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COMMENTS

STATUTORY RAPE — DEFENSES — A BONA FIDE AND REASONABLE MISTAKE AS TO THE PROSECUTRIX'S AGE IS A DEFENSE TO STATUTORY RAPE.

A significant development in criminal law has recently taken place in California. A seventeen year and nine month old girl voluntarily had intercourse with one Hernandez, who was under a bona fide and reasonable belief that she was over the age of consent.[1] Hernandez was convicted of statutory rape. He appealed, assigning as error the trial court's refusal to allow evidence of his belief as to the girl's age. The Supreme Court of California reversed, reasoning that a crime, even the crime of rape, requires a union of act and intent, and that if the defendant reasonably believes the female to be over the age of consent, the requisite intent is lacking. *People v. Hernandez,* 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

It has long been settled that if the female was actually under the age of consent at the time of the act of intercourse, the defendant was guilty whether or not he knew her true age.[2] The law determined her capacity to give operative consent and the defendant's belief as to the facts, however reasonable, was irrelevant.[3] *Hernandez* appears to be the first statutory rape case in the United States to allow the introduction of evidence for the purpose of showing as a defense that the defendant had a bona fide belief that the female was over the age of consent.[4] In doing so the court expressly overruled sixty-eight years of California precedent.[5] Other states have

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[1] CAL. PENAL CODE § 261-1. Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under . . . the following circumstances:

1. Where the female is under the age of eighteen years . . . .

[2] Efsiever v. People, 105 Colo. 88, 96 P.2d 8 (1939), wherein the evidence that prosecutrix told defendant she was twenty years old was uncontradicted.

[3] People v. Griffin, 117 Cal. 583, 49 Pac. 711 (1897); Manship v. People, 99 Colo. 1, 58 P.2d 1215 (1936); Heath v. State, 173 Ind. 296, 90 N.E. 310 (1910); State v. Sherman, 106 Iowa 684, 77 N.W. 461 (1898); Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896); Smith v. State, 44 Tex. Crim. 137, 68 S.W. 995 (1902).

[4] A number of states have by statute, however, made such belief a defense. See, *e.g.,* 38 ILL. REV. STAT. ch. 32, § 11-4(b): "It shall be an affirmative defense to indecent liberties with a child that: (1) the accused reasonably believed the child was of the age of 16 or upwards at the time of the act giving rise to the charge . . . . " N.M. STAT. § 40-A-9-3 (1953): " . . . A reasonable belief on the part of the male at the time of the alleged crime that the female was sixteen [16] years of age or older is a defense to criminal liability for statutory rape."

[5] The rule was established at least as early as People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896). An examination of the California cases which have

allowed presentation of such evidence, but as a consideration in passing sentence rather than as a defense.[6]

The traditional argument supporting such absolute liability, premised on protection of the "innocent child," has been stated by the Supreme Court of Kentucky:

> The victim is without capacity and discretion to have a proper conception of the character of the offense being committed against her person, or to comprehend its consequences fully, or perhaps to possess the strength of will to resist the influence and importunities of the ravisher. That is actually so of an idiot and presumptively so of a child.[7]

The validity of this argument is questionable.[8]

Counsel for *Hernandez* did not attempt to prove that the prosecutrix had the capacity to consent to sexual intercourse.[9] Instead, they argued that unless intent is expressly or by necessary implication excluded by statute,[10] a crime requires a joint operation of act

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cited *Ratz* revealed no statutory rape cases. Apparently the question of admission of evidence showing defendant's belief as to the prosecutrix's age was not argued in the Supreme Court of California from the time of the *Ratz* decision until the advent of *Hernandez*.

[6] See, *e.g.*, Law v. State, 92 Okla. Crim. 444, 224 P.2d 278 (1950); People v. Marks, 146 App. Div. 11, 130 N.Y. Supp. 524 (1st Dep't 1911). Admission of evidence showing the defendant's lack of *mens rea* comports with the American Law Institute's Model Penal Code, which expressly allows such evidence. MODEL PENAL CODE § 213.6(1) (Proposed Official Draft, 1962). The comments to Tentative Draft Number 4, at 253, indicate that this provision of the code is based on the fact that after a girl passes the age of ten she begins to obtain a maturity which justifies the belief that she is over the critical age.

