Chapter 1

Statutory Rape Laws in Historical Context

Introduction

Today's statutory rape laws prohibit sexual intercourse with an unmarried person under the age of consent, which varies depending on the state.[1] That is, if the victim is under that certain age and not married to the perpetrator,[2] he or she is presumed incapable of giving informed and valid consent to sexual activity; therefore, consensuality is not permitted as a defense to the crime. Yet almost all states allow those under their jurisdictional age of consent to marry with judicial and/or parental approval. In other words, sex between a married couple in which at least one party is under the age of consent cannot be prosecuted under the law, even if it is the same sexual activity as that taking place between an unmarried couple in which at least one party is under the age of consent. Several states allow marriage at any age if the female is pregnant or if the two prospective spouses are already parents of an out-of-wedlock child. Of all brides in 1970, 13% were under 18; in 1980, 8.2%; and in 1990, 3.7%. Of all grooms in 1970, 2.1% were under 18; in 1980, 1.3%; and in 1990, 0.6% (Clarke 1995: 14). In 1998, 137,000 15–17-year-olds had ever been married; more than half were already separated or divorced (U.S. Census Bureau 1998).[3]

The laws originally were gender-specific: They punished a male who had sexual intercourse with a female, who was not his wife, under the age of consent; today, they are gender-neutral so as to cover both females and males. When the activity is heterosexual, it is usually the male who is charged; for instance, in

cases in which a female becomes pregnant, she is assumed to be the victim. There is also some evidence that prosecutions under the laws have disproportionately targeted homosexual relationships.[4] In many states, the perpetrator may be the same age as the victim and still be charged with a felony; in most of the states mandating that the perpetrator be a certain number of years older then the victim, a same-age perpetrator can still be charged with a misdemeanor. The perpetrator, regardless of age, will most likely have to register as a sex offender. Some jurisdictions still allow perpetrators the "mistake-of-age" defense, and to escape prosecution by claiming that they had thought the victim to be older than the age of consent.

Considering the marital exemption, the use of the laws against homosexual activity even as most states had decriminalized sodomy of their own accord before the Supreme Court ruling in *Lawrence v. Texas* (539 US ___, 2003), the prosecutions of same-age perpetrators (usually males), and the mistake of age defense, one wonders if "age" is really the operative category in statutory rape laws. Indeed, the categories of victim and perpetrator have proved to be quite fluid as they have been drawn and redrawn throughout the history of the United States. Rather, it appears that such laws are based on proscribing sex outside of marriage, and serve to police and reinforce cultural narratives of gender and sexuality.

This historical contextualization of statutory rape laws and the various amendments made to them is crucial to an understanding of the ways in which such laws have served as a site for the playing out of multiple and historically contingent policy initiatives by particular groups and public officials. Given the more recent public policy attention to the topic, the past three decades will receive greater emphasis and more detailed treatment than previous decades. The three sets of changes to the laws in the 1970s, 1980s, and 1990s are the focus of this research and are detailed in chapters 2, 3, and 4.

English Common Law through the 1800s

Under early English common law, a male could not be convicted of rape if the female had consented to the activity (Fuentes 1994: 139; McCollum 1982: 341; Miller 1994: 289). But as England codified its statutory rape law in the Statute of Westminster of 1275, "The King prohibiteth that none do ravish . . . any Maiden within age."[5] This newly drafted law constructed the crime as sexual intercourse with a female under 12, who was regarded as unable to consent. The offense was made a capital one in 1285,[6] and the age was lowered to 10 in 1576, "if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, every such unlawful and carnal knowledge shall be a felony."[7]

Colonial American statutory rape law basically imported this language. Some states chose 10 as the age of consent, while others chose 12.[8] The idea behind such laws at the time was less about the ability or lack thereof to consent to such activity on the part of the female, and more about protecting white females and their premarital chastity—a commodity—as property (Fuentes 1994: 141; Eidson 1980: 760). The laws thus stated, as they still do today, that no crime has been committed if the female is the wife of the perpetrator. Justice Brennan noted in *Michael M. v. Superior Court of Sonoma County*, the only Supreme Court case having to do with statutory rape law, that "because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the state's protection" (450 US 464 [1981] at 494–495). Females, in other words, were seen as "special property in need of special protection" (McCollum 1982: 355) and thus "statutory rape was a property crime" (Eidson 1980: 767).

This, in practice, only applied to white females. Black females were generally formally enslaved, and for a variety of political, economic, social, and cultural reasons their sexuality was not deemed to be in need of legal protection. This manifested itself in several myths about the "natural" state of black female sexuality as being the opposite of the "natural" state of white female sexuality. While the latter were "chaste [and] pure" and on a "moral pedestal," the black female was promiscuous, impure, and lascivious. "This construct of the licentious temptress served to justify white men's sexual abuse of black women" (Roberts 1997: 11).[9] While black female bodies were commodified, along with their childbearing capacity, their chastity was not.

