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Reasonable Mistake of Age: A Needed Defense to Statutory Rape

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REASONABLE MISTAKE OF AGE: A NEEDED DEFENSE TO STATUTORY RAPE

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[T]o a defence that the accused had no idea and knew nothing about it . . . the Mikado replied: "That's the pathetic part of it. Unfortunately, the fool of an Act says . . . not a word about a mistake, or not knowing, or having no notion . . . . There should be, of course, but there isn't. That's the slovenly way in which these Acts are drawn."

GILBERT & SULLIVAN, *The Mikado*

I. STRICT LIABILITY: A CASE OF MISGUIDED MORALITY

THE time has come for more liberal and realistic laws regarding statutory rape. Men of literature have historically recognized that corporal appearances are not necessarily a precise index of the age of their bearer and that it is a natural inclination for youths to strive to appear older than they are and to pursue activities generally thought to be beyond the capacity of persons in their particular age group.[1] More recently, behavioral scientists have confirmed these facts of life.[2] Thus, notwithstanding the relatively close correlation between a person's physical age and his level of sophistication, these social realities indicate that the selection of any particular "age of consent" in statutory rape laws must necessarily be an arbitrary determination and, therefore, susceptible to reasonable mistakes of fact. Nevertheless, evidence to this effect has traditionally been rejected by the courts, and the nearly uniform holding, in cases involving statutory rape, has been that mistake as to the age of the female is no defense,[3] regardless of the honesty and reasonableness of the mistaken belief.[4]

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1. "When we are young, we long to tread a way none trod before." YEATS, THE LAND OF HEART'S DESIRE; "Youth is wholly experimental." STEVENSON, A LETTER TO A YOUNG GENTLEMAN; "My salad days, when I was green in judgment." SHAKESPEARE, ANTONY AND CLEOPATRA, Act 1, Scene 5, Line 73; "When the brisk minor pants for twenty-one." POPE, EPISTLE 1, Book 1, Line 38; "This age of ours should not be numbered by years, dates, and hours." GUILLAUME DE SALLUSTE, DIVINE WEEKS AND WORKS, Second Week, Fourth Day, Book 2; "Old time is a liar. . . . Young men are fitter to invent than to judge, fitter for execution than for counsel. . . ." HOLMES, THE BOYS.

2. See KINSEY INSTITUTE FOR SEX RESEARCH, SEX OFFENDERS 83-85 (1965) [hereinafter cited as SEX OFFENDERS].

3. See, *e.g.*, United States v. Crimmins, 123 F.2d 273 (2d Cir. 1941); United States v. Mack, 112 F.2d 290 (2d Cir. 1940); Manship v. People, 99 Colo. 1, 58 P.2d 1215 (1936); Simmons v. State, 151 Fla. 778, 10 So. 2d 436 (1942); State v. Duncan, 82 Mont. 170, 266 Pac. 400 (1928); State v. Wade, 224 N.C. 760, 32 S.E.2d 314 (1945); Reid v. State, 290 P.2d 775 (Okla. Crim. 1955); Commonwealth v. Sarricks, 161 Pa. Super. 577, 56 A.2d 323 (1948); Smith v. State, 160 Tex. Crim. 438, 272 S.W.2d 104 (1954); State v. Adkins, 106 W. Va. 658, 146 S.E. 732 (1929).

4. Miller v. State, 16 Ala. App. 534, 79 So. 314 (1918); People v. Marks, 146 App. Div. 11, 130 N.Y.S. 524 (1911).

This unfortunate result has prevailed despite the fact that the defendant's judgment regarding the age of the prosecutrix frequently appears to be warranted by her appearance,[5] her verbal misrepresentations,[6] the environmental facts,[7] or even the defendant's careful and diligent attempts to ascertain her true age.[8] On grounds of public policy, coitus with any under-age female has been deemed punishable without proof that the defendant knew the facts which gave to his act the character of statutory rape. The element of criminal intent, although technically not eliminated, has been deemed to be embodied in the defendant's decision to proceed "at his peril."[9] This irrational doctrine is now so generally accepted that many American courts have not been asked to rule on the question of reasonable mistake of age for over half a century.[10] Moreover, recent decisions by the highest tribunals of Alaska and Hawaii have reaffirmed the dogmatic judicial adherence to the doctrine.[11]

It is important to note, however, that the treatment of this important issue in American law is in sharp contrast to its treatment in European law, which has long and steadfastly upheld mistake of age as a defense to statutory rape.[12] Indeed, even the suggestion of strict liability in the area of statutory rape has occasioned the vociferous and continued criticism of Continental analysts and legal philosophers.[13] The imposition of criminal sanctions in the absence of any

5. People v. Gengels, 218 Mich. 632, 188 N.W. 398 (1922); Elkins v. State, 167 Tenn. 546, 72 S.W.2d 550 (1934); Greene v. State, 101 Tex. Crim. 52, 273 S.W. 853 (1925).

6. People v. Lewellyn, 314 Ill. 106, 145 N.E. 289 (1924); Heath v. State, 173 Ind. 296, 90 N.E. 310 (1910); Farrell v. State, 152 Tex. Crim. 488, 215 S.W.2d 625 (1948); Zachary v. State, 57 Tex. Crim. 179, 122 S.W. 289 (1909).

7. State v. Burns, 82 Conn. 213, 72 Atl. 1083 (1909); State v. Duncan, 82 Mont. 170, 226 Pac. 400 (1928); State v. Snow, 252 S.W. 629 (Mo. 1923); State v. Rash, 27 S.D. 185, 130 N.W. 91 (1911).

8. Manning v. State, 43 Tex. Crim. 302, 65 S.W. 920 (1901).

9. Askew v. State, 118 So. 2d 219 (Fla. 1960). See also BISHOP, STATUTORY CRIMES § 490 (2d ed. 1883): "His intent to violate the laws of morality and the good order of society, though with the consent of the girl, and though in a case where he supposes he shall escape punishment, satisfies the demands of the law, and he must take the consequences."

10. The following representative decisions reveal the antiquity of this rule: Heath v. State, 173 Ind. 296, 90 N.E. 310 (1909); State v. Sherman, 106 Iowa 684, 77 N.W. 461 (1898); Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892); Zent v. State, 3 Ohio App. 473 (1914); Lawrence v. Commonwealth, 71 Va. (30 Grat.) 845 (1878); Herman v. State, 73 Wis. 248, 41 N.W. 171 (1888).

11. Anderson v. State, 384 P.2d 669 (Alaska 1963); Hawaii v. Santos, 42 Hawaii 102 (1957).

12. See, *e.g.*, DANISH CRIMINAL CODE OF 1958, §§ 222, 223; GERMAN PENAL CODE OF 1871, § 182; FRENCH PENAL CODE OF 1957, § 65; NORWEGIAN PENAL CODE OF 1902, § 196 (1961 amend.); SWEDISH PENAL CODE, Ch. 18, §§ 7, 8.

13. See Mannheim, *Mens Rea in German and English Criminal Law*, 17 J. COMP. LEG. & INT'L L. 82 (1935). See also Nelson, *Sexual Offences and Sexual Offenders in Denmark;* Andenaes, *Norwegian Legislation and Practice Concerning Sexual Offences;*

criminal mental element has likewise been attacked in England as incompatible with the basic requirements of civilized and realistic jurisprudence.[14] One prominent English authority even urges that *unreasonable* mistake should be allowed as a defense, subject of course to the jury's rejection.[15] Several eminent authorities in the Union of South Africa argue that unreasonable mistake does, in fact, already exist as a defense to statutory rape.[16]

American text writers and commentators have generally been impressed with the views of their European counterparts, notwithstanding the near unanimity of American courts in rejecting those views. The most active and insistent American critic denounces the notion of strict liability in statutory rape as "anathema to the coherent development of a rational criminal law,"[17] and he feels that "it is obvious that sexual morality has overridden established principles of criminal law."[18] Another noted authority has described this harsh rule as being "hideous" in its operation and effect.[19] Indeed, American legal scholars are almost unanimous in urging the adoption of at least reasonable mistake of age as a defense.[20] Thus, the draftsmen of the Model Penal Code have made reasonable mistake of age a specific defense to statutory rape and have emphasized in the comments that the Code's provisions for culpability make a "frontal attack" upon the notion of absolute liability.[21]

Against this background of conflict, the first dramatic breakthrough in the judicial treatment of statutory rape finally came in 1964 in the case of *People v. Hernandez*.[22] The defendant and the

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Rudholm, *Swedish Legislation and Practice Concerning Sexual Offences*, in SEXUAL OFFENCES (Cambridge Dept. of Criminal Science 1957).

14. WILLIAMS, CRIMINAL LAW 201-05 (2d ed. 1961).

15. KENNY, CRIMINAL LAW 54 (18th ed. Turner 1962).

16. DEWET AND SWANEPOEL, DIE SUIDAFRIKAANSE STRAFREG 129-30 (2d ed. 1960); Burchell, *Unreasonable Mistake of Fact as a Defence in Criminal Law*, 80 SO. AFRICAN L.J. 40 (1963).

17. HALL, CRIMINAL LAW 304 (1947). See also Hart, *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROB. 422 (1958).

18. CLARK & MARSHALL, CRIMINAL LAW § 510 (6th ed. 1958); HALL, CRIMINAL LAW 201-05, 366 (2d ed. 1960).

19. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 37 (1961).

20. MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 756 (1940). *Cf.* PERKINS, CRIMINAL LAW 127 (1957), apparently the lone dissent among American commentators.

21. MODEL PENAL CODE § 213.6(1) (Proposed Official Draft, 1962); § 2.05, comments (Tent. Draft No. 4, 1955).

22. 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964). The significance of the decision is apparent from the attention it has received in the law reviews. See, *e.g.*, 17 ALA. L. REV. 101 (1964); 14 CATH. U.L. REV. 123 (1965); 33 GEO. WASH. L. REV. 588; 53 GEO. L.J. 506 (1965); 78 HARV. L. REV. 1257 (1965); 17 STAN. L. REV. 309 (1965); 16 SYRACUSE L. REV. 148 (1964); 67 W. VA. L. REV. 149 (1965). It should also be noted that United States military courts hold that reasonable mistake as to whether consent

prosecutrix had been companions for several months prior to having consensual intercourse; at the time of the incident in question, the prosecutrix was a mere three months below the statutory age of consent.[23] Defendant sought to introduce evidence to show that the prosecutrix had misled him into believing that she was over the requisite age, but the trial court rejected this evidence and convicted him of statutory rape. The California Supreme Court unanimously reversed the conviction and overruled sixty-eight years of precedent[24] by its holding that proof of the defendant's reasonable belief that the prosecutrix had reached the age of consent could form a sufficient basis upon which the trier of facts could find in the defendant's favor.[25]

Hernandez represents the first positive judicial step toward changing the irrational rules which currently control the crime of statutory rape, and its import should furnish a touchstone for the future development of the law of all sex crimes. In the brief period since the *Hernandez* decision was handed down it has been reaffirmed by its authors,[26] and the legislatures in two other states have enacted statutes which embrace its sound reasoning.[27] However, at least one state has evidenced an intent to follow the traditional judicial approach of imposing strict liability, notwithstanding the defendant's reasonable mistake with respect to the true age of the prosecutrix.[28] Thus, the following analysis is offered to encourage continued acceptance of the *Hernandez* rationale and, it is hoped, to forestall any further retrogression.

