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STATUTORY RAPE IN A POST *LAWRENCE* V. *TEXAS* WORLD

Arnold H. Loewy*

LAURENCE v. Texas¹ has spawned many different perspectives. To some, it is virtually the Magna Charta for the homosexual community.² To others it is the resurgence of the salutary concept of liberty.³ To still others, it is the embodiment of a meaningful Establishment Clause.⁴ But what has not yet been analyzed is the creation (or reaffirmation) of an adult's constitutional right to engage in heterosexual sex in the privacy of his home.

It is the first contention of this article that such a right does now exist. Second, I contend that the existence of such a right impacts on the law of statutory rape in at least two ways. At a minimum, it should provide a constitutional defense for an individual who engages in sexual intercourse with a person that he non-negligently believes is an adult. Beyond that, it is at least plausible that the constitutional right to be sexually active extends to some people under age eighteen. This article will explore these questions.

I. IS THERE A CONSTITUTIONAL RIGHT TO HETEROSEXUAL INTERCOURSE BETWEEN UNMARRIED PARTNERS?

Pre-*Lawrence*, it was certainly arguable that there was a constitutional right for unmarried partners to engage in heterosexual sex as some, but not all, lower courts had held.⁵ I limit this discussion to unmarried part-

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1. 539 U.S. 558 (2003).

2. See, e.g., David B. Zucco, *Symposium: Gay Rights After Lawrence v. Texas*, 88 MINN. L. REV. 1017 (2004).

3. See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 493-94 (2004).

4. See Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159, 181-82 (2003).

5. See, e.g., *State v. Saunders*, 381 A.2d 333 (N.J. 1977); *Purvis v. State*, 377 So. 2d 674 (Fla. 1979); *Doe v. Duling*, 603 F. Supp. 960 (E.D. Va. 1985), *vacated by* 782 F.2d 1202 (4th Cir. 1986) (finding no case or controversy and, thus, not reaching constitutional issues where numerous courts had suggested that the right to privacy included the right to unmarried fornication and, even in some cases, adultery); cf. Martin J. Siegel, *For Better or Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45 (1991-1992). But see *Commonwealth v. Stowell*, 449 N.E.2d 357 (Mass. 1983) (rejecting such a right).

ners because of the potential spouse victimization in an adultery situation⁶ that is not present in regard to fornication.

It is tempting to simply cite *Lawrence* for the proposition that consensual, heterosexual penile-vaginal sexual intercourse in the privacy of one's home is constitutionally protected. And, I do indeed reach that conclusion. Before reaching it, however, I reread *Lawrence* from the perspective of a prosecutor hoping to prosecute a case of fornication.

Imagine a fact pattern virtually identical to *Lawrence*, except that John, instead of engaging in consensual anal intercourse with Tyrone,⁷ engages in consensual vaginal intercourse with Tonya. In both cases, the police search which discovered the activity is lawful. In the hypothetical, we will, of course, assume that fornication is unlawful,⁸ and that an isolated act of sexual intercourse constitutes the crime.⁹

Our hypothetical prosecutor would like to argue that *Lawrence* only involved homosexual conduct. He might also argue that homosexuals may be akin to a discrete and insular minority.¹⁰ Consequently, he might contend that heterosexuals have full access to the electorate and need no special coddling from the courts.¹¹

The problem with this argument is that the decision in *Lawrence* relied on no such basis. Indeed, *Lawrence* specifically critiqued the earlier *Bowers v. Hardwick* opinion¹² for suggesting that the case was about the

6. Cf. Loewy, *supra* note 4, at 165-166 (discussing the "special contract" of marriage and the harm done by breaching that contract through adultery).

7. The parties in *Lawrence* were John Lawrence (the home owner) and Tyrone Garner, his guest.

8. As it is in fourteen states. See FLA. STAT. ANN. § 798.02 (West 2004); IDAHO CODE § 18-6603 (Michie 2004); 720 ILL. COMP. STAT. ANN. 5/11-8 (West 2004); MASS. GEN. LAWS ANN. ch. 272, § 18 (West 2004); MICH. COMP. LAWS ANN. § 750.335 (West 2004); MINN. STAT. ANN. § 609.34 (West 2004); MISS. CODE ANN. § 97-29-1 (2004); N.C. GEN. STAT. § 14-186 (2004); N.D. CENT. CODE § 12.1-20-10 (2004); OKLA. STAT. ANN. tit. 21, § 1120 (West 2004); S.C. CODE ANN. § 16-15-60 (Law Co-op. 2003); UTAH CODE ANN. § 76-7-104 (2004); VA. CODE ANN. § 18.2-344 to 12-345 (Michie 2004); W. VA. CODE ANN. § 61-8-3 (Michie 2004). The Federal government also bans fornication. See 18 U.S.C. § 2421 (2004).

9. This is not universally true, even in jurisdictions that punish fornication. Some such jurisdictions require an "open and notorious" living together. See, e.g., 720 ILL. COMP. STAT. ANN. § 5/11-8 (West 2004). See also N.C. GEN. STAT. § 14-184 (2004) (requiring the couple to "lewdly and lasciviously associate, bed and cohabit together").

10. Beginning in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), the Supreme Court has suggested that such minority groups can lay a special claim to judicial protection because they are unable to defend themselves through the democratic process based on their small numbers and disfavored place in society. Indeed, in reference to homosexuals, Justice Scalia seems to have inadvertently made exactly this point in *Lawrence* by pointing out the long history of persistent discrimination. "Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive." *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). See also *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) (discussing the longstanding social disapproval of homosexuals and homosexual practices).

11. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135 (1980).

12. See *Lawrence*, 539 U.S. at 566.

fundamental right of homosexuals to commit sodomy.¹³ Rather, the Court thought that the issue concerned the right to regulate private sexual behavior between consenting adults in the privacy of one's home.¹⁴

Indeed, the Court eschewed reliance on a readily available equal protection rationale, predicated on Texas' unwillingness to apply the law to heterosexual couples.¹⁵ It predicated its unwillingness to rely on equal protection on its concern that states might be willing to also forbid heterosexual sodomy: "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."¹⁶

So, the Court seems to be saying that criminalizing penile-anal sex between John and Tonya would not justify criminalizing penile-anal sex between John and Tyrone. Rather, it is protected in both cases. So, if *Lawrence* is clearly holding that penile-anal sex between John and Tonya is protected, could it conceivably be argued that penile-vaginal sex between them is not? Not unless non-procreative sex stands in a constitutionally superior position to procreative sex, a position that I can not imagine any court would endorse.¹⁷

There is one other argument that our hypothetical prosecutor might attempt. He might argue that John and Tonya have a constitutionally acceptable way to exercise their fundamental right to sexual intimacy: they could marry. That option was not available to John and Tyrone.

At least one prior case supports this argument. In *Zablocki v. Redhail*,¹⁸ where the Court upheld the fundamental character of the right to marry, part of the Court's reasoning was: "[I]f appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."¹⁹ The Court then dropped a footnote quoting Wisconsin's fornication law seemingly with approval.²⁰

If *Lawrence* had not explicitly rejected this suggestion, plausibly the *Zablocki* dictum could prevail. However, *Lawrence* did explicitly reject

13. *Id.* at 567 (chastising the *Bowers* Court's "failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

14. *Id.*

15. A rationale that appealed to concurring Justice O'Connor. *See id.* at 579-85.

16. *Id.* at 575.

17. I suppose that one could argue that procreative sex runs the risk of unwanted offspring, a societal concern not present in non-procreative sex. Notwithstanding this concern, no Justice has ever even hinted that non-procreative sex stands in a constitutionally superior position to procreative sex.

18. 434 U.S. 374 (1978).

19. *Id.* at 386.

20. *See id.* at n.11 ("Wisconsin punishes fornication as a criminal offense: Whoever has sexual intercourse with a person not his spouse may be fined not more than \$200 or imprisoned not more than 6 months or both."). WIS. STAT § 944.15 (1973).

it.²¹ In rejecting the earlier *Bowers* decision, the Court explicitly quoted with approval from Justice Stevens' *Bowers* dissent, noting: "[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. *Moreover this protection extends to intimate choices by unmarried as well as married persons.*"²²

With language this clear, it seems impossible to seriously maintain that for good or ill, the constitutional right of unmarried adults to engage in penile-vaginal intercourse in the privacy of their homes does not exist. Consequently, the remainder of this article will be predicated on the existence of that right.

II. CAN A STATUTORY RAPE CONVICTION EVER BE UNCONSTITUTIONAL?

Lawrence could not have been clearer in emphasizing that it was considering the constitutional rights of adults only.²³ Consequently, one arguing that *Lawrence* has something to say about statutory rape, which by definition applies only to an under eighteen or younger sex participant,²⁴ clearly has the burden of proof. In this section, I shall discuss a hypothetical case in which a constitutional defense to a statutory rape prosecution would be appropriate.

