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RAPE OF THE MENTALLY DEFICIENT: SATISFACTION OF THE NONCONSENT ELEMENT

SUSAN L. BRODY*

Lack of consent to sexual intercourse has been an element of the crime of rape for centuries. Its roots go as far back as 1900 B.C. when the first rape law appeared in the Code of Hammurabi.[1] Consent to illicit intercourse under the ancient code not only negated the crime, it was also grounds for putting the consenting female to death.[2]

The same attitude toward a woman's consent to extramarital intercourse was reflected one thousand years later in the laws of Moses.[3] If a woman had sexual intercourse with a man in the city where her cries would be audible and her resistance visible, but failed to cry out or resist, she would be stoned to death.[4] Thus, lack of consent by the victim has always been an important aspect of rape for which the victim has historically been held responsible.

The lack of consent by the victim element was incorporated into the laws of seventeenth century England by use of the language: "against her will." In order for the crime to be complete, the prosecution was required to prove that the act of sexual intercourse had occurred against the woman's will.[5] That language, combined with the laws of Moses, was codified for the first time in America, in 1648, in Massachusetts[6] and is retained

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1. The Code of Hammurabi was an extensive code of civil and criminal laws which, according to various sources, was said to have been given to King Hammurabi, the sixth King of the Semitic Dynasty, by the Son God. Gold & Wyatt, *The Rape System: Old Rules & New Times*, 27 CATH. U. L. REV. 695, 696 n.1 (1978) [hereinafter cited as Gold].

2. *Id.* at 697 and n.9 *quoting* THE CODE OF HAMMURABI, KING OF BABYLON § 129 (2d ed. 1904).

3. *Id.* at 698.

4. *Id.* at 698, 699.

5. *Id.* at 699 *citing* 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN, 62-68 (1736).

6. *Id.* at 700.

in most rape statutes today.[7] Though often referred to as the "consent defense," absence of consent is actually an element of the crime to be proven by the prosecution.

The Illinois rape statute provides:

(a) A male person of the age of 14 years and upwards who has sexual intercourse with a female, not his wife, *by force and against her will* commits rape. . . .[8]

The statute then lists two circumstances which unequivocally establish the "by force and against her will" element:[9] *Intercourse by force and against her will includes*, but is not limited to, any intercourse which occurs in the following situations: (1) Where the female is unconscious; or (2) *Where the female is so mentally deranged or deficient that she cannot give effective consent to intercourse*.[10] Thus, when the charge of rape is based upon intercourse with a female who was too mentally defective or deranged at the time to give her consent, the Illinois rape statute presumes that the act of intercourse occurred by force and against her will. First, however, the prosecution must prove that the victim's mental condition effectively precluded consent. It is not difficult to conceive of a situation in which an accused elicits consent, either verbally or by acquiescence, from a mentally deficient woman and believes that her consent was authentic. The resulting legal issues are threefold: (1) What nature and quantum of evidence must the prosecution produce to establish the deficiency or derangement necessary to negate consent? (2) By what standards should the court evaluate such evidence? (3) To what extent, if any, must the prosecution show that the accused was aware of the victim's mental incapacity?

The first and second inquiries concern appropriate evidentiary standards, and are fundamental to most types of litigation.[11] Moreover, Illinois courts,[12] as well as those of other

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7. *See, e.g.*, CAL. PENAL CODE § 261 (West 1970-1980 & Supp. 1981); GA. CODE ANN. § 26-2001 (1977 & Supp. 1981); IND. CODE ANN. § 35-42-4-1 (Burns 1979); IOWA CODE ANN. § 709.1 (1979); OHIO REV. CODE ANN. § 2907.02 (Page 1975 & Supp. 1980); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1981). Other statutes contain general language retaining the common law nonconsent requirement but do not make specific reference to "force." *See, e.g.*, ALASKA STAT. § 11.41.410 (1962 & Supp. 1980); ARIZ. REV. STAT. ANN. § 13-1406 (1978); UTAH CODE ANN. § 76-5-402 (Supp. 1981).

8. ILL. REV. STAT. ch. 38, § 11-1(a) (1979) (emphasis added).

9. *Id.* at §§ 11-1(a)(1)-(2) (1979) [hereinafter cited as 11-1(a)].

10. *Id.* (emphasis added).