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had been obtained is a good defense to a charge of assault with intent to commit *forcible* rape. United States v. Short, 4 U.S.C.M.A. 437, 16 C.M.R. 11 (1954). See the U.S. MANUAL FOR COURTS-MARTIAL § 154 (3), at 295 (1951).

23. CAL. PEN. CODE § 261 sets the age of consent at eighteen.

24. The decisions in People v. Griffin, 117 Cal. 583, 49 Pac. 711 (1897), and People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896), were overruled. Similarly, People v. Sheffield, 9 Cal. App. 130, 98 Pac. 67 (Ct. App. 1908), was disapproved to the extent that the decision is inconsistent with *Hernandez*.

25. The defendant relied upon the general penal code provision that "there must exist a union, or joint operation of act and intent, or criminal negligence" to constitute the commission of a crime. CAL. PEN. CODE § 20. He further relied upon a provision that one is not capable of committing a crime if the act in question was performed under ignorance or mistake of fact which disproves any criminal intent. CAL. PEN. CODE § 26. Thus, the sole issue on appeal focused upon the question of intent and knowledge entertained by the defendant at the time of the incident.

26. See People v. Nigri, 232 Cal. App. 2d 419, 42 Cal. Rptr. 679 (1965), in which the prosecutrix had testified at the preliminary hearing that she had told the defendant she was eighteen.

27. ILL. ANN. STAT. ch. 38, § 11-4(b)(1) (Smith-Hurd 1964); N. M. STAT. ANN. § 40A-9-3 (Supp. 1964).

28. See State v. Ybarra, 386 S.W.2d 384, 386 (Mo. 1965): "It may be noted in passing that age is the essential element in statutory rape and intent and motive play but little if any part in the substantive offense" (quoting from State v. Baker, 276 S.W.2d 131 (Mo. 1955)).

II. Statutory Construction and the Mens Rea Requirement

A. *Historical Derivation of the Doctrine*

Anglo-American courts have traditionally held that in criminal cases "the mental is fundamental."[29] Thus, the perpetrator of an otherwise criminal act will not be punished unless he has a so-called "guilty" or "criminal" mind.[30] Under Roman law, *dolus* (evil intent) and *culpa* (negligence) were the subspecies of this criminal state of mind, and the maxim, *actus non facit reum, nisi mens sit rea,* was the outgrowth of an endeavor "to capture this theory of responsibility, resting upon and requiring concurrence of a wrongful intent and wrongful act."[31] This early concept of *mens rea,* the guilty mind, expressed the principle that it is not anti-social conduct alone, but rather such conduct accompanied by certain mental states, which should concern the law.

The maxim, *ignoranti facti excusat* (ignorance of fact excuses), represents a precept recognized at common law as a defense aimed at demonstrating a lack of *mens rea.* Basically this defense rests upon a belief in the existence of facts which, if they did exist, would render an act innocent.[32] Thus, since criminal intent is ordinarily of the essence of crime, if in any particular case this requisite intent is dependent upon knowledge of particular facts, an absence of such knowledge not resulting from carelessness or negligence relieves the act of criminality.[33]

Sound legal theory similarly negates a conclusive presumption of criminal intent in statutory rape legislation. Under very early English common law, it was no crime to have consensual sexual relations with a female, regardless of her age. Only forcible rape was considered a crime.[34] It was not until the latter part of the thirteenth century that legislation was enacted making it unlawful in England to ravish

29. Nord, *The Mental Element in Crime,* 37 U. Det. L.J. 671 (1960).

30. Clark & Marshall, *op. cit. supra* note 18, at 232; Keedy, *Ignorance and Mistake in the Criminal Law,* 22 Harv. L. Rev. 75 (1908).

31. Morisette v. United States, 342 U.S. 246 (1952). More recent Supreme Court decisions increasingly stress the need for the actor's mental awareness of his wrong before guilt can be imposed. See Robinson v. California, 372 U.S. 952 (1962).

32. Clark & Marshall, *op. cit. supra* note 18, at 288; Hall, *Ignorance and Mistake in Criminal Law,* 33 Ind. L.J. 1 (1957); Mueller, *On Common Law Mens Rea,* 42 Minn. L. Rev. 1043 (1958); Perkins, *Ignorance and Mistake in Criminal Law,* 88 U. Pa. L. Rev. 35 (1939); Woodruff, *Mistake of Fact as a Defense,* 63 Dick. L. Rev. 319 (1959). English courts have recognized mistake of fact as a defense in criminal prosecutions since 1638. Levitt's Case, reported in Cook's Case, Cro. Car. 537, 538, 79 Eng. Rep. 1063, 1064 (K.B. 1639).

33. Gordon v. State, 52 Ala. 308 (1875); State v. O'Neil, 147 Iowa 513, 126 N.W. 454 (1910).

34. 4 Blackstone's Commentaries *210; 2 Coke, Institutes *180.

"damsels" with or without their consent.[35] This early statute avoided the incongruity of attaching the label "rape" to acts of consensual intercourse; instead, the proscribed conduct was more appropriately referred to as "unlawful carnal knowledge and abuse" of "any Maiden within Age," the age being twelve years or under.[36] Toward the close of the sixteenth century, the age of consent was reduced to ten years.[37] This latter statute also incorporated the language, "unlawful carnal knowledge and abuse," and its purpose, like that of the earlier statute, was to declare that a girl under the prescribed age was conclusively presumed to be unable to consent since she was too young to understand the nature and quality of her act.[38]

Throughout this development, however, it is important to bear in mind that there was no presumption eliminating the defense of mistake of fact or modifying the *mens rea* requirement.[39] In fact, although mistake as to the age of an abduction victim was rejected in the landmark case of *Regina v. Prince*,[40] reasonable mistake of age has never been denied as a defense in an English statutory rape case. Moreover, *Prince* was overruled by statute a scant ten years after rendition,[41] and the statute currently in force in England expressly provides that mistake of fact is a defense in both abduction and statutory rape where the girl is over thirteen years of age and the man is under twenty-four and has not been previously charged with a like offense.[42]

B. *Reaction of American Courts*

The English statute of 1576 which redefined the crime of statutory rape has been held to be part of the common law originally brought to the United States.[43] Even though all of the states have modified the original ten-year age of consent to a variety of ages from

35. The crime commonly called statutory rape was created by the Statute of Westminister I, 3 Edw. 1, c. 34 (1275), which reduced the crime of rape to a trespass. The Statute of Westminister III, 13 Edw. 1, c. 34 (1285), reinstated the crime of rape as a felony.

36. 4 BLACKSTONE, COMMENTARIES *212.

37. The Common Informers Act, 18 Eliz., c. 7 (1576).

38. People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896); State v. Burns, 82 Conn. 213, 72 Atl. 1083 (1909); Golden v. Commonwealth, 289 Ky. 379, 158 S.W.2d 967 (1942); State v. Huntsman, 204 P.2d 448 (Utah 1949).

39. See generally HALL, CRIMINAL LAW 287 n.27, 292-93, 339-41 (1947).

40. L.R. 2 Cr. Cas. Res. 154 (1875). In this celebrated case, defendant took an unmarried, underage girl from the possession of her father without his consent. Defendant's honest belief as to the girl's age, even though based upon reasonable grounds, did not relieve him from the consequences of his act.

41. Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, §§ 5 (1)-(2).

42. Sexual Offences Act, 1956, 4 & 5 Eliz. 2, c. 69.

43. Nider v. Commonwealth, 140 Ky. 684, 689, 131 S.W. 1024, 1026 (1910).

seven to twenty-one,[44] the offense aimed at is virtually identical. However, despite adoption of the common-law statute, which was never held by English courts to deny the existence of reasonable mistake of fact as a defense, American courts have not allowed that defense. They have instead accepted the denial of such a defense in *Prince*, an abduction case, and by analogy have extended it to statutory rape.[45] Despite having been soon overruled, *Prince* initiated a trend which was universally followed in American jurisdictions for the next eighty-nine years; statutory rape in America thus fell into a class of cases at variance with the reasonable-mistake-of-fact doctrine.[46] That American law has for so long constituted an exception to the general rule is an unjustified quirk of legal history; only *Hernandez* is in accord with the common-law notion of allowing a bona fide error in judgment.

Prior to an examination of the factors indicating that American courts are operating without a sound foundation when they deny mistake of age as a defense to a charge of statutory rape, the following observation should be made. A state legislature has the power to define conduct as criminal, irrespective of guilty knowledge and no matter how sincere or reasonable the actor's mistaken belief may be.[47] That is, the legislature may define a crime in such a manner as to make immaterial the existence or non-existence of a mental element;[48] in crimes so defined, mistake of fact is no defense.[49] In the specific area of statutory rape, a few legislatures have exercised this prerogative to impose strict liability upon an actor.[50] In contrast, two other states have recently provided for mistake of age as a defense.[51] In these jurisdictions there is no problem of construction—the courts simply follow the legislative mandate.

In the vast majority of jurisdictions, however, the legislative pro-

44. MODEL PENAL CODE § 207(4), comment (Tent. Draft No. 4, 1955); seven years: one state; twelve years: two states; fourteen years: one state; sixteen years: twenty-three states; seventeen years: one state; eighteen years: twenty-one states; twenty-one years: one state. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 74-80 (1961); MODEL PENAL CODE § 213.1(1)(d) (Proposed Official Draft, 1962) retains the ten-year age of consent. However, this statute is supplemented by the Corruption of Minors and Seduction statute which proscribes intercourse with girls under sixteen if the male is at least four years older than the girl. *Id.* § 213.3.

45. See notes 3-8 *supra.*

46. See notes 4-8 *supra.*

47. State v. Williams, 115 N.E.2d 36 (Ohio 1952).

48. Smith v. State, 223 Ala. 346, 136 So. 270 (1931); *In re* Marley, 29 Cal. 2d 525, 175 P.2d 832 (1946); State v. Weisberg, 74 Ohio App. 91, 55 N.E.2d 870 (1943).

49. Commonwealth v. Emmons, 98 Mass. 6 (1867); State v. Kelly, 54 Ohio St. 166, 43 N.E. 163 (1896); Garver v. Territory, 5 Okla. 342, 49 Pac. 470 (1897).

