ISSUE 18

Are Statutory Rape Laws Effective at Protecting Minors?

YES: Sherry F. Colb, from "The Pros and Cons of Statutory Rape Laws," CNN.com (February 11, 2004)

NO: Marc Tunzi, from "Curbside Consultation: Isn't This Statutory Rape?" *American Family Physician* (May 1, 2002)

ISSUE SUMMARY

YES: Sherry F. Colb, columnist and law professor, uses a case study involving a statutory rape case to raise concerns about whether rape and assault cases would be prosecuted sufficiently without statutory rape laws. Although not perfect, statutory rape laws can be assets in such rape cases as when the older partner denies the rape occurred or denies responsibility for a resulting pregnancy or infection.

NO: Marc Tunzi, a family physician, believes that statutory rape laws are ineffective because people can get around them too easily. These laws, he argues, require that an otherwise healthy relationship between two people of different ages be criminalized, solely because there is some kind of sexual activity involved. As a result, medical and other licensed professionals do not want to break up these relationships that, in their professional opinion, are not problematic solely because of the age difference between the two partners.

The term "rape" refers to forced sexual contact between two people that usually involves the insertion of a penis or inanimate object into another person's vagina, anus, or mouth. Rape is against the law in every state in the United States, and usually results in heavy penalties on the rapist.

Statutory rape laws say that sexual behavior between two people when there is a significant age difference is against the law, even if there was no force involved. These laws, which were originally created to protect adolescent girls from predatory adult males, are different in every state. The age at which a person is considered legally able to engage in sexual behavior, called the "age of consent," is different in every state, too. Most state laws are no longer restricted to a female victim and male perpetrator; they now apply to couples of any gender combination, including same-sex relationships. Most

recently, the media has carried news of former schoolteacher Mary Kay Letourneau, an adult who was convicted of statutory rape for having a sexual relationship with an adolescent student. Even though the two claimed then (and maintain now) that they were in love, the law said that this relationship was illegal, and Ms. Letourneau went to prison.

People who support statutory rape laws argue that in any relationship where there is a significant age difference, the older of the two people has an inherent power advantage over the younger. Even if the younger partner agrees to have sex, statutory rape law supporters argue, that person was not old enough to make a well thought-out decision—and may have been coerced emotionally, even if not physically. What an older partner has can be very seductive—power, money, a job, a car, and more. These tangible things, they argue, play a powerful role in a younger person's decision-making process. In addition, it is quite flattering for a 14-year-old to have a 24-year-old person interested in her or him. One wonders, however, what a 24-year-old could possibly have in common, developmentally and experientially, with a 14-year-old. Statutory rape laws are designed, in part, to keep these types of unequal relationships from becoming sexual in nature.

Others disagree, saying that statutory rape laws are ineffective, judgmental, patronizing, and sexist. Opponents to statutory rape laws argue that adolescents and teenagers are able to make their own decisions about their sexual behaviors, even if their partner is older. Opponents maintain that relationships are about much more than sexual behavior, and that if a relationship is otherwise healthy and loving, penalizing the couple for their age difference does more to ruin lives than save them. There are young men, they argue, who have gone to jail because the parents of their younger partners learned that they were having sex, and wanted to punish them. As a result, these young men have a jail sentence on their records forever, solely because of an age difference.

What do you think about statutory rape laws? Do they protect, or do they discriminate? Do you think that an adult has more power than a teenager just because she or he is older? If so, is this power strong enough that the adolescent or teen could not say whether she or he wanted to have sex with that adult? What are some of the inherent problems with a significant age difference in a relationship? What are some of the positive things that can happen from two people of different ages having a relationship?

In the following selections, Sherry F. Colb takes the side of the victim, arguing that statutory rape laws, while inherently imperfect, do much more good than harm. For the number of young adolescents who claim they were forced to have sex (particularly by a known assailant), when the situation is often a simple matter of believing one person over the other, statutory rape laws give young rape victims voice. Dr. Marc Tunzi raises the concern that other health professionals have, how statutory rape laws affect a health professional's guarantee of confidentiality and informed consent to their patients. These laws, he argues, are discriminatory against young men (since these cases most commonly involve an older male partner and a younger female partner), condescending to young women, and sometimes culturally disrespectful, if there is a value that early sexual relationships are appropriate within the couple's particular cultural group.

