

ALASKA'S MENS REA REQUIREMENTS FOR STATUTORY RAPE

I. INTRODUCTION

The prosecution of statutory rape¹ often brings states' interests and defendants' due process rights into conflict. States traditionally cite their strong interest in protecting minors as the basis for allowing convictions of statutory rape without proof of a defendant's purposeful, knowing, reckless, or even negligent state of mind as to the victim's age.² Of the few states that allow a defense involving the defendant's belief of the victim's age, most require that the defendant establish a lack of criminal intent rather than force the prosecution to prove its existence.³

This failure to demand proof of a culpable mental state conflicts with due process ideals requiring both that defendants possess some level of fault for criminal convictions and that the prosecution overcome a presumption of innocence by proof of guilt beyond a reasonable doubt. The Alaska Supreme Court, interpreting the due process clause of the Alaska Constitution, has accentuated this conflict in a number of opinions. The combined effect of those decisions calls into question the constitutionality of recent Alaska statutory rape legislation.

This note will demonstrate that substantive due process under the Alaska Constitution requires a mens rea element for statutory rape.⁴ In

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1. In Alaska, acts commonly referred to as "statutory rape" are classified as "sexual abuse of a minor in the second degree." See ALASKA STAT. § 11.41.436 (1989 & Supp. 1991).

2. See, e.g., *People v. Olsen*, 685 P.2d 52, 54 n.10 (Cal. 1984) ("The view that mistake of age is not a defense to a charge of statutory rape still prevails in the overwhelming majority of jurisdictions.").

3. See, e.g., *Perez v. State*, 803 P.2d 249, 251 (N.M. 1990) (holding that while knowledge of age is not an element of the offense of statutory rape, a defendant may present a reasonable mistake of fact defense); *State v. Smith*, 576 P.2d 1110, 1111 (Mont. 1978) (referring to the Montana Criminal Code in recognizing a belief of age defense for which the defendant has the burden of proof and acknowledging similar statutory defenses in Washington and Kentucky); *People v. Keegan*, 286 N.E.2d 345, 346 (Ill. 1971) (referring to an Illinois statute creating the affirmative defense of a reasonable belief of age).

4. The due process issues that have arisen under Alaska law have not received attention in the statutory rape literature. Despite a variety of scholarly articles addressing both strict liability for crimes and the defense of reasonable belief of age in statutory rape cases, commentators have failed to focus on the possibility that a mental state element may be *constitutionally required* for statutory rape convictions.

addition, procedural due process under both the Alaska and United States Constitutions requires that the prosecution bear the burden of proving all elements of the crime. If a mens rea element is required for the crime of statutory rape, the prosecution must bear the burden of proving that mental state. Currently, Alaska provides only an affirmative defense⁵ for a defendant with a reasonable belief that the victim was over sixteen years of age. In other words, Alaska has shifted the burden of *disproving* mens rea to the defendant; the prosecution need not prove that the defendant had a culpable mental state. This shift violates the due process requirements of both the United States and Alaska Constitutions.

Before approaching this thesis, the note first provides some background. Part II explains the statutory rape law in Alaska and its most

Frank Remington and Orrin Helstad describe the confused state of the law as it pertains to crimes requiring a mental state and strict liability crimes. Frank Remington & Orrin Helstad, *The Mental Element in Crime -- A Legislative Problem*, 1952 WIS. L. REV. 644 (1952). They explain that courts have upheld strict criminal liability for violations of regulations that are based on the state's police power to protect health, safety and welfare. *Id.* at 670. In discussing "regulatory crimes," Remington and Helstad refer to offenses that arise from social needs that are a product of the industrial revolution, such as the illegal sale of liquor, impure food or drugs, misbranded articles, as well as nuisances and violations of motor vehicle laws and traffic regulations. *Id.* However, they also recognize that strict liability is sometimes extended to more serious crimes such as sex crimes committed against persons below a certain age. *Id.*

Francis Sayre also discusses regulatory public welfare crimes as the general exception to requiring criminal intent for crimes. Francis Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933). Sayre warns against extending this exception: "Courts should scrupulously avoid extending the doctrines applicable to public welfare offenses to true crimes. To do so would sap the vitality of the criminal law." *Id.* at 84. He notes that statutory rape cases allowing no mistake of fact defense are completely dissimilar to ordinary regulatory offense cases because the former usually involve a substantial term of imprisonment; the latter usually involve only a rather minor penalty. *Id.* at 73. Sayre does, however, argue against a reasonable belief as to age defense because such a defense would allow defendants to easily avoid punishment and would deprive victims of the protection of the law. *Id.* at 74.

In contrast, Herbert Packer assesses criminal sanctions in the absence of a proven mental state as inefficacious and unjust. Herbert Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (1962). Such sanctions are inefficacious because punishment for conduct absent the actor's awareness that the conduct was criminal does not deter future similar behavior. In addition, the actor's incapacitation and/or reformation is not necessary to protect society. *Id.* The injustice arises when the actor must suffer the stigma of a criminal conviction without moral blameworthiness. This stigma is especially severe in the case of a rape conviction. *Id.* But see Steven Nemerson, Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517 (1975) (arguing that for certain rigidly circumscribed classes of offenses, imposing criminal liability without fault or a culpable mental state is ethically justifiable and conforms with jurisprudential values).

Larry Myers specifically advocates a reasonable belief defense for statutory rape, but does not address issues of burden of proof or constitutional requirements. Larry Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1965).

5. The term "affirmative defense" is used in this note to refer to a defense that must be *raised* by the defendant, but does not necessarily have to be *proved* by the defendant. In this context, the burden of proving the affirmative defense may be placed on either the prosecution or the defense.

recent interpretation by the Alaska courts. Part III surveys some of the history of statutory rape law and the policies underlying it. This survey shows that requiring a culpable mental state as to the victim's age in statutory rape cases is not unreasonable, unrealistic or contrary to public policy. Part IV explores whether the United States Constitution requires a mens rea element for serious crimes such as statutory rape, and whether the *prosecution* must prove that element. Part V argues that Alaska's due process jurisprudence requires a culpable mental state or mens rea for statutory rape, and that Alaska's affirmative defense of a reasonable belief in the victim's age unconstitutionally shifts the burden of disproving mens rea to the defendant. Finally, Part VI addresses various counter-arguments.

II. ALASKA'S STATUTORY RAPE LAW

Alaska currently categorizes acts commonly known as "statutory rape" under the crime of sexual abuse of a minor in the second degree. Alaska Statutes section 11.41.436 provides that:

(a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender . . .

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age

(b) Sexual abuse of a minor in the second degree is a class B felony.⁶

However, when someone "16 years of age or older . . . engages in sexual penetration with a person who is under 13 years of age," the offense committed is sexual abuse of a minor in the first degree and constitutes an unclassified felony.⁷ Courts may sentence defendants convicted of second degree sexual abuse of a minor to "a definite term of imprisonment of not more than 10 years,"⁸ and those convicted of first degree sexual abuse of a minor to "a definite term of imprisonment of not more than 30 years."⁹

The Alaska Legislature has confirmed that:

[W]henver . . . an offense depends upon a victim being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be that age or older, unless the

6. ALASKA STAT. § 11.41.436 (1989 & Supp. 1991) (emphasis added).

7. *Id.* § 11.41.434.

