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# On Statutory Rape, Strict Liability, and the Public Welfare Offense Model

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# On Statutory Rape, Strict Liability, and the Public Welfare Offense Model

## **Abstract**

Statutory Rape. At the center of a long-standing debate on whether its commission should require proof of a criminal mens rea, the prosecution of statutory rape offers a revealing look at the struggle to demarcate the parameters of the public welfare offense doctrine. Specifically, with respect to statutory rape, disagreement is deep and entrenched on whether statutory rape should be categorized as a public welfare offense, which would render irrelevant defendant's lack of knowledge of the victim's age. And despite wholesale revamping of state statutory rape laws on issues of age, gender, and potential grading and punishment, the debate on whether to require a criminal mens rea or embrace strict liability continues. So, how has it come to pass that this particular crime has engendered such serious division of thought regarding the requirement of a mens rea? This Article argues that, fueled in part by a misplaced reliance on dicta from the landmark decision of *Morrisette v. United States*, most states have concluded that statutory rape is a strict liability offense. But as this Article shows, the landscape has changed dramatically since *Morrisette* was written in 1952. Like the child's puzzle book that asks the question, "Which item doesn't belong?" this Article argues that the public welfare offense model's application to statutory rape is, by current standards, strained and outmoded. Statutory rape as a strict liability crime only works because blameworthiness - a cornerstone of punishment - has been replaced by a different sensibility: the strict assumption of the risk that the actor bears when engaging in sexual activity. This paradigmatic shift from blameworthiness to assumption of the risk remains a vital rationale in statutory rape only if the actor can be expected to appreciate that engaging in a broad range of sexual activities may be proscribed by statute. As this Article demonstrates, because of *Lawrence v. Texas* and its progeny, it may no longer be accurate to say that engaging in sexual activity is the criminally risky business envisioned by the *Morrisette* Court in 1952 when statutory rape was just one of many statutes criminalizing sexual activity. And without notice that engaging in adult sexual behavior may be subject to widespread regulation, this Article concludes that it is time for the United States Supreme Court to redefine the parameters of the public welfare offense doctrine as it applies to statutory rape and allow defendants to mount a reasonable mistake-of-age defense.

## **Keywords**

Statutory rape, rape, public welfare offense, strict liability, *Lawrence v. Texas*, criminal law, Garnett, Staples, *Morrisette*

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ON STATUTORY RAPE, STRICT LIABILITY,  
AND THE PUBLIC WELFARE OFFENSE  
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CATHERINE L. CARPENTER\*

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The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

-*Morissette v. United States*<sup>1</sup>

## INTRODUCTION

Statutory Rape.<sup>2</sup> At the center of a long-standing debate on whether its commission should require proof of a criminal mens rea to engage in sexual conduct with an underage person,<sup>3</sup> the

1. 342 U.S. 246, 250 (1952). Other courts have often cited this statement by Justice Jackson. *See, e.g.*, *United States v. Staples*, 511 U.S. 600, 605 (1994); *United States v. Liparota*, 471 U.S. 419, 425-26 (1985); *State v. Kimoktoak*, 584 P.2d 25, 29 (Alaska 1978); *General v. State*, 789 A.2d 102, 107 n.5 (Md. 2002); *Finger v. State*, 27 P.3d 66, 79 (Nev. 2001); *Commonwealth v. Samuels*, 778 A.2d 638, 643 n.4 (Pa. 2001); *State v. Abdallah*, 64 S.W.3d 175, 179 (Tex. Crim. App. 2001); *State v. Anderson*, 5 P.3d 1247, 1252-53 (Wash. 2000).

2. Called a variety of names, statutory rape generally involves sexual intercourse with a person under a specified age, where the victim's age precludes the ability to consent to the activity. *See, e.g.*, TENN. CODE ANN. § 39-13-506 (2002) (stating that "[s]tatutory rape is sexual penetration of a victim by the defendant or of the defendant by the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four (4) years older than the victim"). Interestingly, few states actually call the crime "statutory rape." For other criminal designations, *see, e.g.*, ALASKA STAT. § 11.41.434 (Michie 2002) ("sexual abuse of a minor"); ARIZ. REV. STAT. ANN. § 13-1405 (West 2001) ("sexual conduct with a minor"); IND. CODE ANN. § 35-42-4-3 (Michie 2003) ("child molesting"); LA. REV. STAT. ANN. § 80 (West 2003) ("felony carnal knowledge of a juvenile"); ME. REV. STAT. ANN. tit. 17-A, § 253 (West 2002) ("gross sexual assault"); NEV. REV. STAT. § 200.368 (2003) ("statutory sexual seduction"); TEX. PENAL CODE ANN. §§ 22.011, 22.021 (Vernon 2003) ("sexual assault" and "aggravated sexual assault"); *see also* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 102 (1998) (asserting that the term "statutory rape" signals "that consensual sex with a teenager is not *really* rape. It is only *deemed equivalent* to rape by operation of statute.").

3. The disagreement within courts is quite pronounced and the rhetoric quite impassioned for those favoring a mens rea requirement. *See, e.g.*, *State v. Yanez*, 716 A.2d 759, 786 (R.I. 1998) (Flanders, J., dissenting) (criticizing the majority's imposition of strict liability and rejection of the mistake-of-age defense to the charge of first-degree child-molestation sexual assault). From Flanders perspective, "the majority's conversion of § 11-37-8.1 into a strict-liability crime in mistake-of-age cases, coupled with the statute's mandatory minimum twenty-year prison sentence and convicted sex-offender status creates an unparalleled and unjustified 'double

prosecution of statutory rape offers a revealing look at the struggle to demarcate the parameters of the public welfare offense doctrine.<sup>4</sup> Not simply relegated to the administrative infraction first envisioned,<sup>5</sup> the doctrine's modern expansive reach enables courts and legislatures to reject traditional notions of proof of mens rea<sup>6</sup> in favor of the more prosecutor-friendly use of strict liability.<sup>7</sup> Specifically, with respect to statutory rape, disagreement is deep and entrenched on whether statutory rape should be categorized as a public welfare offense, which would render irrelevant defendant's lack of knowledge of the victim's age.<sup>8</sup> And despite wholesale revamping of state statutory rape laws on issues of gender,<sup>9</sup> relative ages of victim and perpetrator,<sup>10</sup> and potential grading and punishment,<sup>11</sup> the debate on

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whammy' that rains down its crushing blows indiscriminately upon innocently intentioned teenage lovers and heinous child molesters alike." *Id.* See also *Garnett v. State*, 632 A.2d 797, 817 (Md. 1993) (Bell, J., dissenting) ("To recognize that a State legislature may, in defining criminal offenses, exclude mens rea, is not to suggest that it may do so with absolute impunity, without any limitation whatsoever."); *Jenkins v. State*, 877 P.2d 1063, 1068 (Nev. 1994) (Springer, J., dissenting) ("Good sense and good morals would demand that a person who has done nothing wrong not have to serve sixteen years in prison . . . . [Imposing strict liability] is counter-intuitive and contrary to moral common sense."); *Goodrow v. Perrin*, 403 A.2d 864, 868 (N.H. 1979) (Douglas, J., dissenting) (declaring that applying strict liability to statutory rape "presents serious equal protection and due process problems"). This Article includes an Appendix that surveys the split in jurisdictions' determination of whether a criminal mens rea is required. See *infra* Appendix: Jurisdiction Analyses of Statutory Rape [hereinafter Appendix].

4. See Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73 (1933).

5. See *Morissette v. United States*, 342 U.S. 246, 253-58 (1952) (detailing the development of the public welfare offense model during the Industrial Revolution to criminally sanction, without a showing of intent, but with the imposition of relatively minor penalties, a "limited class of offenses" which threatened to the social order); see also *infra* Part I.A (discussing the history of the public welfare offense model).

6. See *infra* note 71 (explaining the evolution of the concept of mens rea as an element in criminal law from the notion of a mind bent on evil-doing to the notion of a mind seeking to endanger the public).

7. Strict liability in the criminal law has been defined as "impos[ing] criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state." *State ex rel. W.C.P. v. State*, 974 P.2d 302, 303 (Utah Ct. App. 1999). For an excellent discussion of the effect of strict liability on the prosecutor's burden of proof, see Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993).

8. See *infra* notes 12 & 15.

9. See *infra* notes 140-44 and accompanying text.

10. See *infra* notes 145-59 and accompanying text.

11. Penalties range from misdemeanors to life imprisonment depending on the classification of the offense. Maryland's code, for example, provides a full range of punishments depending on the grade of the offense and the age of the parties. See MD. CODE ANN., CRIM. LAW § 3-304(b) (2002) (imposing up to twenty years in prison where the victim is under fourteen and the perpetrator is at least four years older (Rape in the Second Degree)); MD. CODE ANN., CRIM. LAW § 3-307(a)(4)-(5) (2002) (imposing up to ten years in prison for sexual conduct or vaginal intercourse between a victim of fourteen or fifteen years of age and a perpetrator at least twenty-one years of age (sexual offense in the third degree)); MD. CODE ANN., CRIM. LAW § 3-308 (2002) (imposing, where the conduct falls outside the scope of § 3-307, a fine

whether to require a criminal mens rea or embrace strict liability continues.<sup>12</sup>

The notion of strict liability has generally been considered an anathema in the criminal law—after all, every first year law student can repeat this mantra: criminal culpability requires an actus reus and a mens rea.<sup>13</sup> Yet, the idea that a crime may be committed without proof of a criminal mens rea has continued to gain momentum since its introduction,<sup>14</sup> and stubbornly persists in statutory rape.<sup>15</sup> In the majority of states, the prosecution bears no

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not exceeding \$1,000 and/or imprisonment up to one year for sexual conduct or vaginal intercourse between a victim fourteen or fifteen years of age and a perpetrator at least twenty-one years of age (sexual offense in the fourth degree)). For a discussion of the harshness of the potential penalties to statutory rape, see *infra* notes 335-48 and accompanying text.

12. Over the years, scholars have discussed, and often criticized, the phenomenon of strict liability in the criminal law. The seminal piece detailing the parameters of the public welfare offense doctrine was written by Francis B. Sayre. See Sayre, *supra* note 4. For other excellent discussions, see Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067 (1983); Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571 (1978); Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960). For general discussion of strict liability and the mistake-of-age defense in statutory rape, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 11.01 & 12.03(b) (3d ed. 2001); WAYNE LAFAVE, CRIMINAL LAW §§ 3.8 & 7.20(c) (3d ed. 2000).

13. This concept is foundational. See BLACK'S LAW DICTIONARY 55 (4th ed. 1968) (defining the *actus non* rule as “[a]n act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intent be criminal”); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932) (“*Actus non facit reum nisi mens sit rea.*”); see also *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (“We start with the familiar proposition that ‘the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.’”) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)).

14. For example, in Utah, a crime was originally considered strict liability “only when a statute defining the offense clearly indicate[d] a legislative purpose to impose strict liability for the conduct by use of the phrase *strict liability* or other terms of similar import.” UTAH CODE ANN. § 76-2-102 (1978) (emphasis added). However, this statute was later amended, dropping the requirement that the phrase “strict liability” be included in the statute. See UTAH CODE ANN. § 76-2-102 (1999) (amended 1983). See also *State v. Martinez*, 14 P.3d 114, 118 n.8 (Utah 2000) (describing the change in the Code as relaxing the legislative standard). It may be true, as posited by one scholar, that “the hard core of the criminal law is . . . riddled with exceptions to the [mens rea] principle” and that “the allegedly pervasive principle of mens rea is not pervasive at all.” See Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 138 (1962).

15. It “stubbornly” persists because statutory rape as a public welfare offense has survived despite wholesale criticism of its application. So well-entrenched is statutory rape as a strict liability crime that it was characterized as the “immemorial tradition of the common law.” See *State v. Stiffler*, 788 P.2d 220, 226 (Idaho 1990) (McDevitt, J., concurring). But see *id.* at 228 (Bistline, J., dissenting) (“Such is not the ‘immemorial tradition of the common law.’ In fact, ‘reasonable mistake-of-age has never been denied as a defense in an English statutory rape case.’”) (citing Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 110 (1965)) (alteration in original).

burden to prove that defendant knew, or should have known, the victim's underage status, and consequently, defendant is precluded from mounting the affirmative defense of mistake-of-age to refute the issue of guilt.<sup>16</sup>

Unlike many crimes whose common law blueprint is copied throughout the country with uniformity, statutory rape laws vary greatly among the states.<sup>17</sup> A review of the statutory schemes documents the modern effort by states to determine the range of sexual behavior that should be proscribed, and at the center lies the debate on whether a mental culpability is required to convict. Although thought of as two opposing views on the requirement of a criminal mens rea regarding the victim's age, the majority of states following strict liability, and the minority requiring a mens rea,<sup>18</sup> this polarized characterization does not present an entirely accurate picture.

Rather, it could be said that states fall into *three* general groupings, or what is referred to in this Article as 'models' on the requirement of a mens rea. The first is the 'true crime' or *malum in se* model.<sup>19</sup> As with other traditional crimes, this model requires proof of both an actus reus and a mens rea, and within that structure, defenses are contemplated that could affirmatively negate the mens rea.<sup>20</sup> The second is the 'public welfare offense' model where the majority of jurisdictions, either by legislative enactment or court decision, have determined that the protection of the community demands strict regulation of sexual activity, and with that goal, the notion that strict liability best serves this purpose.<sup>21</sup> Under this structure, a good faith mistaken belief of the victim's age is irrelevant because the defendant assumes the risk that the victim may be young enough to fall within the statute's protection.<sup>22</sup> The third is what this Article has termed

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16. For a listing of jurisdictions that employ the public welfare offense rationale in regulating statutory rape, see *infra* Appendix.

17. See *infra* Appendix (demonstrating that three states employ the true crime model, eighteen states use the hybrid model and twenty-nine states use strict liability or the public welfare offense model).

18. See, e.g., *Owens v. State*, 724 A.2d 43, 49 (Md. 1999) (examining states' treatment of statutory rape as either a strict liability offense or a crime requiring proof of criminal intent); *Commonwealth v. Robinson*, 438 A.2d 964, 966-67 & n.5 (Pa. 1981) (contrasting the general criminal culpability requirement of the Crimes Code with the intentional lack of culpability requirement in the regulation of statutory rape).

19. See *infra* Part II.B (providing a detailed discussion of the philosophy underlying the true crime model); see also *infra* Appendix (listing the states that follow the true crime model).

20. See *infra* Part II.B.

21. See *infra* Part II.C.

22. The majority of states, either by legislative enactment or court interpretation

the 'hybrid' model. Under this model, states have created a mens rea defense and limited strict liability balance depending on the relative age of the perpetrator and victim.<sup>23</sup> These jurisdictions acknowledge the fairness inherent in allowing the mistake-of-age defense where the victim is close to the age of consent, but believe that defendant's scienter may be inferred when the victim is very young.<sup>24</sup>

So, how has it come to pass that this particular crime has engendered such serious division of thought regarding the requirement of a mens rea? This Article argues that, fueled in part by a misplaced reliance on dicta from the landmark decision of *Morissette v. United States*,<sup>25</sup> most states have concluded that statutory rape is a strict liability offense.<sup>26</sup> Ironically, *Morissette* was not even a statutory rape case, but a case involving whether theft of federal property could be considered a public welfare offense.<sup>27</sup> Its relevance to statutory rape comes in one of the Court's footnotes explaining the historical exceptions to the requirement of a criminal mens rea, where the Court observed that sex offenses had been recognized as an exception to the general principle that a guilty mind, or 'vicious will' was required for conviction.<sup>28</sup>

But as this Article will show, the landscape has changed dramatically since *Morissette* was written in 1952. Like the child's puzzle book that asks the question, "Which item doesn't belong?" this Article will argue that the public welfare offense model's application to statutory rape is, by current standards, strained and outmoded. And the continued legislative attempts to create additional public

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have rejected defendant's good faith defense regarding the age of the victim. See *infra* Appendix.

23. See *infra* Part II.D (discussing the philosophy underlying the hybrid model); see also *infra* Appendix (providing a listing of the states that follow the hybrid model).

24. For a discussion of the hybrid model, see *infra* Part II.D.

25. 342 U.S. 246 (1952). Several state court opinions have cited *Morissette* in their rationalization of statutory rape as a strict liability offense. See, e.g., *In re E.F.*, 740 A.2d 547, 550 (D.C. 1999); *State v. Stiffler*, 788 P.2d 220, 225 (Idaho 1990) (Boyle, J., concurring); *Owens v. State*, 724 A.2d 43, 50 n.7 (Md. 1999); *Todd v. State*, 806 So. 2d 1086, 1097 (Miss. 2001); *Commonwealth v. Dennis*, 784 A.2d 179, 182 (Pa. Super. Ct. 2001); *State v. Yanez*, 716 A.2d 759, 767 (R.I. 1998); *State v. Martinez*, 52 P.3d 1276, 1281 (Utah 2002).

26. For a discussion of the misplaced reliance by jurisdictions on *Morissette*, see *infra* Part III.

27. See *Morissette*, 342 U.S. at 246 (addressing whether the defendant was guilty of stealing government property in violation of a federal statute despite his claim that he lacked the criminal intent in taking it because he thought the property was abandoned). The Court ultimately concluded that the omission of specific language regarding criminal intent in a federal statute should not be construed to eliminate that requirement. *Id.* at 275-76.

28. See *id.* at 251 n.8 (recounting that historically, sex offenses—including statutory rape—were considered the exception to the mens rea requirement).



welfare offenses further demonstrates that the doctrine has become unwieldy and out of control, far exceeding the doctrine's historical mission.<sup>29</sup>

The legitimacy of the public welfare offense model, with its underlying strict liability formulation, is best viewed as a dynamic balance of four important indicia: (1) the risk of illegality an individual assumes when engaging in an activity that is subject to strict regulation; (2) the importance of protecting public and social interests in the community; (3) the relatively small penalty involved in conviction under the offense; and (4) the insignificance of the stigma attached to such conviction. The public welfare offense model survives challenge because, *taken as a whole*, these factors are held to provide a legitimate alternative to the true crime model.<sup>30</sup> If one or more indicia are absent, then the model's application to a specific crime suffers potential collapse. This is the case with statutory rape.

In applying strict liability to statutory rape, one cornerstone of punishment—that of blameworthiness—has been replaced by a different sensibility: the strict assumption of the risk that the actor bears when engaging in sexual activity. This paradigmatic shift from blameworthiness to assumption of the risk remains a vital rationale in statutory rape *only if* the actor can be expected to appreciate that engaging in a broad range of sexual activities may be proscribed by

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29. Outside the context of statutory rape, courts have struck down attempts to characterize some crimes as public welfare offenses. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (declining to apply strict liability to 18 U.S.C. § 2252, the Protection of Children Against Sexual Exploitation Act because, the Court concluded, the statutory language “knowingly” infers that the defendant had knowledge of the children’s ages and of the sexually explicit activity); *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978) (refusing to read the Sherman Act as mandating strict liability in antitrust crimes); *United States v. Kantor*, 858 F.2d 534, 543-44 (9th Cir. 1988) (circumventing strict liability application to the federal crime of sexual exploitation of children by creating a “good faith” exception); *State v. Connor*, 292 N.W.2d 682 (Iowa 1980) (requiring mens rea to support charge of involuntary manslaughter in death occasioned by disobeying traffic signal); *State v. McCallum*, 583 A.2d 250 (Md. 1991) (determining that scienter was required for driving with suspended driver’s license); *Dawkins v. State*, 547 A.2d 1041 (Md. 1988) (requiring scienter in crime of unlawful possession of heroin); *State v. Abdallah*, 64 S.W.3d 175 (Tex. Crim. App. 2001) (rejecting a strict liability interpretation of a tax code statute that required a package of cigarettes offered for sale to be affixed with a tax stamp); *State v. Anderson*, 5 P.3d 1247 (Wash. 2000) (concluding that second degree unlawful possession of a firearm was not a strict liability offense); *see also infra* note 317 (discussing the limitation on strict liability in the context of First Amendment rights).

30. *See infra* Part I (providing the rationale behind the public welfare offense doctrine); *see also* Stuart P. Green, *Why It’s a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

statute. As this Article will demonstrate, because of recent case law, it may no longer be accurate to say that engaging in sexual activity is the criminally risky business envisioned by the *Morissette* Court in 1952 when statutory rape was just one of many statutes criminalizing sexual activity, including adultery, fornication and use of contraceptives.<sup>31</sup> Without that notice, which is critical to the shift from blameworthiness to assumption of the risk,<sup>32</sup> this Article will argue that statutory rape should no longer be treated as a strict liability crime, and defendants should be able to mount a reasonable mistake-of-age defense.

Part I of the Article will provide a primer on the public welfare offense model, and an overview of the intersecting policies of mens rea and strict liability in American jurisprudence. This section will trace the relevant United States Supreme Court decisions from *Morissette* through the Court's recent pronouncement in *Staples v. United States*,<sup>33</sup> offering a brief summary of the development of the strict liability/public welfare offense model. Part II will showcase the current American legislative schemes of statutory rape, exploring the various approaches to the issue of the criminal mens rea in statutory rape and highlighting the policies underlying the different views.

Part III will challenge the public welfare offense model's application to statutory rape, advancing three arguments to suggest that the public welfare offense model strains under current standards. First, this section will question whether engaging in sexual activity under current case law provides the essential notice for a strict liability application. This Article will argue that the United States Supreme Court ban on criminal sodomy laws in *Lawrence v. Texas*<sup>34</sup> may have profoundly impacted the underlying rationale of strict liability crimes, namely, that defendant acts at his or her own peril when engaging in activity known to be highly regulated.<sup>35</sup>

This section will posit that, in light of *Lawrence*, consensual sexual activity between adults is no longer subject to strict legislative

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31. For a discussion of the evolution of the laws regarding sexual activity, see *infra* Part III.B.

32. See *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994) ("By interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, we have avoided construing criminal statutes to impose a rigorous form of strict liability."); see also *infra* Part III.B (providing a more detailed discussion about the relationship between assumption of the risk and the public welfare offense model's application to statutory rape).

33. 511 U.S. 600 (1994).

34. 123 S. Ct. 2472 (2003).

35. See *infra* Part III.B.1.a for a discussion of the effect of *Lawrence v. Texas* on strict liability.

regulation. If that is the case—if consensual sexual activity between adults is now free from significant controls by the state—then a defendant is no longer put on notice that sexual activity is subject to potential criminal regulation. Without that notice, which is critical to the public welfare offense justification, an actor should not bear the risk that the consensual sexual conduct may be proscribed by statute. Indeed, it will be argued that, without notice, due process is violated unless defendant is provided an opportunity to present a mens rea defense.<sup>36</sup>

Second, this section will challenge another underlying rationale of the strict liability offense: that the hallmark of a public welfare offense is the relatively modest punishment and stigma.<sup>37</sup> That was the case when a broad range of criminalized consensual sexual activity carried minor penalties.<sup>38</sup> Today, however, while the criminalization of other consensual activity has decreased, the pain and stigma associated with conviction of statutory rape has increased significantly.<sup>39</sup> Sexual offender registration and notification laws, which have been applied in most jurisdictions to statutory rapists, have been recently upheld by the Supreme Court in *Smith v. Doe*<sup>40</sup> and *Connecticut Department of Safety v. Doe*.<sup>41</sup> Such laws' application to the reasonably mistaken actor has created a stigma that greatly exceeds what was traditionally considered appropriate for a public welfare offense and more than was contemplated in *Morissette*.<sup>42</sup> Compounded by the harsh punishment that is attached to conviction, this Article will question the application of a model that condemns equally the unwitting defendant with the criminally culpable, especially when the stakes are so high.<sup>43</sup> Third, this section will dispute the premise that strict liability is the only valid way to protect

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36. See, e.g., *Owens v. State*, 724 A.2d 43, 60-64 (Md. 1999) (Bell, J., dissenting) (emphasizing defendant's constitutional right under procedural and substantive due process to present defenses at trial).

37. See *Speidel v. State*, 460 P.2d 77, 79 (Alaska 1969) (describing the trivial punishments accompanying public welfare violations).

38. See *infra* notes 291-92 and accompanying text (noting laws in effect at the time *Morissette* was decided in 1952 that made it a crime to have sexual relations with unmarried women, to adulter, and to distribute contraceptives to unmarried people).

39. See *infra* Part III.B.2.b (discussing the often public punishments that laws such as Megan's Law visit upon sex offenders).

40. 538 U.S. 84 (2003).

41. 538 U.S. 1 (2003).

42. See *Payne v. Commonwealth*, 623 S.W.2d 867, 875 (Ky. 1981) (finding that it is overly severe to punish as a rapist a defendant who might be the same age as the victim, or a defendant whom the victim persuaded into engaging in the outlawed conduct).

43. See *infra* note 335 and accompanying text (noting that statutory rape penalties are up to twenty years incarceration in some states).

the exploitation of those who are underage.<sup>44</sup> Analogizing to the recently enacted HIV criminal transmission laws, this section will conclude that a standard of recklessness can serve the community and protect defendant's interests equally well.<sup>45</sup>

Given these three considerations, this Article will urge reconsideration of the long-standing, but flawed, application of the public welfare offense doctrine to statutory rape. It is true, as *Morissette* acknowledged, that the Court has not "undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not."<sup>46</sup> With indicia more closely associated with the true crime model, the Article will conclude that in light of the recent decisions in *Lawrence* and *Smith*, it is time for the United States Supreme Court to refine the parameters of the public welfare offense doctrine as it applies to statutory rape. The crime should be reclassified as a true crime; the prosecutor should bear the burden to prove defendant's criminal mens rea, and defendant should be able to mount an affirmative defense of mistake to rebut the showing where it is reasonable to do so.

With the host of statutory schemes and recent case law to consider, one observation stands out: statutory rape occupies an unclear and conflicted place in the law. This Article attempts to reshape the conversation on the relationship between the public welfare offense doctrine and statutory rape.

## I. A PRIMER ON THE PUBLIC WELFARE OFFENSE DOCTRINE

### A. *The Tenets of the Public Welfare Offense Doctrine*

#### 1. *An overview*

Before we explore the debate of statutory rape as a strict liability crime, it is helpful to consider the historical tenets of the public welfare offense doctrine. The public welfare offense doctrine—and within it, strict liability<sup>47</sup>—sits as a narrowly defined exception to the

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44. See *infra* Part III.B.3 (noting a parallel between the rise of the victim's rights movement and the popularity of the public welfare offense).

45. See *id.* (discussing how courts imputed a mens rea requirement into HIV transmission statutes, but will not do the same for statutory rape).

46. 342 U.S. 246, 260 (1952).

47. At first blush, the term 'strict liability' conjures the image of the manufacturer who, although exercising reasonable care, is nonetheless subject to liability for producing a defective product. See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (replaced by RESTATEMENT (THIRD) OF TORTS (2003)); see also *Escola v.*

fundamental notion that an actor should only be punished for acts that are accompanied by a guilty mind, “a vicious will” as Blackstone described it.<sup>48</sup> Historically, substantive criminal law “postulates a free agent confronted with a choice between doing right and wrong and choosing freely to do wrong.”<sup>49</sup>

The public welfare offense was envisioned as a “narrow class of regulation,”<sup>50</sup> designed out of necessity at the time of the industrial revolution to “impos[e] more stringent duties on those connected with particular industries, trades, properties, or activities that affect public health, safety or welfare.”<sup>51</sup> Public welfare offenses differed from traditional crimes in that no mental state was required for

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Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring) (foreshadowing strict liability in torts litigation by declaring “it should now be recognized that a manufacturer incurs an absolute liability when an article he has placed on the market . . . proves to have a defect that causes injury”); *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963) (holding manufacturer strictly liable for a defective product that causes injury). But, as acknowledged in the RESTATEMENT (SECOND) OF TORTS § 402A cmt. (1965), the tort concept of strict liability owed its genesis to the common law’s application of strict liability to criminal penalties for the seller of tainted food and other materials. For a general discussion of the early divide, see David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59 (1996). Beyond the scope of this paper, Professor Carol Steiker has provided excellent and thoughtful commentary on civil-criminal distinctions. See Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Divide*, 85 GEO. L.J. 775 (1997) (addressing the challenges in the criminal-civil distinctions and their processes).

48. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 21 (facsimile 1979) (1769) (declaring that a will to do an unlawful act is almost as bad as committing the act, but, because no court can read the mind, an act must accompany the desire to do the act). This statement by Blackstone has been the starting point for discussions on whether a mens rea is required in a given crime. See, e.g., *Owens v. State*, 724 A.2d 43, 50 (Md. 1999) (contrasting Blackstone’s vicious-will requirement with the Supreme Court’s declaration in *Lambert* in support of strict liability, and concluding that Maryland’s strict liability statutory rape law was constitutional). The U.S. Supreme Court has explicitly rejected Blackstone’s statement. See *Lambert v. California*, 355 U.S. 225, 228 (1957) (“We do not go with Blackstone in saying that ‘a vicious will’ is necessary to constitute a crime . . . for conduct alone without regard to the intent of the doer is often sufficient.”); see also *State v. Yanez*, 716 A.2d 759, 777 (R.I. 1998) (concluding that from Rhode Island’s dearth of case law of the issue of whether a defendant could raise mistake-of-fact as a defense, the court “might as easily infer that no defendant in Rhode Island has ever been refused this defense as that defendants have never been allowed to raise it”).

