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REASONABLE MISTAKE AS TO AGE— A DEFENSE TO STATUTORY RAPE UNDER THE NEW PENAL CODE

Among the provisions of the revised penal code[1] passed by the 1969 session of the state legislature is a section which places Connecticut in the small minority of jurisdictions recognizing the defense of reasonable mistake of fact as to age in statutory rape cases.[2] In defining non-forcible intercourse between a male and a female as a criminal offense, the new code employs age criteria in two sets of circumstances: 1) when the female is less than fourteen years old;[3] 2) when the male is nineteen years old or more and the female is less than sixteen years old.[4] The defense of reasonable mistake of fact, however, applies only in the latter instance; for when the alleged victim's age is an element of the offense, the affirmative defense "that the actor reasonably believed . . . her to be above the specified age" is not operative if the female "is less than fourteen years of age."[5]

Background Theories

The two other states which allow this statutory defense follow a two-stage arrangement wherein reasonable mistake is applicable to only one age standard. New Mexico defines statutory rape as "the commission of sexual intercourse by a male with a female other than his wife . . . under the age of sixteen . . ." but permits proof that the male reasonably believed she was older to bar criminal liability;[6] however, if the female is under thirteen years of age, no such defense can be maintained.[7] Illinois provides for this defense when the charge

1. Conn. Pub. Acts (January session 1969) No. 828.
2. *Id.* §68 (b).
3. *Id.* §73 (3).
4. *Id.* §75 (2).
5. *Id.* §68 (b). There are two standards of the reasonable man by which reasonableness of mistake can be measured. One is the ordinary reasonable man —the fictional ideal. The other is the individual involved with all his possible physical and mental limitations—the factual real. Since I can find no authority dealing with this subject which even appears to be using the latter as the standard for reasonableness, I am assuming that the legislature meant the former to be the standard.
6. N.M. Stat. Ann. (1953) §40 A-9-3.
7. *Id.* §40 A-9-4.

is indecent liberties with a child, *i.e.*, a male over seventeen years old performing intercourse with a female under sixteen,[8] but not when it is contributing to the sexual delinquency of a child, *i.e.*, a male fourteen years of age or over performing intercourse with a female under eighteen.[9] Thus, the lack of any male age criteria and a slight difference in female age criteria are the only features distinguishing the New Mexico provisions from those of Connecticut. Both use the defense to defeat the charge of "statutory rape" in some cases. However, the Illinois statutes go in an opposite schematic direction. By allowing the defense for the higher standard, Illinois in effect employs it only to lessen the charge rather than to foreclose a conviction.[10]

The American Law Institute has also considered the problem of mistake as to age in statutory rape cases and has designed a formulation in that regard. In its scheme, rape determined by age criteria occurs when a male has sexual intercourse with a female, not his wife, who is less than ten years old[11] or when, in otherwise like circumstances, the female is sixteen and the male at least four years older.[12] The defense that the male "reasonably believed" the female to be above the critical age can be raised only if criminality depends on the female's being below a critical age above ten years old.[13] What should be noted is that ten years old is an age line at which reasonable mistake is less likely to occur than at fourteen, sixteen, eighteen, or twenty-one.[14] (It happens also to be the line traditionally held to delineate the age of consent by English courts on the basis of an ancient statute.[15]) Thus, though the Connecticut statute seems to be based partially on the Model Penal Code,[16] the difference between the two goes beyond the divergence in age criteria, to the age basis upon which reasonable mistake should be rested.

At present the basic sentiment contained in the above statutory

8. SMITH-HURD ILL. ANN. STAT. (1963) Chap. 38 §11-4.
9. *Id.* § 11-5.
10. § 11-4 is a felony provision whereas § 11-5 is a misdemeanor provision.
11. MODEL PENAL CODE § 213.1 (Proposed Official Draft, 1962).
12. *Id.* § 213.3. Note that the two ages are merely suggestions.
13. *Id.* § 213.6.
14. M. PLOSCOWE, SEX AND THE LAW. 179 (1951) [Hereinafter cited as PLOSCOWE.]
15. R. PERKINS, CRIMINAL LAW 154 (2nd ed. 1969) [Hereinafter cited as PERKINS.]
16. *See* Stenographers Notes of Public Hearings before the Joint Standing Committee on Judiciary and Governmental Functions, Mar. 25, 1969, p. 8. [Hereinafter cited as Judiciary and Governmental Functions Committee.]

