3-2004

"No Provincial or Transient Notion": The Need for a Mistake of Age Defense in Child Rape Prosecutions

Jarrod F. Reich
Boston University School of Law

"No Provincial or Transient Notion": The Need for a Mistake of Age Defense in Child Rape Prosecutions

I. INTRODUCTION

Suppose a state legislature enacted a law making any theft a crime punishable by twenty years' imprisonment. Within this law was a provision precluding an accused from introducing evidence that he unwittingly took property to which he was not entitled. Suppose further that after this law was enacted, an elderly woman hung her black coat in a restaurant's lobby and, upon leaving, mistakenly retrieved another's black coat.[1] Under the hypothetical statute, her mistake could neither hinder the prosecution's case against her nor be asserted by her as a defense. By inadvertently taking another's coat from a crowded restaurant, the woman could and would be convicted and sentenced to a mandatory twenty years in prison.

Most would argue that such a statute would be egregious—it seems inconceivable that a legislature could turn an otherwise simple mistake into a top-level felony. However, most states have statutes or judicial rules with a similar effect in the area of sex crimes against children.[2] Nearly every jurisdiction prevents a person accused of engaging in sexual intercourse with a child from introducing evidence that he did so under the mistaken belief that his paramour was above the age of consent, yet there is hardly the public outcry of injustice that one would expect if the hypothetical theft statute were enacted. On one hand, this is completely understandable. Protecting our children is of fundamental importance to our society, and rape, as the Supreme Court has said, is "the ultimate violation of self."[3] Sexual predators who prey on children are considered among the most deviant members of society. Most, if not all, people rest easier knowing that anyone who engages in such activities is locked away for extensive periods of time. Moreover, pedophiles are viewed as heinous and vicious precisely because they actively prey on and derive sexual pleasure from children. It is for these reasons that statutory rape and child rape statutes carry such severe penalties, and rightly so.

What happens, though, to the person who engages in sexual relations with a child only because he mistakenly believes his partner

1. This was adopted from a similar hypothetical used by Professors LaFave and Scott in analogizing the mistake of fact tenets to the Anglo-American criminal jurisprudential requirement of convicting only those defendants who had a culpable mental state for the bad act committed. WAYNE R. LAFAVE, CRIMINAL LAW § 5.6(a), at 282-83 (4th ed. 2003).

2. *See infra* notes 162-168 and accompanying text.

3. Coker v. Georgia, 433 U.S. 584, 597 (1977) (internal quotations omitted).

to be of age? Suppose, for instance, that a graduate student meets a girl at a college party. The girl enters the party with a group of friends, and seems comfortable in her surroundings; she even rebuffs some prospective suitors who attempt to dance with her and pour her a drink. The graduate student strikes up a conversation with this girl, and she tells him that she is a nineteen-year-old sophomore. Her physical appearance, dress, demeanor, and presence at such an event seem to confirm her representations. Shortly thereafter, the two engage in sexual intercourse. It is only then that the girl reveals that she is just shy of her thirteenth birthday. Under the law applicable in all but a very few jurisdictions, this graduate student would face a jail sentence of twenty years and would be unable to proffer any evidence of his mistake of the girl's age.

While there is little dispute that the situation just described is implausible, it is not impossible. In fact, recent studies have shown that the onset of puberty occurs at an increasingly early age in girls and, according to an article published by the American Academy of Pediatrics, it is not abnormal for girls to enter puberty as early as age six or seven.[4] The fact that a remote possibility is just that—a possibility—begs the question: is it unconstitutional for states to preclude a mistake of age defense in child rape cases?

This Note answers this question in the affirmative. Indeed, its goal is to show that statutory preclusion of the mistake of age defense for a man accused of child rape is just as unconstitutional as the hypothetical preclusion of the mistake of fact defense for the errant coat thief. Although sexual intercourse with a child creates much more harm to both the victim and society than does a stolen coat, this Note attempts to demonstrate that disregard of an accused's criminal intent in committing a crime which carries severe penalties is antithetical to Anglo-American criminal jurisprudence, to a person's constitutional rights of due process, and to a person's constitutional right to present a defense.

The scope of this Note's proposal is extremely limited. It offers an accused the ability to present evidence of an honest and reasonable mistake of age, but also maintains a presumption of criminal intent. This presumption could only be overcome by persuasive evidence of the mistake. The policy reasons for precluding the defense, rooted largely in moral grounds and notions of child welfare, are in no way undermined by allowing an accused to present his defense and then leaving the credibility and reasonableness of such a mistake to the jury. This Note's goal is not to discount the irreparable harm inflicted

4. *See infra* notes 209-212 and accompanying text.

upon victim and society when a child is sexually violated, but rather to advance the notion that the denial of a person's liberty for committing an act for which he is mentally blameless is just as repugnant as the act for which he is condemned.[5]

After providing an overview of the terminology involved, Part II of this Note will trace the history of the common law rule of imposing criminal liability only upon a showing that the defendant acted with a culpable "guilty mind." It will then discuss the rationales for the three narrow exceptions to this requirement and analyze the implications and influence of the American Law Institute's Model Penal Code and the California Supreme Court's landmark decision of *People v. Hernandez*.[6]

After arguing that the Constitution requires that an accused can be convicted only upon a showing of the concurrence of the actus reus with a requisite mens rea for every element of an offense, Part III will discuss the current availability of the mistake of age defense in child rape prosecutions across American jurisdictions. While a majority of jurisdictions allow the defense in some situations, only a handful of jurisdictions allow it in all child rape cases. Part III will then critique the rationales for strict liability crimes as applied to child rape offenses. It will then discuss and assess the validity of several proposed age-dependent defenses,[7] ultimately concluding that such bifurcated defenses are inconsistent with arguments against strict criminal liability. Lastly, as a transition into this Note's proposal, Part III will analyze the Alaska Supreme Court's decisions of *State v. Guest*[8] and *State v. Fremgen*,[9] which held that denial of the mistake of age defense is an unconstitutional violation of a defendant's due process rights.

Part IV provides a set of proposed amendments to current rape of a child and mistake of fact statutes. These amendments call for (1) attaching negligence to the age element of the rape of a child statute; (2) allowing an honest and reasonable mistake of age defense, but requiring it be proven by clear and convincing evidence; and (3)

---

5. Although a likely instinctive response to this comment is disbelief and disagreement, because pedophiliac child sex offenders deserve perhaps even more punishment that the law can allow, the reader is urged to read this Note in a vacuum—detached from preconceptions of perpetrators of child sex crimes, and instead with the understanding that it addresses the larger issue of denials of a person's liberty for engaging in what he honestly and reasonably believed was lawful activity.

6. 393 P.2d 673 (Cal. 1964).

7. MODEL PENAL CODE § 213.6 (1980); *see also* Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1965).

8. 583 P.2d 836 (Alaska 1978).

9. 914 P.2d 1244 (Alaska 1996).

allowing, as a mitigating factor, a mistake of age defense where the accused believed he was committing statutory rape. Part IV will attempt to show that this proposal eliminates the inconsistency of bifurcated age-dependent models and ensures a criminal defendant's due process rights without forsaking the policy of protecting children from sexual predators.

Since Tennessee has adopted a derivation of the Model Penal Code's age-dependent approach, which is the most common statutory scheme today, the Tennessee mistake of age provision will be used as an example throughout this Note.[10] Although portions of this Note will deal with Tennessee-specific statutes and case law, the underlying policies are by no means limited to that state. Indeed, the goal of this Note is to demonstrate that the mistake of age defense is needed not only to protect an accused's constitutional rights, but also to preserve our Anglo-American criminal jurisprudential ethos that crime is a "compound concept" of a bad act and a "vicious will."[11]

II. OF CRIME AND "VICIOUS WILLS"—A PRIMER ON STRICT LIABILITY AND CHILD RAPE

A. Preliminary Matters–The Dilemma in Context

It is a fundamental tenet of criminal law that a person is guilty of a crime only if he commits the bad criminal act (actus reus) with a corresponding mental culpability (mens rea). A corollary that follows is that a person cannot be guilty of a crime if he acted under an honest and reasonable mistake of some material fact and he would not have been committing a crime if the facts were as he believed them to be.[12] In other words, an accused can use as an affirmative defense the fact that he acted under a mistake of fact that exculpates him from liability. Tennessee has codified this mistake of fact defense, which initially applied to all crimes.[13] In 1995, however, the legislature amended the mistake of fact statute to allow a defendant to plead his or her ignorance or mistake as a defense to prosecution "*except* in

10. Although Tennessee has the statutory distinction between "Rape of a Child" and "Statutory Rape," this Note will use the term "child rape" to mean any criminal act of intercourse with a minor.

11. Morissette v. United States, 342 U.S. 246, 251 (1952) (internal quotations omitted).

12. As Professors LaFave and Scott have observed: "Instead of speaking of ignorance or mistake of fact . . . as a defense, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for the commission of that particular offense." LAFAVE, *supra* note 1, § 5.6(a), at 282.

13. TENN. CODE ANN. § 39-11-502 (2003).

prosecutions for" rape of a child.[14] The "rape of a child" offense is defined as "the unlawful sexual penetration of a victim by the defendant . . . if such victim is less than thirteen (13) years of age," and carries a mandatory twenty year prison sentence.[15] An accused who engages in sexual relations with a child under thirteen years of age, therefore, would be unable to assert as a defense an honest and reasonable mistake of his partner's age. However, if the victim is thirteen years of age, the accused will be entitled to assert the mistake of age defense and, even if the mistake of age defense is ineffective, could serve less than three months in prison.[16]

Although at first blush denying a mistake of fact defense seems antithetical to our criminal philosophical framework, Tennessee's statute is not unique. In fact, Tennessee is among the majority of jurisdictions that treat such offenses as strict liability crimes, meaning that the commission of the criminal act alone, regardless of criminal intent, is sufficient for conviction.[17]

---

14. *Id.*, *amended by* 1995 Tenn. Pub. Acts 495, § 1.

