"Sexual Motivation" after *State v. Halstien*: Still Hazy for His Teenage Peers

Robert E. Lipscomb

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr
Part of the Juvenile Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol69/iss3/16

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
"SEXUAL MOTIVATION" AFTER STATE v. HALSTIEN: STILL HAZY FOR HIS TEENAGE PEERS

Robert E. Lipscomb

Abstract: In State v. Halstien, the Washington Supreme Court upheld the constitutionality of a juvenile statute that provides for a charge of sexual motivation in offenses other than sex offenses. Such motivation, if proven, becomes an aggravating factor that a judge may consider (along with any mitigating factors) in sentencing. In rejecting the argument that the statute was void for vagueness, the court should have clarified the statute by requiring a finding that the defendant manifested a sexual disorder, as well as a finding that sexual motivation was a substantial factor in the offense.

In 1990, the Washington Legislature passed a statute that allows prosecutors to make special allegations of sexual motivation in juvenile cases other than sex offenses.¹ A finding of sexual motivation under the statute is used as an aggravating factor in sentencing.² State v. Halstien³ involved a challenge to the statute's constitutionality. The Washington Supreme Court held, inter alia, that the juvenile statute was not unconstitutionally vague, either on its face or as applied to the defendant, Halstien.⁴

This Note maintains that the supreme court should have adopted meaningful narrowing constructions for the statute. Without clarification, the statute fails to provide either fair notice to potential offenders or sufficient safeguards against arbitrary enforcement. This

---


⁴. Id. at 121, 857 P.2d at 278. The adult sexual motivation statute, Wash. Rev. Code § 9.94A.127 (1992), was also recently the subject of a vagueness challenge in State v. Stewart, 72 Wash. App. 885, 866 P.2d 677 (1994). The defendant had been convicted of attempted kidnapping, second-degree assault, and firearms violations, and had received an enhanced sentence pursuant to § 9.94A.127 after the trial court found he had committed his crimes with a sexual motivation. Id. at 888–90, 866 P.2d at 679–80. The court of appeals held that because this statute had not been enacted at the time of Stewart's conviction, the imposition of the enhanced sentence violated the ex post facto clauses of both the state and federal constitutions. Id. at 893–94, 866 P.2d at 682–83. Because of this holding, the court did not have to address the vagueness challenge. It observed, however, that this argument would have failed in light of the supreme court's holding in State v. Halstien. Id. at 894 n.6, 866 P.2d at 683 n.6.
Note begins with an overview of the void-for-vagueness doctrine, as well as some fundamental principles of statutory construction. A review of the facts of Halstien follows. The Note then takes issue with the supreme court’s holding that the sexual motivation statute is sufficiently clear as it stands. Finally, this Note suggests two narrowing constructions that the court should have adopted in order to clarify the statute: (1) a requirement that the defendant show signs of a sexual disorder while committing the offense; and (2) a requirement that sexual motivation be a substantial factor in the commission of the offense.

I. CONSTITUTIONAL DICTATES OF VOID FOR VAGUENESS

The void-for-vagueness doctrine requires that statutes provide fair warning of prohibited conduct, and must contain adequate protections against arbitrary enforcement. Although the doctrine guards the interests of criminal defendants, it is difficult for defendants to prevail on a void-for-vagueness theory. In determining whether a statute withstands a vagueness attack, courts apply well-established principles of statutory construction that favor upholding the statute.

A. Statutes Must Provide Fair Notice and Protect Against Ad Hoc Enforcement

The United States Supreme Court has interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments to require fundamental fairness in the deprivation of liberty. The void-for-vagueness doctrine is an elaboration of these clauses that the Court has formulated in numerous ways. A much-quoted passage from a 1926 case holds that a statute is unconstitutional if it is written in such vague terms “that men of common intelligence must necessarily guess at its meaning and differ as to its application.” There are two prongs to vagueness analysis, both of which must be satisfied for a statute to pass constitutional muster. The first deals with warning potential offenders, while the second applies to guiding those enforcing the law.

8. Id.
Indeterminacy of “Sexual Motivation”

Although individuals have a right to understand what behavior is punishable by a particular law,9 the requirement of fair notice does not mean that a person must be able to know the exact point at which conduct crosses the line between permissible and punishable.10 All language is vague to some extent,11 and laws do not have to meet unrealistic standards of specificity in order to be constitutional.12 For obvious reasons, however, courts require a greater degree of certainty for statutes that impose criminal sanctions than for those that impose civil penalties.13

The Supreme Court has indicated that the more important component of vagueness analysis is the requirement of protections against arbitrary enforcement.14 This recognition comes in part because defendants will usually not receive actual notice of statutory provisions.15 By contrast, those charged with enforcing the statute need guidance from clear standards, as these provide a check against law enforcement based on personal biases.16

The danger that a vague law will lead to arbitrary enforcement arises in several contexts. Police officers and prosecutors may assume an undue degree of discretion if a law does not provide them specific criteria on which to base arrests and charges.17 Furthermore, if judges are unable to instruct juries as to what conduct the law prohibits, juries must render verdicts without reference to a clear set of standards.18 This lack of standards is just as problematic for judges conducting nonjury trials. Additionally, appellate courts cannot determine whether or not

---

9. An individual’s need to receive fair notice of prohibited conduct does not end with arrest. An indictment must set forth a factual basis for the charges so that a defendant can prepare his or her defense. United States v. Lane, 765 F.2d 1376, 1380 (9th Cir. 1985).
15. Smith v. Goguen, 415 U.S. 566, 574 (1974). One exception to this general observation applies to individuals operating businesses, who will likely actually consult statutes to ensure that their operations are in conformity with the law. Id.
16. Id. at 575.
17. LaFave, supra note 6, § 2.3(e), at 95. See also John Calvin Jeffries, Jr., Legality, Vagueness and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 196–97 (1985).
18. LaFave, supra note 6, § 2.3(e), at 95.
trial courts have erred unless they can understand the legal standards by which a defendant was convicted.\textsuperscript{19}

However, just as with the fair notice test, the requirement of safeguards against arbitrary enforcement does not mandate an unrealistic degree of precision.\textsuperscript{20} Undue specificity could mean that offenders whom legislators clearly meant to reach might not be charged simply because they failed to match up precisely to the statute’s charging criteria.\textsuperscript{21} Thus, in applying both prongs of vagueness analysis, courts balance the ideal of fundamental fairness against society’s interest in effective law enforcement.