schemes in favor of this defense has found judicial expression in only one jurisdiction. The California Supreme Court, through Justice Peek, in *People v. Hernandez*[17] upheld a defense to a charge of statutory rape based on the male defendant's reasonable, though mistaken, belief that the female was beyond the age of consent. The court seemed to base much of its holding on statutory construction and legislative intent in ruling that a specific intent was necessary for the criminal act and the mistake negated it.[18] Nevertheless, the more important parts of this decision lay in the practical import of the rule of the case and the social policy considerations surrounding that rule. Since the California Penal Code has only one age criteria to determine statutory rape,[19] the defense of reasonable mistake, if proven, is an absolute one; unlike Connecticut, there can be no gradations or exceptions. Moreover, the court indicated that it was fully cognizant of this implication and had a basic social rationale to explain and support it. Justice Peek pointed out that, for the female, both "learning from the cultural group of which she is a member, and her actual sexual experiences will determine her level of comprehension" no matter what the law presumes.[20] In such circumstances, it seems unjust to punish a male whose "relative culpability" with regard to the act may be less than the female's.[21] However, the court was well aware that its ruling did not make the defense practical for all; for if the prosecutrix was an infant female, her tender years would "preclude the existence of reasonable grounds" for the mistake of fact.[22] Thus, instead of relying on artificial statutory demarcations, California has placed in the hands of the fact-finder the responsibility for enforcing certain societal controls relating to sexual activities of minor females.

Contrary to the preceding authorities, the vast majority of jurisdictions have refused to accept reasonable mistake as to age as an affirmative defense to statutory rape.[23] In some instances, this prohibition has been codified;[24] but, in most, judicial decisions have

17. 61 Cal. 2d 529, 393 P. 2d 673 (1964).
18. *Id.* at 531, 393 P. 2d at 674.
19. *See* 261 CALIF. PENAL CODE. The one age is eighteen years.
20. People v. Hernandez, *supra* note 17 at 530, 531, 393 P. 2d at 673, 674.
21. *Id.* at 532, 393 P. 2d at 675.
22. *Id.* at 536, 393 P. 2d at 677.
23. *See* Annot. 8 A.L.R. 3d 1100 (1966).
24. *See* LA. REV. STAT. § 14-42 (3); MINN. CRIM. CODE §609.02 (6); WISC. CRIM. CODE §939.43 (2).

rejected the defense.[25] The reasons for such rulings can be found in the supposed mental and emotional immaturity of the female,[26] the necessity to protect a precocious female from her own acts,[27] the need to preserve the morals of young girls,[28] and the turpitude of the act of fornication itself.[29] The only relaxation of this attitude has come at the sentencing stage; some courts have allowed mistaken appearance and misrepresentation of age in mitigation of penalties.[30]

The Connecticut Position

Remarkably, previous Connecticut law has seldom touched on the subject. The statute now in force sets sixteen as the age of consent and deems any female under that age incapable of consenting.[31] The attitude of the judiciary under this and previous statutes was probably best expressed in *State v. Sebastian*[32] where the court, addressing itself to the question of carnal knowledge and abuse of a girl under sixteen, said:

> Her tender years both render her peculiarly susceptible to the influence of others, and make it imperative that she should be protected against herself. Whether she yield to the solicitations of a seducer, or be the one to propose the guilty act, the law, therefore, declares to be immaterial.[32a]

Nonetheless, though never recognizing an actual defense relating to a female's chronological appearance, the courts have occasionally expressed a willingness to take such an appearance into account. For example, in *State v. Rivers*,[33] prior statements of the prosecutrix misrepresenting her age were allowed to be used for impeachment purposes. In a similar frame of mind and a half century later, the Superior Court, Review Division, substantially reduced a sentence for statutory rape because of the prosecutrix' "repeated practice to

25. *Supra* note 23.
26. State v. Falks, 160 N.W.2d 418 (S.D. 1968).
27. Miller v. State, 16 Ala. App. 534, 70 So. 514 (1918).
28. People v. Marks, 146 App. Div. 11, 130 N.Y.S. 524 (1911).
29. State v. Superior Court of Pima County, 104 Ariz. 440, 454 P.2d 982 (1969); Commonwealth v. Murphy, 163 Mass. 66, 42 N.E. 504 (1895).
30. *See* Heath v. State, 173 Ind. 293, 90 N.E. 310 (1910).
31. Conn. Gen. Stat. (Rev. 1958) §53-238.
32. 81 Conn. 1, 69 A 1054 (1908).
32a. *Id.*, at 7.
33. 82 Conn. 454, 74 A. 757 (1909).

