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# Criminal Law -- Statutory Rape -- Mistake of Age -- Mens Rea

David A. Irvin

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Because of the great amount of business done with credit cards, it is vital that there be some definitive solution to the problem of which of the two parties, the issuer or the holder, should be held responsible for unauthorized purchases made with credit cards. It appears that the result reached in *Diners' Club* is the fairest. If neither the issuer, holder, nor merchant has been negligent, and if the parties have used due care in carrying out their various duties, or if only the holder has been negligent, the contractual liability clause between the issuer and the holder should be given full force and the holder should be liable for the unauthorized purchases. However, as between the holder and the issuer, the issuer is better in a position to prevent unauthorized charges. Therefore, if the issuer or merchant has been negligent in accepting charges, the issuer and *not* the holder should be the one to suffer. To hold otherwise would be to encourage lax practices among the merchants, for the merchants' examination of credit cards would become even more perfunctory than at present if they knew they would be repaid regardless of whether the charges were authorized. Requiring due care by all parties in the three-party credit card situation is the most equitable solution to the problem.

HOWARD S. IRVIN

### Criminal Law—Statutory Rape—Mistake of Age—Mens Rea

Prior to *People v. Hernandez*,<sup>1</sup> all American jurisdictions faced with an ignorance or mistake of age plea in statutory rape cases have held it not to be a valid defense.<sup>2</sup> Upon facts showing that the defendant and the prosecutrix were not married, that the prosecutrix was under the statutory age of eighteen,<sup>3</sup> and that the prosecutrix

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<sup>1</sup> 39 Cal. Rptr. 361, 393 P.2d 673 (Cal. 1964).

<sup>2</sup> Ignorance of age is no defense even though based on a good faith belief that the female was above the prohibited age. *Commonwealth v. Murphy*, 165 Mass. 66, 42 N.E. 504 (1895); *State v. Houx*, 109 Mo. 654, 19 S.W. 35 (1892). This is true even where there has been an exercise of reasonable care to ascertain her age. *Manning v. State*, 43 Tex. Crim. 302, 65 S.W. 920 (1901). It is also true where the defendant was misled by her appearance or her misrepresentations. *Brown v. State*, 23 Del. 159, 74 Atl. 836 (7 Penn. 1909); *Heath v. State*, 173 Ind. 296, 90 N.E. 310 (1910); *Harris v. State*, 115 Tex. Crim. 227, 28 S.W.2d 813 (1930). See generally 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 241 (12th ed. 1952).

<sup>3</sup> CAL. PENAL CODE § 261.

voluntarily engaged in an act of sexual intercourse with the defendant, the California Supreme Court in *Hernandez* departed from the settled law and overruled its prior decisions<sup>4</sup> on this issue. The court applied two other sections of the California Penal Code, both codifications of common law principles, and reversed the conviction of statutory rape, on the grounds that the trial court had committed error in excluding evidence of the defendant's belief of the prosecutrix's age. Although the sufficiency of the defendant's belief was not at issue and thus not determined, the court held the defendant's offer of this evidence "demonstrated a sufficient basis upon which, when fully developed, the trier of fact might have found in defendant's favor."<sup>5</sup>

The rationale of the court in deciding *Hernandez* followed three logical steps. It first recognized the common law principle that there can be no criminal offense without the element of *mens rea*,<sup>6</sup> which the California legislature had codified in section 20 of its Penal Code by declaring that there must be a joint operation of act and intent to constitute a crime.<sup>7</sup> Secondly, the court decided that statutory rape is not an offense made punishable without proof of culpability. It viewed the legislative intent expressed in section 20 as controlling judicial interpretation of statutes that are not ex-

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<sup>4</sup> *People v. Griffin*, 117 Cal. 583, 49 Pac. 711 (1897), and *People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896), were overruled. *People v. Sheffield*, 9 Cal. App. 130, 98 Pac. 67 (1908) was disapproved. When *Ratz* was decided, the statutory age was fourteen and it was contended

that, even though the child be shown to have been under the age of fourteen years, yet that, if the defendant had reason to believe, and did believe, that she was over the age of fourteen years, then there was an absence of the necessary intent to constitute a crime, and that he should be acquitted. He asked the court to give instruction to the jury embodying this as a proposition of law.