At first in the United States, the crime was one of strict liability and allowed no defenses if the prosecution could prove that sexual activity occurred with an unmarried underage female. The penalties in all states for statutory rape were harsher than those for fornication—sex between unmarried people regardless of the age of the parties.[10] Two defenses thus entered into statutory rape law: claiming that one was mistaken as to the victim's age, and claiming that the victim was sexually experienced. The former was not often accepted until midway through the twentieth century. The latter, however, was codified in every state much earlier on: If the young female in question were "impure," statutory rape had not been committed and thus both the perpetrator and the victim would probably be charged with fornication. This defense was manifested by language requiring that the victim be an "unmarried female of previously chaste character." To summarize the intent and effect of the law at this time, "Thus by extending legal protection only to virgins, early statutory rape law served as a tool through which to preserve the common morality rather than to penalize men for violating the law" (Oberman 1994: 26).

Indeed, in both of these defenses, the concern seemed to be less about the age of the victim than about her marital or virginal status. About a dozen states retain the mistake of age defense today. The "previously chaste character"

requirement remained in effect in some states until as recently as the 1990s. As of Mississippi's code revision in 1998, no state now retains this language.[11]

The First Wave: Reforming the Laws at the Turn of the Twentieth Century

In the 1890s, statutory rape laws were changed in virtually every state. A coalition of feminists, religious conservatives, and white working-class men's organizations lobbied together to raise the age of consent. Workingmen joined in this cause generally because the crime was constructed as one of middle-class men preying on working-class women; indeed, the federal Mann Act of 1910 was also known as the White Slave Traffic Act and was based on hysteria about middle-class businessmen kidnapping working-class girls from the street and forcing them into a life of prostitution (Langum 1994). One could also argue that workingmen were also concerned about the public morality of working-women, and joined the age of consent movement out of social conservatism along with protectionist instincts. That this coalition was uneasy in nature is vital to understanding the ways in which the laws were constructed prior to, and implemented after, their amendment.

Background to Raising the Age of Consent

The end of the nineteenth century saw numerous crucial social, economic, and political dislocations; for instance, increasing immigration; imperialistic notions of expansion and of civilizing those deemed more primitive, along with fears of "race suicide" due to the numbers of white, middle-class women having abortions; women securing dominance over the "private" sphere and using that leverage to gain some power in the "public"; and perhaps most important, urbanization and industrialization. These last transformations drew young women to work in the cities, gave them a small measure of economic power, and fostered unchaperoned heterosocial activities.

Of great concern to middle-class women were working-class mores, and the public and therefore quite visible nature of the latter's leisure time activities in the cities.[12] These strange new activities and their customs, undertaken by "the other," in the seemingly foreign city, were symbols of disorder and moral decay. The reformers sought to portray a hearth-oriented married life as the ultimate goal to which a decent and moral woman would aspire. This, they thought, would help save working-class girls from their own apparently degraded or perverse moralities. Unmarried female sexuality was viewed as being akin to prostitution, as young urban women who dated were often "treated" to

dinner, dancing, or a movie and then had sex with their dates (Peiss 1986; Larson 1997). Reformers felt that this was one step removed from a female being overtly given money for sex. They therefore fashioned the "language of virtue and vice into a code of class" (Stansell 1987: 66).[13] They focused more on the moral than on the economic component—the concern was with young women having sex in exchange for commodities they could not purchase, rather than with the fact that young women earned such unequal and meager wages that they could not purchase goods or entertainment for themselves. They also were unable or unwilling to accept that some of these young women may have chosen to engage in sexual activities and perhaps experienced pleasure through them. Thus, they sought to "uplift" the working girls' morals so that they might aspire to take on middle-class values.

At the same time, as "Victorians," these social purity reformers were concerned with the potential for young, vulnerable, and supposedly passionless and passive females to be abused by predatory males, both within and outside of one's family. Like casual dating, this could lead to one's becoming a "fallen woman" looked down on by society, unable to marry, perhaps having to become an actual prostitute.[14] Thus, the reformers' second major concern was with the sexual double standard that demanded female chastity before marriage yet allowed men access to those above age 10 or 12 without much fear of repercussion. As such, they fashioned a particular narrative in which "men of status and wealth took advantage of poor, innocent young women, using various forms of trickery and deception, and force if necessary" (Odem 1995: 16). They wanted society at large to acknowledge sexual coercion and sexual danger, at least that facing white women.

It was this image of the passive white victim that drew the support of more conservative religious elements; indeed, these forces became dominant. But they did not share the feminists' interest in a single moral standard to uplift women. They were more concerned with proscribing premarital sexuality, and particularly female sexuality (Walkowitz 1980; Odem 1995; Olsen 1984; Kunzel 1993).

Black women's groups did support the idea of a single moral standard. But they worried that more stringent age of consent laws within a racist society would be used to target black males, who were stereotyped as uncontrollable rapists of white women and therefore as deserving of being lynched in order to protect the white race.[15]

Second, black women were concerned that the white middle-class feminists did not take into account the kind of sexual danger faced by black women. Namely, that if raped by a white man, black women could scarcely make a legal claim: The laws described black women as property and as not deserving of the same legal rights as whites. The laws of the southern states generally did not allow blacks to testify against whites; some rape laws specifically excluded black women (Roberts 1997). At the same time, cultural

narratives constructed black females as promiscuous and as devious and thus undeserving of protection.