Assume the following: Arthur Brown and Elizabeth Jones are both students at a university in Florida. Arthur, a graduate student, and Elizabeth, a sophomore, meet at a beginning of the school year party sponsored by the English Department for students with an especial interest in Shakespeare. Upon their meeting, Arthur and Elizabeth spend almost the entire party together. Arthur is amazed that Elizabeth, despite being only a sophomore, is more steeped in the intricacies of Shakespeare than most of his fellow graduate students.

As the party ends at 8:00 p.m., Elizabeth invites Arthur to join her for dinner at her apartment. Because Arthur lives on campus and does not have a car, Elizabeth drives him to her apartment, five miles away. At about 11:00 p.m., after a lovely dinner and an extended discussion of the

21. *Lawrence*, 539 U.S. at 565.

22. *Id.* at 578 (emphasis added) (quoting *Bowers v. Hardwick*, 478 U.S. 188, 216 (Stevens, J., dissenting)).

23. *Id.* at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.").

24. There have been times in our nation's history when the age was as high as twenty-one, but currently, no state has an age limit higher than eighteen and only six place the age even that high. See ARIZ. REV. STAT. ANN. § 13-1405 (West 2004); CAL. PENAL CODE § 261.5 (West 2004); FLA. STAT. ANN. § 794.05 (West 2004); IDAHO CODE § 18-6101 (Michie 2004); N.D. CENT. CODE §§ 12.1-20-01 to 1-20-08.1 (2002); TENN. CODE ANN. § 39-13-506 (2004). For a full, state-by-state list of the varying ages of consent and how they have changed over the last century see CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 23-24 (2004).

various nuances of Romeo and Juliet, Arthur asks Elizabeth to drive him home. Elizabeth responds by noting the dangerous thunderstorm outside and invites Arthur to spend the night.

At midnight, while Arthur and Elizabeth are engaged in sexual intercourse initiated by Elizabeth, Elizabeth's mother, Colleen Jones, who has a key to Elizabeth's apartment, unlocks the front door and enters the bedroom to tell Elizabeth that her father was in an auto accident from driving in the thunderstorm. While the three are at the hospital visiting Elizabeth's father, Colleen ascertains that Arthur is twenty-four years old. She then informs him that because Elizabeth is only seventeen years and ten months old, he could technically be prosecuted as a felon for engaging sexual intercourse with Elizabeth.²⁵ Donna Roberts, the local District Attorney who happens to be standing next to Arthur and Colleen, overhears the conversation and exclaims: "There is nothing technical about it! I prosecute statutory rape whenever I discover it."

At Arthur's trial, Elizabeth testifies for the defense, stating that the sex was not only consensual, but that she had initiated it. Arthur testifies that it never occurred to him that Elizabeth might be under eighteen. The average age for sophomores at the University is nineteen or twenty, and Elizabeth seemed considerably more mature than the average sophomore. Nevertheless, Arthur is convicted by the jury on instructions from the trial judge that the elements of the crime include intercourse between the parties, the victim's age being sixteen or seventeen, and the defendant's being at least twenty-four years of age.²⁶

Because of the extenuating circumstances of the case, the judge sentences Arthur to time served (the three months he spent in jail, pending trial), three years probation, and two hundred hours of community service.²⁷ He also notifies Arthur that he will be required to register as a sex offender in any jurisdiction that has such a requirement. Arthur preserves all constitutional objections and ultimately petitions to the United States Supreme Court, which grants *certiorari*.

What arguments might Arthur have and how should the Court resolve them? One argument is that Elizabeth has a constitutional right to privacy which was breached by the arrest and conviction of Arthur. The other is that Arthur non-negligently (*i.e.* reasonably) believed that he was exercising a constitutional right under *Lawrence*.

There is no doubt that the Florida statute limits Elizabeth's privacy rights in a very significant way. First of all, her sexual exploits are publicized. Even though the Florida reporter will refer to her as E. J.,²⁸ the

25. See FLA. STAT. ANN. § 794.05.

26. See *Griffin v. State*, 3202 So. 2d 587 (Fla. 1975) (citing *Lowe v. State*, 19 So. 2d 106 (Fla. 1944)).

27. Cf. *Owens v. State*, 724 A.2d 43, 45 (Md. 1999) (sentencing Timothy Owens to eighteen months of prison (all but the time served suspended) and eighteen months of probation).

28. See FLA. STAT. ANN. § 794.03 (West 2004) (making it unlawful to make public the name, address or other "identifying fact" about the victim of any sexual offense).

public trial, airing her private linen, as well as jailing a treasured friend for accommodating her desires, cannot be pleasant. Moreover, to the extent that others can be prosecuted for satisfying her private sexual desires, her right to obtain such satisfaction is obviously diminished.

In the Supreme Court's one major statutory rape case, the Court was remarkably myopic in its inability or unwillingness to see the question from the perspective of the "victim's" autonomy rights.²⁹ In that case, *Michael M. v. Superior Court*, the Court upheld a California law that penalized consensual penile-vaginal sex with a female under eighteen.³⁰ Consequently, only underage females could be victims, and only males, including underage males, could be perpetrators.³¹

As the Court saw the case, there was no issue in regard to discrimination against young women, who were not permitted to experience sex at the same age as their brothers.³² Rather, the Court was so clear that the issue was exclusively discrimination against men, that the plurality actually concluded, contrary to the Court's prior³³ and subsequent³⁴ jurisprudence, that because this case involved only discrimination against males, there was no need of "special solicitude of the courts."³⁵

This approach should be contrasted to that taken in *Craig v. Boren*,³⁶ where the Court analyzed a law precluding young men from purchasing certain beer until age twenty-one, while young women could purchase the same beer at age eighteen, as discrimination against men.³⁷ So, in the Court's mind, when young women are permitted to buy beer at an earlier age than their brothers, the young men are the discriminated-against class.³⁸ But, when young men are permitted to have sex at an earlier age than their sisters, it is they, rather than their sisters, who are the discriminated-against class.

To be sure, the challenge to the sex/age discrimination was brought by Michael M., a young man who was convicted because his partner was under eighteen.³⁹ But the beer/age discrimination case was brought by a beer vendor, who happened to be a woman.⁴⁰ Indeed, like California's statutory rape law at issue in *Michael M.*,⁴¹ the underage, beer buyer could not be prosecuted, only the vendor. Yet that did not preclude the Court from understanding that the right involved was that of the under-

29. *Michael M. v. Sonoma County Super. Ct.*, 450 U.S. 464 (1981).

30. *Id.* at 476.

31. *Id.* at 466.

32. *Id.* at 475.

33. See *Craig v. Boren*, 429 U.S. 190 (1976).

34. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

35. *Michael M.*, 450 U.S. at 476.

36. *Craig*, 429 U.S. at 190.

37. *Id.* at 191-92.

38. *Id.* at 192.

39. *Michael M.*, 450 U.S. at 466.

40. The named plaintiff, Craig, was a man. But his standing was in question because he had reached twenty-one by the time the Court decided the case. His co-plaintiff, Whitener, however, was a female beer vendor, who the Court thought clearly had standing.

41. *Michael M.*, 450 U.S. at 466.

aged beer buyer.⁴²

As between the two rights, it is clear that the right to sexual privacy is far more fundamental. The Supreme Court has never so much as hinted that the right to ingest whatever substance one chooses is constitutionally protected.⁴³ The right involved in *Michael M.*, however, clearly would have been protected had the parties been a little bit older.⁴⁴

Notwithstanding *Michael M.*, it should be clear that Arthur has standing to raise Elizabeth's right to sexual privacy. Because he is facing a criminal conviction for assisting Elizabeth in the exercise of her claimed constitutional right, his case for standing is at least as strong as the birth control director in *Griswold v. Connecticut*,⁴⁵ or the contraceptive distributor in *Eisenstadt v. Baird*,⁴⁶ and considerably stronger than the beer ven-

42. *Craig v. Boren*, 429 U.S. 190, 192 (1976).

43. Most obviously, the Supreme Court has made it crystal clear that many narcotics can be constitutionally regulated. See, e.g., *Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41, 45 (1921) ("There can be no question of the authority of the state in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs, such as are named in the statute. The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question."). See also *Whalen v. Roe*, 429 U.S. 589, 597-98 (1977). State courts have also made it clear that such prohibitions are permissible. See, e.g., *State v. Rippley*, 319 N.W.2d 129, 133 (N.D. 1982) ("We find it difficult to conceive of any offense which so adversely affects public welfare and interest as the wrongful sale of narcotic drugs. This unquestionably justifies a State, in the exercise of its police power, to prohibit [the possession] thereof, . . . and to place on all persons the responsibility to see that they do not [possess] drugs unlawfully." (quoting *State v. Gordon*, 586 S.W.2d 811, 817 (Mo. Ct. App. 1976) (internal citation omitted))). Further, the Food and Drug Administration (FDA) has tremendously broad discretion to control any product that is "ingested, inhaled, implanted, or otherwise used in close contact with the human body." See *Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination*, 61 Fed. Reg. 44,619 (Aug. 28, 1996) at 44,628. But see *Ravin v. State*, 537 P.2d 494, 502 (Alaska 1975) (finding that possession and use of marijuana in the home was a privacy right that the state had no adequate justification for abridging).