*People v. Ratz*, *supra* at 134, 46 Pac. at 916. It was held no error to refuse the proposed instruction.

<sup>5</sup> 39 Cal. Rptr. at 366, 393 P.2d at 678.

<sup>6</sup> At common law a guilty mind or intent was essential. *United States v. Schultze*, 28 F. Supp. 234 (D.C. Ky. 1939); *State v. Weisberg*, 74 Ohio App. 91, 55 N.E.2d 870 (1943); *Commonwealth v. Jackson*, 345 Pa. 456, 28 A.2d 894 (1942). For the purposes of this note, *mens rea* does not refer to the awareness of wrong-doing related to a mistake of law but to the awareness of the facts that give character to the act. "Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. That awareness is all that is meant by the *mens rea*, the 'criminal intent', necessary to guilt. . . ." *United States v. Crimmins*, 123 F.2d 271, 272 (2d Cir. 1941).

<sup>7</sup> "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." CAL. PENAL CODE § 20.

pllicit as to the element of intent. The court concluded that a strict liability standard should not be imposed in the absence of a declaration in the governing statute that this is the result deemed necessary. In the final step, the court applied section 26 of the Penal Code, which provides that a mistake of fact disproves criminal intent.<sup>8</sup> Since awareness of age is one of the facts that give character to the act, it concluded that, given the proper circumstances and proof, such lack of knowledgeable conduct could be a proper defense in statutory rape.<sup>9</sup>

Although *Hernandez* departs from the previously unanimous, strict rule by allowing a mistake-of-age defense, its real importance is that it is the first adequate treatment by a court of the necessity of the mental element in statutory rape. For it is only by first holding that criminal intent is necessary that mistake of fact can become an effective defense. Obviously, if knowledgeable conduct is not a prerequisite, the lack of knowledgeable conduct will be immaterial.

As stated above, *mens rea* was a fundamental requirement of common law offenses, but when the various legislatures codified common law crimes or created offenses by statute, the relevancy of the mental element was often left for the courts to determine. Some statutes, either by expressly requiring a specific intent<sup>10</sup> or by providing that the conduct be "knowingly" or "willfully" done,<sup>11</sup> leave little room for judicial construction. However, where the governing statute is silent as to the requisite mental element, judicial interpretation faces a problem. Criminal intent is either read into the statute or, in effect, eliminated. The former generally applies to common law crimes that have been codified<sup>12</sup> or crimes involving

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<sup>8</sup> "All persons are capable of committing crimes except those belonging to the following classes: . . . Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." CAL. PENAL CODE § 26.

<sup>9</sup> The California court had previously applied the same two sections to bigamy and allowed a good faith belief that a former wife had obtained a divorce as a valid defense. *People v. Vogel*, 46 Cal. 2d 798, 299 P.2d 850 (1956).

<sup>10</sup> *E.g.*, N.C. GEN. STAT. § 14-54 (Supp. 1963) (break and enter with intent to commit a felony); N.C. GEN. STAT. § 14-90 (1953) (fraudulent intent in embezzlement).

<sup>11</sup> For judicial interpretation, see, *e.g.*, *Dearing v. United States*, 167 F.2d 310 (10th Cir. 1948). For a state court's interpretation, see *State v. Whitener*, 93 N.C. 590 (1885). *But see* *United States v. Gunn*, 97 F. Supp. 476 (D.C. Ark. 1950), stating that these are words of many meanings.

<sup>12</sup> *Morissette v. United States*, 342 U.S. 246 (1952).

moral turpitude.<sup>13</sup> In this instance, the statute is viewed in the light of the common law and it is assumed that if this element were to be eliminated, the legislative intent would have been expressed.<sup>14</sup> The latter interpretation is given to statutes or administrative regulations called "public welfare offenses."<sup>15</sup> These statutes are designed to increase the duties of those in control of particular industries, trades, properties, or activities that affect public health, safety, or welfare, and their breaches are not true crimes even though criminal penalties are imposed.<sup>16</sup> They are directed more at neglect or inaction than the aggression or invasion dealt with by the common law. A violation is regarded as an offense against the authority of the state, because its "occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same . . . ."<sup>17</sup> Since the accused is the one best able to prevent the violation by reasonable care, he acts at his peril to ascertain the true nature of his act.<sup>18</sup> Moreover, the penalties are generally light with little if any threat to reputation. The vast number of such offenses<sup>19</sup>

<sup>13</sup> "The general rule is that in all statutory crimes involving moral turpitude criminal intent is an implied, necessary ingredient." *Seaboard Oil Co. v. Cunningham*, 51 F.2d 321, 324 (5th Cir. 1931). For a distinction between *mala in se* and *mala prohibita*, see *State v. Erlandson*, 126 Mont. 316, 249 P.2d 794 (1952).

