the 2017 Person of the Year.\(^\text{32}\) In November 2017, the *New York Times* revived national coverage of an audio tape featuring President Donald Trump bragging about his own serial groping of women without their consent because of his celebrity status.\(^\text{33}\)

Nevertheless, #MeToo discourse and reform efforts continue to bypass issues unique to minors, even as the movement elevates themes of rape culture and its pervasiveness throughout society and the human life course.\(^\text{34}\)

**B. Underexamined Sexual and Gender-Based Harm Among Minors**

The crisis of sexual victimization among youth cannot be understated. Minors—persons under age eighteen—are the segment of society most likely to be sexually victimized.\(^\text{35}\) The U.S. Department of Justice, Office of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* (2000), reports that sexual assault reported to law enforcement were under eighteen, more than half of whom were under age twelve.
Bureau of Justice Statistics found that girls age twelve to seventeen have a rate of rape or sexual assault victimization that is at least five times that of the general population, and they experience such victimization more than any other female age group. Similarly, a 2017 survey by the Centers for Disease Control and Prevention found that an alarming 11.3% of girls and 3.5% of boys in high school reported being forced to have sexual intercourse against their will and that 9.1% of girls and 6.5% of boys reported experiencing physical dating violence in the past year. In another study, the Centers for Disease Control and Prevention (CDC) reported that almost one in five women surveyed had been raped at some point in their lives, with just under half first experiencing this before age eighteen, primarily between ages eleven and seventeen. While men were far less likely to experience rape, over one-quarter were first raped at age ten or younger.

Studies on the frequency of sexual and verbal harassment at school have yielded results that are no less disconcerting. The American Association of University Women (AAUW) found as many as 81% of students between grades eight and eleven report experiencing school sexual harassment. According to another AAUW study, nearly 48% of students between grades seven and twelve reported experiencing some form of sexual harassment in school just during the 2010-11 academic school year. A study by the University of Illinois at Urbana-Champaign found that 21% of middle school students reported experiencing unwanted physical touching at school and nearly half—43%—experienced verbal sexual harassment, including sexual comments, jokes, or gestures in the prior year. Although the study indicated that verbal harassment appears to be more common than physical harm or assault, it is difficult to measure these harms accurately, as students and teachers often minimize incidents or fail to report them to the proper authorities.

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36 Craig A. Perkins, Bureau of Justice Statistics, Age Patterns of Victims of Serious Violent Crime app. (1997), https://www.bjs.gov/content/pub/pdf/apvsvnc.pdf [https://perma.cc/68D8-SXPB] (finding that girls age 12 to 14 were victims of rape or sexual assault at a rate of 12 per 1,000 and girls age 15 to 17 had a rate of 13.8 per 1,000, at least five times the rate for the general population of 2.4 per 1,000 persons).

37 Plany et al., supra note 2.


40 Id.; see also Snyder, supra note 35, at 4 (“[T]he year in a male’s life when he is most likely to be the victim of a sexual assault is age 4 . . . [while] a female’s year of greatest risk is age 14.”).

41 Hostile Hallways, supra note 1.

42 Crossing the Line, supra note 1.

43 Dorothy L. Espelage et al., Understanding Types, Locations, & Perpetrators of Peer-to-Peer Sexual Harassment in U.S. Middle Schools: A Focus on Sex, Racial, and Grade Differences, 71 CHILDREN & YOUTH SERVICES REV. 174, 177 (2016).

44 Id.

45 See Crossing the Line, supra note 1, at 27 (“Only 9 percent of students (12 percent of girls versus 5 percent of boys) reported [sexual harassment] to a teacher, guidance counselor, or other adult at school.”); Robin McDowell et al., Hidden Horror of School Sex Assaults Revealed by AP, AP NEWS (May 23, 2017) https://apnews.com/afsc:Content:9651740127?bclid=1wAR3McTvJlRkiMfledO9FRLp8mIc-9ZydxwKvDpHKzC512ZUMzTJdA [https://perma.cc/ANA3-FXR6]. (“Elementary and secondary schools have no national requirement to track or disclose

https://scholarship.law.upenn.edu/jlasc/vol23/iss4/2
Indeed, the Associated Press (AP) has described a “hidden horror of school sex assaults” that is actually misconstrued by federal data.\footnote{McDowelletal., supra note 45.} By closely examining the FBI’s National Incident-Based Reporting System records from 2011 to 2015 as well as state education records, the AP found that sexual violence ranging from rape and sodomy to forced oral sex and fondling was often mischaracterized as bullying, hazing, or consensual behavior.\footnote{Id. The nearly 17,000 incidents nationwide of student-on-student sexual violence uncovered by AP involved students as young as five years old through high school but were most frequent among students age twelve to fifteen. Id.} These incidents “occurred anywhere students were left unsupervised: buses and bathrooms, hallways and locker rooms,” and that “[n]o type of school was immune, whether it be in an upper-class suburb, an inner-city neighborhood or a blue-collar farm town.”\footnote{Id.} Such abuse was prevalent whether victimized youth were gender non-conforming or cisgender.\footnote{Id.}

Emerging digital-age methods of SGBV among minors such as nonconsensual sexting may significantly harm youth and communities, although empirical research on them is lacking. There is no uniform legal or research definition of sexting, and various definitions depend on the source, but the activity can include text-only as well as visual communication.\footnote{Barrense-Dias et al., supra, at 545.} According to Merriam-Webster, sexting is “the sending of sexually explicit messages or images by cell phone.”\footnote{https://www.merriam-webster.com/dictionary/sexting [https://perma.cc/7XX6-XG93] (last visited Nov. 26, 2019).} While sexting may occur consensually, it can very easily lead to embarrassment, cyberbullying, blackmailing, and SGBV that cause irreparable harm, particularly when the content is forwarded to others and goes viral.\footnote{Barrense-Dias et al., supra note 50, at 545.} Such victimization can occur through, but is not limited to, nonconsensual sexting (the nonconsensual distribution of sexually explicit images by cell phone, regardless of whether the images or videos were initially taken with consent),\footnote{See Danielle Keats Citron & Mary Anne Franks, Criminalizing Revenge Porn, 49 WAKE FOREST L. REV. 345, 346 (2014) (the authors refer to “nonconsensual pornography” and use that term interchangeably with “revenge porn” consistent with popular usage); see, e.g., Nina Burleigh, Sexting, Shame and Suicide: A Shocking Tale of Sexual Assault in the Digital Age, ROLLING STONE (Sept. 17, 2013), https://www.rollingstone.com/culture/culture-news/sexting-shame-and-suicide-72148/ [https://perma.cc/LW2K-YF65].} revenge porn (“images consensually given to an intimate partner who later distributes them without consent”),\footnote{Citron & Franks, supra note 53; see, e.g., Katy Hastings, Teenager Commits Suicide After ’Sexting’ a Nude Photo to Her Boyfriend Made Her Life a Misery, THE DAILY MAIL (Mar. 10, 2009, 9:39 PM), http://www.dailymail.co.uk/tvshowbiz/article-1161112/Teenager-commits-suicide-sexting-nude-photo-boyfriend-life-misery.html [https://perma.cc/D5NF-TD9F].}

sexual violence, and they feel tremendous pressure to hide it,” and even among those reported many are often “mischaracterized as bullying, hazing or consensual behavior.”\footnote{Yara Barrense-Dias et al., Sexting and the Definition Issue, 61 J. ADOLESCENT HEALTH 544 (2017) (reviewing social science literature to examine variations and trends in definitions of sexting).}
or sextortion (using threats of harm or the distribution of images, usually to obtain images, sexual acts, or money). Although estimates of the prevalence of youth participation in sexting vary from 1% to as many as 60% of youth, a 2018 meta-analysis of thirty-nine studies on sexting concluded that 14.8% of individuals under age eighteen had sent a sext and 27.4% had received sexts. That analysis also determined that 12.0% of youth had forwarded a sext without consent and 8.4% had had a sext forwarded without consent. A 2018 study revealed that 5% of students age twelve to seventeen had been the victim of sextortion and 3% admitted to having threatened another person, with males more likely to have experienced sextortion than females.

Consensual sexting surely comes with many risks, such as nonconsensual sexting, effects on educational and career outlook, its potential as a gateway to risky sexual conduct and substance use, and even criminal prosecution, but it has also been viewed as an age-appropriate form of sexual expression, intimacy, and experimentation. Studies have found that nonconsensual


56 Compare Kimberly Mitchell et al., Prevalence and Characteristics of Youth Sexting: A National Study, 129 PEDIATRICS 13, 17–18 (2012) (“The percentage of youth who have, in the past year, appeared in or created sexually explicit sexual that potentially violate child pornography laws is low (1%). But if sexting is defined as appearing in, creating, or receiving sexually suggestive rather than explicit images, the survey reveals 9.6% of youth who used the Internet in the past year involved in this way.”) with Jeff R. Temple & HyeJeong Choi, Longitudinal Association Between Teen Sexting and Sexual Behavior, 134 PEDIATRICS 1287, 1289 (2014) (finding that 27.6% of high schools had sent a naked picture of themselves over text or e-mail, while 60% had been asked to do so). The large variation is in part due to differences in how sexting is defined with respect to media format, act involved, mode of transmission, sexual characteristics, sending/receiving sexts, and asking/being asked to send sexts. Barrense-Dias et al., supra note 50, at 552 (“The large range of prevalence rates (7.6%–60% for passive sexting and 0.9%–27.6% for active sexting) could be explained by cultural or methodological differences, but it could also come from the lack of a clear and universal definition.”).


58 Id. at 331.

59 Patchin & Hinduja, supra note 55, at 38–39 (noting also that almost half of sextortion victims reported making threats themselves and that over two-thirds of those who admitted making threats had also been victims).

60 See Amanda Lenhart, Teens and Sexting: How and Why Minor Teens Are Sending Sexually Suggestive Nude or Nearly Nude Images via Text Messaging, PEW RESEARCH CENTER 6–8 (2009), https://www.pewresearch.org/internet/2009/12/15/teens-and-sexting/ [https://perma.cc/DX5Q-B67T] (offering qualitative perspectives on sexting through interviews with teen focus groups that describe sexting as an activity in lieu of or a prelude to sexual activity, as an experimental phase for those who are not sexually active, and as an extension of an existing sexual relationship); Michele L. Ybarra & Kimberly J. Mitchell, “Sexting” and Its Relation to Sexual Activity and Sexual Risk Behavior in a National Survey of Adolescents, 55 J. ADOLESCENT HEALTH 757, 726 (2014) (finding that sexting was associated with greater substance use, risky sexual behavior, and low self-esteem, but acknowledging that “[f]or some teens, taking and sending sexual pictures of themselves plays a role in a healthy sexual relationship”); Nicola Döring, Consensual Sexting
sexting, revenge porn, and sextortion, which can result from consensual acts, have become especially problematic, causing victims to suffer many of the same effects as sexual assault survivors, such as loss of self-esteem, loss of control, PTSD, depression, and suicidal behavior. Nonconsensual sexting may also be an indicator of in-person SGBV, as one study of high school girls found that those who had previously experienced a form of sexual coercion were more likely to have sent, been asked for, and received a sexually explicit image without consent compared to those without a past experience of sexual coercion. Given the close link between offline and online SGBV, sexting has been identified by Centers for Disease Control and Prevention as a means of SGBV in teen dating relationships.

The universality of electronic communication among youth has introduced forms of digital abuse including not only sexting but also cyberbullying and intimate partner control and intimidation, as highlighted by a 2013 MTV study. Researchers found that nearly 49% of young people surveyed had experienced digital dating abuse. About one-fifth of young people reported that their partners did at least one of the following: repeatedly checked up on them via the internet or cell phone (22%), read their text messages without permission (21%), or pressured them to respond to their calls, emails, texts, or instant messages (17%). Additionally, some reported that...
their partners demanded access to their internet accounts (8%) or used digital communication to call them names, put them down, or say otherwise hurtful things to them (9%).\textsuperscript{66} Seven percent stated that they were pressured by someone to send sexually explicit graphics of themselves,\textsuperscript{67} and another 11% reported that naked pictures of themselves were shared with someone else without their permission.\textsuperscript{68} Notably, however, the MTV data was not reported based on gender, although the population polled was almost evenly split between youth identifying as males and females.\textsuperscript{69} The study also included young adults between ages eighteen and twenty-four, rather than exclusively covering individuals under the common age of majority, eighteen years old.\textsuperscript{70}

The numerous means of victimization have very tangible negative effects on young people. Rape and sexual assault are strongly associated with lifetime diagnoses of anxiety, depression, eating disorders, PTSD, sleep disorders, and attempted suicide,\textsuperscript{71} as well negative effects on self-esteem, sexual and social reputation, frequency and enjoyment of sex, romantic and family relationships, sexual desire, and work life.\textsuperscript{72} When children suffer a form of sexual abuse, they can experience myriad additional symptoms, such as self-blame and self-loathing, rage, panic, despair, guilt, feelings of abandonment and lack of protection by parental figures, impaired ability to create future relationships, a loss of ownership and trust with their bodies, a shift in patterns of sleeping, eating, and using the bathroom, and many other unfortunate effects that can impair their development and life course.\textsuperscript{73}

A 2011 study found that nearly one-third of students who experienced school sexual harassment did not want to return to school as a result.\textsuperscript{74} Others reported struggling to pay attention while studying (34%), feeling sick to their stomachs (31%), and having trouble sleeping.

\begin{itemize}
\item \textsuperscript{66} MTV-AP-NORC\%20Center\_Digital\_Abuse\_Study\_Full.pdf [https://perma.cc/8BLG-42WK].
\item \textsuperscript{67} \textit{Id.} at 46.
\item \textsuperscript{68} \textit{Id.} at 41.
\item \textsuperscript{69} \textit{Id.} at 44.
\item \textsuperscript{70} \textit{Id.} at 54.
\item \textsuperscript{71} \textit{See} Laura Chen et al., \textit{Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-Analysis}, 85 MAYO CLINIC PROC. 618, 625 (2010) (meta-analysis of 37 studies on the relationship between sexual abuse and common psychiatric disorders).
\item \textsuperscript{72} \textit{See} Carin Perilloux et al., \textit{The Costs of Rape}, 41 ARCHIVES SEXUAL BEHAV. 1099, 1102–04 (2012) (finding through quantitative analysis of interviews of sexual assault survivors that victims of completed rape experienced more negative effects in thirteen categories than victims of attempted sexual assault but that both groups experienced some degree of negative effects); Emily Dworkin et al., \textit{Sexual Assault Victimization and Psychopathology: A Review and Meta-Analysis}, 56 CLINICAL PSYCHOL. REV. 65, 73–74 (2017) (finding a significant positive relationship between sexual assault and suicidality, obsessive-compulsive conditions, trauma- and stressor-related conditions, and bipolar conditions, as well as, to a lesser extent, depression, anxiety, disordered eating, and substance abuse or dependence).
\item \textsuperscript{73} Salman Akhtar & Shawn Blue, \textit{The Realm of Childhood Sexual Abuse: An Introductory Overview, in DEVELOPMENTAL, CLINICAL, AND SOCIOCULTURAL ASPECTS OF CHILDHOOD SEXUAL ABUSE} 1, 8–10 (Salman Akhtar ed., 2019); \textit{see also} Heather A. Turner et al., \textit{The Effect of Lifetime Victimization on the Mental Health of Children and Adolescents}, 62 SOC. SCI. & MED. 13, 21, 22 (2006) (showing from separate analyses of children ages two to seventeen had higher levels of depression, anger, and aggression if they had previously been exposed to sexual assault, especially for those age ten to seventeen).
\item \textsuperscript{74} \textit{Crossing the Line}, supra note 1, at 22–25.
\end{itemize}
(19%). Sexual harassment also led to students getting into trouble at school, changing the way they traveled to or from school, quitting an activity or sport, or staying home from school altogether. These responses were more pronounced for girls as well as students who were harassed both online and in person.

Recent scholarship also demonstrates that the SGBV experienced by youth of color is both compounded and rendered invisible through prevailing cultural stereotypes, adultification and punitive school discipline policies, and ineffective or discriminatory implementation of Title

75 Id.
76 Id.; see also JODY MILLER, GETTING PLAYED: AFRICAN AMERICAN GIRLS, URBAN INEQUALITY, AND GENDERED VIOLENCE 125 (2008) (“[S]exual harassment in school has tangible negative consequences for its female victims, including harmful effects on school performance, the curtailment of social networks, peer rejection, and negative emotional outcomes”).
77 CROSSING THE LINE, supra note 1, at 25 (“For example, 46 percent of students who had experienced sexual harassment both online and in person said they did not want to go to school as a result of the sexual harassment, compared with 19 percent who were sexually harassed only in person and 18 percent who were sexually harassed only online.”).
78 See ANDREA RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 70–79 (2017) (documenting numerous instances of alarming police violence in schools and communities stemming from stereotypes of black girls as “loud . . . ghetto . . . ratchet . . .,” uncontrollable, dangerous, and violent, as well as generalizations that Latinx girls are “hot-tempered” and “volatile”); Cheryl Nelson Butler, A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America, 27 YALE J.L. & FEMINISM 95, 134–36 (2015) (describing how sexual and racial stereotypes of women and girls of color have made them more susceptible to sexual exploitation, particularly as the result of punitive school discipline policies and employment discrimination, and “undermined society’s willingness to help these women escape poverty”); Nancy Chi Cantalupo, Dog Whistles and Beachheads: The Trump Administration, Sexual Violence & Student Discipline in Education, 54 WAKE FOREST L. REV. 303, 318 (2019) (“[S]tereotypes about women of color as unchaste [and] stereotypes of unchaste women as ‘unrapeable’ rend[er] women of color simultaneously more likely to be victimized, since harassers believe these stereotypes, and invisible as victims, as the stereotypes make it nearly impossible for women of color to get legal redress.”).
Valeria M. Pelet del Toro, Let Black Girls Learn: Perceptions of Black Femininity and Zero-Tolerance Policies in Schools, 87 REV. JUR. U.P.R. 55, 68–71 (2018) (“Zero-tolerance discipline policies seem notably blind to and ultimately unfit to handle problems stemming from gender-based violence and harassment in schools . . . [W]hen school officials are faced with a Black female student who seems disengaged or is acting out, she is usually suspended, expelled or referred to law
IX protections. Longstanding perceptions of African-American girls as “angry, hostile, . . . and hypersexualized,” as well as “assertive, independent, and emotionally resilient” contrast with behaviors coded as traditionally female through vulnerability, innocence, and passivity. These implicit biases exist despite black girls being more likely than Latina or white girls to experience physical sexual abuse and thus to suffer greater emotional harm. Male youth of color also remain stereotyped and targeted as suspected perpetrators of SGBV, reducing the chances that they would claim or report their own victimization to which they are particularly vulnerable. A 2015 report produced by Georgetown Law’s Center on Poverty and Inequality, Human Rights
Project for Girls, and Ms. Foundation for Women maps out the existence of a tragic “sexual abuse to prison pipeline” whereby sexual harm is one of the main pathways for girls into the juvenile justice system.\(^\text{87}\) In particular, girls of color who have been sexually and physically abused, experienced exploitation, or fled unsafe home or school environments, become truant or engage in risky behavior because of the abuse they experienced.\(^\text{88}\) As formalized juvenile justice and child protective interventions are “ill-equipped to identify and treat the violence and trauma that lie at the root of victimized girls’ arrests,” legal responses are most likely to re-trigger trauma or subject girls to new incidents of victimization.\(^\text{89}\)

SGBV is generally treated as a heteronormative issue in research and public debate, but sexual orientation and gender identity render individuals, especially youth, particularly vulnerable to victimization.\(^\text{90}\) A 2017 study by the Gay, Lesbian, & Straight Education Network (GLSEN) of over 23,000 students nationwide age thirteen to twenty-one who identified as LGBTQIA+ found that 57.3% had been sexually harassed at school.\(^\text{91}\) More than one-third had been physically harassed specifically because of their sexual orientation, gender expression, or gender identity during the past school year, and 16.4% reported being punched, kicked, injured, or otherwise physically assaulted.\(^\text{92}\) The vast majority (82%) had been the target of name-calling or threats.\(^\text{93}\)

\(^{87}\) \text{SEXUAL ABUSE TO PRISON PIPELINE, supra note 79; see RITCHIE, supra note 78, at 77 ("Today Black girls make up approximately 33 percent of girls referred to law enforcement or arrested on school grounds but only 16 percent of the female student population. Yet the discourse around the policing of youth and the ‘school-to-prison pipeline’ continues to focus nearly exclusively on boys and young men.").}

\(^{88}\) \text{SEXUAL ABUSE TO PRISON PIPELINE, supra note 79, at 22–23 ([W]hen girls with a history of sexual abuse run away, they are more likely to be commercially exploited or engage in other behavior that increases their risk of involvement in the juvenile justice system."); see also Charisa Smith, \textit{No Quick Fix: The Failure of Criminal Law and the Promise of Civil Law Remedies for Domestic Child Sex Trafficking}, 71 U. MIAMI L. REV. 1, 28–29 (2016) [hereinafter Smith, \textit{No Quick Fix}].}

\(^{89}\) Smith, \textit{No Quick Fix, supra note 88, at 5; see infra Part II.}


\(^{92}\) \text{Id. at 24–25.}

\(^{93}\) \text{Id. at 18–21.}
Nearly all students reported hearing homophobic language, remarks about gender expression, and comments specifically about transgender people. This alarmingly common behavior had very significant impacts on LGBTQI students, causing them to skip school, avoid bathrooms and locker rooms, and decline to participate in extracurricular activities. Despite the harms that this SGBV and hostile environment causes for many LGBTQI students, much of this behavior occurred in the presence of teachers and staff, and very often they did not intervene or challenge the behavior, but rather they themselves used homophobic language. According to another survey, 77% of transgender people were verbally harassed or physically attacked at school at least once because of their identity, and 47% reported being sexually assaulted at some point in their lives, both in and out of the workplace. Research has also highlighted the prevalence of interpersonal violence among LGBTQI couples, the disproportionate treatment of such youth by law enforcement and the juvenile justice system, and their need to resort to drastic means of survival, particularly survival sex.

