APPENDIX A

VERMONT SUPREME COURT

No. 2019-246

In re A.P., Juvenile

Filed: October 9, 2020

PRESENT: Reiber, C.J., Robinson, Eaton, Carroll and Cohen, JJ.

¶ 1. **COHEN, J.** Juvenile A.P. appeals an adjudication of delinquency based on "open and gross lewdness and lascivious behavior" under 13 V.S.A. § 2601. Juvenile argues that the evidence does not support a finding that his conduct was open or gross. He further argues that § 2601 is ambiguous and therefore unenforceable against him. Finally, he argues that § 2601 is unconstitutionally vague. We affirm.

¶ 2. The State charged juvenile with lewd and lascivious conduct in violation of 13 V.S.A. § 2601 based on an incident at school. At the time of the incident, juvenile was eighteen years old and complainant was seventeen years old. The matter was transferred to the family division after juvenile requested to be treated as a youthful offender.

¶ 3. The family division held a merits hearing at which the following evidence was presented. On January 19, 2018, juvenile approached complainant in the hallway of the school. Complainant testified: "[A]ll of a sudden, he asked if he could touch my breasts, and then he just reached out, and his hand was on me." No one else was present, although school was in session. When juvenile touched complainant's breast with his hand, she turned around and ran. She was furious and upset. Juvenile testified that he reached out his hand toward complainant's chest but never touched it. He testified that he regretted disregarding complainant's feelings and felt his actions were "disgusting." The family court found complainant to be credible. It concluded that juvenile had touched her breast and in doing so had committed a delinquent act.

¶ 4. On appeal, juvenile argues that there was insufficient evidence to support the trial court's findings that his conduct was open and gross. He also contends that 13 V.S.A. § 2601 is unenforceable under the rule of lenity and the void-for-vagueness doctrine because it does not provide sufficient notice of what conduct is proscribed. We conclude that the court's findings are supported by the record. We further conclude that the statute unambiguously proscribes the type of conduct at issue here, and accordingly affirm the judgment.

I. Sufficiency of the Evidence

¶ 5. Juvenile first argues that his conduct was neither open nor gross, and therefore is not sufficient to support an adjudication of delinquency under 13 V.S.A. § 2601. That statute states: "A person guilty of open and gross lewdness and lascivious behavior shall be imprisoned not more than five years or fined not more than $300.00, or both." *Id.* Juvenile does not challenge the trial court's factual findings, but rather argues that those factual findings were insufficient to meet the requirements of the statute. "In assessing the sufficiency of the evidence, this Court will uphold a judgment unless no credible evidence supports it. We review the evidence in the light most favorable to the State." *In re A.C.*, 2012 VT 30, ¶ 19, 191 Vt. 615, 48 A.3d 595 (mem.). We conclude that, viewed in the light most favorable to the State, the conduct was "open" because it occurred in public, and "gross" because it was "patently offensive." See id. ¶ 21.

A. Openness

¶ 6. Juvenile claims that to be "open" under 13 V.S.A. § 2601, the conduct must have been witnessed by at least one person, not including the complainant. He argues that the original criminal statute addressing lewd and lascivious conduct was intended to protect against public harms, not private harms, and therefore is inapplicable to an act of nonconsensual touching that was witnessed by no one other than the victim. While we agree that the "open" requirement is somewhat unsuited to the statute's more modern usage, we conclude that a school hallway is sufficiently public to meet its requirements.

¶ 7. When it was first codified in Vermont as a statute in 1839, the crime of lewdness was intended primarily to protect public morality. The original statute stated: "If any man or woman, married, or unmarried, shall be guilty of open and gross lewdness and lascivious behavior, every such person shall be punished by imprisonment in the common jail, not more than two years, or by fine not exceeding three hundred dollars." 1839 R.S. 99, § 8. Lewdness appeared in a chapter entitled "Of Offences Against Chastity, Morality and Decency." Id. This chapter criminalized acts that did not conform to the values of the time, particularly those relating to sex. To that end, the chapter proscribed: adultery, defined as married men and unmarried women having "connection," id. § 2; certain persons found in bed together (referring to "any man with another man's wife, or any woman with another woman's husband," id. § 3); persons divorced, cohabitating; polygamy; incest; lewdness; keeping a house of ill fame; importing, printing, selling, or distributing obscene material; blasphemy; defaming courts of justice; cursing and swearing; and disturbing the remains of the dead. See *id.* §§ 1-15. In large part, these were victimless crimes: a person could be fined five hundred dollars for

cohabitating with their ex-spouse or five dollars for swearing profanely. *Id.* §§ 4, 13. Rape, on the other hand, was listed under Chapter 94, "Of Offences Against the Lives and Persons of Individuals," along with assault with intent to commit rape and other forms of nonconsensual touching. *See* 1839 R.S. 94, §§ 21-22. By placing "open and gross lewdness" among morality crimes, rather than crimes against individuals, the Legislature appears to have perceived lewdness primarily as an act that offended collective social norms, rather than an act that injured another individual.

¶ 8. Given this background, defendants have routinely challenged their lewdness convictions on the basis that they were not sufficiently "open," where they did not intend for their conduct to be witnessed by the public. See, e.g., *State v. Maunsell*, 170 Vt. 543, 544, 743 A.2d 580, 582 (1999) (mem.); *State v. Benoit*, 158 Vt. 359, 361, 609 A.2d 230, 231 (1992). In fact, openness was an issue in the earliest case applying the statute, *State v. Millard*, 18 Vt. 574 (1846). In *Millard*, the defendant arrived at the witness's house, exposed himself, took hold of her, and repeatedly urged her to have sexual intercourse with him. *Id.* at 574. The defendant argued that his conduct did not constitute open and gross lewdness because it took place mostly in the witness's house and only between himself and the witness. *Id.* at 576. This Court rejected that theory, holding that "open" meant "undisguised, not concealed," and that "[t]he crime cannot be made to depend on the number of persons, to whom a person thus exposes himself, whether one or many." *Id.* at 578.

¶ 9. We have reaffirmed in recent case law that "'open' means 'undisguised, not concealed,' and requires no more than one witness." *Benoit*, 158 Vt. at 361, 609 A.2d at 231 (quoting *Millard*, 18 Vt. at 578); see also *State v. Discola*, 2018 VT 7, ¶ 20, 207 Vt. 216, 184 A.3d 1177 ("[C]onduct meets the statutory requirement of 'openness' if it is done in the presence of at least one other witness."); *In re A.C.*, 2012 VT 30, ¶ 21, 191 Vt. 615, 48 A.3d 595 (mem.) (affirming based on trial court's finding "that A.C.'s actions were open in that they were witnessed by [the victim]"). We have not insisted that lewd acts take place in public places to be open. See *State v. Penn*, 2003 VT 110, ¶¶ 2, 12-13, 176 Vt. 565, 845 A.2d 313 (mem.) (affirming conviction where conduct took place in third party's apartment). Neither have we insisted that more than one person witness the lewd act. See *Maunsell*, 170 Vt. at 543, 743 A.2d at 582; *State v. Ovitt*, 148 Vt. 398, 401, 535 A.2d 1272, 1273 (1986); *Millard*, 18 Vt. at 578. Our case law shows that we have repeatedly embraced a broad definition of "open." While even this broad interpretation has its limits, this case is not too far a stretch.

¶ 10. The act at issue here took place in a public place, a school hallway, during the school day, and was witnessed by complainant. Viewed in the light most favorable to the State, this was enough to render the act "open" under the meaning of the statute, even though no one other than complainant witnessed it. Juvenile's act was no less inappropriate and invasive than it would have been if another person

had witnessed the incident. More importantly, the harm caused by juvenile's action—the invasion of complainant's bodily privacy—was not contingent on the number of witnesses to the incident. It was, however, intensified by the public nature of the act. Complainant testified, "I was just having a breakdown. I mean, I just—that just happened in school." Juvenile, too, recognized that the school hallway was an "inappropriate setting" because "[s]chool is supposed to be a safe place, and at that time, I definitely, you know, did not—was not doing my part as a student to make that a safe place." The testimony showed that juvenile's touching of complainant took place in a public setting where there was an expectation of safety, and that the touching was especially offensive as a result. This evidence supports the trial court's finding that the act was "open."

B. Grossness

¶ 11. Juvenile next argues that his conduct was not "gross" under § 2601 because it was not "patently offensive." *In re A.C.*, 2012 VT 30, ¶ 21. The State agrees that the test for grossness is whether the conduct was patently offensive, but it maintains that juvenile's conduct meets that standard. We agree that the trial court could reasonably conclude that juvenile's conduct was "gross" within the meaning of § 2601.

¶ 12. The statute prohibits only "gross" or patently offensive acts of lewdness—that is, only acts of lewdness that would cause serious offense or harm to a reasonable witness. *Id.* The offense or harm may arise from, for example, an invasion of an individual's bodily privacy or integrity, or other cognizable interest. The statute does not prohibit arguably "lewd" acts that a reasonable individual would find inoffensive or only mildly offensive—for instance, a suggestive performance, hand gesture, or prank. Context is critical for this inquiry—for example, we have distinguished the unwanted grabbing of a stranger's buttocks from "members of an athletic team encouraging or congratulating one another." *Discola*, 2018 VT 7, ¶ 22. The same act may be a gross "personal invasion" in one circumstance but wholly inoffensive in another. Id. In short, acts that are open and arguably "lewd," but cause no harm in context, do not fall under the statute's prohibition.

¶ 13. In *In re A.C.*, we considered a case that, like this one, involved nonconsensual touching in a school hallway, and concluded that the conduct was "gross" because it was patently offensive. 2012 VT 30, ¶¶ 20-21. In that case, the defendant approached the complainant outside of a classroom with another classmate, cornered her, and reached up her skirt to touch her buttocks while the other student touched her breasts and vagina through her clothing. *Id.* ¶ 2. We concluded "that A.C.'s actions were . . . gross because the act of placing A.C.'s hands under A.R.'s skirt and touching her buttocks through her underwear was patently offensive and known to be patently offensive to any law-abiding person in A.C.'s

situation." *Id.* ¶ 21. The conduct in this case—touching a student's breast in a school hallway without her consent—is similar to the conduct in A.C.

¶ 14. We disagree with juvenile that his conduct was not gross because it was merely "[a]n unwanted touch over clothing for approximately one second." Even assuming that groping complainant's breast was not as egregiously intrusive as the conduct in some cases, see, e.g., *Benoit*, 158 Vt. at 361, 609 A.2d at 231 (holding that conduct of removing all of eleven-year-old's clothing constituted open and gross lewd and lascivious behavior), a reasonable decisionmaker could conclude that the conduct was "patently offensive," and that determination would be consistent with our previous case law. See *Discola*, 2018 VT 7, ¶ 22 (holding that "unwanted and public grabbing of a victim's buttocks" through clothing can constitute open and gross lewd and lascivious behavior). Indeed, juvenile's conduct—unwanted contact with a sexualized part of complainant's body—could be seen as more offensive than it would have been had he touched only a part of his own body, which we have repeatedly treated as gross lewdness. See, e.g., *Maunsell*, 170 Vt. at 543-44, 743 A.2d at 582 (holding that massaging genitals over pants in public constituted open and gross lewd and lascivious behavior); *Ovitt*, 148 Vt. at 404, 535 A.2d at 1275 (same).

¶ 15. In this case, the trial court found that touching complainant's breast in a school hallway without consent was "gross" lewdness. In doing so, it relied on the fact that the touching was nonconsensual. The act of touching complainant's breast without her consent "was patently offensive and known to be patently offensive to any law-abiding person in [defendant's] situation." *In re A.C.*, 2012 VT 30, ¶ 21. Juvenile has never claimed that he was unaware touching complainant's breast would be offensive. Based on these facts, the trial court's determination that juvenile's behavior was "gross" was reasonably supported by the evidence.

II. Enforceability of 13 V.S.A. § 2601

A. Rule of Lenity

¶ 16. Juvenile argues that it is impossible to distinguish felony "lewdness and lascivious behavior" under § 2601 from misdemeanor "lewdness" under 13 V.S.A. § 2601a. According to juvenile, the terms of both statutes are ambiguous, and therefore the rule of lenity requires that only the lesser misdemeanor offense can apply to his conduct.

¶ 17. Our primary goal when interpreting statutes is to implement legislative intent. *State v. LaBounty*, 2005 VT 124, ¶ 4, 179 Vt. 199, 892 A.2d 203. "In interpreting a criminal statute, the rule of lenity requires us to resolve any ambiguity in favor of the defendant." *Id.* The rule of lenity does not apply, however, when the statutory language is unambiguous. *State v. Fuller*, 168 Vt. 396, 402, 721 A.2d 475, 480 (1998). Further, "[t]he rule of lenity is not used to narrow a

statute that has an unambiguously broad thrust." *United States v. Litchfield*, 986 F.2d 21, 22 (2d Cir. 1993).

¶ 18. Lewdness and lascivious behavior are not defined in §§ 2601 or 2601a, and we have historically declined to give these terms "a precise definition ourselves out of deference to the common sense of the community." *Penn*, 2003 VT 110, ¶ 12. We have explained, however, that "[t]he general proscription against lewd behavior is 'aimed at conduct which, by its openness and notoriety, tends to affront the public conscience and debase the community morality.'" *State v. Beaudoin*, 2008 VT 133, ¶ 37, 185 Vt. 164, 970 A.2d 39 (quotation omitted). And we have approved of a jury instruction that "lewd and lascivious behavior means behavior that is sexual in nature, lustful, or indecent, that which offends the common social sense of the community, as well as its sense of decency and morality." *Penn*, 2003 VT 110, ¶ 12 (quotation omitted).

¶ 19. The trial court in this case defined lewdness as "gross and wanton indecency in sexual relationships," and lasciviousness as "tending to excite lust." The court's definitions are in accord with the ordinary meaning of both terms. See *Fuller*, 168 Vt. at 402, 721 A.2d at 480
("When a word in a statute is not defined, we are required to give the word its plain and commonly accepted meaning."); see also *State v. Blake*, 2017 VT 68, ¶ 11, 205 Vt. 265, 174 A.3d 126 (explaining that court may consult dictionaries to determine meaning of undefined statutory term). The primary definition of "lascivious" in Black's Law Dictionary is "tending to excite lust." *Lascivious*, Black's Law Dictionary (11th ed. 2019). "Lewd" is defined as "[o]bscene or indecent; tending to moral impurity or wantonness," while "lewdness" is defined as "[g]ross, wanton, and public indecency . . . ; a sexual act that the actor knows will likely be observed by someone who will be affronted or alarmed by it." *Lewd, lewdness*, Black's Law Dictionary (11th ed. 2019). Similarly, Merriam-Webster defines "lascivious" as "filled with or showing sexual desire," and "lewd" as "obscene, vulgar." *Lascivious*, Merriam-Webster Online Dictionary, Merriam-Webster.com [https://perma.cc/5PWC-LGPY]; *lewd, id.* [https://perma.cc/Y5H8-SNKU]. Each of these dictionaries lists "lewd" as a cross-reference to "lascivious," but the primary definitions of the words are different.