<sup>14</sup> *Masters v. United States*, 42 App. D.C. 350 (Ct. App. 1914).

<sup>15</sup> Examples of public welfare offenses are illegal sales of liquor, sales of impure food or drugs, sales of misbranded articles, violations of anti-narcotic acts, criminal nuisances, traffic regulations, and motor vehicle laws. See generally Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

<sup>16</sup> "Prosecutions for petty penalties have always constituted in our law a class by themselves. . . . That is true though the prosecution is criminal in form." *Tenement House Dep't v. McDevitt*, 215 N.Y. 160, 168-69, 109 N.E. 88, 90 (1915).

<sup>17</sup> *Morissette v. United States*, 342 U.S. 246, 256 (1952).

<sup>18</sup> "In these cases there is a voluntary act which the party does at his peril, and he is not to be excused either by ignorance of the law or ignorance of the fact. Either kind of ignorance implies a fault, and it must be assumed that with due diligence the true character of the act could have been ascertained." FREUND, *POLICE POWER* 635-36 (1904).

<sup>19</sup> It is needless to point out that, swamped with such appalling inundations of cases of petty violations, the lower criminal courts would be physically unable to examine the subjective intent of each defendant, even were such determination desirable. As a matter of fact it is not; for the penalty in such cases is so slight that the courts can afford to disregard the individual in protecting the social interest.

The ready enforcement which is vital for effective petty regulation on an extended scale can be gained only by a total disregard of the state of mind.

Sayre, *supra* note 15, at 69-70.

and the purpose of protecting the public<sup>20</sup> make speedy enforcement a matter of necessity. These considerations have led the courts to construe the silence of the legislature as dispensing with intent and as making the guilty act alone the crime.

However, statutory rape presents a striking exception to the general rule of statutory construction. Statutes creating this offense, which was a common law crime<sup>21</sup> and which courts consider to involve moral turpitude,<sup>22</sup> are not viewed in the light of the common law. Instead, whoever commits the offense is said to act at his peril, at least as far as the girl's age is concerned; in other words, knowledge of her age is not an element of the offense.<sup>23</sup>

This felony falls within the category of crimes "in which, on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that give character to his act," . . . and proof of an intent is not indispensable to conviction. . . . "The law makes the *act* the crime, and infers a criminal intent from the act itself."<sup>24</sup>

Although this inference, in effect, eliminates intent, the courts continue to speak in terms of *mens rea*, the idea being that it varies according to the nature of the offense. While murder requires a mind equal to malice aforethought and theft an intention

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<sup>20</sup> An exception to the common law requirement of criminal intent is recognized in statutes the nature of which are police regulations and the purpose of which would be obstructed by such a requirement. *United States v. Balint*, 258 U.S. 250 (1922). The owner of the car in *People v. Harrison*, 183 App. Div. 812, 37 N.Y. Crim. 20, 170 N.Y. Supp. 876 (1918), was held for his chauffeur's speeding. It was no defense that he was talking to his wife and did not know how fast the car was going, because to allow such a defense would allow all owners to escape the obligations of the law.

<sup>21</sup> "Sir Matthew Hale is, indeed, of the opinion that such profligate actions committed on an infant under the age of *twelve* years, the age of female discretion by common law, either with or without consent, amount to rape and felony, as well since as before the statute of Queen Elizabeth; but that law has in general been held only to extend to infants under *ten*. . . ." 4 BLACKSTONE, COMMENTARIES \*212.

<sup>22</sup> An alien guilty of statutory rape is guilty of a crime involving "moral turpitude" so as to authorize deportation. *Bendel v. Nagle*, 17 F.2d 719 (9th Cir. 1927). Moral turpitude "is a vague term, its meaning depending to some extent upon the state of public morals. It is defined as anything that is done contrary to justice, honesty, principle, or good morals . . . . Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law." *United States ex rel. Berlandi v. Reimer*, 30 F. Supp. 767, 768 (S.D.N.Y. 1939).

