Roger Williams University Law Review

Volume 5 | Issue 2 Article 6

Spring 2000

Protective Cruelty: State v. Yanez and Strict Liability as to Age in Statutory Rape

Vicki J. Bejma
Roger Williams University School of Law

Notes and Comments

Protective Cruelty: *State v. Yanez* and Strict Liability as to Age in Statutory Rape

I. INTRODUCTION

In *State v. Yanez*,[1] the Rhode Island Supreme Court examined for the first time the issue of whether reasonable mistake as to age is a valid defense to a charge of statutory rape/child molestation. Before the Court was Alejandro Yanez, whose summer fling as a youth of eighteen had ended in disaster. During July of 1993, Alejandro had a sexual encounter with a girl identified as "Allison," with whom he had a passing acquaintance over the past year and a half.[2] According to Alejandro, Allison told him that she was sixteen.[3] Because of Allison's appearance and behavior, Alejandro never considered that he might have reason to doubt her.[4] Had Alejandro been correct in his belief as to Allison's age, he would have faced no criminal charges at all as a result of his encounter with Allison. Under Rhode Island's third degree sexual assault statute, sixteen is the age of consent to sexual intercourse, unless the actor is under eighteen, in which case the age of consent is fourteen.[5] However, a few weeks after his encounter, the police informed Alejandro that Allison was actually six weeks short of

1. 716 A.2d 759 (R.I. 1998) (Flanders, J., dissenting).

2. *See id.* at 760.

3. *See id.* at 761.

4. *See* Ana Cabrera, *The Miseducation of Alejandro Yanez*, Prov. Phoenix, Jan. 29- Feb. 4, 1999, at 8.

5. *See* R.I. Gen. Laws § 11-37-6 ("A person is guilty of third degree sexual assault if he or she is over the age of eighteen (18) years and engaged in sexual penetration with another person over the age of fourteen (14) years and under *the age of consent, sixteen (16) years of age.*") (emphasis added).

fourteen.[6] Therefore, Allison fell under the aegis of the first degree child molestation statute, which carries a mandatory twenty-year penalty. [7]

At trial, Alejandro attempted to defend himself on the grounds that he had honestly and reasonably believed that Allison was sixteen.[8] The trial judge refused to permit this defense.[9] Alejandro was then convicted.[10] In a 4-1 decision, the Rhode Island Supreme Court upheld Alejandro's conviction, concluding that the General Assembly's failure to specifically provide for the defense of reasonable mistake as to age should be construed as a legislative intent to deny the defense.[11] The denial of this defense, the *Yanez* majority observed, was necessary to protect youths and children from sexual abuse.[12] Therefore, the *Yanez* majority held, the trial judge correctly ruled that Alejandro could not present any evidence on that issue of his knowledge or belief as to Allison's age. Furthermore, the trial justice had correctly refused to instruct the jury that it could consider the issue when determining his guilt.[13]

Alejandro's plight is hardly unique[14] or new, but has been a trap for the unwary over the past century. As the *Yanez* majority acknowledges, it is a longstanding rule of Anglo-American law that most crimes consist of both an *actus rea*—that is, a forbidden act—

---

6. *See Yanez*, 716 A.2d at 761.

7. *See* R.I. Gen. Laws § 11-37-8.1 (1956) (1994 Reenactment) ("A person is guilty of first degree child molestation sexual assault if he or she engages in sexual penetration with a person fourteen (14) years of age or under."); R.I. Gen. Laws § 11-37-8.2 (1956) (1994 Reenactment) ("Every person who shall commit first degree child molestation sexual assault shall be imprisoned for a period of not less than twenty (20) years and may be imprisoned for life."). Had Allison been but a few weeks older, Alejandro would have been charged with third degree sexual assault under R.I. Gen. Laws § 11-37-6 (1956) (1994 Reenactment). Under R.I. Gen. Laws 11-37-7 (1956) (1994 Reenactment), Alejandro could then only have received a maximum of five years imprisonment for third degree sexual assault, or the judge may have chosen to give no time at all.

8. *See Yanez*, 716 A.2d at 761-62.

9. *See id.* at 762.

10. *See id.*

11. *See id.* at 766.

12. *See id.*

13. *See id.* at 760.

14. According to then-Attorney General Jeffrey B. Pine, the issue of mistake as to age has arisen in other recent cases involving sexual abuse charges. *See* Laura Meade Kirk, *Consensual Sex with Girl, 13, Was Molestation, Justices Rule*, Prov. J. Bull., Aug. 13, 1998, at B1, *available in* 1998 WL 12199878.

and a *mens rea*—an intent to do the forbidden act.[15] As a natural extension of the *mens rea* requirement, it is equally well-recognized that a person who has done a forbidden act under a reasonable and honest mistake or ignorance of the facts surrounding his conduct did not possess a *mens rea*, and therefore has a valid defense.[16] The *mens rea* requirement and the mistake of fact defense, then, serve a key screening function in our criminal justice system. Both prevent the conviction, punishment, and social disgrace of those who had no intent to engage in any criminal activity, and therefore have shown no need for corrective action. Furthermore, the *mens rea* requirement and the mistake of fact defense also protects those who themselves may have been the victims of the bad faith of another—for example, the unaware possessor of narcotics,[17] or stolen goods.[18]

Although *mens rea* is central to our legal tradition, since the 19th century most courts have interpreted statutory rape and child molestation laws as an exception to this rule with respect to the complainant's age.[19] Obviously, most people can recognize that reasonable and honest mistakes can be made as to the age of a sexual partner—including Jeffrey B. Pine, Attorney General at the time of Alejandro's appeal, who would concede that "young people may be growing up faster."[20] However, many still insist that the imposition of strict liability as to age in statutory rape and child molestation is a protective cruelty, necessary to protect children and youths from sexual exploitation.[21] As Attorney General Pine explained: "If an adult male or adult person engages in a sexual assault with an underage victim, then the excuse that she didn't

15. *See id.* at 766 (citing Morissette v. United States, 342 U.S. 246, 252 (1952)).

16. *See* 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law 577 (1986).

17. *See, e.g.*, State v. Gilman, 291 A.2d 425, 430 (R.I. 1975).

18. *See, e.g.*, State v. Motyka, 298 A.2d 793, 794 (R.I. 1973).

19. *See* Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 Mich. L. Rev. 105, 105-06, nn. 3-11 (1965).

20. Meade Kirk, *supra* note 14, at B1. *See also* H.R. Rep. No. 99-594, at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6186, 6198 ("However, where the conduct is noncoercive and involves persons who are not so young that a mistake about age would not be 'a dramatic departure from societal norms,' the Committee believes a reasonable mistake about age defense appropriate.").

21. *See, e.g.*, State v. Owen, 724 A.2d 43, 52 (Md. 1999) (Eldridge, J., concurring in result only) (Bell, C.J., & Cathell, J., dissenting).

look underage or she didn't act underage, that should not be available in our view."[22]

Beyond a doubt, the prevention of sexual abuse of youths and children is a valid goal. However, the judicial denial of the defense of reasonable mistake as to age has also been criticized as legally erroneous from its inception in the late 19th century.[23] Additionally, serious questions exist as to whether strict liability ultimately advances the goal of preventing sexual abuse.[24] As a result of these criticisms, many jurisdictions have begun to permit the defense.[25]

Despite the considerable questions as to the validity of strict liability as to age, the *Yanez* majority has interpreted the Rhode Island first degree child molestation statute as imposing strict liability as to age. It is the position of this paper that the *Yanez* majority's reading of strict liability into the child molestation statute represents a major reversal of the Rhode Island Supreme Court's earlier refusals to read strict liability into statutory silence when interpreting other criminal statutes. Furthermore, the *Yanez* majority's reading of the child molestation statutes in this instance represents a retreat from its earlier practice of interpreting the intent elements of those statutes in order to ensure that persons who did not intend to abuse children were not caught in their web.

Part I of this case note provides the facts and procedural history of Alejandro's case. Part II traces the historical background of how statutory rape and child molestation came to be regarded as a strict-liability crime with respect to the complainant's age by a majority of jurisdictions in the late 19th and early 20th centuries, and how that majority position was eroded in the later half of the 20th century. Part III discusses the weaknesses of the *Yanez* majority's legal reasoning in imposing strict liability as to the complainant's age, particularly in light of its inconsistency with the Rhode Island Supreme Court's earlier decisions evincing a distinct distaste for strict liability interpretations, both in criminal laws generally as well as in the child molestation statutes. Finally, Part IV explores the weakness of the *Yanez* majority's policy arguments in favor of

22. *See* Meade Kirk, *supra* note 14, at B1, *available in* 1998 WL 12199878.

23. *See, e.g.*, Myers, *supra* note 19, at 110-12.

24. *See, e.g.*, Model Penal Code § 213.6, cmt. 2 at 415 (1980); Myers, *supra* note 19, at 120-24.

25. *See* discussion at IIB, *infra*.

imposing strict liability as to age in the statutory rape/child molestation statues.

II. FACTS AND PROCEDURAL HISTORY

A. *Factual Background*

Alejandro Yanez first met Allison at a local Portuguese festival at St. Joseph's Church in West Warwick in August, 1992.[26] He was briefly introduced to Allison through his brother, Victor, who dated Allison's aunt.[27] For approximately the next year, Alejandro only saw Allison in passing.[28] However, in the summer of 1993, their relationship changed. In mid-July, Alejandro was driving down the street in his white convertible Trans Am, saw Allison wave to him, and impulsively turned around and offered her a ride.[29] The two conversed briefly, and Alejandro gave Allison his telephone number.[30] The two talked on the phone later that night.[31] The day after, Alejandro called while Allison was out, leaving a message with either Allison's sister or mother.[32] Allison returned the call and the two arranged to meet later at St. Jo-

26. *See* State v. Yanez, 716 A.2d 759, 760 (R.I. 1998). Under R.I. Gen. Laws § 11-37-8.5 (1956) (1994 Reenactment), the case file itself is confidential. However, those portions of the record appended to the appellate briefs are available for public viewing. According to that portion of the record, Allison described herself as being 5 feet, 3 inches in height at this first meeting. *See* Trial Tr. at 50 (No. K1/94-0146), *appended to* Br. for Appellant-Defendant (No. 97-0110 C.A.). She also claimed that she had not "developed" at the time she met Alejandro, or at the time of their encounters. *See* Trial Tr. at 50-52, *appended to* Br. of Appellee. However, she testified that she wore a bra at the time of her encounter with Alejandro. *See id.* at 38. Furthermore, she testified that at the time of her encounter with Alejandro, she had been menstruating for about a year, and also wore cosmetics. *See id.* at 50-52.

27. *See Yanez*, 716 A.2d at 760.

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.* According to the testimony of Allison's mother, Alejandro had called Allison on the telephone on other occasions. *See* Trial Tr. at 96, *appended to* Br. of Appellee. In fact, at one point, Allison's mother picked up the extension while they were talking, and heard them discussing plans to meet at the mall. *See id.* The fact that Alejandro apparently quite openly called Allison at her home, and the fact that Allison's mother knew all about the contacts between the two, directly contradicts the *Yanez* majority's assertion that "[t]he trial justice appropriately observed that there was some measure of planning involved with Yanez's encounters with Allison which were aimed at avoiding detection by her mother." *Yanez*, 716 A.2d at 769-70.

seph's.[33] Allison kept her date with Alejandro, and the two went for a ride in Alejandro's Trans Am.[34] Eventually, the two went to an apartment belonging to Alejandro's friend, where they engaged in consensual sexual intercourse in a back bedroom.[35]

Allison arrived at home later that night, and proceeded to take a shower.[36] Allison's mother found Allison's stained underwear on the bathroom floor, and confronted Allison as to whether or not she had had sex.[37] At first, Allison denied having had sex.[38] Later, she admitted to having sex.[39] Allison's mother then called the police.[40] Allison then lied to her mother and police as to the identity of her partner and the circumstances under which she had had sex, informing them that she had met a man named Derek at the mall, and then accompanied him to a motel.[41] As she would explain at trial, she had lied "[b]ecause we were pretty—we was friends or whatever and I didn't want to get him in any trouble."[42] Later, Allison became fearful that she had become pregnant or contracted a bladder infection as a result of her encounter with Alejandro, and ultimately confided in a family friend that Alejandro had been her sexual partner.[43] The friend informed Allison's mother.[44] Some time later, Allison would discover that she was pregnant and identified Alejandro as the father.[45] She knew that Alejandro was not the father, because she had taken several pregnancy tests after her encounters with him, and all had been negative.[46] However, as

33. *See Yanez*, 716 A.2d. at 760-61.
34. *See id.* at 761.
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.*
39. *See id.*
40. *See id.*
41. *See* Trial Tr. at 71-73, *appended to* Br. for Appellant-Defendant.
42. Trial Tr. at 82, *appended to* Br. for Appellee. That portion of the record available to the public is somewhat unclear as to the time and sequence of events, or whether the two considered themselves to be in a dating relationship. According to the record, on cross-examination, Allison would testify that the two engaged in intercourse twice before the incident for which Alejandro was indicted. *See id.* at 772 n.12 (Flanders, J., dissenting). Alejandro claimed that he asked Allison to move in with him. *See* Trial Tr. at 85-86, *appended to* Br. for Appellant-Defendant. *See also* Cabrera, *supra* note 4, at 8 (describing relationship between the two).
43. *See* Trial Tr. at 43, *appended to* Br. for Appellee.
44. *See id.* at 97.
45. *See Yanez*, 716 A.2d at 771.
46. *See* Trial Tr. at 141-42, *appended to* Br. for Appellee.

she would admit on cross-examination at trial, Allison lied about the true identity of the father of her child because she did not want her mother to know that she had had sex with somebody else.[47]

Alejandro voluntarily appeared at the West Warwick police station for questioning on August 1, 1993.[48] When questioned, Alejandro admitted that he and Allison had sex.[49] The investigating officer told Alejandro that he was accused of having sex with a girl of thirteen.[50] Alejandro said that he had no idea what the officer was talking about.[51] When the officer showed Alejandro Allison's statement, Alejandro told the officer that Allison was sixteen, not thirteen.[52] Alejandro also gave a written statement to the police indicating that Allison had told him that she was sixteen.[53] Alejandro was then charged with first degree child molestation.[54]

At trial, Alejandro attempted to introduce evidence regarding the honesty and reasonableness of his mistaken belief that Allison was sixteen years old.[55] He offered an account of a discussion between himself and Allison about her possibly moving in with him.[56] During the conversation, Alejandro asked her age, and Allison said she was sixteen.[57] He then remarked, "Well, you only have two more years at home."[58] Alejandro also offered his own

47. *See Yanez*, 716 A.2d at 761. The first degree child molestation statute has been interpreted to allow the conviction of *all* persons engaging in sexual penetration of a person under 14—even if that "person" is himself under 14. *See In re* Odell, 672 A.2d 457, 459-60 (R.I. 1996). Therefore, if Allison conceived before turning 14, the true father of the child could also face charges of first degree child molestation. If Allison had conceived after turning 14, and the true father were over 18, then the true father could face charges of third-degree sexual assault. *See* R.I. Gen. Laws § 11-37-6 (1956) (1994 Reenactment). However, it is unclear whether the Attorney General's office has pursued the matter against the baby's true father; the Attorney General's office refuses to comment on this case until Alejandro is found. *See* Cabrera, *supra* note 4, at 8.

48. *See* Trial Tr. at 122, *appended to* Br. for Appellant-Defendant; Cabrera, *supra* note 4, at 8.

49. *See* Trial Tr. at 128, *appended to* Br. for Appellant-Defendant.

50. *See id.* at 132.

51. *See id.*

52. *See id.*

53. *See* Trial Tr. at 128, *appended to* Br. for Appellee.

54. *See* State v. Yanez, 716 A.2d 759, 761 (R.I. 1998).

55. *See id.* at 761-62.

56. *See* Trial Tr. at 85-86, *appended to* Br. for Appellant-Defendant.

57. *See id.*

58. *Id.*

testimony regarding her physical development, appearance, and ability to communicate.[59] Alejandro was also prepared to introduce corroborating evidence from others regarding Allison's ability to give an impression of greater maturity.[60] This proffered corroboration included the testimony of a social worker from the Rhode Island Department of Children, Youth, and Families, who had written in a report, some months before Allison's encounters with Alejandro, that "[Allison] also looks much older than her age."[61] The trial justice, Joseph F. Rodgers, Jr., refused to allow any of this testimony, indicating that in the majority of jurisdictions, the defense of reasonable mistake as to age is not available to a defendant where the conduct in question is criminal because the victim is a minor.[62]

At trial, Allison testified that she told Alejandro that she was thirteen, and denied ever telling him that she was sixteen.[63] Alejandro attempted to impeach this testimony by introducing Allison's other misrepresentations, namely, her having falsely accused him of having fathered her child.[64] The trial court refused to allow this line of questioning.[65] Because Alejandro's belief as to Allison's age was not a defense, the trial court reasoned, Allison's credibility as to what she told Alejandro about her age was not at issue.[66]

Judge Rodgers then specifically instructed the jury that reasonable mistake as to Allison's age was not a defense.[67] The jury convicted Alejandro of first degree child molestation sexual assault

---

59. *See id.*

60. *See id.* at 86-88.

61. *Id.* at 8, 87.

62. *See* State v. Yanez, 716 A.2d 759, 762 (R.I. 1998).

63. *See* Trial Tr. at 13, 64, *appended to* Br. for Appellant-Defendant. At trial, Allison's mother also testified that at some point before Alejandro's sexual encounters with Allison, she told Alejandro Allison's age. Specifically, Allison's mother testified to an occasion when Alejandro, his brother, Allison's mother, and Allison's aunt arrived at Allison's home after an evening out. Alejandro had inquired as to the identity of two girls in the bedroom window. Allison's mother testified that she told him that the two girls were her daughters, aged 11 and 12, and told him to "stay away." *See* Trial Tr. at 93-94, *appended to* Br. for Appellee.

64. *See Yanez*, 716 A.2d at 771.