YES

Sherry F. Colb

The Pros and Cons of Statutory Rape Laws

A 10 Year Sentence for Marcus Dwayne Dixon

Recently, the Georgia Supreme Court heard arguments in Dixon v. State. The case involves the conviction of Marcus Dwayne Dixon for statutory rape and aggravated child molestation. (Dixon was acquitted of rape and several other charges.)

Statutory rape is sex between an adult and a minor, while aggravated child molestation also involves an injury. At the time of his offense, Dixon was an 18-year-old high school football player who had sex with a 15-year-old female classmate. The aggravated child molestation statute mandates a ten-year minimum sentence, and Dixon challenges the harshness of the resulting penalty.

The case has attracted claims of racism, because the victim was a white girl and the convict an outstanding African-American student with a football scholarship to Vanderbilt.

One provocative underlying (though unstated) question that has contributed to the notoriety of this case is whether the law can legitimately send teenagers to prison for having sex with other teenagers, in the absence of force. Because every state has a statutory rape law in some form, this case presents a challenge to a long and continuing tradition of criminal laws that confine men for what could be consensual sex with minors who are close to the age of majority.

Such liability is controversial in a number of ways, but it also has some benefits that are often overlooked by critics, thus leaving us with a difficult dilemma that admits of no easy answers.

Statutory rape laws have a checkered past. A primary purpose was to guard the virginity of young maidens against seduction by unscrupulous cads. To give up one's "virtue" to a man who was unwilling to pay with his hand in marriage was foolish and presumptively a product of youthful, poor judgment.

Such laws had more to do with preserving female virginity than with the force and violence that define rape. One sign of this is the fact that

a man could (and in some states still can) defend himself against statutory rape charges by proving that his victim was already sexually experienced prior to their encounter (and thus not subject to being corrupted by the defendant).

Justifications for Statutory Rape Laws

Despite their unsavory beginnings, however, some feminists have favored these laws as well. Progressive women supported such statutes mainly as measures to help combat the sexual abuse of young girls.

Though a statutory rape charge would not require proof of force or coercion, feminists observed, young girls were (and may continue to be) especially vulnerable to being raped by the adults in their lives. In one study, for example, seventy-four percent of women who had intercourse before age fourteen and sixty percent of those who had sex before age fifteen report having had a forced sexual experience.

In addition, prosecutors attempting to prove rape in court have historically faced significant burdens, such as corroboration requirements premised on the complaining witness's presumptive lack of credibility.

For many years, legal thinkers like Eighteenth Century British Jurist Sir Matthew Hale were convinced that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." Thus, rape law did not provide a reliable or efficacious vehicle for addressing most sexual violence, and it continues to be of limited utility for acquaintance rapes. . . .

For this reason too, feminists may have viewed statutory rape laws as a godsend. As long as there was sexual intercourse and an under-age victim, the jury could convict. And more importantly, that possibility itself might deter real sexual abuse.

Is Statutory Rape Just Rape Without Proof of One Element?

Viewing statutory rape laws as salutary in this way does raise a serious problem, however. In *In Re Winship*, the U.S. Supreme Court required that prosecutors prove every element of a crime beyond a reasonable doubt before a conviction can be constitutionally valid. Removing the "force" element of rape and leaving only intercourse and age might seem to amount, from some perspectives, to a presumption that the force element of rape is established, without the prosecutor's having to prove it and without the defense even having the option of affirmatively disproving it.

Such a presumption allows for the possibility that a fully consensual sexual encounter will be prosecuted and punished as rape. Some might understandably believe that this unfairly subjects essentially innocent men to unduly harsh treatment, simply in the name of deterring other, unrelated men from engaging in very different and far more culpable sorts of conduct.

Responses to Concerns About Prosecuting Consensual Sex

There are two potential responses to this concern. First, at some level, we might have doubts about the competence of a minor to "consent," in a meaningful way, to sexual activity. Because of her youth, the minor might not fully appreciate the full physical and emotional implications of her decision (including the possibility of offspring for which she will likely have little means of support).

Of course, many adults might also fall into this category, and the decision to treat intercourse as distinctive in this way may simply represent a revival of the old view that maidens should be protected from the corruption of their virtue. Why, otherwise, should girls who are sexually attracted to men be considered the men's victims rather than participants in arguably unwise and socially costly but mutually gratifying activity?

