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Eric A. Johnson

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MENS REA FOR SEXUAL ABUSE: THE CASE FOR DEFINING THE ACCEPTABLE RISK

ERIC A. JOHNSON*

The persistence of strict criminal liability for child sexual abuse is attributable, at least in part, to the shortcomings of the existing alternatives, namely, the recklessness and criminal negligence standards. These two standards require juries to define the acceptable level of risk on a case-by-case basis. Juries are ill-equipped to make this calculation in sexual abuse cases, however, and their efforts to do so almost invariably are skewed by evidence of the victim's unchastity. This Article first explores the shortcomings of the recklessness and criminal negligence standards in this setting, and then attempts to develop a viable alternative. Under the proposed alternative, the legislature, not the jury, would define the acceptable risk of sexual imposition. It would calculate this invariant probability threshold in much the same way that juries calculate the acceptable risk in recklessness and criminal negligence cases—by assigning values to the gravity of the potential harm and to the social utility of the conduct. Under this scheme, the jury would be responsible only for deciding whether the risk of sexual imposition exceeded this invariant probability threshold in the defendant's case.

I. INTRODUCTION

The Supreme Court's decision in *Lawrence v. Texas*[1] has intensified the debate over the constitutionality of statutes that impose strict criminal

* Associate Professor of Law, University of Wyoming College of Law. I am grateful to Joshua Dressler, Ernest Johnson, and Kenneth W. Simons for their comments on an earlier draft, and to Clarissa Collier and Amy Smith for their outstanding research assistance. Thanks also to the Carl M. Williams Faculty Research Fellowships endowment for its generous support of this research.

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

liability for sexual abuse of children.[2] Critics of these statutes have long been troubled by the possibility that an actor might be convicted despite reasonably having been convinced that his partner had reached adulthood.[3] This criticism has taken on new force with *Lawrence*'s apparent "constitutionalization of an individual's right to sexual intimacy."[4] If sexual relations among unmarried adults not only are lawful, but are constitutionally protected, then—according to the critics of strict liability—due process ought to forbid the imposition of criminal liability on an actor who has no reason to suppose that his or her partner in consensual sex has not reached adulthood.[5] What *Lawrence* appears to require, on this view, is that the Government prove some culpable mental state regarding the age element in the crime of sexual abuse.[6]

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[2] *See, e.g.*, Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 364 (2004); Arnold H. Loewy, *Statutory Rape in a Post* Lawrence v. Texas *World*, 58 SMU L. REV. 77, 77 (2005); Jarrod Forster Reich, Note, *"No Provincial or Transient Notion": The Need for a Mistake of Age Defense in Child Rape Prosecutions*, 57 VAND. L. REV. 693, 723-25 (2004).

[3] *See* Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 135 (1964) (arguing that "[t]he ideal law in this area would permit consideration of mistake of fact as a defense to intentional crimes: (1) if *unreasonable*, the mistake would be regarded as negligence; (2) if *reasonable*, the mistake would acquit altogether"); Kelly Vance, Comment, State v. Elton*: The Failure to Recognize a Defense to Statutory Rape*, 1983 UTAH L. REV. 437, 451-52 (arguing that "Utah's statutory rape law should recognize a mens rea requirement as an element of the crime and a defense of reasonable mistake as to the victim's age, which would negate the required mental state").

[4] Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1650 (2004).

[5] *See* Carpenter, *supra* note 2, at 364-67; Loewy, *supra* note 2, at 100. This argument finds support in Alan Michaels's influential theory that strict criminal liability "runs afoul of the Constitution if the other elements of the crime, with the strict liability element excluded, could not themselves be made a crime." Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 834 (1999). In sexual abuse, the removal of the strict liability element—the age of the child—would create an outright prohibition on sexual intercourse, which clearly would run afoul of *Lawrence*. *See* Loewy, *supra* note 2, at 92.

[6] *See, e.g.*, Vance, *supra* note 3, at 451-52. There is an alternative to requiring the Government to prove a culpable mental state with respect to the age element, namely, permitting the defendant to offer an affirmative defense that he "reasonably believed the child to be above the critical age." MODEL PENAL CODE & COMMENTARIES § 213.6(1) (1985); *see also* Carpenter, *supra* note 2, at 383 (arguing that a "defendant's reasonable belief that the victim is of consensual age should be relevant on the issue of the defendant's guilt"). This alternative has grave problems of its own, as I have explained in detail elsewhere. *See* Eric A. Johnson, *Beyond Belief: Rethinking the Role of Belief in the Assessment of Culpability*, 3 OHIO ST. J. CRIM. L. 503 (2006). In a nutshell, the main problem is that even a *reasonable* belief can coexist with awareness of a high probability—for example, 40%—that the belief is mistaken. *Id.* at 521. Few policy-makers would conclude, given the interests at stake, that a person contemplating sex with a partner of indeterminate age would be justified in accepting a 40% risk that his partner is underage. *See infra* text accompanying notes 183-88.

So far, the courts have proven resistant to this argument,[7] perhaps with good reason. The obvious alternatives to strict liability are the recklessness and criminal negligence standards, at least in the many states that have adopted the Model Penal Code's approach to culpability.[8] But recklessness and criminal negligence are problematic in this setting. The trouble is that both of these standards would require jurors to calculate the acceptable level of risk on a case-by-case basis.[9] Both standards, in other words, would require jurors to decide—based primarily on the jurors' own estimates of the gravity of the harm that accompanies sexual abuse—what probability a reasonable person would be willing to accept that his or her partner is underage.[10] Most jurors are ill-equipped to make this calculation. Worse, their efforts to make this calculation almost inevitably will be skewed by evidence of the victim's unchastity.[11]

The solution to this problem lies in recognizing a new criterion of culpability—a new species of mens rea—that provides an alternative to strict liability, on the one hand, and to negligence and recklessness, on the other. Under this new criterion of culpability, the legislature, not the jury, would be responsible for deciding what level of risk is acceptable. The legislature would calculate the acceptable level of risk based on legislative assessments of both (1) the gravity of the harm that results from sexual abuse and (2) the general social utility of sexual intercourse. The jury then

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[7] *See* United States v. Wilson, 66 M.J. 39, 41 (C.A.A.F. 2008); Maxwell v. State, 895 A.2d 327, 336 n.7 (Md. Ct. Spec. App. 2006); State v. Holmes, 920 A.2d 632, 635 (N.H. 2007); State v. Browning, 629 S.E.2d 299, 303 (N.C. Ct. App. 2006); State v. Jadowski, 680 N.W.2d 810, 819 (Wis. 2004). For a helpful summary of the current law in all fifty states, see Carpenter, *supra* note 2, at 385-91.

[8] The Model Penal Code's fourfold classification of culpable mental states—"purposely," "knowingly," "recklessly," and "negligently"—and its definitions of these mental states have been extremely influential among state legislatures. *See* MODEL PENAL CODE & COMMENTARIES § 2.02 cmt. at 233 (observing that "virtually all recent legislative revisions and proposals follow [the Model Penal Code] in setting up general standards of culpability").

[9] *See* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 26, at 62 (2d ed. 1961) (explaining that the degree of risk that will qualify as unjustifiable "must vary in each instance with the magnitude of the harm foreseen and the degree of the utility of the conduct").

[10] *See id.*

[11] *See* State v. Yanez, 716 A.2d 759, 770 (R.I. 1998) (reasoning that recognition of a mistake-of-age defense to sexual abuse would open the door to introduction of evidence concerning a victim's past sexual conduct); *Hearings on Federal Rape Law Reform Before the Subcomm. on Crim. Justice of the H. Comm. on the Judiciary*, 98th Cong. 2d Sess. 114 (1984) [hereinafter *Hearings*] (statement of Leigh Bienen, Special Projects Section, Department of the Public Advocate) ("[I]n my experience the mistake-as-to-age defense has been used disingenuously as a strategy for introducing evidence concerning the victim's sexual behavior and for eliciting prejudicial and hostile attitudes toward victims.").

would be responsible only for determining whether the defendant either culpably failed to perceive or consciously disregarded a risk that exceeded this acceptable level. Thus the jury, instead of being asked to decide whether the defendant was or should have been aware of a "substantial and unjustifiable" risk that his or her partner was underage,[12] would be asked to decide simply whether the defendant was or should have been aware of, say, a *realistic possibility* that his or her partner was underage.

There are precedents for defining legislatively the acceptable level of risk. For example, the Model Penal Code's self-defense provision—like the self-defense provisions of most state criminal codes—makes the defense available only to actors who "believe" that force is necessary.[13] One effect of this provision is to make the defense unavailable to an actor who is aware of a probability greater than 50% that her use of force is not necessary.[14] The Model Penal Code's influential definition of "knowingly" also defines a fixed level of acceptable risk, albeit a very high one.[15] A person acts "knowingly" only if he "is aware that it is practically certain that his conduct will cause [the proscribed] result."[16]

This Article makes the case for a new variety of mens rea that is the obverse of "knowingly," that is, a new variety of mens rea that establishes a very low, fixed level of acceptable risk. In making the case for this new mens rea, the Article will not return to first principles. It will assume that strict liability, as traditionally defined,[17] is unacceptable for offenses that carry severe punishment.[18] It will also assume, as do legislatures and courts, the basic acceptability of criminal negligence, recklessness, and

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[12] *See* MODEL PENAL CODE & COMMENTARIES § 2.02(2)(c), (d) (defining "recklessly" and "negligently").

[13] *Id.* § 3.04(1).

[14] Johnson, *supra* note 6, at 517-18.

[15] Kenneth W. Simons, *Should the Model Penal Code's* Mens Rea *Provisions Be Amended?*, 1 OHIO. ST. J. CRIM. L. 179, 189-90 (2003) (explaining that under the Model Penal Code, "knowledge is indeed an invariant mental state; when it is required, the actor must be aware of a 'high probability' or a 'practical certainty,' *period*, without regard to any other factors").

[16] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(b)(ii).

[17] Traditionally, an offense was classified as a "strict liability offense" only if one of the offense's material elements lacked an associated mental state and, in addition, that element was one of "the facts that make [the] conduct illegal." Staples v. United States, 511 U.S. 600, 606 (1994); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994) (explaining that the common law presumption against strict liability only applies with respect to "elements that criminalize otherwise innocent conduct").

[18] This assumption is not entirely uncontroversial. *See* Mark Kelman, *Strict Liability: An Unorthodox View*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1512, 1516 (Sanford H. Kadish ed., 1983); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 744 (1960).

even so-called general intent as criteria of culpability.[19] Indeed, the better part of this Article will be devoted to showing how the new criterion of culpability is situated in relation to these existing criteria.

Part II.A begins with a brief analysis of recklessness and criminal negligence. This Part develops a kind of standard model for evaluating the justifiability of risk-creating conduct. When the legislature adopts recklessness or criminal negligence as the mens rea for the "social harm" element of an offense, it effectively delegates to the jury the entire responsibility for deciding whether the defendant's conduct was unjustifiable. Accordingly, in defining recklessness and criminal negligence, the legislature provides the jury with formulae for deciding whether the risk was unjustifiable. It is these formulae that will serve as a standard model and a starting point.

Part II.B explains how the legislature implements this standard model when it creates general intent offenses, whose only culpable mental states attach to conduct and attendant-circumstance elements.[20] Focusing on two particular general intent offenses, drunk-driving homicide and drug-induced homicide, this Part will show how these and other general intent offenses can be interpreted as representing antecedent legislative determinations that certain forms of conduct are reckless per se or negligent per se. Put another way: when the legislature creates a general intent offense, it effectively takes upon itself the responsibility for making the same justifiability calculations that are delegated to the jury in cases of negligence and recklessness. This Part demonstrates that there is nothing exceptionable about substituting an antecedent legislative determination of justifiability for the jury's case-specific determination.

Part III explains why none of the criteria of culpability considered so far—not recklessness, nor criminal negligence, nor general intent—will work in sexual abuse cases. Recklessness and criminal negligence founder on the requirement that the jury assign a value to the gravity of the harm in defining the acceptable level of risk. As this Part will show, even appellate

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[19] For criticism of the assumption that criminal negligence supplies an adequate basis for liability, see, e.g., Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 635-43 (1963). For criticism of the assumption that general intent supplies an adequate basis for liability, see, e.g., Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 391 n.36 (2008) (arguing that "proxy" crimes like statutory rape are necessarily "overinclusive, thereby punishing actions that are not in themselves culpable").

[20] *See* People v. Hood, 462 P.2d 370, 378 (Cal. 1969) (defining general intent offense as an offense whose definition "consists only of the description of a particular act"); *see also* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 453 (1978) (recognizing that one of many definitions of the term "general intent" is "an intent simply to do the act that one does").

judges have proven incapable of putting aside evidence of the victim's unchastity in defining the acceptable level of risk in sexual abuse cases. No better can be expected of jurors. Nor can this problem be solved by the creation of a general intent offense; the facts that signal the presence or absence of a risk that the victim is underage are too various and too subtle to be captured in a per se rule.

Part IV constructs an argument for defining legislatively the acceptable risk of sexual imposition. After explaining how this hybrid approach to the question of justifiability would operate, this Part illustrates the point with a brief analysis of the "knowingly" and "reasonable belief" criteria of culpability, both of which employ the hybrid approach. Then it explains why sexual abuse lends itself to legislative calculation of the acceptable risk and how exactly a fixed probability threshold would operate in the sexual abuse context. Finally, Part V argues that a rule requiring proof that the defendant "was or should have been aware" of a probability exceeding the threshold defined by the legislature provides sufficient assurance of the defendant's culpability.

II. TWO MODELS FOR CALCULATING JUSTIFIABILITY

A. RECKLESSNESS AND NEGLIGENCE

At the core of the Model Penal Code's recklessness and criminal negligence standards lies the idea of unjustifiable risk.[21] Under the Code, a defendant is reckless if he "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."[22] By comparison, he is criminally negligent if he "should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct."[23] Both definitions, then, require the jury "to examine the risk and the factors that are relevant to its . . . justifiability" for the sake of determining whether the risk posed by the actor's conduct was, in fact, unjustifiable.[24]

It would be natural to suppose that, despite this shared focus on the justifiability of the risk, recklessness and criminal negligence differ fundamentally even in how the justifiability of the risk is measured.

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[21] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(c), (d); *see also* Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 955, 957 (2000) (identifying unjustifiability as "the core of reckless conduct").

[22] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(c).

[23] *Id.* § 2.02(2)(d).

[24] *Id.* § 2.02 cmt. at 238.

Criminal negligence, after all, is said to be an objective standard of culpability, while recklessness is said to be a subjective one.[25] Thus, it might seem as though the definition of recklessness ought to require the jury to address the question of justifiability "from the point of view of the actor's perceptions."[26] Likewise, it might seem as though the definition of negligence ought to require the jury to address the question of justifiability "in terms of the objective view of the situation as it actually existed."[27] Indeed, that is just what the commentary to the Model Penal Code says. The commentary suggests that though the question of justifiability plays a pivotal role in the definitions of both recklessness and negligence, the perspective from which the jury addresses this question differs depending on which standard is being applied.[28]

This aspect of the commentary, though, vastly overstates the differences between recklessness and negligence. First of all, the negligence standard is less objective than the commentary implies. The very terms of the Code's definition of "negligently" require the jury to consider "the circumstances known to [the actor]" in addressing the justifiability of the risk.[29] Thus, as Professor Peter Low has explained:

> In spite of its concentration on objective components, the baseline for negligence is the context as the actor perceived it. Negligence, therefore, involves a subjective inquiry (what the actor actually knew about the context) and an objective inquiry (the inferences that should have been drawn from what the actor knew).[30]

Furthermore, the Code's definition of negligence could not really be otherwise in this respect. Any standard of liability that "emphasizes the justifiability of acting from an *ex ante* perspective"[31] must take into account what the actor knew when she acted.[32]

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[25] *See, e.g.*, John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111, 123 n.73 (1996) (arguing that "[t]he Model Penal Code terminology, for example, defines negligence in objective terms, as contrasted with recklessness where subjective awareness is required"); Kara M. McCarthy, Note, *Doing Time for Clinical Crime: The Prosecution of Incompetent Physicians as an Additional Mechanism to Assure Quality Health Care*, 28 SETON HALL L. REV. 569, 605 (1997) (arguing that "unlike criminal negligence, recklessness is based on subjective fault").