Fear of reporting sexual assault is rampant, and when it is reported, little may happen:

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94 Id. at 19.
95 Id. at 14–16.
96 Id. at 19–20.
98 Id. at 205.
100 See, e.g. AMY ADELE HASKINOFF, SEXTING PANIC: RETHINKING CRIMINALIZATION, PRIVACY, AND CONSENT 37, 39 (2015) (noting the risk that prosecutors will use child pornography laws to punish youth sexting, particularly against queer youth, and the public belief that it is more appropriate for gay and lesbian youth to register as sex offenders for sexting than heterosexual youth); Kimberlé W. Crenshaw, From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control, 59 UCLA L. REV. 1418, 1423 n.10 (2012) (describing how gender-responsive interventions by the juvenile justice system reinforce stereotypes about femininity and lead to hyperpolicing of lesbian, bisexual, and transgender girls); see generally MEREDITH DANK ET AL., URBAN INSTITUTE, LOCKED IN: INTERACTIONS WITH THE CRIMINAL JUSTICE AND CHILD WELFARE SYSTEMS FOR LGBTQ YOUTH, YMSM, AND YWSW WHO ENGAGE IN SURVIVAL SEX (2015), https://www.urban.org/sites/default/files/publication/71446/2000424-Locked-In-Interactions-with-the-Criminal-Justice-and-Child-Welfare-Systems-for-LGBTQ-Youth-YMSM-and-YWSW-Who-Engage-in-Survival-Sex.pdf [https://perma.cc/E25T-D2LB] (discussing the frequency with which LGBT youth are subject to negative verbal, physical, and abusive contact by the police and denied help by the police); Naomi G. Goldberg et al., Police and the Criminalization of LGBT People, in THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 374 (Tamara Rice Lave & Eric J. Miller eds., 2019) (describing discriminatory targeting of LGBT people by law enforcement and harms suffered by LGBT people at the hands of law enforcement officers).
101 See generally DANK ET AL., supra note 100; Goldberg et al., supra note 100, at 377–78 (“Of LGBTQ youth engaged in survival sex in New York City in 2012–13, 70% had been arrested at least once in their lifetime . . . “).
over 400,000 rape kits go untested every year, preventing the collection of evidence that could identify serial rapists. Rape and sexual assault are two of the most underreported crimes. At least 65% of rapes or sexual assaults go unreported to law enforcement. A victim is less likely to tell law enforcement when they know the offender. Indeed, about three-fourths of rapes of sexual assaults by a current or former male partner are not reported, while 54% of rapes and 34% of sexual assaults by a stranger go unreported. Common reasons survivors cite for not reporting include a fear of reprisal and repercussions, including damage to their friends and extended families or an impact on their employment and finances, as well as doubt that the police would or could do anything, embarrassment, and fear of not being believed. Too often, minors consider their experiences of sexual and gender-based abuse as normal and decline to complain to adults, let alone to report specific incidents. Victims often decline to report because they believe the incident is not serious enough to report and do not want to make it a big deal. When youth see their peers who do speak out denied effective responses or suffer a backlash, they become further conditioned by rape culture and toxic masculinity to downplay their experiences and accept
victimization as a fact of life.\textsuperscript{109} This is the definition of rape culture.\textsuperscript{110} As a result, overall estimates of SGBV among youth are undoubtedly low as much sexual victimization goes unreported, particularly among males,\textsuperscript{111} college students,\textsuperscript{112} persons of color,\textsuperscript{113} children with disabilities,\textsuperscript{114} LGBTQI students,\textsuperscript{115} and girls in foster care.\textsuperscript{116}

\textsuperscript{109} See Hlavka, supra note 108; Swenson, supra note 9.

\textsuperscript{110} See Glossary: Rape Culture, supra note 6 (“Rape culture . . . make[s] sexual violence and coercion seem so normal that people believe that rape is inevitable . . . ‘just the way things are.’”).

\textsuperscript{111} See Karen G. Weiss, Male Sexual Victimization: Examining Men’s Experiences of Rape and Sexual Assault, 12 MEN & Masculinities 275, 283–85 (2010), https://journals.sagepub.com/doi/pdf/10.1177/1097184X08322632 [https://perma.cc/H8AZ-GB54] (finding that men are half as likely (14.9%) to report incidents of rape and sexual assault than women (29.6%) because of the belief that only women are supposed to be victims of rape and sexual assault and the feeling of shame for failing to fulfill societal expectations of masculinity); Patricia Taden & Nancy Thoenness, U.S. Dep’t. of Justice & National Institute of Justice, Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey (2006), https://www.ncjrs.gov/pdffiles1/nij/210346.pdf [https://perma.cc/7243-C9M5] (“Only 19.1 percent of the women and 12.9 percent of the men who were raped since their 18th birthday said their rape was reported to the police.”); Felson & Paré, supra note 105, at 17 (finding that men were especially unlikely to report sexual assault by a female partner). For discussion by male survivors about the decision to report their victimization, see Sexual Assault of Men and Boys, RAINN (RAPE, ABUSE & INCEST NATIONAL NETWORK), https://www.rainn.org/articles/sexual-assault-men-and-boys [https://perma.cc/W4P3-BNSP] (linking to several firsthand accounts).

\textsuperscript{112} See Fisher et al., supra note 108, at 23–26 (finding that more than 90% of college women did not report their rape or sexual assault); Kristin Jones, Barriers Curb Reporting on Campus Sexual Assault, in CTR. FOR PUB. INTEGRITY, SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE 31–45 (Feb. 24, 2010), https://cloudfront-files-1.publicintegrity.org/documents/pdfs/Sexual%20Assault%20on%20Campus.pdf [https://perma.cc/8ZC9-ZAV3]; Sofi Sinozich & Lynn Langton, U.S. Dep’t. of Justice, Bureau of Justice Statistics, Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013 at 9 (Dec. 2014), https://www.bjs.gov/content/pub/pdf/rsava9513.pdf [https://perma.cc/U4VX-TEFB] (finding that college females were less likely to report (20%) rape or sexual assault to police than females between eighteen and twenty-four who were not students (32%)).


\textsuperscript{114} See Jesse Krohn, Sexual Harassment, Sexual Assault, and Students with Special Needs: Crafting an Effective Response for Schools, 17 U. PA. J. L. & SOC. CHANGE 29, 32 (2014) (detailing estimates that reports are made for only 1 in 30 disabled survivors of sexual abuse); West Virginia Sexual Assault Free Environment, Sexual Victimization of
Although a discussion of the challenges posed by Title IX is beyond the scope of this Article, minors who experience sex-based discrimination or abuse in elementary, middle, and high school remain woefully overlooked and underserved by existing Title IX mechanisms relative to college students, and minors have scarce knowledge about school sexual harassment policies and protections. Some scholars contend that elementary, middle, and secondary schools are


115 See DANK ET AL., supra note 100, at 9 (noting that LGBT youth are “more than twice as likely to experience negative sexual contact [by the police] and to report not feeling as comfortable seeking a police officer for help); Goldberg et al., supra note 100, at 380–81 (noting that only 54% of those victimized for sexual orientation or gender identity reported their experiences to the police, and those that do report find that their complaints are not taken seriously, they themselves are charged with a crime, and they are subject to police violence, harassment, threats, and bullying); HUMAN RIGHTS WATCH, “LIKE WALKING THROUGH A HAILSTORM”: DISCRIMINATION AGAINST LGBT YOUTH IN US SCHOOLS (Dec. 7, 2016), https://www.hrw.org/report/2016/12/07/walking-through-hailstorm/discrimination-against-lgbt-youth-us-schools [https://perma.cc/DHG6-9CWN] (detailing how LGBTQI youth in schools face both higher levels of harassment and lower levels of support when they report it, as well as fear of “strong disapprobation, violence, or being kicked out of their house if their transgender status was disclosed to their parents”); KOSCIW ET AL., supra note 91, at 27–33 (finding that the majority of students did not report incidents of harassment and assault to school staff or family, primarily because they believed the staff would not do anything about it or that school staff would not handle the situation effectively); Lu, supra note 90 (detailing the barriers to reporting SGBV faced by LGBTQ youth); but see Marla E. Eisenberg et al., Sexual Assault, Sexual Orientation, and Reporting Among College Students, J. INTERPERSONAL VIOLENCE 1, 12–14 (2017), https://journals.sagepub.com/doi/10.1177/08862605177265414 [https://perma.cc/9T28-ERCG] (finding no significant difference between rates of heterosexual and non-heterosexual college students reporting sexual assault, consistent with prior research on reporting by sexual minorities).

116 See SEXUAL ABUSE TO PRISON PIPELINE, supra note 79, at 28 (discussing the underreporting of sexual abuse of girls in foster care).

117 See HOSTILE HALLWAYS, supra note 1, at 16 (finding that only 36% of students said that their schools distributed literature about sexual harassment); Lauren Lichty et al., Sexual Harassment Policies in K-12 Schools: Examining Accessibility to Students and Content, 78 J. SCH. HEALTH 607, 612–13 (2008) (finding that less than 15% of schools surveys made their sexual harassment policies online and were particularly inaccessible at the elementary school level, potentially affecting student rates of reporting sexual harassment); Emily Suski, The School Civil Rights Vacuum, 66 UCLA L. REV. 720, 736–40 (2019) (arguing that schools’ very limited liability for peer sexual harassment under Title IX leaves students with virtually no legal recourse against schools, which have a duty to protect children while they are in their care); Lauren Camera, #MeToo Goes to School: A Push Is On for More Openness and Accountability When It Comes to Sexual Misconduct and Harassment at the K-12 Level, US NEWS & WORLD REPORT (Jan. 8, 2018), https://www.usnews.com/news/education-news/articles/2018-01-08/the-metoo-movement-goes-to-school (noting that LGBT youth are “more than twice as likely to experience negative sexual contact [by the police] and to report not feeling as comfortable seeking a police officer for help); Lauren Camera, #MeToo Goes to School: A Push Is On for More Openness and Accountability When It Comes to Sexual Misconduct and Harassment at the K-12 Level, US NEWS & WORLD REPORT (Jan. 8, 2018), https://www.usnews.com/news/education-news/articles/2018-01-08/the-metoo-movement-goes-to-school [https://perma.cc/4XRZ-4VL3] (citing expert opinions that K-12 schools are not as equipped to handle complaints of sexual harassment as colleges and universities); Mark Keirleber, The Younger Victims of Sexual Violence in School, THE ATLANTIC (Aug. 10, 2017), https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418/ [https://perma.cc/N3P8-9BAZ] (noting that SGBV among K-12 students has largely been overlooked and handled poorly under Title IX, despite the recent increase of Title IX complaints against K-12 schools and greater scrutiny and guidance by the Office of Civil Rights under the Obama Administration); see, e.g., OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., CHICAGO PUBLIC SCHOOLS DISTRICT 299 (Sept. 2019), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05151178-a.pdf (uncovering 2,800 student-on-student sexual harassment complaints and 280 adult-on-student complaints at more than 400 schools in Chicago); see also Amy B. Cyphert, Objectively Offensive: The Problem of Applying Title IX to Very Young Students, 51 FAM. L. Q. 325 (2017) (arguing that the limited liability of schools under Title IX and confusion about compliance obligations lead schools to
themselves “training grounds for harassment” because court case analyses reveal pervasive neglect of harms on the part of school authorities as well as courts’ overwhelming deference to schools’ decisions—with recent changes to Title IX regulations promising to exacerbate the crisis.\footnote{See CTR. FOR PUB. INTEGRITY, supra note 112 (revealing the institutional barriers facing victims, underreporting by universities, and lack of accountability by the Office of Civil Rights); see, e.g., Michelle J. Anderson, \textit{Campus Sexual Assault Adjudication and Resistance to Reform}, 125 \textit{YALE L.J.} 1940, 1940–69 (2016) (discussing the prevalence of sexual assault on college campuses and OCR’s application of Title IX to campus sexual assault); Nancy Chi Cantalupo, \textit{Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence}, 43 \textit{LOY. U. CHI. L.J.} 205 (2011) (explaining how the judicial requirement of actual notice, lack of DOE enforcement, and problems with the Clery Act have produced “information problems” that encourage schools to inadequately investigate and educate about sexual assault); Donna Coker, \textit{Crime Logic, Campus Sexual Assault, and Restorative Justice}, 49 \textit{TEX. TECH L. REV.} 147, 162–87 (2016) (urging an intersectional view of campus sexual assault victims and highlighting social science research findings); Tamara Rice Lave, \textit{Ready, Fire, Aim: How Universities Are Failing the Constitution in Sexual Assault Cases}, 48 \textit{ARIZ. ST. L.J.} 637 (2016) (arguing that universities violate the procedural due process rights of students accused of sexual assault by providing inadequate protections in disciplinary proceedings); Zoe Ridolfi-Starr, \textit{Transformation Requires Transparency: Critical Policy Reforms To Advance Campus Sexual Violence Response}, 125 \textit{YALE L.J.} 2156, 2160–69 (2016) (describing how the lack of transparency in university Title IX investigations prevents detection of inappropriate investigations, adjudications, and sanctioning); Diane L. Rosenfeld, Commentary, \textit{Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus}, 128 \textit{HARV. L. REV. FORUM} 359 (2015) (offering the concept of “target rape” to describe the culture of normalized campus sexual"

overcorrect with zero-tolerance and other disciplinary policies for sexual harassment that are especially inappropriate for young children); Catherine MacKinnon, \textit{In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education}, 125 \textit{YALE L.J.} 2038 (2016) (arguing that the deliberate indifference test for Title IX claims violates principles of sex equality and creates perverse incentives for schools to avoid learning of sexual abuse instead of providing redress); Tonnesen, supra note 79, at 11–15 (noting that “[K-12] schools have failed dramatically” in their Title IX responsibilities to inform students of sexual harassment policies and investigate sexual harassment claims, particularly in minority communities); see generally 20 U.S.C. § 1681(a) (2018) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”).

\footnote{Ann C. McGinley, \textit{Schools as Training Grounds for Harassment}, 2019 \textit{U. CHI. LEGAL F.} 171, 191–221 (2019) (arguing that then-proposed OCR amendments are closer to courts’ strict interpretations of Title IX protections rather than OCR’s traditional standards, which were more likely to find a school to be noncompliant in responding to student sexual harassment complaints); see generally \textit{Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance}, 85 Fed. Reg. 30026 (May 19, 2020) (codified at 34 C.F.R. pt. 106) (effective Aug. 14, 2020).}

\footnote{Complaint at 2–4, Doe v. Carranza, No. 1:19-cv-02154 (E.D.N.Y. Apr. 29, 2019).}

\footnote{\textit{Id.} at 17, 19, 35, 37.}

\footnote{The allegations include the rape of a fourteen-year-old girl with autism in a school stairwell, and an Assistant Dean telling a thirteen-year-old “Oh, he just likes you” after her classmate reached under her skirt to touch her. The lack of action by colleges and universities in investigating and addressing campus sexual assault, which perhaps receives more attention than incidents among K-12 students, also presents many challenges for victims of SGBV.\footnote{See generally \textit{Schools as Training Grounds for Harassment}, 2019 \textit{U. CHI. LEGAL F.} 171, 191–221 (2019) (arguing that then-proposed OCR amendments are closer to courts’ strict interpretations of Title IX protections rather than OCR’s traditional standards, which were more likely to find a school to be noncompliant in responding to student sexual harassment complaints); see generally \textit{Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance}, 85 Fed. Reg. 30026 (May 19, 2020) (codified at 34 C.F.R. pt. 106) (effective Aug. 14, 2020).}
Unfortunately, both domestic and international efforts against SGBV have failed to recognize the impact of both sexual violence and more nuanced, gendered harms. For example, the International Criminal Court (ICC) has prosecuted crimes of sexual violence in situations of conflict and human rights crisis but have yet to convict “gendered crimes” or crimes of gender-based persecution where someone is victimized for defying narrowly defined gender roles. While different from sexual assault and violence, gendered harms and violations of human dignity also evince the systematic persecution of persons based on gender identity, gender expression, and sexuality. Although the International Law Commission deleted a controversial, outdated definition of gender from the most recent draft of the crimes against humanity (CAH) treaty in May 2019, that change has not yet become international law. Recognizing gendered harms is consistent with the stance that all individuals have the right to be free from discrimination and violence on the basis of gender, including gender expressions based on sexual orientation and gender identity. U.S. Title IX policies and response systems are typically also at a loss when faced with gender-based incidents (rather than overt sexual assault or harassment) in schools, although the lines are admittedly tricky for both survivors and school officials to draw, and these difficulties persist throughout all levels of education, including universities.

Many adult perpetrators evade accountability for causing sexual and gender-based harms while wielding power in the highest levels of politics, law, the arts, industry, athletics, academia, and the clergy, or, conversely, while going unnoticed in everyday life and within intimate family circles. Meanwhile, students are routinely subjected to environments at school and online that assault and urging a focus on education and prevention of “target rape”); see generally Brice & Palmer, supra note 6.

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122 Davis, supra note 12, at 515.

123 See, e.g., Davis, supra note 12 (urging a gender-based view of ISIS’s crimes against humanity that aims to punish crimes systematically directed towards women and LGBTIQ persons).


