

STATUTORY RAPE: A GROWING LIBERALIZATION

A. History of Statutory Rape

One of the oldest crimes found in Anglo-American law is that of "statutory rape," defined as the offense of having sexual intercourse with a female under statutory age, with or without the female's consent.¹ Apparently the first statutory mention of the crime came in the reign of Edward I and was known as the Statute of Westminster.² This historical statute made it a crime to ravish, with or without consent, a maiden of under twelve, the age at which a girl could legally consent to marriage. In Queen Elizabeth I's reign, the age of consent was fixed at ten years by statute. Any violation of a girl under this age with her consent became "consent rape" and was punishable as a common law rape.³

Sir Matthew Hale was of the opinion that sexual intercourse with a girl under twelve years of age was rape, that being the age of discretion at common law. When the punishment for rape was mitigated by statute in England, females under twelve years of age were considered incapable of consent; but the punishment was again incurred by the statute of Elizabeth and made to apply to all sexual intercourse with girls under ten years of age, whether with or without their consent; and this statute has been regarded as part of our common law.⁴

The English statutes were generally accepted in America, usually with an increase in the age of consent. Today, every state provides for statutory rape,⁵ with the age of consent ranging

1. BLACK, LAW DICTIONARY 1427 (4th ed. 1951).
2. Statute of Westminster I, 1275, 3 Edw. 1, c. 13.
3. 18 Eliz. 1, c. 7, 4 (1576); see 1 HALE, PLEAS OF THE CROWN 628 (1736).
4. State v. Wilson, 162 S.C. 413, 426, 161 S.E. 104, 109 (1931).
5. Carnal knowledge of woman child—If any person shall unlawfully and carnally know and abuse any woman child under the age of sixteen years, such unlawful and carnal knowledge shall be a felony, and the offender thereof being duly convicted shall suffer as for a rape; *provided, however*, that when:

(1) The woman child is over the age of ten years and the prisoner is found guilty the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary for a term not exceeding fourteen years, at the discretion of the court;

(2) The woman child is over the age of fourteen years and the prisoner is found guilty, the punishment shall be in the discretion of the court, not exceeding five years imprisonment; and

from seven⁶ to twenty-one.⁷ Indeed, the overall effect of the crime is astounding, when one realizes that from 1930-39, 59% of all convicted sex offenders in New York City were convicted of statutory rape.⁸ Evidently, the number convicted represents but a small number of the offenses actually taking place.⁹

B. Elements

In a prosecution for statutory rape, the state must prove only two elements—that the prosecutrix was under the age of consent and that penetration occurred. A girl reaches the age of consent on the day preceding her birthday marking the statutory age. Intercourse occurring on this day is not within the statute.¹⁰ In South Carolina, the age of consent is sixteen.¹¹ Birth records can be used to prove age, or lacking this, the prosecutrix's family may introduce other evidence.¹²

Penetration, "the insertion of the male part into the female part,"¹³ is the other half of the crime. In short, the statute requires only that the act of sexual intercourse occur. Penetration to some degree is required.¹⁴ No matter how slight it may be, any penetration at all fulfills the necessary requisite, and intercourse is said to have taken place.¹⁵ There is also no requirement of emission on the part of the male.¹⁶

All jurisdictions hold that consent is not an element of statutory rape, or even admissible in mitigation.¹⁷ Thus, in *State v.*

(3) The defendant is under eighteen years of age and the woman child is above the age of fourteen years, previous unchastity may be defensively shown, and if such want of chastity be found by special verdict of the jury, the punishment imposed by the court shall not exceed one year's imprisonment or a fine of not more than five hundred dollars, alternatively awarded.

S.C. CODE ANN. § 11-80 (1962).

6. Delaware.

7. Tennessee.

8. 62 YALE L.J. 55, 748 n. 131 (1952).

9. See generally 43 N.C.L. Rev. 424 (1965).

10. 75 C.J.S. Rape 13 at 479 (1952).

