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Statutory Rape as Viewed by the American and Canadian Legal Systems

When it comes to drafting laws, it is safe to say that no statute or code is perfectly crafted so to deal with every potential complication or ambiguity without error. While a country's legislation is put in place to protect its citizens, there will always be circumstances that surface which challenge the validity of a certain law's holding. The fact of the matter is that life is full of gray areas and often laws do not accommodate for the complex situations that can arise to test the merit of the rules governing people's lives. The legislation on statutory rape is a shining example of a law that is very unforgiving regardless of the circumstances surrounding the crime. I will show how the California's laws, as a part of the American legal system, are too strict when compared to Canada's legislation on the matter.

Comparing the codes of both California and Canada is somewhat difficult on the surface, as Canada doesn't have a law dedicated to statutory rape. However, Canada's legislation does cover the crime, just in a different fashion than California. Under the California penal code statutory rape is defined in quite a lengthy fashion, but the basis of statutory rape is stated in Section 261.5. as follows:

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under 18 years of age.

(b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony...

As compared to California statutes, Canada's legislation regarding statutory rape is covered in the section under sexual offenses, even though there is no specific statutory rape charge. The charge is labeled sexual interference and is stated in Section 151:

Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years

(a) is guilty of an indictable offense and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days; or

(b) is guilty of an offense punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a

minimum punishment of imprisonment for a term of fourteen days.

So while there is no criminal charge specifically labeled as statutory rape, it is clear that the charge of sexual interference in Canadian law encompasses the equitable charge of statutory rape as described in California's penal code.

While both the Californian and Canadian legal systems are derived from English common law, there are some substantial differences on the statutes at hand. The first issue that may strike an observer of the laws is the difference in age of consent for both statutes. In California the age of consent, as noted by statute, is eighteen years of age. So if a boy has sex with his seventeen year old girlfriend on or after his eighteenth birthday, he has committed statutory rape. It is unimportant that the girl may be near the age of consent or the fact that she is less than a year younger than her boyfriend. The minimal difference in age will mitigate the sentencing of the perpetrator, however. Because the difference in age would be less than three years between the two of them he would only be guilty of a misdemeanor. But being that the act committed was a sex crime, if found guilty the boy would have to register as a sex offender for the rest of his life as noted in Section 290 of the California penal code. And this is a fate worse than even murderers have to face. All for just committing a misdemeanor.

When looking at Canada's statute you will find a more flexible and understanding assessment of who should be labeled as a sex offender due to age of consent. With Canada's law stating that the age of consent is fourteen, you avoid the aforementioned problem of an eighteen year old being labeled as a sex offender when there is only a span of one or two years of age between both persons in the relationship. During the ages of late teen-hood sexual acts between partners do occur. While such sexual acts may be frowned upon by certain members of society, or even for sake of argument the majority of society, is it really necessary to impose such harsh penalties? One should find it hard to reason that a person who acted upon hormones and consent, most importantly, should be labeled as a sex offender when only a small difference in age exists. This is especially true as two, three, or even four year differences in age are acceptable in relationships where both persons are legal adults, however, if one person in the relationship is a minor it is illegal. The standing of the rule is shaky at best when a twenty-one year old is guilty of rape when his/her partner is seventeen and eleven months old, but isn't guilty one month later when the partner turns eighteen. This is especially true when there is no objective level of maturity or intellectual sense that is acquired upon arrival of one's eighteenth birthday.

Canada's legal age of consent is not without fault or scrutiny, however. The question arises of whether or not fourteen years of age is too young to consent to sexual acts. As stated in an article in *Family Planning Perspectives*, "Those who become sexually active at an early age are likely to have experienced coercive sex: Seventy-four percent of women who had intercourse before age 14 and 60% of those who had sex before age 15 report having had a forced sexual experience". It has also become aware to the public that the sexual partners of these minor adolescent females are often three or more years older than them (Donovan, par 3). This is a concern about age of consent as is not good for the

general welfare if teens are going to be more easily taken advantage of by older males.