<sup>23</sup> *Brown v. State*, 23 Del. 159, 74 Atl. 836 (7 Penn. 1909).

<sup>24</sup> *Simons v. State*, 151 Fla. 778, 782-83, 10 So. 2d 436, 438 (1942). *Accord*, *State v. Wade*, 224 N.C. 760, 32 S.E.2d 314 (1944).

permanently to deprive the owner of his property, statutory rape requires only that the defendant intend to do the act. It is reasoned that intention is an element of voluntary action; all crimes except omissions must be voluntary actions; therefore, intention is an element of all criminal acts.<sup>25</sup> Thus, when intercourse is voluntarily engaged in, the male assumes a risk and the consequences that ensue.

It appears that this "at peril" doctrine arose because of an underlying notion that the conduct itself is "wrong," and statutory rape has been distinguished from public welfare offenses on this basis.<sup>26</sup> The biblical view<sup>27</sup> that extramarital intercourse is "wrong" continues in the express language of the statutes<sup>28</sup> and in the "laws of morality."<sup>29</sup> Since the defendant has wrongfully done the very thing contemplated by the legislature, he cannot set up a legal defense by merely proving that he thought he was committing a different kind of "wrong" from that which he in fact committed.<sup>30</sup> The concept of "wrong" also draws support from the outrage to parental and community feelings because "an 'unwise' disposition of a girl's sexual 'treasure,' it is thought, harms both her and the social structure which anticipates certain patterned uses. Hence, the law of statutory rape must intervene to prevent what is predicted will be an unwise disposition."<sup>31</sup> Another factor influencing the courts in this respect is the fear that such conduct may jeopardize the female child's later sexual adjustment as well as cause some physical damage.<sup>32</sup> Premarital intercourse has also been condemned because it is thought to lead to the spread of venereal disease and unwanted

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<sup>25</sup> *Brown v. State*, 23 Del. 159, 74 Atl. 836 (7 Penn. 1909).

<sup>26</sup> PERKINS, *CRIMINAL LAW* 699 (1957).

<sup>27</sup> Fornication is forbidden. 1 *Corinthians* 10:8; 1 *Thessalonians* 4:3.

<sup>28</sup> "[T]he act is intrinsically wrong; for the statute says if 'unlawfully' done. The act done with a mens rea is unlawfully and carnally knowing the girl, and the man doing that act does it at the risk of the child being under the statutory age." *Regina v. Prince*, L.R. 2 Cr. Cas. Res. 154, 176 (1875). *Accord*, *Heath v. State*, 173 Ind. 296, 90 N.E. 310 (1910).

<sup>29</sup> "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 when he supposes he shall escape punishment, satisfies the demands of the law, and he must take the consequences." *State v. Houx*, 109 Mo. 654, 661, 19 S.W. 35, 37 (1892).

<sup>30</sup> *Regina v. Prince*, L.R. 2 Cr. Cas. Res. 154, 177 (1875) (concurring opinion).

<sup>31</sup> Comment, 62 *YALE L.J.* 55, 76 (1953).

<sup>32</sup> *Ibid.*

pregnancies.<sup>33</sup> Thus, the policy reasons of protecting society, family, and infant demand the at-the-actor's-peril doctrine, and the courts so construe the statutory rape laws.

North Carolina has two statutes pertaining to statutory rape. Intercourse with a female under twelve is punishable by death or life imprisonment.<sup>34</sup> If the female is between twelve and sixteen and a virgin, it is a felony punishable at the discretion of the court.<sup>35</sup> In both of these statutes intent is neither mentioned nor construed to be an element.<sup>36</sup> Where the defense of mistake of age was raised, it was held to be immaterial.<sup>37</sup>

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<sup>33</sup> See sources listed in KINSEY, POMEROY & MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 560 (1948).

<sup>34</sup> Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.  
N.C. GEN. STAT. § 14-21 (1953).

<sup>35</sup> "If any male person shall carnally know of abuse any female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony and shall be fined or imprisoned in the discretion of the court." N.C. GEN. STAT. § 14-26 (1953).