125 See Office for Civil Rights, U.S. Dep’t of Education, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Mar. 13, 1997), https://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html [https://perma.cc/3JK8-EAL9] (requiring “gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving conduct of a sexual nature” to be “sufficiently severe, persistent, or pervasive, and directed at individuals because of their sex,” but not sexual orientation, to constitute a Title IX violation); see also Phillip Buckley, Planning Ahead and Taking A Stand: Balancing Student Speech Rights and the Promotion of A Safe, Welcoming School, 352 EDUC. L. REP. 1, 2 (2018) (“While drawing lines is not easy, educators and scholars have sought to distinguish between relatively harmless teasing and relatively harmful discriminatory, derogatory and denigrating speech”); MacKinnon, supra note 117.

make it possible for gendered harms and SGBV to persist—with particular impact upon youth of color, LGBTQI youth, and children with special needs—with little hope that reporting incidents to school staff or law enforcement will result in meaningful intervention. The #MeToo movement has placed a spotlight on the harms associated with rape culture and toxic masculinity and empowered victims to share their truths, but at the same time it has failed to give due attention to the experiences and voices of its youngest survivors. Unfortunately, the legal system also continually fails to address the experiences of young victims appropriately and lacks the tools to successfully educate and empower them.

C. Youth: A Universal and Critical Concern

Without a frank approach to SGBV among minors in the #MeToo era, profound transformation on the interpersonal, social, cultural, and institutional levels will remain elusive. It is often easy to forget that every adult on the planet was once a youth and that gender injustice, sexual injustice, and victimization begin at an early age. Childhood and adolescence are universal and formative, albeit not uniform, experiences that determine the behavior and identity of adults. Regardless of an individual’s social positioning, the law itself also plays a formative developmental role during youth by setting limits (or a lack of them) upon behavior, affording protections and privileges, and providing education, though education is not a federal constitutional right. Recent scholarship in children’s rights has theorized about the law’s own developmental expectations of youth, whether societal expectations about equipping youth for healthy adulthood are at all clear, whether resources and education consistently build capacity for independence and law-abiding life, and who bears responsibility for helping minors grow up.


127 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that education is not a fundamental constitutional right); see, e.g., Emily Buss, The Gap in Law Between Developmental Expectations and Educational Obligations, 79 U. CHI. L. REV. 59, 68–71 (2012) (discussing how affirmative educational obligations are derived primarily from state constitutions, but are so broad that they are only somewhat successfully used to improve the equality and adequacy of school funding); Michael N. Tennison & Amanda C. Pustilnik, “And If Your Friends Jumped Off a Bridge, Would You Do It Too?”: How Developmental Neuroscience Can Inform Legal Regimes Governing Adolescents, 12 IND. HEALTH L. REV. 533, 543–56 (2015) (defining the range of legal approaches taken by states to limit and regulate behavior by adolescents).

128 See, e.g., GIRLS FOR GENDER EQUITY, THE SCHOOLS GIRLS DESERVE 19–20 (2017), https://www.ggenyc.org/wp-content/uploads/2017/11/GGE_school_girls_deserveDRAFT6FINALWEB.pdf [https://perma.cc/MLV3-HW8F] (finding that New York City Public Schools failed to provide mental health counseling, extracurricular activities, sports, and other resources that are essential to improving participation, attendance, graduation rates, and overall academic performance, as well as supports for handling situations involving the child welfare system, homelessness, child sexual abuse, and commercial exploitation); CARA MCCLELLAN, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND & THURGOOD MARSHALL INSTITUTE, OUR GIRLS, OUR FUTURE: INVESTING IN OPPORTUNITY & REDUCING RELIANCE ON THE CRIMINAL JUSTICE SYSTEM IN BALTIMORE (2018) (describing the racially isolated Baltimore City Public School System’s failure to provide basic needs and resources, such as access to bathrooms, heating systems, and rigorous course offerings, and BCPSS’s overreliance on policing in schools and confinement, misconduct and use of excessive force by school police officers, and punitive responses to trauma-related behavior) https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf [https://perma.cc/A785-KT99]. For competing
Regardless of the challenges and opportunities that individual minors face, tolerance for SGBV sends a bold message early in life that SGBV, the stigmatization of sexual minorities, and broader rape culture are socially acceptable. Attitudes like “that’s locker room talk” or “boys will be boys” trivialize male sexual aggression.\(^{129}\) Victim-blaming of young girls who dress provocatively and supposedly exhibit irresistible sexual availability promotes harmful stereotypes of male aggression and female submission while stifling healthy identity development.\(^{129}\)

Although her work remains under-recognized, Tarana Burke, the founder of “Me Too” as a phrase and activist rallying call, has always articulated a female youth-centric vision, emphasizing that the experiences and leadership of adolescent girls are critical to assuring broader justice.\(^{130}\) Burke’s New York based organization Girls for Gender Equity (GGE) is “an intergenerational grassroots organization committed to the physical, psychological, social, and economic development of girls and women.”\(^{132}\) GGE has committed to invigorating recent Me Too activism and continues “encourag[ing] communities to remove barriers and create opportunities for girls and women to live self-determined lives.”\(^{133}\) As the #MeToo era evolves, widespread frameworks for reforming the field of children and the law, see, e.g., Cheryl Bratt, *Top-Down or From the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 Yale L.J. F. 918 (2018) (criticizing fundamental constitutional change as impractical and arguing that reform must come from a youth-led, grassroots movement, citing #MeToo, #NeverAgain, and marriage equality as examples of movements that responded to deficiencies in the law); Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 Yale L.J. 144 (2018) (advocating a new approach that shifts from a parent-centered and developmental interests focus to promoting children’s broader interests, such as exposure to diverse values and experiences, identity, expression, relationships, and agency and equality rights); Martin Guggenheim, *The (Not So) New Law of the Child*, 127 Yale L.J. F. 942, 943 (2018) (arguing that “the most important way to protect children’s individual interests is to maximize the authority of parents to make individualized decisions for and about them”).

\(^{129}\) See McGinley, supra note 6.


\(^{132}\) *About*, GIRLS FOR GENDER EQUITY, supra note 131.

\(^{133}\) Id.
empowerment will indeed depend upon keen analysis and strong recalibration of our ineffective legal approaches.

While the experience of SGBV between minors is alarming, underreported, and complex, no justification exists for omitting this phenomenon from #MeToo era discourse, policy-making, or study. Inappropriate treatment of SGBV between youth throughout the legal landscape raises further concern that survivors will be silenced or revictimized as underlying reasons for harm and broader rape culture go unaddressed.

II. THE PROBLEMATIC STATUS QUO

The current legal landscape of responses to SGBV among youth relies on an ill-suited criminal law paradigm that facilitates both overcriminalization and under-protection. Existing responses include state and federal statutes as well as jurisprudence, law enforcement practices, and the policies and regulations of public agencies and schools. As a largely ineffective body of legal interventions, the status quo approach to SGBV among youth has three core features: (1) adult-focused responses that apply a blunt, generalized legal tool and oversimplify a complex, nuanced incident unique to youth identity, development and culture; (2) infantilizing responses that fail to recognize and support emerging youth sexuality in favor of paternalism, surveillance, or repression; and (3) non-existent or inadequate responses to critical instances of harm that are unique to minors. Instances of sexting among youth provide an apropos case study to illustrate how any of the three aforementioned approaches might be applied to a typical habit for arbitrary reasons.

A. Adult Focused Approaches

Adult focused legal interventions to SGBV among minors overwhelmingly view an incident between minors through a criminal law lens and apply a blunt legal tool designed for adults. #MeToo movement founder Tarana Burke, along with many scholars and advocates, contend that the criminal approach to SGBV among adults is likewise fraught.\(^{134}\) Interventions for

\[^{134}\] Tarana Burke, #MeToo Founder Tarana Burke on the Rigorous Work That Still Lies Ahead, VARIETY (Sept. 25, 2018, 6:00 AM), https://variety.com/2018/biz/features/tarana-burke-metoo-one-year-later-1202954797/ [https://perma.cc/8S7S-XJ7S] (“If we could pull back from focusing on the accused and zero in on the ones speaking out, we would see common denominators that bridge the divide between celebrity and everyday citizens: the diminishing of dignity and the destruction of humanity. Everyday people—queer, trans, disabled, men and women—are living in the aftermath of a trauma that tried, at the very worst, to take away their humanity. This movement at its core is about the restoration of that humanity.”); see, e.g., DONNA COKER ET AL., ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING (2015), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1075&context=cl_pubs [https://perma.cc/J8W4-YMD6] (finding from a study of over 900 survivors of sexual assault and domestic violence that they experienced significant levels of police hostility and bias, and suffered negative collateral and punitive consequences in immigration, child welfare, and even arrest); LEIGH S. GOODMAN, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 12–33 (2018) (tracing the growing carceral response to domestic violence in the U.S. since the 1970s, which has led to higher arrest rates among abused women, intervention of the child welfare system, the disempowerment of abuse victims, and a disproportionately negative impact on women of color); Leigh S. Goodmark, Restorative Justice as Feminist Practice, 1 INT’L J. RESTORATIVE JUST. 372 (2018) (explaining that restorative justice, while not without its flaws, is consistent with feminist goals of amplifying women’s voices, fostering empowerment, and engaging women in community); Guy Hamilton-Smith, The Agony & the
minors utilize penal statutes (rather than youth and family codes or social services laws), adult criminal law theories, and conceptual definitions corresponding to adult psychology and sociocultural norms. For example, these interventions assume that barring obvious red flags about mental instability or diminished capacity, an accused perpetrator has the capacity to understand the criminal act, derive intent to commit the act, and contemplate potential consequences of harm to a victim or institution. Such responses also fail to initially inquire about underlying reasons for an incident between youth and instead rely on criminal statutes rooted in theories of adult culpability, criminality, punishment, and deterrence. However, knee-jerk criminalization of youth behavior declines to contextualize, comprehend, and clearly define incidents between developmentally immature parties who may lack information about the event, behavior, options, and even their own personal intent and risk.

Jurisdictions employ a range of adult-focused statutes to regulate sexual behaviors exhibited by minors, including consensual, nonconsensual, coercive, and deceptive incidents featuring harms of varying degrees and no apparent or perceived harm on the part of victim(s). A given jurisdiction may utilize laws covering child pornography and child sexual exploitation to address sexting or revenge porn,135 rape and sexual assault laws to address both consensual and

nonconsensual real-time sex, as well as lewdness laws, harassment laws, and laws prohibiting the corruption of a minor. Ironically, when legal systems use statutes intended for child protection—such as child pornography statutes—to prosecute minors, they overwhelmingly contravene the legislative purpose by targeting members of the protected class as perpetrators. Accused and purportedly victimized minors are often under their states’ age of consent, have a status worthy of legal protection, and by definition of the very law at issue may be too young to comprehend both the extent of their purported crimes and the consequences.

However, among the many instances of overreliance on adult focused approaches, situations where consensual behavior between youth is unnecessarily criminalized and where youth face mandatory sex offender designation are particularly egregious.

1. Overcriminalization of Consensual Behavior

The present legal landscape casts as deviant—or by virtue of existence harmful—much sexual behavior among minors that the youth involved agree is consensual and free of harm. For example, the situation between Dayvon and Kevin described in the Introduction. This knee-jerk impulse to see harm and crime without an inquiry into the actual existence of harm or the intent of the parties sends a message that youth cannot choose consensual sexual activity without criminal implications. Importantly, existing laws often criminalize digital acts such as the creation of lewd behavior; see, e.g., People in Interest of T.B., 452 P.3d 36, 44–45 (Colo. App. 2016) (holding that Colorado’s sexual exploitation of a child statute did not exempt teen sexting from its reach).

See Cynthia Godsoe, Recasting Vagueness: The Case of Teen Sex Statutes, 74 WASH. & LEE L. REV. 173, 186–211 (2017) [hereinafter Godsoe, Recasting Vagueness] (outlining the overcriminalization of juveniles and the inappropriate enforcement of statutory rape laws against peer sexual encounters); Anna High, Good, Bad, and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class, 69 ARK. L. REV. 787, 796–801 (2016) (criticizing the applicability of statutory rape laws without age-span provisions or a minimum age of defendant to minor-minor sexual activity); Jonathan Todres, Maturity, 48 HOU. L. REV. 1107, 1139–42 (2012) [hereinafter, Todres, Maturity] (“[W]hen peers engage in consensual sex, the older partner can be convicted under statutory rape laws and subject to the requirement that he or she registers as a sex offender.”).

See HASINOFF, supra note 100, at 29 (noting that a prosecutor could charge sexting photos “on the lesser and even vaguer charge of ‘open lewdness’”); see, e.g., REV. STAT. ANN. § 201.230(1)(b) (West 2015) (“A person is guilty of lewdness with a child if he or she . . . i) is under the age of 18 years and willfully and lewdly commits any lewd or lascivious act,” short of penetration, with “a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child.”).

See Miller v. Alabama, 567 U.S. 460, 470–73 (2012) (finding that children have diminished culpability, lack of maturity, and greater vulnerability, and so “are constitutionally different from adults for purposes of sentencing” and “are less deserving of the most severe punishments”) (citing Graham v. Florida, 560 U.S. 48, 68 (2010)); Godsoe, Recasting Vagueness, supra note 136, at 179–80 (punishment for peer sexual contact through imprisonment and sex offender registration is “is magnified by minors’ diminished culpability and increased vulnerability”); Kelsey Dumond, “Cast Me Not Away!”: The Plight of Modern Day Romeo and Juliet, 36 QUINNIPAC L. REV. 455, 460–62 (2018) (explaining that the underdeveloped brains of those under about twenty-five years “inhibit [their] ability to make mature, independent decisions” and make them likely “to act impulsively on their sexual desires, despite the consequences”); High, supra note 136; see also Todres, Maturity, supra note 136, at 1133–37 (noting the trend in criminal law toward treating children as “mature enough to suffer adult consequences” even when “research demonstrates that children do not have the capacity to understand the consequences of their actions in the same way that adults do”).

See supra Introduction.
images of a romantic partner while nevertheless considering the real-time sexual acts and relationship as legal and consensual.

Vague statutory rape laws criminalize consensual sex among minors in nearly every state based on age gaps. In many cases, both youth in a consensual relationship can technically be charged with committing statutory rape. As of 2017, consensual peer sex for individuals under age eighteen is decriminalized in only five states. While “Romeo and Juliet laws” create a carve-out from statutory rape for some consensual peer relationships, several states do not include multiple sex acts and LGBTQ relationships, which consistently receive discriminatory treatment.

Few studies have explored the demographic dimensions of SGBV prosecutions among youth considering race, ethnicity, and socioeconomic status. However, social scientists, legal practitioners, youth workers, families, and journalists in multiple jurisdictions report that over-prosecution is inherently selective, as a product of which youth’s communications or actions are discovered or reported, as well as who alerts parents, schools or law enforcement about the incidents. Youths sexting cases accessible through public records or news exposure demonstrate prosecutors’ breadth of discretion and creative paternalism, as well as the consistent impulse to send a message to accused youth. Often, the racial, socioeconomic, and intercultural dynamics

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140 Godsoe, Recasting Vagueness, supra note 136, at 202.

141 Id. at 218–22 (explaining the disproportionate prosecution and punishment of same-sex sexual activity, which is either punished more severely, excluded from age-gap provisions, prosecuted as sodomy, or otherwise selectively prosecuted in many states); see Michael Higdon, Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws, 42 U.C. Davis L. Rev. 195, 224–29 (2008) (highlighting two states—Texas and Alabama—that exclude homosexual activity from Romeo and Juliet exceptions and California, which has an exception from its statutory rape law but not its sodomy law and punishes sodomy more harshly, all of which discriminate against homosexual youth); Diana Caraveo Parra et al., Does Homophobia Affect Prosecutorial Discretion in Ambiguous Statutory Rape Cases?, 3 Soc. Just. & Equity L.J., no. 1, 2019, at 1 (discussing discrimination against same-sex youth in statutory rape laws and prosecution and finding from a survey of seventy prosecutors that they would seek more severe punishments for same-sex activity between youth).

142 See Godsoe, Recasting Vagueness, supra note 136, at 212–33 (describing how statutory rape laws are inherently overbroad, prone to selective prosecution along gendered, orientation, and racial lines, and largely influenced by parent reports); High, supra note 136, at 807–10 (discussing that prosecution against consenting minors, similarly situated minors, though rare, can be selectively used against those engaged in “bad sex”—adolescents in institutional settings, non-heterosexual youth, and black, male youth); Janis Wolak et al., How Often Are Teens Arrested for Sexting? Data from a National Sample of Police Cases, 129 Pediatrics 4, 7 (2012) (finding that police made arrests in 62% of sexual image cases involving adults, 36% of youth-only cases involving nonconsensual, malicious, exploitative, or otherwise aggravating behavior, and 18% of innocent cases involving only experimental and attention-seeking behavior); see, e.g., Com. v. Bernardo B., 453 Mass. 158, 159 (Mass. 2009) (selective prosecution claim in which a 14-year-old boy was convicted for statutory rape and sexual assault but the 11- and 12-year-old girls with whom he had consensual sexual activity were not charged); In re Welfare of B.A.H., 845 N.W.2d 158 (Minn. 2014) (rejecting a claim of selective prosecution of a 14-year-old boy for criminal sexual conduct but not the 13-year-old boy who consented); Jessica Blanchard, Cheerleaders’ Parents Sue in Nude Photos Incident, Seattle Post-Intelligencer (Nov. 21, 2008, 10:00 PM), https://www.seattlepi.com/local/article/Cheerleaders-parents-sue-in-nude-photos-incident-1292294.php [https://perma.cc/5V6D-Z9MU].

143 See, e.g., Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009), aff’d sub nom Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010). District Attorney Skumanick threatened to prosecute twenty students whose phones contained sexted images or who were themselves in the images unless they agreed to probation and to undergo a six- to nine-month education and counseling program (including a $100 program fee). Skumanick, 605 F. Supp. 2d at 638. When asked why these images implicated child pornography laws, Skumanick replied, “[T]hese are the rules. If you don’t like
of a jurisdiction play a significant role. Adults who fear that their children are either being corrupted or worthy of punishment cast narratives of victimhood and perpetration regardless of the minors’ own accounts or wishes.\footnote{144}

\begin{quote}
\textit{a. Sexting and Overcriminalization}
\end{quote}

For better or worse, sexting has become as common as in-person dating and is a powerful tool providing minors with peer affirmation. Comparable to the way that real-time, offline “popularity contests” have traditionally manifested—vis a vis clothing trends, physical signs of puberty, and invitations to social events—the accumulation of sexy text messages, hits on a blog or website, or “likes” of a racy photo on social media platforms are competitive signs of social status. Girls often attempt to garner more attention from boys by making their photos accessible, while boys express bravado in their own groups by demonstrating how easy it is to obtain photos from various girls.\footnote{145}

Sexting among minors is an arena in which the status quo legal landscape overwhelmingly perceives harm, malice, and crime. Sexting law and policy present a peculiar breadth of prosecutorial, judicial, and other law enforcement discretion combining two conflicting doctrinal areas: child pornography and juvenile justice. Children who sext—and notably minors who create images of themselves—have been prosecuted for felony creation, possession, and distribution of child pornography and of child exploitation, often requiring sex offender registration.\footnote{146} At times, youth are adjudicated delinquent for this behavior rather than charged

\footnote{144} See HASINOFF, supra note 100, at 35–39; Godsoe, Recasting Vagueness, supra note 136, at 215–18; Michelle Oberman, \textit{Two Truths and a Lie}, 38 L. & SOC. INQUIRY 364, 378 n.33 (2013) (“[P]ractically speaking, the law distinguishes victim from perpetrator by virtue of reporting: The victim is the one whose parents first complain to the police.”); Interview with Andrew Santa Ana, Executive Director, Day One (Oct. 31, 2018) (notes on file with author); Telephone Interview with Andrew Santa Ana, Executive Director, Day One (Mar. 2019) (notes on file with author); Telephone Interview with Katherine E. Mullen, Staff Attorney, Juvenile Rights Practice, The Legal Aid Society, Brooklyn, N.Y., (Aug. 4, 2016) (notes on file with author); Telephone Interview with Travis Johnson, Assistant Attorney-in-Charge, Juvenile Rights Practice, The Legal Aid Society, Brooklyn, N.Y. (May 2016) (notes on file with author); see, e.g., \textit{Bernardo B.}, 453 Mass. at 161–63.