¶ 20. In sum, the ordinary meaning of lewdness is sexualized behavior that is shocking or repulsive to the community, while lasciviousness connotes sexual desire or lust. While these definitions are broad and there is some overlap between them, they are not identical and are sufficiently definite to give notice of what behavior is proscribed.[44] Our previous decisions are consistent with this

[44] Section 2602(a)(1) makes it a crime to commit a lewd or lascivious act with a child under the age of sixteen years "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of such person or of such child." The dissent argues that interpreting lascivious as meaning

interpretation of these terms. See *Penn*, 2003 VT 110, ¶ 13 (holding that defendant's act of "unbuttoning and unzipping the pants of an unconscious woman" was both "offensive to the community's sense of decency and morality" and "lustful," and therefore was sufficient to support his conviction for lewd and lascivious conduct under § 2601); *Millard*, 18 Vt. at 577 (holding that defendant's public exposure of himself to female "with a view to excite unchaste feelings and passions in her and to induce her to yield to his wishes" was both lewd and lascivious).

¶ 21. We therefore disagree with juvenile that § 2601 is ambiguous. Because the statute clearly applies to juvenile's conduct, which the trial court found to be both indecent and lustful, the rule of lenity does not help him. See *Fuller*, 168 Vt. at 402, 721 A.2d at 480 (holding rule of lenity does not apply where statute is unambiguous); *Litchfield*, 986 F.2d at 22 ("Where statutory and regulatory provisions unambiguously cover the defendant's conduct, the rule does not come into play.").

¶ 22. Moreover, where potentially applicable criminal statutes have overlapping or identical elements but different penalties, the rule of lenity does not require the State to charge the defendant with the crime carrying the lower penalty. In *State v. Shippee*, we rejected the argument that the defendant was subject to arbitrary and discriminatory enforcement because he was charged with a felony under § 2601 instead of misdemeanor lewdness under 13 V.S.A. § 2632 for exposing himself and masturbating in front of a child at a department store. We explained that "[w]hen there are overlapping criminal offenses with which a defendant could be charged based on the facts, it is within the prosecutor's discretion to choose among them." *Shippee*, 2003 VT 106, ¶ 7, 176 Vt. 542, 839 A.2d 566 (mem.). The same is true here: because the facts supported a charge under either statute, the State had discretion to charge juvenile with the felony offense. See *State v. Rooney*, 2011 VT 14, ¶ 29, 189 Vt. 306, 19 A.3d 92 (holding that State had discretion to charge defendant under either of two statutes that had identical elements but different penalties).

B. Vagueness

¶ 23. Finally, defendant argues that § 2601 is unenforceable because it is unconstitutionally vague. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner

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"tending to excite lust" makes the lascivious element functionally equivalent to the sexual-desires element. Post, ¶ 58. We disagree. The lascivious element describes the nature of the conduct, while the sexual-desires element provides the specific intent required for the offense. See State v. Grenier, 158 Vt. 153, 156, 605 A.2d 853, 855 (1992) (noting that § 2602, unlike § 2601, contains specific-intent element). Though similar, they are not identical.

that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "Because First Amendment interests are not implicated here, we must base our examination of the statute on its application to [juvenile] and the facts presented, and not on the statute's possible application to others." *Shippee*, 2003 VT 106, ¶ 8; see also *State v. Cantrell*, 151 Vt. 130, 133, 558 A.2d 639, 641 (1989) ("Ordinarily, a party whose particular conduct is adequately described by a criminal statute may not challenge that statute on the ground that the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit, or because it may conceivably be applied unconstitutionally to others in situations not before the Court." (quotations omitted)).

¶ 24. Juvenile was charged with violating § 2601 because he groped a girl's breast without her consent in a school hallway. As we have found in previous cases raising void-for- vagueness challenges to § 2601, "the statute is sufficiently certain to inform a person of reasonable intelligence that this type of conduct is proscribed." *State v. Purvis*, 146 Vt. 441-42 443, 505 A.2d
1205, 1206-07 (1985) (rejecting vagueness challenge to § 2601 where defendant knocked on window to attract attention of three young girls walking by his house and exposed himself to them); *Shippee*, 2003 VT 106, ¶ 8 (holding § 2601 sufficiently certain to proscribe defendant's conduct of exposing himself and masturbating in front of young child at department store); cf. *In re P.M.*, 156 Vt. 303, 308, 592 A.2d 862, 864 (1991) (holding statute prohibiting lewd and lascivious conduct with child was sufficiently certain to prohibit defendant's act of kissing and hugging victim and rubbing his clothed genital area against child's clothed genital area). The average person would understand that the deliberate, unwanted touching of a sexualized area of a person's body for his or her own gratification constitutes lewd and lascivious behavior under § 2601. Cf. *Discola*, 2018 VT 7, ¶¶ 2, 22 (affirming conviction of lewd and lascivious conduct based on defendant's unwanted and public grabbing of female victim's buttocks). "As far as we can tell, no [United States] Supreme Court decision has ever struck a statute as unconstitutionally vague merely because it uses terms that, at the moment, may not be widely used [T]he question is whether the term provides a discernable standard when legally construed." *United States v.*

Bronstein, 849 F.3d 1101, 1107-08 (D.C. Cir. 2017) (holding statute prohibiting making "harangue" or "oration" on U.S. Supreme Court property not unconstitutionally vague when properly interpreted); see also *Bouie v. City of Columbia*, 378 U.S. 347, 355 n.5 (1964) ("The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants.").

¶ 25. Nor does application of the statute under these circumstances invite arbitrary or discriminatory enforcement. See *Purvis*, 146 Vt. at 443, 505 A.2d at 1207

(rejecting argument that § 2601 was being applied arbitrarily to punish defendant for mere nudity, where defendant deliberately exposed himself to three young girls and such conduct was lascivious beyond question). Properly limited by the explanations we have provided in case law, the statute creates a sufficiently definite range of prohibited conduct to prevent unbridled prosecutorial discretion. See *Commonwealth v. Sefranka*, 414 N.E.2d 602, 604, 608 (Mass. 1980) (holding that statute
prohibiting being "lewd, wanton, and lascivious person[] in speech or behavior" did not invite discriminatory enforcement when given limiting construction by court).

¶ 26. We therefore reject defendant's argument that § 2601 is too vague to be enforceable in this case. While the statute is not a paragon of specificity, and could benefit from legislative review, our case law has defined the words open, gross, lewdness, and lascivious with sufficient definiteness that juvenile should have known that groping a girl's breast without her consent in a school hallway constitutes prohibited conduct. As construed in our case law, the statutory terms also circumscribe the compass of prohibited behavior sufficiently to keep the danger of arbitrary and discriminatory enforcement within constitutional bounds. Given the difficulty in specifying the broad range of offensive sexual conduct the law should prohibit, it is possible that "[t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice." *Michelson v. United States*, 335 U.S. 469, 486 (1948).

Affirmed.

¶ 27. **ROBINSON, J., dissenting.** For over 150 years, we have upheld the crime of "open and gross lewdness and lascivious behavior" against repeated vagueness challenges, while simultaneously refusing to define its terms. As a result, 13 V.S.A. § 2601 has become a stand-in to prohibit any wrongful sexual act, with virtually no discernable standard apart from a general appeal to morality. I do not believe that community standards alone can take the place of legislative judgment, and therefore I would hold that § 2601 is void for vagueness.

¶ 28. I begin with the premise that a statute would be unconstitutionally vague if it read, without further clarification: "No person may commit a grossly immoral act." A statute is void for vagueness if it does not provide "fair warning to potential offenders that their conduct is proscribed" or "sufficiently precise standards to avoid arbitrary and discriminatory enforcement." *State v. Purvis*, 146 Vt. 441, 442, 505 A.2d 1205, 1206-07 (1985). The immoral-act statute's only limiting principle would be whether an act violates the community's sense of morality, leaving prosecutors and courts to decide what acts are acceptable or unacceptable based on majoritarian beliefs or their own moral instincts. Such an undefined, standardless crime would be unconstitutional—even if prosecutors and courts were

very good judges of morality, and even if the individual acts they punished under the statute were awful acts that should be subject to criminal sanctions. As the United States Supreme Court has repeated, "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)). In contexts like this, courts have held that "the most meaningful aspect of the vagueness doctrine is not actual notice but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *District of Columbia v. Walters*, 319 A.2d 332, 337 (D.C. 1974). Because it defines criminality by reference to morality alone, the immoral-act statute would be "impermissibly vague in all its applications." *In re Snyder Grp., Inc.*, 2020 VT 15, ¶ 27, Vt. ___, 233 A.3d 1077 (quotation omitted).

¶ 29. Moreover, the immoral-act statute could not be made constitutional by limiting its universe of immoral acts to only "sexual" immoral acts. If the statute read, "No person may commit a grossly immoral sexual act," it would still be "a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." *Napro Dev. Corp. v. Town of Berlin*, 135 Vt. 353, 361, 376 A.2d 342, 348 (1977) (quotation omitted). And such a statute would invite the Court to "mandate our own moral code" by applying the statute to any sexual act that members of the court view as wrongful. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quotation omitted).

¶ 30. At least as historically interpreted by the Court, 13 V.S.A. § 2601 is essentially an immoral-act statute. It encompasses "the universe of conduct that a reasonable trier of fact could consider criminally offensive under community standards of decency and morality." *State v. Discola*, 2018 VT 7, ¶ 22, 207 Vt. 216, 184 A.3d 1177. I would hold that it is unconstitutionally vague, for three reasons. First, the history of this statute reveals that its definition has expanded beyond its probable original purpose and meaning. Second, the statute as the majority understands it today does not withstand constitutional scrutiny. And third, even if the term "lewd" is not itself ambiguous, § 2601 is unenforceable because it does not distinguish between "lewd" and "lascivious" and therefore does not provide notice to defendants of what conduct rises to the level of a felony.

I. History

¶ 31. The history of 13 V.S.A. § 2601 reveals that the definition of "open and gross lewdness and lascivious behavior" has broadened over time. It was most likely intended to prohibit public indecency and may have been associated with prostitution. However, in conformance with then-contemporary standards of

propriety, we historically refused to define the prohibited behavior with any specificity. Our more recent cases have similarly refused to limit the scope of conduct that falls under the statute and have adopted an extraordinarily broad standard of "openness." As a result, the statute has been used to fill a void in our criminal law by prosecuting a broad range of nonconsensual touching. Today's majority takes the same approach, defining lewdness and lasciviousness in expansive terms that essentially amount to "immoral sexual acts."

¶ 32. Section 2601 was designed to promote morality by prohibiting public indecency. As the majority acknowledges, the crime appeared in a section entitled "Of Offences Against Chastity, Morality and Decency," alongside prohibitions on obscenity, cohabitating with one's ex- spouse after getting divorced, swearing profanely, and publicly denying the existence of God. 1839 R.S. 99 § 8. The term "lewdness" appeared again in the very next section, which prohibited "keep[ing] a house of ill fame, resorted to for the purpose of prostitution or lewdness." *Id.* § 9. Therefore, it seems likely that the primary behaviors targeted by "open and gross lewdness and lascivious behavior" were public exposure or indecency, possibly in relation to prostitution. See *State v. Beaudoin*, 2008 VT 133, ¶ 37, 185 Vt. 164, 970 A.2d 39 (describing statute as addressing "conduct which, by its openness and notoriety, tends to affront the public conscience and debase the community morality" (quotation omitted)). But we have never limited the scope of § 2601 to include only the behaviors clearly included in the statute's original meaning. Cf. *In re K.A.*, 2016 VT 52, ¶ 7, 202 Vt. 86, 147 A.3d 81 (limiting "lewdness" in 13 V.S.A. § 2632(a)(8) to " 'lewd' acts related to prostitution"); *Commonwealth v. Quinn*, 789 N.E.2d 138, 145-46 (Mass. 2003) (interpreting statute prohibiting "open and gross lewdness and lascivious behavior" to "prohibit the intentional exposure of genitalia, buttocks, or female breasts to one or more persons" and setting forth five distinct elements of offense (footnote omitted)).

¶ 33. Instead, in the 1846 case *State v. Millard*, 18 Vt. 574, we explicitly declined to define what constitutes lewdness and lascivious conduct. We wrote: "No particular definition is given, by the statute, of what constitutes this crime. The indelicacy of the subject forbids it, and does not require of the court to state what particular conduct will constitute the offence." *Id.* at 577. We concluded that "[t]he common sense of community, as well as the sense of decency, propriety and morality, which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it." *Id.*

¶ 34. This refusal to define sexual behavior was consistent with social mores of the time. As this Court noted, under contemporary standards of morality, the "indelicacy of the subject" forbade describing sexual acts in precise terms. *Id.*; see also *United States v. Roth*, 237 F.2d 796, 808 (2d Cir. 1956) (Frank, J., concurring) (describing "dogma of 'Victorian morality'" that demanded "'decency' in published words"). For that reason, same-sex intimacy had long been described as "a crime not

fit to be named." See *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (quoting 4 W. Blackstone, Commentaries *215), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003); see also L.I. Appleman, *Oscar Wilde's Long Tail: Framing Sexual*

Identity in the Law, 70 Md. L. Rev. 985, 998 & n.80 (2011) (noting that contemporary news coverage of Oscar Wilde's 1895 trials for gross indecency "refused to specify what exactly Wilde was being prosecuted for in his second and third trials—a triumph of inspecificity").

¶ 35. During the same era as *Millard*, this Court also avoided specific descriptions of "obscene" material, noting that "[i]f the paper is of a character to offend decency, and outrage modesty, it need not be so spread upon the record as to produce that effect." *State v. Brown*, 27 Vt. 619, 620 (1855) (upholding indictment for selling obscene publication that stated "printed paper is so lewd and obscene, that the same would be offensive to the court here, and improper to be placed upon the records thereof, wherefore the jurors aforesaid do not set forth the same in this indictment"). Our early refusal to define lewdness was very clearly a product of its time.

¶ 36. But since then, we have continually refused to define or narrow the scope of lewd and lascivious conduct. We have recognized that "[t]he statute does not define 'open and gross lewdness and lascivious behavior.' " *Discola*, 2018 VT 7, ¶ 20; see also *State v. Ryea*, 97 Vt. 219, ____, 122 A. 422, 422 (1923) (noting that statute "does not define the crime with any particularity"). And "we have declined to give it a precise definition ourselves out of deference to the common sense of the community." *State v. Penn*, 2003 VT 110, ¶ 12, 176 Vt. 565, 845 A.2d 313 (mem.) (adding that "we need not define it with specificity here"). We leave it to the community "and, in turn, the members of the jury, to define open and gross lewd and lascivious conduct in each particular case." *Discola*, 2018 VT 7, ¶ 20.

¶ 37. While we have often identified factors in an individual case that make the conduct "lewd" or "lascivious," each case has ultimately risen or fallen on the basis of its own constellation of facts. For instance, in *Discola* we concluded that "unwanted grabbing" of a woman's and a minor's buttocks could be found to "criminally offend community standards of decency," based in part on "the sexual nature of the buttocks," *id.* ¶ 12, but in *State v. Squiers*, we held that the meaning of "lewd act" in 13 V.S.A. § 2602—prohibiting lewd or lascivious conduct with a child— was not limited to contact with sexual body parts, 2006 VT 26, ¶ 9, 179 Vt. 388, 896 A.2d 80. Similarly, in *State v. Purvis*, we held that the defendant's exposure to complainant was lewd and lascivious because he "intentionally drew attention to himself before he exposed himself," which suggested "a view to excite unchaste feelings and passions." 146 Vt. at 443, 505 A.2d at 1207 (quoting *Millard*, 18 Vt. at 577-78). But in *State v. Maunsell*, we held that lewdness does not require a specific intent to be seen, 170 Vt. 543, 544, 743 A.2d 580, 582-83 (1999) (mem.), and in *State*

v. Grenier, we held that lewdness and lascivious conduct does not require a specific intent to excite unchaste feelings and passions, 158 Vt. 153, 156, 605 A.2d 853, 855 (1992). Because we review each case on a purely individualized basis, our decisions have not narrowed the definition of lewdness beyond any sexual act that offends community standards.