[26] MODEL PENAL CODE & COMMENTARIES § 2.02 cmt. at 238.

[27] *Id.* at 241.

[28] *Id.* at 238, 241.

[29] *Id.* § 2.02(2)(d).

[30] Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L.J. 539, 549 (1988).

[31] Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1102 (1997) (emphasis added).

[32] *Id.*; *see also* OLIVER WENDELL HOLMES JR., THE COMMON LAW 53-55 (Little, Brown & Co. 1945) (1881) (arguing that "[s]o far . . . as criminal liability is founded upon wrong-doing in any sense, . . . [it] must be confined to cases where circumstances making the

The Code commentary also overstates the degree to which the recklessness standard requires the jury to evaluate the risk from the defendant's perspective. It is true, of course, that in applying the Code's definition of recklessness the jury must take into account what the defendant knew—that is, "the circumstances known to him"—as it must when it applies the Code's definition of negligence.[33] Beyond this, however, there is nothing subjective about the justifiability calculus.[34] The principal subjective component of the recklessness standard—the requirement that the actor be "conscious[]" of the risk—bears no relation to the requirement that the risk be unjustifiable. The recklessness standard does not, for example, appear to require proof that the defendant actually was aware that the risk was unjustifiable.[35] Nor does the recklessness standard appear to contemplate that the defendant's mistaken factual beliefs[36] or idiosyncratic moral values will play a role in the

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conduct dangerous were known"); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Liability*, 88 CAL. L. REV. 931, 936 (2000) (arguing that "[r]isk is always relative to someone's perspective, a perspective that is defined by possession of certain information but not other information"); Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333, 358 (2002) (arguing that "there is no such thing as an objective risk; there are only risks to be perceived from certain epistemic vantage points"); Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 386 (2003) (observing that "risk exists only as an *ex ante* perception of a chance of harm").

[33] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(c), (d).

[34] *See* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 367 (1981) (identifying subjective component of recklessness standard as requirement that jury consider the circumstances known to the actor).

[35] *See* Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 405-06 (2001) (observing that actor's awareness of risk satisfies requirement of conscious disregard, even where actor believes that probability of harm is not sufficiently high to make conduct unjustifiable); Simons, *supra* note 15, at 189 (arguing that "it is fairly clear from the [Model Penal Code] commentary (though not from the text) that the defendant needs to be aware only that the risk is substantial, not that it is unjustifiable"); *see also* State v. Boss, 127 P.3d 1236, 1239 n.2 (Utah Ct. App. 2005) ("The risk of death required for recklessness and for criminally negligent conduct is the same; the only difference between the two is whether the defendant was aware of that risk.").

[36] There is an important difference between taking into account "the circumstances known to [the actor]," as the Code's definitions of negligence and recklessness do, and taking into account the circumstances "as [the actor] believes them to be," as the Code's definition of attempt does. MODEL PENAL CODE & COMMENTARIES § 5.01(1)(a). Belief and knowledge are not interchangeable; a belief does not qualify as knowledge unless the belief is true and justified. *See* LAURENCE BONJOUR, THE STRUCTURE OF EMPIRICAL KNOWLEDGE 4 (1985). By opting for the phrase "circumstances known to [the actor]" over the phrase "the circumstances as the actor believed them to be," the Code's drafters unambiguously signaled that mistaken beliefs—and mistaken estimates of the relevant probabilities—do not figure

calculus.[37] Thus, the recklessness and negligence standards require more or less the same analysis of the justifiability of the risk.

Perspective aside, though, what does it mean for a risk to be unjustifiable in the required sense? Recent tort scholarship has emphasized the availability of different approaches to defining the acceptable or reasonable level of risk-imposition in cases of negligence. One approach, for example, would require the jury to apply "various justice-based standards that take into account the rights and relationships among the parties."[38] Another approach, often associated with the "Learned Hand formula," would require the jury to conduct "a straightforward balancing of costs and benefits."[39]

Whatever the benefits of other approaches, the Model Penal Code's definitions of recklessness and negligence plainly appear to adopt the straightforward balancing approach.[40] This is evident, for example, in the definitions' very use of the word *unjustifiable*—rather than, say, *unreasonable* or *unacceptable*—to define the acceptable level of risk-imposition.[41] In this setting, the word *unjustifiable* implies that a risk can be justified, or offset, by countervailing social benefits. The same implication can be found in the definitions' command that jurors consider the "purpose of the actor's conduct" along with the "nature and degree" of

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into the analysis of risk. *Cf.* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (applying similar limitation on the calculation of probable cause: "an arresting officer's state of mind (except for the facts he knows) is irrelevant to the existence of probable cause").

[37] *See* Alexander, *supra* note 32, at 953 n.62 (arguing that "an actor's mistaken belief that his risk-imposition is legally justifiable is, like mistakes of criminal law generally, nonexculpatory, unless, that is, the actor's mistake is one regarding the necessity of the risk-imposition as opposed to the worthiness of the actor's goal"); Simons, *supra* note 15, at 189 n.30 (remarking that "it should not be a defense that the actor believes it is justifiable to impose a particular type of risk on another").

[38] *See, e.g.*, Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 THEORETICAL INQUIRIES L. 145, 145 (2003).

[39] George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972).

[40] Dressler, *supra* note 21, at 957 (arguing that "[t]o determine justifiability [in connection with recklessness], we conduct a criminal law version of the Learned Hand formula for measuring civil negligence"); Hurd & Moore, *supra* note 32, at 393 & n.144 (assuming that conduct will qualify as "reckless" under Model Penal Code only if the risk is unjustified in the sense required by the Hand formula: "all the benefits of taking this risk need to be factored in, balanced against the detriments of taking this risk"); Leo Katz, *A Look at Tort Law with Criminal Law Blinders*, 76 B.U. L. REV. 307, 308 (1996) ("[T]he drafters of the Model Penal Code seem to have been so taken by this claim [that the Hand formula clearly captures our intuitions about the meaning of negligence] as to adopt a formulation pretty close to it: They define negligence as the taking of a substantial, unjustifiable risk.").

[41] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(c), (d).

the risk.[42] Finally, this reading of the negligence and recklessness standards jibes with the Code's version of the choice-of-evils defense, which measures the justifiability of the risk according to a straightforward balancing.[43] It requires the defendant to prove, as an element of the defense, that "the harm or evil sought to be avoided by [the] conduct is greater than that sought to be prevented by the law defining the offense charged."[44]

When the acceptability of a risk is defined by a straightforward balancing of aggregate costs and benefits, it is possible to express the standard of conduct in rough mathematical terms. In torts, for example, where the question of negligence often hinges on the adequacy of safety measures adopted by the defendant, courts sometimes define the acceptable risk in terms of three variables: (1) the probability that the harm will occur, (2) the gravity of the resulting injury if it does, and (3) the cost of taking precautions that would have prevented the harm.[45] On the cost side of the balance, then, is the harm, discounted by the likelihood that it would occur. And on the benefit side is the money saved by the defendant in foregoing precautions that could have prevented the harm. This is the Hand formula, from *United States v. Carroll Towing Co.*:[46] "[I]f the probability is called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$."[47]

In criminal law, the benefits side of the equation is less likely to be framed in terms of the "burden of adequate precautions" than in terms of the "nature and purpose of [the] conduct" generally.[48] This, of course, is how the Model Penal Code's definitions of recklessness and criminal negligence define this variable. This different formulation of the social utility variable reflects the fact that the social utility of the actor's conduct in a criminal case less often will depend on whether the defendant has taken "adequate precautions" and more often will depend (in the words of the Code commentary) on whether and to what extent "the actor is seeking to serve a proper purpose [by his conduct], as when a surgeon performs an operation that he knows is very likely to be fatal but reasonably thinks to be necessary because the patient has no other, safer chance."[49] Thus, in the

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[42] *Id.*

[43] *Id.* § 3.02; *see also* Fletcher, *supra* note 39, at 542 n.19 (observing that Model Penal Code § 3.02 uses a variant of the Hand formula to define the choice-of-evils defense).

[44] MODEL PENAL CODE & COMMENTARIES § 3.02(1)(a).

[45] W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 173 n.46 (5th ed. 1984).

[46] 159 F.2d 169 (2d Cir. 1947).

[47] *Id.* at 173.

[48] MODEL PENAL CODE & COMMENTARIES § 2.02(c), (d).

[49] *Id.* § 2.02 cmt. at 237.

criminal law: if the probability of the harm occurring is called *P*, the gravity of the harm is called *G*, and the social utility of the conduct is *U*, then conduct is unjustifiably risky if $PG > U$.[50]

In summary, then, the widely accepted Model Penal Code definitions of recklessness and criminal negligence require the jury to decide whether the risk created by the defendant's conduct was unjustifiable. And this assessment of the risk's justifiability takes the same basic form regardless of whether the jury is applying a recklessness standard or a criminal negligence standard. In either case, the jury is required to assess the risk on the basis of "the circumstances known to [the defendant]" when he or she acted.[51] And, in either case, the assessment of the risk requires the jury to determine whether the risk posed by the defendant's conduct was "justified" by the countervailing social benefits. In other words, the assessment of the risk requires the jury to balance the aggregate costs and benefits in roughly the way described in the Hand formula.

B. GENERAL INTENT AS NEGLIGENCE PER SE

Crimes of negligence and recklessness are only two of the ways that legislatures target unjustified risk imposition. Legislatures also target unjustified risk imposition by creating so-called general intent offenses, whose only culpable mental states attach to conduct and attendant-circumstance elements.[52] These general intent offenses are relevant to our

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[50] *See* Dressler, *supra* note 21, at 957. Dressler modifies the Hand formula somewhat differently. He says:

> We determine the extent of harm risked by the conduct discounted by its likelihood of occurring and weigh that against the actor's motivation for the conduct (the perceived benefits, to the individual or others, accruing from the conduct) discounted by the probability that the risky behavior will satisfy the actor's goals.

Id.

[51] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(c), (d).

[52] *See* People v. Hood, 462 P.2d 370, 378 (Cal. 1969) (Traynor, C.J.) (defining general intent offense as an offense whose definition "consists of only the description of a particular act"). I use the term "general intent" advisedly. The terminology of general and specific intent is notoriously confusing. *See* United States v. Bailey, 444 U.S. 394, 403 (1980). But there is a dearth of alternatives. R.A. Duff refers to these offenses as "implicit endangerment offenses." R.A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 959 (2005). And Kenneth Simons refers to them as "formal strict liability" offenses. Simons, *supra* note 31, at 1085-88. Neither of these alternatives appears to have gained any following. Larry Alexander and Kimberly Kessler Ferzan use the term "proxy crimes" to refer to offenses of this kind. *See* Alexander & Ferzan, *supra* note 19, at 391 n.36. But the term "proxy crimes" is better reserved for crimes like possession of burglary tools, which criminalize innocuous conduct for the sake of punishing or preventing harmful conduct that is often associated with it. *See* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 16-18 & n.51 (2006) (identifying "possession of burglars' tools and possession of drug

inquiry because they show that the legislature sometimes can make for itself the very justifiability calculation that is delegated to the jury in cases of negligence and recklessness. Offenses of this kind are utterly commonplace, as we will see. But the relationship between these general intent offenses, on the one hand, and offenses of negligence and recklessness, on the other, can best be illustrated by two particular offenses: drunk-driving homicide and drug-induced homicide.

Most state criminal codes, in addition to the usual general prohibitions on reckless and criminally negligent homicide, now have vehicular-homicide statutes in which the driver's liability hinges exclusively on his or her intoxication at the time of the fatal accident.[53] These statutes do not require the jury to make a determination that the defendant was reckless or negligent with respect to the result element—that is, the death of a person.[54] Instead, the statutes' only required mental states pertain to the conduct and attendant-circumstance elements.[55] They usually require, first, that the defendant act purposely with respect to the conduct element—namely driving a motor vehicle—and, second, that the defendant act knowingly with respect to an attendant circumstance element—namely, the fact that the defendant had consumed an intoxicant.[56]

A second, related example of a general intent offense is the crime of drug-induced homicide. A substantial minority of states now have specific drug-induced homicide statutes that supplement the states' broader general proscriptions on reckless and negligent homicide.[57] These statutes

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paraphernalia" as "proxy crimes," which "criminalize[] conduct that is not generally criminal . . . in order to punish or prevent the target criminal conduct").

[53] *See, e.g.*, FLA. STAT. ANN. § 316.193(4) (West 2006 & Supp. 2008); IDAHO CODE ANN. § 18-8006 (2004 & Supp. 2008); MICH. COMP. LAWS ANN. § 257.625(4) (West 2006 & Supp. 2008); NEB. REV. STAT. § 28-306(1), (3)(b) (1995 & Supp. 2006); N.Y. PENAL LAW § 125.12(2) (McKinney 2004 & Supp. 2008); WYO. STAT. ANN. § 6-2-106(b)(i) (2007).

[54] *See, e.g.*, People v. Garner, 781 P.2d 87, 89 (Colo. 1989); State v. Hubbard, 751 So. 2d 552, 563 (Fla. 1999); State v. Creamer, 996 P.2d 339, 343 (Kan. 2000); Reidweg v. State, 981 S.W.2d 399, 406-07 (Tex. App. 1998); Allen v. State, 43 P.3d 551, 569 (Wyo. 2002).

[55] *See* Armijo v. State, 678 P.2d 864, 868 (Wyo. 1984).

[56] *See* People v. Derror, 715 N.W.2d 822, 832 (Mich. 2006) (holding that the Michigan statute defining the offense of operation of a vehicle under the influence of a controlled substance causing death does not require the Government to prove that the defendant knew that he might be intoxicated; but implying that Government is required to prove that defendant knew "that he or she had consumed an intoxicating agent"); *Armijo*, 678 P.2d at 868 (remarking that offense of aggravated homicide by vehicle requires proof that the defendant became "intoxicated voluntarily to the point that he is not able to safely drive"); *see also* State v. Simpson, 53 P.3d 165, 167-68 (Alaska Ct. App. 2002) (explaining that offense of driving while intoxicated usually requires proof that the defendant "knowingly ingested intoxicants").

[57] *See, e.g.*, ALASKA STAT. § 11.41.120(a)(3) (2006); COLO. REV. STAT. § 18-3-102(e) (2008); FLA. STAT. ANN. § 782.04(1)(a)(3) (West 2007); 720 ILL. COMP. STAT. 5/9-3.3 (2006

generally require, first, that the defendant deliver one of several specified controlled substances—for example, heroin, methamphetamine, or cocaine—and, second, that another person die as the result of ingesting the controlled substance.[58] The statutes do not require the Government to prove that the defendant was reckless or negligent with respect to the social harm that is the target of the statute.[59] Instead, by way of mens rea, they typically require the Government only to prove that the defendant knew that he or she was delivering the controlled substance.[60]

To a lawyer schooled in the Model Penal Code's strict, elemental approach to culpability, the crimes of drunk-driving homicide and drug-induced homicide look very different from crimes like reckless homicide and criminally negligent homicide. They look different because they lack a culpable mental state with respect to one of their material elements. The Model Penal Code requires, with a few insignificant exceptions, that every material element of every criminal statute be assigned a culpable mental state.[61] Under the Code, a criminal statute that lacks a mental state with respect to some material element is said to impose "absolute liability," and absolute liability is absolutely forbidden.[62] The offenses of reckless and criminally negligent homicide satisfy the Model Penal Code's standard model; they require proof of some culpable mental state with respect to every element, including the result.