\textbf{B. The Difficulties of Successfully Bringing a Void-for-Vagueness Challenge}

A defendant who brings a void for vagueness challenge can attack a statute in two ways. She can argue that the statute is facially void, which means that there are no instances in which the statute could permissibly be applied.\textsuperscript{22} She can also argue that the statute is void as applied to the facts of her case. A court should consider a facial vagueness challenge only if the statute in question threatens to inhibit the exercise of First Amendment rights.\textsuperscript{23} Otherwise, it will proceed to an analysis of whether the law is void as applied in the case before it.\textsuperscript{24}

A defendant who mounts a void-for-vagueness challenge has a difficult argument to make. The defendant must prove impermissible vagueness beyond a reasonable doubt.\textsuperscript{25} This burden is made more onerous by the widespread policy of U.S. courts to try to give effect to the intent of legislatures by upholding the constitutionality of statutes.\textsuperscript{26}

\begin{thebibliography}{9}
\bibitem{note19} Note, \textit{The Void-For-Vagueness Doctrine in the Supreme Court}, 109 U. Pa. L. Rev. 67, 80 n.72 (1960).
\bibitem{note20} United States v. Petrillo, 332 U.S. 1, 7 (1947).
\bibitem{note21} 1A Norman J. Singer, \textit{Sutherland Statutory Construction} § 21.16, at 138 (5th ed. 1992). \textit{See also} William C. Powers, Jr., \textit{Formalism and Nonformalism in Choice of Law Methodology}, 52 Wash. L. Rev. 28, 30–31 (1976) (discussing the idea that formal rules bar some relevant information from consideration and may thus lead to results in individual cases that are at odds with the policies that generated the rules).
\bibitem{note24} \textit{Id}.
\bibitem{note26} 1A Singer, \textit{supra} note 21, § 21.16, at 139.
\end{thebibliography}
C. Interpretation of Statutes

In addressing vagueness challenges, courts often apply the "plain meaning rule" of statutory interpretation. Under this principle, courts presume that words within a statute mean what they do in everyday usage. If a court can infer a plain meaning from the language of the statute, there is no need to refer to extrinsic sources. The Supreme Court has held this principle to be "an axiom of experience," not a rule of law that prevents courts from looking beyond the statutory language.

Terms in a statute are often defined elsewhere within the same legal code. In such cases, a court is generally bound by the statutory definition. The definition may itself be so uncertain, however, that a court is not obligated to apply it. Courts also look to other sources to clarify statutes, most notably legislative history and case law interpreting the statutes.

Once a state's highest court has construed a statute, that construction is treated as if it had always been part of the statutory language. Thus, a court that finds a law was unduly vague at the time a defendant was charged and convicted may nonetheless uphold the conviction by adopting a narrowing construction that cures the statute's vagueness. In keeping with the fair warning aspect of the vagueness doctrine, however, a court should avoid a construction that is not clearly supported by the language of the statute.

27. LaFave, supra note 6, § 2.2(b), at 76.
28. Id.
29. Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928). See also United States v. American Trucking Ass'ns., 310 U.S. 534, 543–44 (1940); State v. McDougal, 120 Wash. 2d 334, 350–51, 841 P.2d 1232, 1241 (1992) (noting that in cases in which the enforcement of a law as it literally reads would lead to absurd results, courts may examine not only the statute itself, but also other legislative documents to ascertain the purpose of the law).
30. 1A Singer, supra note 21, §20.08, at 90.
31. Id.
32. See, e.g., State v. Talley, 122 Wash. 2d 192, 201–02, 858 P.2d 217, 222–23 (1993) (examining legislative history to hold that a Washington malicious harassment statute was not intended to regulate speech, but only harmful conduct).
33. Jeffries, supra note 17, at 207–08.
35. LaFave, supra note 6, § 2.4, at 105 (citing, inter alia, Winters v. New York, 333 U.S. 507 (1948)).
Washington courts apply the test established by federal courts for addressing a void-for-vagueness challenge. Consequently, they examine whether a statute provides fair notice to potential offenders and whether it provides adequate safeguards against arbitrary enforcement. Furthermore, unless appellants follow a prescribed set of guidelines, Washington courts do not consider vagueness arguments regarding the state constitution, but focus only on possible federal constitutional violations. In *Halstien*, the Washington Supreme Court framed its vagueness analysis in terms of the United States Constitution. This Note likewise limits its analysis to the federal framework.

II. OVERVIEW OF *HALSTIEN*

*State v. Halstien* arose from a residential burglary committed by a juvenile. The defendant was convicted of committing a second-degree burglary with a sexual motivation. He argued before the supreme court that the sexual motivation statute was both vague and overbroad, and that two of the trial court’s evidentiary rulings were reversible errors. The supreme court rejected all these arguments and affirmed the conviction.