Another response to the concern about innocent men is more in keeping with feminist concerns. It is that when sexual activity with a minor is truly consensual, the activity is unlikely, at least in modern times, to be prosecuted. In other words, to the extent that statutory rape is truly a consensual and therefore victimless crime in a particular case, it is highly unlikely to generate a criminal action.

In the Dixon case, for example, the 15-year-old victim claimed that the defendant "tracked her down in a classroom trailer that she was cleaning as part of her duties in an after-school job, asked if she was a virgin, grabbed her arms, unbuttoned her pants and raped her on a table." This description renders the statutory rape and aggravated child molestation prosecution something other than the state targeting consensual activity for unduly harsh punishment.

Though Dixon was acquitted on the rape charge, that fact does not rule out the possibility of sexual assault. It means only that the jury was not convinced beyond a reasonable doubt that Dixon forced the 15-year-old girl to have sex against her will.

The normative question, then, becomes this: Is the likelihood that consensual sex will be punished by imprisonment sufficient to override the benefits of statutory rape legislation in facilitating the fight against actual sexual abuse of young adults?

Is Convicting in the Absence of Force Unacceptable?

One reaction to this question is that even the theoretical possibility of convicting in a case of consensual sex is unacceptable and unconstitutional. Prosecutors and juries, on this reasoning, should not have the option of finding a person guilty in the absence of force, regardless of how unlikely they are to exercise that option. Consensual sex is not criminal, period.

The assumptions underlying this reaction, however, though understandable, are at odds with other areas of the criminal law. Consider drug laws.

Possession of a large quantity of narcotics is regularly treated as a far more serious offense than possession of a smaller quantity. One reason is that the first is viewed as possession with the intent to distribute (that is, drug dealing), while the second is thought to be consistent with personal use. Since legislators and others view dealing as much more harmful than mere possession, the penalties are accordingly more severe.

Yet possession of a large quantity of drugs, though highly suggestive, is not necessarily accompanied by an intent to distribute. A person might, for example, possess large amounts of drugs to avoid having to risk apprehension or sources drying out, through repeated purchases.

Suppose the drug statute did require proof of intent to distribute. If so, then the judge would, on request, have to instruct the jury that the bare fact of quantity alone is enough for a conviction only if the jury draws the inference, beyond a reasonable doubt, that the defendant intended distribution. Without such a finding of intent, the jury would have to acquit.

With the statute providing instead that quantity is the sole element, however, intent becomes legally irrelevant. As a result, even the prosecutor and jury who know that the defendant is simply saving up for an anticipated heroin shortage rather than planning to deal drugs, can convict the defendant of the more serious felony without giving rise to any grounds for appeal.

By crafting a statute without an "intent to distribute" element, in other words, legislators target distribution without requiring its proof (or even allowing for its disproof). One might characterize this as an end-run around the constitutional requisite of proving every element of guilt beyond a reasonable doubt.

The same "end run" accusation can be leveled against statutory rape laws. Young girls may represent a substantial portion of rape victims, perhaps because they are vulnerable and have not yet become sufficiently suspicious of the people around them. In most cases, moreover, a truly consensual encounter with a minor will probably not be brought to a prosecutor's attention or trigger the prosecutorial will to punish.

As with drug possession laws, then, the omission of a requirement that would pose proof problems might generally serve the interests of justice, despite appearances to the contrary.

Consensual Sex With Minors Is Not a Fundamental Right

What permits legislatures the discretion to enact such laws, ultimately, is the fact that (like drug possession), consensual sex with minors is not a constitutionally protected activity. Even if it is victimless, sex with a minor may be criminalized and punished severely without resort to a force requirement. Indeed, it once was punished routinely in this way, because of misogynist concerns about preserving female purity.

In modern times, though, when consensual sex among teenagers is generally understood to be both common and profoundly different from the

crime of rape, there might still be a role for statutory rape laws in protecting young girls from actual rapists, through deterrence and through the real possibility of retribution.

Racism Raised in the Dixon Case

A remaining concern is the worry about racism specifically, and discrimination more generally, that arises whenever officials are vested with a large amount of discretion. In Dixon's case, one witness testified that the victim said that the sexual intercourse in question was consensual but that she claimed it was rape to avoid the wrath of her violent, racist father. This testimony may have given rise to reasonable doubt in the jury on the rape charges.