8. ALASKA STAT. § 12.55.125(d) (1990) (setting forth the sentence for class B felonies).

9. *Id.* § 12.55.125(i).

victim was under [thirteen] years of age at the time of the alleged offense.¹⁰

Because this affirmative defense does not apply if the minor is under thirteen years old, it cannot serve to preclude a conviction for sexual abuse of a minor in the first degree. In order to successfully raise the affirmative defense, the defendant must present some evidence to place the defense in issue, and must prove the defense by a preponderance of the evidence.¹¹

III. THE DYNAMIC HISTORY OF STATUTORY RAPE LAW SUPPORTS THE MENS REA REQUIREMENT

Historically, jurisdictions in the United States have disallowed any reasonable mistake of age defense for statutory rape or sexual abuse-type crimes.¹² Even today, the majority of jurisdictions do not recognize a mistake of age defense to a statutory rape charge.¹³ States that do allow such a defense usually place the burden of proof on the defendant rather than the prosecution.¹⁴

It may seem illogical to assert that due process requires proof of a culpable mental state for statutory rape when the majority of United States jurisdictions do not allow even an affirmative defense to the crime. Despite the fact that most of these jurisdictions preclude a mistake of age defense, this section demonstrates that: (1) the states may have been mistaken in adopting this position; (2) the policy arguments offered in support of this position are no longer persuasive; and (3) several states now require that a mens rea element be proven by the state. In other words, the argument that Alaska should require a culpable mental state for statutory rape is not undermined by the positions taken by other American jurisdictions.

10. ALASKA STAT. § 11.41.445 (1989).

11. ALASKA STAT. § 11.81.900(b)(1) (Supp. 1991); see also *Jager v. State*, 748 P.2d 1172 (Alaska Ct. App. 1988) (holding that the defendant bore the burden of proving the "reasonable belief" affirmative defense).

12. *Myers*, *supra* note 4, at 105. See, e.g., *State v. Stiffler*, 788 P.2d 220 (Idaho 1990); *Commonwealth v. Dunne*, 474 N.E.2d 538 (Mass. 1985); *State v. Silva*, 491 P.2d 1216 (Haw. 1971); *State v. Vicars*, 183 N.W.2d 241 (Neb. 1971).

13. *People v. Olsen*, 685 P.2d 52, 54 n.10 (Cal. 1984); see also *Silva*, 491 P.2d at 1216 (noting that since California became the first state to recognize a reasonable mistake of age defense in *People v. Hernandez*, 393 P.2d 673 (Cal. 1964), several jurisdictions have specifically rejected the *Hernandez* rationale).

14. See *supra* note 3 and accompanying text.

A. Common Law

One scholar suggests that the near-consensus among American jurisdictions of retaining strict liability for statutory rape cases may be the product of misunderstanding.¹⁵ He notes that the definition of statutory rape in a 1576 English statute served as part of the original common law of the United States.¹⁶ Under this statute, English courts allowed the existence of a reasonable mistake of fact to serve as a defense. American courts, however, rejected the defense, despite adopting the English statute.¹⁷

The American courts precluded the defense based upon an English abduction case, *Regina v. Prince*.¹⁸ In *Regina*, the court rejected an honest and reasonable mistake of age defense to the criminal consequences arising from the abduction of an unmarried and underage girl. Although *Regina* was statutorily overruled ten years later, American jurisdictions retained the preclusive effect upon the mistake of fact defense, and extended it to *all* statutory rape cases.¹⁹ Thus, the misunderstanding resulted when, for a ten-year period, the English statutory rape law differed in cases of abduction.²⁰ The fact that the statutory rape jurisprudence of other jurisdictions differs only because of an erroneous reading of English precedent supports Alaska's position as one of the few states that allows a defense based upon a defendant's reasonable mistake of age.

B. Policy Development

Over time, the policies originally espoused to justify strict liability for statutory rape have become outdated and inapplicable. States have historically used two theories to justify strict liability: "Lesser Legal Wrong" and "Moral Wrong."²¹ The Lesser Legal Wrong Theory posits that states rationalize the elimination of a mens rea element for statutory rape or sexual abuse by transferring the intent to commit one crime to another related crime, even if the related crime is more serious. In other words, if fornication is a crime and the defendant has the required mens rea for fornication (i.e., knowledge that he or she is having sex), that intent

15. Myers, *supra* note 4, at 110-11. Myers uses the "misunderstanding" idea in a persuasive argument for the allowance of reasonable mistake of age defenses to statutory rape.

16. *Id.* (citing *Nider v. Commonwealth*, 131 S.W. 1024, 1026 (Ky. 1910)).

17. *Id.*

18. L.R. 2 Cr. Cas. Res. 154 (1875).

19. Myers, *supra* note 4, at 111.

20. *Id.* at 110-11.

21. *Id.* at 127.

applies to all the legal consequences of the act of fornication.²² Naturally, if the other participant in the sexual act is younger than the statutory age, a charge of statutory rape or sexual abuse of a minor would be such a consequence.

Similar reasoning provides the basis for the Moral Wrong Theory. Even when non-marital sexual intercourse does not constitute a crime, society often considers it immoral or wrong. Courts frequently have transferred the intent to commit such immoral acts into the requisite mens rea for unintended crimes associated with those immoral acts.²³ Under this theory, a mistake of fact defense would be rejected, since the mistake applied only to the degree of the wrong rather than the presence of the wrong.²⁴

Neither of these theories can continue to justify strict criminal liability for statutory rape. First, most states no longer criminalize extramarital or premarital sex; those that do often decline to enforce these offenses.²⁵ In fact, the Alaska Supreme Court has explicitly noted that Alaska does not consider sexual intercourse between consenting adults to be a crime.²⁶ By definition, transferring intent from one crime to another *requires two crimes*. Since Alaska has decriminalized the lesser offense, the Lesser Legal Wrong Theory is inapplicable.

Second, although courts have justified strict liability for statutory rape on the Moral Wrong Theory,²⁷ that theory has lost its persuasiveness. The logic underlying this theory is invalid. Immorality is not synonymous with illegality; intent to do an immoral act does not necessarily entail some form of criminal intent. Using immorality as the basis for inferring serious criminal intent, especially when the accused is not even aware that the act is criminal, seems unjustifiable and unfair.

In addition, the values and morals of society have evolved since this theory was implemented in statutory rape jurisprudence. Advocates of the notion that premarital or extramarital sexual intercourse is immoral can no longer boast of a national mandate in support of their view. Events in recent history such as the sexual revolution, the advent of the birth control pill, and television advertisements for condoms evidence this change in

22. *Id.*

23. *Id.* at 128.

24. *Id.*

25. *Id.* at 127-28.

26. *Guest v. State*, 583 P.2d 836, 839-40 (Alaska 1978).