11. For example, in the criminal context, there is extensive law and theory regarding proof of fitness to stand trial and insanity. In the civil area, there is substantial law pertaining to mental capacity to sue, to contract and to make a will.

states,[13] have adopted a test to determine the victim's capacity to consent. The controlling question is whether the victim had mental capacity sufficient to permit her to understand the act, its nature, and possible consequences.[14] The third inquiry, despite two recent Illinois Appellate Court decisions touching upon the issue, has never been answered by the Illinois Supreme Court.[15] Illinois law is unclear as to the degree of awareness a defendant must have regarding the victim's inability to consent.

This article attempts to illuminate the issue by examining the Illinois rape statute and related portions of the Illinois Criminal Code. In addition, recent case law will be analyzed with reference to the Code. Public policy and precedent from other jurisdictions will also be discussed. The focus will then shift to the author's proposal that prosecutors be uniformly required to prove the defendant's mental state using precisely articulated standards. First, however, some insight[16] into the effect of the accused's ignorance or mistake as to consent, is necessary.

MISTAKE IMPACTS MENTAL STATE

Because lack of consent is a definitional element of rape in Illinois, the presence of consent[17] negates the offense. By con-

12. *See, e.g.*, People v. O'Neal, 50 Ill. App. 3d 900, 365 N.E.2d 1333 (1977); People v. Blunt, 65 Ill. App. 2d 268, 212 N.E.2d 719 (1965) (a mere showing of mental incapacity is not enough; capacity must be sufficiently diminished to preclude consent).

13. *See, e.g.*, People v. Boggs, 107 Cal. App. 492, 290 P. 618 (1930); People v. Easley, 42 N.Y.2d 50, 396 N.Y.S.2d 635, 364 N.E.2d 1328 (1977); Hacker v. Stat, 73 Okla. Crim. 119, 118 P.2d 408 (1941); State v. Fox, 72 S.D. 119, 31 N.W.2d 451 (1948).

14. For a discussion of that test and the cases developing it *see* People v. McMullen, 91 Ill. App. 3d 184, 188-89, 414 N.E.2d 214, 217 (1980).

15. People v. Farrokhi, 91 Ill. App. 3d 421, 414 N.E.2d 921 (1980); People v. McMullen, 91 Ill. App. 3d 184, 414 N.E.2d 214 (1980).

16. Ignorance or mistake of fact or law plays an illusory role in substantive criminal law. Discussion herein merely alerts the reader to the complexity of the subject, and hopefully, provides the minimum insight necessary to appreciate the immediate topic. For more thorough analysis of "mistake," *see* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 356 (1972) [hereinafter cited as LAFAVE].

17. Whether consent is present is a question of fact. The effect of consent upon the state's case is purely a question of law. Comment, *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 323 (1895) [hereinafter cited as *Consent*].

It should be noted that the victim's consent does not necessarily operate as a defense to all crimes against the person; the injury is to the peace of society, *i.e.*, an offense against the state. For instance, homicide, mayhem, and battery jeopardize not only the immediate victim, but the public's interest in protecting its citizens as well. These crimes may be committed even though the individual injured consented to injury. In contrast, most statutory definitions of larceny are inconsistent with "a taking with the owner's

trast, mistakenly perceived consent does not eliminate the nonconsent element or prevent an objectively cognizable crime from taking place. The accused's mistake affects only the subjective criminality of the act.

Clearly, some wrongful state of mind, or *mens rea*, must accompany the act. A crucial preliminary question, however, must be addressed: must the required mental state (whatever it may be) accompany each element of the offense?[18] For purposes of this article, the specific inquiry is whether the *mens rea* requirement must be specifically proven as to the lack of consent element. If so, the defendant's good-faith belief that he obtained the victim's consent should negate that element of the crime and result in acquittal. If not, the mistake at best is a justification or defense precluding conviction only if reasonable;[19] the prosecutor's *prima facie* case remains intact.

There is authority in English case law which holds that the *mens rea* requirement must accompany each element of the rape. In *Regina v. Morgan*,[20] four defendants claimed they had been told by the victim's husband that she enjoyed being forced to have sexual intercourse. Allegedly believing they had her consent, defendants overpowered and had sex with the gentleman's wife. The defense at trial was that *any* belief that the victim consented negated the intent to commit rape. The jury was instructed, however, to reach a verdict of guilty unless defendants' belief was reasonable. The instructions reflected the theory that intent to engage in nonconsensual intercourse is not an essential element of rape. Defendants appealed to the House of Lords which took the position that belief that the victim con-

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consent." Similarly, sexual intercourse is not rape if it's with a consenting (adult, sane, sober) female. The key to the distinction is the language defining the offense. Where lack of consent is an element of a crime such as rape, the presence of consent negates the offense.

