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Criminal Culpability for Defense of Third Persons

> It is not necessary that Margreth Williams should prove that she produced by her labor a part of the very money that was used in purchasing the land. If she and Thomas Jefferson were working together to a common purpose, and the proceeds of labor performed by them became the joint property of the two . . . each would own the property acquired in proportion to the value of his labor contributed to the acquisition of it.[40]

It is not suggested that the *Keene* court was bound to invoke the reasoning employed in *Hayworth v. Williams.* It is suggested, however, that the court could have allowed plaintiff to recover upon several rationales. "In the absence of a controlling contract such an interest stems from the fact that the property was acquired through the joint efforts or contributions of the parties with the intention that both should share in its benefits. . . ."[41]

The *Keene* court, however, refused to indulge in the mild presumption that the parties intended to deal fairly with each other. The *Keene* decision has the effect of allowing one guilty party to profit at the expense of another guilty party. As was mentioned in the dissenting opinion, one standard is applied to the man, while a second more strict standard is applied to the woman. It is submitted that the *Keene* decision was unfair and not in the interests of good public policy. The illicit cohabitation turned out to be quite profitable to defendant inasmuch as he was able to take advantage of her services to him in his businesses for approximately seventeen years without having to compensate her. While the illicit relationship itself gives rise to no rights, plaintiff should not be deprived of rights which she would enjoy were it not for the relationship.

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CRIMINAL CULPABILITY FOR DEFENSE OF THIRD PERSONS

In criminal law an interesting question arises whether a person aggressively intervening in a struggle between two other persons is judged by his own intent or by that of the person whom he defends. The difference in approach may determine whether the intervenor is himself guilty of a criminal offense.

The question is considered in the New York case of *People v.*

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[40]Id. at 46.

[41]Beuck v. Howe, 71 S.D. 288, 23 N.W.2d 744, 745 (1946).

Young.[1] Two plain-clothes detectives observed an argument between two motorists in the middle of a busy thoroughfare; when one of them, McGriff, refused to move out of the street, one of the detectives, after identifying himself, undertook to arrest him. A struggle ensued. The defendant came out of the crowd, which had gathered, and attacked one of the detectives from the rear. As a result of the encounter, the detective was injured. The defendant was indicted for assault in the third degree. He contended that he did not know the two men were police officers, but thought they were wrongfully assaulting McGriff. A conviction of assault in the third degree was reversed by the Appellate Division of the Supreme Court, but the conviction was reinstated by the Court of Appeals.

The Court of Appeals in upholding the conviction reasoned that the right of one person to defend another should not be greater than such person's right to defend himself.[2] The majority of the court held that the motive of the defendant is immaterial, because, in New York, to be guilty of the offense charged, "It is sufficient that the defendant voluntarily intended to commit the unlawful act of touching."[3]

A dissenting opinion took the view that the basic element necessary for criminal liability is a guilty mind, or mens reas, and if the defendant entertained an "honest and reasonable belief" that the facts were as he perceived them to be, he is not guilty of any criminal offense.[4] The dissenting opinion went on to say that the majority was ignoring a basic principle of criminal law, "That crimes mala in se require proof of at least general criminal intent," and in doing so was eliminating the defense of mistake-of-fact.[5]

There are two approaches to the right of one person to intervene in a struggle on the behalf of another. One is that the fault of the defended party is imputed to the one who intervenes on his behalf, while the other is that the intervening party is bound only by his own intent.

The prevailing rule, commonly referred to as the "alter ego" rule,[6] is that the right of one person to defend another is co-extensive with the right of the other to defend himself.[7] In other words, the party

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[1]11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962).

[2]183 N.E. 2d at 320, 229 N.Y.S.2d at 2.

[3]Ibid.

[4]People v. Young, 11 N.Y.2d 274, 183 N.E.2d 319, 321, 229 N.Y.S.2d 1, 4 (1962)).

[5]Ibid.

[6]State v. Chiarello, 69 N.J. Super. 479, 174 A.2d 506 (1961).

[7]Griffin v. State, 229 Ala. 482, 158 So. 316 (1934); Thompson v. State, 37 Ala. App. 446, 70 So. 2d 282 (1954); Pacheco v. People, 96 Colo. 401, 43 P.2d 165 (1935); Commonwealth v. Hounchell, 280 Ky. 217, 132 S.W.2d 921 (1939); Stanley v. Com-

who intervenes in a struggle "stands in the shoes of the one defended,"[8] and therefore, if the party who is being defended was the aggressor and could not claim self-defense, his "rescuer" is to be treated as an aggressor also.[9] The rule is applicable where the party who intervenes does not have knowledge of the aggressiveness of the one defended,[10] acting upon outward appearances or misinformation.[11]

The prevailing rule generally does not make any distinction between the defense of strangers, social guests[12] and members of one's family.[13] In *State v. Ronnie,*[14] the New Jersey court held a person had the right to defend his social guests provided the right of self-defense would have been available to the one defended. However, there has been some attempt to limit the application of the rule as to the defense of one's relatives. In *State v. Best,*[15] for example, West Virginia held that persons standing in certain relationships of consanguinity may resist an officer in making an unlawful arrest. But the Alabama court in *Robinson v. City of Decatur*[16] applied the more generally accepted view that one who intervenes in defense of a relative is in no different situation than if he had intervened in defense of a nonrelative.