¶ 38. Although the word "open" could potentially limit the scope of this statute, our expansive interpretation of that term has ensured that it does not. We have held that conduct is considered "open" if it is done in the presence of at least one other witness, and that witness can be the victim. See *In re A.C.*, 2012 VT 30, ¶ 21, 191 Vt. 615, 48 A.3d 595 (mem.). And it can be considered open regardless of whether the act takes place in public. See *Penn*, 2003 VT 110, ¶¶ 4, 13 (affirming conviction where conduct took place in third party's living room); *Grenier*, 158 Vt. at 155, 605 A.2d at 854 (affirming conviction where conduct took place in third party's bedroom and where victim was only witness); *Millard*, 18 Vt. at 578 (affirming conviction where conduct took place on private property and where victim was only witness). Thus, our interpretation of "open" generally only excludes conduct that is witnessed by no other person. Cf. *Beaudoin*, 2008 VT 133, ¶ 37 (suggesting that consensual private conduct would "not necessarily be subject" to lewdness charge).

¶ 39. Our broad definition of "open and gross lewdness and lascivious behavior" has allowed the State to prosecute acts that the Legislature has not otherwise expressly criminalized, namely nonconsensual touching short of sexual assault.[45] In fact, punishing nonconsensual touching has become a primary use of the statute, even though the statute is theoretically aimed at conduct that "tends to affront the public conscience and debase the community morality," and was not originally enacted to address invasions of individual privacy or bodily integrity. *Beaudoin*, 2008 VT 133, ¶ 37. We have repeatedly upheld convictions under § 2601 for unwanted touching, on the basis that the underlying conduct is "offensive to the community's sense of decency and morality." *Penn*, 2003 VT 110, ¶ 13; see also *Discola*, 2018 VT 7, ¶ 22; *In re A.C.*, 2012 VT 30, ¶¶ 18-21.

¶ 40. Importantly, the Court's decision today retains the statute's sweeping scope. It concludes that, in conformance with the dictionary definitions, "the ordinary

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[45] The Legislature, it appears, approves of this use of the statute. After our decision in *In re K.A.*, 2016 VT 52, ¶ 7, limited 13 V.S.A. § 2632(a)(8)'s prohibition on lewdness to "'lewd' acts relating to prostitution," the Legislature enacted 13 V.S.A. § 2601a, which added a misdemeanor crime of "open and gross lewdness" in the subchapter addressing "[l]ewd and [i]ndecent" conduct, see 2017, No. 44, § 1 (adding "[p]rohibited conduct" statute). And the Legislature has used the term lewd and lascivious in statutes that presumably intended to capture nonconsensual touching. See 13 V.S.A. §§ 1375, 1379 (prohibiting caregivers from engaging in "sexual activity" with vulnerable adults, defined as sexual acts or lewd and lascivious conduct); § 2602 (prohibiting lewd or lascivious conduct with child). But the Legislature's acquiescence in our broad interpretation of the terms lewd and lascivious does not mean that their expansive scope and ambiguity is constitutional.

meaning of lewdness is sexualized behavior that is shocking or repulsive to the community, while lasciviousness connotes sexual desire or lust." *Ante*, ¶ 20. But the majority also makes clear that "lascivious" does not actually require a specific lustful intent—it only "describes the nature of the conduct" in a more general sense. Id. ¶ 20 n.1; see also *Grenier*, 158 Vt. at 156, 605 A.2d at 855 (holding specific lustful intent is not element under § 2601). So—setting aside whether there is any distinction between these two elements, which I discuss below, *infra*, ¶¶ 55-61—the functional definition of lewdness and lascivious behavior is simply sexual behavior that is offensive to community standards. This is a broader definition than even the Legislature seems to have intended in 1839. It should not be the role of this Court to expand the reach of a crime to fill a gap in the criminal code. See, e.g., *Smith v. Parrott*, 2003 VT 64, ¶ 14, 175 Vt. 375, 833 A.2d 843 (stating that "decision to expand" liability for medical malpractice was "more properly left to the Legislature").

II. Vagueness of "Lewdness and Lascivious Behavior"

¶ 41. Community standards alone are an insufficient basis for criminal sanction, and therefore I would find § 2601 unconstitutionally vague. I base this conclusion on three factors. First, the statute as interpreted by this Court provides no meaningful standards apart from morality, and is therefore impermissibly vague in all its applications. Second, other states have rightly criticized and overturned similar statutes. And third, if the Legislature wanted to penalize nonconsensual touching or indecent exposure, it could do so explicitly, as many other states have done.

¶ 42. Like the hypothetical immoral-acts statute, § 2601 provides no meaningful standards apart from morality. Our statutes do not define "lewdness" or "lascivious behavior"—except the statute prohibiting prostitution, which employs "the splendidly helpful definition of lewdness as 'open and gross lewdness.'" *In re K.A.*, 2016 VT 52, ¶ 13 (quoting 13 V.S.A. § 2631(2)). And the majority has defined lewd and lascivious behavior as conduct that is "both indecent and lustful"—or, more expansively, as "sexualized behavior that is shocking or repulsive to the community" and that generally "connotes sexual desire or lust." *Ante*, ¶¶ 20, 21 & n.1. In doing so, the Court relies on Black's Law Dictionary, which defines "lewd" as "[o]bscene or indecent; tending to moral impurity or wantonness," and "lascivious" as "tending to excite lust; lewd; indecent; obscene," *Lascivious, Lewd*, Black's Law Dictionary (11th ed. 2019). But these definitions, including the Court's, merely reinforce that "lewd" and "lascivious" are defined only by reference to ambiguous moralistic judgments. "[V]ague statutory language is not rendered more precise by defining it in terms of synonyms of equal or greater uncertainty." *Pryor v. Municipal Court*, 599 P.2d 636, 642 (Cal. 1979); see also *State v. Kueny*, 215 N.W.2d 215, 217-18 (Iowa 1974) ("[A]lthough the words 'lewdness' and 'indecent' have often been defined, the very phrases and synonyms through which meaning is purportedly ascribed serve to

obscure rather than clarify those terms.").

¶ 43. Vermont case law supports overturning a statute with sweeping and ambiguous language such as this one. "A statute is void for vagueness when it either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Kimbell v. Hooper*, 164 Vt. 80, 88, 665 A.2d 44, 49 (1995) (quotation and alteration omitted). We have reaffirmed that "a legislature [must] establish minimal guidelines to govern law enforcement," because otherwise "a criminal statute may permit a standardless sweep that allows [police officers], prosecutors, and juries to pursue their personal predilections." *State v. Berard*, 2019 VT 65, ¶ 16,___Vt. __, 220 A.3d 759 (quotations omitted) (reading statute narrowly to avoid vagueness issue). Section 2601 fits these descriptions: it does not criminalize any particular type of sexual conduct, but merely criminalizes sexual conduct that most people deem criminally offensive.

¶ 44. For that reason, I believe this is one of the rare statutes that "is impermissibly vague in all its applications." *In re Snyder Grp.*, 2020 VT 15, ¶ 27 (quotation omitted). We have foreshadowed that "in certain circumstances the words 'lascivious' and 'lewd' might be too vague to be applicable." *State v. Roy*, 140 Vt. 219, 229, 436 A.2d 1090, 1095 (1981). And we have commented that "the meaning of the term 'lewd' in § 2632 is murky at best." *In re K.A.*, 2016 VT 52, ¶ 10. The murky and self-referential definition of lewdness invites prosecutors and courts to "mandate our own moral code" by applying the statute to any sexual act that could be perceived as wrongful. *Lawrence*, 539 U.S. at 571 (quotation omitted). The Legislature must define illegal acts, not only by reference to their immorality, but by setting forth the elements that make up the acts themselves. Because § 2601 does not describe any specific acts that are criminal, or meaningful standards for what makes a type of act criminal, all prosecutions for lewdness and lascivious conduct rely almost entirely on the moral judgments of State actors, and ultimately jurors, and it is therefore vague in all applications.

¶ 45. This conclusion is consistent with previous case law in which we noted the danger of a "sprawling doctrine" that would leave too much discretion to the executive and judicial branches. In *Napro Development Corp. v. Town of Berlin*, 135 Vt. 353, 376 A.2d 342 (1977), we held that a town's authority to abate public nuisances did not include the ability to censor "obscene" materials in the name of decency. The Town board of health determined that an adult bookstore had created an "unhealthful condition" by selling sexually explicit materials, and issued a cease-and-desist order against the bookstore. *Id.* at 353-54. The Town argued that the board was empowered by statute to abate nuisances affecting the public health, and that obscenity was such a nuisance. *Id.* at 355-56, 376 A.2d at 345. We declined to read "public nuisance" to encompass obscenity by implication, reasoning that the concept of public nuisance was "vague and amorphous" and that the concept of

obscenity was also famously difficult to define. *Id.* at 356-57, 376 A.2d at 345-46 ("I know it when I see it" (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring))). We refused to create a "sprawling doctrine of public nuisance," likening it to a statute that would "sweep[] in a great variety of conduct under a general and indefinite characterization, and leav[e] to the executive and judicial branches too wide a discretion in its application." Id. at 361, 376 A.2d at 348 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (internal quotation marks omitted)). While the present case does not implicate First Amendment protections, as *Napro* did, *Napro* supports the principle that we should not permit amorphous statutory language to become a one-size-fits-all vehicle for enforcing community values. See also *In re Club 107*, 152 Vt. 320, 326, 566 A.2d 966, 969 (1989) (holding that Liquor Control Board could not expand its authority beyond Title 7 to "define and regulate individual conduct that is obscene, lewd, or indecent").

¶ 46. Overturning § 2601 would be in line with decisions from numerous other jurisdictions. In 1974, the District of Columbia Court of Appeals struck down the portion of a statute criminalizing "any other lewd, obscene, or indecent act." *Walters*, 319 A.2d at 335. The court stated that the statute "betrays the classic defects of vagueness in that it fails to give clear notice of what conduct is forbidden and invests the police with excessive discretion to decide, after the fact, who has violated the law." *Id.* The court considered whether there was a construction of the statute that would provide sufficient standards, but concluded that the provision was "so lacking in coordinates, other than its apparent application to sexual matters, that inadequate guidance has been given . . . for our development of a remedial formula for a saving construction." Id. at 336. And the court held that the statute was vague as-applied because "the most meaningful aspect of the vagueness doctrine is not actual notice but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. It is in this regard that the statutory language under scrutiny has its most notable deficiencies." Id. at 337 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). In particular, the court concluded that the statute subjects individuals to criminal liability "under a standard so indefinite that police, court and jury are free to react to nothing more than what offends them, and impermissibly delegates to them basic policy matters to be resolved on an ad hoc, after-the-fact basis with the attendant dangers of arbitrary and discriminatory application." *Id.* (citation omitted).

¶ 47. In *Harris v. State*, the Supreme Court of Alaska held that the term "crime against nature" was void for vagueness. 457 P.2d 638, 647 (Alaska 1969). The court stated:

There are many instances in which the law resorts to the general understanding of the community as the standard of legal result. But where the conduct to be prohibited by a criminal statute is capable of objective definition by language

descriptive of precise physical acts and events, it simply will not do to use language so ambiguous as to be capable of expansion or contraction at the whim of the reader... Neither the delicate sensibilities of William Blackstone nor the hushed euphemisms of the Victorian era can justify the use of imprecision in penal legislation. Nor can they govern our determination of whether a statute is valid under current American constitutional standards. *Id.* In a later case, Alaska considered a vagueness challenge to a statute criminalizing a "lewd or lascivious act upon or with the body of a child intending to arouse the sexual desires of either the actor or the child." *Anderson v. State*, 562 P.2d 351, 357 (Alaska 1977) (quotation and alterations omitted). While the court held that the terms "lewd and lascivious" were not vague when viewed in the context of the entire statute, it noted that "the terms 'lewd and lascivious' taken by themselves seem as imprecise as the phrase 'crime against nature.' " *Id.* at 357.

¶ 48. There are more. The Iowa Supreme Court struck down a statute prohibiting "open and gross [l]ewdness" and "open and [i]ndecent or [o]bscene exposure of [a] person" in part because those terms "are so indefinite and uncertain that persons of ordinary intelligence are given inadequate notice as to what conduct is thereby prohibited." *Kueny*, 215 N.W.2d at 216, 218-19 (quotation omitted). The Texas Court of Criminal Appeals struck down as impermissibly vague a liquor law prohibiting businesses from "[p]ermitting entertainment, performances, shows, or acts that are lewd or vulgar." *Courtemanche v. State*, 507 S.W.2d 545, 547 (Tex. Crim. App. 1974). The Florida Supreme Court struck down a "crime against nature" statute for vagueness. *Franklin v. State*, 257 So.2d 21, 23 (Fla. 1971); see also *Campbell v. State*, 331 So.2d 289, 290-91 (Fla. 1976) (England, J., concurring) (concurring in judgment that over-clothes touching in gay bar was not open and gross lewdness and lascivious behavior, and noting that "[t]his case re-emphasizes the need for legislative review of the unused, vintage, sex offense statutes which are still in force in this state"). The Eighth Circuit held that the term "indecent or lewd act of behavior" in a Missouri ordinance was unconstitutionally vague. *D.C. v. City of St. Louis, Mo.*, 795 F.2d 652, 654-55 (8th Cir. 1986). And the U.S. District Court for the Eastern District of Michigan concluded that the portion of an ordinance referring to "other lewd immoral acts" was unconstitutionally vague because "[t]here are no objective standards to measure whether proposed conduct is 'lewd' " and "[t]he word 'immoral' is subject to the same objections." *Morgan v. City of Detroit*, 389 F. Supp. 922, 930 (E.D. Mich. 1975).[46]

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[46] Other jurisdictions have rejected similar challenges. See, e.g., *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1348-49 (9th Cir. 1984) (upholding statute prohibiting lewd or lascivious conduct with minor); *State v. Cota*, 408 P.2d 23, 26 (Ariz. 1965) (in banc) (upholding ordinance that prohibited "any lewd or indecent act" against vagueness challenge (quotation omitted)); *State v. Coleman*, 915 P.2d 28, 32 (Idaho Ct. App. 1996) (holding that statute prohibiting lewd or lascivious act upon minor was not void for vagueness); *City of Mankato v. Fetchenhier*, 363 N.W.2d 76, 79 (Minn. Ct. App. 1985) (upholding statute that prohibited "any open or gross lewdness or lascivious behavior, or any public indecency" against vagueness challenge (quotation omitted)).

¶ 49. Additionally, several states have construed lewdness statutes narrowly, providing the specificity lacking in the term "lewd" in order to satisfy constitutional standards. For instance, in *Quinn*, 789 N.E.2d at 146, the Massachusetts Supreme Judicial Court concluded that a statute prohibiting "open and gross lewdness" was unconstitutionally vague as applied to a defendant who had dropped his pants to reveal his bare buttocks and thong underwear in front of a group of school children. In order to satisfy the constitutional standard of specificity, the court construed the statute to prohibit "the intentional exposure of genitalia, buttocks, or female breasts to one or more persons" done openly in a way such as to produce alarm or shock, and actually producing such alarm or shock. *Id.* (footnote omitted). Similarly, the California Supreme Court construed a statute prohibiting "solicit[ing] anyone to engage in or . . . engag[ing] in Lewd or dissolute conduct" narrowly, holding that "lewd" refers to conduct involving "touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense" if the actor knows or should know others are present who may be offended by the conduct and the conduct occurs in a place exposed to public view. *Pryor*, 599 P.2d at 647 (quotation omitted). The court noted that its narrowing definition avoids "vague and far-reaching standards under which the criminality of an act depends upon the moral views of the judge or jury, does not prohibit solicitation of lawful acts, and does not invite discriminatory enforcement." Id. at 647-48; see also *State in Interest of L.G.W.*, 641 P.2d 127, 131 (Utah 1982) (adopting narrowing definition of "gross lewdness" in Utah statute that tracks California Supreme Court's narrowing definition in *Pryor*, but adding conduct involving touching the anus.