18. The Model Penal Code suggests that when the relevant statute prescribes a mental state without distinguishing among the material, objective elements of the offense, the given mental state applies to all elements. MODEL PENAL CODE § 2.02(4) (1962 version).

19. *See generally* G. FLETCHER, RETHINKING CRIMINAL LAW 698-707 (1978). The author illustrates the distinction between consent as a justification for sexual intercourse and consent as a definitional element of the offense. If consent is of definitional dimension, the accused's mistake *i.e.* his belief that the purported victim has consented, suffices for acquittal. If consent is merely a justification, the accused's belief that he obtained consent must be free from fault and *reasonably grounded* to preclude liability. In the latter case, the defendant's belief that the victim consented justifies rape to the extent that self-defense justifies battery or manslaughter. *Id.* at 698.

20. [1975] 2 W.L.R. 923.

sented, however unreasonable, bars conviction in a rape case.[21] The Lords thus adopted the view that the mental requirement encompasses each element of the rape. Defendants' belief in the victim's consent precludes liability.

However, the fact that rape is a general intent crime,[22] supports the argument that a specific mental state need not be proved for each element of the crime. The defendant may be convicted of rape even if he did not intend that the intercourse be nonconsensual or that the victim lack capacity to give consent; his general wrongful state of mind will suffice for conviction. For instance, if defendant has sex with one other than his spouse, he has manifested an intent to commit adultery; *mens rea* is implicit. Similarly, if the defendant obtains the victim's consent via trickery,[23] whether or not a court considers the lack of consent element satisfied, defendant, at a minimum, has manifested that degree of culpability necessary for the lesser offense of assault and battery.[24] Again, the wrongful state of mind is supplied.

The absence of a specific intent requirement, however, may result in rape convictions for harmless behavior. It is the violence of the crime of rape which offends society, not the act of intercourse itself; it is the *nonconsensual* element which society meant to prohibit. Where defendant does not intend to do precisely the act which society meant to prohibit, he should be punished for a different offense or not punished at all. If the courts

21. *Id.* Although rejecting the theory of law recited by the lower courts, the appellate court was not convinced that defendants had *any* real belief in the victim's consent and thus affirmed the convictions.

22. People v. Utinans, 55 Ill. App. 3d 306, 317, 370 N.E.2d 1080, 1087 (1977); *see generally*, LAFAVE, *supra* note 16, at 358.

23. Textual reference to "consent via trickery" raises the issue whether fraudulently induced consent is legally effective consent. Fraud in the inducement does not vitiate consent; fraud in the *factum* does. For instance, where defendant obtains consent to enter owner's house and remove a box, but walks off with a box containing a diamond, fraud is in the *factum*, and the victim's consent is legally ineffective. By contrast, where the rape victim's consent is procured by defendant's promise to marry her, consent, though fraudulently induced, exists. Although not technically guilty of rape, the defendant, in such a case, would at least be guilty of the lesser included offense of assault and battery. *Consent*, *supra* note 17, at 321-22.

Fraudulently induced consent should be distinguished from consent extorted by force or imminent threats. In the former case, consent has been deceitfully obtained. In the latter case, there has been no actual consent; the threat negates it. Similarly, no real consent can be elicited from an unconscious, insensible, incompetent or wholly deranged victim. *Id.* at 321, n.1.

24. For general discussion of how mistake or ignorance of fact may render defendant unaware of the magnitude of what he is doing and thus guilty of some lesser included offense, or no offense at all, *see* LAFAVE, *supra* note 16 at 360.

refuse to require that some mental state be extended to the lack of consent element, a rule will be implemented which punishes solely for sex and nothing else. The balance of this article assumes, therefore, that whichever mental state applies to rape, it attaches to the nonconsent element as well. The inevitable conclusion is that mistake as to consent undercuts the general intent to rape as that offense is defined in Illinois. The sections which follow concentrate upon which mental state should be applied.

The Illinois Rape Statute

As noted, rape is a general intent crime[25] and not a strict liability offense.[26] Accordingly, the Illinois rape statute does not prescribe a specific mental state,[27] but rather, as indicated by Section 4-3(b) of the Criminal Code, the requirement may be satisfied in any of three ways: intent; knowledge; or recklessness.[28] Either of the three may apply to a defendant's awareness of his victim's mental capability.