49. See *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 493 (E.D.N.Y. 1993) (quoting Roscoe Pound, *Introduction*, in FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW xxxiv-xxxvii (1927)).

50. See *Speidel v. State*, 460 P.2d 77, 78 (Alaska 1969) (noting as key features of public welfare offenses their protection of the general public and imposition of a relatively low penalty, and therefore concluding that a statute making the failure to return a rental car on time a felony was not a public welfare offense because the penalty was too high and the group that the statute protected too narrow).

51. *Id.*; see also *Morissette v. United States*, 342 U.S. 246, 255-56 (1952) (stating that public welfare offenses are different from those against the state, people, or property, partially because these offenses do not create immediate danger, but rather a latent threat).

criminal conviction of these offenses—hence the phrasing ‘strict liability,’ which has been characterized as clearly intending to impose criminal responsibility for prohibited conduct without requiring proof of criminal intent.<sup>52</sup> Under the public welfare offense model, the prosecution only must prove that there was an illegal act.<sup>53</sup>

The introduction of the public welfare offense was not a chance occurrence. Scholars have commented that the development of the administrative regulation corresponded with the increasing need for order in the burgeoning urban society<sup>54</sup> and marked the growing shift from the protection of the individual’s rights to the protection of the community.<sup>55</sup> Two factors necessitated applying strict liability to the proliferating regulatory offenses. First, requiring individuated proof of mens rea would overtax an already burdened docket,<sup>56</sup> and second, in many of the regulatory infractions, a criminal mens rea was very difficult to prove.<sup>57</sup>

Yet, even with the understanding that this narrowly defined class of offenses was important to the ordering of societal interests, its scope was never intended to be without limit. As has often been repeated, enacting a criminal offense without the requirement of a mens rea is disfavored in the law<sup>58</sup> because to negate the importance of the guilty

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52. See UTAH CODE ANN. § 76-2-102 (1999).

53. See, e.g., *People v. Lardie*, 551 N.W.2d 656, 660 (Mich. 1996) (citing *People v. Quinn*, 487 N.W.2d 194, 199 (Mich. 1992)) (“For a strict liability crime, the people need only prove that the act was performed regardless of what the actor did or did not know.”).

54. See Steiker, *supra* note 47, at 792 (noting that the proliferation of public welfare offenses reflected the growing acceptance of a non-moral, regulatory dimension of criminal law); see also John L. Diamond, *The Crisis in the Ideology of Crime*, 31 IND. L. REV. 291 (1998) (“[T]o a substantial degree, criminal law punishes transgressions without reference to personal culpability. While traditional strict liability crimes are obvious examples, they are not, as is sometimes argued, merely isolated exceptions to a regime which otherwise requires a culpable mens rea.”).

55. See Sayre, *supra* note 4, at 68 (“As a direct result of this new emphasis upon public and social, as contrasted with individual, interests, courts have naturally tended to concentrate more upon the injurious conduct of the defendant than upon the problem of his individual guilt.”).

56. See *id.* at 69 (concluding that the criminal law’s attachment to the centuries-old paradigm of determining individual blameworthiness is not suited to the numerous petty offenses of modern life).

57. See *id.* at 69, 72 (finding also that even if the state could obtain evidence of mens rea, many regulatory offenses generate so many offenders that gathering evidence for the prosecution of each would greatly burden the state). As the *Morissette* Court explained, “[c]onvenience of the prosecution thus emerged as a rationale.” *Morissette v. United States*, 342 U.S. 246, 253 (1952).

58. See *Morissette*, 342 U.S. at 256 n.14 (“Consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology.”); see also *State v. Granier*, 765 So. 2d 998, 1000 (La. 2000) (acknowledging that “offenses that dispose of a scienter requirement are not favored”); *People v. Lardie*, 551 N.W.2d 656, 660 (Mich. 1996) (finding constitutional a Michigan statute that required a maximum penalty of fifteen years

mind directly affects the goals derived in punishing the individual.<sup>59</sup> While the philosophical underpinnings of criminal culpability stem from a variety of theories, under the twin concepts of retribution and deterrence, the guilty mind serves as the justification to punish those members of the community who engage in conduct that is proscribed.<sup>60</sup> Under Retributivist principles, punishing the wrongdoer is based on the notion that a human being, endowed with free will, may exercise the choice to violate society's rules, and based on the exercise of that choice, will subject herself to the moral condemnation of the community.<sup>61</sup> Her blameworthiness is directly tied to the choice that she made to engage in the proscribed conduct, and should not be based merely on the fact that the conduct or result occurred.<sup>62</sup> Under the Utilitarian view, that values punishing the

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for killing someone while driving a car under the influence of a controlled substance). *But see* Commonwealth v. Miller, 432 N.E.2d 463, 465 (Mass. 1982) ("While the existence of mens rea is the rule, rather than the exception to the principles of Anglo-American jurisprudence, it is just that—a general rule, not always a constitutionally mandated doctrine.").

59. *See* Steiker, *supra* note 47, at 785 (summarizing utilitarian theory's principle that humans wish to maximize pleasure and minimize pain; therefore, punishing humans for acts they do not know are wrong will not deter them from committing such acts again).

60. So much has been written on the philosophy of punishment and its different theories. Although this Article addresses briefly the concepts of retribution and deterrence, there is weighty and interesting scholarship that explores in depth the goals of criminal law and the theories of punishment. *See generally* PAUL H. ROBINSON, CRIMINAL LAW § 1.2 (1997) (explaining various justifications for punishment, such as deterrence, incapacitation, rehabilitation, and deservedness). *See also* Kent Greenawalt, *Commentary: Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343 (1983) (exploring various moral principles used to justify the imposition of punishment); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism and Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2073-78 (2002) (detailing the history of the four traditional theories of punishment: retribution, deterrence, rehabilitation and incapacitation); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity in Modern Punishment*, 51 HASTINGS L.J. 829, 830 (2000) (suggesting that we are in the midst of a severity revolution in the breadth and depth of punishing the accused); V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691 (2003) (advancing an approach that differs from the mainstream theories of deterrence and retribution by promoting criminal law from the governmental perspective); Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 301 (1990) (arguing that the Denunciation theory is superior to other theories of punishment).

61. *See generally* DRESSLER, *supra* note 12, § 2.03 (describing the denunciation principle as a hybrid of utilitarianism and retribution, and concluding that denunciation is a desirable theory because, *inter alia*, it educates society about what is right and wrong).

62. For discussions on the theory of retribution, see Russell L. Christopher, *Detering Retributivism: The Injustice of "Just Punishment"*, 96 NW. U. L. REV. 843, 849 (2002) (arguing retributivism as a theory of criminal punishment is no better than the consequentialist theory of punishment); Jeremy Firestone, 27 HARV. ENVTL. L. REV. 105, 108 (2003) (observing the importance of the role of blame assignment); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39

individual for the greater good of the community, deterrence as a theory of punishment requires a rational actor with full knowledge of the relevant facts.<sup>63</sup> It would be ineffective, and therefore wasteful, if the violation is of an *ex post facto* law or the actor does not otherwise have notice of the law, if the actor is insane, an infant or intoxicated, or if the actor labors under a mistake of fact or in response to duress or physical compulsion.<sup>64</sup>

In the seminal piece on the scope of public welfare offenses,<sup>65</sup> Francis B. Sayre identified the following criteria in determining whether a crime should be considered a public welfare offense: (1) what is the character of the offense? Is its purpose primarily to single out wrongdoers, which would require a *mens rea*, or is its purpose primarily regulatory in nature;<sup>66</sup> and (2) what is the nature of

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UCLA L. REV. 1659, 1686 (1992) (adding to the theory of 'expressive' retributionism and asserting that retributionism is a necessary element to criminal punishment); Nourse, *supra* note 60, at 1739-40 (questioning whether the twin notions of retribution and deterrence are the only possible purposes that serve the criminal law); see also Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 661 (1989) (expanding upon Kant's respect principle, which states that society should judge people based on their exercise of choice).

63. See JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM, PRINCIPLES OF PENAL LAW 398 (John Bowring ed., 1962) (concluding that a punishment is 'economic' when it produces the least possible suffering while achieving the desired result); Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 118 (2000) (denouncing critics' assertions that the utilitarian theory of punishment requires punishing innocent people if that punishment will deter others from committing crime).

64. See BENTHAM, *supra* note 63, at 398 (explaining that the "real value" of punishment is the knowledge shared by potential criminals that there are consequences to their criminal activity).

65. See Sayre, *supra* note 4, at 56 (analyzing the then-new rise of public welfare offenses and concluding that, while these offenses have a place in the law, they will remain an exception to criminal law's requirement of *mens rea*). A number of decisions have cited Sayre's work. In addition to *Morissette*, see *Staples v. United States*, 511 U.S. 600, 617 (1994) (involving strict liability application to possession of machine gun); *United States v. Charnay*, 537 F.2d 341, 355 n.1 (9th Cir. 1976) (Sneed, J., concurring) (clarifying that securities violations are not typical public welfare offenses); *Gov't of Virgin Islands v. Rodriguez*, 423 F.2d 9, 12 (3d Cir. 1970) (rejecting strict liability for crimes involving a prostitution ring run in a building); *Smith v. City of Tuscaloosa*, 666 So. 2d 101, 106 (Ala. Crim. App. 1995) (affirming public welfare offenses regarding driving on a revoked license and without proper headlights); *State v. Rice*, 626 P.2d 104, 108 (Alaska 1981) (rejecting strict liability in gaming violations); *People v. Chevron Chem. Corps.*, 143 Cal. App. 3d 50, 54 (1983) (applying strict liability to a violation of a Fish and Game Code provision); *People v. Travers*, 52 Cal. App. 3d 111, 114 (1975) (finding the crime of mislabeling and selling motor oil a legitimate application of the public welfare offense doctrine); *People v. Vogel*, 299 P.2d 850, 853 (Cal. 1956) (determining that the mistake-of-fact defense should be available in a bigamy charge); *Price v. State*, 319 S.E.2d 849, 850 (Ga. 1984) (Smith, J., concurring) (concluding that hunting doves over a baited field was a public welfare offense); *State v. McCallum*, 583 A.2d 250, 252 (Md. 1991) (determining that scienter was required for driving with suspended driver's license).

66. See Sayre, *supra* note 4, at 72 (examining which offenses require *mens rea*,



the possible penalty? If the wrongdoer is exposed to light monetary fines, then regulating the behavior outweighs the need for individuated proof. But if the penalty subjects the wrongdoer to possible imprisonment, then a mens rea should be required because “[t]o subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice.”<sup>67</sup> Traditional public welfare offenses include: (1) illegal sales or transport of intoxicating liquor; (2) sales of impure or adulterated food; (3) sales of misbranded articles; (4) violations of anti-narcotics acts; (5) criminal nuisances; (6) violations of traffic regulations; (7) violations of motor-vehicle laws; and (8) violations of general police regulations passed for safety, health, or well being of the community.<sup>68</sup> Although seemingly disparate offenses with different objectives, they share a common characteristic: each affects the lives and health of those in the community.

## 2. *From Morissette through Staples*

Much has been written on the public welfare offense doctrine since its establishment and introduction in American jurisprudence. In his commentary, Sayre posed the question of whether the onset of the public welfare offense “presage[s] the abandonment of the classic requirement of a *mens rea* as an essential element of criminality.”<sup>69</sup> Although he believed that such was not the case,<sup>70</sup> it is fair to say that the seductive nature of the public welfare offense—the ease of conviction—has led to a legislative trend in the twentieth century to omit mens rea from a growing list of crimes.<sup>71</sup> With the expansion,

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and which offenses could fit under a public welfare regulation). The “character of the offense” that Sayre identified has evolved into “a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.” *Liparota v. United States*, 471 U.S. 419, 433 (1985). See also *Staples*, 511 U.S. at 607 (explaining that the Court has given limited recognition to public welfare offenses, examining “the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional mens rea requirements”).

67. Sayre, *supra* note 4, at 72.

68. See *id.* at 73 (distinguishing the listed offenses from those in which the defendant’s mistake-of-fact can constitute a defense, such as statutory rape).

69. *Id.* at 55.

70. See *id.* (predicting that the law will always require mens rea as one of criminal guilt’s main factors).

71. As society has shifted from punishing moral wrongdoing to “protecting social and public interests,” the mens rea principle “is coming to mean, not so much a mind bent on evil-doing as an intent to do that which unduly endangers social or public interests.” Sayre, *supra* note 13, at 1017. See also *State v. Navarette*, 376 N.W.2d 8, 11 (Neb. 1985); *State v. McDowell*, 312 N.W.2d 301 (N.D. 1981); *Zent v. State*, 3 Ohio App. 473, 478 (1914). But even with this trend, strict liability has been rejected in some offenses. See, e.g., *State v. Abdallah*, 64 S.W.3d 175 (Tex. Crim. App.

however, it became increasingly clear how ineffective the early attempts were to distinguish the true crime from the public welfare offense.<sup>72</sup> In recent years, it has been a particularly challenging task to demarcate the true crime from the ever-growing list of public welfare offenses.<sup>73</sup>

*Morissette v. United States*,<sup>74</sup> a decision of significant consequence, emerged amid the litigation on strict liability. Neither the first Supreme Court decision to attempt to characterize the public welfare offense,<sup>75</sup> nor a bright line guide on the subject,<sup>76</sup> the case is noteworthy because of its appreciation of the far-reaching implications of its decision. As stated by Justice Jackson in *Morissette*, “[t]his would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law.”<sup>77</sup>

*Morissette* involved a case of theft, but unlike many theft cases tried under codified common law principles, this case was tried under a federal conversion statute that purportedly required no criminal mens rea for conviction.<sup>78</sup> At trial, defendant was denied the

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2001) (concluding that a tax code provision requiring that cigarette packages offered for sale be affixed with a tax stamp was not a strict liability offense); *State v. Anderson*, 5 P.3d 1247 (Wash. 2000) (holding that second degree unlawful possession of a firearm was not a strict liability crime).

72. See Sayre, *supra* note 4, at 70-71 (describing two demarcations: (1) the distinction between malum in se and malum prohibitum and (2) the notion that public welfare offenses are statutory in origin while true crimes are based on the common law); see also *Morissette v. United States*, 342 U.S. 246, 251-60 (1952) (recounting the historical attempts to distinguish the public welfare offense from the true crime).

73. In appreciation of the complexity of the task to discern a strict liability crime, one court noted:

[T]he mens rea principle remains, in the modern criminal law, a fundamental requirement . . . Like most ancient doctrines, however, it has grown far more sophisticated and nuanced than it once was. It can no longer simply be invoked. Its application must be carefully explained and its many distinctions must be considered.

*United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 495-96 (E.D.N.Y. 1993).

74. 342 U.S. 246 (1952).

75. See *United States v. Balint*, 258 U.S. 250 (1922) (finding the crime of selling an opiate derivative to be a public welfare offense); *United States v. Dotterweich*, 320 U.S. 277 (1943) (affirming as a strict liability offense the misbranding and placing of drugs into the stream of commerce).

76. In fact, the *Morissette* Court stated “[w]e attempt no closed definition.” 342 U.S. at 260. See also *Lambert v. California*, 355 U.S. 225 (1957) (acknowledging that the Court had never articulated a general constitutional doctrine of mens rea); accord *Powell v. Texas*, 392 U.S. 514, 534 (1968).

77. 342 U.S. at 247.

78. *Morissette* was convicted under 18 U.S.C. § 641, which states that “[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing

opportunity to argue to the jury that he had no felonious intent to steal, but was only taking what he believed to be abandoned property.<sup>79</sup> Both the trial court and court of appeals concluded that ‘knowing’ conversion of government property did not require an element of criminal intent, and therefore, any mistake-of-fact defense was irrelevant.<sup>80</sup> The court of appeals based its decision on the belief that since Congress had not specifically included a mens rea, it therefore must have intended the conversion statute to be a strict liability offense.<sup>81</sup> This shift in assumptions is a striking departure from early common law principles of legislative analysis,<sup>82</sup> where courts assumed that an omission of a mens rea was merely that—an omission. So inherent was the notion of a mens rea that “it required no statutory affirmation.”<sup>83</sup> In reversing the court of appeals decision, the Supreme Court relied on the principles of common law theft and concluded that the conversion statute required a mens rea.<sup>84</sup> In so doing, the Court also highlighted the problematic feature of the public welfare offense rationale: “[h]ad the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions.”<sup>85</sup>

And herein lies the difficulty—the sweeping net of the public welfare offense doctrine captures equally the unwitting conduct and the criminally culpable conduct. Can there be occasions when unwitting and inadvertent conduct justifies punishment for crimes more serious than administrative infractions? The answer may be yes, providing that some element equal to the guilty mind could serve as the substitute. So stated the Court in *Lambert v. California*,<sup>86</sup> a case involving the issue of a strict liability ordinance that required a convicted felon to register in Los Angeles if staying in the city more than five days. While the Court reiterated that lawmakers have the prerogative to declare an offense and to exclude elements of knowledge and diligence from its definition,<sup>87</sup> the Court nevertheless concluded that due process demands that the defendant be on notice

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of value of the United States or of any department or agency thereof.” *Id.* at 248 n.2.

79. The trial court refused to submit an instruction of the mistake-of-fact defense, and instead instructed the jury “if you believe . . . he intended to take it . . . . He had no right to take this property [sic] . . . . And it is no defense to claim that it was abandoned . . . .” *Id.* at 249.

80. *Id.* at 249.

81. *Id.* at 250.

82. *Id.* at 252.

83. *Id.*

84. *Id.* at 260-62.

85. *Id.* at 270.

86. 355 U.S. 225 (1957).

87. *Id.* at 228.

that the conduct may be subject to potential regulation.<sup>88</sup> The Court held that the ordinance in *Lambert* was unconstitutional because that type of registration law did not provide the kind of notice that would shift the burden to the defendant to discern the facts and discover the potential regulation.<sup>89</sup>

The concept of notice is an important one. Public welfare statutes render criminal “a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.”<sup>90</sup> Notice serves to shift the burden to the defendant, who should be on heightened awareness that his or her conduct may be subject to regulation.<sup>91</sup> Although not specifically required, the failure to investigate and discern whether the behavior is criminal equates to a type of negligent behavior, which can serve as the substitute for a criminal mens rea. Hence, the unwitting or innocent conduct is really tinged with a negligence that belies lack of culpability. Notice, therefore, is the lynchpin. Without it, there is little justification to punish under the traditional theories earlier identified. Noted one scholar,

to punish conduct without reference to the actor’s state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subject to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed.<sup>92</sup>

But, determining whether the defendant was on notice has engendered considerable discussion. In 1994, the Supreme Court

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88. See *Lambert*, 355 U.S. at 228. The Court cited to Holmes, who wrote in THE COMMON LAW:

A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear. Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it.

*Id.* at 229 (citation omitted). See also *Liparota v. United States*, 471 U.S. 419, 424 (1985) (stating that although the definition of the elements of a criminal offense is entrusted to the legislature, it is nonetheless subject to constitutional constraints).

89. Compare *Lambert*, 355 U.S. at 229, with *United States v. Balint*, 258 U.S. 250 (1922). In *Balint*, the Court held that collection of taxes under the Narcotics Act was sufficiently important to the public to impose on the taxpayer the burden of finding out the facts upon which his liability to pay depends, and to meet it at the peril of punishment. 258 U.S. at 252.

90. *Liparota*, 471 U.S. at 433.

91. *Id.*

92. Packer, *supra* note 14, at 109; see also *Liparota*, 471 U.S. at 426 (concluding that to impose strict liability would be to criminalize a broad range of apparently innocent conduct).

specifically addressed this issue in *Staples v. United States*,<sup>93</sup> which concerned the extent of the defendant's knowledge regarding the nature and character of the product he possessed.<sup>94</sup> In *Staples*, the defendant was found to be in possession of an unregistered AR-15 rifle that had been modified to become an automatic weapon.<sup>95</sup> As a consequence of the modification, the weapon was subject to strict registration laws.<sup>96</sup> The defendant was charged with unlawful possession of an unregistered machinegun.<sup>97</sup> At trial, the defendant claimed he was unaware that the weapon had been modified, and therefore, his lack of knowledge regarding the changes to the firearm should shield him from criminal liability.<sup>98</sup> The trial court, and the appellate court that followed, rejected his claim as irrelevant, concluding that Congress did not intend to require proof of a mens rea to establish the offense.<sup>99</sup> On appeal, the Supreme Court agreed that a public welfare offense is supportable "as long as a defendant knows that he is dealing with a dangerous device of a character that places him 'in responsible relation to a public danger,' [because] he should be alerted to the probability of strict regulation."<sup>100</sup> But the Court reversed the lower courts' rulings, finding instead that the crime with which the defendant was charged did not put him on sufficient notice of the probability of strict regulation.<sup>101</sup> Distinguishing these facts from *United States v. Freed*,<sup>102</sup> which involved unlawful possession of unregistered hand grenades, the majority in *Staples* found that possession of firearms involved the type of innocent conduct that would not put a person on notice of potential illegal conduct.<sup>103</sup> Because there is a "long tradition of widespread lawful gun ownership by private individuals in this country,"<sup>104</sup> the defendant's lack of knowledge regarding the exact nature of his

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93. 511 U.S. 600 (1994).

94. *Id.* at 602-04.

95. *Id.*

96. *Id.* at 603.

97. *Id.*

98. The defendant requested the trial court to instruct the jury that it had to find beyond a reasonable doubt that the defendant knew that the gun was fully automatic. *Id.* at 603-04. The district court rejected defendant's request, instead instructing, "[t]he Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation." *Id.* at 604.

99. *Id.*

100. *Id.* at 607.

101. *Id.* at 612.

102. 401 U.S. 601 (1971).

103. *Staples*, 511 U.S. at 610-11.

104. *Id.* at 610. But for a different perspective on whether defendant possessed notice regarding the lawfulness of possession, see *id.* at 624 (Stevens, J., dissenting) (asserting that possession of a semi-automatic weapon puts the possessor on notice of likely regulation).

possession was relevant on the issue of his guilt, and therefore his mistake of fact defense should have been allowed.<sup>105</sup>

In emphasizing the role of notice on the constitutionality of a strict liability crime, the Court made an important observation: “[b]y interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, we have avoided construing criminal statutes to impose a rigorous form of strict liability.”<sup>106</sup> As will be argued in Part III, recent Supreme Court case law may have seriously impacted the notice element, which is crucial to the application of strict liability in statutory rape.

*B. Statutory Rape as a Public Welfare Offense: Engaging in Sex  
is Risky Business*

Although the Supreme Court has addressed the issue of the strict liability crime, the Court has not directly dealt with the issue of statutory rape as a public welfare offense.<sup>107</sup> In *Morissette v. United States*, for example, the Court only spoke of the issue in a footnote that related to the history of the public welfare offense.<sup>108</sup> In that note, the Court observed that not all crimes require a guilty mind, citing specifically sex offenses including statutory rape where the defendant could be convicted despite a reasonable belief that the victim was old enough to consent.<sup>109</sup> And in *United States v. X-Citement Video, Inc.*,<sup>110</sup> which involved the distribution of a sexually explicit but not obscene video featuring an underage performer, the Court noted in passing that construing the statute at issue to require a mens rea did not conflict with the common law approach to sex offenses.<sup>111</sup> Without specific Supreme Court guidance on this issue, state courts have been left to interpret the occasional Court reference,<sup>112</sup> often

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105. Compare *id.*, with *United States v. Freed*, 401 U.S. 601 (finding that possession of hand grenades should have put defendant on notice that his activity may be subjected to strict regulation). The *Freed* analysis was in keeping with the view taken by Oliver Wendell Holmes; “[i]n some cases, especially of statutory crimes, [the individual] must go even further, and, when he knows certain facts, must find out at his peril whether the other facts are present which would make the act criminal.” OLIVER WENDELL HOLMES, *THE COMMON LAW* 75 (1881).

106. *Staples*, 511 U.S. at 607 n.3.

107. See *Robinson v. Pennsylvania*, 457 U.S. 1101 (1982) (declining to hear a statutory rape, mistake-of-age defense case); see also *Commonwealth v. Miller*, 432 N.E.2d 463, 465 (Mass. 1982) (recognizing that mistake-of-fact has never been found by the Supreme Court to be a defense for statutory rape).

108. 342 U.S. 246, 251 n.8 (1951).

109. *Id.*

110. 513 U.S. 64 (1994).

111. *Id.* at 72 n.2.

112. See, e.g., *Johnson v. State*, 967 S.W.2d 848, 853 (Tex. Crim. App. 1998)

concluding incorrectly that the Court has validated statutory rape as a strict liability crime.<sup>113</sup>

Historically, the crime of statutory rape was legislatively created in England during the thirteenth century in order to afford special protection to those considered too young to appreciate the consequences of their actions.<sup>114</sup> When the mistake-of-fact defense surfaced in the nineteenth century, it was summarily rejected.<sup>115</sup> Because of the difficulty in fitting statutory rape into the traditional public welfare offense model—after all, it is not the type of administrative infraction the model envisioned—it has sometimes been referred to as a “morality offense,”<sup>116</sup> suggesting that its grouping with more traditional public welfare offenses is impelled by the protection of the community’s welfare.

Labeling statutory rape as a quasi-public welfare offense, however, is still based on traditional public welfare offense language, namely the requirement that defendant is placed on notice when engaging in sexual activity that his or her conduct may be proscribed.<sup>117</sup> Indeed, this is a common theme—that engaging in sexual activity is risky business. Implicit in the risk the actor assumes is that sexual intercourse, even between consenting adults, may be proscribed by statute. One court has stated that a state legislature may rationally require that a perpetrator who engages in sexual intercourse “does so at his own peril.”<sup>118</sup> In *Owens v. State*,<sup>119</sup> a recent decision in Maryland, the court echoed this reasoning, explaining that defendant assumed the risk that is inherent in engaging in any type of sexual activity.<sup>120</sup>

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(concluding that because the United States Supreme Court declined to hear an appeal based on the mistake-of-fact defense in *Robinson v. Pennsylvania*, 457 U.S. 1101 (1982), the application of strict liability to statutory rape remains a sound principle).

113. See, e.g., *State v. Granier*, 765 So. 2d 998, 1000 (La. 2000) (citing *Morissette* in support of the proposition that the Supreme Court has recognized that some criminal offenses, such as sex offenses, do not require mens rea); *State v. Yanez*, 716 A.2d 759, 767 (R.I. 1998) (relying on Supreme Court precedent to find that mens rea was not required to convict the defendant of a sexual offense).

114. See *United States v. Ransom*, 942 F.2d 775, 777 (10th Cir. 1991) (detailing the history of statutory rape in concluding that the state’s statutory rape statute was constitutional).

115. See *United States v. Brooks*, 841 F.2d 268, 269-70 (9th Cir. 1988) (reviewing the origins of statutory rape law and noting that reasonable mistake-of-fact only has in most cases been considered a defense only when permitted by statute).

116. See *Levenson*, *supra* note 7, at 422-25 (discussing the use of strict liability to police behavior of which society disapproves).

117. See *id.* at 423-34 (noting strict liability places the risk of borderline behavior on the defendant).

118. *Commonwealth v. Robinson*, 438 A.2d 964, 966 (Pa. 1981).

119. 724 A.2d 43 (Md. 1999).

120. See *id.* at 52-53 (finding that the state’s interest in protecting children justified the lack of mens rea in the statutory rape statute).

The court also noted that an individual has no constitutional right to engage in sexual activity outside of marriage and that sexual conduct including adultery and fornication continues to be a subject of state regulation.<sup>121</sup> Labeling sexual activity as risky business justifies shifting the burden to defendant who must assume the risk of potential prosecution. As discussed in Part III, if it can be shown that engaging in sex is no longer risky business—that sexual activity outside of marriage is no longer subject to significant legislative interference—then a defendant has no notice of the potential proscriptions. Without this notice, there is no discernible risk that a defendant must bear, and the underlying premise of the public welfare offense rationale as applied to statutory rape collapses.