In contrast, the crimes of drunk-driving homicide and drug-induced homicide lack a culpable mental state with respect to one of their elements. Indeed, they lack a culpable mental state with respect to the element that is

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& Supp. 2007); LA. REV. STAT. ANN. § 14:30.1(3) (2007); MICH. COMP. LAWS ANN. § 750.317a (West Supp. 2008); MINN. STAT. ANN. § 609.195(b) (West 2003); N.J. STAT. ANN. § 2C:35-9 (West 2005); 18 PA. CONS. STAT. ANN. § 2506(a) (West 1998); R.I. GEN. LAWS § 11-23-6 (2002); TENN. CODE ANN. § 39-13-210(a)(2) (2006); VT. STAT. ANN. tit. 18, § 4250(a) (Supp. 2008); WASH. REV. CODE ANN. § 69.50.415 (West 2007); WIS. STAT. ANN. § 940.02(2)(a) (West 2005); WYO. STAT. ANN. § 6-2-108 (2007).

[58] *See* People v. Faircloth, 599 N.E.2d 1356, 1360 (Ill. App. Ct. 1992).

[59] *See* ALASKA STAT. § 11.41.120(a)(3) (providing explicitly that "the death is a result that does not require a culpable mental state"); *Faircloth*, 599 N.E.2d at 1360 (interpreting Illinois's statute not to require a culpable mental state with respect to the result: "The defendant just needs to make a knowing delivery of a controlled substance, and if any person then dies as a result of taking that substance, the defendant is responsible for that person's death").

[60] *See Faircloth*, 599 N.E.2d at 1360.

[61] *See* MODEL PENAL CODE & COMMENTARIES § 2.02(1) (1985) (commanding that statutes defining substantive offenses be interpreted to require proof of some culpable mental state with respect to "each material element of the offense," except as provided in Section 2.05); *id.* § 2.05(1)(a) (providing that if an offense qualifies as a "violation," then no mental state requirement applies).

[62] *See id.* § 2.05.

the principal determinant of punishment: the death of a person. Drunk-driving homicide carries a penalty that is dozens or even hundreds of times more severe than the penalty for ordinary drunk driving.[63] Likewise, drug-induced homicide carries a penalty that is substantially more severe than the penalty for ordinary drug dealing.[64] And yet, for both of these offenses, the element that triggers this enhanced liability—the death of a person—has no attached culpable mental state. From the perspective of the Model Penal Code's drafters, the fact that these statutes operate to impose liability for homicide "based on culpability required for the underlying [offense] without separate proof of any culpability with regard to the death" makes them fundamentally problematic.[65]

But there is another way of looking at these offenses. As Professor Mark Kelman has pointed out, general intent offenses like drunk-driving homicide and drug-induced homicide are related to reckless and criminally negligent homicide in much the same way that negligence per se is related to ordinary negligence.[66] What differentiates these two relatively novel forms of homicide from the more traditional offenses of reckless manslaughter and criminally negligent homicide is just the identity of the decision-maker.[67] Instead of requiring a jury to make an ad hoc, case-by-case determination of unreasonableness, these statutes "require an antecedent [legislative] judgment of *per se* unreasonableness."[68] The legislature, not the jury, assumes the responsibility for balancing the three

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[63] *See, e.g.*, MICH. COMP. LAWS ANN. § 257.625(4) (West 2006 & Supp. 2008) (providing that maximum sentence for drunk-driving homicide is fifteen years' imprisonment); WYO. STAT. ANN. § 6-2-106(b) (2007) (providing that maximum sentence for "aggravated homicide by vehicle" is twenty years' imprisonment).

[64] *See, e.g.*, MICH. COMP. LAWS ANN. § 750.317a (West Supp. 2008) (providing that drug-induced homicide is "punishable for life or any term of years"); WYO. STAT. ANN. § 6-2-108 (2007) (providing that "[d]rug induced homicide is a felony punishable by imprisonment in the penitentiary for not more than twenty (20) years").

[65] MODEL PENAL CODE & COMMENTARIES § 210.2 cmt. at 31-32 (explaining the operation of the felony-murder rule at common law and classifying felony-murder as an absolute liability offense).

[66] Kelman, *supra* note 18, at 1516 (arguing that "the key to seeing strict liability as less deviant in the criminal justice system is . . . to see the real policy fight as a rather balanced one over the relative merits and demerits of precise rules (conclusive presumptions) and vague, ad hoc standards (case-by-case determinations of negligence)"). Kelman's operative definition of "strict liability," like the Model Penal Code's, is broad enough to encompass most general intent offenses as well. *See also* KEETON ET AL., *supra* note 45, at 229-30 (explaining the operation of "negligence per se" in tort cases).

[67] Kelman, *supra* note 18, at 1517 (raising the possibility that the legislature "might *predefine* what constitutes 'reasonable care'").

[68] Wasserstrom, *supra* note 18, at 744 (discussing strict liability; Wasserstrom also characterizes this antecedent legislative judgment as "similar to a jury determination that conduct in a particular case was unreasonable").

factors in the justifiability calculus: the social utility of the actor's conduct, the gravity of the potential harm, and the probability that the harm will come about as a result of the conduct.

The first of these factors—the social utility of the actor's conduct—clearly lends itself to antecedent legislative determination in both drunk-driving homicide and drug-induced homicide. Both statutes define with specificity the conduct that will trigger liability—drunk driving in the one case, and the delivery of drugs in the other. There is nothing controversial in the legislature's antecedent determination that the delivery of heroin, cocaine, or methamphetamine to other persons lacks any redeeming social value. To be sure, drunk driving has greater social value than drug dealing; it serves the same basic need for mobility that ordinary driving does. But, again, there is nothing very controversial about the legislature's assumption of the responsibility for assigning a value to the utility of driving. The social value of driving, though not constant, varies only within a narrow range. And for those rare cases where driving serves a compelling social need—say, the delivery of a sick child to the hospital—the necessity or choice-of-evils defense is available to the driver.[69]

The second factor in the justifiability calculus—the gravity of the potential harm—is even more clearly within the competence of the legislature. The gravity of the potential harm is a factor separate, and different in kind, from the probability of the harm occurring. The gravity of the harm presents a question of value, while the probability of the harm occurring is a question of fact.[70] Questions of value, of course, are uniquely well-suited to legislative determination.[71] And the value to be assigned to

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[69] *See* People v. Pena, 197 Cal. Rptr. 264, 272 (Cal. Ct. App. 1983) (holding that the duress defense is available in a prosecution for driving while intoxicated when the unlawful act is performed by defendant to prevent imminent harm from coming to a third party).

[70] The Model Penal Code recognizes this distinction in the related context of the choice-of-evils defense. MODEL PENAL CODE & COMMENTARIES § 3.02 cmt. at 12-13. As the Code commentary explains, a defendant's assertion of the choice-of-evils defense raises a question of value that is distinct from any factual assessment of the probability of either "evil" coming to pass. *Id.* This question of value, as distinct from the factual question, "is not committed to the private judgment of the actor." *Id.* at 12; *see also* Nelson v. State, 597 P.2d 977, 980 n.6 (Alaska 1979) (recognizing that the necessity defense raises the question "whether the defendant's value judgment was correct, given the facts as he reasonably perceived them"). Notably, the commentary to the choice-of-evils provision also acknowledges that the legislature's judgment on questions of value trumps the judgment of the finder of fact: "[T]he general choice of evils defense cannot succeed if the issue of competing values has been previously foreclosed by a deliberate legislative choice." MODEL PENAL CODE & COMMENTARIES § 3.02 cmt. at 13.

[71] Clarence Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21, 47 (1949) ("The legislative process includes opportunities to arrive at informed value judgments superior to the opportunities of judges and jurors.").

the death of a person is no exception.[72] There is nothing controversial, then, in the legislature's decision to assign a value to the gravity of the potential harm from either drug dealing or drunk driving.

It is the third factor in the justifiability calculus—the probability of the harm occurring—that appears to make these statutes problematic. Recall that the unjustifiability of conduct has to be judged on the basis of what the defendant knew when he or she acted, rather than on the basis of how things later turned out.[73] This is true when the jury makes a case-specific determination of unjustifiability, and it ought equally to be true when the legislature makes a categorical determination of unjustifiability per se. This means, though, that the legislature has to evaluate the probability of the harm occurring on the basis of what the defendant knew. This evaluation seems problematic at first glance because, whatever the legislature's competence in assigning values to the conduct's social utility or to the gravity of the potential harm, the legislature seems ill-equipped to decide in advance what circumstances will be known to a particular future actor when he or she acts.[74]

This first glance is deceiving, however. In statutes that define offenses like drunk-driving homicide and drug-induced homicide, the legislature takes a foolproof approach to identifying just those cases where the defendant knew of the circumstances that made his or her conduct unjustifiably risky: namely, it requires the Government to prove that knowledge. In drunk-driving homicide, for example, the Government is required to prove that the defendant knew he or she was driving a motor vehicle and knew he or she had consumed an intoxicant.[75] And in drug-induced homicide, the Government is required to prove that the defendant knew that the substance he or she was delivering really was, say, cocaine or heroin.[76] Thus, the legislature's antecedent determination that the conduct

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[72] *See* Mack v. Mack, 618 A.2d 744, 761 (Md. 1993) (concluding that questions going to the value of human life are "quintessentially legislative").

[73] Alexander, *supra* note 32, at 936 (arguing that "[r]isk is always relative to someone's perspective, a perspective that is defined by possession of certain information but not other information"); Hurd & Moore, *supra* note 32, at 358 (arguing that "there is no such thing as objective risk; there are only risks to be perceived from certain epistemic vantage points").

[74] *But cf.* Kelman, *supra* note 18, at 1517 (arguing that "[t]he problem [with general intent statutes] is that this centralized [legislative] command may be imperfectly tuned to the precise circumstances of each potential defendant").

[75] *See* People v. Derror, 715 N.W.2d 822, 832 (Mich. 2006) (implying that Michigan's version of drunk-driving homicide requires the Government to prove that the defendant knew "that she had consumed an intoxicating agent").

[76] People v. Faircloth, 599 N.E.2d 1356, 1360 (Ill. App. Ct. 1992) (interpreting Illinois's drug-induced homicide statute to require proof that the defendant made "a knowing delivery of a controlled substance").

is unjustifiable per se is—like the jury's ad hoc, case-by-case determination—grounded on inferences from "the circumstances known to [the actor]."[77] The legislature's reliance on these known circumstances as the basis for calculating the justifiability of the risk is no more inherently suspect than is the jury's.

In this respect, statutes that define crimes like drunk-driving homicide and drug-induced homicide are fundamentally different from statutes that impose strict criminal liability. A statute that imposes strict liability might, in some sense, be based on a legislative judgment that the defendant accepted an unjustifiable risk.[78] But this judgment will be grounded on how things turned out after the fact, not on the Government's proof of "circumstances known to [the actor]" *ex ante*.[79] Take, for example, statutes that impose strict liability for sexual abuse. In these statutes, the only required mental state is the defendant's knowledge that he or she was engaged in sexual relations with another person.[80] But the defendant's mere knowledge that he or she was engaged in sexual relations with another person cannot, by itself, provide a basis for inferring that the defendant also was, or should have been, aware that his or her partner was underage. The only basis for *this* inference is the fact that the partner turned out, after the fact, to be underage. In other words, from the fact that the defendant's partner turned out to be underage, the legislature infers that the defendant could not have remained unaware of a substantial risk that the partner was underage.[81]

There is a difference, then, between (1) statutes in which the legislature's per se determination of unjustifiable risk is grounded on the government's proof of circumstances known to the actor *ex ante* and (2)

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[77] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(c), (d) (1985).

[78] Wasserstrom, *supra* note 18, at 744 (arguing that "strict criminal liability is similar to a jury determination that conduct in a particular case was unreasonable").

[79] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(c), (d).

[80] *See* Steve v. State, 875 P.2d 110, 115-16 (Alaska Ct. App. 1994) (explaining that common law sex offenses required the Government to prove by way of mens rea only "that the defendant voluntarily committed an act of sexual intercourse").

[81] This inference is evident, for example, in the legislative history of 18 U.S.C. § 2243, which denies the mistake-of-age defense to anyone who engages in sexual relations with a child under twelve years old. 18 U.S.C. § 2243 (2006). In adopting this section, Congress appears to have relied in part on a determination that "'no credible error of perception would be sufficient to recharacterize a child [who is under twelve years old] as an appropriate object of sexual gratification.'" H.R. REP. NO. 99-594, pt. 2, at 15-16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6186, 6195-96 (quoting MODEL PENAL CODE & COMMENTARIES § 213.6 cmt. at 414). Likewise, the Ohio legislature imposed strict liability on the basis of its determination that no actor who engages in sexual relations with a child under thirteen realistically could remain unaware of some risk that the child is not an appropriate partner. OHIO REV. CODE ANN. § 2907.02(A)(1)(b) (West 2006) (committee comment on H 511).

statutes in which the legislature's per se determination of unjustifiable risk is grounded, at least in part, on "how things turned out." And this difference roughly corresponds to the traditional boundary between general intent offenses and strict liability offenses. Traditionally, a statute was said to impose strict criminal liability if it lacked a culpable mental state with respect to one of "the facts that make [the] conduct illegal."[82] In strict liability, the way things turn out—for example, the fact that one's partner turns out to be underage—is among the facts that make the conduct criminal.[83] By contrast, in crimes like drunk-driving homicide and drug-induced homicide, the way things turn out is not among the facts that make the conduct criminal. Drunk driving and drug dealing are criminal regardless of how things turn out—regardless of whether somebody dies.

This point does not only highlight the distinction between strict liability crimes and crimes like drunk-driving homicide and drug-induced homicide. It also highlights the close relationship between these two forms of homicide and more commonplace offenses like drunk driving and drug dealing. Drunk driving and drug dealing are just the inchoate versions of drunk-driving homicide and drug-induced homicide.[84] Moreover, like these homicide offenses, drunk driving and drug dealing appear to be based on antecedent legislative determinations of unjustifiability per se. That is, they appear to be based on legislative determinations that anybody who

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[82] Staples v. United States, 511 U.S. 600, 605 (1994); *see also* United States v. Crimmins, 123 F.2d 271, 272 (2d Cir. 1941) (Learned Hand, J.) (distinguishing general intent offenses, which require proof that the defendant was "aware of the existence of all those facts which make his conduct criminal," from strict-liability offenses, which do not).

[83] *But cf.* Simons, *supra* note 31, at 1090. Professor Simons appears to deny the distinction between the two kinds of offenses. Simons first hypothesizes the creation of a general intent offense that makes it a crime to knowingly light a match in or near a forest. *Id.* at 1086. Then he asks:

> [I]f the state cannot legitimately punish an "innocent" or "nonculpable" person whose actions merely causally contribute to starting a fire [i.e., if the state cannot punish a person on the basis of how things turn out] . . . why can the state treat as "guilty" or "culpable" someone who knowingly lights a match simply because this crime contains a formal fault element?

Id. at 1090.

[84] Kimberly Kessler Ferzan, *A Reckless Response to Rape: A Reply to Ayres and Baker*, 39 U.C. DAVIS L. REV. 637, 665 (2006) (observing that "DUI laws criminalize an inchoate act—by driving intoxicated, one takes the risk that one might kill another person"); Douglas Husak, *Applying* Ultima Ratio*: A Skeptical Assessment*, 2 OHIO ST. J. CRIM. L. 535, 543 (2005) (arguing that "a proscription of drug use, no less than a proscription of drug possession, is an inchoate offense" and that "[n]o harm need occur on the literally tens of billions of occasions in which drugs have been consumed"); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 5 (2003) (characterizing driving while intoxicated as an "inchoate crime[]").

knowingly drives while intoxicated, or who knowingly sells cocaine or heroin, has created an unjustifiable risk of harm to other persons.[85]

There is room for disagreement on the question whether statutes like these are desirable[86]—that is, whether society is better served by bright-line rules embodying antecedent legislative determinations of unjustifiability per se[87] or instead is better served by statutes that delegate to the jury the responsibility for making ad hoc, case-by-case determinations of unjustifiability.[88] What is not subject to disagreement, though, and what is critical to the argument here, is that legislatures traditionally have made extensive use of both kinds of criminal statutes.[89] When the problem to be addressed lends itself, as drunk driving and drug trafficking do, to the adoption of per se rules that embody antecedent legislative judgments about the unjustifiability of risk, legislatures usually adopt per se rules.[90] In other settings, where "it is impossible to articulate in advance specific rules to cover the full range of ways in which one might be at fault and risk harm to

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[85] *See* Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQUIRIES L. 283, 321 (2002) (arguing that "many statutory inchoate offenses, while not formally defined in terms of risk-creation or negligence, are in substance derivative legal norms, since the reason for punishing the relevant conduct is to avoid a more serious, primary harm").

