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## Statutory Rape: A Critique

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"No party to any expropriation proceeding shall be entitled to or granted a suspensive appeal from any order, judgment, or decree rendered in such proceeding, whether such order, judgment, or decree is on the merits, exceptions, or special pleas and defenses, or any or all of them. The whole of the judgment, however, shall be subject to the decision of the appellate court on review under a devolutive appeal."

This final resolution of the question of whether a suspensive appeal is available is summarized in this excerpt:<sup>49</sup>

"Articles 2634 and 2636 of the Civil Code have been amended by Act 92 of 1960 to strengthen the statement in the first sentence of Article 2634, forbidding suspensive appeals in expropriation cases. The new amendment clearly precludes suspensive appeals from any facet of an expropriation proceeding."

Prior to 1958, there was some obscurity as to the legal right of the Department of Highways to reserve to a property owner minerals and royalties with respect to the expropriation of land in full ownership. In 1958, an act<sup>50</sup> was adopted by the legislature that set this matter at rest and it is now established practice to include in all expropriation suits an allegation effecting such reservation where title is taken in fee or full ownership.

## STATUTORY RAPE: A CRITIQUE

In the evolution of statutory criminal law two classes of crimes have emerged in which knowledge and consequently intent are no longer demanded.<sup>1</sup> One of these classes is "public welfare offenses." These crimes are violations of statutes designed to protect the health, safety, and welfare of the community at large and they extend, for example, to the sale of

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49. *Legislative Symposium of 1960—Civil Code and Related Subject Matter*, 21 LA. L. REV. 53, 62 (1960).

50. LA. R.S., 9:5806 (1950).

1. *Smith v. State*, 71 Fla. 639, 642, 71 So. 915, 916 (1916): "While all common-law crimes consist of two elements—the criminal act or omission, and the mental element, commonly called criminal intent, it is within the power of the Legislature to dispense with the necessity for a criminal intent, and to punish particular acts without regard to the mental attitude of the doer." See also Sayre, *The Present Significance of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 407 (1934); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

food, drugs, liquor, and to traffic offenses.<sup>2</sup> The other class excludes intent but on a different basis and is composed of narcotic, bigamy, and statutory rape crimes.<sup>3</sup>

The crime of statutory rape is based on the conclusive presumption that a female under a certain age cannot legally consent to sexual intercourse.<sup>4</sup> If the female is incapable of consenting, it logically follows that any act of intercourse must have been against her will and hence must constitute rape. The male may reasonably suppose that he received the consent of a female mistakenly believed to be of legal age, only to find that he has received no legally recognizable consent. In this situation, his perhaps reasonable ignorance of the girl's age and consequent lack of criminal intent are no defense.<sup>5</sup> The act alone suffices to establish guilt. This is the position taken by most states.<sup>6</sup>

The English Sexual Offences Act of 1956 provides that if a female is between the ages of thirteen and sixteen, mistake of

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2. *United States v. Dotterweich*, 320 U.S. 277 (1943); *People v. Sweeney*, 66 Cal. App. 2d 855, 153 P.2d 371 (1944); *State v. Dahnke*, 244 Iowa 599, 57 N.W.2d 553 (1953); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933). Interesting in this light are the results of a study set forth in Remington, *Liability Without Fault Criminal Statutes—Their Relation to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin*, 1956 WIS. L. REV. 625, 667, where it was found that a large percentage of criminal statutes in Wisconsin do not expressly require proof of fault for conviction.

3. CLARK & MARSHALL, *CRIMES* 699 (bigamy), 247, 295 (adultery), 675 (rape) (6th ed. 1958); HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 395-401 (bigamy), 374 (narcotics), 373 (rape) (2d ed. 1960); PERKINS, *CRIMINAL LAW* 836 (bigamy), 700, 833 (adultery), 708 (narcotics), 110, 127, 699, 833 (rape) (1957).

4. LA. R.S. 14:80 (1950); *Rose v. United States*, 240 Fed. 685 (1917); *Ollis v. State*, 44 Ga. App. 793, 163 S.E. 309 (1932); *Golden v. Commonwealth*, 289 Ky. 379, 158 S.W.2d 967 (1942); Bennett, *The Louisiana Criminal Code: A Comparison with Prior Louisiana Criminal Law*, 5 LA. L. REV. 6, 41 (1942).

