WRONGFUL DEATH—Unborn Child. *Graf v. Taggert*, 43 N.J. 303, 204 A.2d 140 (1964).

The Supreme Court of New Jersey has ruled that under the New Jersey Death Act there could be no right of recovery for wrongful death of an unborn child. The mother in this case had been injured in an automobile during her seventh month of pregnancy and her child was stillborn less than a month later. If the child had survived, under New Jersey law, it could have recovered for tortiously inflicted prenatal injuries.

WRONGFUL DEATH—Unborn Child. *Gullborg v. Rizzo*, 331 F.2d 557 (3rd Cir. 1964).

In an action arising out of a Pennsylvania automobile accident, the United States Circuit Court of Appeals for the Third Circuit has ruled that there is a right of recovery for the wrongful death of a stillborn viable fetus under the Pennsylvania Wrongful Death Act. The Court observed that a sharp division exists among the states as to whether, under wrongful death statutes, an action can be maintained for prenatal injuries suffered by a viable fetus which is stillborn but concluded that the weight of authority was in favor of allowing such action to be maintained.

Student Notes

STATUTORY RAPE—MISTAKEN BELIEF AS TO GIRL'S AGE A DEFENSE. In *People v. Hernandez*,[1] the supreme court of California reversed a trial court's ruling and held that a person accused of statutory rape should be allowed to prove as a complete defense to the crime his reasonable belief at the time of the intercourse as to the girl being over the statutory age of eighteen. The court thus felt that for a conviction of statutory rape, criminal intent (*mens rea*) is a necessary element. In this case the boy and the girl had been constant companions for several months. The prosecutrix was one month shy of the age of eighteen at the time of the alleged offense and had given her consent to the intercourse. The court applied three different sections of the California Criminal Code in order to justify its decision.

> Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:
>
> 1. Where the female is under the age of 18 years.[2]
>
> In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.[3]
>
> All persons are capable of committing crimes except those belonging to the following classes.
>
> 4. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.[4]

In applying the latter two sections to the former one, the court stated that "The Legislature, of course, by making intent an element of the crime, has established the prevailing policy from which it alone can properly advise us to depart."[5] The idea of the requirement of a *mens rea* in statutory rape and the validity of this interpretation of supposed legislative direction will be discussed after a general look at the crime itself.

A "crime" is usually said to be composed of three basic elements which are: (1) an act, (2) an intent, and (3) a con-

1. 39 Cal. Rptr. 361 (1964).
2. Cal. Pen. Code, § 261.
3. Cal. Pen. Code, § 20.
4. Cal. Pen. Code, § 26.
5. 39 Cal. Rptr. 361, 364 (1964).

currence of the two.[6] It will be seen that statutory rape has been treated as an exception to this established principle in that the crime is complete with only "an act."[7] As its name indicates, statutory rape has been created, and owes its existence to, legislative enactments in the various jurisdictions. There is a great disparity in these statutes as to the age at which it is presumed the girl cannot legally give her consent to the intercourse, as to whether or not the question of the girl's chastity at the time of the intercourse in question is an element, and as to whether such factors as consent and mistaken belief as to the girl's age are admissible as mitigating factors in a court's determination of the punishment to be given. However, as far as whether the offense itself has been committed, a 1911 New York case expressed the theory generally followed by most courts today when it stated:

> . . . . neither the consent, nor the previous unchastity of the girl, nor her representations nor information derived from others as to her age, nor her appearance with respect to age is a defense to a prosecution. . . .[8]

As can be seen from this court's statement, only two elements are generally necessary for this statutory offense—the act of sexual intercourse and the nonage of the girl. Thus the crime of statutory rape has historically not required the specific intent to have intercourse with a girl under the statutory age, or resistance on the part of the female. As one court said, "(the) Prosecutrix being under the age of fifteen years, intent to rape is not an element of the crime and the consent of the prosecutrix is not a defense."[9] On the other hand conviction for the common law felony of rape has usually required sexual intercourse accomplished by force and against the will of the woman.[10]

If one goes on the premise that this crime should be one

6. People v. Vogel, 46 Cal.2d 798, 299 P.2d 850 (1956), where the court held that a good faith belief that a former wife had obtained a divorce is a defense to the charge of bigamy.