\footnote{146} See HASINOFF, supra note 100, at 5–9, 25–48; Corbett, supra note 135; Alexandra Kushner, \textit{The Need for Sexting Law Reform: Appropriate Punishments for Teenage Behaviors}, 16 J. L. & SOC. CHANGE 281, 284–87 (2013);
with an adult criminal offense.\textsuperscript{147} Importantly, accused minors are usually under their states’ age of consent to have sex, are inherently members of the protected class that child pornography statutes shield from harm, and may be too young to fully comprehend both the extent of their purported crimes and their prosecutions.\textsuperscript{148}

Prosecution of minors for sexting occurs only when the commonplace behavior is either discovered by adults (often inadvertently), who later report it to law enforcement, or when it reaches a level of inappropriateness prompting youth to report the behavior themselves.\textsuperscript{149} Schools and other adult responders usually involve law enforcement to avoid liability because even in the hands of the most well-meaning adult, possession of a sexually explicit image of a minor amounts to patently illegal behavior.\textsuperscript{150} As of July 2019, twenty-six states have passed criminal laws related to sexting,\textsuperscript{151} and several more states have similar legislation pending.\textsuperscript{152} While all states

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\textsuperscript{149} See \textit{Hasiqoff}, supra note 100, at 35–39; Levick & Moon, \textit{supra} note 148, at 1036 (“Often the photos are discovered on cell phones confiscated by school officials, who turn over the evidence to the police.”); see, e.g., T.B., 452 P.3d at 39; Canal, 773 N.W.2d at 529.


\textsuperscript{151} Sameer Hinduja & Justin W. Patchin, \textit{State Sexting Laws}, \textit{Cyberbullying Research Center}, https://cyberbullying.org/pdfs/2019_Sexting_Laws.pdf [https://perma.cc/U2XC-HMZA] (last updated July 2019); see, e.g.,
that have passed sexting laws continue to criminalize the behavior, most states made sexting a lesser offense than child pornography as purported protection for youth by treating it as a misdemeanor or charging youth as juveniles. Limited reforms also base criminal charges and affirmative defenses on a young person’s role in an incident, their level of knowledge, their attempts to destroy the image, or their lack of intent to harm. Still others view age as a mitigating factor in prosecution or impose other minor fixes to criminalization.

Any criminal sanction for consensual sexting between minors creates unnecessary involvement with the courts, possible juvenile or criminal records, and often lifetime sex offender registration despite the behavior being a product of typical hormones, self-expression and experimentation that could be re-directed if reckless. Misguided sexting laws also contravene


Kallee Spooner & Michael Vaughn, Youth Sexting: A Legislative and Constitutional Analysis, 15 J. SCHOOL VIOLENCE 213, 217–18 (2016); see Kimberlianne Podlas, The “Legal Epidemiology” of the Teen Sexting Epidemic: How the Media Influenced a Legislative Outbreak, 12 U. PITT. J. TECH. L. & POL’Y 1, 40–41 (2011) (noting that these reforms are “designed to rescue teens from the harsh penalties of a child pornography conviction”).


See Kushner, supra note 146, at 288–89 (arguing that punitive responses to sexting penalize normal adolescent self-expression while also subjecting youth to the court system and causing a criminal record with long-term negative effects); Levick & Moon, supra note 148, at 1047–50 (detailing the adverse effects of a sexting conviction on future housing, education, employment, and residency from a juvenile record or sex offender registration); Rankin, supra note 148, at 2; Spooner & Vaughn, supra note 153, at 219 (noting that, as of 2016, the overwhelming majority of states still allow sex offender registration for minors involved in sexting); Robby Soave, Perverting Teen Sexting Laws: Laws That Punish Minors as Sex Offenders for Perfectly Normal Behaviors Harm Teenagers, USA TODAY (Jan. 10, 2016, 4:53 PM), https://www.usatoday.com/story/opinion/2016/01/10/perverting-teen-sexting-laws-criminal-felony-abbott-copengen-column/77745364/ [https://perma.cc/NA8M-XVQZ]; but see Leary, supra note 135, at 514–18 (arguing that states still have substantial flexibility in deciding whether sexting crimes will be subject to sex offender registration, preferably through prosecutorial discretion); James Merritt, Letter to the Editor, Sexting and the Law: Lessons for Youth, INDIANAPOLIS STAR, Jan. 15, 2010, at A15, available at 2010 WLNR 978175 (“[T]he intention is to carve out a new, less punitive status offense of sexting in which the offender can be taught the seriousness of the offense and be held accountable in a manner... [a]nd also to save these teens from felony records and jail, and... keep them off the sex offender registry.”).
the positive trend towards more realistic Romeo and Juliet statutes. Two minors who may legally engage in a romantic (real life) sexual relationship would face criminal charges for the mere technological depiction of that (legal) behavior. In a few promising developments, New Mexico amended its “Sexual Exploitation of Children” statute in 2016 to exempt consensual teen sexting between ages fourteen and eighteen.\textsuperscript{157} Washington also passed legislation in 2019 that would subject teens to counseling for a first offense of sexting, rather than a felony, and potentially a misdemeanor if the person photographed is between thirteen and seventeen years old,\textsuperscript{158} and several other states have considered legalizing or reducing penalties for consensual youth sexting.\textsuperscript{159} Advocates from civil rights, youth justice, and anti-violence organizations increasingly recommend that sexting altogether be viewed as an education issue, or as sometimes personal or parental, rather than legal.\textsuperscript{160} Some scholars propose amending federal sentencing schemes to exempt youth from federal child pornography offenses.\textsuperscript{161} Civil responses are still in their infancy.\textsuperscript{162}

2. Unnecessary and Stigmatizing Sex Offender Designation

The unnecessary and inappropriate stigmatization of minor (juvenile) sex offenders is a

\begin{footnotesize}
\begin{enumerate}
\item [\textsuperscript{157}] Act of Feb. 25, 2016, ch. 2, § 1, 2016 N.M. Laws 280, 281 (amending N.M. STAT. ANN. § 30-6A-3(B) (2016)).
\item [\textsuperscript{161}] E.g., Natasha Marie Landon, Sexting: The 21st Century’s Digital Lovers’ Lane, 79 OHIO ST. L.J. 591 (2018) (advocating for a class-wide exemption from federal child pornography offenses for sexting between minors).
\item [\textsuperscript{162}] See generally 160 AM. JUR. PROOF OF FACTS 3d Proof of Sexting and Criminal Liability §§ 3–10 (2017).
\end{enumerate}
\end{footnotesize}
controversial and unfortunate feature of overcriminalization. The status quo approach frequently ties Sex Offender Registration and Notification Act (SORNA) requirements to criminal penalties for nonviolent, consensual sexual behavior by youth. SORNA requirements can involve life-long court monitoring, severe restrictions on where an individual can live and work, and public notification of the individual’s residence and moves to a new jurisdiction— all imposed before a minor receives their complete secondary education or even decides their goals and aspirations for adulthood. This trend is part of a well-documented overreaction to juvenile sexuality as sex offending more generally. Recently, experts in the field of juvenile sex offending have reiterated their colleagues’ arguments that harsh public policies concerning juvenile sex offenders “contravene several lines of existing evidence” regarding the low likelihood of reoffending.

The tendency to overcriminalize and demonize minors’ sexual expression is not unusual, but can be traced to a constant propensity of adults throughout the ages to become alarmed about changing youth mores, rapidly evolving society, and modern technology. Media hype, legal overreaction, and public panic abound in eras of socio-cultural and economic transition. In other eras, panic about youth hyper-sexuality, social change, and moral turpitude focused on post-Victorian clothing trends, early city life, telephones, jazz music, rock and roll, and birth control.

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164 See, e.g., ACLU, supra note 160; Carter, supra note 147, at 12–15 (urging schools and judges to make individualized assessments and focus on educating teens of the harms of sexting); JUVENILE LAW CENTER, supra note 163; Landon, supra note 161.

165 Andrew J. Harris et al., Collateral Consequences of Juvenile Sex Offender Registration and Notification: Results from a Survey of Treatment Providers, 28 SEXUAL ABUSE: J. RES. & TREATMENT 770, 771 (2015) (finding from a survey of mental health specialists that juvenile sex offender registration and notification impose many negative consequences, particularly in light of juveniles’ low rates of recidivism); see Corey Yung, The Ticking Sex-Offender Bomb, 15 J. GENDER, RACE & JUST. 81, 82 (2012) (“. . . the belief that sex offenders generally, and child molesters specifically, will inevitably commit new offenses is not based upon reality. Nonetheless, the concept of the sex offender who is a ticking time bomb waiting to molest more children has served as the basis for numerous recent laws. Among other statutes, sex-offender registration, residency restrictions, community notification, and civil commitment have become increasingly popular ways to combat the perceived threat of sexual predators in our midst . . . [T]he results have significantly curtailed civil liberties and constitutional protections. The idea has proven so pernicious that it has become an unquestioned assumption of legislatures, judges, law enforcement, and government officials.”).

Mae Quinn’s work on puberty and sex-positivity compares girls prosecuted for sexting to urban girls of the Progressive Era who were penalized for expressing their sexual individuality in new public spaces, mainly because they threatened certain adults’ notions of propriety. Likewise, John Kip Cornwell compares “the assault on sexting” to the wave of statutory rape laws in the eighteenth, nineteenth, and early twentieth centuries, which also attempted to regulate public morality and protect vulnerable populations. Adult paranoia over sexting and youth sexuality in the digital age may be the latest “Techno-Panic,” which is typically disproportionate to the actual degree of risk involved to minors.

Further, concern about adult sexual predators has misguided fueled social fears about the dangers of youth sexuality among and the need for SORNA. The popular television show To Catch a Predator fosters law enforcement misrepresentation of data about online sexual predators and sex offending generally. Clinical research continually reveals that youth who do exhibit

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Note 167: Quinn, supra note 166, at 85–87.

Note 168: Cornwell, supra note 154, at 155.

Note 169: Alice Marwick, To Catch a Predator? The MySpace Moral Panic, FIRST MONDAY (June 2, 2008), https://firstmonday.org/article/view/2152/1966 (coining the term “technopanic” to refer to “the moral panic as a response to fear of modernity as represented by new technologies” and examining the technopanic surrounding early MySpace use).

Note 170: Willard, Achieving a Rational Response, supra note 135, at 547–48; see HASINOFF, supra note 100, at 9, 161–63 (providing a history of the sexting panic and noting that “rhetoric about the risks [of sexting] often exaggerates the actual danger and blames the consensual sexters for their failures to abstain from sexting”); see also STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS xxii (Routledge 2002) (1972) (explaining that a main element of moral panics is “[d]isproportionality,” whereby “[p]ublic concern is not directly proportionate to objective harm.”); Finkelhor, supra note 166 (discussing how technological changes have, throughout history, led to anxiety about the effect of these changes on children); Anne Collier, Why Technopanics are Bad, NET FAMILY NEWS (Apr. 23, 2009), https://www.netfamilynews.org/why-technopanics-are-bad (discussing the drawbacks of technopanics despite their perceived ability to prevent online abuse); Wade Roush, The Moral Panic over Social Networking Sites, MIT TECH. REV. (Aug. 7, 2006), https://www.technologyreview.com/s/406215/the-moral-panic-over-social-networking-sites/ (discussing proposed legislation to clamp down on minors’ access on commercial social-networking sites and chat rooms, which one professor “believes . . . plays on parents’ lack of understanding, and their resulting fears, about their kids’ activities on the Internet”); Adam Thierer, PROGRESS & FREEDOM FOUNDATION, TECHNOPANICS and the GREAT SOCIAL NETWORKING SCARE, PFF BLOG (July 10, 2008), http://blog.pff.org/archives/2008/07/technopanics_an.html (discussing technopanics in the context of the social media era).

sexual misbehavior rarely reoffend sexually and are especially amenable to treatment. Further, misapplying adult sex offender sanctions to minors “fails to consider the developmental and psychosocial contexts in which youthful sexual offending occurs,” meaning that sex offender “registration and notification are not only overly punitive and contrary to the parens patriae principles of juvenile justice but also may exacerbate rather than mitigate the risk of reoffense for many youth through their impact on the social adjustment of affected youth.” Although writing before the #MeToo era, the pediatric psychologist Mark Chaffin aptly framed the challenge of addressing juvenile sexuality in public policy when he lamented that “advocacy tends to be followed by excess.” Chaffin has shown that fundamental misperceptions of juvenile sex offenders – that they present uniquely high risk and largely homogeneous, intransigent behavior – are deeply enshrined in policies ranging from SORNA, to state and local placement policies, to treatment standards, all despite a large body of contradictory empirical evidence. Presently, no published studies connect juvenile requirements under SORNA with any positive public safety gains. On the contrary, the research on the relationship between state and federal juvenile SORNA policies with prevention and recidivism strongly support removing juveniles from those requirements.

B. Infantilization

In an attempt to protect minors from the dangers of sexual behavior, many jurisdictions also employ youth-specific statutes or interventions that ultimately infantilize minors and prevent the emergence of well-informed, discerning, supported, self-actualized adulthood.

The impulse towards paternalistic state overreach in response to SGBV involves what

See Harris et al., supra note 165; see also DAVID FINKELHOR ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, JUVENILES WHO COMMIT SEX OFFENSES AGAINST MINORS, JUV. JUST. BULL. 8 (2009), https://www.ncjrs.gov/pdfs1/ojjdp/227763.pdf [https://perma.cc/NHT3-M85Q].


See, e.g., id. at 135–37 (finding no relationship between juvenile SORNA policies in four states and rates of juvenile sexual crime reports, which supports excluding juveniles from state and federal registration policies).
some scholars coin “carceral protectionism” 178 or “punitive paternalism.” 179 Relying on the traditional European doctrine of parens patriae which undergirds the U.S. child welfare and family court systems, infantilizing approaches to SGBV mandate surveillance and programming for youth and families to the same end as parens patriae 180—to supposedly protect youth “from their own bad choices, as well as from manipulation and exploitation of their immaturity by others” because they lack certain physical, mental, and moral resources of adults. 181 Such intrusive approaches include unnecessary foster care placements for at-risk youth; mandatory participation in nonprofit, private, or state-run social service programs; extended curfews; electronic monitoring (e.g., probation ankle bracelets); social media monitoring; prolonged confiscation of communication devices; and continued child protective monitoring of adult guardians and homes of origin. 182

Despite any good intentions, compulsory surveillance, home removals, and unnecessary programming present a system of social control and moralistic overreach by the state, intruding

178 Jennifer Lynne Musto, Control and Protect: Collaboration, Carceral Protection, and Domestic Sex Trafficking in the United States 4, 28 (2016) (referring to the response to victims of domestic sex trafficking through “law-enforcement coordinated, social-service assisted interventions that may include arrest, detention, or technological surveillance—all under the auspices of helping them,” which actually expose the individuals to further risk of victimization); see McClellan, supra note 128, at 3 (“Nearly half of girls committed to out-of-home placement in 2017 had been either physically or sexually abused, compared to 18% of boys. Paradoxically, a history of trauma, in particular a history of sexual abuse and exploitation, is sometimes used by judges as a justification for detaining girls for longer periods of time ‘for their own protection.’”).


181 Id. at 43–44 (quoting Hrshman & Larson, supra note 13, at 126). Under parens patriae—literally, “parent of the country”—the state was responsible for all persons who were considered dependent, including minors, the disabled, and the mentally incapacitated. Id. at 43 (citing Grossberg, supra note 180). English common law had acknowledged the concept of diminished capacity, which included minors. Id. (citing Hrshman & Larson, supra note 13, at 126); see Grossberg, supra note 180, at 12–13. See also Charisa A. Smith, Don’t Wait Up: Issues in Juvenile Justice, 28 N.J. Fam. L. 144, 145 (2008) [hereinafter Smith, Don’t Wait Up] (citing interviews with various medical experts and academics regarding research on “differences between the decision-making capabilities and brain maturation of juveniles and adults”); MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, Issue Brief 3: Less Guilty by Reason of Adolescence 1–2 (2006) [hereinafter MacArthur Foundation Research Network], http://www.adjj.org/downloads/6093issue_brief_3.pdf [https://perma.cc/4UWK-HBSY] (advocating for developmental immaturity as a mitigating factor for sentencing of juveniles).

182 See Musto, supra note 178, at 9, 22, 31; Carter, supra note 147, at 9; Smith, No Quick Fix, supra note 88, at 22 (describing law enforcement’s collaboration with private and nonprofit social service agencies as an expansion of the carceral state); Sarah Stillman, The List: When Juveniles Are Found Guilty of Sexual Misconduct, the Sex-Offender, Registry Can Be a Life Sentence, The New Yorker (Mar. 7, 2016), https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes [https://perma.cc/P85M-4FSP]; see, e.g., Terms and Conditions of Sex Offender Probation, Yamhill County Juvenile Department, https://www.co.yamhill.or.us/sites/default/files/TERMS_SEX_OFFEND.pdf [https://perma.cc/J43A-94QZ] (last visited May 25, 2020).
upon minors’ psychological, physical, and legal autonomy. Such measures deepen both gender divides and racial, ethnic, and socio-economic oppression while potentially inhibiting upon individual civil rights. Infantilizing legal interventions for SGBV also ensure that racial and sexual minority survivors—who already have a warranted mistrust of public systems—will remain reluctant to seek redress among condescending, paternalistic, meddling service professionals, attorneys, courts, law enforcement officials, and state agencies. Paternalistic responses and coercive service provision can further re-traumatize survivors, whether or not the interventions are suited to a young person’s particular needs.

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183 Smith, No Quick Fix, supra note 88, at 22 (citing MUSTO, supra note 178, at 27–47); see HASINOFF, supra note 100, at 28 (criticizing the “consensus” that society should “monitor, control, and guide adolescent sexuality [either] through the legal system or through parental and school-based instruction”); see generally Godsoe, Punishment as Protection, supra note 179, at 1353–54 (citing Gerald Dworkin, Paternalism, STAN. ENCYCLOPEDIA OF PHILOS., https://plato.stanford.edu/entries/paternalism/ [https://perma.cc/88HV-8FA4] (last updated June 4, 2014)) (noting the overapplication of legal paternalism to minors); Dorothy E. Roberts, Democratizing Criminal Law as an Abolitionist Project, 111 NW. U. L. REV. 1597, 1602–03, 1605–06 (2017) (noting how public assistance programs, the foster care system, and law enforcement operate to monitor and regulate black women, while also removing children from black mothers and incarcerating black victims of domestic abuse seeking help); Victoria Law, Against Carceral Feminism, JACOBIN (Oct. 17, 2014), https://www.jacobinmag.com/2014/10/against-carceral-feminism/ [https://perma.cc/9JUW-8MKC] (drawing attention to the existing system of addressing domestic violence through incarceration and violence at the hands of the state, often against victims themselves, and urging a focus on “male entitlement, economic inequality, the lack of safe and affordable housing,” and other resources and community supports).