5. *Miller v. State*, 16 Ala. App. 534, 79 So. 314 (1918); *Anderson v. State*, 384 P.2d 669 (Alaska 1963); *Heath v. State*, 173 Ind. 296, 90 N.E. 310 (1910); *State v. Baker*, 276 S.W.2d 131 (Mo. 1955); *State v. Houx*, 109 Mo. 654, 19 S.W. 35 (1892).

6. Louisiana (LA. R.S. 14:80 (1950)), Minnesota (MINN. STAT. ANN. § 609.02 (9) (6) (1953)), and Wisconsin (WIS. STAT. ch. 939.43 (1963)), explicitly exclude a defense based on mistake or ignorance of the female's age. New Mexico allows the defense when the female is between thirteen and sixteen, but excludes it if the female is below thirteen (N.M. STAT. ANN. ch. 40A-9-3, 4 (1953)). Illinois gives the prosecutor the choice of charging statutory rape as a felony, in which case ignorance of the female's age will be a defense, or of charging statutory rape as a misdemeanor for which ignorance of age is not a defense (ILL. ANN. STAT. ch. 38, § 11-4, 5 (1964)). The statutes of nine other states either allows ignorance of the female's age as a defense or provide that there must be a union of act and intent to constitute a crime (Arizona, Colorado, California, Georgia, Idaho, Montana, Oklahoma, Texas, Utah). Thirty-six states have statutes which simply provide the male is liable for carnal knowledge of a female without any explicit mention of intent.

fact as to age may be a defense.<sup>7</sup> The position of the American Law Institute's Model Penal Code is similar except that the Code extends the age from ten to sixteen and demands the actor be at least four years older than the girl.<sup>8</sup> Should the female be within these age limits there is a presumption that she was known to be underage and as a result the act alone suffices for conviction; however, the presumption is rebuttable. Thus upon sufficient showing a mistake of fact as to age may constitute a valid defense. If the female is below thirteen under the English Act<sup>9</sup> or below ten under the Model Penal Code<sup>10</sup> mistake of fact as to age cannot be a defense. Here the act alone suffices to establish guilt because there is a conclusive rather than a rebuttable presumption that the male had knowledge of the female's age. The rationale is that if the statutory age is placed low enough, it becomes extremely improbable that a mistake of age could be made.<sup>11</sup>

Thus it appears that the English Act and the Model Penal Code establish a minimum age below which, it is believed, a female definitely lacks the capacity to fully understand the implications of intercourse and hence cannot legally consent to it. Above this minimum age it is recognized that some females may be more sexually sophisticated than others, and the unwary male who may have believed the girl to be of age and capable of legal consent is allowed to introduce evidence to overcome the presumption that he was aware of the female's age.

R.S. 14:42 provides that sexual intercourse with females under the age of twelve is aggravated rape. The statute expressly states that "lack of knowledge of the female's age shall not be a defense."<sup>12</sup> Like the English Act and the Model Penal Code this statute establishes a minimum age below which mistake of age is highly improbable and consequently is excluded as a defense.

Another statute, R.S. 14:80,<sup>13</sup> provides that the offense of

7. Sexual Offences Act, 4 & 5 Eliz. 2, c. 69, § 6 (1956).

8. MODEL PENAL CODE § 213.1(1) (d) (1962).

9. Sexual Offences Act, 4 & 5 Eliz. 2, c. 69, §§ 5-6 (1956). This statute also requires that the male must be under twenty-four years of age and never previously charged with a similar offense. If these conditions are not met, then mistake of age is not a defense and the act alone suffices to insure conviction.

10. MODEL PENAL CODE § 213.6(1) (1962).

11. *Id.* § 207.4(10), (11) (Tent. Draft No. 4, 1955). See also FLOSCOWE, *SEX AND THE LAW* 167-81 (1951); Comment, 62 *YALE L.J.* 55, 82 (1952).

12. LA. R.S. 14:42(3) (1950).

13. *Id.* 14:80.

carnal knowledge of a juvenile is committed whenever anyone over the age of seventeen has sexual intercourse with an unmarried female between the ages of twelve and seventeen with her consent. This statute expressly states that "lack of knowledge of the female's age shall not be a defense."<sup>14</sup> The Louisiana position therefore differs from that of the English Act and the Model Penal Code, for under the latter two, if the female were between the ages of twelve and seventeen there would be a rebuttable presumption that the male was aware of the female's true age; but under the Louisiana provision, the presumption is conclusive.