7. See Brown v. State, 7 Penn. (Del.) 159, 74 A. 836 (1909), for an early decision discussing to some length the concepts and ideas behind statutory rape. On related topics where intent was held not to be an element of the offense, see Commonwealth v. Saericks, 161 Pa. Super. 577, 56 A.2d 323 (1948) (defendant's contributing to a child's delinquency—fornication). Brown v. State, *supra* (harboring a girl for prostitution purposes). *In re* License to C. M. Carlsen, 127 Pa. 330, 18 A. 8 (1889) (selling liquor to minors).

8. People v. Marks, 146 App. Div. 11, 130 N.Y.S. 524, 525 (1911).

9. Stapleman v. State, 150 Neb. 46, 34 N.W.2d 907, 910 (1948).

10. State v. Dell, 3 Terry 533, 40 A.2d 443 (Del. 1944).

where the specific intent to have intercourse with a girl under the statutory age is not a requirement, then certainly the fact that an accused believed in good faith that a girl was above the statutory age of consent has no bearing whatsoever in determining his innocence or guilt. This apparently has been the theory all courts previous to the one which rendered the *Hernandez* decision have followed.[11] The following instruction of which a state court approved exemplifies the position in which a defendant, who believed that the girl who freely consented to his advances was "of age," can find himself.

> The Court instructs the jury that, as a matter of law, neither misrepresentation by the complaining witness, Dorothy M. Shelton, to the defendants as to her age, nor her appearance with respect to age, nor the fact that defendants, or either of them, actually believed that said Dorothy M. Shelton was 18 years of age, are material in this case, if, from all evidence in the case, you believe beyond a reasonable doubt that at the time of the alleged act of sexual intercourse she actually was under the age of 18 years.[12]

At the same time, however, it should be noted that at least one jurisdiction has held in dealing with statutory rape that while the defendant's belief as to the girl being over the statutory age does not condone his act under law, it is a factor to consider in determining the punishment.[13] While this certainly is a step in the right direction, the problem of statutory rape still being considered an exception to the rule—that a crime must consist of the concurrence of an act plus an intent—is not solved.

How then can the harshness of a rule which punishes a man for rape when he had only the intent to commit fornication be justified? There have been two major arguments in favor of this. The first is that mentioned by Perkins in his treatise on criminal law where it is stated:

> This (referring to the fact that a mistaken belief to a girl's age is no defense in a prosecution for statutory rape) seems to be at

11. People v. Marks, *supra*, n. 8; Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896); State v. Duncan, 82 Mt. 170, 266 P. 400 (1928); Manship v. People, 99 Col. 1, 58 P.2d 1215 (1936); State v. Wade, 224 N.C. 760, 32 S.E. 2d 314 (1944); Law v. State, 92 Okla. Crim. 444, 224 P.2d 278 (1950); Farrell v. State, 152 Tex. Cr. 488, 215 S.W.2d 625 (1948); Reid v. State, 290 P.2d 775 (Okla. 1955); Simmons v. State, 151 Fla. 778, 10 So.2d 436 (1942); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892); Heath v. State, 173 Ind. 296, 90 N.E. 310 (1910); Stapleman v. State, *supra*, n. 9. For prior California law see People v. Raty, 115 Cal. 132, 46 P. 915 (1896); People v. Griffin, 117 Cal. 586, 49 P. 711 (1897); People v. Sheffield, 9 Cal. App. 130, 98 P. 67 (1908).

12. Manship v. People, 99 Col. 1, 58 P.2d 1215, 1218 (1936).

13. Law v. State, *supra*, n. 11; Reid v. State, *supra*, n. 11.

> variance with the familiar "reasonable mistake of fact" doctrine, but it is a recognized exception due to the fact that what was done would have been unlawful and highly immoral even under the facts as the offender supposed them to be. It was in no sense an "innocent" mistake but merely a mistake as to the extent of the wrong and this is not sufficient to excuse the actual wrong done.[14]