11. S.C. CODE ANN. § 16-80 (1962).

12. State v. Wagstaff, 202 S.C. 443, 25 S.E.2d 484 (1943).

13. BLACK, LAW DICTIONARY 1291 (4th ed. 1951).

14. State v. Moorner, 241 S.C. 487, 129 S.E.2d 330 (1963).

15. State v. Worthy, 239 S.C. 449, 123 S.E.2d 835 (1962); State v. LeBlanc, 3 Brev. 339 (S.C. 1813).

16. State v. Worthy, 239 S.C. 449, 123 S.E.2d 835 (1962); State v. Wyatt, 221 S.C. 407, 70 S.E.2d 635 (1952).

17. See, e.g., State v. Wade, 224 N.C. 760, 325 S.E.2d 314 (1944); People v. Pantages, 212 Cal. 237 (1931); State v. Wilson, 162 S.C. 413, 161 S.E. 104 (1931); State v. Gilchrist, 54 S.C. 159, 31 S.E. 866 (1898).

*Boyd*¹⁸ the defendant who obtained the consent of the nine year old prosecutrix of low intelligence, was sentenced to death; a striking example of the teeth of the statute. The theory behind prosecution in cases of consent is that the female's willingness to consent is only apparent. She is regarded as resisting, no matter what her state of mind, for the law is said to resist for her.¹⁹

Unlike common law rape, force is unnecessary in statutory rape.²⁰ Nor is any resistance required on the part of the prosecutrix.²¹ However, the fact that the prosecutrix was either forced or gave resistance does not require the state to choose between prosecution for statutory rape or prosecution for common law rape.²² Thus, where a defendant, convicted of statutory rape, appealed, the South Carolina Supreme Court stated that the conviction was good under either statutory or common law rape, and the state could join the two in the same indictment.²³

O. Why Statutory Rape?

What is the justification for statutory rape? One of the more practical reasons advanced is that intercourse at a pre-pubescent age can result in actual physical and mental damage. "The exposure to sexual experience represents a real threat to the life of a child. Anyone who tampers sexually with a young child is potentially a killer and hence a dangerous individual outside prison walls."²⁴ Besides the real danger of adverse physical effects, a child may be left with lasting mental scars. Early sexual experiences are given excessive and distorted significance with possible resultant psychological damage.²⁵ However, the fear of possible physical and mental injuries is usually applicable only when the child is pre-pubescent. After puberty, there

18. 123 S.C. 24, 115 S.E. 809 (1923).

19. *State v. Nagel*, 75 N.D. 495, 28 N.W.2d 665 (1947).

20. *State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955); *State v. Weekly*, 223 S.W.2d 494 (Mo. App. 1949); *Addington v. Commonwealth*, 161 Va. 975, 170 S.E. 565 (1933); *Cabe v. State*, 182 Ark. 49, 30 S.W.2d 855 (1930); *People v. Guertin*, 342 Ill. 99, 173 N.E. 824 (1930); *State v. Christopher*, 167 Iowa 109, 149 N.W. 40 (1914).

21. *Addington v. Commonwealth*, 161 Va. 975, 170 S.E. 565 (1933); *People v. Guertin*, 342 Ill. 99, 173 N.E. 824 (1930).

22. *State v. Harrison*, 236 S.C. 246, 113 S.E.2d 783 (1960); *State v. Horton*, 209 S.C. 151, 39 S.E.2d 222 (1946); *State v. Gilchrist*, 54 S.C. 159, 31 S.E. 866 (1899).

23. *State v. Harrison*, 236 S.C. 246, 113 S.E.2d 783 (1960).

24. *PLASCOWE, SEX AND THE LAW* 184 (1951).

25. 62 *YALE L.J.* 55, 76 (1952).

seems to be little likelihood of any danger. When girls of ten or twelve years engage in sexual intercourse it is dangerous and abnormal, but "when age limits are raised to sixteen, eighteen, and twenty-one, when the young girl becomes a young woman, when adolescent boys as well as young men are attracted to her, the sexual act begins to lose its quality of abnormality and danger to the victim."²⁶ Therefore, it would seem quite clear that as far as actual protection to a young girl is concerned, pre-pubescence is the period of actual concern and, ideally, statutes should provide solely for the protection of a child in this age group. Unfortunately, the general holding is that, if a girl is under the statutory age, it is of no consequence whether or not she has passed puberty.²⁷