65. *See id.*

66. *See id.*

67. *See id.* at 762

after four hours of deliberation.[68] Judge Rodgers, after agonized reflection, took the "middle ground" of giving Alejandro two years to serve, and suspending the rest: "Very, very few cases have troubled me over the last 22 years."[69] Judge Rodgers recognized the harshness of the result to Alejandro: "It's not as if someone went in and molested a little girl."[70] However, he indicated that he still felt a public example needed to be made "[t]o let [the public] know that if they succumb to passion with someone under 14 years of age, there's a very high price to pay."[71] Pursuant to statue, Rodgers also ordered Alejandro to register as a sex offender.[72] Judge Rodgers also ordered Alejandro not to have any contact with Allison for twenty years.[73]

B. *The Rhode Island Supreme Court Speaks*

Alejandro appealed, but the Rhode Island Supreme Court upheld the trial court's refusal to allow Alejandro to use reasonable mistake as to Allison's age as a defense to the charge of first degree child molestation.[74] The *Yanez* majority began its decision by noting that only four jurisdictions had judicially accepted the mistake of fact defense for statutory rape—California, Utah, New Mexico, and Alaska.[75] The *Yanez* majority, however, distinguished the

---

68. *See Man Convicted of Molestation*, Prov. J. Bull., April 26, 1996, at C2, *available in* 1996 WL 9381819.

69. Peter DuJardin, *Judge Troubled by Mandatory Sentence in Molestation Case*, Prov. J. Bull., July 15, 1996, at C3, *available in* 1996 WL 11079983. As Justice Flanders' dissent points out, the fact that 18 years of Alejandro's sentence was suspended is a cold comfort, since he would be subject to re-imprisonment for the remainder of his term for petty offenses. *See Yanez*, 716 A.2d at 772 n.10 (Flanders, J., dissenting).

70. Laura Meade Kirk, *Man Flees Rather Than Go to Prison for Molestation*, Prov. J. Bull., Sept. 19, 1998, at A3, *available in* 1998 WL 19865711.

71. DuJardin, *supra* note 69, at C-3.

72. *See Yanez*, 716 A.2d at 762.

73. *See id.*

74. *See id.* at 761.

75. *See id.* at 763-64 (citing People v. Hernandez, 393 P.2d 673 (Cal. 1964); State v. Elton, 680 P.2d 727 (Utah 1984); Perez v. State, 803 P.2d 249 (N.M. 1990); State v. Guest, 583 P.2d 836 (Alaska 1978))). In addition to these four jurisdictions, Tennessee, in *State v. Parker*, 887 S.W.2d 825 (Tenn. Crim. App. 1994), acknowledged that the defendant's intent as to age must be, as with any other crime, "intentional, knowing, or reckless." *Id.* at 888. The defendant's conviction in this case was upheld because the court found that there was sufficient evidence for the jury to find that the defendant had been at least reckless as to the complainant's age. *See id.*

California and Utah decisions of them on the grounds that their holdings had rested upon provisions in their states' criminal codes specifically requiring a *mens rea* for all crimes.[76] The *Yanez* majority then distinguished the New Mexico and Alaska cases on the grounds that they had involved complainants aged fifteen, while Allison was nearly fourteen.[77]

Turning to the Rhode Island's own laws, the *Yanez* majority analyzed the sexual assault provisions of Chapter 11-37 to determine whether the General Assembly intended to make first degree child molestation a strict liability crime.[78] The majority noted that mental elements had been provided for other sexual assaults, such as when the defendant had intercourse with a person that he or she "knew or should have known" was mentally or physically disabled," or had engaged in sexual penetration under the guise of a medical examination.[79] Therefore, the *Yanez* majority reasoned, the General Assembly's silence as to whether or not to permit the reasonable mistake of age was deliberate.[80] The General Assembly, the *Yanez* majority concluded, had specifically intended to deny a reasonable mistake as to age defense in order to effectuate the statute's protective purpose.[81] The majority also rejected Yanez's argument that the imposition of strict liability as to age in the child molestation statutes violated his due process rights.[82] The *Yanez* court acknowledged that *mens rea* was traditionally considered an element of serious crimes.[83] However, since statutory rape had long been considered a strict liability offense with respect to the complainant's age, the court concluded that the mistake of age defense did not qualify as a traditional, fundamental

76. *See Yanez*, 716 A.2d at 763.

77. *See id.* at 763-64.

78. *See id.* at 764-66.

79. *Id.* at 765 (citing R.I. Gen. Laws § 11-37-2 (1956) (1994 Reenactment)).

80. Although not called upon to make any holding on R.I. Gen. Laws § 11-37-6 (1956) (1994 Reenactment) (third degree sexual assault), the Court took care to point out that this statute, too, lacks a mental element and is also designed to protect the underaged. *See Yanez*, 716 A.2d. at 766 & n.5.

81. *See id* at 766.

82. *See id.* at 767-68.

83. *See id.* at 766 (citing Morissette v. United States, 342 U.S. 246, 252 (1952)).

principle of justice, and therefore, no due process violation had occurred.[84]

Justice Flanders, in his dissent, cited a number of earlier cases interpreting the child molestation statutes that had demanded a *mens rea*,[85] and had in fact suggested that a reasonable mistake as to identity would be accepted.[86] The majority distinguished all of these cases, stating that they had involved accidental touching, and therefore pertained to the *mens rea* of the accused in making contact with the complainant.[87] These cases, the *Yanez* majority held, should not be read so broadly as to require *mens rea* as to age.[88]

The court also discussed policy reasons for denying the reasonable mistake as to age defense.[89] The dissenting Justice Flanders had argued that this case was particularly worthy of the reasonable mistake of age defense because of the relative youth and closeness of age of the parties involved.[90] The *Yanez* majority, however, noted that strict liability with respect to age for statutory rape or child molestation had long been considered necessary, because allowing the defense of reasonable mistake as to age would strip youths of the protections afforded by the statute.[91] If the court were to allow the defense of reasonable mistake as to age here, the *Yanez* majority observed, that defense would be available to anyone accused of child molestation.[92] Furthermore, allowing the defense of reasonable mistake as to age in this case "would open the door to the introduction of evidence concerning a victim's past sexual conduct, evidence that the General Assembly has already sought to restrict through the enactment of the rape-shield stat-

84. *See id.* (citing Morissette v. United States, 342 U.S. 246, 251 n.8 (1952); United States v. Ransom, 942 F.2d 775, 777 (10th Cir. 1991); United States v. Brooks, 841 F.2d 268, 270 (9th Cir. 1988); Nelson v. Moriarty, 484 F.2d 1034, 1035 (1st Cir. 1973); State v. Stiffler, 763 P.2d 308, 310 (Idaho Ct. App. 1988)).

85. *See Yanez*, 716 A.2d at 773-75 (Flanders, J., dissenting) (citing State v. Bryant, 670 A.2d 776 (R.I. 1996); State v. Griffith, 660 A.2d 704 (R.I. 1995); State v. Tobin, 602 A.2d 528 (R.I. 1992))).

86. *See id.* (Flanders, J., dissenting) (citing State v. Tevay, 707 A.2d 700 (R.I. 1998)).

87. *See id.* at 768-69.

88. *See id.*

89. *See id.* at 769-71.

90. *See id.* at 771-72 (Flanders, J., dissenting).

91. *See id.* at 769 (citing Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 73-74 (1933)).

92. *See id.* at 770.

ute."[93] Finally, the court expressed concerns that allowing the defense would produce the incongruous result of leading to the presentation of evidence of consent by the defendant, where child molestation did not permit consent as a defense.[94] At most, the court concluded, a reasonable mistake as to age should be considered when determining the sentence.[95]

Since reasonable mistake of age was not an available defense, the majority held, the trial justice did not err in limiting the cross-examination of Allison.[96] Alejandro wished to impeach the credibility of Allison regarding her allegations that she told him that she was only thirteen, and had therefore sought to cross-examine Allison about her falsely identifying Alejandro as the father of her child.[97] However, the majority held that because reasonable mistake as to Allison's age was not a defense, it was irrelevant whether Allison had made any representations to Alejandro regarding her age.[98] Therefore, the trial court had not erred when preventing Alejandro from impeaching Allison's testimony about what she had told him about her age.[99]

C. *Epilogue*

The supreme court remanded Alejandro's case to the superior court for sentencing.[100] Since his encounter with Allison, Alejandro met and married another woman, Gisel.[101] At the time the supreme court denied Alejandro's appeal, he and Gisel already had one daughter, and had another child on the way.[102] Alejandro did not report to the superior court on the morning of his sentencing, September 17, 1998.[103] Instead, he fled the country, leaving his attorney a note stating that he could not go to prison and be separated from his family.[104] Furthermore, he could not bear the disgrace to himself and his family of his being forever branded a

93. *Id.*
94. *See id.*
95. *See id.*
96. *See id.* at 771.
97. *See id.*
98. *See id.*
99. *See id.*
100. *See id.* at 772.
101. *See* Cabrera, *supra* note 4, at 8.
102. *See id.*
103. *See* Meade Kirk, *supra* note 70, at A3.
104. *See id.*

"perpetual child molester."[105] After giving birth, Gisel and the children followed Alejandro in his flight from Rhode Island authorities.[106] As of this date, Alejandro has avoided capture.

III. Strict Criminal Liability in Statutory Rape: A General Background

The *Yanez* majority based its holdings on legislative intent and due process partly on the idea that the defense has traditionally been denied in the majority of jurisdictions.[107] The *Yanez* majority, however, failed to recognize that this tradition began with an erroneous and anachronistic legal reasoning that has been sharply criticized by a number of commentators.[108] Furthermore, this "traditional" exception to the general *mens rea* rule has been quite short-lived when contrasted with the centuries-old insistence upon a *mens rea* element for serious crimes. The imposition of strict liability only arose during the latter quarter of the 19th century. However, today—barely one hundred years later—the emerging trend is to allow the defense to some degree, particularly as to older youths.

A. *Strict Liability and Statutory Rape/Child Molestation: Early Views*

Both the requirements of *mens rea* and the legal prohibitions against sexual conduct with a person under a particular age are part of our common-law heritage originating in medieval England. However, it was not until the 19th century that the American courts divorced *mens rea* from the legal prohibitions against sexual conduct with a female under a certain age. This development appears to have arisen partially as a result of Victorian morals and

105. *Id.*

106. *See* Cabrera, *supra* note 4, at 8.

107. *See Yanez*, 716 A.2d 759, 763-64 (R.I. 1998).

108. *See, e.g.*, State v. Garnett, 632 A.2d 797, 805-24 (Md. 1993) (Eldridge, J. & Bell, J., filing separate dissents); People v. Cash, 351 N.W. 2d 822, 830-31 (Mich. 1984) (Kavanagh, J., dissenting); Jenkins v. State, 877 P.2d 1063, 1067-68 (Nev. 1994) (Springer, J. & Rose, C.J., dissenting); Myers, *supra* note 19; Richard A. Tonry, Comments, *Statutory Rape: A Critique*, 26 La. L. Rev. 105 (1965); J. Lawrence Hamil, Current Decisions, 37 U. Colo. L. Rev. (1965); Case Comments, 50 Minn. L. Rev. 170 (1965); Recent Cases, 18 Vand. L. Rev. 244 (1964); Recent Decisions, 33 Geo. Wash. L. Rev. 588 (1965); Brian Edward Smith, Casenotes, 7 Ariz. L. Rev. 324 (1966); George Thacker, Student Notes, 5 J. Fam. L. 107 (1965); Criminal Law, 78 Harv. L. Rev. 1257 (1965).

partially as a general confusion as to when the new strict criminal liability laws were properly applied.

The Anglo-American tradition's first mention of criminal prohibitions against intercourse with a female under a certain age, whether consensual or not, appeared in the 1275 Statute of Westminster I.[109] According to Sir Edward Coke, the age of consent was twelve, the age at which a female could consent to marriage.[110] Under this statute, intercourse with a female under a particular age, whether consensual or not, was classified as a species of rape.[111] The commonly supplied rationale for that classification was that a female of such a young age was incapable of giving valid consent to intercourse because "by reason of her tender years she is incapable of judgment and discretion."[112] In 1576, legislative attention would turn to the issue of sexual conduct with very young females; under the Statute of Elizabeth, "the abominable wickedness of carnally knowing or abusing any woman child under the age of ten years," was considered a felony without benefit of clergy.[113]

---

109. *See* Statute of Westminster I, 3 Edw. 1, c. 13 (1275); 1E. Coke, The Second Part of the Institute of the Laws of England 179 (1797):

> And the king prohibiteth that none do ravish, nor take away by force, any maiden within age (neither by her own consent, nor without) nor any wife or maiden of full age, nor any other woman against her will; and if any do, at his suit that will sue within fourty days, the king shall do common right, and if none commence his suit within fourty days, the king shall sue; and such as be found culpable, shall have two years imprisonment, and after shall fine at the king's pleasure; and if they have not whereof, they shall be punished by longer imprisonment according as trespass requireth.

Id.

Several years later, forcible rape, once a misdemeanor, became a felony punishable by "judgement of life and member." Statute of Westminster II, 13 Edw. I, c. 34 (1285); 1E Coke, The Second Part of the Institute of the Laws of England 432 (1797). This new provision did not specifically reference the crime of non-forcible rape of a child. Therefore, some question exists as to whether this more severe penalty would have applied to that crime. *See* Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 Seton Hall Legis. J. 1, 9 (1997).

110. *See* 1E. Coke, The Second Part of the Institute of the Laws of England 181 (1797).

111. *See* Statute of Westminster I, 3 Edw. 1, c. 13 (1275); 1E. Coke, The Second Part of the Institute of the Laws of England 179 (1797).

112. *See* 4 Blackstone's Commentaries on the Laws of England 212 (1769).

113. *See id.* (citing 18 Eliza. c. 7 (1576)); Sir Edward Coke, The Third Institute of the Laws of England 60 (4th ed. London 1669). Apparently, this law was the result of some confusion as to whether the crime of rape encompassed sexual inter-

Of course, at common law, a crime always consisted not only of a forbidden act, but a *mens rea*, a guilty intent. As a natural extension, by 1639, the English courts were accepting a reasonable and honest mistake as to the facts surrounding one's conduct as a defense to criminal conduct.[114] The issue of whether mistake as to age was permitted as a defense apparently never arose until the 19th century.[115] Perhaps this was due in part to the fact that the age of consent was drawn so low under these statutes. In any event, the early English courts never imposed strict liability as to age for these crimes.

However, during the later 19th century, there was a resurgence of interest in the statutory rape laws. This interest has been given various historical interpretations, such as the beginnings of today's continuing struggle to liberate women from sexual exploitation,[116] the seeds of today's laws protecting children against sexual abuse,[117] or as a characteristically Victorian effort attempt to impose a moral standard on society, particularly aimed at the

---

course against young children. In 1571, a case was tried at the Queen's Bench, in which the court held that the rape of seven-year-old child was held to be no offense: "if she had been nine years or more, it would have been otherwise." Mortimer Levine, *A More than Ordinary Case of "Rape," 13 and 14 Elizabeth I*, 7 Am. J. Legal History 159, 162 (1963). Levine postulates that this decision rested on the justice's belief that rape was not possible in so young a female because procreation was not possible, or, alternately, suggests that the court was simply dismissing a bad indictment. As noted, it was far from clear whether Westminster II—the statute which made rape a felony—applied to non-forcible intercourse of an underage female. If it indeed was not, then the only applicable statute would have been Westminster I, a misdemeanor. Therefore, the indictment for having "*feloniously* ravished" the victim would have been fatally flawed. *See* Levine, *supra*, at 163. On the other hand, this view has been criticized as mere speculation because the court did not provide its reasoning. *See* Phipps, *supra* note 109, at 10 & nn. 31-33. In any case, it appears that the Statute of Elizabeth was a direct outcome of the 1571 case. *See id.* at 9 & n.31 (citing Sir Edward Coke, The Third Institute of the Laws of England 60 (4th ed. London 1669)).

114. *See* Levitt's Case, reported in Cook's Case, Cro. Car. 537, 538, 79 Eng. Rep. 1063, 1064 (K.B. 1639).

115. *See* Myers, *supra* note 19, at 111.

116. *See* Jane E. Larson, *"Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America*, 9 Yale J.L. & Human. 1, 14-18, 30 (1997) (arguing, after an analysis of writings of the Women's Christian Temperance Union, that the Union's focus on abuse of young females was in fact intended to correct a double standard of morality. Also, the effort represented a backdoor attempt at reform of forcible rape laws generally, which at the time failed to cover a number of coercive situations and allowed a very broad defense of consent.).

117. *See id.* at 32-33 (noting the child welfare movement's interest in the statutory rape laws).

protection of "pure" womanhood.[118] As a result of this movement, many states raised their ages of consent to intercourse until late adolescence or adulthood.[119] Thus, the stage was set for mistakes of age to be made.

Further complicating matters was the fact that roughly around the period that the age of consent was being raised, the function of *mens rea* in criminal law was being undermined by the creation of new strict-liability crimes. During the 19th century, criminal laws were enacted not simply to punish traditional common-law crimes such as murder, rape, or theft. Instead, criminal laws were being enacted to address the social ills brought about by industrialization and urbanization, such as the sale of impure food and intoxicants, lack of sanitation, traffic, unsafe working conditions, unsound building construction, nuisances, and also moral offenses.[120] These statutes did not involve serious penalties.[121] Furthermore, since the vast number of these statutes would clog the criminal courts, there was a need for summary adjudication.[122] Therefore, this new type of criminal statutes, which came to be known as "public welfare offenses," did not require a *mens rea*, and imposed strict criminal liability.[123]

---

118. *See* Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. Crim. L. & Criminology 15, 25-26 (1994) (arguing the fact that ultimately, many states' refusal to allow a mistake of fact as to age defense, while permitting a defense based upon the promiscuity of the victim, demonstrates that the purpose of the statutory rape laws ultimately was for the protection of "pure" girls). *See also* Larson, *supra* note 116, at 62-64 (conceding that as finally enacted and judicially construed, the statutory rape laws, with their allowing for a promiscuity defense, ultimately failed in their mission to eradicate a moral double standard).

119. *See* Larson, *supra* note 116, at 2-3.

120. *See* Bowes Sayre, *supra* note 91, at 68-69. *But see* Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337, 341-374 (1989) (arguing that Bowes Sayre overestimates the extent to which strict liability was designed to protect the public welfare, as well as the extent to which the entire notion of strict criminal liability was accepted by the English and American courts).

121. *See* Bowes Sayre, *supra* note 120, at 68-69.