Third, violence within black communities, if reported at all, was generally ignored by the mostly white legal establishment. If the parties were slaves, their activity was deemed outside the criminal code and under the jurisdiction of the master. Later, some black women became reluctant to subject black men to the discrimination of the legal system and often did not report if black men had harmed them.[16]

In short, black women's groups did not support the white reformers' campaign. They conducted their own program of moral uplift in their communities which included the idea of racial uplift as well (Odem 1995: 26–30). White women reformers went forward without them in the campaign to change statutory rape laws.

Implementing the Changes

In 1885 in England, conservative purity reformers and feminists together successfully lobbied Parliament to raise the age of consent to 16. This prompted American reformers to act. That same year the New York Committee for the Prevention of State Regulation of Vice, a group dedicated to a single moral standard for men and women as well as to abolishing prostitution, began its lobbying (Odem 1995: 13; Larson 1997: 27). The national Women's Christian Temperance Union (WCTU) revived its Department for the Suppression of Social Evil and in the 1890s broadened its efforts from temperance in alcohol consumption to combating "depraved appetite in every form" (Larson 1997: 22, 24).[17] Using a narrative of sexual danger to female virtue, feminist movements and suffragists, religious leaders, and white workingmen's organizations led by the WCTU agitated at the state level to have "the age at which a girl can legally consent to her own ruin be raised to at least eighteen years" (Odem 1995: 15, 16; Larson 1997: 38, 46). All states did raise the age, to 16 or 18; at one point, Tennessee raised it to 21. The changes occurred most quickly in those states in which women could vote at the state level (Larson 1997: 44).

The male legislators did not give in without a fight. "In incidents in several states, legislators proposed dilatory amendments to mock the proposed reform, such as proposing that the age of consent be raised to eighty-one years, that all girls be required to wear a chastity belt, or to mandate that all women must consent to sex after the age of eighteen years" (Larson 1997: 41–42).[18] In short, they did not take the protectionist ideals very seriously. As early as the 1890s, many states considered measures to roll back the age of consent to their pre-reform levels although in most cases the women's groups were able to halt those efforts (Larson 1997: 57–58; Pivar 1973: 144–145).

The men had two basic concerns: that young men in particular would be denied sexual access to young women in an era in which marriage in one's teens was extremely common, and that men of any age who were expressing their "natural" sexual desires would be punished for engaging in activity with willing and sexually mature young women. Legislators in a few states graded the penalties so that underage males would have more lenient sentences; for instance, bills regarding the District of Columbia mandated a 5-year maximum for a male under 18 and a 15-year maximum for a male 18 and older, with no minimum sentences (Larson 1997: 56).

This was the point at which the requirement that female victims be "of previously chaste character" began to be codified. A Kansas legislator protested that because the age had been raised to 18, "'several young men from highly respectable families' had been sent to the penitentiaries by 'immoral young women'" (Odem 1995: 33). A representative from Kentucky noted, "We see at once what a terrible weapon for evil the elevating of the age of consent would be when placed in the hands of a lecherous, sensual, negro woman, who for the sake of blackmail or revenge would not hesitate to bring criminal action even though she had been a prostitute since her eleventh year!" (Odem 1995: 33). This was exactly the kind of characterization of a young black female that the black women's clubs feared—highly sexualized, promiscuous, dishonest, and undeserving of the law's protection regardless of her age.

In effect, the raising of the age of consent and the codification of the "chaste character" defense made what was a crime about taking the virginity of a female of 10 or 12 into a crime about taking the virginity of a female of 16 or 18. The amended laws became almost identical to the traditional crime of "seduction," which punished sexual activity with a woman of previously chaste character, generally under promise of marriage (Bienen 1980a: 191). Seduction laws presumed nonforcible sexual activity involving an unmarried female, who was generally a teenager, although they did not assume she was incapable of consent. Rather, they assumed she had been tricked, or defrauded by promise of marriage, into having sex. The new statutory rape laws covered the same "crime," but also codified a young female's incapacity vis-à-vis decisions concerning sexuality. Yet marriage laws presumed that "underage" females could decide to marry—and sex within marriage was and continues to be an ironclad defense to a statutory rape charge.

Thus began an interesting anomaly in which one could be of age to choose to marry and thus have sexual intercourse legally, but not of age to consent to unmarried sex. Indeed, today, tens of thousands of underage teens marry each year because although in most states one must be 18 to marry on one's own, one can do so at a younger age with parental or judicial permission; and in some states the couple does not need such permission if the female is pregnant or has already given birth. But in the Victorian period in particular,

many young women were married and had children before they reached the age of consent.