<sup>36</sup> *State v. Browder*, 252 N.C. 35, 112 S.E.2d 728 (1960); *State v. Jones*, 249 N.C. 134, 105 S.E.2d 513 (1958); *State v. Swindell*, 189 N.C. 151, 126 S.E. 417 (1925) (by implication). Intent was not required even when the statute provided for a mandatory death sentence. *State v. Gibson*, 221 N.C. 252, 20 S.E.2d 51 (1942).

<sup>37</sup> *State v. Wade*, 224 N.C. 760, 32 S.E.2d 314 (1944). The court stated: One who has carnal knowledge of a female child under the age of twelve years is guilty of rape, and the fact that the offender may have believed the child was above the age of consent, will not mitigate the crime. The statute does not require the State to charge or prove that a person indicted thereunder must have known the female child to have been under the age of consent; one having carnal knowledge of such a child, does so at his peril, and his opinion as to her age, is immaterial.

*Id.* at 762, 32 S.E.2d at 315. The court also uses morality in varying degrees. In justifying a sentence of thirty years of hard labor for violation of what is now N.C. GEN. STAT. § 14-26 (1953), the court said that "the defendant, a man of 26 years of age, ensnares a 13 year old girl, innocent and virtuous, and debauches her under circumstances that would make him guilty at least of such turpitude as amounts in morals to rape. For legal rape the penalty is death." *State v. Swindell*, 189 N.C. 151, 154, 126 S.E. 417, 418 (1925).

The "abusing" constructed with the "carnally knowing" means the imposing upon, deflowering, degrading, illtreating, debauching and ruining socially, as well as morally, perhaps, of the virgin of such tender years, who, when yielding willingly, does so in ignorance of the consequences and of her right and power to resist.

It is the opinion of the writer that the statutory rape laws need to be reconsidered. The history of this offense reveals that it was designed to protect the female *child* below the age of discretion.<sup>38</sup> Children under ten or twelve were conclusively presumed to have no understanding of the nature and consequences of the sexual act. Thus their consent was immaterial. Slowly, the statutory age limits have been raised to sixteen, eighteen, or higher until its original purpose is obscured. At some point in their growth, children begin to understand sex. It has been said that substantially all females have completed the period of sexual awakening by the end of their fifteenth year.<sup>39</sup> In light of this finding, the present judicial construction of statutory rape can only be justified by the "wrongful" conduct theory and by its deterrent effect. But to continue to uphold convictions "on the grounds that what was done would not be proper even if the facts had been as the defendant reasonably supposed them to be"<sup>40</sup> is to ignore social realities. "Pursuit of females who appear to be over 16 betokens no abnormality but only a defiance of religious and social conventions which appear to be fairly widely disregarded."<sup>41</sup> The biblical view that the immoral are to be judged by God<sup>42</sup> seems to comport with sound contemporary thought about the purposes of a criminal code:

The Code does not attempt to use the power of the state to enforce purely moral or religious standards. 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. Such matters are best left to religious, educational and other social influences. Apart from the question of constitutionality which might be raised against legislation

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State v. Monds, 130 N.C. 697, 700, 41 S.E. 789, 790 (1902). Justice Clark, dissenting in State v. Hart, 186 N.C. 582, 605, 120 S.E. 345, 356 (1923), advocated the conviction of an aider and abettor in a statutory rape case, quoting an English Chancellor: "Morality comes in the cold abstract from the pulpit, but men smart practically under its lessons when we lawyers are the teachers." *Id.* at 608, 120 S.E. at 358.

<sup>38</sup> State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892); State v. Bowman, 232 N.C. 374, 61 S.E.2d 107 (1950); State v. Johnston, 76 N.C. 209 (1877). See also State v. Hart, 186 N.C. 582, 590, 120 S.E. 345, 349 (1923) (Clarkson, J., dissenting). For Blackston's support of this statement, see note 21 *supra*. See generally PLOSCOWE, SEX AND THE LAW 178 (1951).

<sup>39</sup> MODEL PENAL CODE § 207.4, comment at 252 & n.134 (Tent. Draft No. 4, 1955).

<sup>40</sup> PERKINS, *op. cit. supra* note 26, at 699.

