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Criminal Law - Rape - Mistake of Age as a Defense

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discrimination transcends the requirements of due process.[30] To incur censure under the Fifth Amendment, the legislative classification must be arbitrary and unreasonably discriminatory.[31] The reasonableness test espoused in *Perez*[32] and postulated in *Schneider*[33] is, "Is the means, withdrawal of citizenship, reasonably calculated to affect [sic] the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations . . .?" Mr. Justice Douglas, speaking for the majority, answered in the negative, observing that the statute proceeds upon the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native-born,[34] and the legislative intent did not demonstrate a valid exercise of congressional authority.[35]

Considering the present membership of the Supreme Court, there appears little doubt but that denationalization legislation will encounter rigorous opposition. Three Justices are committed to the position that congressional authority to denationalize is nonexistent absent expatriation by the voluntary renunciation of nationality and allegiance.[36] It may well be anticipated that this minority will muster the requisite support to defeat attempted denationalization from the veritable arsenal available in the Fifth, Sixth, and Eighth Amendments to the Constitution which have been successfully pressed in recent decisions.[37]

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CRIMINAL LAW—RAPE—MISTAKE OF AGE AS A DEFENSE—The defendant was charged with statutory rape of a minor seventeen years and nine months of age. The defendant offered evidence to show his lack of criminal intent due to a reasonable and substantial belief that she was eighteen years of age or older, the age of legal consent. This evidence was not admitted and the defendant was found guilty in Superior Court. On appeal, the Supreme Court of California *held*, the defendant's reasonable belief that the prosecutrix

30. Korematsu v. United States, 323 U.S. 214 (1944). *Accord,* Hirabayashi v. United States, *supra* note 28.
31. Nebbia v. New York, 291 U.S. 502 (1934).
32. 356 U.S. 44, 58 (1958).
33. 84 Sup. Ct. 1187, 1189 (1964).
34. *Id.* at 1190.
35. *Id.* at 1189.
36. See Mr. Chief Justice Warren's dissent in *Perez* at 68-69; Mr. Justice Douglas' dissent in *Perez* at 83-84; and Mr. Justice Black's concurring opinion in Nishikawa v. Dulles, 356 U.S. 129 (1958) at 138-39.
37. In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Court struck down a provision which asserted automatic expatriation for evading military service, declaring that it was penal in nature and would inflict severe punishment without due process of law and without the safeguards which must attend a criminal prosecution under the Fifth and Sixth Amendments. And in Trop v. Dulles, 356 U.S. 86 (1958), a denationalization provision for desertion was found penal and violative of the Eighth Amendment's prohibition against cruel and unusual punishment.

had reached the age of consent could prove a lack of criminal intent constituting a complete defense. *People v. Hernandez*, 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

To prevent the degradation of morals, society has developed the legal fiction of statutory rape,[1] based on the theory that below a certain age the female does not have the ability to consent to sexual intercourse[2] because she neither understands the nature of her acts nor the consequences thereof.[3] Common law set the age of consent at puberty,[4] but state legislatures have increased it to as high as twenty-one.[5]

All American jurisdictions have statutory rape legislation, and the majority make it a strict liability crime.[6] The *Hernandez* decision is the first to hold that mistake of fact is a complete defense to this crime; this defense has been provided by legislation in Illinois[7] and New Mexico.[8] New Mexico allows the defense when the victim is thirteen to sixteen years of age but imposes strict liability if the female is below thirteen;[9] Illinois gives the prosecutor a choice of charging statutory rape as a felony,[10] in which case mistake is a defense, or of charging statutory rape as a misdemeanor for which the defendant is strictly liable.[11] The American Law Institute has adopted the latter policy regarding mistake of age.[12]

The California court reasoned that intent should be a necessary element of statutory rape, therefore there could be no crime when intent was negated by a mistake of fact. This appears contrary to the general rule that the only intent necessary is intent to do the act declared wrongful, not intent to commit a crime.[13] But California has no fornication statute, thus the act could only be wrongful as a violation of the rape statute.[14] The court, however, made no mention of the general rule or of the lack of a fornication statute,

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1. People v. Marks, 146 App. Div. 11, 130 N.Y.S. 524 (1911); Ledbetter v. State, 187 Tenn. 396, 99 S.W.2d 112 (1947); State v. Huntsman, 115 Utah 283, 204 P.2d 448 (1949).