122. *See id.*

123. *See id.* For the Rhode Island cases, see State v. Smith, 10 R.I. 258, 261 (1872) (upholding conviction under statutes forbidding the sale of adulterated milk, despite the fact that the defendant had no knowledge of the adulteration); State v. Melville, 11 R.I. 417, 418 (1877) (upholding conviction under statute forbidding the dealing or banking for a faro game, even if "innocently" dealt); State v. Hughes, 16 A. 911, 913 (R.I. 1889) (upholding a conviction for maintaining a common nuisance, i.e., a "building, place, or tenement used for the illegal sale and

The 19th century legislatures were silent as to whether statutory rape statutes were to be included among the strict liability crimes. Instead, it was the 19th century courts that made that leap.[124] This imposition of strict liability appears to have begun with the 1875 English case, *Regina v. Prince*.[125] In that case, the defendant, Henry Prince, had been convicted of the crime of taking "an unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father."[126] The girl involved, Annie Phillips, was fourteen years of age, but "looked very much older than sixteen," and had told Prince that she was eighteen.[127] This abduction statute, too, was silent as to whether or not strict liability was to be imposed as to the age of the girl in question. The *Prince* court, however, rejected Prince's argument that there could be no offense without his actual knowledge as to Annie Phillips' age. Instead, the *Prince* court imposed strict liability as to age based upon its belief that strict liability was necessary in order to protect young women:

> . . . we are of the opinion that the intention of the legislature sufficiently appears to have been to punish the abduction, unless the girl, in fact, was of such an age as to make her consent an excuse, irrespective of whether he knew her to be too young to give an effectual consent, and to fix that age at sixteen.[128]

---

keeping of intoxicating liquors," despite lack of jury instruction that defendant must be found to know that the liquor being sold there was intoxicating).

124. *See* Myers, *supra* note 19, at 111-12.

125. *See id.* at 110 (citing Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875)).

126. Regina v. Prince, L.R. 2 Cr. Cas. Res. 154, 155 (1875) (Brett, J., dissenting).

127. *Id.*

128. *Id.* at 171. The *Prince* court arrived at its conclusion about the legislative intent by examining the other sections of the statute, which forbade the unlawful carnal knowledge and abuse of girls between ten and twelve, and under ten years old. *See id.* at 171-72. The *Prince* court noted that these sections, too, had no mental element. *See id.* The *Prince* court assumed that no defense of mistake was permitted for these crimes: "It would produce the monstrous result that a man who had carnal connection with a girl, in reality not quite ten years old, but whom he on reasonable grounds believed to be a little more than ten, was to escape altogether." *Id.* Therefore, the *Prince* court inferred from this that Parliament's silence as to the defendant's knowledge of the girl's age in the abduction statute similarly constituted a deliberate denial of the defense. However, the *Prince* court cited no authority for the proposition that these statutory rape provisions — themselves the embodiments of Westminster I and the Statute of Elizabeth — imposed strict liability as to age.

Additionally, one of the concurring opinions held that Prince's conviction should rest on the "moral wrong" theory—that is, Prince should be held strictly liable because when he took the girl out of the possession of her father, he had intended to commit an act that was morally wrong, even if it were not criminally punished:

> . . . the question is, whether we are bound to construe the statute as though they [the words "not believing her to be over the age of sixteen] were, on account of the rule that the mens rea is necessary to make an act a crime. I am of the opinion that we are not, nor as though the word "knowingly" was there, and for the following reasons: The act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong.[129]

Alternately, the same concurrence also suggested a "lesser legal wrong" theory for Prince's culpability, since Prince had committed a legal wrong against Annie Phillips' father by depriving him of his right to his possession of her. Prince, the concurrence reasoned, knew that he had interfered with that right to possession. Therefore, Prince must accept all legal consequences flowing from that original wrong act, including those stemming from the fact that she proved to be under sixteen:

> But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a *girl*, can be said to be in another's *possession*, and in that other's *care or charge*. The legislature has enacted that if anyone does this wrong act, he does it at the risk of her turning out to be under sixteen. . . . If the taker believed he had the father's consent, though wrongly, he would have no mens rea; so if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the *act* forbidden by the statute—an act which, if he knew she was in possession and in care or charge of anyone, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention, if done without lawful cause.[130]

In America, the *Prince* holding was applied to statutory rape as well.[131] Some American courts would apply *Prince*'s rationale

---

129. *Id.* at 174 (Bramwell, J., concurring).
130. *Id.* at 175.
131. *See* Myers, *supra* note 19, at 111.

that strict liability as to age was absolutely indispensable to the fulfillment of the statutory goal of protecting young females from exploitation from predatory males, however reasonable the defendant's mistake may have been.[132] Other courts would apply the *Prince* concurrence's "moral wrong" or "lesser legal wrong" theory—the other "moral" or "legal" wrong being fornication—and thus conclude that because the defendant had intended to engage in the moral or legal wrong of fornication, he could be held criminally liable for statutory rape.[133]

However enthusiastically the American courts followed *Prince* and imposed strict liability as to age, their legal reasoning was often erroneous. The issue in *Prince* was mistake of age as to abduction; there would be no English case rejecting reasonable mistake of age as to statutory rape.[134] In fact, ten years after *Prince*, Parliament amended the statutes in order to permit the defense of reasonable mistake as to age for the crime of "defilement of a girl between thirteen and eighteen."[135] Therefore, the precedential value of *Prince* was severely weakened. Furthermore, in some cases, these American decisions find support for imposing strict liability for statutory rape in the existence of strict liability public

---

132. *See, e.g.*, Miller v. State, 79 So. 314, 315 (Ala. Ct. App. 1918)

> If into this statute should be injected the knowledge of the age of the girl, or if the fact of her appearance would indicate she is more than 16, will justify the defendant in the commission of the offense, in many instances the very purpose of the statute would be thwarted, for it is a matter of universal common knowledge that many girls under the age of 16 are more precocious and more fully developed than are those of 16 and even 17 years of age, and it is manifest that these are the very girls, those who are more mature in appearance, whom the statute is intended to protect, and who most need the protection of this statute.

People v. Marks, 130 N.Y.S. 524 (N.Y. App. Div. 1911); Zent v. State, 3 Ohio App. 473 (1914).

133. *See, e.g.*, Commonwealth v. Murphy, 42 N.E. 504, 505 (Mass. 1896)

> The defendants in the present cases knew that they were violating the law. Their intended crime was fornication, at the least. It is a familiar rule that, if one intentionally commits a crime, he is responsible criminally for the consequences of his act, if the offense proves to be different from that which he intended.

Regina v. Prince, L.R. 2 Crown Cas. 154, 175 (1875). *See also* Edens v. State, 43 S.W. 89, 89 (Tex. Crim. App. 1897) (quoting Bish. St. Crimes, § 490: "His intent to violate the laws or morality and the good order of society, though with the consent of the girl, and though in a case where he supposes he shall escape punishment, satisfies the demands of the law, and he must take the consequences.").

134. *See* Myers, *supra* note 19, at 110-11.

135. Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, §§ 5 (1)-(2).

welfare offenses, thus demonstrating a failure to appreciate the difference between a petty public welfare offense and a serious, common-law crime such as rape.[136] Despite these weaknesses, however, until 1964, *Prince* and its progeny managed to dominate American jurisprudence on this issue, to the point where it was generally understood that no defense of mistake as to the complainant's age would be allowed to statutory rape in any jurisdiction, regardless of the honesty and reasonableness of the mistake, or the level of care which the defendant might have taken to discover the complainant's true age.[137]

B. *Modern Views on Strict Liability as to Age in Statutory Rape and Child Molestation*

During the latter half of this century, the uniform imposition of strict liability as to age in statutory rape/child molestation has shown distinct signs of crumbling. The emerging rule followed by a number of jurisdictions is to allow the defense of mistake as to age, usually based upon a judgment as to when a mistake as to a complainant's age might be reasonable.

In part, the new reluctance to impose strict liability as to the age of a complainant springs from changing sexual mores. Currently, courts now recognize that the doctrines of "moral wrong," as applied to statutory rape, have been seriously undercut for the simple reason that sexual mores are in a state of flux.[138] Given this wide-spread debate on a sexual moral code, attempts to impose strict liability as to age on the strength of the "moral wrong" theory are questionable at best.[139] Furthermore, fornication stat-

136. *See Murphy*, 42 N.E. at 505 (noting that strict liability for statutory rape was justified because strict liability had been imposed for other crimes, such as "the unlawful sale of intoxicating liquor, for selling adulterated milk, for unlawfully selling naptha, for admitting a minor to a billiard room, and the like.").

137. *See* Myers, *supra* note 19, at 105-06 & nn. 3-11.

138. *See, e.g.*, State v. Garnett, 632 A.2d 797, 802 (Md. 1993).

139. *See* Model Penal Code § 213.6, cmt. at 414 (1980); LaFave & Scott, *supra* note 16, at 583. The Rhode Island General Assembly itself appears to have recognized the weakness of resting on community standards of morality in a criminal statute when revising the sexual assault statutes. In 1972, in *State v. Beaulieu*, 290 A.2d 850 (1972), the Rhode Island Supreme Court refused to find that the former R.I. Gen. Laws § 11-37-6 (1956) (1969 Reenactment) ("Indecent assault on child") contained an implied intent to "gratify sexual desires or to frighten the child;" the simple fact that community standards would find the assault "immodest, immoral, and improper" was sufficient to support a conviction. *Beaulieu*, 290 A.2d at 854. Since *Beaulieu*, the Rhode Island General Assembly changed the

utes—including Rhode Island's—have been repealed,[140] go largely unenforced,[141] and may still be debatable on constitutional grounds.[142] Thus, even some modern courts imposing the defense acknowledge that the "lesser legal wrong" rationale for imposing strict liability as to age has also become a virtual dead letter.[143]

Of course, nowadays, there still remains the issue of whether strict liability is necessary to fulfill the protective function of the statutory rape statutes—which by now cover both males and females. Even this rationale, however, has been undermined by a general reaction against strict criminal liability generally. The drafters of the Model Penal Code, among others, strongly criticize the use of strict criminal liability for serious crimes as having an unduly harsh result, and also as lacking in any justification in terms of deterrence.[144] The debate upon the appropriateness of imposing strict liability for serious crimes has even taken on a constitutional dimension. As the United States Supreme Court has declared, *mens rea* is "the rule of, rather than the exception to, the

---

mens rea required for crimes requiring sexual contact, to "the intentional touching of the victim's or accused's intimate parts, clothed or unclothed, if that intentional touching can be reasonably construed as intended by the accused to be for the purpose of sexual arousal, gratification, or assault." R.I. Gen. Laws § 11-37-1 (1956) (1994 Reenactment & Supp. 1999).

140. Rhode Island repealed its own fornication and incest statutes in 1989. *See* 1989 R.I. Pub. Laws ch. 214, § 1.

141. *See* State v. Silva, 491 P.2d 1216, 1222 (Haw. 1971) (Levinson, J., dissenting) (criticizing majority's reliance upon lesser legal wrong theory where no prosecutions for fornication had taken place in at least the past 4 years). *But see* Robert Misner, *Minimalism, Desuetude, and Fornication*, 35 Willamette L. Rev. 1, 6-13 (1999) (describing Idaho's recent campaign to eliminate teenage pregnancy by bringing fornication charges against teenage mothers and the fathers of their children).

142. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (declaring Connecticut's statute forbidding the use of contraception to be unconstitutional as applied to married persons); Eisenstadt v. Baird, 405 U.S. 438 (1972) (declaring Massachusetts' law against distribution of contraceptives to unmarried persons to be unconstitutional); Carey v. Population Services Inter., 431 U.S. 678 (1977) (striking down New York laws against distribution of contraceptives to minors as unconstitutional, despite arguments that the law was intended to protect the morality of the young). *But see* Bowers v. Hardwick, 478 U.S. 186 (1986) (refusing to invalidate Georgia's anti-sodomy statute, declaring that there was no fundamental right for homosexuals to engage in sodomy).

143. *See Garnett*, 632 A.2d at 802.

144. *See* Model Penal Code, § 2.05 cmt.1 at 282-83 (1985); LaFave & Scott, *supra* note 16, at 348-351; Herbert Packer, *Mens Rea and the Supreme Court*, Supreme Court Rev. 107, 109 (1962); Singer, *supra* note 120, at 403-407.

principles of Anglo-American criminal jurisprudence."[145] Given this long tradition of a *mens rea* requirement, it could be argued that the imposition of strict liability as to age in statutory rape " offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[146] The United States Supreme Court has in fact suggested that in some cases, strict criminal liability may violate due process.[147] However, the United Supreme Supreme Court has also failed to delineate those circumstances under which strict criminal liability may violate due process.[148] Therefore, constitutional

145. Dennis v. United States, 341 U.S. 494, 500 (1951).

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

147. *See, e.g.*, Lambert v. California, 355 U.S. 225, 228 (1957) (striking down a conviction under the felon registration requirement, especially where her supposedly criminal conduct involved mere presence in the city, where appellant had no way of knowing of the registration requirement or having reason to inquire as to such requirements); Smith v. California, 361 U.S. 147, 156 (1959) (refusing to uphold California statute's imposition of strict liability as to knowledge of book's contents as to bookseller charged with selling obscene materials). *But see* Montana v. Egelhof, 518 U.S. 37, 43-46 (1996) (upholding Montana's statutory ban on refusal of defense of voluntary intoxication); Powell v. Texas, 392 U.S. 514, 536 (1968) ("The doctrines of actus reus, mens rea, insanity, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States."); United States v. Balint, 258 U.S. 250, 250-51 (1922) (permitting strict liability in drug sale laws).

148. *See* Packer, *supra* note 144, at 107 ("To paraphrase: Mens rea is an important requirement, but it is not a constitutional requirement, except sometimes."). *See also* Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 Buff. Crim. L. Rev. 859, 904 (1999) (agreeing that the constitutional status of mens rea remains ambiguous).

The issue of whether strict liability may be constitutionally imposed for statutory rape may intersect with the issue of whether there is any fundamental right for adults to engage in consensual sexual relationships without state interference. *See* Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828 (1999). Michaels argues that the unifying principle—albeit a poorly articulated unifying principle—of the U.S. Supreme Court's rulings on strict liability may be that strict liability may not be imposed where another constitutional right is involved. *See id.* at 829. Recently, however, the notion of the idea that there is a constitutional right to be free from state interference in sexual matters has been seriously weakened by the Supreme Court's ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986), wherein the Court refused to invalidate Georgia's anti-sodomy statute, declaring that there was no fundamental right for homosexuals to engage in sodomy. Under this analysis, then, the imposition of strict liability as to age in statutory rape may pass constitutional muster. *See* Michaels, *supra*, at 893-94.

Some defendants have in fact attempted to argue that that the imposition of strict liability as to age, which forces one to accept criminal penalties if one's part-

challenges to strict liability in statutory rape laws rarely succeed.[149]

However, successful judicial challenges have been brought to the imposition of strict liability in statutory rape laws where the challenge was couched in a statutory interpretation argument. Ultimately, the first United States case allowing the defense of reasonable mistake as to age, the California Supreme Court's 1964 decision in *People v. Hernandez*, did in fact rest upon statutory interpretation principles.[150] The *Hernandez* court began its analysis

---

ner proved to be underaged, unacceptably impinges upon the freedom to engage in sexual relationships. However, even before *Bowers*, these arguments failed. *See* Nelson v. Moriarty, 484 F.2d 1034, 1035 (1st Cir. 1973) (holding that cases on reproductive rights did create right to engage in sexual relationships; strict liability as to age unconstitutional); Goodrow v. Perrin, 403 A.2d 864, 865-66 (N.H. 1979) (noting that even if there was a fundamental right to personal decisions in sexual matters, there was still a compelling state interest in protecting youth and children).

149. *See* Nelson, 484 F.2d at 1035; United States v. Brooks, 841 F.2d 268, 269 (9th Cir. 1988); United States v. Ransom, 942 F.2d 775, 777 (10th Cir. 1991); State v. Tague, 310 N.W.2d 209, 211-12 (Iowa 1981); Owens v. State, 724 A.2d 43 (Md. 1999) (Eldridge, J., concurring in result only) (Bell, C.J., & Cathell, J., dissenting); Veasey v. State, 507 S.E.2d 799, 801 (Ga. Ct. App. 1998); Commonwealth v. Miller, 432 N.E.2d 463, 466 (Mass. 1982) (reaffirming Commonwealth v. Moore, 269 N.E.2d 636 (Mass. 1971) in asserting that strict criminal liability as to age of complainant is not necessarily a denial of due process)); People v. Cash, 351 N.W.2d 822, 828 (Mich. 1984); Goodrow v. Perrin, 403 A.2d 864, 866-67 (N.H. 1979) (Douglas, J., dissenting); State v. Navarette, 376 N.W.2d 8, 11 (Neb. 1985). *But see* State v. Guest, 583 P.2d 836, 838-39 (Alaska 1978) (holding that under the Alaska constitution, it would be a violation of due process to convict a person of the serious crime of statutory rape (defined as intercourse with a person less than 19 years of age) without permitting defense of reasonable mistake as to age); State v. Fremgen, 889 P.2d 1083, 1085 (Alaska Ct. App. 1995), *aff'd* 914 P.2d 1244 (Alaska 1996) (holding that statutory denial of defense of reasonable mistake as to age for the crime of sexual abuse of a minor (defined as intercourse with a person less than 13 years of age) violated due process provisions of Alaska constitution)).

Although no Rhode Island constitutional argument appears to have been made in this case, the Rhode Island Supreme Court on repeated occasions has interpreted the state constitution to provide protections beyond those contained in the federal constitution. *See, e.g.*, State v. Pimental, 561 A.2d 1348 (R.I. 1981) (refusing to interpret Art. I., Sec. 6 of the Declaration of Rights to permit drunk-driving roadblocks, despite federal authority interpreting the Fourth Amendment to allow them); *In re* Advisory Opinion to the Senate, 278 A.2d 852 (R.I. 1971) (requiring 12-person criminal jury under Art. I. Secs. 10 and 15, although U.S. Supreme Court had held that a 6-person jury was acceptable under the Sixth and Seventh Amendments). No Rhode Island case, however, answers the question of whether Article I, Section 10 of the Declaration of Rights might require mens rea for serious crimes.

