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People v. Hernandez, 39 Cal. Rptr. 361, 393 P.2d 673 (1964)

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most desirable means of affording this protection.[25] If the bias and prejudice of judges in fact constitutes a serious problem, then, to give maximum effect to the object of the statute, and to promote substantial justice, the disqualification should be allowed before any of the separate stages in the progress of the case.

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REASONABLE MISTAKE AS TO THE AGE OF THE PROSECUTRIX IS AN AFFIRMATIVE DEFENSE TO A CHARGE OF STATUTORY RAPE.—The defendant was charged and convicted of the offense of statutory rape.[1] On appeal to the California Supreme Court, *held,* reversed. Proof of a reasonable belief that the female was older than the statutory age constituted a defense to the charge. *People v. Hernandez,* 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

Before the instant case the unanimous rule in the United States was that mistake of the female's age did not constitute a defense to the crime of statutory rape. Defenses such as a good faith belief that the prosecutrix was above the prohibited age,[2] that the defendant had exercised reasonable care to ascertain her age, or that he was misled by the girl's appearance or misrepresentations were not available.[3] The Montana Supreme Court, in dictum, has concurred with this rule.[4]

[25]Where such a statute is interpreted as allowing disqualification for imputed bias and prejudice, or peremptory challenge, a constitutional problem may arise. In the instant case the court recognized this possibility, but said that this matter was not properly before the court. This question is now before the court, in regard to the civil disqualification statute, in the case of State *ex rel.* Peery v. District Court of the Fourth Judicial District, *petition for Mandamus filed,* No. 10853, Sup. Ct. of Mont., Sept. 8, 1964.

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[1]CAL. PEN. CODE § 261: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of eighteen years. . . ." Montana has substantially the same statute. REVISED CODES OF MONTANA, 1947, § 94-4101. See note 33, *infra,* for the California statute dealing with the punishment for the offense of statutory rape. The defendant in the instant case had sexual intercourse with a girl seventeen years and nine months of age and was convicted of a misdemeanor under these statutes. REVISED CODES OF MONTANA are hereinafter cited R.C.M.

[2]See discussion and extensive annotation in 44 AM. JUR. *Rape* § 41 (1942). Regina v. Prince, 2 Cr. Cas. Res. 154, 13 Eng. Rep. 385 (1875), was the first case to promulgate this rule and is heavily relied on by modern cases.

[3]Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896); State v. Wade, 224 N.C. 760, 32 S.E.2d 314 (1944).

[4]State v. Duncan, 82 Mont. 170, 184, 266 Pac. 400 (1928); State v. Reid, 127 Mont. 552, 562, 267 P.2d 986 (1954). Neither case involved a defense of mistake as to the age of the prosecutrix. The court in the *Reid* case quoted the following passage from the *Duncan* case as expressing the law on the subject:

> The consent of the female, the lack of knowledge of her age, or even her misrepresentation as to her age . . . are all immaterial matters; a conviction depends solely upon proof of intercourse and nonage, and if a man indulge in promiscuity with strange women he has only himself to blame if it later develops that he has unwittingly committed the crime of rape. Such is the law as declared by the lawmaking body of this state, and the province of the courts is to enforce the law as they find it.

The court in United States v. Red Wolf, 172 F. Supp. 168 (D. Mont. 1959), cited these cases as expressing the Montana law on the subject; but the court held that federal, not Montana, law was controlling.

The general rule excludes the requirement of *mens rea* with respect to one element of the crime of statutory rape; the sub-statutory age of the prosecutrix. The common law required proof of *mens rea* as to all elements of every crime except public nuisance.[5] Today, many states have incorporated the requirement of *mens rea* into their criminal codes. Montana, for example, requires a joint operation of act and intent,[6] and lists those who act under ignorance or mistake of fact as incapable of committing crimes.[7] Similarly, most courts consider malicious intent to be a basic element of crime. Thus, if that intent is dependent on the knowledge of particular facts, a want of such knowledge, not the result of carelessness or negligence, relieves the act of criminality.[8] Ordinarily there is no crime unless there is an awareness of all the facts which make the conduct criminal.[9]

The criminal law may be regarded as a continuum running from the least serious offenses, such as traffic law violations, to the most serious, such as treason. The theory of *mens rea* has the effect of dividing this continuum into three parts: public welfare offenses, some statutory offenses, and common law offenses.