This was not always the position taken by Louisiana.<sup>15</sup> A former statute<sup>16</sup> placed the legal age at eighteen and was silent regarding lack of knowledge of the juvenile's age as a defense. However, *State v. Dierlamm*,<sup>17</sup> decided under this statute, held that it was not necessary for the state to prove the male knew the female was under eighteen; the act alone would suffice for liability.<sup>18</sup> The court stated that since the statute "makes no mention of felonious intent or guilty knowledge" the offense defined in the statute is purely a statutory crime.<sup>19</sup> This rule was codified in the present Louisiana statute.<sup>20</sup>

It is submitted that the *Dierlamm* decision may be criticized on two grounds. First, it does not seem logical to assign the statute's silence regarding criminal intent as the reason for

14. *Ibid.*

15. If past decisions had consistently supported the view that silence as regards intent indicated that the act alone sufficed for liability then such reasoning would be justified. But such is not the case; rather, Louisiana criminal statutes, proposed codes, and cases, from Livingston to the codification of the decision in *State v. Dierlamm*, 189 La. 544, 180 So. 135 (1938), have warned of the danger of reading out intent. For a complete *chronological* analysis see LIVINGSTON, REPORT MADE TO THE GENERAL ASSEMBLY OF THE STATE OF LOUISIANA ON THE PLAN OF A PENAL CODE (1822); *State v. Miller*, 42 La. Ann. 1186, 8 So. 309 (1890); La. Acts 1896, No. 115; DRAFT OF A PENAL CODE FOR THE STATE OF LOUISIANA, prepared under Gov. Murphy J. Foster (1898); MARR, CRIMINAL JURISPRUDENCE OF LOUISIANA (1906); *State v. Mehojovich*, 118 La. 1013, 43 So. 660 (1907); La. Acts 1912, No. 192; *Brunet v. Deshotels*, 160 La. 285, 107 So. 111 (1926); MARR, CRIMINAL STATUTES OF LOUISIANA (1929); DART, CODE OF CRIMINAL PROCEDURE AND CRIMINAL STATUTES OF THE STATE OF LOUISIANA (1932).

16. La. Acts 1912, No. 192(1) (the statutory age was from twelve to eighteen).

17. 189 La. 544, 180 So. 135 (1938).

18. *Ibid.*

19. 189 La. 544, 559, 180 So. 135, 139 (1938).

20. See LA. R.S. 14:80 (1950) and Reporter's Comment. This comment points out the arbitrary method by which the age of consent was determined. The former statute provided the age of eighteen, the Reporters favored sixteen, but the Advisors favored a higher age. The compromise age of seventeen was decided upon.

deciding against the necessity for intent; rather, the statute's silence is only the occasion for deciding and as such does not indicate what decision should be made. Moreover, the usual tendency is to demand intent when a statute is silent regarding it.<sup>21</sup> Second, the court cites five cases as precedent,<sup>22</sup> but a careful scrutiny of these cases will reveal that they in no way support the decision reached in *Dierlamm*.

In *State v. Berger*,<sup>23</sup> the court held that if the statute is silent regarding intent, the indictment need not charge intent; the words of the statute will be sufficient. This does not lend support to the *Dierlamm* decision. The indictment need not charge intent because the court has not yet decided whether intent must be proved to constitute a crime under the statute in question. This is a question for judicial interpretation, hardly one to be determined in the issuance of an indictment. Therefore, when the statute is silent on criminal intent, the words of the statute should suffice for a valid indictment. This in no way impedes the court's subsequently reading criminal intent into the statute.

In *State v. Standard Petroleum Co.*<sup>24</sup> the court was treating an entirely different area, the violation of a public welfare law regulating the sale of substandard gasoline.<sup>25</sup> The act in question contained two clauses: one, providing that anyone who "places in tanks, pumps, . . . gasoline . . . contrary to the provisions of this Act" is guilty of an offense under the Act; and, two, that whoever "shall willingly use any [inaccurate] pump" is guilty of an offense under the act.<sup>26</sup> The charge was brought under clause one and it was held that since the second clause expressly provided that the act must be done "willingly" it follows that criminal intent was necessary under it, but not under the first clause. The court reasoned that if the legislature had intended criminal intent to be an element under clause one, they would have expressly included it as they had done under clause two. In the *Dierlamm* case, there are no clauses to provide so

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21. See note 15 *supra* for Louisiana development. For the common law tradition see 2 BRACTON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* 121 (Twiss ed. 1879); 1 HALE, *HISTORY OF THE PLEAS OF THE CROWN* 14 (1736); STEPHEN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* ch. 4 (1890).