184 See Smith, No Quick Fix, supra note 88, at 66 (noting “the historical harm of excessive paternalism towards socially non-confirming [sic] children, the violation of their due process rights in child welfare and justice system efforts, and the racial, cultural and class dimensions of over-simplified child rescue endeavors); see generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOURLINESS 94–95 (2010) (describing how the U.S. criminal justice system is a tool of racial control, including the use of probation and parole surveillance and restrictions, which essentially guarantee that those released from prison will end up back there); Roberts, supra note 183, at 1603, 1606 (noting the many ways that the federal and state governments “regulate the sexual and reproductive decisions” of black women and inflict “intolerable amounts of state violence against black people” to “prop up the unequal U.S. racial order”).

185 See Smith, No Quick Fix, supra note 88, at 20–21 (explaining how punitive responses to juvenile sex offenses affect youth development and discourage youth from seeking help from the courts and social service agencies); see, e.g., DANK ET AL., supra note 100, at 9 (noting that LGBT youth are “more than twice as likely to experience negative sexual contact [by the police] and to report not feeling as comfortable seeking a police officer for help); HASINOFF, supra note 100, at 35–42 (criticizing the criminalization of consensual sexting for “the uneven application of the law, punitive and unfair education programs, and the silencing of victims,” and noting that reporting privacy violations “makes victims . . . vulnerable not only to harsh judgment and punishment but potentially to criminal charges”); RACHEL LLOYD, GIRLS LIKE US 123–25, 176–77, 181–83 (2011) (explaining mistrust, fear, and skepticism among young victims of sex trafficking of seeking help from police officers, particularly among girls from overpoliced minority communities, and from professional service providers, stemming from the trauma of abuse at the hands of traffickers and the police themselves); Godsoe, Punishment as Protection, supra note 179, at 1333 (describing how criminal responses to juvenile prostitution “rend[er] them unlikely to ever seek assistance” because they inadequately address victims’ needs and cause them to distrust the police); see also Fernando Camacho, Sexually Exploited Youth: A View from the Bench, 31 TOURNO L. REV. 377 (2015) (drawing on his experience with cases of sexually exploited minors to argue that intervention programs are a better solution to the cycle of prostitution and crime than prison sentences).

186 See, e.g., HASINOFF, supra note 100, at 35–42; MUSTO, supra note 178, at ix (quoting a district judge’s statement in an interview “about what happens when a child is placed in an unsafe foster home . . . ‘The question: Is that child being further traumatized by being treated as a criminal? Do I want to lock them up? No I don’t . . . We’ve got to get
1. Sexting and Infantilization

Criminal responses to sexting in particular reveal a misguided impulse to infantilize minors through carceral protection. Trial level juvenile and family courts—which rarely publish their findings and opinions—overwhelmingly select bizarre, infantilizing strategies to address sexting. These include house arrest, prohibitions on youth use of technology, compelling youth to dramatize certain behaviors, and accountability-based writing assignments that youth must share openly with the court or public officials regardless of compromised dignity or privacy. Sexting jurisprudence is scarce, but more generally, federal courts have ruled that schools can limit children’s Fourth Amendment rights in schools by searching their cell phones when there is a close nexus between school policy, scope of the search, and the inciting incident. Miller v. Mitchell is the main appellate decision on sexting among youth but does not deal directly with the activity or its definition. In Miller, teen girls were under scrutiny by a district attorney for sexting via cellphone and provided with an invasive, humiliating choice: enter an “educational” program where they would confess to serious wrongdoing in writing or face child pornography charges. The Third Circuit panel held that the district attorney’s demands likely violated the girls’ First Amendment rights against compelled speech even though the government compulsion...
was not a direct threat.192

C. Inadequate Responses and Neglect

While adult-focused approaches and infantilization are common throughout the current legal landscape, status quo approaches to SGBV among minors also manage to neglect crucial instances of victimization, harm, and boundary-crossing while compounding existing harms. Circumstances that do not fit neatly into the criminal law framework are frequently overlooked, underestimated, misunderstood, or exacerbated.

The current legal landscape ignores important types of SGBV among youth. For example, attorneys at the New York City based organization Day One work with youth who have experienced intimate partner violence (IPV) and find that survivors of revenge porn are often left feeling isolated and defeated.193 As victims, they are blamed by society and law enforcement for creating and sending an explicit image of themselves to begin with. Despite revenge porn becoming increasingly weaponized in abusive relationships, the legal system lags behind reality, shifting the focus away from the behavior of the person who shared the photos maliciously and without consent. Outdated child pornography laws assist perpetrators of abuse by placing young survivors of IPV in a catch-22 scenario: report the abuse to the police and risk being prosecuted for the creation and distribution of child pornography, or stay in an abusive relationship.194

Status quo legal responses also compound initial harm, as documented by attorneys, families, program staff, and media reports. For example, many interventions unnecessarily stigmatize youth sexuality. As local demographics and cultural context play a significant role in determining the legal response, parents—such as Kevin’s homophobic father in the scenario in the Introduction195—aim to safeguard their child’s virtue or penalize another child for corrupting their own, and the actual wishes and identity-formation of involved youth are obscured or suppressed.196 Even when a consensual romantic relationship exists between youth, parents and law enforcement may seek prosecution in an interracial or same-sex incident due to long-held cultural stereotypes regarding innocence, victimhood, guilt, and predation.197

192 Id. at 152.
193 Amanda Reynoso-Palley & Mary Ciera Wilson, Protect, Don’t Prosecute: Consensual Teen Sexting and Child Pornography Laws, Sex Offender L. Rep., Apr.–May 2019, at 33; see also Bates, supra note 61; Klettke et al., supra note 61.
194 JANIS WOLAK & DAVID FINKELHOR, CRIMES AGAINST CHILDREN RESEARCH CENTER, SEXTORTION: FINDINGS FROM AN ONLINE SURVEY ABOUT THREATS TO EXPOSE SEXUAL IMAGES 52, 55, 63 (2016), http://www.unh.edu/ccrc/Sextortion%20Report%20final%206-22-2016.pdf [https://perma.cc/9GTJ-3UR4] (noting instances where survey respondents feared being threatened, or were in fact threatened by police, with child pornography charges, so that “perpetrators were shielded from criminal consequences and respondents had little support from authorities,” while also often remaining in abusive relationships); Telephone Interview with Andrew Santa Ana (Mar. 2019), supra note 144; Reynoso-Palley & Wilson, supra note 193.
195 See supra Introduction.
196 See HASINOFF, supra note 100, at 35–39 (describing how “parents can also be a source of discrimination in their exercise of legal control over their adolescents’ sexuality,” leading to biases regarding sexual orientation, race, and class); see also Julia Halloran McLaughlin, Crime and Punishment: Teen Sexting in Context, 115 PENN ST. L. REV. 135, 142–43 (2010) (explaining how criminal responses to sexting stifle and punish the youth identity formation process).
197 See HASINOFF, supra note 100, at 35–39; Godsoe, Recasting Vagueness, supra note 136, at 215–18;
youth charged with any type of SGBV is minute in comparison with the statistical prevalence of criminalized behaviors, low-income youth of color and LGBTQ youth are overwhelmingly singled out for behavior that is widespread, commonplace, and often harmless. Too often, adults make inaccurate assumptions about the minors’ experiences, priorities, and needs. Responses to SGBV among youth in the current paradigm also fail to tackle rape culture and toxic masculinity directly. The commonplace teasing or harassment a young person experiences in school hallways or locker rooms is perceived as minor, although such behavior can underpin more harmful or serious situations. A misguided direction of resources towards the sharing of digital images between consenting partners such as Dayvon and Kevin precludes an inquiry about Kevin’s safety and emotional health at home, or about the overall safety of the school climate. Sexually aggressive or exploitative images in mass media, widely accepted language or humor, and discriminatory laws and policies impacting SGBV also remain continually unconfronted and unrecognized. The American Psychological Association Task Force on the Sexualization of Girls concluded that the proliferation of sexualized images of girls and young women in advertising, merchandising, and media is harmful to girls’ self-image and healthy development. Their report investigated the concerns about sexual media found in virtually every form of media, including television, music videos, music lyrics, magazines, movies, video games and the Internet, as well as advertising campaigns and merchandising of products aimed toward girls.

However, unchecked rape culture and toxic masculinity have concrete cognitive, emotional, and physical consequences for minors. Serious implications include low self-esteem, body image distortions, shame, anxiety, eating disorders, depression, isolation, suicidal tendencies, and stunted or dysfunctional sexual development. Inattention towards certain consensual, pleasure-seeking conduct that involves unaddressed risks or the need for guidance can...
also perpetuate SGBV and unhealthy sources of self-esteem and social status. For example, youth indicate that “sexually competitive behavior” will happen regardless of the technologies present. Peer pressure among some groups proliferates to the point where girls willingly compete to accrue the most sexual partners at an event for popularity while others fear the isolating consequences of voicing their personal disapproval or dissent.

1. Sexting and Neglected Harm

Typical approaches to sexting behavior among minors also neglect and exacerbate concerning instances of harm. At times, peers secretly record one another changing in the locker room and circulate the images to cyberbully a victim. Several “sexting rings” have been uncovered where boys nonconsensually exchange photos of female peers and may even profit financially from the enterprise. Media reports have also detailed scenarios where school administrators and counselors failed to address a youth’s complaints about being photographed or videotaped without consent and the bullying and harassment that often accompany these incidents. In such cases schools ignore repeated cries for intervention, normalize the abusive behavior, and fail to inform a victim about possibilities for support, intervention, or self-protection.

When youth actually bring their fears to adults for help with nonconsensual peer sexting and are ignored or receive minimizing responses, this perpetuates the cycles of shame involved with SGBV as well as overall rape culture. Nonconsensual circulation of a sexually explicit image

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203 Id. at 28–30; see, e.g., JOEL BEST & KATHLEEN A. BOGLE, FROM RAINBOW PARTIES TO Sexting, Kids Gone Wild: UNDERSTANDING THE HYPE OVER TEEN SEX 2–4 (2014) (describing stories from the early 2000s claiming that youth were collecting sex bracelets and participating in rainbow parties).
of oneself—particularly during childhood—is emotionally, psychologically, and socially harmful during a subject’s youth and throughout adulthood. Both survivor accounts and extensive research show that discovering the image’s “permanent record” and its circulation for the stimulation of others into perpetuity, can be traumatic, destabilizing, and “haunting.” A feeling of repetitive victimization ensues each time an image is viewed due to the exploitative nature of child pornography involving minors too young to consent. Multiple cases of nonconsensual sexting or revenge pornography have been linked to a young person’s suicide.

III. THE CORE DILEMMA: FAILURE TO RECOGNIZE #ME IN #METOO FOR MINORS

A survey of the legal landscape reveals that prevailing approaches to SGBV are ill-suited for minors, their unique and burgeoning identities, and their digital age socio-cultural worlds. Current responses fail to discern the concept of “Me”—one’s personal and sexual identity—as a developmentally distinct, evolving, and vulnerable selfhood for persons under age eighteen. An interdisciplinary lens that incorporates expertise in the physical sciences, social sciences, and public health reveals sound reasons for revamping the status quo approach to SGBV in order to better treat minors as a protected yet evolving class of persons with agency and leadership capacity. Emerging scholarship has begun to recognize the “grey area” of adolescence and the need for non-binary responses within the law and public policy. Despite the lack of continuity

207 Leary, supra note 135, at 525–26; see supra note 61.
208 Leary, supra note 135, at 525 (quoting Osborne v. Ohio, 495 U.S. 103, 111 (1990)); see also Kreimer, supra note 150, at 151 (“A major part of the real danger of sexting is the prospect that, instead of an ‘electronic hickey,’ impulsive minors will end up with the equivalent of a ‘cybertattoo’: that the diffusion of humiliating images over the Internet will mark them for life.”).
210 E.g., Burleigh, supra note 53; Dean, supra note 55; Goo Hara and the Trauma of South Korea’s Spy Cam Victims, BBC NEWS (Nov. 28, 2019), https://www.bbc.com/news/world-asia-50582338 [https://perma.cc/K9VW-GPXW]; Hastings, supra note 54; see also, e.g., Kashmir Hill, Dharun Ravi Gets Off Easy in Rutgers Spying Case: Month in Jail and $10,000 Fine, FORBES (May 21, 2012, 1:21 PM), https://www.forbes.com/sites/kashmirhill/2012/05/21/dharun-ravi-gets-off-easy-in-clementi-case-month-in-jail-and-10000-fine/#3e122a211ab0 [https://perma.cc/3SF4-4JHW].
211 See MACARTHUR FOUNDATION RESEARCH NETWORK, supra note 181; Smith, Don’t Wait Up, supra note 181, at 145 (contrasting emerging research showing later development of adolescent brains with punitive juvenile justice policies).
212 E.g., Emily Buss, Developmental Jurisprudence, 88 TEMP. L. REV. 741 (2016) [hereinafter Buss, Developmental Jurisprudence] (proposing a developmental approach to law that both protects children and plays a childrearing role); Smith, Don’t Wait Up, supra note 181, at 145; Jonathan Todres, Independent Children and the Legal Construction of Childhood, 23 S. CAL. INTERDISC. L.J. 261 (2014) [hereinafter Todres, Independent Children] (recognizing independent children as simultaneously mature and vulnerable compared to children in traditional family structures); Todres, Maturity, supra note 136, at 1107 (arguing for consideration of cultural perspectives on maturity under the law); see also Peter Ash, But He Knew It Was Wrong: Evaluating Adolescent Culpability, 40 J. AM. ACAD. PSYCHIATRY L. 21 (2012) (proposing several factors for forensic psychiatric evaluators to consider in determining a child’s culpability for the purposes of an insanity defense, such as appreciation of wrongfulness, ability to conform to law, developmental course of aggression and impulsivity, immaturity, out-of-character action, and environmental circumstances); but see, e.g., GIDEON YAFFE, THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY (2018) (arguing that children are punished less harshly for wrongdoing not because of reduced maturity or developmental conditions—otherwise they are being punished for normal behavior since they are less culpable—but
in U.S. juvenile law and the doctrinal debates throughout the literatures of children’s rights, juvenile justice, and family law, #MeToo-era progress requires rejection of the reflexive, ineffective criminal paradigm for SGBV among youth.²¹³

The subject of sexual and gender-based harms among minors has been surprisingly under-theorized. Nearly two decades ago, children’s rights scholars Elizabeth Scott and Laurence Steinberg astutely described youth crime regulation as “a cautionary tale of policy without theory.”²¹⁴ The groundbreaking work of Scott and Steinberg, along with countless other advances in scholarship, reform, and advocacy has led broader jurisprudence on youth crime to inherently engage interdisciplinary perspectives, most recently culminating in elimination of the harshest sanctions against minors—the juvenile death penalty and life imprisonment without parole. Yet, legal approaches for addressing SGBV among minors remain fixed within the classic criminal law paradigm of retributive justice, punitive response, and frequently zero tolerance. The digital age necessitates a distinct (although related), more nuanced empirical inquiry. Understanding #MeToo means applying lessons from extra-legal scholarship that can inform best practices on youth identity development, capacity-building, and sexual health; thresholds for legal intervention; definitions of capacity, consent, complicity, harm, crime, perpetration, victimization, and remedy; and ultimately a typology of incidents and potential responses.

A. The Developmental Perspective

Maturity and capacity to act and discern are complex physical, mental, cultural, social, and legal constructs that inform one’s ability to consent to sexual activity, to formulate intent towards harm, to contemplate future ramifications of a given behavior, and to demonstrate culpability for wrongdoing.²¹⁵ Although the youth population is diverse and far from monolithic, line-drawing based on chronological age always exists for practicality’s sake. Developmental

because they are unable to vote, and thus do not have a voice in lawmaking).

²¹³ See generally, e.g., HIRSHMAN & LARSON, supra note 13; Carissa Byrne Hessick & Judith M. Stinson, Juveniles, Sex Offenses, and the Scope of Substantive Law, 46 Tex. Tech. L. Rev. 5 (2013) (arguing that, like status offenses where youth are punished for activity that would be otherwise permissible if committed by adults, criminal law should be narrower for youth with respective to certain age-determinative sex offenses, such as statutory rape and child pornography, because such activity is less serious when committed by youth); Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 48 Buff. L. Rev. 703 (2000) [hereinafter Oberman, Regulating Consensual Sex] (highlighting the disconnect between the selective enforcement of overbroad statutory rape laws in practice and purported aim of protecting girls from coercion and exploitation, and instead proposing the use of extra-carceral responses and victim-led prosecution).


²¹⁵ See generally, e.g., Ash, supra note 212; Smith, Don’t Wait Up, supra note 181, at 145; Todres, Independent Children, supra note 212; Todres, Maturity, supra note 136, at 1107. The matter of juvenile competence to stand trial is more isolated and distinct from the subject herein. For reference on competence, see generally, e.g., Alan R. Felthous, Commentary: Competence to Stand Trial in Juveniles and the Judgment Model, 39 Am. Acad. Psychiatry L. 327 (2011) (discussing variation in standards used by courts in assessing juvenile competence to stand trial and incorporating prior findings that future orientation may play a role); Randy K. Otto, Considerations in the Assessment of Competent to Proceed in Juvenile Court, 34 N. Ky. L. Rev. 323 (2007) (examining current practices in attorney and court determinations of juvenile competence to stand trial); George Yeannakis, TEAMCHILD, Juvenile Competency to Stand Trial (CST), https://www.ncsl.org/documents/cj/yeannakisppt.pdf [https://perma.cc/TDZ8-NRHT] (last visited May 29, 2020).
experts agree that persons under age eighteen require specialized attention and legal treatment in the context of statutory rape and human trafficking.\footnote{216 See, e.g., AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE TASK FORCE ON TRAFFICKING OF WOMEN & GIRLS 32–33 (2014), https://www.apa.org/pi/women/programs/trafficking/report.pdf [https://perma.cc/K7SY-6R93]; Todres, Maturity, supra note 136, at 1142 (“To the thirteen-year-old, whether her boyfriend is sixteen years and ten months old or seventeen years old probably changes little if anything, but the law says the difference significant . . . Some line-drawing must occur in the law, and statutory rape laws provide important protections for young children.”).}

Both law and psychology make a strong distinction between persons over and under age eighteen although evidence also shows that humans continue maturing well into their mid-twenties while certain characteristics of youth in their teens can, at times, resemble those of adults.\footnote{217 MACARTHUR FOUNDATION RESEARCH NETWORK, supra note 181, at 2.} According to the Supreme Court in \textit{Roper v. Simmons},

\begin{quote}
Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in \textit{Thompson} drew the line at 16. In the intervening years the \textit{Thompson} plurality’s conclusion that offenders under 16 may not be executed has not been challenged. The logic of \textit{Thompson} extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.\footnote{218 543 U.S. 551, 574 (2005).}
\end{quote}

As society continues wrestling with boundary-setting, empiricism has most recently influenced the law—including Supreme Court opinions such as \textit{Roper}—by pointing to adolescence as a unique stage of human development. While children are typically considered not responsible, and adults are presumed fully responsible, adolescents are deemed “somewhere in the middle, in a gray zone, so it is often not clear whether a particular adolescent is only somewhat less culpable than an adult charged with a comparable crime, or considerably less culpable.”\footnote{219 Ash, supra note 212, at 21.}

sexuality, social location, thrill-seeking, and susceptibility to immature and irresponsible behavior, accompanied by a comparative lack of control over their immediate surroundings (as compared with adults).\footnote{222} Neuroscientific and psychosocial research now shows that while cognitive abilities of adolescents typically resemble those of adults, “psychosocial” abilities that undergird decision-making change greatly over the course of adolescence and into the mid-twenties, having the greatest implication for mitigation of criminal culpability.\footnote{223}