The major policy underlying statutory rape is the protection of children who, it is assumed, lack the proper conception of the act and are unable to understand fully its consequences.²⁸ Many courts use the protection idea as a basis for the existence of the statutes.²⁹ This theory of protection has been termed the "Treasure Theory."³⁰ The idea is that virginity is a thing of social, economic, and personal value, and at an early age, a girl is incapable of properly dispensing this treasure for she is ignorant as to the nature and implications of the sexual act. In order to aid her in better defending herself, at an age when her natural defenses are at a necessarily weak stage, the law provides added deterrent by placing a penalty for any trespasser who seeks to take advantage of her. This legal deterrent obviously serves a valid purpose in protecting one with weak defenses. The fault lies in a lack of flexibility which becomes more obvious as the age of consent is raised. A sexually mature girl will soon learn the rewards and penalties of premarital sex if she evinces interest. One writer submits that a defendant should be allowed to submit evidence that his partner understood the nature and implication of the sex act.³¹ This solution would partially solve

26. *PLASCOWE, supra* note 24, at 184.

27. See, e.g., *Fields v. State*, 203 Ark. 1046, 159 S.W.2d 745 (1942); *Lewis v. State*, 183 Miss. 192, 184 So. 53 (1938); *Brock v. People*, 98 Colo. 225, 54 P.2d 892 (1936); *State v. Wilson*, 162 S.C. 413, 161 S.E. 104 (1931).

28. *Golden v. Commonwealth*, 289 Ky. 379, 158 S.W.2d 967 (1942).

29. See, e.g., *State v. Huntsman*, 115 Utah 283, 204 P.2d 448 (1949); *State v. Schwartz*, 215 Minn. 476, 10 N.W.2d 370 (1943); *State v. McPadden*, 150 Minn. 62, 184 N.W. 568 (1921).

30. 62 *YALE L.J.* 55, 75 (1952).

31. Any man who has sexual intercourse with a girl under the age of seventeen years shall be guilty of rape. But if the girl is fourteen years or over and comprehends the nature and implications of the sex act, then her

UNIVERSITY OF LOUISIANA LIBRARY

the dilemma presented by the case in which the girl is more experienced than the boy, and it would seem reasonable to allow such evidence into the record. This solution has been attempted, but to no avail, in several states that lack a so-called "chastity clause."⁸²

D. Defenses Available

Defenses to statutory rape do exist, although they are limited to a relatively small minority of persons. In England, a boy under fourteen could not commit rape.⁸³ This presumption of incapability was so strong that even in the face of a surgeon's testimony that a defendant had reached full puberty, the court ruled that he must have reached fourteen in order to be found guilty.⁸⁴ This idea of a conclusive presumption of incapability seems to have found but little favor in the United States. However, two nineteenth century cases so hold;⁸⁵ and Oregon provides by statute that a defendant under sixteen is incapable of rape.⁸⁶ The majority of American courts, however, have found boys to be capable, basing their decision on the grounds that young females need to be protected from precocious boys.⁸⁷ The majority, including South Carolina, appears to use a rebuttable presumption that a defendant under fourteen is incapable of forming a criminal intent and physically unable to perform the sex act. By allowing evidence in rebuttal,⁸⁸ the English view is thus rejected.⁸⁹ This position follows well known medical au-

consent to the act in question shall be an absolute defense. The burden of proving the girl's comprehension shall be on the accused and relevant evidence of her previous experience in, or knowledge of, sexual matters, from whatever source such experience or knowledge has been obtained, shall be admissible for this purpose.

62 YALE L.J. 55, 75 (1952).

32. *Parsons v. Brown*, 160 Va. 810, 170 S.E. 1 (1933); *People v. Marks*, 146 App. Div. 11, 12, 130 N.Y.S. 524, 525 (1911).

33. *Regina v. Phillips*, 8 Car. & Payne Rep. 736 (1839).

34. *Regina v. Jordan and Commeadow*, 9 Car. & Payne Rep. 118 (1839).

35. *Foster v. Commonwealth*, 96 Va. 306, 31 S.E. 503 (1898); *State v. Handy*, 4 Harrington Rep. 567 (Pa. 1843). The Virginia case rested its refusal to change the English common law on the difficulty or even inconvenience of obtaining proof of a boy's puberty under age of fourteen.

36. OREGON PENAL CODE § 23-420 ().

37. *Beacon v. State*, 96 Miss. 105, 50 So. 488 (1909).

38. *Hiltabiddle v. State*, 35 Ohio 52 (1878); *William v. State*, 14 Ohio 222 (1846); *Commonwealth v. Green*, 19 Mass. 380 (1824).