¶ 50. Michigan's line of case law interpreting its gross-indecency law is particularly instructive, because that state initially adopted the "common sense of society" standard from our decision in *Millard*, 18 Vt. 577. *People v. Carey*, 187 N.W. 261, 262 (Mich. 1922). In *People v. Howell*, a plurality of the Michigan Supreme Court noted that for consensual conduct taking place in private, the "common sense of society" test "leaves the trier of fact 'free to decide, without any legally fixed standards, what is prohibited and what is not," and therefore interpreted gross indecency more narrowly to mean "oral and manual sexual acts committed without consent or with a person under the age of consent or any ultimate sexual act committed in public." 238 N.W.2d 148, 151 (Mich. 1976) (quotations omitted). More recently, in *People v. Lino*, the court splintered as to whether the "common sense of the community" definition was still good law. 527 N.W.2d 434 (Mich. 1994). A majority of justices rejected the common-sense standard, but the majority's memorandum opinion did not affirmatively state what standard did apply. *Id.* at 436. A separate opinion by Justice Levin argued that the "common sense of the community" definition is unconstitutional because it is "devoid of substantive limitations" and "we cannot allow criminality to depend only upon the moral sentiment or idiosyncrasies of the tribunal before which a defendant is tried." Id. at 444-48. (Levin, J., writing separately) (quotation and

alteration omitted). But Justice Levin nevertheless joined the majority decision that the two defendants could be tried under the statute because they should have known that their conduct was prohibited by the statute. *Id.* at 438-40. Justice Boyle pointed out that Justice Levin's reasoning did not align with the majority's conclusion. *Id.* at 457 (Boyle, J., concurring and dissenting). She argued that "[t]he Court reads the statute as if the Legislature intended it to be general morals legislation. Specifically, the result of today's decision is that the statute will punish the conduct this Court determines to be immoral." *Id.* at 451. And Justice Riley, who preferred the "common sense of the community" definition, pointed out that although the majority rejected that definition, it did not offer an alternative. *Id.* at 458 (Riley, J., concurring and dissenting). This troubled history of disagreement and uncertainty about the meaning of gross indecency—particularly given its roots in our own "standard" for lewd and lascivious conduct—demonstrates how much that standard leaves to be desired.

¶ 51. Finally, if the Legislature wishes to prohibit indecent exposure or unwanted touching, it does not have to rely on such ambiguous language. We are no longer bound to respect the "undesirability of the expression of certain words or thoughts within the chambers of Victorian society . . . . If certain acts of a sexual nature are considered by our Legislature to be objectionable . . . then let such acts be enacted as crimes fully defined in clear, unequivocal language." *Barnes v. State*, 266 N.E. 617, 619 (Ind. 1971) (Prentice, J., concurring and dissenting). Clearly-defined crimes of nonconsensual sexual touching and indecent exposure are not only possible—they are commonplace.

¶ 52. Numerous states penalize nonconsensual sexual contact short of sexual assault. For instance, New York law prohibits "sexual abuse in the third degree," which includes any nonconsensual "touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party." N.Y. Penal Law §§ 130.00(3), 130.55 (McKinney 2010). Massachusetts has a crime called "indecent assault and battery," which has been interpreted as an "intentional, unprivileged and indecent touching of the victim." See *Commonwealth v. Kennedy*, 90 N.E.3d 722, 728 (Mass. 2018) (quotation omitted); Mass. Gen. Laws ch. 265, § 13H. Maine penalizes "[u]nlawful sexual touching," which includes, among other things, sexual touching to which the other person has not acquiesced and sexual touching where the other person is unconscious. Me. Rev. Stat. Ann. tit. 17-A, § 260(1). And in New Hampshire, sexual assault is punishable as a misdemeanor where the offender subjects the victim to "sexual contact" rather than sexual penetration. N.H. Rev. State. Ann. §§ 632-A:1(IV); 632-A:4(I)(a); 632-A:2.

¶ 53. The same is true for indecent exposure. Numerous states criminalize the exposure of one's genitals in public or where the act is likely to cause distress to another person. See, e.g., 11 R.I. Gen. Laws Ann. § 11-45-2(a) (West 2008); N.Y. Penal Law § 245.01 (McKinney); 18 Pa. Stat. and Cons. Stat. Ann. § 3127. Maine

defines "indecent conduct" in several different ways, with carefully differentiated acts and mental elements. Me. Rev. Stat. Ann. tit. 17-A, § 854. Indecent conduct in Maine may be: (A)(1) in a public place, engaging in a sexual act, (A)(2) in a public place, knowingly exposing one's genitals "under circumstances that in fact are likely to cause affront or alarm," (B) in a private place, exposing one's genitals with the intent to be seen from a public or another private place, or (C) in a private place, exposing one's genitals with the intent to "be seen by another person in that private place under circumstances that the actor knows are likely to cause affront or alarm." *Id.* And Connecticut similarly provides several alternate definitions of the crime "public indecency." Conn. Gen. Stat. § 53a-186. A person is guilty of public indecency in Connecticut when they perform any of the following acts in a public place, defined as a place where the conduct may reasonably be expected to be viewed by others: (1) an "act of sexual intercourse," as defined in another section; (2) a "lewd exposure of the body with intent to arouse or to satisfy the sexual desire of the person"; or (3) a "lewd fondling or caress of the body of another person." *Id.* § 53a-186(a). While the Connecticut legislature used the term "lewd," it used the term alongside a description of the actual behavior that it believed could be criminal if performed in public. If the Vermont Legislature wants to punish the offensive exposure of a person's genitals or nonconsensual touching, it could (and must, in my view) say so in more explicit terms than "open and gross lewdness and lascivious behavior."

¶ 54. In sum, § 2601 does not provide adequate guidelines for police, prosecutors, and courts to determine what conduct is legal or illegal and is therefore unconstitutionally vague in all its applications. A longstanding custom of broad application of the statute to sanction a wide range of offensive behavior with a sexualized component does not supplant the need for clear statutory guidance or otherwise salvage the vagueness of the statute.

III. Failure to Distinguish "Lascivious"

¶ 55. In addition, § 2601 is void for vagueness because "lascivious" has no discernible meaning distinct from lewdness.[47] The only difference between the

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[47] Juvenile frames this argument regarding lasciviousness as a rule-of-lenity issue, and that is how the majority addresses it. However, it is more properly addressed as a vagueness issue. Under the rule of lenity, "we resolve ambiguity in statutory language in favor of the defendant." *State v. Brunner*, 2014 VT 62, ¶ 11, 196 Vt. 571, 99 A.3d 1019 (emphasis added). Here, juvenile argues that the ambiguity of "lascivious" cannot be resolved and that the statute is therefore unenforceable, an argument better addressed by our vagueness doctrine. In any case, the principles underlying the rule of lenity infuse our vagueness analysis, since both doctrines are related to "the fundamental right to adequate notice of what conduct may give rise to criminal punishment." *State v. Rooney*, 2011 VT 14, ¶ 57, 189 Vt. 306, 19 A.3d 92 (Johnson, J., dissenting) (discussing rule of lenity); see also *State v. Billington*, 2020 VT 78, ¶ 19, Vt., A.3d (identifying void- for-vagueness doctrine and rule of lenity as "related manifestations of the fair warning requirement"); cf. *In re Snyder Group, Inc.*, 2020 VT 15, ¶ 25 ("Laws and regulations are unconstitutionally vague when they . . . fail to provide sufficient notice for ordinary people to understand what conduct is prohibited" (quotation omitted)).

felony offense under § 2601 and the misdemeanor offense under § 2601a is that the felony involves "lewd and lascivious conduct" while the misdemeanor involves only "lewdness." Therefore, the statute does not provide notice that juvenile's conduct would fall under the felony statute as compared to the misdemeanor statute. In addition to relying on the absence of meaningful definitions described in more detail above, I base my conclusion on this point on a black-letter maxim of statutory construction, a consideration of the terms lewd and lascivious in the context of the broader statutory scheme, and the incongruity of the definition of lascivious offered by the majority.

¶ 56. Maxims of statutory interpretation tell us that lascivious must have a meaning distinct from lewd. "A fundamental principle of construction assumes that the drafters intended no redundancy." *In re PRB Docket No. 2007-046*, 2009 VT 115, ¶ 14, 187 Vt. 35, 989 A.2d 523. "We have long presumed that all language in a statute or regulation is inserted for a purpose, and that we must not allow a significant part of a statute to be rendered surplusage or irrelevant." *In re Miller*, 2009 VT 36, ¶ 14, 185 Vt. 550, 975 A.2d 1226 (quotations and citation omitted). In this case, the felony that juvenile has been convicted of has four statutory components: openness, grossness, lewdness, and lasciviousness. We presume that the latter two terms are not identical.

¶ 57. The structure of Vermont's lewdness-related statutes also supports the notion that "lascivious" has a meaning distinct from "lewd." There are now four statutes in Chapter 59 of Title 13 criminalizing some form of lewd behavior, two of which also reference lascivious behavior. The felony statute at issue here, § 2601, provides for imprisonment for up to five years for "open and gross lewdness and lascivious behavior." With respect to conduct directed at a child, § 2602 prohibits "any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of 16 years . . . ." The maximum penalty for a first-time offense is fifteen years. The relatively recently enacted prohibited-conduct statute, § 2601a, penalizes "open and gross lewdness" as a misdemeanor. And § 2632(a)(8), also a misdemeanor, prohibits "lewd acts relating to prostitution," *In re K.A.*, 2016 VT 52, ¶ 21.

¶ 58. The two felony offenses address "lascivious" behavior, while the two misdemeanor offenses penalize certain forms of "lewd" behavior. This statutory structure creates a hierarchy of conduct, where behavior that is lascivious, or which involves a child, is subject to more severe penalties. Consistent with this structure, courts have treated misdemeanor lewdness as a lesser- included offense of lewd and lascivious conduct. Even before the Legislature created a freestanding crime of "prohibited conduct" untethered to the statutes dealing with prostitution, courts treated lewdness as a lesser-included offense of lewd and lascivious behavior. See Id. ¶ 22 (noting that "§ 2632(a)(8) was used as a catch-all for offenders who are not charged under § 2601 and § 2602"); *In re A.C.*, 2012 VT 30, ¶ 5 (noting that trial

court, on its own motion, substituted lesser offense of prohibited acts under § 2632(a)(8)). But even though lasciviousness is the feature that elevates conduct from a misdemeanor to a felony within this statutory scheme, our statutes and case law provide no clarity as to what "lascivious" means, or how it is distinct from "lewd."

¶ 59. The majority defines lascivious as "tending to excite lust" or "connot[ing] sexual desire or lust," *ante*, ¶¶ 19-20, but the statute concerning lewd conduct with children, 13 V.S.A. § 2602, belies that interpretation, see *In re G.G.*, 2019 VT 83, ¶ 10,_Vt. __, 224 A.3d 494 ("When statutes deal with the same subject matter or have the same objective, we construe them together."). Section 2602 states:

> No person shall willfully and lewdly commit any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of such person or of such child.

13 V.S.A. § 2602(a)(1) (emphasis added). Under this statute, the State must prove either lewd or lascivious conduct, and must show that the defendant intended to arouse the defendant or child's sexual desires. Under the majority's interpretation of lascivious as "tending to excite lust," this statute would not make sense: should the State choose to charge the defendant with "lascivious," rather than "lewd" conduct, the lasciviousness element would be functionally identical to the sexual-desires element. See *State v. Wiley*, 2007 VT 13, ¶ 11, 181 Vt. 300, 917 A.2d 501 (holding in prosecution for lewd or lascivious conduct with a child that "lewd and lascivious conduct includes the element of appealing to or gratifying one's sexual desires," and was therefore distinguishable from sexual assault, where "such motive is not an element").

¶ 60. The majority's counterargument on this point leads to even greater problems. The majority states: "The lascivious element describes the nature of the conduct, while the sexual- desires element [in § 2602] provides the specific intent required for the offense." *Ante* ¶ 20 n.1. But that interpretation leaves us back where we started, with no meaning of lascivious that distinguishes it from lewd. Lustful behavior, without any specific requirement of lustful intent, is functionally the same as "sexualized behavior," which is part of the majority's definition of lewdness. Put another way, the majority points out that Merriam-Webster defines lascivious as "filled with or showing sexual desire," and cross-references "lewd" and "lustful." *Lascivious*, Merriam-Webster Dictionary [https://perma.cc/5PWC-LGPY]. But if we exclude "sexual desire" and "lustful," because lasciviousness does not require actual intent, the only remaining definition of lascivious is "lewd." Setting aside the difficulties with defining lewd conduct at all, which I have discussed exhaustively, I do not believe that the majority's definitions create a distinguishing principle between § 2601 and § 2601a.

¶ 61. And the meaning of lascivious becomes no clearer in applying the statute to the facts of this case. It is not at all clear why juvenile's unwanted touch over complainant's clothing was not only "lewdness" but also "lascivious behavior." Absent explicit statutory definitions, it is difficult to imagine a case that could meaningfully shed light on the difference between "lewdness" and "lascivious."[48]

¶ 62. Based on my reasoning in Part II, I would overturn § 2601 as void for vagueness. But even if I thought that we could salvage a meaningful definition of "lewd" from these statutes, I do not believe that the word "lascivious" gives us the tools we need to distinguish between felonious lewd and lascivious conduct and misdemeanor lewd conduct.

¶ 63. If the Legislature aims to criminalize unwanted sexual touching, I strongly urge it to enact a statute setting forth the standards and penalties for such conduct, rather than relying on "lewdness" or "lewdness and lascivious behavior" to carry the weight of all offensive sexual conduct short of sexual assault. Both defendants and victims deserve a clear statement of what conduct warrants criminal penalties under the law.

1

[48] The majority correctly notes that "'[w]hen there are overlapping criminal offenses with which a defendant could be charged based on the facts, it is within the prosecutor's discretion to choose among them.'" *Ante*, ¶ 22 (quoting *State v. Shippee*, 2003 VT 106, ¶ 7, 176 Vt. 542, 839 A.2d 566 (mem.)). But that is only true when the Legislature has demonstrated "unambiguous intent" to allow such discretion. *Rooney*, 2011 VT 14, ¶ 31. Here, the Legislature's intent is not "unambiguous" as to the applicability of § 2601 to juvenile's conduct. It is not even clear what the elements of both crimes (§ 2601 and § 2601a) are or whether they are identical.