[5]Perkins, *Ignorance and Mistake in the Criminal Law*, 88 U. PA. L. REV. 35, 59, 63 (1939). See also WILLIAMS, CRIMINAL LAW 30 (1961). Coke's statement, "*Actus non facit reum, nisi mens sit rea,*" is sometimes said to be the fundamental maxim of the whole criminal law. 3 COKE, INSTITUTES *6 (1797), in reference to Act of 25 Edw. 3, c. 2. But, 2 STEPHENS, HISTORY OF THE CRIMINAL LAW 95 (1883), calls this a "minim" and suggests that intention means only that the act be voluntary. In accord with Coke, Blackstone stated, 4 BLACKSTONE, COMMENTARIES *21, 27 (1900), that there is no crime without a vicious will and an act consequent on that vicious will, and that "Ignorance or mistake is another defect of the will; when a man intending to do a lawful act does that which is unlawful." See also *Regina v. Prince, supra* note 2, at 170 (Brett, J., dissenting): "It seems to me that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe to be the facts, would, if true, make his acts no criminal offense at all." *Regina v. Tolson*, 23 Q.B.D. 168, 190 (1889), an adultery case, reaffirmed the doctrine of *mens rea*, but carefully distinguished the *Prince* case as sui generis.

[6]R.C.M. 1947, § 94-117. "In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence." *Accord*, CAL. PEN. CODE § 20.

[7]R.C.M. 1947, § 94-201 provides:

> All persons are capable of committing crimes except those belonging to the following classes:
>
> . . .
>
> 4. Persons who committed the act or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent.
>
> . . .
>
> 6. Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

[8]See 15 AM. JUR. *Criminal Law* § 305 (1942) also listing a large class of cases which for reasons of public policy make certain acts punishable without proof that the defendant understood the facts giving character to his act. For cases applying the joint operation statutes, see People v. Stuart, 47 Cal. 2d 167, 302 P.2d 5 (1956); State v. Smith, 135 Mont. 18, 334 P.2d 1099 (1959). But mistake of fact only operates to disprove a criminal charge if it is honestly entertained, based on reasonable grounds, and of such a nature that the act would have been lawful had the facts been as they were reasonably supposed. Perkins, *Ignorance and Mistake in the Criminal Law*, 88 U. PA. L. REV. 35, 55 (1939).

[9]People v. McLaughlin, 111 Cal. App. 2d 781, 245 P.2d 1076 (1952). In United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941) Judge Hand found statutory rape to be unique and excepted it from his considerations.

Public welfare offenses occupy the very bottom portion of the continuum. The modern conception of this offense incorporates the old distinctions between statutory and common law crimes,[10] and between offenses *mala prohibita* and *mala in se*.[11] The public welfare offenses are all statutory, *mala prohibita* crimes entailing relatively small penalties, such as the sale of liquor to minors. Proof of *mens rea* is justifiably never required in this class.[12]

The class of statutory crimes extends beyond the public welfare offense category to comprise the central portion of the continuum. The courts do require proof of *mens rea* for many of these offenses.[13]

Above the range of the statutory offenses there is an absolute break in the continuum. The upper section is occupied entirely by common law, *mala in se* offenses, all of which require a showing of *mens rea* for conviction.

There are three well recognized exceptions to the general requirement of *mens rea*. The first two, public welfare offenses and statutory offenses, are included in the lower two portions of the criminal law continuum. The third, made up of statutory rape and a few other sexual offenses involving a "high degree of moral delinquency," has no place on this continuum.[14] Statutory rape is a common law offense involving moral turpitude and potentially great penalties,[15] but it does not require a showing of *mens rea*. This unique position of statutory rape has been

[10]There is a great deal of authority that intent is a necessary element of all common law crimes, but not of statutory crimes. Brown v. State, 7 Del. 159, 74 Atl. 836 (1909); *State v. Smith, supra* note 8, at 326.

[11]Many cases hold that where a statute dealing with an offense which is *mala prohibita* does not expressly state that intent is an element of the crime, proof of intent is not necessary for conviction. In Garver v. Territory, 5 Okla. 342, 49 Pac. 470 (1897), the court held that the defendant was convicted under one of a class of *prohibita* statutes, "such for instance . . . [as those] which prohibit sexual intercourse with a girl under 16." Montana courts have subscribed strongly to this distinction. See, *e.g.*, State v. Erlandson, 126 Mont. 316, 249 P.2d 794, 797 (1952), involving a liquor law violation by an agent of defendant: "As to acts *mala in se* intent governs but as to those *mala prohibita* the only question is: Has the law been violated?"