27. *See Myers, supra* note 4, at 127-28; *see, e.g., People v. Ratz*, 46 P. 915, 916 (Cal. 1896) (holding that the immorality of the act of carnal knowledge with a minor necessitates that the state refuse a reasonable belief of age defense for statutory rape), *overruled by People v. Hernandez*, 393 P.2d 673, 677 (Cal. 1964).

public opinion. Even contemporary advocates of abstinence from sexual intercourse focus their arguments more on the health risks associated with extramarital intercourse than on questions of morality.

Finally, courts and commentators have recognized that extramarital sex is not immoral under modern standards.²⁸ For example, basing its decisions in part on a newly recognized constitutional right to privacy, the United States Supreme Court has confirmed the right of unmarried and married people to use contraceptives²⁹ and obtain abortions.³⁰ The Court has, to a certain extent, extended these rights even to minors.³¹ Thus, the Court has intimated that the right to engage in sexual intercourse is constitutionally protected.

In sum, established statutory rape law seems ripe for change. Transferred intent, the traditional substitute for requiring an awareness of the age of the victim, is no longer sufficient for such purposes. Because sexual intercourse between consenting unmarried adults is neither illegal nor clearly considered to be immoral, the theories of Lesser Legal Wrong and Moral Wrong do not support strict liability for statutory rape.

C. Other Jurisdictions

Changes in the statutory rape law of other jurisdictions have occurred in two ways. Some states that now allow an affirmative defense for a defendant with a reasonable belief that the victim was the age of consent³² place the burden of proving that belief on the defendant. However, a few states require that the prosecution prove the mens rea element with respect to the victim's age.

In *State v. Elton*,³³ the Utah Supreme Court considered a statutory rape statute similar to Alaska's sexual abuse of a minor statute. Under the

28. See *People v. Hernandez*, 393 P.2d 673, 677 (Cal. 1964) (noting that extramarital sexual intercourse is not immoral); see also *Myers*, *supra* note 4, at 129. In comparing statutory rape to bigamy, where a good faith reliance on a divorce or annulment is a defense, the *Hernandez* court declared that "[c]ertainly it cannot be a greater wrong to entertain a bona fide but erroneous belief that a valid consent to an act of sexual intercourse has been obtained." *Hernandez*, 393 P.2d at 677.

29. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that states could not prohibit married couples from using contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that the state could not interfere in the decision of an individual, married or unmarried, to either procreate or use contraceptives).

30. See *Roe v. Wade*, 410 U.S. 113 (1973). Although the viability of *Roe* remains in doubt, most states will likely maintain some form of the right to obtain an abortion. The ongoing and widely publicized abortion debate illustrates that no national consensus exists on the issue.

31. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding that a New York law prohibiting the sale of contraceptives to minors under 16 was unconstitutional).

32. See *supra* note 3 and accompanying text.

33. 680 P.2d 727 (Utah 1984).

statute in question, sexual intercourse with a person under sixteen years of age constituted a third degree felony.³⁴ The court held that such unlawful sexual intercourse was not a strict liability crime because the statute did not expressly provide for strict liability.³⁵ Absent strict liability, the state was required to prove a mens rea element for every offense.³⁶ On this basis, the court concluded that "the prosecution must prove that the defendant either was aware of the fact that the partner was underage or that the defendant ought to have been aware of a substantial and unjustifiable risk that his partner was underage."³⁷ Thus, Utah not only allows a mistake of age defense, but also places the burden of proving mens rea on the prosecution.

Illinois also requires that the prosecution prove at least negligence with respect to the age of the victim in statutory rape cases. In *People v. Plewka*,³⁸ the Illinois appellate court explained that a reasonable belief that the victim was at least sixteen years old constituted an affirmative defense to statutory rape.³⁹ While Alaska's definition of an affirmative defense burdens the defendant with proving the issue,⁴⁰ the affirmative defense used in *Plewka* requires that the defendant only raise the issue by presenting some evidence, if the prosecution has not already done so.⁴¹ Once the issue has been raised, the prosecution must prove the defendant's guilt concerning that issue beyond a reasonable doubt.⁴²

California has unquestionably recognized a reasonable belief of age defense to statutory rape. Despite conflicting judicial opinions, California courts have indicated that the prosecution bears the burden of proving this issue. In the landmark case of *People v. Hernandez*,⁴³ the California Supreme Court departed from traditional statutory rape law and declared that the charge could be defended by negating criminal intent through a showing of reasonable belief that the victim was eighteen or older.⁴⁴ Although the court did not expressly discuss who should bear the burden of proof, the case involved an offer of proof of reasonable belief by the

34. UTAH CODE ANN. § 76-5-401 (1990).

35. *Elton*, 680 P.2d at 729.

36. *Id.* at 729-30.

37. *Id.*

38. 327 N.E.2d 457 (Ill. App. Ct. 1975).

39. *Id.* at 459.

40. See *supra* notes 10-11 and accompanying text.

41. *Plewka*, 327 N.E.2d at 459 (citation omitted).

42. *Id.*

43. 393 P.2d 673 (Cal. 1964).

44. *Id.* at 677.

defendant,⁴⁵ possibly indicating that the court expected the accused to convince the jury of his reasonable belief.

In *People v. Winters*,⁴⁶ the California District Court of Appeal interpreted *Hernandez* to "require[] the People, in a statutory rape case if the defense of lack of criminal intent is raised, to prove that the defendant did not have reasonable cause to believe that the victim was over [eighteen] years of age."⁴⁷ This language appears to require that the accused raise the issue of reasonable belief and that the prosecution bear the burden of proving a lack of reasonable belief. A subsequent case illustrates the disagreement in some California courts over the burden of proof issue. In *People v. Thomas*,⁴⁸ the majority, while not directly addressing the burden of proof issue, cited *Winters* in declaring that a defendant did not have to testify to utilize the reasonable belief defense.⁴⁹ The dissent, however, asserted that this defense "is an affirmative defense as to which the defendant has the burden of proof."⁵⁰

The background of statutory rape law in the United States demonstrates that it is not unreasonable or unfounded to argue that Alaska should require a mens rea element for sexual abuse of a minor. In fact, the reality that most American jurisdictions do not include mens rea as an element of statutory rape does nothing to cure the constitutional infirmities of that practice in Alaska.

IV. MENS REA REQUIREMENTS UNDER THE UNITED STATES CONSTITUTION

A. Are Mens Rea Elements Required?⁵¹

Morissette v. United States,⁵² decided in 1952, remains one of the leading United States Supreme Court decisions on the acceptability of the strict criminal liability standard. The *Morissette* Court emphatically reiterated the longstanding rule requiring a mens rea element for crimes.⁵³

45. *Id.* at 678.

46. 51 Cal. Rptr. 735 (Cal. Dist. Ct. App. 1966).

47. *Id.* at 738.

48. 73 Cal. Rptr. 590 (Cal. Ct. App. 1968), *overruled on other grounds by* *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975).

49. *Id.* at 597.