50. LA. REV. STAT. ANN. § 14:42 (3) (1950); MINN. STAT. ANN. § 609.02-(9) (b) (1964); WIS. STAT. ANN. § 939.43 (1959).

51. See note 27 *supra* and accompanying text.

hibitions against statutory rape are silent with respect to the question of *mens rea*; it is therefore necessary to turn to judicial rules of statutory construction to ascertain the legislative intent. The ultimate objective is to determine whether the intention of the legislature was to make knowledge of the facts an essential element of the offense or, on the other hand, to put upon the actor the burden of finding out whether his contemplated act is prohibited. In making this determination, the general rule is that the court will consider the nature of the offense, the purpose to be accomplished by the statute, the practical methods available for the enforcement of the law, and any other relevant factors.[52]

In statutes containing either a general mistake-of-fact section[53] or a general penal code provision requiring the joint operation of act and intent,[54] it is easy for courts to infuse the requirement of intent into all specific crimes not expressly prohibiting it.[55] Where, however, there are no such general guidelines, more subtle principles of statutory construction must be called upon. Notwithstanding decades of American judicial construction to the contrary with respect to statutory rape, the usual rule is that a statute restating a common-law crime should not be understood as having displaced a requirement of *mens rea* "unless the statute displacing it is, in its express words and necessary effect, plain and unequivocal."[56] As stated previously, most American statutory rape laws are devoid of such express "displacing" language.

When a statute dealing with a common-law crime is silent with respect to the actor's intent and if intent was an element of the crime at common law, as in the case of statutory rape, then the courts should assume that the common-law element of intent still exists.[57] In

52. See Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896); 15 AM. JUR. *Criminal Law* § 306 (1938).

53. CAL. PEN. CODE § 26(4); IDAHO CODE ANN. § 18.201(4) (1947); MONT. REV. CODE ANN. § 94.201(4) (1947); NEV. REV. STAT. § 194.010 (1957); N.D. CENT. CODE § 12-02-1(5) (1959); OKLA. STAT. tit. 21, § 152(5) (1961); S.D. CODE § 13.0201(5) (1939). The Wisconsin statute comes closest to stating this principle explicitly: "An honest error, whether of fact or law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime." WIS. STAT. ANN. § 939.43 (1958).

54. See CAL. PEN. CODE § 20.

55. This is in fact the rationale of *Hernandez*.

56. BISHOP, STATUTORY CRIMES 233 (1873). See also Armitage, *Statutory Offence—A Presumption of Mens Rea*, 1963 CAMBRIDGE L.J. 177; Endlich, *Doctrine of Mens Rea*, 13 CRIM. LAW. MAG. 831 (1891); Mueller, *Mens Rea and the Law Without It*, 58 W. VA. L. REV. 35 (1955). See also 53 GEO. L.J. 506, 509 n.16 (1965): "It has been contended that the 'necessary effect' of the statute requires the elimination of intent. See Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 74 (1933). Admittedly more statutory rapists would be punished by eliminating the element of intent from the crime, but if the 'necessary effect' of the statute required this, it would have been done long before 1875."

57. State v. Bigelow, 76 Ariz. 13, 258 P.2d 409 (1953).

construing a statute defining an offense which contains no additional elements not found in the common-law definition, a court is bound by the construction which existed with reference to the common-law offense.[58] The statutory rape laws have not created a new crime as a substitute for the common-law offense, so the general rules pertaining to common-law offenses should prevail over all other rules of construction. Intercourse with an underage female was a common-law felony, and, in the absence of legislative direction to the contrary, the courts must look to the common law for the description of the offense.[59] This suggestion is in keeping with the cardinal principle that criminal statutes are always to be strictly construed in favor of the defendant. It would take little effort on the part of legislatures to carve out express exceptions to the common-law rule that mistake of fact is a defense; it is arguable that their failure to do so indicates an intention not to restrict the mistake-of-fact doctrine in this area.[60]

C. *Public Welfare Offenses: An Exception to the General Rule*

It must be noted in this regard that there is a certain class of crimes—public welfare offenses—which are generally considered not to require proof of *mens rea.* This is a group of police offenses and criminal nuisances which have been developing in England and America within the last century and which are punishable irrespective of the actor's state of mind. They include illegal sales of intoxicating liquor, magazines, impure or adulterated food, and misbranded goods; narcotics act violations; violations of motor vehicle laws; and infractions of general police regulations designed to promote the safety, health or well-being of the community.[61] In the interpretation of these statutes, courts hold that if the legislature failed to include intent as an express element of the offense, then the legislature desired to dispense with the mental element,[62] especially if conviction does not result in great damage to reputation or severe punishment.[63] This widely accepted rule has long denied the defense of mistake of age in situations involving selling liquor to a minor,[64]

58. Ross v. State, 93 Pac. 299 (Wyo. 1908).

59. Warren v. Commonwealth, 253 S.W.2d 612 (Ky. 1952).

60. The author does not of course overlook the counter-argument that the inaction of the legislatures may indicate "ratification" of the courts' action in imposing strict liability for statutory rape.

61. See generally Sayre, *Public Welfare Offenses,* 33 COLUM. L. REV. 55, 84 (1933).

62. State v. Wojahn, 204 Ore. 84, 282 P.2d 675 (1955).

63. Hall, *Prolegomena to a Science of Criminal Law,* 89 U. PA. L. REV. 549, 568-69 (1941).

64. See Hershorn v. People, 108 Colo. 43, 113 P.2d 680 (1941); State v. Lougiotis,

selling lewd magazines to a minor,[65] allowing minors on certain premises,[66] and violating child labor laws.[67] It is the actual and not the apparent age which governs culpability, and such merchants and employers are, in effect, insurers of the fact that the person with whom they are dealing has attained majority.

However, the existence of strict liability in the public welfare offenses is not a persuasive argument in favor of strict liability for statutory rape. The underlying situations are not even analogous, because statutory rape cannot be considered a public welfare offense. In contrast to statutory rape, which descends from the common law, the public welfare offenses are *new* crimes, created solely by legislative enactments in the nature of police regulations. Moreover, these offenses are not strictly criminal, even though traditional criminal sanctions are relied upon, since the primary purpose of the legislature is neither punishment nor correction, but rather regulation.[68] In addition, there is actually no sound reason why public welfare offenses should be an exception to the general rules regarding reasonable mistake of fact. Recognizing this, some legislatures have seen fit to include provisions expressly or impliedly making ignorance or good faith a defense.[69] For this reason, new developments in the areas of the sale of liquor [70] and of magazines[71] allow reasonable mistake of

130 Conn. 372, 34 A.2d 777 (1943); Lavoie v. Committee of Law Enforcement, 87 Idaho 536, 394 P.2d 300 (1965); State v. Dahnke, 244 Iowa 599, 57 N.W.2d 553 (1953); State v. Koliche, 143 Me. 281, 61 A.2d 115 (1948); State v. Holm, 201 Minn. 53, 275 N.W. 401 (1937); State v. Paar, 129 Mont. 175, 283 P.2d 1086 (1955); Beverley Lanes v. Rohan, 209 N.Y.S.2d 98 (1961); Ross's Dairies v. Rohan, 202 N.Y.S.2d 807 (1961); Sheibar v. Liquor Authority, 166 N.Y.S.2d 394 (1958); Hanewald v. Board of Liquor Control, 101 Ohio App. 375, 136 N.E.2d 77 (1957); State v. Buttery, 95 Ohio App. 236, 118 N.E.2d 548 (1953); State v. Kominis, 73 Ohio App. 204, 55 N.E.2d 344 (1943); State v. Raper, 174 Ore. 252, 149 P.2d 165 (1944); Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959); State v. Schull, 66 S.D. 102, 279 N.W. 241 (1938); Christ v. Kiltz, 232 Wis. 567, 288 N.W. 175 (1939).

65. See People v. Lida, 42 Misc. 2d 56, 247 N.Y.S.2d 421 (1964).

66. See State v. Rosenfield, 111 Minn. 301, 126 N.W. 1068 (1910); People v. Voltana, 231 N.Y.S.2d 337 (1962); Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959); City of West Allis v. Megna, 26 Wis. 2d 545, 133 N.W.2d 252 (1965).

67. See Purtell v. Philadelphia & R. Coal & I. Co., 256 Ill. 110, 99 N.E. 899 (1912); Kendall v. State, 113 Ohio St. 111, 148 N.E. 367 (1925).

68. See Sayre, *supra* note 61, at 72-75.

69. People v. Averill, 179 Mich. 224, 146 N.W. 189 (1914); Aultfather v. State, 4 Ohio St. 467 (1855); Knoff v. Board of Liquor Control, 61 Ohio L. Abs. 563, 105 N.E.2d 673 (1951); Suta v. Board of Liquor Control, 88 Ohio App. 88, 94 N.E.2d 464 (1950).

70. See 5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control, 155 Cal. App. 2d 748, 318 P.2d 820 (1957); Trader Jon v. State Beverage Dept., 119 So. 2d 735 (Fla. App. 1960); Ross v. State, 116 Ind. 495, 19 N.E. 451 (1888); People v. Bronner, 145 Mich. 399, 108 N.W. 672 (1906); Laurino v. State, 81 N.J. Super. 220, 195 A.2d 306 (1963); Appeal of D. & R. Beer Distributors, 6 Pa. D. & C. 2d 761 (Luzerne County Ct. 1955).

71. See People v. Malinauskas, 110 N.Y.S.2d 314 (1952): A defendant charged with

fact as to the age of a minor. In these progressive jurisdictions, a seller may be exculpated if he can adequately demonstrate that he exercised due care in attempting to ascertain the age of the buyer before making the sale.[72]

D. *Offenses Involving Moral Turpitude: A Turning Point*

In addition to public welfare offenses, a second area of related crimes often cited by analogy to support strict liability in statutory rape is the group of sexual or marital offenses involving "moral turpitude." These statutory offenses, which have occasioned a thorough sifting of the question of the effect of ignorance or mistake of fact on criminal responsibility, include bigamy, adultery, abduction from parent or guardian of females under a certain age, or using such females for the purpose of prostitution, and conduct contributing to the delinquency of a minor. With regard to some of these, the courts have been greatly perplexed, and there is a conflict of authority in respect to several. Traditionally, several of these offenses have been regarded as exceptions to the mistake-of-fact doctrine. The primary components of this group are offenses such as adultery, bigamy, and indecent acts committed upon underage children. Generally, the legislative intent has not been clearly expressed in defining these crimes, and the courts have had to determine for themselves whether intent is a required element. Shortly after the turn of the century one court remarked:

> There appears to be no case decided by a competent tribunal, either in England or America . . . in which the court did not hold that the knowledge of the age of the young girl abducted or defiled, or received or harbored for defilement or prostitution, did not constitute an element or ingredient of the offense. Invariably, in such cases, it has been held that whoever committed the offense did it at his peril so far as the girl's age was concerned,

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selling liquor to minors could be convicted only if he sold to a minor who actually and apparently was under eighteen. The court distinguished this from statutory rape, which involves "dealing with one who is engaged in an act which is itself illicit, and not with one who is making a sale in the ordinary course of a legitimate business recognized and sanctioned as such by the state." See Dethfelson v. State Bd. of Equalization, 145 Cal. App. 2d 561, 303 P.2d 7 (1956); State v. Fahey, 21 Del. (5 Penne.) 585, 65 Atl. 260 (1904); Cohen v. Schott, 48 So. 2d 154 (Fla. 1950); Fehn v. State, 3 Ind. App. 568, 29 N.E. 1137 (1891).