44. At least in a post-*Lawrence* world. At the time *Michael M.* was decided, the question was more debatable. Certainly, many scholars have argued for years that the right to privacy must encompass such sexual autonomy. See, e.g., David R. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1271-79 (1979) (arguing that sexual autonomy is a "human right" that may not be constitutionally abridged except where a compelling state interest requires), and Note, *Constitutional Barriers to Criminal and Civil Pre- and Extra-Marital Sex*, 104 HARV. L. REV. 1660, 1660 (1991) (arguing that "consensual heterosexual intercourse is a constitutionally protected activity, immune from governmental regulation absent reasons compelling enough to justify the invasion of the most private matters"). However, others have argued that the important state interests involved require significant limitations. Indeed, there are several points of *dicta* from the Supreme Court suggesting that fornication and adultery were not understood to be protected before *Lawrence*. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) (noting that it was "beyond doubt" that fornication and adultery laws were constitutionally permissible). See also *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) (arguing for the rights of married couples to use contraceptives, noted that, in his view, adultery, homosexuality, fornication, and incest should not be protected, even in the privacy of the home).

45. *Griswold*, 381 U.S. 480-81.

46. 405 U.S. 438, 443-46 (1972).

dor in *Craig*, who had not yet even been prosecuted.⁴⁷

A. ELIZABETH'S CONSTITUTIONAL CLAIM

The only certain rules in regard to juveniles' constitutional rights are (1) they have them,⁴⁸ (2) they are not necessarily coextensive with adult rights,⁴⁹ and (3) they expand as the child approaches adulthood.⁵⁰

The first question involves the ascertainment of adulthood. It would seem hard to make the case for the age being older than eighteen. Notwithstanding rules concerning alcohol, virtually every adult right and responsibility is now available at eighteen. In regard to sex, no state has a higher age of consent than eighteen. Consequently, it seems clear that had Elizabeth been two months older at the time of her encounter with Arthur, they would have been protected under *Lawrence*.⁵¹

It is possible that the right to sexual activity might attach prior to eighteen, although *Lawrence* said nothing to so indicate.⁵² Two obvious analogues are the abortion⁵³ and contraceptive⁵⁴ cases. If Elizabeth desired an abortion, it seems quite clear that she would have been able to obtain one.⁵⁵

Similarly, if she had desired to purchase a contraceptive product, she also would have had that right.⁵⁶ Is there any good reason to distinguish sexual activity?

47. *Craig v. Boren*, 429 U.S. 190, 192 (1976).

48. *See, e.g., Tinker v. Des Moines*, 393 U.S. 503, 506-07 (1969).

49. *See, e.g., Bethel Sch. Dist. v. Fraser*, 478 U.S. 603, 687 (1986).

50. Recognized by courts at every level and in areas of the law from *Miranda* warnings (*Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140, 2152 (2004) (O'Connor, J., concurring) ("[Older adolescents] vary widely in their reactions to police questioning, and many can be expected to behave as adults")) to abortion rights (*Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (stressing the requirement for "sensitivity and flexibility to the special needs of . . . children")) to the right to refuse medical treatment (*In re E.G.*, 549 N.E.2d 322, 325 (Ill. 1989) (agreeing that the age of majority "is not an impenetrable barrier that magically precludes a minor from possessing and exercising certain rights normally associated with adulthood")).

51. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

52. *Id.*

53. *See, e.g., Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979); *but see Ohio v. Akron Cir. for Reprod. Health*, 497 U.S. 502 (1990).

54. *See Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977).

55. Ever since *Planned Parenthood v. Danforth*, *supra* note 53, a minor, old enough to become pregnant, has had a constitutional right to an abortion. While the precise parameters of the right in regard to parental notification have been a little fuzzy (*see, e.g., H.L. v. Matheson*, 450 U.S. 398 (1981)), there is little doubt that a seventeen and ten month old college sophomore with her own apartment has an unfettered constitutional right to obtain an abortion.

56. In *Carey*, *supra* note 54, the Supreme Court overturned a New York statute that, among other things, prohibited distribution of contraceptives to anyone under sixteen. Justice Brennan, for the Court, made it clear that "the right to privacy, in connection with decisions affecting procreation, extends to minors as well as to adults" and, in light of the rights of minors to terminate pregnancy, "the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed." *Carey*, 431 U.S. at 693.

In regard to the abortion cases, one can argue that there is no time for postponement to a later age. The underaged girl is pregnant now. If she waits until adulthood, it will be too late to exercise her right to not procreate. Given the fundamental character of the right of non-procreation, coupled with the social disutility of forcing a child upon a child who is clearly unwilling and probably unable to assume that responsibility, the abortion cases could be seen as almost *sui generis*. Put differently, her right to abortion must be exercised now or not at all. Her right to sexuality, on the other hand, can be postponed if the law in its wisdom deems that to be appropriate.

Distinguishing the right to contraception is not so easy. If sexual activity can wait, so can contraceptive use. Indeed, it is difficult to know why one would want a contraceptive if she did not contemplate sexual intercourse. Nevertheless, the Court has offered a plausible distinction.⁵⁷ The State may prohibit teenage sexual intercourse, but nevertheless must not prohibit contraceptives, thereby making the illegal intercourse extra hazardous.⁵⁸ As Justice Stevens put it in his concurring opinion in *Carey*: "It is as though a state decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets."⁵⁹ Though, frankly, I am not overwhelmed by that logic,⁶⁰ it convinces me that the Court, at least at the time of the *Carey* case, did not intend to constitutionalize the right of minors to be sexually active.⁶¹ Of course, at that time, it was not clear that adults had a constitutional right to engage in sexual intercourse either.⁶² Now that they do, it seems prudent to examine that right from the perspective of minors afresh.

57. *Id.* at 694-99.

58. *Id.*

59. *Id.* at 715.

60. Governments frequently take what seem Draconian measures to indicate their disapproval of certain behavior. Most governments punish medicinal use of marijuana even where the benefits clearly outweigh the harm. *See, e.g., State v. Tate*, 505 A.2d 941 (N.J. 1986). Similarly, a common argument against government-supplied clean needles is that their availability will encourage more drug use. By that reasoning, I could well imagine a government that forbade juveniles from riding (even as passengers) on motorcycles from purchasing motorcycle helmets lest they be tempted to ride them. More to the point, that same government might prohibit juveniles from contraceptive devices because with them, they would be more likely to engage in sexual intercourse. Indeed, several states have statutorily mandated abstinence-only education in public schools. *See, e.g., N.C. GEN. STAT. § 115C-81(e1)(6)* (2001); 105 ILL. COMP. STAT. ANN. 5/27-9.1(b) (West 2000); ARIZ. REV. STAT. ANN. § 15-716 (West 2004).

61. *See also Michael M.*, 450 U.S. 464 (1981) (holding by at least six justices that says basically the same thing). Justice Rehnquist (joined by Chief Justice Burger and Justice Powell) writing for the plurality made it clear "that a State may regulate the sexual behavior of minors." *Id.* at 473 n.8 (citing *Carey*, 431 U.S. at 694 n.17). Concurring with the plurality, Justice Stewart (*id.* at 476) and Justice Blackmun (*id.* at 481) were also unpersuaded that a minor's constitutional privacy rights might encompass sexual activity. Even Justice Stevens' dissenting opinion expressly stated that "[a]s a matter of constitutional power . . . [he had] no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual intercourse." *Id.* at 497.

62. *See* similar reasoning in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) which overturned a statute limiting single peoples' access to contraception based on equal protection grounds, rather than on a fundamental right to sexual intercourse. *See also supra* note 44.

One method that the Court typically employs is to look at the rule of the various jurisdictions.⁶³ A slight majority of the states put no sexual limitations on seventeen or sixteen year olds.⁶⁴ In those states, sixteen and seventeen year olds are functionally treated as adults insofar as their private sexual experiences are concerned.⁶⁵ Most of the states that limit the sexuality of seventeen or sixteen year olds, including Florida, only limit their power to have sex with individuals substantially older than themselves.⁶⁶ Consequently, a perusal of states might suggest that sixteen ought to be the constitutional age of consent.

Buttressing this conclusion is the fact that more than half of America's teenagers have experienced at least one act of voluntary sexual intercourse before age seventeen.⁶⁷ Furthermore, substantial numbers of doctors and other health professionals believe that this is a healthy part of an older adolescent's development into adulthood.⁶⁸ Given the almost reverential respect to which *Roe v. Wade*⁶⁹ held medical opinions, this point is not without relevance.