15. § 39-13-522. Rape of a Child is a Class A felony, which carries, for a first-time-offender, a sentence of twenty years in prison. *Id.*; *see also* § 40-35-112(a)(1) (allocating the sentence range for a Class A felony between fifteen and twenty-five years in prison); § 40-35-210(c) (creating a presumptive sentence at twenty years, absent either aggravating or mitigating factors). A person convicted of Rape of a Child must serve the entirety of his sentence in prison. § 40-35-501(i).

16. If a person sexually penetrates a victim who is between the ages of thirteen and seventeen, and is at least four years older than the victim, then the accused is guilty of statutory rape. § 39-13-506. A person convicted of such an offense is guilty of a Class E Felony, which carries, for a first time offender, a prison sentence of one year. *Id.*; § 40-35-112(a)(5) (allocating the sentence range for a Class E Felony between one and two years in prison); *see also* § 40-35-210(c) (creating a presumptive sentence at the minimum of the sentence range). If convicted, a person will serve only 30 percent of his sentence and could receive an additional 25 percent of his sentence reduced for "good behavior." § 40-35-501(c), (a)(3) (authorizing mandatory parole upon serving 30 percent of the sentence); § 41-21-236(a)(2) (allowing an inmate to have his sentence reduced eight days for every montb of good bebavior). In other words, a person convicted of statutory rape would serve eighty-one days in prison. Further, the mistake of age defense is allowed for one accused of statutory rape. § 39-11-502(a).

This disparity in sentences between rape of a child and statutory rape convictions may indeed raise cruel and unusual punishment issues implicating the Eighth Amendment, but, for purposes of this Note, it will be presumed that such sentences carry no constitutional infirmities. *See* Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991) (holding that state law creating a mandatory life sentence for a possession of a large quantity of cocaine does not constitute cruel and unusual punishment, on the grounds that the Eighth Amendment applies only to cruel and unusual methods of punishment, not the proportionality of the sentence to the offense charged); *see also* Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 12 (1996) (arguing that under *Harmelin*, "a state can with constitutional impunity sentence a sixteen-year old to life imprisonment without possibility of parole for the sale of one marijuana cigarette").

17. *See infra* notes 162-168 and accompanying text. *See generally* Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R.5th 499, 508 (1997) ("The majority rule in the United States is that a defendant's

B. Strict Liability and Child Rape: Historical Justifications

One of the foremost tenets of Anglo-American jurisprudence is that the commission of a crime requires the concurrence of the bad act, or actus reus, with a culpable mental state, or mens rea. As Blackstone noted centuries ago, "as a vicious will without a vicious act is no civil crime . . . an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will."[18] This section will discuss the common law justifications for an exception to this fundamental precept in which the mens rea is assumed by the commission of the actus reus itself. Such offenses, where a criminal conviction is not predicated on an actor's intent, are known as strict liability offenses.

1. Supreme Court Strict Liability Doctrine—The Public Welfare Offense

The notion that "[c]rime, as a compound concept, [is] constituted only from [a] concurrence of an evil-meaning mind with an evil-doing hand," has long been recognized by American courts.[19] In the early twentieth century, the United States Supreme Court began to assess the constitutionality of statutes that declared certain acts to be criminal regardless of the actor's mental state.[20] Such statutes were crafted as "regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of

---

knowledge of the age of a victim is not an essential element of statutory rape. . . . A defendant's good-faith or reasonable belief that the victim is over the age of consent is simply no defense.").

18. 4 WILLIAM BLACKSTONE, COMMENTARIES *21.

19. Morissette v. United States, 342 U.S. 246, 251-52 (1952). The Court notes that the actus reus/mens rea requirement is so inherent in the American jurisprudential landscape that as states began to codify common law offenses and did not enumerate requisite mental states, legislatures, through such silences, "merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Id.* at 252.

20. *See, e.g.*, United States v. Dotterweich, 320 U.S. 277 (1943) (reversing the defendant's acquittal by the lower court under the Federal Food, Drug, and Cosmetic Act for mislabeling pharmaceuticals, despite the defendant's lack of knowledge of the false labels); United States v. Balint, 258 U.S. 250 (1922) (upholding an indictment under a provision of the Narcotic Act, which made criminal the unauthorized sale of opium, despite the defendant's demurrer on the grounds that he did not know the substance he sold was indeed opium). In *Balint*, the Court noted that although a culpable mens rea or "scienter" is required for a criminal conviction, "there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement," whereby legislatures may "in the maintenance of a public policy" remove the necessity of proving a mental culpability. *Id.* at 252.

the crimes as in cases of mala in se."[21] As more of these statutes were promulgated, the Court began to find that if Congress did not enumerate a requisite mental state, no mens rea was required for conviction.[22] It was not until *Morissette v. United States*,[23] however, that the Court decided to resolve the developing dissonance between the common law mens rea requirement and the burgeoning class of strict liability statutory offenses.

In *Morissette*, the Supreme Court overturned the conviction of a scrap iron collector who removed spent bomb casings from a seemingly abandoned army base in Michigan.[24] It was presumed throughout the community that this base was abandoned; the land was primarily thought of as "good deer country."[25] While on a deer hunting expedition, the petitioner collected some three tons of spent bomb casings from the land "without the slightest effort at concealment," netting a profit of $84.[26] The statute under which he was convicted did not enumerate a requisite mens rea.[27] However,

---

21. *Balint*, 258 U.S. at 252. The Court in *Balint* further explained that "where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person tbough he be ignorant of the noxious character of what he sells." *Id.* at 252-53. Similarly, in *Dotterweich*, the Court reversed acquittal even though the defendant was the president of a pharmaceutical sales company and had no part in the (mis)labeling of the drugs. *Dotterweich*, 320 U.S. at 278, 285. The Court did so on the grounds that legislation such as the Federal Food, Drug, and Cosmetic Act is a "familiar" type of legislation "whereby penalties serve as effective means of regulation. . . . In the interest of the larger good [such statutes] put[ ] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Id.* at 280-81.

22. In both *Dotterweich* and *Balint*, the statutes at issue did not enumerate a mens rea, and the Court in each case held that no mention of a mental state meant that Congress intended such offenses to be strict liability. *Dotterweich*, 320 U.S. at 285; *Balint*, 258 U.S. at 254. In *Dotterweich*, the Court warned that "[h]ardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting." 320 U.S. at 284. Justice Murphy dissented on the grounds that strict liability crimes should exist only if the legislature explicitly intended to do so: "It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ougbt not lightly to be imputed to a citizen who . . . has no evil intention or consciousness of wrongdoing. . . . Before we place the stigma of a criminal conviction upon any such citizen the legislative mandate must be clear and unambiguous." *Id.* at 286 (Murphy, J., dissenting).

23. 342 U.S. 246.

24. *Id.* at 247.

25. *Id.*

26. *Id.* at 247-48.

27. *Id.* at 250. The Act under which the petitioner was convicted provides in part:

> Whoever embezzles, steals, purloins, or knowing converts to his use or the use of another, or without authority, sells, conveys or disposes of any . . . thing of value of the United States . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

despite his ignorance of both the active status of the base and the criminality of his actions, Morissette was indicted and convicted of converting government property, for which he was sentenced to imprisonment for two months or to pay a fine of $200.[28]

The Court, led by Justice Jackson, overturned the conviction on the ground that there must be a concurrence of an actus reus and a mens rea. Invoking Blackstone's "vicious will" tenet, Justice Jackson noted that the contention that an actus reus can amount to a crime only if accompanied by a concurrent mens rea "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."[29] He explained that the relationship between a culpable intent and punishment for a harmful act, which has roots in Biblical, Greek, and Roman law, "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."[30] This precept, according to Jackson, has endured with "unqualified acceptance" in Anglo-American law.[31]

Notwithstanding the fundamental necessity of a vicious will for a criminal conviction, the Court explained that certain statutes may effectively eliminate the requirement of a culpable mental state.[32] Such statutes, like those at issue in *United States v. Balint*[33] and *United States v. Dotterweich*,[34] "consist only of forbidden acts or omissions" and create "new duties and crimes which disregard any ingredient of intent."[35] Indeed, the Court found that *Balint* and *Dotterweich* represented stages in a century-long development of what the Court referred to as "public welfare offenses."[36] These offenses are

---

Id. at 248 n.2 (citing 18 U.S.C. § 641 (2000)). It is interesting to note that, although the threshold values have changed, the statute in its current form is nearly identical. § 641.

28. *Morissette*, 342 U.S. at 248.

29. *Id.* at 250.

30. *Id.* at 250-51 & n.4.

31. *Id.* at 251.

32. *Id.* at 252-54.

33. 258 U.S. 250 (1922).

34. 320 U.S. 277 (1943).

35. *Morissette*, 342 U.S. at 253.

