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Introduction

Statutory rape is usually defined by the state law concerned. However, statutory rape is distinguished from other forms of rape in that the victim must necessarily be below the age of consent and that lack of consent is not a requisite to the crime on the common understanding that a person below a certain age lacks the capability to give an informed consent. Prior to the development of modern statutory rape laws, statutory rape was used to protect young women and children from the sexual incursion of unwanted males. At that time, women were regarded as chattels or property and as such were ferociously protected by their 'owners.' Early statutory rape laws require carnal knowledge between a female below the age of consent and a male over a certain age, chaste condition of the female, and not the wife of the male (Carlan et al 96). Figure 1 show these elements, which are common law elements of statutory rape. The development of statutory rape laws in the country is haphazard because of the variance of perspectives by states as to the nature of statutory rape - whether it is a true crime, a public welfare crime or a combination of both.

Statutory Rape: Background

Statutory rape laws, however, have seen changes through the years. Although the states do not have exactly the same statutory rape law, there are elements to the crime that are common to all of them. All state statutory rape laws require sexual intercourse or penetration with a person below the age of consent (Christopher & Christopher 16). As can be seen from Table 1, the age of consent varies from state to state and ranges from 16 to 19. The

majority of states, i. e. 33, placed their age of consent at 16, while 6 states legislated the age of 17 as their age of consent. The rest of the states made 18 the age of consent. Most states have added the element of age differential between victim and perpetrator. The application of the age difference is that the person engaging sex with the person below the age of consent can be tried for the felony only if the age difference between them is that indicated by the below or above. Table 1 show that 26 of the 50 states have added this element and the age gap ranges from 2 to 10. It is only Utah, however, which indicated an extreme of 10 years as the differential gap, while majority of those that added this element opted for the range of 2 to 5 years, thus, 9 states chose 4 as the age difference, 5 indicated 3, 2 states opted for 2 and 2 states for 5. The rest of those that added this element provided for conditions. In Colorado, for example, 4 years is the age gap, but only of the victim is below the age of 15. If the victim is 15 to 17 years of age, the age difference is 10 years.

Another element added by 11 states (see Table 1) is the minimum age of the defendant as the determining factor for felony prosecution. The majority of the states, however, chose not to add this specific element to the crime. For those states opting for this element, the minimum ranges from 12 to 24: Alabama, 16; Arkansas, 20; Florida, 24; Missouri, 21; Nebraska, 19; Indiana, Nevada, New Mexico, Ohio, Oklahoma, Rhode Island, Virginia, all at 18; North Carolina, 12; and, West Virginia, 16 and 14 depending on the age of victim.

The Development of the Statutory Rape Legislations in the US

The first known law on statutory rape can be traced to the English codification of the 1275 Statute of Westminster. It prohibited sexual intercourse with females under the age of 12 because of the presumption that those falling within that age were not capable of giving consent. Prior to this, statutory rape requires only the absence of consent, but ten years after codification statutory rape was made a capital offense and the age was lowered to 10. The English law on statutory rape was imported by English settlers to Colonial America, but the law served more to protect the chastity of young, single women than their inability to give consent. This was because in the old days, female chastity had a value that made women more valuable as special property. Statutory rape used to be, therefore, a property crime and was only applicable to unmarried white women of a certain age. In the years that followed, there were three waves of statutory rape laws reforms: at the turn of the 20th century, in the 1970s and 1980s, and in the 1990s (Cocca 11-24).

The First Wave

The first wave of reforms of statutory rape laws occurred at the turn of the century and was centered on raising the age of consent. The movement was precipitated by the widespread exploitation of young female factory workers and those in urban centers (Wolfson et al 63). In Delaware, for example, the age of consent in 1885 was 7, but was raised to 15 in 1890 and to 16 in 1920. Similarly, in Montana the age of consent was raised to 15 in 1890, and then to 18 in 1920 from 10 in 1885. The movement did not go through without

resistance particularly from men who were concerned that they would be denied access to young women. Thus, in some states statutory rape laws allowed for a gradation of penalties with younger males meted lesser punishment than older ones. In addition, the movement also spurred the emergence in some states of lack of female chastity as a defense to statutory rape. Thus, sexual intercourse with a young girl even below the age of consent could not be characterized as statutory rape if the girl was proven to be no longer a virgin. Under marriage laws, however, girls can marry even below the age of consent, implying that married girls below the age of consent can engage in sex, but not those single girls.

The Second Wave

The second wave of reforms, which occurred in the 1970s and 1980s centered on two aspects: the first is the introduction of age spans between the parties for prosecution at the felony level, and the second is the introduction of gender neutrality. Age spans or age differential between the person below the age of consent and the other party determine whether the person having sex with the person below the age of consent can be prosecuted at the felony level (Richards et al 108). Table 1, for example, shows that the Alabama statutory rape law provides for 2 years as the age differential between the parties, with the age of consent pegged at 16. This means that if a 15 year old person engages in the sexual act with a 17 year old person, the latter cannot be prosecuted at the felony level because of the legal protection provided by the law. However, if the other party is 20 year of age, then he/she can be charged for statutory rape. The rationale for this provision is that there is a presumption of consensuality when two persons of

about the same age engage in sexual intercourse (Richards et al 108).