A. The Facts of Halstien

On the morning of November 3, 1990, 15-year-old Steve Halstien broke into the house of a woman, C.B., who had been a customer on his newspaper route. Prior to the burglary, C.B. had become uncomfortable with the amount of attention Halstien showed her, and with questions he asked her that she deemed to be inappropriate. As she

---


38. Defendants may argue that the Washington State Constitution affords them broader rights than does the United States Constitution. Courts will not consider such arguments, however, unless defendants brief six factors that the Washington Supreme Court enumerated in *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986). The *Gunwall* factors are as follows: (1) the text of the state constitution; (2) ways in which the state constitution differs significantly from corresponding provisions of the federal constitution; (3) the history behind the adoption of the passage in question, including legislative intent as well as common-law influences; (4) preexisting state law; (5) structural differences between the two constitutions (whereas the federal constitution enumerates the powers which the government may exercise, the state constitution focuses on limiting the sovereign immunity of the people and the representatives they elect); and (6) whether the right at issue is a matter of state, rather than federal concern (i.e., whether the subject matter is local in character and does not involve issues calling for national uniformity). *Id.* at 61–62, 720 P.2d at 812–13.

testified at trial, Halstien often inquired about her clothes, car, stereo, and house. She testified that he “gave [her] the creeps when he came to the door and collected,” and that this uneasiness prompted her to cancel her subscription. Halstien continued delivering the papers anyway. During the eight months before the break-in, C.B. often heard noises outside her house after midnight, and then found the gate in the fence around her house open the next morning. She began finding burn holes in her window screens near the latches and noticed that some of her screens were missing. At about 10 p.m. on the Friday preceding the burglary, Halstien came to her house to collect on the newspaper subscription. When C.B. came to the door barefoot, with bloodshot eyes, and wearing an oversized sweater, Halstien asked her if she had had to get dressed to answer the door. C.B. testified that she did not find it unusual at the time that Halstien had come at such a late hour because she was often away from home earlier in the evening.

At the time of the burglary, C.B. was sleeping in her bedroom on the ground floor of her house. At approximately 7:30 in the morning, she heard a noise upstairs and went to see what had caused it. She found the bathroom window broken. Searching her house, C.B. found no valuables or money missing, although a box of condoms and a vibrator had been taken. Police found muddy footprints in several rooms, including some around her bed. The burglar had also sifted through a box of photographs of C.B., scattering them over the floor of an upstairs room. A police officer who had investigated the break-in testified at trial to seeing a substance on one of the photographs that he believed was semen or some other bodily fluid. When the picture was dusted for fingerprints, the substance was contaminated, making positive identification of the substance impossible.
During questioning following the break-in, Halstien confessed. He admitted to having made cigarette burns in the victim's window screens at the time of the burglary. He said that he did not know why he had stolen the vibrator and condoms. He told the interrogator he had smashed the vibrator against a tree near C.B.'s house; the item was found broken in pieces as he had indicated. Halstien also said that he took the condoms with him after throwing the box away.

In a nonjury trial, Halstien was convicted of committing second-degree burglary with a sexual motivation. The sentencing court found the standard-range sentence of five to ten days for second-degree burglary to be a manifest injustice and sentenced Halstien to 104 weeks.
Indeterminacy of "Sexual Motivation"

at the Department of Juvenile Rehabilitation. The court of appeals upheld the conviction, and the supreme court granted review.

B. Halstien Challenges His Convictions

Halstien appealed his conviction to the supreme court under three theories. First, he argued that the sexual motivation statute was unconstitutionally overbroad. Second, he asserted that the statute was void for vagueness, both facially and as applied to the facts of his case. Finally, he argued that the admissions into evidence of testimony about his prior contacts with C.B. and the police officer's testimony regarding the substance on the photograph were reversible errors.

I. Vagueness Arguments Were Unsuccessful

The supreme court held that the sexual motivation statute was not void for vagueness, either facially or as applied to the facts of Halstien's
case.\textsuperscript{60} Since a statute must threaten First Amendment freedoms before a court properly considers a facial vagueness challenge,\textsuperscript{61} the court's rejection of Halstien's overbreadth argument\textsuperscript{62} meant that a facial vagueness challenge would also fail. Therefore, only an as-applied vagueness theory merited serious consideration.

The court offered several justifications for holding that the statute was not void for vagueness. First, the court found that the term "sexual motivation" is clear enough to inform ordinary persons of the proscribed conduct.\textsuperscript{63} Second, the statute requires that the finding of sexual motivation be based upon the defendant's conduct in committing the underlying offense.\textsuperscript{64} Third, the court found that the statute contains sufficient safeguards against arbitrary enforcement.\textsuperscript{65}