Under the Illinois Criminal Code,[29] "(a) person intends, or acts intentionally or with intent to accomplish a result or engage in conduct described by the statute defining the offense, when his *conscious objective or purpose* is to accomplish that result or engage in that conduct."[30]

The Illinois knowledge requirement is satisfied where the accused is *consciously aware of the existence of circumstances* which, by statute, render his conduct criminal; a person is said to have knowledge of a *material fact* when he has an awareness of the *substantial probability* that such facts exist;[31] a person is said to have knowledge of the *result* of his conduct when he is *consciously aware* that a certain result is *practically certain* to be caused by his conduct.[32] Reckless conduct occurs when a

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25. People v. Marchese, 32 Ill. App. 3d 872, 336 N.E.2d 795, 804 (1975).

26. *See* ILL. REV. STAT. ch. 38, § 4-9 (1979). For a discussion of the factors considered in determining whether an offense is one for which the legislature intended absolute liability, *see* ILL. ANN. STAT. ch. 38, § 4-9, Committee Comments (Smith-Hurd 1961). *See also* People v. Nunn, 77 Ill. 2d 243, 249-50, 396 N.E.2d 27, 29-30 (1979); People v. Malone, 71 Ill. App. 3d 231, 232-33, 389 N.E.2d 908, 909-910 (1979).

27. *See* ILL. REV. STAT. ch. 38, § 11-1 (1979).

28. ILL. REV. STAT. ch. 38, § 4-3(b) (1979) [hereinafter referred to in text as 4-3(b)]; People v. Utinans, 55 Ill. App. 3d 306, 315, 370 N.E.2d 1080, 1087 (1977). For a discussion of the meaning of these mental states *see* United States v. Bailey, 444 U.S. 394 (1980). *See also* People v. Parr, 35 Ill. App. 3d 539, 541, 341 N.E.2d 439, 441 (1976).

29. ILL. REV. STAT. ch. 38, §§ 4-3 through 4-6 (1979).

30. ILL. REV. STAT. ch. 38, § 4-4 (1979) (emphasis added).

31. ILL. REV. STAT. ch. 38, § 4-5(a) (1979) (emphasis added).

32. ILL. REV. STAT. ch. 38, § 4-5(b) (1979) (emphasis added).

person acts and *consciously disregards a substantial and unjustifiable risk that circumstances exist* or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise under the same or similar circumstances.[33]

Thus, under the Illinois Criminal Code, an Illinois prosecutor could secure a rape conviction under Section 11-1(a)(2)[34] by showing: (1) that the defendant had a conscious objective or purpose (intent) to rape a mentally deficient person; or (2) that he was consciously aware of the circumstances surrounding the victim's inability to consent or that he was aware of a substantial probability that the victim was, in fact, mentally deficient (knowledge); or (3) that he consciously disregarded a substantial and unjustifiable risk that the victim was mentally deficient (recklessness).

On its face, Section 4-3(b) indicates that any of the three mental states will suffice for a rape conviction where the victim is shown to be mentally deranged or deficient. In two recent cases which have touched upon the issue, the defendants argued that the state should be required to prove at least knowledge *i.e.* that recklessness should not be sufficient for a conviction.

The Illinois Decisions

People v. McMullen[35]

On November 20, 1978, Mark McMullen and two other school boys lured a sixteen year old girl into a small room at school, pulled her pants down and had sexual intercourse with her. While McMullen took his turn, one of the other boys held her hands to the ground. The victim walked home after the occurrence and neither reported the incident to her parents nor to any school authorities.[36]

The evidence revealed that the victim lived with her father, stepmother and two younger sisters. She was enrolled in special education classes for the educably mentally handicapped.[37] The victim's stepmother testified regarding the victim's capabilities. She never traveled by herself, could not find her way around her home town and was incapable of shopping alone be-

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33. ILL. REV. STAT. ch. 38, § 4-6 (1979) (emphasis added).
34. *See* notes 8-9 and accompanying text *supra*.
35. People v. McMullen, 91 Ill. App. 3d 184, 414 N.E.2d 214 (1980).
36. *Id.* at 186, 414 N.E.2d at 215.
37. *Id.*

cause she didn't understand the value of money.[38] She was given only a few menial tasks to perform at home but was manipulated easily into performing her sisters' chores as well.[39]

