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THE OVERTURNING OF *MICHAEL M.*: STATUTORY RAPE LAW BECOMES GENDER-NEUTRAL IN CALIFORNIA

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I. THE DEVELOPMENT OF CALIFORNIA'S STATUTORY RAPE LAW

A. *The History*

American statutory rape law draws its origins from early English law.¹ Statutory rape was first codified in England under the Statute of Westminster I, which prescribes that a female under the age of twelve is legally and factually incapable of consenting to sexual intercourse.²

In 1859, the California Legislature enacted the state's first statutory rape law,³ California Penal Code section 261.5, entitled

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1. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 402-03 (1984); Maryanne Lyons, Comment, *Adolescents in Jeopardy: An Analysis of Texas' Promiscuity Defense for Sexual Assault*, 29 HOUS. L. REV. 583, 584-87 (1992). Lyons indicates that it is widely believed that the original purpose behind making statutory rape a special offense was to protect the marriageability of young females. She notes that the statute has been described as an effort to protect "virtuous maidens" and "the purity of womanhood." *Id.* at 586-87.

2. The Statute of Westminster I was enacted in 1275. In 1285, the Statute of Westminster II was enacted, making the offense of statutory rape punishable by death. Lyons, *supra* note 1, at 586 n.10 (citing 75 C.J.S. *Rape* § 13 (1952), 2 SIR FREDERICK POLLOCK & FREDERIC W. MATTLAND, THE HISTORY OF ENGLISH LAW 491 (2d ed. 1959) and 3 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 316 (3d ed. 1923)).

3. David Wharton, *Sex and Section 261.5: California's Statutory Rape Law Applies Only to Female Victims. For Underage Males, There is Less Legal Protection*, L.A. TIMES (Valley Edition), Apr. 30, 1992, at E9A.

"Unlawful sexual intercourse with female under age 18."⁴ The statute defined "[u]nlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."⁵ Thus, under the language of this law, the sexes were treated differently: only females could be victims of statutory rape and only males could be punished for it.⁶

As a consequence of its gender-based language, this statutory rape law was attacked on equal protection grounds in the landmark United States Supreme Court case, *Michael M. v. Superior Court*.⁷ In *Michael M.*, a seventeen-year-old male was charged with statutory rape as a result of his engaging in sexual intercourse with a sixteen-year-old female.⁸ The defendant contended that this gender-based law violated the Equal Protection Clause of the Fourteenth Amendment as it makes men alone criminally liable for the act of sexual intercourse.⁹ The State of California justified the law on the basis that the state legislature enacted it for the purpose of preventing teenage pregnancies,¹⁰ and that a gender-neutral law would prevent effective enforcement because the female would not report violations of the statute if she were potentially subject to criminal charges.¹¹ In the end, five of the Justices upheld the law as constitutional and four dissented.¹²

Writing for the plurality, Justice Rehnquist asserted that the law was constitutional because it served a valid state interest: preventing teenage pregnancy.¹³ He reasoned that "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may

4. CAL. PENAL CODE § 261.5 (West 1988) (amended 1994).

5. *Id.*

6. Some feminists criticize gender-based versions of statutory rape law for, among other things, restricting a female's ability to consent, reinforcing the stereotype that males are sexual aggressors and females are their victims, and perpetuating the idea that females need extra protection. See, e.g., Olsen, *supra* note 1, at 404-06. The law also incorporates the assumption that a woman cannot be raped by her husband, but this concern is beyond the scope of this Recent Development.

7. 450 U.S. 464 (1981).

8. *Id.* at 466-67.

9. *Id.* at 464.

10. *Id.* at 470.

11. *Michael M. v. Superior Court*, 450 U.S. 464, 473-74 (1981).

12. It is interesting to note that at the time *Michael M.* was decided by the Supreme Court, 37 states already had statutory rape laws that punished an adult partner of a minor of either sex. *Id.* at 492.