A leading case adhering to the majority approach is the South Carolina decision in *State v. Cook.*[17] In that case, the deceased, a special policeman, was assigned to preserve order at a carnival. When the

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monwealth, 86 Ky. 440, 6 S.W. 155 (1887); Guerriero v. State, 213 Md. 545, 132 A.2d 466 (1957); State v. Ritter, 239 N.C. 89, 79 S.E.2d 164 (1953); State v. Anderson, 222 N.C. 148, 22 S.E.2d 271 (1942); State v. Young, 52 Ore. 227, 96 Pac. 1067 (1908); Moore v. State, 219 Pac. 175 (Okla. 1923); State v. Cook, 78 S.C. 253, 59 S.E. 862 (1906); Crowder v. State, 8 Lea 669 (Tenn. 1881); Waddell v. State, 1 Tex. Crim. 720 (1877); State v. Best, 91 W. Va. 559, 113 S.E. 919 (1912). See 6 C.J.S., Assault and Battery § 93 (1957).

[8]Thompson v. State, 37 Ala. App. 446, 70 So. 2d 282, 284 (1954).

[9]Humphries v. State, 28 Ala. 159, 181 So. 309 (1938).

[10]Wood v. State, 128 Ala. 27, 29 So. 557 (1900).

[11]State v. Hays, 67 Mo. 692 (1878). This case has not been expressly overruled even though Missouri is aligned with the minority jurisdictions in note 27 infra.

[12]State v. Ronnie, 41 N.J. Super. 339, 125 A.2d 163 (Essex County Ct. 1956). Even though New Jersey is classified as a jurisdiction adhering to the minority rule in note 22 infra, State v. Ronnie has not been expressly overruled but only distinguished by the subsequent case.

[13]Robinson v. City of Decatur, 32 Ala. 654, 29 So. 2d 429 (Ct. App. 1947); Pacheco v. People, 96 Colo. 401, 43 P.2d 165 (1935); State v. Herdina, 25 Minn. 161 (1878); State v. Melton, 102 Mo. 683, 15 S.W. 139 (1891); State v. Anderson, 222 N.C. 148, 22 S.E.2d 271 (1942); Waddell v. State, 1 Tex. Crim 720 (1877).

[14]See note 12 Supra.

[15]91 W. Va. 559, 113 S.E. 919 (1922).

[16]32 Ala. 654, 29 So. 2d 429 (Ct. App. 1947).

[17]78 S.C. 253, 59 S.E. 862 (1907).

deceased sought to arrest Daisy Cook for an alleged breach of a town ordinance, he was shot and killed by Daisy's brothers who had come upon the scene. In affirming a conviction of manslaughter, the South Carolina court held that freedom from fault in bringing on the difficulty on the part of the party defended is a condition precedent to a plea of self-defense by one who intervenes on his behalf. The court went on to say that the law does not give one person the right to provoke a difficulty, and then allow another to intervene and kill on his behalf.

The underlying theory of the majority rule is applicable also to the amount of force that may be employed in the defense of third persons. In other words, an intervening party may use whatever force the defended party may have employed, and no more.[18] This necessarily follows because, as emphasized in the Kentucky case of *Stanley v. Commonwealth*,[19] the intervening party "takes the place of one of the combatants, and can only do for him what he had the right to do under the circumstances in defense of himself."[20]

The minority view is that one who intervenes in a struggle under a reasonable but mistaken belief that he is protecting another who he assumes is being unlawfully assaulted is thereby exonerated from criminal liability.[21] This is commonly referred to as the "objective test" theory.[22] In other words, the culpability of the intervening party is measured by the intent with which he acted and not by the intent of the party for whom he was acting, the intent of the latter being immaterial.[23] The courts following the minority approach reason that in order for there to be criminal culpability, the defendant must have mens rea,[24] and when one intervenes on behalf of another under the reasonable belief that the other is in imminent danger, mens rea is obviously lacking. Therefore, under this approach, "the acts and conduct of the defendant must be judged solely with reference to the situation as it was when he first and afterwards saw it."[25]

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[18]Stanley v. Commonwealth, 86 Ky. 440, 6 S.W. 155 (1887).

[19]Ibid.

[20]Id at 156.

[21]Williams v. State, 70 Ga. App. 10, 27 S.E.2d 109 (1943); State v. Menilla, 177 Iowa 283, 158 N.W. 645 (1916); State v. Mounkes, 88 Kan. 193, 127 Pac. 637 (1912); McGehee v. State, 138 Miss. 822, 104 So. 150 (1925); State v. Chiarello, 69 N.J. Super. 479, 174 A.2d 506 (1961); People v. Maine, 166 N.Y. 50, 59 N.E. 696 (1901); People v. Coleman, 7 App. Div. 2d 155, 180 N.Y.S. 2d 978 (1959). See generally Perkins, Criminal Law (1957).