Activity centered around statutory rape laws began to take a more conservative and punitive turn in the Progressive Era, when reformer women joined forces with the male establishment to create juvenile courts and reformatories to better serve the needs of youth. But the feminists did not have quite as much control over the implementation of the laws as did their former allies. This had three major implications for statutory rape prosecutions: (1) Middle-class women reformers had begun to discover that many working-class females were willing participants in sexual activity and sought to repress and "rehabilitate" those instincts through reformatories and maternity homes; (2) families began to use the laws to try to control their "incorrigible" and "delinquent" daughters, and young females were unable to stop the prosecutions; and (3) male police, prosecutors, and judges were more prone to subscribe to the notion of female as temptress rather than victim and would often sentence the male defendant to probation while sentencing the female on delinquency charges and sending them to the above-mentioned reformatories. These young women were far more often than not poor and of immigrant descent or status.[19] At this point, classed notions about female sexuality appeared to triumph over the desire to protect young women from harm. As a result, "[s]ometimes the supposed beneficiaries of such efforts often [found] their lives overly regulated and controlled by legal definitions that fail[ed] to reflect their circumstances" (Fineman 1995: 193).

The workings of statutory rape law at the turn of the century are vital to understanding the ways in which the laws operate today. First, codes of class, and of race and ethnicity, continue to operate as a strong undercurrent to contemporary statutory rape laws. Second, even though many states have gender-neutral laws, the idea of male as aggressor and female as victim pervades the discourse as well as the prosecutions. Third, the laws as implemented at the turn of the nineteenth and the turn of the twentieth centuries are a double-edged sword—they both protect and punish adolescent sexual activity. Lastly, a feminist–liberal–conservative coalition is still in evidence on this issue, and has had repercussions for the ways in which the laws have been debated, amended, and implemented.[20] These points, and present-day conflicts over statutory rape laws, will be discussed further in chapters 2, 3, and 4 and are outlined below.

The Second Wave: Feminist Reforms of the 1970s and 1980s

Second-wave feminists sought and secured two sets of changes to statutory rape laws beginning in the 1970s.[21] In most states, one of the participants in the sexual activity now must be a certain number of years older than the other for

that person to be prosecuted at the felony level. Second, in all states the laws are now gender neutral—that is, both males and females can be victims of the crime, and both males and females can be charged as perpetrators of the crime.

Background to Age-Span Provisions and Gender-Neutral Language

Statutory rape reform was part of a larger program of forcible rape reform begun in Michigan in 1973. The goals for forcible rape reform included:

1. redefining "rape" as "sexual assault" or "sexual battery" to emphasize the violent nature of the crime and to take away the emphasis on "consent";
2. grading the offenses based on the seriousness or severity of the conduct;
3. broadening the offenses beyond penile–vaginal penetration to include other penetration, touching, and oral/genital activity;
4. lowering and grading the penalties for fear that the traditionally high penalties for rape of 25 years to life in prison to the death penalty deterred juries from convicting;
5. eliminating the "marital exemption" in forcible rape law that excluded husbands from prosecution;
6. eliminating corroboration requirements and proof of resistance requirements;
7. implementing rape shield laws so that the victim's sexual past could not be brought into evidence;
8. implementing gender-neutral language.

The feminists hoped that reform would symbolize a rejection of the partriarchal and stereotypical view of what sex crimes consisted of, increase the number of reports by women through the removal of antiquated notions of consent and resistance, and increase the number of arrests and, hopefully, prosecutions and convictions. To accomplish this, the reformers had to ally with law-and-order forces, such as police and prosecutors, who wanted rape reform that would encourage women to report the crime and cooperate with authorities so that convictions were easier to obtain.[22]

At the same time, the reformers decided to redraft statutory rape laws, seeing them less as protective and more as punitive, less as empowering and more as infantilizing. They felt that the nineteenth-century feminists had served in some measure to reinscribe patriarchal notions of female sexuality and mental (in)capacity into law and to reinforce stereotypes of gender by prohibiting sex with an underage female only. They were also concerned with the discourses used by the first-wave feminists who advocated for passivity and chastity, and implied that sexuality be confined to heterosexual marriage.

But second-wave feminists also felt that the shortcomings of forcible rape law proved the necessity of statutory rape law to "catch" coerced or manipulated sex with the underage that fell short of the legal definitions and cultural conceptions of rape. For instance, while today "date rape" has been defined as a crime and has been prosecuted with varying degrees of success, in the 1970s juries were even more likely to feel that the crime of rape required an armed male stranger as the perpetrator. Further, most states required that a victim resist the force of her attacker to her utmost ability and to prove that that resistance had occurred. In a statutory rape case, the prosecution has to prove only that the victim was underage and that the two people were not married when the sexual act occurred.[23] Statutory rape is simply easier to prosecute than is forcible rape.

Liberal feminists thus sought to restore some agency and formal equality to young women while also retaining the ability to safeguard them from sexual coercion. Specifically, they lobbied for gender-neutral language, which would include young males as part of the protected class and enable females to be charged as perpetrators, and age-span provisions, which mandate that the perpetrator be a certain number of years older than the victim. These two reforms are the subject of chapters 2 and 3. Along with gender-neutral language and age spans, their other goals for statutory rape laws (similar but not identical to their goals for forcible rape reform) included:

1. redefining the crime as "sexual assault" or "sexual battery" to emphasize coercion;
2. grading the offenses based on the age of the victim;
3. broadening the offenses to include touching and oral/genital activity; this was particularly important for cases having to do with very young children;
4. lowering and grading the penalties;
5. eliminating corroboration requirements;
6. eliminating the "promiscuity" clause that dismissed cases if the young female was not a virgin;
7. eliminating the mistake-of-age defense in which the perpetrator could claim he thought the victim was above the age of consent.[24]

The liberal feminists felt that the gender-specific laws inscribed the stereotypes of male-as-aggressor and female-as-victim in the realm of sexuality, and phrased their argument in terms of an inequality of the rights granted to males and females: "If sex is viewed as a privilege, for a state to say that a girl of a certain age is neither legally nor factually capable of consenting to that act while boys are able to consent to sex at any age with any women, that girl has been deprived of a right that her male counterpart has been allowed to engage

in" (Fuentes 1994: 151). Second, they argued, the gender-specific language neglected young males as victims.