2. \textit{Halstien Challenged the Trial Court’s Evidentiary Rulings}

The supreme court found that the evidence of prior contacts between Halstien and the victim was relevant to the issue of his motive or intent.\textsuperscript{66} However, the court agreed with Halstien’s assertion that the trial judge should have stated on the record that the probative value of Halstien’s prior contacts with the victim outweighed the danger of undue prejudice to his case.\textsuperscript{67} Nonetheless, the court deemed this oversight on the part of the trial judge to be harmless error because the burglary itself provided sufficient evidence to prove Halstien’s sexual motivation. Thus, the challenged evidence did not materially affect the outcome of the trial.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{60} \textit{Halstien}, 122 Wash. 2d at 121, 857 P.2d at 278.
\item \textsuperscript{61} \textit{Maynard v. Cartwright}, 486 U.S. 356, 361 (1988).
\item \textsuperscript{62} Halstien argued that the sexual motivation statute was unconstitutionally overbroad in that it had the effect of "chilling" speech protected by the First Amendment. The court found overly speculative the possibility that individuals would suppress thoughts of a sexual nature so that such thoughts could not later be used against them in a criminal prosecution. \textit{Halstien}, 122 Wash. 2d at 124–25, 857 P.2d at 279–80.
\item \textsuperscript{63} \textit{Id.} at 118, 857 P.2d at 276.
\item \textsuperscript{64} \textit{Id.} at 120, 857 P.2d at 277.
\item \textsuperscript{65} \textit{Id.} at 121, 857 P.2d at 277–78.
\item \textsuperscript{66} \textit{Id.} at 126, 857 P.2d at 280.
\item \textsuperscript{67} \textit{Id.}, 857 P.2d at 280. Evidence Rule 404(b) allows the admission of evidence of other crimes, wrongs, or acts by an individual for the purpose of proving motive. Wash. R. Evid. 404. Such admissions depend upon a court's determination, under Evidence Rule 403, that the probative value of the evidence outweighs the danger of unfairly prejudicing the defendant. Wash. R. Evid. 403.
\item \textsuperscript{68} \textit{Halstien}, 122 Wash. 2d at 127, 857 P.2d at 281. This conclusion is questionable because the supreme court's own determination that the burglary itself provided sufficient evidence of sexual motivation does not necessarily mean the trial court would have made the sexual motivation finding without considering the prior contacts. In fact, the trial court's justification for the finding of sexual
\end{itemize}
Indeterminacy of “Sexual Motivation”

Halstien likewise challenged the admission of testimony about the substance on the photograph, contending that the danger of unfair prejudice outweighed the evidence’s probative worth. The court noted that the trial court had apparently attached no weight to this evidence, as it made no mention of the testimony in its findings and conclusions.69 Thus, even if the trial court should have excluded the testimony because of the danger of unfair prejudice, any evidentiary error was harmless.70

The court’s holdings on the evidentiary issues meant that the trial court could legitimately have found sexual motivation in Halstien’s conduct by examining only the facts of the burglary. Furthermore, the most potentially damaging piece of evidence from the burglary was not essential to this finding. These holdings on the evidentiary issues become important as one considers the dictates of the void-for-vagueness doctrine and inquires whether the court validly rejected Halstien’s vagueness challenge.

III. FLAWS IN THE HALSTIEN DECISION

In finding that the sexual motivation statute does not infringe First Amendment rights,71 the court was able to dispense effectively with Halstien’s facial vagueness challenge, as well as with his charge of overbreadth. The court was far less convincing, however, in defending its conclusion that the statute was not unconstitutionally vague as applied to the facts of Halstien’s case. The opinion leaves serious questions as to whether Halstien had fair notice that his actions would lead to a charge of sexual motivation. Halstien likewise fails to alleviate doubts about whether the statute protects against ad hoc enforcement.

A. The Fair Notice Requirement

A key point in Halstien’s void-for-vagueness argument was that the idea of a sexual motivation for a nonsexual offense is too vague to give

---

69. Halstien, 122 Wash. 2d at 128, 857 P.2d at 281.
70. Id., 857 P.2d at 281.
71. See supra note 62.
fair warning of what conduct the statute proscribes. The supreme court responded that the term that Halstien found unacceptably vague is defined in Wash. Rev. Code § 13.40.020(25), which states: “‘Sexual motivation’ means that one of the purposes for which the respondent committed the offense was for the purpose of his or her sexual gratification.” This attempt to explain sexual motivation only raises the question of when a person can be said to be acting for the purpose of sexual gratification.

In an effort to show that “sexual gratification” is a readily understandable concept, the court cited a previous Washington case, In re Adams, in which a defendant was found to have acted in order to gratify sexual desire. In Adams, a case involving an indecent liberties statute, the Washington Court of Appeals found that when a defendant had placed his hands on a female minor’s hips when her slacks were down to her mid-thigh, and had then stretched himself out prone on top of her, it was clear that the defendant had acted for the purpose of sexual gratification. However, the supreme court failed to note crucial distinctions between Adams and Halstien. Adams involved a statute that could be violated only by an interaction between individuals. Furthermore, the statute provided that this interaction had to involve sexual contact. The language of the sexual motivation statute, by contrast, requires neither that the offender be in anyone’s presence at the time of the violation, nor that he or she engage in overt sexual behavior. Thus, the indecent liberties statute explicitly described the conduct that would result in criminal charges, whereas the sexual motivation statute leaves culpable conduct undefined.

---

74. Halstien, 122 Wash. 2d at 119, 857 P.2d at 276–77.
76. Id. at 518, 601 P.2d at 996.
77. The provision at issue in Adams read as follows:

(1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or . . .

(2) For purposes of this section, “sexual contact” means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.


828
Adams also involved an unsuccessful vagueness challenge to the statutory phrase “sexual or other intimate parts.” The court of appeals held that a person of common intelligence would have known the minor's hips were “sexual or other intimate parts,” especially if the person were touching them in a way that suggested an attempt at sexual gratification. In addition to Adams, the Halstien court pointed to three other cases—State v. Johnson, State v. Galbreath, and State v. Bohannon—as examples of unsuccessful vagueness challenges to statutes “containing language similar to the juvenile sexual motivation statute.” These cases are readily distinguishable from Halstien, however, in that the challenged statutes defined the proscribed conduct and thus clarified phrases that otherwise might have been unduly vague. In Johnson, a defendant who was convicted of statutory rape and indecent liberties challenged the same language at issue in Adams—the phrase “intimate parts.” Relying on Adams to dismiss the vagueness challenge, the Johnson court held in a separate portion of the opinion that when the defendant had wiped a five-year-old girl's genitals with a washcloth, and then induced her to perform fellatio on him, it was clear that the defendant had taken indecent liberties when he touched the girl's

