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Michael McGillicuddy

tial need for such evidence would seem to make this a valid exception to the hearsay rule.

These are only a few of the solutions available, but they do indicate the best methods by which the present law can be improved. Whichever solution is ultimately chosen it will surely improve a statute that has resulted in headaches to all those who have labored under it.

RUTLEDGE R. LILES

CRIMINAL LAW: MISTAKE OF AGE AS DEFENSE TO STATUTORY RAPE

In *People v. Hernandez*[1] the defendant was convicted of statutory rape under section 261 of the California Penal Code. At the time of the offense the prosecutrix was seventeen years and nine months old, three months below the statutory age of consent. Having known the defendant for several months, she voluntarily engaged in the act of sexual intercourse with him. The trial court rejected the defendant's offer of evidence that at the time of the act he had a reasonable and bona fide belief, based on statements made by the prosecutrix, that she was eighteen. On appeal, the Supreme Court of California held that this rejection of evidence constituted reversible error.[2]

A generally accepted proposition in criminal law is that a conviction should not be sustained when the defendant has not assented to all of the elements of the crime charged.[3] When no crime would have been committed if the circumstances were as the defendant believed them to be, mistake of fact usually is a defense.[4] By applying

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stantial probability has never constituted a true guarantee of truthfulness." Ladd, *The Dead Man Statute: Some Further Observations and a Legislative Proposal*, 26 IOWA L. REV. 207, 238 (1941).

1. 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).
2. *Id.* at 529, 393 P.2d at 678, 39 Cal. Rptr. at 361.
3. *E.g.*, Gordon v. State, 52 Ala. 308 (1875); People v. Cohn, 358 Ill. 326, 193 N.E. 150 (1934); State v. O'Neill, 147 Iowa 513, 126 N.W. 454 (1910).
4. PERKINS, CRIMINAL LAW 826 (1957).

this general rule to statutory rape, the California Supreme Court has taken a position in direct conflict with that maintained by the majority of American jurisdictions. Most courts have held that mistake of age is no defense to a prosecution for statutory rape, regardless of the reasonableness of the mistake.[5] Whether the defendant was misled by the prosecutrix's appearance,[6] by her indirect representations,[7] or by her positive statements that she had reached the age of consent,[8] the mistake as to age can be no defense. Even when the defendant has made an effort to ascertain the prosecutrix's age, the defense of mistake is not allowed.[9] In the majority of states, then, the accused may be convicted of statutory rape without appreciating the criminal character of his act.[10]

By operation of statute and through court interpretation, Florida is in accord with the majority position. As prescribed by Florida Statutes, section 794.05 (1), the proof of intercourse with a previously chaste and unmarried victim under the age of eighteen is proper grounds for a conviction of statutory rape. Because intent was not included by the legislature as an element of the crime, the courts have declared that the act is made punishable on grounds of public policy, regardless of the actor's state of mind concerning the victim's age.[11] The propriety of following this policy is debatable.

Abandoning the traditional requirement of intent, the statutory rape statute subjects the defendant to strict criminal liability for his act. In most instances strict liability is applied to criminal offenses only through the operation of regulatory statutes aimed at public welfare offenses.[12] Because much litigation is foreseeable under these statutes, the elimination of intent as an element of the crimes is justified by the reduction of the number of litigable issues. Upon conviction of a public welfare offense, damage to one's reputation is slight and the penalties imposed are relatively mild. The possibility of harsh results is therefore decreased.[13] Such considerations are not per-

5. Heath v. State, 173 Ind. 296, 90 N.E. 310 (1910).
6. Campbell v. State, 63 Tex. Crim. 595, 141 S.W. 232 (1911).
7. *Ibid.*
8. People v. Marks, 130 N.Y. Supp. 524 (App. Div. 1911).
9. Manning v. State, 43 Tex. Crim. 302, 65 S.W. 920 (1901).
10. Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896).
11. Simmons v. State, 151 Fla. 778, 10 So. 2d 436 (1942).
12. Such offenses are: (1) illegal sales of intoxicating liquor; (2) sales of impure or adulterated food or drugs; (3) sales of misbranded articles; (4) violations of anti-narcotic acts; (5) criminal nuisances; (6) violations of traffic regulations; (7) violations of motor vehicle laws; (8) violations of general police regulations. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73 (1933).
13. Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952).

suasive, however, when more serious penalties are involved.[14] Here, strict liability is an abuse.[15]

The application of absolute penal liability to section 794.05 is neither necessary nor desirable. This section is not a regulatory provision. Statutory rape is a felony punishable by a prison sentence of up to ten years.[16] Upon conviction of this felony, the defendant may encounter great public opprobrium. Under these circumstances the burden of litigation should have no relevance to the determination of guilt.

Many courts have contended that the refusal to allow a mistake of age defense is proper because even if the facts were as the defendant believed them to be, the act would have been a legal wrong or a moral wrong.[17] According to this position, the intent to commit the act supplies the intent to commit the crime. Although such an argument is at first appealing, the application of such a fictional formula to statutory rape may be questioned.

In Florida, the crime of fornication[18] is the lesser legal wrong that the defendant would have committed if the facts were as he had supposed them to be. Because the laws against fornication are generally unenforced[19] and the legal wrong is either ignored or condoned by society,[20] the intent to commit fornication should not be considered equivalent to an intent to commit statutory rape. Moreover, because fornication carries with it a maximum prison sentence of only three months,[21] the intent required for conviction of fornication should not be viewed as sufficient criminal intent for conviction of a crime bearing a ten-year penalty.