Expert evidence disclosed that the victim had the mental ability of a beginning second-grader. Whereas a mean score for social reasoning and judgment is 10, the victim's score for those areas was 2.[40] The expert opined that the victim could not "comprehend the meaning, circumstances, responsibility, consequences and nature of sexual activity."[41]

The court instructed the jury that McMullen could be found guilty of rape either because (1) he committed an act of sexual intercourse with the victim by force and against her will; or (2) had intercourse with the victim when she was so mentally deranged or deficient that she could not effectively consent to intercourse.[42] The jury returned a general verdict of guilty. It is thus unknown upon which grounds for rape the jury based its decision.[43]

The Appellate Court for the Fourth District found ample evidence to support the verdict on either ground.[44] Regarding the latter, the court found the victim so mentally deranged or deficient that she could not effectively consent.[45] The defendant urged that the state be required to prove defendant's knowledge of the victim's mental incompetency.

The court did not expressly address the contention that knowledge should be required. Instead, it found that those acts by the defendant which constituted force also justified a finding of intent.[46] Assuming defendant's normal mental ability, the court reasoned that the act of pulling the victim's pants down while her hands were held down demonstrated force and consequently, intent.[47] Alternatively, the court stated that, if the defendant had subnormal mental abilities, the circumstances were sufficient to justify a finding that defendant acted recklessly with respect to the victim's mental condition.[48] In effect, the

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38. *Id.*

39. *Id.*

40. *Id.* at 186-87, 414 N.E.2d at 215.

41. *Id.* at 187, 414 N.E.2d at 216.

42. For discussion of this standard *see* notes 12-14 and accompanying text *supra*.

43. *Id.* at 187, 414 N.E.2d at 216.

44. So long as the indictment contains a single valid charge, a general finding of guilt will be upheld. *Id.* at 187, 414 N.E.2d at 216.

45. *Id.* at 188-89, 414 N.E.2d at 216-17.

46. *Id.* at 190, 414 N.E.2d at 218.

47. *Id.*

48. *Id.*

court ruled that evidence of either intent or recklessness would establish the *mens rea* requirement set forth under section 4-3(b) of the Criminal Code. The court was satisfied that McMullen intended to have sex with a mentally deficient victim; it did not debate the wisdom of using a recklessness standard.

People v. Farrokhi[49]

Medhi Farrokhi met Angela Waters on June 27, 1979.[50] Farrokhi had been delivering newspapers when he noticed Angela sitting in front of her home. He gave her a newspaper and she smiled. The two spoke and he told her he'd return after he finished delivering papers. Upon his return, Angela entered his car and they sat inside listening to the radio.[51]

Defendant testified that, upon Angela's suggestion, they went to his apartment where they had sexual intercourse.[52] After a bench trial, the court convicted defendant of rape[53] and defendant appealed.

Whether the victim lacked the mental capacity to give effective consent was not an issue on appeal.[54] Defendant's main contention was that he could not be convicted unless the state proved, beyond a reasonable doubt, that he had knowledge of the complainant's mental inability to give effective consent. The state argued, *inter alia*, that it satisfied the general intent requirement where it proved, beyond a reasonable doubt, that the defendant was merely reckless with regard to ascertaining the mental condition of the victim.[55]

The Appellate Court for the Second District affirmed the trial court's decision without committing itself to the proposition that the state must prove knowledge. Determining that the trial court used a knowledge and not a recklessness standard,[56] the appellate court appropriately limited its review to a consideration of whether defendant knew of his victim's handicap.

The court concluded, after a review of the evidence, that the victim's limited mental abilities and lack of knowledge about the nature and consequences of sex made it unlikely or improbable

49. 91 Ill. App. 3d 421, 414 N.E.2d 921 (1980).
50. *Id.* at 423, 414 N.E.2d at 924.
51. *Id.* at 424, 414 N.E.2d at 924.
52. *Id.*
53. *Id.* at 422, 414 N.E.2d at 922 (defendant was convicted of rape and sentenced to a term of six years in jail).
54. *Id.* at 423, 414 N.E.2d at 923.
55. *Id.* at 422, 414 N.E.2d at 923. (alternatively, the state argued that the provision in issue, *i.e.* the nonconsent provision, required *no* proof of *mens rea*; this theory was rejected by the court).
56. *Id.* at 423, 414 N.E.2d at 923.