---

79. Id. at 520–21, 601 P.2d at 997–98.  
80. 96 Wash. 2d 926, 639 P.2d 1332 (1982).  
81. 69 Wash. 2d 664, 419 P.2d 800 (1966).  
83. Halstien, 122 Wash. 2d at 119–120, 857 P.2d at 277.  
84. See supra note 77 for relevant portions of the indecent liberties statute at issue in Adams; the defendant in Johnson addressed his vagueness challenge to the same statute. Johnson, 96 Wash. 2d at 929–30, 639 P.2d at 1333–34.  
85. The provision at issue in Galbreath read as follows:  
(2) Every person who takes any indecent liberties with or on the person of any child under the age of fifteen years, or makes any indecent or obscene exposure of his person, or of the person of another, whether with or without his or her consent, shall be guilty of a felony. Wash. Rev. Code § 9.79.080(2) (repealed 1975) (as quoted in Galbreath, 69 Wash. 2d at 665–66, 419 P.2d at 802).  
86. Id., 639 P.2d at 1333.
private parts. In *Galbreath*, a defendant convicted of indecent exposure argued that the words “indecent” and “obscene” were impermissibly vague as used in the challenged statute. The supreme court held that these words, when used in the phrase “indecent or obscene exposure of the person,” were not unconstitutionally vague because that phrase suggested an obvious meaning to persons of common intelligence. The defendant in *Bohannon*, who was convicted of sexual exploitation after taking nude photographs of a female minor, challenged the term “sexually explicit conduct” as unduly vague. The supreme court, noting that the statutory definition of this term included exposure of private parts for the purpose of sexually stimulating the viewer, held that a person of common intelligence would have known that the statute proscribed the defendant’s conduct.

*Adams, Johnson, Galbreath, and Bohannon* effectively illustrate the difficulty of prevailing on a vagueness challenge to a sex offense statute in Washington. They do not clarify, however, the kind of conduct that an offender would have to display in order to violate the sexual motivation statute at issue in *Halstien*. Furthermore, the court’s observation that the challenged statutes in these cases had similar language to that of the sexual motivation statute is misleading. Although *Adams, Johnson*, and *Bohannon* involved statutes that mentioned sexual gratification or sexual stimulation, these statutes also described prohibited acts. The sexual motivation statute offers no such clarification of proscribed behavior. Without describing the conduct from which courts will infer sexual motivation, the statute does not provide fair notice to potential offenders, and thus fails the first test of vagueness analysis.

The lack of fair warning is underscored by the statute’s provisions for filing the sexual motivation charge. The statute provides that when sufficient admissible evidence exists to justify the finding of sexual motivation and to overcome the most plausible defense, “[t]he prosecuting attorney shall file a special allegation of sexual motivation in every juvenile offense other than sex offenses . . . .” A juvenile who

---

87. *Id.* at 934, 639 P.2d at 1336.
88. 69 Wash. 2d at 666–67, 419 P.2d at 802.
89. *Id.* at 668–69, 419 P.2d at 803.
91. *Id.* at 468–69, 814 P.2d at 697.
92. See supra notes 77 and 84.
shoplifted a box of condoms would presumably be subject to an enhanced punishment under the statute, since the theft could reasonably be ascribed to a desire for sexual gratification. A juvenile who stole an item of equal or greater value but without sexual applications, such as a box of candy, would avoid the added penalty. Imposing a greater punishment on the juvenile who shoplifts the condoms not only offends basic notions of fairness, but also does little to advance the policy of intercepting and treating potential sex offenders before they bring harm to others. Not every juvenile offense other than a sex offense should come within the purview of the sexual motivation statute. No limitations now exist, however, to ensure that the statute reaches only those offenders whose conduct suggests a propensity for sex offenses.

B. Protection Against Arbitrary Enforcement

Even if the Halstien court correctly concluded that potential offenders have adequate notice of what conduct the sexual motivation statute proscribes, the court should have recognized that the statute provides inadequate protections against arbitrary or ad hoc enforcement. Neither the statutory language nor judicial interpretations have explained what conduct is chargeable under the statute. This indeterminacy can lead to one person’s being charged with sexual motivation, while an equally culpable offender whose case involves slightly different facts may escape this allegation. Also contributing to the danger of arbitrary enforcement is the lack of a standard prescribing how large a portion of a defendant’s overall motivation the sexual component must be. Halstien failed to alleviate these infirmities.

1. The Court’s “Some Conduct” Standard Is Not a Useful Narrowing Construction

In a further attempt to show that the sexual motivation statute was not impermissibly vague, the court interpreted the statute to require that the finding of sexual motivation “be based on some conduct forming part of the body of the underlying felony.” The opinion further asserted that


the statute punishes only identifiable conduct during the commission of the offense that shows the defendant was acting for the purpose of sexual gratification. This is a circular explanation that leaves unanswered the question of what kind of conduct would support a finding of sexual motivation. Without a clearer guide as to actions by an offender that would indicate sexual motivation, those who enforce the statute run the risk of arbitrary enforcement.

The court rejected Halstien’s argument that a finding of sexual motivation should be based only on sexual contact, reasoning that if there is sexual contact, the defendant can then be charged under sex offense statutes. The court explained that the purpose of the sexual motivation statute was to supplement sex offense statutes and to treat offenders before they actually commit sex offenses. Since individuals can derive sexual gratification in ways other than by sexual contact, the court was correct in not adopting a sexual contact requirement for the sexual motivation statute. The court was remiss, however, in not proceeding to offer a meaningful conduct requirement in place of sexual contact. A statute’s laudable purpose does not obviate the due process requirement of setting forth ascertainable standards of guilt.