22. *State v. Standard Petroleum Prod. Co.*, 176 La. 647, 146 So. 321 (1933); *State v. Berger*, 156 La. 737, 101 So. 124 (1924); *State v. Quinn*, 131 La. 490, 59 So. 913 (1912); *State v. Dowdell*, 106 La. 645, 31 So. 151 (1902); *State v. Southern R.R.*, 122 N.C. 1053, 30 S.E. 133 (1898).

23. 156 La. 737, 101 So. 124 (1924).

24. 176 La. 647, 146 So. 321 (1933).

25. See note 2 *supra*.

26. La. Acts 1932, No. 14.

facile an interpretation of legislative intent. Finally, in *Standard Petroleum* the court, in dicta, pointed out that "even in criminal law when a statute makes an act indictable without regard to guilty knowledge, then ignorance of fact, although sincere, is no defense, and the intent with which the act is done is of no consequence."<sup>27</sup> This is the language utilized by the court in *Dierlamm*. The statement, as such, is valid. The statement is not valid if it is meant to apply to statutes which are merely silent as regards intent.<sup>28</sup>

In *State v. Quinn*,<sup>29</sup> the court held that proof of an offer of money to a witness in a criminal trial is sufficient to convict of bribery without the necessity of also proving criminal intent. The court seems to be saying that the proof of an offer of money to a witness is sufficient to constitute a manifestation of an intent to bribe. Note that the present bribery statute requires criminal intent, "the intent to influence his [the witness'] conduct."<sup>30</sup> Therefore, the *Quinn* decision has been repealed by the legislature.

In *State v. Dowdell*,<sup>31</sup> the defendant lay in wait and shot at the prosecuting witness as he emerged from a rooming house. Indictment was based on an act making it unlawful "to shoot at any dwelling house, any person [being] therein."<sup>32</sup> Defendant asserted that he was shooting at a man on the porch and was unaware of the house and consequently that he lacked the intent to shoot at the rooming house. The court ruled that the trial judge need not instruct the jury that "if he shot at the person with intent to kill, but without any intent to shoot at the dwelling house, he could not be guilty under the statute."<sup>33</sup> Today the doctrine of transferred intent would obviate the difficulty.<sup>34</sup>

The final case cited in *Dierlamm* is *State v. Southern R.R.*<sup>35</sup> This case can easily be dismissed for it concerns ignorance of law and not of fact. One cannot justifiably reason from the denial of ignorance of law as a defense that criminal intent

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27. 176 La. 647, 650, 146 So. 321, 322 (1933).

28. See note 3 *supra*.

29. 131 La. 490, 59 So. 913 (1912).

30. LA. R.S. 14:118 (1950).

31. 106 La. 645, 31 So. 151 (1902).

32. La. Acts 1870, No. 8(8).

33. 106 La. 645, 646, 31 So. 151, 152 (1902).

34. See PERKINS, CRIMINAL LAW 713 (1957).

35. 122 N.C. 1052, 30 S.E. 133 (1898).

is not an element of the statute under which the offense is brought.<sup>36</sup>

To dispense with the reasoning and precedents of the *Dierlamm* case is not necessarily to suppose that the legislature was unwise in codifying that decision. Perhaps other reasons exist that make it wise to adopt such a statute; basic policy considerations could have had a decisive influence. Two policy considerations frequently advocated are: first, that it is desirable to provide the fullest possible protection to the innocent and naive female child incapable of understanding the nature of sexual intercourse;<sup>37</sup> and, second, that the act done is immoral in itself, *malum in se*, and so it is appropriate to hold that the offender acts at his peril.<sup>38</sup>

The first policy consideration has as its purpose the protection of the sexually immature female who lacks the capacity to understand the nature and implications of the sexual act. To achieve this, an age standard is established below which females are considered sexually immature and above which they are considered mature. However, past puberty (which is itself a variable within limits) there is no assurance that every girl below a certain age is sexually immature and that every one above it is sexually mature. Accordingly it is submitted that age alone does not adequately demarcate the two groups<sup>39</sup> when, as in the United States, these minimum ages range from seven to twenty-one years.<sup>40</sup> If age alone does not effect an adequate division then difficulties are presented.