39. *Beacon v. State*, 96 Miss. 105, 50 So. 488 (1909); *State v. Fisk*, 15 N. D. 589, 108 N.W. 485 (1906); *State v. Coleman*, 54 S.C. 162, 31 S.E. 866 (1898); *Gordon v. State*, 93 Ga. 531, 21 S.E. 54 (1893); *Louisiana v. Jones*, 39 La. Ann. 935, 3 So. 57 (1887); *Heilman v. Commonwealth*, 84 Ky. 457, 1 S.W. 731 (1886).

thority⁴⁰ and cannot be reasonably disparaged. Most courts recognize in males, therefore, that an arbitrary statutory age does not allow for the multitudinous variations in development. It is submitted that to recognize this variation in young males and not in young females, creates a real and unfair double standard under most of our statutory rape laws.

Insanity, as in all crimes, is a valid defense in statutory rape. In order to commit the offense, the intent to have sexual intercourse with the prosecutrix must be present.⁴¹ However, the defense of "irresistible impulse" is not recognized in South Carolina.⁴² In one case the court intimated that "irresistible impulse" would be a defense if it arose quickly and could not be resisted short of third party interference. The court said that a mere uncontrollable sex urge of which the defendant was both aware and could plan moves to alleviate, was not to be considered an "irresistible impulse."⁴³

E. Chastity Requirement

Some states by statute allow in certain instances a showing of unchaste behavior in the prosecutrix, either as a defense or as a mitigating circumstance. In South Carolina, previous unchastity may be shown when the prosecutrix is over fourteen and the defendant is under eighteen.⁴⁴ The benefits of a requirement of chastity of a prosecutrix over twelve are obvious. The requirement strikes to the very heart of the statutory rape problem by protecting only the innocent. It requires no great imagination to picture a situation in which a relatively inexperienced male becomes sexually involved with an underage female who is actually little better than a prostitute. Justice would seem to cry out against the "protection of the defiled."⁴⁵ The inclusion of a previous chaste character requirement in the statute protects innocence, as the statutes were originally intended to do.⁴⁶ Florida, one of the more liberal states in the requirement of chastity, allows evidence of mere loose moral conduct to be

40. See 31 IOWA L. REV. 659 n. 9 (1946).

41. *Beason v. State*, 96 Miss. 105, 50 So. 488 (1909).

42. *State v. Gatlin*, 208 S.C. 414, 38 S.E.2d 238 (1946); *State v. Gilstrap*, 205 S.C. 412, 32 S.E.2d 163 (1944).

43. *Snider v. Smyth*, 187 F. Supp. 299 (E.D. Va. 1960).

44. S.C. CODE ANN. § 16-80 (3) (1962).

45. *State v. Snow*, 252 S.W. 629 (Mo. 1923).

46. See generally 13 U. FLA. L. REV. 213 (1960).

admitted in evidence.⁴⁷ Thus, the fact that prosecutrix had venereal disease at age eleven,⁴⁸ that she habitually sat on the laps of men,⁴⁹ that she wrote letters to her boy friend inviting him to visit with her,⁵⁰ that her mother had seen her in bed with a soldier,⁵¹ were all admissible in evidence in different cases.⁵² In order for a conviction to result, the state has the burden of proof as to the prosecutrix's chastity.⁵³ Several other states besides Florida follow this rule,⁵⁴ but the majority of states presume chastity.⁵⁵ There is some conflict as to whether "chaste" means physical or carries the broader connotation of overall moral character.

We cannot think that a female who delights in lewdness, who is guilty of every indecency, and lost to all sense of shame, and who may even be the mistress of a brothel, is equally the object of this statute (if she has only escaped actual sexual intercourse) with an innocent and pure woman; and that a man is equally liable under the law, as well in the one case as the other.⁵⁶

In a Tennessee case, prosecutrix associated with prostitutes and used her uncle's home as a place of assignation. The facts proved that she was of lewd character, although no direct evidence as to any prior act of intercourse was allowed.⁵⁷ Evidence of foul language and indecent jokes by prosecutrix was admitted by one court, which held that unchastity extended beyond physical bounds and included purity of mind and innocence of heart.⁵⁸ An early South Carolina case admitted the general reputation

47. Any person who has unlawful carnal intercourse with any unmarried person, of previous chaste character, who at the time of such intercourse is under age of eighteen years, shall be punished by imprisonment in the state prison for not more than two years, or by fine not exceeding 2000 dollars. FLA. STAT. § 794.05 (1959).