[12]United States v. Mack, 112 F.2d 290 (2d Cir. 1940); Simmons v. State, 151 Fla. 778, 10 So.2d 436 (1942). For a full discussion see Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933). For a historical case analysis of the development of the public welfare offense see Morisette v. United States, 342 U.S. 246 (1952).

[13]Whether a given court will require a showing of intent in a statutory offense depends on the size of the penalty, the degree of moral turpitude involved, the wording of the statute, and the court's interpretation of the legislative intent. For a full discussion of the latter two, see generally EDWARDS, MENS REA IN STATUTORY OFFENSES (1955).

[14]See Perkins, *supra* note 5. Offenses such as abduction and contributing to the sexual delinquency of minors may be included under the definition of statutory rape. The crimes of bigamy and rape of an incompetent female also fit within this exception. The general rule is that *mens rea* is not a defense to bigamy. But there are cases which argue persuasively to the contrary. See, *e.g.*, *Regina v. Tolson, supra* note 5; People v. Vogel, 44 Cal. 2d 798, 299 P.2d 850 (1956). These offenses make up the greater part of the exception since a reasonable belief in the competency of a female is commonly a defense to a charge of rape of an incompetent. The latter is distinguished from statutory rape on the grounds that there is a presumption of sanity, but no such presumption that a female is above the statutory age. State v. Helderle, 186 S.W. 696 (Mo. 1916).

[15]See notes 31, 32, and 33 *infra*.

justified by the courts on the grounds of both legislative intent and public policy. One court has said:

> The object and purpose of the law are too plain to need comment, the crime too infamous to bear discussion. The protection of society, of the family, and of the infant, demand that one who has carnal intercourse under such circumstances shall do so in peril of the fact, and he will not be heard against the evidence to urge his belief that the victim of his outrage had passed the period which would make his act a crime.[16]

The policy concern is the protection of the integrity of young females who lack the capacity to consent, by preserving them from the unwise disposition of their sexual favors.[17] This protection of female chastity justifies placing on the male the burden of the risk of even a reasonable mistake of the girl's age.[18]

The courts reason that placing this burden on the defendant is required by the principles of statutory construction: "Where an act is in general terms made indictable, a criminal intent need not be shown unless from the language of the law applicable a purpose to require the existence of such an intent can be discovered."[19] Thus, unless the statute expressly requires proof of intent, ignorance is no excuse.[20]

However, relatively few of the cases simply state that no intent is required, that the prohibition is absolute.[21] Most courts attempt to show that under the general rule the crime of statutory rape is consistent with the basic requirements of the criminal law and not a sui generis offense. This is done by various arguments summarily drawn from the theory of *mens rea*. Some courts state that the intent may be inferred or even con-

[16]People v. Ratz, 115 Cal. 132, 46 Pac. 915, 916 (1896).

[17]Instant case, at 676. A full discussion of the secular bases for the punishment of illicit intercourse may be found in the MODEL PENAL CODE § 207.1, comment at 207-210 (Tent. Draft No. 4, 1955). This policy, for obvious reasons, has been referred to as the "Treasure Trove Theory":

> Then weigh what loss your honor may sustain
> If with too credent ear you list his songs,
> or lose your heart, or your chaste treasure open
> to his unmastered importunity.
>
> Hamlet, I, iii.

See also 62 YALE L. J. 55 (1952).

[18]"There is unanimity that one who does the offense does so at his peril so far as the age of the girl is concerned and ignorance is no excuse." *Brown v. State, supra* note 10, at 838, involving employment of a female under eighteen years of age for purposes of prostitution; People v. Griffin, 117 Cal. 583, 49 Pac. 711, 712 (1897).

[19]*State v. Smith, supra* note 8, at 579; *Regina v. Prince, supra* note 2, at 171.

[20]Feeley v. United States, 236 Fed. 903, 905 (8th Cir. 1913). It is constitutional for a legislature to do away with the necessity for criminal intent, where this intent is difficult to prove, or where this is required by public policy. People v. Sheffield, 9 Cal. App. 130, 98 Pac. 67 (1908).