<sup>41</sup> MODEL PENAL CODE § 207.4, comment at 253 (Tent. Draft No. 4 1955).

<sup>42</sup> Hebrews 13:4. Cf. John 8:4-11.

avowedly commanding adherence to a particular religious or moral tenet, it must be recognized, as a practical matter, that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions.<sup>43</sup>

Moreover, the act of intercourse alone is not a "wrong" in the legal sense of that word, for when discreetly done with a girl above the statutory age and with her consent, it would go unpunished under most fornication and adultery laws.<sup>44</sup> Realizing that the act must be punished as it was intended to be at its commission and not as it was later found to be,<sup>45</sup> the common law doctrine of mistake of fact is pertinent. It should not be assumed that what the defendant did was unlawful within the meaning of the statute, for that is the very question to be determined.<sup>46</sup> The courts, accordingly, must face directly the issue of intent. To uphold the "at peril" interpretation without the "wrongful" conduct theory would be an extension of the rationale applied to a public welfare offense. This extension should

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<sup>43</sup> MODEL PENAL CODE § 207.1, comment at 207 (Tent. Draft No. 4 1955). For a related discussion, see Schwartz, *Morals Offenses And The Model Penal Code*, 63 COLUM. L. REV. 669 (1963).

<sup>44</sup> At the present time 11 of the 48 states have no fornication statute, and only 18 punish a single act of intercourse between unmarried persons (four of these by fine alone). The rest of the states require either a continuous or an "open and notorious" relationship, or both. Fornication is not criminal in England or, generally speaking, in the rest of the world. Model Penal Code § 207.1, comment at 204-05 (Tent. Draft No. 4 1955). "Lewdly and lasciviously . . . cohabit" in N.C. GEN. STAT. § 14-184 (1953) implies habitual intercourse, and the single act will not constitute fornication and adultery. *State v. Kleiman*, 241 N.C. 277, 85 S.E.2d 148 (1954); *State v. Ivey*, 230 N.C. 172, 52 S.E.2d 346 (1949); *State v. Davenport*, 225 N.C. 13, 33 S.E.2d 136 (1945). *Quaere*: Is "open" conduct necessary? It seems to play a part, although not required, in *State v. Davenport*, *supra*. When is requisite habitual intercourse, "in the manner of husband and wife," established? In *State v. McDuffie*, 107 N.C. 885, 12 S.E. 83 (1890), an instruction that habitual illicit sexual intercourse for two weeks was sufficient to constitute the offense was approved, but the facts reveal that the defendants lived together in a one-room house during the period and that they were seen together in a bunk at least four different times.

<sup>45</sup> To constitute a crime the personal volition or negligence of the actor preceding the act is essential. Whether or not the exculpatory defense that in so exercising his volition there was no criminal intent will avail him depends upon whether the defense was at common law, where the criminal intent is essential, or under a statute where it is not.

*State v. American Agricultural Chem Co.*, 118 S.C. 333, 338, 110 S.E. 800, 802 (1922). The intent and the act, at least, must concur. *People v. Walrath*, 279 App. Div. 56, 108 N.Y.S.2d 54 (1951).

<sup>46</sup> *Regina v. Prince*, L.R. 2 Cr. Cas. Res. 154, 156 (1875) (dissenting opinion).

be rejected because statutory rape carries the stigma of a true crime, severe penalties, prolonged loss of liberty, and substantial loss to reputation. Faced with these consequences, a defendant must be given an opportunity to litigate his guilt even though the purpose of the law, a factor in the public welfare offense rationale, is slightly hindered.

The theory of deterrence does not seem to support a strict liability standard where the age has been raised to such limits as are now found in statutes. Dr. Kinsey's report shows a gap between what men do and what the law assumes they do. His finding that eighty-five per cent of the total male population has premarital intercourse<sup>47</sup> becomes important when considered with these findings: late adolescence in males is the period of greatest sexual activity;<sup>48</sup> most males have intercourse with girls of about their own age;<sup>49</sup> and the number of persons participating and the frequency of the act vary according to the educational and social level.<sup>50</sup> Among groups with no more than grade school education that were surveyed in two or three lower level communities, the reporters were "unable to find a solitary male who had not had sexual relations with girls by the time he was 16 or 17 years of age."<sup>51</sup> Thus, while there *may* be public abhorrence attached to the commission of sexual intercourse among unmarried persons, there is evidence of an equally widespread practice which is privately regarded as normal and expected.<sup>52</sup>

Not only has the effectiveness of such statutes been placed in doubt, but also the severe consequences of the present construction

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<sup>47</sup> KINSEY, POMEROY & MARTIN, *op. cit. supra* note 33, at 392.