[22]1 Wharton, Criminal Law and Procedure § 219 (12th ed. 1957).

[23]State v. Menilla, 177 Iowa 283, 158 N.W. 645 (1916).

[24]Dennis v. U.S., 341 U.S. 494 (1951); State v. Chiarello, 69 N.J. Super. 479, 174 A.2d 506 (1961). See generally 33 Colum. L. Rev. 55 (1933).

[25]People v. Maine, 166 N.Y. 50, 59 N.E. 696 (1901).

The minority rule is equally applicable to interventions on behalf of strangers, social guests[26] and members of one's family.[27] As long as the intervening party reasonably believes that an apparently blameless party is in danger of great bodily harm, he may lawfully intervene on his behalf even though he is misinformed about the conflict,[28] or was mistaken as to who was in fact the aggressor.[29]

A leading case adhering to the minority approach is *Mayhew v. State*.[30] There a struggle ensued between the defendant's son and the deceased, in which the former was the aggressive party. The defendant, who was in his store at the inception of the incident, was informed by a third person that his son was being killed. The defendant rushed to the scene and stabbed the person struggling with his son, causing his death. In reversing a conviction of murder in the second degree, the Court of Criminal Appeals of Texas held that the culpability of a party intervening in a difficulty between two other persons is measured by the intent with which he acted and not by the intent of the party defended, unless the defendant knew or might reasonably have known the intent of the person defended. The court went on to reason that the apprehension of danger must be viewed from the position of the defendant, "whether he acts in his own behalf or in behalf of another."[31]

In reference to the amount of force that may be used in the defense of third persons, *State v. Menilla*,[32] points out that an intervening party may use whatever force he reasonably considers necessary in the protection of third persons, even though the party defended knows or should know that the quantum of force ultimately used was not necessary. Therefore, the objective test is applied not only to determine the lawfulness of the intervention, but also the amount of force that may be employed.

In comparing the majority and minority approaches, certain advantages and shortcomings of each become apparent.

In applying the majority approach, the principal feature, as brought out by Oklahoma in *Hare v. State*,[33] is that although in cer-

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[26]State v. Yates, 301 Mo. 225, 256 S.W. 809 (1923).

[27]Brannin v. State, 221 Ind. 123, 46 N.E.2d 599 (1943).

[28]Mayhew v. State, 65 Tex. Crim. 290, 144 S.W. 229 (1912). Although Texas is classified as a jurisdiction adhering to the majority rule in notes 7 and 13 supra, the Mayhew case does not expressly overrule that case.

[29]Brannin v. State, 221 Ind. 123, 46 N.E. 2d 599 (1943).

[30]See note 28 Supra.

[31]Id. at 231.

[32]177 Iowa 283, 158 N.W. 645 (1916).

[33]58 Okla. Crim. 420, 54 P.2d 670 (1936).

tain instances this rule may work hardships, it prevents an innocent person who had been compelled to strike in self-defense from being attacked with impunity merely because at the time the intervening party came upon the scene of conflict appearances happened to be against the wrongfully assaulted party.

The most important result of the minority approach is the maintaining of the fundamental principle that one must have mens rea or a "guilty mind" in order to be subject to criminal liability. Another important feature of the minority rule is that if a party, before he can lawfully intervene on the behalf of another, must wait until he ascertains who was at fault, then an innocent party may be more seriously assaulted or even killed because no one will intervene on his behalf.[34] The final aspect of the minority approach is that such approach preserves the mistake-of-fact doctrine, which is a distinct part of criminal law. The preservation of such doctrine prevents an intervening party from being guilty of the most serious crimes when he acts entirely without mens rea, and from the highest sense of duty.

The American Law Institute has recognized the serious shortcomings of the majority approach and has chosen to adhere to the minority rule in the Model Penal Code.[35] The comments on the pertinent section of the Penal Code bring out that liability without fault is an indefensible principle.[36] The draftsmen of the Code stress the fact that innocent persons may be injured without receiving assistance from bystanders because bystanders who know the law will be very cautious and refrain from acting.[37] Therefore it appears that the minority rule is the preferable one. Under such rule, not only is the mistake-of-fact doctrine preserved, and the traditional application of the mens rea theory applied, but one will not hesitate in going to the aid of another who is being subjected to an assault.

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[34]It was pointed out in 1 Bishop on Criminal Law § 303 (9th ed. 1923) that: "What is absolute truth no man ordinarily knows. All act from what appears, not from what is. If persons were to delay their steps until made sure, beyond every possibility of mistake, that they were right, earthly affairs would cease to move; and stagnation, death, and universal decay would follow. All therefore, must, and constantly do, perform what else they would not, through mistake of facts."

[35]Model Penal Code § 3.05 (1962).

[36]Model Penal Code § 3.05, comment (Tent. Draft No. 8, 1956).

[37]Ibid.