So a problem then surfaces as to whether an adolescent is impressionable and truly has the capacity to consent the majority of the time. Well as the numbers were shown there is still a percentage of adolescent women who do consent and that the figure increases as their age does as well. So to punish those males who do have full consent seems a little harsh if little age difference exists. And in the case of those who were coerced, it would be hard to argue that genuine consent actually did exist, even if there was no overt act of resisting, due to duress or undue influence. It is also important to note that Canada has potentially addressed the problem of coercion. As stated by the Library of Parliament, "The *Criminal Code* does not now criminalize consensual sexual activity with or between persons 14 or over, unless it takes place in a relationship of trust or dependency, in which case sexual activity with persons over 14 but under 18 can constitute an offense, notwithstanding their consent" (par 11). Then it would ultimately be up to the court to decide the facts, not just slap an overly harsh penalty on a the accused who was potentially acting in good faith.

Delving deeper into the issue of consent, neither the Canadian or Californian statute pertaining to statutory rape constitute consent to sexual acts as a defense for breach of the law. However, unlike the California penal code, Canadian statute allows exception to the rule. Under section 151.1 (2):

... it is not a defense that the complainant consented to the activity that forms the subject-matter of the charge unless the accused

(a) is twelve years of age or more but under the age of sixteen;

(b) is less than two years older than the complainant;

and

(c) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

These provisions put in place allow for situations that could surface that may not warrant punishment necessarily. There seems to be a safeguard missing in the American legal system, especially California's penal code, that allows perpetrators who are actually acting in good-faith to absolve their permanent status as a sex offender.

There is some question as to whether a twelve year old should be able to consent to sexual acts due to maturity level, and if fifteen year old should be punished for having sex with someone that young given the differences in maturity. But if you were to look past Canada's age of consent and apply their "formula" of defenses for consent, you may find a happy medium.

The age of consent in California is eighteen so say you took Canada's consent exception rule and modified it so that it stated consent was an exception to the rule if the accused was sixteen years of age or more but under the age of twenty; is less than two years older than the complainant; and is not in a position of trust or authority towards the complainant. This would certainly allow for some discretion on the behalf of the court in order to administer fair punishment. But even in the event that such an exception would provide a fairer administration of

the law, it doesn't justify excuse to the law in place. Norfolk County District Attorney William R. Keating sated that when he talks talks with students they often say how the consent rule is unfair. His response is, "I tell them to change it then. It is our job to act under the law" (Vennoch A.11)

The last issue that should be noted is that the California penal code makes no exception for a mistake of age where as Canada's statute does in section 150.1 (4) as follows: "It is not a defense to charge under section 151... that the accused believed that the complainant was fourteen years of age or more at the time the offense is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant". In Canada so long as the accused asks the complainant's age and is lied to, sees a fake I.D., meets her in a place where only adults are admitted, etc., they excused for having taken reasonable steps to discover the age of the complainant. In California the accused is left to the peril of the complainant's honesty, which makes one wonder if the laws should really be applied. If California did apply the exception to mistake of age it could possibly just create a loophole for criminals to avoid punishment. Mistake of age testimony could ultimately result in a he-said-she-said battle in court with little to no objective resolution.

In the end these laws are just trying to protect the general well-being of their respective countries. California, with its black-and-white policy, does a great job of closing off any loopholes or excuses for criminals who violate it's statutory rape laws. Canada, on the other hand, is much more lax with it's definition of whom is guilty of statutory rape and what it will allow as an exclusionary rule to it's statutes in place. However, some may construe Canada's laws as not being restrictive enough and that they allow adolescents to be taken advantage of. In reality the best solution lies some where in between the two country's laws. But at the moment where both countries currently stand, Canada's laws regarding statutory rape appear to have the advantage. Our lives are filled with colorful and complex social situations and Canada's legislation recognizes this by realizing that hindering itself to seeing in purely black and white simply won't cut it.

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