First, it would seem reasonable to allow the accused to introduce evidence of the female's maturity, sophistication, and past sexual experience, since her maturity is the chief concern and age is but a determinative factor indicating the presence or absence of maturity. Yet generally such evidence is inadmissible.<sup>41</sup>

36. See CLARK & MARSHALL, CRIMES 297 (6th ed. 1958); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 376-414 (2d ed. 1960).

37. *State v. Bowden*, 154 Fla. 511, 18 So.2d 478 (1944); *Holton v. State*, 28 Fla. 303, 9 So. 718 (1891); *State v. Huntsman*, 115 Utah 283, 204 P.2d 448 (1949); *Parsons v. Parker*, 160 Va. 810, 170 S.E. 1 (1933).

38. *State v. Houx*, 109 Mo. 654, 19 S.W. 35 (1892); CLARK & MARSHALL, CRIMES § 5.04 (6th ed. 1958); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW chs. 3, 4 (2d ed. 1960); PERKINS, CRIMINAL LAW 127 (1957).

39. PLOSCOWE, SEX AND THE LAW 181 (1951); Comment, 62 YALE L.J. 55, 82 (1952). Both commentators set the age of consent at fourteen.

40. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 74-80 (1961).

41. *People v. Marks*, 146 App. Div. 11, 12, 130 N.Y. Supp. 524, 525 (1911): "[N]either the consent, nor previous unchastity of the girl, nor her representa-



Second, the age standard (unless it is low enough) with its universal application draws an arbitrary line above and below which line breaches of justice are almost certain to occur.<sup>42</sup>

Third, if the age standard is placed too high, and without doubt this has happened in the United States, it results in the anomaly of a female legally able to consent to marriage but, in that same state, not legally able to consent to intercourse.<sup>43</sup>

The second policy consideration often put forward is that the act is immoral, *malum in se*, and sufficient to constitute guilt regardless of intent.<sup>44</sup> This assertion, that an act is *malum in se*, when made either by the legislature or by the courts, is

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tions, nor information derived from others as to her age, nor her appearance with respect to age is a defense to a prosecution." *Parsons v. Parker*, 160 Va. 810, 170 S.E. 1 (1933), in dictum stated that chastity or virginity is not a prerequisite to the commission of statutory rape. Louisiana has followed the same trend. See *State v. Patterson*, 176 La. 1013, 147 So. 62 (1933); *State v. Menard*, 169 La. 1197, 126 So. 921 (1930); *State v. Holland*, 169 La. 149, 124 So. 675 (1929); *State v. Mischior*, 165 La. 705, 115 So. 909 (1928); *State v. Williams*, 161 La. 851, 109 So. 515 (1926); *State v. Gibbs*, 153 La. 274, 95 So. 716 (1923); *State v. Higdon*, 153 La. 374, 95 So. 868 (1923); *State v. Romero*, 117 La. 1003, 42 So. 482 (1906).

42. See *State v. Snow*, 252 S.W. 629, 632 (Mo. 1923): "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 probably with the same result. The girl was a common prostitute. . . . The boys were immature and doubtless more sinned against than sinning. . . . Why should the boys, misled by her, be sacrificed? What sound public policy can be subserved by branding them as felons? Might it not be wise to ingraft an exception in the Statute?" The defendants were convicted. In this case, even if there exists no mistake of fact as to the girl's age, justice would seem to demand that the defendants be released. The capacity-to-consent test would certainly have resulted in their release had it been applied. See *Elkins v. State*, 167 Tenn. 546, 72 S.W.2d 550 (1934), *reversed on other grounds*. Here the female was within thirty days of the statutory age of twenty-one, had been married, but was now separated from her husband. The court held she could not give her consent under the statute. The court in *People v. Derbert*, 138 Cal. 467, 469, 71 Pac. 564, (1903) stated: "Under the Statute the girl may be the older and more aggressive of the two, and the real seducer. . . . She may be a common prostitute and seduce a boy of fifteen, and yet in such case the boy is guilty of felony, while to her the law awards no punishment."

Nor is it any defense to assert that these inadequacies should have been taken care of through administrative justice, that prosecutors should not have brought the actions and judges should have suspended sentences. The above are cases where actions were brought and sentences not suspended. See Comment, 62 *YALE L. J.* 55, 81, 82 (1952). Moreover, HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 343 (2d ed. 1960), has pointed out that no one would think of maintaining such a position regarding any major crime, *e.g.*, a statute which provided that anyone who killed a human being must be held guilty of murder, on the ground that the statute would be enforced only against those who killed with malice aforethought. This is to render judgment before trial.