[86] *See, e.g.*, Duff, *supra* note 52, at 960-61 (describing the relative advantages and disadvantages of per se rules, on the one hand, and vaguer, ad hoc standards, on the other); Kelman, *supra* note 18, at 1517 (describing the same).

[87] *See* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (Marshall, J.) (arguing that one of the vices of vague criminal laws is that they "impermissibly delegate[] basic policy matters to . . . juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application"); HOLMES, *supra* note 32, at 97-102 (arguing that "it is very desirable to know as nearly as we can the standard by which we shall be judged at a given moment").

[88] *See* Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 BUFF. CRIM. L. REV. 599, 620-22 (1998) (arguing that offenses like drunk driving should either (1) be redefined to require proof of culpability—that is, recklessness—with respect to the ultimate social harm that is the target of the offense or (2) be replaced by "a more general offense of risk creation"); Cynthia Lee, *"Murder and the Reasonable Man" Revisited: A Response to Victoria Nourse*, 3 OHIO ST. J. CRIM. L. 301, 305-06 (2005) (arguing that "the jury is a better institutional actor than the legislature when it comes to deciding questions of culpability"); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974, 2036-39 (2008) (arguing that justice and racial equality can best be served by "defin[ing] criminal prohibitions more vaguely").

[89] *But cf.* Kelman, *supra* note 18, at 1517 (characterizing as "perfectly traditional" the policy choice "between strict, easily applied rules and vaguer, ad hoc standards").

[90] Indeed, delegating the normative judgment to the jury when the circumstances clearly lend themselves to the adoption of a per se rule probably would raise constitutional vagueness concerns. *See* State v. Stanko, 974 P.2d 1132, 1135, 1138 (Mont. 1998) (striking down as unconstitutionally vague a Montana law that replaced traditional per se speed limits with flexible rule requiring drivers to drive "at a rate of speed no greater than is reasonable or proper under the conditions existing at the point of operation").

others,"[91] legislatures delegate to the jury the responsibility for deciding whether the defendant's conduct was unjustifiably risky.[92]

III. WHY NEITHER NEGLIGENCE, NOR RECKLESSNESS, NOR GENERAL INTENT PROVIDES A WORKABLE MENS REA FOR SEXUAL ABUSE

A. WHY NEGLIGENCE AND RECKLESSNESS DO NOT WORK

In theory, criminal negligence ought to function perfectly as the culpable mental state for the age element in the crime of child sexual abuse. Under a criminal negligence standard, again, the acceptable probability of social harm varies with (1) the gravity of the potential harm and (2) the degree of utility of the conduct.[93] In theory, then, a jury instructed on the standard definition of criminal negligence in a sexual abuse case would be able to calculate, on the basis of these factors, the acceptable probability that the defendant's partner was underage.[94] It then would decide simply whether the defendant was or should have been aware of a probability greater than this that his or her sexual partner was underage.

In practice, though, juries are ill-equipped to assess the gravity of the harm wrought by sexual abuse. The difficulty is not that most jurors lack direct experience of sexual abuse. Most jurors also lack direct experience of, say, the grave physical injuries that result from gun shots and automobile accidents, but they are no less capable for that of deciding whether the defendant was negligent or reckless in shooting or driving. The real trouble is that the harm wrought by sexual abuse is not intuitively obvious in the way that physical disability or disfigurement is, nor is it a matter of common knowledge. Moreover, the criminal trial is not an

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[91] Simons, *supra* note 85, at 309.

[92] *See Stanko*, 974 P.2d at 1147 (rejecting constitutional vagueness challenge to statute prohibiting reckless driving); Rabuck v. State, 129 P.3d 861, 864-68 (Wyo. 2006) (rejecting constitutional vagueness challenge to broad statute defining offense of "indecent liberties").

[93] WILLIAMS, *supra* note 9, § 26, at 62 (explaining that the degree of risk that will qualify as unjustifiable "must vary in each instance with the magnitude of the harm foreseen and the degree of the utility of the conduct").

[94] In a sexual abuse prosecution, the age of the child is, in the terminology of the Model Penal Code, an attendant circumstance element rather than a result element. *See* MODEL PENAL CODE & COMMENTARIES § 1.13(9) (1985). In the crime of sexual abuse, though, as in the crime of rape, the critical attendant circumstance element serves as a kind of final proxy for social harm. *See* Julian Hermida, *The Convergence of Civil Law and Common Law in the Criminal Theory Realm*, 13 U. MIAMI INT'L & COMP. L. REV. 163, 198 (2003) (observing that social harm may "adopt the form of" an attendant circumstance element). *But cf.* Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 346 (2004) (identifying "the primary harm that rape statutes seek to prevent" as the harm of being "subjected to sexual intercourse without . . . having subjectively chosen it").

appropriate forum for a broad discussion of the harm typically wrought by sexual abuse. The dangers of addressing such questions in a criminal trial are reflected, for example, in the traditional rule precluding prosecutors from injecting issues broader than guilt or innocence into the trial.[95] They are reflected, too, in the rule barring admission of evidence of the psychological trauma suffered by the victim herself.[96]

Worse, under a negligence standard, the jury's exercise of its broad power to establish an appropriate standard of care almost inevitably would be affected by evidence of the victim's unchastity. In nearly every case, the jury would hear evidence that the victim had given her consent to the sexual encounter with the defendant, or had even initiated it. And in many if not most cases, the jury also would hear evidence of the victim's prior sexual conduct.[97] The victim's prior sexual conduct would be relevant and admissible to explain why the defendant believed that the victim had reached the critical age.[98] Consider, for example, *Bibbs v. State*,[99] where the defendant, Charles Bibbs, raised a mistake-of-age defense to a charge that he had sexually abused a thirteen-year-old girl, identified as D.C. in court documents.[100] At his trial, Bibbs attempted to introduce "the content of his initial telephone conversation with D.C. in which he claim[ed] she

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[95] Courts generally hold that the prosecutor must refrain from making "'argument[s] which would divert the jury from its duty to decide [a] case on the evidence, by injecting issues broader than the guilt or innocence of the accused' into the trial." State v. Washington, 521 N.W.2d 35, 40 n.3 (Minn. 1994) (quoting 1 AM. BAR ASS'N, STANDING COMM. ON ASS'N, STANDARDS FOR CRIMINAL JUSTICE § 3-5.8(d) (2d ed. 1986)).

[96] *See* State v. Buttner, 458 N.W.2d 390, 1990 WL 100365, at *5 (Wis. Ct. App. 1990) (unpublished table decision) (holding that admission of evidence of psychological trauma suffered by victim of sexual assault was inadmissible); *see also* White v. State, 80 P.3d 642, 649 (Wyo. 2003) (holding that "[v]ictim impact testimony must not be permitted [during trial on question of guilt] 'unless there is clear justification of relevance'"). Professor Cynthia Lee argues that the solution to problems of bias in criminal cases lies in the education of jurors: "Prosecutors simply need to do a better job of educating jurors whenever there is a risk that race, gender, or sexual orientation bias may affect the way jurors view a case." Lee, *supra* note 88, at 306. This seems problematic for a number of reasons. For one thing, conducting quasi-legislative hearings in every criminal case would be very time-consuming and perhaps very confusing. For another, assigning prosecutors an "educational" function in the trial process might fundamentally alter the adversarial system and undercut the presumption of innocence.

[97] *See* State v. Yanez, 716 A.2d 759, 770 (R.I. 1998) (reasoning that recognition of a mistake-of-age defense to sexual abuse "would open the door to the introduction of evidence concerning a victim's past sexual conduct"); *Hearings*, *supra* note 11, at 114 (statement of Leigh Bienen) (stating that "in my experience the mistake-as-to-age defense has been used disingenuously as a strategy for introducing evidence concerning the victim's sexual behavior and for eliciting prejudicial and hostile attitudes toward victims").

[98] *See Yanez*, 716 A.2d at 770.

[99] 814 P.2d 739, 740 (Alaska Ct. App. 1991).

[100] *Id.* at 739.

discussed her prior sexual history and experience in detail."[101] Bibbs also "sought to question D.C. about the specific details she discussed with Bibbs on the telephone."[102] The trial court excluded this testimony.[103] But the appellate court reversed Bibbs's conviction after concluding that "Bibbs was entitled to develop the substance of this conversation."[104]

A jury that is exposed to evidence of this sort—to a detailed account of the victim's "prior sexual history and experience"—may be inclined to view the victim as unworthy of the law's protection.[105] The negligence standard, moreover, gives the jury a clear and seemingly legitimate avenue for putting this perception to use. Again, the negligence standard requires the jury to assign a value to the "gravity of the harm" in calculating the acceptable probability that harm will occur.[106] Where the jury concludes that the victim was already sexually "sophisticated" when the abuse occurred,[107] it may well infer that the potential incremental harm from the victim's sexual encounter with the defendant was minimal.[108] The negligence standard, then, gives the trier of fact a license to take the victim's unchastity into account in calculating the acceptable probability of harm under the circumstances of the case.

This is more than speculation. The reported decisions on mistake-of-age are shot through with otherwise irrelevant comments by appellate judges on the unchastity of the victim. In these decisions, the victim's unchastity is not offered up as a basis for concluding that the defendant was misled by the victim's apparent sexual maturity. Rather, it is offered to

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[101] *Id.*

[102] *Id.*

[103] *Id.* at 740.

[104] *Id.* at 740-41.

[105] *See* United States v. Kasto, 584 F.2d 268, 271-72 n.3 (8th Cir. 1978) (acknowledging the "highly prejudicial effect" of evidence of rape victim's unchastity).

[106] *See* 1 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.4(a)(1), at 317 (2d ed. 2003).

[107] State v. Elton, 680 P.2d 727, 732 (Utah 1984).

[108] *See id.* at 732 (implying that interests protected by sexual abuse laws are not at stake where minor is sexually "sophisticated"); Garnett v. State, 632 A.2d 797, 815 n.15, 816 (Md. 1993) (Bell, J., dissenting) (arguing that "it would seem reasonable . . . to introduce evidence of the minor's maturity, sophistication, and past sexual experience, since maturity, not age, is the chief concern, age being but a factor"). This view is in keeping with the traditional view that the harm in statutory rape lies in the moral contamination of the victim. *See* Abbott v. People, 16 P.2d 435, 438 (Colo. 1932) (Butler, J., dissenting) (arguing that statutory rape law was intended "to save [the victims] from moral contamination"); Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 880 (2002) (explaining that, on the traditional view, "the victim's sexual virtue—a moral quality—was taken from the offender via sexual invasion . . . . If the victim had previously been virginal, she lost her innocence forever").

show either that the victim did not suffer the harm that is the law's target, or that the real fault lay with the victim rather than her adult abuser.

Consider, for example, the California Supreme Court's landmark decision in *People v. Hernandez*,[109] where the court adopted a "reasonable mistake" defense to the crime of statutory rape.[110] In support of its conclusion that the defense was necessary, the court relied in part on the fact that some victims of sexual abuse are "sexually experienced."[111] To illustrate, in the court's words, the "inequitable consequences to which we may be led" by the imposition of strict liability for sexual abuse, the court quoted at length from a 1923 decision of the Missouri Supreme Court, *State v. Snow*,[112] where the Missouri court had commented on the character of the fourteen-year-old victim:

> This wretched girl was young in years but old in sin and shame. A number of callow youths, of otherwise blameless lives . . . fell under her seductive influence. They flocked about her, . . . like moths about the flame of a lighted candle and probably with the same result. The girl was a common prostitute . . . . The boys were immature and doubtless more sinned against than sinning. They did not defile the girl. She was a mere "cistern for foul toads to knot and gender in." Why should the boys, misled by her, be sacrificed? What sound public policy can be subserved by branding them as felons? Might it not be wise to ingraft an exception in the statute?[113]

The description of a fourteen-year-old girl as a "mere 'cistern for foul toads to knot and gender in'" must have sounded jarring even in 1964, when *Hernandez* repeated it. But the same description was used again thirty years later by a dissenting judge in *Garnett v. State*.[114] In *Garnett*, as in *Hernandez*, the question was whether the court should recognize a mistake-of-age defense to sexual abuse despite clear indications of contrary legislative intent.[115] A majority of the Maryland Court of Appeals declined to recognize the defense.[116] But Justice Robert Bell dissented.[117] Justice Bell argued that "it would seem reasonable to allow the accused to introduce evidence of the minor's maturity, sophistication, and past sexual

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[109] 393 P.2d 673 (Cal. 1964).

[110] *Id.* at 677.

[111] *Id.* at 674.

[112] *Id.* at 674 & n.1 (quoting State v. Snow, 252 S.W. 629, 632 (Mo. 1923)).

[113] *Snow*, 252 S.W. at 632. The phrase "a cistern for foul toads to knot and gender in" is from Othello, Act 4, scene 2, where Othello tells Desdemona that his heart, "the fountain from the which my current runs," has run dry and so should be discarded, or else kept as "a cistern for foul toads to knot and gender in." WILLIAM SHAKESPEARE, OTHELLO act 4, sc. 2.

[114] 632 A.2d 797, 816 n.17 (Md. 1993) (Bell, J., dissenting).

[115] *Id.* at 800.

[116] *Id.* at 805.

[117] *Id.* at 807 (Bell, J., dissenting).

experience, since maturity, not age, is the [law's] chief concern."[118] Bell's argument was not that the victim's apparent sexual maturity sometimes misleads actors. Rather, his argument was that sexually experienced children (the victim in *Garnett* was thirteen years old) do not suffer the social harm that is the law's target and so do not deserve protection. To illustrate the considerable danger posed by wily adolescent seductresses—to whom hapless men, young or just young in spirit, are drawn like "moths around the flame of a lighted candle"—Justice Bell quoted at length from the *Snow* decision.[119]

The stock image of the adolescent femme fatale made yet another appearance in *State v. Elton*,[120] where the Utah Supreme Court held that in sexual abuse prosecutions, the Government is required to prove that the defendant was negligent with respect to the victim's age.[121] In explaining this standard, the court implied that a misrepresentation by the victim of her age would be of more or less dispositive significance on the question of the defendant's negligence.[122] But the Utah court's decision to assign dispositive significance to the victim's misrepresentation was not based on an assumption that such misrepresentations are always credible. Rather, the decision was based on an assumption that the societal interest protected by the sexual abuse laws—the moral purity of the victim—is not really in play "where a young participant intentionally misrepresents his or her age."[123] In cases like these, the court said, the mistake-of-age defense is necessary to protect the "honestly misled party" from "a sophisticated youth who seeks to abuse the criminal law for his or her own sensual indulgences."[124] In support of this proposition, the court cited the Missouri Supreme Court's 1923 decision in *Snow*.[125]

There are several interrelated assumptions at work in *Snow* and its progeny. First, there is the assumption that the purpose of the sexual abuse laws is to protect children from moral contamination, and that a thirteen- or

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[118] *Id.* at 814 n.15.

[119] *Id.* at 816 n.17 (quoting State v. Snow, 252 S.W. 629, 632 (Mo. 1923)).

[120] 680 P.2d 727 (Utah 1984).

[121] *Id.* at 729-30.

[122] *Id.* at 731-32.

[123] *Id.* at 732.