## II. A COMPARATIVE LOOK AT STATUTORY RAPE LAWS

### A. Generally

Rarely does one find a crime whose statutory schemes engender as much division of thought as statutory rape. At its most basic, statutory rape is the carnal knowledge of a person who is deemed underage as proscribed by statute<sup>122</sup> and who is therefore presumed to be incapable of consenting to sexual activity.<sup>123</sup> The crime serves to protect its underage victims from a host of dangers, including pregnancy, venereal disease, and the vulnerability to physical and psychological harm as a result of the lack of mature judgment.<sup>124</sup>

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121. See *id.* at 53 (relying on this reasoning in part to uphold the constitutionality of the statute at issue); see also *State v. Haywood*, No. 78276, 2001 WL664121 at \*5 (Ohio App. June 7, 2001) (finding that defendant assumed the risk on the rationale that “American culture might glorify youthful sex appeal, but is at the same time rife with warnings against sexual conduct with children . . . . Any person contemplating sexual conduct with a child . . . should be cautious—the existence of ‘statutory rape’ laws is hardly a secret”).

122. See BLACK’S LAW DICTIONARY 1267 (7th ed. 1999) (defining statutory rape as the “[u]nlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person’s will”). A more colloquial and cruder term, “jailbait,” is defined in MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 625 (10th ed. 1998) (“[A] girl under the age of consent with whom sexual intercourse is unlawful and constitutes statutory rape.”).

123. See, e.g., *State v. Granier*, 765 So. 2d 998, 1001 (La. 2000) (explaining the policy rationale for statutory rape statutes as the belief that juveniles were not mature enough to understand the consequences of their actions); see also *Jones v. State*, 640 So. 2d 1084, 1087 (Fla. 1994) (noting that the state has an obligation to protect children from sexual activity until they are old enough for such activity to be appropriate or safe); *accord Collins v. State*, 691 So. 2d 918, 923 (Miss. 1997). See generally WAYNE LAFAVE, CRIMINAL LAW § 17.4(c) (4th ed. 2003) (providing a discussion of the policies behind statutory rape).

124. See *Michael M. v. Super. Ct.*, 450 U.S. 464, 470 (1981) (chronicling the interests of the state in deterring underage sexual activity); see also *People v. Dozier*, 424 N.Y.S.2d 1010, 1014 (1980) (listing concerns that include “[f]orced marriage,



Unlike rape, the crime of statutory rape acknowledges that the actions by the victim may appear to be consensual.<sup>125</sup> Although evidence at trial may demonstrate that the victim engaged in the sexual activity voluntarily,<sup>126</sup> the victim is presumed to lack the capacity to consent because of the victim's age.<sup>127</sup> Noted one court, "the state has long recognized an obligation to protect its children from others and from themselves."<sup>128</sup> The essence of the crime, then,

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unwed motherhood, adoption, abortion, the need for medical treatment and precipitate withdrawal from school . . ."); *State v. Barlow*, 630 A.2d 1299, 1300 (Vt. 1993) (finding these interests to create a compelling state interest in protecting children from sexual activity). Two interesting sets of statistics belie the forcefulness of these statements. According to the Alan Guttmacher Institute, a not-for-profit corporation for health research, policy analysis and public education, teenage pregnancy rates have declined through most of the 1990s, due primarily to more effective contraceptives; and most of the nearly one million young women under the age of twenty who become pregnant each year are eighteen years old or older, and not covered under the statutory rape laws. See THE ALAN GUTTMACHER INSTITUTE, FACTS IN BRIEF: TEEN SEX AND PREGNANCY, at [http://www.agi-usa.org/pubs/fb\\_teen\\_sex.html](http://www.agi-usa.org/pubs/fb_teen_sex.html) (1999) (on file with the American University Law Review).

125. Consensual sexual activity may also be specifically noted in the statutory scheme so as to differentiate forcible rape from statutory rape. See *Slobodian v. State*, 808 P.2d 2, 3 (Nev. 1991) (concluding that conviction for statutory sexual seduction requires the complainant to have consented to the activity).

126. Cases are filled with references to the consensual nature of the sexual activity. See, e.g., *Short v. State*, 79 S.W.3d 313, 315 (Ark. 2002) (describing a thirteen-year-old complainant who testified that she told the defendant that she wanted to have sex with him); *Walker v. State*, 768 A.2d 631, 632 (Md. 2001) (involving fifteen-year-old complainant who stated she had consensual sexual intercourse with the defendant while living with him after running away from home); *Commonwealth v. Knap*, 592 N.E.2d 747, 748 (Mass. 1992) (regarding thirteen-year-old girl who climbed into defendant's bed naked while defendant was sleeping and who began massaging him); *State v. Campbell*, 473 N.W.2d 420, 423 (Neb. 1991) (concerning fourteen-year-old complainant who admitted that she had consensual sexual intercourse after she began dating the defendant); *Jenkins v. State*, 877 P.2d 1063, 1064 (Nev. 1994) (introducing testimony by complainant detailing her consensual sexual relations with defendant over a three to four week period); *Perez v. State*, 803 P.2d 249, 249 (N.M. 1990) (concluding that "there is no question that the sex was consensual").

127. See, e.g., *Foxwell v. State*, 125 A. 893, 894 (Md. 1924) (holding that under the Maryland carnal knowledge statute, the victim is legally presumed incapable of consent); see also *Commonwealth v. McCutcheon*, 748 N.E.2d 489, 493 (Mass. App. Ct. 2001) ("Since the law presumes that a person under sixteen is incapable of consenting, the assumption that one who consents to a sexual act would not make a complaint is both inapt and irrelevant."); *People v. Cash*, 351 N.W.2d 822, 829 (Mich. 1984) (noting consent is not an issue in statutory rape cases because the victim cannot legally consent); *State v. Anthony*, 528 S.E.2d 321, 324-25 (N.C. 2000) (rejecting defendant's defense that the victim consented and stating that the argument that those under the age of consent are actually capable of giving real consent should be directed to the legislature).

128. *State v. Barlow*, 630 A.2d 1299, 1300 (Vt. 1993). While one may view statutory rape as an effort to protect the exploitation of the underage victim, sometimes the "victim" does not feel exploited. The case of *State v. Thorp*, 2 P.3d 903 (Or. Ct. App. 2000), offers an interesting illustration. There, both the victim and her mother testified that they did not believe that the victim had been raped. The victim stated

[a]s far as I am concerned, Justin didn't do anything wrong. From the beginning I never thought that these charges should have been made against Justin. I still think that this whole thing is stupid and should have never

is not the victim's lack of consent<sup>129</sup> but the state's responsibility to protect those who, because of youth and lack of maturity, are unable to protect themselves from an imprudent decision to engage in the sexual activity.<sup>130</sup> Challenges to the presumption of lack of consent have been unsuccessful,<sup>131</sup> and there is overwhelming support for the premise that the prosecution does not need to prove lack of consent.<sup>132</sup>

Yet, it must also be said that the crime of statutory rape shares a complicated and symbiotic relationship with the crime of rape.<sup>133</sup> Indeed, a perusal of the statutory schemes suggests that the structure and placement of statutory rape in the code is often designed to complement other sexual crimes, including rape and child

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been pursued. As far as I am concerned, I was never a victim of rape.  
*Id.* at 904.

129. In a case of first impression in North Carolina, the court addressed whether lack of consent was a required element of statutory rape. *See State v. Anthony*, 516 S.E.2d 195, 198 (N.C. App. 1999) (concluding that, unlike rape "by force and against the will," which necessarily implicated only nonconsensual relations, consensual sexual relations could constitute statutory rape).

130. The state's interest in protecting the child from sexual activity, even in the face of seemingly contradictory actions by the child, drives the strict liability view. *See id.* (concluding that North Carolina's statutory rape scheme served the state's interest in protecting the young from sexual activity); *Gibbs v. People*, 85 P. 425, 426 (Colo. 1906) (finding that the purpose of statutory rape was to protect the morals of the children from the consequences of acts they were not able to comprehend); *State v. Campbell*, 473 N.W.2d 420 (Neb. 1991) (noting that neither the consent, nor the sexual history of the victim was relevant or admissible in a statutory rape case).

131. A disturbing line of cases involves the claim of consent in the carnal knowledge of extremely young children by their parents and stepparents. These challenges to the presumption of lack of consent in statutory rape have been quickly rejected. *See State v. Ainsworth*, 426 S.E.2d 410, 416 (N.C. Ct. App. 1993) (concerning the sexual abuse of a twelve-year-old by the concerted actions of his mother, stepfather and babysitter); *see also Drake v. State*, 236 S.E.2d 748, 750 (Ga. 1977) (holding that lack of consent is conclusively presumed in the sexual abuse of a nine-year-old).

132. *See, e.g., Payne v. Commonwealth*, 623 S.W.2d 867, 875 (Ky. 1981) (concluding with "no hesitancy" that the irrebuttable presumption that minors less than sixteen years of age were incapable of consenting to sexual activity did not violate the Fourteenth Amendment to the United States Constitution or Section Eleven of the Constitution of the Commonwealth of Kentucky). In Oregon, the legislature has modified the prevailing view on the incapacity to consent. *See OR. REV. STAT. § 163.345* (2003) (legislating a defense of consent where the actor is less than three years older than the victim at the time of the alleged offense).

133. Unlike statutory rape, where the lack of consent is presumed because of age, the term "rape" is used in this section to connote sexual activity that is not consensual because of other factors including force or threat of force, mental incapacity, drugs or duress. For an interesting discussion of the current state of consent in rape laws, see Joshua Dressler, *Where Have We Been and Where Might We Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409 (1998) (questioning whether rape law reform has gone too far in favor of the victim by broadening what constitutes force, interpreting silence as non-consent, and increasingly disregarding mens rea).

molestation.<sup>134</sup> In the case of rape and statutory rape, for example, similar facts may call for both charges to be pled.<sup>135</sup> Where the evidence at trial demonstrates proof of both rape and statutory rape, convictions are obtained for both offenses.<sup>136</sup> Sometimes, due to formal filing procedures, the statutory rape charge is alleged as a lesser-included offense to the crime of rape.<sup>137</sup> There have been occasions when the prosecution has attempted to use the age of the child to prove, not only statutory rape, but also the elements of lack of consent and force to prove rape.<sup>138</sup> And, sometimes statutory rape serves as ‘the fallback position’ for a winnable prosecution. In these cases, defendant is only convicted of statutory rape because of the difficulty in proving beyond a reasonable doubt that the sexual

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134. For example, CAL. PENAL CODE § 261.5 (West 2000) covers statutory rape while § 288(a) applies to lewd and lascivious acts with a minor. As the court in *People v. Toliver*, 75 Cal. Rptr. 819, 821-22 (1969), observed,

the philosophy applying to violations of [section 288] is entirely different from that applying to [unlawful sexual intercourse]. . . . consent can be an element of statutory rape, on the principle that a female whom a male may reasonably believe to be older than 18 can consent to an act of intercourse. On the other hand, [a] violation of section 288 does not involve consent of any sort, thereby placing the public policies underlying it and statutory rape on different footings.

Sometimes statutes are numbered consecutively with each statute having a slightly different focus. For example Connecticut’s statutory scheme provides punishment for sexual assault in the first degree, second degree, third degree and fourth degree. See, e.g., CONN. GEN. STAT. ANN. §§ 53a-70, 53a-71, 53a-72, 53a-73a (West 2001); UTAH CODE ANN. §§ 76-5-401, 76-5-401.1, 76-5-401.2, 76-5-402 (1999).

135. See, e.g., *State v. Martinez*, 14 P.3d 114, 115 (Utah Ct. App. 2000) (finding the defendant guilty of only unlawful sexual activity with a minor, to which he admitted); see also *Commonwealth v. Rhodes*, 510 A.2d 1217, 1220 (Pa. 1986) (finding the evidence sufficient to establish rape by “forcible compulsion, threat of forcible compulsion and with a victim who was so mentally deficient by virtue of her young age as to be legally incapable of consent.”).

136. See, e.g., *Commonwealth v. Moore*, 269 N.E.2d 636, 637 (Mass. 1971) (upholding convictions for statutory rape and assault because evidence showed that defendant beat victim with various objects); *State v. Smith*, 576 P.2d 1110, 1111 (Mont. 1978) (involving a perpetrator who forced the underage victim to the floor, restrained her, and removed her pants); *State v. Miller*, 466 S.E.2d 507, 510 (W. Va. 1995) (convicting defendant of both first degree and third degree sexual assault). For an early case finding that no election need be made between the two charges, see *State v. Houx*, 19 S.W. 35, 37 (Mo. 1892).

137. This is a state-sensitive issue depending on the elements of each crime and the state’s particular view of lesser-included offenses. See *Johnson v. State*, 522 N.E.2d 1082, 1084 (Ohio 1988) (finding that gross sexual imposition is a lesser-included offense of rape); see also *State v. Green*, No. W2001-00455-CCA-R3-CD, 2002 WL 1482680 (Tenn. Crim. App. Sept. 23, 2002). Although not officially reported, the case provides an excellent discussion of the relationship between rape and the lesser-included offense of statutory rape in Tennessee. For a discussion of the use of lesser-included offenses at trial, see Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257 (1999).

138. See *State v. Collins*, 508 S.E.2d 390, 391 (Ga. 1998) (affirming conviction for statutory rape of child, but reversing conviction on rape because the state lacked proof on the issue of force).

intercourse was accompanied by force or threat of force, or other statutory determination of non-consent.<sup>139</sup>

Initially, statutory rape legislation was predominantly gender-specific.<sup>140</sup> Only males could be convicted of statutory rape of females.<sup>141</sup> Although statutory rape as a gender-specific statute survived constitutional scrutiny in the landmark case of *Michael M. v. Superior Court*,<sup>142</sup> nearly all states have chosen to recast the crime as gender-neutral, both in who may be the perpetrator and in who may be the victim.<sup>143</sup> Interestingly, although the criminal statutes may

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139. See, e.g., *Alvarado v. State*, 164 P.2d 460, 461 (Ariz. 1945) (disregarding the evidence of force to charge defendant only with statutory rape); *State v. LaMere*, 655 P.2d 46, 48-49 (Idaho 1982) (allowing the prosecution to amend indictment to charge statutory rape instead of forcible rape); *Jobe v. State*, 401 S.W.2d 247, 248 (Tex. Crim. App. 1966) (charging defendant with only statutory rape of thirteen-year-old, despite substantial evidence of force). Indeed, the landmark United States Supreme Court ruling of *Michael M. v. Superior Court*, 450 U.S. 464 (1981), may have been one such case. Although it was filed as a statutory rape charge, evidence strongly suggested rape. The complainant testified that defendant “slugged her” in the face with his fist when she refused his advances. *Id.* at 487.

140. See, e.g., *People v. Hernandez*, 393 P.2d 673, 674 (Cal. 1964) (stating that “even in circumstance where a girl’s actual comprehension contradicts the law’s presumption, the male is deemed criminally responsible for the act, although himself young and naïve and responding to advances made to him.”); *Elkins v. State*, 72 S.W.2d 550, 551 (Tenn. 1934) (stating that the intent of the statute was to protect “innocent and immature girls” from more experienced men).

141. See, e.g., CAL. PENAL CODE § 261.5 (1970) (amended 1993) (defining the victim of statutory rape as “a female not the wife of the perpetrator, where the female is under the age of 18 years”); IOWA CODE ANN. § 698.1 (West 1977) (repealed 1978) (prohibiting carnal knowledge by a male over the age of twenty-five of a female under the age of seventeen); KAN. STAT. ANN. § 21-424 (1969) (repealed 1970) (defining the victim as “female person under the age of eighteen”); Louisiana Act No. 192 of 1912 (amended 1995) (defining victim as female between the ages of twelve and eighteen). These codes have all been changed to reflect gender-neutral terms. See CAL. PENAL CODE § 261.5 (West 2000); IOWA CODE ANN. § 709.4 (West 2003); KAN. STAT. ANN. § 21-3502(c)(2) (2002); LA. REV. STAT. ANN. § 42(a)(4) (West 2003).

142. 450 U.S. 464 (1981) (ruling that California’s gender-specific statutory rape statute did not violate equal protection even though it punished only males). Beyond the scope of this Article is the important issue raised by feminists on whether statutory rape—especially when it is gender specific—endorses a protectionist and paternalistic attitude that undermines the personal autonomy of women. See Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 73-74 (1994) (noting that “[l]aws which fail to both define coercive and non-coercive sex, and differentiate between them, ignore the fact that girls can identify and experience both pleasure and love in their intimate relationships”); Francis Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984). For a discussion of *Michael M.*, see Leslie G. Landau, *Gender-Based Statutory Rape Law Does Not Violate the Equal Protection Clause: Michael M. v. Superior Court of Sonoma County*, 67 CORNELL L. REV. 1109 (1982); Susannah Miller, *The Overturning of Michael M.: Statutory Rape Law Becomes Gender-Neutral in California*, 5 UCLA WOMEN’S L.J. 289 (1994).

143. See *supra* note 141 (noting as examples of the revisions to the gender-specific language of original statutory rape laws, the changes made in California, Iowa, Kansas and Louisiana); see also CAL. PENAL CODE § 261.5 (West 2003) (referring to both victim and perpetrator as “any person”); ME. REV. STAT. ANN. tit. 17-A, § 254

have been rendered gender-neutral, vestiges of male-dominated language remain in their legislated affirmative defenses.<sup>144</sup>

Obviously, the victim's age is a critical factor in a statutory rape case. It serves two purposes: it establishes the victim's lack of capacity to consent, and it represents notice to defendant that the conduct is prohibited.<sup>145</sup> States differ on the age below which the victim is incapable of consent. It is somewhat erroneous to think of states having defined one threshold age of consent, although certainly a few states have so declared.<sup>146</sup> Rather, because of the increased complexity of the many statutory schemes, states often provide different ages for consent depending on the particular offense.<sup>147</sup> Sometimes the classification of the crime as a misdemeanor or felony will depend on the relative age of the victim and perpetrator.<sup>148</sup>

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(West Supp. 2002-2003) (referring to perpetrator as "a person" and victim as "the other person"). *But see* IDAHO CODE § 18-6101 (Michie 1997) (describing the victim of statutory rape as a "female . . . under the age of eighteen (18) years").

144. *See, e.g.*, MONT. CODE ANN. § 45-5-511(1) (2001) (stating that "when criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that *he* reasonably believed the child to be above that age.") (emphasis added); *accord* KY. REV. STAT. ANN. § 510.040 (Banks-Baldwin 1995) (calling the perpetrator "he" throughout the code); WYO. STAT. ANN. § 6-2-308 (Michie 1996) (detailing the parameters of the affirmative defense with the following: "it is no defense that the actor did not know the victim's age, or that *he* reasonably believed that the victim was twelve (12) years or fourteen (14) years of age or older.") (emphasis added). But generally states attempt to create gender-neutral language in the affirmative defenses as well. *See, e.g.*, ARIZ. REV. STAT. § 13-1407 (2001) (using 'defendant' throughout the section); ARK. CODE ANN. § 5-14-102 (Michie 1997 & Supp. 2003) (claiming that the offender may be guilty "of the lesser offense defined by the age that *he or she* reasonably believed the child to be.") (emphasis added); 18 PA. CONS. STAT. § 3102 (2000) (finding that "it is a defense for the defendant to prove by a preponderance of the evidence that *he or she* reasonably believed the child to be above the critical age.") (emphasis added). For an interesting look at the use of pronouns in the law, see Debora Schweikart, *The Gender Neutral Pronoun Redefined*, 20 WOMEN'S RTS. L. REP. 1 (1998).

145. *Garnett v. State*, 632 A.2d 797, 822 (Md. 1993) (Bell, J., dissenting). In statutory schemes where the victim and perpetrator are required to have an age differential of several years, the gap is designed to ensure that a mistake regarding age is "more than mere inadvertence." *Commonwealth v. Dennis*, 784 A.2d 179, 182 (Pa. Super. Ct. 2001).

146. *See, e.g.*, ARK. CODE ANN. § 5-14-103(a)(1)(C)(i) (Michie 2003) (providing for the capacity to consent at age fourteen); *accord* IND. CODE § 35-42-4-3 (1998). At the other end of the spectrum, see IDAHO CODE § 18-6101 (Michie 1997) (denoting the victim as a female under eighteen years of age).

147. For jurisdictions which provide more than one age as the capacity to consent depending on the particular offense, see, for example, CONN. GEN. STAT. §§ 53a-70, 53a-71 (Supp. 2003) (proscribing conduct with persons under thirteen and under sixteen respectively); *see also* N.J. STAT. ANN. § 2C:14-2(a)(1), 14-2(a)(2) (West Supp. 2003) (providing threshold age of thirteen in the case of aggravated sexual assault and sexual assault if the victim is less than sixteen years of age respectively); S.C. CODE ANN. § 16-3-655 (Law. Co-op. 2003) (differentiating between a victim who is under eleven years of age, under fourteen years of age, and under sixteen years of age).

148. Connecticut's statutory scheme offers one such illustration where age

Indeed, in an attempt to distinguish the egregious felonious sexual activity from the non-egregious, many statutory schemes comprise complex, multi-layered age differential scenarios of victim and perpetrator. Minnesota's statutory scheme offers such an illustration where sexual offenses are divided among four code sections depending on the type of sexual contact,<sup>149</sup> and the code sections describe various scenarios depending on the age or relationship between the victim and the perpetrator. The prohibited relationships include: (1) a victim who is under thirteen with an actor who is more than thirty-six months older than the victim;<sup>150</sup> (2) a victim who is at least thirteen but less than sixteen years of age and an actor who is more than forty-eight months older;<sup>151</sup> (3) where the victim is between thirteen and sixteen and the actor is more than twenty-four months older<sup>152</sup> and (4) where the victim is at least sixteen years old "but less than [eighteen] years of age and the actor is more than [forty-eight] months older."<sup>153</sup> Other states have equally complex schemes that are intended to identify the subtle distinctions in the level of presumed coercion in relationships.<sup>154</sup> Many states also recognize that sexual activity between high school age peers may be

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determines the seriousness of the charge and punishment. Under CONN. GEN. STAT. § 53a-70(a)(2) (Supp. 2003), sexual assault of one under thirteen is a potential Class A or B felony. Under § 53a-71(a)(1), the sexual assault of someone between thirteen and sixteen years of age is described as a Class B or C felony. The provision for sexual assault in the fourth degree, § 53a-73a, prohibits sexual contact of someone under fifteen and is either a Class A misdemeanor or Class D felony. For other examples which detail the classification of the crime depending on the age of the victim and perpetrator, see N.C. GEN. STAT. § 14-27.7A (2001); N.Y. PENAL LAW §§ 130.25-130.80 (McKinney 1998 & Supp. 2003); OHIO REV. CODE ANN. § 2929.21 (West 1996).

149. MINN. STAT. ANN. § 609.342-345 (West 2003) (proscribing sexual penetration, conduct or contact with an underage person).

150. *See id.* § 609.342(1)(A)—Criminal Sexual Conduct in the first degree; § 609.343(1)(A)—Criminal Sexual Conduct in the second degree; § 609.344(1)(A)—Criminal Sexual Conduct in the third degree; § 609.345(1)(A)—Criminal Sexual Conduct in the fourth degree.

151. *See id.* § 609.342(1)(B)—Criminal Sexual Conduct in the first degree; § 609.343(1)(B)—Criminal Sexual Conduct in the second degree; § 609.345(1)(B)—Criminal Sexual Conduct in the fourth degree.

152. *Id.* § 609.344(1)(B)—Criminal Sexual Conduct in the third degree.

153. *Id.* § 609.344(1)(E)—Criminal Sexual Conduct in the third degree; § 609.345(1)(E)—Criminal Sexual Conduct in the fourth degree.

154. New Jersey's statutory scheme provides another example. N.J. STAT. ANN. § 2C:14-2 (West Supp. 2003-2004) (breaking down into (a) Aggravated Sexual Assault: where "[t]he victim is less than 13 years old," or where the victim is between thirteen and sixteen years old and the actor is in a special relationship to the victim; (b) Sexual Assault: where there is sexual contact with a victim less than thirteen years old and where the actor is four years older than victim; (c) Sexual Assault: where there is penetration of a victim between sixteen and eighteen years old and the actor is in a special relationship to the victim or where "[t]he victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim").

common and not necessarily meant for the chilling and punitive reach of the criminal law.<sup>155</sup> To accommodate that phenomenon, some states have re-categorized the crime<sup>156</sup> or have applied less serious punishment when committed by a perpetrator whose age differential is less than three<sup>157</sup> or four<sup>158</sup> years from the victim or when both perpetrator and victim are below the recognized age of consent.<sup>159</sup> The resulting classifications affect the grading and punishment of the perpetrator.<sup>160</sup>

Beyond these variations, an additional issue exists: whether the acts by the perpetrator must carry the additional requirement of scienter regarding the victim's age—namely, should statutory rape include whether defendant knew or should have known that the complainant was under the threshold age of consent?<sup>161</sup> Independent

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155. See, e.g., ARIZ. REV. STAT. § 13-1407(F) (2001) (allowing a defense to sexual conduct with a minor if “the defendant is less than nineteen years of age or attending high school and is no more than twenty-four months older than the victim and the conduct is consensual”) (emphasis added). But see *In re Pima County Juvenile Appeal No. 74802-2*, 790 P.2d 723 (Ariz. 1990) (rejecting an age-based defense to the charge of sexual assault in a case involving a sixteen-year-old boy's consensual fondling of the breasts of a fourteen-year-old girl), abrogated by ARIZ. REV. STAT. ANN. 13-1407(B) (West 2001) (providing a defense to the charge of sexual misconduct with a minor if the victim is age fifteen or older).

156. In Kentucky, for example, unlawful sexual activity between a perpetrator under eighteen and a victim who is between twelve and eighteen has been called sexual misconduct rather than the more stigmatizing labels of rape or statutory rape. See *Payne v. Commonwealth*, 623 S.W.2d 867, 874 (Ky. 1981).

157. Alaska's statutory scheme provides an example. See, e.g., ALASKA STAT. § 11.41.436(a)(1) (Michie 2002) (charging as a Class B felony sexual abuse of a victim who is between thirteen and fifteen by one who is at least sixteen years of age); *id.* § 11.41.440 (charging as Class A misdemeanor sexual abuse of a victim who is between thirteen and fifteen by one who is less than sixteen years old); see also VA. CODE ANN. § 18.2-63 (Michie 1996) (charging as a Class 4 misdemeanor when the accused is a minor and the consenting victim is “less than three years the accused's junior,” and charging as a Class 6 felony when victim is more than three years accused's junior). But see 2003 ARK. ADV. LEGIS. SERV. 1391 (Michie) (removing the three-year age difference defense in most applications of Arkansas' sexual assault laws).

158. See, e.g., COLO. REV. STAT. § 18-3-402(d) (2002) (prohibiting sexual penetration of a victim less than fifteen by a perpetrator four or more years older); MD. CODE ANN., CRIM. LAW § 3-304 (2002) (describing rape in the second degree as vaginal intercourse with another person who is under fourteen years of age by a person “at least 4 years older than the victim”) (emphasis added).

159. See *supra* note 157 (noting statutes in Alaska and Virginia that apply when both the victim and accused are minors).

160. See VA. CODE ANN. § 18.2-11 (Michie 1996) (punishing Class 4 misdemeanors with a \$250 fine); *id.* § 18.2-10 (punishing Class 6 felonies with imprisonment of one to five years); see also ALASKA STAT. § 12.55.125(d) (Michie 2002) (sentencing those convicted of Class B felonies to up to ten years in prison); *id.* § 12.55.135(a) (sentencing those convicted of misdemeanors to up to one year in jail).

161. Beyond the scope of this Article, there is considerable discussion on whether the mistake-of-age defense is in theory an affirmative defense by defendant or evidence offered to negate a critical element by the prosecution. See, e.g., *Perez v. State*, 803 P.2d 249, 250 (N.M. 1990) (declaring that knowledge of victim's age was

of this theoretical inquiry is the additional and often overriding analysis of whether statutory construction compels a certain interpretation by the court.<sup>162</sup> Faced with appellate challenges on whether the statute requires a criminal mens rea, courts must first address whether the legislature has spoken to the issue by the insertion of specific statutory language relating to mens rea<sup>163</sup> or, while omitting specific language, whether the legislature has demonstrated its legislative intent on whether statutory rape should be a strict liability offense.<sup>164</sup> This is sometimes easier said than done, as divining legislative intent might be blurred by compromises and alterations in language.<sup>165</sup> Where the legislature is silent, as is often

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not an element of the crime to be proven by the prosecution but concluding that defendant could raise it as an affirmative defense); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 406 (2d ed. 1986) (explaining the general principle that “mistake-of-fact . . . is a defense when it negatives the existence of a mental state essential to the crime charged”). Since no mental state is required in the case of statutory rape, permitting a mistake-of-fact defense deviates from the defense’s general application. Although unpublished, *State v. Sherman*, 1995 WL 118917 (Minn. Ct. App. Mar. 21, 1995), offers a good discussion of the issue.