VERMONT SUPREME COURT

IN RE: AP, a Juvenile

Transcription of an audio recording of the oral argument presented on April 14, 2020

APPEARANCES:
JAMES VALENTE, Costello, Valente & Gentry, PC
JAMES PEPPER, Deputy State's Attorney

THE BAILIFF: Good afternoon, Your Honors. The matter before the court is In Re: AP, a Juvenile, Docket Number 2019-246. Representing the Appellant, AP, is James Valente. Representing the Appellee, the State of Vermont, is James Pepper.
THE COURT: Thank you. Counsel for the Appellant, will you introduce yourself, tell us who you represent to make sure the audio is working, and then go ahead with your argument, please?
ATTORNEY VALENTE: Yes, I'm James Valente. I represent the Appellant, AP.
THE COURT: Okay, thank you. Please go ahead.
ATTORNEY VALENTE: Chief Justice, members of the Court, may it please the Court, first, let me thank you for hearing this in this somewhat unusual manner. My clients have been wondering what was going to happen, and we appreciate what must have been somewhat difficult.
In 1846 this court said in Millard, the first major decision on the lewd and lascivious statute, that the reason lewd and lascivious conduct was not defined with any specificity is because of the indelicacy of the subject. The court said the indelicacy of the subject prohibits a more specific definition.

That is not an appropriate or a sufficient reason to choose not to define more clearly conduct with significant consequences. If the State is going to wield its power to incarcerate somebody for up to five years, often with mandatory programming to get out; to put them on the sex offender registry, which is the closest thing we have in the modern law to the scarlet letter or banishment; to take away their right to vote; to take away their right to bear arms; to take away their right to serve on a jury or travel to many countries; often to lose their employment, their licensing, and their livelihood, if the State is going to wield that power, it must tell a citizen, "This is what you cannot do".

And telling the citizen something like, "Well, you need to understand you are going to jail if you commit lewd and lascivious conduct", is simply not specific enough in today's world in order to put them on adequate notice sufficient to satisfy the requirements of due process. Moreover, it puts the courts and the prosecutors and the officers charged with enforcing the law in the position of figuring out which offense is or is not lewd and lascivious in each occasion. By doing that --

THE COURT: Do you think there's an argument

to be made that the conduct here was acceptable under some standard?
ATTORNEY VALENTE: Yes, there is.
THE COURT: You do?
ATTORNEY VALENTE: Yes. The statutory language bans open and gross lewd and lascivious conduct. "Gross" is a term of art with meaning in many different legal contexts from gross --
THE COURT: I want to you to confine it to the lewd and lascivious part. We'll talk about gross later.
ATTORNEY VALENTE: I may not understand the question of the Court, and please interrupt me if I don't, but I think what you're saying is, Are lewd and lascivious different vis-a-vis --
THE COURT: What I'm asking you is, Do you think that there is some definition by which this conduct does not constitute acceptable behavior? In other words, you're saying lewd and lascivious is not defined. Do we need a definition to know whether this conduct is acceptable or not?
ATTORNEY VALENTE: At one time, I would have answered your question affirmatively, and that's the logic that the Court used in Shippee 2003, in Roy in 1981, and Purvis in 1985. We respectfully submit that

that method of analysis, the case-by-case analysis, is no longer valid in the wake of Johnson, Dimaya, and Davis, all of which rejected that style of analysis and looked instead to an analysis of whether the definition itself, rather than the circumstantial conduct, was unconstitutional.

In each of those cases, the language that was analyzed had to do with definitions that we submit are more specific than lewd and lascivious conduct, specifically, crime of violence, which is actually a fairly specific term. In each of those cases, the Supreme Court, the United States Supreme Court, found, not that the individual defendant's conduct ran afoul or would be classified as a crime of violence, but, rather that the concept of using the term "crime of violence" in order to decide who would or would not get deported, who could or could not be eligible for enhancement for possession of a firearm during a felony, that was the element that needed to be reviewed for constitutionality.

It's notable that all three of those cases started in 2014, which was eleven years after Shippee, the last time this court looked at whether the lewd and lascivious conduct statute was void for vagueness.

It's also notable that this appeal comes subsequent to

In Re: KA. In Re: KA was the decision in which prohibited acts was found not to apply to lewdness, but this court, analyzing the statutory history, determined that it needed to have some relationship to prostitution, the original crime against the public for which it was instituted.
In the wake of In Re: KA, what happened on the ground is that prosecutors who generally charge people with a crime when they grope another person without their consent, they used to charge people with prohibited acts when that would occur. Since In Re: KA, and I can tell you this from personal experience, because I've had other cases similar to this one where the conduct charge is nothing more than groping, they're charging that as lewd and lascivious conduct. We respectfully submit that lewd and lascivious conduct under 2601, not 2602, is intended to be a prohibition on a crime against the public, just the same way prohibited acts was once upon a time, and this case before you is an example of a troubling trend where prosecutors and trial courts are doing the same thing to the lewd and lascivious statute, that is, using it to prohibit conduct against an individual that they used to do with 2632.
THE COURT: It, it prohibits conduct. The

whole statute is designed to prohibit certain types of conduct that is against the decency, propriety, and morality of a community, correct?
ATTORNEY VALENTE: You're talking about both 2601 and 2602 or just 2601?
THE COURT: 2601.
ATTORNEY VALENTE: Yes, that's right. However, our view is that, that using a community standard in that way is simply a way for the judiciary to, on a case-by-case basis, have what is the equivalent of legislative power. In Roth versus United States, which was one of the first careful reviews of the obscenity laws in the 50s, Justice Harlan wrote a dissent, and in his dissent -- this was about obscenity statutes, not lewd and lascivious conduct statutes -- but he said, "The ultimate problem here is that any test that turns on what is offensive to community standards is too loose, too capricious, too destructive to give citizens notice of what they're supposed to do and what they're not supposed to do".
A look at the history of this case and the cases that are similar to it in other jurisdictions shows how much that community standard has changed. There were times, at one time, sodomy, any sort of homosexual activity, interracial relationships, infidelity,

cohabitation between unmarried people, even women in short skirts or pants would have likely been considered lewd and lascivious conduct that offends the community standards.
Those community standards were based on our Puritan heritage in New England, but that is not the community standard today. We all know it. As a matter of fact, we all know that in the 50s and 60s it was likely not considered lewd and lascivious conduct to grope somebody. It was considered much more acceptable at that time. Something, by the way --
THE COURT: Where does that come from? Where do you get that from, that it was acceptable to grope somebody in public in the 50s?
ATTORNEY VALENTE: If you look to the case law in the early development of sexual harassment cases, courts frequently downplayed things like goosing the secretary and similar sorts of conduct that were not overtly discriminatory or more aggressive, and our view is that the Court can take notice that American culture on things like groping has changed significantly since the 60s and 70s, just like the American perspective on smoking cigarettes.
In fact, we live in a time now in Vermont where you have incredibly arbitrary enforcement of the

statute. Almost every major town in Vermont has a massage parlor, an Asian massage parlor, which almost everyone in the law enforcement community and the legal community knows is essentially a somewhat mild prostitution business. They don't charge that as lewd and lascivious conduct. I'm not sure why.
Likewise, it's considered appropriate to bathe in the nude, even though many people would not want their children swimming at beaches where there are many adults who are in the buff. We find that to be okay.
In, in one of the examples of arbitrary enforcement that was cited at the end of the reply brief, in Brattleboro we had a spate of people walking around Main Street in the buff. The local police chief decided that that was okay. When one of them started to dance, it became lewd and lascivious conduct.
It, it all serves to show how this developing and somewhat loose community standard fails to tell any citizen what they should or should not do. In fact, what you can and can't do has changed over time. We know that there are things that we can now do in public that would have once been considered lewd and lascivious, but there's no way to tell when that happens. It happens at different times in different places. It's likely that --

JUSTICE ROBINSON: Sorry. Can you help me think through, though, the practical implications of what you're deciding? These, the lewd and lascivious statute seems to carry a lot of water in our contemporary criminal justice system. Anything short of sexual assault could fall into the lewd and lascivious basket. If we were to strike this statute, and I gather you're asking us to strike it across the board, wouldn't that leave a gaping hope in our criminal justice enforcement rules?
ATTORNEY VALENTE: Yes, but the legislature left a gaping hole. The legislature left a gaping hole, and they forced the judiciary. Everybody here knows that groping is wrong. I am not going to come in front of this court and suggest that groping is appropriate. For some reason, our legislature has never seen fit to ban unwanted touching, and the type of vague language that is present in the lewd and lascivious statute, and it was present in prohibited acts relating to lewdness before, was the only thing that prosecutors and officers of the law could use to proscribe conduct that they judged to be wrong because of that gaping hole.
But that still doesn't mean that it satisfies the requirements for due process, because the fact of the

matter is you have a, a young person in this case who is being charged with an extraordinarily serious crime for conduct that is far below what many citizens would understand can result in your placement on a sex offender registry, can result in your incarceration, can result in a felony. That is a failure of the legislature.
THE COURT: You, you would submit that someone the age of your client who did the act that he did, a reasonable person of that age would not understand that he could be subjecting himself to criminal action?
ATTORNEY VALENTE: I would go so far as to say that a person of any age would be unlikely to appreciate that that crosses this line that divides non-lewd and lascivious conduct from lewd and lascivious conduct in particularly a juvenile. I remember Justice Dooley authored an opinion about a stalking statute where he found that the evidence was insufficient, because a high schooler would be unlikely to understand that his fairly indelicate efforts at achieving a relationship -- it was State versus Ellis in 2009 -- probably couldn't understand that that might be construed as threatening. And, in that sense, we agree with the Court's

proposition, and it may be that the general rule of restraint favors taking that route rather than nullifying a statute, but the problem is the language is so vague that even a very educated person would be hard pressed to answer this very fundamental question, "What's the difference between lewd conduct and lewd and lascivious conduct?", and, by the way, if you can't answer that right, that's the difference between a misdemeanor and a five-year felony that gets you registered as a sex offender.

THE COURT: Does there need to be a difference?

ATTORNEY VALENTE: Our view is "yes", and, if you look to Justice Dooley's dissent in the case of In Re: PM, that was a case that compared the indecent exposure statute in 2602, and Justice Dooley was trying to answer the question of, "What do you do with two people under the age of 16 who have sex with each other, which, arguably is lewd and lascivious conduct with a child, and it's arguably an indecent relationship under the state statute?" Our view is that that supports applying the rule of lenity here in a similar situation, particularly where you have these overtones of vagueness and a very, very serious consequence.

THE COURT: Well, I think the, if I read the, the column correctly, I think your time is up. So thank you very much. We'll hear from counsel from for the Appellee. Again, would you please introduce yourself and identify your client for us? No, we can't, we can't hear you.
ATTORNEY PEPPER: Sorry about that.
THE COURT: That's okay. Thanks. You're set now. Please go ahead.
ATTORNEY PEPPER: Good afternoon, Your Honor and Mr. Chief Justice. My name is James Pepper, and I represent the State of Vermont. I will pick up, I guess, on the vagueness argument. Certainly, a person of reasonable intelligence would understand that touching a female's breasts against her wishes in a school corridor was a lewd act, lewd and lascivious act. The Appellant himself testified to the inappropriateness of an even less intrusive act, which he admitted to reaching out to touch a breast without actually making contact. He said that, in one word, he would describe it as disgusting. I don't think the family court made any error in finding that this statute as applied here was not unconstitutionally vague.
THE COURT: Justice Robinson, you're muted.

JUSTICE ROBINSON: Thank you. Sorry about that. Let's assume that we agree with you that a person, an ordinary person, would recognize that that conduct was not only wrong but potentially criminal. Don't we also have to be able to say that, based on the terms of the statutes, the ordinary person would understand that that conduct was not only open and gross lewdness, a misdemeanor, but also that that conduct rose to the level of lewd and lascivious, a felony, and, if so, what is it that would enable an ordinary person to understand why it elevated to the lascivious level?

ATTORNEY PEPPER: Well, the, the Court, the Court has described kind of the difference between these two statutes where the lewd behavior is conduct which kind of affronts the public consciousness. I mean, I think in Purvis the Court said, "It wasn't the mere fact of your nudity that rose to lewd and lascivious behavior. It was the fact that you knocked on the window and got the attention of the three young women because you were trying to incite the kind of sexual in nature, incite the lustfulness".

So there is a clear distinction, I think, between these two statutes that involves this kind of behavior that's sexual in nature and lustful and it's trying to

incite the kind of lustful proclivity.
JUSTICE ROBINSON: So 2602, which talks about lewd and lascivious conduct with a child, specifically includes as one of the elements that sort of lustful piece, that it's appealing, it's an attempt to arouse the passions of either the doer or the witness. Why would the legislature have seen fit to add that element if it's already intrinsic to the notion of lasciviousness?
ATTORNEY PEPPER: You know, there's a, there's a huge gap in between the time where these two statutes were written, and it's possible that the future legislature wanted to be absolutely clear with respect to the intent element. Whereas the lasciviousness in 2601 has been developed over, through case law over a number of years, you know, a couple hundred years, they didn't want to disrupt any of the case law that's there.
So I think that, moving kind of more back to the response to the Appellant's brief with respect to this, this conduct being open, we both cite to the similar cases with respect to the definition of whether conduct is open. It's open when it's neither disguised nor concealed and it's witnessed by at least one person. Certainly, the conduct here was not disguised.

There was no attempt to conceal. It occurred in an open school hallway. Often, students will wander through these hallways. There's no, no kind of move to a bathroom or an empty classroom here. The primary disagreement here is whether the victim can be the witness for the purpose of openness.

We would look to In Re: AC, where the Court found sufficient evidence for openness where the, where the lewd acts were witnessed by the victim. Vargas is another case where the individual opened his pants and put himself up against the victim and there was no witness of the actual lewd act. There's a number of cases -- of course, they're cited in both of our briefs -- where there is a, there's, where the victim is the only witness.

The Appellant distinguishes these cases based on the fact that they are exhibitionist acts and not actual lewd touching. The State's perspective is that there's no, there shouldn't be a difference when, had AP touched his own private parts in a school library, which was the case in Maunsell, that would be criminal, versus him grabbing someone else's private parts in a school hallway, which would not be criminal under this argument. I don't see that distinction as being relevant.

1 And then there's, you know, had the legislature
2 expressly wanted to have a third party other than the
3 victim present in order to satisfy openness, it could
4 have expressly written this into the statute, as it did
5 in the two statutes that were cited in the Appellant's
6 brief. I think the lack of that language specifically
7 underscores that this requirement is not necessary.
8 THE COURT: Do you think it's necessary for
9 lewd and lascivious to have two different meanings, or
10 can they be synonymous?
11 ATTORNEY PEPPER: I believe the case law has
12 established that lewd behavior -- you know, we spoke
13 about this earlier. The lewd behavior is kind of the,
14 you know, exposing yourself. The, the lascivious
15 element is added that it incites the kind of lustful
16 passions. I think there is a, there is a difference
17 there, yes.
18 So, with respect to the conduct not being gross,
19 you know, as the Appellant mentioned, the courts are
20 not really defining what is open and gross. It turns
21 to the common sense of the community to define these
22 things. So, really, I feel like this is more kind of a
23 sufficiency of the argument, whether, this, in fact,
24 this behavior constitutes grossness.
25 There, certainly, the family court representing

the common sense of the community made the finding that this behavior was gross, and --
JUSTICE ROBINSON: Do you have a response to this argument in that this generic invocation of the sense of the community is really an invitation to, A, impose community morals in a way that we actually, I think, do, and, B, to sort of arbitrary enforcement of conduct that may not be comfortable to popular majorities but ought to be within the realm of constitutionally protected behavior?
ATTORNEY PEPPER: I mean, similar arguments could be made about criminal threats and hate crimes, and, certainly, there are a number of -- you know, I can understand why these statutes are routinely challenged for vagueness, but, at some point, someone needs to draw the line and say, "No, this is not political hyperbole. This is a true threat", and there are -- I mean, it's part of kind of a functioning society to have the courts and juries determine when that line has been crossed.
Just, you know, with respect to whether the behavior at issue constitutes gross, lewd conduct, I mean, if we looked to other cases, Discola, that was a nonconsensual grabbing of the buttocks over the clothes; Vargas, defendant with his pants open held his

genitals against the victim's backside; Maunsell, defendant massaged his genitals in a college library over his pants; defendant stood in front of a barn and masturbated where the victim could see him. Again, AP himself in the merits hearing referred to the less intrusive behavior of reaching out to grab a breast in a school hallway as disgusting.