The age-span, or age-differential, provisions required that one partner be a certain number of years older than the other for the crime of statutory rape to occur. Such a provision was intended by the liberal feminists to allow conduct that was more likely to be consensual, between teenagers of similar ages, to go unprosecuted.[25] Age acts as a proxy for a power differential that is suspect of coercion. The idea here is that being the less powerful party in heterosexual relationships because of one's youth, added to the well-catalogued vulnerability of the teen years in which one's (and particularly, young women's) self-esteem tends to decline, could be easily taken advantage of by someone who was older and thus more experienced in manipulating sexual situations.

But this is not to say that all feminists were united in their support of statutory rape laws. Their views on the issue were somewhat reflective of the virtually simultaneous debates over sexuality, sexual consent, and pornography. Radical feminists in particular critiqued the legal construct that sex fell into two categories: consensual sex or rape. They argued that for socially constructed reasons, men and women were simply not similarly situated in modern society and that females were always already inside a power relationship with males in which they were the less powerful party; some extended that argument to suggest that the idea of a woman being able to give true consent was untenable (see, e.g., Chamallas 1988). As such, pornography reflected the degraded status of women and should be regulated as a means of pursuing equal protection for women. In this environment, radical feminists were concerned that gender-neutral statutory rape laws could not acknowledge that adolescent males and females in particular were not similarly situated in regard to psychological needs and sexual power. The problem was one of "social inequality, of sex aggravated by age" (MacKinnon 1991: 1281), and that a young female's nonconsent may manifest itself in a way not recognized in forcible rape laws.

In other words, gender-neutral laws would not serve to advance the substantive equality of females in the law and in real life, but instead would grant females only formal equality, which would do them a disservice. "Boys and girls may both be harmed by early sexual activity, but they are harmed differently and we gain nothing by pretending the harm is the same" (Olsen 1984: 426). A number of studies recount that adolescent females have low self-esteem, are uncomfortable with speaking their minds for fear of appearing unfeminine or intellectually threatening to their male counterparts, and are insecure and willing to please (see, e.g., Oberman 1994). Adding to the potential for pregnancy, disease, pain, and shame, a young female might engage in sex before she is ready, and then regret having made that decision—but socialized as she is to believe that sex and love go together, still see such an encounter as consensual because she was not physically forced (but perhaps felt

coerced) to do so. In this line of argument, age-span provisions can be useful to targeting older males who would take advantage of young females, but they also presume that males and females close in age are engaged in consensual activity when they may not be. Therefore, these feminists would worry, statutory rape reform might actually worsen the situation by allowing public officials, and feminists, to claim credit for advancements in the cause of gender equality, thus causing any fervor for change to be undercut with no progress made on the underlying structures of gender inequality that pervade (adolescent) heterosexual relationships.

Feminist sex radicals (sometimes referred to as pro-sex feminists or sexual libertarians) were on the opposite side of the sexuality and pornography debate from the radical feminists. They felt that the latter essentialized all females as victims and all pornography as problematic, rather than acknowledge that many women were actively confronting inequalities and that pornography in and of itself could be received differently by different audiences—perhaps even reconstructed in a feminist fashion (see, e.g., Duggan and Hunter 1995). Worse, they worried, the radical feminist position that women are different (for socially constructed reasons) could play right into the hands of conservative censorial forces, who were all too willing to agree with that notion (for biological reasons); indeed, these two groups joined forces to pass antipornography ordinances in the midwest (Ind. Code §16-1 to 16-28, 1984).

While they acknowledged that statutory rape laws had a protective function, sex radicals were concerned that their patriarchal and proscriptive roots punished potentially consensual unmarried sex, painted young people and particularly young females as a monolithic group unable to make decisions about their own bodies, and sent a message that nonmarital sex and female sexual agency in and of themselves were wrong and harmful (see, e.g., Rubin 1984). Therefore, they saw the laws as violating rights of privacy and personal autonomy in sexual matters.

Sex radicals also argued that the laws' marital exemption which allowed those under the age of consent and married to be free from prosecution showed that the laws had little to do with one's age and everything to do with one's marital status. Along the same lines, the gender-neutral language would enable the prosecution of homosexual couples already suffering from other forms of legalized discrimination based on their sexuality. Indeed, in the battle over pornography, many sex radicals were appalled but not surprised that one of the arguments used to win over male judges was to tell them that in gay porn, males were just as degraded as females (Duggan and Hunter 1995: 10). The intertwining of sex and violence in statutory rape laws might only serve to further marginalize, rather than protect, homosexuals.