72. See Reich v. State, 63 Ga. 616 (1879); Thibodeaux v. Sulphur, 140 So. 2d 49 (La. Ct. App. 1962); People v. Welch, 71 Mich. 548, 39 N.W. 747 (1888); Rochenstein's License, 19 Pa. Dist. 710 (1909); Feldman v. Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22 (1943); Liquor Control Bd. v. Duvall, 170 S.W.2d 820 (Tex. Crim. App. 1943); Smith v. State, 134 Tex. Crim. 259, 115 S.W.2d 412 (1938); State v. Constantine, 43 Wash. 102, 86 Pac. 384 (1906).

and that ignorance or mistake in respect to her age would constitute no defense. . . .[73]

Admittedly, there is much subsequent authority in favor of strict liability. For example, most courts consider that a woman's remarriage within seven years of her husband's disappearance is bigamous if he is still alive, even though her belief that he was dead is reasonable and well-founded.[74] Similarly, mistaken belief in the existence of a divorce has traditionally not been regarded as a defense.[75] These holdings are based primarily on the principle of statutory construction that since the legislature has fixed certain exemptions from a prosecution for bigamy, the courts cannot extend them to persons and situations not expressly exempted.

While this is still the majority view in this country, its influence is dwindling, and there is an increasing movement away from strict liability. Ever since the leading English case of *Regina v. Tolson*[76] held that a wife's honest and well-founded mistake of fact constituted a valid defense to a bigamy charge, an increasing number of American courts have taken the position that a mistaken belief in the death of the first spouse,[77] or belief in the validity of a divorce not in fact obtained,[78] constitutes a valid defense to bigamy. Even though bigamy was not a crime at common law,[79] these courts have nevertheless construed the statutes so that one is not guilty of bigamy if he has a bona fide and reasonable belief that facts existed that left him free to remarry.[80] Similarly, although the customary view has been that the defendant's ignorance of the fact that the other party was married is no defense to a prosecution for adultery,[81] several courts

73. Brown v. State, 23 Del. (7 Penne.) 159, 165, 74 Atl. 836, 838 (1909).

74. See Alexander v. United States, 136 F.2d 783, 784 (D.C. Cir. 1943); State v. Henke, 58 Iowa 457, 12 N.W. 477 (1882); Rose v. Rose, 274 Ky. 208, 118 S.W.2d 529 (1938); Commonwealth v. Thompson, 93 Mass. (11 Allen) 23 (1865); Commonwealth v. Mash, 48 Mass. (7 Met.) 472 (1844).

75. See Ellison v. State, 100 Fla. 736, 129 So. 887 (1930); People v. Spoor, 235 Ill. 230, 85 N.E. 207 (1908); Braun v. State, 230 Md. 82, 185 A.2d 905 (1962); State v. Trainer, 232 Mo. 240, 134 S.W. 528 (1948); Duncan v. State, 23 Okla. Crim. 321, 214 Pac. 937 (1923); Manahan v. State, 188 Tenn. 394, 219 S.W.2d 900 (1910); State v. Hendrickson, 67 Utah 15, 245 Pac. 375 (1926); Rex v. Wheat, [1921] 2 K.B. 119 (CCA).

76. 23 Q.B.D. 168 (1889).

77. See Long v. State, 44 Del. 262, 65 A.2d 489 (1949); Bruton v. State, 100 Fla. 139, 129 So. 339 (1930); State v. DeMeo, 20 N.J. 1, 118 A.2d 1 (1955); Hainis v. State, 16 Ohio C.C.R. (n.s.) 443, 31 Ohio C.C. Dec. 619 (1906).

78. See People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956); Robinson v. State, 6 Ga. App. 696, 65 S.E. 792 (1909); Squire v. State, 46 Ind. 459 (1874); State v. Cain, 106 La. 708, 31 So. 300 (1902); Chapman v. State, 77 Tex. Crim. 591, 179 S.W. 570 (1915); Jones v. State, 73 Tex. Crim. 152, 165 S.W. 144 (1914).

79. See State v. Sellers, 140 S.C. 66, 134 S.E. 873 (1926).

80. See People v. Palmer, 35 Cal. Rptr. 476 (Dist. Ct. App. 1963); Reed v. State, 148 Tex. Crim. 409, 187 S.W.2d 660 (1945).

81. See Commonwealth v. Elwell, 43 Mass. (2 Met.) 190 (1840); People v. Hess, 286

have more recently held intent to be a necessary element of this crime.[82] When one person in good faith marries another believing the other to be unmarried, it is likewise not per se adultery.[83] Thus, in these jurisdictions the mere specification of certain defenses in bigamy and adultery statutes does not exclude the additional defense of mistake of fact.[84]

The judicial treatment of abduction cases is somewhat more complex. As mentioned above, an early English decision held that a male had to take his chances with respect to a girl's age—if he made a mistake, he had to bear the consequences.[85] This doctrine, although subsequently overruled in England,[86] had already taken root in the United States.[87] Some statutory definitions specified a maximum age for the victim; in the absence of any express provision as to age, statutes were construed to require that the girl be under twenty-one.[88] Although the defense of mistake of age has not even been raised in an abduction case for almost half a century, generally where a particular fact, such as age, is an element of this crime, it is no defense that the perpetrator was unaware of the existence of that fact.[89] The essential criminal intent is deemed included in the mere doing of the prohibited act.[90]

Where the statute requires knowledge by the accused of the female's age, however, this knowledge is an essential element of the offense.[91] Even in the absence of such legislative direction, several courts have allowed as a defense the honest belief that the girl was over the statutory age.[92] The juries in these cases have been permitted

App. Div. 617, 141 N.Y.S.2d 804 (1955); State v. Cutshall, 109 N.C. 550, 14 S.E. 107 (1891); Commissioner v. Dolph, 164 Pa. Super. 415 (1949).

82. See San Chez v. Superior Court, 153 Cal. App. 2d 146, 314 P.2d 135 (1957); People v. Lipski, 328 Mich. 194, 43 N.W.2d 325 (1950); Karchner v. Mumie, 398 Pa. 13, 156 A.2d 537 (1959).

83. See Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956).

84. See Long v. State, 44 Del. 262, 65 A.2d 489 (1949). *Cf.* Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 413 (1934).

85. Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875).

86. See note 41 *supra* and accompanying text.

87. See State v. Ruhl, 8 Iowa 447 (1859); BISHOP, STATUTORY CRIMES § 632 (3d ed. 1901).

88. See Boyett v. State, 130 Ala. 77, 30 So. 475 (1900); Whaley v. State, 187 Tenn. 507, 216 S.W.2d 17 (1948).

89. See People v. Dolan, 96 Cal. 315, 31 Pac. 107 (1892); People v. Fowler, 88 Cal. 136, 25 Pac. 1110 (1891) (now in doubt due to *Hernandez*); State v. Jones, 16 Kan. 608 (1876); Howell v. Commissioner, 5 Ky. L. Rep. 174, 12 Ky. Op. 199 (1883); Riley v. State, 18 So. 117 (Miss. 1895); State v. Baldwin, 214 Mo. 290, 113 S.W. 1123 (1908); People v. Stott, 4 N.Y. Crim. 306, *aff'd*, 5 N.Y. Crim. 61 (1886); Lopez v. State, 70 Tex. Crim. 71, 156 S.W. 217 (1913).

90. State v. Locoshus, 96 N.H. 76, 70 A.2d 203 (1950).

91. See Herman v. State, 73 Wis. 248, 41 N.W. 171 (1888).

92. See, *e.g.*, State v. Suennen, 36 Idaho 219, 209 Pac. 1072 (1922); People v. Ragone,

to arrive at the apparent age of the female by a consideration of her appearance and other relevant evidence.[93] Thus, these courts uphold the common-law presumption that *mens rea* is a prerequisite to guilt, unless the particular statute involved has either expressly or by necessary implication dispensed with this basic requirement.

Finally, it should be emphasized that the weight of authority in recent cases involving the charge of contributing to the delinquency of a minor favors allowance of the defense of reasonable mistake of age. Although a few courts are still of the opinion that such statutes make the act criminal irrespective of guilty knowledge,[94] the trend is definitely toward exculpating the defendant who can show that the offense took place under a misconception as to the minor's true age.[95]

This trend, coupled with the aforementioned weakening of strict liability in other related areas, seems to point toward a serious reappraisal by forward-looking courts of the merits of strict liability in areas in which the doctrine has been regarded as impregnable.[96] The law has been presumed settled in these areas for decades, but the mistake-of-age defense may be revitalized shortly in many states in various situations to which it has traditionally been held inapplicable. Several courts have recently moved away from imposition of criminal sanctions in the absence of culpability where the governing statute expresses no legislative intent or policy to be served by imposing strict liability. If a legislature desires to eliminate intent as an element of a particular crime, it is no great burden to demand that this purpose be expressly stated in the statute. In contrast, however, it is a great burden upon defendants for courts not to read in a requirement of *mens rea* when the legislature has failed to express its wishes. It is only logical to conclude, as did the court in *Hernandez*, that "in the

54 App. Div. 498, 15 N.Y. Crim. 192, 67 N.Y. Supp. 23 (1900); Mason v. State, 29 Tex. Civ. App. 24, 14 S.W. 71 (1890).

93. See People v. Ragone, *supra* note 92.

94. See State v. Klueber, 132 N.W.2d 847 (S.D. 1965), where knowledge that the child was under fifteen years of age was held not to be an essential element of the offense of indecent molestation. The court stated the following theory: "It is to be noted that in defining the crime our legislature did not prescribe that it was necessary to the offense that the act be committed knowingly. When the word knowingly is omitted in the statutory specification of a public offense, and no words of similar import are used, good faith is unimportant and the absence of criminal intent is no excuse." *Id.* at 848. See also Hanewald v. Board of Liquor Control, 101 Ohio App. 375, 136 N.E.2d 77 (1957); Birdsell v. State, 205 Tenn. 631, 330 S.W.2d 1 (1959).

95. See People v. Eurard, 55 Ill. App. 2d 270, 204 N.E.2d 777 (1965); People v. Bailey, 341 Mich. 592, 67 N.W.2d 785 (1954); McGowan v. State, 83 Okla. Crim. 310, 176 P.2d 837 (1947); Baxter v. State, 363 S.W.2d 475 (Tex. Crim. 1963).

96. *Hernandez*, for example, is just another in a series of recent California decisions eliminating areas of strict responsibility in felonies. See People v. Stuart, 47 Cal. 2d 167, 302 P.2d 5 (1956); People v. Winston, 46 Cal. 2d 151, 293 P.2d 40 (1956).

absence of a legislative direction otherwise, a charge of statutory rape is defensible wherein a criminal intent is lacking."[97] This is simply a logical extension of the mistake-of-fact doctrine into an area in which it has always rightly belonged.