36. *Id.* at 255. For a survey of the development of such "public welfare offenses," see generally Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 62-67 (1933). Professor Sayre catalogued public welfare offenses into the following categories: (1) illegal sales of intoxicating liquor; (2) sales of impure or adulterated food or drugs; (3) sales of misbranded articles; (4) violations of anti-narcotic acts; (5) criminal nuisances; (6) violations of traffic regulations; (7) violations of motor-vehicle laws; and (8) violations of general police regulations,

not common law offenses "such as those against the state, the person, property, or public morals."[37] Instead, they were promulgated in response to the Industrial Revolution and the accompanying growth in technology, employment, congestion, and consumerism.[38] The Court explained the characteristics of public welfare offenses as violations of law that (1) result from omissions of duties or other impositions of care; (2) cause no direct or immediate injury; (3) impair the public health, safety, and welfare, generally on a societal level; and (4) yield small penalties and little stigmatization for a conviction.[39]

The petitioner in *Morissette* was convicted of larceny, a crime which existed at common law.[40] Larceny cannot be seen as either neglect or omission of a duty, does not impair the health, safety, and welfare of society at large, and carries, inter alia, a potential ten-year prison sentence.[41] The Court held, therefore, that an implied mens rea requirement should be read into the statute, reasoning that "[s]uch a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative."[42] Since a conviction now required a finding of the implied requisite mens rea and it was beyond dispute that the petitioner had no intention to steal government property, the Court reversed his conviction.[43] The Court recognized, however, that Congress had a limited power to dispense with the intent requirement if it did so specifically.[44]

---

passed for safety, health, or well-being of the community. *Morissette*, 342 U.S. at 262 n.20 (citing Sayre, *supra*, at 73, 84).

37. *Morissette*, 342 U.S. at 255.

38. *Id.* at 253-54.

39. *Id.* at 255-56. Dean Richard Singer has listed several bases for public welfare offenses: (1) deterring profit-driven manufacturers from ignoring the well-being of the consuming public; (2) an inquiry into intent for such offenses would exhaust courts' resources; (3) since the penalties are small and the social stigma is minimal or nonexistent, the imposition of strict liability is not inconsistent with the "moral underpinnings of criminal law"; and (4) tbe legislature is constitutionally empowered to create strict liability crimes for public welfare offenses. Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 389 (1989).

40. *Morissette*, 342 U.S. at 260-62.

41. *Id.*

42. *Id.* at 263.

43. *Id.* at 274-76. The Court also held that a judge cannot remove the question of intent from the hands of the fact-finder. *Id.* at 274. For this proposition, the Court cited approvingly a quote from Judge Andrews of the New York Court of Appeals: "It is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system . . . both must be found by the jury to justify a conviction for crime." *Id.* at 274 (quoting People v. Flack, 26 N.E. 267, 270 (N.Y. 1891)).

44. *Id.* at 275 (citing Tot v. United States, 319 U.S. 463, 467 (1943)).

The principal value of *Morissette*, therefore, is its recognition of the public welfare offense as a modern exception to the Anglo-American requirement of a culpable mens rea for every criminal actus reus. This exception applies to offenses that are "*new* crimes, created solely by legislative enactments in the nature of police regulations. Moreover, these offenses are not strictly criminal, even though traditional criminal sanctions are relied upon, since the primary purpose of the legislature is neither punishment nor correction, but rather regulation."[45]

2. Common Law Strict Liability—Lesser Legal Wrong and Moral Wrong

Public welfare offenses are not the only offenses subject to strict liability. In dicta, the *Morissette* Court noted that although Blackstone's vicious will requirement received "[u]nqualified acceptance" by "[c]ommon law commentators of the Nineteenth Century . . . a few exceptions . . . came to be recognized."[46] The Court commented that historically, a certain class of common law offenses has not required the existence of mental culpability.[47] These exceptions "include sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent."[48] Offenses of this nature also include bigamy, adultery, abduction of minor females from their parents or guardians, prostituting a minor female, and contributing to the delinquency of a minor.[49] The common law justifications for holding an accused criminally liable for these offenses without a culpable mens rea have rested on two theories: the lesser legal wrong and the moral wrong.

The lesser legal wrong theory predicates conviction for an actus reus on an intent to commit *any* type of criminal act; the elimination of a mens rea is rationalized by focusing on the defendant's intent to commit a related crime.[50] The moral wrong theory posits that strict criminal liability can be justified on the basis that society's characterization of the act at issue is so immoral or wrong that it

45. Myers, *supra* note 7, at 114.

46. *Morissette*, 342 U.S. at 251

47. *Id.* at 251 & n.8. Since these exceptions were "not relevant to [the] present problem," the Court did not address the continuing vitality and constitutionality of these common law exceptions. *Id.*

48. *Id.* While the Court gave several other examples of such traditional strict liability, child rape is the only offense pertinent to this Note.

49. Myers, *supra* note 7, at 115.

50. LAFAVE, *supra* note 1, § 5.6(a), at 287-89.

outrages public decency and good morals.[51] Under this theory, "acts which allegedly involve moral turpitude are revolting to the better instincts of the community and are universally recognized to be a serious wrong not only to the individual, but also to society."[52]

The seminal case advancing the lesser legal wrong and moral wrong theories is *Regina v. Prince*.[53] In *Prince*, the defendant was convicted of unlawfully taking a girl under the age of sixteen from her father's possession against the father's will.[54] The defendant admitted to taking the girl, but insisted that he did so with the belief that she was over sixteen.[55] The taking of a girl under twenty-one without the father's consent was criminal as well, so the defendant would still have been committing a crime (albeit a lesser one) even if the facts were as he believed them to be.[56] In addition to this lesser legal wrong justification for affirming the conviction, the court advanced a moral wrong justification, stating that "[t]he act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong."[57]

Although the issue in *Prince* is prima facie similar to issues presented by child rape offenses, it must be noted that there are conflicting accounts of the historical roots of the proscription of a mistake of age defense in prosecutions for child rape.[58] Nevertheless, and notwithstanding the statutory abrogation of the crime at issue in *Prince*, American courts have widely accepted the *Prince* lesser legal wrong/moral wrong construct since the end of the nineteenth century.[59] In the child rape context, the principal "lesser legal wrongs" warranting the more severe convictions have been the crimes of fornication and adultery.[60] Such crimes, however, are generally no

51. Myers, *supra* note 7, at 128.

52. *Id.*

53. 2 L.R.-C.C.R. 154 (1875).

54. *Id.* Apparently, it was a crime to take a girl under sixteen from her father's home regardless of consent. *Id.* at 154 n.1.

55. *Id.* at 157.

56. *Id.* at 155-56.

57. *Id.* at 174 (Bramwell, J., concurring), *cited in* Vicki J. Bejma, Note, *Protective Cruelty:* State v. Yanez *and Strict Liability as to Age in Statutory Rape*, 5 ROGER WILLIAMS U. L. REV. 499, 516 (2000).

58. *See* Owens v. State, 724 A.2d 43, 49 (Md. 1999) (comparing United States v. Brooks, 841 F.2d 268, 270 (9th Cir. 1988) ("[S]tatutory rape was universally regarded as a strict liability offense until well into the twentieth century.") with Myers, *supra* note 7, at 109-10 (finding that reasonable mistake of age has never been denied as a defense in an English statutory rape case)).

59. Myers, *supra* note 7, at 111.

60. *See id.* at 127 ("[I]f in some general way the actor had a guilty mind as to his conduct, such as knowledge that he was committing an act of fornication, it is assumed that he had a criminal intent to justify his conviction of an unintended criminal act . . . because the mistake went to the *degree* of wrong rather than to the *presence* of the wrong."); Benjamin L. Reiss,

longer present as statutory offenses.[61] Advocates of the moral wrong theory cite the taboo and immorality of engaging in sexual relations with children, as well as society's condemnation of that act.[62]

The lesser legal wrong and moral wrong justifications for making child rape a strict liability offense have been attacked on many fronts. Principal among the criticisms of the lesser legal wrong theory is that the lesser legal wrongs which previously "justified" a conviction of child rape, namely fornication and adultery, have been abolished, abrogated, or are simply not enforced.[63] Critics also attack the moral wrong theory, citing the impropriety of government legislating morality, the shifting and different conceptions of "morality" within and among societies, and the notion that a person's morality or immorality is determined by his or her intentions.[64] A

Alaska's Mens Rea Requirements for Statutory Rape, 9 ALASKA L. REV. 377, 381-82 (1992) ("[I]f fornication is a crime and the defendant has the required mens rea for fornication . . . that intent applies to all the legal consequences of the act of fornication. Naturally, if the other participant in the sexual act is younger than the statutory age, a charge of statutory rape . . . would be such a consequence."); *see also* Garnett v. State, 632 A.2d 797, 812 n.10 (Md. 1993) (Bell, J., dissenting) (acknowledging that if the defendant, who engaged in sexual relations with a girl under the age of consent, were married, his conviction of statutory rape could be upheld on lesser legal wrong grounds because adultery is a crime in Maryland).

61. Fornication is still illegal in only eight states and adultery illegal in nine. *See infra* notes 178-179 and accompanying text. The impropriety of the use of the lesser legal wrong theory will be discussed in more detail. *See infra* Part III.C.2.

62. *See, e.g.*, People v. Ratz, 46 P. 915, 916 (Cal. 1896) (relying on *Prince* in prohibiting a defendant from asserting a mistake of age defense in a statutory rape prosecution because "protection of the society, of the family, and of the infant, demand that one who has carnal intercourse under such circumstances shall do so in peril"). It has been argued that *Ratz* is the first case in any jurisdiction to hold directly that immorality alone is enough for conviction. Myers, *supra* note 7, at 128 n.141.

63. *See infra* notes 178-184 and accompanying text; *see also* LAFAVE, *supra* note 1, § 5.6(c), at 288 ("[W]hen fornication is itself not criminal [statutory rape] should not become criminal merely because the defendant has made a reasonable mistake about the age of the girl with whom he has intercourse."); Myers, *supra* note 7, at 127-28 ("[T]he foundation of this 'lesser legal wrong' theory in statutory rape cases is totally wiped out where fornication is no longer criminal."); Reiss, *supra* note 60, at 382 (reasoning that a defendant should not be held strictly liable for statutory rape if premarital or extramarital sex is not a criminal offense).