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

by noting that California's criminal code's requirement of a "union, or joint operation of act and intent, or criminal negligence" to constitute commission of crime, and also provided that one was not capable of committing a crime if one acted "under an ignorance or mistake of fact which disapproves any criminal intent."[151] The *Hernandez* court acknowledged that strict liability had been held to be permissible in some instances despite that requirement.[152] However, the *Hernandez* court also observed that more recently it had not imposed strict liability unless the legislature had, by implication or otherwise, expressed an intent or policy to be served by imposing strict liability.[153] The *Hernandez* court noted that no intent to impose strict liability was ever expressed by the legislature. Instead, strict liability had originally been judicially imposed in its earlier decision of *People v. Ratz*,[154] which rested partially on the discredited *Regina v. Prince*.[155]

The *Hernandez* court then proceeded to analyze the continued justification for imposing strict liability as a protective measure. The *Hernandez* court observed that its earlier decision in *Ratz* involved a child under the age of fourteen.[156] However, the *Hernandez* court noted, the harsh measure of strict liability was far less justified when the law was attempting to protect an older teenager. Given a complainant had achieved an age and level of maturity that a reasonable mistake as to her age was possible, and the defendant in fact was honestly misled, the defendant in having sex with her had in fact shown no intent to abuse a child, and therefore the imposition of strict liability was ultimately illogical.[157] In any case, the *Hernandez* court observed, an older teen-

---

151. *Hernandez*, 393 P.2d at 675.

152. *See id.*

153. *See id.* (citing People v. Vogel, 299 P.2d 850 (Cal. 1956) (reconsidering earlier holdings on strict liability for bigamy)).

154. People v. Ratz, 46 P. 915, 916 (Cal. 1896).

155. Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875).

156. *Hernandez*, 393 P.2d at 677.

157. *See id.* at 676 & n. 3 (quoting Morris Ploscowe, Sex and the Law, 184-85 (1951).

> When the law declares that sexual intercourse with a girl under the age of ten years is rape, it is not illogical to refuse to give any credence to the defense, 'I thought she was older, and I therefore did not believe that I was committing a crime when I had sexual intercourse with her' . . . . But when age limits are raised to sixteen, eighteen, and twenty-one, when the young girl becomes a young woman, when adolescent boys as well as young men are attracted to her, the sexual act begins to lose its quality of

ager was in less need of protection, for she might well have attained some level of physical, social, and sexual maturity, therefore would be far more capable of dealing with the possible complications of a sexual relationship.[158]

Since *Hernandez*, a substantial number of jurisdictions have modified their views on strict liability as to age. It is true that as referenced in the *Yanez* majority's opinion, only a few other courts have interpreted their jurisdictions' statutory rape statutes to allow the defense of reasonable mistake of age.[159] Other courts do continue to read strict liability into their silent statutory rape and child molestation statutes. Some of those decisions do have some basis for the conclusion that the legislature intended to deny the defense, for there is legislative history suggesting that the defense had been considered and rejected.[160] On the other hand, some jurisdictions have rested upon the theory of "legislative ratification"—that is, the presumption that the legislature is aware of an earlier precedent denying the defense, and accepts the court's view when it redrafts or reenacts the statute without providing for the defense.[161] However, this interpretation is open to criticism where the precedents in question rested on the discredited "moral wrong"

> abnormality and physical danger to the victim. Bona fide mistakes in the age of girls can be made by men and boys who are no more dangerous than others of their social, economic and educational level . . . . Even if the girl looks to be much older than the age of consent fixed by the statute, even if she lies to the man concerning her age, if she is a day below the statutory age sexual intercourse with her is rape. The man or boy who has intercourse with such girl still acts at his peril. The statute is interpreted as if it were protecting children under the age of ten.

Id. (omissions in original).

158. *See id.* at 674.

159. *See* discussion at Section IB, *supra*.

160. *See, e.g.*, State v. Buch, 926 P.2d 599, 606 (Haw. 1996) (Levinson, J. & Klien, J., concurring in part and dissenting in part); State v. Garnett, 632 A.2d 797, 804 (Md. 1993) (Eldridge, J. & Bell, J., filing separate dissents); State v. Vasquez, 622 S.W.2d 864, 865-66 (Ct. Crim. App. Tex. 1981); State v. Searles, 621 A.2d 1281, 1283 (Vt. 1993). State v. Stiffler, 788 P.2d 220, 225 (Idaho 1990) (Boyle, J., specially concurring) (McDevitt, J., specially concurring) (Bistline, J., dissenting) (relying in part on the fact that the Idaho legislature had briefly enacted, then repealed, the Model Penal Code, which would have allowed the defense). *See also* State v. Plude, 621 A.2d 1342, 1346 (Conn. 1993) (observing that the legislature had since repealed the statute containing provisions for mistake of age for provisions regarding intercourse for a person under the age of 16).

161. *See also* People v. Cash, 351 N.W.2d 822, 824-25 (Mich. 1984) (Kavanagh, J., dissenting) (relying upon earlier opinion in *People v. Gengels*, 188 N.W. 398 (Mich. 1922), but analyzing the continuing viability of *Gengels*).

or "lesser legal wrong" theory.[162] Many jurisdictions simply reject the defense without any analysis as to the ultimate intent of the legislature.[163] Still, other jurisdictions have yet to revisit this issue since *Hernandez*.[164]

While the judicial response may have been slow, and in many cases, analytically weak, a number of legislatures have changed their laws to clarify the circumstances under which the defense of reasonable mistake as to age will be allowed. A minority of jurisdictions have specifically denied the defense as to all complainants.[165] However, far more have amended their statutes to permit

---

162. *See, e.g.*, Commonwealth v. Miller, 432 N.E.2d 463, 465 (Mass. 1982). *See also* State v. Oar, 924 P.2d 599, 601 (Idaho 1996) (Johnson, J., concurring in part and dissenting in part) (Trout, J., concurring in part and concurring in result) and *State v. Stiffler*, 788 P.2d 220, 225 (Idaho 1990) (Boyle, J., specially concurring) (McDevitt, J., specially concurring) (Bistline, J., dissenting) (assuming that the legislature relied upon dicta in *State v. Suennen*, 209 P. 1072 (Idaho 1922) and *State v. Herr*, 554 P.2d 961 (Idaho 1976)). Interestingly enough, the Idaho Supreme Court denied the defense despite a statute regarding intent like California's. Nevada, as well, in *State v. Jenkins*, 877 P.2d 1063, 877 (Nev. 1994), also refused the defense despite a similar intent statute.

163. *See, e.g.*, State v. Fulks, 160 N.W.2d 418, 419 (S.D. 1968), *overturned on other grounds*; State v. Ree, 331 N.W.2d 557 (S.D. 1983). Iowa, in *State v. Tague*, 310 N.W.2d 209, 212 (Iowa 1981), merely rested upon earlier holdings in *State v. Sherman*, 77 N.W. 461, 462 (Iowa 1898) and *State v. Newton*, 44 Iowa 45, 47 (1876)). Mississippi merely relied upon the "majority" view that strict liability was to be imposed. *See* State v. Collins, 691 So.2d 918, 923 (Miss. 1997) (relying on mere "majority" view that strict liability was to be imposed as to age in interpreting its own statute). Similarly, Nebraska assumed that its own statute followed the "majority" view in *State v. Vicars*, 183 N.W.2d 241, 243 (Neb. 1971), and has followed it since. *See* State v. Navarette, 376 N.W. 8, 11 (Neb. 1985) (following *Vicars*); State v. Campbell, 473 N.W.2d 420, 424 (Neb. 1991) (following *Navarette*). *See also* Veasey v. State, 507 S.E.2d 799, 800 (Ga. Ct. App.) (1998) (relying upon dicta in *Tant v. State*, 281 S.E.2d 357, 358 (Ga. Ct. App. 1981), a kidnapping case).

164. For example, Alabama has not examined the issue since *Miller v. State*, 79 So. 314 (Ala. Ct. App. 1918), nor North Carolina since *State v. Wade*, 32 S.E.2d 314 (N.C. 1944), nor Oklahoma since *State v. Reid*, 290 P.2d 775 (Crim. Ct. App. Ok. 1955), nor Virginia since *Lawrence v. Commonwealth*, 71 Va. 30 Gratt. 845 (Va. 1878).

165. *See* D.C. Code Ann. § 22-4111 (1981); Fla. Stat. Ann. § 794.021 (West 1992); N.J. Stat. Ann. §§ 2c:14-5 (West 1995) (forbidding mistake of age defense in all sex crimes). *See also* La. Rev. Stat. Ann. § 14:80 (West 1997) (defense of lack of knowledge as defense to carnal knowledge of a juvenile, defined as when a person over age of 17 had intercourse with person over 12, but under 17); La. Rev. Stat. Ann. § 14:42. (West 1997) (forbidding defense of lack of knowledge as to age for aggravated rape, defined as intercourse with person under 12). *See also* N.Y. Penal Law § 15.20 (McKinney 1998); Wis. Stat. Ann. § 939.23 (West 1996); Wis. Stat. Ann. § 939.43 (West 1996) (denying mistake as to age for any crime unless specified); Del. Code Ann. tit. 11, § 762 (1995 & 1998 Supp.); People v. Olsen, 685 P.2d

the defense. At least two legislatures permit the defense without limitation as to the complainant's age.[166] Many other legislatures allowed the defense once the potential complainant has reached a particular age.[167]

52, 57 (Cal. 1984) (refusing to extend *People v. Hernandez*, 393 P.2d 673 (Cal. 1964) to permit a defense of reasonable mistake as to age for charge of lewd and lascivious conduct with person under 14, relying in part on statutory provision denying probation or suspension of sentence for the offense unless defendant honestly or reasonably believed that complainant was 14 or over).

166. *See* Ind. Code Ann. §§ 35-42-4-3, 35-42-4-9 (West 1998 & 1999 Supp.) (allowing defense if the defendant reasonably believed the child to be 16 years or older); Ky. Rev. Stat. Ann. § 510-030 (Michie 1990) (permitting defendant to prove in exculpation the lack of knowledge as to age).

167. *See* 18 U.S.C. §2243 (1994) (permitting defense for sexual abuse of a minor between 12 and 16, where defendant can establish by a preponderance of evidence that he reasonably believed complainant was 16 years of age); 18 U.S.C. § 2241 (1994) (no defense where child under 12). *See also* Ariz. Rev. Stat. Ann. § 13-1407 (West 1989 & 1999 Supp.) (permitting defense where criminality depends upon complainant's being 15, 16, or 17 years of age, if defendant did not and could not have reasonably known age); Ark. Code Ann. § 5-14-102 (Michie 1997 & 1999 Supp.) (permitting defense where criminality depends upon complainant's being a critical age older than 14 years and defendant reasonably believed child to be of critical age or above. Defendant may be guilty of lesser offense defined by the age he reasonably believed child to be.); Colo. Rev. Stat. Ann. § 18-3-406 (West 1999) (permitting defense where criminality depends upon complainant's being below age of 18 and child was at least fifteen years of age, and defendant reasonably believed child to be 18 or older; no defense of lack of knowledge or reasonable belief where criminality depends on complainant's being below age of 15); Ill. Comp. Stat. ch. 720 § 5/12-17(b) (West 1993 & 1999 Supp.) (defense available for offenses where complainant is between 13 and 17 if defendant reasonably believes the victim is 17 years of age); Me. Rev. Stat. Ann. Tit. 17-A § 254 (West 1983 & 1999 Supp.) (permitting defense where complainant is over 14); Minn. Stat. Ann. §§ 609-344 (West 1987 & 1999 Supp.) (permitting defense where complainant is at least 13 years of age, and defendant can prove his mistake by a preponderance of evidence); Mo. Ann. Stat. § 556.020 (West 1999) (allowing defense where criminality depends upon child being under 17 if defendant reasonably believed child was 17 or over, but forbidding defense where criminality depends upon child being 13 years of age or younger); Mont. Code Ann. § 45-5-511 (1999) (permitting defense where criminality depends upon complainant's being less than 16 and defendant reasonably believed child to be older. Such belief will not be considered reasonable if complainant is less than 14); N.D. Cent. Code § 12.1-20-01.1 (1997) (permitting defense where criminality depends upon complainant being a minor and actor reasonably believed complainant to be an adult; denying defense where criminality depends upon complainant's being below age of 15, and defendant did not know age or reasonably believed complainant to be over 14.); Ohio Rev. Code Ann. §§ 2907.02, 2907.04 (Banks-Baldwin 1997 & 1999 Supp.) (requiring that defendant know that child is between 13 and 16, or is reckless in that regard; no defense where child is under 13); Or. Rev. Stat. Ann. § 163.325 (1990) (forbidding defense where the criminality of conduct depends upon child being under 16 but allowing defense where criminality depends upon child's being under a specified age other

In short, the *Yanez*'s majority's position that strict liability as to age is an entrenched view is clearly called into question. Although once strict criminal liability as to age briefly dominated American jurisprudence, that position is in the process of being reversed. Given the statutory and judicial developments over the years, it appears that the view that strict liability is necessary to protect children and youths has been considerably modified since *Prince*, particularly where, as in *Yanez*, the complainant has reached adolescence. Since more and more jurisdictions take the view that strict liability is not necessary for adolescents, the *Yanez* majority's assumption that the General Assembly deliberately intended to impose strict liability as to age in order to protect youths is seriously undermined.

IV. STRICT LIABILITY IN *STATE V. YANEZ*

The *Yanez* majority asserted a two-pronged argument for its denial of the defense of reasonable mistake as to age in the statutory rape/child molestation statute.[168] The Court argues that the General Assembly's silence as to whether or not the reasonable mistake of age would be permitted was deliberate, intended to

---

than 16 and the defendant reasonably believed child to be above the specified age); Pa. Stat. Ann. tit. 18 § 3102 (West 1983 & 1999 Supp.) (permitting defense where criminality depends on complainant's being below a critical age older than 14 years, if he can prove by a preponderance of evidence that he or she reasonably believed that child was above critical age; no defense as to belief as to age where criminality depends upon complainant's being below 14); Wash. Rev. Code Ann. § 9A.44.030 (West 1998 & 2000 Supp.) (allowing defense where mistake is based upon victim's representations provided the victim is over the age of 12, and defendant can prove his mistake by preponderance of evidence); W. Va. Code § 61-8B-12 (1997) (allowing affirmative defense of lack of knowledge as to age, unless reckless in failing to know of age, unless complainant is under 11 years or under); Wyo. Stat. Ann. § 6-2-308 (Michie 1999) (permitting defense where criminality depends upon complainant's being under 16 and actor reasonably believed complainant to be older; no defense where criminality depends upon child being under 12 or 14); Utah Code Ann. § 76-2-304.5 (1999) (modifying *State v. Elton*, 680 P.2d 727 (Utah 1984) by forbidding use of reasonable mistake of age for all of those offenses except unlawful sexual conduct with a 16 or 17 year old).

Statutory age limits as to use of the defense also fall under constitutional challenges. However, these are generally unsuccessful. *See, e.g.*, United States v. Ransom, 942 F.2d 775, 777-78 (10th Cir. 1991). *But see* State v. Fremgen, 889 P.2d 1083, 1085 (Alaska Ct. App., 1995), *aff'd* 914 P.2d 1244 (Alaska 1996) (holding that statutory denial of defense of reasonable mistake as to age for the crime of sexual abuse of a minor (defined as intercourse with a person less than 13 years of age) violated due process provisions of Alaska constitution)).

168. *See* State v. Yanez, 716 A.2d 759, 764-67 (R.I. 1998).

adopt the majority rule the reasonable mistake of age defense would not be permitted in order to effectuate the protective purposes of the statute.[169] Additionally, the court argues that its earlier precedents demanding a *mens rea* for other elements of the crime of child molestation should not be extended to demand a defense of reasonable mistake of age. However, as we shall see, the court bases its arguments on an extremely narrow reading of the statutes and cases involved.

A. *The Legislative Intent—The Direct Evidence*

Unfortunately, little direct assistance is provided by our legislature in determining whether the statutory rape and child molestation statutes were ever intended to permit or deny a defense as to reasonable mistake of age. At several points in its history, Rhode Island made substantial revisions in the laws regarding sexual crimes against youth and children. Initially, the Rhode Island colonial government incorporated the Statute of Westminster I into its criminal laws.[170] In common with many other jurisdictions in the latter half of the 19th century, Rhode Island in 1889 enacted a prohibition of "carnal knowledge and abuse of girls under the age of fourteen,"[171] later raising the age of consent to

---

169. *See id.* at 765-66.

170. *See* Proceedings of the First General Assembly of "The Incorporation of Providence Plantations," and The Code of Laws Adopted by That Assembly in 1647, *reprinted* in J. Cushing, The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations: 1647-1719, 26 (1977) ("Rape is forbidden by this present Assembly throughout the whole colony, and we do hereby declare that it is when a man through his vile and unbridled affection lyeth with or forceth a woman against her will; like hereunto is the knowing of a maid carnally who is under the age of ten years, though it be with her consent. The penalty we do declare felony of death. See for confirmation 13 Ed. 1, 34."). *See also* Laws and Acts of Rhode Island and Providence Plantations Made from the First Settlement in 1636 to 1705, *reprinted in* Cushing, *supra*, at 65 ("Rape. *This Assembly* strictly Forbid the Same & we doe hereby decla [sic] that it is when a man through his wild & unbridled affection eth wth & Forceth A woman against her will like unto him the Knowing of a maid Carnally who is under the [lost text] age of Years though it b Her Consent The Penalty we declare to be the Felony of Death: 13 : Edw: I : 34: 18: 6."). *See also* Acts and Laws of His Majesties Colony of Rhode Island and Providence Plantations in America, *reprinted* in Cushing, *supra*, at 1647-1719, 142 ("Sodomy, Buggery or Rape, punished with Death."). However, in the 1798 reenactment, the specific references to the statutory rape provisions contained in the colonial statutes were dropped. *See* An Act to Reform the Penal Laws § 6, Public Laws of the State of Rhode Island and Providence Plantations 585 (Jan. 1798).

171. *See* 1889 R.I. Pub. Laws, ch. 738, at 135-36.

sixteen in 1894, where it remains to the present day.[172] Later, in the 1956 edition of the Rhode Island General Laws, Chapter 11-37 of the Rhode Island General Laws, entitled "Rape and Seduction," prohibited "common-law" rape and "carnal knowledge and abuse" of a female under sixteen.[173] The statute would be amended to include "indecent assault" upon a child under the age of thirteen.[174] These statutes themselves did not contain definitions for any of the prohibited acts and little case law existed to interpret them.