13. *Id.* at 470.

become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity."¹⁴ He argued that, while pregnancy provides a natural deterrence for women, "[n]o similar natural sanctions deter males."¹⁵ Thus, "a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct."¹⁶ Justice Rehnquist also accepted the State of California's argument that "a gender-neutral statute would frustrate its interest in effective enforcement,"¹⁷ because "a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution."¹⁸

On the other hand, four dissenting Justices in *Michael M.* would have invalidated the statute. Justice Brennan's opinion, in which Justices White and Marshall joined, argued that the law was invalid because "the State has been unable to demonstrate a substantial relationship between the classification and its newly asserted goal [of preventing teenage pregnancy]."¹⁹ In his opinion, Justice Stevens asserted that "the only acceptable justification for a general rule requiring disparate treatment of the two participants in a joint act must be a legislative judgment that one is more guilty than the other."²⁰ He argued that the State failed to show that such a legislative determination was behind the enactment.²¹

Thus, one hundred twenty-two years after the law's enactment, the State of California successfully defended its gender-specific statutory rape law before the Supreme Court. Yet, only twelve years later, the California legislature amended the law to

14. *Id.* at 471.

15. *Id.* at 473.

16. *Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981). However, Justice Stewart notes in his concurring opinion that California does have other, less severe statutes, that would allow prosecution of females who have intercourse with male minors. *Id.* at 476-77 (Stewart, J., concurring). For example, Justice Stewart mentions that "[a]ll persons are prohibited from committing 'any lewd or lascivious act' " with a child under age fourteen, and that any person may be convicted of contributing to the delinquency of a minor. *Id.*

17. *Id.* at 473.

18. *Id.* at 473-74.

19. *Id.* at 496 (Brennan, J., dissenting).

20. *Id.* at 500 (Stevens, J., dissenting).

21. *Michael M. v. Superior Court*, 450 U.S. 464, 500-01 (1981) (Stevens, J., dissenting).

make it gender-neutral and no longer subject to an equal protection attack such as the one made by the defense in *Michael M.*

B. *California's New Gender-Neutral Statute*

In 1993, the California Legislature amended section 261.5 by replacing gender-specific terms with words such as "person," "minor," and "spouse," thereby creating a gender-neutral law.²² The statute still protects those who are under age eighteen and may still be used to prosecute a perpetrator for either a misdemeanor or a felony,²³ but it also takes into account the relative ages of the perpetrator and the minor.²⁴ Thus, where both participants are within three years of age of each other, a violation is not punishable by imprisonment;²⁵ however, in the case of a perpetrator who is over the age of twenty-one, and who engages in intercourse with a person who is under sixteen years of age, a violation is punishable by a maximum of four years in prison.²⁶

C. *Problems Created by the Gender-Neutral Statute*

The amended version of section 261.5 raises many questions.²⁷ For example, it calls into question the State of California's defense of its gender-specific statutory rape law in *Michael*

22. This law became effective in 1994. In full it reads:

(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 the age of 18 years.

(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, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

(d) Any person over the age of 21 years who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years.

CAL. PENAL CODE § 261.5 (West Supp. 1994).

23. *Id.*

24. *Id.* § 261.5(b)-(d).

25. *Id.* § 261.5(b).

26. *Id.* § 261.5(d).

27. Only some of these questions are discussed below as the purpose of this piece is merely to illustrate the types of problems created by the new law.

M. because it does not incorporate the State's proclaimed justifications for the gender-specific structure of the law. One of the main arguments asserted by the State in *Michael M.* was that the gender-specific law was designed to prevent teenage pregnancy by punishing the male participant who lacks "natural sanctions," thereby serving to "equalize" the deterrents on the sexes."²⁸ Under this logic, the new gender-neutral statutory rape law will inhibit or discourage females from engaging in sexual intercourse more than males because females are subject to both the "natural sanctions" of pregnancy and the criminal sanctions imposed under the statute. Thus, the new gender-neutral law may be criticized as sexist because it may serve to repress female sexual activity more than male sexual activity.

Additionally, the gender-neutral statute undermines the other main argument put forth by the State in *Michael M.*: that a gender-neutral statute would frustrate the State's ability to effectively enforce the law because the State believes "a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution."²⁹ The plurality in *Michael M.* found this argument persuasive and stated that "we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement."³⁰ In fact, the gender-neutral version of the law does raise questions about how it will be enforced.