64. Indeed, the Supreme Court may have rejected the proposition that morality alone is a rational basis for a law that otherwise infringes upon one's constitutional rights. Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 2480 (2003) ("[T]he majority may [not] use the power of the State to enforce [its] views [of morality] on the whole society through operation of the criminal law."); *id.* at 2483 ("'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . .'" (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))); *see also id.* at 2495 (Scalia, J., dissenting) (arguing that the majority decision "effectively decrees the end of all morals legislation" because it "asserts [that] the promotion of majoritarian sexual morality is not even a *legitimate* state interest"); *Garnett*, 632 A.2d at 813-14 (Bell, J., dissenting) (enumerating the many objections to the moral wrong theory). For a pithy aphorismic illustration of the connection between morality and intent, see OLIVER WENDELL HOLMES, THE

more in-depth analysis of the lesser legal wrong and moral wrong theories will be offered later in this Note.

C. *Return of the "Vicious Will"—The Model Penal Code and* People v. Hernandez

Despite Supreme Court precedent and academic criticisms that attacked the underpinnings of strict criminal liability for child rape crimes, a mistake of age defense did not first appear until the 1960s. As one court noted at the turn of the twentieth century, "[i]nvariably, in [prosecutions for child rape,] it has been held that whoever committed the offense did it at his peril so far as the girl's age was concerned, and that ignorance or mistake in respect to her age would constitute no defense."[65] In the latter half of the twentieth century, however, two reforms—one academic and one judicial—began an apparent shift toward requiring a culpable mens rea for a conviction of child rape offenses. The first was the drafting (and subsequent influence) of the American Law Institute's Model Penal Code (M.P.C. or the Code), and the second was the California Supreme Court's decision in *People v. Hernandez*.[66]

The American Law Institute promulgated the Model Penal Code in 1962 in an effort to "put the house of penal jurisprudence into some kind of rational order."[67] Among the most striking features of the Model Penal Code's philosophical framework is its systematic and discrete method for defining and determining the mental element of a crime and how it should attach to the various elements of a given offense.[68] Briefly stated, the Code requires that an enumerated mental state must be required to prove any material element—defined as the conduct, its attendant circumstances, and its results—of the offense for which an accused is charged.[69] Strict liability offenses under the Code embrace the *Morissette* public welfare construct. In the absence of a contrary statute, such offenses are not crimes but "violations" which carry only civil penalties such as a fine or forfeiture.[70] In other words, "[a] violation does not constitute a crime

---

COMMON LAW 3 (Little, Brown & Co. 1946) (1923) ("Even a dog distinguishes being stumbled over and being kicked.").

65. Brown v. State, 74 A. 836, 838 (Del. 1909), *cited in* Myers, *supra* note 7, at 115-16.

66. 393 P.2d 673 (Cal. 1964).

67. Charles McClain & Dan M. Kahan, *Criminal Law Reform: Historical Development in the United States*, *in* 1 ENCYCLOPEDIA OF CRIME & JUSTICE 412, 423 (Joshua Dressler ed., 2d. ed. 2002).

68. *See, e.g.*, MODEL PENAL CODE § 2.02(4) (1985).

69. §§ 1.13(9), 2.02(1).

70. §§ 2.05(1), 1.04(5).

and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense."[71] Otherwise, a conviction is predicated on a jury finding that the accused acted, depending on the statutory requirements, purposely, knowingly, recklessly, or negligently with respect to each material element.[72] If no such mental state is enumerated in the statute, however, a jury must find that the accused acted at least recklessly for each element.[73] It follows, therefore, that except for strict liability "violations," it is a defense if an accused's honest and reasonable ignorance or mistake of fact "negatives the purpose, knowledge, recklessness or negligence required to establish a material element."[74]

In child rape offenses, the Code offers a separate mistake of age provision, section 213.6(1), which limits the use of a pure mistake of fact defense in such prosecutions.[75] The Code provides:

> Whenever in [an enumerated sexual offense] the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.[76]

The drafters of the Code eliminated the honest and reasonable mistake of age defense for offenses against children under ten years old in an effort to resolve the conflict between its "mental state for every element" philosophical construct and the reality that sexual activities with minors are perceived as a moral wrong.[77] The drafters compromised by prohibiting the mistake defense below the age of ten;

---

71. § 1.04(5).

72. § 2.02 (1)-(4). A person acts "purposely" with respect to an element of an offense if the conduct or result elements are the result of his or her conscious object, and he is aware of the attendant circumstances or hopes they exist; he acts "knowingly" with respect to all elements if he is aware of the nature of his conduct or the attendant circumstances and is practically certain such conduct and circumstances will cause such a result; he acts "recklessly" with respect to a material element if he "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct," and that risk is of such a nature and degree that its disregard is "gross deviation from the standard of conduct" that a reasonable, law-abiding person would observe; and s/he acts "negligently" when s/he should be aware of a substantial and unjustifiable risk, and his or her failure to perceive such a risk is a gross deviation from the conduct of a reasonable person. § 2.02(2)(a)-(d).

73. § 2.02(3).

74. § 2.04(1)(a). It is also important to note that the Code embraces a somewhat modified lesser legal wrong theory, providing that "the defense [of mistake of fact] is not available if the defendant would be guilty of another offense had the situation been as he supposed." § 2.04(2). In such a case, an accused can only be convicted of the offense for which he would have been found guilty if the facts were as he supposed. *Id.*

75. § 213.6(1).

76. *Id.*

77. § 213.6(1) cmt. 2.

they opined that strict liability for offenses committed against children so young is acceptable because "no credible error regarding the age of a child in fact less than 10 years old would render the actor's conduct anything less than a dramatic departure from societal norms."[78] Further, "[t]he actor who is mistaken as to the age of a child under ten can make no such claim [of mistake of age], for no credible error of perception would be sufficient to recharacterize a child of such tender years as an appropriate subject of sexual gratification."[79] For children over ten years of age, section 213.6 differs from the general mistake of fact statute in important ways. First, the phrase "reasonably believes" allows the defense only for a mistake that is both honest and reasonable.[80] Second, the burden of persuasion is shifted to the defendant, eliminating the need for the prosecution to disprove beyond a reasonable doubt that the actor was mistaken about his partner's age.[81]

The M.P.C.'s mistake of age provision, with its bifurcation of the common law rule along age lines, was highly influential.[82] However, the drafters expressed some misgivings about the tiered, age-dependent approach, recognizing that the provision tempers and indeed conflicts with the intended goal of a philosophically consistent penal code. Acknowledging that any actor who has an honest and reasonable mistake of any material fact "has [a] substantial claim for exculpation," they further asserted that "[p]unishing him anyway simply because his intended conduct would have been immoral under the facts as he supposed them to be postulates a relation between criminality and immorality that is inaccurate on both descriptive and normative grounds."[83] Despite their conclusion that "[t]he penal law does not try to enforce all aspects of community morality, and any thoroughgoing attempt to do so would extend the prospect of criminal sanctions far into the sphere of individual liberty and create a regime too demanding for all save the best among us," the drafters abandoned their theoretical rubric for offenses against children under ten because of social mores and the unlikelihood of an honest and reasonable mistake with such young children.[84]

---

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. According to the drafters, at least twenty-five jurisdictions have adopted or proposed some form of culpability requirement in child rape offenses. Most commonly, these states allow the defense for higher ages but retain strict liability for the young age defining the most serious version of the offense. § 213.6(1) cmt. 2 & nn. 10-11, 13-15.

83. § 213.6(1) cmt. 2.

84. *Id.*

The Model Penal Code's treatment of strict liability and mistake of age, despite its apparent compromise with society's moral mandates, was revolutionary in that it demonstrated, at least on an academic level, that a mistake of age defense furthers the goals of and philosophies behind Anglo-American criminal jurisprudence. Two years after the promulgation of the Code, this "revolution" filtered from academia into practicality. In 1964, in what one scholar has called a "dramatic breakthrough in the judicial treatment of statutory rape," the California Supreme Court became the first American court to require the availability of a mistake of age defense in child rape prosecutions.[85] The defendant in *People v. Hernandez* was convicted of engaging in sexual relations with his girlfriend who, at the time, was three months shy of the statutory age of consent.[86] The defendant appealed on the grounds that he had an honest and reasonable belief that his paramour was above the critical age.[87]

Speaking for a unanimous court, Justice Peek held that absent an explicit statute to the contrary, an accused cannot be criminally liable for an offense that he did not have the criminal intent to commit.[88] The court found that the traditional justifications for prohibiting the mistake of age defense in child rape prosecutions—protecting the integrity of society and young, generally female, children—are no longer valid on two grounds. First, the court reasoned that basing criminal liability on blanket assumptions regarding a certain-aged child's understanding of and ability to appreciate and emotionally deal with sexual mores is arbitrary.[89] Second, the court suggested that the societal goals of protecting child victims and the sanctity of the community would not be hindered by allowing a defendant to present evidence of an honest and reasonable mistake of age, suggesting that the traditional approach has never been "satisfactorily explain[ed]" by courts who adhere to it.[90]

The court rationalized its decision by analogizing statutory rape to bigamy, another crime of "moral turpitude."[91] It relied on an

85. Myers, *supra* note 7, at 107-08.

86. 393 P.2d 673, 673-74 (Cal. 1964).

87. *Id.* at 674.

88. *Id.* at 677.