In 1979, the General Assembly repealed Chapter 11-37 and substituted a newly revised chapter pertaining to sexual assault, which, with some changes, remains in place to this day.[175] This statute classified sexual penetration of both males and females under the age of thirteen as first degree sexual assault, and the sexual penetration of persons under sixteen by persons over eighteen as third degree sexual assault.[176] In 1984, the General Assembly placed children under thirteen under the protection of the child molestation statutes, which mandated harsher penalties.[177] In 1988, the General Assembly then raised the threshold age of the child molestation statutes to fourteen.[178]

At no point in the history of Rhode Island's sexual assault statute was the issue of mistake of age ever addressed. The statutes themselves have always been silent. Nor does the limited legislative history maintained by the Rhode Island General Assembly

---

172. *See* 1894 R.I. Pub. Laws, ch. 1270, at 18-19.

173. *See* R.I. Gen. Laws § 11-37-1 (1956) (1969 Reenactment).

174. *See* R.I. Gen. Laws § 11-37-6 (1956) (1969 Reenactment).

175. *See* 1979 R.I. Pub. Laws, ch. 302.

176. *See id.*

177. *See* 1984 R.I. Pub. Laws ch. 59 §2.

178. *See* 1988 R.I. Pub. Laws ch. 219 § 1. The history of how the threshold age for the child molestation statutes came to be raised is somewhat interesting. On at least two occasions, the state attempted to charge persons under the child molestation statutes where the children involved had passed their 13th birthdays. *See* State v. Jordan, 528 A.2d 731 (R.I. 1987); State v. Collins, 543 A.2d 641 (R.I. 1988). The Supreme Court rejected these attempts on two grounds. First, it had long been understood that when a statute stated an upper threshold age, then it meant *exactly* that age or younger. *See Jordan*, 528 A.2d at 733-34. Secondly, the child molestation statutes had to be read harmoniously with the third degree sexual assault statute, which prohibited sexual penetration of persons 13 to 16. If the court allowed prosecutions for child molestation when the complainant had passed his or her 13th birthday, then the state would have unfettered discretion to prosecute under either statute. *See id.* at 733-35. After the *Jordan* ruling, the House Committee on Judiciary submitted the bill raising the threshold age at the request of the Attorney General. *See* 88-H 9474 (1988).

demonstrate any support for the idea that the defense was considered and rejected. A search of "dead bills" from 1956 to date—including another bill considered by the 1979 General Assembly in revising the sexual assault statute[179]—shows no consideration of the issue by the General Assembly. Prior to the mid-1980's, debates were not preserved in any form. Although some videotapes of legislative sessions exist for 1988, the year the threshold age for the child molestation statutes was raised to fourteen, there appears to have been no recorded discussion of the issue.

The *Yanez* majority, then, has no direct evidence as to the General Assembly's intent to deny the defense of reasonable mistake as to age. Therefore, it attempts to rely upon a negative inference: the fact that the General Assembly made no provision for the defense of reasonable mistake as to age in either the child molestation or third degree sexual assault, while specifying the intent necessary for other types of sexual assault.[180] Initially, in 1979, when the General Assembly revised the sexual assault statute, that statute punished "sexual penetration" under circumstances closely paralleling the definition of common law rape,[181] that is, where the defendant engaged in such penetration using "force or coercion," or "through concealment or by the element of surprise, is able to overcome the victim," and where "the victim is thirteen years of age or under."[182] However, the General Assembly also engrafted on this statute two new types of offenses that would not have constituted rape at common law, that is, where the perpetrator "knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless,"[183] or "engages in the medical treatment or examination of the victim for the purpose of sexual arousal, gratification, or stimulation."[184] The *Yanez* majority concludes that because the General Assembly provided a specific mental element for these new offenses, the omission of a mental intent in provisions for children under thirteen (later fourteen) was deliberate, and designed to impose strict liability as to the age of the complainant.[185]

179. *See* 79-H 5410 (1979).
180. *See Jordan*, 528 A.2d at 765-66.
181. *See* 1979 R.I. Pub. Laws ch. 302.
182. State v. Babbitt, 457 A.2d 1049, 1053 (R.I. 1983).
183. R.I. Pub. Laws 1979, ch. 302.
184. *Id.*
185. *See Yanez*, 716 A.2d at 765-66.

This reading is seriously flawed because the *Yanez* majority fails to analyze the entire first degree sexual assault statute before arriving at its conclusion.[186] The General Assembly, while providing a mental element for the new types of sexual assault, made no specific provisions for any mental element for those sexual assaults under circumstances that closely paralleled the definition of common-law rape.[187] However, as the dissenting Justice Flanders observes, if we took the *Yanez*'s majority's position that the failure to provide a mental element equaled strict liability, we would be forced to conclude that the General Assembly intended to impose strict liability as to the forcible rape provisions contained in the first degree sexual assault statute. However, forcible rape is still considered a general intent crime.[188] In fact, despite the legislative silence, the defense of mistake of fact as to consent has apparently been permitted for forcible rape.[189] Thus, the *Yanez* majority's conclusion that silence equals an intent to impose strict liability for underaged complainants is placed in serious doubt.

The *Yanez* majority might have drawn another possible inference about the legislative intent as to the defense of reasonable mistake as to age. The General Assembly provided no mental element where the complainant was under the age of thirteen, but did provide such a mental element where the perpetrator "*knows or has reason to know*" that the victim is mentally incapacitated or disabled, or otherwise helpless. It could then be argued that the General Assembly had intended that a reasonable mistake as to the person's capacity to consent would be permitted where that incapacity was due to disability, but not where that incapacity was due to age. Justice Flanders, however, presents another possible reading: the specific intent elements discussed in both of the provisions for new types of sexual assault were never intended to make

186. *See id.* at 779 (Flanders, J., dissenting).

187. *See* R.I. Pub. Laws 1979, ch. 302.

188. *See* State v. Bryant, 670 A.2d 776, 783 (R.I. 1996).

189. *See* State v. Martino, 642 A.2d 679 (R.I. 1994). This case involved an appeal from a conviction of first degree sexual assault on the grounds that the jury was not instructed on mistake of fact as to consent. The conviction was upheld not because of a rejection of mistake of fact as to consent, but because the defendant failed to preserve his objection to the instructions as given. *See id.* at 682. Furthermore, questions that the jury had asked indicated that it had not convicted even though the defendant may have made a reasonable mistake as to the complainant's consent, but had actually found that the complainant had unequivocally expressed her lack of consent. *See id.*

any statement about strict liability as to age for underage complainants. Instead, these new provisions should be read together, as intending to carve out situations where the defense of consent would not be available in cases of sexual assault of adults.[190]

Justice Flanders' reading appears the more likely. It seems logical that the General Assembly would have naturally been focusing on the mental elements necessary for the new types of assault, while not having a reason to do so for older types of sexual assault. Additionally, as Flanders points out, the General Assembly would have taken greater care with the intent elements of the statute not merely because they were new, but also to ensure that they did not sweep too far beyond their protective purpose.[191] A specific intent to gain sexual arousal would be quite desirable in the medical examination provisions in order to avoid convictions where the examiner's intention was innocent, but simply misconstrued. Similarly, particular care would be required when defining the intent element for the crimes involving the physically or mentally disabled because the condition of the victim might not be determinable by a layperson.[192] However, Flanders argues, since age is a condition more readily assessed by a layperson, the General Assembly would have had no cause to train its attention upon age.[193]

Ultimately, Flanders' position appears to have been reinforced by the later action of the 1984 General Assembly. At that time, the General Assembly divorced the provisions regarding underage complainants from the first degree sexual assault statute, and placed them into the new first degree child molestation statute.[194] With that legislation, the provisions regarding disabled adults and the provisions regarding underaged persons were no longer placed in the same category. Therefore, it is all the more debatable that the provisions for children and the provisions for adults were intended to be read together.

The *Yanez* majority advances another argument for imposing strict criminal liability in the first degree child molestation statute while distinguishing cases permitting the defense. The *Yanez* ma-

190. *See Yanez*, 716 A.2d at 779 (Flanders, J., dissenting).
191. *See id.*
192. *See id.*
193. *See id.*
194. *See* 1984 R.I. Pub.Laws ch. 59 § 2.

jority distinguished the cases permitting the defense by arguing that the complainants in Alaska's *State v. Guest*[195] and New Mexico's *Perez v. State*[196] were fifteen, and were therefore within a year of age of consent in their states. On the other hand, the *Yanez* majority argued, Allison was nearly fourteen. The *Yanez* majority, then proceeds to compare the penalties for statutory rape and child molestation, and attempts infer an intent that strict liability should apply:

> Unlike the circumstances in *Guest* and *Perez* in which the victims were fifteen, however, Allison was only thirteen years of age. Furthermore, our Legislature has drawn distinctions based upon the age of the victim. For example, § 11-37-8.2 provides a minimum penalty of twenty years in prison for the sexual penetration of a person fourteen years of age or younger, while § 11-37-7 prescribes a maximum penalty of five years in prison for the sexual penetration of a person over the age of fourteen but under the age of sixteen, provided that the accused is over the age of eighteen. *Compare* § 11-37-8.2 *with* § § 11-37-6 and 11-37-7. We therefore conclude that these two cases are also of no help to Yanez.[197]

This argument fails. As we have observed, some states allowing the defense do in fact have statutory schemes that make similar distinctions based upon age, and allow the defense where the complainant is in the higher age bracket.[198] In such cases, of course, the courts properly construe the omission of the defense from the lower age bracket as a deliberate intent to deny the defense. However, the provisions cited by the *Yanez* majority simply define the defense and supply the punishment. There is no evidence that the General Assembly has made any legislative judgment at all as to whether the defense of mistake would be permitted, much less drawing any line as to when the mistake of age was permitted.[199] Therefore, the *Yanez* majority's inference based upon these statutory provisions is weak.

---

195. 583 P.2d 836, 836 (Alaska 1978).
196. 803 P.2d 249, 250 (N.M. 1990).
197. *Yanez*, 716 A.2d at 764.
198. *See* note 167, *supra*.
199. The *Perez* Court, at least, appears to have been guided in its distinction between the two age groups by former statutes that had specifically addressed the issue of whether the defense would be allowed. *See Perez*, 803 P.2d at 251. *Guest*, in fact, was followed by *State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996), which permitted the defense as to youths under 13.

In short, the statutory analysis advanced by the *Yanez* majority is inconclusive at best. Rather than establishing a deliberate intent to create a strict liability crime for statutory rape/child molestation, the General Assembly's provisions for mental elements for the new types of sexual assault seem at least as likely to have been created as a matter of defining consent regarding adults. When, as the dissent also points out, one considers that it is a well-established canon of statutory interpretation that ambiguities in the criminal statutes must be interpreted in favor of the defendant,[200] then the *Yanez* majority should have given Yanez the benefit of the doubt inherent in the statutory silence.

B. *The Implied Intent Doctrine in Rhode Island*

The *Yanez* majority's textual analysis of the intent elements of the sexual assault statutes is inconclusive for determining whether or not the General Assembly intended to impose strict liability for statutory rape and child molestation. Ultimately, all we are left with is a statute that is silent as to the necessary intent elements. In addition to misinterpreting the General Assembly's silence, however, the *Yanez* majority also fails to fully analyze the question of implied intent elements in Rhode Island criminal statutes. The *Yanez* majority rejected California's *Hernandez*, as well as Utah's *Elton*, because unlike California and Utah, the Rhode Island criminal code does not contain any provisions specifically requiring a mental element for a crime and/or provisions requiring that strict liability only be imposed when such a legislative intent was expressly stated.[201] This easy dismissal of these cases overlooks the fact that even in absence of a criminal code provision defining intent, statutes that are silent or ambiguous as to the requisite mental element have long been understood to require at least a general criminal intent.[202] In fact, prior to *Yanez*, when dealing with other crimes—including child abuse—the Rhode Island Supreme Court had established its reluctance to impose strict criminal liability without clear instruction from the General Assembly.

---

200. *See* State v. Beck, 43 A. 366, 368 (R.I. 1898); State v. Powers, 644 A.2d 828, 830-31 (R.I. 1994).

201. *See Yanez*, 716 A.2d at 763.

202. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 262 (1952).

The *Yanez* majority places a great deal of weight upon a footnote in the United States Supreme Court case of *Morissette v. United States* stating that: "sex offenses, such as rape, in which the victim's actual age was determinative despite the defendant's reasonable belief that the girl had reached the age of consent" were an exception to the rule that a crime held an implied *mens rea* intent.[203] As Justice Flanders points out in his dissent, this observation was never intended as an ultimate holding on the validity of interpreting statutory rape to be a strict liability crime.[204] Furthermore, the *Yanez* majority's limited view of this case ignores the larger lessons that *Morissette* teaches about statutory construction—lessons that the Rhode Island Supreme Court had apparently also applied in the past.

Whatever the ultimate constitutional status of *mens* rea,[205] *Morissette* established that when interpreting federal statutes, the Court will not assume that silence equals a legislative intent to impose strict liability as to a particular element of a crime.[206] In that case, the appellant took old bomb casings from an old government bomb site, thinking that the casings had been abandoned.[207] He was then charged under 18 U.S.C. § 641, which punished any person who "embezzles, steals, purloins, or knowingly converts" government property to his use.[208] At his trial, he was denied the opportunity to present evidence that he had believed the casings had been abandoned.[209] On appeal, the government attempted to argue that this denial was proper. The government pointed out that Congress had provided the mental element of "knowingly" as to the "conversion" portion of the statute.[210] Therefore, the government argued that the statute should be interpreted as requiring only that the conversion must be done volitionally, but as imposing strict liability as to the defendant's knowledge as to ownership of the property.[211]

---

203. *Yanez*, 716 A.2d at 767 (citing Morissette v. United States, 342 U.S. 246, 251 n.8 (1952)).

204. *See id.* at 776 n.17 (Flanders, J., dissenting).

205. *See* discussion at IIIB, *supra*.

206. 342 U.S. 246 (1952).

207. *See id* at 247.

208. *Id.* at 248.

209. *See id.* at 249.

210. *See id.* at 263-64.

211. *See id.*

The *Morissette* Court rejected this argument. The Court held that would be acceptable to interpret an omission of mental element from a criminal statute as a legislative intent to impose strict liability in the instance of "public welfare" offenses where the penalties for violation were small and a conviction did not greatly hurt one's reputation.[212] Where a criminal statute was based on a common-law crime such as larceny, however, an omission as to the mental state had to be interpreted very differently.[213] Such crimes were distinguishable from public welfare statutes in that they were not created to impose a duty of care to ameliorate the potential for harm inherent in an industrialized society, but were designed to punish "positive aggressions or invasions," such as offenses against the state, the person, property, or public morals.[214] Such crimes were harshly punished, and subjected the actor to public disgrace.[215] These common-law crimes had from time immemorial been understood to have contained a *mens rea* element.[216] Therefore, when a legislature fashioned a criminal statute based on a common-law crime concept, the legislature was to be understood as having imported the *mens rea* element into the new statute.[217] Thus, the statute in question, which was geared towards the punishment of larceny-type crimes, must also require *mens rea* as to the defendant's knowledge as to the ownership of the property.[218] The term "knowing," the *Morissette* Court held, should not be read as a modification of that *mens rea* requirement as to ownership of property in larceny- type crimes.[219] Logically, a larceny-type crime would include "knowing" conversions in the sense that one knew one had taken goods into one's possession, but not "unknowing" conversions, which might be actionable only at tort law.[220] Therefore, the specification of the mental element of "knowing" should not be read as an imposition of strict liability as

212. *See id.* at 256.
213. *See id.* at 262-63.
214. *Id.* at 255.
215. *See id.* at 260.
216. *See id.* at 262-63.
217. *See id.* at 263.
218. *See id.* at 269-72.
219. *See id.*
220. *See id.*

to knowledge of ownership as to goods, but merely as a specification of what types of conversions would be punished.[221]

The United States Supreme Court—albeit not entirely consistently[222]—has since expanded the *Morissette* doctrine to statutes that were not crimes at common law, but, like the statutory rape and child molestation laws, could arguably to be a public-welfare crime in which strict criminal liability would be justified under *Morissette*. For example, the Court has refused to read strict liability into anti-price-fixing statutes.[223] It has also refused to read the statute criminalizing the possession of an unregistered machine gun as imposing strict liability as to the defendant's knowledge of whether his weapon had automatic firing capacity.[224] Furthermore, the Court has also refused to read the statute regarding the receiving, transporting and shipping of sexually explicit material to impose strict liability as to the defendant's knowledge of the age of the performer, despite the fact that a natural grammatical reading of the statute might suggest that *mens rea* was only required as to the knowledge that one had received, shipped, or transported some video or printed material.[225]

Similarly, in the period just prior to the repeal and revision of the present sexual assault code, the Rhode Island Supreme Court had been presented with a number of cases involving criminal statutes that were silent as to intent. However, despite the silence, the

---

221. *See id.*

222. For a complete treatment of the United States Supreme Court's statutory interpretation cases, see Singer & Husak, *supra* note 148, at 861 (arguing, generally, that while the United States Supreme Court may not have constitutionally enshrined *mens rea*, the Court appears to have adopted a general presumption against strict liability).

223. *See* United States v. United States Gypsum Co., 438 U.S. 422, 440-42 (1978).

224. *See* Staples v. United States, 511 U.S. 600, 613-15 (1994). *But see* United States v. Freed, 401 U.S. 601, 607 (1971) (imposing strict liability as to knowledge of whether hand grenades were registered, noting that most people would be placed upon notice that the possession of hand grenades were not an "innocent act," and therefore were under a duty to inquire as to the legality of their actions).

225. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 69-70 (1994). Admittedly, Justice Rehnquist, in dicta, observes that interpreting a statute to impose strict liability might be more justified in the case of a person accused of actually producing the video, or of having intercourse with an underaged person, as both would have had more contact with the minor in question. *See id.* at 71 n.2. In any case, the United States Supreme Court will not be called upon to interpret the federal statutes regarding statutory rape, as they already make provision for mistake of age for those over twelve. *See* 18 U.S.C. § 2241 (1994).

court appeared to presume that strict liability was not intended in these statutes. The Rhode Island Supreme Court has also explicitly considered the statutory construction rules raised in the *Morissette* line of cases, beginning with Rhode Island's drug possession statutes. In *State v. Gilman*,[226] the defendant demurred to his indictment for drug possession on the grounds that it punished those who were unaware of the fact that they were in possession of drugs, and was therefore unconstitutional.[227] Read literally, the *Gilman* court noted, the statute criminalizing the possession of barbiturates or amphetamines did impose strict liability regardless of whether or not the defendant actually knew the substance was in his possession, or knew the nature of the substance that he possessed.[228] The *Gilman* court noted that the imposition of strict liability was not necessarily unconstitutional.[229] Furthermore, the legislature had the right to impose strict liability statutes in the interests of public health and safety—particularly in those "public welfare" types of offenses described in *Morissette*, which a drug statute could arguably fall into. In fact, although not cited by the *Gilman* court, an earlier Rhode Island decision had interpreted the statute regarding the possession of intoxicating liquors as strict liability crime.[230] At the time, some jurisdictions did in fact punish unaware possession.[231] Thus could be argued that the General Assembly's silence had in fact been intended to impose such strict liability.

The *Gilman* court, however, chose not to rest on any decision regarding due process. Furthermore, it specifically chose not to limit itself to the common-law/public welfare crime division in *Morissette*.[232] The court instead simply chose to resolve the question in favor of protecting "the name and reputation of the individual in whose building, automobile, luggage or clothing are found

226. 291 A.2d 425 (R.I. 1975).

227. *See id.* at 429.

228. *See id.*

229. *See id.* (citing United States v. Balint, 258 U.S. 250 (1922)) (permitting strict liability in laws pertaining to sale of narcotics).

230. *See* State v. Hughes, 16 A. 911, 913 (R.I. 1889) (upholding a conviction for maintaining a common nuisance, i.e., a "building, place, or tenement used for the illegal sale and keeping of intoxicating liquors," despite lack of jury instruction that defendant must be found to know that the liquor being sold there was intoxicating).

231. *See Gilman*, 291 A.2d at 431 & n.5.

232. *See id.* at 430

liquor, narcotics or similar commodities which were surreptitiously placed there by another."[233] Therefore, the *Gilman* court interpreted the statute to include an intent element into the drug possession statute, noting that the term "possess" by some courts was interpreted as including conscious knowledge of the nature of the object in one's possession.[234] As a natural extension to *Gilman*, other possessory-type crimes were covered.[235]

Where earlier interpretations of a similar statute did require a *mens rea*, the court has followed it. In *State v. Drew*,[236] the defendant was convicted of obstructing an officer while in execution of his duties. Again, the statute was silent as to intent. On appeal, the court was called upon to consider the specific question of whether the Due Process Clause of the Fourteenth Amendment and Article I, Section 10 of the Rhode Island Declaration of Rights required that a conviction rest upon the person's knowing that the person that he obstructed was an officer, or that he knowingly obstructed the officer.[237] The Supreme Court once again never specifically ruled on when due process required such a mental element,[238] Here, however, there was an earlier holding regarding a similar statute stating that this was not a strict liability crime. In 1879, the Rhode Island Supreme Court in *State v. Maloney*[239] had required that an indictment or complaint for the crime must show that the defendant knew the officer to be an officer when he ob-

233. *Id.* at 431.

234. *See id.* at 430.

235. *See* State v. Benevides, 425 A.2d 77, 80 (R.I. 1981) (extending *Gilman* to instances of unknowing possession of a concealed weapon); State v. Motyka, 298 A.2d 793, 794 (R.I. 1973) (extending conscious possession requirements of *Gilman* to instances of constructive possession of stolen property). *But see* State v. Sharburno, 429 A.2d 1294, 1296 (R.I. 1981) (refusing to imply specific intent into drug possession statute, and therefore refusing to permit the defense of intoxication); State v. Johnson, 414 A.2d 477, 479-80 (R.I. 1980) (refusing to interpret the concealed weapon statute to include an implied intent to use the weapon unlawfully); State v. Almeida, 304 A.2d 894, 898 (R.I. 1973) (refusing to extend *Gilman* to an instance where the defendant argued that the General Assembly had erroneously included cannabis in the statutory prohibitions against "narcotics," when scientifically, it was not. The defendant attempted to argue that his due process rights were violated because the statute thus penalized the possessor without requiring a showing that the possessor knew of the nature of the contraband.).

236. 308 A.2d 516 (R.I. 1973).

237. *See id.* at 518.

238. *See id.*

239. 12 R.I. 251, 253-54 (1879).

structed him.[240] The *Drew* court chose to follow this interpretation, and thus held that similarly, the present statute did not impose strict liability.[241]

Finally, three years before the creation of the present first and second degree child molestation statutes, the Rhode Island Supreme Court had already asserted that child abuse statutes were no exception to the presumption against strict liability. In *State v. Lima*,[242] the defendant babysitter was accused of child abuse after placing a child of two in scalding water, causing the child to become seriously burned.[243] The trial judge refused to instruct the jury on mental element, since one was not required in the statute. The court, however, overturned the conviction, declaring that if the General Assembly did not include a mental element in a criminal statute, the courts would fill in the blanks when instructing its juries: "As a general proposition, where the requisite intent is not defined in a statute establishing a criminal offense such intent should be explicated in an instruction."[244] An instruction as to intent would only be inappropriate where the statute was "clearly intended" to impose strict liability.[245] In absence of that clear intent to impose strict liability, the court used the Model Penal Code's default intent provision: "[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposefully, knowingly, or recklessly with respect thereto."[246] Interestingly enough, the court made no attempt to interpret the General Assembly's intention. Instead, the court simply asserted it felt such an instruction as to mental element struck an appropriate balance between the rights of a defendant and the state's interest in protecting children: "We view such an instruction as protecting a defendant from a conviction predicated upon an act devoid of mens rea while at the same time protecting a class of defenseless victims from physical abuse."[247]

---

240. *See id.*

241. *See Drew*, 308 A.2d at 518.

242. 546 A.2d 770 (R.I. 1988).

243. *See id.* at 771

244. *Id.* (citing Marcinski v. United States, 479 A.2d 856, 861 (D.C. App. 1984), *cert. denied*, 469 U.S. 1224 (1985)).

245. *See id.* at n.2.

246. *Id.* at 772. (citing Model Penal Code, § 2.02(3) at 226 (1985)).

247. *Id.*

In light of the precedents regarding implied intent, a judicial interpretation imposing strict liability on Rhode Island's statutory rape and child molestation law immediately emerges as incongruous. Beyond a doubt, the prohibition against engaging in sexual activities with an underage person is part of our common-law tradition. It has long been considered a species of rape, always considered a serious offense against the person. These offenses are seriously punished—far more harshly than some of the other crimes for which the Rhode Island Supreme Court refused to impose strict liability. Third degree sexual assault is punishable by a sentence of up to five years.[248] Those convicted of first degree child molestation sexual assault are punished by a "not less than twenty (20) years, and may be imprisoned for life."[249] Sexual contact with a person under fourteen, that is, second degree child molestation sexual assault,[250] is punished by a term "not less than six years nor more than thirty (30) years."[251] Furthermore, persons convicted of either third degree sexual assault or first or second-degree child molestation sexual assault are subject to the registration and community notification requirements of Rhode Island's equivalent to Megan's Law.[252] Clearly, then, sexual offenses against children are quite unlike the petty "public welfare" offenses for which strict liability might be acceptably imposed. In any case, the Rhode Island Supreme Court has apparently not considered itself constrained by *Morissette*'s "public welfare" and "common law" crime categories, or even, in *Lima*, the argument that strict liability was necessary to protect children. Instead, the court has simply refused to read strict liability into silence.

Despite these holdings, however, the *Yanez* majority has in fact read strict liability into utter silence. The *Yanez* majority attempts to argue that the General Assembly's silence should be read as a deliberate intent to impose strict liability. As noted, it bases its interpretation partially upon the fact that the General Assembly did make some provisions as to mental state in other aspects of the sexual assault statute, but not as to the statutory rape and

248. *See* R.I. Gen. Laws § 11-37-7 (1956) (1994 Reenactment).
249. R.I. Gen. Laws § 11-37-8.2 (1956) (1994 Reenactment).
250. *See* R.I. Gen. Laws § 11-37-8.3 (1956) (1994 Reenactment).
251. R.I. Gen. Laws. § 11-37-8.4 (1956) (1994 Reenactment).
252. *See* R.I. Gen. Laws § 11-37.1 (1956) (1999 Supp.).

child molestation provisions.[253] On the other hand, as *Morissette* teaches, such a narrow, textual reading of intent elements may not necessarily be dispositive when we are reading statutes with long common-law roots which would historically require a *mens rea*. As the *Morissette* court noted, the provision of a mental element as to one aspect of the statute—that is, a knowing conversion—did not necessarily obviate the requirement that the accused have known the property was not abandoned. Similarly, there is in fact a strong argument that the General Assembly's provision of a mental element for the sexual assaults involving persons whom the defendant "knows or should know" was physically or mentally disabled, or who had engaged in an assault under the guise of a medical examination was in fact never intended to modify the mental elements as to assaults involving underage persons.[254] Instead, it is entirely possible that those provisions were merely to carve out exceptions to the defense of consent as to the provisions for sexual assault as to adults.[255]

Furthermore, the *Yanez* majority apparently attempts to infer a legislative intent to impose strict liability based upon the "traditional" understanding that the defense of reasonable mistake as to age would not be permitted.[256] This argument, too, fails, under principles of statutory construction. The General Assembly is presumed to legislate in harmony with existing law.[257] In Rhode Island, however, that existing law never included strict liability as to age. As the dissent correctly points out, the General Assembly could not have counted on any background supposition that statutory rape and child molestation was a strict liability crime, for at no point in its three hundred and fifty year history did either the Rhode Island courts or legislature ever take this stance when dealing with its statutory rape laws.[258] The General Assembly would thus no longer be able to rely upon the general understanding that statutory rape and child molestation laws imposed strict liability as to age.[259] Furthermore, the General Assembly is also charged

253. *See* discussion at Section IVA, *supra*.
254. *See id.*
255. *See id.*
256. *See* State v. Yanez, 716 A.2d 759, 766 (R.I. 1998).
257. *See* Smith v. Retirement Bd. of Employees' Retirement Sys., 656 A.2d 186, 189 (R.I. 1995).
258. *See Yanez*, 716 A.2d at 785 (Flanders, J., dissenting).
259. *See id.* at 782.

with the knowledge that in the immediate period prior to the revision of the sexual assault statutes and the development of the child molestation statute, the Rhode Island Supreme Court had indicated its distinct reluctance to impose strict criminal liability on its own. Finally, as the dissent also suggests, although this knowledge would not be binding upon the General Assembly, it is significant because by the time Rhode Island revised its sexual assault statutes, as a result of *Hernandez* and its progeny, the General Assembly—assuming that it considered the issue at all—denied the defense notwithstanding repeated challenges.[260]

Therefore, the inescapable conclusion one draws is that had the General Assembly in its solicitude towards the youth and children of Rhode Island determined that strict liability as to age was necessary, it would have taken the safest route in ensuring that a strict liability component did not get lost in the implied intent doctrine and thus explicitly imposed strict criminal liability in the third degree sexual assault and child molestation statutes. Thus, the attempt to read an implied strict liability into the child molestation statute based either on the legislative silence as to the intent elements of the crime, or the "traditional" view of statutory rape, ultimately emerges as incongruous with precedents on the construction of criminal laws involving serious, common-law offenses such as statutory rape. Under these precedents, precisely the opposite view should have prevailed: that Alejandro was entitled to present a defense of a reasonable mistake as to the complainant's age.

C. *Implied Intent and the Statutory Rape / Child Molestation Statutes*

The *Yanez* majority's holding is made more dubious because over the past few years, the child molestation statutes have been treated as no exception to the implied intent theories expressed in *Morissette* and *Lima*. [261] In general, prior to *Yanez*, the Rhode Island Supreme Court had been broadly interpreting the intent elements of the ambiguously-worded child molestation statutes to avoid the possibility that they might entrap persons who had evinced no intent to abuse a child.

260. *See id.* at 782 (Flanders, J., dissenting).
261. *See id.*

The consideration of whether there was an implied intent element in the child molestation statutes first arose as a challenge to the constitutionality of the second-degree child molestation statute in *State v. Tobin*.[262] Second-degree child molestation is defined as "sexual contact" with a person under the age of fourteen.[263] "Sexual contact" was defined as "the intentional touching of the victim's or accused's intimate parts, clothed or unclothed, if that intentional touching can be reasonably construed as intended by the accused for the purpose of sexual arousal, gratification or assault."[264] In *Tobin*, the defendant appealed from his conviction of second-degree sexual assault of his niece on the grounds that the jury instruction, which tracked the statute, was insufficient because it failed to instruct the jury that the conviction must be based on the defendant's intent to engage in the sexual contact for his own purpose of sexual arousal, gratification, or assault.[265] Such a reading of the statute, the defendant argued, was unconstitutional.[266]

While not specifically striking down the statute as unconstitutional, the Rhode Island Supreme Court agreed that there were difficulties with convicting on the complainant's interpretation of the defendant's conduct rather than upon the defendant's own *mens rea*.[267] Such an interpretation creates a potential for an effective imposition of strict liability in that the defendant could be convicted without any actual finding of an intent to engage in the sexual contact. Instead, a jury might feel that it was required to convict based upon what the defendant may have intended when touching the child. A person could then be convicted under mistaken or accidental touching, or intentional, but non-sexual touching, such as bathing a child. In support of its holding, the court cited *Morissette*'s observation that the notion of *mens rea* is so deeply rooted in common law that even if the enactment was silent on intent, *mens rea* was implied.[268] Therefore, the court followed its precedent in *Lima* by requiring that the trial justice on remand instruct the jury that in order to sustain a conviction, it must find that the defendant acted with the intent to arouse or gratify him-

262. 602 A.2d 528 (R.I. 1992).
263. *See* R.I. Gen. Laws § 11-37-8.4 (1956) (1994 Reenactment).
264. R.I. Gen. Laws § 11-37-1 (1956) (1994 Reenactment & 1999 Supp.).
265. *See Tobin*, 602 A.2d at 534.
266. *See id.* at 531.
267. *See id.* at 534.
268. *See id.*

self sexually.[269] The court once again expressed its comfort with the balance it struck between protecting defendants and children.[270]

Several years later, the Rhode Island Supreme Court extended *Tobin* to the first degree child molestation statute, which encompasses sexual penetration of persons under fourteen.[271] In *State v. Griffith*,[272] the defendant was charged with first degree child molestation, having allegedly penetrated the complainant's vagina with his finger. Penetration was defined as "sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, by any part of a person's body or by any object into the genital or anal openings of another person's body, but the emission of semen is not required."[273] No specific intent element, of course, is provided here at all, whereas one might be gleaned from the provisions regarding "sexual contact." Furthermore, As the newly-appointed Justices Bourcier and Lederberg pointed out when the court revisited the issue in a later case, one could argue that the definition of sexual penetration was merely an extension of the common-law definition of rape, that is, vaginal penetration, for which only a general intent was required.[274] Given that the other types of intrusion were included in the same passage as these general intent elements, requiring a specific intent for digital penetration does not comport with the textual type of analysis employed by the *Yanez* majority. However, the *Griffith* court held that as with the definition of "sexual contact," there was an implied specific intent element that the defendant to have engaged in the penetration for the purpose of arousal or gratification. Without such a

---

269. *See id.* at 534-35

270. *See id.*

271. *See* R.I. Gen. Laws 11-37-8.1 (1994 Reenactment).

272. 660 A.2d 704 (R.I. 1995). The *Griffith* opinion itself never states precisely what manner in which the defendant allegedly engaged in sexual penetration. Nor does the earlier opinion in this case. *See* Griffith v. State, 612 A.2d 21 (R.I. 1992). The court in a later case stated that Griffith allegedly engaged in digital penetration. *See* State v. Bryant, 670 A.2d 776, 782 (R.I. 1996).

273. *Griffith*, 660 A.2d at 705 (citing R.I. Gen. Laws§ 11-37-1 (1956) (1981 Reenactment), as amended by P.L. 1986, ch. 191, § 1). This section defining "sexual penetration" has since been amended to include penetration with objects perpetrated not only by another person, but by "the victim's own body upon the accused's instruction." R.I. Gen. Laws § 11-37-1 (1999 Supp.).

274. *See* State v. Bryant, 670 A.2d 776, 785-86 (R.I. 1996) (Bourcier, J., & Lederberg, J., dissenting).

reading, the jury could convict for any volitional, but innocent touching.[275] As the court explained:

> We believe that the first-degree child-molestation sexual-assault statute, like its second-degree sexual-assault counterpart, has an implied *mens rea* requirement requiring that the state must prove that a defendant must act with the intent of sexual arousal or gratification in order to be guilty of the offense. It is true that our Legislature can enact strict liability statutes devoid of any *mens rea*; *however, first-degree child-molestation sexual assault, which carries a minimum twenty-year sentence, is not a strict liability offense.*[276]

In short, the court specifically stated that first-degree child molestation was no exception to the court's refusal to read strict liability into a silent or ambiguous statute, and clearly demonstrated its intent to give defendants the benefit of any possible interpretational differences.

The *Yanez* majority, however, attempts to limit the import of *Griffith* on two bases. First, it notes that in other jurisdictions, and in the eyes of other commentators, the harsh penalties are imposed along with strict liability.[277] Secondly, it points out that *Griffith* has been limited by *State v. Bryant.*[278] *Bryant* involved a charge of anal intercourse with penile penetration.[279] Here, the court did refuse to require a *Griffith* instruction.[280] *Bryant* distinguished *Griffith* by separating the old and new portions of the definition of first degree sexual assault statute. The *Bryant* court noted that rape at common law only encompassed vaginal penetration by the penis, and was a general intent crime.[281] Obviously, however, when the new definitions of "penetration" for the purposes of the sexual assault statutes came to include not only "intercourse, cun-

275. *See id.* at 707.

276. *Id.* at 706-07 (emphasis added).

277. *See* State v. Yanez, 716 A.2d 759, 769 (R.I. 1998) (citing Miss. Code Ann. § 97-3-65 (1972) ("Every person eighteen (18) years of age or older who shall be convicted of rape by carnally and unlawfully knowing a child under the age of fourteen (14) years, upon conviction, *shall be sentenced to death or imprisonment for life* in the State Penitentiary.") (emphasis added); Collins v. State, 691 So. 2d 918, 922-23 (Miss. 1997) (rejecting mistake of fact defense); Bowes Sayre, *supra* note 91, at 73-74.