The court emphasized that the statute contains several procedural safeguards against arbitrary enforcement. Specifically, a prosecutor may file the sexual motivation charge only when sufficient admissible evidence exists to support the allegation against a defendant’s most plausible defense. Additionally, the prosecution must prove the charge beyond a reasonable doubt. Finally, the trial court must enter a finding of fact as to whether the offense was committed with a sexual motivation. As reassuring as these safeguards may sound, they are not meaningful unless there is a clear definition of culpable conduct under the statute. Without this definition, prosecutors cannot know what evidence is sufficient to support the allegation, and judges cannot determine whether the prosecution has proved its case.

One can see that this indeterminacy worked to Halstien’s disadvantage by comparing the circumstances of his offense with a slightly altered

96. Halstien, 122 Wash. 2d at 120, 857 P.2d at 277.
97. Id. at 120–21, 857 P.2d at 277.
98. Id. at 121, 857 P.2d at 277.
101. Halstien, 122 Wash. 2d at 121, 857 P.2d at 277–78.
scenario. If one accepts the supreme court’s statements that neither the police officer’s testimony concerning the substance on the photograph nor the evidence concerning Halstien’s prior contacts with C.B. was necessary for the finding of sexual motivation, the remaining evidence that supports this finding is remarkably sparse. Of chief significance is Halstien’s theft of the vibrator and condoms while leaving valuables untouched, as well as the interest he showed in C.B.’s photographs.

One can imagine another burglar, just as fascinated with the victim as Halstien was, who might behave just as he did, except that this burglar steals more than just the vibrator and condoms. If the burglar also takes a wallet, stereo equipment, and jewelry, a sexual motivation will be far less apparent than in Halstien’s case. The clouding of this burglar’s motivations could mean he would escape charges under the sexual motivation statute, with the result that he would receive a lighter sentence for a more serious offense. This incongruous result demonstrates one way in which the sexual motivation statute invites arbitrary enforcement.

2. Halstien Fails To Articulate a Standard for Causation

Another weakness in the arbitrary enforcement context is the statute’s failure to specify how large a proportion of the overall motivation the sexual component must be. While the Halstien decision noted the finding by the trial court that the sexual motivation was a “primary motivation” behind the burglary, the supreme court did not indicate whether a “primary motivation” finding is necessary under the statute. The court confused matters when it concluded that sufficient evidence existed for the trial court to find that “one of Halstien’s motives” was sexual gratification.

A requirement that the prosecution show that “one of the purposes” for the defendant’s actions was sexual gratification is less rigorous than a

---

104. These were the only specific acts which the trial judge cited to support the finding of sexual motivation, although the judge also noted Halstien’s obsession with the victim, as well as his “lurking behavior” during the burglary. Findings and Conclusions, supra note 39, at 3–4. Whether any of Halstien’s other actions (e.g., making cigarette burns in window screens, smashing the vibrator against a tree) suggested a sexual motivation is a matter which only experts in human psychology should address. At any rate, these other actions do not appear to have figured in the trial court’s determination of sexual motivation.
105. Halstien, 122 Wash. 2d at 114, 857 P.2d at 274.
106. Id. at 129, 857 P.2d at 282.
"primary motivation" standard. Without knowing what standard to apply, a trial judge cannot determine whether the state has met its burden of proof. This lack of guidance invites arbitrary enforcement.

If sexual motivation needs to be present only to some degree, the state's case is easily made. During adolescence, males experience increases of up to 1800 percent in their levels of testosterone, the strongest biological factor in their sex drive. With sex hormones present at such high levels in teenagers, one would expect the desire for sexual gratification to be influencing their conduct at virtually all times.

IV. PROPOSED SOLUTIONS TO THE STATUTE'S AMBIGUITIES

The error of the Halstien court lay not in upholding the constitutionality of the sexual motivation statute, but in treating the statute as if it were already sufficiently clear. Had the court offered meaningful clarifications, it could have more persuasively rejected Halstien's void-as-applied arguments, since such clarifications would operate as though they had always been part of the statute. The court therefore missed an opportunity to adopt narrowing constructions that would satisfy constitutional dictates of fair warning and safeguards against arbitrary enforcement.

A. The Finding of Sexual Motivation Should Require a Deviant Sexual Disorder

The Halstien court contended that one of the protections against arbitrary enforcement of the sexual motivation statute is the requirement that the finding be based on some conduct forming part of the body of the underlying offense. This judicial gloss is hardly of assistance to prosecutors and judges, for it leaves them to decide for themselves what kind of conduct should trigger the statute.

The task force report that proposed the sexual motivation statute emphasized the need for sentencing options that would allow sexually

110. See supra notes 34–36 and accompanying text.
111. Halstien, 122 Wash. 2d at 120, 857 P.2d at 277.
motivated offenders to receive treatment. The court would have been wise to consult psychological literature to learn what experts consider to be deviant sexual behavior. The court could then have placed a sensible narrowing construction on the sexual motivation statute by requiring that a defendant display signs of a sexual disorder while committing the underlying offense. This construction would be an improvement over the court's "some conduct" standard for two reasons. First, a "sexual disorder" standard is more narrowly tailored to the goal of identifying and treating prospective sex offenders. Second, this standard offers more guidance to prosecutors and judges and thus guards against arbitrary enforcement.

