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MAPPING AMERICAN CRIMINAL LAW Variations Across the 50 States: Ch. 20 Statutory Rape

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Repository Citation

Robinson, Paul H. and Williams, Tyler Scot, "MAPPING AMERICAN CRIMINAL LAW Variations Across the 50 States: Ch. 20 Statutory Rape" (2017). *Faculty Scholarship at Penn Law*. 1714.
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MAPPING AMERICAN CRIMINAL LAW

VARIATIONS ACROSS THE 50 STATES

Ch. 20 Statutory Rape

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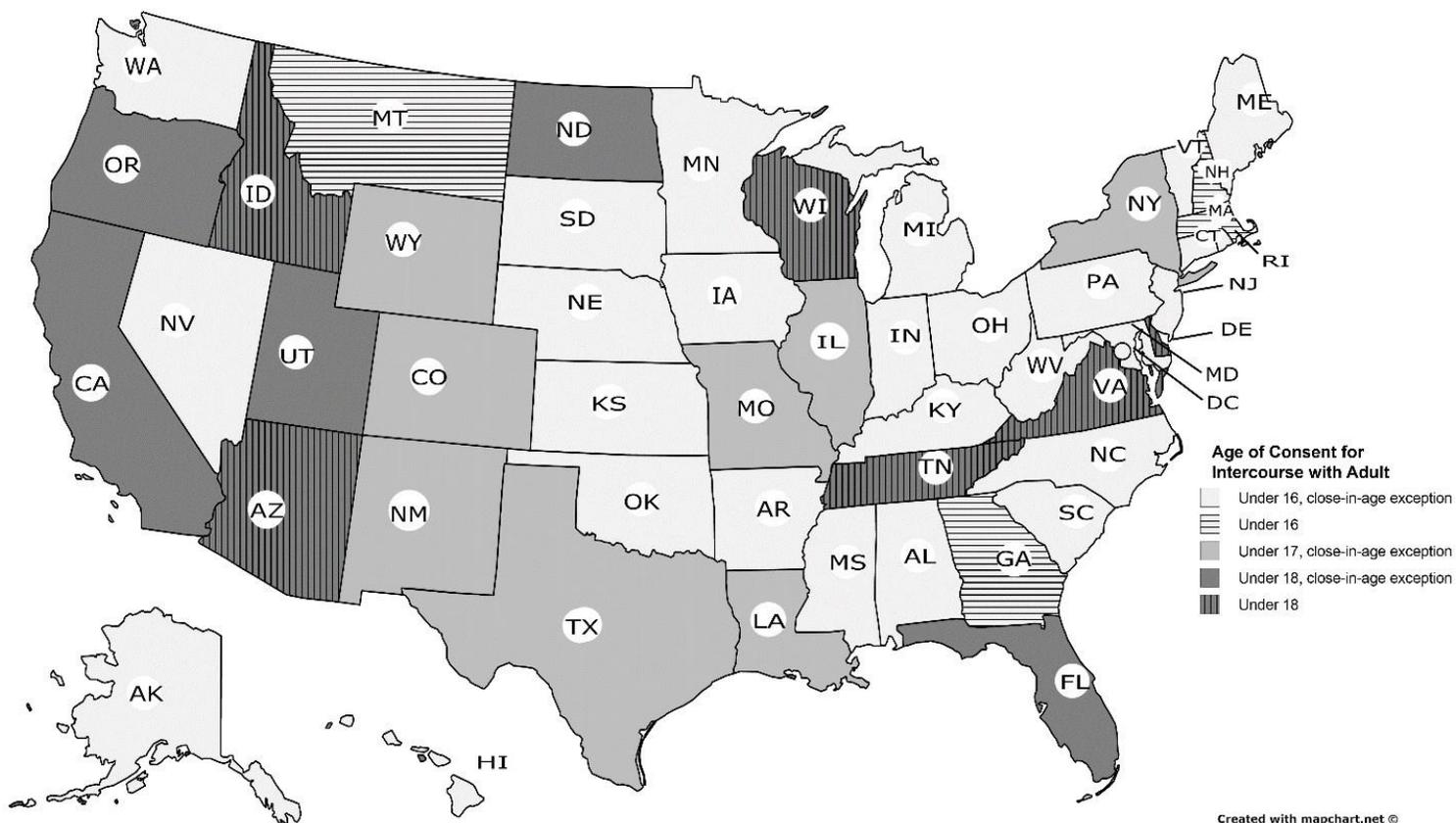
January 2, 2017

20. STATUTORY RAPE

Every state puts some limitation on how young a sexual partner can be, although there is disagreement as to what the “age of consent, as it is called, should be and as to whether special exemptions should be recognized, such as the youthfulness of the defendant. The limitations are based in part upon the norms and customs of the community but also upon a recognition that young persons below a certain age may not

fully appreciate the implications and consequences of their sexual activity. Without this full appreciation for the nature and implications of the act, legislators reason that the young person's consent may not be fully informed and therefore ought to be seen as invalid.