278. *See Yanez*, 716 A.2d at 765 (citing State v. Bryant, 670 A.2d 776 (R.I. 1996)).

279. *See id.* at 778.

280. *See id.* at 783.

281. *See id.*

nilingus, fellatio, and anal intercourse," but also "any other intrusion, however slight, by an part of a person's body or by any object into the genital or anal openings of another person's body . . .,"[282] there were obvious concerns that an innocent touching could be construed as a sexual offense, and a specific intent element was necessary to ensure that the statute did not outrun its intent and punish those who had had no intent to abuse a child.[283] For example, without the element of sexual gratification, even medical treatment could be punished. This concern, of course, does not apply to cases of purposeful penile penetration, which logically precluded any such finding of innocent touching. The *Yanez* majority, however, interprets this as a general rule that no instruction as to the intent of the defendant was necessary in cases involving penile penetration:

> We further stated that "first-degree child-molestation sexual assault, which carries a minimum twenty-year sentence, is not a strict liability offense." Yanez relies on this dictum and invites us to extend the *mens rea* requirement to the second element of the statute. We do not read *Griffith* this broadly, however, since we have subsequently determined that this implied *mens rea* is applicable only in cases that do not involve penile penetration. Thus the *mens rea* necessary in cases involving penile penetration is implicit in the intentional doing of the act.[284]

The *Yanez* majority's analysis fails on several grounds. First of all, as we have noted, unlike the other states, whose interpretation of the law is not binding upon us, there is little evidence that the General Assembly, when imposing the severe penalties, ever reflected upon whether or not strict liability was to be imposed in child molestation cases. Additionally, given the long history of the court's refusal to interpret strict liability into criminal statutes, and given the court's earlier care in ensuring that the child molestation statutes did not sweep beyond their protective purpose, it is difficult to dismiss the court's pronouncement in *Griffith* as mere "dicta."

Furthermore, *Bryant* did not do away with the necessity of *mens rea* in first degree child molestation crimes involving penile

282. R.I. Gen. Laws § 11-37-1 (1956) (1994 Reenactment & 1999 Supp.).
283. *See Bryant*, 670 A.2d 776, 783 (R.I. 1996).
284. *Yanez*, 716 A.2d at 767 (citations omitted).

penetration. While partially basing their interpretation of the mental element necessary for penetration on the common law traditions, which never required a specific intent as to the defendant's arousal or gratification, the *Bryant* court's refusal to interpret the statute as requiring a specific intent ultimately lies in the common sense of the matter: little if any principled argument can be made that "purposeful" penile penetration is for any purpose other than arousal or gratification. Therefore, there is no need to require any specific mental element, since it would be obvious that the defendant intended to abuse a child. This rationale, however, does not apply to a third degree sexual assault or child molestation statute, where there is a question as to whether the defendant was mistaken as to the complainant's age. The complainant's age, of course, is the *sine qua non* of these crimes. Whether a defendant should have or could have known of his sexual partner's age is certainly open to interpretation. Therefore, the denial of the defense creates the risk that those who have never intended to abuse a child will be punished.

Furthermore, the *Yanez* majority seems to be confused about the nature of a reasonable mistake of fact defense. Apparently, the court appears to believe that the defense requires that the prosecution prove a specific intent to engage in sexual intercourse with a person of a particular age. A specific intent crime, as read through the eyes of *Bryant*, does rest upon proof and an assessment of the defendant's subjective intent. The reasonable mistake as to age defense, however, does not ultimately rest entirely on Yanez's subjective intention. Instead, it includes an objective test as to whether outward appearances would have led a reasonable person to make a mistake. Such a reasonable mistake as to facts has long been considered sufficient to negate the mental state for a general intent crime.[285] Given that *Bryant* did not disturb *Tobin* or *Griffith's* pronouncement that first degree child molestation was not and could not be a strict liability crime, a reasonable mistake of fact defense is still a permissible defense even after *Bryant*.[286]

---

285. *See* LaFave & Scott, *supra* note 16, at 577; Perez v. State, 803 P.2d 249, 250 (N.M. 1990).

286. Of course, we note that the other decisions required a *specific* intent. If that level of mental element were in fact imposed, then even an *un*reasonable mistake as to the complainant's age would be a sufficient defense. *See* LaFave & Scott, *supra* note 16, at 578.

Additionally, the *Yanez* majority's holding is made more anomalous by the fact that not six months prior to its decision, the court implied that reasonable mistake as to identity would be accepted as a defense to second-degree child molestation. In *State v. Tevay*,[287] the complainant, the defendant's stepdaughter, testified that she went into the defendant's bedroom on her mother's instructions in order to wake him for work. The defendant at trial denied that he had had any such sexual contact with his stepdaughter. However, the defendant admitted that he was a very heavy sleeper and that on some occasions when his wife woke him, he would pull her into bed. Therefore, he conceded, there was a "ten percent chance" that this incident may have taken place, with his mistaking his stepdaughter for his wife and without recalling it later.[288] When instructing the jury, the trial judge refused to instruct on mistake of fact, but did include accidental conduct, advising the jurors "that [Tevay] may not be found guilty of conduct which you feel from the evidence, causes you to conclude the conduct was accidental."[289]

In a per curiam decision, the Rhode Island Supreme Court found that the instruction was adequate. The court held that in this instance, both accident and mistake of fact related to the same defense theory, and therefore the instruction was not inadequate: "In other words the accident was the mistaken belief that Jody was Tevay's wife. Therefore, we conclude the jurors were adequately informed that if they had found Tevay's conduct towards Jody was unintentional, for any reason, they were to return a verdict of not guilty."[290]

The *Yanez* majority rejects the idea that this case mandates a mistake of fact as to age defense, pointing out that no specific holding was made as to whether the defense of mistake was allowed.[291] As it observes: "Our holding in *Tevay* has no relevance to the case at bar since *Tevay* merely reflects our common sense determination that a touching that is 'accidental' cannot have been intended for any reason, including for purposes of sexual arousal or gratifi-

287. 707 A.2d 700 (R.I. 1998).

288. *See id.* at 701.

289. *Id.* at 702.

290. *Id.*

291. *See* State v. Yanez, 716 A.2d 759, 768-69 (R.I. 1998).

cation."[292] This distinction, too, is questionable. A mistake of fact instruction was likely not warranted by Tevay's theory of the defense, which was that Tevay had acted in a virtually somnambulistic state, and was not acting volitionally, under a mistaken impression as to the facts of the situation – as Yanez claims to have done. The term "accident," of course, is generally understood to include non-volitional conduct, and therefore the jury would have been given enough of an instruction allowing it to acquit if it believed Tevay's version of the facts. The *Tevay* court may have left its decision there. On the other hand, the *Tevay* court went much further. As Justice Flanders points out, the above-cited language in the *Tevay* opinion specifically broadens the term of "accident" to include mistake of fact, and appears to have and expressly condoned the jury acquitting on those grounds.[293] In any case, however we want to characterize the defense permitted by *Tevay*, as the dissent points out, we are still in inconsistent position of apparently permitting a jury to hear evidence, assess credibility, and possibly acquit a person who claims to have engaged in sexual conduct with a minor based upon the belief that he or she was somebody else[294]—arguably an even less believable position than a mistake as to age.

Read in the light of these earlier cases, the *Yanez* majority's holding emerges not only as a questionable statutory interpretation, but a substantial retreat from its earlier reluctance to impose strict liability for serious crimes, including child molestation. Even if one does not agree with the broader proposition that *Griffith* or *Tevay* alone mandates a reasonable mistake as to age defense, it is significant that the court had previously attempted to ensure that a set of child molestation statutes with absent or ambiguous intent elements did not sweep beyond their protective intent to punish those who never intended to sexually abuse a child or youth. With *Yanez*, however, the court calls an abrupt halt. Once presented with the question of mistake as to age, the court reverts to cruder, strict-liability interpretation that does not differentiate between a

292. *Id.*

293. *See id.* at 774 (Flanders, J., dissenting).

294. *See id.* Flanders points out that Massachusetts, resting on its earlier holdings refusing the defense of reasonable mistake as to age, has at least been consistent and refused to recognize this mistake of identity defense. *See id.* (citing Commonwealth v. Knap, 592 N.E.2d 747, 749 (Mass. 1992)).

true sexual offender and a young person who was honestly and reasonably misled as to the age of his sexual partner, and ultimately, creates the risk that a defendant will be branded as a child molester regardless of any intent to engage in deviant conduct.

V. Reasonable Mistake as to Age and Public Policy

The *Yanez* majority and Justice Flanders' dissenting views on reasonable mistake as to age spring in part from competing views on the purpose of the child molestation statute. Justice Flanders questions the proposition that the child molestation statutes were ever intended to reach situations involving two youths, and thus takes the position that a reasonable mistake as to age is necessary in order to effectuate the General Assembly's intent to allow juries to "sort out true cases of child molestation from those involving premarital sex between teenagers based upon a mistaken but reasonably held belief that both were old enough to do so legally."[295] The *Yanez* majority, on the other hand, takes the position that intercourse with a person under fourteen, even with a person close in age, is a presumptively harmful and abusive act.[296] Given that

---

295. *Id.* at 773 (Flanders, J., dissenting).

296. *See id.* at 770 & n. 8 (observing that while the third degree sexual assault statute does not criminalize sexual intercourse with persons between 14 and 16 unless the actor is over 18, the child molestation laws make no distinctions regarding the defendant's age).

The Rhode Island Supreme Court has in fact held that even a person under the age of fourteen can be convicted of child molestation. *See In re* Odell, 672 A.2d 457, 459-60 (R.I. 1996) (upholding finding of delinquency of person under 14 for first-degree child molestation of girl aged 11). However, *Odell* apparently involved an assault upon one person under fourteen by another, rather than consensual conduct. This use of the child molestation statute to reach non-consensual conduct raises special problems, which will be discussed later. *See* note 327, *infra*.

Additionally, the Yanez majority apparently attempts to cast the child molestation statute as a measure designed to protect the health of minors. *See Yanez*, 716 A.2d at 766 (citing State v. Ware, 418 A.2d 1, 4 (R.I. 1980); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 471-73 (1981))). However, the *Yanez* majority's reliance upon these cases as a final statement of the purposes of this statute is somewhat misplaced. *Ware* does not deal with the child molestation statute. Instead, it deals with Rhode Island's former carnal knowledge and abuse statute, which protected only girls under 16. *Michael M.* deals with a similar California statute. Both cases involved the issue of whether statutory rape provision that only punished males could survive an equal protection challenge. *See Ware*, 418 A.2d at 4; *Michael M.*, 450 U.S. at 471-73. Both statutes survived this challenge based upon the rationale that the statute was intended to protect young women from disease, pregnancy, and injury due to intercourse. *See Ware*, 418 A.2d at 4; *Michael M.*, 450 U.S. at 471-73. However, as the *Michael M.* Court conceded, at

consensual sexual activity between two peers has, for obvious reasons, traditionally been a low law-enforcement priority,[297] Justice Flanders' version arguably mores closely approaches the spirit of the child molestation laws. However, even if we did accept the *Yanez* majority's belief that the statute was meant to encompass situations involving two youths close in age, the *Yanez* majority's unanalyzed assumption that strict liability is necessary to prevent child molestation ultimately fails under closer examination.

To some extent, the argument that strict liability is necessary to fulfill the protective functions of the statutory rape and child molestation statutes may seem even more compelling today than in the time of *Hernandez*. Although once considered unspeakable, beginning in the 1980s, when Rhode Island first enacted its child molestation statutes, the crime of sexual abuse of children and youths gained recognition as a major social problem demanding strong government action.[298] As the New Jersey Supreme Court observed when upholding the state's community notification laws, the sexual abuse of children and youths has been associated with a number of serious debilitating psychological disorders, such as chronic depression and anxiety, isolation and poor social adjustment, substance abuse, and suicide.[299] These negative effects apparently persist into adulthood.[300] Worse, still, are the apparent effects upon the next generation; studies suggest that sexually abused boys tend to be more likely to become sex offenders themselves, and sexually abused girls are more likely to have children who are sexually abused.[301] Over the past decade, sexual abuse even has been associated with the problem of teenage pregnancy,

---

their inception, the statutory rape statutes may have been more aimed at imposing a standard of morality rather than protecting health and preventing pregnancy. *See id.* at 470. In any case, this equal protection analysis ultimately did not need to rest on the "actual" purpose of the statute, but on any rational basis the state can assert for a gender-based classification. *See id.* In any case, the present third degree sexual assault statute – which obviously covers the more active and fertile group – does not punish intercourse with persons under sixteen where the actor is under 18 himself or herself. *See* R.I. Gen. Laws. § 11-37-6 (1956) (1994 Reenactment). Thus, the argument that the statutes were intended as health measures naturally suffers.

297. *See* Oberman, *supra* note 118, at 23, 38 & n. 114.

298. *See* Phipps, *supra* note 109, at 80.

299. *See* Doe v. Poritz, 662 A.2d 367, 375-76 (N.J. 1995) (quoting Br. for the United States at 5-8 (citations omitted)).

300. *See* Phipps, *supra* note 109, at 90-95.

301. *See Doe*, 662 A.2d at 375-76.

with recent studies claiming that a high percentage of teenage pregnancies occur where there is a disparity in age between the teenage mother and her partner.[302]

For better or worse, our courts and legislatures have responded to this sense that extraordinary measures are necessary to protect youths and children from sexual abuse. Therefore, various measures have been taken to make a conviction for sexual abuse easier to obtain and the penalties harsher. For example, evidentiary standards are relaxed to allow the substantive use of prior episodes of sexual abuse.[303] Courts have begun to admit controversial "recovered memory" evidence in trials for sexual abuse taking place many years previously.[304] Rhode Island itself in 1984 imposed a mandatory minimum twenty-year sentence on all those convicted of first-degree child molestation.[305] Those convicted of crimes involving sexual abuse of children and youths are subject to registration and community notification requirements.[306] Some jurisdictions have even taken the radical step of "chemically castrating" those convicted of sexual abuse crimes.[307] In other jurisdictions, those convicted of sex offenses may be subject to civil confinement after completion of their sentences—with the apparent blessing of the United States Supreme Court.[308]

---

302. *See*, Elizabeth Hollenberg, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 Stan. L. & Pol'y Rev. 267, 269-272 (1999) (criticizing studies as exaggerating problem of older men impregnating young girls).

303. *See, e.g.*, State v. Hopkins, 698 A.2d 183 (R.I. 1997) (permitting admission of prior uncharged sexual misconduct to show "common scheme or plan" to molest young boys). *See also* Fed. R. Evid. 413 (permitting admission of similar crimes in sexual assault cases); Fed. R. Evid. 414 (permitting admission of similar crimes in child molestation cases).

304. Rhode Island has already rejected expert testimony as to repressed memory as unreliable. *See* State v. Quattrocchi, 1999 WL 284882 (R.I. Super. 1999).

305. *See, e.g.*, R.I. Gen. Laws § 11-37-8.2 (1956) (1994 Reenactment).

306. *See, e.g.*, R.I. Gen. Laws § 11-37.1 (1956) (1994 Reenactment & Supp. 1999).

307. *See* Linda Beckman, *Chemical Castration: Constitutional Issues of Due Process, Equal Protection, and Cruel and Unusual Punishment*, 100 W. Va. L. Rev. 853, 854 (1998) (describing California's requirement that second-time offenders accept MPA treatment as a condition of parole).

308. *See* Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding Kansas' Sexually Violent Predator's Act, which allowed for civil commitment of those charged with sexually violent crimes (including child molestation) and found to be suffering from a "mental abnormality" predisposing the person to commit sexually violent offenses).

The idea that strict liability as to age is necessary to protect youth, then, may seem part and parcel of a commitment to "zero tolerance" for sexual abuse. On the other hand, one should keep in mind that our newfound and sometimes dangerously uncritical concern for youths and children has caused legal excesses before. Over the past two decades, there have been instances of overzealousness in investigating allegations of sexual abuse. The results were flawed investigations that often blatantly coached children into making allegations of wholesale abuse under outlandish circumstances. The accused individuals in many cases were exonerated only after years of public humiliation and crushing legal expenses.[309] Furthermore, the new methods of gaining convictions and controlling sexual abusers—that is, relaxed evidentiary standards, community notification and registration, and mandatory sentencing—have not gone without criticism, both in terms of their impact on defendants' rights and on their actual effectiveness in eliminating sexual abuse.[310] Clearly, then, the assertion that the imposition of strict liability as to age is necessary

309. *See, e.g.*, James Selkin & Peter G.W. Schouten, The Child Sexual Abuse Case in the Courtroom: A Source Book 186-87 (1987) (detailing the frequency of false reports, and criticizing the view held by some child-welfare workers that children "never" lie about sexual abuse); Robert Rosenthal, *State of New Jersey v. Margaret Kelly Michaels: An Overview*, 1 Psychol. Pub. Pol'y & L. 246 (1995) (describing the severely flawed investigation of sexual abuse allegations against the defendant, a teacher at the Wee Care day care center); Brian McGrory, *Just Who Is Guilty Here?*, Boston Globe, Oct. 22, 1999, at B1, *available in* 1999 WL 6087076 (commenting on Fells Acres day care case).

310. *See, e.g*, Doe v. Poritz, 662 A.2d 367, 430-31 (N.J. 1995) (Stein, J., dissenting) (noting incidents of vigilante action taken after community notification of a released sex offender—in one instance, resulting in the beating of a person mistaken for the sex offender in question); Moira Johnston, *Spectral Evidence: The Ramona Case: Incest, Memory, and Truth on Trial in Napa Valley*, 20 Women's Rts. L. Rep. 49 (1998); Beckman, *supra* note 307, at 859-65 (detailing limitations of chemical treatment for child molesters); Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 Cornell L. Rev. 1004, 1032-33 (1999) (suggesting that the invalid questioning methods used in a number of day care sexual abuse cases may have ultimately served to create confusion as to the credibility of children in other cases); Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 Ariz. L. Rev. 485, 487 (1999) (criticizing community notification statutes as lulling communities into a false sense of security); Note, Heather E. Marsden, *State v. Hopkins: The Stripping of Rhode Island Rule of Evidence 404(b) Protections from Accused Sexual Offenders*, 3 Roger Williams U.L. Rev. 333 (1998); DuJardin, *supra* note 69, at C3 (quoting Justice Rodgers' assertion that *Yanez* is an instance of why legislatures should be cautious about passing minimum sentencing laws).

to protect youth and children should also be more carefully considered.