III. Relative Culpability of Defendant and Prosecutrix

Because of supposed policy reasons, the "wrongdoer" has traditionally been required to assume the risk of his actions in statutory rape. In order to effectuate the basic purpose of preventing the victimization of immaturity, he has been held to have acted at his peril, even when the girl's sexual sophistication should contradict the law's presumption.[98] This conclusive presumption of non-consent in underage girls is customarily rationalized in terms of their lack of capacity to understand the nature and implication of the sexual act.[99] It is thought necessary for the protection of the immature female, and society in general, that the defendant assume the risk of committing the crime of rape if the girl is in fact under the statutory age.[100]

Certainly, no one can doubt the soundness of the "victimization of immaturity" justification, which assumes that it is in the public interest to protect the sexually naive female from physical, emotional, and psychological exploitation. No responsible person would hesitate to condemn as untenable a claimed good faith belief in the attainment of age of consent by an "infant" female whose obviously tender years preclude the existence of reasonable grounds for that belief. Societal interests still require the protection of young girls from physical harm;[101] and regulation of the abnormality known as pedophilia

97. 61 Cal. 2d at 536, 39 Cal. Rptr. at 365, 393 P.2d at 677.

98. The girl's consent to the act is deemed immaterial because she "is without capacity and discretion to have a proper conception of the character of the offense . . . or to comprehend its consequences fully, or perhaps to possess the strength of will to resist. . . ." Golden v. Commonwealth, 289 Ky. 379, 383, 158 S.W.2d 967, 969 (1942). See People v. Courtney, 180 Cal. App. 2d 61, 4 Cal. Rptr. 274 (1960); Model Penal Code § 207.4, comment at 251-53 (Tent. Draft No. 4, 1955).

99. Golden v. Commonwealth, *supra* note 98; State v. Adkins, 106 W. Va. 658, 146 S.E. 732 (1929); Model Penal Code § 207.4, comment at 251-53 (Tent. Draft No. 4, 1955).

100. "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 facts, 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." People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896). See Miller v. State, 16 Ala. App. 534, 79 So. 314 (1918); Holton v. State, 28 Fla. 303, 9 So. 716 (1891); Parsons v. Parker, 160 Va. 810, 170 S.E. 1 (1933).

101. Ploscowe, Sex And The Law 184 (1951): "The exposure to sexual experience represents a real threat to the life of the child. Anyone who tampers sexually with a young child is potentially a killer and hence a dangerous individual outside prison

—an adult male's proclivity for sex relations with children—is well-founded.[102] The crucial object of protection is, of course, the infant, and the American courts' enthusiasm to promote this goal is quite evident:

> It matters nothing that this girl was forward. . . . [T]he statute was enacted to protect just such girls as this one from their own folly. The legislature has said, in effect, of the adolescent girl under 16 years: "The brook has not yet met the river. She is merely a child—a child perplexed at the disquiet of puberty; confused by emotions she cannot fathom, and unable to comprehend the significance of those emotions to her own being, or their relation to society. She is incapable of consenting to the desecration of her incipient womanhood." The statute makes her sexual profanation a ravishment, even though invited. It has therefore erected a barrier of years around wilful girlhood—a barrier across which the profligate proceeds at his peril.[103]

A. *Unrealistically High Ages of Consent*

In their zeal to protect immature girls, the legislatures have, with a few exceptions, raised the original common-law age of consent from twelve to sixteen, eighteen, and even twenty-one.[104] However, the courts have not correspondingly altered their attitudes. Judicial decisions are still written as if the courts were in all cases condemning pedophilia and protecting a naive girl under twelve years of age, although this is usually an inaccurate description of a statutory rape case.[105] Indeed, the issue raised in *Hernandez* directly questioned the applicability of the increased age of consent statutes to situations where a young man seduces a technically underage girl who is hardly describable as "infantile." There is great danger in assuming that immaturity can be accurately determined solely by calendar age. The thrust of the *Hernandez* opinion is its implicit recognition of the potential harshness of imposing strict liability upon a young man when the age of consent is sixteen or above and the girl has become a young woman.[106] This recognition is well-

walls." *But cf.* SEX OFFENDERS 81-82: "The great majority of offenders against children (under age 12) were not physically dangerous since they did not use force and since they seldom attempted coitus."

102. MODEL PENAL CODE § 207.4, comment at 251 (Tent. Draft No. 4, 1955).

103. State v. Adkins, 106 W. Va. 658, 663, 146 S.E. 732 (1929).

104. See note 44 *supra*.

105. See generally SEX OFFENDERS 81-82.

106. "In fact, the customary dividing line at age twenty-one is in direct conflict with the ideals of sexual desirability in our culture—note how many Miss Americas and Miss Universes are legally minors. We say in effect, 'Here are the most beautiful and desirable girls, but you must leave them alone until they reach their twenty-first

founded, for it is clear that the policy of protecting underage girls applies with less force as the age limits are raised.

In our culture, the separation of females into taboo and non-taboo categories on the basis of an arbitrary age, usually in the late teens, has little relationship to physical or emotional maturity. To be sure, there are many girls between the ages of twelve and fifteen who are so obviously immature in physique, dress, and deportment that they would be approached only by a person psychologically disturbed or coming from a subculture where the acceptable age-range is lower than the usual level in the United States. However, there are even more girls from twelve to fifteen whose appearance and behavior place them within, or on the vague border of, the average male's category of desirable females.[107] By the middle teens, most girls are sufficiently developed physically and are sufficiently aware of social attitudes for a man to have to use considerable force or some definite threat if the girl objects to sexual contact. Thus, "heterosexual offenders against minors" include adult males convicted of sexual contact, without force or threat, with females aged twelve to fifteen who are not their daughters. The great majority of these girls, however, are sexually mature and biologically ready for coitus.[108] "The vague duress and domination seen in child-adult relationships is here minimal: the girl knows that an adult's desires are not unquestionable; she knows that in rejecting a sexual advance society is on her side."[109]

Intercourse with a girl who is in her middle to late teens lacks the qualities of abnormality and physical danger that are present when she is still a child.[110] The physical-harm argument is inherently weakened by modern marriage laws which sanction middle-teen marriages[111] and by the number of girls who actually get married by the time they are sixteen.[112] It is clear that the element of "victimiza-

year.'" *Id.* at 83. In overruling People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896), the *Hernandez* court emphasized that the original purpose of statutory rape statutes was literally to protect "infants," and that when *Ratz* was decided, the age of consent was fourteen, rather than the current eighteen in California. In criticizing the interpretations of modern statutes where the age limits are generally sixteen to twenty-one, the court quotes and emphasizes PLOSCOWE, SEX AND THE LAW 185 (1951): "*The statute is interpreted as if it were protecting children under the age of ten.*" 39 Cal. 2d at 364 n.3, 61 Cal. Rptr. at 534 n.3, 393 P.2d at 676 n.3.

107. SEX OFFENDERS 84.

108. *Id.* at 83.

109. *Id.* at 85.

110. See MODEL PENAL CODE § 207.4, comment at 252 (Tent. Draft No. 4, 1955); PLOSCOWE, *op. cit. supra* note 106, at 184-85.

111. Most states allow girls sixteen or over to marry with their parents' consent and allow girls under sixteen to marry upon obtaining a court order.

112. According to the 1950 census, six per cent of the females in the United States are

tion" decreases as the girl grows older and more sophisticated. In brief, by the middle teens most girls have reached a point of maturity which realistically enables them to give meaningful, although not legal, consent.

B. *Victims or Instigators?*

Not only are teen-age girls capable of giving operative consent; the increasing sexual awareness and promiscuity currently evident at lower ages enhances the probability that sexual experimentation will be indulged in, and many times actively solicited by, the girl. "There are sexually promiscuous young girls in every neighborhood of a city whose favors can be bought by any boy or man for a pittance,"[113] and the amateur counterparts to these young professionals are even more numerous.[114] Thus, it becomes readily apparent that the law's assumption that age alone brings an understanding of the sexual act to a young woman is of doubtful validity. The existence of this situation was apparent to the *Hernandez* court and was well illustrated by its observation that:

> Both learning from the cultural group of which she is a member and her actual sexual experiences will determine her level of comprehension. The sexually experienced 15-year-old may be far more acutely aware of the implications of sexual intercourse than her sheltered country cousin who is beyond the age of consent. A girl who belongs to a group whose members indulge in sexual intercourse at an early age is likely to rapidly acquire an insight into the rewards and penalties of sexual indulgence.[115]

Just as the number of promiscuous girls has increased, so also has the burden increased upon young men to judge accurately a girl's true age.

> With the great emphasis our culture places upon feminine beauty (a euphemism for sexual attractiveness), the omnipresent pressure of advertising, and the breakdown of age distinctions in dress and cosmetics, it has become increasingly difficult to judge accurately a young girl's age. Moreover, girls in the twelve-

married by age sixteen. See U.S. BUREAU OF THE CENSUS, UNITED STATES CENSUS OF POPULATION FOR 1950, Special Reports: Marital Status, table 5, p. 42 (1953).

113. PLOSCOWE, *op. cit. supra* note 106, at 181.

114. The Kinsey Institute surveyed 110 cases where both the official version and the offender's version were in agreement concerning the circumstances of the offense against girls thirteen to sixteen: "[B]oth agree that in 99 instances the girl did not discourage the sexual activity. This understatement conceals the fact that an undetermined number of girls actively encouraged it. . . . Who reported the sexual behavior to the authorities? The girl herself rarely did so directly. Usually the situation was discovered by friends or relatives who thereupon reported it." SEX OFFENDERS 100-01.

115. 61 Cal. 2d at 531, 39 Cal. Rptr. at 362, 393 P.2d at 674.

> to fifteen-year bracket are often ashamed of their youth and wish to give the impression of being older and more sophisticated than they really are.[116]

Such feelings can readily lead to deliberately deceptive practices.[117] The modern use of cosmetics enables the young girl to mask her age with what is literally a disguise, and in this she will frequently have the approval, or at least the tacit permission, of her parents. Unfortunately, if proceedings are subsequently undertaken against a man, the parents usually see to it that their daughter's appearance is radically altered for the trial.[118]

C. *Minimal Deterrent Value*

Studies have shown that recidivism among statutory rapists is almost nonexistent because the offenders are usually adolescent boys who, as they grow older, will normally be interested in older girls their own age.[119] Intercourse is primarily limited to partners whose ages differ little, since the major basis of induction into such activity is the peer society itself and not seduction by adults.[120]

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116. SEX OFFENDERS 83.

117. "Deception is easy, particularly when the male involved is a victim of wishful thinking. For the sake of the prestige and material benefits to be derived from associating with an older man some girls will do everything in their power to convey the impression that they are 'of age,' or at least old enough to be reasonably 'safe.' To be regretfully but firmly rejected as 'jailbait' or 'San Quentin quail' is an experience that girls in this hypersensitive phase of life find extraordinarily humiliating." *Id.* at 83-84.