that nineteen year old Angela knew how to perform the act or understood its nature.[57] Moreover, the court found that the defendant could not possibly have been oblivious to the victim's obvious mental deficiencies. Her speech was poor, difficult to understand and frequently unintelligible. Her expressive vocabulary skills were comparable to a four year old's. She could print her name but could not add four plus four or read. Expert evidence revealed her I.Q. score at 35 and a mental age of between 4 and 6 ½ years. Two psychiatrists opined that Angela was severely mentally retarded.[58] The court ruled that the circumstances were sufficient to establish a mental state of knowledge by defendant and found the record sufficient to support a finding that defendant knew the victim was so mentally deficient that she was incapable of effective consent.[59] The court did not rule on whether recklessness would, under any circumstances, be sufficient to convict a defendant under Section 11-1(a)(2) because it was procedurally bound to evaluate only the defendant's knowledge.

Analysis

Should a Definite Mental State Be Uniformly Applied?

Neither the *McMullen* nor the *Farrokhi* courts satisfactorily resolve the issue whether the prosecution must prove knowledge under Section 11-1(a)(2). *McMullen* relies heavily upon the express language of Section 4-3(b) of the Code[60] which indicates that any of the three mental states suffice if the statute defining the offense prescribes no specific mental state. The *Farrokhi* court similarly avoided a determination as to the propriety of using any mental state other than knowledge because of procedural restraints and also because the circumstantial evidence indicating that defendant had such knowledge was overwhelming.

If any of the three mental states will suffice, defendants are very much at the mercy of prosecutorial discretion.[61] Clearly, the mental state criterion under which defendants will be tried will vary from one case to the next. Such unpredictability puts the defendant at a distinct disadvantage. A clearly articulated

57. *Id.* at 427-28, 414 N.E.2d at 926-27.
58. *Id.* at 427, 414 N.E.2d at 926.
59. *Id.* at 427-28, 414 N.E.2d at 926-27.
60. 91 Ill. App. 3d at 190, 414 N.E.2d at 218.
61. People v. Gold, 38 Ill. 2d 510, 232 N.E.2d 702, *cert. denied*, 392 U.S. 940 (1968). *Gold* states that in the case of a general intent offense such as rape, the state need not allege a specific mental state. Thus, the pleadings do not apprise the defendant of the theory under which he will be prosecuted.

standard is necessary to anticipate the state's attorney's trial strategy and to evaluate the relevance of evidence. Arguably, the lack of a clear standard is unfair from a constitutional standpoint.[62] Unquestionably, it creates strategic obstacles to defense.

The extent to which the defendant's mental deficiency succeeds as a defense logically depends upon the degree of awareness necessary to convict. Assume that a court requires the mental state of knowledge, a degree of awareness falling somewhere between intent and recklessness. A relatively minor mental deficiency would likely render the defendant incapable of achieving the requisite mental state. If, however, the required mental state is recklessness, a lesser level of awareness, a more severely diminished capacity of the defendant would be necessary to vitiate the requisite mental state and preclude conviction. A defense attorney who cannot count on the application of a definite standard will be unable to evaluate the probable success of a diminished capacity defense. In both *Farrokhi* and *McMullen* counsel attempted to utilize the accused's mental inadequacy as a defense.

In *Farrokhi*, the defendant, an Iranian, testified that he had very poor command of the English language, that he spoke infrequently except with his Iranian friends, and that he took the job delivering papers so that he would not have to talk to anyone.[63] The state presented evidence to the contrary. The police sargeant who spoke with Farrokhi on the night of the incident testified that he was able to communicate effectively with defendant, that he never had to repeat anything, and that defendant never asked questions.[64] The chief of police testified that Farrokhi spoke English properly and had no difficulty communicating.[65] The circulation manager for the newspaper which hired defendant to deliver the papers testified that defendant had no difficulty in filling out the employment application. Defendant's supervisor at a prior job testified that defendant had some difficulty speaking English but none in understanding it. In addition, Farrokhi had been in this country for two years and had completed at least two semesters of college.[66]

The court, therefore, found frivolous, defendant's contention that language difficulties prevented him from ascertaining the

62. Defendant's due process rights are implicated where he has only a vague notion of the charges levelled against him.

63. 91 Ill. App. 3d at 424-25, 414 N.E.2d at 924.

64. *Id.* at 425, 414 N.E.2d at 924-25.