48. Ward v. State, 149 Fla. 107, 5 So. 2d 59 (1941).

49. Dallas v. State, 76 Fla. 358, 79 So. 690 (1918).

50. *Ibid.*

51. Hickman v. State, 97 So. 2d 37 (Dist. Ct. App. Fla. 1957).

52. See generally 13 U. FLA. L. REV. 209, 210-12 (1960).

53. Dallas v. State, 76 Fla. 358, 79 So. 690 (1918).

54. Larson v. State, 125 Neb. 789, 252 N.W. 195 (1934); Humphrey v. State, 34 Okla. Crim. 247, 246 Pac. 486 (1926).

55. See, e.g., Smith v. State, 188 Miss. 339, 194 So. 922 (1940); Benton v. State, 158 Tenn. 273, 12 S.W.2d 946 (1929); Williams v. State, 105 Tex. Crim. 381, 288 S.W. 205 (1926).

56. State v. Andre, 5 Iowa 389, 395 (1857).

57. Ledbetter v. State, 199 S.W.2d 112 (Tenn. 1947).

58. State v. Wilcoxon, 200 Iowa 1250, 206 N.W. 260 (1925).

of prosecutrix before the rape as relevant to the issue of consent.⁵⁹ Although this was a common law rape prosecution, in the light of the 1962 Code,⁶⁰ it is probable that such evidence of general reputation would be admissible in a statutory rape case.

It appears, however, that most states demand a showing that the prosecutrix was not a virgin before the act complained of occurred.

"[O]f chaste character" does not mean purity of mind, nor purity of heart, but purity of body—i.e., that the prosecutrix had never sustained illicit relations with anyone prior to the alleged offense with the defendant.⁶¹

Similar reasoning is found in a Washington case, in which the court said, "it [chastity] means a female who has never submitted to the sexual embrace of a man . . ."⁶² The fact that the prosecutrix was a virgin, although she lived in a house of prostitution, prevented one defendant from claiming unchaste character as a defense.⁶³ In jurisdictions holding that chaste character refers to physical virginity only, specific acts of sexual intercourse are admissible when the defense is based on non-chastity.⁶⁴ The question immediately arises as to whether previous acts with the defendant can be introduced to establish the prosecutrix's unchaste character. The court in *Henry v. State*⁶⁵ held evidence of prior intercourse with the defendant was admissible. In a similar case the court found the prosecutrix unchaste.⁶⁶ The best rule would seem to be that which does not allow the defendant to rely on his own wrongs, thus not allowing evidence of prior relations with defendant.⁶⁷

For the purposes of the "chaste clause," some non-virgins are considered chaste. Thus, neither an otherwise untarnished victim

59. State v. Taylor, 57 S.C. 483, 355 S.E. 729 (1900).

60. S.C. CODE ANN. § 16-80(3) (1962).

61. Lowe v. State, 154 Fla. 730, 19 So. 2d 106, 108 (1944); accord, State v. Sigler, 110 Wash. 581, 200 Pac. 323 (1921); Bailey v. State, 57 Neb. 706, 78 N.W. 284 (1899).

62. State v. Dache, 59 Wash. 238, 240, 109 Pac. 1050, 1051 (1910).

63. State v. Burns, 82 Conn. 213, 72 Atl. 1083 (1909).

64. Hickman v. State, 97 So. 2d 37 (Dist. Ct. App. Fla. 1957); Ward v. State, 149 Fla. 107, 5 So. 2d 59 (1941); Taylor v. State, 165 Tenn. 166, 53 S.W.2d 377 (1932); Moya v. People, 79 Colo. 104, 244 Pac. 69 (1926); Williams v. State, 105 Tex. Crim. 381, 288 S.W. 205 (1926).

65. 132 Tex. Crim. 148, 103 S.W.2d 377 (1937); accord, State v. Drake, 59 Wash. 238, 109 Pac. 1050 (1910).

66. Coots v. State, 110 Tex. Crim. 105, 75 S.W.2d 539 (1928).

67. State v. Sargeant, 62 Wash. 692, 114 Pac. 868 (1911).

of a prior forcible rape,⁶⁸ nor a widow is unchaste.⁶⁹ These decisions rest on the theory that "unchaste" refers only to illicit intercourse.