118. *Id.* at 84. The Kinsey Institute proceeds to cite a somewhat humorous, but partially pathetic, story of one such calculated risk induced by deception: "His sexual partner he had known only as a good-looking girl given to heavy cosmetics, high heels, tight dresses, and provocative mannerisms. After she demonstrated a propensity for drink and sexual banter, he followed the anticipated sequence of events, finding her experienced and moderately satisfactory. When he saw her, on the witness stand in court, his hopes of leaving the room a free man collapsed abruptly. 'I knew I was done for,' he stated, 'when I saw they braided her hair in pigtails and had given her a rag doll to hold.'" *Ibid.*

119. DONNELY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 245-46 (1962).

120. Reiss, *Sex Offenses—The Marginal Status of the Adolescent*, 25 LAW & CONTEMP. PROB. 309, 325 (1960). The Kinsey Institute classifies the great bulk of offenders of girls thirteen to sixteen into two varieties—subculture offenders and near-peer offenders. "The subculture offenders are those who belong to a portion of society, a subculture, which regards as a suitable sexual object any female past menarche, or even a prepubescent female if she is of adult size. . . . The near-peer offenders are simply males who are so close in age to their 'victims' that a sexual relationship is psychologically and socially appropriate although illegal. A classic case is that of a seventeen-year-old boy and a fifteen-year-old girl. In prison, where the boy was serving six months for statutory rape, the psychologist described him as 'an embarrassed male of seventeen who had intercourse with a girl fifteen. He says she offered no protest and he thought there would be no legal complications. . . . [His] social group fully approved of such a pastime procedure. Much fault seems to rest in the willingness of the girls. . . .'" SEX OFFENDERS 102-03. Of the offenders against girls thirteen to sixteen which the Kinsey Institute surveyed, "for roughly four fifths of them this was their first sex offense:

Such conclusions tend to dispel the argument that absolute prohibition of statutory rape has a deterrent effect upon such activities. The assumption has long been that the knowledge that others were punished will promote a conscious re-evaluation by a potential offender. The reasoning underlying this assumption is that if some young man who is inclined to such conduct does know the law as it is now held to be, he may say to himself: "I believe the girl to be over the age of consent; but if she is in fact under that age I may be punished; it is not worth the risk." To this extent, absolute prohibition may deter a few potential offenders, but statistics indicate that the alleged deterrent effect of the strict liability statutes is minimal and does not markedly reduce seductions of underage girls by boys in their peer group, especially when the activity is a mutual undertaking.[121] "Legislators have been blithely unaware of the limitations of the penal law in deterring the expression of as deeply rooted a drive as sex when they set the ramparts of rape around the sexual intercourse of grown girls and young women."[122] The argument that the pursuit of females who appear to be over sixteen betokens no abnormality has fallen on deaf judicial ears in all cases except *Hernandez*, where the defense counsel successfully urged:

> Surely, in the face of the problems faced by our young men, society should not impose upon [Hernandez] the burden of acting at his peril when he seeks to satisfy a normal biological urge, second only to that of self-preservation, with a female he reasonably believes to be over the age of consent.[123]

D. *Distorted Public Images*

Closely related to this argument is the popular misconception as to the nature of the statutory rapist—perhaps the major reason behind legislative retention of statutory rape laws. Few criminals are regarded with greater fear and contempt, or dealt with more harshly by the law, than the *forcible* rapist. The frightening public image of the forcible child rapist—a grotesque, perverted, lurking monster[124]—

a ratio in keeping with the concept of these offenders as 'ordinary men' who were careless in the matter of age. This same idea is reinforced by the data concerning psychosis and neurosis: 2 per cent had a history of mental or emotional illness." *Id.* at 100.

121. SEX OFFENDERS 100.

122. PLOSCOWE, *op. cit. supra* note 106, at 193.

123. Brief for appellant, p. 27.

124. See STOTT, *Child Rapist*, in NEW STATESMAN, July 7, 1961. See also PLOSCOWE, *op. cit. supra* note 106, at 178. Since 1958 *forcible* rapes have increased thirty per cent, and forty per cent of the *forcible* rapes in the United States in 1964 were committed by males under twenty-one years of age. F.B.I., CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS FOR THE UNITED STATES for 1964, 9, 111 (1965).

carries over unjustifiably to indict the statutory rapist on the same grounds. In reality, however, the statutory rapist is quite generally found to be a normal young man,[125] and research evidence shows that in most cases he is not a rapist in any sense that coercion was used, since most such acts occur through common consent.[126] It has been indeed unfortunate for the development of the law of statutory rape that the public so often views the statutory rapist with the same revulsion as the forcible rapist.

E. *Summation*

These observations serve as background for the basic criticism of statutory rape laws: to maintain absolute prohibition involves punishing the unlucky ones who turn out to be wrong, while letting go free those who happen to be right. This, in brief, "offends the sense of justice."[127] It often involves the automatic punishment of innocent boys[128] who may, in fact, have been enticed by the most seductive of young women.[129] Nevertheless, even in circumstances

125. "[S]tatutory rapists often are quite normal young men who have coital relations with slightly under-aged girls. Many of these men are ignorant of the law, or of the girl's true age, at the time of committing their offense . . . . [T]hose convicted of statutory rape are more sexually and psychiatrically normal individuals whose offenses are partly an offshoot of their general anti-social patterns." Wheeler, *Sex Offenses—A Sociological Critique*, 25 LAW & CONTEMP. PROB. 258, 275 n.68 (1960). In 1964 the proportion of young persons arrested for *non-forcible* sex offenses, including statutory rape, rose, with persons under eighteen accounting for twenty-four per cent of these arrests as compared to twenty-one per cent in 1963. F.B.I. REPORT, *op. cit. supra* note 124, at 10.

See also CALIF. LEGIS., PRELIMINARY REPORT OF THE SUBCOMMITTEE ON SEX CRIMES 27, 105 (1950): "At some time or another 95 per cent of the male population commits a sex offense for which he might be prosecuted . . . . [I]f you pass a law which is going to make such a crime one for which they can be committed for life, if the law is effectively enforced, you can put 50 per cent of the males of your population into penal institutions."

126. Reiss, *supra* note 120, at 314.

127. WILLIAMS, CRIMINAL LAW 158 (2d ed. 1961).

128. "While the offender against minors is unusually prone to rationalize his behavior by stressing the adult appearance of his partner, it is not uncommon to find they were truly unaware of the girl's real age. Still others lulled their suspicions by deciding (often with good reason) that the girl was so experienced that her chronological age could be safely ignored. Men often labor under the delusion that a particular girl's promiscuity and notoriety somehow exempt them from the dictates of society regarding age. An understanding policeman may take such mitigating circumstances into account, but in a court there is often no mitigation. A drunken man seduced by a fifteen-year-old prostitute will learn to his dismay that his condition and the girl's profession do not shield him from the charge of contributing to a delinquency of a minor or of statutory rape." SEX OFFENDERS 84.

129. "There are not a few soberminded fathers and mothers who feel that the statute is more drastic than sound policy requires. . . . It is too true that many immature boys do not have the moral fiber and discretion of a Joseph. A lecherous woman is a social menace; she is more dangerous than T.N.T.; more deadly than 'the pestilence that walketh in darkness or the destruction that wasteth at noonday.'" State v. Snow, 252 S.W. 629, 632 (Mo. 1923).

where the girl's actual comprehension contradicts the law's presumption, the male is deemed criminally responsible for the act, although he may be young and naive and merely responding to advances. The extreme and manifestly unjust consequences to which this may lead are graphically illustrated in a case where the "victim" and "victimizer" were reversed:

> We have in this case a condition and not a theory. This wretched girl was young in years but old in sin and shame. A number of callow youths, of otherwise blameless lives . . . , fell upon her seductive influence. They flocked about her . . . like moths about the flame of a lighted candle and probably with the same result. The girl was a common prostitute . . . the boys were immature and doubtless more sinned against than sinning. They did not defile the girl. . . . Why should the boys, misled by her, be sacrificed? Might it not be wise to engraft an exception in the statute?[130]

When a girl acquires a great amount of sexual experience at an early age, it is difficult to justify the law's assumption that the male is always responsible for the act.[131] In this type of situation, fundamental notions of justice greatly overbalance the public policy of protection of young females. In the effort to provide a maximum protection for young girls, regardless of their maturity, the law has frequently worked an injustice by disallowing the defense of reasonable mistake of age. "The girl's participation, her intellectual and emotional status—these are of small consequence. Society's age-grading hierarchy has been affronted and someone must be served up as a propitiatory sacrifice."[132]

Nevertheless, strict liability has traditionally been imposed in all statutory rape cases, and the resulting penalties may be harsh indeed. England has relatively light penalties, imposing a maximum of life imprisonment only for intercourse with girls under thirteen and reducing the maximum to two years if the girl is between thirteen and sixteen.[133] The least stringent penalty imposed by any state in the United States is that of Ohio, which specifies one to twenty years.[134] Several states have a much more onerous system, with the possibility of death or life imprisonment.[135] Fortunately, some states

130. *Ibid.*

131. Comment, *Forcible and Statutory Rape—An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 65, 82 (1952).

132. SEX OFFENDERS 106.

133. Sexual Offences Act, 1956, 4 & 5 Eliz. 2, § 6(3).

134. OHIO REV. CODE ANN. § 2105.03 (Page 1954).

135. See generally Tappan, *Sexual Offences and the Treatment of Sexual Offenders in the United States*, in SEXUAL OFFENCES 500-02 (Cambridge Dept. of Criminal Science 1957).

have provided the jurors and the trial judge with a considerable amount of latitude in the determination of punishment.[136] Even if this discretion results in a nominal penalty, however, this is not a sufficient safeguard because the stigma of conviction for even the misdemeanor of "rape" is likely to be more serious and permanent than for many felony convictions; of course, the court is powerless to mitigate this effect.

Nevertheless, *Hernandez* is the only case in which a court has given meaningful consideration to these factors. Instead of shielding a knowledgeable girl who was only three months beneath the age of consent, the court dealt with statutory rape as a joint enterprise. Noting the similarity between the legislative treatment of bigamy and statutory rape, the court approved the reasoning of an earlier California decision:

> The severe penalty imposed . . . , the serious loss of reputation conviction entails . . . , and the fact that it has been regarded for centuries as a crime involving moral turpitude, make it extremely unlikely that the Legislature meant to include the morally innocent to make sure the guilty did not escape.[137]

IV. The "Lesser Legal Wrong" and "Moral Wrong" Theories

A. *Lesser Legal Wrong Theory—Strict Limitations on Scope*

The basis propounded by many courts to support strict liability is that if in some general way the actor had a guilty mind as to his conduct, such as knowledge that he was committing an act of fornication, it is assumed that he had a criminal intent sufficient to justify his conviction of an unintended criminal act, including one with a greater punishment, because the mistake went to the *degree* of wrong rather than to the *presence* of wrong.