Unless the Court has further questions, I think that, I think we've touched on most of the elements in our briefs.

THE COURT: Okay, all right. I, I think, I think that's it then. The Appellant has no time; am I right, Mr. Bailiff?

THE BAILIFF: That's correct, Your Honor.

THE COURT: Okay. Well, thank you both very much. We appreciate your arguments, appreciate your appearance here, and we very much appreciate the support of staff, Emily Weatherill in particular, for all the work that's gone into putting these hearings together. And that's, I think that concludes the hearings for today. Thanks again.

(Recording ends.)

C E R T I F I C A T E

I, Sunnie Donath, RMR, Notary Public, do hereby certify that the foregoing pages numbered 1 through 20, inclusive, are a true and accurate transcription to the best of my ability of an audio recording of an Oral Argument before the Vermont Supreme Court In Re: AP, a Juvenile.

I further certify that I am not related to any of the parties thereto or their counsel, and I am in no way interested in the outcome of said cause.

Sunnie Donath, RMR
Credential #157.0005905

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IN THE VERMONT SUPERIOR COURT
WINDSOR COUNTY FAMILY DIVISION

IN RE:	) Case No. 77-6-18 Wrjv
	)
A.P.	) White River Jct., Vermont
	)
	) May 29, 2019
	) 9:11 AM

TRANSCRIPT OF JUVENILE MERITS HEARING

BEFORE THE HONORABLE TIMOTHY B. TOMASI,
SUPERIOR COURT JUDGE

APPEARANCES:

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time on what is gross. And we respectfully submit that gross is a word that has a -- it's a term of art in law that the Court regularly sees in civil cases and criminal cases. There's a clear distinction between gross negligence and regular negligence. And the question is whether the conduct involves open and gross lewdness that is witnessed by someone else.

We respectfully submit that, here, where the allegation is touching over the clothing for a very short period of time with no other members of the public present, once in a place where no other member of the public could've been present and once in a place where no member of the public was present, that the State, even with the evidence taking a light most favorable to them, can't meet a legal standard of gross lewdness or gross lasciviousness for what amounts to an allegation of groping.

Moreover, Your Honor, the statutory scheme has been amended since 2017, when the Supreme Court struck down the old prohibited act for lewdness. And there are now two lewd and lascivious conduct statutes: One of them is called Prohibited Acts, that's 2601(a). And they both appear to borrow to exactly the same conduct with two different punishments and no way for a reasonably intelligent individual to determine how to conform their conduct, the law, or what differentiates between a misdemeanor and a felony.

2601 says, a person guilty of open and gross lewdness and lascivious behavior shall be in prison, etc., etc., etc. 2601 says, no person shall engage in open and gross lewdness. There only real difference there is that they've taken out lasciviousness, but they've not made any effort to define what lasciviousness is. There's no case law on what it is. And there's no way for an eighteen-year-old person or really any person of reasonable intelligence to determine what is the specific type of conduct that is a misdemeanor, or what is the specific type of conduct that's a felony.

Moreover, the statute doesn't sufficiently define specific conduct when it would have been very easy for the legislature to simply say, you can't touch somebody when they don't want you to touch them in a private area. New Hampshire has a statue that says more or less exactly that, and many other states do. For whatever reason, the Vermont legislature has not adopted something with clear language. If it had, that would apply here, and there would be no question as to the statutory culpability.

Instead, we are trying to adopt a statue with extremely broad, vague language meant to protect the public for something that most people agree is wrong, but that's not the standard for due process. The standard for due process is that the person who's charged with the crime has to have a had a way to know that what they were doing was criminal when they

did it. And we respectfully submit that the statutory writing, which is just not good enough to accord, in this case, Mr. Parker, his constitutional rights. And accordingly, both --
THE COURT: You'd like me to figure that out --
MR. VALENTE: -- things should be dismissed.
THE COURT: -- in Rule 29 motion, Mr. Valente?
MR. VALENTE: I'm sorry?
THE COURT: You like me to figure that out in Rule 29 motion?
MR. VALENTE: No, the heart of our argument, Your Honor, is really that the first incident happened in a room where no one was present, and the second incident happened in the hallway. And we understand and expect that the Court's ruling will hinge on the question of whether Skye -- excuse me, sorry, Echo, could've been a witness for the purpose of the statute or really should've been a victim for a statute that was not written, which is the touching statute that would've been easy for the legislature to write, or whether it's appropriate to fashion her as a member of the public meant to be protected by this statute, which was originally designed to protect the people from obscenity, open sexual conduct, of things, that in a Victorian era, when this statute was written, the legislature viewed as very important.
THE COURT: Ms. Remick.

MS. REMICK: Your Honor, the lewd and lascivious statute, while much of the State actually agrees that it's not the statutory language I would have picked had I -- had that been my job to write the statutes, but the statute has survived countless dateless challenges and has been upheld by the Vermont Supreme Court over and over and over again. And the one witness issue is, of course, one the parties have briefed for the Court in connection with the motion to dismiss in Docket 510. But to revisit that now, the State submits that the Court has repeatedly defined open as undisguised and unconcealed as opposed to private, concealed, and unseen. And one of the earliest cases on point actually is a case, State v. Millard, that happened with no other witness.

MR. VALENTE: What case, I'm sorry?

MS. REMICK: State v. Millard, which is 18 Vt. 574, which was a case where a man entered into a woman's home, and there was nobody present except her baby. And he exposed himself to her in the home and made unwanted advances towards her. And the Court held that, even though there was no other witness, but that was open because it was not private, it was unconcealed. There had been no efforts to hide the conduct. Furthermore, the State submits that it cannot have been the legislature's intent to make conduct, unwanted sexual touching that happens in private between two people with no

other witnesses present, lawful. That cannot have been the legislature's intent. Because this is behavior that usually happens in private, that people engage in sexual conduct when there's nobody else around to see it.

And so the State submits that the caselaw beginning with Millard but going through Benoit and Penn and many of the cases cited by the defense all support the proposition that open doesn't mean witnessed by others but means unconcealed. This is behavior that was unconcealed. It began, initially, in Bella's room. The testimony is that they didn't know how long Bella would be gone; she could've come back at any time. So there was always, at least, the possibility of discovery that the defendant appears not to have been concerned with.

And then, subsequently, because Ms. Lyman testified that the incident began in the room but continued outside for ten to fifteen minutes where, over the course of the whole event, the defendant continued being handsy. He touched her breast in Bella's room without her consent, and then outside he took her hand and put it on his penis. And so outside is also undisguised, unconcealed, open for purposes of the statute.

And the testimony is that this was unwanted, unwelcome, unconsented conduct. And the caselaw has also been clear that behavior that is lawful and appropriate in a

consenting relationship may be lewd and lascivious in the absence of consent. Specifically on that issue is State v. Beaudoin, 100 Vt. 373, I think. Oh, 185 Vt. 164. And also State v. Franzoni, which was the second case that I cited. So this is conduct that was not consented to. It was something that shook Echo up considerably. It was something that made her, after that initial incident, avoid the defendant at school, block him on social media. Even though it is an incident that happened between the two of them with no other witnesses, there is evidence of her testimony of how she behaved going forward that corroborate that this was not consensual behavior, that she did not invite this. They did not have a relationship where that sort of touching was invited or implied.

And so the State submits that the evidence, when viewed in the light most favorable to the State and particularly when taken into account the relevant caselaw, the State has met it's burden here.

THE COURT: You want to talk about the new statute and what the impact that may or may not have on this?

MS. REMICK: The --

THE COURT: New, prohibited, act sort of thing. I don't even know the title of it right now, but it's prohibited act.

MR. VALENTE: 2601(a). I believe it's prohibited

act. I think it's prohibited conduct, Your Honor.
MS. REMICK: It is prohibited conduct, Your Honor.
And I would say that the language in that statute is similar to language that has been found constitutional previously by the Supreme Court in connection with the 2601 lewd and lascivious conduct statute.
And any issue that arises from the difference between felony and misdemeanor conduct is within the wisdom of the legislature, but it also is not the only thing. There are many situations where prosecutorial discretion drives what the charges are. It's not at all unusual for there to be factual fact patterns that give rise to any number of charges, and the State could choose to charge felonies, could choose to charge misdemeanors, and there is nothing that prohibits the prosecutor from having that discretion. There's no constitutional prohibition for there to be both felony and misdemeanor charges that cover the same conduct.
THE COURT: Well, there's usually some elements there that -- but -- okay.
MR. VALENTE: I just want to be heard --
THE COURT: Mr. Valente.
MR. VALENTE: -- be very, very briefly on the record because I disagree with the final argument made by the State there.
The issue here is not about -- I'm not sure whether

the legislature can do what the State says it's trying to do, but the issue here is clarity to the citizen. And I just imagine, as a lawyer, if I had a client say, well, how do I avoid the felony of lewd and lascivious conduct and stay within the misdemeanor of prohibit act, you would have to respond to them, well, you --
THE COURT: I'm not sure you could answer that question right now, so I think (indiscernible) --
MR. VALENTE: Well, that's the --
THE COURT: -- technically, but go ahead.
MR. VALENTE: This is just a hypothetical to illustrate how confusing it is. The advice, if you hued to the language to the statute would be, well, don't commit open and gross lewdness and lascivious behavior if you want to avoid the felony; only engage in open and gross lewdness. Thus, you are safe under the misdemeanor, which obviously, I would not give that advice because of the rules of ethics. But it's an incredible splitting of hairs. There's no legislative statement of purpose. There's no legislative statement of purpose. There's no reporter's notes. There's nothing that is within the statute that offers any clarity on 2601(a). And in fact, the history of the caselaw with respect to lewd and lascivious conduct is it has withstood constitutional challenges including a three -- two decisions where Justice Dooley said that it barely qualified. And

another decision where the Supreme Court called it murky at best.
But each time there's a new fact pattern that the Court is asked to consider, it needs to address whether the statute is sufficiently clear to prohibit what the defendant is accused to have done to violate the statute. And this is a fact pattern that is very different than the other Supreme Court cases in which the Supreme Court judged that the statute did pass constitutional muster.
So in State v. Roy, 140 Vt. 219, that's a case from 1981. But the Supreme Court, when they allowed the statutory language to stand, they also predicted that it might be too vague to withstand a void for vagueness challenge under certain circumstances. It's that circumstantial analysis that the Court has to make because there are circumstances that are clearly very lewd. If two people are having sex in public, there's a long history of caselaw that the Court can draw upon and say, okay, sex in public, there's a case from the 1800's and a fairly voluminous body since then saying that that is the kind of open and gross lewd and lascivious conduct that this is statute is mean to bar. There's nothing suggesting that an unwanted touching in a private area is as easily fit within the statutory framework as the first example I offered.
The first time the statutory language was challenged was in 1950 in a case called State v. Ploof, 116 Vt. 93. And

the Supreme Court then wrote, "The statute does not define with any certainty the crime, and the complaint should set forth the nature of the acts alleged to be lewd and lascivious with such particularity that it will clearly appear upon the fact of the complaint whether their character is as to come within those terms."
And so at least for, roughly, the last half century, the question has been for the trial court to determine if the alleged acts fall within the definition that is already fairly vague within the lewd and lascivious conduct statute. There needs to be fair warning to potential offenders, and there needs to be sufficiently precise standards to avoid arbitrary and discriminatory enforcement.
THE COURT: All right, thank you. Let's try to come back at 1:30, which I don't know many arraignments I'll have to do, so you might have to sit around. And if we want to take your witness out of turn, we can do that as well, and I'll issue everyone, to the extent that I don't grant a motion, to move forward defensively.
MR. VALENTE: Thank you.
THE COURT: Okay? And I'll -- I have no idea whether you intend to testify, sir. I just want to let you know it is your ultimately your choice and counsel to decide whether to testify or not. You can take your advice from your counsel, and it's reasonable to do so, but ultimately, it has to be

your choice alone. You have a right, absolute right, to rely on the fact that you're presumed to be innocent and rely on the State having failed to produce sufficient evidence that might convince me beyond a reasonable doubt. But if you decide to testify, I'll assume that you're doing that of your own choice, and if you don't, I'll assume that's your own choice, too. Okay?
MR. PARKER: Yes, Your Honor.
THE COURT: Thank you.
THE CLERK: All rise.
(Recess at 11:54 a.m., until 1:48 p.m.)
THE CLERK: All rise.
THE COURT: Thank you all; be seated.
So based upon the -- obviously, the Rule 29 motion's been made, which calls into question the State's ability to bring its case to a jury. Essentially, the Court needs to consider in that analysis the evidence in the light most favorable to the State and weighing all evidence and all inferences from that evidence in the light most favorable to the State to determine whether a jury potentially could find beyond a reasonable doubt in favor of the State on the charge of lewd and lascivious conduct as to both events, which is essentially a four part testing in which there's four elements: if the defendant intentionally engaged in conduct alleged, that the conduct was open and gross, and that it was

also lewd and lascivious.
Here the defense -- I guess the Court will note that the Court could make -- a jury, potentially, or Court, as fact finder, could make determinations that, based upon the evidence presented by Echo, that if her testimony were believed that there were two incidents involving, or potentially even three as it is, but two incidents separated, one in the fall of 2017, one in the January of 2019, both involving conduct between the defendant and her, who she's been identified, in that some of the conduct involved in the defendant touching her breast, initially, in the fall and also having him grabbing her hand and having it touch his penis area, both over the clothes, that both of those were not welcome by her. And her conduct afterwards indicated that as well as the conduct in the statements that she made to him in asking him to leave would have made that clear as well.
Similarly, the next event was also unwelcome and -- touching the breast -- but also in the Court's mind, again, without prejudice to, perhaps, the longer exodus of that in a potential with regard to the filings of the defense. But at this stage, the Court could make a determination that it does have both an element of sexuality, indecency given the lack of consent and also that it does affect the genital areas both of the defendant and Echo.
Similarly, the Court could make a determination it

was designed to excite or appeal to lust. The Court could make those findings as well. The defense has argued that it needs to be more public, and certainly the statutes both -- all the lewd and lascivious conduct statues seem, in the Court's mind, to be poorly thought out from the Court's perspective, but the question is not whether that they were drafted and the Court would draft them that way. The question is whether they are appropriate and how to interpret them. I think Vermont caselaw would say that you can have open and gross conduct, which is essentially being undisguised and not concealed. It's State v. [Mall'-ard] -- [Mill'-ard], there has certainly been indications that one witness who's nonconsenting would be sufficient. Similarly, the Court has noted in, sort of, passing that the fact that things that might be -- that people who are willing participants, such as State v. Franzoni, where there is a sexuality -- sexual intercourse at a fair grounds, that would be permissible because it's -- not permissible, but it would be a consensual conduct. And then the question might be whether it was open to others.

Similarly, in the case, State v. Beaudoin, indicated that some contact which is consensual in private might not be lewd but if it weren't consensual it might. Similarly, in Discola, 2018 Vt. 17, and they also discuss the fact that it must be unwanted sexual contact is what is prohibited here.