One of the questions raised is whether the State will prosecute both participants in a sexual encounter, or whether the state will need to determine which participant to prosecute and punish. Thus, it is crucial to know how the State will determine who to prosecute. If the State's policy were to prosecute the older participant, what happens in the case of a seventeen-year-old male who is coerced into intercourse with a sixteen-year-old female? If the State adopted a policy of prosecuting the perpetrator who coerced the other participant, the policy would suggest that the purpose of the law is to protect minors from sexual exploitation. However, in many cases it would be impossible to determine if there was in fact coercion or who was the coercive party.

Moreover, restructuring the law to take into account the relative ages of the participants creates problems because it may

28. 450 U.S. at 473.

29. *Id.* at 473-74.

30. *Id.* at 474.

lead to unfair or illogical results. For instance, under the new law, a twenty-one-year-old who engages in sex with someone under sixteen years of age is treated in a dramatically different manner than a twenty-year-old who also engages in sex with someone under sixteen years of age. Compare the following results: a twenty-year-old who has intercourse with a ten-year-old would be subject to a maximum of one year in prison. Yet, a twenty-one-year-old who has intercourse with a fifteen-and-ten-month-year-old would be subject to a maximum penalty of four years.³¹

Thus, the new law is problematic. Whether it is a useful and beneficial law will depend greatly on the State's decisions about when and whom to prosecute for statutory rape.

D. *The Events That Acted as a Catalyst for the Amendment*

The complete reversal of policy by the State of California stems primarily from two recent incidents. In particular, it was the outrage of one woman, Marcia Beckerman, that provided the initial impetus to a movement which quickly gained momentum.³² In 1992, Beckerman's teenage son was seduced by a forty-year-old woman. The defendant, Faye Abramowitz, used alcohol and sexually explicit videos to entice Beckerman's son and other teenage boys into having sexual intercourse with her. Abramowitz was charged with oral copulation and other lesser crimes, but not with statutory rape.³³

Beckerman felt that Abramowitz's sentence did not reflect the seriousness of the crime. Abramowitz pled no contest and was sentenced to five years probation, although the maximum sentence was imprisonment for seven years and eight months.³⁴

31. The gender-neutral law also raises the issue of whether a male victim of statutory rape should be held liable for child support where a pregnancy results from the encounter. An adolescent father in Kansas was held jointly and severally liable for child support although he was the victim of a statutory rape. *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273 (Kan. 1993). See generally John A. Greenbaum, Note, *Holding a Male Statutory Rape Victim Liable for Child Support - State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273 (Kan. 1993), 98 DICK. L. REV. 549 (1994).

32. Karen Nikos, *Effort to Make Statutory Rape Law Apply to Women Gaining Support*, SACRAMENTO BEE, Feb. 22, 1993, at B6.

33. Karen Nikos, *Bill Would Apply California Law on Statutory Rape to Both Sexes*, DALLAS MORNING NEWS, Mar. 14, 1993, at A7. More specifically, Abramowitz was charged with three counts of lewd conduct with a child and five counts of oral copulation with a person under 18. Wharton, *supra* note 3, at E9A.

34. Nikos, *supra* note 33, at A7.

According to District Attorney Craig Richman, who prosecuted the case, the circumstances in this case would have met the definition of statutory rape under (the then-existing version of) section 261.5, but only if the perpetrator was a man enticing teenage girls.³⁵ Under the old section 261.5 such charges could have resulted in up to three years imprisonment for each conviction of unlawful intercourse.³⁶

Beckerman believed that the old law reflected a double standard³⁷ — that boys, unlike girls, cannot be victimized by incidents of statutory rape — and she attacked the perceived injustice by writing to state lawmakers.³⁸ In response to her letters, two lawmakers proposed gender-neutral versions of the statute which eventually were combined and passed into law.³⁹

In addition to Beckerman's efforts, the testimony of two teenage boys who were victims of sexual coercion by an older couple helped to propel the Legislature to act. The boys, A.T. Page and Marc Searl, were pressured by their high school football coach, Randy Brown, to have sex with his wife, Kelly Brown.⁴⁰ Neither of the Browns were charged with statutory rape because intercourse with a male minor was not illegal. However, the Browns did plead guilty to the lesser charges of solicitation and oral copulation, for which they received suspended prison sentences and five years probation.⁴¹