89. *Id.* at 674 ("The sexually experienced [child] may be far more acutely aware of the implications of sexual intercourse than her sheltered [adult] cousin. . . . A girl who belongs to a group whose members indulge in sexual intercourse . . . is likely to rapidly acquire an insight into the rewards and penalties of sexual indulgence.").

90. *See id.* at 676-77 ("[T]here is nothing in the record to indicate that the purposes of the law as stated in [the majority approach to child rape offenses] can be better served by foreclosing the defense of a lack of intent.").

91. *Id.* at 676-77.

earlier decision holding that a person who remarries with an honest and reasonable yet mistaken belief that she has obtained a divorce from her prior spouse cannot be held criminally liable under bigamy laws.[92] The former decision held that "[t]he severe penalty imposed for bigamy, the serious loss of reputation conviction entails, and the fact that it has been regarded for centuries as a crime involving moral turpitude, make it extremely unlikely that the Legislature meant to include the morally innocent to make sure the guilty did not escape."[93] As a result, the *Hernandez* court questioned the criminality of a person operating under a mistake of age in the context of child rape.[94]

An accused, according to the court, who operates with an honest and reasonable mistake has not committed an immoral act, for he "has subjectively eliminated the risk by satisfying himself on reasonable evidence that the crime cannot be committed. If it occurs that he has been misled, we cannot realistically conclude that for such reason alone the intent with which he undertook the act suddenly becomes more heinous."[95] The court conceded that it is "sound policy . . . to protect the sexually naive female from exploitation," and therefore held that the legislature could statutorily prohibit the mistake of age defense.[96] In the absence of a contrary statute, however, the court held that "a charge of statutory rape is defensible wherein a criminal intent is lacking."[97]

The Model Penal Code and *Hernandez* suggest an ideological and jurisprudential shift in the required mental culpability in child sex offenses. Indeed, *Hernandez* has been hailed as a "dramatic breakthrough" in the judicial treatment of the mistake of age defense.[98] However, the court in *Hernandez*, like the American Law Institute, seems to temper its position, this time by deferring to the legislature.[99]

---

92. *Id.* at 677 (citing People v. Vogel, 299 P.2d 850 (Cal. 1956)).

93. *Id.* (citing *Vogel*, 299 P.2d at 855).

94. *Id.* at 676 ("[C]riminal intent exists when the perpetrator proceeds with . . . the lack of grounds for[ ] a belief that the female has reached the age of consent. But if he participates in a mutual act of sexual intercourse, believing his partner to be beyond the age of consent, with reasonable grounds for such belief, where is his criminal intent?").

95. *Id.*

96. *Id.* at 677.

97. *Id.*

98. Myers, *supra* note 7, at 107.

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

III. DISCUSSION: THE 'REVOLUTION' WILL NOT BE RECOGNIZED

The notion that a criminal defendant is subject to criminal liability only upon proof that he committed an offense with a culpable intent to do so is fundamental to the Anglo-American penal justice system.[100] From *Morissette* and its progeny two exceptions emerge: (1) public welfare regulatory offenses, and (2) traditionally accepted strict liability in sex offenses where the victim's age was determinative.[101] In *Morissette*, the Court, however, made no judgment as to the validity of this latter exception—it merely listed it in a footnote as an exception that "came to be recognized."[102] Most jurisdictions, however, have adopted this exception and have either judicially or statutorily proscribed the mistake of age defense in child rape cases.[103]

This Part will discuss the current state rules regarding the mistake of age defense and critique the justifications for precluding it. It will also discuss the Alaskan extension of *Hernandez*. As a threshold matter, however, it is necessary to ascertain whether there is indeed a constitutional right to present a defense.

A. Can States Eliminate Mens Rea Requirements? Egelhoff *and the Constitutional Right To Present a Defense*

The Fourteenth Amendment provides that no person shall be deprived of "life, liberty, or property, without due process of law,"[104] and the Sixth Amendment guarantees a criminal defendant the rights "to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."[105] "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " [106] The Supreme

---

100. *See supra* Part II.B.1.

101. *See supra* note 36-39, 48 and accompanying text.

102. Morissette v. United States, 342 U.S. 246, 251 & n.8 (1952).

103. Campbell, *supra* note 17; *see also* 18 U.S.C. § 2243 (2000) (allowing for a defense of engaging in a sexual act with another person between the ages of twelve and fifteen if the defendant can prove by a preponderance of the evidence that he reasonably believed that the person was sixteen).

104. U.S. CONST. amend. XIV, § 1.

105. U.S. CONST. amend. VI.

106. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)); *see also In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

Court has held that through these provisions, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' "[107] The Court, however, has been inconsistent in deciding whether this "meaningful opportunity" creates a constitutional mandate of a mens rea requirement.[108]

In addition to acknowledging the fundamentality of the Blackstonian "vicious will" requirement,[109] the Supreme Court has held that the right to present a defense is fundamental. The right gives an accused the opportunity "to offer the testimony of witnesses, and to compel their attendance . . . [which] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury."[110] Indeed, as far as this relates to mens rea, the Court has been clear that "intent generally remains an indispensable element of a criminal offense," and that *Morissette* should be read as "establishing, at least with regard to crimes having their origin in the common law, an interpretative presumption that mens rea is required."[111] According to the Court, "[t]he right of accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[112] This right to present a defense, in appropriate situations, trumps state rules of evidence governing topics such as hearsay,[113] permissible class of witnesses,[114] and admissible prior testimony.[115] In other words, "an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence."[116] Based on such Supreme Court precedent, it would seem that this fundamental right to present such competent and reliable

107. Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

108. For a thoughtful article on mens rea in Supreme Court jurisprudence, see Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107 ("Mens rea is an important requirement, but it is not a constitutional requirement, except sometimes.").

109. Morissette v. United States, 342 U.S. 246, 251 (1952).

110. Webb v. Texas, 409 U.S. 95, 98 (1972) (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

111. United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978).

112. Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

113. *Id.* (holding right to present a defense trumps state rules requiring "voucher" of a hearsay statement).

114. *Washington*, 388 U.S. at 23 (holding unconstitutional a state's preclusion of convicted coparticipants as defense witnesses).

115. Rock v. Arkansas, 483 U.S. 44, 61 (1987) (holding that a state per se preclusion of a defendant's recorded statement during a hypnotic session infringes impermissibly on her right to present a defense).

116. Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citations omitted).

evidence includes the imposition of a mental state requirement for every element of every crime not appropriately considered a public welfare offense.

The right to present a defense, however, is not absolute.[117] In *Montana v. Egelhoff*,[118] the Supreme Court narrowly held that a state statute prohibiting a defendant from using the defense of voluntary intoxication in a murder charge did not violate the defendant's due process rights.[119] In this case, the defendant wished to present evidence of his extreme intoxication to show that he was physically incapable of shooting two companions despite evidence of gunshot residue on his hands and that he brought the gun with him several hours earlier and retrieved it before using it.[120] The jury was told to disregard any evidence of the defendant's drunkenness because a Montana statute provided that "[a] person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense."[121] As noted, however, the defendant did not attempt to use his intoxication to disprove mental culpability, but rather that he was physically unable to have committed the crimes.[122] The Montana Supreme Court reversed the conviction on the grounds that the statute denied the defendant's due process right to present a defense by preventing the jury from considering evidence relevant to the issue of the defendant's mental culpability.[123]

Even though the Montana legislature attempted to preclude the defendant from claiming that he lacked mental culpability, the Montana Supreme Court concluded that the federal constitution required that the defendant be allowed to argue that he had no mental culpability. If accepted by the United States Supreme Court, the Montana Supreme Court's conclusion may mean that the federal constitution demands that a mental state is required for every element of every crime, regardless of a legislature's attempt to remove mens rea for certain elements of certain crimes.

---

117. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.").

118. 518 U.S. 37 (1996) (plurality).

119. *Id.* at 56.

120. *Id.* at 40-41, 54.

121. *Id.* at 41; MONT. CODE ANN. § 45-2-203 (1995).

122. *Egelhoff*, 518 U.S. at 41.

123. *Id.*

Justice Scalia, speaking on behalf of himself and Chief Justice Rehnquist, Justice Thomas, and Justice Kennedy, reversed the Montana Supreme Court's decision.[124] Unfortunately, this plurality's reasoning sheds little light on whether eliminating mens rea is constitutionally permissible. Rather, it construed Montana's statute to restrict a defendant's right to introduce evidence, and held that states are allowed to do so unless such a restriction violates a "fundamental principle of justice."[125] Looking toward historical practice in an attempt to discern the fundamentality of a voluntary intoxication defense, the plurality noted that the common law regarded a person who committed a crime while intoxicated as doubly culpable.[126] Although most states recognized voluntary intoxication as a defense over the last century-plus, the plurality felt that such a theory, even if held by the majority of jurisdictions "is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental."[127]

The plurality acknowledged that "[i]n the absence of any valid state justification, exclusion of . . . exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing."[128] The Court concluded that evidence of the defendant's voluntary intoxication, however, would be misleading to the jury because there was no clear evidence as to whether an intoxicated person was able to form the requisite mens rea.[129] As a result, the plurality held that the state had a valid justification to forbid "consideration of voluntary intoxication when a defendant's state of mind is at issue."[130]

Justice Ginsburg's concurrence provided the decisive "swing vote." Unlike the plurality, she did not see the statute as evidentiary. Instead, she saw it as within the constitutional purview of the states' "wide latitude" to redefine mens rea as they see fit, particularly "when determining the extent to which moral culpability should be a prerequisite to conviction of a crime."[131] She considered the case as presenting one "essential" question: "Can a State, without offense to the Federal Constitution, make the judgment that two people are

124. *Id.* at 39.