[124] *Id.*; *see also id.* at 731 (explaining that the real blame of sexual abuse often lies with a victim "who created the deceit and entrapped the defendant into committing a crime he or she attempted to avoid").

[125] *Id.* at 732 (citing State v. Snow, 252 S.W. 629, 632 (Mo. 1923)). The court also relied on Vance, *supra* note 3, at 452. Vance, a student author, argued that the court or the legislature "should make allowance expressly for those men and women who engage in sexual intercourse with sexually sophisticated children or innocent children who deliberately mislead their partner."

fourteen-year-old girl who has previously been sexually abused therefore has nothing to lose by being re-victimized by another adult.[126] Second, there is the assumption that a thirteen- or fourteen-year-old girl who responds to earlier abuse by "sexually acting out"[127] is morally responsible for her misbehavior to the degree that she may fairly be characterized as "a mere cistern for foul toads to knot and gender in."[128] Finally, there is the seemingly inconsistent assumption that an adult man who falls under the "seductive influence"[129] of a thirteen- or fourteen-year-old girl is morally blameless.[130]

To the degree that a state legislature rejects these assumptions—to the degree that the state legislature wants to protect even unchaste children from sexual imposition by adults—the legislature would be ill-served by making negligence or recklessness the culpable mental state with respect to the child's age. Many jurors would bring to the jury room the same assumptions that were at work in *Hernandez*, *Elton*, and *Garnett*. The assumption that unchaste children are not harmed by sexual abuse would be put to use by these jurors in calculating the acceptable level of risk, as would, presumably, the assumption that the victim bore the primary moral responsibility for what happened. In addition, the related assumption that adult men are helpless to resist the seductive influence of adolescent girls would influence the jury's exercise of its second distinct function in negligence and recklessness cases: making the normative determination whether the defendant deserves condemnation.[131]

B. WHY PER SE RULES DO NOT WORK

Ordinary per se rules do not supply the answer to the problem of mens rea for sexual abuse, either. The facts that signal the presence or absence of

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[126] *Cf.* Rabuck v. State, 129 P.3d 861, 866 (Wyo. 2006) (rejecting the defendant's claim that purpose of sexual abuse law was to preserve the "morals" of the victim and concluding that "a more accurate statement of the policy behind the indecent liberties statute is 'to protect children from exploitation'").

[127] KAREN L. KINNEAR, CHILDHOOD SEXUAL ABUSE: A REFERENCE HANDBOOK 18 (2d ed. 2007) (identifying sexual "acting out" as one of the potential effects of childhood sexual abuse).

[128] People v. Hernandez, 393 P.2d 673, 674 n.1 (Cal. 1964) (quoting *Snow*, 252 S.W. at 632); *cf.* Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 18 (1994) (challenging the assumption that a teenage girl's consent to sexual intercourse is "freely chosen"; "[w]hile girls may dress and act like sexy women, they are still girls").

[129] *Hernandez*, 393 P.2d at 674 n.1 (quoting *Snow*, 252 S.W. at 632).

[130] *Cf.* V.F. Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361, 374 (2004) (attributing to John Stuart Mill the insight that "our ideas of self-control . . . are infused with notions of inequality").

[131] MODEL PENAL CODE & COMMENTARIES § 2.02 cmt. at 238, 241 (1985).

a risk that one's partner is underage are too various and too subtle to be captured, even in substantial part, by a per se rule. An inexhaustible variety of contextual facts will play a role in fostering or dispelling concerns about age: Did the defendant meet his partner at the office? Or did he meet her at the mall? Does the partner listen to the latest college-radio, alt-rock sensation? Or does she listen to Miley Cyrus? Contextual variety is only part of the problem, however. In the ordinary case, the actor will rely heavily on very subtle visual and auditory cues in assessing his partner's age. He will rely, for example, on the tone of her skin, and on his innate knowledge that a woman's "eyes will look smaller and her nose larger as she ages."[132] None of these subtle visual and auditory cues is sufficiently regular or measurable to be of use in formulating a per se rule for sexual conduct.

The only practicable way to formulate a per se rule for sexual abuse would be to impose a specific affirmative duty on each partner to verify his or her partner's age before engaging in sexual relations. The law might, for example, require each partner to demand a government-issued identification card from the other. A person who failed to make the required identification check would be guilty of sexual abuse if his or her partner turned out to be underage. And if the partner did not turn out to be underage, the actor would presumably be guilty of an inchoate version of the same offense. No state appears to have taken this approach to sexual abuse, and probably with good reason. This approach seems vulnerable to the same sort of criticism that was directed at the Antioch College Sexual Offense Policy, which required Antioch students to obtain verbal consent before moving to a "higher level of sexual intimacy."[133] If a requirement of verbal consent could be said to "stultify relationships between men and women on the cusp of adulthood,"[134] worse could probably be said of a requirement that each person check his or her partner's identification before sex.[135]

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[132] ROBERT WRIGHT, THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE 65 (1994).

[133] Katharine K. Baker, *Sex, Rape, and Shame*, 8 DEPAUL J. HEALTH CARE L. 179, 204 (2004) (describing Antioch policy and recounting criticism of the policy).

[134] Sarah Crichton, *Sexual Correctness*, NEWSWEEK (N.Y.), Oct. 25, 1993, at 52.

[135] At least one state has adopted a statute that appears to strike a compromise between a per se approach and a pure negligence approach. Alaska, like many other states, makes mistake of age a defense to charges of sexual abuse. ALASKA STAT. § 11.41.445(b) (2006). But the Alaska statute defining the defense does not just require the defendant to prove that he or she "reasonably believed" that the victim had reached the critical age. *Id.* It also requires him or her to prove that he or she "undertook reasonable measures to verify that the child was [the critical] age or older." *Id.*; *see also* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 462-63 (1993)

IV. HYBRID MENS REA: DEFINING THE ACCEPTABLE RISK

A. DEFINING THE ACCEPTABLE RISK: THE BASIC IDEA

In summary, then, neither the jury nor the legislature is in a position to make the justifiability calculation in sexual abuse cases. The jury is not well-equipped to assign a value to the gravity-of-harm factor and, in any event, cannot really be trusted to put aside what it knows about the victim's unchastity. The legislature, on the other hand, cannot assign a value to the probability-of-harm factor in the justifiability calculus, because it cannot know in advance to what degree the relevant facts will be known to a particular defendant. Moreover, the legislature's usual way of getting around this problem—creating a general intent offense whose elements include knowledge of the circumstances that make the conduct unjustifiably risky—does not work in the sexual abuse setting, because the facts that signal the presence or absence of a risk that one's partner is underage are too various and too subtle.

The answer to this problem is to divide the labor between the legislature and the jury. Recall that the relationship among the three factors in the justifiability calculus can be described mathematically: if the probability of the harm occurring is P, the gravity of the harm is G, and the social utility of the conduct is U, then conduct is unjustifiable if $PG > U$ or, to put it slightly differently, if $P > U/G$.[136] This means that the legislature, at least in theory, could calculate the acceptable probability of harm, P, based on its own assessments of the gravity of the harm, G, that results

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(arguing that a defendant who is charged with sexual abuse of a minor, and who raises a mistake-of-age defense, should be required to prove not only that his belief was reasonable, but also that he "made reasonable affirmative efforts to learn the true state of circumstances to comply with the law"). This rule at least has the virtue of suggesting to the jury that the harm associated with sexual abuse is sufficiently grave to require of the actor more than a rough visual reckoning of his partner's age. But the reasonable-measures requirement also suffers from the same basic flaws as the negligence standard, since it requires jurors to calculate the "reasonable" level of care. These flaws appear to have played out in a recent Fairbanks, Alaska prosecution where five adult men, ranging in age from nineteen to thirty, were charged with sexually abusing two girls, ages twelve and thirteen, during a party at the residence of one of the men. *See* Dan Rice, *5 Men Acquitted in Sex Abuse Trial*, FAIRBANKS DAILY NEWS-MINER, Nov. 1, 2003, at A1. Three of the defendants relied, at least in part, on a mistake-of-age defense. *Id.* The jurors appear to have credited this defense, despite the fact that the defendants' only "efforts" to verify the girls' ages consisted of listening to the girls lie. Dan Rice, *Arguments Wrap in Sex Abuse Trial*, FAIRBANKS DAILY NEWS-MINER, Oct. 17, 2003, at B1. When the prosecutor asked one of the men why he had not, for example, "checked the girls' IDs," he answered, "You don't ask for ID in the middle of sex." Dan Rice, *One Defendant Takes the Stand*, FAIRBANKS DAILY NEWS-MINER, Oct. 15, 2003, at B1.

[136] *See supra* text accompanying notes 45-50.

from sexual abuse and of the social utility, *U*, of sexual relations. Then the legislature could delegate to the jury the responsibility for determining whether, given the circumstances known to the defendant, the probability of harm actually exceeded this acceptable level. If, for example, the legislature were to conclude that the gravity of harm, *G*, from sexual abuse was ten times greater than the utility, *U*, of casual sexual intercourse between persons of indeterminate age, then the legislature would adopt a statute requiring the jury merely to decide whether the probability, *P*, of the defendant's partner being underage was greater than 1/10, or 10%.

The basic point here—that the relationship among the three factors in the justifiability calculus makes it possible to define the acceptable probability of harm legislatively—can best be illustrated with an example from a very different context: standards of proof. Standards of proof operate much as standards of conduct do. Just as standards of conduct tell actors when it is permissible to engage in a particular act, standards of proof tell triers of fact when it is permissible to return a particular verdict. In a criminal case, for example, the jury is told not to return a guilty verdict unless it concludes that the Government has proved all of the elements of the crime "beyond a reasonable doubt."[137] This and other standards of proof, moreover, do exactly what the proposed standard of conduct for sexual abuse does: they instruct the actor to refrain from action if the probability that he or she is wrong about a critical fact exceeds a specific, legislatively (or constitutionally) defined probability threshold.[138]

It is easier to understand this feature of standards of proof if one considers the alternative, which was nicely articulated a few years ago by Professor Erik Lillquist.[139] Lillquist argued that "the standard of proof in criminal cases should vary from case to case" with the interests at stake.[140] In a capital case, Lillquist said, "a flexible standard of proof should usually require nearly absolute certainty."[141] On the other hand, Lillquist said, "in a case involving someone accused of terrorism and known to be an outspoken advocate of such actions, the standard of proof will probably be lower than in other cases, because the risk of harm from an erroneous acquittal is higher than in other cases."[142] He also argued that a lower standard was

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[137] *See* Brinegar v. United States, 338 U.S. 160, 174 (1949).

[138] *See, e.g.*, 9TH CIR. CRIM. JURY INSTRUCTIONS 3.5 ("If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty.").

[139] Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 146-47 (2002).

[140] *Id.* at 91 (emphasis omitted).

[141] *Id.*

[142] *Id.*

justified in cases involving petty offenses.[143] What Lillquist was proposing was that standards of proof operate roughly as the negligence and recklessness standards of conduct do. On his view, the probability at which "action" would be deemed justifiable should vary with (1) the social utility of a correct verdict and (2) the gravity of the harm that would accompany an incorrect verdict.[144]

Of course, this is not how standards of proof usually operate. Jurors are not instructed to return a guilty verdict if a guilty verdict is justified. Rather, they are instructed to return a guilty verdict if the Government's proof has satisfied a particular fixed probability threshold, that is, beyond a reasonable doubt.. Moreover, the probability thresholds reflected in standards of proof obviously are based on the very kind of calculation the legislature would conduct in setting the probability threshold for sexual abuse.[145] The "preponderance of the evidence" standard is appropriate in civil actions because the interests of the plaintiff and the defendant are roughly proportional: any benefit conferred on the plaintiff as a result of a damages award will be proportional to the cost inflicted on the defendant by the award.[146] By contrast, the "beyond a reasonable doubt" standard is appropriate in criminal proceedings because the interests of the state and the defendant are not proportional. What the defendant stands to lose from being wrongly imprisoned is vastly disproportionate to the mostly intangible benefits—for instance, deterrence and general reinforcement of societal norms—that society hopes to obtain by imprisoning him or her.[147]

At least in theory, then, it ought to be possible for the legislature to perform the same calculation in defining standards of conduct. It ought to be possible for the legislature to assign values to the gravity-of-harm and

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[143] *Id.*

[144] *Id.*

[145] *See* Addington v. Texas, 441 U.S. 418, 425 (1979); *see also* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1334 (1982) (arguing that the real content of any particular burden of proof—for example, "reasonable suspicion"—is determined by measuring the dispositions of a neutral fact-finder who keeps in mind both the government interest in law enforcement and the suspect's interest in freedom from unreasonable detention—"the practical role of 'reasonable suspicion'").

[146] *In re* Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (explaining that "[i]n a civil suit between two private parties for money damages, . . . we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor").

[147] *See id.* at 372 (explaining that "[i]n a criminal case, . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty").

social utility factors in the justifiability calculus, and to calculate on this basis the acceptable probability of harm or error.[148]

B. THE EXISTING HYBRIDS: KNOWLEDGE AND BELIEF

This possibility is more than theoretical. At least two existing criteria of culpability appear to be based on legislative calculations of the acceptable level of risk. This is true, first, of the "knowingly" standard. Under the Model Penal Code, a person is said to act knowingly with respect to a "result" element if he "is practically certain that his conduct will cause such a result."[149] In effect, the code's definition of *knowingly* requires that the defendant be aware of a very high probability of a bad outcome. Thus, as Professor Peter Low has put it, the code's definition of *knowingly* differs from its definitions of *negligently* and *recklessly* in that "the legislature itself makes the 'objective' judgment."[150] The legislature itself assumes the responsibility for weighing the conduct's social utility and the gravity of the potential harm, and for determining, on the basis of this weighing, at what specific level of probability of harm the defendant's conduct is culpable. The jury is responsible only for deciding whether the defendant was aware of a risk of this level.

The legislative calculation underlying the adoption of a knowingly standard is most readily apparent in those statutes where the knowing mental state defines the boundary between lawful and unlawful conduct.[151] In these statutes, the knowingly standard can plausibly be said to reflect a legislative determination that the interests at stake justify setting the level of acceptable risk very high. In other words, it can plausibly be said to reflect a legislative determination that the social utility of the conduct is high in relation to the gravity of the potential harm.

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[148] *See* Simons, *supra* note 85, at 287 (commenting that "[t]he law could . . . explicitly develop a range of standards: creating a trivial risk of trivial harm requires only slight justification; creating a more significant risk of a trivial harm requires a more weighty justification; creating a significant risk of more significant harm requires an even more weighty justification; and so forth").

[149] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(b)(ii) (1985).

[150] Low, *supra* note 30, at 552; *see also* Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601, 644 (explaining that knowledge is "not gauged according to the normative expectations of others").

[151] Often the knowingly standard is used, not to define the boundary between innocent and unlawful conduct, but rather to define the boundary between one offense and another, more serious offense. This is the case, for example, in the Model Penal Code's homicide provisions, which use the knowingly standard (along with other standards) to separate murder from manslaughter. MODEL PENAL CODE & COMMENTARIES § 210.2.

Consider, for example, the federal statute prohibiting so-called partial-birth abortion.[152] A partial-birth abortion, as defined by the statute, is one in which the doctor partly delivers an intact, living fetus before dispatching it.[153] In *Gonzales v. Carhart*,[154] the Supreme Court interpreted this statute to impose a culpability standard of knowingly with respect to the critical fact.[155] That is, a doctor can be convicted under the statute only if, at the very least, he or she was aware that the delivery of an intact, living fetus was "practically certain to follow" from her conduct.[156] The statute, then, establishes a very high, fixed probability threshold at which the risk of an intact delivery is unacceptable.