Of course, Florida could argue that it does permit Elizabeth to be sexually active. It merely requires that she choose a partner twenty-three years old or younger. It could further argue that the overwhelming majority of the voluntary sexual activity just described involves individuals no more than five years older than the teenager.⁷⁰ Furthermore, to the extent health professionals support such activity, it is with somebody in

63. See, e.g., *Lawrence*, 539 U.S. at 558-59. Cf. *Atkins v. Virginia*, 536 U.S. 304 (2002) (concluding that executing mentally retarded people had become "cruel and unusual" based on the "evolving standards of decency" of the United States as evidenced by numerous changes among state laws on the subject).

64. All but six place their age of consent below 18. See *supra* note 22, at 23-24, and of the remaining forty-four, only thirteen so limit the sexual freedoms of sixteen year olds (ALA. CODE § 13A-6-62 (1975); COLO. REV. STAT. § 18-3-402 (1977); CONN. GEN. STAT. § 53a-71(a)(1) (2003); HAW. REV. STAT. § 707-730 (2003); KAN. STAT. ANN. § 21-3504 (1969); MINN. STAT. § 609.342 (1975); MO. REV. STAT. § 566.034 (1995); N.J. STAT. ANN. § 2C:14-2 (West 1979); N.Y. PENAL LAW § 130.25 (McKinney 1965); OHIO REV. CODE ANN. § 2907.04 (Anderson 2000); 18 PA. CONS. STAT. ANN. § 3121 (West 1995); S.D. CODIFIED LAWS § 202-202-1 (Michie 1939); TEX. PENAL CODE ANN. § 202.011 (Vernon 1983)).

65. *Id.*

66. Only four states, Arizona, California, Idaho, and Massachusetts do not so limit the definition of statutory rape, and even among those, two states (Arizona and California) offer reduced sentences for defendants who are of similar age to their "victims." See ARIZ. REV. STAT. ANN. § 13-1405 (West 2004); CAL. PENAL CODE STAT. § 261.05 (West 2004); IDAHO CODE § 18-6101 (Michie 2004); MASS. GEN. LAWS ANN. 272 § 4 (West 2004).

67. See *75% of 19-Year-Old Women Have Had Sex, Study Finds*, CHI. TRIB., Jan. 6, 1991, at 8, col. 2 (reporting that over 25% of fifteen-year old women and over 50% of seventeen-year old women have had consensual premarital sex). Further, the average age for women's first intercourse is 16.2, and for men is 15.7. See Melvin Zelnik & Farida K. Shah, *First Intercourse Among Young Americans*, 15 FAM. PLAN. PERSP. 64 (1983), cited in Ruth Jones, *Inequality from Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children Resulting from their Victimization?*, 36 GA. L. REV. 411 (2002).

68. See, e.g., PHILIP G. ZIMBARDO & RICHARD D. GERRIG, *PSYCHOLOGY AND LIFE* (15th ed. 1998), cited in Susan S. Kuo, *A Little Privacy Please: Should We Punish Parents for Teenage Sex?*, 89 KY. L.J. 135 (2000-01).

69. 410 U.S. 113 (1973).

70. See Zelnik & Shah, *supra* note 67.

the same general age range.⁷¹ Consequently, Florida could argue that, assuming Elizabeth has a constitutional right to sexual privacy, Florida has not breached it.

Elizabeth could counter-argue that the very nature of sexual privacy requires that the participant and not the State choose. For example, Texas was not free to tell John Lawrence that he should have chosen a female partner.⁷² Plausibly, there could be a difference with juveniles. Given that juvenile rights are not normally equal to adult rights, the age limit might be thought reasonable.

One reason the State might choose such an age limit is the likelihood that much older people might exert undue influence on juveniles to give up their unquestioned constitutional right to *not* have intercourse with them. Furthermore, the likelihood of lasting harm coming from such an encounter may be far greater than the harm coming from an encounter with a teenager's peer.⁷³

Elizabeth could argue that the State's interest could be met more narrowly. First, she would contend that the State could meet its objectives by requiring a higher level of consent when teenagers are involved with older people. For example, as opposed to merely demanding that "no" means no,⁷⁴ the state could require affirmative assent. A few jurisdic-

71. See *Zimbaro & Gerrig*, *supra* note 68. Certainly, several significant studies have suggested that two of the primary justifications for statutory rape laws—increased teen pregnancy and abusive/coercive relationships based on an imbalance of power—are minimized when the partners are of a similar age. See, e.g., David J. Landry & Jacqueline Darroch Forrest, *How Old Are U.S. Fathers?*, 27 *FAM. PLAN. PERSP.* 159, 160-61 (1995) (noting 60% of 15- to 17-year-old mothers had a partner who was three or more years older, half of whom were at least twenty years of age, and almost 20% of such mothers had a partner six or more years older); Mike Males & Kenneth S.Y. Chew, *The Ages of Fathers in California Adolescent Births, 1993*, 86 *AM. J. PUB. HEALTH* 565, 567 (1996) (reporting study showing two-thirds of California school age mothers had partners whose average age was more than four years older than their mother). Most famously, the Alan Guttmacher Institute released its 1994 study *Sex and America's Teenagers*, indicating that 65% of U.S. teen mothers had children by men who were twenty or older. See Alan Guttmacher Institute, *Sex and America's Teenagers* (1994) (cited in *COCCA*, *supra* note 24, at 96). Indeed, this concern that older males were taking sexual advantage of young women and leaving them pregnant (and on the welfare rolls) motivated a spate of laws in the mid- and late-1990's that revitalized statutory rape prosecutions. See, e.g., CAL. PENAL CODE § 261.5 (West 1995) California's Teenage Pregnancy Prevention Act of 1995. Compare with an interesting case involving consensual sexual intercourse between a twelve-year-old victim and a fourteen-year-old perpetrator where an Ohio court refused to uphold the charge of rape. See *In re Frederick*, 622 N.E.2d 762, 765 (Ohio Misc. 2d 1993) (asserting that the legislature could not have intended a perpetrator so close in age to be held accountable for the crime of rape solely because of the age of the victim and amending the charge to find perpetrator guilty of being an unruly child).

72. See generally *Lawrence*, 539 U.S. 558.

73. Indeed, one of the primary justifications for statutory rape laws has always been to protect the young and vulnerable from more experienced adults who can be assumed to have vastly superior economic, social, and physical power at their disposal. This power imbalance obviously leaves the minor victim open to a degree of abuse unlike what they may face from a similarly-aged partner.

74. See, e.g., SUSAN ESTRICH, *REAL RAPE*, 80-97, 102 (1987) (proposing that rape law be predicated on the notion that "no" always be understood as an absolute denial).

tions require this in rape cases generally,⁷⁵ but most do not.⁷⁶

Although the question is close, the Court would probably say that limiting Elizabeth's intimate choices to somebody under twenty-four until such time as she reaches her eighteenth birthday is constitutional. If the State had absolutely precluded her sexual expression, as a few states do,⁷⁷ it should be held unconstitutional as more burdensome than necessary to meet the State's legitimate interest.⁷⁸ But it did not, and so it should probably be upheld as a reasonable limitation on Elizabeth's rights.

Of course, just as Arthur was unaware of Elizabeth's age, Elizabeth was unaware of Arthur's age. Most likely, however, the Court would deal with this under Arthur's personal constitutional claim, to which we now turn.

B. ARTHUR'S CONSTITUTIONAL CLAIM

There seems to be little question that Arthur was honestly and reasonably mistaken about Elizabeth's age. I suppose that a cynical prosecutor could argue that he was not mistaken, he just did not think about it at all. Undoubtedly this is true in a sense. Just as Elizabeth did not know (or care) whether Arthur was twenty-two, twenty-four, or twenty-six, Arthur did not know (or care) whether Elizabeth was eighteen, nineteen, twenty, or twenty-one. But he certainly did not think or imagine that an unusually sophisticated sophomore with a graduate student's understanding of Shakespeare could be under eighteen; especially since she had her own apartment off campus.

In most states, including Florida,⁷⁹ a mistake of age, no matter how

75. See *State ex rel. v. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992).

76. See, e.g., *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1104 (Pa. 1994).

77. See *supra* note 66.

78. I assume that the State's only legitimate interest is assuring itself that the consent was given freely and that the experience is unlikely to cause lasting harm to the young person involved. I assume that the Victorian notions of chastity that originally gave rise to the concept of statutory rape would no longer qualify as a legitimate state interest. See Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 *BUFF. CRIM. L. REV.* 691-96 (2003) (discussing the Victorian roots of statutory rape laws protecting a girl's chastity as a valuable economic and moral good). Cf. Anne Coughlin, *Sex and Guilt*, 84 *VA. L. REV.* 1 (1998). To the extent that the State is interested in preventing unwanted pregnancy and sexually-transmitted diseases, that interest seems better-served by preventing sex between minors and much older partners. See *supra* note 71. Of course, one could argue that the interest would be better served by totally disallowing sex by those under eighteen. However, the statistics do not indicate that minors who engage in sex with those of a similar age are any more likely than the population as a whole to acquire sexually transmitted diseases or unwanted pregnancy. See Abigail English & Catherine Teare, *Statutory Rape Enforcement and Child Abuse Reporting: Effects on Health Care Access for Adolescents*, 50 *DEPAUL L. REV.* 827, 843-45 (2001) (arguing that statutory rape laws discourage young people from contacting public health officials for fear of loss of their privacy, thus increasing their risk of contracting STD's and of leaving such diseases untreated). But see Cocca, *supra* note 24, at 93-129 (discussing the flaws in the popular argument that relationships between partners of different ages are more likely to result in pregnancy and STD's that burden the state's coffers).