In states which regard "unchaste" in the non-physical sense, the concept of reformation is often present: "For it would be inhuman and perilous to assume that women, once fallen, but reformed, are afterwards exposed without redress to a seducer's arts. The policy of the law in such cases is to reclaim and guard."⁷⁰ This "fallen angel" idea gives a previously immoral woman a second chance, allowing a revitalization of a supposedly lost soul by clean living and circumspect behavior.⁷¹ While the bad character of the woman is often a defense, the good character of the defendant is not,⁷² although it may mitigate punishment.⁷³

The fact that a woman is married is not a defense in statutory rape, as the prosecutrix is considered incapable of consent to an illicit act.⁷⁴ Thus, the claim that the statute was for the purpose of protecting innocent and naive girls has been defeated on the grounds that if the legislature had intended to exclude married women, they could have easily done so.⁷⁵ In South Carolina a defendant in a statutory rape case successfully defended on the grounds that he and the prosecutrix were married by common-law, the court holding that a man cannot rape his wife.⁷⁶

F. Mens Rea

The main point of contention with statutory rape crimes is the absence of mistake of fact, or *mens rea*, as a defense. Although early English courts have recognized mistake of fact as a defense in criminal prosecution since 1638,⁷⁷ apparently the issue was not raised in a statutory rape case until the mid-nineteenth cen-

68. *Hickman v. State*, 137 Tex. Civ. App. 616, 132 S.W.2d 598 (1939).

69. *State v. Eddy*, 40 S.D. 390, 167 N.W. 392 (1918).

70. 2 WHARTON, CRIMINAL LAW § 1757, at 602 (10th ed. 1898).

71. *People v. Weinstock*, 140 N.Y.S. 453 (Magis. Ct. 1912); *State v. Thornton*, 108 Mo. 640, 18 S.W. 841 (1891); *State v. Moore*, 78 Iowa 494, 43 N.W. 273 (1889); *Patterson v. Haden*, 17 Ore. 238, 21 Pac. 129 (1889).

72. *State v. Jones*, 145 Iowa 176, 123 N.W. 860 (1909).

73. *Reid v. State*, 290 P.2d 775 (Okla. Crim. Ct. App. 1955); *People v. Marks*, 130 N.Y.S. 524 (Sup. Ct. 1911).

74. *State v. Huntsman*, 115 Utah 283, 204 P.2d 448 (1949), see generally 21 *Mo. L. Rev.* (1961).

75. *People v. Courtney*, 4 Cal. Rptr. 274 (Dist. Ct. App. 1960).

76. *State v. Ward*, 204 S.C. 210, 28 S.E.2d 785 (1944).

77. *Levitt's case*, reported in *Cook's case*, Cro. Car. 537, 538, 79 Eng. Rep. 1063, 1064 (K.B. 1639).

tury. The classic case is *Regina v. Prince*,⁷⁸ which, while not dealing with statutory rape as such, considered the question of a mistake of fact in an abduction case. Defendant, believing a girl's statement that she was eighteen, took her from her father's house. In reality, the girl was under sixteen and thereby fell within a statutory prohibition for removal without permission from the parent's home. In spite of a jury finding of reasonable belief, the court held that defendant had assumed the risk of his action and that, by merely taking the girl had evinced sufficient intent as to be found guilty.

The act is intrinsically wrong; for the statute says if "unlawfully" done. The act done with *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.⁷⁹

Therefore, with *Prince* as the precedent, American and English jurisdictions have uniformly ruled that criminal intent is not needed to sustain a conviction for statutory rape.⁸⁰

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 crime, and infers a criminal intent from the act itself."⁸¹

Therefore, the law holds that the intent to do something immoral (commit fornication) fulfills the requirement of general intent in statutory rape.⁸² In our present day society, all extra-marital sexual intercourse is considered wrong.⁸³ Therefore, it may be said that the *mens rea* requirement is fulfilled because the actor intends to do an immoral act, and if in the commission of such act, he does a statutorily forbidden act unintentionally,

78. 13 *Lox Crim. Car.* 138 (Crim. App. 1875).

79. *Id.* at 139; *accord*, *Heath v. State*, 173 Ind. 296, 90 N.E. 310 (1910).