The Court also makes note of State v. Hammond. That was a case, 192 Vt. 48, where the State -- the defendant was charged with both sexual assault and lewd and lascivious conduct, and the only two people who were involved in it were the alleged victim and the defendant. And the Court concluded that the evidence with suspicion to sustain a conviction there beyond reasonable doubt.

So based on those, the Court will make a determination that the statutory scheme was allowed for there to be one witness who's an unwilling and unconsenting witness, and that is established by the facts here. Similarly, the Court, though the Court agrees, and it's without prejudice to lead a consideration and further briefing on the issue, the Court does believe that there is some light between 2601(a) and 2601.

Similarly, it's interesting with lewd and lascivious conduct statute for -- who is a child, it has to be lewd or lascivious conduct. For lewd and lascivious conduct under 2601, it could be lewd and lascivious conduct, and for 2601(a) it's the lewd conduct.

Vermont State Court has indicated that there is some difference between those words. It's made reference to that in Gabert, 152 Vt. 83, also In Re: U.M. 2016 Vt. 18 (sic), in that the difference between the words essentially could mean that the difference between lascivious, meaning tending to

excite lust, and lewd, being gross and wanton indecency in sexual relations.
Court agrees that most of the time when a witness is defined in a caselaw, they're talking about lewd or lascivious conduct, and they just lump things in and that, even in the Court's description of those two standards, is a very thin line between those two points of view. But there is a line there in the Court's mind, and perhaps later cases will need to develop that further now that there are plainly two different sets of laws.
So for now, the Court's going to make the determination that there's nothing that would make this unconstitutional going forward. So with that, the Court could make a determination that the Rule 29 motion will be denied.
Do you want to proceed with the defense case?
MR. VALENTE: Yeah. There's one preliminary issue I'd like the Court to address. Because of the way we're doing this, we're taking evidence likely from the defendant, and that evidence is meant to relate both to the Court's merits adjudication of the two charges of delinquency and also to the Court's eventual adjudication of whether or not it's appropriate to treat the January allegations against the defendant as part of the youthful offender program.
The youthful offender statute has a provision that says that, in the course of making that determination, the

[END OF EXCERPT #1]

happy to let the Court go look over everything.
THE COURT: Mr. Valente.
MR. VALENTE: Your Honor, I'll try to make it brief.
I'm sorry, it's hard for me to sit down and not say anything.
It's not a great habit.
But we respectfully submit that the State can't meet its burden of proof here, which is beyond a reasonable doubt, for the following reasons: The evidence is that the only relationship that Mr. Parker and Echo had -- I'm sorry, that Adam and Echo has was a sort of singular, outlying, hookup in middle school and that they were not part of the same social group, that they partied together one night before a senior football game, that Echo told him, stop, you have a girlfriend.
And there's disagreement as to whether what followed was him being the sole aggressor or the two of them kissing.
But what is clear is that afterwards, at least according to Echo, she walked Adam out. She got in a car with him. Her behavior was not consistent with somebody who had just been victimized in a nonconsensual sexual encounter sufficient to rise to felonious lewd and lascivious conduct.
Moreover, she's indicated that the reason she never reported it and the reason that she is hesitant about testifying and really, quite oppositional about testifying about that incident, is that she does not see that as the

thing that should be the subject of these court proceedings. There's no evidence on the record that there was ever any exposure of any private parts. Using the definition of a sexual act found in the criminal statutes, there was no sexual act. There was no penetration of any sort. The most significant allegations here are that there were kissing and fondling with clothes on. That fact pattern is less significant than any other case we were able to find reviewing backwards, both for cases involving lewd and lascivious statute and for cases involving the old prohibited act lewdness paragraph. And some of those cases were not prostitution cases because things got a little far off field. As to both the first and the second --
THE COURT: What about Squire (ph.)?
MR. VALENTE: I don't remember that case, I'm sorry.
THE COURT: It's all right.
MR. VALENTE: My guess is if you're saying that, then you're probably right and --
THE COURT: No, I --
MR. VALENTE: -- I'm probably wrong.
THE COURT: -- I might be misremembering it, too.
MR. VALENTE: Well, let me --
THE COURT: Either way, why don't you just --
MR. VALENTE: -- let me just qualify by saying the majority of the cases we reviewed were much more prurient

activity with much more nudity, overt sexual act, penetration, or attempted penetration, things of that nature than what is found in the allegations here even if the Court does not credit Mr. Parker's testimony.

With respect to both the first and the second incident, there were statements that Echo made to both the CAC interviewer and the investigating officer where she said that her breasts were not, in fact, touched, and then she essentially recanted her recantation, went back to saying that her breasts had been touched. That's a very significant inconsistency because it really gets to the heart of the factual matter that the State seeks to prove and the factual matter which the State seeks to prove more or less only with Echo's testimony and some corroboration as to her disposition in the period after the preceding.

There were opportunities for the State to corroborate the testimony with more. Bella Gray was supposedly present immediately after the first incident, but the Court got no testimony from her. The Court didn't hear from either investigating officers. The Court didn't get any video from the downstairs hallway which would have, according Echo's testimony, seen her running because she ran down the stairs. There's no evidence that there ever any admissions from the defendant, and in fact, the defendant has shown through his testimony today that he is making statements against his

interest with respect to this but still denies the key point on which Echo was inconsistent, which is the touching of the breasts.
The forensic interviewer didn't come here to testify.
The, sort of, pseudo guardian who Echo supposedly reported to didn't come here to testify. Ms. Hall didn't come here to testify, all people who supposedly were the recipients of excited utterance from Echo which would have corroborated her statements made on the day of the incident.
In the absence of physical evidence and in the absence of video absence, we ask the Court to look critically at Echo's testimony. And it is clear that Echo was significantly emotionally impacted by what Mr. Parker did that day. It's clear from the testimony that she gave. But what's also clear is that she's not able to offer details that allow the Court to make a very meaningful finding of fact.
Her memory is really open to suggestion during both direct and cross examination. She actually changed her story in the middle of cross examination when confronted with her earlier statement, and she continued to say that she had never say said in her interview with Det. Howell that she slapped Mr. Parker's hand away before he touched her breast even after she heard a recording of herself saying that in the interview. These statements go to her credibility, and we are not suggesting that she should have been fine with what

happened. We're not suggesting that what Mr. Parker did that day was good, smart, mature, any of those things. It's possible to engage in activity which is rude and suggestive and causes another person great upset without necessarily running afoul of the criminal statutes.

A great example of that is the awful racist and threatening things that can be said without actually committing disorderly conduct. Here the lewdness statute is designed to prevent open and gross, lewd and lascivious behavior.

And we respectfully submit that, although what Mr. Parker did is, I think, certainly not something he's proud of, not something his parents enjoy hearing in the back, not something that the Court would sanction any juvenile before it or any adult before it to do, that doesn't necessarily make it a factually sufficient basis to find for the State in terms of whether they've proved beyond a reasonable doubt that he committed lewd and lascivious conduct.

In making this decision, we'd like the Court to consider one other thing, and I believe there's very little law on this issue. There was a time when the Supreme Court took up the question of whether the prohibited acts lewdness misdemeanor was a lesser included offense of L and L. And the Supreme Court said no, it's not. Different elements. What the legislature did with the new statute, with the new

prohibited conduct statute, we respectfully submit, brings it within the appropriate spectrum for the Court to consider it as it a lesser included offense.
I confess to not having read the cases that the Court mentioned earlier that distinguish between lasciviousness and lewdness. I cannot imagine an act that would be lasciviousness but not lewd or lewd but not lasciviousness, but I can see that there must be something.
But we respectfully ask that, in making this adjudication, the Court not only consider whether the State has proved the merits of the case as to lewd and lascivious conduct but also whether it is more appropriate to find for the State on the lesser offense of prohibited conduct.
There are a couple of reasons to do that: one, where the actions are of a less intense sexual nature than many of the fact patterns that have been examined in prior case law. That would seem to suggest that this is an appropriate case to consider as lewd but not lascivious. A second reason is that the Court -- strike that. The Court, in examining how one would explain what the new lesser misdemeanor means, should consider that this is a fact pattern that seems like a good explanation if one were trying to parse the differences between 2601 and 2601(a). You have no sexual acts, no exposure of private parts, no taking off of the clothes, no penetration. You don't have the presence of a person who's

under sixteen. You don't have an element of violence of a bodily injury.
And the question of consent here is one in which we're evaluating it under the new affirmative consent protocol rather than the old style, which is whether Echo gave positive indications of consent rather than the old, well, did she say, no, and if she didn't, that's consent.
And so given that Mr. Parker's case falls on the less severe, less intense side of almost all of those questions that can be up in the air in a case involving potentially lewd and lascivious acts, we respectfully submit that this is a good case study of the new misdemeanor law, recognizing that there's not a lot of guidance for the Court to make that determination.
THE COURT: What's the effective date of that? I know it's 2017. Is that the effective date of it?
MR. VALENTE: Yes.
THE COURT: July 1?
MR. VALENTE: Yes, it's right in the reporter's notes. I don't remember if it's July 1, but it's certainly 2017, and this was January 2018.
MS. REMICK: I want to say it was sometime in May. I think it took effect upon passage of 2017.
MR. VALENTE: As my mentor, Tom Costello, said -- he used a swear word here, but he said, maybe you should read the

statute, James. So I'm just going to read the statute and tell you. Oh, it doesn't say, but it indicates that it was added in 2017.
THE COURT: That's why I didn't know the answer. Any final thoughts, Mr. Valente?
MR. VALENTE: No, thank you, Your Honor. I'm sorry to be a problem.
THE COURT: And anything you want to speak -- any of these you want to respond to very briefly?
MS. REMICK: I would like to respond to a few things very briefly, Your Honor. But primarily -- well, starting with the premise that this incident is not as serious or significant. These incidents are not as significant as other conduct that the Supreme Court has held constitutes lewd and lascivious conduct under 2601. Many of the lewd and lascivious conduct cases are about exposure where there is no touching. So from the State's perspective, this is significant, more significant, because there is unwanted sexual touching. There was an invasion of Echo Lyman's space that she did not invite, and which she did not welcome and to the extent that consent was verbalized, it was in both cases negative. There was an explicit lack of consent.
In the incident at Bella's house, the uncontroverted testimony is that the only thing Echo said was no, you have a girlfriend. And with respect to the incident in the hallway

at the high school, the testimony is uncontroverted that she said no as he reached out to grab her. So there is not a miscommunication here. The communications that were made were clearly, there is no consent. You may not do this. I do not want this.

To address Echo's, sort of, reluctance to come forward with the first incident, she talked about this a little bit and was too upset to bring it out as well as I had I hoped, but she did talk about it a little bit on the stand, which was that the second incident was more significant to her because it happened at school where she should've felt safe. Because it was so out of the blue, it happened at school, she had been trying to avoid him for these months. And if she couldn't be safe even at school, it made -- it shook her up much more than the first incident, which is not to say that the first incident was not a significant and criminal overstepping of social norms and the evidence as to lack of consent here is clear.

This is not a case where they had the kind of relationship where consent could be presumed. They were not dating. They had had one kiss that lasted a minute or two four years previous at a middle school dance. But they were not dating. They were not friends. They did not socialize outside of school, so there was no history in their relationship through which the defendant could have presumed

that his conduct was okay. And the indications of Ms. Lyman, by her testimony and her verbal expressions to Mr. Parker in the moment were both no, I don't want this. This is not welcome.
Thank you.
MR. VALENTE: May I just respond with one sentence?
THE COURT: Okay.
MR. VALENTE: The statutory definition of consent includes actions of consent.
THE COURT: Unless --
MR. VALENTE: It's not simply words. That's all.
THE CLERK: All rise.
MR. VALENTE: Thank you, Your Honor.
THE COURT: Thank you.
THE CLERK: You may be seated.
(Recess at 4:00 p.m., until 4:14 p.m.)
THE CLERK: All rise.
THE COURT: Thank you all; be seated.
Thank you for your presentations. So obviously, the Court was neither at neither place for these incidents and can only make its decisions based upon the evidence that's presented from the parties and the witnesses that have been provided today.
First of all, the Court will first, with regard to Docket 109, confirm on the record that will set youthful

offender status for the defendant and make determinations that public safety can be treated sufficiently by probation. And as a youthful offender, if the Court find the defendant to be having committed a delinquent act if the youth is amenable. The Court makes that determination based upon his statements and the fact that are sufficient resources that could be provided through DCF and its counterparts in New York State that would allow treatment. And with the defendant is almost twenty -- right -- but that the jurisdiction can exceed to twenty-two, so that should, in the Court's mind, in light of the circumstances, be sufficient, should the Court find the defendant to be adjudicated as a delinquent, to provide any services that will be appropriate to ensure that this sort of event doesn't happen in the future.

So the Court makes the following determinations: first of all, with regard to the first incident, with regard in Docket 77, there's a number -- I mentioned at the beginning here, that there's four elements that the Court needs to make a determination on: that the defendant intentionally engaged in conduct towards Ms. Lyman, that it was open and gross, and that the conduct was also lewd and lascivious.

To determine whether it's open and gross, the Court does have to make a determination that when there are two people involved and one being a witness and also the victim, that there's not consent, which consent means words or actions

by the person indicating a voluntary agreement to do something or to participate in something. And consent means consent of the will. Lack of any consent may be shown without proof of any resistance.

In this incident here, we've had two young people tell two different stories, although there is some overlap between both of them. In this particular incidence, the Court has some concerns about the memory of the alleged victim here, Ms. Lyman. This was an event that, as she said, and multiple times admitted, that she had difficult recalling three years ago, that there was pot smoking going on. Her memory was spotty at times and subject to influence here.

There's no evidence of third-party corroboration that was presented here. The defendant's version of the events has some internal coherence and is supportive of nonverbal consent participation in sexual activity. Whether judged from a purely subjective standpoint or an objective one, the Court still has reasonable doubt as to whether the State's established that these acts were done without Ms. Lyman's consent. So given that doubt, the Court makes no finding as with regard to that Docket 77.

With regards to Docket 109, some facts are uncontested. The defendant has admitted that he was in school and engaged in the encounter with Ms. Lyman, that he wasn't acting without through any accident or without any intent to

move forward in that encounter. My Lyman -- there doesn't seem to be any contention that Ms. Lyman that consented here nor is there any basis to believe that she had any objective or subjective basis for this Court to make any determination that she consented. So open and gross conduct has been established.

The defendant disputes principally touching Ms. Lyman's breast. In this instance, after considering the demeanor and all the evidence, the fact the Court does find that Ms. Lyman's version to be the more convincing to a beyond a reasonable doubt standard. Her emotional reaction here was significant, severe, and (indiscernible) to corroborate by others, even the defendant.

Her testimony as to touching her breast, from the Court's perspective, was entirely credible. The fact that she may have also misspoken in the -- or said something in halfhearted manner during the police reporting, did not change the Court's view of that under the State v. Eaton. Certainly, victims have often told slightly different stories over time, and that is not necessarily unusual. Hers, from the Court perspective and having had a chance to observe her demeanor in Court, the Court does find beyond a reasonable doubt that that occurred.

And the defendant next claims that, even if that were true, that it does not amount to lascivious conduct or lewd

conduct. And I think it -- I think the new law probably is more than likely to be as a lesser included offense. As for lewd and lascivious conduct, as conduct that is lustful, indecent, or sexual behavior that offends current morality in Vermont. Lewdness is defined as gross and wanton indecency in sexual relationships where at least lasciviousness tends to mean tending to excite lust. And to make the determination, the Court needs to apply its own -- or a sense of community standards of sexual decency, propriety, and morality in Vermont.