This high threshold is justified by the interests at stake, as the Court recognized.[157] The usual second-trimester abortion procedure—intact dilation and extraction—unavoidably will result in the partial delivery of a living fetus in "a significant number of cases."[158] Thus, if the risk threshold were set any lower—or were set on a case-by-case basis by jurors charged with balancing the relevant interests—doctors might be discouraged from performing a standard abortion procedure that has very substantial social utility. What is more, the "harm" that is the target of the partial-birth abortion statute is intangible at best.[159] Thus, it makes sense that Congress would have concluded that the social utility of an abortion outweighs the potential harm except in those cases where the doctor is practically certain that his or her conduct will result in a partial-birth abortion.[160]

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[152] 18 U.S.C. § 1531 (2006).

[153] *Id.*

[154] 127 S. Ct. 1610 (2007).

[155] *Id.* at 1632.

[156] *Id.*

[157] *Id.* at 1631.

[158] *Id.*; *see also* Planned Parenthood v. Doyle, 162 F.3d 463, 469 (7th Cir. 1998) (striking down Wisconsin statute prohibiting partial-birth abortion in part because that statute would make doctors afraid to perform permissible abortion procedures).

[159] *Carhart*, 127 S. Ct. at 1633-34 (describing the interest the statute is designed to protect); *see also* Eric A. Johnson, *Habit and Discernment in Abortion Practice: The Partial-Birth Abortion Ban Act of 2003 as Morals Legislation*, 36 RUTGERS L.J. 549, 587 (2005) (arguing that prohibition on partial-birth abortion is justified (if at all) only by society's interest in cultivating in physicians a general habit of refraining from violence to persons).

[160] Other cases, too, suggest that legislatures choose knowingly as the culpability baseline in just those situations where the gravity of the harm is relatively slight or the statute threatens to affect conduct that has substantial social utility. *See* Lee v. Smith, 772 P.2d 82, 87 (Colo. 1989) (interpreting drug-paraphernalia statute to require "aware[ness] that the paraphernalia 'is practically certain' to be put to an illegal use in connection with a controlled substance"); Town Tobacconist v. Kimmelman, 462 A.2d 573, 587 (N.J. 1983) (interpreting drug-paraphernalia statute to require proof that the defendant was "practically certain" that the item would used for illegal purposes"); Gregory W. O'Reilly, *Illinois'*

The same sort of calculus is at work in statutes where the legislature uses "belief" to define the culpability baseline. The Model Penal Code's self-defense provisions, for example, provide that a person is justified in using deadly force only if she believes that deadly force is immediately necessary to protect herself against death, serious bodily harm, kidnapping, or rape.[161] This requirement of actual belief makes the defense unavailable to a person who merely *suspects* that deadly force will prove necessary to protect herself, or who merely has a *hunch* that deadly force will prove necessary. In other words, it makes the defense unavailable to a person who estimates the probability that deadly force will prove necessary at something less than 50%.[162] After all, a person who estimates the likelihood of a fact's existence at less than 50% cannot really be said to *believe* in that fact.[163]

Of course, a requirement of belief is rarely used in isolation. More often, legislatures define the culpability threshold using the more complex notion of "reasonable belief." This is true, for example, of most state statutes defining the defense of self-defense, which make the defense available only to actors who "reasonably believe" that force is necessary.[164] It also is true of the Model Penal Code provision defining the mistake-of-age defense to child sexual abuse.[165] This provision affords the defense to anyone who reasonably believes that his or her partner has reached the critical age.[166] In these provisions, the effect of the reasonable belief standard is to impose liability if either (1) the defendant did not believe in the existence of the critical fact, that is, did not assign a probability greater than 50% to its existence or (2) a "reasonable person" who knew just what the defendant knew would not have believed in the existence of the critical

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Stalking Statute: Taking Unsteady Aim at Preventing Attacks, 26 J. MARSHALL L. REV. 821, 829-30 (1993) (explaining that Illinois's statute defining the offense of felony stalking, 720 ILL. COMP. STAT. 5/12-7.3(a)(2) (2006 & Supp. 2007), requires the Government to prove that the defendant was "practically certain" that his public movements would place the victim in fear of injury).

[161] MODEL PENAL CODE & COMMENTARIES § 3.04(1), (2)(b) (1985).

[162] *See* Johnson, *supra* note 6, at 509-11. This relationship between belief and probability is nicely illustrated by cases applying the "preponderance of the evidence" standard. *See, e.g.*, Sargent v. Mass. Accident Co., 29 N.E.2d 825, 827 (Mass. 1940) (explaining that a proposition "is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind . . . of the tribunal not withstanding any doubts that may linger there").

[163] Simons, *supra* note 15, at 187 (arguing that it would be incoherent to suppose both that a person believes *X* and is aware of a probability greater than fifty percent that not *X*).

[164] 2 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4(c), at 147 (2d ed. 2003).

[165] MODEL PENAL CODE & COMMENTARIES § 213.6(1).

[166] *Id.*

fact, that is, would not have assigned a probability greater than 50% to its existence.

It is tempting to suppose that with the addition of this reasonable person component, the belief standard devolves into a simple negligence standard. This is what the authors of the Model Penal Code commentary appear to have assumed, for example. In the commentary on the section defining the mistake-of-age defense, they said that the "reasonable belief" defense in this section "in effect . . . imposes a culpability standard of negligence."[167] But this assumption is wrong. Even with the addition of a reasonable person component, the belief standard retains its hybrid character; it continues to define a fixed probability threshold at which the risk of a bad outcome is unjustifiable.[168]

Here is why. Under a negligence standard, fault can arise at either of two stages of the decision-making process: (1) the information-gathering, probability-estimating stage or (2) the information-*using* stage, at which the defendant evaluates the various courses of action on the basis of his or her probability estimates.[169] To illustrate, imagine a man who is considering engaging in sexual relations with a young woman. After meeting the young woman at a party and returning with her to his apartment, he estimates at 70% the probability that she has reached the critical age of, say, sixteen. On the basis of this probability estimate, he decides to engage in sexual intercourse with her. Under a negligence standard, a jury plausibly could find fault in the process by which he arrived at the 70% estimate; perhaps he ignored some clear sign that his partner was underage, or perhaps he ignored an obvious avenue for obtaining additional information. But the jury *also* could find fault in his decision to *act* on this probability estimate, however carefully formulated. The jury could conclude that a 30% chance of being wrong is just too high in this setting, given the interests at stake.

The reasonable belief standard takes the second of these two questions out of the jury's hands. In common parlance, the reasonableness of a belief depends on whether the actor exercised due care in forming the belief.[170] But the reasonableness of a belief does not depend on whether the belief is sufficient in *degree of certainty* to justify action under the circumstances in

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[167] *Id.* § 213.6 cmt. 2 at 413.

[168] *See* Johnson, *supra* note 6, at 518-21.

[169] *See* ELLERY EELLS, RATIONAL DECISION AND CAUSALITY 5 (1982) (observing that "decision making involves two processes: (i) obtaining a body of relevant information (the process of information-acquisition) and (ii) evaluating the available courses of action in terms of the information at hand (the process of deliberation, or of information-use)").

[170] Johnson, *supra* note 6, at 516-18; *see also* MODEL PENAL CODE & COMMENTARIES § 1.13(16) (providing that "'reasonably believes' or 'reasonable belief' designates a belief which the actor is not reckless or negligent in holding").

which the actor finds himself or herself.[171] If, for example, a friend who had just decided to walk around a glacial crevasse instead of jumping over it were to tell us that she nevertheless believed that she could have jumped the crevasse if she'd tried, we would probably not be inclined to characterize her belief as unreasonable just because it was insufficient in degree of certainty to justify action under the circumstances in which she found herself. Just so for the defendant in our hypothetical case: his belief that his partner had reached the critical age was not unreasonable merely by virtue of the fact that it was insufficient in degree of certainty to justify action under the circumstances in which he found himself. This insufficiency makes his *actions* unreasonable, not his beliefs.[172]

What this means, in substance, is that a reasonable belief standard—like an unadorned belief standard—represents an antecedent legislative determination that the risk posed by the defendant's conduct is unjustifiable per se if the probability of a bad outcome exceeds 50%. This legislative determination operates to exculpate the defendant if (1) the defendant assigned a probability less than 50% to the chance of a bad outcome *and* (2) a reasonable person who knew only what the defendant knew would have assigned a probability less than 50% to the chance of a bad outcome. And so this legislative determination relieves the jury of the responsibility of deciding at what level of probability the actor would have been justified in acting.

This account of the reasonable belief standard probably explains why state legislatures so frequently have adopted this standard as the culpability baseline for self-defense.[173] The costs of mistakenly using force in self-defense will always be roughly proportional to the costs of mistakenly *refraining* from the use of force in self-defense. In terms of costs and benefits, an injury inflicted on an innocent aggressor is no worse and no better than an injury to an innocent defender. Given this rough proportionality—between (1) the gravity of the harm that the actor hopes to avoid by his or her conduct and (2) the gravity of the harm of that would result from a mistake—it makes sense to conclude, as the drafters of the Model Penal Code evidently did, that the use of force will always be justifiable at a probability of 50% or so. That is, the use of force will always be justifiable if the actor estimated at greater than 50% the likelihood that force was necessary; if, in common parlance, the actor "believed" that force was necessary.

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[171] Johnson, *supra* note 6, at 518-21.

[172] Brian Carr, *Knowledge and Its Risks*, 82 PROC. ARISTOTELIAN SOC'Y 115, 124 (1982) (acknowledging the existence of a distinction between rational action and rational belief).

[173] *See* LAFAVE, *supra* note 164, § 10.4(c), at 147.

C. WHY SEXUAL ABUSE LENDS ITSELF TO LEGISLATIVE DEFINITION OF THE ACCEPTABLE RISK

Some crimes would not lend themselves to antecedent legislative calculation of the acceptable risk. This is true, for example, of reckless manslaughter and criminally negligent homicide. The statutes that define these offenses apply to a wide array of different kinds of conduct, each of which carries its own costs and benefits. For this reason, it would not be possible to replace the prohibition on criminally negligent homicide with a prohibition on conduct that creates, for example, a 5% risk of causing another person's death.[174]

In contrast to crimes like criminally negligent homicide, sexual abuse plainly lends itself to a legislative definition of the acceptable risk. The legislature is perfectly capable of assigning a value to the social utility of sexual conduct in advance, since this value will vary only within a narrow range. The only real benefits of sexual intercourse lie in the pleasure and intimacy it affords to the participants. Sexual intercourse does not carry substantial educational benefits for the participants,[175] nor does it carry substantial medical benefits for them,[176] despite occasional arguments to the contrary by criminal defendants. Where sexual abuse is concerned, then, it is not beyond the legislature's competence to assign a uniform social utility value that can fairly be applied to every case in which the defendant is charged with sexual abuse.[177]

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[174] *See* Simons, *supra* note 85, at 320 (arguing that "[o]ne cannot, for example, simply define negligent homicide as a killing in which the actor should have realized that he created a 2%, or 5%, risk of unjustifiably causing a death").

[175] *See, e.g.*, United States v. Chee, 86 F. App'x 400, 402 (10th Cir. 2004) (recounting defendant's testimony at his trial for sexual abuse of six-year-old girl that "he did these things . . . not for any sexual gratification but because he wanted to teach her about the birds and the bees"); State v. Stricklin, No. M2005-02911-CCA-R3-CD, 2007 WL 1028535, at *4 (Tenn. Crim. App. Apr. 5, 2007) (recounting defendant's testimony at his trial for rape and aggravated sexual battery that he had touched the two minor victims on their breasts and genitals "as part of his teaching the victims about sexual matters").

[176] *See* Boro v. Superior Court, 210 Cal. Rptr. 122, 123 (Cal. Ct. App. 1985) (reversing rape conviction of defendant who had persuaded victim to consent to sexual intercourse by telling her falsely that sexual intercourse with him was necessary to cure her of a potentially fatal disease).

[177] *Cf.* Commonwealth v. Dunne, 474 N.E.2d 538, 545 (Mass. 1985) (arguing that "[the person] who contemplates intercourse with a partner of indeterminate age can resolve doubts in favor of compliance with the law without sacrificing behavior that society considers desirable" (quoting *Recent Case*, 78 HARV. L. REV. 1257, 1259 (1965)); Wasserstrom, *supra* note 18, at 737 n.24 (observing that there do not "appear to be any very serious undesirable consequences in discouraging persons from having intercourse with females who may be around the age of sixteen")).

The same thing is true, moreover, of the other factor that plays a role in the calculation of the acceptable risk—the gravity of the potential harm to the victim. The effects of sexual abuse vary from victim to victim,[178] but it is not the case-specific effects of the abuse that matter. This factor in the justifiability calculus is, like the others, considered from an *ex ante* perspective, rather than an *ex post* perspective.[179] Accordingly, the relevant question is not what the effects of the sexual abuse on any specific victim happen to have been, but rather what sort of harm can be expected to accompany sexual abuse of the kind perpetrated by the defendant. The legislature is in a better position than a trial jury to answer this question. A jury will not, and probably should not, hear general testimony at trial about the effects of sexual abuse. Only the legislature, "with its paraphernalia of committee and commission," really has the ability to hear the testimony and make the findings necessary for the required valuation.[180]

In sexual abuse cases, then, the legislature is in a better position than the jury to assign appropriate values to the social utility of defendants' conduct and the gravity of the potential harm. It is only the last of the three factors in the justifiability calculation—the degree of probability of harm that was or should have been apparent to the defendant under the circumstances—that lies beyond the legislature's ken. This is why the legislature, under a hybrid standard, would delegate to the jury the responsibility for making this determination. The jury would have the opportunity to view and listen to the victim, as well as to hear evidence of the contextual facts that were known to the defendant.

D. CALCULATING THE ACCEPTABLE RISK

Neither of the existing hybrids—neither the knowingly standard nor the reasonable belief standard—would likely be of any use to a state legislature in defining the acceptable risk in sexual abuse cases. The knowingly standard establishes a very high probability threshold under which the risk is justifiable unless the defendant's conduct is "practically certain" to cause the proscribed social harm.[181] This standard is appropriate

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[178] KINNEAR, *supra* note 127, at 35 (noting that "the effects of child sexual abuse are characterized by great variation and range" (quoting ELIZABETH HOLLENBERG & CYNTHIA RAGAN, CHILD SEXUAL ABUSE: SELECTED PROJECTS 179 (1991))).

[179] *See* Peter Z. Grossman, Reed W. Cearley & Daniel H. Cole, *Uncertainty, Insurance and the Learned Hand Formula*, 5 LAW, PROBABILITY & RISK 1, 2 (2006) (positing that Learned Hand formula would require the fact-finder to assess the magnitude of the expected harm from an *ex ante* perspective).

[180] Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 508 (1908).

[181] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(b) (1985).

as a culpability baseline where the utility factor in the justifiability calculus is very high in relation to the gravity-of-harm factor, as it is for, say, a medical procedure like partial-birth abortion. The other hybrid standard—belief or reasonable belief—also establishes a relatively high probability threshold. In self-defense, for example, the effect of this standard is to make the defense unavailable to an actor who is aware of a probability greater than 50% that his or her use of force is unnecessary. This threshold is appropriate in self-defense because the utility and gravity-of-harm factors are roughly in equipoise; the defender's life is worth as much as the aggressor's.[182]

The acceptable risk of sexual imposition is probably far lower, given the limited social utility of sexual intercourse—at least in the kinds of settings where mistakes of age occur—and given, too, the gravity of the harm that accompanies sexual abuse. Mistakes of age rarely will occur in settings where the sexual conduct "is but one element in a personal bond that is more enduring."[183] After all, the development of an enduring personal bond is likely to provide each partner with ample opportunity for learning the other's age.[184] In the relevant class of cases, then, the benefit at stake is limited to the momentary gratification of the sex act itself. Accordingly, legislatures charged with defining the acceptable level of risk in sexual abuse are likely to conclude, as courts and commentators have, that "[the person] who contemplates intercourse with a partner of indeterminate age can resolve doubts in favor of compliance with the law without sacrificing behavior that society considers desirable."[185]

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[182] Unfortunately, legislatures and courts often have used the reasonable belief standard in defining the acceptable risk of sexual imposition, despite its obvious inaptness. *See, e.g.*, State v. Guest, 583 P.2d 836, 839 (Alaska 1978); People v. Hernandez, 393 P.2d 673, 676 (Cal. 1964); *see also* ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS: IPI CRIMINAL § 11.64 (4th ed. 2000) (instructing jury that it is a defense to statutory rape that the defendant reasonably believed the victim had reached the critical age); MODEL PENAL CODE & COMMENTARIES § 213.6(1) (making it a defense to charge of statutory rape that the defendant "reasonably believed the child to be above the critical age").