125. *Id.* at 43 (citing Patterson v. New York, 432 U.S. 197, 201-02 (1977)).

126. *Id.* at 43-47.

127. *Id.* at 47, 51. The plurality even acknowledges that this "new rule" of intoxication as a defense to mental culpability has existed since 1819. *Id.* at 46.

128. *Id.* at 53 (quoting Crane v. Kentucky, 476 U.S. 683, 690-91 (1986) (emphasis omitted)).

129. *Id.* at 50-51.

130. *Id.* at 56.

131. *Id.* at 58 (Ginsburg, J., concurring) (quoting Powell v. Texas, 392 U.S. 228, 232 (1987)).

equally culpable where one commits an act stone sober, and the other engages in the same conduct after his voluntary intoxication has reduced his capacity for self-control?"[132] Like the plurality, Ginsburg acknowledged that "[w]hen a State's power to define criminal conduct is challenged under the Due Process Clause, [the Court] inquire[s] only whether the law 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[133] Given the common law tradition relied upon by the plurality and its continued acceptance in a minority of states, Justice Ginsburg found that the Montana legislature's redefinition of mens rea "encounter[ed] no constitutional shoal."[134] If read broadly—and not limited to voluntary intoxication—Justice Ginsburg's concurrence could stand for the proposition that the Fourteenth Amendment does not require a mental state for every element of every crime. As discussed below, however, it is unlikely that either Justice Ginsburg intended or the Constitution allows such an expansive reading of the opinion.

Taken together, *Egelhoff*'s five separate opinions,[135] including a "majority" resting on different conceptions of the nature of the statute, are, as Dean Singer and Professor Douglas Husak put it, "extraordinarily difficult to decipher."[136] At least five justices implicitly hold that states are free to redefine the mens rea elements of crimes as they see fit, as the plurality expressed "complete agreement" with Justice Ginsburg's approach.[137] Does this mean that

---

132. *Id.* at 57.

133. *Id.* at 58 (quoting *Patterson*, 432 U.S. at 202).

134. *Id.*

135. Justice O'Connor, in a dissent joined by Justices Stevens, Souter, and Breyer, viewed the Montana law as an evidentiary law, as did the plurality, but found that there was no legitimate justification for the withholding of evidence of a defendant's drunkenness. *Id.* at 69-71 (O'Connor, J., dissenting). Unlike the plurality, O'Connor found the centuries-old availability of an intoxication defense to be a "fundamental principle." *Id.* at 71. Although she disagreed with Justice Ginsburg's reading that the statute is merely a redefinition of culpable mens rea, she acknowledged that states reserve the right to so define the elements of crimes within their statutory law. *Id.* at 71-73. In a separate dissent, Justice Souter agreed with this point, saying "I have no doubt that a State may so define the mental element of an offense that evidence of a defendant's voluntary intoxication at the time of commission does not have exculpatory relevance and, to that extent, may be excluded without raising any issue of due process." *Id.* at 73 (Souter, J., dissenting). His dissent, however, rested on his belief that the Court was bound to interpret the statute as one of evidentiary exclusion, as the Montana Supreme Court had done, and on his belief, one that he share with Justice O'Connor, that the State did not provide any justification for excluding this relevant evidence. *Id.* at 73-74. Finally, Justice Breyer wrote a separate dissent, joined by Justice Stevens, in which he opined that reading the statute as a redefinition of the mental state may "produce anomalous results." *Id.* at 79-80 (Breyer, J., dissenting).

136. Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 906 (1999).

137. *Egelhoff*, 518 U.S. at 50 n.4.

Egelhoff stands, at least implicitly, for the proposition that states can constitutionally abolish mens rea requirements required by *Morissette*? In other words, is crime as a compound concept no longer a "fundamental principle of justice"?

Dean Singer and Professor Husak suggest that *Egelhoff* should not be read so expansively.[138] Instead, they read the opinion to apply only to the voluntary intoxication defense.[139] Such a reading, they contend, does "not undermine the Court's commitment to protect innocent persons from criminal liability."[140] Rather, they argue that *Egelhoff* is actually consistent with the Court's "compound concept" jurisprudence. "[T]he protection of innocence has formed the cornerstone of recent Supreme Court decisions," and *Egelhoff*, in order to be consistent with such a protection, must apply only to voluntary intoxication.[141] Singer and Husak's thesis that *Egelhoff* does not allow states to eliminate mental culpability is instructive in analyzing the current state of the constitutional right to present a defense.[142]

Professor Peter Westen, like Singer and Husak, reads *Egelhoff* as confined to voluntary intoxication, but his interpretation further limits its reach to only instances in which crimes are committed during a state of "intoxication-induced automatism" or "blackout."[143] He argues that the rather unique set of facts in the case—in which the defendant did not argue that his intoxication negated any intent to commit the two murders, but rather that "his intoxication induced a fugue state of automatism during which he was wholly unconscious of what he was doing"—limits the decision's scope.[144] Since the statute only affects the defendant's ability to negate mental culpability by evidence of not remembering his commission of the crimes, Westen argues, as did eighteen states in amicus curie briefs to the Court in *Egelhoff*, that the Montana statute would not exclude evidence of voluntary intoxication to prove accident or mistake.[145] Otherwise, the statute would have the "very constitutionally worrisome effect . . . of denying defendants a right to introduce evidence relevant to elements

138. Singer & Husak, *supra* note 136, at 909.

139. *Id.*

140. *Id.*

141. *Id.* at 910-11.

142. *Id.* at 912-43.

143. Peter Westen, Egelhoff *Again*, 36 AM. CRIM. L. REV. 1203, 1278 (1999).

144. *Id.* at 1255, 1276.

145. *Id.* at 1249. In an amicus brief, eighteen states argued that "[h]ad the evidence been such tbat Egelhoff had . . . accidentally killed two unknown persons while taking 'target practice' at some tin cans in the middle of a field, Egelhoff would have been entitled to an acquittal of the charge of deliberate homicide, even if he were voluntarily drunk." *Id.*

that the state was required to prove."[146] Put simply, Westen argues that the statute requires the prosecution to prove the defendant's mens rea for each element of the offense as if the defendant was not intoxicated, and that the Court, particularly Justice Ginsburg, at least implicitly understood that its holding was confined to "rare cases of intoxication-induced automatism."[147]

Principles of federalism and state autonomy indicate that state legislatures are unquestionably free to create statutes and to define crimes as they see fit.[148] Such freedom, however, is not unlimited.[149] Indeed, even the *Egelhoff* plurality would limit such freedom on due process grounds if the statute in question "offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," but instead, the plurality held that the presentation of evidence of voluntary intoxication is not a fundamental right, and that there were significant state policies advanced by the Montana statute.

The plurality based its determination of the fundamentality of the voluntary intoxication defense on the questionable historical preclusion of voluntary intoxication as a defense as well as recent studies showing the fallacy of the "learned belief" of intoxication as an excuse for criminal culpability.[150] The view that voluntary intoxication is a defense to criminal liability is a "new common-law rule" that cannot, according to the Court, be held as a "fundamental principle" protected by the Fourteenth Amendment.[151] Further, the plurality held that not considering voluntary intoxication as a defense serves as a deterrent to criminal activity on three levels: (1) it deters generally "irresponsible behavior while drunk"; (2) it serves as a specific deterrent by "ensuring that those who prove incapable of controlling violent impulses while voluntarily intoxicated go to prison"; and (3) "it comports with and implements society's moral perception that one who voluntarily impaired his own faculties be responsible for the consequences."[152]

---

146. *Id.* at 1258.

147. *Id.* at 1278.

148. *See generally* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

149. The next sentence in Brandeis's famous dissent is as follows: "This Court has the power to prevent an experiment. . . . We have the power to do this, because the due process clause [is] applicable to matters of substantive law. . . ." *Id.*

150. Montana v. Egelhoff, 518 U.S. 37, 43-51 (1996).

151. *Id.* at 48.

152. *Id.* at 49-50.

The plurality's justifications for precluding the voluntary intoxication defense cannot justify eliminating the mental culpability requirement of every element of a crime. Since the days of Blackstone, criminal liability required a "vicious will," and the *Morissette* Court remarked that "[c]rime, as a compound concept," is "no provincial or transient notion."[153] The *Morissette* Court further noted that this "compound concept" has enjoyed "unqualified acceptance" in both British and American common law, and the current Court (including the members of the *Egelhoff* plurality) has approvingly cited and unqualifiedly accepted *Morissette*.[154] Eliminating the need for the government to prove an accused's mental culpability for each element of the offense for which he is charged therefore "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" and is violative of the accused's due process rights.[155]

Additionally, there is neither general nor specific deterrence value in prohibiting a mistake of fact defense. A person who acts under a mistake of fact believes that he is engaging in lawful activity. But for the mistake, he would be. The *Egelhoff* plurality found that the ban on the voluntary intoxication defense would be a general deterrent for irresponsible behavior caused by a person irresponsibly becoming intoxicated. Such general deterrence would not occur if a mistake of fact defense were similarly precluded, for it is implausible to believe a ban on a mistake of fact defense would deter people from making mistakes. Similarly, there is no specific deterrence value in banning a mistake defense. As Singer and Husak note, it is easy to identify violent drunks, but the identification of "mistake prone" people and the specific deterrence of those people is a much more difficult task.[156]

Justice Ginsburg's notion that there should be equal culpability between a person who commits an act while voluntarily intoxicated and one who commits it "stone sober" is the final justification of the "majority" that deserves mention. This "equal culpability" rationale seems limited to voluntary intoxication (and inapposite to the mistake of fact defense) on two grounds. First, as espoused by the plurality, is the academic theory that the connection between intoxication and

153. Morissette v. United States, 342 U.S. 246, 250-51 (1952).

154. *Id.* at 251; *see* Staples v. United States, 511 U.S. 600, 605 (1994) (opinion by Thomas, J., joined by Rehnquist, C.J., and Kennedy, Scalia, and Souter, JJ.) (citing and reaffirming *Morissette*).