[21]"The essential elements of statutory rape are the facts of sexual intercourse, and the age of the prosecutrix." State v. Gauthier, 113 Ore. 297, 231 Pac. 141, 144 (1924). The majority opinion in *Regina v. Prince, supra* note 2, is based on the idea that the prohibition is absolute.

clusively presumed from the act itself.[22] Others distinguish between "general" and "special" intent, holding that where an act is indictable in general terms, only "general" intent is required.[23] This requires a finding of *mens rea* only as to a part of the *actus reus* of the crime, namely, intercourse with a female. Whether there is also intent to have intercourse with a less than eighteen year old female is immaterial.[24] Courts have held that since fornication is in itself either a crime,[25] or a moral wrong,[26] no injustice is done by not requiring intent as to the other element of the *actus reus* of the offense.

The instant case stands in direct opposition to this general rule. It recognizes that a defendant in a statutory rape case is entitled to the protection of the *mens rea* doctrine to the same extent as a defendant in a forcible rape, larceny, or arson case. By implication, the instant case holds that the general rule is inconsistent with the doctrine of *mens rea,* and that statutory rape may not properly be regarded as a strict liability offense.

A requirement of only "general" intent is incompatible with the doctrine of *mens rea.* Proof of such intent requires proof that the *act* was intentionally performed. The prohibited act in statutory rape consists of two elements, both of which must be proved for a conviction: first, sexual intercourse, and second, with a female under the age of eighteen.

[22] "Though in every public offense there must exist a union of act and intent, in statutory offenses such as this, the intent is conclusively presumed, when it is shown that the statute has been violated." State *ex rel.* Rowe v. District Court, 44 Mont. 318, 326, 119 Pac. 1103 (1911), involving receipt of illegal fees. This amounts to no more than a statement that the offense is one of strict liability. It is a semantical way to avoid the application of the joint operation statute. See *supra* note 6.

[23] People v. Gory, 28 Cal. 2d 450, 170 P.2d 433 (1946), involving possession of marijuana. "General" intent is defined as "not an intent to commit a crime but merely intent to knowingly perform the interdicted act." State v. Taylor, 59 Idaho 724, 87 P.2d 454 (1939). State v. McLeod, 131 Mont. 478, 488-489, 311 P.2d 400 (1957) states that if the act which is criminal "is voluntarily done, the intent to do the act is present, and it constitutes criminal intent." STEPHENS, *supra* note 5, states that intention may mean merely a voluntary act, and as such is a necessary element of all crimes.

[24] This, in effect, was the reasoning used by Bramwell, B., in his concurring opinion to *Regina v. Prince, supra* note 2, at 171.

[25] The court in *United States v. Crimmins, supra* note 9, at 273, supported this position in the following dictum:

> Even this general intent is not always necessary . . . . In statutory rape the accused need not know that the victim is below the age of consent; he takes his chances . . . in such cases the accused's conduct is independently immoral or unlawful, and that casts on him the risk that that element of the crime of which he is ignorant may in fact exist.

Accord, Commonwealth v. Murphy, supra note 3, at 505: "Their intended crime was fornication at the least. It is a familiar rule that if one intentionally commits a crime, he is responsible criminally for the consequences of his act, if the offense proves to be different from that which he intended."

[26] Courts supporting this contention reason that the intent to commit a moral wrong equals an illegal motive and that equals a criminal intent. State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892); People v. Griffin, 117 Cal. 583, 49 Pac. 711, 712 (1897). Perkins, *Ignorance and Mistake in the Criminal Law,* 88 U. PA. L. REV. 35, 53 (1939), states that the moral wrong doctrine is largely the basis of the concurring opinions in *Regina v. Prince, supra* note 2.

If the knowledge or the intent extends to only the first of these elements, it logically follows that there is not a sufficient criminal intent.[27]

The requirement of only "general" intent is not made consistent with the doctrine of *mens rea* by requiring proof of intent as to only the first element of the *actus reus*. This has been criticised for introducing great uncertainty into the requirement of *mens rea*.[28] If that part of the *actus reus* for which intent is required is a crime in itself, the general rule would accord with the principles of *mens rea*. However, fornication statutes of many states require either "cohabitation" or that the offense be "open and notorious."[29] In very few statutory rape cases could the defendant be proved to have intended an act which would meet the requirements of the fornication statute. The fact that fornication is in itself a moral wrong certainly does not justify such a drastic limitation of the requirement of *mens rea*. The fallacy in this reasoning is that an act, whether or not immoral, is not illegal unless declared so by statute. The spheres of moral and legal wrongs are separate, coinciding only where so declared by the legislature. This separation is a *sine qua non* of a just and workable system of criminal law since "the moral eyesight even of good citizens does not always correspond."[30]