43. PLOSCOWE, *SEX AND THE LAW* 184 (1951).

44. See note 38 *supra*. Additionally, since the act itself is immoral, even if the facts were as they are mistakenly believed to be, the actor should still be punished. See *State v. Ruhl*, 13 Iowa (8 Clarke) 447 (1859); *State v. Houx*, 109 Mo. 654, 19 S.W. 35 (1892); *Regina v. Tolson*, 23 Q.B.D. 168 (1889).

an extension beyond the realm of legal judgments into that of moral philosophy and is replete with difficulties and ambiguities.

First, it might cogently be argued that it is not the function of the legislature to promulgate morality or of the courts to base their interpretations and decisions on moral judgments. The awesome difficulty of determining moral or ethical truths admittedly valid and applicable has in the past precluded both legislatures and courts from considering such to be within their proper activity. This is not to deny that certain moral offenses are also legal offenses, but they are not legal offenses solely because they are moral ones.<sup>45</sup>

Second, to hold that an act is immoral in itself, divorced from any consideration of the intention of the actor, is contrary to the general consensus of what makes an act moral or immoral. Rather, the consensus seems to be that an act is made moral or immoral by the intention with which it is done.<sup>46</sup> Thus, to kill for self gain is considered immoral while to kill in defense of one's country is considered moral, even praiseworthy. To impose strict liability based on a judgment that the act is immoral in itself is to disregard the commonly accepted criterion of guilt—a dubious position when the stakes are so high.

Third, the assertion that the act alone will suffice for liability without the necessity of proving criminal intent is contrary to the traditional demand of the criminal law that only the act plus criminal intent is sufficient to constitute a crime.<sup>47</sup>

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45. Holmes, *Early Forms of Liability*, in *THE COMMON LAW* 33 (Howe ed. 1963); 2 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 94, 95 (1883): "Actus non facit rerum nisi mens sit rea . . . is frequently though ignorantly supposed to mean that there cannot be such a thing as legal guilt where there is no moral guilt, which is obviously untrue, as there is always a possibility of conflict between law and morals." See also CLARK & MARSHALL, *CRIMES* 81-86 (6th ed. 1958).

46. Holmes, *Early Forms of Liability*, in *THE COMMON LAW* 7 (Howe ed. 1963): "Even a dog distinguishes between being stumbled over and being kicked." Intention is seen as demanding premeditation and therefore maximum culpability. See BRADLEY, *ETHICAL STUDIES, Essay 1* (1876). See also MOORE, *ETHICS* 14 (1944); MOORE, *PHILOSOPHY* 180 (1942), where a duty violated by a person able to conform to it suffices to establish the moral culpability of the actor's conduct. "When the famous actor, Garrick, was said to have declared that he felt like a murderer whenever he acted Richard III, Dr. Johnson, as a moral philosopher, retorted; 'Then he ought to be hanged whenever he acts it'." PERKINS, *CRIMINAL LAW* 652 (1957). See also STEPHEN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 3, 4 (1890).

47. *State v. Blue*, 17 Utah 175, 181, 53 Pac. 978, 980 (1898): "To prevent the punishment of the innocent, there has been ingrafted into our system of jurisprudence, as presumably in every other, the principle that the wrongful

The criminal law has devised an intricate system of classification of crimes based on the kind or degree of intent present and this system is founded on the general consensus that intention colors the offense, that punishment should be weighted according to the presence and degree of intent found.<sup>48</sup> To disregard intention is to go contrary to this tradition.<sup>49</sup>

Fourth, is it not possible that considering an act *malum in se* today is merely the outgrowth of some positive system of law which at one time had prohibited the act and then had handed down the prohibition from generation to generation?<sup>50</sup> For example, sexual intercourse between parents and children was not always viewed as *malum*, much less as *malum in se*.<sup>51</sup> If there is so much difficulty in distinguishing positive prohibitions from moral ones it would seem unwise to utilize such a distinction in determining the admissibility of intent.<sup>52</sup>

Fifth, if an act is immoral in itself it must always have been so and it must always have been recognized as such. If not, there is no ground for the assertion that the act is *essentially* immoral. Now it is questionable to assert that intercourse with a female between the ages of twelve and seventeen is immoral in itself. In certain cultures girls are married and mothers at that age. Is it only within the confines of this era and within the geographical limits of the county or more spe-

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or criminal intent is the essence of the crime, without which it cannot exist." 2 BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 121 (Twiss ed. 1879): "With intention, as if anyone with certain knowledge and with a premeditated assault, through anger or hatred, or for the cause of gain, wickedly . . . has slain a person." 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 14 (1736): "The consent of the will is that, which renders human actions either commendable or culpable." Also, *id.* at 15: "[W]here there is no will to commit an offense, there can be no . . . just reason to incur the penalty."