155. *Egelhoff*, 518 U.S. at 43.

156. Singer & Husak, *supra* note 136, at 923.

crime is "as much cultural as pharmacological."[157] In other words, the Court accepts the skepticism of intoxication's effects on one's criminal mental culpability; states can conclude, therefore, that an accused can act with a requisite mens rea while being intoxicated. Second, since mental culpability and voluntarily intoxication are not mutually exclusive, the government still has to prove beyond a reasonable doubt that the accused acted with the requisite mens rea. As the plurality admits, the defendant could not have been convicted unless the trial court found that he acted purposely or knowingly.[158] Singer and Husak argue that this rationale cannot be justified for mistake of fact defenses because, unlike voluntarily intoxicated defendants who are at some level at least arguably culpable, actors who operate under a mistake of fact "are the epitome of innocence."[159] There exists no scholarly opinion, legal precedent, or psychological study that would support equal culpability in a mistake of fact scenario.[160]

Justice Ginsburg recognized the "wide latitude" enjoyed by the states in defining the mens rea of crimes committed within their borders.[161] Such latitude, however, ends when the mental state of a crime is statutorily eliminated. The Court announced in *Morissette* and has followed ever since the principle that due process requires proof of *mens rea* for every element of every crime. *Egelhoff* simply holds that a state can enact a statute disallowing evidence of an accused's voluntary intoxication to negate mental culpability; it does nothing to limit the constitutional requirement of mental culpability or the right to present a defense.

B. Forsaking the Compound Concept—The Current State of Child Rape Mens Rea Requirements

Four separate views of the mistake of age defense can be identified in current state statutes. The first group of statutes, enacted in ten jurisdictions, prohibits the use of the mistake of age defense for sex offenses in which the age of the victim is an element of the offense.[162] Second, at the other extreme, is a statutory allowance

157. *Egelhoff*, 518 U.S. at 50.

158. *Id.* at 54.

159. Singer & Husak, *supra* note 136, at 936.

160. *Id.* at 936-37.

161. *Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring).

162. DEL. CODE. ANN. tit. 11, § 762(a) (2001); D.C. CODE ANN. § 22-3011(a) (2001); FLA. STAT. ANN. § 794.021 (West 2000); KAN. STAT. ANN. § 21-3202(2) (1995); LA. REV. STAT. ANN. §§ 14:43.1(b), :80 (West 1997 & Supp. 2004); MINN. STAT. ANN. § 609.343(1)(a)-(b) (West 2003); N.J. STAT. ANN. § 2C:14-5(c) (West 1995); UTAH CODE ANN. § 76-2-304.5 (1999 & Supp. 2003); WIS. STAT. ANN. § 939.43(2) (West 1996). Connecticut amended its mistake of fact statute to

of the defense, as espoused in Alaska, Indiana, Kentucky, and South Carolina.[163] The third type of legislation, influenced by the Model Penal Code, has a "bifurcated defense" whereby the defense is allowed when criminality is dependent upon a certain (higher) age but eliminating the defense if it is dependent upon a lower critical age.[164] In other words, the defense is allowed in lesser-grade child sexual offenses but precluded in the more severe ones.

Lastly, twenty-three states have statutes that neither explicitly allow nor prohibit the use of the defense, and those jurisdictions' rules are dependent upon judicial decision.[165] These jurisdictions almost universally view their child rape statutes as requiring no culpable mental state, either by judicial decisions interpreting their respective state's statutes or by the "legislative reenactment" canon of statutory

---

eliminate the availability as an affirmative defense a mistaken belief of the victim's age. CONN. GEN. STAT. ANN. § 53a-67 (West 2001) (amended 1975).

163. ALASKA STAT. § 11.41.445(b) (Michie 2000) (allowing the Mistake of Age defense if an accused (1) reasonably believed the victim to he ahove the critical age, and (2) undertook reasonable measures to ensure the victim was above that age); IND. CODE ANN. § 35-42-4-3(c) (Michie 1998) (allowing the defense if the accused can prove a reasonable belief the victim was sixteen years of age or older, regardless of her actual age); KY. REV. STAT. ANN. § 510.030 (Michie 1999) (allowing the defense if the accused can show lack of knowledge of the victim's minor age); S.C. CODE ANN. § 16-3-830 (Law. Co-op. 2003) (allowing the defense if the accused can prove a good faith and reasonable belief the victim was eighteen years of age or older, regardless of her actual age). Colorado has repealed a statute that made unavailable the Mistake of Age defense. COLO. REV. STAT. ANN. § 18-3-406 (repealed 2001).

164. 18 U.S.C. §§ 2241(c)-(d), 2243(c) (2000); ARIZ. REV. STAT. ANN. § 13-1407(b) (West 2001); ARK. CODE ANN. § 5-14-102(b)-(c) (Michie 1997 & Supp. 2003); ME. REV. STAT. ANN. tit. 17A, § 254(2) (West 1964 & Supp. 2003); MO. ANN. STAT. § 566.020(2)-(3) (West 1999); N.D. CENT. CODE § 12.1-20-01 (1997); OHIO REV. CODE ANN. §§ 2907.02(A)(1)(b), 2907.04(A) (West 1997 & Supp. 2003); OR. REV. STAT. § 163.325(1)-(2) (2001); 18 PA. CONS. STAT. ANN. § 3102 (West 2000); TENN. CODE ANN. § 39-11-502 (2003); W. VA. CODE ANN. § 61-8B-12 (Michie 2000); WYO. STAT. ANN. § 6-2-308 (Michie 2003). Illinois has a modified bifurcated scheme, whereby the defense is available if the accused reasonably believed the victim to be seventeen years of age or older for only criminal sexual abuse crimes, not the more severe crimes of criminal sexual assault. 720 ILL. COMP. STAT. ANN. 5/12-17 (West 2003). Montana, too, has a variation on this statutory scheme, by allowing the defense if the accused honestly and reasonably believes the victim is sixteen years of age or over, but precluding the defense, regardless of the mistake or the statutory age, if the victim is under fourteen years of age. MONT. CODE ANN. § 45-5-511(1) (2001).

165. ALA. CODE § 13A-6-61 (1994 & Supp. 2003); CAL. PENAL CODE § 261.5 (West 1999 & Supp. 2004); GA. CODE ANN. §§ 16-6-1, -3, -4 (2003); HAW. REV. STAT. ANN. §§ 707-730 to -733 (Michie 2003); IDAHO CODE § 18-6101 (Michie 1997 & Supp. 2003); IOWA CODE ANN. §§ 709.3-.4 (West 2003); MD. CODE ANN., CRIMINAL LAW § 3-304 (2002); MASS. GEN. LAWS ANN. ch. 265, § 23 (West 2000); MICH. COMP. LAWS §§ 750.520b-e (West 1991 & Supp. 2003); MISS. CODE ANN. § 97-3-65 (2000 & Supp. 2003); NEB. REV. STAT. § 28-319 (1995); NEV. REV. STAT. ANN. 200.366, .368 (Michie 2001 & Supp. 2003); N.H. REV. STAT. ANN. §§ 632-A:3 to :4 (1996 & Supp. 2003); N.M. STAT. ANN. § 30-9-11 (Michie 1978 & Supp. 2002); N.Y. PENAL LAW § 130.10 (McKinney 1998 & Supp. 2004); N.C. GEN. STAT. § 14-27.7A (2003); OKLA. STAT. ANN. tit. 21, § 1114 (West 2002); R.I. GEN. LAWS § 11-37-8.1 (2002); S.D. CODIFIED LAWS § 22.22.1 (Michie 1998); TEX. PENAL CODE ANN. § 22.011 (Vernon 2001 & Supp. 2004); VT. STAT. ANN. tit. 13, § 3252 (1998); VA. CODE ANN. § 18.2-61, -63 (Michie 1996 & Supp. 2003); WASH. REV. CODE ANN. § 9A.44.073 (West 2000).

construction in the face of cases decided decades or even centuries ago.[166] Many jurisdictions went so far as to reject *Hernandez* outright.[167] In fact, only two states, California (in *Hernandez*) and New Mexico, have read an implied mens rea into their child rape statutes.[168]

C. A Critique of Strict Liability

The three rationales for removing the mens rea requirement for a criminal offense (the public welfare rationale, as described in *Morissette*, and the lesser legal wrong and moral wrong rationales of *Prince*) were described earlier in this Note.[169] This section critiques the validity of these rationales as applied to child rape crimes in an attempt to ultimately show that none of the rationales sufficiently justifies precluding the availability of the mistake of age defense.