The *Yanez* majority bases its holding partially on the idea that strict liability as to age is necessary in order to ensure that the potential defendant take the utmost caution in order to avoid breaking the law.[311] This argument fails when one considers that there are already more than ample incentives for a defendant to exercise caution in selecting a sexual partner. It is well known that the crime involves severe penalties. Indeed, even the folk wisdom advises us that underage girls are "jailbait," and admonishes the prurient that "sixteen will get you twenty." Even if the defendant is successful in his defense, he will have undergone the harrowing experience of confrontation with the police, possible pretrial detention, and a trial for sexual abuse of a minor. He will also forever suffer the effects of the attendant publicity and loss of reputation.[312] The further imposition of a strict liability component—which punishes no matter what degree of care the defendant took—clearly is overkill in terms of deterrence and ensuring caution.

To some extent, the insistence on strict liability was also based upon a fear that the defendant would use a mistake of age defense as an easy escape from liability because the claim of mistake as to age will be difficult to rebut.[313] A prosecutor will naturally have a vast array of materials in order to rebut a claim of reasonable mistake of age, such as testimony from the victim herself about the representations that she made about her age, photographs, and the testimony of others regarding her mature appearance and de-

311. *See* State v. Yanez, 716 A.2d 759, 769 (R.I. 1998) (citing Bowes Sayre, *supra* note 91, at 73-74.) "Unless defendants were made to determine at their peril whether or not their victims fall within the class peculiarly needing the protection of the law and thus set apart, there could be no real protection." *Id.*

312. *See* Terese L. Fitzpatrick, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. Bridgeport L. Rev 175, 196-205 (1991) (describing the "media circus" frequently attending sexual abuse allegations).

313. *See Yanez*, 716 A.2d at 787 (Flanders, J., dissenting); Bowes Sayre, *supra* note 91, at 73-74 n.68 ("Were ignorance as to the girl's age allowed as a defense, any defendant by keeping in discreet ignorance as to his victim's age, could evade punishment."); Attorney General Pine's comments, discussed *supra* at Introduction & n.22.

meanor.[314] Furthermore, our juries have long been entrusted to listen to and evaluate credibility, often when dealing with complex technical information. In fact, under our current case law, juries are entrusted with claims of mistake as to identity, or a claim that touching was non-sexual in intent.[315] It is patently inconsistent to state that it cannot properly assess a claim as to age. Finally, the idea that allowing the defense will serve as an easy escape is simply not borne out in the experience of jurisdictions accepting the defense, where triers of fact have apparently had no difficulty rejecting a claim of mistake as to age as unbelievable.[316]

---

314. Of course, a prosecutor may have a distinct advantage over a defendant in a courtroom setting, where the complainant may well be presenting a very different image than during her encounters with the defendant. *See* People v. Battles, 240 Cal. App. 2d 122, 123 (Cal. Dist. Ct. App. 1966).

> When appellant met her she wore a black dress, gold shoes, black stockings, high heels and carried a gold purse. No doubt the court realized that she appeared more mature to appellant than she did in court. It must be presumed that appellant received the full benefit of the court's knowledge that an artful woman can contrive a deceptive appearance of maturity or youth, as the occasion requires; but it is clear that the court doubted that appellant's downfall was one such occasion.

Id.

The Michigan Supreme Court raises the practical problem that while awaiting a trial, a complainant may rapidly develop to the point where a defendant's claim of mistake could seem credible to a jury that is seeing the complainant for the first time, years after the fact. *See* People v. Cash, 351 N.W.2d 822, 828 (Mich. 1984). However, in Rhode Island, this difficulty is somewhat overcome. There is already a statutory provision for a speedier trial where the complainant is under fourteen. *See* R.I. Gen. Laws § 11-37-11.2 (1956) (1994 Reenactment). In any case, the prosecutor will have a vast array of evidence to establish the complainant's level of physical and social maturity at the time of the alleged abuse, such as photographs and testimony from those close to the complainant.

315. *See* discussion at IIIC, *supra*.

316. *See* People v. Battles, 240 Cal. App. 2d 122, 123 (Cal. Dist. Ct. App. 1966); State v. Ruska, 1996 WL 276390 (Wash. App. Div. 3) (1996) (unpublished decision); State v. Stepney, 1997 WL 765710 (Wash. App. Div. 2) (1997) (unpublished opinion); State v. Hottinger, 461 S.E.2d 462 (W. Va. 1995). *See also* State v. Parker, 887 S.W.2d 825, 828 (Tenn. Crim. App. 1994) (accepting the general proposition that mistake as to age was a defense to crime of having intercourse with a person under 13, but observing that there was sufficient evidence on the record that the defendant had at least behaved recklessly in regards to complainant's age); Collins v. Mississippi, 691 So. 2d 918, 925 (Miss. 1997) (observing, even while denying the defense, that defendant could not have reasonably believed she was of the age of consent due to the fact that he had known complainant since infancy); State v. Parker, 887 S.W.2d 825, 828 (Tenn. Crim. App. 1994) (noting that there was sufficient evidence on the record that defendant had at least been reckless as to determining the age of his partner).

Furthermore, the insistence on strict liability as to age does not comport with our knowledge of the circumstances as to when sexual abuse takes place. Since the days of *Prince*, the state of our knowledge regarding sexual abuse has been considerably refined. Under the circumstances where most abuse occurs, the defense of reasonable mistake as to age will not serve as an easy "out" for the true abuser. As uncomfortable as the fact may be, and as much as our legislative efforts may focus on "stranger danger," it is well-recognized that most sexual abuse of children and youths is perpetrated by persons who already have a relationship with the child or youth, that is, family, friends of the family, or persons in authority over the child.[317] Where there is already such a relationship with the youth, a defendant would be unable to claim with any degree of credibility that he did not or could not have known that the complainant in question had not reached the statutory age of consent. Therefore, allowing the defense of reasonable mistake of age will not protect the majority of sexual abusers from punishment. However, where the individuals involved were strangers—or, as in *Yanez,* mere acquaintances—there is more likelihood that an honest and reasonable mistake can and will be made, and therefore, that the innocent will suffer—again, without serving any preventive purpose.

Additionally, our knowledge about the typical abuser has expanded. Courts and legislatures have become aware of the fact that those who sexually exploit children and youths suffer from mental disorders.[318] Our own General Assembly demonstrated awareness of this fact in 1986 with the enactment of a statute requiring those convicted and imprisoned for child molestation to seek treatment as a condition of parole.[319] It is also recognized that this disorder is incredibly difficult to treat successfully. Therefore—whether one agrees with the wisdom of this legislation or not—Rhode Island, in common with many other jurisdictions, requires registration for those convicted under the child molestation and third degree sexual assault statutes, and possible community notification based upon an assessment of future

317. *See* Simon, *supra* note 310, at 490-95. *See also* Lucy Berliner, *Nature & Dynamics of Child Sexual Abuse*, 2, *in* ABA Center on Children and the Law, A Judicial Primer of Child Sexual Abuse, 2 (1994).

318. *See* Berliner, *supra* note 317, at 7-9.

319. *See* 1986 R.I. Pub. Laws, ch. 528 § 1 (now R.I. Gen. Laws § 11-37-8.7).

dangerousness.[320] The concepts behind the statutes involved, then, have changed from mere retribution, towards identification, treatment and incapacitation of an offender who is assumed to have a mental disorder causing him to commit this specific crime again.[321] Under this scheme, the denial of reasonable mistake as to age emerges as incongruous. No matter what the level of care the defendant took in determining that his partner was of an age that the state declared was sufficiently mature to consent to intercourse, he is treated in the same fashion as a person who had deliberately set out to abuse a youth or child. This is clearly an absurdity, for in the words of the Model Penal Code:

> [a] man who engages in consensual intercourse in the reasonable belief that his partner has reached [the age of consent] evidences no abnormality, no willingness to take advantage of immaturity, no propensity to corruption of minors. In short, he has demonstrated neither intent nor inclination to violate any of the interests that the law of statutory rape seeks to protect.[322]

This argument against strict liability become all the more compelling where, as here, the case involves youths fairly close in age. Although the ultimate line-drawing is better left to the legislature, it is worth considering that young adults like Alejandro commonly interact with younger teenagers on a social level. As a result, young adults could arguably be placed at a higher risk than older persons of getting involved in a situation where a mistake of age could occur, and might require more leniency.

To some extent, it could be argued that strict liability should be imposed where, as here, the complainant was less than fourteen years of age. The *Hernandez* court, the *Yanez* majority observed, had specifically stated that the mistake of fact defense should not be permitted where the girl was "of tender years."[323] However,

---

320. *See* 1992 R.I. Pub. Laws, ch. 196, § 1, as amended by 1996 R.I. Pub. Laws ch. 104 § 1 (now R.I. Gen. Laws § 11-37.1 (1956) (1994 Reenactment & 1999 Supp.)).

321. *See, e.g.*, Doe v. Poritz, 662 A.2d 367, 374-76 (N.J. 1995) (describing recidivist rates as part of the justification for the registration and community notification laws); Berliner, *supra* note 317, at 7-9 (describing the patterns of recividism of offenders, as well as the tendency of offenders to deliberately seek out victims and attempt to rationalize behavior).

322. Model Penal Code § 213.6, cmt. 2 at 415 (1980).

323. *See* State v. Yanez, 716 A.2d 759, 764 (R.I. 1998) (citing People v. Hernandez, 393 P.2d 673, 676 (Cal. 1964)).

where a child molestation statute extends to persons who in most cases have developmentally proceeded well beyond childhood, the denial of the mistake becomes more problematic. The limitation of use of the defense to a judicially or statutorily-drawn age limit may be somewhat justified where the line is drawn at a very early age, such as ten, or perhaps twelve.[324] However, at nearly fourteen, youths drastically vary in terms of physical and social maturity.[325] Therefore, a case-by-case assessment of the facts and circumstances surrounding the alleged mistake becomes all the more necessary, in order to assure that there was in fact an intent to exploit a child or youth. Otherwise, great hardship has been imposed upon a defendant, without any corresponding benefit of identifying, treating, or incapacitating a potential offender.

The *Yanez* majority expressed concerns that allowing the defense of reasonable mistake as to age will "inevitable lead to the presentation of evidence concerning the issue of consent." The defendant, the *Yanez* majority explains, would be required to allege not only the reasonableness of his or her mistake, but also that the complainant consented. The prosecution would then be forced to prove that the complainant did not consent, where consent is irrelevant to the crime of child molestation.[326] This rationale, however,

---

324. *See* H.R. Rep. No. 99-594 at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6186, 6198; Model Penal Code § 213.6 cmt. 2 at 415 (1980).

325. Indeed, there may be medical support for Attorney General Pine's observation that "young people are growing up faster." *See* Paul B. Kaplowitz & Sharon E. Oberfield, 104 Pediatrics 936, Oct. 1, 1999, *available in* 1999 WL 11267395 (citing anecdotal evidence from doctors claiming that puberty is occurring at an earlier age).

326. *See* Yanez, 716 A.2d. at 770. It is far less than clear that the issue of consent is *completely* irrelevant to statutory rape and child molestation, at least insofar as the presentation of evidence is concerned. For example, in our own jurisdiction, in In re *Odell*, 672 A.2d 457, 458 (R.I. 1996), the juvenile, himself under the age of 14, was adjudged delinquent based upon the finding of a Family Court judge that he had engaged in sexual penetration with a person under the age of fourteen. *See id.* The Court here held that because the child molestation statute specifically provided that "any person" who engaged in sexual penetration with a person under 14 was guilty of child molestation, the fact that the juvenile himself was under 14 did not constitute a defense. *See id.* at 460. Here, apparently the issue of consent evidence regarding that issue was apparently considered at trial; the 11-year-old victim testified that she had been "sexually assaulted" by the juvenile and her brother on several occasions. *See id*; *see also* State v. Searles, 621 A.2d 1281, 1284 (Vt. 1993) (refusing to find error in admission of testimony regarding use of force in a trial for sexual assault of a girl of 14 by three males, despite the fact that under the relevant statute, consent was not an element of the crime: "Absent the evidence, the sexual episodes would have appeared incomplete. The

also does not provide a satisfactory reason to deny the defense. Our statutory scheme in fact contemplates instances where issues of consent and lack of consent might be considered in the same case involving an underage complainant. Under R.I. Gen. Laws § 11-37-9, joinder of the offenses of statutory rape/child molestation along with first-degree sexual assault (i.e., forcible rape.) is permitted.[327] In any case, a defendant in Alejandro's position, who is using reasonable mistake as to age as an affirmative defense, has already admitted to all of the necessary elements of the crime—sexual penetration with a person under a particular age. All that would remain was a determination of whether the mistake was reasonable.

The *Yanez* majority's final arguments against permitting the defense were based upon the rape shield law. The *Yanez* majority objected to the use of the defense even in cases involving two youths, based on the idea that it would "open the door to the introduction of evidence concerning a victim's past sexual conduct, evidence that the General Assembly has already sought to restrict through the enactment of the rape-shield statute."[328] However, as Justice Flanders correctly observes, Alejandro never attempted to use the evidence to show consent, which the law does forbid, but intended to impeach Allison's credibility regarding what she had

---

resulting gaps in the narrative would detract from its 'ring of truth.'"). In other jurisdictions, it has been observed that prosecutors infrequently pursue cases of consensual sexual activity between peers. However, the prosecutors will use the consent-neutral statutory rape statutes to gain convictions where forcible rape of a young person is alleged, but there are serious problems in proving that the complainant's participation in sexual acts was not coerced. *See* Oberman, *supra* note 118, at 37.

Where Rhode Island's child molestation statute is applied to cases involving young adolescents who both fall under its protection, the failure to fully consider consent issues may create a problem of basic fairness. Without a determination that one party did not consent to the activity, then, logically, we may have a mere case in which both have committed a crime by engaging in sexual activity with a person who is under the threshold age. However, only the party charged is being punished. *See* State v. McGovern, 1998 WL 252236, at *4 (R.I. Super.) (criticizing the use of the former statutes forbidding oral and anal sex in order to gain convictions in cases of adult sexual assault where evidence of lack of consent was weak).

327. *See* R.I. Gen. Laws § 11-37-9 (1956) (1994 Reenactment).

328. *Yanez*, 716 A.2d at 700 (citing R.I. Gen. Laws § 11-37-3 (1956) (1994 Reenactment)).

said to Alejandro about her age. Using such past history in credibility challenges is permitted under the law.[329]

Flanders also argues that knowledge might acceptably be used as substantive evidence to show the reasonableness of mistake—provided, of course that Alejandro knew about it and relied upon it.[330] Using evidence regarding a complainant's sexual past as part of a reasonable mistake of fact defense may present other challenges. First, the use of such evidence may cause the reasonable mistake of fact as to age defense to degenerate into a "promiscuity defense" for statutory rape, which was formerly permitted in many states, and is now considered virtually untenable.[331] Secondly, it has also been suggested that the young complainant's sexual conduct probably should not be used substantively as a reliable indicator of reasonable mistake as to age, as sexual promiscuity in complainant's of Allison's age may well be the result of previous abuse.[332]

Whatever the ultimate policy decision on this issue, the *Yanez* majority's focus on this issue as a basis for denying the defense in this case is somewhat of an exaggeration, as many other factors were offered to support Alejandro's claim of reasonable mistake as to Allison's age. Alejandro offered testimony as to Allison's physical development, appearance, and ability to communicate, as well as her own representations and the belief of others.[333] As for future cases, many other factors will obviously be used to support a defense of reasonable mistake as to age—or, for that matter, undermine a false claim—such as the complainant's apparent level of intellectual development, poise, association with older persons, employment, activities, presence in areas such as drinking establishments, and the representations of persons associated with

---

329. *See, e.g.*, State v. Haslam, 663 A.2d 902, 909-10 (R.I. 1998) (permitting admission of evidence regarding teenager's pregnancy by her boyfriend as evidence of source of sexual knowledge allowing her to make complaint).

330. *See Yanez*, 716 A.2d at 773 n.14 (Flanders, J., dissenting).

331. *See* Oberman, *supra* note 118, at 26. Some modern courts in fact still permit the sexual "aggressiveness" of the complainant as a mitigating factor to be considered in sentencing. *See, e.g.*, State v. Rush, 942 P.2d 55 (Kan. Ct. App. 1997).

332. *See* Oberman, *supra* note 118, at 35 & n. 109 (citing Catherine Stevens-Simon & Susan Reichert, *Sexual Abuse, Adolescent Pregnancy and Child Abuse: A Developmental Approach to an Intergenerational Cycle*, 148 Archives of Pediatrics and Adolescent Medicine 23 (Jan. 1994)).

333. *See* Discussion at IIA, *supra*.

her—none of which are matters covered under the rape shield statute.

Thus, it becomes apparent that imposing strict liability as to a complainant's age only marginally advances the goal of protecting youths and children from sexual abuse. Furthermore, the *Yanez* majority was unable to advance any other policy argument that would support the blanket denial of the defense. On the other hand, as we have seen in *Yanez*, the potential cost of imposing strict liability is grave: somebody who has not shown any propensity to abuse children or youths will be subjected to harsh penalties and exposure to social disgrace mandated by the statute. Clearly, then, strict liability as to age is an archaic, ineffective and dangerous tool when applied to the task of preventing sexual abuse.

VI. CONCLUSION

Despite a matured understanding regarding when it is appropriate for a court to construe a statute to impose strict criminal liability, despite earlier holdings that specifically stated that statutory rape/child molestation was not a strict liability crime, and despite the fact that strict liability has little practical purpose in effectuating the purposes of statutory rape/child molestation provisions, the Rhode Island Supreme Court has persisted in maintaining the position that reasonable mistake as to age is not available to those accused of the serious offense of statutory rape/child molestation. Instead, the *Yanez* majority asserts that the question must be decided by the General Assembly.[334] Since the *Yanez* decision, however, the General Assembly has completed one legislative session and begun another, apparently without considering the fact that yet another youth may find himself in the same cruel plight as Alejandro. Therefore, we now suggest that the General Assembly amend the statutes regarding statutory rape and child molestation to permit the defense of reasonable mistake as to age.

Vicki J. Bejma

334. *See Yanez*, 716 A.2d at 770-71.