162. *See, e.g.*, *Short v. State*, 79 S.W.3d 313, 315 (Ark. 2002) (detailing the court’s protocol in interpreting a state statute). For a particularly compelling read regarding rules of statutory construction of Hawaii’s statutory rape laws, *see State v. Buch*, 926 P.2d 599, 615-25 (Haw. 1996) (Levinson, J., dissenting). Justice Levinson’s thorough dissent may be the exception rather than the norm, according to one scholar who suggests that state supreme courts have done a less than stellar job at culpability evaluations. *See* Dannye Holley, *Culpability Evaluations in the State Supreme Courts From 1977 to 1999: A “Model” Assessment*, 34 AKRON L. REV. 401 (2001).

163. *See, e.g.*, *State ex rel. W.C.P. v. State*, 974 P.2d 302, 303 (Utah App. Ct. 1999) (declaring that “[a] crime imposes strict liability ‘if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state’”). Sometimes the interpretation of strict liability is against the better judgment of the court reviewing the statute. *See Owens v. State*, 724 A.2d 43, 48 (Md. 1999) (“[O]ur decision here is not concerned with the wisdom of Maryland’s policy of imposing strict criminal liability.”); *see also infra* Appendix (reviewing which states have specifically indicated that mistake-of-fact is not a defense in statutory rape).

164. *See, e.g.*, *Walker v. State*, 768 A.2d 631, 634-35 (Md. 2001) (declaring that legislative history showed that the prohibitions had been drafted specifically to preclude defenses); *Johnson v. State*, 967 S.W.2d 848, 849 (Tex. Crim. App. 1998) (“Had the Legislature intended to make a provision regarding the knowledge of the victim’s age it would have expressly included that requirement . . .”).

165. Several states have acknowledged the difficulties in trying to determine the legislative intent following reconfiguration of the statutory scheme. In *State v. Stiffler*, 788 P.2d 220 (Idaho 1990), the majority and dissent differed on whether the legislature intended to incorporate the tradition of strict liability into the import of the statute. In Indiana, a reconstructed statutory scheme left a gap in years between which it was difficult to determine whether the mistake defense applied. *See Lechner v. State*, 715 N.E.2d 1285, 1287 (Ind. Ct. App. 1999) (concluding that the gap reflected scrivener’s error, rather than legislative intent, thus the mistake-of-fact defense was available to all who reasonably believed the victim to be of such an age that the activity engaged in was not criminally prohibited). Difficulties also arose in New Mexico upon the legislative reconfiguration of the statutory rape laws, leaving the court “without guidance” on whether a mistake defense had been included. *See*



the case, courts must impute a particular position regarding the requirement of mens rea.<sup>166</sup> Although it is suggested that there are two views on this issue—jurisdictions either requiring a mens rea or employing strict liability<sup>167</sup>—it can be more accurately said that states actually fall into three general categories. The first, the ‘true crime model,’ includes those jurisdictions that require proof of a mens rea regarding the victim’s age—that the actor knew or should have known that the complainant was below the age of consent.<sup>168</sup> By this categorization I mean to suggest those jurisdictions whose statutory schemes specifically allow defendant to raise the affirmative defense of mistake-of-age or jurisdictions whose courts have interpreted the legislative silence on the issue to allow for the defense in every case, no matter the age differential of defendant and victim.<sup>169</sup> The second, the ‘public welfare offense model,’ is followed in the majority of jurisdictions and substitutes strict liability for a requirement of mens rea.<sup>170</sup> As a result, the only proof required for conviction is

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Perez v. State, 803 P.2d 249, 251 (N.M. 1990) (reviewing New Mexico’s statutory rape statute, and concluding that ultimately it was a “numbers game,” whose outcome is determined not only by the child’s age, but by the relative age of the defendant,” thus mistake of age should be permitted as valid affirmative defense); State v. Hoehne, 717 P.2d 237, 239 (Or. Ct. App. 1986) (commenting on the lack of legislative history in Oregon regarding a mens rea defense when the threshold age was changed from twelve to sixteen years old).

166. Instructive for our purposes, the Model Penal Code’s position is clear. Where the legislature omitted a culpable mental state, the presumptive requisite culpable mental state the prosecution must prove is at least ‘recklessness’ with respect to that crime or an element of that crime. See MODEL PENAL CODE § 2.02(3)-(5) (1962); see also MODEL PENAL CODE AND COMMENTARIES (Official Draft and Revised Comments) §§ 1.01-2.13, 244-51 (1985). For a general discussion of the Model Penal Code’s position on culpability, see Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 720-24 (1983); see also George P. Fletcher, *Mistake in the Model Penal Code: A False False Problem*, 19 RUTGERS L.J. 649, 650-51, 656-66 (1988) (providing a detailed evaluation of the effect of the Model Penal Code’s extension of its mistake-of-fact doctrine to all ‘material elements’ of a crime, which under the Code also includes general defenses, both justifications and excuses).

167. See Garnett v. State, 632 A.2d 797, 803-05 (Md. 1993) (contrasting certain states’ recognition of mistake as a defense to statutory rape with the traditional view of statutory rape as a strict liability offense).

168. See *infra* Appendix. Currently only Alaska, Indiana and Kentucky use this model.

169. This Article has affixed labels of true crime only to those jurisdictions whose sexual offenses all entitle defendant to raise the mistake-of-age defense. Where a state offers a mistake-of-age defense in one set of sexual offense statutes but not in another set, this Article has referred to the state as a hybrid model. See *infra* Appendix (providing a jurisdictional review of the true crime states).

170. Although it is often called a moral wrong, it is questionable whether engaging in sexual activity with a teenager is inherently immoral. When one considers the great variety among the states in the threshold age of consent, the universality of condemnation suggested by the term ‘inherent immorality’ may not be present. See, e.g., ARIZ. REV. STAT. § 13-1405 (2001) (“A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse

proof of the actus reus for statutory rape—the proscribed sexual activity with an underage person. The third category, called in this Article the ‘hybrid model,’ is followed in a number of jurisdictions and incorporates elements of both the true crime model and the public welfare offense models in the statutory scheme. Under the hybrid model, the victim’s age will determine whether strict liability will be employed or whether the actor will be entitled to raise the affirmative defense of mistake.<sup>171</sup>

One need only review the case of Raymond Garnett<sup>172</sup> to appreciate the conflicting results raised by the various statutory schemes. Twenty-year-old Raymond Garnett was convicted of the statutory rape of a thirteen-year-old girl and faced the possibility of a twenty-year sentence.<sup>173</sup> At trial, Garnett, a mentally retarded young man with an I.Q. of fifty-two, requested to introduce evidence that he had reasonably believed that the complainant was sixteen years old.<sup>174</sup> Depending on the jurisdiction, Garnett’s mistake-of-age defense (1) may have been introduced because statutory rape is considered a true crime which requires proof of a mens rea,<sup>175</sup> or (2) it may have been rejected because statutory rape is a strict liability offense, and defendant’s mistake as to victim’s age is irrelevant;<sup>176</sup> or (3) allowed if the victim had been older, but rejected in this situation because the victim was so young.<sup>177</sup>

### B. *The True Crime Model*

Invoking traditional common law principles, jurisdictions following the ‘true crime’ model believe that the crime of statutory rape must be governed by the same fundamental principles that control any

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or oral sexual contact with any person who is under eighteen years of age.”); ARK. CODE ANN. § 5-14-103(a)(1)(C)(i) (Michie 2003) (providing for the capacity to consent at age fourteen).

171. In an interesting twist on the mistake-of-age defense, see *Commonwealth v. Knap*, 592 N.E.2d 747, 748 (Mass. 1992), where defendant tried to present a mistake-of-identity defense, claiming that he believed the underage girl in his bed was his girlfriend and not his child’s babysitter.

172. See *Garnett v. State*, 632 A.2d 797 (Md. 1993).

173. *Id.* at 798-99.

174. *Id.*

175. In Alaska, Garnett’s defense would have been allowed. See ALASKA STAT. § 11.41.445(b) (Michie 2002).

176. In addition to Maryland, home of this case, most states would have barred Garnett’s mistake-of-age-defense. See *infra* Appendix (showing that twenty-nine states employ strict liability in statutory rape cases).

177. In other states, even though there may be a limited mens rea defense available where the victim is under sixteen years of age, the defense is not available if the victim is under fourteen years of age. See, e.g., MONT. CODE ANN. § 45-5-502(5)(b) (2002); see also *infra* Part II.D (discussing the hybrid model’s view of absolute liability where victim is below a particularly young statutorily determined age).

crime with the indicia of *malum in se*. In these jurisdictions, the seriousness of purpose and the harshness of the penalty require that the crime of statutory rape be treated as a true crime, not as a public welfare offense, and therefore, conviction for statutory rape must be predicated on a notion of blameworthiness that is accompanied by proof of criminal mens rea.<sup>178</sup> Without proof of criminal intent, the actor should not be held accountable.

In the case of statutory rape, it is not enough that the actor appreciates the nature of the activity in which he or she is engaged. Under the true crime model, consciousness of wrongdoing is an essential element of criminal culpability.<sup>179</sup> Actors must also know, or should have reason to know, that their sexual partners are below the prescribed age of consent.<sup>180</sup>

This is not to suggest that these jurisdictions have a fundamental disagreement with the crime of statutory rape itself. To the contrary, these states acknowledge the value of the underlying rationale for making statutory rape a crime—the victim “is presumed too innocent and naive to understand the implications and nature of her act.”<sup>181</sup> However, recognizing the value of criminal prosecution for statutory rape is a far cry from endorsing the principle of strict liability and its accompanying punishments that are assigned regardless of the intent and understanding of the defendant.<sup>182</sup> Despite the seductive and prosecutor-friendly environment of the strict liability offense, due

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178. See *People v. Hernandez*, 393 P.2d 673, 677 (Cal. 1964) (holding that defendant’s reasonable belief that victim was of majority age was a legitimate defense to the charge of statutory rape).

179. See *State v. Guest*, 583 P.2d 836, 838 (Alaska 1978) (holding that defendant was entitled to raise the defense of an honest and reasonable mistake to the charge of statutory rape because of the requirement that defendant should be aware of some wrongdoing in order to be convicted) (quoting *Speidel v. State*, 460 P.2d 77, 78 (Alaska 1969)).

180. *Perez v. State*, 803 P.2d 249, 251 (N.M. 1990) (“[It is] a ‘numbers game’ . . . . When the law requires a mathematical formula for its application, we cannot say that being provided the wrong numbers is immaterial.”); see also *Lechner v. State*, 715 N.E.2d 1285, 1287-88 (Ind. Ct. App. 1999) (supporting a mistake-of-age defense in all cases where the defendant reasonably believes the victim to be of any age where the activity engaged in would not be criminally prohibited).

181. See *Hernandez*, 393 P.2d at 674; see also *Garnett v. State*, 632 A.2d 797, 808 (Md. 1993) (Bell, J., dissenting) (recognizing that, despite dislike for the public welfare offense rationale, it is nonetheless in the public interest “to protect the sexually naive child from the adverse physical, emotional, or psychological effects of sexual relations.”).

182. *Speidel v. State*, 460 P.2d 77, 80 (Alaska 1969) (“To make [an inadvertent, unwitting] act, without consciousness of wrongdoing or intention to inflict injury, a serious crime, and criminals of those who fall within its interdiction, is inconsistent with the general law.”). For an in-depth look at the constitutional issues in the Alaska line of cases, see Benjamin L. Reiss, Note, *Alaska’s Mens Rea Requirements for Statutory Rape*, 9 ALASKA L. REV. 377, 389 (1992).

process of law and the potential for deprivation of liberty impel the conclusion that no one should be convicted of a serious crime based on inadvertent or innocent conduct.<sup>183</sup>

An interesting variation of the true crime model is found in Washington where the defense of mistake is legislatively applied to all crimes within the statutory scheme, with two important provisos: first, proof must exist that the defendant's mistaken belief as to age is predicated on the declarations of the victim,<sup>184</sup> and second, the defendant's mistaken belief fits within statutorily described parameters for mistakes of age.<sup>185</sup>

Thus, assuming the evidence so warrants, the defendant is entitled to raise as an affirmative defense the honest and good faith belief that the complainant was of statutory age for consent.<sup>186</sup> A typical jury instruction on the affirmative defense of mistake of fact regarding the material element of the complainant's age is as follows:

It is a defense to a charge of statutory rape that the defendant reasonably and in good faith believed that the female person was of the age of sixteen years or older even though, in fact, she was under the age of sixteen years. If from all the evidence you have a reasonable doubt as to the question whether defendant reasonably and in good faith believed that she was sixteen years of age or

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183. Concern over the ever-broadening public welfare offense doctrine extends beyond the issue of statutory rape as courts have found other unintentional acts to be outside the ambit of strict liability and therefore not crimes. *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 620 (1994) (concerning awareness that a weapon had the capability to fire automatically); *Morrisette v. United States*, 342 U.S. 246, 274-76 (1952) (involving the taking of apparently abandoned spent shell casings from government property); *Kimoktoak v. State*, 584 P.2d 25, 33-34 (Alaska 1978) (regarding the failure to render assistance in an automobile accident); *Speidel*, 460 P.2d at 80 (concerning the failure to return a rented vehicle to the owner); *see also supra* note 29 (documenting cases where courts refused to interpret statutes as strict liability offenses).

184. *See* WASH. REV. CODE ANN. § 9A.44.030(2) (West 2003).

185. *See id.* § 9A.44.030(3) (delineating when a mistake of age defense may be used according to the age of the victim and the age of the defendant). Although the mistake-of-age defense may relieve a defendant of one class of alleged statutory rape, it will not serve as a defense to a lesser-included offense that proscribes sexual activity with a minor of *the age the defendant believed the victim to be*. *See* *State v. Dodd*, 765 P.2d 1337, 1338 (Wash. Ct. App. 1989) (sanctioning mistake-of-age defense for second degree statutory rape, but affirming the conviction for third degree statutory rape because the act would have been criminal had the victim been the age the defendant believed her to be).

186. Federally, the affirmative defense of mistake of age has been codified in 18 U.S.C. § 2243(c) (2003) ("In a prosecution [for sexual abuse of a minor] it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.").

older, you must give the defendant the benefit of that doubt and find him not guilty.<sup>187</sup>

Appellate courts have held that trial courts violated defendants' constitutional rights by refusing to provide the requested instruction or by finding evidence regarding the mistake-of-age defense inadmissible.<sup>188</sup> Despite the importance of such evidence to the issue of criminal culpability, these states are nonetheless comfortable in requiring that the defendant bear the burden of proving the mistake as an affirmative defense, rather than as an element that the state must disprove.<sup>189</sup>

For some states the affirmative defense of an honest and reasonable mistake-of-age to the charge of statutory rape has been codified by legislation,<sup>190</sup> whereas in California, the defense was judicially created.<sup>191</sup> In fact, it is fair to say that the embodiment of the true crime model in statutory rape is California's judicial recognition of the defense established in *People v. Hernandez*.<sup>192</sup> Decided forty years ago, this case has served as a lightning rod on the debate of whether statutory rape should require a criminal mens

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187. *State v. Guest*, 583 P.2d 836, 837 (Alaska 1978). The court's failure to provide a mistake-of-fact instruction may be deemed prejudicial error requiring reversal at the appellate level. *See General v. State*, 789 A.2d 102, 111 (Md. 2002) (trial court abused discretion in failing to give requested instruction on mistake of age defense); *State v. Boogaard*, No. K6-01-332, 2003 WL 897207 (Minn. Ct. App. Mar. 4, 2003) (finding plain error where trial court failed to instruct on the limited mistake-of-age defense).

188. The jurisprudence of Alaska provides important commentary on this issue. *See State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996) (reiterating that the stare decisis of Alaska case law clearly forbids the application of the strict liability doctrine to serious crimes); *see also State v. Kimoktoak*, 584 P.2d 25, 28-31 (Alaska 1978) (finding that a defendant charged with violating an Alaska statute requiring motorists to stop and render aid in the event of an accident may request a jury instruction on intent because Alaska courts have historically read an intent requirement into statutes where the legislature was silent); *Alex v. State*, 484 P.2d 677, 678-81 (Alaska 1971) (writing that the court "would not . . . and will not . . . sanction conviction of a serious felony for mere inadvertence or simple neglect"); *Speidel*, 460 P.2d at 78-80 (holding that to convict an individual for a serious crime where that person acted innocently or had no criminal intent would be to violate due process of the law).

189. *See, e.g., State v. Smith*, 576 P.2d 1110, 1112 (Mont. 1978) (affirming the principle that the defendant has the burden of proving reasonable mistake as an affirmative defense); *accord Steve v. State*, 875 P.2d 110, 123 (Alaska Ct. App. 1994).

190. *See, e.g., WASH. REV. CODE ANN. § 9A44.030(2), (3)* (West 2003); ALASKA STAT. § 11.41.445(b) (Michie 2002). In Alaska, it appears that both the judiciary and the legislature arrived at this conclusion in the same time period. *See Guest*, 583 P.2d at 837. Other states have also legislated mens rea defenses, but in conjunction with strict liability application. *See infra* Appendix (listing these states as "hybrid" states).

191. *See People v. Hernandez*, 393 P.2d 673, 677 (Cal. 1964).

192. *Id.* In the immediate wake of *Hernandez*, two cases were remanded to provide the defendant with the opportunity to present the mistake-of-age defense at trial. *See People v. Mosley*, 50 Cal. Rptr. 67, 69 (Cal. Dist. Ct. App. 1966) and *People v. Nigri*, 42 Cal. Rptr. 679, 682 (Cal. Dist. Ct. App. 1965).

rea—touching off impassioned commentary for,<sup>193</sup> and especially against, the view expressed by the California Supreme Court.<sup>194</sup>

Several factors coalesced to create *Hernandez*. The statutory scheme in effect in California during that time incorporated rape and statutory rape in the same code section<sup>195</sup> and, as a result, it was difficult to interpret whether the mens rea required in the rape portion of the statute also applied to the statutory rape section.<sup>196</sup> The complainant in *Hernandez* was seventeen years, nine months—just three months shy of the age of consent in California.<sup>197</sup> California Penal Code § 26 codified a mistake-of-fact defense that would negate a mental element,<sup>198</sup> and the legislature was silent on whether statutory rape was intended to be a strict liability crime.<sup>199</sup>

In rejecting the public welfare offense rationale for statutory rape, the *Hernandez* court stated: “the courts have uniformly failed to satisfactorily explain the nature of the criminal intent present in the mind of one who in good faith believes he has obtained a lawful consent before engaging in the prohibited act.”<sup>200</sup> Under *Hernandez*,

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193. Some courts cited *Hernandez*, 393 P.2d 673, with approval despite their need to follow their states’ contradictory legislative dictates. See, e.g., *People v. Doyle*, 167 N.W.2d 907, 908 (Mich. Ct. App. 1969) (opining that “[c]urrent and social moral values make more realistic the California view that a reasonable and honest mistake of age is a valid defense to a charge of statutory rape”); *State v. Yanez*, 716 A.2d 759, 785 (R.I. 1998) (Flanders, J., dissenting) (“[I]t is probable that at least some of these courts (like California) would today reject strict liability if given the chance to do so.”).

194. See *State v. Silva*, 491 P.2d 1216, 1217 (Haw. 1971) (reaffirming decisions that repudiate “the result reached by the California court in *Hernandez*”); *State v. Navarrete*, 376 N.W.2d 8, 11 (Neb. 1985) (declaring, “[w]e have expressly rejected the ‘California Rule’ stated in *People v. Hernandez*”); *State v. Moore*, 253 A.2d 579, 581 (N.J. Super. Ct. App. Div. 1969) (opining that “California has seen fit to modify its law as indicated by *People v. Hernandez* . . . . New Jersey has not.”); *State v. Randolph*, 528 P.2d 1008, 1009 (Wash. Ct. App. 1974) (declining to be the first jurisdiction to follow *Hernandez*); *Kelley v. State*, 187 N.W.2d 810, 814 (Wis. 1971) (noting that “at least seven jurisdictions have expressly refused” to follow *Hernandez*); accord *State v. Klueber*, 132 N.W.2d 847, 848-49 (S.D. 1965).

195. See CAL. PENAL CODE § 261(1) (West 1964) (current version at CAL. PENAL CODE § 261.5 (West 2000)).

196. Interestingly, this was exactly the issue presented in *Garnett* under a very similar statute. The Maryland Court of Appeals held, contrary to the California court, that the mens rea indicated for the rape provision did not apply to the statutory rape provision. *Garnett v. State*, 632 A.2d 797, 804-05 (Md. 1993).

197. See *Hernandez*, 393 P.2d at 674.

198. See CAL. PENAL CODE § 26(3) (West 2000) (“All persons are capable of committing crimes except . . . those persons who committed the act or made the omission charged under an ignorance or mistake-of-fact, which disproves any criminal intent.”).

199. See *Hernandez*, 393 P.2d at 675.

200. *Id.* at 676. In deciding *Hernandez*, the court drew similarities between statutory rape and bigamy. See *id.* (reasoning that as in the case of bigamy, the actions of an individual accused of statutory rape should not become criminal simply because the person acted upon untruthful or misleading information). The court

as long as the defendant entertained an honest and reasonable mistake of fact as to the victim's age, the jury should be so instructed.<sup>201</sup>

Although *Hernandez* was a striking and well-reasoned departure from the mainstream position, it generated little replication. Application of the true crime model to statutory rape, while consistent with fundamental principles in criminal law, has found few takers.<sup>202</sup> Interestingly, even though *Hernandez* is recognized as the leading case on mistake-of-age defense, California itself is no longer a true crime model jurisdiction, but may be more accurately described as a hybrid model state.

In 1984, in *People v. Olsen*,<sup>203</sup> the California Supreme Court upheld *Hernandez*'s application of the mistake-of-age defense to California's statutory rape provision,<sup>204</sup> but rejected its use in a companion statute that proscribes lewd and lascivious acts with a young child.<sup>205</sup> In

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had held that bigamy was no longer a strict liability offense several years earlier. *See People v. Vogel*, 299 P.2d 850, 852 (Cal. 1956) (finding that defendant was not guilty of bigamy, "if he had a bona fide and reasonable belief that facts existed that left him free to remarry").

201. The *Hernandez* decision was modified by *People v. Scott*, 100 Cal. Rptr. 2d 70, 80 (2000), which relied on the California Supreme Court's decision in *People v. Olsen*, 685 P.2d 52 (Cal. 1984). In *Scott*, the court was asked to test the weight of the honest and reasonable mistake defense. 100 Cal. Rptr. 2d at 81. The court rejected the defendant's mistake-of-age defense stating that the *Hernandez* defense of mistake-of-fact under CAL. PENAL CODE § 26 (West 1999) should only be admitted if "the mistaken belief is . . . of such a nature that *the conduct would have been lawful and proper* had the facts been as they were reasonably supposed to be." *Id.* at 82 (quoting PERKINS & BOYCE, CRIMINAL LAW 1945 (3d ed. 1982)). The defendant's belief that the victim was over sixteen might have precluded culpability under CAL. PENAL CODE § 288 (West 2000) (lewd and lascivious acts with a minor), but it still would have made the defendant criminally culpable under CAL. PENAL CODE § 261.5 (West 2000) (statutory rape). *Id.*

202. It has been forty years since *Hernandez*. Yet, few states have adopted its approach. *See Johnson v. State*, 967 S.W.2d 848, 850 (Tex. Crim. App. 1998) (Price, J., concurring) (noticing that "[a]lthough this 'universal rule' was first 'broken' by the California Supreme Court [in *Hernandez*], . . . such breakage has hardly been universally accepted"). In her article, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 763 (2000), Michelle Oberman notes that it is surprising that so few proposals have been made to eliminate strict liability in statutory rape. *See supra* note 194 (discussing judicial criticism of *Hernandez*).

203. 685 P.2d 52 (Cal. 1984).

204. CAL. PENAL CODE § 261.5 (West 2000).

205. *See* CAL. PENAL CODE § 288(a) (West 2000), which provides in relevant part:

[a]ny person who willfully and lewdly commits any lewd and lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for a term of three, six, or eight years.

*See Olsen*, 685 P.2d at 57 (distinguishing the crime of lewd and lascivious conduct with a child from statutory rape based on the former's application to conduct involving only children age fourteen and below, i.e. victims of "tender years").

distinguishing between the two statutes, the court viewed as instructive the strong legislative policy underlying the second statute to protect “children of tender years.”<sup>206</sup> Further, the role of the honest and reasonable mistake to support probation in a conviction under the second statute suggested that the legislature did not intend for the mistake defense to be entertained on the issue of guilt.<sup>207</sup> As will be shown later in Part II.D, this dichotomous view is not uncommon; a number of jurisdictions have attempted to carve out mens rea and strict liability compromises depending on the age of the victim.<sup>208</sup>

### C. *The Public Welfare Offense Model*

In direct opposition to the true crime model, the public welfare offense model deems defendant’s mental culpability irrelevant to a conviction for statutory rape. Only two essential elements are required to prove the case: first, that defendant engaged in sexual intercourse (or the proscribed sexual activity) with the victim; and second, that the victim is under the threshold age of consent.<sup>209</sup> The prosecution bears no burden to prove a mens rea and, further, the defendant is precluded from raising any affirmative defense that would negate a mens rea.<sup>210</sup>

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206. *See Olsen*, 685 P.2d at 56-57 (noting a string of court of appeals decisions distinguishing the mistake-of-age defense permitted in CAL. PENAL CODE § 261.5, from the strict liability imposed on violators of § 288, based on the youth of the victims protected by § 288).

207. *Id.* at 58 & n.18 (referring to CAL. PENAL CODE § 1203.0669(a)(3) (West 2000), which allows probation and suspension of sentences only when a defendant entertained a reasonable mistake regarding the victim’s age).

208. *See infra* Part II.D (discussing the hybrid model).

209. *See State v. Yanez*, 716 A.2d 759, 766 (R.I. 1998) (finding that the legislative definition of third-degree sexual assault clearly included only two elements: the act and the age of the victim). The sexual activity, while not accompanied by a separate mens rea, must be volitional. *See State v. Pierson*, 514 A.2d 724, 727 (Conn. 1986) (holding that an implicit part of the state’s burden of proof included showing that the defendant “intended to perform the physical acts” required for statutory rape). In some jurisdictions, the prosecution must prove a third element—that the defendant and the complainant were not married at the time of the sexual activity. *See, e.g., State v. Stokely*, 842 S.W.2d 77, 81 (Mo. 1992) (reiterating that the defendant and the victim must not be married for a conviction of statutory rape); *see also HAW. REV. STAT. ANN. § 707-732(1)(b)* (Michie 2003) (requiring for conviction proof that the parties are not married to each other); *accord PA. CONS. STAT. ANN. § 3122.1* (West 2003). *But see Wis. STAT. ANN. § 948.02(4)* (West 2002) (providing that marriage to victim is “not a bar to prosecution”).

210. *See Yanez*, 716 A.2d at 767 (finding that the “state must prove beyond a reasonable doubt only that [the defendant] engaged in sexual intercourse with a person who was fourteen years of age or younger”). The Rhode Island court continued that the defendant could present no evidence on a mistake of age defense because to do so would “open the door to the introduction of evidence concerning a victim’s past sexual conduct” among other social policy considerations. *Id.* at 770.



While recognizing that most crimes require an actus reus and a mens rea, the public welfare offense model gives the legislature the power to dispense with the element of mens rea.<sup>211</sup> Specifically, in the case of statutory rape, the compelling interest in protecting the state's youth from engaging in sexual activity outweighs the need to provide traditional protections to defendant.<sup>212</sup> Bolstered by the open-ended language of *Morissette*, these states conclude that such use of legislative power does not run afoul of Supreme Court pronouncements.<sup>213</sup>

Because defendant's mens rea is deemed irrelevant for conviction, public offense jurisdictions regularly punish those whose conduct could be viewed as innocent or inadvertent. The case of *Jenkins v. State*<sup>214</sup> provides a good illustration of the problem. The defendant in *Jenkins* was convicted of statutory rape, called sexual seduction in Nevada,<sup>215</sup> and sentenced to sixteen years in prison for having sexual relations with two girls under the age of sixteen.<sup>216</sup> There was no dispute that Jenkins did believe, and could have reasonably believed that one of the victims, Sherry, was sixteen years of age and therefore

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211. See *Lambert v. California*, 355 U.S. 225, 228 (1957) (finding that "[t]here is wide latitude in the law-makers to declare an offense and to exclude elements of knowledge and diligence from its definition"); see also *Simmons v. State*, 10 So. 2d 436, 438 (Fla. 1942) (citing *Mills v. State*, 51 So. 278, 281 (Fla. 1910) to suggest that the legislature is free to dispense with the necessity of an element). But see *Johnson v. State*, 967 S.W.2d 848, 855 (Tex. Crim. App. 1998) (Baird, J., dissenting) (disputing that the Texas legislature has "plainly dispensed" with a criminal mens rea).