Psychologists recognize three categories of paraphilia, or "attraction to the deviant." The first type involves a tendency to engage in sexual encounters that involve the infliction of pain or suffering. The second involves a disposition toward achieving sexual arousal using nonhuman objects. The third type involves a tendency to achieve sexual arousal from nonconsenting partners.

Since the sexual motivation statute applies in cases in which the offender is not acting directly upon a victim, the first class of paraphilia—requiring an actual encounter between individuals—would not be relevant in cases involving the statute. On the other hand, an individual who committed an offense other than a sex offense and fell into either of the other categories would be an appropriate candidate for the sexual motivation charge.

For example, a burglar who declined to steal valuable possessions, but instead showed a preoccupation with women's underwear, sexual paraphernalia, or other objects with an intimate connection to the victim might fit the second category of paraphilia. In Halstien's case, the trial court would properly have examined whether his interest in the

113. See, e.g., Sarason & Sarason, supra note 99, at 84 ("Classifying abnormal behavior should be a matter of drawing a picture of a person rather than simply marking a point on a graph.")
114. See supra note 95 and accompanying text.
116. Id.
photographs, the vibrator, and the condoms was a manifestation of this second type of disorder. By contrast, a court hearing the case of a burglar who steals an issue of *Hustler* as an afterthought would make a similar inquiry, but would likely not find in this one act an abnormal preoccupation with nonhuman objects.

A person who broke into a home hoping to achieve sexual arousal by spying on its occupant might fit the third category of paraphilia, involving a need to achieve sexual arousal from nonconsenting partners. Halstien's behavior prior to the burglary, particularly his tendency to spend more time outside C.B.'s house than was necessary to discharge his duties as a newspaper deliverer, would have been relevant to this inquiry. The fact that during the burglary Halstien apparently walked around the sleeping woman's bed without touching her would also be a point to consider.

Judges and juries without expertise in sexual disorders would normally be ill-equipped to decide whether a defendant's conduct during the course of an offense indicated a sexual disorder. Testimony by expert witnesses would be necessary. A Washington statute already authorizes judges to order examinations of convicted juvenile sex offenders to determine if they are amenable to treatment. Because of


118. The supreme court seems to support an examination of prior contacts to aid the inquiry into sexual motivation. Although the court held that Halstien's prior contacts with the victim were not necessary to the finding of sexual motivation, the supreme court also noted the relevance of these contacts to the issue of sexual motivation. See supra notes 66-68 and accompanying text. Moreover, the opinion quoted and concurred with the court of appeals' summary of evidence demonstrating Halstien's sexual motivation, which noted that Halstien's prior contacts with the victim indicated he held a strong interest in her. *Halstien*, 122 Wash. 2d at 129, 857 P.2d at 282 (quoting State v. Halstien, 65 Wash. App. 845, 851-52, 829 P.2d 1145, 1149 (1992)).

119. Wash. Rev. Code § 13.40.160(5). This subsection vests sentencing judges with the discretion to order post-conviction evaluations of first-time juvenile sex offenders to determine whether the offenders are amenable to community-based treatment. Halstien's two-year sentence was based, in part, on evaluations by a social worker who found Halstien at high risk to reoffend, and thus a poor candidate for outpatient treatment. See supra, note 54.

120. In view of the enhanced sentences that juveniles may face because of the aggravating factor of sexual motivation, the ordering of post-conviction evaluations of these offenders should not be discretionary with the sentencing judge, but should be required before a judge imposes sentence. A useful comparison can be made to a Minnesota statute that is aimed at patterned sex offenders, Minn. Stat. § 609.1352 (1990). The statute authorizes judges to impose sentences that are over twice the length of the presumptive sentence under the sentencing guidelines, but only if several criteria are met. One is the requirement of a finding by a professional examiner that the offender is a patterned sex offender who needs long-term treatment and supervision. Furthermore, the crime for which the defendant is being sentenced must reasonably appear to the sentencing court to have been sexually motivated. Finally, the offender must pose a threat to public safety. *Id.*
the stigma that could accompany a person convicted of a sexually motivated offense, however, it is critical to determine at the trial stage whether the offender's conduct rises to the level of a sexual disorder.

B. The Court Should Adopt a "Substantial Factor" Test for Evaluating Sexual Motivation

The *Halstien* court could have further clarified the sexual motivation statute by delineating a required causal connection between sexual motivation and the underlying crime. As Washington now defines "sexual motivation," a juvenile whose criminal conduct is influenced to any degree by a desire for sexual gratification is presumably chargeable under the statute. The task force that drafted the sexual motivation statute was concerned with intercepting future sex offenders in need of treatment, rather than with penalizing individuals for the hormonal onrush that accompanies adolescence. If the court required sexual motivation to clear a higher threshold than being merely "one of the purposes" of a defendant's actions, the statute would still reach those in

---

This statute recently withstood several constitutional challenges in State v. Christie, 506 N.W.2d 293 (Minn. 1993), *cert. denied*, 114 S. Ct. 1316 (1994). Christie, who had several prior convictions for sex offenses, was sentenced under the patterned sex offender statute after burglarizing a couple's home carrying only a condom, aware that the couple was home and that the complainant's wife was in a place where she would be vulnerable to attack. *Id.* at 295–96. The Minnesota Supreme Court held, *inter alia*, that the statute was not unconstitutionally vague as applied to Christie's conduct, as it was clear that his crime was "part of a predatory pattern of behavior that had criminal sexual conduct as its goal." *Id.* at 301 (quoting Minn. Stat. § 609.1352, subd. 1(1) (1990)). Christie also argued that the statute failed to satisfy due process dictates because it allowed sexual motivation to be proven under a less strict standard than "beyond a reasonable doubt." *Id.* at 297. The court rejected this challenge as well, noting that a finding of sexual motivation, by itself, was not enough to subject a person to sentence enhancement under the patterned sex offender statute. That finding was only one of three factual determinations which were required to bring a person within the reach of the statute. *Id.* at 298–99.