[7] Golden v. Commonwealth, 289 Ky. 379, 385, 158 S.W.2d 967, 969 (1942). California itself utilized similar reasoning in People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896), in which the court said: "The protection of society, of the family, and of the infant, demand that one who has carnal intercourse under such circumstances shall do so in peril of the fact, and he will not be heard against the evidence to urge his belief that the victim of his outrage has passed the period which would make his act a crime."

[8] See KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 347 (1948). In recent years extensive surveys of sexual behavior patterns have indicated that nearly 50% of the males between adolescence and the age of fifteen in low socio-economic groups, and over 10% of the males in middle and higher socio-economic groups experience heterosexual relations. These relations are generally with school companions, thus indicating that the above figures could be applied, though to a lesser degree, to females of the same age and socio-economic groups. Mr. Justice Peek concludes, with some justification, that a girl who belongs to a group whose members indulge in sexual intercourse at an early age is likely to acquire an insight into the rewards and penalties of sexual indulgence. 393 P.2d at 674. The statutory presumption that all females under the age of consent do not have the capacity to comprehend the consequences of such acts is hardly realistic. The fact that so few charges of statutory rape are brought causes the author of this comment to doubt the preventive value of statutory rape sanctions to these groups.

[9] Brief for Appellant, pp. 10-11.

[10] People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956).

and intent.[11] They showed that the California Code does not expressly exclude intent as a requirement of rape,[12] and its exclusion cannot be reasonably implied. In addition, the section of the Code governing capacity to commit a crime excludes therefrom one who

[11] CAL. PENAL CODE § 20. "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

[12] CAL. PENAL CODE § 261. "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: . . . "

commits the act under ignorance or mistake of fact which disproves any criminal intent.[13] Therefore, they argued, if the defendant had a bona fide and reasonable belief that the prosecutrix was over the age of consent, the intent required for commission of the crime was lacking.

The *Hernandez* decision is an extension of a marked trend in California away from the imposition of criminal sanctions in the absence of culpability. The supreme court had previously held that a good faith belief of a prior divorce is a defense to a bigamy charge,[14] non-negligent ignorance of faulty labeling is a defense to a charge under the California Health and Safety Code,[15] and lack of negligence is a defense to charges under the crimes against children statutes.[16] The first two of these cases had an element in common with *Hernandez:* the defendant was either ignorant of or reasonably mistaken as to the facts. The California court has ruled that "intent" is necessary for the commission of these crimes and that knowledge of the facts, or an unreasonable lack of knowledge, is an essential element of that intent.

A disturbing factor in *Hernandez* is the court's failure to mention the distinction which has often been made between such crimes as bigamy and faulty labeling on the one hand, and statutory rape on the other.[17] In the latter case, even if the facts were as the defendant believed them to be, he would still be committing fornication, an immoral and, in many states, illegal act.[18] In the bigamy and labeling cases, if the defendant's belief were true, he would be free of moral as well as legal guilt.

Failure to recognize the distinction renders the ultimate meaning of *Hernandez* unclear. The court indicated that "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"[19] than to remarry in good faith reliance on an invalid divorce. One can hardly believe that the court sees no difference between marital and extramarital intercourse, and must therefore conclude that this issue was overlooked entirely. It is not possible to determine whether the decision extends to acts which are illegal if the facts

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[13] CAL. PENAL CODE § 26. "All persons are capable of committing crimes except those belonging to the following classes: . . .

"Four — Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent."

[14] People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956).

[15] People v. Stuart, 47 Cal. 2d 167, 302 P.2d 5 (1956).

[16] People v. Roderiguez, 186 Cal. App. 2d 433, 8 Cal. Rptr. 863.

[17] See, *e.g.*, State v. Ruhl, 8 Iowa 447 (1859); State v. Audette, 81 Vt. 400, 70 Atl. 833 (1908); Regina v. Prince, 13 Cox Crim. Cas. 138 (1875).

[18] Fornication is not a crime in California. In re Lane, 18 Cal. Rptr. 33, 367 P.2d 673 (1962); People v. Hopwood, 130 Cal. App. 168, 19 P.2d 824 (1933).