212. See *Owens v. State*, 724 A.2d 43, 56 (Md. 1999) (explaining that the legislature's refusal to allow a mistake-of-age defense furthered the state's interest in protecting children from sexual abuse); see also *State v. Searles*, 621 A.2d 1281, 1283 (Vt. 1993) (finding that imposing strict liability on statutory rape reflects "our enhanced concern for the protection and well-being of minors and the gravity we attach to crimes involving the exploitation of minors"); accord *Walker v. State*, 768 A.2d 631, 638 (Md. 2001); *Commonwealth v. Dennis*, 784 A.2d 179, 181 (Pa. Super. Ct. 2001).

213. See, e.g., *Yanez*, 716 A.2d at 767 (quoting *Morissette* to validate its application of strict liability); *State v. Martinez*, 52 P.3d 1276, 1281 (Utah 2002) (citing *Morissette* in affirming the constitutional validity of statutory rape as a strict liability offense). As one court noted:

The offense here is of that class which, by reason of *an unbroken line of judicial holdings*, it can be said that the statute denounces the mere doing of the act as criminal, regardless of whether the perpetrator had a bad mind, the generalized intent to engage in a course of criminal conduct.

*State v. Super. Ct. of Pima County*, 454 P.2d 982, 985 (Ariz. 1969) (emphasis added), *abrogated by* ARIZ. REV. STAT. ANN. 13-1407(B) (West 2001) (providing a defense to the charge of sexual misconduct with a minor if the victim is age fifteen or older). But see *infra* Part III (questioning the continued validity of *Morissette* in light of recent changes in the law).

214. 877 P.2d 1063 (Nev. 1994).

215. See NEV. REV. STAT. § 200.364(3) (2003).

216. See *Jenkins*, 877 P.2d at 1063.

able to consent. In fact, the court accepted as true that Sherry misrepresented her age to the defendant.<sup>217</sup> Despite the victim's misrepresentation and the harsh sentence that awaited Jenkins, the court was not persuaded. Rejecting a mistake-of-age defense, the court determined that the crime of statutory sexual seduction was a strict liability offense.<sup>218</sup>

In numerous other cases, evidence strongly suggests that defendant was operating under an honest belief that the victim was of age.<sup>219</sup> But under this model, two overarching principles diminish the relative importance of defendant's belief. First, the protection of the victim outweighs the immediate need to prove a particular defendant culpable. Courts suggest that the purpose of the legislation—to protect those who are underage from engaging in sexual activity—would be thwarted if the actor's lack of knowledge were considered.<sup>220</sup>

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217. Sherry's misrepresentation was quite elaborate and included her statement that her birth certificate was false. *See id.* at 1067. In fact, her misrepresentation was so thorough that the dissent was not entirely certain whether to accept as true that Sherry was a minor. *See id.* (Springer, J., dissenting) (noting that because Sherry was adopted and had no birth certificate conclusively evidencing her age, the prosecution should have been required to present more than Sherry's adoption papers (the birth date on which the state had made up for adoption purposes) to prove she was under age sixteen).

218. *See id.* (finding nothing in the "design or wording" of the statute requiring knowledge of the age of the victim). Requiring proof of such knowledge, the court concluded "would emasculate the salutary purposes of the statute." *Id.* In an interesting and somewhat contradictory vein, the proscribed sale of alcohol to a minor requires proof of defendant's knowledge regarding the minor's age. *See Garcia v. Sixth Judicial Dist. Ct. ex rel. County of Pershing*, 30 P.3d 1110 (Nev. 2001).

219. *See, e.g., Commonwealth v. Moore*, 269 N.E.2d 636, 639 (Mass. 1971) (concerning fourteen-year-old victim who showed defendant her identification card which said she was eighteen); *People v. Cash*, 351 N.W.2d 822 (Mich. 1984) (observing that victim was one month shy of her sixteenth birthday—the threshold age for consent—and that victim told defendant she was seventeen years old); *Walker v. State*, 768 A.2d 631 (Md. 2001) (involving a fifteen-year-old complainant who told defendant she was seventeen years old, and whom defendant believed because her place of employment refuses to hire persons younger than seventeen); *State v. Navarette*, 376 N.W.2d 8, 9 (Neb. 1985) (regarding a victim who was only six weeks shy of his sixteenth birthday, the age of consent in the state). Sometimes, however, it is hard to accept that defendant believed victim's deceit. *See, e.g., People v. Salazar*, 920 P.2d 893 (Colo. Ct. App. 1996) (questioning defendant's mistaken belief where eleven-year-old claimed to be seventeen or eighteen years of age).

220. *See, e.g., Owens v. State*, 724 A.2d 43, 54 (Md. 1999) ("The legislature's decision to disallow a mistake-of-age defense to statutory rape furthers its interest in protecting children in ways that may not be accomplished if the law were to allow such a defense."). While defendant's honest belief cannot negate culpability under the public welfare offense model, the state may sometimes use that information to mitigate punishment. *See State v. Stiffler*, 763 P.2d 308, 311 (Idaho Ct. App. 1988), *aff'd*, 788 P.2d 220 (Idaho 1990) (commenting that a female adolescent's sexual sophistication may be properly considered in imposing punishment); *State v. Rush*, 942 P.2d 55, 57 (Kan. Ct. App. 1997) (noting that the aggressive acts of the underage victim can be considered during sentencing); *Law v. State*, 224 P.2d 278, 279-80 (Okla. Crim. App. 1950) (approving the use of defendant's mistaken belief for purposes of punishment).

As the majority in *State v. Yanez*<sup>221</sup> stated: “the child molestation sexual assault statutes’ silence with regard to a mens rea is designed to subserve the state interest of protecting female children from the severe physical and psychological consequences of engaging in coitus before attaining the age of consent in the statute.”<sup>222</sup>

Second, and equally important, courts view the action of having sexual activity as inherently risky behavior, warranting prosecution if the sexual partner turns out to be under the age of consent. As one court noted, finding in favor of strict liability, the defendant placed himself in risky circumstances by “relying only on the victim’s mature behavior to substantiate her representation of age.”<sup>223</sup> This reasoning—that defendant’s assumption of the risk substitutes for a clearly defined mens rea—is at the heart of statutory rape’s treatment as a strict liability crime. Engaging in sexual activity, the argument continues, puts the actor on notice that he or she may be subject to criminal regulation.<sup>224</sup> This is a common theme. Engaging in sexual activity carries with it the risk, and hence the assumption of that risk, that the other person is underage.<sup>225</sup> In fact, so strong is this assumption of the risk, courts find it irrelevant that the victim may have actively concealed or lied about his or her age.<sup>226</sup> Thus, strict

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221. 716 A.2d 759 (R.I. 1998). For an excellent discussion of *Yanez* and Rhode Island law, see Vicki Bejma, Note, *Protective Cruelty: State v. Yanez and Strict Liability as to Age in Statutory Rape*, 5 ROGER WILLIAMS U. L. REV. 499 (2000).

222. *Yanez*, 716 A.2d at 766 (quoting *State v. Ware*, 418 A.2d 1, 4 (R.I. 1980)).

223. See *State v. Carlson*, 767 A.2d 421, 426-27 (N.H. 2001). The theme of shifting obligations could be found early in Supreme Court analysis. See *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (“Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than throw the hazard on the innocent public who are wholly helpless.”).

224. *Commonwealth v. Robinson*, 438 A.2d 964, 966 (Pa. 1981) (“In an exercise of the police powers, the legislature rationally may require that [the perpetrator] engages in sexual intercourse . . . at his own peril.”).

225. See *Garnett v. State*, 632 A.2d 797, 819 (Md. 1993) (Bell, J., dissenting) (noting that “anyone who has sexual relations with a female under the age of 14 is treated as if he knew that she was under 14 and so intended to have such relations with a fourteen-year-old female”).

226. See *State v. Campbell*, 473 N.W.2d 420, 425 (Neb. 1991) (dismissing the defense of reasonable mistake-of-age to a charge of first degree sexual assault on a child even when the victim sought to misrepresent his or her age); see also *Jenkins v. State*, 877 P.2d 1063 (Nev. 1994) (rejecting defense of mistake-of-age in a case involving complainant who told defendant that her birth certificate was incorrect because she was adopted and that she was probably two years older than the age listed on the certificate). For other cases involving acts of misrepresentation by the victim, see *supra* note 219. But see WASH. REV. CODE § 9A.44.030(2) (West 2003) (requiring proof of the victim’s misrepresentation in order to introduce the mistake-of-age defense); *State v. Bennett*, 672 P.2d 772, 776 (Wash. Ct. App. 1983) (reiterating the requirement that victim make explicit and false assertions of age in order for defendant to present mistake-of-age defense).

liability is not an arbitrarily adjudged finding: culpability is based on having knowingly engaged in an activity that could be subject to prosecution.

#### D. *The Hybrid Model*

In addition to the traditionally identified true crime and public welfare offense models, there is a third model, which shares characteristics from both sets of jurisdictions. The hybrid jurisdiction employs both strict liability and a limited mens rea defense when triggered by certain age-sensitive contexts and generally arose because of wholesale changes in the structure of the crime of statutory rape.<sup>227</sup> The combination provides “a form of compromise between the strict liability majority view that reasonable belief that the victim was older than a particular age is no defense and the minority view that reasonable mistake of fact as to age is a defense in statutory rape cases.”<sup>228</sup> Consequently, attempts to refer to these jurisdictions as part of the majority view embracing strict liability, are not entirely accurate.

Although it does not fully embrace the rationale of *People v. Hernandez*<sup>229</sup> and the true crime model, the hybrid approach is nonetheless a significant departure from the traditional public welfare offense model in that it recognizes a mistake-of-age defense in certain statutorily prescribed situations. Indeed, over the last twenty-five years, without much fanfare, these limited defenses have made their way into a variety of statutory schemes.<sup>230</sup>

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227. For example, before the adoption of the Montana Criminal Code of 1973, strict liability was imposed upon a defendant upon proof of a sex crime committed by him upon a female under the age of eighteen. *See State v. Reid*, 267 P.2d 986, 991 (Mont. 1954). It was no defense for the defendant to prove he believed the girl to be older, despite the reasonableness of such belief. MONT. CODE ANN. §§ 94-4101, 94-4106 (1947) (repealed January 1, 1974). Conversely, in Pennsylvania, until 1976, mistake-of-age was a complete defense to statutory rape. *See Commonwealth v. Dennis*, 784 A.2d 179, 180-81 (Pa. Super. Ct. 2001) (detailing the history of PA. CONS. STAT. § 3122). The defense was eliminated by statute when the crime was redefined to include relative age differential between victim and perpetrator. *Id.* Given this change, the legislature did not believe that a mistake-of-age defense was warranted. *Id.* at 181. But in 1995, the statute was once again revised, and mistake-of-age was introduced in a limited fashion. *Id.*

Federal law experienced similar change. Until 1986, statutory rape did not expressly include a mistake-of-age defense, and courts inferred that it was a strict liability crime. *See United States v. Brooks*, 841 F.2d 268, 269-70 (1988) (detailing the history of the repealed 18 U.S.C. § 2032 and the enactment of § 2243). In 1986, however, Congress enacted 18 U.S.C. § 2243(c)(1), which expressly provided for a mistake-of-age defense where defendant believed the victim was sixteen years of age. *Id.* at 269 n.2.

228. MO. ANN. STAT. § 566.020 cmt. to the 1973 Proposed Code (West 1999).

229. 393 P.2d 673 (Cal. 1964).

230. *See, e.g., ARIZ. REV. STAT. § 13-1407* (2001) (providing mens rea defense under

Under the hybrid model of statutory rape, states establish various categories of criminal conduct that depend on the victim's age or the relative age of victim and defendant. Hybrid jurisdictions allow the mistake-of-age defense where the victim is "close" to the threshold age of consent; "closeness" is marked statutorily by an age range for the victim.<sup>231</sup> The younger the victim is, and therefore the further the victim is from the threshold age of consent, the more serious the potential punishment, and the more likely it will be labeled a strict liability crime.<sup>232</sup> Below statutorily determined ages, absolute or strict liability is the rule.<sup>233</sup> The mens rea defense may be found in the substance of the criminal statutory rape statute itself,<sup>234</sup> or in a general provision governing the use of the mistake-of-age defense as it applies to any sexual crime.<sup>235</sup>

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revised statute if the victim is fifteen, sixteen, or seventeen years of age); COLO. REV. STAT. § 18-1-503.5 (2002) (creating statutory mistake defense if the victim is between fifteen and eighteen years of age); IND. CODE ANN. § 35-42-4-3(c) (Michie 2003) (recognizing defense where victim is between twelve and sixteen years of age); MINN. STAT. ANN. § 609.344(1)(b) (West 2003) (permitting mistake-of-age defense in limited situation where victim is between thirteen and sixteen years of age and defendant is more than twenty-four months older); MONT. CODE ANN. § 45-5-511(1) (2001) (granting mens rea defense where victim is between fourteen and sixteen years of age); accord 18 PA. CONS. STAT. ANN. § 3102 (West 2003); see also *infra* Appendix (providing a complete listing of the eighteen states that allow some form of the mistake-of-age defense).

231. See, e.g., ARIZ. REV. STAT. § 13-1407 (West 2001) (providing for the defense of mistake-of-age to sexual assault if the victim was either, fifteen, sixteen or seventeen years of age); ARK. CODE ANN. § 5-14-103(a)(1)(c)(ii), (B)(2)(c)&(d) (Michie 2003) (allowing the mistake of age defense where the victim is not more than three years older than the victim); COLO. REV. STAT. § 18-1-503.5 (2003) (permitting mistake-of-age defense where victim is between fifteen and eighteen years of age).

232. See, e.g., COLO. REV. STAT. § 18-1-503.5 (2003) (barring mistake-of-age defense where victim is under fifteen years of age); MINN. STAT. ANN. § 609.344(1)(b) (West 2003) (prohibiting mistake-of-age defense where victim is under thirteen and defendant is more than two years older than victim); 18 PA. CONS. STAT. ANN. § 3102 (West 2003) (refusing to admit defense where victim is under fourteen years of age).

233. Statistics appear to bear out the likelihood that the younger the victim, the more likely it was involuntary. See ALAN GUTTMACHER INSTITUTE, SEX AND AMERICA'S TEENAGERS 24 (1994) (reporting that seven in ten women who had sex before age fourteen, and six in ten of those who had sex before age fifteen, report having had sex involuntarily). But in a very interesting case involving consensual sexual intercourse between a twelve-year-old victim and a fourteen-year-old perpetrator, an Ohio court refused to uphold the charge of rape. See *In re Frederick*, 622 N.E.2d 762 (Ohio Ct. C.P. 1993). Asserting that the legislature could not have intended a perpetrator so close in age to be held accountable for the crime of rape solely because of the age of the victim, the court amended the charge to find perpetrator guilty of being an unruly child. *Id.* at 765.

234. See MO. ANN. STAT. § 566.020(2) (West 2003) (prohibiting the mistake defense where victim is thirteen or younger).

235. See *id.* § 566.020(3) (enabling defendant to raise mistake-of-age defense where charged with an offense requiring an age of consent of seventeen). When read in conjunction with subsection (b) of the statute, subsection (c) in effect permits the use of mistake-of-age as a defense where the victim is between the ages of fourteen and sixteen. See also *id.* § 566.020 cmt. to the 1973 Proposed Code (noting

Missouri's legislative scheme illustrates this type of model. With a threshold age for capacity to consent set at seventeen, Missouri has created the following mens rea/strict liability division: "Absolute liability" will be found as to the element of age when the victim's age is less than fourteen.<sup>236</sup> Where the victim's is between fourteen and seventeen years of age, a reasonable belief that the child was seventeen years or older is permissible as an affirmative defense.<sup>237</sup> While age boundaries may differ in hybrid jurisdictions, this is a common schematic formulation: an age below which the mistake defense will not be allowed, and an age grouping between absolute liability and consent when the mistake-of-age defense may be presented.<sup>238</sup>

Courts in hybrid jurisdictions have dismissed challenges to the strict liability aspect of the model employing the same rationale as in public welfare offense jurisdictions.<sup>239</sup> In *United States v. Ransom*,<sup>240</sup> for example, defendant was convicted of a sexual act with a child under twelve years old.<sup>241</sup> The federal statutory provision at issue precludes the defense of mistake of age, although a related statute allows the defense if the victim is between twelve and sixteen, and if defendant reasonably believed the victim was over sixteen.<sup>242</sup> The defendant specifically challenged the strict liability portion of the statute as

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that the statute's provision of strict liability for victims under the age of fourteen is a compromise position based on the Model Penal Code and the Federal Criminal Code).

236. *Id.* § 566.020 cmt. to the 1973 Proposed Code ("That is if the child is under the age of fourteen, defendant's belief (whether reasonable or unreasonable) as to the age is irrelevant.").

237. *Id.* § 566.020(3). Although § 566.020(3) suggests that defendant may always be entitled to an affirmative defense of mistake, read together with § 566.020(2) and the legislative commentary, it is clear that the affirmative defense of mistake only applies where the victim is between the ages of fourteen and seventeen years old.

238. In Pennsylvania, for example, defendant may raise the affirmative defense of mistake if the complainant is older than age fourteen. *See* 18 PA. CONS. STAT. ANN. § 3102 (West 2000). And in an interesting misapplication of the hybrid provision, one Oregon court provided a mens rea defense *only* for those defendants who are charged with the statutory rape of very young children. *See* *State v. Jalo*, 696 P.2d 14 (Or. Ct. App. 1985). But that decision was quickly overruled the following year in *State v. Hoehne*, 717 P.2d 237 (Or. Ct. App. 1986).

239. *See, e.g.*, *Short v. State*, 79 S.W.3d 313, 316 (Ark. 2002) (determining that where the victim is under fourteen years of age, "the State does not have to prove that the accused 'purposely' had sex with a person under fourteen years of age. [The accused] . . . is guilty of the crime, regardless of how old he or she thought the victim was, and regardless of whether there was consent."); *see also* OHIO REV. CODE ANN. § 2907.02 committee cmt. (Anderson 2002) ("The rationale [for strict liability where victim is under thirteen years of age] is that the physical immaturity of a pre-puberty victim is not easily mistaken, and engaging in sexual conduct with such a person indicates vicious behavior on the part of the offender.").

240. 942 F.2d 775 (10th Cir. 1991).

241. 18 U.S.C. § 2241(c) (2001).

242. *See* 18 U.S.C. §§ 2243(a)(1), (c) (2001).

violative of equal protection because the mistake-of-age defense was available in cases where the victim was older than twelve.<sup>243</sup> While the court accepted that the defendant was similarly situated to one who was charged with engaging in sexual activity with a minor over twelve,<sup>244</sup> it nevertheless rejected the claim finding that the legislature was well within its rights to make this a strict liability crime because “no credible error of perception could regard a child under twelve as an appropriate object of sexual gratification.”<sup>245</sup>

Interestingly, the Model Penal Code’s position is reflected in both the hybrid and true crime jurisdictions. The drafters of the Model Penal Code advocated that mistake of fact as to the victim’s age be allowed as a defense, at least “[w]hen criminality depends on the child’s being below a critical age *other than 10* . . . .”<sup>246</sup> It may be argued that the spirit of the Model Penal Code rests with the true crime model. Having delineated an age so low, the Model Penal Code suggests that should a defendant engage in behavior with one so young, he or she has demonstrated, at the least, criminally reckless behavior. But it perhaps also could be argued that the hybrid model’s formulation may be most closely aligned with the intent of the Model Penal Code. Having excluded from consideration the mistake-of-age defense for those who are extremely young, the drafters accomplished two goals. First, the threshold age in this situation suggests that the mistake-of-age defense is inherently unbelievable when dealing with a child so young; and second, even if defendant were operating under a honest and reasonable mistake of fact regarding age, sexual activity with one so young can never as a matter of law be deemed acceptable, making the mistake defense equally irrelevant.<sup>247</sup>

### III: CHALLENGING STATUTORY RAPE AS A PUBLIC WELFARE OFFENSE

#### A. *General Principles of Legislative Prerogative to Create a Public Welfare Offense*

It is true and axiomatic that the legislature has the general power and authority to create the criminal rules and to dispense with a

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243. See *Ransom*, 942 F.2d at 777.

244. *Id.* at 778 n.4.

245. *Id.* at 778.

246. MODEL PENAL CODE § 213.6(1) & cmt. 2 (Official Draft) (emphasis added).

247. See *id.* (explaining that in permitting the use of the defense of mistake where the victim is above the age of ten, the Code sought a compromise position between the strict liability of former law and the general mens rea requirement of criminal law).

particular element.<sup>248</sup> In early American jurisprudence, the controlling principle appears to be that if a statute were silent as to mens rea, the court would imply one.<sup>249</sup> In an interesting development, however, some courts have interpreted legislative silence on a mens rea to mean that the legislature intended the crime to be strict liability.<sup>250</sup> General rules of statutory construction compel that the plain meaning of statutes should be enforced, and laws should be overturned only where the exercise of that power “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>251</sup>

Yet, it can also be said that notwithstanding general conventions of legislative prerogative and statutory interpretation, the legislature’s power to dispense with a criminal mens rea will not always withstand constitutional scrutiny.<sup>252</sup> Indeed, one must remember that every criminal defendant possesses the fundamental right to present a defense against the State’s accusations, and that denying the mistake-of-age defense infringes on that fundamental right.<sup>253</sup> If the

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248. See *Lambert v. California*, 355 U.S. 225, 228 (1957) (recognizing that the legislature’s authority to define an offense includes the power “to exclude elements of knowledge and diligence from its definition”); see also *United States v. Balint*, 258 U.S. 250 (1922); *Simmons v. State*, 10 So. 2d 436, 438 (Fla. 1942); *State v. Granier*, 765 So. 2d 998, 1000 (La. 2000); *Commonwealth v. Miller*, 432 N.E.2d 463, 465-66 (Mass. 1981); *People v. Cash*, 351 N.W.2d 822, 826 (Mich. 1984).

249. See *Morissette v. United States*, 342 U.S. 246, 251-52 (1952) (chronicling courts’ historical interpretation of legislative intent); see also *supra* notes 212-13 (detailing courts’ adoption of the public welfare offense model in cases of statutory rape).

250. See, e.g., *State v. Keaten*, 390 A.2d 1043, 1046 (Me. 1978) (concluding that the absence of a culpable mental state in the legislative reenactment suggests that strict liability was intended); *People v. Cash*, 351 N.W.2d 822, 826 (Mich. 1984) (construing legislative silence to mean no mens rea was intended); *State v. Todd*, 806 So. 2d 1086, 1097 (Miss. 2001) (sanctioning application of strict liability in a case of first impression interpreting a statute prohibiting fondling and sexual battery); *State v. Curry*, 330 N.E.2d 720, 724 (Ohio 1975) (remarking that if the statute is silent as to intent, then intent is not required to commit the crime); *Johnson v. State*, 967 S.W.2d 848, 849 (Tex. Crim. App. 1998) (determining that absence of express language means that Legislature did not intend the mens rea of knowledge as to age); *State v. Searles*, 621 A.2d 1281 (Vt. 1993) (declining in the face of legislative silence to imply knowledge of age as an element of statutory rape).

251. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

252. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (interpreting a statute to require mens rea even in the face of congressional silence); see also *Morissette*, 342 U.S. at 246 (observing that courts have nearly uniformly construed such statutes to contain a mens rea requirement). In his dissent in *Garnett*, Justice Bell stated, “I do not believe that . . . the General Assembly in every case, whatever the nature of the crime and no matter how harsh the potential penalty, can subject a defendant to strict criminal liability.” *Garnett v. State*, 632 A.2d 797 (Md. 1993) (Bell, J., dissenting).

253. See *Webb v. Texas*, 409 U.S. 95, 98 (1972) (Blackmun, J., dissenting) (emphasizing that a defendant has “in plain terms the right to present a defense, the right to present defendant’s version of the facts”) (citing *Washington v. Texas*, 888



legislature has unfettered discretion to eliminate a mens rea, it disturbs the delicate balance between the State's interest in protecting the community and the protection of defendant's fundamental rights. The reach of the legislative prerogative to eliminate a mental state is made more enigmatic by the Supreme Court's refusal to construct a constitutional mandate on the requirements of a mens rea.<sup>254</sup> As this section will demonstrate, the legislative prerogative to eliminate a mens rea in statutory rape fails because the public welfare offense indicia are absent.

As noted in the introduction, the legitimacy of the public welfare offense model, with its underlying strict liability formulation, is best viewed as a dynamic balance of four important indicia: (1) the risk of illegality that a defendant assumes when engaging in an activity that is subject to strict regulation; (2) the importance of protecting public and social interests in the community; (3) the relatively small penalty involved in conviction under the offense; and (4) the insignificance of the stigma attached to such a conviction.<sup>255</sup> The public welfare offense model might survive challenge because, *taken as a whole*, these factors provide a legitimate alternative to the true crime model.<sup>256</sup> This section will argue that statutory rape can no longer be called a public welfare offense because several of the indicia no longer apply.

It is true that since its introduction into American jurisprudence, statutory rape has been labeled as a strict liability crime.<sup>257</sup> Traditional notions of criminal culpability and mens rea have been abandoned in favor of marching orders that are clear—prove the intent to commit the sexual act and culpability will flow irrespective of proof of the perpetrator's lack of knowledge regarding the victim's age. Mental culpability, a cornerstone of the basis for punishment, has been replaced by a different justification: society's interest in

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U.S. 14, 19 (1967)); *see also* *Owens v. State*, 724 A.2d 43, 61-63 (Md. 1999) (Bell, J., dissenting) (examining the substantive and procedural due process impact in denying the mistake-of-age defense).

254. *See Powell v. Texas*, 392 U.S. 514, 535-36 (“[T]his Court has never articulated a general constitutional doctrine of mens rea.”).

255. *See supra* Part I (defining and explaining the use of the public welfare offense model).

256. *See supra* Part I.A (describing the rationale behind the public welfare offense doctrine); *see also* Green, *supra* note 30, at 1556-58 (distinguishing between public welfare offenses and strict liability crimes). For another view on the issue of overcriminalization, see Kyron Huigens, *What Is and Is Not Pathological in Criminal Law?*, 101 MICH. L. REV. 811 (2002) (responding to William J. Stuntz's article regarding the “political pathology” of overcriminalization).

257. *See generally* *Morrisette v. United States*, 342 U.S. 246 (1952) (reviewing the history of statutory rape as a strict liability crime in England and America). *But see* Myers, *supra* note 15, at 109-10 (disagreeing with the claim that statutory rape in England did not allow mistake-of-age defense).

preventing the exploitation of the underage victim, even at the cost of the innocent defendant's freedom.<sup>258</sup> Some courts have expressed that the best way to provide protection to an underage victim is to shift the burden to defendants to determine at their own peril whether their sexual partners fall within that proscribed class. Stated by one court in defense of strict liability in statutory rape, "a contrary result would strip the victims of the protection which the law exists to afford."<sup>259</sup>

As noted earlier in the Article, the language of *Morissette* would also give strength to such a routine application, where the Court observed in dicta, "[e]xceptions [to the requirement of a guilty mind] came to include sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent."<sup>260</sup> But, the Court's reference was based only on a historical read of the situation, not on an analysis of its legitimacy. In fact, it would appear that the label has persisted without much critical high court assessment, its enduring nature masking the inherent flaws in the association.<sup>261</sup> Despite reconfiguration of statutory schemes and opportunities to change, and despite significant judicial and scholarly commentary to the contrary,<sup>262</sup> many states steadfastly refuse to recategorize the crime to require a mens rea.<sup>263</sup> To these courts, invoking strict liability serves a purpose so laudable that it outweighs any claim of constitutional

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258. See *State v. Tague*, 310 N.W.2d 209, 211 (Iowa 1981) (claiming that the state's interest in this case is to "regulate the sexual activity of younger citizens"); *State v. Navarette*, 376 N.W.2d 8, 11 n.9 (Neb. 1985) ("It is not violative of due process for the Legislature, in framing its criminal laws . . . to require one who gets perilously close to an area of proscribed conduct to take the risk that he may cross over the line.") (internal quotations omitted).

259. *State v. Yanez*, 716 A.2d 759, 769 (R.I. 1998) (citing Sayre, *supra* note 4, at 73-74); see *Meinders v. Weber*, 604 N.W.2d 248, 260 (S.D. 2000) (reasoning from the expansion of statutory rape prohibitions that "the Legislature obviously concluded that young adolescents need additional protections").

260. *Morissette*, 342 U.S. at 251 n.8.