Ultimately, a scientific consensus has emerged that adolescents should be considered within a special legal category; that the overwhelming majority of offending youth under eighteen should remain in juvenile court to account for their diminished culpability, developmental capacity, and amenability to rehabilitation and treatment; and that youth under eighteen are not as equally mature as adults.\footnote{224} However, state and federal laws continue to splice the population of adolescents and pre-adolescents into various categories for various reasons. Nineteen states allow children age ten or younger to be adjudicated delinquent for their behavior, and twenty-nine states do not specify a minimum age of juvenile court jurisdiction.\footnote{225}

As of 2016, thirteen states allow youth age ten or younger to be tried in adult criminal court, while many others try older preteens and teenagers in adult court.\footnote{226} State ages of consent to sex now vary between age sixteen and eighteen,\footnote{227} with notable differences in tolerance for heterosexual and same-sex activity,\footnote{228} and minors’ ability to exercise rights to medical decision-making, abortion, contraception, and myriad other matters, continues to range by state—often illogically, and with younger age boundaries.\footnote{229}

A growing body of legal scholarship suggests that persons under age eighteen should not be prosecuted for sex offenses in the same way as persons over age eighteen because of their developmental uniqueness, their default tendency to desist from misbehavior, and their amenability to treatment.\footnote{230} These scholars suggest that the level of vulnerability inherent in

\footnotesize{\bibitem{222} See \textit{Roper}, 543 U.S. at 569–70; McNeely \& Blanchard, \textit{supra} note 220, at 45–53.}
\footnotesize{\bibitem{223} Smith, \textit{Don’t Wait Up}, \textit{supra} note 181.}
\footnotesize{\bibitem{224} MACARTHUR FOUNDATION RESEARCH NETWORK, \textit{supra} note 181, at 4. Commonalities in the maturing process of most adolescents, along with the impracticalities of evaluating individual maturity in all juvenile crime cases, further confirm the consensus. \textit{Id}.}
\footnotesize{\bibitem{228} See Godsoe, \textit{Recasting Vagueness}, \textit{supra} note 136, at 218–22; Higdon, \textit{supra} note 141, at 224–29.}
\footnotesize{\bibitem{229} For discussions of medical and reproductive decisionmaking rights by adolescents, see \textsc{Samuel M. Davis, \textit{Children’s Rights Under the Law} 88–90 (2011)}; Elizabeth S. Scott, \textit{The Legal Construction of Adolescence}, 29 HOFRSTA L. REV. 547, 566–76 (2000). Laws governing the civil emancipation of minors also vary by state and are often the sole way that minors can execute wills, \textsc{Davis, supra, at 21}, while at the same time unemancipated children often have substantial flexibility in entering into and disaffirming contracts, \textit{id}. at 10–15.}
\footnotesize{\bibitem{230} E.g., Godsoe, \textit{Recasting Vagueness}, \textit{supra} note 136, at 197–99, 246–57 (noting the lesser culpability and greater vulnerability of minors and urging for complete decriminalization of sexual activity between minors); Hessick &
minor status, including the fraught reasons that youth consent to sex with another person of any age, requires a different legal approach to regulation of youth sexual activity than the traditional sex offending statutory scheme.

Although a thorough discussion of sexual consent is beyond the present endeavor, the consent debate has flourished in the #MeToo era with implications for both minors and adults. As scholar Aya Gruber asserts, “The rapid proliferation of law, policy, and scholarship defining sexual consent has produced a legal terrain marked by uncertainty, contradiction, and hidden value judgments.” Future work should strive to demystify “the empirical and normative presumptions” embedded in concepts of consent and resist tendencies to bolster “the criminal apparatus” that too often inflicts further harm.

Bright lines regarding sexual consent among all age groups remain elusive. However, a working baseline age of consent to sex is discernable through a combination of youth development analysis and feminist socio-cultural considerations. Hirshman and Larson suggest that the age of consent to sex be sixteen years for all minors and that statutory rape (the act of sex between a person over age eighteen and a person under age sixteen) be a crime of strict liability, or “the equivalent of forcible rape.” This proposal requires decriminalization of all sex acts by minors, whether the sex occurs with adults or with other youth, since a protective rationale applies equally to child perpetrators and victims if “the child, like an unconscious adult, is not mentally or morally competent to consent.” After age sixteen, this approach would “balance protection for immaturity and respect for the complex developmental tasks of adolescence with the pleasure demands of the maturing body . . . and the practical problems of enforcement.”

Stinson, supra note 213; Oberman, Regulating Consensual Sex, supra note 213; see also Hirshman & Larson, supra note 13, at 272–76.

231 Aya Gruber, Consent Confusion, 38 CARDozo L. Rev. 415, 419 (2016)

232 Id. at 420; see generally, e.g., Jonathan Witmer-Rich, Symposium, Violence Against Women: Unpacking Affirmative Consent: Not as Great as You Hope, Not as Bad as You Fear, 49 Tex. Tech L. Rev. 57 (2016) (rejecting the assumption that affirmative consent is necessarily unambiguous and arguing that an affirmative consent standard would have little effect on rape prosecutions).

233 Hirshman & Larson, supra note 13, at 272–76.

234 Id. at 275–76 (“[W]e propose to exclude sex between underage persons from the category of statutory rape, and indeed from the reach of the law altogether . . . This is not because we regard sex between the young as either moral, wise, or a social good, or because we are not willing to see a female as a rapist. Instead, we are consistent in our adherence to the logic of the legal concept of incapacity, which intends to prevent the young from being held to bad decisions that will have enduring life consequences. This rationale argues for not judging the young in their sexual dealings as we would adults, extending this protective rationale even to perpetrators and not just to victims. Adults should not punish the sexually active young, but seek to restore young people to the path of flourishing, equality, and community membership.”).

235 Id. at 274–75 (“In addition, we would reject the traditional common law defenses of mistake of age and promiscuity of the victim . . . Because our goal is to impose a duty of care on the stronger player, we expect the older person to discover the age of any potential sex partner . . . As to the younger player’s ‘promiscuity,’ our proposal does not rest on the value that a child places on himself or herself as reflected in prior sexual behavior. Nor do we value only sexually innocent children, a position that limits legal protection to kids lucky enough never to have been harmed by sex before. The entrapment defense remains available in cases of gross unfairness to defendants. Finally, children should never be treated as criminals for making the bad sexual choice to deal with an adult. The core of the incapacity of age idea is that children are not competent to defend their own interests against predatory adults in an unregulated marketplace, sexual, economic, or otherwise.”).
Distinguishing between minors of a comparable age through a developmental approach is tricky and ongoing. Most experts on child sexual abuse assert that an age differential of five years or more between a child victim and a sexual aggressor constitutes an inherent dynamic of coercion, even when both parties involved are under age eighteen and when criminal ramifications are inappropriate. Romeo and Juliet statutes aim to decriminalize some, but not all, distinctions between minors with age differences in sexual relationships, in favor of permitting more consensual behavior.236

A few states have tiered or bifurcated statutory schemes of sexual consent for youth, divide youth under age eighteen into multiple categories, and account for both sexual autonomy among adolescents and the dangers of coercion among youth. The nature of the sexual relationship, including the position of the older person, are also highly crucial to most states today, i.e., whether there is an inherent abuse of authority by the older person—such as a babysitter, teacher, or coach—and whether the parties consider themselves romantic equals or not. Yet, many everyday consensual sexual encounters among minors remain widely overcriminalized just as other serious incidents are overlooked.237

Considering the propensity of youth towards sexual exploration and the prevalence of adolescent consensual sex including technology-based interaction, the status quo approach to SGBV among minors should shift from decriminalization to prevention, education on rape culture and healthy relationships, capacity-building, and interventions centering youth agency in accountability processes. Youth continue to need adult guidance, support, and realism.

Generally, youth between ages sixteen and eighteen are often able to consent to sexual activity but likewise incapable of fully grasping its repercussions; and younger youth have a long way to go before reaching maturity. Statutes imputing mens rea of a child pornographer to minors and requiring sex offender designation are overwhelmingly inappropriate. While Title IX response systems are not the focus herein, youth development research demonstrates that many minors—particularly those under preteen age or youth with learning or developmental disabilities—require continued education and guidance to aptly comprehend and report incidents of gender-based harassment and violence, not to mention understanding the types of language and notice legally required under Title IX.238

236 Godsoe, Recasting Vagueness, supra note 136, at 201–02.

237 See HASINOFF, supra note 100, at 25–48 (arguing for the decriminalization of consensual teen sexting and the treatment of nonconsensual activity as sexual assault); Godsoe, Recasting Vagueness, supra note 136; High, supra note 136; Kreimer, supra note 150; Todres, Maturity, supra note 136; cf. Tamar R. Birkhead, The “Youngest Profession”: Consent, Autonomy, and Prostituted Children, 88 WASH. U. L. REV. 1055 (2011) (criticizing the criminalization of prostituted minors, which treats them as offenders rather than victims); Amanda Peters, Modern Prostitution Legal Reform & the Return of Volitional Consent, 3 VA. J. CRIM. L. 1 (2015) (endorsing modern prostitution reforms that properly distinguish between those who willingly engage in sex work and those who are forced or coerced, rather than laws which focus only on contractual consent without looking at volitional consent or traditional mens rea). Notably, Hirshman and Larson, Catherine MacKinnon, Andrea Dworkin and other feminist legal scholars additionally contend that adult heterosexual relationships are inherently unequal, based on unequal distribution of physical vulnerabilities (to pregnancy, nursing, and sexual disempowerment) and societal inequalities. See generally ANDREA DWORIN, INTERCOURSE (1987); Hirshman & Larson, supra note 13; Catherine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281 (1991).

238 See generally Suski, supra note 117, at 736 (discussing the requirement for Title IX cases that students give notice to school administrators that amounts to “very specific actual knowledge of substantial sexual harassment”).
Despite the urgent need to inform approaches to SGBV between youth with an interdisciplinary, developmental perspective, wholesale reliance on a developmental approach can be problematic. Firstly, scientific bases for treating youth distinctly from adults do not fully account for the broad variation in maturity and developmental change among minors. Although bright lines must be drawn to articulate the threshold for certain conduct—for example, drinking alcohol or safely driving a car—there is a potential for overinclusivity or underinclusivity. Scholars Emily Buss and Gideon Yaffe argue that age and development-based legal distinctions are far more nuanced than we may recognize.  

States will afford driving privileges to a permit-qualified sixteen-year-old accompanied by an older, more experienced teen. Yet, these judgments are subjective, based on guardians’ assessments which could be faulty or biased. Courts likewise restrict the scope of children’s First Amendment rights in school by interpreting them as variable with the age of both the speaker and the audience. Expertise about youth development is also perpetually dependent upon currently available data, accessible populations, and other research constraints.

Another danger of over-relying on physical and social science to determine the legal treatment of minors is the inexplicable dimension of cultural influence, or behavioral differences otherwise undetectable by science. For example, studies show that girls appear to consistently mature more quickly than boys—both emotionally and physically. However, it would be discriminatory to impute additional legal culpability for SGBV to girls under the theory that they are more mature and should thus know better. Likewise, brain imaging cannot explain why


240 See Buss, Child Development Research, supra note 239, at 49–52 (highlighting socio-cultural theories of child development, largely ignored by the prior focus on cognitive and psychosocial development, instead focusing on the role of parents, teachers, communities, and culture); Buss, Developmental Jurisprudence, supra note 212, at 62–63 (“[W]hile the brain can be expected to mature as a simple product of physiological maturation, even those most organic of transformations can be affected by environment and experience” such as “the presence of an adult . . . engagement with prosocial peers, and . . . participation in activities that encourage the adolescent to ‘develop and practice autonomous decision-making and critical thinking.’”); Todres, Maturity, supra note 136, at 1160–64 (noting the role of communities in fostering development, which leads to variation in cultural conceptions and approaches to maturity).

241 E.g., Vincent J. Schmithorst et al., Developmental Differences in White Matter Architecture Between Boys and Girls, 29 HUM. BRAIN MAPPING 696 (2008) (finding that girls’ brains develop white matter earlier in adolescence than boys’, which is closely associated with gains in cognitive function and brain power); McNeely & Blanchard, supra note 218, at 4, 7–10 (noting that “[p]uberty typically starts for girls between ages 8 and 13, and for boys between ages 9 and 14”).

adolescents in different cultures around the world (with similar brain structure) behave differently—often in less risky or harmful ways than youth in the U.S.\textsuperscript{243} Traumatic or positively formative experiences during childhood and adolescence might also impact maturity in ways undetectable by brain science.\textsuperscript{244}

\textbf{C. The Role and Limits of Law}

Revamping the current approach to SGBV among youth in the #MeToo era requires special critical consideration of the ways that the law itself serves as “scaffolding” in society, creating (or depriving opportunities for) growth, maturity and capacity.\textsuperscript{245} Legal tools and systems do not always address each young person’s concerns with respect to SGBV incidence, risk, harm, maladaptive behavior, prevention, or awareness. In such situations, extended socio-cultural fabric should play a more pivotal role in addressing these concerns. For example, considerations might include family, community, schools, civic organizations, private sector stakeholders and gatekeepers, social supports, and peer influences. Youth are more likely to develop healthy sexual identities and refrain from the riskiest behavior when afforded diverse resources, capacity-building supports, and strong non-judgmental adult guidance and modeling.\textsuperscript{246}

(maturity) into a gender characteristic” for girls” and “explains why most men tend to have difficulty in expressing their feelings or articulating their inner thoughts” since “they’re given a free pass when it comes to emotional maturity”); Rebecca Reid, Opinion, \textit{Stop Using the Excuse That ‘Boys Mature Slower than Girls’ for Bad Behaviour}, METRO (Jan. 29, 2018, 5:41 PM), https://metro.co.uk/2018/01/29/stop-using-excuse-boys-mature-slower-girls-bad-behaviour-7270774/ [https://perma.cc/3WPJ-GRPJ] (“We know that human beings are first and foremost, social animals, this means we are hyper-sensitive to what’s expected of us by our ‘tribe’ especially during adolescence when a key psychological challenge is to arrive at a personal identity that allows us to simultaneously fit in and to stand out.”).

\textsuperscript{243} See Natasha Duell et al., \textit{Age Patterns in Risk Taking Across the World}, 47 J. YOUTH & ADOLESCENCE 1052 (2018) (finding from a study of eleven countries that “the ways in which, and the extent to which, adolescents’ propensities to engage in risky activity are manifested in real-world recklessness seems to vary across the cultural contexts in which these inclinations develop,” with U.S. youth generally more likely to engage in behavior with health risks and at earlier ages); Herbert L. Friedman, Guest Editorial, \textit{Culture and Adolescent Development}, 25 J. ADOLESCENT HEALTH 1 (1999) (urging greater consideration of how variations in cultural values impact development); Carolyn Gregoire, \textit{How American Babies Behave Differently from Infants in Other Cultures}, HUFFPOST (Dec. 28, 2016, 1:49 PM), https://www.huffpost.com/entry/child-psychology-babies-around-world_n_585c0055e4b0d9a5945756d1 [https://perma.cc/PP75-HDGL] (discussing how parenting differences attributable to variations in cultural values can affect infant behavior and temperaments, which can play a role in future mental and emotional health).

\textsuperscript{245} See generally COMMITTEE ON THE SCIENCE OF ADOLESCENCE, INSTITUTE OF MEDICINE & NATIONAL RESEARCH COUNCIL, \textit{THE SCIENCE OF ADOLESCENT RISK-TAKING: WORKSHOP REPORT} 58–89 (2011) (reviewing research on sociological and environmental factors that affect adolescent development, such as family, peers, schools, communities, and media and technology).


\textsuperscript{247} See JEFFREY A. BUTTS ET AL., \textit{COALITION FOR JUVENILE JUSTICE, POSITIVE YOUTH JUSTICE: FRAMING JUSTICE INTERVENTIONS USING THE CONCEPTS OF POSITIVE YOUTH DEVELOPMENT} (2010) (explaining how a positive youth development framework that emphasizes educational supports, positive social relationships, civic engagement, physical activity, and artistic expression can improve the overall health and wellbeing of adolescents and reduce the likelihood of risky behavior); COMMITTEE ON ADOLESCENT HEALTH CARE, \textit{ACOG Committee Opinion: Promoting Healthy Relationships in Adolescents}, 132 OBSTETRICS & GYNECOLOGY e213, e217–18 (2018) (describing the positive role of parents in modeling good relationships, providing information about sex and relationships, monitoring of media and
Feminist theorists and juvenile law scholars alike assert that the development of sex positivity requires a balance of self-confidence, personal agency, and external boundaries. This healthy sexual personhood also requires increased awareness of the risks of violence, exploitation, boundary-crossing and oppression. Although the U.S. has historically failed to acknowledge youth self-determination and healthy development in setting sex education and contraception agendas, the #MeToo era has ushered in newfound enthusiasm for medically accurate, empowering, realistic sex education in schools rather than vague, abstinence-only messaging.\textsuperscript{247} Harm-reduction and public health approaches offer important lessons in this arena. Denying youth agency and framing minors’ sexuality in terms of abstinence or shame, or strict victimhood and perpetration, will only prevent youth from evolving into critically-thinking, mature adults, while branding them with criminal records.\textsuperscript{248} For instance, lessons from the ongoing debate about sex education and reproductive health for minors point towards a mantra of \textit{safe sexting} in most scenarios versus coaching youth on abstinence from such normalized communication and avoidance of realistic discussion and education.\textsuperscript{249}

Ultimately, little clarity may exist regarding the true existence of perpetrator(s) or technology, and taking a flexible approach); Smith, \textit{No Quick Fix, supra} note 88, at 29; Todres, \textit{Maturity, supra} note 136, at 1160–64.

\textsuperscript{247} See Sneen, \textit{supra} note 6, at 481–82 (giving an overview of current sex education trends and the post-

\textsuperscript{248} See, \textit{e.g.}, \textit{HASINOFF, supra} note 100, at 110–14 (arguing that acknowledging youths’, especially girls’, agency in self-sexualization and self-objectification helps eradicate rape culture, specifically, stereotypes that girls participating in sexting are inherently victims while girls abstaining are autonomous, and promote healthy identity formation); Butler, \textit{supra} note 78 (exploring the problematic dichotomy between victims and offenders in the context of underage sex work); Godsoe, \textit{Punishment as Protection, supra} note 179, at 1323–42; Smith, \textit{No Quick Fix, supra} note 88, at 60–64; Todres, \textit{Independent Children, supra} note 212, at 296–97 (recognizing not only the vulnerability of independent children but also their maturity and thoughtfulness).