Since the general rule is inconsistent with the doctrine of *mens rea*, it must be applied on the basis of strict liability. In spite of its name, however, statutory rape is a common law offense[31] involving a high degree

[27]EDWARDS, *supra* note 13, at 11, 245-251, refers to this as "implied malice" rather than "general intent." He criticises the theory as completely doing away with the requirement of *mens rea* because "the forbidden 'act' generally consists of a number of constituent elements, and secondly, that a wrong is intentional only when the intention extends to all the elements of the wrong."
Accord, SALMOND, JURISPRUDENCE 394 (7th ed. 1924):

> An act, and therefore a wrong, which is intended only in part, must be classed as unintended, just as a thing completed only in part is incomplete. If a constituent element or essential factor of the complete wrong falls outside the limits of the doer's intent, he cannot be dealt with on the footing of willful wrongdoing. If liability in such a case exists at all, it must be either absolute or based on negligence. A wrong is intentional only when the intention extends to all the elements of the wrong, and therefore to its circumstances no less than to its origin and its consequences.

[28]WILLIAMS, CRIMINAL LAW 185-199 (1961).

[29]R.C.M. 1947, § 94-4107 requires "open and notorious cohabitation, in a state of adultery or fornication." According to a MODEL PENAL CODE comment, *supra* note 17, at 204, eleven states have no fornication statutes, and only eighteen punish a single act of intercourse between unmarried persons (four of these by fine alone). The rest of the states require either a "continuous" or an "open and notorious" relationship, or both. The comment states that these laws are seldom enforced, and criticises them on the grounds that the state should not "attempt to control behavior that has no substantial significance except as to the morality of the actor."

[30]WILLIAMS, *supra* note 28.

[31]3 COKE, INSTITUTES *60 (1797): "Rape is a felony by the common law declared by parliament for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with her will, or against her will." Coke referred to the Act of 18 Eliz. c. 7, § 4, which provides that if any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, it shall be a felony without benefit of clergy.

of moral turpitude[32] and potentially large penalties.[33] These characteristics place the offense in the top portion of the criminal law continuum, requiring the application of the *mens rea* doctrine. By imposing strict liability in spite of this fact, the general rule has created a sui generis offense. This can be justified only by the above mentioned considerations of public policy and legislative intent.

A more desirable construction of legislative intent would favor the rule of the instant case. Before *Regina v. Prince*[34] the general rule was: "Where a statute creates a crime the intention of the legislature should be presumed to include the requirement of *mens rea* unless a contrary intention is shown."[35] There is a modern trend reviving this rule.[36] The general statutes incorporated into many codes require joint operation of act and intent and provide that ignorance of fact is a defense. These logically require proof of *mens rea* for all offenses except those in which the statute expressly negates the requirement.

Revised considerations of public policy also favor the rule of the instant case. The California Supreme Court in recent decisions has followed a modern policy trend which seeks to utilize the doctrine of *mens rea* to its fullest effect.[37] The court has said:

[32]Perkins, *supra* note 5, at 59: "There is no moral delinquency without a blameworthy state of mind, and hence if the purpose of the statute is to prevent conduct which would generally be regarded as morally wrong . . . . the element of *mens rea* will ordinarily be assumed to be included even if not mentioned in the enactment."

[33]R.C.M. 1947, § 94-4104 provides that statutory rape is subject to the same penalty as any other type of rape: imprisonment for not less than two nor more than ninety-nine years. The CAL. PEN. CODE § 264, as it applies to statutory rape provides that, at the discretion of the trier of fact, "the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years . . . ." Even under this statute the offense does not fit within the public welfare class because the accused is still subject to the possibility of a felony conviction. The collateral penalties of a felony conviction must also be considered. For a complete discussion see BRIGGS, LEGAL BARRIERS TO COMPETITION IN MONTANA 97-108 (1964). See also Sayer, *supra* note 12, at 84: "With respect to public welfare offenses involving light penalties the abandonment of the classic requirement of mens rea is probably a sound development. But the courts should scrupulously avoid extending the doctrine applicable to public welfare offenses to true crimes. To do so would sap the vitality of the criminal law." This article, like many similiar discussions, scrupulously excepts statutory rape from its consideration on the grounds that it is sui generis, and *mens rea* is justly not required because of public policy.