Reliance upon the moral wrong theory to supply the element of criminal intent is also unsatisfactory. Though the defendant's act may be considered by many to be immoral even if the mistaken belief were true, such judgment as to morality should not be the determinative factor in criminal prosecution. When it is recognized that ninety-five per cent of the male population of the country has at one time committed a criminal sex offense,[22] and that premarital and

14. *Ibid.*

15. In reversing a larceny conviction based on a statute that did not include intent as an element of the crime, the United States Supreme Court questioned the application of strict liability to traditional crimes outside the area of public welfare offenses. Morissette v. United States, 342 U.S. 246 (1952).

16. FLA. STAT. §794.05 (1) (1965).

17. Brown v. State, 23 Del. 159, 74 Atl. 836 (1909); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892).

18. FLA. STAT. §798.03 (1965).

19. PLOSCOWE, SEX AND THE LAW 155 (1951).

20. Comment, 67 W. VA. L. REV. 149, 151 (1965).

21. FLA. STAT. §798.03 (1965).

22. See KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE

extra-marital intercourse is more widespread than generally supposed,[23] the supposition that any moral consensus as to permissible sexual activity exists is of doubtful validity. Criminal intent should not be determined by such vague standards when the task of ascertaining the moral conscience of the community would be impossible. The conclusion from this analysis would indicate that even in those states where the lesser crime or moral wrong doctrine is applied, a type of strict liability is imposed.

If the dangers of strict liability are to be avoided, revision of section 794.05 is necessary. It is not suggested, however, that justice would be furthered by a simple amendment allowing mistake of age as a defense in all cases. Implementation of the mistake of age defense should take place only in conjunction with a revision resulting from close scrutiny of the purposes and effects of the statutory rape law.

It should be noted that, under the present law, activities evidencing drastically varying degrees of danger to society are categorized and dealt with uniformly. Such uniform treatment is a consequence of adoption of the principles applied at common law to sex offenses concerning minors. Although the defense of mistake of age was not allowed at common law,[24] the age of consent was only ten years. The primary effect of this rule was the reduction of abnormal sexual activity with children.

In addition to this common law rape provision[25] the Florida Legislature enacted section 794.05 in order to protect the chastity of persons below the age of eighteen years.[26] By raising the age of consent to eighteen years, Florida has broadened the purpose and scope of the criminal law in this area, but has continued to apply principles suitable only to the restricted situation of abnormal sexual activity with very young children. Significant differences in culpability are disregarded. In Florida the law recognizes no difference between a person who has the abnormal desire to engage in intercourse with very young children and the person who responds to a normal and basic human drive with a partner who has at least reached the age at which physical injury is unlikely. Also, one who intends to take advantage of a youth's naive comprehension and understanding of the sex act and one who does not intend to do so are treated by the law as if they were of equal culpability. The individual who has a reasonable but mistaken belief that his partner has reached the age

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392 (1948).

23. See KINSEY, POMEROY, MARTIN & GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 416 (1953).

24. Statute of Westminster, 1, 1275, 3 Edw. 1, c. 13.

25. FLA. STAT. §794.01 (1965).

26. Deas v. State, 119 Fla. 839, 842, 161 So. 729, 730 (1935).

at which a mature and legally operative consent could be given is viewed in the same light as the individual whose implicit motive is to victimize the young. Yet, in these situations varying degrees of culpability are manifest.

To the extent that meaningful differentiation between degrees of culpability is a valid object of the criminal law, the above distinctions should be recognized in revising the present law. If the immediate purposes of a statutory rape law are the elimination of abnormal sexual abuse of children and the protection of the naive, a revision of section 794.05 should include a provision prohibiting sexual intercourse with children who have not yet reached the age of fourteen. Because physical and mental injury is a probable result of intercourse with a child below this age[27] and because intercourse with a child of such tender years evidences an abnormal mental condition on the part of the accused,[28] mistake of age should not here be allowed as a defense. If intercourse with persons between the ages of fourteen and seventeen is also to be prohibited, however, a reasonable mistake of age should be exculpatory as to the statutory rape charge. When the actor believes his partner to have reached an age at which discretion and mature judgment could be exercised, he has not exemplified the hazardous propensity to take advantage of the immature.[29] Mistake of age, however, should not be exculpatory when the accused is above the age of twenty-four.[30] Here, the great difference in ages suggests an abnormal element in the relationship and the presumption of victimization seems justified.

Proper criminal prosecutions would not be thwarted by the allowance of the mistake of age defense. Only a reasonable mistake of age, not ignorance of age, would be a defense. Moreover, the defendant would have the burden of proving the reasonable mistake. Under these circumstances, the harsh and unjust operation of strict liability could be avoided, and no undue compromise of the purposes of the statutory rape law would be effected.

MICHAEL MCGILLICUDDY

27. Comment, 62 YALE L.J. 55, 76 (1952).
28. PLOSCOWE, SEX AND THE LAW 155 (1951).
29. ILL. ANN. STAT. ch. 38, §11-4, comment (Smith-Hurd 1961).
30. The age of twenty-four is suggested by a similar provision in the English Statutes. Sexual Offenses Act, 1956, 4 & 5 Eliz. 2, c. 69, §§5-6.