<sup>48</sup> *Id.* at 219.

<sup>49</sup> *Id.* at 558.

<sup>50</sup> 98% of the males with grade school education or less, 84% of those with high school education, and 67% of those with college education have premarital intercourse. *Id.* at 549-52.

<sup>51</sup> *Id.* at 381.

<sup>52</sup> One complicating factor in this respect relates to the difference in perspectives identified with culture and class between those who legislate and those who enforce the law.

Anglo-American sex laws are a codification of the sexual mores of the better educated portion of the population. . . . However, the enforcement of the law is placed in the hands of police officials who come largely from grade school and high school segments of the population. For that reason, the laws against non-marital intercourse are rarely and only capriciously enforced, and then most often when upper level individuals demand such police action.

*Id.* at 389-90.

of them can be shown by statistics compiled in New York. During the period of 1930-1939 in New York City, eighty-two per cent of all rape *convictions* and fifty-nine per cent of all *convicted* "sex offenders" were statutory rape situations involving acts of sexual intercourse with the consent of girls under eighteen.<sup>53</sup> Thus, with premarital intercourse on the increase<sup>54</sup> and with the lack of official diligence or public clamor that is characteristic of forcible rape cases,<sup>55</sup> a basic injustice against the male prevails under the present statutes and their judicial construction. Considering the severe penalty and the irreparable damage to character, one fails to see justification to include the innocent in order to convict the guilty.

What is being advocated is not an elimination of statutory rape laws but only a return to their original purpose and objectives. The conflicting views of the protection of *infants* and chastity and of the protection of an individual's rights could be reconciled with a recognition of the mental element that is involved in statutory rape. Such recognition would permit only the punishment for conscious violations of the law and would protect the *child* obviously or known to be below the age of consent. But, because physical development and sexual sophistication appear well before the present age limits,<sup>56</sup> bona fide mistakes will occur and should be considered in the determination of guilt. Criminal intent could be made an element of statutory rape by either of two methods. Courts could give judicial notice to the statute's purpose and the present attitude of society and apply their *mens rea* statute<sup>57</sup> to overrule past precedents, as California did. In jurisdictions without such a statute, the common law principle would be sufficient grounds for a different construction. The abnormality of seeking out the very young<sup>58</sup> and the practical difficulties of reasonableness would take care of a groundless defense of mistake of age. A better approach seems to be a clear declaration

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<sup>53</sup> PLOSCOWE, *op. cit. supra* note 38, at 178; Comment, 62 YALE L.J. 55, 74 n.131 (1955).

<sup>54</sup> DRUMMOND, THE SEX PARADOX 321 (1953).

<sup>55</sup> Comment, 62 YALE L.J. 55, 75 (1955).

<sup>56</sup> MODEL PENAL CODE § 207.4, comment (Tent. Draft. No. 4, 1955).

<sup>57</sup> *E.g.*, ARIZ. REV. STAT. ANN. § 13-131 (1956); COLO. REV. STAT. ANN. § 40-1-1 (1953); GA. CODE ANN. § 26-201 (1953); IDAHO CODE § 18-114 (1948); MONT. REV. CODE § 94-117 (1949); NEV. REV. STAT. § 193-190 (1957); UTAH CODE § 76-1-20 (1953).

<sup>58</sup> "[A]n adult male's proclivity for sex relations with children is a recognized symptom of mental aberration, called pedophilia." MODEL PENAL CODE § 207.4, comment at 251-52 (Tent. Draft No. 4, 1955).

by the legislature of its purpose and intent within the governing statute, much in the fashion of the Model Penal Code. There a two step grading system was employed, providing that all intercourse under ten to be rape<sup>59</sup> and consensual intercourse with a female less than sixteen is to be corruption of a minor.<sup>60</sup> The original purpose of the law is given effect by declaring that mistake of age will not be a proper defense to the former but will be to the latter.<sup>61</sup>

The way is open in North Carolina for either approach. The one case<sup>62</sup> denying a mistake of age defense upon the rationale of other jurisdictions could be distinguished on its facts—the prosecutrix was nine, the defendant was twenty-three, and the record reveals serious doubts as to the reasonableness of his belief. Given the proper case, the court could then properly deal with the criminal intent involved by following the three logical steps of recognizing the common law requirement of *mens rea*, of rejecting the “wrong-

<sup>59</sup> MODEL PENAL CODE § 213.1 (Proposed Official Draft, 1962).