79. See *Simmons v. State*, 10 So.2d 436, 438 (Fla. 1942); see also *Hodge v. State*, 866 So.2d 1270, 1272 (Fla. 2004).

reasonable, is no defense.⁸⁰ Various reasons and non-reasons are given for this rule. The most prominent non-reason is: "The Legislature has chosen to make this a strict liability crime."⁸¹ Of those states that have attempted reasons, the most common are (1) the law is necessary for the protection of minors,⁸² and (2) the defendant knew that he was doing something wrong.⁸³ The fact that his wrong was greater than he believed is no ground for exculpating him.⁸⁴

In 1964, in *People v. Hernandez*,⁸⁵ the California Supreme Court began a minority trend by holding that a reasonable mistake of age constituted a defense to statutory rape. In the court's view, it was unreasonable for a man,⁸⁶ who reasonably thought that his sex partner was over eighteen, to be deemed a criminal.⁸⁷ Conversely, the court thought it inappropriate to view each of the young women as victims.⁸⁸ A few other courts have followed suit,⁸⁹ though usually not on constitutional

80. See *Simmons*, 10 S.2d at 438.

81. See, e.g., *State v. Yanez*, 716 A.2d 759, 764 (R.I. 1998) (stating "The plain words and meaning of § 11-37-8.1 prohibit the sexual penetration of an underaged person and make no reference to the actor's state of mind, knowledge, or belief. In our opinion this lack of a *mens rea* results not from negligent omission but from legislative design."). See also *State v. Searles*, 621 A.2d 1281, 1283 (Vt. 1993); *United States v. Ransom*, 942 F.2d 775, 776 (10th Cir. 1991).

82. See *Commonwealth v. Walker*, 362 A.2d 227, 232 (Pa. 1976).

83. See *State v. Jadowski*, 680 N.W.2d 810, 812 (Wis. 2004); see also discussion *infra* Part III. A.

84. The genesis of this "lesser legal wrong" or "moral wrong" position is the old English case of *Regina v. Prince*, 2 L.R.-C.C.R. 154, 155 (Cr. Cas. Res. 1875), not technically a statutory rape case. The reasoning has been invoked with some frequency in the United States. See, e.g., *State v. Stiffler*, 788 P.2d 220, 221 (Idaho 1990); *State v. Silva*, 491 P.2d 1216, 1217 (Haw. 1971).

85. 393 P.2d 673, 678 (Cal. 1964).

86. At that time, the California law was gender specific, providing for only female "victims" and male perpetrators. See *Michael M.*, 450 U.S. at 464. Today the California law, like the laws of every state, is gender neutral. See *Cocca*, *supra* note 24 ("[Gender-neutral] language had been imposed in every state by the year 2000."). See also *Cocca*, *supra* note 24, at 74 (listing year-by-year the year of adoption of gender neutral language). Although several states use masculine pronouns to describe statutory rape offenders, in a way, this is probably meant to be gender neutral potentially read as non-neutral. See, e.g., *Mo. ANN. STAT. § 566.034 (1) (West 2004)* (Missouri's statutory rape law, that reads, "A person commits the crime of statutory rape in the second degree if being 21 years of age or older, he has sexual intercourse with another person who is less than seventeen years of age."). But see *Tina M. Allen*, *Gender-Neutral Statutory Rape Laws: Legal Fictions Disguised as Remedies to Male Child Exploitation*, 80 U. DET. MERCY L. REV. 111, 111-12 (2002) (arguing that statutory rape laws still fail to sufficiently protect boys from abuse).

87. See *Hernandez*, 393 P.2d at 677-78.

88. *Id.*

89. See, e.g., *Perez v. State*, 803 P.2d 249, 261 (N.M. 1990) (holding that defendant should have been permitted to argue that he was reasonably mistaken about his underaged partner's age). See also *ALASKA STAT. § 11.41.445 (Michie 2000)* (providing for mistake of age defense if victim is at least thirteen years of age); *COLO. REV. STAT. § 18 (2004)* (stating reasonable belief that victim is over eighteen is a defense if the victim is over fifteen years old but is not a defense if victim is younger than fifteen); *CONN. GEN. STAT. § 53a-67 (2004)* (allowing mistake of fact defense when victim is older than fourteen). Indeed, the United States Congress has also created a mistake of age defense to statutory rape. See *Criminal Law and Procedure Technical Amendments Act of 1986*, Pub. L. No. 99-646, § 87(b) Stat. 3592, 3620-24 (codified at 18 U.S.C. §§ 2243 (a) and (c)(1) (1994) (referring to

grounds.⁹⁰

But post-*Lawrence*, the landscape should change. In bygone days, we could say to Arthur: "You knew that you were doing something wrong. The fact that your wrong was greater than you anticipated will not avail you. If you didn't want to take a chance, you could have abstained from sexual intercourse entirely." Today, Arthur would answer: "But what I believed I was doing was a constitutional right. Perhaps some people may consider it immoral, but that doesn't matter. The nation's fundamental charter protects what I reasonably thought I was lawfully doing."

To be sure, not everything that the Constitution protects is universally deemed moral. Many consider flag desecration to be immoral.⁹¹ At least a substantial minority of the country would say the same about abortion⁹² or homosexual sodomy.⁹³ But those things, like fornication,⁹⁴ are constitutionally protected. We now explore the consequences that follow from that status.

The analogues that have engendered the most litigation are obscenity and child pornography. In the leading case, *Smith v. California*,⁹⁵ the Court invalidated a California statute that imposed strict criminal liability on a bookseller for selling an obscene book.⁹⁶ The Court reasoned that if a bookseller could be strictly liable for selling obscene books, he might not sell a book until he had read it.⁹⁷ Consequently, the public would be deprived of constitutionally protected reading material as well as obscenity.⁹⁸ Thus, the law designed to restrict the sale of unprotected books would also reduce the sale of constitutionally protected books.⁹⁹

In *Hamling v. United States*,¹⁰⁰ however, the Court indicated that so long as the defendant was aware of the general character of the material, it mattered not whether he personally knew that it was obscene.¹⁰¹ Of course, this meant that some self-censorship was tolerable in order to meaningfully enforce the statute, but absolute liability was not.¹⁰²

That is probably, but not certainly, the rule in regard to child pornogra-

the federal crime of committing statutory rape "in the special maritime and territorial jurisdiction of the United States or in a Federal prison").

90. *But see* State v. Guest, 583 P.2d 836, 837 (Alaska 1978) (holding that a mistake of age defense must be read into the offense of statutory rape for such a law to pass constitutional muster).

91. *See* Texas v. Johnson, 491 U.S. 397, 398 (1989) (holding that flag burning is protected speech).

92. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 13 (1973).

93. *See* *Lawrence*, 539 U.S. at 558.

94. *See supra* Part I.

95. 361 U.S. 147 (1959).

96. *Id.* at 155.

97. *Id.* at 153.

98. *Id.* at 154.

99. *Id.*

100. 418 U.S. 87 (1974).

101. *Id.* at 120-21.

102. *Id.* at 123.

phy. In *United States v. X-Citement Video, Inc.*,¹⁰³ the Supreme Court construed an ambiguous statute to require that a purveyor of child pornography know that at least one of the actors or actresses in a sexually-explicit film is under eighteen.¹⁰⁴ In the course of the opinion, the Court suggested “that a statute completely bereft of a scienter requirement as to the age of its performers would raise serious constitutional doubts.”¹⁰⁵

In an interesting opinion, Justices Scalia and Thomas disagreed.¹⁰⁶ In their view, sexually-explicit material was either unprotected by the Constitution or only marginally protected.¹⁰⁷ Consequently, as they saw it, the right to distribute sexually explicit material required no constitutional breathing room.¹⁰⁸ In language highly relevant to the subject of this article, Justice Scalia wrote: “It is no more unconstitutional to make persons who knowingly deal in hardcore pornography criminally liable for the underage character of their entertainers than it is to make men who engage in consensual fornication criminally liable (in statutory rape) for the underage character of their partners.”¹⁰⁹

Of course, at the time Justice Scalia wrote these words, *Lawrence* had not yet been decided and fornication was arguably not yet constitutionally protected.¹¹⁰ Nevertheless, one could argue that the right to fornication does not require the same breathing room as the right to free speech. Justice Scalia’s point was two-fold. First, he argued that, to the extent that sexually-explicit speech was protected by the Constitution, it required less breathing room than other speech.¹¹¹ Second, he argued that the nature of the sexually-explicit film industry was such that a strict liability age limitation law would have no significant deterrent effect.¹¹²

By that reasoning, one could argue that fornication, even as a constitutional right, does not need as much breathing room as free speech. Free speech benefits society generally, whereas fornication only benefits the immediate actors. So, in our hypothetical problem, only Arthur and Elizabeth were benefited by the act that resulted in Arthur’s conviction. By way of contrast, assume that Arthur and Elizabeth, inspired by their experience, had written: *A Modern Day Romeo and Juliet*. Assume further that a bookstore owner, faced with the California statute, invalidated in *Smith*, refused to stock the book because he had not read it. Not only would Arthur, Elizabeth, and the bookstore owner’s rights be compro-

103. 513 U.S. 64 (1994).