[34]*Supra* note 2.

[35]EDWARDS, *supra* note 13, at 58, 62. This rule was stated in the *Prince* case, *supra* note 2, at 162-163 (Brett, J., dissenting): "[I]t would seem that the ultimate proof necessary to authorize a conviction is not altered by the presence or absence of the word 'knowingly', though by its presence or absence the burden of proof is altered; and it would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind, or *mens rea*, in every offense really charged as a crime."

[36]EDWARDS, *supra* note 13 at 59, 246. This trend is reflected by the discussion in the instant case of *People v. Vogel*, *supra* note 14. Perkins, *supra* note 5, at 59, states that in determining whether a statute requires a showing of intent the court should consider the subject matter of the prohibition, the nature of the penalty, and the language of the statute. See also note 32 *supra*.

[37]The MODEL PENAL CODE § 2.02 (Proposed Official Draft, 1962) provides that except for certain "violations", "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently . . . with respect to each material element of the offense." Section 2.04 provides that ignorance or mistake is a defense if it negates all of these mental states.

> [T]his court has moved away from the imposition of criminal sanctions in the absence of culpability where the governing statute, by implication or otherwise, expresses no legislative intent or policy to be served by imposing strict liability.[38]

This policy is also evident in the recently revised Illinois criminal code. It distinguishes between statutory rape as a felony, to which a reasonable belief that the girl was over the statutory age is an affirmative defense,[39] and as a misdemeanor, to which reasonable belief is no defense.[40] A comment after the felony provision states that this distinction is "consistent with the policy of the code to abandon absolute liability in felony offenses."

There has also been a re-evaluation of the public policy considerations specifically relating to the offense of statutory rape. The instant case and a comment in the Illinois Annotated Statutes[41] cite Ploscowe's treatise, *Sex and the Law,* to the effect that placing the burden of the risk on the defendant was just when the statutory age was ten. It is much less just when the age is raised to eighteen, and the man making the mistake is neither abnormal nor socially dangerous.[42] The rule of the instant case is consistent with this argument. There could be no reasonable belief that a girl is over the statutory age when her actual age is less than thirteen or fourteen years.

It is submitted that the general rule should be discarded in favor of that declared by the instant case: a reasonable belief that the prosecutrix is above the statutory age is an affirmative defense to the charge of statutory rape. This rule is required by the *mens rea* doctrine and is based on a more reasonable conception of the public policies of contemporary society.

The most desirable way to implement the rule of the instant case would be by legislative enactment. In view of the highly controversial nature of the subject matter, this method will be difficult for most legislatures. Two states which have recently revised their criminal codes, Wisconsin in 1958 and Minnesota in 1963, have gone out of their way to

[38]Instant case, at 675. See this case for further citations.

[39]ILL. ANN. STAT. ch. 38, § 11-4 (Smith-Hurd 1961). This statute carries a penalty of imprisonment in the penitentiary from one to twenty years. Section 3-2 of this chapter defines "affirmative defense" as a defense which is not an issue until the defendant introduces some evidence thereon. Once the issue is raised "the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense."

[40]ILL. ANN. STAT. ch. 38, § 11-5 (Smith-Hurd 1961). The penalty for this is a fine of not over $1,000, or imprisonment for less than one year, or both.

[41]ILL. ANN. STAT. ch. 38, § 11-4, comment (Smith-Hurd 1961).

[42]PLOSCOWE, SEX AND THE LAW 184-185 (1951). The MODEL PENAL CODE comment, *supra* note 17, at 250, lists ten jurisdictions as probably maintaining the common law ten year old requirement, eleven jurisdictions as raising it to twelve years, two to thirteen years, five to fourteen years, fourteen to sixteen years, and twelve to eighteen years. The comment states that a reasonable belief that the girl is over sixteen is a complete defense because "pursuit of females who appear to be over sixteen betokens no abnormality but only a defiance of religious and social conventions which appear to be fairly widely disregarded."

support the general rule.[43] The Model Penal Code[44] contains the most liberal approach to this problem yet suggested, but it has not been adopted in any jurisdiction.