<sup>60</sup> MODEL PENAL CODE § 213.3 (Proposed Official Draft, 1962).

<sup>61</sup> With respect to sex offenses, MODEL PENAL CODE § 213.6 (Proposed Official Draft, 1962) states:

(1) *Mistake as to Age*. Whenever in this Article the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove that he reasonably believed the child to be above the critical age.

As another example of a legislative declaration, reference is made to the present law in England: The Sexual Offenses Act, 1956, 4 & 5 Eliz. 2, c. 69, which provides in part as follows:

6. Intercourse with girl between 13 and 16.—(1) It is an offence, subject to the exceptions mentioned in this section, for a man to have unlawful sexual intercourse with a girl not under the age of thirteen but under the age of sixteen.

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(3) A man is not guilty of an offence under this section because he has unlawful sexual intercourse with a girl under the age of sixteen, if he is under the age of twenty-four and has not previously been charged with a like offence, and he believes her to be of the age of sixteen or over and has reasonable cause for the belief.

In the past, North Carolina has relied on the English law in shaping its sex laws. The following are some examples of this reliance: the definition of carnal knowledge, *State v. Johnston*, 76 N.C. 209 (1877); necessity of proof of emission of seed as well as penetration for conviction, *State v. Gray*, 53 N.C. 170 (1860) [later changed by the legislature to a requirement of only penetration, *State v. Hodges*, 61 N.C. 231 (1867)]; sufficient indictment even without the words “female child,” *State v. Goings*, 20 N.C. 289 (1838).

<sup>62</sup> *State v. Wade*, 224 N.C. 760, 32 S.E.2d 314 (1944).

ful" conduct theory and the analogy to public welfare offenses, and of allowing the common law mistake of fact defense. In this manner, past precedents on the issue of intent could be overruled.

The legislative approach is applicable because under the present classification, the age limit of twelve reasonably corresponds to the purpose of the law and a declaration by the legislature that mistake of age will not be given credence would be appropriate. During the prohibited period of twelve to sixteen, the legislature has already recognized the consequences of the "at peril" doctrine and tempered it by requiring that it must be the female's first intercourse. This requirement will not always be sufficient to protect the male from injustice. To alleviate any possible injustice, the legislature could declare that intent is a necessary element or that mistake of age is to be a defense of this offense.

Punishment at the discretion of the court does not minimize the fact that the defendant is branded a felon, which in many cases is an unnecessary attribution of guilt to individual defendants and an irrational response by a society which cannot realistically expect to derive any general deterrence thereby.

DAVID A. IRVIN

#### **Insurance—Insurer's Liability for Injuries Intentionally Inflicted by Insured by Use of Automobile**

In *Nationwide Mut. Ins. Co. v. Roberts*,<sup>1</sup> the North Carolina Supreme Court held that a person injured by one insured under a "compulsory" or "assigned risk" automobile liability insurance policy issued under the North Carolina Motor Vehicle Safety and Financial Responsibility Act of 1953<sup>2</sup> could recover from the insurer, notwithstanding the fact that the insured had intentionally inflicted the injury by assault and battery. The insurer disclaimed liability on three bases: that the coverage extended only to those persons injured as the result of an "accident"<sup>3</sup> and that injuries resulting

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<sup>1</sup> 261 N.C. 285, 134 S.E.2d 654 (1964).

<sup>2</sup> N.C. GEN. STAT. §§ 20-279.1 to -279.39 (Supp. 1963).

<sup>3</sup> The term "accident" has been defined as follows:

An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event . . . Hence, . . . an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a mishap resulting in injury to a person or damage to a thing; a casualty. . . . . an unexpected happening not due to any negligence or malfeasance of the party concerned.