The age below which sexual intercourse with an adult is considered statutory rape varies from 16 years of age to 18 years of age in the United States, as indicated by the map below. Some states define their statutory rape offense to exempt defendants who are close in age to their underage partner, although even these close-in-age statutes set some limit on how young the partner can be. The darker the shading on the map, the more restrictive the rules permitting intercourse with young person.



A. Under 16, Close-in-Age Defense

Twenty-eight states set sixteen years old as the cutoff but exempt from the offense persons who are just a few years older than the victim: Alabama, Alaska, Arkansas, Connecticut, District of Columbia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South

Dakota, Vermont, Washington, and West Virginia.¹ For example Alabama provides:

§ 13A-6-62. Rape in the second degree.

(a) A person commits the crime of rape in the second degree if:

(1) Being 16 years old or older, he or she engages in sexual intercourse with a member of the opposite sex less than 16 and more than 12 years old; provided, however, the actor is at least two years older than the member of the opposite sex.

(2) He or she engages in sexual intercourse with a member of the opposite sex who is incapable of consent by reason of being mentally defective.

(b) Rape in the second degree is a Class B felony.

Thus, in Alabama, a person less than 16 years old is not liable for the offense. Further, a 17-year-old is not liable for the offense if the person has intercourse with a 15-year-old – the defendant must be at least two years older than the victim. The underlying rationale for the close-in-age exemption does not focus upon the consent of the victim; presumably the victim's consent is no more valid in such cases. Rather, the exemption may be based upon an assumption that there is less likely to be the kind of predatory manipulation that may take place where the offender is considerably older than the victim.

B. Under 16

Four states – Georgia, Massachusetts, Montana, and New Hampshire² – do not recognize such a close-in-age exemption. Even the 17-year-old with his 15-year-old high school sweetheart will be liable for the offense.

For example, Massachusetts provides:

§ 23. Rape and abuse of child

Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age, shall be punished by imprisonment in the state prison for life or for any term of years or, except as

¹ Ala.Code 1975 § 13A-6-62; Alaska Stat. Ann. § 11.41.434 (West); Ark. Code Ann. § 5-14-127 (West); Conn.G.S.A. § 53a-73a; D.C. Code Ann. § 22-3008 (West); Haw.RS § 707-730; Indiana 35-42-4-9; Iowa C.A. § 709.4; Kan. Stat. Ann. § 21-5506 (West); Ky. Rev. Stat. Ann. § 510.020 (West); Me. Rev. Stat. tit. 17-A, § 254; MD Code, Criminal Law § 3308; Mass. G.L.A. 265 § 23; Mich. Comp. Laws Ann. § 750.520d (West); Minn. Stat. Ann. § 609.344 (West); Miss. Code. Ann. § 97-3-65 (West); Neb. Rev. Stat. Ann. § 28-319 (West); Nev. Rev. Stat. Ann. § 200.364 (West); New Jersey S.A. 2C:14-2; North Carolina G.S.A. § 14-27.7A; Ohio § 2907.04; Okla. Stat. Ann. tit. 21, § 1111 (West); 18 Pa.C.S.A. § 3122.1; Rhode Island § 11-37-6; South Carolina Code 1976 § 16-3-655; S.D. Codified Laws § 22-22-1; 13 Vermont S.A. § 3252; Washington 9A.44.079; W. Va. Code, § 61-8B-5.

² Ga. Code Ann. § 16-6-3; Mass. G.L.A. 265 § 23; Mont. Code Ann. § 45-5-503 (West); N.H. Rev. Stat. § 632-A:4.

otherwise provided, for any term in a jail or house of correction. A prosecution commenced under this section shall neither be continued without a finding nor placed on file.

The rejection of a close-in-age exemption may be based on a wish to maintain a bright line rule without any exception, in the hopes that it will be more likely to gain compliance. One would expect that the close-in-age cases would be recognized as somewhat less blameworthy, however, and therefore subject to noticeably less punishment at sentencing.

C. Under 17, Close-in-Age Defense

Eight states provide the close-in-age exemption but use seventeen as the age cutoff: Colorado, Illinois, Louisiana, Missouri, New Mexico, New York, Texas, and Wyoming.³

For example, New York provides:

§ 130.25 Rape in the third degree

A person is guilty of rape in the third degree when:

1. He or she engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old;
2. Being twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old; or
3. He or she engages in sexual intercourse with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent. Rape in the third degree is a class E felony.

Notice that the close-in-age exemption is quite a bit broader in New York. The offender must be at least twenty-one years old to be liable for the offense. Thus, even a 20-year-old having intercourse with a 13-year-old cannot be liable for this offense.