50. *Id.* at 598 (Shoemaker, J., dissenting).

51. It is important to address the possibility that the federal constitution requires a mens rea element for serious crimes such as statutory rape, or in Alaska's case, sexual abuse of a minor in the second degree. If the federal constitution requires mens rea, then Alaska and other states must also require mens rea in order to abide by the federal constitution.

52. 342 U.S. 246 (1952).

53. In a now famous passage, Justice Jackson declared:

However, the Court specifically permitted an exception to this rule, recognizing the propriety of strict liability for public welfare crimes or regulatory offenses that arose from the industrial revolution and the need to impose more stringent standards on particular industries and trades.⁵⁴ Finding that the exception did not apply to the case at bar, the *Morissette* Court inferred a mens rea element for the larceny statute in question.⁵⁵ Justice Jackson explained that due to the seriousness of the crime involved, the mere omission of words indicating fault could not demonstrate Congress' intent to impose strict liability. The Court noted that the crime in question constituted a felony, would gravely besmirch the defendant's reputation, and originated from a common law crime that required proof of criminal intent.⁵⁶ Thus, while approving the use of a strict liability standard for public welfare crimes, the Court required proof of a culpable mental state when society considers the crime serious and the crime has historically included a mens rea element.

In *United States v. Gypsum Co.*,⁵⁷ the Court construed and elaborated on *Morissette*. After citing both *Morissette* and *Lambert v. California*⁵⁸ as examples in which it had read a mens rea element into a statutory offense, the Court explained that *Morissette* established an

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

Id. at 250-51 (footnotes omitted).

54. *Id.* at 253-56.

55. *Id.* at 270-71.

56. *See id.* at 256, 260-63.

57. 438 U.S. 422 (1978).

58. 355 U.S. 225 (1957). In *Lambert*, the Court held that registration requirements for convicted felons entering Los Angeles violated due process when applied to people who were unaware of the duty to register, absent proof of a probability of such awareness. *Id.* at 229-30. The Court based this awareness requirement on the concept that notice was required in order to satisfy due process standards. *Id.* at 228. Despite this holding, the Court acknowledged strict liability as a legitimate option in some areas by explaining that "[t]here is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition." *Id.* The Court distinguished the failure to register offense as passive conduct, "unlike the commission of acts . . . under circumstances that should alert the doer to the consequences of his deed." *Id.* (citing *Chicago B & O Ry. v. United States*, 220 U.S. 559, 578 (1911)). Notably, this distinction could be read to require a "reasonable under the circumstances" standard. Under such a standard, due process might require at least negligence for statutory rape. Nonetheless, the result in *Lambert* failed to provide a definitive rule as to when strict liability violates due process.

interpretive presumption that mens rea is required, at least for crimes with a common law origin.⁵⁹ This presumption assumes that Congress legislates against a background of traditional legal concepts, which the legislature may alter only explicitly.⁶⁰ The Court declared that “[w]hile strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, . . . the limited circumstances in which Congress has created and this Court has recognized such offenses . . . attest to their generally disfavored status.”⁶¹ Although this language adds little apart from a further condemnation of strict liability in American jurisprudence, it does suggest that many instances may exist in which strict liability *would* “offend constitutional requirements.”

The Supreme Court has not produced a definitive answer as to whether, absent a mens rea requirement, strict liability for a *serious crime* such as Alaska’s second degree sexual abuse of a minor violates the United States Constitution. Despite its approval of strict liability for many public welfare crimes and its inference of a mens rea element in *Morrisette*, the Court has neither established specific guidelines for permitting strict liability, nor has it delved deeply into the requirements of the United States Constitution. Although it is unclear whether the Constitution prohibits strict liability for statutory rape or sexual abuse of a minor, language in *Gypsum* indicates that such preclusion may be a realistic possibility.

B. Who Bears the Burden of Proof?

If mens rea elements are constitutionally required, the prosecution must bear the burden of proving those elements. In the *In Re Winship*⁶² decision, the United States Supreme Court explicitly held that the federal Due Process Clause⁶³ requires the prosecution to prove “beyond a reasonable doubt every fact necessary to constitute the crime with which [the defendant] is charged.”⁶⁴

Later Supreme Court cases affirmed and elaborated on the standard promulgated in *Winship*. In *Mullaney v. Wilbur*,⁶⁵ the Court resolved the burden of proof issue in the context of a defendant seeking to reduce a homicide charge to manslaughter by asserting that he acted in the heat of

59. *Gypsum*, 438 U.S. at 437.

60. *Id.* (citing *Morrisette v. United States*, 342 U.S. 246, 263 (1952)).

61. *Id.* at 437-38 (citations omitted).

62. 397 U.S. 358 (1970).

63. The Due Process Clause of the United States Constitution provides that “[n]o state shall . . . deprive any person of life, liberty or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

64. *Winship*, 397 U.S. at 364.

65. 421 U.S. 684 (1975).

passion on sudden provocation. The Court held that the Due Process Clause requires that the *prosecution* prove beyond a reasonable doubt the absence of heat of passion on sudden provocation when the defendant properly raises the issue in a homicide case.⁶⁶

The *Mullaney* requirement that the prosecution prove the lack of heat of passion is analogous to requiring proof of a lack of a reasonable belief of age in the statutory rape context. If the absence of such a belief constitutes a fact necessary for second degree sexual abuse of a minor, under *Mullaney*, federal due process would require that the prosecution bear the burden of proof on that issue. In *Mullaney*, the Court concluded that the requirement of proving a negative did not impose a hardship on the prosecution so unique as to justify compelling the defendant to prove the critical issue of criminal culpability.⁶⁷

In *Patterson v. New York*,⁶⁸ the Court, while upholding the *Winship* rule, distinguished *Mullaney* and appeared to limit the reach of *Winship*. The Court held that requiring the accused to prove the affirmative defense of extreme emotional disturbance by a preponderance of the evidence in order to reduce a charge of murder to manslaughter did not violate the Due Process Clause.⁶⁹ The Court reasoned that recognizing mitigating circumstances through an affirmative defense did not require that the state prove the non-existence of such circumstances whenever they were put at issue.⁷⁰ The court distinguished *Patterson* from *Mullaney* and *Winship* on the ground that the defense in question in *Patterson* did not serve to negate any facts which the prosecution had to prove beyond a reasonable doubt to constitute the crime.⁷¹ The Court recognized a balance in that the Due Process Clause demands that the prosecution prove "all of the elements included in the definition of the offense of which the defendant is charged," but not "the nonexistence of all affirmative defenses."⁷²

The central themes from *Winship*, *Mullaney* and *Patterson* indicate that if the Constitution requires a mens rea element for statutory rape, sexual abuse of a minor, or any other serious crime, the prosecution

66. *Id.* at 704.

67. *Id.* at 702.

68. 432 U.S. 197 (1977).

69. *Id.* at 206-07.

70. *Id.* at 209.