\textsuperscript{249} See, \textit{e.g.}, Justin W. Patchin & Sameer Hinduja, \textit{It Is Time to Teach Safe Sexting}, 66 \textit{J. Adolescent Health} 140, 141 (2019) (“[I]t is time to move beyond abstinence-only, fear-based sexting education (or worse yet, \textit{no education at all})… ‘Safe sexting’ education would involve teaching youth about the possible consequences of participating while equipping them with the knowledge to minimize harms that may result.”).
victim(s) in a given incident of SGBV between youth—particularly if the youth withhold information from intervening adults. This lack of clarity makes reliance on a criminal law paradigm—as opposed to starting with a developmental perspective—even more counter-productive. Extremely troublesome and complex cases reiterate this point. At a Pennsylvania school, two girls convinced an autistic classmate to show them a picture of his penis, which they later distributed to their peer group.\footnote{Hanna Rosin, Why Kids Sext, THE ATLANTIC (Nov. 2014), https://www.theatlantic.com/magazine/archive/2014/11/why-kids-sext/380798/ [https://perma.cc/QCZ3-3Z6Y].} Disregarding developmental and coercive concerns, the district attorney pressed charges against the boy until the ACLU of Pennsylvania finally intervened.\footnote{Id.} In a shocking turn of events in Virginia, the lead detective on a flurry of youth sexting cases committed suicide after aggressively prosecuting teenage boys, requesting explicit photos from them, and then being discovered as a pedophile himself.\footnote{Tom Jackman, Teen in Manassas City ‘Sexting’ Case Sues Prince William Prosecutor, Detective for Civil Rights Violations, WASHINGTON POST (May 26, 2016, 5:00 AM), https://www.washingtonpost.com/news/true-crime/wp/2016/05/26/teen-in-manassas-city-sexting-case-sues-prince-william-authorities-for-civil-rights-violations/ [https://perma.cc/9RSU-68FW].} In the Virginia case, potential shaming of male victims obscured egregious harm while consensual sexting between one of the male victims and his girlfriend was an intentional distraction.\footnote{One seventeen-year-old male victim of the detective was tried for possession of child pornography for exchanging explicit media with his girlfriend, for which a court finding was deferred pending completion of a year of probation by the youth of 100 hours of community service, curfew, and a ban on social media or texting. \textit{Id}. This is all despite the fact that he himself was victimized by the detective, who forced him to pull down his pants and pose for pictures pursuant to a warrant. \textit{Id}.}

IV. SHIFTING THE PARADIGM: A TYPOLOGY OF GRADUATED RESPONSES TO SEXUAL AND GENDER-BASED HARMS AMONG MINORS

A paradigm shift regarding responses to SGBV among youth in the #MeToo era should involve a tiered response system prioritizing education and prevention as a default, and only turning to criminal justice in extreme situations. Alternative inquiries are required about the nature, existence, extent, and intent of harm or unreasonable risk of danger, as well as the intent, concerns, wishes, and needs of involved parties. Developmental expertise informs this theoretical, analytical endeavor centering youth agency, awareness, capacity-building, and extra-legal needs assessment. Beyond the retributive binaries of victim and offender, harm and remedy there is a more appropriate continuum—a tiered typology of possible events and behaviors between youth and commensurate responses that prioritize prevention, decriminalization, and avoidance of unnecessary legal overreach. Other guiding factors for this typology include: safety from physical, emotional, and digital harm; existence of mental health challenges or disability related needs; protection from peer or adult shaming; notions of both individual and collective harm and remedy; and opportunities for minors to choose modes of recourse that bolster their own capacity to resist rape culture and SGBV while developing into discerning, sex-positive well-informed citizens of both digital and visceral worlds.

The theoretical framework undergirding this typology of SGBV among minors is grounded in empirical realities and interdisciplinary best practices. While recent children’s rights
scholarship has moved the discourse in a positive direction, away from the strict “dependency and autonomy” paradigm of youth law to one of “children’s interests” and development, the work stops short of articulating the damage of unnecessary legal intervention and surveillance, cultural incompetence, structural injustice, and general devaluing of youth and community activism.\textsuperscript{254}

This typology organizes incidents along a continuum where the most developmentally typical behavior is on one end and aggravated behavior that could exhibit the most serious dysfunction is at the opposite end. Valuing the minor subjects involved, the complexities of a given scenario, and the conditions under which incidents occur, this typology incorporates evidence-based, interdisciplinary principles. The continuum herein weighs various dimensions to account for nuance and individualized approaches instead of a one-size-fits-all response. An “Ecology of Teen Sexting” created by federally funded researchers in 2013 provides an especially compelling visual aide for conceptualizing and categorizing youth sexual behavior. The Ecology

not only accounts for variation in... behaviors and contexts, but also recognizes the diverse spectrum of developmental, psychological, social, institutional, technological, and cultural forces that might influence these behaviors...[including] four primary sets of elements:

1. Descriptive elements, including the specific activities, content, settings, and participants that may be subsumed under the “sexting” label;

2. Situational context, particularly related to the interpersonal dynamics and cognitive and emotional states that may be associated with “sexting” behaviors;

3. The developmental context, encompassing the developmental processes that broadly affect teen decisions and behaviors, including those related to sexting;

4. The environmental context, encompassing the external spheres of influence that may affect teen decisions and behaviors, including those related to sexting.\textsuperscript{255}

Crucial dimensions along this SGBV continuum include overall context of the incident; context of the youth’s ages, histories, developmental stages, and capacities; cultural context and localized sexual or social norms; intent of all youth involved; presence or absence of consent; actual harm as interpreted by experts in both law and child development; perceived harm; extent of harm; and expectation of privacy. Typical sexual interactions between youth may well be imprudent or reckless but involve common experimentation or attention-seeking without intent to harm; however malicious, deceptive, violent, exploitive, or harassing behavior demonstrates dysfunction and a potentially clearer example of SGBV that might trigger a legal gatekeeper or law enforcement contact for safety interventions.\textsuperscript{256}

\textsuperscript{254} E.g. Bratt, supra note 128; Dailey & Rosenbury, supra note 128; Guggenheim, supra note 128.


\textsuperscript{256} James Wolak & David Finkelhor, Sexting: A Typology (Crimes Against Children Research Ctr.,
This typology follows initial analysis of incidents between minors with an inquiry regarding the choice of gatekeeper to handle a commensurate response. Considering the socio-cultural context of youth in the digital age, where many incidents currently perceived as criminal SGBV (like sexting between romantic prospects or partners) are actually consensual, gatekeeping by extra-legal authority figures or supportive adults should be the default. Barring serious red flags or extraordinary circumstances and dysfunction, physically nonviolent sexual or gender-based incidents should be presumptively treated as matters of education or prevention.257

**A. The New Normal: Decriminalization and Extra-legal Gatekeeping as the Default**

Many incidents that the law currently addresses as SGBV among youth are neither atypical, unreasonably risky, significantly harmful, illegal in the physical (versus digital) realm, nor nonconsensual when considering the new normal for youth. Daily habits online, through mobile devices, and through interactive gaming systems disregard traditional expectations and notions of privacy. Instead, technologically mediated communication (TMC) enables real-life individuals to test the boundaries of their identity, imaginations, and behavior with both the benefits and drawbacks of technology and often anonymity, affecting how people disclose information about themselves, sparking greater information sharing than face-to-face communication.258 Personal expressions and interpersonal interactions through TMC constantly

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U.N.H.), Mar. 2011, at 1 (adopting a dual typology of sexting as either “aggravated” or “experimental” and suggesting that cases in each category could be handled differently by law enforcement); see HARRIS ET AL., supra note 255, at 85–86 (recommending that “sexting behaviors occur[ing] within the context of relationships, teen experimentation and innocent indiscretion . . . [be] handled through families and schools rather than the justice system” while “justice involvement might be warranted in cases involving evidence of intent to harass, exploit, or otherwise harm”); April Gile Thomas & Elizabeth Cauffman, *Youth Sexting as Child Pornography? Developmental Science Supports Less Harsh Sanctions for Juvenile Sexters*, 17 NEW CRIM. L. REV. 631, 641–45 (2014) (arguing that juveniles engaged in consensual sexting are less culpable than adults engaged in the same behavior and should be punished less severely because the activity is largely a form of experimentation and sexual expression and adolescents are “more impulsive and less well-reasoned” decisionmakers); Nancy Willard, *Center for Safe and Responsible Internet Use, Sexting Investigation and Intervention Protocol* (2010), http://www.ciclt.net/ul/garesa/print%20sextinginvestigationandintervention.pdf [https://perma.cc/B7HN-S2MZ] (detailing characteristics and responses to different sexting situations, such as those which are developmentally normative, harassment, at-risk, and exploitative).

257 HARRIS ET AL., supra note 255, at 85–86; Willard, supra note 256, at 2 (primarily addressing developmentally normative activities through education and counseling, but perhaps restorative justice and juvenile court review with aggravating factors).

258 Adam N. Joinson, *Self-Disclosure in Computer-Mediated Communication: The Role of Self-Awareness and Visual Anonymity*, 31 EUR. J. SOC. PSYCHOL. 177 (2001) (referring instead to computer-mediated communication (CMC)); L. Crystal Jiang et al., *From Perception to Behavior: Disclosure Reciprocity and the Intensification of Intimacy in Computer-Mediated Communication*, 40 COMM. RES. 125 (2013); see Thomas & Cauffman, supra note 256, at 142 (“Teens refer to their peers to gain a sense of what is ‘normal’ and to assess how they compare to those around them; therefore, youths’ desire to share their sexual thoughts and urges with their peers through the use of digital messaging is hardly unexpected, given that such technology makes such peer interactions almost effortless.”); Telephone Interview with Travis Johnson, supra note 144; Telephone Interview with Andrew Santa Ana (Mar. 2019), supra note 144; see, e.g., Shafia Zaloom, *Sexting, Consent and the ‘Quaranteen’*, N.Y. TIMES (Apr. 28, 2020), https://www.nytimes.com/2020/04/28/well/family/coronavirus-shutdown-teen-sexting-consent.html [https://perma.cc/LK4D-CUW6] (reporting that there is likely an uptick in teen sexting during the COVID-19 pandemic, with teens participating in more intimate and explicit sexual behavior over text than they otherwise would in person).
trigger each other, blurring the lines between users’ reality, fantasy, true ego, vulnerability, and false confidence.\textsuperscript{259} The new normal of TMC heightens age-old features of youth development, including amenability to peer pressure, malleable self-esteem, and lack of perception of future consequences—essentially creating a new reasonable person standard for minors in mainstream U.S. culture.\textsuperscript{260}

\textit{B. Choosing Gatekeepers}

This continuum of incidents that could potentially be considered SGBV next utilizes an inquiry about the levels and nature of risk to determine a gatekeeper for response. Once an incident becomes known to adult authority figures, it could be handled informally, extra-legally yet somewhat formally, or legally, all the while prioritizing restorative approaches and peer norm-setting. As a principle, formalized, surveillance-focused systems should play a minimal role in gatekeeping, to increase the likelihood that youth can internalize impact of an incident and its consequences, feel connected to (rather than stigmatized by) their community, and gain ownership and capacity for risk avoidance, boundary awareness, and healthy relationships.

Where there is minimal harm yet significant risk, extra-legal and informal gatekeepers—such as a supportive adult community member, a peer youth leader or small youth council, or a program facilitator—would focus a commensurate response on the youth involved. If an incident demonstrates problematic riskiness, destructive attention-seeking, or obvious socio-emotional needs, onus falls on adults who have more formal or even professional roles. For example, a licensed counselor or social worker (unconstrained by punitive child welfare system connections) could receive information about the incident, then identify which needs of the survivor, alleged offender, and/or other individuals involved can be handled informally—including by dialogue together, education and prevention measures, and restorative processes addressing harms. The counselor (as gatekeeper) would likewise discern which needs illustrated by the event require specialized interventions that are trauma-informed or address mental health diagnoses.

If minimal harm accompanies minimal or nonexistent risk to youth directly involved in an incident, extra-legal gatekeepers could (and often should) decline to respond at all in a real-

\textsuperscript{259} Jianget al., \textit{supra} note 258, at 135 (finding that the intimate disclosures of one user made the other user much more likely to reciprocate with more intimate disclosures than if they were engaged in face-to-face communication); \textit{see, e.g.}, Jennifer L. Cline, \textit{Wired to Bond: The Influence of Computer-Mediated Communication on Relationships} (May 2013) (unpublished Ph.D. dissertation, James Madison University) (on file with The Graduate School at JMU Scholarly Commons, Dissertations) (discussing the connections between technology and narcissism, self-esteem, and individualism, arguing that “computer-mediated communication allows social media users to interact with other people only as reflections of their own selves . . . construct[ing] the imagined reactions of the other through their own egocentric lens”).

\textsuperscript{260} \textit{See, e.g.}, Deborah Richards et al., \textit{Impact of Social Media on the Health of Children and Young People, 51 J. PEDIATRICS & CHILD HEALTH 1152} (2015) (highlighting the impact of social media on youth risk-taking behavior, self-esteem, and mental health); \textit{see generally} LaToya O’Neal Coleman et al., \textit{The Impact of Information and Communication Technology (ICT) Usage on Psychological Well-Being Among Urban Youth, in TECHNOLOGY AND YOUTH: GROWING UP IN A DIGITAL WORLD 267, 271–74} (Sampson Lee Blair et al. eds., 2015) (providing an overview of the literature showing technology can impact youth well-being in both positive and negative ways, by replacing offline relationships on the one hand while increasing social networks and interaction on the other hand). For a theoretical discussion of reasonable person considerations for minors and decriminalization, \textit{see generally} Scott & Steinberg, \textit{supra} note 214, at 833–34 (noting that failing to adjust the reasonable person standard for external influences that uniquely impact adolescents does not appropriately tailor punitive responses to adolescent culpability).
time interventionist capacity, but could alternatively focus their response externally. Members of the minors’ extended support system, including peers, amenable family members, school personnel, and recreation program staff, would focus not on the youth in a specific incident, but on the broader school culture, the need for broader supports for the peer group and community, or general availability of education and prevention resources for youth and their guardians.

Contrastingly, where minimal harm accompanies significant risk, an externally focused, extra-legal gatekeeper might seriously rethink their delivery of services, programs, or the nature of a physical space provided. As an important principle, organizations and adults in charge should strive for partnerships with youth in their improvement and transformation processes. For example, when an incident arises, the parties (and supporters) involved may turn to the private sector to reduce future risks. A tech company may be approached to innovate privacy protections and monitoring of minors on its media platform, or to provide clear guidelines and processes for removing content without involving law enforcement. A business could be asked to better monitor its physical space, to employ certain supportive staff, or to improve its layout to reduce the risk of sexual and gender-based objectification within that location. Further, it is crucial for organizations, businesses, and facilities to heighten their awareness of the risks and prevalence of SGBV regardless of whether youth involved in an incident describe experiencing a serious harm in the moment. Externally focused measures are themselves preventive. Assessing and transforming a school culture or a community setting can diminish the risk of gender-based objectification and vulnerability to SGBV in both the short- and long-term.

C. Education, Prevention, and Divestment

Creating a presumption or default rule that nonviolent incidents of sexual and gender-based harm or boundary-crossing will be handled extra-legally as education or prevention issues, this typology views harm and remedy in both an individual and collective manner. As practitioners and theorists of Transformative Justice point out, communities where youth reside may be both perpetrators and victims of systemic SGBV, and cultures of gender-based violence and objectification produce youth who may incite harm, experience personal victimization, or both.\footnote{See generally, e.g., Donna Coker, Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 143–49 (Heather Strang & John Braithwaite eds., 2002) [hereinafter Coker, Transformative Justice] (describing transformative justice as it can be applied to cases of domestic violence); GENERATIONFIVE, ENDING CHILD SEXUAL ABUSE: A TRANSFORMATIVE JUSTICE HANDBOOK (2017), http://www.generationfive.org/wp-content/uploads/2018/08/g5-Transformative-Justice-Handbook.pdf [https://perma.cc/SVYZ-S5FX] (describing transformative justice, its underlying principles, and its goals); Donna Coker, Restorative Responses to Campus Sexual Harm: Promising Practices and Challenges, 1 INT’L J. RESTORATIVE JUST. 385 (2018) [hereinafter Coker, Restorative Responses] (highlighting strategies and benefits of restorative responses to campus sexual assault, as well as the limitations of restorative approaches); Mimi E. Kim, From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration, 27 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 219 (2018) (contrasting restorative justice and transformative justice, and explaining how transformative justice differs in the context of sexual violence); Mia Mingus, Transformative Justice: A Brief Description, LEAVING EVIDENCE (Jan. 9, 2019, 6:13 PM), https://leavingevidence.wordpress.com/2019/01/09/transformative-justice-a-brief-description/ [https://perma.cc/CUT8-NW2S] (providing an overview of transformative justice, an “abolitionist framework that understands systems such as prisons, police, and I.C.E. as sites where enormous amounts of violence take place” and “works to build alternatives to our current systems . . . to prevent future violence from happening”).} Importantly, this work explicitly recognizes SGBV within the context of other types of
structural oppression (poverty, racism, sexism, homophobia, ableism, etc.). For that reason, transforming the status quo is a key long-term goal, as opposed to a sole focus on conflict resolution, or on restoration of a harmed party to their previous status quo through redress of isolated harms. Programs and resources for eradicating rape culture, toxic masculinity, and SGBV among youth should be intergenerational whenever possible. Rather than focusing on mitigation of an accused offender’s culpability by virtue of their youth, education and prevention efforts will emphasize mitigation of harm to all involved parties as well as healing and reimagining of safety in the broader peer group, family systems, and/or community.

Although forthcoming work by this author will more closely examine initiatives that address prevention, education, and alternative dispute resolution for SGBV among youth, some promising programs have emerged to combat SGBV among minors thus far. In 2015, the Los Angeles Unified School District began an “ambitious,” multi-generational educational campaign around sexting called “Now Matters Later.” Meanwhile, state lawmakers in California passed an affirmative consent requirement for high school curricula. While one effort focuses specifically on sexting and the other on affirmative consent and peer boundary-setting more generally, and it is unclear how they have converged and progressed, the methodology of

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262 See Coker, Transformative Justice, supra note 261, at 144–45 (describing how a transformative approach aims to shift community norms and challenge systems of oppression in a domestic abuse victim’s life such as “racial and gender subordinating institutions, beliefs, and practices that support the crime of battering”); GENERATIONFIVE, supra note 261, at 21–27 (explaining how various systems of oppression make children vulnerable to sexual abuse through economic exploitation, isolation and rejection for failing to conform to rigid gender and sexual norms, and infantilization of people with disabilities, while the threat of violence or other harms, in turn, serves to maintain these systems of oppression); Coker, Restorative Responses, supra note 261, at 391–95 (“The intersection of race, ethnicity, gender identity, sexual orientation and sex frames risks for sexual assault as well as social construction of sexual experiences, the popular image of likely sexual assaulters, and the risks of biased treatment by campus administrators.”); Mingus, supra note 261 (“[Transformative justice] acknowledges that we must work to end conditions such as capitalism, poverty, trauma, isolation, heterosexism, cis-sexism, white supremacy, misogyny, ableism, mass incarceration, displacement, war, gender oppression and xenophobia if we are truly going to end cycles of intimate and sexual violence.”).