After their case had been decided, Page and Searl were determined to speak up publicly because they felt the statutory rape law needed to be changed in order to protect others like them.⁴² Before the Legislature, they testified that boys, as well as girls, can be coerced into having sexual intercourse and left emotionally traumatized as a result.⁴³ Page described his ordeal

35. *Id.*

36. *Id.* Under the current law, the maximum imprisonment for an individual over twenty-one years who has intercourse with a minor is four years in prison for each conviction of unlawful intercourse. CAL. PENAL CODE § 261.5(d) (West Supp. 1994).

37. Nikos, *supra* note 33, at A7.

38. *Id.*

39. *Id.* The lawmakers were California Assembly member Paula Boland (R-Granada Hills) and California Senator Newton R. Russell (R-Glendale). *Id.*

40. Tom Gorman, *2 Boys Seek Statutory Rape Protection: They Were Victimized by Coach, Wife*, DALLAS MORNING NEWS, Aug. 1, 1993, at A6.

41. *Id.*

42. *Id.*

43. *Id.*

by saying that he felt "emotionally raped."⁴⁴ The boys' testimony is supported by mental health experts who indicate that being male does not eliminate the trauma of statutory rape, which can manifest itself in victims of either sex through depression, withdrawal, and problems with intimacy.⁴⁵

The above described course of events propelled the Legislature to amend section 261.5. However, the amendment is not merely the result of those specific events; it also reflects a more general societal change.

II. ANALYSIS: A CHANGE IN ATTITUDE TOWARD MALE SEXUALITY, NOT FEMALE SEXUALITY, ALLOWED THE AMENDMENT TO BE ENACTED

Although many feminist legal scholars had long sought the change to a gender-neutral statutory rape law,⁴⁶ the passage of the amended section 261.5 appears to reflect a new understanding in California of the complex and emotional consequences of sexual exploitation and a new awareness of how it affects young males.

A. *The Enactment of the New Law Does Not Address Feminist Criticisms of the Old Law*

Feminist scholars have heavily criticized gender-based statutes such as the old section 261.5 as harmful to women.⁴⁷ These criticisms can be categorized into two general types: ideological and practical.⁴⁸ The ideological criticisms focus on how such laws reinforce a "double standard of sexual morality" because they presuppose "the sexual stereotype of men as aggressors and women as passive victims."⁴⁹ The practical criticisms emphasize the "oppressive restriction" such laws place on minor females and point out the dangers of the "unwarranted governmental intrusion."⁵⁰ Some feminist critics argue that gender-based statutory

44. *Id.* at A6.

45. Wharton, *supra* note 3, at E9D.

46. Olsen, *supra* note 1, at 402-04 (describing efforts by feminists to revise the old statutory rape law).

47. *Id.* at 404-06 (summarizing and categorizing feminist criticisms of gender-specific statutory rape law).

48. *Id.* at 404.

49. *Id.* at 405.

50. *Id.* at 404.

rape laws violate a female minor's right to privacy and to consent to sexual intercourse as freely as her male counterpart.⁵¹

The new law, at least on its face, no longer perpetuates outdated sexual stereotypes of sexually passive women and sexually aggressive men because the new law includes young males in the class of potential victims and older women in the class of potential violators. However, while these stereotypes may no longer be embedded in the letter of the law, it remains to be seen whether such stereotypes will influence the enforcement of the law. As discussed above, the decisions made by law enforcement personnel will greatly influence who is prosecuted and the circumstances under which someone is prosecuted.

Additionally, the new section 261.5 fails to address the practical criticisms of intrusion and oppression. More specifically, the new gender-neutral statutory rape law may still reflect stereotypes concerning the amount of autonomy a minor should have over his or her body and sexuality, and the ability of a person under age eighteen to give meaningful consent.⁵² Many scholars may also argue that the gender-neutral law incorrectly treats the conduct of a woman who seduces a boy equal to the conduct of a man who seduces a girl.⁵³ These scholars believe that society is so patriarchal that "sexual freedom" for women is actually only freedom for men to exploit women.⁵⁴ Thus, although some may argue that the new section 261.5 is a reflection of society's more modern view of female sexuality, it may be more realistic to say that this new law is actually a product of a change in the sexual stereotypes of males.⁵⁵

51. *Id.* at 405.