65. *Id.*

66. *Id.* at 423, 414 N.E.2d at 923.

victim's mental deficiency.[67] It also found overwhelming the evidence of defendant's normal mental capacity. That evidence coupled with indicators of Angela's mental inability convinced the Appellate Court for the Second District to affirm the conviction.

In *McMullen*, the trial court refused to admit evidence of defendant's mental deficiencies.[68] Mr. Justice Craven, in a vigorous dissent, pointed out the incongruity of employing the victim's incompetence as a theory of prosecution while ignoring the comparable incompetence of the accused.[69] While the dissent states that it would reverse and remand for a new trial with directions to allow evidence of defendant's mental deficiencies, it gives no guidance as to what degree the defendant's mental deficiency must be established to avoid a conviction.

Farrokhi and *McMullen* thus illustrate the confusion created by the absence of straightforward criteria. Two problems emerge: whether and when to admit evidence of defendant's mental deficiency, and if the evidence is admissible, how to gauge its significance against the backdrop of the victim's mental handicap.

Which Mental State Should be Utilized?

Knowledge should be the mental state uniformly applied to rape cases under Section 11-1(a)(2). The prosecution should be required to plead and prove that defendant knew his victim to be mentally deficient or deranged, or the lack of such knowledge should be available as an affirmative defense. Illinois authority supports that conclusion.

In *People v. Utinans*,[70] the Illinois Appellate Court for the First District required a "knowledge" mental state.[71] Defendant argued that he did not knowingly participate in the rape and that the codefendants committed the act. He further claimed that he had no knowledge that any of the acts performed were against the victim's will.[72] While the case did not concern the rape of a mentally deficient victim, the court announced that its decision would depend upon whether there was sufficient evidence in the record from which the jury could find that defendant acted *knowingly*.[73] *Utinans* thus supports a conclusion that knowledge is the applicable mental state for all rape cases.

67. *Id.* at 425-26, 414 N.E.2d at 925.
68. 91 Ill. App. 3d at 191, 414 N.E.2d at 218-19 (Craven, J. dissenting).
69. *Id.* at 191, 414 N.E.2d at 219.
70. 55 Ill. App. 3d 306, 370 N.E.2d 1080 (1977).
71. *Id.* at 315, 370 N.E.2d at 1087.
72. *Id.*
73. *Id.* at 317, 370 N.E.2d at 1087.

Under Section 11-4 of the Criminal Code—Indecent Liberties with a Child[74]—the accused's knowledge of the victim's age is essential. The Indecent Liberties statute provides that a person 17 years of age or more commits that offense when he or she submits to or performs, *inter alia*, an act of sexual intercourse with a child under 16 years of age.[75] The statute further provides that if the accused reasonably believed the child was 16 or older, such will constitute an affirmative defense.[76]

Section 11-4 does not expressly establish a knowledge requirement. The "reasonable belief" provision signifies, theoretically, that the accused's *reasonable* mistake as to the victim's age justifies the act.[77] The Committee Comments to that section, however, state that the gist of the offense is the knowing and deliberate victimization of a child's immaturity;[78] conceivably, lack of knowledge negates the offense. Section 11-1(a)(2) does not contain a reasonable belief provision; therefore, convictions may be easier to obtain under Section 11-1(a)(2) than under Section 11-4.

Infants and mentally deficient adults alike are especially vulnerable to criminal assault. There is no reason to believe that the legislature sought to provide better protection for handicapped adults than it sought to provide for children.[79] Indeed, a woman's mental capacity may be less discernable than her chronological age. If ignorance is a defense under 11-4, it should also be available under 11-1(a)(2).

Moreover, rape is a Class X felony;[80] indecent liberties with a child is a Class 1 felony.[81] The mental requirement applicable

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74. ILL. REV. STAT. ch. 38, § 11-4 (1979).

75. ILL. REV. STAT. ch. 38, § 11-4(a) (1979).

76. ILL. REV. STAT. ch. 38, § 11-4(c) (1979). It is noteworthy that both the sex crime of contributing to the sexual delinquency of a child, ILL. REV. STAT. ch. 38, § 11-5 (1979) and that of Indecent Solicitation of a Child, ILL. REV. STAT. ch. 38, § 11-6 (1979) expressly provide that it is not a defense that the accused reasonably believed the child to be of the age required therein. Those crimes, however, are misdemeanors and the sentence for each is substantially less than that for Indecent Liberties. In fact, the Committee Comments to the Indecent Solicitation statute specifically state that one of the policy reasons for precluding mistakes of age as a defense is because the offense is a misdemeanor. For these reasons, the Indecent Liberties statute lends itself more easily to analogy with the rape statute.