264 Watanabe, supra note 160.

prevention and targeted education points in a positive direction. For example, the “Now Matters Later” program provides teaching tools including videos, lesson plans and handouts for schools, and multi-generational viewing and discussion materials for community members.\textsuperscript{266} It will be crucial for adults to help youth make connections between sexting and broader issues of gender-based violence, sexual assault, harassment, and affirmative consent, rather than becoming inappropriately fixated on the dangers of technology. At least in the matter of “sext education,” Los Angeles school police, families, community groups, teachers, counselors, school officials, students themselves, and the city attorney’s office have all been involved.\textsuperscript{267}

Importantly, Los Angeles is one of numerous cities that has voted to either defund or reduce its school police force following the May 25, 2020, police killing of unarmed civilian George Floyd in Minneapolis, MN, and national protests against systemic, racially motivated police violence. While an abolitionist framework requires true defunding as divestment, along with reinvestment in community-driven infrastructure like youth support programming and healthcare, the Los Angeles Board of Education only approved an immediate 35% cut to its school police (a reduction of $25 million) after student activists, the teachers union, and community groups demanded full defunding.\textsuperscript{268} LAPD officials assert that even the 35% cut will prematurely end “intervention and prevention efforts” in schools, including a detective focused on sex trafficking prevention.\textsuperscript{269} However, considerable evidence discussed herein articulates the need for, and greater efficacy of, noncarceral intervention and prevention.\textsuperscript{270} Cities including New York, Minneapolis, San Francisco, and Cleveland have also taken steps in the direction of diminishing either their general police forces or school police, with Oakland taking an historic step of defunding school officers.\textsuperscript{271} Many policy-makers, advocates, educators, and scholars still contend that tweaks to reform broken policing systems and partial budget cuts will fail to eradicate systemic violence and racism, when history necessitates a re-imagining of care for youth and safe communities.\textsuperscript{272}

\textsuperscript{266} Watanabe, supra note 160.
\textsuperscript{267} Id.
\textsuperscript{269} Id.
\textsuperscript{270} See supra Parts II and III.

https://scholarship.law.upenn.edu/jlasc/vol23/iss4/2
Youth in Nevada have also taken a crucial step towards securing progressive education on both safe sexting and prevention of SGBV. Nevada’s Youth Legislature—a nationally recognized coalition of youth that develops youth-related proposals—achieved state passage of a bill in 2017 to require schools to teach sexual consent, sexual assault, gender-based violence, and sexting deterrents to students.273 Currently, Nevada is still studying the best way to implement the legislation after the State Board of Education issued limited recommendations in April 2018.274 Possible changes include establishing academic standards and revisions of health standards regarding the topics proposed, requiring the Nevada Department of Education “to curate a list of high quality instruction materials and Community Partners who deliver content . . . for teachers,” and “engaging with community partners and districts” for professional development while increasing collaboration “between social workers, students and multi-disciplinary teams in schools.”275 Interestingly, the law houses these new curricular requirements in American government courses that are required in Nevada public high schools.276 Olivia Yamamoto, the student proponent of the bill, asserted, “It’s not a sex-ed bill—I don’t ask that we teach sexuality or even contraception, but that we arm our children with the knowledge and the empathy to understand what consent and, conversely, assault is.”277 These welcome efforts come amidst national debate over sexual assault, rape culture, and consent among youth and college students.278

The organization A CALL TO MEN engages in both education and interactive, intergenerational prevention programs, aimed at teaching men and male youth to pursue “healthy, respectful manhood,” preventing SGBV and other behavior that stem from toxic masculinity and rape culture, and urging men to listen to women, girls, transgender, and nonbinary survivors of SGBV “to create the conditions where #MeToo moments do not happen in the first place.”279 For over two decades, A CALL TO MEN has employed the CDC’s Social-Ecological Model for means defunding police . . . It does not mean budget tricks or funny math. It does not mean moving school police officers from the NYPD budget to the Department of Education’s budget so the exact same police remain in schools.”; Leila Raven et al., 8 to Abolition Is Advocating to Abolish Police to Keep Us All Safe, TEEN VOGUE (June 25, 2020), https://www.teenvogue.com/story/8-to-abolition-abolish-police-keep-us-safe-op-ed [https://perma.cc/M6U3-79DK] (“Following the lead of DecrimNow DC and Decrim NY, we seek to chip away at the carceral state by repealing laws that criminalize survival, such as the criminalization of sex work and anti-homelessness ordinances that criminalize loitering and sleeping in public spaces. This platform also focuses on where to direct resources freed up by dismantling the prison industrial complex: housing, health care, childcare, youth programming, and community-based public safety efforts.”); see generally #8TOABOLITION, https://www.8toabolition.com/ (last visited July 29, 2020) [https://perma.cc/JB4U-KKQK].

275 Id. at 2.
276 Act of May 24, 2017; Blad, supra note 265.
277 Blad, supra note 265.
278 See supra note 121.
prevention of violence in partnership with national professional sports leagues, the U.S. military, the Department of Justice, the United Nations, and many other national and international businesses and institutions.280 The organization publishes free online curricula to guide coaches, educators, and mentors in educating males, along with blogs and video training seminars, and most recently released a podcast episode featuring co-founder and CEO Tony Porter on sexism and male supremacy. 281 A CALL TO MEN also promotes “Man Enough,” a “movement,” “brand,” and web series hosted by actor Justin Baldoni and motivated by his viral TED Talk.282 Baldoni’s series engages a range of male celebrities in a roundtable gathering for what The New Yorker described as “heady, repentant, candle-lit debates about masculine privilege in the age of #MeToo.”283

Although further research is needed—both to examine efficacy and to ensure equity for gender non-conforming individuals and avoidance of unhealthy generalities regarding gender, sex, and sexuality—research thus far appears promising. In mid-2017, A CALL TO MEN published a survey of about 300 male middle- and high-school participants in its LIVERESPECT program, illustrating “dramatic shifts in attitudes and behaviors that will prevent dating violence, sexual assault and bullying in school and sports.”284 One North Carolina and South Carolina event entitled “LIVERESPECT on Campus – Preventing Sexual Assault in High School and College” featured training for faculty, administrators, and students.285

Less progress has been made towards SGBV prevention and education on the federal level. Federal responses rarely highlight SGBV among youth, and proposed federal legislation on internet safety and media literacy failed over a decade ago.286 Several federal agencies jointly

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280 About Us, supra note 279.
284 New Data from A CALL TO MEN’s LIVERESPECT Curriculum Shows Dramatic Shifts in Attitudes and Behaviors That Will Prevent Dating Violence, Sexual Assault and Bullying in School and Sports, A CALL TO MEN (July 25, 2017), http://www.ncdsv.org/ACTM_NEW-DATA-FROM-A-CALL-TO-MEN-LIVERESPECT-7-25-2017.pdf [https://perma.cc/A8CZ-PTN8]; Curriculum Pilot Report & Data Findings, A CALL TO MEN (2017), https://www.acalltomen.org/s/LIVERESPECT-Pilot-Report.pdf [https://perma.cc/6XWD-DQFM] (showing significant increases in the percentage of students, before and after the program, believing women have the same value as men, boys are taught to view women and girls as property of men, they understand consent, and rape and sexual assault is not always committed by a stranger).
286 The federal SAFE Internet Act died in the Senate Judiciary Committee in 2009, despite being one of the major pieces of federal legislation to provide grant funding to “identify, develop, and implement Internet safety education programs,” “provide professional training to elementary and secondary teachers, administrators, and other staff on Internet
released the publication “Net Cetera,” most recently revised in 2018, designed to help parents and teachers discuss internet and cellphone safety with youth, including talking points on cyberbullying, sexting, social networking, and other cell phone and Internet safety and privacy concerns. Concerningly, Net Cetera’s discussion of sex consists of: “Talk to your teens about avoiding sex talk online” (altogether), to prevent mistaken communication with an adult sexual predator, and “Sexting: Don’t Do It” in order to avoid ruining one’s “reputation and . . . friendships” or law-breaking. While numerous federal programs address prevention and education on sexual exploitation of youth and sex trafficking, agencies and legislators prioritize protecting youth from adults.

The CDC’s Dating Matters campaign is an innovative initiative encouraging healthy adolescent relationships and aiming to reduce “emotional, physical, and sexual dating violence among youth.” Dating Matters claims to utilize a multi-faceted approach that engages youth, parents and caregivers, educators, communities, and local governments. School participation is “a cornerstone” of the approach, including partnerships with local health departments and community organizations, in order to reach more youth and caregivers while providing communities with resources. However, the program’s target demographic is alarmingly narrow. Given the widespread crisis of SGBV among youth, Dating Matters should focus much farther outside the target population: minors age eleven to fourteen years old in high-risk urban communities.

While future research by this author will more thoroughly examine promising education and prevention interventions, this Article contends that incidents of harm, boundary-crossing, and subjection to rape culture overwhelmingly necessitate socio-emotional interventions rather than medicalized, highly technical responses and services. Although psychological instability, violent tendencies, and behavioral dysfunction certainly exist in the youth population, an improved response continuum should reject the impulse to pathologize individuals in favor of the more challenging task of addressing problematic gender tropes and cultural stereotypes, sexual objectification in media and pop culture, restrictive gender roles, and institutionalized discrimination on the basis of sex, sexuality, and gender identity. Positive Youth Development (PYD) programs are a prime example of identity-affirming, strengths-based (as opposed to personally stigmatizing), community-based interventions that reduce recidivism among diverse youth.
offenders in the juvenile justice system.\textsuperscript{293} Progressive prevention and education initiatives on SGBV between minors should spend considerable time dispelling misinformation, offering safe spaces to vent, fostering youth-led discussion about consent, and conveying images of diverse healthy relationships and personal boundary setting.

The #MeToo movement has fortunately energized sex education advocates after most federal funding was diverted to abstinence programs after 1981. Currently, only twenty-nine states and the District of Columbia have laws mandating sex education, fifteen states require instruction to be medically accurate, and twenty-six states and D.C. require that it be age-appropriate.\textsuperscript{294} Before 2019, five states included consent in their sex education curricula, and in 2019 four states passed such laws and nine more considered bills that would incorporate consent into sex education.\textsuperscript{295} While forty jurisdictions have laws requiring that abstinence is included in sex education, only twenty require educators to also share information about birth control.\textsuperscript{296} So far New Jersey is the only state that has implemented an educational program regarding the significant risks of digital image sharing, and a similar proposal has gained media attention in Illinois.\textsuperscript{297} However, many state bills focusing on prevention, education, and alternatives to court involvement in this arena have failed, and states continue to employ an abstinence-only and fear-based approach to sexting.\textsuperscript{298}

\textbf{D. Remedies and Proportionality}

This proposed typology-continuum re-orient the criminal law concept of proportionality. Instead of assessing the fairness of individual punishments so as to be commensurate with charged offenses, proportionality in this interdisciplinary context strives to ensure that youth and families experience a minimal amount of legal, mandatory state intrusion or surveillance when peer SGBV is suspected or apparent. Cultural competence would acknowledge the autonomy, defining characteristics, and inherent expertise of groups affected by a given phenomenon.\textsuperscript{299} Institutional monitoring and coercive interventions—even mental health

\begin{footnotesize}
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\item \textsuperscript{293} See generally BUTTS ET AL., supra note 246.
\item \textsuperscript{296} \textit{Sex and HIV Education}, supra note 294.
\item \textsuperscript{298} See Dale, supra note 295.
\item \textsuperscript{299} Smith, \textit{Nothing About Us Without Us}, supra note 198, at 3.
\end{itemize}
\end{footnotesize}
treatment—should only be dispatched as remedies commensurate with an egregious incident or potentially persistent individual dysfunction. Alternative dispute resolution (ADR) approaches to SGBV for #MeToo-era youth will be explored in-depth in this author’s forthcoming work, including restorative justice interventions for redress of discernable harm and transformative justice interventions that reach beyond incident response, towards re-imagining healing and addressing systemic, relational change. In general, however, guiding questions to foster a new paradigm for proportionality include:

- Did the victim(s) or school request generalized education and prevention among purported offender(s), or a broader community of youth? If so, prioritize culturally competent, localized, and context-specific interventions that are youth-focused, engaging, and strengths-based.

- Did someone ask for a remedy other than generalized education or prevention among purported offender(s) or a community of youth?
  - Did the victim(s) request another, affirmative response?
    - If the remedy requested focuses on individual repair of harm:
      - Restorative approach for interpersonal issue: apology, mediation, healing circles.
      - Community service requested by victim(s).
      - If a monetary remedy is requested, this requires a separate inquiry.
        - Civil proceeding: legal action, prioritize mediation.
        - Reimbursement for therapies, treatment.
        - Restitution to victim(s).
  - Did the victim’s family/victims’ families request another, affirmative response?
    - If remedy requested focuses on individual repair of harm, initial triage is required to discern stance, perception, and wishes of minors involved in relation to those of the adults.  

300 See, e.g., Geddes v. Cessna Aircraft Co., 881 F.Supp. 94, 100–01 (E.D.N.Y. 1995) (stating that while “[a] guardian does not have to be appointed if the infant’s interests are amply represented and protected . . . [i]f there is a conflict of interest [between the parent’s interests and the interests of their children] . . . the court must appoint a guardian ad litem as a matter of proper procedure”); MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. 4 (AM. BAR ASS’N 2011) (attorney for a minor taking direction from child’s representative or guardian may have some distinct duty to the child, particularly if guardian is acting adversely to minor’s interest); Martin Guggenheim, How Children’s Lawyers Serve State Interests, 6 NEV. L.J. 805 (2006) (describing the role of children’s lawyers in sustaining the child welfare system by providing inadequate protection against removal of the child from the parents); Kristin N. Henning, It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases, 6 NEV. L.J. 836 (2006) (discussing the tension between preferences of the child and those of parents in attorneys’ decisionmaking process); see also, e.g., JESSICA FEIERMAN & LAUREN FINE, JUVENILE LAW CENTER, TRAUMA AND RESILIENCE: A NEW LOOK AT LEGAL ADVOCACY FOR YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS 33–35 (2014) (noting that courts tend to use trauma experienced by a child or parent as a justification for terminating parental rights and arguing that states should make significant efforts to provide services for parents and children who have suffered trauma to support reunification); see generally Sarah Bergen & David A. Shapiro, The Impact of National Standards of Juvenile Defense Practice, 32 CHILD L. PRAC. 81 (2013) (providing an overview of standards for representation of young clients released by the National Juvenile Defender Center in early 2013).
the same analysis as where victim(s) requested another, affirmative response.

- Family-focused restorative approaches may play a role: i.e., guardians of the victim(s) and purported offender(s) may engage in healing circles or mediation.
- Additional needs assessment of youth and whether ongoing supports or services can help avoid risky behavior and boundary-crossing.
  - Where disagreement, coercion, or safety concerns due to adults’ approach to youth sexuality (i.e. homophobia, racial or ethnic bias relating to sexual relationships, etc.), further inquiry is needed.
  - Family-focused needs assessment: culturally competent, local behavioral health and social service professionals should be involved. Whenever possible, seek peer guidance for parents and youth.
  - Additional needs assessment of youth involved and whether ongoing supports or services are needed to avoid risky behavior, boundary-crossing after the initial remedy concludes.
  - Stark differences in the perspectives of guardians and youth regarding sexual identity development and risk avoidance often persist. Especially in this situation there are no easy answers. For example, LGBTQ youth may struggle to feel safe or accepted in their homes throughout adolescence, as long as they are financially and legally dependent minors. Safety and supports should be a goal and focus. Whenever possible, encourage family healing and reconciliation. Strong evidence reveals this population of youth are at risk of homelessness, vulnerability to exploitation, emotional crisis, and increased risky behavior.  

  - Did education, behavioral health, social service, or medical professionals request another, affirmative response?
    - Focus on individualized, context-specific responses for each youth and family. Culturally competent, local professionals should be involved. Wherever possible, seek peer guidance for parents and youth and community governance/accountability. Prioritize privacy and avoid linking punitive reporting measures to services.
    - As much as possible, provide community-based supports and services, capacity-building, sex positive interventions, and positive youth development.

  - Did legal actor(s) request another, affirmative response? Weigh the necessity for legal interventions against the potential harm they could cause.

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https://scholarship.law.upenn.edu/jlasc/vol23/iss4/2
E. Threshold for Legal or Criminal Law Intervention

Egregious acts that demonstrate clinically dangerous behavior, cause severe harm, and pose ongoing safety risks can set a baseline for legal intervention. Often, such instances of SGBV can still avoid criminalization of youth and surveillance of families in favor of intensive behavioral health treatment, social supports, and rehabilitative education. Where one minor has clearly abused their role or violated their duty towards another—such as sexual coercion of a child by a babysitter also under age eighteen or improper advances towards a child by their minor camp counselor—extra-legal gatekeepers should at least demand removal of the accused minor from their caregiving capacity to pursue inquiry, accountability, and healing for all parties.

F. Prospects for Civil Remedies

Civil law remedies for SGBV among youth are underexamined and worthy of discussion, although a thorough analysis is beyond the purview of this Article. Some scholars have suggested that a more appropriate criminal response may be to treat sexting at school as peer sexual harassment and a Title IX violation rather than child pornography. Others discuss potential use of civil tort invasion of privacy or intentional infliction of emotional distress statutes in egregious cases of breach, and civil tort false light statutes for fake images designed to damage another young person’s reputation.

Future work regarding civil legal recourse for SGBV among youth should contemplate which parties initiate the tort law focus; whether the harm is monetarily quantifiable or amenable to repair through civil court remedies; whether civil litigation could compound initial harms; which individuals or institutions bear responsibility or accountability; whether additional parties including a tech entity share complicity; and how a civil law focus achieves the ultimate goals of healing harm, preventing further incidents, educating and supporting youth, repairing diminished community bonds or peer group culture of safety, and eradicating broader rape culture.

CONCLUSION

A paradigm shift is vital. As #MeToo era survivors and allies reclaim our narratives and transform the civic landscape—even amidst a global pandemic and protests re-imagining public safety and police abolition—youth remain centrally impacted yet persistently misunderstood. The typology of instances of SGBV among minors described herein, along with the proposed tiered response system, provide recommendations for dismantling the status quo, failing carceral approach. A majority of SGBV incidents between youth involve issues beyond the narrow scope of law and involve individuals (and communities) seeking nonlegal, often longer-term remedies. Meanwhile, widespread tolerance for both individual harms and pervasive rape culture is taken for


303 E.g., Elizabeth Ryan, Sexting: How the State Can Prevent A Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults, 96 IOWA L. REV. 357, 369-70 (2010); Willard, Achieving a Rational Response, supra note 135, at 552; see, e.g., HASINOFF, supra note 100, at 150 (further suggesting the use of torts such as public disclosure of private facts and breach of confidentiality).
granted as the air we breathe starting from grade school, is accepted as normal, and continues intergenerationally.

On Thursday, July 23, 2020, Rep. Alexandria Ocasio-Cortez (D-NY) thanked Rep. Ted Yoho (R-FL) on the floor of the U.S. House for giving her the opportunity to address how cycles of gender-based violence unfold in real time.\footnote{Luke Broadwater & Catie Edmondson, \textit{A.O.C. Unleashes a Viral Condemnation of Sexism in Congress}, \textit{N.Y. Times} (July 23, 2020), https://www.nytimes.com/2020/07/23/us/alexandria-ocasio-cortez-sexism-congress.html [https://perma.cc/N2F7-UAT5].} Describing an incident of sexist vulgarity against her by Yoho that went viral days earlier, Ocasio-Cortez explained that walking alongside Rep. Roger Williams (R-TX), Yoho called her “a fucking bitch” on the Capitol steps in front of a reporter from \textit{The Hill}.\footnote{Mike Lillis, \textit{Ocasio-Cortez Accosted by GOP Lawmaker over Remarks: 'That Kind of Confrontation Hasn’t Ever Happened to Me’}, \textit{The Hill} (July 21, 2020, 8:45 AM), https://thehill.com/homenews/house/508259-ocasio-cortez-accosted-by-gop-lawmaker-over-remarks-that-kind-of [https://perma.cc/96T9-6R3Q]; Manu Raju, \textit{Ocasio-Cortez Reveals New Details About Viral Incident with Rep. Ted Yoho}, CNN \textit{Politics} (July 24, 2020, 8:07 PM), https://www.cnn.com/2020/07/24/politics/aoc-ted-yoho-latest/index.html [https://perma.cc/3XUW-7U84].} Reiterating that such behavior is far from new in her life or that of countless women and girls of any class or ethnic identity, Ocasio-Cortez assured listeners that a Congressman unapologetically invoking a sexist slur towards a woman two years younger than his own daughter on the Capitol steps clarifies to any daughter, and everyone else, that men are given express permission to use abusive language— and actions—towards other females at their leisure, with impunity.\footnote{Broadwater & Edmondson, \textit{supra} note 304.} Yet, the fearlessness Ocasio-Cortez demonstrated in making such a speech and the persistent fact of this \#MeToo moment and movement offer hope. New voices will emerge, the paradigm can shift, and responses to SGBV can more aptly account for the evolving yet empowered concept of “Me” within younger \#MeToo generations.