71. The *Patterson* Court explained that in New York, the victim's death, the accused's intent to kill and causation comprised the facts that the state needed to prove in order to convict *Patterson* of murder. *Id.* at 205. However, malice or the absence of provocation represented an additional fact necessary under the statute considered in *Mullaney*. *Id.* at 215-16.

72. *Patterson*, 432 U.S. at 210.

must bear the burden of proof as to that element. Alternatively, if a statutory rape law contains no mens rea element but allows the collateral defense of reasonable belief of age or lack of a culpable mental state, then the federal Constitution does not prevent the state from placing the burden of proof on the defendant on that issue.

V. MENS REA REQUIREMENTS UNDER THE ALASKA CONSTITUTION

A. Alaska May Extend Due Process Further Than Under the Federal Constitution

Alaska can and has extended its own due process safeguards further than the protections available under federal due process.⁷³ This option enables Alaska to interpret its own due process clause⁷⁴ to require a mens rea element for second degree sexual abuse, notwithstanding the uncertainty concerning the demands of the United States Constitution. The Alaska Supreme Court, in *State v. Rice*,⁷⁵ confirmed the state's power to interpret its own due process clause more expansively than that of the United States Constitution. After recognizing the obligation to enforce federal protections, the *Rice* court explained that:

[W]e also have a concomitant duty to develop constitutional rights under the Alaska Constitution . . . "if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by . . . waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law."⁷⁶

The *Rice* court thus exercised its ability to extend Alaska's due process guarantees.⁷⁷ The availability of greater due process protection under the

73. See *supra* Paul E. McGreal, *A Tale of Two Courts: The United States Supreme Court, The Alaska Supreme Court, and Retroactivity*, 9 ALASKA L. REV. 305 (1992) (discussing the propriety of the extension of a state's own constitutional guarantees beyond those available under the United States Constitution).

74. The due process clause of the Alaska Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." ALASKA CONST. art. I, § 7.

75. 626 P.2d 104 (Alaska 1981).

76. *Id.* at 112 (quoting *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970)); see also *Bush v. Reid*, 516 P.2d 1215, 1219 (Alaska 1973) (declaring that in the context of due process, Alaska is free to develop additional rights and privileges under its constitution).

77. *Rice* involved a situation somewhat analogous to the issue in this note. The court held that the forfeiture of an innocent security holder's interest did not violate federal substantive due process, but that not allowing innocent security owners to show their lack of involvement in criminal activity, and thereby avoid forfeiture, violated Alaska's due process. *Rice*, 626 P.2d at 112-14.

Alaska Constitution opens the door for Alaska to require a culpable mental state as an element of second degree sexual abuse or statutory rape.

B. Alaska Jurisprudence Indicates that Due Process Requires Criminal Intent for Serious Crimes

Alaska first considered the principle that due process requires mens rea elements for certain crimes in *Speidel v. State*,⁷⁸ *Alex v. State*⁷⁹ and *Kimoktoak v. State*.⁸⁰ In *Speidel*, the Alaska Supreme Court reversed a conviction for failure to return a rented automobile.⁸¹ The defendant argued that because this crime constituted a felony, the statute was unconstitutional for failing to require criminal intent.⁸² The court observed a "universal rule" that for conduct to become criminal, the accused must have possessed an awareness of wrongdoing.⁸³ Referring to *Morissette v. United States*,⁸⁴ the *Speidel* court also noted the "public welfare offenses" exception to this rule.⁸⁵ The court reasoned that the statute in question did not represent a public welfare crime, as it focused on protecting those in the business of renting cars, rather than on guarding the health, safety and welfare of the public as a whole.⁸⁶ The court found the statute to be valid in that it criminalized the failure to return a rented car with a purposeful intent to harm the vehicle's owner. However, the portion of the statute that mandated a felony conviction for negligent failure to return such a vehicle violated due process.⁸⁷ In a unanimous opinion, the court explained that "[t]o convict a person of a felony for such an act, without proving criminal intent, is to deprive such person of due process of law."⁸⁸ Not only did the *Speidel* court declare that criminal intent was necessary for felony convictions, but the phrase "proving criminal intent" indicates that the court also intended that the prosecution retain the burden of proving mens rea.

In *Alex v. State*,⁸⁹ the Alaska Supreme Court elaborated on the principles discussed in *Speidel*.⁹⁰ The court reaffirmed *Speidel*'s holding

78. 460 P.2d 77 (Alaska 1969).

79. 484 P.2d 677 (Alaska 1971).

80. 584 P.2d 25 (Alaska 1978).

81. *Speidel*, 460 P.2d at 78, 84.

82. *Id.* at 78.

83. *Id.*

84. 342 U.S. 246 (1952); see *supra* notes 52-56 and accompanying text.

85. *Speidel*, 460 P.2d at 78.

86. *Id.* at 79.

87. *Id.* at 80-81.

88. *Id.* at 80.

89. 484 P.2d 677 (1971).

90. In *Alex*, the court affirmed the defendant's conviction of felony escape from the

that convicting someone of a "serious crime" such as a felony, without requiring some type of criminal intent, would deprive that person of his or her liberty without due process of law.⁹¹ The policy behind this rule was to prevent criminal liability for accidental or innocent behavior.⁹² Chief Justice Boney explained that due process necessitated an awareness of one's behavior and the specific acts being committed, but not an understanding that such acts violated the law.⁹³ The *Alex* court also based its rationale on *Morissette*, maintaining that *Morissette* and *Speidel* require that serious crimes include at least "a general criminal intent as opposed to strict criminal liability which applies regardless of intention."⁹⁴ Thus, the principles set forth in *Speidel* and *Alex* reflect Alaska's interpretation of the meaning of the *Morissette* Court's general guidelines concerning the necessity of culpable mental state elements.

The court reaffirmed the above principles in *Kimoktoak v. State*,⁹⁵ indicating that due process requires mens rea elements for serious crimes.⁹⁶ The defendant was convicted of the statutory offense of failing to render aid to someone he had struck with a motor vehicle.⁹⁷ Relying on *Speidel*, *Alex* and *Morissette*, the court found that the statute in question was facially unconstitutional for not requiring that an accused possess criminal intent (i.e., the knowledge of failing to render aid).⁹⁸ Although the defendant argued that courts could read intent requirements only into statutes codifying common law crimes, the court ruled that *Speidel* and *Morissette* did not preclude courts from inferring criminal intent requirements into statutes creating new offenses.⁹⁹ Thus, rather than invalidating the failure-to-aid statute, the court read a knowledge requirement into the statute.¹⁰⁰

The *Speidel*, *Alex* and *Kimoktoak* opinions evidence the firmly entrenched due process requirement that an element of criminal intent must exist for serious crime convictions. These opinions set the stage for Alaska

facility where he already was serving a criminal sentence. *Id.* at 677, 686. The court found that the jury instructions required a finding of intentional conduct and awareness, and therefore achieved *Speidel*'s mental state requirements. *Id.* at 682.

91. *Id.* at 680-81; see *Speidel*, 460 P.2d at 80.

92. *Alex*, 484 P.2d at 681.

93. *Id.* at 681-82.