261. See, e.g., Richard Singer, *Strict Criminal Liability: Alabama State Courts Lead the Way into the Twenty-First Century*, 46 ALA. L. REV. 47, 78-80 (1994) (criticizing the Alabama courts for their cursory analysis in determining whether statutory rape should be treated as a strict liability crime).

262. See *State v. Silva*, 491 P.2d 1216, 1220 (Levinson, J., dissenting) ("With due respect, I submit that the 'prevailing view' is bad law."); see also Packer, *supra* note 14, at 109 (arguing that to punish without reference to the actor's state of mind has no deterrence value and cannot be justified on retributive grounds since the actor is not morally blameworthy).

263. Utah presents an interesting example. In 1984, the Utah Supreme Court held in *State v. Elton*, 680 P.2d 727, 732 (Utah 1984), that statutory rape was not a strict liability offense and that mistake as to victim's age was a valid defense. Following the court's decision, the Utah Legislature enacted UTAH CODE ANN. § 76-2-304.5 (1999), which expressly repudiated the holding of *Elton* and precluded mistake-of-age defense in all sexual offenses.

infirmity.<sup>264</sup> Protection of the underage person serves the larger social and public interests, and if in the process it convicts the unwitting or innocent defendant, it is a small price to pay.

Given this backdrop then, why would one want to ponder the road less traveled? Why consider injecting the requirement of mens rea into the prosecution of a crime whose etymology is so well settled in so many states? Stated simply, the public welfare offense jurisdictions are in error. The public welfare offense model, if it ever supported application to statutory rape, strains under current scrutiny. And the error is not lessened merely because many courts and legislatures have clamored for the doctrine's application.<sup>265</sup>

### *B. Examining the Public Welfare Indicia*

#### *1. Is engaging in sex still risky business?*

Public welfare offenses are predicated on the idea that these exceptions to the traditional proof of mens rea can be justified because defendant is held to heightened scrutiny for engaging in an activity, or dealing with a product that is highly regulated.<sup>266</sup> Under traditional public welfare offense lingo, the knowledge that one is engaging in an activity that is strictly regulated, or dealing with dangerous or deleterious product, serves as the substitution for a traditional mens rea. *Lambert v. California*<sup>267</sup> provides an example. Fundamental to the constitutionality of the California ordinance in question was whether defendant had notice that her behavior could be criminally proscribed.<sup>268</sup> There, the Court concluded that the ordinance requiring registration of convicted felons was

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264. See *supra* Part I.B (explaining the policy rationale for interpreting statutory rape as a strict liability offense). For a derisive take on the oft-quoted policies, see *Jenkins v. State*, 877 P.2d 1063, 1068 (Nev. 1994) (Springer, J., dissenting) (musing that “many state supreme courts chant ritualistic platitudes about protecting young females and about these kinds of defendants acting at their peril”).

265. See *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (recognizing that some practices should not withstand constitutional scrutiny merely because of the longevity of the practice); see also *Owens v. State*, 724 A.2d 43, 64 (Md. 1999) (Bell, J., dissenting) (“Due Process simply is not determined by reference to the number of courts ruling a particular way.”).

266. See *supra* Part I.A (examining the rationale for public welfare offenses); see, e.g., *State v. Tague*, 310 N.W.2d 209, 211 (Iowa 1981) (“[S]trict liability concepts are commonly used in the public interest to ‘put the burden upon the person standing in a responsible relation to a public danger even though he might otherwise be innocent.’”); *Commonwealth v. Heck*, 491 A.2d 212, 226 (Pa. Super. Ct. 1985) (reiterating philosophy that “the ‘sound doctrine’ underlying [strict liability in] statutory rape is that defendant who enters upon admittedly immoral act does so at his own peril and therefore cannot be exonerated . . .”).

267. 355 U.S. 225 (1957).

268. *Id.* at 227.

unconstitutional because the city failed to establish that Lambert had notice that her conduct could result in criminal prosecution.<sup>269</sup> Notice of the potentiality of criminal conduct serves an important function in that it shifts the burden to defendant who acts at his or her own peril when engaging in such behavior.<sup>270</sup> As the United States Supreme Court stated in *United States v. Staples*,<sup>271</sup> “[b]y interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, we have avoided construing criminal statutes to impose a rigorous form of strict liability.”<sup>272</sup> In order to justify the elimination of the mens rea, the public welfare offense model substitutes the assumption of risk in lieu of criminal culpability.<sup>273</sup>

In the case of statutory rape, it is argued that engaging in sexual activity puts the actor on notice that he or she may be engaging in a type of activity that is highly regulated under the law, and it, therefore, places the burden on the actor to ascertain at his or her own peril whether the conduct is proscribed by law.<sup>274</sup> It should be emphasized here that the risk we are speaking of is not only that defendant may be engaging in sexual activity with an underage person. The identified risk is broader. It is believed that by engaging in any kind of sexual activity with a person who is not one’s spouse, an actor may be subjected to a number of criminal regulations in addition to statutory rape, such as adultery or fornication.<sup>275</sup> Therefore, as noted in one opinion, when the “defendant had sex relations with the female . . . [he] knew or should have known that he

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269. *Id.* at 229-30.

270. *See, e.g.*, *People v. Dozier*, 424 N.Y.S.2d 1010 (N.Y. App. Div. 1980) (reasoning that defendant acted at his own peril in a statutory rape case, and therefore could not raise the affirmative defense of mistake).

271. 511 U.S. 600 (1994).

272. *Id.* at 607 n.3. *But see* *United States v. Hutzell*, 217 F.3d 966, 968-69 (8th Cir. 2000) (asserting that gun possession, “especially by anyone who has been convicted of a violent crime, is nevertheless a highly regulated activity, and everyone knows it”).

273. *See, e.g.*, *United States v. Freed*, 401 U.S. 601, 607-09 (1971) (construing possession of hand grenades as a strict liability offense because the possessor should know they are dangerous devices likely to be regulated). *But see* *Staples*, 511 U.S. at 609-10 (1994) (distinguishing *Freed* in concluding that strict liability did not apply to the possession of unregistered and disguised machine gun); *see also supra* Part I.A.2 (detailing modern treatment of the public welfare offense).

274. *Commonwealth v. Heck*, 491 A.2d 212, 226 (Pa. Super. Ct. 1985).

275. *See, e.g.*, HAW. REV. STAT. § 768-13 (2002) (prohibiting the crime of adultery, which is defined as intercourse with a married woman); *id.* § 768-17 (2002) (prohibiting fornication, which is defined as intercourse with an unmarried woman); D.C. CODE ANN. § 22-1602 (2003) (establishing the penalty for fornication as a fine of up to \$300 or six months in prison); *accord* GA. CODE ANN. § 16-6-18; (2003); IND. CODE § 18-6603 (2002); MASS. GEN. LAWS ch. 272, § 18 (2003); MINN. STAT. § 609.34 (2002); N.C. GEN. STAT. § 14-184 (2003); S.C. CODE ANN. § 16-15-60 (Law. Co-op. 2002); UTAH CODE ANN. § 76-7-104 (1999); VA. CODE ANN. § 18.2-344 (Michie 1996).

was by his act committing a criminal offense. The age of the consenting female only determined the gravity of the offense.”<sup>276</sup>

Using the *Staples* rationale, knowledge of the risk of criminal regulation in sexual activity is the isolated feature that replaces the traditional mental culpability.<sup>277</sup> Under this reasoning, retaining the feature of strict liability in statutory rape would survive scrutiny *as long as a broad range of sexual activity remained a highly regulated activity*. Indeed, in *Staples*, despite defendant possessing a type of machine gun, the Supreme Court nonetheless took the view that a broad range of gun ownership activity was lawful, and therefore machine gun possession, in and of itself, did not provide defendant with notice that the activity might be proscribed.<sup>278</sup>

The First Circuit explored the issue of knowledge of criminal prohibition in sexual activity in *Nelson v. Morianity*,<sup>279</sup> when it addressed the issue of the mistake defense:

The Supreme Court has never held that an honest mistake as to the age of the prosecutrix is a constitutional defense to statutory rape . . . and nothing in the Court’s recent decisions *clarifying the scope of procreative privacy* . . . suggests that a state may no longer place the risk of mistake as to the prosecutrix’s age on the person engaging in sexual intercourse with a partner who may be young enough to fall within the protection of the statute.<sup>280</sup>

*Nelson* is not the only case to have connected legislative prerogative in statutory rape with privacy rights enumerated by the Court. In *Owens v. State*, the Maryland Court of Appeals employed the same analysis.<sup>281</sup> In support of strict liability in statutory rape, the *Owens* court emphasized that the risk defendant assumed is one that is inherent in *any* type of sexual activity:

Although we need not reach the issue, it has been held that a person has no constitutional right to engage in sexual intercourse, at least outside of marriage, and sexual conduct frequently is subject to state regulation. Many states still criminalize fornication and other sexual behavior.<sup>282</sup>

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276. *State v. Silva*, 491 P.2d 12 16, 1217 (Haw. 1971) (Abe, J., concurring). *But see State v. Guest*, 583 P.2d 836, 839 (Alaska 1978) (rejecting the *Silva* rationale).

277. *Staples v. United States*, 511 U.S. 600, 611-12 (1994).

278. *Id.*

279. 484 F.2d 1034 (1st Cir. 1973).

280. *Id.* at 1035-36 [citations omitted] (emphasis added).

281. 724 A.2d 43, 51 (Md. 1999) (noting that sexual activity involves conscious activity which gives rise to circumstances that place a reasonable person on notice of potential illegality).

282. *Id.* at 53 (citations omitted). *But see Goodrow v. Perrin*, 403 A.2d 864, 866 (N.H. 1979) (accepting as true for purposes of plaintiff’s argument that an adult has a privacy right in consensual sexual activity with another adult).

This reference by the *Owens* court to the view that no person has a constitutional right to engage in sexual intercourse outside of marriage was based in part on its reliance of then existing Supreme Court precedent of *Bowers v. Hardwick*<sup>283</sup> which upheld the state's legislative power to criminalize sodomy.<sup>284</sup> One must question the resulting impact on the strict liability doctrine in statutory rape if it is found that persons have a constitutional right to sexual privacy outside of marriage.

a. *The impact of Lawrence on strict liability*

The notion that sexual activity outside of marriage is a potentially highly regulated activity which provides defendant with notice of possible criminal penalties—the same argument raised in *Nelson* and *Owens*—may have been significantly altered by the recent United States Supreme Court decision of *Lawrence v. Texas*,<sup>285</sup> which banned state criminal sodomy laws.<sup>286</sup> In clarifying the scope of procreative privacy rights between consenting adults, *Lawrence* may have a profound effect on the underlying assumptions regarding the strict liability doctrine in statutory rape. That is not to suggest that *Lawrence* has sounded the death-knell on all proscriptions of consensual sexual conduct,<sup>287</sup> or, that following *Lawrence*, all statutory rape laws, even those that require proof of criminal mens rea, will be found unconstitutional. No, it is fair to say that *Lawrence* appears to address only sexual activity between consenting adults. As Justice Kennedy stated:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.<sup>288</sup>

This argument, therefore, starts with the assumption that the prohibition on underage sexual activity remains an important state

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283. 478 U.S. 186 (1986).

284. See *Owens*, 724 A.2d at 53.

285. 123 S. Ct. 2472, 2483-84 (2003).

286. *Id.* at 2483-84.

287. But see *id.* at 2497-98 (Scalia, J., dissenting) (arguing that *Lawrence* will have far-reaching implications on the government's ability to proscribe sexual conduct).

288. *Id.* at 2484.

consideration beyond the immediate reach of *Lawrence*.<sup>289</sup> The decision in *Lawrence*, however, while directed at consensual sodomy laws, includes broader language, which may shape the public welfare offense doctrine's applicability to statutory rape.

How does *Lawrence* suggest this leap? The public welfare offense doctrine and post-*Morissette* decisions start from the postulation that the state has the prerogative to regulate a wide range of sexual activity, including *adult* sexual activity.<sup>290</sup> Indeed, in 1952, at the time *Morissette* was written, it is fair to say that sexual activity was a highly regulated activity. Criminal laws regarding sexual activity between consenting adults, such as adultery and fornication were drafted and enforced.<sup>291</sup> Other criminal laws affecting private sexual activity were also enforced, including the distribution and sale of contraceptives to married and unmarried persons.<sup>292</sup> Engaging in sexual activity was risky business; it subjected the actor to notice that the state may have enacted a regulation proscribing some aspect of that conduct. And according to *Staples*, defendant's knowledge of the potential proscription validates the use of strict liability because it is fair to shift the burden of the risk to an actor *only if* the actor can expect that some aspect of his or her sexual activity may be proscribed by statute.<sup>293</sup>

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289. This is not to suggest that the enactment of statutory rape is without its critics. For a seminal discussion of the significant liberty interests at stake, see Olsen, *supra* note 142, at 405. Michelle Oberman also provides insightful coverage of this area. 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, 800 (2001) (identifying a sinister purpose in the enactment of statutory rape laws as being "[to secure] male control over women's and girls' bodies and sexuality"). Oberman continues, "[i]t is this latter factor, surprisingly persistent throughout the common law history of statutory rape, which has saddled these laws with negative connotations and led to considerable ambivalence regarding their relevance to contemporary society." *Id.* See also Oberman, *supra* note 142, at 31 (observing that feminists in the twentieth century were troubled by gender specific statutes which oppressed a woman's sexuality even as they were attempting to protect her).

290. See *supra* notes 274-82 and accompanying text (discussing the legitimacy of legislative regulation of sexual offenses and activities).

291. Adultery and fornication laws still exist in some states. See *supra* note 275. They are, however, no longer universal in state law. See, e.g., *State v. Yanez*, 716 A.2d 759, 781 (R.I. 1998) (Flanders, J., dissenting) (observing that Rhode Island no longer considers fornication a crime).

292. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700-01 (1977) (invalidating a New York law which prohibited the sale of contraceptive devices to persons under sixteen years of age); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (finding it unconstitutional to criminalize distribution of contraceptives to unmarried persons under the guise of a health measure); *Griswold v. Connecticut*, 381 U.S. 479, 497-99 (1965) (striking down a Connecticut statute that made it a crime to distribute contraceptives to married persons).

293. See *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994) (explaining, in general, the legitimacy of the strict liability shift); see also *supra* notes 266-82 and

In the fifty years since *Morissette* was written, however, the landscape has changed dramatically. Procreational autonomy has been recognized,<sup>294</sup> privacy interests have expanded,<sup>295</sup> and conversely, legislative interference of aspects of sexual activity has decreased.<sup>296</sup> *Lawrence*, in fact, symbolizes the culmination of fifty years of court decisions, which have seen privacy interests increase and attitudes regarding sexual conduct change and which, taken together, have reshaped controls on the legislative power to interfere with such interests.<sup>297</sup> As one scholar has commented, “[t]he ‘fundamental liberty interest’ or ‘unenumerated right’ branch of substantive due process—of course the most controversial—has gained a remarkable degree of at least formal acceptance by the current Supreme Court.”<sup>298</sup> So, if *Owens* is correct in its characterization of legislative interference on sexual activity, and if the court in *Nelson* is correct

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accompanying text (discussing the relationship between assumption of risk and engaging in sexual activity).

294. See cases cited *supra* note 292; see also *Roe v. Wade*, 410 U.S. 113, 154 (1973) (upholding a woman’s privacy right to determine whether to carry or terminate her pregnancy). The right to privacy in the abortion context, however, was modified in subsequent cases. See *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 872 (1992) (noting that “[t]hough the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed”); *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 519-20 (1989) (finding constitutional a state-required test used to determine fetus viability).

295. See *Griswold*, 381 U.S. at 484 (declaring that “specific guarantees in the Bill of Rights have penumbras, formed by the emanations from those guarantees that give them life and substance” and that these “[v]arious guarantees create zones of privacy”); see also *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (noting that “mere categorization of films as ‘obscene’ is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments.”).

296. See, e.g., *Yanez*, 716 A.2d at 785 (Flanders, J., dissenting) (offering a dramatic visual in describing statutory rape as outdated). Justice Flanders stated, “[i]n many jurisdictions the only authority for a strict-liability rule is a musty judicial decision—the product of an era of radically different mores and social attitudes—when any extramarital sex, let alone sex between consenting teenagers, was generally considered morally reprehensible.” *Id.* at 785.

297. See, e.g., *State v. Silva*, 491 P.2d 1216, 1222 (Haw. 1971) (Levinson, J., dissenting) (noting that “[it is] inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor”) (citing MODEL PENAL CODE § 207.1, cmt.); see also *Eisenstadt*, 405 U.S. at 452 (concluding that “despite the statute’s superficial earmarks as a health measure, health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations”). The court continued, “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Id.* at 453.

298. Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 837-38 (2003) (noting, specifically, the Supreme Court’s increased recognition of “personhood-related rights”).



that a clarification on the laws regarding procreative privacy might affect the mistake defense in statutory rape, then we must examine *Lawrence* to see whether it provides such a clarification.

In reversing its decision in *Bowers v. Hardwick*,<sup>299</sup> and decriminalizing all acts of sodomy,<sup>300</sup> the *Lawrence* Court made a broad sweeping declaration: liberty interests allow substantial protection from legislative interference to consenting adults in matters of sexual activity.<sup>301</sup> Justice Kennedy stated:

In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>302</sup>

The increased liberty interest referenced in *Lawrence* suggests that sexual activity between consenting adults is beyond most legislative interference. In expanding upon the importance of the privacy interest in this context, the Court further stated, “[t]his, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”<sup>303</sup>

Unlike the environment in which *Morissette* or *Owens* were written, a post-*Lawrence* setting may not include considerable prohibitions against sexual activity between consenting adults. Legislative attempts to interfere with one’s sexual privacy may be more limited than what *Owens* anticipated. If that is true, it may no longer be accurate to say that engaging in consensual sexual activity is a highly regulated activity that puts individuals on notice of its potential illegality.

*b. Employing the Staples rationale*

If *Lawrence* provides protection for consensual sexual activity between adults, and certainly, the Court’s language in *Lawrence* advocates the plausibility of this argument, one must then ask the following question: If the actor *believes* that he or she is engaging in

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299. 478 U.S. 186, 189 (1986) (upholding the legislative power to criminalize sodomy).

300. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

301. *See id.* at 2480.

302. *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

303. *Id.* at 2478.

sexual activity with an adult, shouldn't that belief be relevant to whether the actor assumed the risk that the behavior is subject to criminal regulation? Essential to employing strict liability is the fundamental requirement that the actor must at least appreciate that he or she is dealing with a dangerous product or device, or involved in a highly regulated industry, and because of significant criminal regulation, can expect to be subject to potential criminal penalties.<sup>304</sup> If the actor cannot be expected to appreciate that the activity may be subject to strict regulations, then it is erroneous to cause the actor to assume what is, essentially, a nonexistent risk.

*Staples v. United States*<sup>305</sup> presented such a situation. As noted earlier in this Article, *Staples* concerned the extent to which defendant's lack of knowledge regarding the gun he possessed was relevant on the issue of his guilt.<sup>306</sup> Charged with unlawful possession of an unregistered machinegun,<sup>307</sup> defendant claimed that since he was unaware that the weapon had been modified into a machinegun, his lack of knowledge regarding the changes to the firearm should have shielded him from criminal liability.<sup>308</sup> In determining that the crime with which defendant was charged included the requirement of mens rea, the Court distinguished these facts from *United States v. Freed*,<sup>309</sup> which involved unlawful possession of unregistered hand grenades.<sup>310</sup> The majority in *Staples* stated that possession of firearms, unlike hand grenades, might not put defendant on notice of criminal regulation, because his possession could involve innocent conduct.<sup>311</sup> Since there was a "long tradition of widespread lawful gun ownership by private individuals in this country"<sup>312</sup> defendant's lack of knowledge

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304. See *Staples v. United States*, 511 U.S. 600, 602 (1994) (noting that "the Government should have been required to prove beyond a reasonable doubt that [the defendant] knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun"); see also *supra* Part I (detailing the four basic tenets of the public welfare offense doctrine, one of which is the extent to which the defendant can be said to have assumed the risk of his actions).

305. 511 U.S. 600 (1994).

306. *Id.*

307. See *id.* at 602 (according to the National Firearms Act, 26 U.S.C. § 5841).

308. *Id.* at 603. Defendant requested the trial court instruct the jury that it had to find beyond a reasonable doubt that the defendant "knew that the gun would fire fully automatically." *Id.* at 604. The district court rejected defendant's request and instead instructed as follows: "The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation." *Id.* at 604.

309. 401 U.S. 601 (1971).

310. *Id.* at 604-05.

311. 511 U.S. at 610 (noting the tradition of private gun ownership that is not characteristic of the ownership of hand grenades).

312. *Id.* at 610.

regarding the exact nature of his possession was relevant on the issue of his guilt.<sup>313</sup>

Such was also the conclusion of the Supreme Court in *United States v. X-Citement Video, Inc.*, which involved the distribution of a sexually explicit but not obscene video.<sup>314</sup> The problem, however, was that the performer in the video was underage.<sup>315</sup> The issue involved was whether the term ‘knowledge’ as used in the statute applied to the underage status of the performer.<sup>316</sup> In determining that the statute required scienter on the element of age, and was therefore, not a public welfare offense, the Court stated, “[o]ne would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults. Therefore, the age of the performers is the crucial element separating legal innocence from wrongful conduct.”<sup>317</sup>

So too, it may be said post-*Lawrence*, that an actor who engages in sexual activity with a person he or she *believes to be* of consenting age

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313. Defendant’s expectation regarding the level of regulation in the activity has been the subject of other Supreme Court decisions. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994) (involving the distribution of an adult video made with an underage performer wherein the Court explained that “[p]ersons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation”).

314. *Id.* at 64.

315. *Id.* at 66.

316. *Id.* at 68. The statute in question, 18 U.S.C. § 2252, provides:

Any person who—(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct . . . shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252 (2000).

317. 513 U.S. 64, 73 (1994). The intersection of the public welfare offense with the First Amendment presents an important and corollary discussion that is beyond the scope of this Article. In *United States v. Kantor*, 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit Court of Appeals was faced with a difficult choice in interpreting 18 U.S.C. § 2251(a), a companion statute to the one considered in *X-Citement Video, Inc.*, 858 F.2d at 535. In *Kantor*, defendants were charged with the production of materials depicting a minor, Traci Lords, engaged in sexually explicit conduct. *Id.* at 536. Once the appellate court determined that the materials themselves were not obscene, the court implied a mens rea in the statute, stating, “[Congress] may not impose very serious criminal sanctions on those who have diligently investigated the matter and formed a reasonable good-faith belief that they are engaged in activities protected by the first amendment.” *Id.* at 540. For a thorough discussion of the good-faith exception and the *Kantor* case, see Levenson, *supra* note 7.

lacks the knowledge regarding the criminal nature of his activity. For both Staples and a mistaken statutory rape defendant, if the circumstances were as they believed them to be, both actors would be engaging in conduct that is within the contemplated range of lawful behavior. Their lack of knowledge regarding the potentially criminal nature of the activity precludes them from being put on sufficient notice that their conduct may be subject to strict regulation. If notice of proscribed sexual activity is critical to the application of the public welfare offense model, then *an obvious lack of notice* should exempt statutory rape from the model's application. The sentiment expressed in *Owens*, that strict liability is justified because sexual activity outside of marriage is so heavily regulated, is no longer a viable argument in light of *Lawrence*.<sup>318</sup> Indeed, no clearer assertion for this proposition exists than the following twin statements: the *Owens* majority citing *Bowers* as justification for the imposition of strict liability;<sup>319</sup> and Justice Scalia's dissent in *Lawrence* citing *Owens* as justification for the proposition that *Bowers* was firmly entrenched in American jurisprudence.<sup>320</sup> Obviously, *Owens*' use of the overruled *Bowers* to support strict liability in statutory rape creates a gap in reasoning that may point to the doctrine's demise.

Additionally, an unwitting defendant's behavior may not even reach a level of negligence. Professor Levenson points out that a defendant takes an unjustifiable risk when engaging in behavior subject to strict regulation, and that this unjustifiable risk demonstrates at least negligent behavior.<sup>321</sup> Following that line of reasoning, if post-*Lawrence*, a defendant has not undertaken an unjustifiable risk when engaging in sexual activity with someone reasonably believed to be an adult, then he or she has not demonstrated negligent behavior solely from engaging in sexual activity.

Without knowledge, and therefore without the implied assumption of the risk, the behavior underlying statutory rape is beyond the

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318. See *Owens v. State*, 724 A.2d 43, 53 (Md. 1999) (referencing *Bowers* which has been overruled by *Lawrence* for the proposition that "a person has no constitutional right to engage in sexual intercourse, at least outside of marriage, and sexual conduct frequently is subject to state regulation"). Concluding that statutory rape is a strict liability offense in Maryland has raised strong dissent. See *id.* at 60, 63 (Bell, J., dissenting) (arguing that the majority has "ignored the real issue" and "confused the analysis"). It will be interesting to see whether *Lawrence* will provide the motivation for the Court to endorse the mens rea view.

319. *Owens*, 724 A.2d at 51.

320. *Lawrence v. Texas*, 123 S. Ct. 2472, 2490 (2003).

321. See Levenson, *supra* note 7, at 425.

rationale of the public welfare offense model.<sup>322</sup> In *Staples*, the Court found that defendant's lack of knowledge was relevant on the issue of mistake.<sup>323</sup> Post-*Lawrence*, logic would suggest that the *Staples* rationale should apply to statutory rape as well. Defendant's belief that the victim was of consenting age should be relevant to whether defendant would have reason to know that the activity might be subject to strict regulation. On this factor alone, statutory rape should fail under the public welfare offense rationale.

*c. Knowledge of risk under the hybrid model*

If the mistake-of-age defense is legitimately based, as I have suggested, what shall be argued of barring the defense where the victim is very young? The hybrid model's view on the mens rea/strict liability balance represents an interesting compromise—and an interesting admission. Such a mens rea defense, albeit limited, acknowledges that honest and reasonable mistakes regarding age are relevant to the issue of culpability in statutory rape. The closer the victim is to the age of consent, the more reasonable it is that defendant entertained a good faith mistaken belief regarding the victim's age.<sup>324</sup> The more reasonable the mistake, the less likely that defendant would have been placed on notice that the behavior is subject to strict regulation.

In light of the arguments advanced to this point, is it nonetheless valid to bar the mistake-of-age defense where the victim is very young? Or in *Staples* parlance, has defendant assumed the risk when engaging in sexual activity with someone who is clearly below the threshold of consent? Although the term 'strict liability' may be an inarticulate characterization of the rejection of the mistake defense, the underlying principle may still be valid. Sometimes, an actor should be barred from presenting a 'reasonable' mistake defense because of the *degree of unreasonableness* attached to the defense. There may be valid justification to distinguish between the admissibility of a mistaken belief where the victim, at fifteen, is just shy of the capacity to consent, and the admissibility of the defense

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322. As was discussed in Part II.D, under the hybrid view, there may be instances where it could be argued that because of the victim's extreme youth, defendant is placed on notice that his or her sexual activity may be subject to strict regulation. See *supra* notes 227-47 and accompanying text.

323. *Staples v. United States*, 511 U.S. 600, 615 (1994).

324. See *Garnett v. State*, 632 A.2d 797, 815 (Md. 1993) (Bell, J., dissenting) (“[T]he closer a minor is to the age of consent, the more the appearance and behavior of that minor can be expected to be consistent with persons who have attained the age of consent.”) (citing *Perez v. State*, 803 P.2d 249 (N.M. 1990)).

where the victim is twelve years of age and thus far removed from the threshold age. Even *Hernandez* acknowledged that “[n]o responsible person would hesitate to condemn as untenable a claimed good faith belief in the age of consent of an ‘infant’ female whose obviously tender years preclude the existence of reasonable grounds for that belief.”<sup>325</sup> Indeed, the dissent in *Garnett* recognized that if the age standard is low enough, the mens rea defense may not be appropriate.<sup>326</sup>

Such restriction is not uncommon in the law. Reasonableness as a threshold requirement for a mistake-of-fact defense is well established where the crime does not require specific intent,<sup>327</sup> and it is not error to refuse a mistake-of-fact defense where facts presented plainly refute the reasonableness of such a claim.<sup>328</sup> To the extent a mistake-of-age defense is inappropriate in the case of a very young victim, the defense fails—not because strict liability should attach to the behavior—but because of the lack of believability in the claim. Montana’s code is couched in exactly those terms; although the code allows a mistake-of-age defense for defendants who believe their sexual partners are over sixteen years old, “[s]uch belief *shall not be deemed reasonable* if the child is less than 14 years old.”<sup>329</sup>

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325. *People v. Hernandez*, 393 P.2d 673, 677 (Cal. 1964). The California court, however, did criticize the complete barring of the mistake-of-age defense, stating that the strict liability statute is “interpreted as if it were protecting children under the age of ten.” *Id.* at 676 n.3 (citing MORRIS PLASCOWE, SEX AND LAW 184-85 (1951)).