However, three jurisdictions have adopted statutes representing approaches preferable to the general rule. Kentucky has adopted a provision so qualified that its effect on the general rule will be very slight.[45] The Illinois statutes will restrict the harshness of the general rule to a much greater extent.[46] The fact that mistake is no defense under the misdemeanor section is somewhat justifiable because the light penalty imposed brings the offense closer to the public welfare exception. However, even this penalty may be more than that contemplated by a satisfactory definition of a public welfare offense.[47] England, by setting a low statutory age, and by making the offense a misdemeanor to which mistake is a defense in some circumstances, has enacted the most satisfactory statute.[48]

It will without doubt be some time before a legislature is able to enact a statute which will fully conform to the requirements of the theory of *mens rea* and the reasonable exigencies of public policy. Such a statute may be drafted in any one of three ways:

1. By lowering the statutory age sufficiently to make strict liability justifiable by reasonable public policy considerations;[49]

[43]The Wisconsin law dealing with statutory rape does not mention a requirement of criminal intent, and a general statute dealing with *mens rea* leaves no doubt that the general rule of statutory rape is to remain in effect in the state. WIS. STAT. ANN. § 939.23 (1) (1958), provides that if criminal intent is to be an element in a given crime, it is so designated in the statute dealing with that crime. Subdivision 6 states that "criminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question." Minnesota has the same two provisions. See MINN. STAT. ANN. § 609.02 (1963).

[44]MODEL PENAL CODE, *supra* note 42, at § 213.6 (1):

> Whenever in this Article the criminality of conduct depends upon a child's being below the age of ten, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than ten. When criminality depends upon the child's being below a critical age other than ten, it is a defense for the actor to prove that he reasonably believed the child to be above the critical age.

[45]KY. REV. STAT. § 435.100 (3) (Supp. 1963): "When the complaining witness is over the age of sixteen years and the defendant is under twenty-one, testimony may be heard in aggravation or mitigation of the charge."

[46]ILL. ANN. STAT. ch. 38, §§ 11-4, 11-5 (Smith-Hurd 1961). See notes 40 and 41 *supra*.

[47]See Sayre, *supra* note 12.

[48]Sexual Offenses Act, 1956, 4 & 5 Eliz. 2, c. 69, §§ 5, 6, and sch. 2. Section 5 provides: "It is a felony for a man to have unlawful sexual intercourse with a girl under the age of thirteen." Section 6(1) states: "It is an offense, subject to the exceptions mentioned in this section, for a man to have unlawful sexual intercourse with a girl not under the age of thirteen but under the age of sixteen." Section 6(3) states: "A man is not guilty of an offense under this section because he has unlawful sexual intercourse with a girl under the age of sixteen, if he is under the age of twenty-four and has not previously been charged with a like offense, and he believes her to be of the age of sixteen or over and has reasonable cause for this belief."
Schedule 2 of this act provides that the maximum penalty for a conviction under section 5 if life imprisonment, and that a conviction under section 6 carries a maximum penalty of two years imprisonment.

[49]The MODEL PENAL CODE sets this age at ten. See *supra* note 44. The age would have to be low enough (*e.g.*, 14 at most) so that absolute liability could be justified on the basis of real physical and psychological dangers to the girl.

2. By providing that a reasonable mistake is an affirmative defense when the age of the prosecutrix is in fact above a set minimal age;

3. By reducing the penalty sufficiently to make strict liability clearly justifiable under the theory of the public welfare offense.[50]

The hesitancy on the part of the legislatures to act on this question indicates that the more efficacious way to accomplish the change would be by court decision. This is particularly true in states like Montana which have general statutes applying the doctrine of *mens rea* to all criminal offenses. These statutes should be considered as legislative mandates to the courts requiring that ignorance be considered a defense in statutory rape. Because California law is strong secondary authority in Montana,[51] and because Montana has no binding judicial precedent upholding the general rule, such a decision could be made with relative ease by the Montana Supreme Court.

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[50]This is the least desirable of the alternatives. Statutory rape will not fit smoothly within the public welfare class because it is a common law offense involving moral turpitude. A fine at the maximum would conform to the low penalty requirement, but only at the cost of the deterrent and punitive objectives of the legislature.

[51]This is because Montana adopted the Field Code from California, and the statutes governing this problem are substantially the same in both states. See *supra* note 1.