The problem, then, was and is the following:

> Every effort to protect young women against private oppression by individual men risks subjecting women to state oppression, and every effort to protect them against state oppression undermines their power to resist individual oppression. Further, any acknowledgment of the actual difference between the present situation of males and females stigmatizes females and perpetuates discrimination. But if we ignore power differences and pretend that women are similarly situated, we perpetuate discrimination by disempowering ourselves from instituting effective change. (Olsen 1984: 411)

Implementing the Changes

With these problems in mind, the reformers moved forward. One participant described the dual-pronged approach to statutory rape reform:

> Rather than focus on a gendered notion of power in sexual relations, they decided to isolate and criminalize sexual conduct which they felt raised a presumption of concern. This conduct was then incorporated into [the revised statute] using gender-neutral language which penalized sexual conduct according to varying degrees of severity, depending on the age range between the victim and the accused. (Oberman 1994: 31)[26]

They also designed the penalty structure to reflect the age of the victim. With both of these provisions in place, reformers sought to better protect young children while exempting similarly aged teenagers from felony-level prosecution:

> These goals are potentially contradictory, as increasing protection for children requires relatively high statutory ages, while permitting consensual sexual contact requires somewhat lower ages. Feminist reformers are divided on how to translate these goals into law, although a common approach is to identify a series of two or more graded offenses that prohibit sexual activity with youths below specific ages (e.g., first degree sexual assault if less than twelve years, but second degree assault if greater than twelve but less than sixteen). (Searles and Berger 1987: 26)

But while one can look at the gradation of offenses through the lens of preventing sexual abuse rather than through the lens of protecting virginity, the new language viewed sexual activity with a person under 10 or 12 and with a person under 16 or 18 as two manifestations of the same crime. The problem in making the offenses parallel in language and in offense lies in their implementation. The teenage boyfriend or girlfriend of a 15-year-old and the adult stranger who molests a 5-year-old both may be required to register as sex offenders under Megan's Law provisions; both may be subject to confinement and/or psychiatric treatment to "cure" such urges as part of their prison term, parole, or probation. Both are perpetrators of statutory rape. By redefining the offenses as sexual assault or sexual battery, the reformers purposely made no room for the notion of consent or for stereotypes of gender to be considered. But in practice, what is clearly child abuse and what may be a consensual sexual relationship can both be prosecuted as sexual abuse under statutes titled "statutory rape," "child molestation," "sexual assault," or "sexual battery."[27]

This problem is similar to that encountered after the raising of the age of consent by nineteenth-century feminists, which made statutory rape more akin to the traditional crime of "seduction," sexual activity with a woman of previously chaste character under promise of marriage (Bienen 1980a: 191). Seduction laws presumed nonforcible sexual activity involving an unmarried female, who was generally a teenager, although they did not assume she was incapable of consent. The revised statutory rape laws combined traditional statutory rape laws (which criminalized sexual activity with a female under 12 or 10) with seduction laws, and thus treated all underage females as equally incapable of consent in matters of nonmarital sexuality.[28] In some sense, then, the modern gradation of offenses solidifies the duality of statutory rape laws—they may prevent abuse, but may also punish consensual nonmarital conduct and label it "abuse."

The drive for gender-neutral language was successful in all states by 2000. The laws now read that "any person" who has sex with "any person" under the age of consent has committed a criminal act. Age-span provisions were adopted by all but seven states by 1999, and the spans themselves vary wildly, as shown in table 1.1.

Those at the forefront of the reform movement, successful in agitating for both age spans and gender-neutral language, hoped that those reforms would speak to the concerns about adolescent sexuality cited above. But as the underlying gendered inequalities could not be changed overnight as could the formal language of the law, and as feminist reformers have had little control over the implementation of the laws (as was true in the nineteenth century), the gains made have been noteworthy but incomplete. These two sets of amendments to statutory rape laws are discussed in detail in chapters 2 and 3.

TABLE 1.1 Ages of Consent 1885–1999, and Age Spans in the Fifty States, 1999

State	1885	1890	1920	1999	Age Span in Years
Alabama	10	10	16	16	2
Alaska	NA	NA	16*	16	3
Arizona	12	14	18	18	2
Arkansas	10	10	16	16	5
California	10	14	18	18	3
Colorado	10	10	18	15	4
Connecticut	10	14	16	16	2
Delaware	7	15	16	16	4
Florida	10	10	18	18	6
Georgia	10	10	14	16	3
Hawaii	10*	NA	NA	14	0
Idaho	10	10	18	18	5
Illinois	10	14	16	17	5
Indiana	12*	NA	16	16	3
Iowa	10	13	16	16	5
Kansas	10	10	18	16	0
Kentucky	12	12	16	16	6
Louisiana	12	12	18	17	2
Maine	10	14	16	16	5
Maryland	10	10	16	16	6
Massachusetts	10	14	16	16	0
Michigan	10	14	16	16	0
Minnesota	10	10	18	16	2
Mississippi	10	10	18	16	3
Missouri	12	14	18	17	5
Montana	10	15	18	16	3
Nebraska	10	15	18	16	4
Nevada	12	14	18	16	6
New Hampshire	10	10	16	16	0
New Jersey	10	16	16	16	4
New Mexico	10	10	16	17	4
New York	10	16	18	17	5
North Carolina	10	10	16	16	4
North Dakota	10	14	18	18	5
Ohio	10	10	16	16	4
Oklahoma	NA	14*	NA	16	3
Oregon	10*	NA	16	16	3
Pennsylvania	10	16	16	16	4