[19] 393 P.2d at 677.

are as the defendant believes them to be, or is confined to those which may be immoral.[20]

Despite the shortcomings of this case, California has made a significant return to the common law requirement of *mens rea* in all crimes by applying the "intent" requirement to statutory rape. At common law there is no crime without a union of act and intent,[21] and many states[22] have general statutory provisions similar to California's[23] which expressly require intent. The so-called "public welfare offenses"[24] exist as an exception to this general principle. It has been suggested[25] that the theory behind imposition of criminal liability for acts classified as "public welfare offenses" requires that they meet at least two criteria. First, the crime must have been created primarily for regulatory purposes such as traffic control or business regulation and not for the purpose of singling

[20] PERKINS, CRIMINAL LAW 833 (1957), indicates that a conviction upon mistake of fact can be obtained only where the act as the defendant saw it would constitute a crime or "involved a high degree of moral delinquency," giving statutory rape as an example. Regina v. Prince, 13 Cox Crim. Cas. 138, 141 (1875) states that the act need not be illegal, merely "wrong." HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 375 (2d ed. 1947) reaches the conclusion that "This branch of our law [strict penal liability] is so thoroughly disorganized, rests so largely on conjecture and dubious psychology, and effects such gross injustice as to require major reform." It is questionable, in this sense at least, whether *Hernandez* is more than a first groping step in the right direction.

[21] People v. Fernow, 286 Ill. 627, 122 N.E. 155, 157 (1919). "At common law a crime consisted of an unlawful act with evil intent . . . . "

[22] See, *e.g.*, COLO. REV. STAT. §40-1-1 (1963). "A crime or misdemeanor consists in a violation of a public law in the commission of which there shall be an union or joint operation of act, and intention or criminal negligence." COLO. REV. STAT. § 40-1-2 (1963). "Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused."

[23] CAL. PENAL CODE § 20.

[24] Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 56 (1933). The term, "public welfare offenses," is used to denote the group of police offenses and criminal nuisances punishable irrespective of the actor's state of mind, which have developed in England and the United States within approximately the last century.

[25] *Id.* at 72.

out individual wrongdoers. Second, the possible penalty for a violation must be relatively light because sentencing an individual to prison for an act free from moral guilt would be repugnant to the community sense of justice. The Supreme Court of California has followed these principles in *Henandez.* Statutory rape is a crime created for the purpose of singling out individuals for punishment by infliction of a serious penalty. It is not, therefore, a "public welfare offense," and *mens rea* is required for its commission.

A further ambiguity in *Hernandez* is found in the determination of the quantum of culpability necessary to constitute the requisite *mens rea.* The court says:

> There can be no dispute that a criminal intent exists when the perpetrator proceeds with utter disregard of, or in the lack of grounds for [sic], a belief that the female has reached the age of consent. But if he participates in a mutual act of sexual intercourse, believing his partner to be beyond the age of consent, with reasonable grounds for such belief, where is his criminal intent?[26]

The Model Penal Code defines four kinds of culpability: purposely, knowingly, recklessly, and negligently.[27] It then specifically provides that the degree of culpability required to establish the offense of statutory rape is recklessness.[28] On the other hand, the statement of the Supreme Court of California seems to indicate that mere negligence is sufficient. While the California Penal Code's requirement that "There must exist a union, or joint operation of act and intent, or criminal negligence"[29] can be interpreted as calling for more than mere tort negligence, and perhaps even something approaching recklessness,[30] the court does not seem to follow this approach.[31]

The view of the Model Penal Code is usually regarded as the common law position,[32] and is believed by the author of this comment to be the better reasoned view. *Hernandez* may not have gone far enough in this respect.

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[26] 393 P.2d at 676.
[27] MODEL PENAL CODE § 2.02(2) (Proposed Official Draft, 1962).
[28] *Id.* § 2.02(3): "When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly, or recklessly thereto."
[29] CAL. PENAL CODE § 20.
[30] *Cf.* PAULSEN & KADISH, CRIMINAL LAW & ITS PROCESSES 589 (1962).
[31] "No responsible person would hesitate to condemn as untenable a claimed good faith belief in the age of consent of an 'infant' female whose obviously tender years preclude the existence of reasonable grounds for that belief." 393 P.2d at 677.
[32] Turner, *The Mental Element in Crimes at Common Law,* 6 CAMB. L. J. 31 (1936).