It seems that the fallacy of the argument—that intent to commit fornication can be substituted for the intent to have intercourse with a girl under the statutory age—can easily be shown by comparing this to a situation where two unmarried adults have intercourse, but it turns out that the woman did not have the mental capacity to legally give her consent. True, in the latter example the man is guilty of the crime of fornication where such is recognized, but courts have stated that a man's good faith belief in her being mentally capable to give such consent is a defense to the charge of rape.[15] Thus, why should the defense of mistaken belief in one situation be allowed and not in the other, since in *both* instances the man did intend to commit fornication? The Model Penal Code seems to provide the correct and intelligent approach when it says:

> Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.[16]

Thus the second justification appears to be the real basis of the argument for such crime being *malum prohibitum* in nature. In *Simmons v. State,* the Florida court remarked:

> This felony falls within the category of crimes in which on grounds of *public policy* (emphasis added), 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. . .[17]

It is submitted however that the court in *People v. Hernandez* reassured anyone who on the basis of public policy

14. PERKINS, CRIMINAL LAW 127 (1957).
15. State v. Robinson, 345 Mo. 897, 136 S.W.2d 1008 (1940); Commonwealth v. Stephens, 143 Pa. S. 394, 17 A.2d 919 (1941).
16. Model Penal Code § 2.04(2).
17. 151 Fla. 778, 10 So.2d 436, 438 (1942).

might question a move away from strict liability when it commented:

> Our departure from the views expressed in Ratz (a case which the court expressly overruled) is in no manner indicative of a withdrawal from the sound policy that it is in the public interest to protect the sexually naive female from exploitation. No responsible person would hesitate to condemn as untenable a claimed good faith belief in the age of consent of an "infant" female whose obviously tender years preclude the existence of reasonable grounds for that belief.[18]

In other words there is no doubt but that in a situation with a girl ten to twelve years of age, public policy would and should demand that a male having intercourse with her would do so at his own peril. The reason for this being that at this age the possibility of biological or psychological harm to the girl is so great that it should outweigh all considerations like the sexual maturity of the girl, the lack of resistance on her part, or the defendant's belief as to her age. However, to apply this same reasoning, which results in serious punishment, to where the girl is of an age that by her representations and appearance the boy reasonably forms a belief that she is of age to give her legal consent, can in *no* way be justified on a public policy basis.

This is basically the idea proposed by the Model Penal Code which says:

> *Mistake as to Age.* Whenever in this Article the criminality of conduct depends upon 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 upon 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.[19]

An example of the strict interpretation of a statute dealing with the carnal knowledge of a girl under a certain age, which can easily result in a boy discovering that what he thought was only an act of fornication with a girl old enough to give her consent actually constituting an act whereby he is declared a criminal by society and is punished by an imposition of a prison sentence, is evident in a 1928 Montana case.[20] There the court said that since the crime of statutory rape is com-

18. 39 Cal. Rptr. 361, 365 (1964).
19. Model Penal Code § 213.6.
20. State v. Duncan, *supra,* n. 11.

mitted by the presence of only the elements of nonage and intercourse, *that it matters not even if the girl was at the time an inmate of prostitution.* True, this is probably as far as a court could possibly go, but the majority of the cases included in this note dealt with situations where due to the girl's age and surrounding circumstances, it could reasonably be assumed that a defendant could be misled. If such a situation arises, remembering that courts have always treated the girl as the "victim" of the boy's advances, it seems incomprehensible to exonerate the one who not only consented freely to the intercourse, but in many instances misrepresented her age to the boy, and yet at the same time to subject the boy to heavy criminal sanctions.

If then the requirement of a specific criminal intent in statutory rape be justified, the added problem still exists that this crime owes its existence to state statutes. Thus the question of judicial interpretation and application of the controlling legislative enactment becomes paramount. As one court stated:

> Considering the nature of the offense, the purpose to be accomplished, the practical methods available for the enforcement of the law, and such other matters as throw light upon the meaning of the language, the question in interpreting a criminal statute is whether the intention of the legislature was to make knowledge of the facts an essential element of the offense, or to put upon every one the burden of finding out whether his contemplated act is prohibited, and of refraining from it if it is.[21]

In other words if a statute would expressly say that a reasonable mistaken belief as to the prosecutrix's age is no defense, a court would have no choice but to follow such direction. However, the cases found which dealt with this problem concerned the application of statutes which only said that rape is the carnal knowledge of a girl under a certain age. These are the situations where the courts in interpreting such have said that only the elements of intercourse and nonage are necessary for a conviction. It is true that in some jurisdictions, like Kentucky for example, a statute does provide for different degrees of punishment depending upon the girl's age and chastity.[22] The fact still remains that even in such a detailed statute as exists in Kentucky, no mention is made whether a *mens rea* is an element necessary for conviction or not.

21. Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504, 505 (1896).
22. K.R.S. 435.100.

At first glance one might say that since this is a statutory crime, let the legislature make the needed step as to the requirement of a criminal intent (remembering of course that if the girl is so young as to preclude a reasonable mistake as to her age, that a lack of intent should not be an acceptable defense). It is true that legislatures could lower the statutory age from sixteen or eighteen or whatever it might be, to an age around ten to twelve and accomplish the proper result. However, it must be remembered that state legislatures are political bodies and as such are hesitant in the field of sex and morality to directly state that certain concepts should be changed since in so doing, they would appear as though they were condoning certain conduct which has always been considered an "offense" against the set pattern by which society must operate. At the same time, the judicial branch should not set guidelines regardless of legislative direction.

An insight might be gained from the approach of the California courts. As late as 1960, in *People v. Courtney* the court, in discussing section 261.1 of the California Penal Code (one of the sections applied in the *Hernandez* case), said:

> It is sufficient to aver and prove that she was under the age of consent and not at the time the wife of the one having sexual intercourse with her. The offense is complete under the statute. . . .[23]

Just four years later the court in the *Hernandez* decision remarked that sections 20 and 26 of the Penal Code must be read along with section 261.1, and stated in summing up its position, "We hold only that in the absence of a legislative direction otherwise, a charge of statutory rape is defensible wherein a criminal intent is lacking."[24]

Of course it might be said that the California court has "grabbed hold of a loophole in the law" in order to provide a basis for its holding. Whether this is so is not a question which will be answered here although the court was certainly persuasive in its discussion of how sections 20 and 26 have been applied to the crime of bigamy, which before had not recognized the defense of a good faith belief which negates the criminal intent. The decision, however, must be commended as recog-

23. People v. Courtney, 180 ACA 59, 4 Cal. Rptr. 274, 276 (1960) citing People v. Sheffield, 9 Cal. App. 130, 98 P. 67, 68 (1908).
24. 39 Cal. Rptr. 361, 365 (1964).

nizing that when strict criminal sanctions are to be imposed, a criminal intent should be considered just as necessary as the criminal act. To hold otherwise, punishment will simply not serve a deterrent purpose, but will only be punishment for punishment's sake.

GEORGE THACKER

TENDER YEARS — A DIMINISHING DOCTRINE? — To favor one parent with custody of a minor child pursuant to a decree of separation or divorce is a difficult decision for any court, particularly where the facts of a case reveal no lack of fitness on the part of either. Special rules and guidelines are utilized to achieve a just result — that result being the welfare of the child. One of the most commonly employed standards is the so-called "tender years" doctrine whereby infants are given to the mother for care.[1] At best, the standard is very flexible and almost always purely a matter of discretionary application by the judge. Age and sex of the child comprise the elements of the rule, and its value seems to be measured more by the cases in which it is not applied. Recently the Kentucky Court of Appeals cast a shadow on the validity of the doctrine in the case of *Nicol v. Conlon*.[2]

In reopening the question of custody of two boys ages ten and twelve the mother argued that "it is an accepted rule that the mother should not be deprived of the custody of children of tender years"[3] . . . unless she is unfit. Originally, divided custody had been awarded, but the boys had lived with their father for two years preceding this action. In affirming award to the father the court declared that "Assuming this (tender years doctrine) to be a valid principle, it does not here apply. Boys of ten and twelve cannot be classified as children of tender years."[4]

By the strength of the court's language two inferences may be drawn. First, that there is a doubt as to the validity of

1. 27 B CJS Divorce § 309(4), See also 41 LRA 564, 575, 598 for historical review.
2. Ky., 385 S.W.2d 779.
3. *Id.* at 781.
4. *Id.* at 782.

this alleged rule, and secondly that once a boy reaches the age of ten years he no longer can be included in the class of affected children. This opinion seems to question a policy which, only a year before was reiterated with the strength of over a half-century's accumulated respectability.[5] In *Hinton v. Hinton*,[6] a custody dispute for daughters, ten, seven and four at the time suit was filed, the mother prevailed, the court reassuring that:

> (I)t is equally well settled that without evidence of unfitness of the mother, she should have custody of minor children. . . . The basis for awarding custody to the mother rests in the accepted premise that to do so serves the welfare of the children.[7]

Further attesting to the previous efficacy of the doctrine and its emphasis on the mother's lack of unfitness, the Kentucky Court has considered poverty and crime no deterrent to the preference. Even where the mother had shot and killed her ex-spouse's second wife, she was given custody of a ten-year-old daughter.[8] She was found to be a good parent, her other act notwithstanding.

Custody of a fourteen-year-old daughter was left with the female parent in an opinion which declared the abandonment of any preference for the father. The implication of this case was that in the absence of proof of moral unfitness, the mother was the natural custodian of this minor child regardless of her relative poverty.[9]

As late as the early twentieth century, this court had recognized the prima facie right of the father to the custody of children.[10] This constituted a reflection of the common law view of the dominion of the father over his minor offspring. Perhaps the decision in *Conlan* is expressive of a move to favor neither parent by the use of arbitrary rules of thumb. Since the rule is a creature of the court, and the court obviously did not desire to apply it in this case, it may be noted that a 1912 California case[11] was cited to support this refusal. This deci-

5. See Ky. Digest Divorce § 298(6) for collected cases.
6. Ky., 377 S.W.2d 888.
7. *Id.* at 890.
8. Wilson v. Wilson, 271 Ky. 631, 112 S.W.2d 980.
9. Reitmann v. Reitmann, 168 Ky. 830, 183 S.W. 215.
10. Edwards v. Edwards, 23 Ky. L.R. 1051, 64 S.W. 726.
11. Russell v. Russell, 20 Cal. App. 457, 129 Pac. 467.

sion went only so far as to say that a ten-year-old boy was not of tender years as a matter of law; the standards were the age, sex and physical development of the child. In effect, it may be concluded that more than the mere absence of unfitness in the mother will be required to upset a situation where the parents otherwise are equal.

England abrogated the common law domination of the male parent in 1839[12] and the statutory preference for mothers of minor children spread widely.[13] For example, New Jersey provided in 1860[14] that the mother was entitled to custody of children under seven years of age. In 1879, Michigan's legislature established a mark of twelve years,[15] which is still substantially the law in that jurisdiction. New Jersey, however, presently directs no preference between the feuding parents.[16] Ohio[17] and Kentucky[18] have provided a general statutory guide, leaving to the courts the application of such nostrums as "tender years." Oklahoma recommends that, all things being equal, a child of tender years is awarded to the mother, but to the father if of an age to require education and preparation for labor or business.[19] California, as well, statutorily enunciates a "tender years" preference.[20] If any pattern is discernible, it is merely that this criterion is a makeweight in otherwise balanced cases.

A cogent appraisal of the doctrine appears in *McCray v. McCray*,[21] a case which not so much questioned the doctrine as severely limited it. The opinion recognized certain presumptions as to the care and affection afforded by a mother but counterbalanced this by a need for a father's firm guidance. It categorically denied the application of the doctrine to a "school child" which in this case was a boy of five years.

Conceding that the welfare of the child is the ultimate consideration in custody proceedings, *Conlon* appears to be a

12. 2 & 3 Vict. Ch. 54 (1839), Talfourd's Act.
13. *i.e.*, Canada, Consol. Stat. (U.C.) Ch. 74 § 8 (1859).
14. New Jersey Act, March 20, 1860.
15. Mich. Public Acts 1879, p. 154, but see Horning v. Horning, 107 Mich. 587, 65 N.W. 555.
16. Rev. Statutes of New Jersey 1937, §§ 9:2-3, 9.2-4.
17. Ohio, R.C. § 3109.03, see Herzog v. Herzog, 72 OLA 22, 132 N.E.2d 754.
18. K.R.S. 403.070.
19. 30 O.S. 1941 § 11.
20. Calif., C.C. § 138.
21. Wash., 350 P.2d 1006.

step in the direction of removing a questionable presumption and emphasizing more than ever reliance upon the facts of each case and the discretion of the judge.

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