(continued)

TABLE 1.1 Ages of Consent 1885–1999, and Age Spans in the Fifty States, 1999 *(continued)*

State	1885	1890	1920	1999	Age Span in Years
Rhode Island	10	13	16	16	3
South Carolina	10	10	16	15	0
South Dakota	10	14	18	16	3
Tennessee	10	10	18	18	4
Texas	10	10	18	17	3
Utah	10	13	18	16	4
Vermont	10	14	16	16	0
Virginia	12	12	16	15	3
Washington	12	12	18	16	4
West Virginia	12	12	16	16	4
Wisconsin	10	14	16	16	0
Wyoming	10	14	16	16	4

NA = not available.

*Data drawn from Bienen (1980a: 190).

Note: Compare these ages and their variety across the states to those of some European countries: Austria 14, Belgium 16, Denmark 15, Finland 16, France 15, Germany 16, Great Britain 16 (except Northern Ireland 17), Greece 15, Ireland 17, Italy 14, Luxembourg 16, Netherlands 16, Portugal 16, Spain 12, Sweden 15. Data from Levy (1999).

Sources: Adapted by the author from state statutes, current through 1999 sessions. For 1885, 1890, and 1920, data are drawn from Odem (1995: 14–15, 30, 199).

The Third Wave: Conservative Reforms of the 1990s

In the late 1990s, statutory rape laws were amended in ten states in order to target males whose underage female partners become pregnant. This was a move supported at first by some feminists and liberals who felt that young, abused, impoverished women deserved protection and predatory males deserved punishment. But, different from the other two sets of amendments to statutory rape laws in this century, this was a policy initiative most pursued by conservative forces, who as in the nineteenth century were able to exert more control over the policy's implementation.

Background to Targeting Pregnancy

Reacting to longer-term changes in the social structure and mores of the United States that had begun in the 1960s and 1970s, conservative forces in the 1980s

became focused on the rising numbers of nonmarital sexual relationships and out-of-wedlock births and on the concurrently rising percentage of women and children in poverty who required public assistance. The 1980s saw a dual backlash: against moral and sexual permissiveness as well as against the perceived overexpansion of the welfare state that gave incentives to the poor to receive economic assistance but seemed to require little from them in return.[29] Indeed, the two became tied together in a cultural argument: The lax morals and single-parent families of the poor, particularly people of color, were responsible for the rising number of such families requiring welfare and the rising cost of supplying that welfare.

In 1981, the Supreme Court heard its only case dealing with statutory rape laws, *Michael M. v. Superior Court of Sonoma County*,[30] which considered whether gender-specific statutory rape laws violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. The majority opinion held that such laws, in which only males were considered perpetrators, were constitutional because they served to deter the "epidemic" of teenage pregnancy. Young females were, or should be, deterred from sex by the threat of pregnancy, and young males would be deterred from sex by the fear of prosecution. In making this much-criticized argument, the court explicitly linked teen pregnancy, statutory rape, and adolescent sexuality. This judicial support dovetailed with the movement described above vis-à-vis sexuality, pregnancy, and the economy, making the 1980s and 1990s ripe for a new policy initiative aimed at reclaiming "traditional" American economics and morality.

Implementing the Changes

Both the discourse about and the activities around statutory rape vis-à-vis teen pregnancy and teen births intensified beginning in 1995, when the nonpartisan Alan Guttmacher Institute released a study on teen pregnancy.[31] It found that 65% of teen mothers had children by men who were 20 or older; and that often the younger the mother, the larger the age gap between her and the baby's father. While subsequent studies showed that about two-thirds of these teen mothers were 18 or 19 with partners of 20 or 21, and more than one-fourth of the 15–17-year-old mothers had a same-age partner,[32] calls for stemming the tide of teen pregnancy grew louder. Vital to doing so, according to this view, would be to get tough on statutory rape. This would deter the behavior of predators whom one sociologist described as engaging in "hit and run . . . sex without commitment and babies without responsibility" (Goodman 1995).[33] Further, some argued, severe punishment for violating statutory rape laws would result in fewer unmarried teen births and thus reduce the public assistance rolls.

Just one year after the statistics appeared, the newly Republican-controlled Congress was debating welfare reform. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996[34] established Temporary Assistance to Needy Families (TANF), a block grant to the states that replaced Aid to Families with Dependent Children. The first line of the PRWORA is "Marriage is the foundation of a successful society." Shortly thereafter, it says, "The increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women." Here, directly stated, is a cultural concern that had been underlying contestations over the meaning of statutory rape since the eighteenth century when female chastity was a commodity with which to bargain for a spouse, and since the nineteenth century when working girls in the cities seemingly exchanged sex for being treated to dinner, thus potentially harming their marriage prospects. In these two time periods as well as in the 1990s, the focus was on the morals of an individual rather than on social, political, or economic structures. Here, the number of people in poverty is caused solely by unmarried females giving birth.