In easing the burden of proof at trial by eliminating the requirement of proving force, then, the law does permit unscrupulous prosecutors and complainants to bring charges on the basis of what is truly victimless behavior.

One does wonder, though, why a girl would tell a violent and racist father about a sexual encounter with a black man in the first place, rather than simply keeping the information from him, if the encounter were actually consensual.

Are Statutory Rape Laws Worth Their Cost?

In short, the crime of statutory rape may have originated from repressive and misogynist conceptions of sexuality. Nonetheless, it has (and may always have had) redeeming characteristics, even from an enlightened perspective that takes into account the realities of prosecuting rape and of women's equality. It makes it easier, for example, to prosecute and thus to deter real rapists who count on jury skepticism about acquaintance rape allegations.

Still, reducing burdens of proof relies a great deal on trust—in victims and in prosecutors—that the omitted element will truly be present when cases come to trial. If and when that trust is misplaced, . . . a grave injustice can result.

Marc Tunzi

NO

Curbside Consultation: Isn't This Statutory Rape?

Case Scenario

Several pregnant teenagers in my practice are underage and have boyfriends older than 18. Isn't this statutory rape? Some of these patients are immigrants who prefer to keep a low profile, not calling the attention of local authorities to themselves or their boyfriends. In most cases, the sex is consensual, and the teens involved don't particularly care about legal fine points. However, I do, because I have often seen older boyfriends disappear, becoming "deadbeat dads." If I reported these young men, maybe they would be forced to fulfill their obligations. On the other hand, reporting them might disrupt a potentially viable relationship. What is my obligation?

Commentary

"Isn't this statutory rape?" our colleague asks. The answer is . . . "maybe." Statutory rape laws were first enacted to protect minors from older predators. States differ considerably in the legal definition of statutory rape.[1] For example, in California, where my practice is located, the age of consent for lawful sexual relationships is 18. If the age difference between the adult and the minor victim is more than three years, the charge is a felony; if three years or less, it is a misdemeanor. In Hawaii, the age of consent is 14. In other states, the age of consent ranges from 15 to 18 years, and many states have associated provisions that specify the level of offense depending on age differences and other factors.

Consideration of the legal fine points of statutory rape requires knowledge of specific state laws. Most states require that health care providers report injuries related to criminal violence regardless of the age of the victim, and four states (California, Colorado, Kentucky, and Rhode Island) require health professionals to report domestic violence.[2] While reporting violent injuries is a well-accepted practice, there continues to be controversy about domestic violence laws (for example, what if the victim doesn't want the abuse reported?). Most experts, however, believe that unreported domestic violence simply breeds more violence and that it should be reported in most cases.

Whether statutory rape is considered violence may depend on the consent of the minor involved. From a strictly legal standpoint, minors are unable to give consent, which is exactly the reason statutory rape laws exist. However, in the majority of statutory rape cases, minors have given consent (legally or not) to having sex, limiting any potential criminal charge to that of domestic violence rather than the more serious charge of child abuse.

In fact, whether health care professionals are required to report consensual statutory rape to authorities really depends on whether the specific state considers it a type of child sexual abuse, which is reportable in all states. Unfortunately, laws on mandatory statutory rape reporting are confusing and often do not appear to be enforced even where they exist.[3–5] California child abuse law requires health practitioners and other child-related professionals to report statutory rape only when the adult is 21 years or older and the minor is younger than 16 years.[6] California law also specifically states that "the pregnancy of a minor does not, in and of itself, constitute a reasonable suspicion of child abuse."[6]

Many people believe that enforcing statutory rape laws will decrease the teen pregnancy rate and the number of young families needing public support because of "deadbeat dads." In fact, part of the 1996 federal welfare reform law specifically directed state and local governments to develop and enforce strict measures against statutory rape for those very reasons. California's response was a multimillion-dollar vertical prosecution program that allows the same prosecutor and investigator to remain on a case from beginning to end, while other states have developed their own programs.[4]

Even though more statutory rape convictions have resulted from these efforts, there is no real evidence that any of the programs have been the effective deterrents that Congress intended. In fact, there are still a lot of 16- and 17-year-olds on my hospital's labor and delivery unit. What these laws may have influenced is the unwillingness of pregnant teens to seek early prenatal care. While knowledge of statutory rape laws does not appear to prevent adult-minor relationships from occurring, fear of these laws may keep some young women from seeking prenatal care as a means of protecting their boyfriends from incarceration or deportation. Many professionals who work with pregnant adolescents are beginning to collect evidence supporting this concern.[1,4]

Another issue for family physicians is that statutory rape laws seem to conflict with the law as it applies to our practice and our understanding of informed consent for adolescents in other situations. Many teens have the capacity to participate in their own health care decision-making, even regarding serious and terminal illnesses. For example, teens are specifically able to consent for contraception, STD treatment, and pregnancy care in nearly all cases. The only illegality may be actually having sex.