2. Propes v. State, 68 Ga. App. 418, 23 S.E.2d 98 (1942); State v. McCall, 245 Iowa 991, 63 N.W.2d 874 (1954); State v. Nagel, 75 N.D. 494, 28 N.W.2d 665 (1947).

3. People v. Hernandez, 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

4. United States v. Jacobs, 113 F. Supp. 203 (E.D. Wis. 1953).

5. TENN. CODE ANN. § 39-3706 (1956).

6. *E.g.*, Miller v. State, 16 Ala. 534, 79 So. 314 (1918); Anderson v. State, 384 P.2d 669 (Alaska 1963); State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892).

7. ILL. ANN. STAT. ch. 38 § 11-4, 5 (Smith-Hurd. 1964).

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

9. *Ibid.*

10. ILL. ANN. STAT. ch. 38 § 11-4 (Smith-Hurd. 1964).

11. *Id.* at § 11-5. See Bowman, *Committee Comments*, ILL. ANN. STAT., vol. 38, page 598, 628 (1961). The commentator points out that to be consistent with the policy of preventing under age sexual activities, this misdemeanor charge is always available despite a mistake of fact, while at the same time, the harshness of a felony charge is alleviated in cases where extenuating circumstances are involved.

12. MODERN PENAL CODE § 213.6, comment (Tent. Draft No. 13, 1962).

13. *Cf.* Gates v. United States, 122 F.2d 571 (10th Cir. 1941); Watkins v. District of Columbia, 60 A.2d 227 (D.C. 1948); Balark v. State, 81 Ga. App. 649, 59 S.E.2d 524 (1950); See generally, PERKINS, CRIMINAL LAW, 699 (1957).

14. North Dakota has a fornication statute, N.D. CENT. CODE § 12-22-08 (1960), therefore the accused always intends to do a wrongful act.

thus it would seem that the decision is broadly based on a trend away from strict liability felonies.[15]

California appears to be a leader in the movement requiring a criminal intent for felonies, such as bigamy[16] and possession of narcotics,[17] generally declared by the majority to be strict liability offenses.[18] This movement limits strict liability to minor offenses such as police regulations which are misdemeanors,[19] and eliminates strict liability felonies[20] unless there is a legislative intent to the contrary.[21]

It seems that legislation is a better method for establishing the California rule. The legislatures can provide a flexible statutory scheme to deal effectively and equitably with variable fact situations, while the courts, like California, may have to eliminate statutory rape entirely if they are to change the law.

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15. See generally, HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 157-168 (1957).

16. People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956).

17. People v. Winston, 46 Cal. 2d 151, 293 P.2d 40 (1956).

18. State v. Braun, 230 Md. 82, 185 A.2d 905 (1962) (bigamy); State v. Goonan, 89 N.H. 528, 3 A.2d 105 (1938) (bigamy); See generally, 45 CALIF. L. REV. 70 (1957); United States v. Balint, 258 U.S. 250 (1922) (narcotics); Jenkins v. State, 215 Md. 70, 137 A.2d 115 (1957) (narcotics).

19. *Supra* note 16, at 853 n. 2; See generally, Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

20. See Wallace v. State, 77 Nev. 123, 359 P.2d 749 (1961); State v. Gedding, 67 N.M. 87, 352 P.2d 1003 (1960); See generally, 45 CALIF. L. REV. 70 (1957).

21. See Morissette v. United States, 342 U.S. 246 (1952).