104. *Id.* at 79.

105. *Id.* at 78.

106. *Id.* at 80.

107. *Id.* at 84.

108. *Id.*

109. *Id.* at 85.

110. Although it could be argued that some prior decisions had plainly suggested the existence of such a right, it is doubtful that Justice Scalia, who dissented in *Lawrence*, in part because he was concerned with the creation of such a right by the decision, would have concurred.

111. *X-Citement Video*, 513 U.S. at 84.

112. *Id.* at 85.

mised, but the entire potential readership of the community would be compromised because they would be unable to purchase the book. So, it is possible to argue the right to fornication need not be treated with the same solicitude as the right to free speech.

Furthermore, a person desirous of sexual intercourse with a willing partner is less likely to be deterred by a strict liability statutory rape law than a bookseller is by a strict liability determination of obscenity. One particular book is not that important to a bookseller, and if it is a potential source of criminal liability, the seller is likely to simply eschew the opportunity to sell by not stocking the book.¹¹³ A fornicator in the privacy of his home, on the other hand, aware of the difficulty of detection, is more likely to assume the extremely small risk that his apparently adult partner may turn out to be a juvenile.

Notwithstanding these distinctions, I contend that Arthur should be entitled to raise reasonable mistake of age as a matter of constitutional right. Professor Alan Michaels has recently argued persuasively that when one is non-negligently exercising a constitutional right, as opposed to merely a statutory right, the Constitution demands that he have a defense.¹¹⁴ So, under this theory, if one non-negligently sells liquor to a minor, she can be punished even if she took every reasonable precaution to ascertain the minor's true age but was deceived by his phony identification card. This is justified because the State could have forbidden her to sell alcohol. So, by accepting the State's permission to sell, which the State was not constitutionally obligated to grant, the seller assumes the risk of improperly ascertaining someone's age.

Pre-Lawrence, one could have said the same for fornication. But now that the State cannot punish the intended act, Professor Michaels' theory would suggest that the State cannot punish the unintended, non-negligent result of statutory rape.¹¹⁵

Whether or not Michaels' theory should be universally adopted, I would clearly apply it here. The hallmark of Justice Kennedy's *Lawrence* opinion suggests that adults should feel safe in their exercise of sexual privacy in their homes.¹¹⁶ The possibility of an apparent adult being a juvenile is extremely small, but then so was the possibility of John Lawrence and Tyrone Garner being discovered in their intimate act. Had Garner been a juvenile, contrary to all outward manifestations, Lawrence would have been no more deserving of punishment than he was in the actual case. I do not deny that harm can and should be relevant to the

113. *Cf.*, *Bantam Books v. Sullivan*, 372 U.S. 58, 71 (1963) (overturning a Rhode Island law which created a Commission to Encourage Morality in Youth empowered to seek out and prosecute booksellers who offered "objectionable" books because of its impact on booksellers).

114. *See* Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 829 (1999).

115. *See id.*

116. *See generally Lawrence*, 593 U.S. at 558.

overall assessment of one's criminal liability,¹¹⁷ but, at a constitutional minimum, his culpability should be something more than his non-negligent exercise of a constitutional right.

Another analogy worth pursuing is that of producers, as opposed to sellers, of sexually-explicit films. Although the Supreme Court has yet to rule on the state of mind necessary to convict a producer of a film containing a minor participating in sexually-explicit conduct, it has hinted that the state of mind may be less than that of the seller of the material.¹¹⁸ In a rather enigmatic footnote in *X-Citement Video*, the Court noted "that producers are more conveniently able to ascertain the age of performers [than sellers]. It thus makes sense to impose the risk of error on producers."¹¹⁹

This conclusion was predicated on *United States District Court for the Central District Court of California*,¹²⁰ where Judge Alexander Kozinski, for the Ninth Circuit, held that the First Amendment precludes strict liability for the producer of a non-obscene sexually-explicit film with a child actress.¹²¹ At the same time, the court held that the First Amendment could be satisfied by allowing a conviction, unless the producer could prove "by clear and convincing evidence, that he did not know, and could not reasonably have learned, that the actor or actress was under eighteen years of age."¹²²

On the surface, Judge Kozinski's opinion appears internally inconsistent. On the one hand, he relies on *Smith v. California* for the proposition that strict liability in regard to the age of the actress is forbidden.¹²³ On the other hand, he places an extreme burden on the producer that *Smith* would not have tolerated.¹²⁴ Indeed, the bookseller in *Smith* would have been convicted under the *United States District Court* standard. *Smith* could have avoided liability by examining all of his inventory. However, the *Smith* Court thought that this was an intolerable burden under the First Amendment.¹²⁵

Judge Kozinski's explanation for this dichotomy is the ability of producers to meet the subjects face to face and insist on adequate identification.¹²⁶ Thus, on the facts before the court where a young actress, Traci Lords, had produced a vast amount of false identification,¹²⁷ coupled with

117. See Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law is Predicated*, 66 N.C. L. REV. 283 (1988).

118. *X-Citement Video*, 513 U.S. at 77 n.5 (citing *United States v. United States Dist. Ct. for the Cent. Dist. of Ca.*, 858 F.2d 534, 543 n.6 (9th Cir. 1988)).

119. *Id.*

120. 858 F.2d at 540.

121. *Id.*

122. *Id.* at 543.

123. *Id.* at 540. See generally *Smith v. California*, 361 U.S. 147 (1959); see also *supra* note 95 and accompanying text.

124. 858 F.2d at 543.

125. 361 U.S. at 153 (quoting *King v. Ewart* 25 N.Z.L.R. 709, 729).

126. 858 F.2d at 540.

127. See TRACI LORDS, UNDERNEATH IT ALL 56 (2003) (describing how she used a borrowed birth certificate to obtain a driver's license indicating that she was of age and

both an adult appearance and sexual *savoir-faire*, Judge Kozinski thought that the defense would be available.¹²⁸ Otherwise, it would not.¹²⁹

Obviously, on this reasoning, Arthur would not have a defense. He could have done a lot more to have learned Elizabeth's age. First, he could have asked her. Second, if she had said she was eighteen,¹³⁰ he could have asked for her birthdate, or better yet, a picture identification card. He did none of these things, but simply assumed (or perhaps never thought about whether) she was of age.

Nevertheless, I would contend that even if *United States District Court* was correctly decided, Arthur should have a defense. Hiring an actress to perform in a sexually-explicit movie, though brigaded with First Amendment overtones, is essentially a commercial transaction. It is not uncommon for child labor laws, which was the essence of the law in *United States District Court*,¹³¹ to be predicated on strict liability.¹³² So, Judge Kozinski essentially concluded that because of the First Amendment overtones of the case, strict liability was not appropriate.¹³³ On the other hand, because of the employer/employee nature of the transaction, only the most minimal culpability was required.¹³⁴

Arthur's case is different for two reasons. First, what is reasonable in the employer/employee relationship is not necessarily reasonable in a social setting. A movie producer expects to have a degree of regulation and, especially when making a sexually-explicit film, would expect to use extraordinary care to avoid hiring an underage actress. Ordinary care would seem far more appropriate in the social situation where part of the *Lawrence* right is the right to be free of excessive government snooping.

how she also obtained other identification, including a U.S. passport using the same birth certificate).

128. 858 F.2d at 540.

129. See Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 462 (1993) (supporting Judge Kozinski's reasoning).

130. A likely answer from one who is seventeen years and ten months old. At that age it is not uncommon for even honest, ethical people to round up to the nearest birthday, especially when the speaker does not realize that a slightly inaccurate answer may have tremendous legal ramifications.

131. See Arnold H. Loewy, *Obscenity, Pornography, and First Amendment Theory*, 2 WM. & MARY BILL RTS. J. 471, 480 (1993).