326. See *Garnett*, 632 A.2d at 815 (Bell, J., dissenting).

327. See generally DRESSLER, *supra* note 12, § 12.06; LAFAVE, *supra* note 161, § 5.1. The good faith nature of the mistake defense has been the subject of other discussions. See *In re Christian S.*, 872 P.2d 574, 583 (Cal. 1994) (recognizing that imperfect self-defense is a narrow defense requiring substantial proof that defendant actually entertained an honest belief of an imminent deadly attack); *People v. Williams*, 841 P.2d 961 (Cal. 1992) (limiting the opportunity for defendant to raise good faith belief regarding consent in a rape charge).

328. While not a statutory rape case, *State v. Dizon*, 390 P.2d 759 (Haw. 1964), presents an excellent example of a mistake defense rejected because of its lack of believability. There, the defendant was charged with rape. The evidence showed extensive use of force by defendant to accomplish the sexual intercourse. *Id.* at 762. The victim suffered serious injuries including scratches, abrasions, fractures of the fourth and fifth ribs, a fracture of the sternum, and an injury to her jaw. *Id.* With scorn, the court dismissed defendant’s challenge to the failure to instruct on reasonable mistake-of-fact:

[s]uch facts betray the hollowness of any claim that defendant in good faith believed the prosecutrix consented to his act. Under the circumstances, even if it be assumed *arguendo* that defendant’s claim of honest belief was true, such belief was allowed to exist in his mind only through his own negligence, fault, or carelessness.

*Id.* at 769.

329. MONT. CODE ANN. § 45-5-511 (2003) (emphasis added); see also *State v. Smith*, 576 P.2d 1110 (Mont. 1978).

In the case of sexual activity with one significantly younger than the threshold of consent, the defense of mistake is deemed unreasonable as a matter of law.<sup>330</sup> The finding of guilt here is tied to a belief that the actor is presumed blameworthy because of having engaged in sexual behavior with one that young.<sup>331</sup> Indeed, one could argue that in having sexual relations with someone as young as twelve or thirteen, the defendant was placed on notice that such behavior may be subject to serious regulation. The blameworthiness of the defendant comes from the assumption of risk in engaging in sexual activity with someone who is so young that he or she is clearly below the threshold age of statutory consent.<sup>332</sup>

2. *Is it inconsequential pain and stigma?*

In addition to the requirement of notice, courts and commentators speak of two other related factors in assessing whether a crime should be considered a public welfare offense. Penalties arising from public welfare offense convictions are usually minor, and conviction of these offenses carries “no grave damage to an offender’s reputation.”<sup>333</sup> Even assuming that an unwitting or innocent defendant is convicted under a traditional strict liability formulation, the pain and stigma attached to such a conviction is not overly burdensome. Conversely, “[t]o make such an [inadvertent, unwitting] act, without consciousness of wrongdoing or intention to inflict injury, a serious crime . . . is inconsistent with the general law.”<sup>334</sup>

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330. Evidenced by Montana law where the defense of mistake-of-age is not allowed by law for acts committed against children below the age of fourteen. MONT. CODE ANN. § 45-5-511 (2003). Tennessee law holds the same, for children under thirteen. TENN. CODE ANN. § 39-11-502 (2002).

331. Whether the term strict liability is used, or we discuss the inadmissibility of the defense in terms of a per se standard, one is still mindful of the problematic nature of such a label. Barring a defendant from introducing a mens rea defense is, in effect, masking an irrebuttable presumption. Stated by the dissent in *Garnett*, “[w]hen the Legislature enacts a strict liability crime, *i.e.*, promulgates a statute which excludes as an element, the defendant’s mental state, it essentially creates an irrebuttable presumption that the defendant’s mental state, *i.e.*, knowledge or intent, is irrelevant.” See *Garnett*, 632 A.2d at 819 (Bell, J., dissenting). It should be noted that Justice Bell was quite critical of the irrebuttable presumption’s application against defendant in *Garnett*. *Id.* (“Its use to relieve the State of its burden of proof to prove the defendant’s intent in that regard runs afoul of the due process clause of the Fourteenth Amendment.”).

332. See *supra* notes 223-25 and accompanying text (examining the importance of the assumption of the risk rationale in the classification of statutory rape as a strict liability offense).

333. See *Speidel v. State*, 460 P.2d 77, 79 (Alaska 1969) (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

334. *Id.* at 80.

*a. Harshness of punishment*

Statutory rape laws carry a wide range of penalties, including serious consequences such as sentences of twenty years and beyond.<sup>335</sup> Incarceration in prison, and the length of the potential sentence, make statutory rape an unlikely candidate for the public welfare offense model where penalties associated with other public welfare offenses are usually minor.<sup>336</sup> In rejecting the public welfare offense application to statutory rape, the Alaska Supreme Court stated in *State v. Guest*,<sup>337</sup> “[s]tatutory rape may not appropriately be categorized as a public welfare offense. It is a serious felony.”<sup>338</sup> While not a statutory rape case, *X-Citement Video* echoed these sentiments when it expressed concern regarding the harsh penalties and substantial fines that could be imposed on an unwitting actor for conviction under the federal statute.<sup>339</sup> The dissenting opinion in *State v. Yanez*<sup>340</sup> presented it well when reviewing the twenty-year sentence affixed to the strict liability crime of statutory rape: “[t]he degree of punishment and societal opprobrium befitting true sexual abuse crimes cannot be so cavalierly imposed with regard to the culpable intention of the actor as can the light fines and slap-on-the wrist penalties attached to typical public welfare offenses.”<sup>341</sup>

Interestingly, although the harsh nature of the potential penalty in statutory rape contradicts the spirit behind the public welfare offense model, many courts disregard the pain of such punishments. *Commonwealth v. Moore*<sup>342</sup> offers a typical but compelling example. There, the defendant, charged with statutory rape, claimed that imposing strict liability in the face of a potential penalty of life

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335. In Maryland, for example, a conviction for statutory rape could carry a twenty-year sentence in prison. See *Garnett v. State*, 632 A.2d 797, 801 (Md. 1993).

336. See Sayre, *supra* note 4, for a discussion of the traditional public welfare offenses and their penalties.

337. 583 P.2d 836 (Alaska 1978).

338. *Id.* at 838. In Alaska, as the court noted, “If [the offender] is less than nineteen years of age, he may be imprisoned for up to twenty years. If he is nineteen years of age or older, he may be punished by imprisonment for any term of years.” *Id.* See also *Speidel*, 460 P.2d at 78 (finding that a statute protecting renters of automobile did not relate to the health, safety or welfare of the public, thus was not a public welfare offense).

339. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (noting that “[v]iolations are punishable by up to 10 years in prison as well as substantial fines and forfeiture”).

340. 716 A.2d 759, 781 (R.I. 1998) (Flanders, J., dissenting).

341. *Id.* at 781-82 (Flanders, J., dissenting). In striking contrast to the majority view that penalties for statutory rape are not beyond the public welfare offense, such was not found in *Commonwealth v. Heck*, 491 A.2d 212 (Pa. Super. Ct. 1985), where the court held that the harshness of penalty was one sign that vehicular homicide could not be a strict liability crime.

342. 269 N.E.2d 636 (Mass. 1971).



imprisonment<sup>343</sup> violated due process and was cruel and unusual punishment.<sup>344</sup> The court acknowledged that conviction under the statutory rape laws possibly subjected the defendant to a “Draconian” measure of life imprisonment, and also agreed that there was further fallout from such a conviction, including restrictions on parole and on deductions for good conduct, examination as a sexual offender, and registration requirements.<sup>345</sup> Despite having recited the litany of serious consequences that emanate from such a conviction, the court nonetheless summarily dismissed that argument stating, “we do not deem them disproportionate to the offence shown in this case. Nor do we think strict criminal liability is necessarily a denial of due process of law.”<sup>346</sup> *Moore* is not the only case to dismiss claims regarding the harshness of the punishment. Both *Owens* and *Yanez* dismissed as unpersuasive the potential twenty-year sentence that awaited the defendants under the strict liability statutes.<sup>347</sup> And, in an interesting twist on this theme, the California Supreme Court rationalized that the harshness of the penalty associated with § 288(a), lewd and lascivious acts with a minor, actually encouraged a strict liability interpretation because the harshness of punishment demonstrated a strong legislative intent to protect children under the age of fourteen.<sup>348</sup>

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343. See MASS. GEN. LAWS ch. 265, § 23 (2002) (“Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under sixteen years of age shall, for the first offense, be punished by imprisonment in the state prison for life or for any term of years.”).

344. See *Moore*, 269 N.E.2d at 640 (citing the applicable constitutional provisions of the Fourteenth and Eight Amendments).

345. *Id.* (citing to various applicable Massachusetts statutes that were consequentially related to defendant’s conviction).

346. *Id.*

347. See *Owens v. State*, 724 A.2d 43, 50 (Md. 1999) (“Nor do we believe that the risk of 20 years of imprisonment or the trial court’s requirement that the defendant register as a ‘child sex offender’ renders unconstitutional Maryland’s statutory rape law.”). Interestingly, *Owens* left open the question of whether an actual sentence of twenty years, which defendant did not receive, would have been a violation of constitutional rights. See *id.* The majority in *State v. Yanez*, 716 A.2d 759 (R.I. 1998), also dismissed as unpersuasive the potential twenty-year sentence that awaited Yanez. The court stated, “[t]he dissent also maintains that since § 11-37-8.1 carries a minimum twenty year prison sentence, this offense is not a strict-liability crime. However, this factor alone is not persuasive since statutory-rape laws frequently involve substantial terms of imprisonment.” *Id.* at 769.

348. See *People v. Olsen*, 685 P.2d 52, 58 (Cal. 1984). The court stated:

It is significant that a violation of § 288 carries a much harsher penalty than does unlawful sexual intercourse (§ 261.5), the crime involved in *Hernandez*. Section 261.5 carries a maximum punishment of one year in the county jail or three years in state prison § 264, while § 288 carries a maximum penalty of eight years in state prison. The different penalties for these two offenses further supports the view that there exists a strong public policy to protect children under fourteen.

*b. Effect of sexual offender registration laws*

Whether it carries significant prison time or minimal jail time, conviction of statutory rape in most jurisdictions bears the public equivalent of the ‘scarlet letter’<sup>349</sup>—the requirement that sex offenders, after serving their sentences, must register with law enforcement officials.<sup>350</sup> Further, in most states, community notification statutes, enacted following the sexual assault and murder of seven-year-old Megan Kanka in 1994, require officials to notify members of the community of the offender’s location.<sup>351</sup> Whatever the underlying basis for the statutory rape conviction—intentional exploitation of a young child, or strict liability in the face of a reasonable mistake—all who are convicted in the vast majority of jurisdictions are subject to sexual offender registration laws, and the consequences of such registration.<sup>352</sup> Although there has been speculation on their constitutionality, just this past term, the

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*Id.*

349. For a thoughtful look at sex offender registration and notification laws, see Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 Nw. U. L. REV. 788 (1996).

350. See 42 U.S.C. § 14071 (West 1995 & Supp. 2003). The Act was named for Jacob Wetterling, an eleven-year-old boy who was abducted in 1989 by a gunman. See *The Jacob Wetterling Foundation Online*, at [http://www.jwf.org/jwf\\_about.html](http://www.jwf.org/jwf_about.html) (last visited Oct. 7, 2003). To date, Jacob remains missing. Four months after his abduction, Jacob’s parents established the nonprofit Jacob Wetterling Foundation to focus national attention on missing children and their families. *Id.* The Foundation was helpful in the 1991 passage of Minnesota’s Sex Offender Registration Act, MINN. STAT. § 243.166, and in 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. The Wetterling Act was included in the Federal 1994 Omnibus Crime Bill. *Id.* As it pertains to statutory rape, see 42 U.S.C. § 14071(a)(3)(A)(iii)-(vii) (2001) (establishing for states registration guidelines of sexual offenders, including those who commit any sexual crime against a minor).

351. Often called Megan’s Law, Congress amended the Jacob Wetterling Act in 1996 to include the requirement of community notification. See 42 U.S.C. § 14071(e)(2) (2001) (“The State or any agency designated by the State shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section.”); see also *Conn. Dep’t of Pub. Safety v. Doe*, 123 S. Ct. 1160 (2003) (upholding the public disclosure of the registration information); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (Feb. 23, 1998) (concluding that New York’s sex offender registration law was not prohibited as an ex post facto law, because the registration requirement was not a punishment within the meaning of the U.S. Constitution’s Ex Post Facto Clause).

352. See Alex B. Eyssen, *Does Community Notification for Sex Offenders Violate the Eighth Amendment’s Prohibition Against Cruel and Unusual Punishment? A Focus on Vigilantism Resulting from Megan’s Law*, 33 ST. MARY’S L.J. 101, 136 (2001) (listing all jurisdictions’ sex offender registration and notification laws). There are several states that exempt statutory rape from the list of offenses that require registration. See, e.g., CAL. PENAL CODE § 290(a)(2)(A) (West Supp. 2003) (omitting § 261.5 from the list of crimes that require registration); LA. REV. STAT. ANN. § 15:541-542 (West Supp. 2003); N.C. GEN. STAT. § 14-208.6 (2002); 42 PA. CONS. STAT. ANN. § 9792 (West 1998 & Supp. 2003); WIS. STAT. ANN. § 301.45(1)(m) (West Supp. 2003).

Supreme Court upheld the validity of registration and public notification laws.<sup>353</sup>

Currently, all states and the District of Columbia have passed sexual registration laws,<sup>354</sup> designed to protect the public safety through the release of certain information about sex offenders to public agencies.<sup>355</sup> As initially envisioned, registration laws were intended to facilitate data banks of sex offenders,<sup>356</sup> and with the advent of Megan's law, to notify members of the community of the convicted sex offender's location.<sup>357</sup> Registration requirements continue for a period of years for the conviction of a non-aggravated sex crime, and for life if convicted of an aggravated sex crime.<sup>358</sup>

The widespread passage of registration laws was due in part to the pressure applied by Congress following its 1994 passage of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act").<sup>359</sup> States that had not yet enacted sex offender registration laws were threatened with losing a percentage of their federal law enforcement block grants,<sup>360</sup> and

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353. See *Conn. Dep't of Public Safety v. Doe*, 123 S. Ct. 1160 (2003) (upholding public notification without proof of future dangerousness); see also *Smith v. Doe*, 123 S. Ct. 1140, 1142 (2003) (declaring that Alaska's registration laws did not violate ex post facto principles).

354. See Eyssen, *supra* note 352 (providing a chart of sex offender registration and notification laws in each of the states).

355. Legislative history among the states suggests that public safety is the primary goal. See ARK. CODE ANN. § 12-12-902 (Michie 1999) ("[P]rotecting the public from sex offenders is a primary governmental interest, [and] that the privacy interest of the persons adjudicated guilty of sex offenses is less important than the government's interest in public safety."); ME. REV. STAT. ANN. tit. 34-A, § 11201 (West Supp. 2002) ("The purpose of the chapter is to protect the public from potentially dangerous sex offenders and sexually violent predators by enhancing access to information concerning sex offenders and sexually violent predators."); MICH. COMP. LAWS ANN. § 28.721a (West Supp. 2003) ("The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state.").

356. See 42 U.S.C. § 14072(b) (2001) ("The Attorney General shall establish a national database at the Federal Bureau of Investigation to track the whereabouts and movement of—(1)each person who has been convicted of a criminal offense against a victim who is a minor."). Noted the Idaho legislature in enacting the registration laws: "[E]fforts of law enforcement agencies to protect their communities, conduct investigations and quickly apprehend offenders who commit sexual offenses are impaired by the lack of current information available about individuals who have been convicted of sexual offenses who live within their jurisdiction." IDAHO CODE § 18-8302 (Michie 1997 & Supp. 2003).

357. See *supra* notes 350-51 and accompanying text.

358. See *Smith v. Doe*, 123 S. Ct. 1140, 1142 (2003) (describing Alaska Sex Offender Registration Act); see also Eyssen, *supra* note 352 (documenting all jurisdictions' sex offender registration and notification laws in chart form).

359. See *supra* note 350 (documenting the history of the Act and the impetus for its passage).

360. See 42 U.S.C. § 14072(g) (2001) (requiring states to comply with the Act's

consequently states quickly adopted registration statutes that largely mirror the requirements of the Wetterling Act.<sup>361</sup> Registration under the Act is required of any person convicted of a criminal offense against a minor,<sup>362</sup> including criminal sexual conduct toward a minor, solicitation of a minor to engage in sexual conduct, and use of a minor in a sexual performance.<sup>363</sup> The one noted exemption to registration requirements of the Act is “conduct which is criminal only because of the age of the victim shall not be considered a criminal offense *if the perpetrator is 18 years of age or younger.*”<sup>364</sup> This provision also coincides with the current view of some jurisdictions that perpetrators who are under eighteen should be exempted from liability or charged only with misdemeanors in connection with the sexual assault.<sup>365</sup>

Sexual Offender Registration laws may require registration of all who are convicted—not only of those who possess future dangerousness.<sup>366</sup> The Supreme Court recently found in *Connecticut Department of Safety v. Doe*<sup>367</sup> that it is a legitimate rationale to have public registration based on past conviction alone, without any proof of future dangerousness.<sup>368</sup> In fact, the Court sanctioned the registration and public disclosure “of *all* sex offenders—currently

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provisions within three years of the Act’s passage). States that did not comply were faced with a decrease in funding. *See id.* § 14702(g)(2)(a)-(b).

361. *See* Eyssen, *supra* note 352 (listing in chart form each state’s sex offender registration and notification laws).

362. *See* 42 U.S.C. § 14071(a)(1) (2001).

363. *See id.* § 14071(a)(1)(A)(iii)-(v).

364. *See id.* § 14071(a)(1)(A) (emphasis added). Several states have adopted similar provisions. *See, e.g.,* HAW. REV. STAT. § 846E-1(7) (2002) (excluding registration requirements where perpetrator is eighteen years of age or under); *accord* IDAHO CODE § 18-8303(1) (Michie 2003); KY. REV. STAT. ANN. § 17.500(3)(b) (Banks-Baldwin 2003); MISS. CODE ANN. § 45-33-23(g)(ii) (2003); S.C. CODE ANN. § 23-3-430 (Law. Co-op. 2002); VT. STAT. ANN. tit. 13, § 5401(10)(B) (2002).

365. *See, e.g.,* GA. CODE ANN. § 16-6-3 (1999) (“[I]f the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim, such person shall be guilty of a misdemeanor.”); N.Y. PENAL LAW § 130.30 (Consol. 1998) (“It shall be an affirmative defense to the crime of rape in the second degree as defined in subdivision one of this section that the defendant was less than four years older than the victim [who is under 15 years of age] at the time of the act.”); OR. REV. STAT. § 163.345 (2001) (“[I]t is a defense that the actor was less than three years older than the victim at the time of the alleged offense if the victim was at least 15 years of age at the time of the alleged offense.”).

366. In Connecticut, for example, the Registry’s Website contains a disclaimer that the Department of Public Safety has not made any determination regarding the dangerousness of those whose names have been registered. *See* Conn. Dep’t of Pub. Safety v. Doe, 123 S. Ct. 1160, 1164 (2003) (citing CONN. GEN. STAT. §§ 54-257, 54-258 (2001)).

367. *Id.* at 1160.

368. *Id.* at 1163 (rejecting Petitioners’ contention that future dangerousness should be proven prior to their names’ placement in a registry).

dangerous or not.”<sup>369</sup> Under the Court’s ruling, for those who possess ‘a guilty mind,’ the burden of registration may be an appropriate one. Legislatures have evinced a strong desire to protect the public from those who have exploited the young and who are highly likely to repeat the offense.<sup>370</sup> And the intentional sexual predator fits that category. But for those unwitting or innocent who have been convicted of statutory rape, such attention and condemnation is not deserved. Under a strict liability model, not only is the innocent convicted equally with the guilty, the innocent is subject to the same registration requirements as those who possess criminal culpability.

Registration laws have survived a variety of constitutional attacks,<sup>371</sup> including most recently, a challenge that the registration laws violate ex post facto principles.<sup>372</sup> Despite their constitutionality, the impact on those convicted of sex offenses cannot be underestimated. As the Court pointed out in *Lawrence*

[t]he stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged.

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369. *Id.* at 1164.

370. *See, e.g.*, ARK. CODE ANN. § 12-12-902 (Michie 2002) (finding that “sex offenders pose a high risk of reoffending after release from custody”); LA REV. STAT. ANN. § 15:5540 A. (West 2002) (declaring that “sex offenders often pose a high risk of engaging in sex offenses, and crimes against minors even after being released”); MISS. CODE ANN. § 45-33-21 (2003) (highlighting the “danger of recidivism”); NEB. REV. STAT. § 29-4-2 (2002) (stating that sex offenders “present a high risk to commit repeat offenses”).

371. For cases that have rejected constitutional attacks on the registration laws, see *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997) (upholding New York’s sex offender registration act); *People v. Adams*, 581 N.E.2d 637 (Ill. 1991) (finding that Illinois’ Registration Act did not violate the cruel and unusual punishment clause of the Eighth amendment); *Akella v. Michigan Dep’t of State Police*, 67 F. Supp. 2d 716 (E.D. Mich. 1999) (finding that Michigan’s sex offender registration law did not violate the substantive due process rights of individuals required to register under the Act, nor did it violate the Constitution’s Ex Post Facto clause); *Boutin v. LaFleur*, 591 N.W.2d 711 (Minn. 1999) (declaring that the state’s sex offender registration act did not violate the fundamental right of the presumption of innocence because the Act is not punitive in nature).

372. *See Smith v. Doe*, 123 S. Ct. 1140 (2003) (finding that the registration act did not violate ex post facto principles because (1) the legislative intent was to create a civil, nonpunitive regime, and (2) the Act does not impose physical restraint). In finding Alaska’s registration laws civil and ‘nonpunitive’ in nature, the Court may have disregarded some of the seven factors that give guidance on whether the statute in question is regulatory or penal. *See id.* at 1157 (Stevens, J., dissenting) (arguing that the registration laws constitute a “severe deprivation of the offender’s liberty”) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)); *see also id.* at 1159 (Ginsburg, J., dissenting) (“Measured by the *Mendoza-Martinez* factors, I would hold Alaska’s Act punitive in effect.”).

The petitioners will bear on their record the history of their criminal convictions.<sup>373</sup>

Beyond the pain and stigma attached to the length of sentence or the reach of registration laws, one must not forget the social stigma attached to the conviction itself. It is of such concern that in Kentucky, for example, crimes have different labels depending on whether the perpetrator is a teenager or adult.<sup>374</sup> Expressing the reasoning for different labels, one court in Kentucky stated that

[t]he purpose in denominating such conduct between persons within the specified age groups as 'sexual misconduct' rather than 'rape' or 'sodomy' is to eliminate an undesirable stigma. In such cases the defendant may well have been persuaded by the 'victim' to engage in the proscribed conduct. It seems unnecessarily harsh to have a defendant within the prescribed age limitation who has been convicted of such a statutory offense to bear a criminal record labeling him as a 'rapist' or 'sodomist'.<sup>375</sup>

One has to ask whether it is still a legitimate exercise of police power to deny a mens rea defense to a charge of statutory rape when such an onerous and socially stigmatizing penalty awaits those so charged. Certainly, it is fair to question whether, given the national landscape at the time, the Court in *Morissette* could have possibly considered the future ramifications of the significant intrusion that such a conviction portends.

### 3. *Is strict liability necessary to protect community interests?*

Proponents of the public welfare offense model suggest that the use of strict liability is the best, and most efficient way to protect the public. If in the process, the unwitting or innocent defendant should be convicted, it is a small price to pay considering the behavior that the state is attempting to chill.<sup>376</sup> Professor Carol Steiker notes an interesting parallel modern development in this shift. She attributes, in part, the increasing popularity of the public welfare offense to the emergent voice of the victims' rights movement "which has similarly

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373. *Lawrence v. Texas*, 123 S. Ct. 2472, 2482 (2003).

374. See, e.g., KY. REV. STAT. ANN. § 510.140 (Banks-Baldwin 1995); see also *Payne v. Commonwealth*, 623 S.W.2d 867, 874 (Ky. 1981) (discussing the rationale behind using the term 'sexual misconduct' instead of the terms 'rape' or 'sodomy,' which have a negative connotations).

375. *Payne*, 623 S.W.2d at 873-74.

376. See, e.g., *Doe*, 120 F.3d at 1263 (declaring that New York's sex offender registration act was constitutional); see also *Adams*, 581 N.E.2d at 637 (determining that Illinois' Registration Act did not violate the Eighth amendment).

emphasized the importance of harm, rather than culpability, in criminal law.”<sup>377</sup>

Even with the shift in priorities from culpability to protection of the community, the question remains: Is strict liability the best answer, given the other important considerations mentioned earlier in the Article? Highly instructive for our purposes, let us consider a different crime that was enacted to protect the welfare of the public—HIV criminal transmission statutes.<sup>378</sup> Created in the 1980s and 1990s, these statutes were enacted to curb the behavior that transfers the potentially lethal HIV virus from one person to another.<sup>379</sup> Borne out of an intense desire to stop the spread of the HIV virus,<sup>380</sup> these statutes came into existence primarily after traditional criminal charges proved to be ineffective measures.<sup>381</sup> If

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377. See Steiker, *supra* note 47, at 792. Professor Steiker notes that victims’ advocates have “challenged the traditional notion that criminal and civil law occupy separate public and private spheres.” *Id.* (citing the rise in legislation allowing victim impact statements as evidence of this phenomenon).

378. See, e.g., 720 ILL. COMP. STAT. 5/12-16.2 (2002) (proscribing the intentional transmission of HIV through sexual intercourse or other means).

379. See *People v. Jensen*, 586 N.W.2d 748, 750 n.1 (Mich. 1998) (noting that the legislature did not specify a required intent to transmit HIV, and that it is reasonable for the legislature to assume that it is grossly negligent for someone who is HIV positive to have “any sexual penetration with another person without full disclosure”). The court further noted, “what does nondisclosure achieve? Only further dissemination of a lethal, incurable disease in order to gratify the sexual or other physical pleasures of the already infected individual.” *Id.* at 754. For articles that detailed the enactment and analysis of the criminal transmission statutes, see David Kromm, *HIV-Specific Knowing Transmission Statutes: A Proposal to Help Fight an Epidemic*, 14 ST. JOHN’S J. LEGAL COMMENT. 253 (1999); Mona Markus, *A Treatment for the Disease: Criminal HIV Transmission/Exposure Statutes*, 23 NOVA L. REV. 847 (1999); Amy L. McGuire, *Aids as a Weapon: Criminal Prosecution of HIV Exposure*, 36 HOUS. L. REV. 1787 (1999).

380. See *Jensen*, 586 N.W.2d at 755 (citing as the legislature’s primary concern stopping the spread of AIDS). For newspaper articles that reported on the enactment of the laws, see Douglas J. Besharov, *Make it a Crime to Spread AIDS*, WASH. POST, Oct. 18, 1987, at D5 (arguing that “states should make it a felony to expose others deliberately or recklessly to the AIDS virus”); Lynda Richardson, *Wave of Laws Aimed at People with HIV*, N.Y. TIMES, Sept. 25, 1998, at A1 (observing that due to growing fear of the AIDS epidemic, legislators around the country are enacting laws designed to protect the public from the spread of the disease); Debbie Salamone, *Exposing Someone to AIDS—Is that a Crime?*, ORLANDO SENTINEL, May 12, 1992, at A1 (rationalizing criminal prosecution as a deterrent).