94. *Id.* at 681.

95. 584 P.2d 25 (Alaska 1978).

96. *Id.* at 29.

97. *Id.* at 27.

98. *Id.* at 29.

99. *Id.* at 28-30.

100. *Id.* at 31.

to consider whether due process requires the inclusion of mens rea for statutory rape, and suggests an answer in the affirmative.

C. Alaska Has Extended Due Process to Require Mens Rea for Sexual Abuse of a Minor Convictions

In the landmark case of *State v. Guest*,¹⁰¹ the Alaska Supreme Court first determined that due process requires that *statutory rape* include a mens rea requirement. The court declared that the state could not convict a defendant of statutory rape if that defendant reasonably believed that the person he or she had sexual intercourse with was sixteen years of age or older.¹⁰² In the court's decision, Justice Matthews explained that *Alex, Speidel* and *Kimoktoak* had held "that it would be a deprivation of liberty without due process to convict a person of a serious crime without the requirement of criminal intent."¹⁰³ The court explained that to refuse a mistake of age defense to statutory rape would violate this constitutional principle, as defendants with no criminal intent would be convicted.¹⁰⁴ Based on due process, Justice Matthews reasoned that where the particular felony statute does not explicitly require intent and "is not a public welfare type of offense, either a requirement of criminal intent must be read into the statute, or it must be found unconstitutional."¹⁰⁵ Holding that the case did not come within the public welfare exception, the court read a culpable mental state requirement into Alaska's statutory rape statute. The court did not explicitly address who should bear the burden of proving the defense of honest and reasonable mistake as to the victim's age.¹⁰⁶

The statutory rape statute involved in *Guest* has since been revised. Nevertheless, the *Guest* holding applies to the current crime of second degree sexual abuse of a minor. The *Guest* court used the phrase "statutory rape" because the statute at issue included the offense of sexual intercourse with a person under sixteen.¹⁰⁷ This action would now be referred to as sexual abuse of a minor in the second degree, provided the perpetrator was three years older than the victim.¹⁰⁸ The former statute and the current statute involve almost identical conduct,¹⁰⁹ and second degree

101. 583 P.2d 836 (Alaska 1978).

102. *Id.* at 839.

103. *Id.* at 838.

104. *Id.* at 838-39.

105. *Id.* at 839.

106. *Id.* at 839-40.

107. *See infra* note 109.

108. ALASKA STAT. § 11.41.436 (a)(1)-(2), (b) (1989). If the victim was under the age of 13, the same action would constitute first degree sexual abuse. *Id.* § 11.41.434.

109. The statutory rape provision in effect at the time of the *Guest* decision and prior

sexual abuse of a minor constitutes a felony punishable by a substantial prison sentence.¹¹⁰ Therefore, the current sexual abuse of a minor offense must also be considered a "serious crime" triggering the due process requirements of *Alex* and its progeny. The language in *Guest* suggests that due process requires some form of criminal intent for all serious crimes in Alaska, including, but not limited to, statutory rape.¹¹¹

In *Jager v. State*,¹¹² the Alaska Court of Appeals suggested that Alaska's reasonable belief affirmative defense prevented strict criminal liability for sexual abuse of a minor from violating due process. The *Jager* court ruled that *Guest*'s holding did not apply to Alaska's sexual abuse of a minor statute.¹¹³ In the *Jager* opinion, Chief Judge Bryner asserted that the *Guest* court had inferred "a requirement of criminal intent in order to avoid the imposition of strict criminal liability for an offense not involving the public welfare."¹¹⁴ Judge Bryner explained that the language in *Guest* no longer applied because the legislature had provided for a reasonable belief affirmative defense to second degree sexual abuse of a minor.¹¹⁵

Under this reasoning, the legislative creation of an affirmative defense of reasonable belief of age precluded the imposition of strict liability in

to the 1978 revisions of the Alaska Criminal Code provided that: "a person who . . . (2) being 16 years of age or older, carnally knows and abuses a person under 16 years of age, is guilty of rape." *Guest*, 583 P.2d at 837 n.1 (quoting ALASKA STAT. § 11.15.120 (1976) (repealed 1978)). Note that the statutory rape provision that was repealed when the Alaska Criminal Code was revised in 1978 is very similar to the definition of sexual abuse of a minor in the current Alaska Criminal Code. In fact, the only differences are that the current statute: (1) uses the term "sexual penetration" in place of "carnal knowledge"; (2) classifies sexual penetration as first degree sexual abuse when the victim is under 13 years of age and second degree sexual abuse when the victim is 13 or older; and (3) specifies that the offender must be at least three years older than the victim. Compare ALASKA STAT. § 11.15.120 (1976) (repealed 1978) with ALASKA STAT. § 11.41.434-.436 (1989 & Supp. 1991).

110. See *supra* text accompanying notes 6-9. *Jager v. State*, 748 P.2d 1172 (Alaska Ct. App. 1988), provides an example of a prison sentence for someone convicted of second degree sexual abuse of a minor. The court affirmed a sentence of four years imprisonment with three years suspended. *Id.* at 1173.

111. See *supra* notes 101-105 and accompanying text. Justice Matthews' concurring opinion in *State v. Rice*, 626 P.2d 104 (Alaska 1981), however, casts some doubt on this proposition. In *Rice*, Justice Matthews recommended requiring a culpable mental state whenever imprisonment may result, but admitted that Alaska had not yet held so unconditionally. *Id.* at 115 (Matthews, J., concurring). Although the *Guest* court required a mens rea element for statutory rape and justified this requirement in part on the fact that statutory rape was a serious crime, the author of the *Guest* opinion acknowledged that Alaska has not yet mandated criminal intent elements for every offense punishable by a prison sentence.

112. 748 P.2d 1172 (Alaska Ct. App. 1988).

113. *Id.* at 1178.

114. *Id.*

115. *Id.* at 1177-78 (quoting ALASKA STAT. § 11.41.445(b) (1989)). For a discussion of this affirmative defense statute, see *supra* note 10 and accompanying text.

Jager. Absent strict liability, there is no unconstitutionality to be resolved by the courts.

If the defendant has the opportunity to prove a lack of intent sufficient for exoneration, does the crime remain a strict liability offense? Without support or justification, the *Jager* court assumed a negative answer to this question, and improperly equated the inclusion of a mens rea element in *Guest* to the availability of an affirmative defense in *Jager*, insofar as those principles cure strict liability. "Curing" strict liability means, in essence, giving effect to due process safeguards.¹¹⁶ The inclusion of a mens rea requirement and the provision of an affirmative defense are not equal vis-a-vis preserving due process guarantees. Providing an affirmative defense will not always cure an unconstitutional strict liability statute if it remains possible for the prosecution to convict a defendant without demonstrating any criminal intent. Since that possibility exists, an affirmative defense fails to adequately cure strict liability, and *Jager* was wrongly decided. Due process requires that the prosecution prove a culpable mental state to convict a defendant of sexual abuse of a minor.