[183] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[184] *Cf.* Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 662 (2005) (arguing that a statute criminalizing unprotected sex between first-time partners would not affect the privacy interests protected by *Lawrence*, 539 U.S. 558, because "[i]t does not impose any kind of regulation on an on-going intimate relationship . . . . The sexual liberties that are constitutionally protected from state interference . . . are simply not implicated by a statute that only affects first-time sexual encounters").

[185] Commonwealth v. Dunne, 474 N.E.2d 538, 545 (Mass. 1985) (quoting *Recent Case*, *supra* note 177, at 1259); Wasserstrom, *supra* note 18, at 737 n.24 (observing that there do not "appear to be any very serious undesirable consequences in discouraging persons from having intercourse with females who may be around the age of sixteen").

The other side of the balance is the harm that accompanies sexual abuse. The adverse short- and long-term effects of sexual abuse on the victim are fairly well-documented at this point—hostility, anxiety, low self-esteem, vulnerability to re-victimization, feelings of isolation, sexual maladjustment, and substance abuse.[186] But these short- and long-term effects are also largely beside the point. If scientists were to demonstrate that victims of, say, aggravated battery or armed robbery were unlikely to suffer any measurable long-term harm from the offense—or even that the victims of these crimes were likely to be happier in the long run than persons who were not victimized—nobody would be inclined on this basis to legalize aggravated battery or armed robbery.[187] This holds true for sexual abuse as well. Most sexual abuse statutes are designed to identify the point at which the youth of the victim and the discrepancy in age between the victim and the perpetrator combine to make the sex coercive.[188] Coercion in the disposition of sexual favors would appear to be a cognizable harm quite apart from the short- and long-term effects on the victim.

This Article does not attempt to resolve this question definitively. What matters, for our purposes, is only this: judicial and legislative decisions imposing strict liability for sexual abuse appear to be grounded, at least in part, on the not-implausible view that the harm wrought by sexual abuse is disproportionate to the social utility of casual sex with teenagers.[189] So if we are to construct a viable alternative to strict liability—if, that is, we are to construct a mens rea requirement that will prove satisfactory to courts

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[186] *See* DIANE DEPANFILIS, LITERATURE REVIEW OF SEXUAL ABUSE 10-12 (1986); KINNEAR, *supra* note 127, at 14-20; Angela Browne & David Finkelhor, *Initial and Long-Term Effects: A Review of the Research, in* A SOURCEBOOK ON CHILD SEXUAL ABUSE 143 (David Finkelhor ed., 1986); *see also* RICHARD A. POSNER, SEX AND REASON 396-98 (1992) (arguing that, despite methodological difficulties, "the heavy preponderance of studies which find that the sexual abuse of children leaves deep and lasting scars makes a cumulatively convincing case").

[187] *See* DANIEL GILBERT, STUMBLING ON HAPPINESS 152-53 (2007) (summarizing recent "studies of those who survive major traumas suggest[ing] that the vast majority do quite well, and that a significant portion claim that their lives were *enhanced* by the experience").

[188] *See* Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 810 (2001) (explaining that the "underlying theory" behind sexual abuse statutes that assign significance to the discrepancy in age between victim and perpetrator is "that a young person is more vulnerable to coercion when their sexual partner is considerably older"); Elisa Poncz, *Rethinking Child Advocacy After* Roper v. Simmons*: "Kids Are Just Different" and "Kids Are Like Adults" Advocacy Strategies*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 273, 296 (2008) ("The basic legal theory behind statutory rape is . . . that youths cannot give the appropriate consent due to the inherent power difference that comes from the age difference.").

[189] *See Dunne*, 474 N.E.2d at 545.

and legislatures that currently impose strict liability—then we must calculate the acceptable risk on the basis of the same assumptions. This means setting the acceptable risk low. If, for example, the gravity-of-harm factor in the justifiability calculus were to be assigned a value ten times greater than the social utility factor, then the acceptable probability of one's partner being underage would be just 10%.

Of course, using a numerical probability figure in instructing the jury would probably not be advisable. A better alternative would be to instruct the jury using an ordinary-language equivalent. If, for example, the legislature were to determine that the acceptable level of probability was 10%, then the jury might be instructed that the Government was required to prove that the defendant was or should have been aware of a "realistic possibility" that the victim was underage. This formula is of a piece with the "practical certainty" formula that is used to define the acceptable risk where knowingly is the mens rea.[190]

It also is of a piece with formulae used by legislatures outside the criminal setting to define a low, fixed threshold of acceptable risk. For example, some state statutes require public officials to refrain from accepting a campaign contribution if there is any "substantial possibility" that it is being offered to influence the official.[191] Similar threshold-defining formulae also are sometimes used in laws protecting the environment and public health.[192] For example, the Food Quality

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[190] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(b) (1985).

[191] *See* GA. CODE ANN. § 45-10-3(7) (West 2003) (providing that a member of a state board or commission shall "[n]ever accept any economic opportunity under circumstances where he knows or should know that there is a substantial possibility that the opportunity is being afforded him with intent to influence his conduct in the performance of his official duties"); 5 ILL. COMP. STAT. § 420/3-102 (2006) (prohibiting state legislator from accepting an economic opportunity "where he knows or should know that there is a substantial possibility that the opportunity is being afforded him with intent to influence his conduct in the performance of his official duties"); ME. REV. STAT. ANN. tit. 1, § 1014(1)(E) (1989) (defining "conflict of interest" to include any situation "where the Legislator knows that there is a substantial possibility that an opportunity for employment is being afforded him or a member of his immediate family with intent to influence his conduct in the performance of his official duties").

[192] *See* Gregory C. Keating, *Pricelessness and Life: An Essay for Guido Calabresi*, 64 MD. L. REV. 159, 180-81 (2005). The "safety-based" approach to risk regulation establishes a fixed, sometimes numerical, level of permissible risk. ROBERT E. KEETON ET AL., TORT AND ACCIDENT LAW: CASES AND MATERIALS 1237 (4th ed. 2004). Under this approach, the regulator is responsible solely for assessing the probability that harm will come to pass, not for deciding at what level the risk is "feasible" or "cost-justified." *Id.* at 1237; *see also* Alon Rosenthal et al., *Legislating Acceptable Cancer Risk from Exposure to Toxic Chemicals*, 19 ECOLOGY L.Q. 269, 275 (1992) (explaining that legislators often adopt "mandated numerical risk levels" as a way to "better guarantee that an appropriate degree of protection is provided to the public").

Protection Act of 1996[193] effectively requires the Environmental Protection Agency to reduce pesticide chemical residues on food to the point where "there is a *reasonable certainty* that no harm will result from aggregate exposure to the pesticide chemical residue."[194] In this setting, as in other environmental settings, defining legislatively the acceptable level of risk "better guarantee[s] that an appropriate degree of protection is provided to the public."[195] Just so in sexual abuse.

Finally, the realistic possibility formula is consistent with formulae used by the Model Penal Code to define secondary mental states for some offenses. The Code section defining the offense of "misapplication of entrusted property," for example, is satisfied when a fiduciary disposes of property entrusted to him "in a manner which he knows is unlawful and involves a substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted."[196] Thus, the offense has two mental elements: the actor must be aware that his or her conduct is unlawful and must, in addition, be aware "of a substantial risk of loss or detriment to the beneficial owner of the property."[197] This second mental element, which the Code commentary describes as "the gravamen of

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[193] 21 U.S.C § 346a(b)(2) (2006).

[194] The Act provides that the Administrator of the Environmental Protection Agency (EPA), as a general rule, may establish or leave in place a tolerance for pesticide residue on food only if the tolerance is "safe." *Id.* § 346a(b)(2). A tolerance will qualify as "safe" only if "the Administrator has determined that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue." *Id.* § 346a(b)(2)(A)(ii). The 1996 Act was a departure from the cost-justified approach to pesticide residues that had prevailed until 1996. Until 1996, the Administrator establishing tolerances for pesticide residue was required to consider, among other things, "the necessity for production of an adequate, wholesome, and economical food supply" and the "usefulness" of the pesticide. *See* former 21 U.S.C. § 346a(b)(1) (amended 1996).

[195] Rosenthal et al., *supra* note 192, at 275. This approach to risk regulation is also illustrated by aspects of the 1990 amendments to the Clean Air Act. *See* Pub. L. No. 101-549, 104 Stat. 2399 (1990). The 1990 amendments' approach to air pollution was primarily technology-based; they required application of the best available technology for the reduction of emissions. Rosenthal et al., *supra* note 192, at 324. But the amendments also required the Administrator of the EPA to take additional action if, after six years, technology-based regulations had failed adequately to reduce the risk from known, probable, or possible human carcinogens. 42 U.S.C. § 7412(f) (2000); 1 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 2.03[15][c] (2008); Keating, *supra* note 192, at 182. Specifically, the administrator would be required to take action if the existing regulations had not "reduce[d] lifetime excess cancer risks to the individual most exposed to emissions . . . to less than one in one million." 42 U.S.C. § 7412(f)(2)(A). This aspect of the amendments, then, establishes a fixed, numerically-defined level of acceptable risk from carcinogens. The acceptable level of risk is one in one million, regardless of cost or feasibility.

[196] MODEL PENAL CODE & COMMENTARIES § 224.13 (1985).

[197] *Id.* § 224.13 cmt. at 361.

the offense,"[198] appears to define an invariant, low risk threshold, just as the realistic possibility standard does.[199]

Nor is this the only setting where the Model Penal Code appears to contemplate that juries will apply a low, invariant threshold of risk. Recall that the Model Penal Code requires that some culpable mental state be proved with respect to every material element of an offense, regardless of whether the element makes the conduct criminal or just makes it a more serious offense.[200] This means that the Government sometimes will be required to prove that the defendant was negligent or reckless with regard to an aggravating circumstance, such as the fact that the value of the property stolen was more than $1,000,[201] or the fact that the drug sale occurred within 1,000 feet of a public school.[202] In this setting, however, it does not make sense to talk about the "justifiability" of the risk. Theft is unjustifiable quite apart from the value of the property, and drug-dealing is unjustifiable quite apart from whether it occurs within 1,000 feet of a public school. Accordingly, when the jury sets out to determine whether the defendant was negligent or reckless with regard to one of these aggravating facts, the question it addresses will just be whether the defendant was or should have been aware of a "substantial risk."[203] This substantial risk requirement presumably operates just as the requirement of a realistic possibility would.[204]

V. THE SEPARATE QUESTION OF CULPABILITY

The mens rea I have proposed—which would require proof that the defendant was or should have been aware of a realistic possibility that his partner was underage—does more than define the acceptable risk. It also

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[198] *Id.* at 362.

[199] *See* Fredette v. City of Long Beach, 231 Cal. Rptr. 598, 602 n.5 (Cal. Ct. App. 1986) (interpreting statutory reference to "substantial risk" to reflect legislative concern "'not with the extent of the injury, but with the *probability* that an injury would occur'"); Robinson, *supra* note 32, at 375 (arguing that this formulation "leave[s] out of the prohibited-risk analysis consideration of most of the factors that the Code drafters themselves seem to agree are relevant [to justifiability]" and "might be taken to focus only on the degree of the risk"); Simons, *supra* note 15, at 189-92 (arguing that the better view is that the "substantiality" of a risk depends exclusively on the probability of a bad outcome occurring).

[200] MODEL PENAL CODE & COMMENTARIES § 2.02(1).

[201] *Id.* § 223.1 cmt. at 144 (explaining that "the culpability provisions of Section 2.02 are fully applicable to the values used to differentiate the degrees of theft").

[202] *See* State v. Rutley, 123 P.3d 334, 337-38 (Or. Ct. App. 2005) (concluding that proof of some culpable mental state is necessary with respect to the statutory requirement that drug sales occur within 1,000 feet of a school), *rev'd*, 171 P.3d 361 (Or. 2007).

[203] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(c), (d).

[204] *See* sources cited *supra* note 35.

defines the circumstances under which a defendant will be deemed culpable for creating an unacceptable risk. The question of culpability, though, is distinct from the question of justifiability. In this Part, I will try to answer this question by showing how the new mens rea is related, first, to the culpability component of recklessness and criminal negligence and, second, to the knowingly and reasonable belief standards.

A. CULPABILITY IN RECKLESSNESS AND NEGLIGENCE

I said before that the idea of unjustifiable risk lies at the core of the recklessness and criminal negligence standards.[205] But the baseline requirement of unjustifiability does not, of course, exhaust the content of these standards. As the Model Penal Code commentary explains, the assessment of the risk is just the first of the jury's "two distinct functions" in applying the definitions of recklessness and criminal negligence.[206] Both standards require the jury to perform a second function too. The recklessness standard requires the jury "to make [a] culpability judgment in terms of whether the defendant's conscious disregard of the risk justifies condemnation."[207] The negligence standard likewise requires the jury to make a separate "culpability judgment, this time in terms of whether the failure of the defendant to perceive the risk justifies condemnation."[208]

It may be unclear at first what this second step adds to the analysis, at least with respect to negligence. After all, the jury takes the defendant's perspective into account when it performs the basic justifiability calculation; the justifiability of the risk, again, is calculated on the basis of the "circumstances known to [the defendant]."[209] Moreover, the basic justifiability calculation makes allowances for actors whose conduct falls close to the edge. By requiring a "gross deviation" from the standard of care, the negligence and recklessness standards seem to build a margin of latitude into the justifiability calculation itself.[210] Why is anything more required for the imposition of criminal liability?

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[205] *See supra* text accompanying notes 21-24.

[206] MODEL PENAL CODE & COMMENTARIES § 2.02 cmt. at 238, 241.

[207] *Id.* at 238.

[208] *Id.* at 241.

[209] *Id.* § 2.02(2)(c), (d); *see also* Simons, *supra* note 85, at 299 (acknowledging that "the *ex ante* perspective that is normally a necessary feature of the tort negligence judgment itself presupposes a certain kind of 'cognitive' [negligence]").

[210] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(c) (defining "recklessly" to require "a gross deviation from the standard of care that a law-abiding person would observe"); § 2.02(2)(d) (defining "negligently" to require "a gross deviation from the standard of care that a reasonable person would observe"); *see also* Dressler, *supra* note 21, at 958 (arguing that recklessness "exists when one takes a substantially unjustified—or, if you wish, grossly unjustified—risk").

The answer is that culpability cannot be assigned merely on the basis of the defendant's awareness of the circumstances that make the conduct unjustifiably risky. To illustrate, suppose that Bill engages in sexual intercourse with Violet after meeting her at a fraternity party. At the party, Bill and Violet have a lengthy and wide-ranging conversation during which Bill learns (1) that Violet's mother died tragically at the age of thirty on September 11, 2001, in the attack on the World Trade Center, (2) that Violet's sister, Katherine, was born when their mother was just fifteen, and (3) that Violet is ten years younger than her sister Katherine. On the basis of the circumstances known to Bill before he had sex with Violet, the jury would have to conclude that the probability of Violet being underage was 100%. (Violet's sister was born around 1986 and so Violet herself was born around 1996, which makes her about thirteen years old.) This 100% risk of Violet being underage is not only unjustifiable, but also grossly unjustifiable. At the same time, though, if these were the only facts available to Bill—if, for instance, Bill is visually impaired and so could not see Violet—a question remains as to whether Bill's actions deserve condemnation. In the words of the Model Penal Code commentary, Bill's unjustifiable conduct might really be attributable to an innocent "intellectual failure to grasp" the significance of known facts, rather than to a culpable "insensitivity to the interests of others."[211]

The jury's second distinct function in its application of the negligence and recklessness standards is to make this determination whether the defendant's actions deserve condemnation. Even after the jury determines on the basis of facts known to the defendant that the risk posed by his or her conduct was unjustifiable, the jury still must determine whether the conduct was attributable to an innocent intellectual failure to grasp the significance of known facts or instead was attributable to a culpable insensitivity to the interests of others.[212] This second determination is necessary because sometimes even purely deductive inferences from known facts—like those that Bill failed to draw—are less than obvious, and so sometimes the defendant's failure to realize that his or her conduct is unjustifiable is less than culpable. This is obviously true of negligence, where the defendant's fault lies in failing to perceive the risk. But it is also true of recklessness, where the jury makes a threshold determination that the defendant was actually aware of some level of risk.[213] Even a defendant who is aware of *some* level of risk might be less than culpable in failing to realize that the

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[211] MODEL PENAL CODE & COMMENTARIES § 2.02 cmt. at 237.