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vex with importunity and impertinence."[34] Consequently, the present provisions represent a very decisive, though not complete, break from the attitudes of the past.

Still—whatever their context, their parallels, or their past—the new provisions, with their revised definition of statutory rape and limited defense of reasonable mistake, must be evaluated by their success in confronting and dealing with the problems of competing considerations and theories in this area of the law. Unfortunately, this success is limited at best. Despite their attempt at enlightenment and realism, the code sections fall short of revealing either a socio-philosophical rationale or practical policy grounds to justify their fine distinctions.

Success is exhibited in the destruction of certain myths. The treasure-trove rationale[35] for statutory rape laws (*i.e.* the girl must be protected from an unwise disposition of her sexual treasure) certainly has been undercut. Where the girl is above fourteen years old, actions indicating her actual comprehension of the implications of the sex act can be admitted to establish the defense (*i.e.*, she acts older than she is).[36] Thus, the statute shows an implicit recognition that a girl may have the "wisdom" to dispense her favors at an early age.[37]

Additionally, the lawmakers have indicated in the new provisions a realization that the male is often the object, not the subject, of the sexual experience. By automatically precluding males under nineteen years old from criminal liability where the girl is above fourteen,[38] the code recognizes "that immature males may themselves be victims . . . rather than engage in exploitation. . ."[39] More importantly, the statute applies this same line of reasoning to adult males in providing for mistake of age with regard to the same category of females.[40] Therein is an awareness that a mature male can fall prey to a seductive and sexually precocious girl without intending to engage in "more than ordinary sexual promiscuity."[41]

34. State v. Bourbeau, 25 Conn. Supp. 429, 209 A. 2d 190 (Super. Ct. 1965).
35. *See Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L. J. 55, 75-76 (1952).
36. CONN. PUB. ACTS (January session, 1969) No. 828 §68 (b).
37. *Supra* note 35.
38. *See* CONN. PUB. ACTS (January session, 1969) No. 828 §§ 73 (3) and 75 (2).
39. MODEL PENAL CODE 207.4 Comment (Tent. Draft No. 4, 1955).
40. CONN. PUB. ACTS (January session, 1969) No. 828§ 75 (2).
41. PLOSCOWE, *supra* note 14, p. 181.

The state legislature has thus shown a willingness to solve the problem of "relative culpability" discussed by the California Supreme Court.[42]

However, by limiting the applicability of the reasonable mistake defense, the legislature has not dealt satisfactorily with the problem. Justifications can not be found in the psychomedical consequences for the female, the possible mental aberration in the male, or the theory of guilt through commission of a lesser evil. One cannot discern any clearly reasoned policy. One can see only arbitrary age lines drawn in committee compromise and sapped of any meaning.[43]

The psychic and physical harm caused to a female child through intercourse, however willing, has been cited as a reason for statutory rape laws.[44] Quite possibly the code seeks to give expression to this idea by precluding the defense where the girl is under fourteen years old.[45] However, neither the physiological[46] nor the psychological capacity[47] for the sex act is dependent upon a female's age. Nor is any damage done to a female under fourteen lessened by the punishment of a male to whom she reasonably appeared older. Rather than solving any difficulties of the female in the psycho-medical area, the limit on the defense simply subjects the male to a harsh and insensible penalty. Such cannot repair a girl's injured body or psyche.

Still, one could argue that by limiting the defense the state gains

42. People v. Hernandez, *supra* note 17.

43. Judiciary and Governmental Functions Committee, *supra* note 16. Mr. Borden, executive director of the commission to revise the criminal statute, was the main witness in explaining the provisions of the new code to the committee. In reply to a question on age criteria he said:

> The whole question of where you draw the line in ages was discussed at great length as my recollection [sic] in the commission meeting and these sections were being debated and drafted. Now the [sic], why a particular age was picked as opposed to another, it's difficult to say why it was eighteen instead of nineteen or seventeen. I really can't say except that this was the consensus of the commission as to where to draw the line. Some of the ages, age categories, were taken from the New York revision and some from the Model Penal Code enacted by the American Law Institute. Some of them are variations of those. It's difficult for me to answer your question any more specifically than that except to say that they were focused on specifically and decided.

This, I submit, reflects a somewhat confused attitude on the part of the drafters of the code.

44. *Supra* note 35.

45. CONN. PUB. ACTS (January session, 1969) No. 828 § 68 (b).

46. MODEL PENAL CODE § 207.4 Comment (Tent. Draft No. 4, 1955).

47. *Supra* note 35.