80. See, e.g., *Miller v. State*, 16 Ala. App. 534, 79 So. 314 (1918); *Heath v. State*, 173 Ind. 296, 90 N.E. 310 (1910); *People v. Lewellyn*, 314 Ill. 106, 145 N.E. 289 (1924); *State v. Duncan*, 82 Mont. 170, 266 Pac. 400 (1928); *State v. Wade*, 224 N.C. 760, 32 S.E.2d 314 (1944); *Manning v. State*, 43 Tex. Crim. 302, 65 S.W. 920 (1901).

81. *Simmons 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).

82. See *State v. Houx*, 109 Mo. 654, 19 S.W. 35 (1892).

83. Fornication is a sin. 1 *Corinthians* 10:8; 1 *Thessalonians* 4:3.

he had sufficient criminal intent to project him outside the pale of the law.⁸⁴

The absence of a *mens rea* requirement in statutory rape should not be confused with the so-called "public welfare offenses." "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 been developing in England and America within the past three-quarters of a century"⁸⁵ These offenses are usually of a regulatory nature and are generally punished, not by imprisonment, but by fines. Illegal sale of liquor, traffic violations, and health regulations are noteworthy examples of these public welfare violations.⁸⁶ However, statutory rape is not included in these relatively minor violations as often substantial jail sentences are invoked against offenders. "The reason that mistake of fact as to the girl's age constitutes no defense is, not that these crimes like public welfare offenses require no *mens rea*, but that a contrary result would strip the victim of the protection which the law exists to afford. Public policy requires it."⁸⁷ Therefore, statutory rape has no real *mens rea* requirement, and the defense of mere ignorance will not suffice.⁸⁸ Indeed, an honest mistake of fact, such as the mature appearance of, or a misrepresentation by, the prosecutrix will not serve as a defense,⁸⁹ for in such a case defendant proceeds at his own risk.

[I]gnorance of the age of the prosecutrix on the part of the defendant in a prosecution for such crime committed on a female under a prohibited age constitutes no defense, no matter whether such ignorance was based on a good faith belief that the prosecutrix was above the prohibited age, or on an exercise of reasonable care to ascertain her age, or whether the defendant was misled by her appearance or her misrepresentation.⁹¹

84. *People v. Griffin*, 117 Cal. 583, 49 Pac. 711 (1897); *Commonwealth v. Murphy*, 165 Mass. 66, 42 N.E. 504 (1896); *State v. Houx*, 109 Mo. 654, 19 S.W. 35 (1892).

85. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 n.5 (1933).

86. *Id.* at 72.

87. *Id.* at 74.

88. *Commonwealth v. Murphy*, 165 Mass. 66, 42 N.E. 504 (1896).

89. *Commonwealth v. Sarricks*, 161 Pa. Super. 577, 56 A.2d 323 (1948); *Simmons v. State*, 151 Fla. 778, 10 So. 2d 436 (1942); *Harris v. State*, 115 Tex. Crim. 227, 28 S.W.2d 813 (1930); *Manning v. State*, 43 Tex. Crim. 320, 65 S.W. 920 (1901).

90. *Farrell v. State*, 152 Tex. Civ. App. 488, 215 S.W.2d 625 (1948).

91. *State v. Wade*, 224 N.C. 760, 761, 32 S.E.2d 314, 315 (1944).

While ignorance of age is generally not a defense, an honest mistake is at times allowed to mitigate the punishment.⁹² However, there may be limitations even when allowed. For example, a reasonable mistake of age is a valid defense under the New Mexico Statute, but only if the prosecutrix is between thirteen and sixteen years of age:⁹³ that provided by statutes which specifically require *mens rea* for statutory rape.

The possible start of a new and liberal trend occurred recently in California, when the California court found that a specific statement negating the common law requirement of *mens rea* was needed in the statute in order to void a mistake of fact defense.⁹⁴ Overruling a strong case precedent,⁹⁵ the court found this a general requirement of criminal intent in California statutes.⁹⁶ Dismissing the analogy with public welfare crimes, the court stated ". . . this court has moved away from the imposition of criminal sanctions in the absence of culpability where the governing statute, by implication or otherwise, expresses no legislative intent to be served by imposing strict liability."⁹⁷ By finding, in the absence of specific legislative language to the contrary, a need for *mens rea*, the court drew abreast of the times,⁹⁸ recognizing that modern necessity and realism requires the removal of the outdated failure of mistake of fact as a defense.

