Vague Victims/Offender-Less Crimes
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Vagueness doctrine guards against two primary harms: fair notice and non-arbitrariness. A handful of recent state high court cases suggest a third, related yet distinct, harm—the specter of overcriminalization where those harmed by the crime, the victims, are not clearly identified.[1] These courts reversed delinquency adjudications of statutory rape where both the purported victim and purported offender were within the zone of the statute's protection. In doing so, they identified a number of concerns including the inconsistency of prosecuting a juvenile for having sex with the purpose of the statutes to protect children from exploitative adults, and the risk of selective enforcement by police and prosecutors. More broadly, these cases illustrate the failure of the law to accurately and fairly distinguish between victims and offenders.

After outlining the rationales and scopes of these cases, I argue that statutory rape presents heightened risks of selective enforcement, even more so than the low-level street crimes usually at issue in vagueness cases. Most vagueness cases have considered street crime such as vagrancy or loitering and the related problem of discretion in order maintenance policing.[2] The cases discussed here are statutory rape cases, a strict liability offense much more severely punished and stigmatized than loitering or vagrancy.[3]

Statutory rape cases also embody gender and sexuality norms more than almost any other crime.[4] Prosecutions are usually triggered by parents reporting children's activity, rather than by law enforcement investigations.[5] Parents tend to report most often, and concomitantly, prosecutions proceed most often, against minors who do not conform to gender, racial, sexual or other norms.[6] This concern was particularly clear in the most recent of this trio of cases, *In re DB*, where a 12-year-old boy was adjudicated delinquent for "anal sex" with an 11-year-old boy, in part because D.B. "always initiated" the sexual activity,[7] and "every single time it was about D.B. being sexually gratified."[8]

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[1] *See* In re DB, 129 Ohio St.3d 104 (2011) (striking as unconstitutionally vague Ohio's statutory rape statute when applied to prosecute a 12-year-old boy for sex with an 11-year old-boy and also finding the statute as applied to the 12-year-old to violate equal protection); In re ZC, 165 P.3d 1206 (Utah 2007) (reversing a delinquency finding against a 13-year-old girl for statutory rape of a 12-year-old boy and vice versa, where each child was the victim in one case and the offender in another); In re G.T., 758 A.2d 301 (Vt 2000) (reversing a delinquency adjudication against a 14-year-old boy for statutory rape of a 12-year-old girl). The DB and GT Courts both broadly held that statutory rape prosecutions are inapplicable where the alleged offender is also under the age of consent, i.e. a potential victim. 758 A.2d at 309; 129 Ohio St.3d at 108. The ZC Court limited its holding to sexual encounters between two minors "where no true victim or perpetrator can be identified."

[2] See e.g. Papachristou, 405 U.S. 162 (vagrancy); Morales v. Chicago, 527 U.S. 41 (1999) (gang "loitering").

[3] See Michelle Goodwin, *Law's Limits: Regulating Statutory Rape Law*, XX WISC. L. REV. 481 (2013). To name just one indicia of the stigma attaching to this offense, many states require sex offender registration for those convicted of statutory rape.

[4] Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464 (1981).

[5] Cynthia Godsoe, *Protection as Punishment*, HOUS. L. REV. (forthcoming 2015).

[6] See e.g. 129 Ohio St.3d at xx (noting the court's concern that the prosecution there, and the underlying parental report, was based in part on the fact that the sexual activity was between two boys).

[7] 129 Ohio St.3d 104, 105 (2011) (also noting the court's concern that the prosecution, and the underlying parental report, was based in part on the fact that the sexual activity was between two boys).

[8] Merit brief of Appellant D.B. (Aug. 24, 2010), 2010 WL 3498429 (Ohio).

I will conclude with both a concrete recommendation and a broader discussion of the problems with the victim-offender binary. First, I will argue for offender-less crimes, harms for which no one should be punished due either to the blurriness of the victim and offender, or the inefficacy of sanctions in addressing the harm. Statutory rape between two peers presents a perfect example of an offender-less crime. Turning to the broader issues, I will question how does and should the law distinguish between victims and offenders when the victim-offender overlap indicates that the interaction between victims and offenders is often complex? What factors do police use in designating people in one category or another? Can they be both?