The three-part test of the Minnesota statute, in particular the requirement of specific findings by an expert, offers a strong check against arbitrary enforcement. Washington's sexual motivation statute, by not requiring expert testimony at either the trial or sentencing stage, does not deal as effectively with this danger.

121. *See* Daniel Golden, *Sex-Cons*, Boston Globe, Apr. 4, 1993, Sunday Mag., at 12 (detailing the post-incarceration lives of several sex offenders, including an 18-year-old Washington State resident who, after serving time for raping two boys, was refused enrollment in a municipal school system, was evicted from two apartments, and was able to find only one shelter in Olympia which was willing to accept him).


124. *See supra* notes 108–09 and accompanying text.
need of treatment while protecting others from unwarranted enhancements of their sentences.

Courts often hear cases in which they must consider the multiple motives of a person's actions. They have adopted various tests for determining the legal consequences of a proscribed motivation. At one end of the spectrum is a test that attaches legal significance to a motivation if it influenced an outcome to any degree. At the other end is a test that requires that the motivation in question be the actor's sole purpose. Both these tests would place an unfair handicap on one of the parties to a sexual motivation case. Under an "any degree" standard, a juvenile charged under the statute would face the nearly impossible task of proving a negative, namely, that there was no sexual motivation present during the offense. A "sole purpose" standard, on the other hand, would require the prosecution to prove the absence of anything but a sexual motivation, a heavy burden that could undermine legislative intent. A "sole purpose" inquiry is also objectionable because of the shaky premise that an individual's actions will have had only one motivation.

Compromises between these extreme standards can be found in tort law. A classic causation test in tort law is the "but for" inquiry. If the plaintiff's damages would not have occurred "but for" the defendant's acts, the defendant's conduct is deemed to have been a cause of the damages. This test may not always be appropriate, however. One area in which the test has proved problematic is employment discrimination. In a recent Washington case, a plaintiff alleged her dismissal from work was a retaliation against her for filing an age

---

126. Id.
127. See supra notes 108-09 and accompanying text.
130. Id. Even if the defendant's conduct is a "but for" cause of the damages, however, the defendant may not be held legally responsible for them. The nature and degree of the connection between the defendant's conduct and the damages are important considerations in determining liability. Id.
131. Employment discrimination suits are based on statutes, and thus not properly classified as torts cases. However, the historical basis for these statutory causes of action lies in common-law tort and contract claims. Mack A. Player, Employment Discrimination Law xvii (1988).
discrimination claim. In this case, the Washington Supreme Court deemed the “but for” standard too harsh, as it required the plaintiff to show the exact causal effects of her employer’s legitimate and illegitimate motivations. Nonetheless, the court held that the plaintiff could not prevail merely by showing that illegitimate motivations influenced her dismissal to any degree. As the court observed, this standard would almost relieve the plaintiff of having to prove the motivation and causation elements of her claim. Adopting an intermediate standard, the court held that the plaintiff had to prove that retaliation was a substantial factor motivating her dismissal.

A “substantial factor” test would work equally well in prosecutions under the sexual motivation statute. Proof of sexual motivation as a substantial factor influencing a defendant’s conduct is a realistic proposition for prosecutors. This standard also takes into consideration the interests of defendants by helping to screen out individuals who have not shown a propensity to become sex offenders. A juvenile who breaks into a home in order to steal valuable items, but also carries off a copy of Hustler he finds lying on the coffee table, has not behaved in a sexually deviant way that calls for treatment. Such an individual would fall outside the reach of the statute under a “substantial factor” test.

Another advantage of a “substantial factor” test is that judges are already accustomed to applying it. In addition to using this test in civil cases, Washington courts also apply it in criminal contexts. The fact that judges are familiar with “substantial factor” determinations provides an additional safeguard against arbitrary enforcement of the statute.

The two narrowing constructions proposed here will help the sexual motivation statute satisfy due process requirements. The sexual disorder requirement is useful both in providing fair notice to potential offenders and in clarifying punishable behavior for law enforcement officials and judges. The requirement that the state prove sexual motivation as a substantial factor is an added safeguard against arbitrary enforcement, for

133. Id. at 81, 821 P.2d at 35.
134. Id. at 87–88, 821 P.2d at 38.
135. Id. at 94–95, 821 P.2d at 42.
136. Id. at 94, 821 P.2d at 42.
137. Id. at 95–96, 821 P.2d at 42–43.
138. See, e.g., supra notes 132–37 and accompanying text.
139. See, e.g., State v. Ross, 71 Wash. App. 556, 565, 861 P.2d 473, 479 (1993) (holding that in criminal prosecutions, vulnerability of victim is a statutory aggravating factor if defendant knew of vulnerability and the vulnerability was a substantial factor in accomplishing the crime).
it helps judges to assess whether the prosecution has met its burden of proof.

V. CONCLUSION

As it stands, the juvenile sexual motivation statute fails either to give proper notice to potential offenders of what conduct is being proscribed, or to provide standards that guard against unequal treatment of offenders. At a minimum, the supreme court should have clarified the type of conduct that will trigger the statute, as well as the extent to which the sexual motivation must be a cause of the underlying crime. At the next opportunity, Washington courts should construe the statute to require a finding that the defendant manifests a sexual disorder, and to require that the state prove sexual motivation was a substantial factor in the defendant’s actions. With these judicial glosses, the statute can legitimately withstand constitutional challenges.