The decision's impact might be weakened by the court's reliance on the California Code requirement.⁹⁹ This reliance would not handicap courts in jurisdictions with statutes containing similar

92. *Law v. State*, 92 Ohio St. 444, 224 P.2d 278 (1950); *Manship v. People*, 99 Colo. 1, 58 P.2d 1215 (1936).

93. N.M. STAT. ANN. §§ 40 A-9-3, 40-9-4, (Supp. 1964).

94. *People v. Hernandez*, 39 Cal. Rptr. 361, 393 P.2d 673 (Sup. Ct. 1964).

95. *People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896).

96. 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 (1872).

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 ignorance or mistake of fact, which deprives any criminal intent.

CAL. PENAL CODE § 26 (1872).

97. *People v. Hernandez*, *supra* note 94, at 363, 393 P.2d at 675.

98. Previous California Supreme Court decisions requiring specific exclusion of *mens rea* for crimes have pointed to the *Hernandez* decision. See *People v. Winston*, 46 Cal. 2d 151, 293 P.2d 40 (1956), requiring intent in possession of narcotics prosecution; *People v. Vogel*, 41 Cal. 2d 798, 299 P.2d 850 (1956), allowing a showing of defendant's good faith in bigamy trial; *People v. Stuart*, 47 Cal. 2d 167, 302 P.2d 5 (1958), holding no absolute liability under an accident resulting from a lack of required skill.

99. Cal. Penal Code §§ 20, 26; *supra* note 96.

provisions, but in states without a statutory declaration of needed intent, difficulty could arise. It is to be hoped, however, that courts, seeing the way broken by California will be emboldened to proceed as no doubt their sense of justice and realism directs them. In this manner, there might be a renaissance of judicial thought in American courts concerning statutory rape, thus keeping justice parallel with modern fact.

G. Conclusion

It would seem that in order to protect against possible injustices under statutory rape prosecutions, the state legislatures could do either of two things. Like Florida, they could place a "chaste character" requirement in their statute, allowing a defense against ensnarement by a prostitute of tender years, but affording ample protection for those that the original statute was designed to protect. They could also specifically place a criminal intent requirement in the statute, thus accomplishing by statute what *Hernandez* accomplished by judicial decision.

Fortunately, the South Carolina statute appears to be among the most liberal. It provides for graduated punishments when the prosecutrix is over ten, with extreme judicial discretion.¹⁰⁰ The state legislature could go a step further, however, by allowing as a defense "mistake of fact" when the prosecutrix has passed puberty. In this manner, it would be difficult to imagine any injustices arising in South Carolina under a statutory rape statute.

EARLE G. PREVOST

100. S.C. CODE ANN. § 16-80 (1962).

FEDERAL INCOME TAXATION: LEGAL EXPENSES OF CRIMINAL LITIGATION AS ORDINARY AND NECESSARY

The note immediately following, dealing with the deductibility for federal income tax purposes of legal expenses incurred by a taxpayer in defending himself against criminal charges, went to print before publication by the United States Supreme Court of its decision in Commissioner v. Tellier, 34 U.S.L. WEEK 4297 (U.S. March 22, 1966). Indeed, at the time the note was written it was not anticipated that the Court would decide the Tellier case during its October term. It may be conjectured that the Court decided the case too promptly after argument because no dissents were registered. Unanimous decisions by the Court in federal income tax cases are infrequent.

The Court's holding is that legal expenses are deductible even though incurred by a taxpayer in defending himself against criminal charges, and even though his defense is unsuccessful. The taxpayer, Tellier, had paid and deducted legal expenses of \$2,924.20 dollars in defending against charges on which he was convicted and sentenced to prison.

In his note, Mr. Evans has analyzed the traditional position of the Commissioner of Internal Revenue opposing deductions for such expenses, the widely varying attitudes of the Tax Court and the several circuit courts of appeal, and the views of commentators on the subject. He concludes, on the basis of thorough research and cogent reasoning, that such deductions should be allowed. His conclusion, and the reasoning to that conclusion, are vindicated fully by the Court's decision that these expenses are deductible under Section 162(a) of the Internal Revenue Code of 1954 as "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business."^{}*

Under section 162(a) deductions are permitted for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."¹ Questions which arise concerning the phrase "ordinary and necessary" are

* William A. Clineburg, Assistant Professor of Law, University of South Carolina.

1. INT. REV. CODE OF 1954.