48. CLARK & MARSHALL, CRIMES 57 (6th ed. 1958); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 310, 316 (2d ed. 1960).

49. See notes 45 and 46 *supra*.

50. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 341 (2d ed. 1960).

51. XENOPHON, MEMORABILIA IV, 4, 19 (Burnet ed. 1930).

52. Some philosophers assert that acts are immoral insofar as they violate some abstract standard, *i.e.*, of human nature, of the state's good, of greatest pleasure, of greatest happiness, of most utility. See THOMAS AQUINAS, SUMMA THEOLOGICA Ia, IIae, 90-91, 95-96, 99-102, ad 2 (Pegis ed. 1948); ARISTOTLE, ETHICA NICOMACHEA 1094a, 1-3, 1094b, 27, 1177a, 12-13 (Smith & Ross 2d ed. 1928); BERGSON, THE SOURCES OF MORALITY AND RELIGION 9 (Audra & Breton ed. 1935); BERKELEY, PHILOSOPHICAL COMMENTARIES 769, I, 93 (Luce & Jessop eds. 1948); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 146-63 (2d ed. 1960); HOLMES, THE COMMON LAW 4, 44, 46-47 (1881); LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 2, 20, 2, I, 303; 2, 28, 5, I, 474 (Pringle-Patterson, Oxford, 1924); PLATO, PHILEBUS Ia, 1-a, 1 (Bohn ed. 1858). This, in reality, is to beg the question of the act's inherent immorality and to posit some other standard which the act allegedly violates; as such, the act itself can be no more than indifferent.

cifically of contemporary Louisiana that such an act is "inherently immoral"?

It seems the courts are implying that intercourse with a female incapable of understanding the nature of the act, the sexually immature female, is *malum in se*. The idea can be expressed in a syllogism:

To have intercourse with a sexually immature female is *malum in se*.

This female is sexually immature.

Therefore, to have intercourse with this female is *malum in se*.

By concluding from age alone that the female is sexually immature, the courts are failing to allow the defendant to contest the minor premise. Evidence of past sexual promiscuity, of sophistication, and experience should be considered relevant, but the *a priori* judgment that age alone is an adequate standard prevents admission of this evidence and thus often has the effect of thwarting justice.

Acceptance of the idea that intercourse with a female between the ages of twelve and seventeen is *malum in se* is seen to be dependent on the particular cultural environment; therefore the act cannot be essentially immoral or *malum in se*. Even admitting that intercourse with a sexually immature female could be considered *malum in se*, the admission presupposes proof of the maturity or immaturity of the female—a proof the courts have failed to admit. By equating age and capacity the courts are reverting to the completely untenable position that age alone is sufficient to establish the act as *malum in se*. It is submitted that the policy considerations traditionally offered as reasons for imposing strict liability in statutory rape offenses are not valid.

A recent California decision seems to provide support for this conclusion. In *People v. Hernandez*<sup>53</sup> the defendant was charged with statutory rape under the California Penal Code.<sup>54</sup>

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Specifically, to determine whether sexual intercourse with one below a certain age is immoral in itself, a criterion must be selected. Conceivably, different judgments could arise depending on the criterion selected. Even within any selected criterion, different results could be reached. It is submitted that such a distinction should not be the basis for imputing strict liability.

53. 61 Cal.2d 529, 393 P.2d 673 (1964).