132. See, e.g., *Krutlies v. Bulls Head Coal Co.*, 94 A. 459, 461-62 (Pa. 1915) (holding that where an underaged coal breaker lied about his age, the employer is still liable despite reasonable efforts to ascertain the employee's age). Cf. *United States v. Frazier*, 123 F.3d 409, 419 (7th Cir. 2000) (holding that a drug dealer need not know that his employee is a minor to be subject to enhanced penalties under 21 U.S.C. § 861(a)(1)). But see 29 C.F.R. § 570.5 (establishing and describing the certification system administered by the Chief of the Children's Bureau to insure that underaged workers are not employed illegally). Although using child labor remains a "strict liability" offense in the sense that an employer can be found liable regardless of intent or willfulness, see, e.g., *Chao v. Videotape, Inc.*, 196 F. Supp. 2d 281, 295 (E.D.N.Y. 2002), this certification system protects employers who may be fooled by dishonest employees in a way that someone accused of statutory rape is not protected.

133. 858 F.2d at 540.

134. *Id.* at 543.

Second, the potential harm to the minor is far greater in the *United States District Court* situation. A film of a minor engaging in sex acts with herself or others is a permanent public record, available to anyone for the price of admission to the movie. To put it mildly, few, if any, psychologists would argue that allowing a juvenile to make such a choice at an incompletely mature age is a good thing.¹³⁵ A seventeen year old's *private*, consensual sexual activity will seldom have as much potential for future harm as a movie of such activity and, indeed, will sometimes arguably be constitutionally protected in its own right.¹³⁶ Even when it is not, there is at least a reasonable possibility that it will be a good thing for the "victim."¹³⁷ And, where not an unmitigated good, it may at least be a bittersweet experience in which the harm fails to approach the harm of an appearance in an X-rated movie.¹³⁸

So, I would conclude that, at a minimum under *Lawrence*, a defendant should have a constitutional defense to statutory rape whenever he can establish, by a preponderance of the evidence, that a reasonable person would have believed that his perspective sex partner had reached the age of consent. Thus, Arthur's constitutional defense should prevail.

III. SOME SPECIFIC CASES

A. JADOWSKI

In *State v. Jadowski*,¹³⁹ decided nearly a full year after *Lawrence*,¹⁴⁰ the Wisconsin Supreme Court, without so much as mentioning *Lawrence*, upheld a statutory rape conviction where the fifteen year old "victim" used what appeared to be a State-issued identification card, establishing her age as nineteen.¹⁴¹ She also held herself out to others as nineteen, and maintained, in the defendant's presence, that she was old enough to be an exotic dancer.¹⁴²

135. Obviously, there is no debate that child pornography is not constitutionally protected. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 763 (1982); *Osborne v. Ohio*, 495 U.S. 103, 107 (1990). Psychological findings about harm to minors caused by appearing in child pornography, which buttress these cases and the laws that they upheld, have been legion. *See, e.g.*, M. Silbert, *The Effects on Juveniles of Being Used For Prostitution and Pornography* 23 (1986), appended to E. Mulvey & J. Haugaard, *Report of the Surgeon General's Workshop on Pornography and Public Health* (1986) (describing how recordings of their sexual activity leave victims of child pornography, even many years after the fact, feeling that they "have lost any sense of control over their lives and have accepted feeling trapped and victimized").

136. *See* discussion *infra* Part II.A.

137. *See supra* note 68 and accompanying text.

138. Consider the classic country song "Strawberry Wine" that retells the composer's first sexual experience at age seventeen. Though the author uses the term "bittersweet," the listener gets the distinct impression that the sweet outweighed the bitter. *See* Deanna Carter, *Strawberry Wine, on DID I SHAVE MY LEGS FOR THIS* (Capitol Records 1996).

139. 680 N.W.2d 810 (Wis. 2004).

140. *Lawrence* was decided on June 26, 2003. *Jadowski* was decided on June 10, 2004.

141. 680 N.W.2d at 823.

142. *Id.* at 813-14.

The court held first that the statute, properly construed, did not allow for a defense based on either the defendant's reasonable mistake of fact or the victim's perpetrating a fraud on him by virtue of her false identification.¹⁴³ Second, the court held that nothing in the Due Process Clause precluded application of the statutory rape law to Todd Jadowski.¹⁴⁴

Interestingly, in regard to the statutory construction argument, Jadowski relied on *United States District Court* where, you will recall, the producers of a sexually-explicit film were permitted to rely on similar deception by actress Traci Lords.¹⁴⁵ The *Jadowski* court concluded that *United States District Court* was not relevant stating: "The present case is not a First Amendment case and it is not necessary for the court to read any language into these statutes to preserve their constitutionality."¹⁴⁶ Obviously, if the court had recognized the relevance of *Lawrence*, the question would have been different and more complex. We now turn to an analysis of whether the answer would have been different as well.

One of the issues deals with the difficulty of ascertaining minority. It is common knowledge, repeated in several opinions,¹⁴⁷ that it is often very difficult to ascertain age.¹⁴⁸ Indeed, the *Jadowski* court specifically recognized the difficulty of ascertaining age and used that as an argument *against* allowing a reasonable mistake of age to be a defense.¹⁴⁹ As the court put it: "[E]ngrafting the defendant's proposed defense onto the statute undermines the policy of protecting minors from sexual abuse and would raise practical law enforcement problems. Age is difficult to ascertain and actors could often reasonably claim that they believed their victims were adults."¹⁵⁰

One would have thought that the difficulty in ascertaining age would have cut in the other direction. Certainly, the First Amendment cases, particularly *X-Citement Video*, suggest that the more difficult it is to ascertain age, the stronger the argument for a constitutional defense.¹⁵¹ And one of the hallmarks of Justice Kennedy's libertarian *Lawrence* opinion was the assurance that adults sleeping together in private need

143. *Id.* at 818-19.

144. *Id.* at 823.

145. See *supra* text accompanying notes 120-22.

146. 680 N.W.2d at 816 n.15.

147. See, e.g., James P. Semmens & F. Jane Semmins, *Physiological Growth and Emotional Adjustment of Adolescent Girls*, cited in *THE ADOLESCENT EXPERIENCE: A COUNSELING GUIDE TO SOCIAL AND SEXUAL BEHAVIOR* 50-51 (James P. Semmins & Kermit E. Krantz eds., 1970) (describing the physical developments that occur during adolescence as a highly individual process, particularly in the United States with the mixing of races, ethnicities, and regional backgrounds). Indeed, in a case decided this term, Justice O'Connor (concurring) remarked "it is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority . . . 17 1/2 -year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults." *Yarborough v. Alverado*, 124 S. Ct. 2140, 2140, 2152 (2004).

148. For what it is worth, the last time I allowed a professional age guesser at an amusement park to guess my age, he underestimated my age by twelve years.

149. 680 N.W.2d at 817.

150. *Id.*

151. 513 U.S. at 72 n.2.

not fear governmental intrusion.¹⁵² Obviously to the extent that individuals cannot safely rely on appearances, that liberty is compromised.

We should not underestimate the difficulty in ascertaining age. While I like to think that the deceptions perpetrated by Traci Lords and the *Jadowski* victim are relatively rare, many twenty year olds appear to be fifteen and vice-versa. Certainly a twenty year old with proper identification should not have her right to sexual intimacy impaired because her chosen partner fears intimacy lest her identification prove inaccurate.

In one respect, *Jadowski* is a weaker case for the defendant than the Arthur and Elizabeth hypothetical. Unlike the Florida statute discussed in that case, Wisconsin makes the age of consent sixteen.¹⁵³ Consequently, if my argument has been correct thus far, she has no constitutional right to sexual intimacy. Thus, *Jadowski's* argument is based entirely on mistake and not at all on his victim's constitutional right to sexual intimacy.

On the other hand, his reasonable belief was that she was nineteen, an adult. Had he believed that she were sixteen or seventeen, a different question would be raised.¹⁵⁴ Because he reasonably believed that she was nineteen, the fact that the statute only protects youngsters under sixteen is quite beside the point. By way of analogy consider two sellers of obscene books. Seller A sells a book that is clearly obscene, but the contents of the book were never called to his attention. Seller B sells a book that is marginally obscene, but the seller was aware of its contents. Under current Supreme Court jurisprudence, Seller A is not guilty, but Seller B is.¹⁵⁵ Similarly, a statutory rape defendant's liability should be measured not by the actual youth of the victim, but by the purity of the defendant's heart. Thus, a thirty-five year old defendant¹⁵⁶ should have a defense when he is intimate with a fifteen year old partner that he reasonably believes to be nineteen, but a similarly situated defendant should not have a constitutional defense when he has sex with a seventeen year old who he has no reason to believe is older.¹⁵⁷

B. WALKER

In *Walker v. State*, twenty-nine year old William Walker and fifteen year old runaway Carla Peterkin met while both were employed at Weis Supermarket in Baltimore.¹⁵⁸ Carla initially informed William that she

152. *Lawrence*, 539 U.S. at 578.

153. 680 N.W.2d at 817.