In this particular instance, the Court does believe that the touching of a breast in this situation at school without consent is both lewd and lascivious. In the Court's mind it does offend traditional notions of morality and appropriateness to touch the private parts of a breast of a woman in public without any consent and then a deal. And as those are closely linked to sexual activity and lust and sexual excitement, the Court also believes beyond a reasonable doubt, it does tend excite lust which means that the State has also proven lewd and lascivious conduct beyond a reasonable doubt as well.

Based on that, the Court does make a finding of delinquency with regard to the second act in January 2018 and will set this for a disposition hearing and ask for a case plan from DCF to determine what determines, I'm assuming

probation, determining terms of probation that would be appropriate in this case.
Mr. Valente.
MR. VALENTE: Your Honor, we respectfully ask that the Court keep in mind the consequence of its finding which is that Mr. Parker will have to live in Vermont during New York's review of the transfer of supervision. And I'm worried that the Court's schedule is a four-dimensional chess game, to put it mildly, but if there's any way that the Court can expedite this so that the forty-five day window can occur in July and August, that would enable him to continue to attend school, which, I think, is probably in everybody's interest.
THE COURT: Certainly I think it's supposed to be done within thirty-five days, isn't it? Is that for a disposition hearing? Is that -- do you know? Unless that's the old law.
MS. REMICK: It is thirty or thirty-five. It is a fairly short turn-around.
THE COURT: That would be our intention -- the Court's intention to try to set that up, obviously, to the extent that Counsel could confer and discuss to see whether there's any -- can be some meeting of the minds as far as conditions that might be beneficial to expedite things as well.

So we'll order that case plan. We'll set that for

[END TRANSCRIPT]

IN THE SUPREME COURT OF
THE STATE OF VERMONT

SUPREME COURT DOCKET NO.: 2019-246

In re: A.P., Juvenile

ON APPEAL FROM THE VERMONT SUPERIOR COURT
FAMILY DIVISION, WINDSOR UNIT
DOCKET NO. 109-8-18 Wrjv

APPELLANT'S BRIEF

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[BEGIN EXCERPT]

and the United State Supreme Court see as synonymous. Application of such ambiguous language is the difference between misdemeanor and felony.

Applying the rule of lenity would not produce an irrational or absurd result, but would provide a clearer distinction as to the conduct that is prohibited under each statute. *See State v. Wainwright*, 195 Vt. 370, 374 (2013). There exists no clarity from the Legislature, courts, or common usage to sufficiently warn the public of the difference in application of these two statutes. Until the Legislature provides clarity, any conduct that falls in the gray area between "lewd" and "lascivious" should be construed in favor of a defendant. The rule of lenity should apply here, and the ambiguous nature of these penal statutes should be resolved in Appellant's favor.

D. The Statute is Unconstitutionally Vague

Vague laws invite arbitrary power. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring). The void-for-vagueness doctrine "serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution." *Id.* at 1224. It "guarantees that ordinary people have fair notice of the conduct a statute proscribes." *Sessions*, 138 S. Ct. at 1212.

This means "that [the Legislature], rather than the executive or judicial branch, [should] define what conduct is sanctionable and what is not." *Id.* "Allowing the legislature to hand off the job of lawmaking risks substituting this

design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to condemn[n] all that [they] personally disapprove and for no better reason than [they] disapprove it." *Sessions*, 138 S. Ct. at 1228 (Gorsuch, J., concurring) (internal quotations omitted).

Criminal statutes must be interpreted and applied to ensure the text provides fair warning of the legal consequences for committing certain defined acts. *In re K.A.*, 2016 VT 52 at ¶ 9, (citing *McBoyle v. United States*, 51 S. Ct. 340, 342 (1931)).

The constitutionality of the term "lewdness" as set forth in § 2601 has been challenged at least five times as void for vagueness. *See In re K.A.*, 2016 VT 52; *State v. Shippee*, 176 Vt. 542 (2003); *In re P.M.*, 156 Vt. 303 (1991); *State v. Purvis*, 146 Vt. 441 (1985); *State v. Roy*, 140 Vt. 219 (1981). While the Supreme Court did not find the statute unconstitutional in the above cases, it has nevertheless repeatedly criticized the vagueness inherent in the term "lewdness."

The Court first examined the issue in *State v. Roy*, where a man was charged with Lewd and Lascivious Conduct with a Child when police "saw a man driving a car...with a young child standing in the front seat. The child was pulling up his trousers and his genitals were exposed." 140 Vt. 219, 222 (1981). The Court held "[w]hile in certain circumstances the words "lascivious" and "lewd" might be too vague to be applicable, it strains credibility to argue that the crimes herein charged are not sufficiently obvious so as to be legitimately proscribed." *Id.* at 229-30

(internal citations omitted) (citing *McCright v. Olson*, 467 F. Supp. 937, 945 (D.N.D. 1973)).

In *State v. Purvis*, the Court did not address "whether [the Lewd and Lascivious] statute passes constitutional muster under all possible applications." 146 Vt. 441, 443 (1985). There, a man "exposed himself to [three young girls between the ages of 11 and 14] from a window of his house as they were walking home from school," and "the [man] knocked on his window to attract their attention before he revealed himself." The Court reached the same conclusion in *State v. Shippee*, where the defendant "exposed himself and masturbated in front of a young child at a department store." 176 Vt. 542, 544 (2003).

In *In re P.M.*, the defendant, who was fifteen years old, "kissed and hugged M.C., and rubbed the genital areas of his partially clothed body against the genital areas of M.C.'s partially clothed body in order to gratify his own sexual desires." 156 Vt. 303, 305 (1991). M.C. was eight years old at the time. *Id.* The Court found that a person of reasonable intelligence would be aware that the conduct was proscribed by statute given the age disparity between P.M. and M.C. *Id.* at 308. But Justices Dooley and Morse recognized in the dissent that the language "both fails to inform reasonably intelligent people of proscribed conduct and invites arbitrary enforcement." *Id.* at 314 (Dooley, J., dissenting).

In *In re K.A.* a middle school male student played four-square with at least six other students near the school. 2016 VT 52, ¶ 2. S.K., a female student wore a coat with two zippered pockets along the front for her hands. *Id.* K.A. asked to put

his hands in her pockets, and S.K. said no, but K.A. put his hands in her pockets anyway. *Id.* K.A. pulled S.K. backwards with his hands in her pockets, and told her to kiss him or he would throw her into a nearby snowbank. *Id.* S.K. again said no and tried to remove K.A.'s hands from her pockets. *Id.* K.A. then tried to get his hands under the waistband of the girl's jeans, but S.K.'s belt prevented his hands from going down her pants. *Id.* K.A. then pulled S.K. towards the school with his hands in her pockets when a teacher intervened. *Id.* The majority held that the definition of "lewd" was "murky at best," but upheld the statute. *Id.* at ¶ 10.

The case at bar is distinguishable from *Roy*, *Purvis* and *Shippee* as the conduct here is not so clearly proscribed as blatant sexual contact with a small child, exposing genitals to three young girls, or masturbating in front of a small child in a department store. But in each of those cases, the Court left open the possibility that the statute could be deemed void for vagueness, but the correct set of circumstances had not yet presented itself. The Court struggled to uphold the statute as constitutional in *In re P.M.* and *In re K.A.*, but the Court found the statute should have informed an intelligent person that the conduct was proscribed. Here, Appellant's behavior was not as severe as the conduct in *In re P.M.*, nor as pervasive as the student's conduct in *In re K.A.*, and although unwelcome, Appellant's conduct falls within the "murky" waters that lie above the boundary between what is lewd and what is not. 2016 VT 52, ¶ 10.

Many other jurisdictions have found similar statutes regarding "lewd" conduct void for vagueness because enforcement of the statute relies on subjective,

biased opinions of the judge, jury, police and prosecutors. *See Pryor v. Mun. Ct.*, 599 P.2d 636 (Cal. 1979) (finding that statute's use of "lewd" was void for vagueness because "all definitions of that term in ordinary usage are subjective, dependent upon the speaker's social, moral, and cultural bias."); *Commonwealth v. Sefranka*, 414 N.E.2d 602, 608 (Mass. 1980) (Court gives example of constitutional, definite construction of lewd and lascivious conduct, which does not "impose generalized, indefinite behavioral standards under which the criminality of conduct depends on the personal predilections of the judge or the jury; nor does it invite discriminatory enforcement by police and prosecutors."); *D.C. v. Walters*, 319 A.2d 332, 337 (D.C. Ct. App. 1974) ("statute [is] void for vagueness because it subjects a defendant to criminal liability under a standard so indefinite that police, court and jury are free to react to nothing more than what offends them and impermissibly delegates to them basic policy matters to be resolved on an ad hoc, after-the-fact basis with the attendant dangers of arbitrary and discriminatory application."); *Morgan v. Detroit*, 389 F. Supp. 922, 930 (E.D. Mich. 1975) ("[W]hatever definition is accepted the standard is subjective in that whether an act is 'lustful,' 'dissolute,' 'libidinous,' or 'lascivious' depends on the actor's social, moral, and cultural bias. There are no objective standards to measure whether proposed conduct is "lewd."); *Jellum v. Cupp*, 475 F.2d 829, 831 (9th Cir. 1973) ("[statute], as limited, supplies no legally fixed standards and constitutes a grossly unconstitutional delegation of legislative power to the prosecutor, judge, and jury").

The Iowa Supreme Court found that a statute criminalizing lewdness was void because the definition "has been so generalized as to encompass an infinite variety of behavioral patterns[, which] in turn has eroded the effective employment of such terms in any statutory enactment, absent an attendant specific definition thereof, as descriptions of proscribed ultimate criminal conduct." *See State v. Kueny*, 215 N.W.2d 215, 218 (Iowa 1974).

Justice Gorsuch followed his concurrence in *Sessions* by delivering the majority opinion in *U.S. v. Davis*:

> In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements.
>
> They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.

139 S. Ct. 2319, 2323 (2019).

Appellant respectfully requests this Court to deem the Lewd and Lascivious Conduct statute "a nullity and invite [the Legislature] to try again."

III. CONCLUSION

Based on the foregoing, Appellant respectfully submits that the lower court's decision should be reversed.

[END EXCERPT]

IN THE SUPREME COURT OF
THE STATE OF VERMONT

SUPREME COURT DOCKET NO.: 2019-246

In re: A.P., Juvenile

ON APPEAL FROM THE VERMONT SUPERIOR
COURT FAMILY DIVISION, WINDSOR UNIT
DOCKET NO. 109-8-18 Wrjv

APPELLANT'S REPLY BRIEF

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Appellee cites *State v. Rooney* for the proposition that, even if the statutes are indistinguishable, it is of no moment, because it is permissible for identical statutes to have differing penalties. *See State v. Rooney,* 189 Vt. 306, 318; Brief at 7-8. *Rooney* addressed a defendant convicted of murder committed during the perpetration of a sexual assault, which traditionally was penalized with a sentence of 35 years to life pursuant to 13 V.S.A. § 2303(b). The defendant was charged (and sentenced), however, under § 2311(c), which also punished murder committed during the perpetration of a sexual assault with "life and for no lesser term." *See Rooney* at 318.

The case at bar is distinguishable. It concerns two statutes with differing language that is meant to evoke differing punishment, but it is impossible to comprehend the meaning of the difference. Thus the controlling rule is not the "identical offense sentencing doctrine" discussed by the dissent in *Rooney,* but rather the rule of lenity, which is predicated on the fundamental right to adequate notice of what conduct may give rise to criminal punishment, and the obligation to resolve ambiguity in favor of the accused. *See Rooney* at 335 (Johnson, J., dissenting).

For example, if Vermont had two statutes prohibiting murder, and one allowed for a milder penalty in cases of killing under the influence of "anger," but an enhanced penalty for killing under circumstances of "hostility," the punishment for the offense could not be established "clearly and without ambiguity." *Bell v. United*

States, 349 U.S. 81, 84 (1955). Under the rule, the lesser sanction must apply. *See State v. LaBounty*, 179 Vt. 199, 200-201 (2005) (citing *Bell, supra*).

D. Vagueness. Appellee argues that § 2601 is not vague by summarizing several cases involving instances of substantial sexual misconduct (public masturbation, inappropriately rubbing an eight-year-old's genitals, fondling a seven-year-old, and exposing one's genitals to three girls between the ages of 11 and 14) which were found perceptibly "lewd" sufficient to overcome a void-for-vagueness challenge. *See* Brief at 9. Appellee says that they are not meaningfully different from the facts in the case at bar, where Appellant, a senior, was found to have briefly touched the clothed breast of his high school classmate, who was one (1) year younger than him. Appellee asserts, moreover, that any person of reasonable intelligence would know that both the former and the latter were "lewd and lascivious," and thus felonious.

In *Landrum*, discussed at *supra* at 7-8, the Oklahoma Court of Criminal Appeals clearly articulated the function of statutes banning generalized "lewdness." They exist to criminalize "[a]nything that flouts propriety, morals, is unusual, is against social custom, or violates the law of nature..." *Id.* This aptly describes why vague statutes like § 2601 should not persist—they rely on subjective, biased opinions of the judge, jury, police and prosecutors, and thus make proscribed behavior dependent upon "social, moral, and cultural bias." *See Pryor v. Mun. Ct.*, 599 P.2d 636, 640 (1979). And, as a result of § 2601's vagueness, there are

prosecutors and police officers who have in fact legislated what can and cannot be done in Vermont for decades.

For example, Senator Patrick Leahy, when he was Chittenden County State's Attorney, was in the 1970s forced to address the legality of skinny dipping. *See* Pauline Phillips, *The skinny on skinny-dipping laws*, Chicago Tribune (Oct. 21, 2001).[49] He created the following guidelines: (1) in public and "semi-public" areas, nude bathing is not acceptable; (2) on private land, it is; (3) in "secluded areas sometimes publicly used," if no one is offended, it is permissible; but if they complain, it is a crime.[50] *Id.*

Similarly, in 2007, it became popular to walk up and down Main Street in Brattleboro in the nude. AP, *Spring brings out naked people in Brattleboro, Vt.* (May 18, 2007).[51] The police established when such conduct became "lewd": while "simply being naked is not a crime, if someone crosses the line by taunting other people or acting in a way that is for their own sexual gratification, they are breaking the law." Patrick Crowley, *Man signs plea deal in nude dancing case*, Brattleboro Reformer (July 4, 2007).[52]

This is precisely the kind of "standardless sweep that allows police[], prosecutors, and juries to pursue their personal predilection" when a statute cannot

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[49] Available at: https://www.chicagotribune.com/news/ct-xpm-2001-10-21-0110210229-story.html

[50] Sen. Leahy's analysis was related to the obscenity prong of the disorderly conduct statute. Appellant respectfully submits that what is and is not "obscene" is sufficiently close to the question of what is and is not "lewd" to render it apposite.

[51] Obtained through Napa Valley Register, available at: https://napavalleyregister.com/news/national/spring-brings-out-naked-people-in-brattleboro-vt/article_e7adad69-c4f8-51aa-bea6-4a366b95d81c.html.

[52] Available at: https://www.reformer.com/stories/man-signs-plea-deal-in-nude-dancing-case,289211.

"define a criminal offense with sufficient certainty so as to inform a person of ordinary intelligence of conduct which is proscribed..." *State v. Berard*, 2019 VT 65 at ¶ 16. Accordingly, this Court should declare the statute overly vague and thus void.

II. CONCLUSION

Based on the foregoing, Appellant respectfully submits that the lower court's decision should be reversed.

DATED at Brattleboro, County of Windham and State of Vermont, this 24th day of October, 2019.

A.P.,
Appellant.

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