However, the foundation of this "lesser legal wrong" theory in statutory rape cases is totally wiped out where fornication is no longer criminal. Ten states have no fornication statutes,[138] and many others proscribe it only if it is "continual," "open and notorious," or both.[139] In addition, even where fornication is still technically a

136. Evidence of the girl's declarations as to her age has frequently been admitted to show mitigating circumstances and thus to help the court decide whether the offense was a felony or a misdemeanor. See, *e.g.*, People v. Pantages, 212 Cal. 237, 297 Pac. 890 (1931); Heath v. State, 173 Ind. 296, 90 N.E. 310 (1910); People v. Marks, 146 App. Div. 11, 130 N.Y.S. 524 (1911); Sprague v. State, 243 Wis. 456, 10 N.W.2d 109 (1943).

137. 61 Cal. 2d at 535, 39 Cal. Rptr. at 365, 393 P.2d at 677 (quoting from People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956)).

138. Delaware, Iowa, Maryland, New Mexico, New York, Oklahoma, South Dakota, Tennessee, Vermont, and Washington.

139. See Model Penal Code § 207.1, comment (Tent. Draft No. 4, 1955).

crime, the "legal" wrong that the accused might have supposed he was committing is one that is to a great extent ignored or even condoned by both society and the courts. Laws punishing illicit cohabitation or fornication are generally unenforced.[140]

B. *Moral Wrong Theory—Absence of Definitive Standards*

Even if an act is not illegal, some courts have held that the mere intent to do an *immoral* act supplies the requisite *mens rea* when an unintended criminal act results.[141] The basis for this conclusion is that acts which allegedly involve moral turpitude are revolting to the better instincts of the community and are universally recognized to be a serious wrong not only to the individual, but also to society. The chief attraction of this view lies in the practicality of equating *mens rea* with knowledge of moral reprobation. Since the relevance of the precise age of the girl is a legal technicality and does not affect the morality of the matter, mistake as to age, it is claimed, should not be a defense. "Basically, you take . . . the statute and say that it describes a legal-moral wrong. You then say that the specification of the girl's age, although part of the technical legal wrong, is not part of the legal-moral wrong; consequently no knowledge of it is required."[142]

This reasoning is subject to question, since it is obvious that there are varying degrees of morality.[143] It must be recognized that different individuals and groups in a heterogeneous community have widely divergent opinions with respect to the morality of extra-marital intercourse. Although certain groups, and perhaps the law itself, may judge such conduct to be wrong, it may be in complete conformity with the standards of the actors' peer group. Thus, in many cases the imposition of statutory rape penalties does not serve to protect, but is only an attempt to maintain debatable standards—standards which reflect as vague a norm as the community ethic.[144] What two mature people do sexually in private should not be governed by statute.[145]

140. PLOSCOWE, *op. cit. supra* note 106, at 155.

141. People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896), appears to be the first case in any jurisdiction to hold directly that "immorality" alone is enough for conviction. *Hernandez* directly overrules this case and its rationale. For other decisions which rely on the moral-wrong theory, see People v. Fowler, 88 Cal. 136, 25 Pac. 1110 (1891); State v. Ruhl, 8 Iowa 447 (1859); Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875); 1 BISHOP, CRIMINAL LAW § 247 (1st ed. 1850) (first statement of the rule).

142. WILLIAMS, CRIMINAL LAW 190 (2d ed. 1961).

143. MODEL PENAL CODE § 207.1, comment (Tent. Draft No. 4, 1955).

144. The American Law Institute states: "We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor." MODEL PENAL CODE § 207, comment (Tent. Draft No. 4, 1955).

145. "The advisability of punishing as rape an act which may or may not be considered as immoral by the peer groups of the actor is highly questionable. Behavior

Hernandez knocks out the moral-wrong justification and brings the law into line with sound legal theory. The court, in drawing upon its comment in the prior case of *People v. Vogel*[146] that a bona fide and reasonable belief by the accused that he was single could not be translated into a criminal intent to commit bigamy, stated: "Certainly it cannot be a greater wrong to entertain a bona fide but erroneous belief that a valid consent to an act of sexual intercourse has been obtained."[147] The court intimated that extra-marital intercourse is amoral or, at least, not immoral in any culpable degree.

To disregard the immorality argument is to remove one of the fundamental reasons for applying strict liability to statutory rape. It is an abrupt departure from traditional authority, but nevertheless fits squarely within the trend of thinking set by modern behavioral scientists.[148] *Hernandez* thus broadened the requirement of *mens rea* in statutory rape by refusing to derive criminal intent from immoral intent and by questioning the very immorality of such intent itself. Why, indeed, should one's knowledge that he is committing some moral wrong (or lesser legal wrong) make him guilty of the crime of statutory rape? That legal responsibility in this degree should automatically follow is a *non sequitur.*

C. *Piecemeal Attempts at Correction*

Rejection of the lesser-legal-wrong and moral-wrong doctrines is only in keeping with the current attitude of the public, which has been gradually eroding imposition of strict liability for years. Recognition of the injustice traditionally thrust upon the male has resulted in the tempering of statutory rape laws through the inclusion of various piecemeal provisos. Thus, the severity of the punishment

that has no substantial significance except to the morality of the parties involved is best left to the control of the religious, education and social influences." MODEL PENAL CODE § 207.1, comment (Tent. Draft No. 4, 1955).

146. 46 Cal. 2d 798, 299 P.2d 850 (1956).

147. 61 Cal. 2d at 535, 39 Cal. Rptr. at 365, 393 P.2d at 667. The court compared the reasonable mistake of fact defense in statutory rape to the same defense in bigamy cases. One commentator has noted in this regard: "[I]n these two cases, if the facts conform to the defendant's reasonable belief, the moral implication of their conduct would be distinctly different, since a defendant convicted of bigamy has sexual relations in the marital state, whereas a defendant convicted of statutory rape has extramarital intercourse—presumably an immoral act. Thus, at most the *Hernandez* court fails to confirm the immorality of extramarital intercourse; at least, it refuses to imply criminal intent from immoral conduct." 53 GEO. L.J. 506, 510 (1965).

148. DRUMMOND, THE SEX PARADOX (1953); FORD & BEACH, PATTERNS OF SEXUAL BEHAVIOR 197 (1952); KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 264, 389-93 (1948); MURDOCK, SOCIAL STRUCTURE 265 (1949); PLOSCOWE, *op. cit. supra,* note 106, at 184-85; MURDOCK, *A Comparative Anthropological Approach,* 36 J. SOCIAL HYGIENE 133, 137 (1950).

may be dependent on the age of the boy[149] or on the age[150] or want of prior chastity[151] of the girl. Similarly, legislation has been enacted which recognizes mistake of age as a mitigating factor,[152] but only two states have recently allowed mistake to exculpate entirely.[153] Finally, the jury may be vested with discretion to recommend that statutory rape be punished as a misdemeanor rather than as a felony.[154] All of these measures are obvious legislative attempts to soften the effect of an arbitrary rule.

In addition to the legislative inroads, there is a growing public recognition that it is unfair to characterize many adolescent sex experimentation cases as felonious rape. There is an awareness that control of heterosexual sex offenses against girls in the age group from sixteen to twenty-one is a singularly difficult problem, primarily because society is caught in a contradiction:

> [I]t is difficult to find logic in our culture vis-à-vis adult heterosexuality. On one hand we stress and encourage the development of heterosexual behavior—the literature, the advertisements, the movies, everything relentlessly dins in the, order: be sexually attractive, find romance, get a mate! On the other hand we strive to prevent heterosexuality, in any situation other than legal marriage. We tread on the accelerator and the brake simultaneously; this may result in the desired speed, but it is rough on the mechanism. If early marriage were feasible for everyone, our position would be more tenable, but our complex civilization demands that marriage be delayed.[155]

As a girl increases in age after sixteen, the rationale for punishing her partner in voluntary sexual behavior tends to evaporate. "Obviously there is a great difference in terms of illegality, immorality and actual guilt between a relatively innocuous intercourse on the one hand and a heinous incestual relationship or rape-like intercourse on

149. See, *e.g.*, ALA. CODE tit. 14, § 399 (1958); N.J. REV. STAT. 2A:138-1 (1951); Sexual Offences Act, 1956, 4 & 5 Eliz. 2, § 6(3). Under the MODEL PENAL CODE § 213.3 (Proposed Official Draft, 1962), consensual sexual intercourse with a female between the ages of ten and sixteen is not termed rape, but rather is covered in a separate section entitled "Corruption of Minors and Seduction."

150. MINN. STAT. § 617.02 (1961).

151. See, *e.g.*, KY. REV. STAT. § 435.100 (1962); MISS. CODE ANN. § 2359 (Supp. 1962); PA. STAT. ANN., tit. L, § 4721 (1936); WASH. REV. CODE § 9.79.020 (Supp. 1961); W. VA. CODE ANN. § 5930 (1961).

152. CAL. PEN. CODE § 264. Indeed, the trial court in *Hernandez* did receive such evidence to show mitigation and put the accused on probation for two years.

153. ILL. REV. STAT. ch. 38, § 11-4(b)(1) (Smith-Hurd 1964): "to prevent the *knowing* and deliberate victimization of the young" (Emphasis added); N.M. STAT. ANN. § 40A-9-3 (Supp. 1964).

154. See CAL. PEN. CODE § 264.

155. SEX OFFENDERS 108.

the other."[156] For this reason, the good sense of courts, prosecutors, and juries has often mitigated the deficiencies of statutes governing statutory rape.[157] English judges criticized such legislation before the 1956 Sexual Offences Act as being both a "grotesque state of affairs" and "amazing legislation," and correspondingly imposed relatively nominal punishment.[158] Similarly, American grand juries frequently refuse to indict youngsters whose only crime was that their love-making took no account of the limitations of the calendar or of penal statutes.[159]

Yet, despite this evident tendency to mitigate the harshness of the statutory rape laws, there can be no escape from the necessity of revising such statutes or substituting a more reliable remedy. It may be hoped that a judge would regard reasonable mistake as excusing from punishment, if not from conviction, but there is obviously no certainty of this. "The reactions of judges, administrative officials and jurymen vary from county to county with respect to the different aspects of the problem of rape."[160] The policy to be pursued should find expression in the legal texts which are guides to official action rather than being left to the caprices and attitudes of varying groups of officials. It is submitted that the policy should be one which views the potential injustice to young males as far outweighing the alleged affront to society's moral standards.

As a practical matter, there has not been as large an organized demand for change made upon state legislatures as one might anticipate. Unless there is an unusual social disturbance, there are seldom any complaints filed or charges made in cases which would fall within the statutory rape laws. In the absence of some compelling reason to prosecute, all parties normally consider their interests best served by avoiding the unwelcome publicity that would attend a trial. This does not, however, justify the continued existence of such conventional statutes if their application can even occasionally lead to unjust results. The *Hernandez* court manifested its recognition of this situation by refusing to derive criminal intent from alleged immoral intent and by declining to presume conclusively that the defendant had *mens rea.*

156. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 74-80 (1961).