The *Guest* court stated that denying an accused the chance "to show that he lacked criminal intent . . . [would result in] strict criminal liability."¹¹⁷ One might infer from the use of the word "show" that no strict liability occurs if the law allows a defendant to prove a lack of intent. However, "show" is not synonymous with "prove." A homicide defendant generally has the right to "show" that she did not pull the trigger, yet the prosecution retains the burden of proof on that issue.

In contrast, the prosecution has no burden of proving intent for Alaska's sexual abuse of a minor offense. Unless the accused proves reasonable belief of age by a preponderance of the evidence, the state could convict a defendant of this serious crime without any showing that the accused knew or was even negligent in not knowing that he or she had sexual intercourse with a person under the statutory age. Because the *Guest* court declared that due process prohibits strict criminal liability for statutory rape, due process requires that the prosecution prove a culpable mental state beyond a reasonable doubt to convict a defendant of sexual abuse of a minor. Forcing defendants to negate such a mental state via an affirmative defense fails to afford defendants their constitutionally-guaranteed due process rights.¹¹⁸

116. See *Guest*, 583 P.2d at 838. The Alaska Supreme Court's decisions in *Alex, Speidel* and *Kimoktoak* indicate "that it would be a deprivation of liberty without due process to convict a person of a serious crime without the requirement of criminal intent." *Id.*

117. *Id.* at 838-39 (emphasis added).

118. *State v. Elton*, 680 P.2d 727 (Utah 1984), is one example of a court that took this approach to the need to cure strict liability. See *supra* notes 33-37 and accompanying text.

D. The Unconstitutionality of Alaska's Affirmative Defense Statute

Since sexual abuse of a minor in Alaska requires a culpable mental state, or mens rea, *Winship* demands that the prosecution retain the burden of proving this fact beyond a reasonable doubt.¹¹⁹ The Alaska Legislature violated federal due process by shifting the burden of proving a reasonable belief of age to the defendant.¹²⁰ Alaska courts have no choice but to recognize and apply *Winship*'s law, and they have done so on numerous occasions.¹²¹ The *Guest* decision, combined with the principles announced in *Winship*, renders the reasonable belief of age affirmative defense statute unconstitutional.¹²²

The limitation placed on *Winship* by the *Patterson v. New York*¹²³ opinion does not affect *Winship*'s application to *Guest*. As explained above, the *Patterson* court maintained that due process compels the prosecution to prove the elements of the crime, but not to disprove affirmative defenses beyond a reasonable doubt.¹²⁴ The issue of whether *Patterson* allows Alaska to burden the defendant with proving a reasonable belief of age defense hinges on the proper interpretation of *Guest*. The *Guest* court's inference of a culpable mental state requirement for statutory rape appears equivalent to requiring negligence as a mens rea element for that type of offense. In *Hentzner v. State*,¹²⁵ the Alaska Supreme Court affirmed this interpretation of *Guest*. Justice Matthews, the author of the *Guest* opinion, explained that the court "construed the statute involved in *Guest* to include criminal intent as an element of the offense proscribed in order to avoid finding the statute unconstitutional."¹²⁶ Therefore, even under *Patterson*, the prosecution must bear the burden of proving the mental state.

119. See *supra* notes 62-64 and accompanying text.

120. See *supra* notes 10-11 and accompanying text.

121. See, e.g., *Smallwood v. State*, 781 P.2d 1000, 1003 (Alaska Ct. App. 1989) (citing *Winship* in holding that the court plainly erred in taking judicial notice of an element of the charge); *Howard v. State*, 583 P.2d 827, 833 (Alaska 1978) (citing *Winship* in holding that the state has the burden to prove beyond a reasonable doubt that property taken in larceny belongs to another).

122. See ALASKA STAT. § 11.41.445(b) (1989). The argument that due process necessitates a mens rea element for sexual abuse of a minor and requires that the prosecution bear the burden of proving this issue would also logically apply to sexual abuse of a minor in the first degree, where the victim is younger than 13 years old. Obviously, it would be much easier for the prosecution to show that the defendant had reason to know that the victim was less than 16 years old when the victim is actually younger than 13 years old, but one could argue that the possibility of a reasonable belief still exists.

123. 432 U.S. 197 (1977); see *supra* notes 68-72 and accompanying text.

124. *Patterson*, 432 U.S. at 210; see *supra* notes 68-72 and accompanying text.

125. 613 P.2d 821 (Alaska 1980).

126. *Id.* at 827 (emphasis added).

It follows from *Patterson* that the defendant may only be forced to sustain the burden of proof on defenses that rebut an element of the crime.¹²⁷ Offering an affirmative defense option instead of reading a mens rea element into a crime fails even *Patterson's* low threshold due process standard. It does so by assigning the defendant the burden of proof on an issue that, under Alaska's due process, is an element of the crime.

VI. CONSIDERING THE COUNTER-ARGUMENTS

A. The *Guest* Footnote

One argument against the proposal that Alaska constitutionally require a mens rea element as to the age of a statutory rape victim derives from the *Guest* court's citation of the revised affirmative defense statute. Alaska Statutes section 11.45.445,¹²⁸ later referred to by the *Jager* court, was not in effect at the time of *Guest*. However, the *Guest* court cited the draft of this statute, which made reasonable belief in the age of the victim an affirmative defense to sexual abuse of a minor, as an example of the type of defense that the *Guest* court allowed.¹²⁹ Why would the court cite a future statute in an opinion that has the effect of rendering that statute unconstitutional? One could assume that Justice Matthews and the *Guest* court had Alaska's upcoming affirmative defense statute in mind when allowing a reasonable belief of age defense to statutory rape. If so, the court probably never intended to permanently affix a mens rea element to the actions included in statutory rape and later in sexual abuse of a minor offenses. Instead, *Guest* might stand for the proposition that due process prohibits the conviction of a defendant for a statutory rape-type offense unless the defendant has an opportunity to demonstrate a lack of awareness of the facts. In other words, the court may have believed that an affirmative defense cures strict liability. Therefore, even if the statutory rape statute in *Guest* did require a mental element, the sexual abuse of a minor statute, with its corresponding affirmative defense, would not.

127. See *Patterson*, 432 U.S. at 210.

128. See *supra* note 10 and accompanying text.

129. The court stated that:

Several states, by statute, have recognized [a reasonable mistake of age] defense. . . . This point of view has also been adopted by the 1978 revisors of the Alaska Criminal Code. Alaska Criminal Code revision (effective 1980) provides . . . [that] whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that . . . the defendant reasonably believed the victim to be that age or older, unless the victim was under 13 years of age at the time of the offense.

State v. Guest, 583 P.2d 836, 838 n.2 (Alaska 1978).