Another development during these two decades was the introduction of the gender neutrality that replaced the long-held traditional gender specificity of the crime. This development was incited by feminist activists who wanted to eliminate the patriarchal and stereotype notions of female and male sexuality (Cocca 20).. This development came through despite the ruling of the US Supreme Court in Michael M. v. Superior Court of Sonoma County, 450 U. S. 464 (1981). That case involved a rape by 17 year old boy of a 16 year old girl. Under the old California law, statutory rape occurs when a person engages in sexual intercourse with a female under the age of 18. The defendant challenged the law on the grounds of the 14th Amendment and the Equal Protection clause of the Constitution because of its gender specificity. The Court upheld the constitutionality of the law on the grounds that there are differences in the impact of sexual experience of young males and females. Girls bear the consequences of the act more heavily from a physical, moral, psychological point-of-view because of their susceptibility to pregnancy. Moreover, the law, according to the Court, meets the standard test of furtherance of state interest through means related to such interest.

The Third Wave

The third wave of reforms of statutory rape legislations came in the 1990s, but these reforms were comparatively conservative to earlier ones. The reforms in that decade were precipitated by the results of a study by the Alan Guttmacher Institute, which revealed that 65% of teen mother had children by men who were 20 years old or older. Thus, statutory rape laws

were directly connected to teen pregnancy. The federal government promised to grant \$100 million to states

that can reduce out-of-wedlock pregnancies in their jurisdictions. This spurred several states to look to their statutory rape legislations to target the partners of young, unwed mothers (Cocca 25-27).

Variance in Perspectives of Statutory Rape

As can be seen from the previous discussions, statutory rape laws vary from state to state. Carpenter (2003) attributed this to the dilemma whether statutory rape is a malum in se, a public welfare law, or a combination of both. An offense that is malum in se is inherently evil in itself and includes serious crimes as murder, rape, assault and similar crimes that are commonly seen by society as something that must be given a stop (Berg 11). In this type of crime, the element of mens rea as shown in Fig. 1 is a requisite for conviction together with actus reus. On the other hand, public welfare offenses, also classifiable as mala prohibita offenses, are not necessarily inherently evil, but are merely reflective of current values and temper. Mala prohibita offenses are usually strict liability offenses, which mean that the mere act of doing them suffices conviction without the proof of intent or mens rea required in mala in se offenses (Berg 11). A combination of these types balances the requisites of mens rea and strict liability in one offense legislation. In statutory rape laws, for example, the proof of mens rea is allowable if the age differential between parties is small and imposes strict liability when the age gap is big (Carpenter 318).

Thus, it is noticeable from Table 1 that in many states, the elements of age

differential and minimum age of defendants are not applicable. The implication of this is that these states do not require proof of the age difference between the minor and the other party or proof of the age of the defendant for felony prosecution. These states include California, Delaware, Georgia, Idaho, Illinois, Kansas, Kentucky, Massachusetts, Michigan, Montana, New Hampshire, New York and Wisconsin. Christopher & Christopher (2012, 507) pointed out the primary flaw in strict liability statutory rape laws as failing to take into consideration current realities. With the age of sexual revolution, adult persons are at risk for being raped by sexually aggressive, but below the age of consent persons. This is because under a strict liability statutory rape law, the mere act of sexual intercourse and penetration with a person below the age of consent is sufficient evidence for conviction. An example of this scenario is *Humphrey v. Wilson* 282 Ga. 520 (Ga. 2007). In that case, a 17 year old with no prior criminal record, had a 3.2 GPA, star football player and homecoming king ended in prison after a 15 year old girl performed oral sex on him. Although he insisted that the girl initiated the oral sex and that she would do it only if she was willing, he was nevertheless, convicted of aggravated child molestation and would have spent 10 years in jail had the Georgia SC not released him (cited Cohen 719-720).

Carpenter (2003) attributed the imposition of strict liability on statutory rape laws on the misapprehension of the holding in the case of *Morissette v. United States*, 342 U. S. 246 (1952). The case, which was about conversion of government property, cited rape, amongst others, as the historical exception to the mens rea requirement - a conception that has become

outmoded through the years, in the opinion of Carpenter (2003).

On the other hand, statutory rape law that is not strict liability, but is either legislated from a mala in se perspective, likewise present some problems. As earlier indicated, this type of law is indicated by the presence of additional elements that mitigates the offense. Such laws would invite controversy and open to too much prosecutorial discretion, as what Levine (2006) termed it. Thus, prosecutors are given the leeway to create a gap between the law in the book and the law in action because of the broadness of the law. The closeness of intimacy between the partners, for example, would likely lead to less likelihood of prosecution proving Blackwood's theory that intimacy advantages the defendant in some crimes and in some phases of the process (cited Levine 694). This is not necessarily bad, however, because it can serve the purposes of justice, but can also lead to discriminatory practices. Present realities indicate that minors are more sexually aggressive than teenagers in past eras and they are more aware of the consequences of their actions. A 1995 study indicated that 50% of American teenagers engage in sex (cited Oberman 703) and a serious application of statutory rape law, especially in jurisdictions that do not put a limit to the age of the defendant or provide a gap in ages of the parties, can mean serious consequences to the criminal justice system.

Conclusion

Statutory rape legislations have come a long way through reforms that have taken root through the years. Nonetheless, facts and statistics indicate that states do not see statutory rape from the same perspective or uniformly apply it. Some jurisdictions have failed to take into consideration the realities

of the times and continue to cling to age old traditions that sex between a person below the age of consent and another person is punishable because of societal consequences. Thus, they continue to apply the law as a strict liability without granting the defendant the option to prove absence of mens rea or other circumstances that would justify or excuse her or him from the offense. For some states, strict liability is balanced with criminal intent for a more judicious application of the law. Other, however, are beginning to view statutory rape as a mala in se or something in which intent is an important requirement for conviction. Considering the gravity of the punishment for statutory rape and the implications it would have on the lives of the parties, minor and defendant, the legislature must craft a version of statutory law that is consistent with present realities taking into account the dissimilarities of past and present conditions.

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