52. *Id.* at 404-06.

53. *See id.* at 429-30 (summarizing feminist concerns about statutory rape law).

54. *Id.* at 430. Also, while it is not solely a feminist criticism, statutory rape law has been criticized because it is a strict liability offense. This allows a defendant to be convicted of statutory rape without proof of a culpable mental state. Actual culpability could arise if the defendant's partner did not consent or was forcibly raped; or if the defendant knew the partner's age. For statutory rape, however, it is not necessary to prove the defendant was purposeful, knowing, reckless, or even negligent with regard to the consent or age of the other participant. It has been argued that the lack of a requirement for a culpable mental state violates due process ideals which require criminal defendants to have some level of culpability. *See* Benjamin L. Reiss, *Alaska's Mens Rea Requirements for Statutory Rape*, 9 ALASKA L. REV. 377 (1992); Lyons, *supra* note 1, at 583.

55. In *Michael M.*, the attorneys for the male defendant put forth this analysis when they argued that the gender-based law was founded "on the outdated stereotype of male supremacy." Fred Barbash, *Supreme Court to Review Laws on Statutory Rape*, WASH. POST, June 10, 1980, at A10.

B. *New Conceptions of Male Sexuality Underlie the Recent Change in California's Statutory Rape Law*

Traditionally, males have been viewed as the initiators of sexual intercourse,⁵⁶ and any act of sexual intercourse by a male has been treated as an accomplishment.⁵⁷ The recent successful lobbying of Page, Searl, and Beckerman supports the view that a change in male stereotypes is the actual cause of the revision. Their success in reaching the legislators suggests that society is now more open to the idea that boys, rather than feeling proud of an accomplishment, may feel victimized by older women who seduce them.⁵⁸ This recognition reflects a shift from the traditional view which considered sexual encounters between teenage boys and older women to be a coming of age ritual for boys.⁵⁹ As explained by Professor Susan Estrich, "[s]ociety has traditionally put a prize on female virginity and on male experience."⁶⁰

In light of the recent events that triggered the amendment, it appears that there is a new recognition that a boy may feel sexually exploited by an incident of sexual intercourse with an older woman, or ashamed and confused about the encounter. The new law may reflect an understanding that boys, like girls, may be simply too young to make a knowing and mature decision about whether to engage in sexual intercourse.

Thus, it appears that the revised version of section 261.5 was not a response to the feminist critique of inequality in the law, but rather a recognition of the injustice done to male minors who were not protected equally under the law.

CONCLUSION

Even if the new section 261.5 is merely a product of a change in society's attitude toward male sexuality, it is a positive step for women because, on its face, it takes a more equal stance toward the sexes. First, the new section 261.5 recognizes that women, as

56. John D. Ingram, *Date Rape: It's Time for "No" to Really Mean "No"*, 21 AM. J. CRIM. L. 3, 3 (1993).

57. Olsen, *supra* note 1, at 405.

58. It is also possible that the change reflects growth in women's political power, but a discussion of this issue is beyond the scope of this Recent Development.

59. Examples of this attitude can be seen in movies such as *THE GRADUATE*, *MY TUTOR*, and *THE SUMMER OF '42*. See Wharton, *supra* note 3, at E9A.

60. Wharton, *supra* note 3, at E9A. Wharton also reports that the police said that some of the boys who were seduced by Abramowitz "consider their experience a 'badge of honor.'" *Id.* at E9A.

well as men, can be sexually aggressive. Second, it acknowledges that boys, as well as girls, can be emotionally traumatized by statutory rape. Thus, under the language of the law, the sexes are treated equally. However, although the law is now written in nondiscriminatory language, it does not necessarily follow that it will be applied in a nondiscriminatory manner. The true test of this law is yet to come. The answer will be exposed over time — in the patterns of enforcement that will emerge.