54. CALIF. PENAL CODE § 261(1): "Rape is an act of sexual intercourse,

The prosecutrix, seventeen years and nine months old, had dated the defendant for several months. The trial court refused to allow the defendant to introduce evidence that he had a reasonable belief that she was over eighteen. The district court of appeals affirmed,<sup>55</sup> but the Supreme Court of California reversed, holding that without criminal intent there could be no crime. In so holding, the court was acutely aware of the policy considerations enumerated above;<sup>56</sup> however, it pointed out that the purpose of the California statute is to protect infants: "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 precluded the existence of reasonable grounds for that belief."<sup>57</sup> Yet in cases where the girl was sexually sophisticated owing either to cultural factors or to her own experience the public interest is not served by excluding mistake of fact as a defense.<sup>58</sup> Thus, "in the absence of legislative direction otherwise, a charge of statutory rape is defensible wherein a criminal intent is lacking."<sup>59</sup> Finally, the court noted that this holding was a logical extension of *People v. Vogel*,<sup>60</sup> which it stated, held "that a good faith belief that a former wife had obtained a divorce was a valid defense to a charge of bigamy arising out of a second marriage when the first marriage had not in fact been terminated."<sup>61</sup>

The *Hernandez* decision, it is submitted, is an advance in the right direction. It turns from an absolute standard of age

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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 eighteen years. . . ."

55. 29 Cal. Rptr. 253 (1963).

56. These had been clearly enumerated in *People v. Ratz*, 115 Cal. 132, 133 46 Pac. 915, 916 (1898). There the Supreme Court of California followed the decision of *Regina v. Prince*, L.R. 2 Crown Cas. 154 (1875), and ruled that reasonable belief that the girl was over the age of consent would not justify an absence of consent necessary to constitute a crime. The court ruled that the "protection of society, of the family, and of the infant, demand that one who has carnal influence under such circumstances shall do so in peril of the fact." 115 Cal. 132, 133, 46 Pac. 915, 916 (1898). However, fornication is not a crime in California. See *In re Lane*, 58 Cal.2d 99, 104, 372 P.2d 897, 900 (1962). Moreover, the threats to society and the family—illegitimacy, unwed mothers, venereal disease—are still present when the girl is past the age of consent. Thus protection of society and the family do not appear as important as *Prince* would lead us to believe. The *Prince* case was repealed ten years later by legislation and the *Ratz* case which followed both *Prince* and the overruling legislation appealed to *Prince* as precedent and ignored the subsequent legislation.

57. 61 Cal.2d 529, 536, 393 P.2d 673, 677 (1964).

58. *Id.* at 530, 393 P.2d at 674.

59. *Id.* at 536, 393 P.2d at 677.

60. 46 Cal.2d 798, 299 P.2d 850 (1956).

61. *People v. Hernandez*, 61 Cal.2d 529, 531, 393 P.2d 673, 677 (1964).

to the intent necessary to constitute the crime. In so doing, it recognizes that the purpose of the statute is to protect the emotionally and sexually immature rather than all females under a certain age. It recognizes that age may be indicative of sexual immaturity and that in such cases a mistake of age would lack a reasonable basis. In so recognizing, it does not ignore the intent of the male, but simply infers that, in particular circumstances, the male must have intended to take advantage of an immature girl. As a result, each case can be treated on its facts and such abuses of justice as the previous rule fostered can be avoided.

As has been seen, the central issue in statutory rape seems to be that of operative consent. The *Hernandez* decision does not go far enough to confront this issue directly. It allows mistake of age to be a defense, but does not extend the defense to cases where, although there is no mistake of age, the girl is sexually mature and comprehends the nature of her consent. If, as seems likely, the statute was not designed to protect this wise but underage female, it follows that one should treat as rebuttable the presumption that a young girl lacks the capacity to consent. The defendant should be allowed to introduce evidence to show that the girl understood the significance of the act and her consent should therefore have the same effect as that of a legally mature female. It is submitted that the female's capacity to grant operative consent could be a question for the jury, just as it is in rape cases where the girl is alleged to be mentally incompetent. This rebuttable presumption would continue to protect the naive and innocent, but the law would no longer punish the man who copulates with a girl fully capable of understanding the significance of her participation.

*Richard A. Tonry*

## FEDERAL ESTATE AND GIFT TAX: EFFECT OF LOUISIANA POWERS TO REVOKE INTER VIVOS DONATIONS

The basic incident of taxation by the federal estate or gift tax<sup>1</sup> is the transfer of property. The estate tax is imposed on the transfer of property at death<sup>2</sup> and on certain inter vivos

1. See INT. REV. CODE of 1954, subtitle B.

2. *Id.* §§ 2001, 2031, 2051. See *Chase Nat'l Bank v. United States*, 278 U.S. 327 (1928); *McCaughn v. Fidelity Trust Co.*, 34 F.2d 443 (3d Cir. 1929);