154. See discussion *infra* Part III.B.

155. Compare *Smith v. California*, 361 U.S. 147, 153 (1959), with *Hamling v. United States*, 418 U.S. 87, 121-24 (1974).

156. *Jadowski* was thirty-five.

157. Of course in Wisconsin, he would have a statutory defense because Wisconsin does not punish sex with those sixteen and over. On the other hand, in Florida, he could be convicted of a serious felony for which he would lack a constitutional defense. See FLA. STAT. ANN. § 794.05 (West 2004). The extent to which he would have a constitutional defense in a state with a lower age of consent is discussed *infra* Part III.B.

158. 768 A.2d 631, 632 (Md. 2001).

was nineteen years of age.¹⁵⁹ At some point, they moved in together and began a consensual sexual relationship.¹⁶⁰ At some point during the relationship, Carla admitted that she was only seventeen.¹⁶¹ William also knew that Weis Supermarket would not hire anybody under seventeen.¹⁶² Indeed, Carla's application did state that she was seventeen, although William had not seen it.¹⁶³ Subsequently, a policeman found Carla, returned her to her father, and the defendant was prosecuted.¹⁶⁴ The Maryland Court of Appeals affirmed his conviction.¹⁶⁵

Because *Walker* was decided before *Lawrence*, the court obviously did not invoke that case.¹⁶⁶ Nevertheless, the *Walker* issue is appropriate for analysis in a post-*Lawrence* world. One issue that *Walker* presents different from *Jadowski* is the apparent age of the "victim." In *Jadowski*, at all relevant times, the defendant believed that his partner was nineteen.¹⁶⁷ In *Walker*, for at least some of the relationship, William believed that Carla was seventeen.¹⁶⁸

We have already determined that to the extent a seventeen year old has a constitutional right to sexual intimacy with another that right can be limited to relations with someone within a few years of her age.¹⁶⁹ Consequently, it seems clear that had the facts been as William believed them to be, he and Carla would *not* have had a constitutional right to sexual intimacy with each other. Thus, the State can argue that because William did not believe that he was exercising a constitutional right, *Lawrence* offers no protection and the classic strict liability model returns.

There is some force to this argument. The State after all could have entirely forbidden sex between a twenty-nine year old and a seventeen year old. Therefore, nothing should preclude it from the less onerous requirement that if the twenty-nine year old chooses to engage in such behavior, he does so at his peril. After all, he does know that Carla lied about her age at least once. That does seem to be the theory supporting much strict liability legislation, and certainly appears to comport with Professor Michaels' "Constitutional Innocence" theory.¹⁷⁰

159. *Id.*

160. *Id.*

161. The language of the opinion is somewhat ambiguous on this point, but the textual statement is a reasonable inference one could draw from the various statements admitted as agreed facts. *Id.* In any event, for purposes of analysis, I will assume this to be a correct statement of the facts of the case.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 638.

166. In fact, the court referred to an earlier decision, *Owens v. State*, 724 A.2d 43 (Md. 1999) in which the court relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986) for the proposition that fornication was not a constitutional right.

167. *Jadowski*, 680 N.W.2d at 813-14.

168. 768 A.2d at 632.

169. *See supra* Part II.A.

170. *See supra* note 114.

Nevertheless, I believe that William should have a constitutional defense. In regard to the initial lie (that she was nineteen), William had nothing other than her word. In regard to her claim to being seventeen, he does know that the supermarket where they both work will not hire anyone under seventeen. Although, from his perspective, it is theoretically possible that she lied to the supermarket (which in fact she did) that is not likely what most people would reasonably believe. One would especially assume that she was at least seventeen because she was apparently on her own with no parental supervision.¹⁷¹

As to whether strict liability is appropriate when the State allows more than the Constitution requires, I would argue that in this context it is not. William has a constitutional right to sexual intimacy. Although he knows¹⁷² that this right is limited to sex with adults, he does not know what constitutes an adult as a matter of constitutional law.¹⁷³ Consequently, his most appropriate source is the Maryland Penal Code which provides various penalties for certain sex acts between parties, one of whom is under sixteen, and the other of whom is substantially older. It provides no penalty nor prohibition when both parties are at least sixteen.¹⁷⁴ Thus, William's most natural conclusion is that Maryland deems sixteen the age of adulthood for purposes of sexual intimacy.

So, from William's perspective, the United States Constitution protects consensual sex with another adult. Maryland's statute appears to define adulthood for this purpose as sixteen.¹⁷⁵ He has been told at different times that Carla is seventeen and nineteen. Does it make any sense for him to attempt to clarify the ambiguity? Either way, the law of Maryland permits their living arrangement, complete with its sexual component. Only the most pedantic constitutionalist would worry about which of the two lawful ages she was. Consequently, William should be able to invoke the constitutional defense proposed in this essay.

IV. CONCLUSION

Statutory rape is a serious crime that under some circumstances deserves substantial punishment. Furthermore, the mistake of age defense has been claimed by some reprobates for whom any constitutionally al-

171. Plausibly, if she looked young, that would undercut the reasonableness of his belief. However, I can recall that at age fourteen at a camp, a female introduced herself to me who appeared to be my age or younger. It turned out that she was a nineteen year old, married counselor.

172. More accurately, he is presumed to know.

173. *Lawrence* did not say, and my prior analysis is not even law yet, much less something about which William Walker should be expected to be aware.

174. See *Walker*, 768 A.2d at 637 chart (spelling out the criminal/non-criminal character of sexual relations between two partners of various ages and making it clear that sexual intercourse between a sixteen year old and her partner, regardless of age, would create no criminal liability).

175. *Id.*

lowable punishment would seem too kind.¹⁷⁶ Nevertheless, there are those for whom the defense is highly appropriate. The hypothetical Arthur Brown and the all too real Todd Jadowski and William Walker belong in that latter category.

They may not even be the most extreme. Imagine a twenty-four year old man or woman sitting at a bar. An exquisitely attractive opposite (or same) sex person sits down next to him or her, orders a drink, which is served after the bartender is satisfied by the patron's state-issued picture identification card. Our protagonist, enthralled by his/her neighbor's attractiveness, invites him/her to spend the evening with him/her. The evening culminates in a sex act between the two.

Later, it is learned that the sex partner's identification card was phony and that his/her real age is fifteen.¹⁷⁷ Ironically, under these circumstances, some states would excuse the bar tender who relied on the state-issued identification card,¹⁷⁸ notwithstanding the traditional strict liability nature of this crime. Yet, many of these same states would not afford a defense to our protagonist, whose very reasonable mistake could render him/her a convicted felon.¹⁷⁹

Lawrence v. Texas was a clarion call for government to stay out of people's private bedrooms. At the same time, from the citizen's perspective, he or she was assured freedom from governmental intrusion so long as his/her sex partner was an adult. Like most constitutional rights, this one needs breathing room. If an individual knows that however careful he/she is, one blameless mistake could render him/her a branded-for-life sex criminal, he/she is in the same position that a pre-*Lawrence* homosexual was in. He/she knows that it is highly unlikely that engaging in a particular sex act will result in criminal liability, but there is always that fear that it could happen.

If the need to make statutory rape a strict liability offense were overwhelming, perhaps there would be a reason to limit the breathing room *Lawrence* needs to fulfill its promise to the populace of individual sexual autonomy. However, there is no such overwhelming need. There is no evidence that those states that allow reasonable mistake of age as a defense have fewer statutory rape prosecutions or a significantly higher acquittal rate.

176. See, e.g., *Commonwealth v. Miller*, 432 N.E.2d 463 (Mass. 1982) (detailing events where the defendant had sexual intercourse with a fifteen year old girl, took several nude pictures of her, and used threats to expose their relationship to her parents and to circulate those pictures in order to extort money from her).

177. Compare this to Traci Lords phony state-issued identification cards that were good enough to get her work in several sexually-explicit movies and magazines. See *supra* note 127.

178. See, e.g., MINN. STAT. ANN. § 340A.503(6) (West 2004) (providing a defense if the minor provides a state-issued photo identification card).

179. For example, in Maryland the courts have made it clear that a reasonable mistake of age can be a defense for selling alcohol to minors. See *Haskin v. State*, 131 A.2d 282 (Md. 1957)). Meanwhile, no mistake of age defense exists for statutory rape. See *Garnett v. State*, 632 A.2d 797, 804 (Md. 1993). See also *Walker*, 768 A.2d at 631.

For years, commentators have urged allowing reasonable mistake of age as a defense to statutory rape.¹⁸⁰ Some states have joined in the call.¹⁸¹ Most have not. Now that fornication has moved from a petty societal annoyance to a protected constitutional right, it is again time to re-think statutory rape. This time in the shadow of the Constitution.

180. See, e.g., Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313 (2003); Larry W. Meyers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1965); Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703 (2000); Benjamin L. Reiss, *Alaska's Mens Rea Requirements for Statutory Rape*, 9 ALASKA L. REV. 377 (1992).

181. See *supra* note 89.