Nevertheless, the citation of the affirmative defense statute by the *Guest* court does not undermine the thesis of this note for two reasons. First, the above counter-argument must assume that the citation of the affirmative defense statute proves that the court concluded that the statute cures strict liability. As previously explained, however, an affirmative defense of a lack of mens rea cannot logically cure strict liability because a jury may still convict an accused without any showing of mens rea by the prosecution.¹³⁰ The possibility that the *Guest* court disregarded this logic and improperly believed that an affirmative defense cured the strict liability problem is unlikely. Most courts which have allowed only a reasonable belief affirmative defense for statutory rape have accepted such a defense based on policy rather than considerations of due process.¹³¹ A more likely possibility is that the court simply reached no conclusion at all. The opinion refers to the statute only in a footnote, as part of a list of examples of states recognizing reasonable belief defenses.¹³² The court expressed no opinion as to who bore the burden of proof of the reasonable belief defense, and probably never considered the constitutional issues deriving from assigning defendants the burden of proving this type of defense. If the court had considered these issues, the plain meaning of *Guest's* language, including such phrases as "requirement of criminal intent"¹³³ and "element of the offense,"¹³⁴ would have forced the court to warn that Alaska's future statute violated due process.

Second, any inconsistency raised by the court's citation of the affirmative defense statute pales when compared with the rest of the *Guest* opinion. The court developed a detailed argument in which it described a line of prior due process opinions, discussed the strict liability problems with failing to require some kind of mental state as to the age of the victim in statutory rape, and concluded that due process mandated that the court infer a criminal intent element for statutory rape.¹³⁵ This argument constituted the bulk of the opinion and clearly indicates the court's intent. In order to find the affirmative defense statute constitutional, the Alaska Supreme Court would have to retract much of the language and many of the principles set forth in *Guest*, *Alex*, *Speidel* and *Kimoktoak*. The

130. See *supra* discussion at pp. 31-32.

131. See, e.g., *Perez v. State*, 803 P.2d 249, 251 (N.M. 1990) (allowing a reasonable belief of age affirmative defense while refraining from classifying knowledge of age as an element of the offense). The one court that *did* specifically rely on due process principles decided that more than an affirmative defense was needed to cure strict liability. *State v. Elton*, 680 P.2d 727 (Utah 1984), see *supra* notes 33-37 and accompanying text.

132. *Guest*, 583 P.2d at 838 n.2.

133. *Id.* at 839.

134. *Hentzner v. State*, 613 P.2d 821, 827 (1980) (citing *Guest*, 583 P.2d at 839).

135. See *supra* notes 101-105 and accompanying text.

court could no longer maintain that due process requires a culpable mental state element for serious crimes such as sexual abuse of a minor. Thus, even if the court's citation of the affirmative defense statute is inconsistent with the remainder of the opinion, it does not substantially affect the strength of that opinion

B. The "Unrealistic" Argument

A second counter-argument is that Alaska's requirement of a mens rea element for sexual abuse of a minor is unrealistic. Under Alaska standards, a culpable mental state element requirement would cause the statutory rape law in most states to violate due process, as states tend either to not permit a reasonable belief of age defense or to allow such a defense but place the burden of proof on the defendant.

Alaska has taken a comparatively drastic step in allowing such a defense for sexual abuse of a minor only because the Alaska Supreme Court has held that due process precludes severe punishment for crimes lacking a required mens rea element. Most states have not taken this step in their due process jurisprudence. For instance, Nebraska's explicit refusal to broaden due process served as a basis for rejecting a reasonable belief of age defense. In *State v. Vicars*,¹³⁶ the Nebraska Supreme Court declared that no specific intent as to age was required for statutory rape.¹³⁷ The court reasoned that "cast[ing] upon the public the duty of care or extreme caution," by not requiring criminal intent, did not violate due process.¹³⁸ Similarly, although New Mexico has allowed a defense of reasonable mistake of a victim's age, it has not extended due process as far as Alaska. In *Perez v. State*,¹³⁹ the New Mexico Supreme Court explained:

We recognize the increased maturity and independence of today's teenagers and, while we do not hold that knowledge of the victim's age is an element of the offense, we do hold that under the facts of this case the defendant should have been allowed to present his defense of mistake of fact.¹⁴⁰

The court did not resort to due process as a basis for this new defense.

Considering the limitations other states have placed on due process rights, the claim that Alaska defies the law of the overwhelming majority of states by requiring that the prosecution prove lack of reasonable belief

136. 183 N.W.2d 241, 243 (Neb. 1971).

137. *Id.*

138. *Id.*

139. 803 P.2d 249 (N.M. 1990).

140. *Id.* at 251.

of age does not seem so outlandish. The basis for Alaska's minority position lies in recognizing that Alaska actually has -- permissibly -- extended its constitutional due process protections further than have other states.

C. *Bell v. State*

A third argument against the thesis that Alaska should require the prosecution to prove that the defendant was at least negligent with regard to knowing the age of the victim in statutory rape derives from the holding in *Bell v. State*.¹⁴¹ In *Bell*, the Alaska Court of Appeals found that mistake of age did not constitute a defense, affirmative or otherwise, to the crime of promoting the prostitution of a minor.¹⁴² This ruling can be distinguished from *Guest*, as the *Bell* court reasoned that specific intent was not required for crimes where the criminal intent for a lesser included offense does exist.¹⁴³ Since the defendant knew he was promoting prostitution, itself a crime, his intent could be transferred to satisfy the mens rea required for promoting the prostitution of a minor, a more serious crime arising from the same act. In contrast, since fornication is not an enforced criminal offense,¹⁴⁴ the same rationale cannot be used to eliminate the necessity of a mental state for sexual abuse of a minor in the first or second degree.

VI. CONCLUSION

In 1978, the Alaska Supreme Court moved forward in an area that the United States Supreme Court has avoided. The *Guest* court faced the issue of whether due process requires a mens rea element for a serious crime such as statutory rape; that court held that such crimes *do* require a culpable mental state. Three years later, the *Hentzner* court affirmed that the *Guest* ruling did require a mens rea element for statutory rape. Today, Alaska statutes define actions that previously comprised the crime of "statutory rape" as sexual abuse of a minor in the second degree. The crime still constitutes a felony that is punishable by a prison sentence, and clearly represents an example of a serious crime. Since the Alaska Constitution demands a mens rea element for "statutory rape," renaming that action by statute should not eliminate the constitutional requirement. Since mens rea (negligence, recklessness, knowledge or purpose as to

141. 668 P.2d 829 (Alaska Ct. App. 1983).

142. *Id.* at 832-33.

143. *Id.* at 834-35.

144. *See supra* text accompanying notes 25-26.

having sexual relations with someone under sixteen) exists as an element of sexual abuse of a minor, established United States Supreme Court and Alaska Supreme Court precedent demonstrates that the prosecution must retain the burden of proving the mental state. The requirement of a mens rea element for sexual abuse of a minor compels: (1) the recognition that Alaska's affirmative defense statute for reasonable belief in the age of the victim is unconstitutional; and (2) the rejection of the *Jager* decision. Unless the due process principles recognized in *Alex*, *Speidel* and *Kimoktoak*, and elaborated on in *Guest*, are to be sacrificed and abandoned, Alaska must declare Alaska Statutes section 11.41.445 in its current form void and unconstitutional as a deprivation of due process rights.

Benjamin L. Reiss