The problem is that not all teens and situations are the same. Some teens are much more mature than others of the same age and are as able to consent to sex as an 18- to 20-year-old. At the same time, I think all of us would question a relationship between even the most mature 15-year-old and a 25- or 30-year-old. My own experience is that many teens of 16 and 17 know the emotions and consequences of having intercourse just as well as many teens of 18 and 19. In some

of my Latina patients, becoming sexually active at a young age seems culturally acceptable and, at times, even encouraged within their culture. I, however, discourage it quite strongly. The question is whether enforcing laws against it is the right approach.

What is the right thing for a family physician to do when caring for a patient who has been involved in statutory rape (as defined by state law)? Not all young men are "deadbeat dads"—many work and are as responsible and dedicated to their partners and children as older men with older partners. Removing a source of financial and emotional support by incarcerating a young man in this situation would probably not help the young woman and her baby; in fact, it might possibly harm them.

If criminal violence has been involved, it must be reported to authorities. If domestic violence has been involved and the victim is a minor, I would report it as a case of child abuse even if the state does not have a mandatory domestic violence reporting law. If it is not violence, given the fact that mandatory statutory rape reporting laws are confusing and not necessarily enforced, I believe that a physician should report only after carefully considering several factors.

How mature is the minor? Is he or she in school and responsible in other matters? Does the minor have the capacity to consent to intercourse? Is she or he using contraception? Does the minor understand the consequences of pregnancy?

Is the couple's relationship truly consensual? What is the couple's age difference? Are they 16 and 36 (an older predator), or are they 16 and 19? Is the adult partner using physical or other power to take advantage of the minor?

If the patient is a pregnant minor, is her adult male partner emotionally and financially responsible and supportive? Is this a potential family in the making, or has the man already abandoned the patient?

Family physicians will probably not report most cases to authorities, believing instead that building patient trust and making appropriate referrals to social services and other allied health professionals are the right things to do for the patient and family involved.

References

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POSTSCRIPT

Are Statutory Rape Laws Effective at Protecting Minors?

The combination of age and sexuality is a sensitive subject in many cultures and societies. In the United States, we have many double standards about the age difference between sexual and romantic partners, and the gender of the people involved in the relationship. An older man with a much younger woman is much more commonplace than an older woman with a much younger man. An adult male pursuing a teenage girl is seen as a predator, while an adult female doing the same is seen as much less threatening. Even in some court cases, judges have dismissed charges in cases where the older partner was female and the younger one male. It is as if the law does not see an adolescent girl as being able to consent, but that a younger male is simply "coming of age" by being sexual with an older partner. In our mainstream society's eyes, an adolescent girl has lost something by being sexual so young; she has shown poor judgment and has been taken advantage of by this terrible older male. An adolescent male in the same situation with an adult woman, however, is often seen as having gained from the relationship—respect and experience. These assumptions are as prejudicial to boys as they are to girls.

What about same-gender relationships? In the well-known play, "The Vagina Monologues," a 15-year-old girl talks about her first sexual experience with an adult woman in town. The description is very loving, empowering, and positive. When I heard it read in the theater, the audience made sounds of appreciation and approval. All I could think was, "But isn't this statutory rape? Would anyone be smiling at this coming-of-age story if the 15-year-old girl had done the exact same things with a 30-year-old man?"

There are far too many unhealthy and abusive relationships in the United States. People bring different things to their relationships, including different levels of power. In some cases, age brings power with it; in others, money and experience; race or ethnicity; physical ability—the examples can continue almost endlessly. The questions that remain are, in what way can people have healthy, respectful, equal relationships given the inherent power differences that are there? To what extent can and should personal relationships be governed by law? As you read in Issue 11, there used to be laws dictating whether people of different races could marry (and, implicitly, be sexual together). In what ways is it different to govern who can be sexual together based on the ages of the people involved?