Focusing on the high economic and social costs of out-of-wedlock childbearing, the welfare reform act has as an integral part a section on teen pregnancy and statutory rape that links the two and challenges states to put that link into action. Each state must submit plans on how it will "prevent and reduce the incidence of out-of-wedlock pregnancies, with special emphasis on teen pregnancies, and establish numerical goals for reducing the illegitimacy ratio of the State . . . [and provide] education and training on the problem of statutory rape so that teenage pregnancy prevention programs may be expanded in scope to include men."[35] Up to five states each year can receive bonuses of up to $100 million if they have the highest rates of decrease in both illegitimate births and abortions. By merging the nineteenth-century image of the seduced and/or abused teen with the twentieth-century impoverished teen mother, the Congress was able to attack nonmarital sex as well as the perceived lax morals and economic handouts of the welfare state.

With TANF resources to back them, and in response to conservative lobbying, some states began to dust off their statutory rape laws to target men for the impregnation of young impoverished women (Navarro 1996). Ten states quickly allotted millions of dollars to targeting the partners of pregnant teens, explicitly intertwining the moral and economic bases of statutory rape laws.[36]

While some feminists and liberals supported the targeting at first as a means by which to collect child support and protect young women from exploitative relationships, they became wary of the fervent support from some from the Religious Right, and backed away from the issue (Maynard 1999). Groups such as the National Organization for Women protested the welfare reform bill; Planned Parenthood and the American Civil Liberties Union, among others, testified repeatedly at the state level against the new construction of the

crime. While little noted in the media,[37] these groups expressed a number of concerns about the potentially adverse effects of the implementation of the laws:

1. A pregnant teen in a consensual relationship could be deterred from seeking prenatal care for fear that her partner might be incarcerated during his child's infancy or have to register as a sex offender if he were convicted at the felony level, even if he intended to support the child and remain in a relationship with the mother.
2. A pregnant teen in a nonconsensual relationship could similarly be deterred because she would fear physical or other retribution from the father.
3. A pregnant teen wishing to receive an abortion might be more prone to seek an illegal one so as to avoid a judicial bypass requirement[38] in which she might have to name the father.
4. The law would tell males that coercive relationships would go unpunished as long as they did not result in pregnancy.

In other words, these groups argued, same-age relationships that do not result in pregnancy might be nonconsensual, and age-differentiated relationships that do result in pregnancy might be consensual and long-term—but the newly revised laws would not catch the first instance and would punish the second.[39]

The link forged between statutory rape, the number of births to teen mothers, and public assistance expenditures served to reinvigorate funding and prosecutorial efforts toward the crime, while also undermining the gender-neutral language of the laws by focusing on young women as victims. But as in the nineteenth century, the implementation of the laws has tended to have mixed results that have pleased few and have not served to deter adolescent sexuality—they remain both protective (if indeed a young female is being abused) and punitive (if the relationship is a consensual one).

Conclusion

Statutory rape laws have undergone numerous constructions and reconstructions over the past one hundred years in particular. This history of revisions to the laws and the discourses surrounding them has served to illustrate their unsettled nature as both safeguarding and punishing adolescent sexuality.

The laws also serve to marginalize adolescent sexuality and pregnancy. As they specifically state that the perpetrator and the female be unmarried to one another, and as homosexual couples have been charged disproportionately, they reveal themselves to be more about marriage and sexuality than about age. Statutory rape laws purport to be about protecting those under a certain age

from sexual intercourse, but marriage laws allow those under the age of consent to marry. This leaves married males and females of the same age as their unmarried counterparts unprotected, simply by virtue of their being married. Married teens in coercive relationships will go unprosecuted, while unmarried teens cannot prevent prosecutions of their sex partners. Indeed, "marriage laws and practices [operate] as linchpins at the intersection of economic and political institutions regulating race and reproduction, and defining the American nation" (Duggan 2000: 187). In the 1800s, statutory rape laws were focused on preserving the chastity of white females for marriage, but black and Native American women were not so safeguarded; in the 1900s, the laws centered on reforming the sexual behavior of immigrant working-class girls in the cities so that they would aspire to middle-class values and family structures; in 2000, the laws targeted a population coded as nonwhite and as immoral: teens who give birth out of wedlock and require public assistance.

Rather than consider structural problems, institutional failures, or ideological contradictions, blame for societal ills is placed on individuals—in this case, teens and their sex partners, especially those of low income. While individual behavior can be contained much more readily than, say, the economic dislocations wrought by urbanization or globalization or the political implications of the civil rights and feminist movements, neither poverty nor the changing nature of the family are likely to be stemmed by regulating the female body. The debate over statutory rape laws has focused on individual private morality, rather than delving into cultural assumptions about gender roles and gender equality, marriage and the family, sexuality and sexual violence, and poverty and capitalism.[40] The next three chapters will detail various facets of statutory rape laws, and their adoption and implementation in the United States.