D. Under 18, Close-in-Age Defense

³ Colo. Rev. Stat. Ann. § 18-3-402 (West); 720 Illinois CS 5/11-1.60; La. Stat. Ann. § 14:80; Mo. Ann. Stat. § 566.034 (West); N.M. Stat. Ann. § 30-9-11 (West); N.Y. Penal Law § 130.25 (McKinney); Texas Penal Code § 21.11; Wyo. Stat. Ann. § 6-2-316 (West).

A close-in-age exemption is also provided in four states that set the cutoff age for statutory rape at 18 years old: California, Florida, North Dakota, and Utah.⁴ In Florida, for example:

' 794.05. Unlawful sexual activity with certain minors

(1) A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. As used in this section, "sexual activity" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

(2) The provisions of this section do not apply to a person 16 or 17 years of age who has had the disabilities of nonage removed under chapter 743.

(3) The victim's prior sexual conduct is not a relevant issue in a prosecution under this section.

(4) If an offense under this section directly results in the victim giving birth to a child, paternity of that child shall be established as described in chapter 742. If it is determined that the offender is the father of the child, the offender must pay child support pursuant to the child support guidelines described in chapter 61.

Notice that the statute does not mention the age 18 as the cutoff age but rather defines the offense as having intercourse with a person 16 or 17 years of age, which has the same effect. (Intercourse with a person less than 16 years of age remains criminal, indeed is a more serious offense, under a different Florida code section.)

Here the young-age exemption is even broader: all persons less than 24 years of age are exempt from the offense. Thus, a 23-year-old having intercourse with a 16-year-old would be exempt.

As these examples make clear, the exemptions come in many varieties, some focusing on the age difference between the defendant and the victim, others focusing on the age of the defendant, and still others, like Alabama above, using a formula that includes both.

E. Under 18

⁴ Cal. Penal Code § 261.5; Fla. Stat. Ann. § 794.05 (West); N.D. Cent. Code Ann. § 12.1-20-05 (West); Utah Code Ann. § 76-5-401.2 (West).

Seven states keep things simple by providing an 18-year-old cutoff: Arizona, Delaware, Idaho, Oregon, Tennessee, Virginia, and Wisconsin.⁵ For example, Arizona provides:

§ 13-1405. Sexual conduct with a minor; classification

A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.

B. Sexual conduct with a minor who is under fifteen years of age is a class 2 felony and is punishable pursuant to § 13-705. Sexual conduct with a minor who is at least fifteen years of age is a class 6 felony. Sexual conduct with a minor who is at least fifteen years of age is a class 2 felony if the person is or was in a position of trust and the convicted person is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed has been served or commuted.

While the cutoff age for statutory rape is simple here, even a state like this provides significantly different grades for the offense depending upon the age of the victim. (The grade of an offense establishes the statutory maximum punishment that may be imposed.) Every state in the country provide such grading differences based upon the defendant's age, typically dramatically increasing the grade of the offense to levels comparable for homicide offenses, for example, when the age of the victim is twelve or less.

F. Observations and Speculations

As the analysis above indicates, different states take significantly different approaches in defining statutory rape. The existence of such diversity is consistent with the idea that the proper age below which sexual intercourse should be criminalized is in some part a function of existing community norms and customs. The collection of darker sheeted states in the West, with a line of median shaded states separating them from a somewhat later shaded Midwest and East suggest that some of the cultural differences may be regional.

However, it is also possible that a variety of other factors influence the cutoff age. Perhaps some state legislatures are inclined to be influenced by what their neighboring states do. Or perhaps news coverage of some particular case in the state

⁵ Ariz. Rev. Stat. Ann. § 13-1405; 11 Del.C. § 770; Idaho § 18-6101; Or. Rev. Stat. Ann. § 163.315 (West); Tenn. C. A. § 39-13-506; Va. Code Ann. § 18.2-371 (West); Wis. Stat. Ann. § 948.09 (West).

has prompted the legislature to undertake a reform, where their neighboring states have had no such triggering case and public upset.⁶

The diversity among the states does create some significant points of contrast, even for neighboring states. Consider two examples of pairs of neighboring states from the discussions above. Massachusetts set the cutoff age of 16 while across the border New York the cutoff ages 17. More striking, however, is the fact that even a 16-year-old can't commit the offense in Massachusetts but an offender must be 21 across-the-board or New York. Similarly, Alabama provides a cutoff age of 16 years of age while across the state line in Florida the cutoff age is 18. Even more striking, in Alabama 16-year-olds can be convicted of statutory rape but across the border in Florida even 23-year-olds cannot be.

⁶ For a general discussion of this dynamic, see Robinson & Robinson, *Tragedy, Outrage & Reform: Crimes That Changed Our World* (Rowman & Littlefield 2017).