381. Sometimes, attempts to prosecute the transmission of the virus did not fit neatly in the framework of traditional crimes. For example, transmitting the virus did not necessarily demonstrate the intent to kill required for a charge of attempted murder. See *Smallwood v. State*, 680 A.2d 512 (Md. 1996) (concluding that attempted murder should not stand because the State did not prove that HIV infected rapist possessed the intent to kill); see also Scott A. McCabe, *Maryland Survey: 1995-1996 Rejecting Inference of Intent to Murder for Knowingly Exposing Another to a Risk of HIV Transmission*, 56 MD. L. REV. 762 (1997); Rebecca Ruby, *Apprehending the Weapon Within: The Case for Criminalizing the Transmission of AIDS*, 36 AM. CRIM. L. REV. 313, 326-31 (1999) (analyzing the difficulties in prosecuting transmission under traditional common law crimes).

one harkens back to that time, one remembers the desperation and panic felt by much of the population—some of it, surely, out of ignorance—and the regulations that were suggested to punish those that spread the virus.<sup>382</sup>

Yet, criminal transmission statutes were not drafted as strict liability crimes. To the contrary, these statutes were drafted with a mens rea requirement, often a duality of mens rea.<sup>383</sup> First, they require some degree of knowledge on the part of defendant as to the attendant circumstance, namely that that he or she is infected with the HIV virus.<sup>384</sup> Second, the prosecution must prove that the defendant also possesses a mental culpability connected to the act of transmission, either intent or willfulness,<sup>385</sup> or the less stringent mental state of recklessness.<sup>386</sup> And when transmission statutes have been drawn without a specifically stated mens rea, courts have imputed a mens rea.<sup>387</sup> One Michigan court expressed that, “[a]lthough [the criminal transmission statute] contains no express mens rea requirement, we

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382. See Clare Ansberry, *Fear and Loathing: AIDS, Stirring Panic and Prejudice, Tests the Nation's Character*, WALL ST. J., Nov. 13, 1987, at 1 (reporting on the fear among the population of contracting the AIDS virus, leading to social isolation of carriers of HIV, as well as acts of physical violence against carriers); Peter Applebome, *AIDS, Like a Roof, is Realtors' Concern*, N.Y. TIMES, Mar. 14, 1988, at A14 (discussing a Texas law which requires realtors to disclose if a person with AIDS previously lived in the house, because it is viewed as a defect in the premises); *Poll Indicates Majority Favor Quarantine if AIDS Victims*, N.Y. TIMES, Dec. 20, 1985, at A24 (finding fifty-one percent of Americans favor quarantine of AIDS victims, forty-eight percent think those infected should carry identification cards, and fifteen percent advocate tattooing carriers of the virus). For a thoughtful treatment on the employment of criminal law to address a public health issue, see J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435 (1994).

383. See, e.g., CAL. HEALTH & SAFETY CODE § 120291 (West 1990) (indicating the existing duality of the mens rea requirement).

384. See *id.*; see, e.g., MO. REV. STAT. § 191.677 (1996) (applying a reckless standard to exposing another person to HIV).

385. See LA. REV. STAT. ANN. § 14:43.5 (West 1997) (providing that “[n]o person shall intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus through sexual contact without the knowing and lawful consent of the victim”). North Dakota’s transmission statute provides that “[a] person who, knowing that that person is or has been afflicted with acquired immune deficiency syndrome, afflicted acquired immune deficiency syndrome related complexes, or infected with the human immunodeficiency virus, willfully transfers any of that person’s body fluid to another person is guilty of a class A felony.” N.D. CENT. CODE § 12.1-20-17 (1997). Thus, a defendant may only be convicted under North Dakota’s statute if he deliberately intended to expose another person to HIV. See CAL. HEALTH & SAFETY CODE § 120291 (West Supp. 2003) (suggesting the duality of the mens rea requirement in stating that “[e]vidence that the person had knowledge of his or her HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent”).

386. An example of a statute applying a reckless standard is Missouri’s, which states that “[i]t shall be unlawful for any individual knowingly infected with HIV to . . . [a]ct in a reckless manner by exposing another person to HIV . . . .” MO. REV. STAT. § 191.677 (1996).

387. See, e.g., *People v. Jensen*, 586 N.W.2d 748 (Mich. 1998).



presume that the Legislature intended to require that the prosecution prove that the defendant had a general intent to commit the wrongful act.”<sup>388</sup> It is interesting to note the sharp contrast to statutory rape: even though the public interest that is served is important in both cases, the criminal transmission statutes were drafted according to the true crime model, while statutory rape continues to languish under the vestige of a public welfare offense.

#### CONCLUSION

Statutory Rape. To identify the crime as a strict liability offense is to appreciate that its characterization was attached early in jurisprudential thought, and without the imprimatur of recent Court decision. Similar to a story passed from generation to generation, it is a label affixed from long ago, and a classification repeated through generations of lawmaking.

It is obvious but true that statutory rape can only continue to be justified if it still fits appropriately in the public welfare offense model. This Article has suggested that since the 1952 landmark decision of *Morissette*, the national landscape has changed significantly with respect to the underlying rationales of statutory rape under the public welfare offense model. This Article presented three arguments for why the public welfare offense model no longer applies to statutory rape. First, in light of *Lawrence v. Texas*,<sup>389</sup> consensual sexual activity between adults may no longer be heavily proscribed. If that is the case, defendant’s reasonable belief that the victim is of consensual age should be relevant on the issue of defendant’s guilt. Second, given that sexual offender registration laws have been declared constitutional in *Smith v. Doe*,<sup>390</sup> their excessively stigmatizing nature, while acceptable where defendant is mentally culpable, must be considered inappropriate under a strict liability model. Finally, this Article has shown that the public welfare offense model, with its underlying component of strict liability, is not the only way to protect the community interest. The recent additions of the HIV criminal transmission statutes have provided an excellent illustration of statutes that are designed to protect the public interest at less cost to the defendant.

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388. *Id.* at 753. It is interesting to note that one scholar suggests in a footnote that the criminal transmission statutes could have been created as strict liability offenses. See Mona Markus, *A Treatment for the Disease: Criminal HIV Transmission/Exposure Statutes*, 23 NOVA L. REV. 847 n.97 (1999).

389. 123 S. Ct. 2472 (2003).

390. 538 U.S. 84 (2003).

Stated by Hawaii Supreme Court Justice Levinson in his dissent of *State v. Silva*,<sup>391</sup> “[i]t is time to substitute knowledge of sex offenses for emotional fixations and to reform rules in light of sound principles of penal liability.”<sup>392</sup> The time has arrived for the judiciary to recognize that statutory rape no longer fits the public welfare offense model and to overturn legislative attempts that demand otherwise.

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391. 491 P.2d 1216 (Haw. 1971).

392. *Id.* at 1223 (Levinson, J., dissenting) (citing to JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 342 (1947)).

## Appendix: JURISDICTIONAL ANALYSES OF STATUTORY RAPE LAWS

Jurisdiction	True Crime	Strict Liability	Hybrid
Alabama		X <sup>393</sup>	
Alaska	X <sup>394</sup>		
Arizona			X <sup>395</sup>
Arkansas			X <sup>396</sup>
California			X <sup>397</sup>
Colorado			X <sup>398</sup>

393. See ALA. CODE §§ 13A-6-61, 13A-6-62 cmt. (1994) (noting that the 1977 legislature amended the Code's article on rape to include a defense of "honest mistake" of age, but 1979 legislature removed the provision); *Miller v. State*, 79 So. 314, 315 (Ala. Ct. App. 1918) (declining to recognize a mistake-of-age defense, reasoning that girls who appear older than their physical age are the victims most in need of the protection of the statute).

394. See ALASKA STAT. § 11.41.445(b) (Michie 2002) ("[I]t is an affirmative defense that, at the time of the alleged offense, the defendant (1) reasonably believed the victim to be that age or older; and (2) undertook reasonable measures to verify that the victim was that age or older."); *State v. Fremgen*, 914 P.2d 1244, 1246 (Alaska 1996) (reiterating that a refusal to allow a mistake-of-age defense to a charge of statutory rape would violate the Alaska Constitution); *State v. Guest*, 583 P.2d 836, 838-40 (Alaska 1978) (holding that an honest and reasonable mistake-of-fact as to the victim's age is an affirmative defense to a statutory rape charge and opining that statutory rape is not a "public welfare" offense in which the requirement of criminal mens rea is waived).

395. See ARIZ. REV. STAT. ANN. § 13-1407 (West 2001) (providing a defense to a charge of sexual misconduct with a minor if the victim is fifteen, sixteen or seventeen and if the defendant "did not know and could not reasonably have known the age of the victim" or if the defendant is "less than nineteen years of age or attending high school and is no more than twenty-four months older than the victim and the conduct is consensual"). However, if the victim is younger than fifteen years old, the mistake-of-age defense is unavailable under § 13-1407.

396. See ARK. CODE ANN. § 5-14-102 (Michie 1997). Subsection (b) states that "[w]hen the criminality of conduct depends on a child being below the age of fourteen (14) years, it is no defense that the actor did not know the age of the child, or reasonably believed the child to be fourteen (14) years of age or older." *Id.* Subsection (c) provides that "[w]hen criminality of conduct depends on a child being below a critical age older than fourteen (14) years, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above." *Id.* See also ARK. CODE ANN. § 5-14-103(a)(3) cmts. (Michie 1989) ("In these cases the State does not have to prove that the accused 'purposely' had sex with a person under fourteen years of age. A person who has sexual intercourse or deviate sexual activity with one less than fourteen years of age is guilty of the crime, regardless of how old he or she thought the victim was, and regardless of whether there was consent."); *Short v. State*, 79 S.W.3d 313, 317-18 (Ark. 2002) (finding that a statutory rape charge where the victim is under 14 years of age is a strict liability crime).

397. See *People v. Hernandez*, 393 P.2d 673 (Cal. 1964) (holding that in the absence of legislative direction otherwise, a charge of statutory rape under CAL. PENAL CODE § 261.5 is defensible when a criminal mens rea is lacking). *But see* *People v. Olsen*, 685 P.2d 52, 57 (Cal. 1984) (rejecting mistake-of-age defense in companion statute § 288(a) where the victim is under the age of fourteen years).

398. See COLO. REV. STAT. § 18-1-503.5 (2002) (stating that if the victim is fifteen years of age or older, a reasonable mistake of age will be a defense, but if the child is below fifteen years of age, mistake of age is never a defense).

Jurisdiction	True Crime	Strict Liability	Hybrid
Connecticut		X <sup>399</sup>	
Delaware		X <sup>400</sup>	
Dist. of Columbia		X <sup>401</sup>	
Florida		X <sup>402</sup>	
Georgia		X <sup>403</sup>	
Hawaii		X <sup>404</sup>	
Idaho		X <sup>405</sup>	
Illinois			X <sup>406</sup>

399. See CONN. GEN. STAT. ANN. § 53a-67(b) (West 2001) (disregarding mens rea in statutory rape by precluding the affirmative defense of mistaken age when the victim is younger than fourteen); *State v. Plude*, 621 A.2d 1342, 1346-47 (Conn. App. Ct. 1993) (“By enacting No. 75-619 of the 1975 Public Acts, the General Assembly eliminated mistake of age as an affirmative defense to a violation of § 53a-71(a)(1). Through this act, the legislature clearly expressed its will that engaging in sexual intercourse with a person under the age of sixteen years constitutes a violation of law without regard to the actor’s belief as to the victim’s age.”).

400. See *Brown v. State*, 74 A. 836, 841 (Del. 1909) (holding that mistake-of-fact is not a defense to statutory rape because the crime is against community values and morally damaging, not just to the individual, but to society as a whole).

401. See D.C. CODE ANN. § 22-3011 (1995) (“Neither mistake of age nor consent is a defense to a prosecution under § 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.”).

402. See FLA. STAT. ANN. § 794.021 (West 2002) (“When, in this chapter, the criminality of conduct depends upon the victim’s [sic] being below a certain specified age, ignorance of the age is no defense. Neither shall misrepresentation of age by such person nor a bona fide belief that such person is over the specified age be a defense.”); *Simmons v. State*, 10 So. 2d 436, 438 (Fla. 1942) (“The law makes the act the crime, and infers a criminal intent from the act itself.”) (quoting *Mills v. State*, 51 So. 278, 281 (1910)).

403. See *Brown v. State*, 504 S.E.2d 35, 37 (Ga. Ct. App. 1998) (stating that per GA. CODE ANN. § 16-6-3, the defendant’s knowledge of the age of the victim is not an essential element of the crime, therefore there is no scienter requirement to statutory rape—it need not be committed “knowingly”); *Tant v. State*, 281 S.E.2d 357, 358 (Ga. Ct. App. 1981) (“With regard to statutory rape . . . ‘the defendant’s knowledge of the age of the female is not an essential element of the crime . . . and therefore it is no defense that the accused reasonably believed that the prosecutrix was of the age of consent.’”) (quoting 65 AM. JUR. 2D *Rape* § 36 (1981)).

404. See HAW. REV. STAT. ANN. § 707-732(1)(b)-(c) (Michie 2003); *State v. Buch*, 926 P.2d 599, 607 (Haw. 1996) (“The legislative history unequivocally indicates that, where the age of the victim is an element of a sexual offense, the specified state of mind is not intended to apply to that element. We therefore hold that a defendant is strictly liable with respect to . . . the victim’s age in a sexual assault.”).

405. See *State v. Stiffler*, 788 P.2d 220, 221-23 (Idaho 1990) (basing its affirmation of statutory rape as a strict liability crime on indications in the legislative history that the legislature intended statutory rape to be a strict liability crime and on the important public policy concerns involving the prevention of illegitimate teenage pregnancies).

406. See 720 ILL. COMP. STAT. ANN. 5/12-17 (West 2002) (providing a reasonable mistake-of-age-defense for Criminal Sexual Abuse and Aggravated Criminal Sexual Abuse, but not for Aggravated Criminal Sexual Assault).

Jurisdiction	True Crime	Strict Liability	Hybrid
Indiana	X <sup>407</sup>		
Iowa		X <sup>408</sup>	
Kansas		X <sup>409</sup>	
Kentucky	X <sup>410</sup>		
Louisiana		X <sup>411</sup>	
Maine			X <sup>412</sup>
Maryland		X <sup>413</sup>	

407. See IND. CODE ANN. § 35-42-4-3(c) (Michie 1998) (“It is a defense that the accused person reasonably believed that the child was sixteen (16) years of age or older at the time of the conduct.”); *Lechner v. State*, 715 N.E.2d 1285, 1286-88 (Ind. Ct. App. 1999) (holding that the legislature’s failure to modify the age at which a defense becomes available was an oversight, not reflective of the legislature’s actual intent, and that the mistake-of-age defense will be available to any defendant who reasonably believes the victim to be of any age that the activity engaged in was not criminally prohibited).

408. See *State v. Tague*, 310 N.W.2d 209, 212 (Iowa 1981) (holding that mistake-of-fact is not a defense to sexual abuse); *State v. Sherman*, 77 N.W. 461, 462 (Iowa 1898) (“It is not necessary that the defendant should be shown to have knowledge that the female was under the age of thirteen years to sustain a conviction for an assault with intent to commit rape. The crime does not depend upon the knowledge of defendant of the fact that the child was under that age, but upon the fact of the assault.”).

409. See KAN. STAT. ANN. § 21-3202(2) (1994) (“Proof of criminal intent does not require proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which he is charged.”); *State v. Fore*, 843 P.2d 292, 293-94 (Kan. App. 1992) (affirming that the statute precludes a mistake-of-age defense in a sexual offense case); accord *State v. Rush*, 942 P.2d 55, 57 (Kan. Ct. App. 1997) (interpreting the statute to be a strict liability crime and stating that “the very act of engaging in sexual intercourse with a child under 14 years of age establishes the crime [of statutory rape]”).

410. See KY. REV. STAT. ANN. § 510.030 (Banks-Baldwin 1995) (“In any prosecution . . . in which the victim’s lack of consent is based solely on his incapacity to consent because he was less than sixteen (16) years old . . . the defendant may prove in exculpation that at the time he engaged in the conduct . . . he did not know of the facts or conditions responsible for such incapacity to consent.”); see also *Payne v. Commonwealth*, 623 S.W.2d 867, 874 (Ky. 1981) (“The victim is statutorily incapable of consent. However, mistake as to age is a defense under KRS 510.030.”).

411. See LA. REV. STAT. ANN. § 14:80 (West 2002) (declaring that lack of knowledge of the victim or juvenile’s age is not a defense); *State v. Granier*, 765 So. 2d 998, 1000 (La. 2000) (affirming statutory rape as a strict liability crime and noting that “in the interest of protecting juveniles, historically recognized as a special class of persons in need of protection, the legislature may dispense with the knowledge requirement as to the age of the juvenile in certain crimes”).

412. See ME. REV. STAT. ANN. tit. 17-A, § 254 (West Supp. 2002) (offering a limited mistake-of-age defense in a charge of sexual abuse of a minor in the following situations: where the victim is either fourteen or fifteen years old, or where defendant is at least ten years older than victim; and provided that defendant reasonably believes that the victim is sixteen years of age).

413. See MD. CODE ANN., CRIM. LAW § 3-304(a)(3) (2002); *Walker v. State*, 768 A.2d 631 (Md. 2001) (reaffirming *Owens* and *Garnett*); *Owens v. State*, 724 A.2d 43 (Md. 1999) (finding that the statutory rape statute does not violate due process under either the United States or Maryland Constitutions); *Garnett v. State*, 632 A.2d 797 (Md. 1993) (holding that there is no defense of reasonable mistake-of-age in Maryland).

Jurisdiction	True Crime	Strict Liability	Hybrid
Massachusetts		X <sup>414</sup>	
Michigan		X <sup>415</sup>	
Minnesota			X <sup>416</sup>
Mississippi		X <sup>417</sup>	
Missouri			X <sup>418</sup>
Montana			X <sup>419</sup>
Nebraska		X <sup>420</sup>	
Nevada		X <sup>421</sup>	
New Hampshire		X <sup>422</sup>	
New Jersey		X <sup>423</sup>	

414. See *Commonwealth v. Miller*, 432 N.E.2d 463, 464 (Mass. 1982) (“It has long been the law of this Commonwealth that it is no defense that the defendant did not know that the victim was under the statutory age of consent.”); *Commonwealth v. Montalvo*, 735 N.E.2d 391, 393 (Mass. App. Ct. 2000) (stating that “[i]t is immaterial that the defendant reasonably thought the victim was sixteen or older”).

415. See *People v. Cash*, 351 N.W.2d 822, 823 (Mich. 1984) (affirming the rule set out in *People v. Gengels*, 188 N.W. 398, 401 (Mich. 1922), that statutory rape is a strict liability crime).

416. See MINN. STAT. ANN. §§ 609.344, 609.345 (West 2003) (allowing a mistake-of-age defense only if the victim is between thirteen and sixteen years old).

417. See *Collins v. State*, 691 So. 2d 918, 923 (Miss. 1997) (declining to recognize the mistake-of-age defense on the basis that it would frustrate the purpose of the legislature in creating statutory rape).

418. See MO. ANN. STAT. § 566.020 cmt. (West 1999) (“Subsections 2 and 3 provide for absolute liability as to the element of age when the age is less than 14 . . . . However, where the age element is 14 or 15 years, a reasonable mistake can be a defense.”). The Commentary further notes, “[t]he subsections are based on MODEL PENAL CODE § 213.6(1) and FEDERAL CRIMINAL CODE § 1648(1) (Study Draft) and are a form of compromise between the strict liability majority view that reasonable belief that the victim was older than a particular age is no defense and the minority view that reasonable mistake-of-fact as to age is a defense in statutory rape cases.” *Id.*

419. See MONT. CODE ANN. § 45-5-511(1) (2001) (“When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that he reasonably believed the child to be above that age. Such belief shall not be declared reasonable if the child is less than 14 years old.”); see also *State v. Smith*, 576 P.2d 1110, 1111 (Mont. 1978) (noting that prior to 1973, statutory rape was a strict liability offense, but the Montana Criminal Code of 1973 “expressly recognizes” a reasonable mistake-of-age defense to statutory rape where the victim is at least fourteen years old).

420. See *State v. Navarette*, 376 N.W.2d 8 (Neb. 1985) (concluding that a mistake-of-fact as to the age of the victim is not a defense to statutory rape); see also *State v. Campbell*, 473 N.W.2d 420 (Neb. 1991) (rejecting the “California rule” of *People v. Hernandez* and affirming *Navarette*).

421. See *Jenkins v. State*, 877 P.2d 1063 (Nev. 1994) (rejecting the mistake-of-age defense in the crime of statutory sexual seduction).

422. See *Goodrow v. Perrin*, 403 A.2d 864, 868 (N.H. 1979) (affirming the legislature’s power to create the crime of statutory rape without a mens rea requirement).

423. See N.J. STAT. ANN. § 2C:14-5(c) (West 2003) (“It shall be no defense to a prosecution for a crime under this chapter that the actor believed the victim to be above the age stated for the offense, even if such a mistaken belief was reasonable.”).

Jurisdiction	True Crime	Strict Liability	Hybrid
New Mexico			X <sup>424</sup>
New York		X <sup>425</sup>	
North Carolina		X <sup>426</sup>	
North Dakota			X <sup>427</sup>
Ohio			X <sup>428</sup>
Oklahoma		X <sup>429</sup>	

424. See *Perez v. State*, 803 P.2d 249, 251 (N.M. 1990) (finding that, although teenagers today are more mature and independent, a child under age thirteen needs the protection of strict liability). The court further noted that “Section 30-9-11(D) is indeed a ‘numbers game,’ whose outcome is determined not only by the child’s age, but by the relative age of the defendant. When the law requires a mathematical formula for its application, we cannot say that being provided the wrong numbers is immaterial.”

425. See N.Y. PENAL LAW § 15.20 (McKinney 1998) (“Notwithstanding the use of the term ‘knowingly’ in any provision of this chapter defining an offense in which the age of a child is an element thereof, knowledge by the defendant of the age of such child is not an element of any such offense and it is not, unless expressly so provided, a defense to a prosecution therefor that the defendant did not know the age of the child or believed such age to be the same as or greater than that specified in the statute.”); *People v. Dozier*, 424 N.Y.S.2d 1010 (N.Y. App. Div. 1980) (finding no mens rea requirement in New York’s statutory rape statute and justifying the lack of mens rea by citing the policy of protecting children under seventeen years of age).

426. See *State v. Ainsworth*, 426 S.E.2d 410, 416 (N.C. Ct. App. 1993) (rejecting defendant’s argument that the crime of first degree rape of a minor requires a mens rea since it is punishable by life imprisonment); *State v. Wade*, 32 S.E.2d 314, 315 (N.C. 1944) (“[O]ne having carnal knowledge of such a child, does so at his peril, and his opinion as to her age, is immaterial.”).

427. See N.D. CENT. CODE § 12.1-20-01 (1997) (“When the criminality of conduct depends on a child’s being below the age of fifteen, it is no defense that the actor did not know the child’s age, or reasonably believed the child to be older than fourteen.”).

428. See OHIO REV. CODE ANN. § 2907.02 (Anderson 2002) (“No person shall engage in sexual conduct with another . . . when . . . [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person.”); OHIO REV. CODE ANN. § 2907.02 (Anderson 2002) (Comm. cmt. to H511) (“[T]he section designates as rape sexual conduct with a pre-puberty victim, regardless of whether force or drugs are used, and regardless of whether the offender has actual knowledge of the victim’s age.”). The commentary continues, “The rationale for this is that the physical immaturity of a pre-puberty victim is not easily mistaken, and engaging in sexual conduct with such a person indicates vicious behavior on the part of the offender.” *Id.*

429. See *Reid v. State*, 290 P.2d 775, 784 (Okla. Crim. App. 1955) (refusing to allow a mistake-of-age defense but allowing the facts to be considered in connection with the amount of punishment to which defendant would be sentenced); *Law v. State*, 224 P.2d 278, 279-80 (Okla. Crim. App. 1950) (“It is not shown that the defendant had any personal knowledge as to the actual age of the prosecutrix. This . . . would not condone his conduct under the law in committing the act with a girl who is under the age of sixteen years, but it is a fact that the court should take into consideration in connection with the question as to the amount of punishment which he should suffer for this unlawful act.”).

Jurisdiction	True Crime	Strict Liability	Hybrid
Oregon			X <sup>430</sup>
Pennsylvania			X <sup>431</sup>
Rhode Island		X <sup>432</sup>	
South Carolina		X <sup>433</sup>	
South Dakota		X <sup>434</sup>	
Tennessee			X <sup>435</sup>
Texas		X <sup>436</sup>	

430. See OR. REV. STAT. § 163.325(1) (2001) (“In any prosecution under ORS 163.355 to 163.445 in which the criminality of conduct depends on a child’s being under the age of 16, it is no defense that the defendant did not know the child’s age or that the defendant reasonably believed the child to be older than the age of 16.”); *id.* § 163.345(1) (“In any prosecution . . . in which the victim’s lack of consent was due solely to incapacity to consent by reason of being less than a specified age, it is a defense that the actor was less than three years older than the victim at the time of the alleged offense.”).

431. See 18 PA. CONS. STAT. § 3102 (2000) (“Except as otherwise provided, whenever in this chapter the criminality of contact depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child’s being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.”).

432. See *State v. Yanez*, 716 A.2d 759, 766 (R.I. 1998) (holding that no mens rea is required for statutory rape, and determining that the legislature did not intend proof of mens rea to be a part of the crime).

433. See *State v. Whitener*, 89 S.E.2d 701, 716 (S.C. 1955) (“Where the female is under the age of fourteen and unmarried, the only other element necessary to be proven in order to establish the crime of rape is the fact that the defendant had sexual intercourse with her.”).

434. See *State v. Fulks*, 160 N.W.2d 418, 420 (S.D. 1968) (“A person who engages in sexual intercourse with a female below the statutory age of consent does so at his peril. The arbitrary age of consent in these cases has been established by our legislature as a matter of public policy for the obvious protection of young and immature females. We cannot properly make exceptions. Therefore, in a prosecution for alleged statutory rape a defendant’s knowledge of the age of the girl involved is immaterial and his reasonable belief that she is over the age of eighteen years is no defense.”).

435. See TENN. CODE ANN. § 39-11-502 (2002) (providing a mistake-of-fact defense for statutory rape but expressly disallowing the mistake-of-fact defense for a charge of rape of a child, which is sexual intercourse with a child under the age of thirteen).

436. See *Johnson v. State*, 967 S.W.2d 848, 849 (Tex. Crim. App. 1998) (finding that the State did not have to prove that defendant knew the victim to be under seventeen years old. To require the State to do so would be in “contravention of clear legislative intent”); see also *Jackson v. State*, 889 S.W.2d 615, 617 (Tex. Crim. App. 1994) (citing *Vasquez v. State*, 622 S.W.2d 864, 865 (Tex. Crim. App. 1981) in affirming the long-standing principle in Texas that the mistake-of-age defense is not available for sex offense charges involving children). While the mistake-of-age defense is not available, statutory language provides a complete defense to the charge of sexual assault where the victim is, in fact, at least fourteen years of age, and the defendant is less than three years older. See TEX. PENAL CODE ANN. § 22.011(e)(1), (2) (Vernon 2003).



Jurisdiction	True Crime	Strict Liability	Hybrid
Utah		X <sup>437</sup>	
Vermont		X <sup>438</sup>	
Virginia		X <sup>439</sup>	
Washington			X <sup>440</sup>
West Virginia			X <sup>441</sup>
Wisconsin		X <sup>442</sup>	
Wyoming			X <sup>443</sup>

437. See UTAH CODE ANN. § 76-2-304.5 (2003) (stating that mistake-of-age is not a defense). Utah's clear legislative language was created in response to, and overruled, the 1984 decision of *State v. Elton*, 680 P.2d 727 (Utah 1984), that held statutory rape was *not* a strict liability offense and that a defendant could utilize a mistake-of-age defense.

438. See *State v. Searles*, 621 A.2d 1281, 1283 (Vt. 1993) (citing the MODEL PENAL CODE § 213.6 cmt. 2 (1980)) (declining to recognize reasonable mistake-of-age as a defense to sexual assault of a minor, instead finding that statutory rape "has traditionally been considered a strict liability offense, where mistake as to age of an underage participant has been accorded no defensive significance").

439. See *Rainey v. Commonwealth*, 193 S.E. 501, 502 (Va. 1937) ("[T]he statute does not require that the accused must possess knowledge of the victim's age when the sexual act takes place in order to constitute the crime of statutory rape.>").

440. See WASH. REV. CODE § 9A.44.030 (1988) (providing a defense of reasonable mistake-of age *only if* the victim was within certain statutorily prescribed ages, or was younger than the defendant by certain statutorily prescribed ages) (emphasis added); accord *State v. Dodd*, 765 P.2d 1337, 1338 (Wash. Ct. App. 1989) ("It is a defense to either of these offenses that at the time of the offense the defendant reasonably believed the alleged victim to be older based upon declarations as to age by the alleged victim."); *State v. Abbott*, 726 P.2d 988, 990 (Wash. App. 1986) (noting that except for statutorily prescribed situations under WASH. REV. CODE § 9A.44.030 (1988) *that the defendant must prove* by a preponderance of the evidence, "it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older").

441. See W. VA. CODE § 61-8B-12 (1984) (providing that "[i]n any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions").

442. See WIS. STAT. § 939.43 (2002) ("A mistake as to the age of a minor or as to the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section is not a defense.>").

443. See WYO. STAT. ANN. § 6-2-308 (Michie 1997) (providing a defense of reasonable mistake of age if criminality of conduct depends on the victim being sixteen years of age or older, but providing no defense if criminality of conduct depends on the victim being under twelve years or under fourteen years of age).