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51. PERKINS, *supra* note
833 (1908).

custody of those males who have symptoms of the mental aberration called pedophilia.[48] Men who have been tampering with females under fourteen are likely to be suffering from this affliction. However, this supposed rationale fails on two counts. First, custody enables the state to do little to ameliorate the situation no matter what treatment is provided. One instance of sexual relations with a child does not establish the aberration;[49] and even if it did, the rate of recidivism is so low for statutory rape as to make any treatment marginally effective, at best.[50] Second, and more important, a man over whom the state has custody may reasonably have believed the girl was over fourteen. By treating or imprisoning him, the state is not only wasting its resources, but is also punishing an individual whose only crime may be lack of clairvoyance. The legislators may have been so determined to prevent a lecher's craving that they were blinded to the nonsensical results which flow from a limited defense.

The final possible justification for the limitation of the defense can be found in the theory of commission of a lesser wrong.[51] By this reasoning, the male is punished because he intends to perform an act which is wrong, *i.e.*, fornication, and his mistaken belief does not negate its turpitude but only varies its degree of turpitude. Even though the male might be reasonably misled as to age, his supposed realization of the qualitative evil of the act of intercourse makes him liable for all the consequences of such a wrongful act. Thus, he is punished criminally for rape and not for fornication. There are two difficulties with this possible rationale. First, applied consistently, no reasonable mistake defense can be permitted in any circumstances; the legislative intent would thus be at odds with the legislative result. Yet, even if a ratiocination can be found to explain away that difficulty, a second one is more imposing. That is, such a theory will have no application in Connecticut since fornication is not a crime under the new penal code. Nowhere in the statute can a legislatively

48. *See* MODEL PENAL CODE § 207.4 Comment (Tent. Draft No. 4, 1955). Pedophilia is defined as "erotic craving for children; sexual attraction to children, or gratification from sexual intimacies with children." *See* footnote 131 at 252.

49. *Id.*

50. R. DONNELLY, J. GOLDSTEIN, & R. SCHWARTZ, CRIMINAL LAW 245 (1962) quoting: A. ELLIS & R. BRANCALF, THE PSYCHOLOGY OF SEX OFFENDERS, 26, 35-37 (Springfield, Ill., Charles C. Thomas, 1956).

51. PERKINS, *supra* note 15, at 818. *See also* State v. Audette, 81 Vt. 400, 70 A. 833 (1908).

articulated policy condemning fornication per se be found. It is totally illogical to base criminal liability for statutory rape on the intent to do an act to which no criminal liability attaches.

Conclusion

A better solution to the problems posed above would be the adoption of a complete defense of reasonable mistake of fact as to age.[52] There would be no arbitrary age lines below which such a defense could not be invoked. The question of reasonableness would always be submitted to the fact-finder. Such a scheme would thus more realistically protect whatever societal interests are involved without punishing males of a reasonable frame of mind. Of course, psychomedical difficulties would still remain since neither a rape statute nor a defense to it can prevent a female from voluntarily engaging in the sex act. However, any custodial treatment or penalty deemed necessary for deviant males could be prescribed with more selectivity; the fact-finder would be designating only males who could not have entertained a reasonable belief as to a mistaken age, *i.e.*, those abnormally attracted to younger females, and not all males involved sexually with girls under the consensual age. Moreover, any standard of societal morality prohibiting sexual intercourse with a female child would be more truly met since age alone would no longer be the determining factor. Only those relationships in which a female reasonably acted and appeared to be a child would be condemned by legal sanction, and not those in which she, however young, did not so act and appear.

Yet, these valid societal interests are not best served by a penal code which condemns a man on the basis of an arbitrary age standard. In the last session the legislature took a step toward realism, but it is a halting step. Unless the defense of reasonable mistake as to age is extended to all cases of statutory rape we may someday hear a Connecticut court repeating these unfortunate words:

> We have in this case a condition and not a theory. This wretched girl was young in years, but old in sin and shame. A number of callow youths of otherwise blameless lives . . . fell under her seductive influence. They flocked about her . . . like moths about the flame of a lighted candle, and prob-

52. *See* People v. Hernandez, *supra* note 17.

ably with the same result. The girl was a common prostitute ... The boys were immature, and doubtless more sinned against than sinning. They did not defile the girl.... Why should the boys misled by her be sacrificed? What sound public policy can be subserved by branding them as felons?[53]

—*Dennis L. Pieragostini*

53. State v. Snow 252 S.W. 629, 632 (Mo. 1923).