[212] *Id.*

[213] *Id.* at 236 (identifying awareness of risk as component of recklessness); *see also* Simons, *supra* note 85, at 290 (noting that "the *only* difference between negligence and recklessness under the Code is this difference in awareness").

probability of harm is high enough to make his or her conduct unjustifiable.[214]

B. CULPABILITY IN HYBRID FORMS: AWARENESS OF RISK EXCEEDING A LEGISLATIVELY DEFINED THRESHOLD

Hybrid criteria of culpability—like the knowingly and reasonable belief criteria, and like my proposed realistic possibility criterion—take a different approach to the question of culpability. These hybrid criteria provide two separate avenues for assigning culpability. First, a defendant is culpable per se if he or she actually is aware that the probability of harm exceeds the legislatively defined justifiability threshold.[215] Second, a defendant is culpable if a jury later decides that he or she deserves condemnation for failing to recognize that the risk exceeded this threshold.[216] This subpart addresses the first of these two avenues for assigning culpability.

Both the knowingly and the reasonable belief standards are satisfied by proof that the defendant actually was aware of a probability of harm exceeding the legislatively defined threshold. The knowingly standard is satisfied where the actor actually is "aware that it is practically certain that his conduct will cause [the proscribed] result."[217] And the reasonable belief standard is satisfied where the actor actually is aware of a risk that exceeds the fixed probability threshold of roughly 50%. In a self-defense case, for example, if the defendant is aware of a probability greater than 50% that force is unnecessary, then he or she cannot believe that force is necessary.[218] Bear in mind, this actual awareness determination differs from the base determination of unjustifiability. The base determination of unjustifiability requires only that the defendant be aware of circumstances from which a certain probability of harm may logically be inferred. Actual awareness requires additionally that the defendant actually has drawn the inference and is thus aware of a probability of harm exceeding the legislatively defined threshold.

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[214] *See* Batey, *supra* note 35, at 405-06 (observing that an actor's awareness of risk satisfies the requirement of conscious disregard, even where an actor believes that probability of harm is not sufficiently high to make conduct unjustifiable); Simons, *supra* note 15, at 189 (arguing that "it is fairly clear from the [Model Penal Code] commentary (though not from the text) that the defendant needs to be aware only that the risk is substantial, not that it is unjustifiable").

[215] *See infra* text accompanying notes 217-18.

[216] *See infra* text accompanying notes 224-25.

[217] MODEL PENAL CODE & COMMENTARIES § 2.02(2)(b)(ii).

[218] *See* Johnson, *supra* note 6, at 517-18.

This is a powerful guarantee of culpability—more powerful than the guarantees afforded by the criminal negligence and reckless standards. Where a defendant actually is aware that the probability of harm exceeds the level at which it is justifiable, not just aware of the underlying facts that make his or her conduct unjustifiable, the defendant cannot plausibly claim that the wrongdoing is attributable to an innocent "intellectual failure to grasp" the significance of known facts.[219] The decision to act in the face of this known risk can only be attributable to a culpable "insensitivity to the interests of others."[220] Actual awareness of a risk exceeding the legislatively defined justifiability threshold also provides a more powerful guarantee of culpability than does general intent. General intent offenses ordinarily require the Government only to prove that the defendant was aware of the underlying facts that make his or her conduct unjustifiable, for example, that he or she is driving and that he or she has consumed intoxicants.[221] The hybrid criteria go further in requiring that the defendant actually realize to what degree these facts make the conduct risky.

Moreover, actual awareness of a probability exceeding the legislatively defined threshold ought to suffice for culpability regardless of how high or how low the legislature fixes the threshold. After all, there is not anything *inherently* more culpable about awareness of, say, a "practical certainty" than there is about awareness of a "realistic possibility." It all depends on what is at stake—on the gravity of the potential harm and the

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[219] MODEL PENAL CODE & COMMENTARIES § 2.02 cmt. at 237.

[220] *Id.*

[221] Crimes like drunk-driving homicide and drug-induced homicide require no more by way of culpability than knowledge of the facts that make the conduct dangerous. *See, e.g.*, State v. Hubbard, 751 So. 2d 552, 565 (Fla. 1999). In this setting, a defendant's assertion that her actions did not "justif[y] condemnation" despite her knowledge of the relevant facts would essentially take the form of a mistake-of-law defense. MODEL PENAL CODE & COMMENTARIES § 2.02 cmt. at 238. After all, the legislature already has determined that the conduct in question is unjustifiably risky per se and, in reliance on that determination, has announced a specific prohibition on the conduct. To viably claim that his or her decision to engage in this conduct was not culpable, the defendant would have to assert, among other things, that he or she was unaware of this specific prohibition. But it is settled that ignorance of the law is not an excuse, even when the offense in question is *malum prohibitum* rather than *malum in se*. *See* People v. Marrero, 507 N.E.2d 1068, 1072 (N.Y. 1987) (upholding defendant's conviction under N.Y. PENAL LAW § 265.02 for possession of an unlicensed, loaded pistol); *see also* United States v. Weintraub, 273 F.3d 139, 147 n.3 (2d Cir. 2001) (holding that mens rea "does not demand knowledge of guilt in the sense of knowledge of the law that makes conduct illegal, but rather only knowledge of the facts that make the conduct illegal"); MODEL PENAL CODE & COMMENTARIES § 2.02(9) (providing that "neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides").

utility of the conduct.[222] What makes the defendant's awareness of a practical certainty culpable in a case where *knowingly* defines the criterion of culpability is the fact that the defendant is aware of a risk greater than what is justifiable.[223] And the same is true regardless of how high or low the legislature defines the acceptable risk. Thus, if the legislature concludes that an actor is not justified in accepting even a realistic possibility that his or her partner is underage, then actual awareness of such a possibility ought to suffice for culpability.

C. CULPABILITY IN HYBRID FORMS: CULPABLY FAILING TO BE AWARE OF A RISK EXCEEDING THE LEGISLATIVELY DEFINED THRESHOLD

For much the same reason, it should also be enough for the Government to prove that the defendant *should have been* aware of a realistic possibility that his or her partner was underage. When the knowingly standard or the reasonable belief standard defines the culpability baseline, it is enough for the Government to prove that the defendant was culpable in *failing* to be aware of a probability of harm exceeding the defined threshold. Thus, the knowingly standard is satisfied by proof of "willful blindness," that is, by proof that the defendant "ha[d] his suspicion aroused but then deliberately omit[ted] to make further inquiries, because he wishe[d] to remain in ignorance."[224] Probably more to the point, the reasonable belief criterion of culpability is satisfied when a reasonable person in the defendant's place would not have "believed" in the existence of the critical fact.[225] This means that the criterion is satisfied when a reasonable person in the defendant's place would have been aware of a

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[222] *See* Alexander, *supra* note 32, at 940-41 (arguing that "[s]eeing knowledge just as a species of recklessness" is helpful, in part, because "it allows us to avoid the error of deeming all cases of knowledge to be more culpable than all cases of recklessness, even where the harm risked is the same").

[223] *Id.*

[224] WILLIAMS, *supra* note 9, § 57, at 157, *quoted in* United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976). The willful blindness doctrine, as traditionally conceived, is more demanding than, say, a requirement that a reasonable person would have been aware of a "practical certainty" of the result occurring. This makes sense, though. The knowingly mental state is used to define the culpability baseline in just those cases where the social utility of the conduct is high in relation to the gravity of the potential harm. *See supra* text accompanying notes 152-60. When the social utility of the conduct is high in relation to the gravity of the harm, it makes sense to demand more by way of culpability, and less by way of caution, at the information-gathering, belief-formation stage of the decision-making process.

[225] *See* People v. Valencia, 46 P.3d 920, 926 (Cal. 2002) (framing the question as what "a reasonable person would believe").

probability of the critical fact's *non*-existence sufficient to negate "belief" in the critical fact.

In both the reasonable belief standard and the realistic possibility standard, the reasonable-person construct plays roughly the same role that it plays in Model Penal Code's definition of negligence. That is, the reasonable person serves not only to provide a perspective from which to calculate the risk *ex ante*,[226] but also to provide a moral standard against which to evaluate the defendant.[227] It serves to focus the evaluative question whether, in the words of the Code commentary, the actor deserves "condemnation."[228] Bear in mind, though, that the evaluative question is narrower here than in the case of negligence.

The evaluative question is narrower because it goes only to the information-gathering, probability-estimating stage of the decision-making process. Recall that the reasonableness of a belief depends on whether the actor has exercised due care in forming the belief, but does not depend on whether the belief is sufficient in degree of certainty to justify action under the circumstances in which the actor finds himself.[229] Thus, in the application of the reasonable belief standard, the evaluative question for the jury is just whether the defendant's carelessness in the *formation* of his beliefs (or probability estimates) deserves condemnation.[230] Much the same thing would be true under the reasonable person component of a realistic possibility standard. The evaluative question for the jury would just be whether the defendant was culpable in failing to be aware of a probability exceeding the defined threshold.

Granted, in deciding what degree of care the sexual abuse defendant should have exercised in the information-gathering, probability-estimating stage of the decision-making process, the jury would have to assign a value

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[226] Hurd & Moore, *supra* note 32, at 358-59 (suggesting that one possible reason why courts "conceptualiz[e] negligence in terms of a hypothetical reasonable person" is to "specify an epistemic vantage point from which a risk is to be assessed").

[227] *Id.* at 359 (suggesting that another purpose of the reasonable-person construct is to permit deviation from a strict justifiability calculus: "On this view, the reasonable person may be the (deontologically) moral person, not the one who correctly sums the consequentialist balance of benefits versus risks"); *see also* Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 255 (1996) (arguing that the "calculus of risk" required by the Hand formula does not exhaust the intuitive content of the reasonable person test).

[228] MODEL PENAL CODE & COMMENTARIES § 2.02 cmt. at 238, 241 (1985).

[229] Johnson, *supra* note 6, at 516-21.

[230] There is nothing incoherent in this. Indeed, the Model Penal Code's provisions on self-defense explicitly require this very determination. They impose liability for negligence or recklessness if the actor, though he believed that force was necessary in self-defense, was "reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force . . . ." MODEL PENAL CODE & COMMENTARIES § 3.09(2).

to the gravity of the harm that accompanies sexual abuse. This inquiry would raise the same concerns about the jury's inaptitude that the recklessness and criminal negligence inquiries raised.[231] The difference lies in the scope and importance of the jury's gravity-of-harm determination. In criminal negligence and recklessness, the jury has to rely on its gravity-of-harm determination *both* in calculating the acceptable level of risk *and* in deciding whether the defendant was culpable in failing to perceive or in disregarding a risk exceeding this magnitude.[232] The hybrid realistic possibility standard counts as an improvement on criminal negligence and recklessness because it takes the first of these calculations—the justifiability calculation—out of the jury's hands. If the hybrid standard is not perfect—if it has the potential to demand too little of defendants cognitively—it is still much better than the alternatives.

In any event, the real point here is that the realistic possibility standard provides much the same assurance of culpability that the criminal negligence standard does, and exactly the same assurance of culpability that the reasonable belief standard does. For good measure, it also provides actors with advance notice of precisely what probability of harm will trigger liability. If, for example, a legislature were to adopt a realistic possibility standard for sexual abuse, a person who was considering engaging in sexual intercourse with a partner of indeterminate age would know precisely what degree of risk was acceptable and would be able to shape his or her conduct accordingly. In this respect, the standard serves to guarantee culpability in the same way that general intent statutes do—by telling citizens in advance "what they may and may not do."[233]

VI. CONCLUSION

For decades academics have bemoaned the persistence of strict liability for sexual abuse,[234] to very little effect.[235] What they have not done is construct a truly viable alternative to strict liability. This is no small thing, for the persistence of strict liability is largely attributable to the lack of a viable alternative. For right or wrong, courts are convinced that the existing alternatives to strict liability "would strip the victims of the

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[231] *See supra* text accompanying notes 93-131.

[232] *See* Johnson, *supra* note 6, at 516-18.

[233] Duff, *supra* note 52, at 961 (describing the benefits of per se rules).

[234] *See, e.g.*, Carpenter, *supra* note 2, at 383; Loewy, *supra* note 2, at 100; Myers, *supra* note 3, at 135; Vance, *supra* note 3, at 451-52.

[235] *See* Carpenter, *supra* note 2, at 385-91 (providing a table showing current status of state laws).

protection which the law exists to afford."[236] It is for this reason, and not because judges are somehow incapable of understanding the arguments against strict liability, that strict liability has persisted.[237] The answer to strict liability, then, lies in constructing a new alternative.

Probably the most appealing aspect of the new alternative proposed here is its unimaginativeness. This alternative does not remake the existing conceptual landscape of criminal culpability; it just casts light on an unmapped corner of that landscape. Juries and legislatures have always shared the responsibility for determining whether the risk created by a defendant's conduct is unjustifiable. Where crimes of recklessness and criminal negligence are concerned, the jury makes this justifiability determination by, in effect, assigning values to (1) the gravity of the potential harm, (2) the utility of conduct, and (3) the probability that the harm will occur. Where general intent offenses are concerned, the legislature makes the same calculations in advance. There is nothing particularly imaginative, then, about the idea of dividing the three factors in the justifiability calculus between the legislature and the jury, in accordance with those institutions' very different competencies. Nor is there likely to be anything politically controversial about such a division.

Finally, it deserves passing mention that the new mens rea proposed here might be useful in settings other than child sexual abuse. It might be useful, for example, in the law of environmental crime, where courts and legislatures have struggled over the choice of an appropriate mens rea and, as in the law of sexual abuse, often have opted for strict liability.[238] The new mens rea might also be useful in the law of rape, particularly with respect to the defense of reasonable but mistaken belief as to consent.[239] Where a defendant raises this defense, the jury will face much the same difficulty in defining the acceptable risk that it faces in sexual abuse

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[236] State v. Holmes, 920 A.2d 632, 636 (N.H. 2007) (quoting State v. Yanez, 716 A.2d 759, 769 (R.I. 1998)).

[237] *Id.* (explaining that "[t]he reason that mistake of fact as to the [child]'s age constitutes no defense is, not that these like public welfare offenses require no mens rea, but that a contrary result would strip the victims of the protection which the law exists to afford").

[238] Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL L. 1165, 1166, 1179-88 (1995). Indeed, some courts appear already to have moved toward requiring only awareness of a slight risk to the environment. *See* United States v. Laughlin, 10 F.3d 961, 966 (2d Cir. 1993) (interpreting Federal Resource Conservation and Recovery Act to require proof that the defendant charged with disposing hazardous waste without a permit knew that substance disposed of was potentially harmful to others or potentially harmful to the environment).

[239] *See* Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 817-19 (1996) (examining the defense).

cases.[240] There is a powerful case to be made that the legislature, not the jury, should define the acceptable risk of being wrong about a partner's consent.

[240] *See* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 110-13 (2002) (arguing that admission of evidence of rape victim's sexual history, by triggering "old prejudices around women's sexuality," would subvert the jury's application of the reasonable-mistake defense).