77. *See* note 19 *infra*.

78. Committee Comments ILL. ANN. STAT., ch. 38, § 11-4, 210-11 (Smith-Hurd 1972).

79. For an excellent elaboration of this argument *see* Brief for Defendant-Appellant, People v. Farrokhi, 91 Ill. App. 3d 421, 414 N.E.2d 921 (1980).

80. ILL. REV. STAT. ch. 38, § 11-1(c) (1979).

81. ILL. REV. STAT. ch. 38, § 11-4(e) (1979).

to the greater offense, rape, should be at least as stringent as that required to convict of the lesser offense.

Public policy considerations also favor a finding that a defendant know of a victim's mental inability to consent to intercourse in order to be guilty of rape. Societal mores and values have changed since the offense of rape was first codified. Many people enter into sexual relationships quite casually. Naivete about sex, even among teenagers, is no longer typical or expected. Conceivably, defendant may not have been availed of an opportunity to evaluate the victim's mental condition. More importantly, he may have underestimated the importance of doing so.

Committee Comments to Section 4-3, the section describing mental states,[82] note that crimes involving recklessness are much less common than those involving knowledge.[83] One can speculate that the reason stems from a reluctance by the courts to impose severe sanctions unless a defendant acted with a sufficiently wrongful state of mind. Where the crime is a felony, the courts should be particularly wary of convicting without evidence of a culpable mental state. Rape is a class X felony[84] punishable by a minimum of six and a maximum of thirty years in jail.[85] It is unconscionable that a defendant can be sentenced to such a term absent the requirement of a specific mental state.

Finally, many other jurisdictions provide that an essential element of the crime of rape of a mentally deficient victim is the defendant's knowledge of the victim's mental incapacity.[86] Several do so by express statutory language; others by judicial interpretation.[87] Only a few jurisdictions have found the accused's knowledge or lack of knowledge immaterial to the issue of guilt.[88]

Based on the foregoing, knowledge should be the mental state required of a defendant accused of raping a victim who is mentally deficient or deranged. A defendant should not be con-

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82. Committee Comments ILL. ANN. STAT. ch. 38, § 4-3 at 253-62 (Smith-Hurd 1972).

83. Committee Comments ILL. ANN. STAT. ch. 38, § 4-3 at 257-58 (Smith-Hurd 1972).

84. ILL. REV. STAT. ch. 38, § 11-1(c) (1979).

85. ILL. REV. STAT. ch. 38, § 1005-8-1(a)(3) (1979).

86. Annot., 31 ALR3d 1227, 1230 (1970).

87. Among the states which have codified the knowledge requirement are Indiana, Ohio, and Texas. States which have imposed the requirement judicially are California, Georgia, Iowa, Kentucky, Missouri, Pennsylvania, and Vermont. For a full discussion of the cases, *see* Annot., 31 ALR3d 1227, 1249-76 (1970).

88. Those states are Minnesota and Washington. For a full discussion *see* Annot., 31 ALR3d 1227, 1271 (1970).

victed and sent to jail for years unless it is proved, beyond a reasonable doubt, that he had knowledge of the victim's mental infirmity or unless he was permitted to present his ignorance of her condition as an affirmative defense. Analysis of Illinois case law and statutes, public policy considerations, legislative intent and the law in other jurisdictions overwhelmingly support the conclusion.

The Future

McMullen[89] and *Farrokhi*[90] indicate a case by case approach to the issue of defendant's mental state for the rape of a mentally deficient person. Until the Illinois Supreme Court decides the issue of which mental state, if any, should be uniformly applied, it is likely that courts will continue to decide cases on an *ad hoc* basis. The language of Section 4-3(b), which indicates that any of three mental states may be applied if the statute defining the offense charged prescribes no particular mental state, and the absence of such a provision in the rape statute, leads one to suspect that the Illinois Supreme Court will not easily be persuaded to require knowledge of the victim's incapacity to consent in rape cases. More likely, the courts will defer to the legislature; any change in the way the cases are decided will be the result of a legislative amendment to Section 11-1(a)(2).

89. Ill. App. 3d 184, 414 N.E.2d 214 (1980).
90. Ill. App. 3d 414, 441 N.E.2d 921 (1980).