157. PLOSCOWE, *op. cit. supra* note 106, at 179, 190.

158. Williams, *op. cit. supra* note 142, at 154 n.15. The following example appeared in Bijou, The Times (London), March 3, 1959: A Jamaican laborer had intercourse with a girl who was just under sixteen, but who told him that she was over sixteen and who looked and behaved as though she were. The trial judge passed a sentence of nine months' imprisonment; fortunately the C.C.A. intervened.

159. MUELLER, *op. cit. supra* note 156, at 74-80; PLOSCOWE, *op. cit. supra* note 106, at 190.

160. PLOSCOWE, *op. cit. supra* note 106, at 191.

V. Recommendations

A. *Legislative*

1. *Classification of Females by Age*

Three legislative changes would conform the law of statutory rape to realistic standards. First, the age requirements should be changed so that offenses fit into either of two distinct categories: (1) where the female is less than thirteen years old and (2) where the female is thirteen through fifteen years of age.

Absolute liability would still be imposed where the girl is not yet thirteen years old. This imposition of strict liability is realistic because it is in this period of pre-puberty and initial puberty that the girl is just gaining the physical capacity to engage in intercourse, but remains seriously deficient in comprehension of the social, psychological, emotional, and physical significance of sexuality.[161] It is still realistic to regard her as "victimized" because very few girls enter the period of sexual awakening before the thirteenth year.[162]

In the second category, the defense of reasonable mistake of fact would be allowed unless the male were more than four years older than the girl.[163] In this period of middle to later adolescence, the chief significance of such behavior lies in its contravention not of physical standards, but rather of the moral standards of the community. If the girl looks and acts as if she were sixteen or older, and especially if she lies concerning her minority, intercourse with her will no longer automatically be deemed a rape. Thus, whether she is a day or a year below age sixteen, a teenage boy would no longer act at his peril if he had a reasonable belief that she was over fifteen when she consented to the act.[164] This approach would give full credence to a realistic age dichotomy when the man is genuinely mistaken.

Finally, consensual intercourse with females sixteen and older should not be branded as rape. When a girl is sixteen, she has become a young woman, and the consensual act loses its quality of abnormality, heinousness, and physical danger to her. The Kinsey Institute has formulated a persuasive list of reasons for the establishment of the sixteenth birthday as the beginning of adult life:

161. Model Penal Code § 207.4, comments (Proposed Official Draft, 1962).
162. Ploscowe, *op. cit. supra* note 106, at 184.
163. See text accompanying note 169 *infra*.
164. See Comment, *Forcible and Statutory Rape—An Exploration of the Operation and Objectives of the Consent Standard*, 62 Yale L.J. 54, 82 (1952); text accompanying note 169 *infra*.

1. The average sixteen-year-old is biologically adult. She has attained the basic physique which will be hers the rest of her life even though it may be altered by additional adipose tissue and ultimately by the deteriorations of age. She is sexually mature, being capable of conceiving and bearing children; she is physically as capable of sexual response as she ever will be, though this capacity may be masked by inexperience and inhibition. Her strength and motor coordination are sufficient to meet the needs of adult life. She has developed the secondary sexual characteristics that all peoples regard as the distinguishing features of adult females. Throughout human history the majority of the societies of the world have regarded the sixteen-year-old as physically eligible for an adult sexual life.[165]
2. From a social point of view the average sixteen-year-old has at least a basic knowledge of the behavior that society expects from adults, and sufficient motivation and control to conform to this expectation. Her IQ will not be significantly altered with passing years—her judgment may improve and her fund of knowledge increase, but she has fully developed her fundamental intellectual equipment. Until this century, when we artificially protracted childhood, the sixteen-year-old female was considered sufficiently mature, intellectually and emotionally, to function as an adult member of society.[166]
3. [Many] professional scholars have also used age sixteen as the critical dividing point, and note that this is the demarcation age in compulsory school attendance, and is also recognized as a turning point in child labor laws.[167]

To be sure, there are many girls over sixteen who are not sufficiently mature to engage in consensual sexual activities. However, if in fact we are to permit sexual activity only among the emotionally and intellectually mature, we should logically withhold permission from vast numbers of individuals aged beyond the magic numeral "twenty-one."[168]

2. *Limitation on Age Differentials*

As a second measure designed to prevent automatic punishment of relatively innocent adolescent sex experimentation, but still in

165. SEX OFFENDERS 106.
166. *Id.* at 107.
167. *Id.* at 108.
168. *Id.* at 107. *Cf.* Ploscowe, *Sex Offenses—The American Legal Context*, 25 LAW & CONTEMP. PROB. 217, 222 (1960): "It is absurd in our culture, however, to talk of young women of middle and late adolescence not having knowledge and appreciation of the sexual act. Such knowledge is usually acquired by the time of puberty. The law should, accordingly, take a more realistic view and fix the age of consent at fourteen years, instead of the higher limits that are more commonly found. Should the legislator wish to protect the morals of young women over fourteen years of age, this can be done by means other than branding as a rapist every male who may dally with them."

keeping with the effectuation of the victimization-of-immaturity rationale, legislatures should require a substantial age differential between male and female before imposing strict liability. Recent English legislation and the Model Penal Code require a four year differential in age before the defense of mistake is excluded.[169] This would avoid the harsh and unreasonable automatic application of the "rape" label to sex experimentation where the girl is just under, and the boy just over, the age of consent.

3. *Definite Standards of Culpability*

Finally, legislatures should deal directly with the problem of degrees of culpability by expressly adopting provisions substantially identical to those in the Model Penal Code. Legislative treatment of such matters in the United States has been "relatively sparse and often indeterminate in meaning."[170] In contrast, however, the Code, following the lead of the European penal codes, has now articulated an integrated set of principles addressed to the pervasive problems concerning *mens rea.* The Code proposes four concepts to describe the kinds of culpability which are sufficient to establish liability: purpose, knowledge, recklessness, and negligence.[171] However, since to a large extent "the answer rests with the judges and not with the draftsmen, the Model Penal Code does not resolve the problem but it does radically reduce its dimensions by stating certain rules which are more specific and helpful than any which have been [previously] formulated in this country."[172] If legislatures choose to act in this area, they could deal directly with *mens rea* problems by expressly providing that if negligence is mentioned in the statute, it will suffice to impose liability. In all other cases, intention would be necessary for culpability. The mental elements in crime would thus be articulated by the use of general categories—assumptions upon which the whole penal code could rest unless it were clear that the legislature had carved out an exception. This would be a major step forward in

169. Sexual Offences Act, 1956, 4 & 5 Eliz. 2, § 6; MODEL PENAL CODE § 213.3 (Proposed Official Draft, 1962). For an exhaustive discussion of this point, see EAST, SEXUAL OFFENDERS 15 (1955); ELLIS & BRANCALE, THE PSYCHOLOGY OF SEX OFFENDERS 15-21 (1956); SEX OFFENDERS 106-08; THE DANGEROUS SEX OFFENDER 7 (Madow ed. 1968); Frankel, Psychiatric Characteristics of Sex Offenders (Trenton: New Jersey, 1950), mimeo., p. 2; Revitch & Weiss, *The Pedophiliac Offender,* 23 DISEASES OF THE NERVOUS SYSTEM 73 (1962).

170. See Wechsler, *On Culpability and Crime—The Treatment of Mens Rea in the Model Penal Code,* 339 Annals 24 (1962). See also Remington & Helstad, *The Mental Element in Crime—A Legislative Problem,* 1952 WIS. L. REV. 644.

171. MODEL PENAL CODE § 2.02 (Proposed Official Draft, 1962).

172. Preveser, *English Criminal Law Reform and Pre-American Model Penal Code,* in CURRENT LEGAL PROBLEMS 62 (1958).

telling judges what the requirements of the specific offense should be. It would free judges from current doubts and promote consistent statutory construction—if the legislation does not make express exception to the otherwise uniform requirement of *mens rea,* then the courts would assume that they are to read in this element.

B. *Judicial*

If the legislatures fail to provide remedial measures in this area, the courts themselves, as in *Hernandez,* should take the initiative and bring their decisions into line with social realities by recognizing the defense of reasonable mistake of age. They should recognize that bona fide errors in judgment as to the age of girls can be made by young men and boys who are no more dangerous than other persons on a similar social, educational, and economic level. This recognition would then allow the courts to cease interpreting statutory rape laws as if they were protecting children under the age of ten. The courts should have the courage to return to the early and well-established principles of strict construction and the presumed requirement of *mens rea* when interpreting statutory rape legislation. This would give full credence to a realistic jurisprudence when the man is genuinely mistaken. It should be noted in this regard that the *Hernandez* court based its decision on the lack of specific legislative direction removing the mental element from the crime of statutory rape. The court declared that the legislature must expressly direct any departure from the traditional necessity of *mens rea*; since the legislature had not done so in the California statutory rape provisions, the court concluded that it was still a prerequisite to criminal responsibility.

The courts in England and America should also change from the traditional concept of *mens rea* to the "half-way house" concept which makes a proscribed act still punishable, though to a lesser degree, if the actor's conduct was based upon a mistake which was the result of negligence. The ideal law in this area would permit consideration of mistake of fact as a defense to intentional crimes: (1) if *unreasonable,* the mistake would be regarded as negligence; (2) if *reasonable,* the mistake would acquit altogether. Such judicial interpretation would eliminate the problem that Anglo-American courts have had during the past hundred years in dealing with statutory offenses—a feeling that they had to punish even though there was no guilty element as far as intention or knowledge was concerned. They have failed to see that negligence, with its concomitant reason-

able-man standard, is a way to deal with the problem of culpability lying between criminal intent and strict liability.

In short, if legislation does not make express exception to the *mens rea* requirement in an offense, then the courts should assume that they are to read in this test. In doing so, they should also consider the different degrees of *mens rea*: purpose, knowledge, recklessness, or negligence, according to the actor's state of mind. This judicial supplementation of statutes would reverse the current, harsh imposition of strict liability in the face of legislative silence.

VI. Conclusion

Judicial responsibility is long overdue in exposing statutory rape laws as an "ethereal structure of fictions"[173] which for so long has artificially protracted American childhood. The California Supreme Court should be given great credit for its courage in casting aside the dogmatic thinking which has obscured the law of sex crimes. It overruled decades of precedent to give judicial sanction to a sound, increasingly prevalent public belief—that the crime of statutory rape is unsupportable in its present form and that neither public sentiment nor the policies underlying the law warrant culturally constructed barriers or the imposition of harsh rape penalties solely because of a teenage girl's youth.

The opinion underscores the belief that, in our culture, the permissibility of a given type of sexual behavior should not depend solely upon the age of the participants, but rather upon the elastic concept of maturity. This decision represents a substantial judicial advancement which, in the absence of specific legislative direction to the contrary, should be extended to all Anglo-American jurisdictions in statutory rape and related areas. Such a course of positive action would lead to greater public respect for, and confidence in, the administration of a system of justice that does not turn a blind eye to the individual facts of each case or to the presumption of each man's innocence.

173. 53 Geo. L.J. 506, 512 (1965).