1. The Inapplicability of the Public Welfare Rationale

In defining a strict liability public welfare offense, the *Morissette* Court described a narrow classification of offenses, or

---

166. *See* Tant v. State, 281 S.E.2d 357, 358 (Ga. Ct. App. 1981); State v. Buch, 926 P.2d 599, 604-06 (Haw. 1996); State v. Oar, 924 P.2d 599, 601-02 (Idaho 1996); State v. Gilmour, 522 N.W.2d 595, 596-98 (Iowa 1994); Owens v. State, 724 A.2d 43, 54-55 (Md. 1999); Commonwealth v. Montalvo, 735 N.E.2d 391, 393-94 (Mass. App. Ct. 2000); People v. Cash, 351 N.W.2d 822, 826-28 (Mich. 1984); Darden v. State, 798 So.2d 632, 634 (Miss. Ct. App. 2001); State v. Navarrete, 376 N.W.2d 8, 11 (Neb. 1985); Jenkins v. State, 877 P.2d 1063, 1065-67 (Nev. 1994); Goodrow v. Perrin, 403 A.2d 864, 867-68 (N.H. 1979); People v. Prise, 515 N.Y.S.2d 387, 391-92 (N.Y. Sup. Ct. 1987); State v. Anthony, 516 S.E.2d 195, 196-97 (N.C. Ct. App. 1999); Reid v. State, 290 P.2d 775, 784 (Okla. Crim. App. 1955); State v. Yanez, 716 A.2d 759, 770-71 (R.I. 1998); Meinders v. Weber, 604 N.W.2d 248, 264 (S.D. 2000); Jackson v. State, 889 S.W.2d 615, 617 (Tex. App. 1994); State v. Searles, 621 A.2d 1281, 1282-83 (Vt. 1993); State v. Dodd, 765 P.2d 1337, 1338 (Wash. Ct. App. 1989). Alabama's leading mistake of age case was decided in 1918. Miller v. State, 79 So. 314, 315 (Ala. Ct. App. 1918). Virginia has not addressed this mistake of age issue in over one-and-a-quarter centuries. Lawrence v. Comm., 71 Va. (30 Gratt.) 845, 854-55 (1878).

167. *See, e.g.*, State v. Stiffler, 788 P.2d 220, 224 (Iowa 1990) (stating that the *Hernandez* rule "has not been the development of the law of criminal intent in this state [and w]e reject the invitation here to discard the distinction between general intent crimes and those requiring proof of some specific intent").

168. *See* People v. Hernandez, 393 P.2d 673, 677 (Cal. 1964); Perez v. State, 803 P.2d 249, 251 (N.M. 1990) (holding that although the statutory definition of statutory rape of a child between the ages of thirteen and sixteen did not explicitly impose a mental state requirement regarding the age of the victim, the defendant was entitled to present evidence of his mistake of age before the jury). It is worth noting that Utah was once among the jurisdictions that followed the *Hernandez* principle, but its decision was later abrogated by statute. *See* State v. Martinez, 52 P.3d 1276 (Utah 2002) (affirming the constitutionality of UTAH CODE ANN. § 76-5-401, which imposes strict liability for unlawful sexual activity with a minor, thereby abrogating *State v. Elton*, 680 P.2d 727, 732 (Utah 1984), the court's previous *Hernandez*-type decision requiring a mens rea).

169. *See supra* Part II.B.1-2.

rather, regulations, that (1) are quasi-torts which involve either negligence or inaction when either care is required or a duty imposed; (2) result in no direct or immediate injury; (3) impair the public health, safety, and welfare, generally on a societal level; and (4) yield small penalties and minimal social stigma.[170] Public welfare offenses "do not fit neatly into any . . . accepted common law offenses, such as those against the state, the person, property, or public morals."[171]

Child sexual assault is a common law offense against the person. It does not involve either negligence or inaction, and it does not impair the public health, safety, or welfare on a macro level. Moreover, using Tennessee as our model, a conviction for a first-time offender carries a mandatory twenty-year sentence with no possibility of parole, probation, or jail credit.[172] As such, child sexual assault cannot be classified as a public welfare offense, and its status as a strict liability offense cannot be supported under this rationale.

2. Deconstructing the Lesser Legal Wrong and Moral Wrong Rationales

Morissette's public welfare justification of strict liability crimes encompasses only a narrow range of consumer and social protection offenses like mistakenly selling adulterated milk or mislabeling pharmaceuticals.[173] The Court points out in a footnote, however, that statutory rape-type offenses have been one of the exceptions to the rule that "[c]rime . . . generally constitute[s] only from concurrence of an evil-meaning mind with an evil-doing hand."[174] This seeming contradiction can be resolved in either of two ways. First, the footnote can be seen as merely a tangential point apart from and irrelevant to the Court's principal reasoning, a point which the Court neither accepted nor rejected.[175] Alternatively, one could view the Court's reference to statutory rape-type offenses as an example of the common law acceptance of both the lesser legal wrong and moral wrong

170. Morissette v. United States, 342 U.S. 246, 255-56 (1952).

171. *Id.* at 255.

172. Rape of a Child is a Class A felony in Tennessee. TENN. CODE ANN. § 39-13-522(b) (2003). Class A felonies carry a mandatory sentence of generally twenty years, and Rape of a Child is one of the offenses enumerated for which parole is unavailable. §§ 40-35-112, -501(i).

173. *Morissette*, 342 U.S. at 256 (discussing earlier Massachusetts cases affirming convictions for such an offense); *see also* United States v. Dotterweich, 320 U.S. 277, 278 (1943).

174. *Morissette*, 342 U.S. at 251 & n.8.

175. *See* State v. Yanez, 716 A.2d 759, 776 n.17 (R.I. 1988) (Flanders, J., dissenting) ("[T]he Supreme Court merely acknowledged . . . that many states came to recognize an exception to the common-law rule of mens rea with respect to a mistake-of-age defense in sex-offense prosecutions. The Court never ventured to opine whether the imposition of strict liability in such cases was proper, principled, or constitutional.").

rationales of criminal guilt. Regardless of whether the Court intended the former or latter, the modern legitimacy of these two rationales must be evaluated.[176]

The lesser legal wrong rationale posits that an accused is guilty of any crime he commits so long as he would have been committing at least some illegal act if the facts were as he believed them to be.[177] In the child rape context, if an accused is operating under a mistaken belief that his paramour is of the age of consent, he could be found guilty under the lesser legal wrong theory only if fornication or, if he were married, adultery, were crimes as well. Today, just eight states still criminalize fornication,[178] and only nine criminalize adultery,[179] with each offense punishable as a misdemeanor.[180] Even in those states that recognize one or both offenses, "the 'legal' wrong[s] that the accused might have supposed he was committing [are] to a great extent ignored or even condoned by both society and the courts . . . [and the] [l]aws punishing [them] are generally unenforced."[181] In Tennessee, neither adultery nor fornication is a criminal offense. Moreover, in *Lawrence v. Texas*, the Supreme Court has held unconstitutional laws banning consensual sodomy, recognizing a right to engage in otherwise consensual, private, intimate conduct.[182]

---

176. *See id.* at 780 ("Beginning in the 1960s and 1970s, a seemingly unanimous front of legal commentary has opposed the concept of strict liability for [child rape] crime[s] as lacking any sound philosophical, historical, or legal foundation and, what is even worse, as having its origin in faulty and inept judicial analysis of applicable precedents.").

177. *See* MODEL PENAL CODE § 213.6 cmt. 2 (1980).

178. GA. CODE ANN. § 16-6-18 (2003) (held unconstitutional by *In re* J.M., 575 S.E.2d 441, 444 (Ga. 2003)); IDAHO CODE § 18-6603 (Michie 1997); 720 ILL. COMP. STAT. ANN. § 5/11-8 (West 2003) (making fornication a misdemeanor only if it is "open and notorious"); MASS GEN. LAWS ANN. ch. 272, § 18 (West 2000) (imposing a fine of only $30 or imprisonment for not more than three months); MINN. STAT. ANN. § 609.34 (West 2003); S.C. CODE ANN. § 16-15-60 (Law. Co-op. 2003); UTAH CODE ANN. § 76-7-104 (1999); VA. CODE ANN. § 18.2-344 (Michie 1996); W. VA. CODE ANN. § 61-8-3 (Michie 2000) (imposing a minimum fine of only $20). Mississippi and North Carolina define fornication to include an element of cohabitation. MISS. CODE ANN. § 97-29-1 (2000); N.C. GEN. STAT. § 14-184 (2003). Wisconsin recreated its fornication statute to prohibit only "public fornication," and North Dakota criminalizes only the commission of "a sexual act in a public place." N.D. CENT. CODE § 12.1-20-08 (1997 & Supp. 2003); WIS. CODE ANN. § 944.15 (effective Feb. 1, 2003).

179. ALA. CODE § 13A-13-2 (1975); COLO REV. STAT. ANN. § 18-6-501 (West 2003); FLA. STAT. ANN. § 798.01 (West 2000); GA. CODE ANN. § 16-6-19 (2003); IDAHO CODE § 18-6601 (Michie 1997); MASS. GEN. LAWS ANN. ch. 272, § 14; MICH. COMP. LAWS ANN. § 750.30 (West 1991); N.Y. PENAL LAW § 255.17 (McKinney 2000). North Carolina criminalizes adultery if there is cohabitation. N.C. GEN. STAT. ANN. § 14-184.

180. *See supra* notes 178-179.

181. Myers, *supra* note 7, at 128; *see also* Doe v. Duling, 782 F.2d 1202, 1204 (4th Cir. 1986) (noting that the last reported conviction under Virginia's anti-fornication statute was in 1849).

182. Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 2475 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

"By definition, [the lesser legal wrong] transferring [of] intent from one crime to another *requires two crimes*."[183] Therefore, in light of the majority of states' decriminalization of such "lesser wrongs" as fornication and adultery, as well as the Supreme Court's *Lawrence* decision, the lesser legal wrong rationale is no longer applicable to child rape offenses.[184]

The moral wrong rationale, which would assign liability on the basis of the commission of an act society considers morally repugnant, is equally illegitimate. Scholars have argued that the moral wrong rationale has little persuasiveness on several grounds. First, it is contended that there are varying degrees of morality, and that perceptions of morality differ among and between various community groups.[185] Second, and this perhaps follows from the previous critique, laws are enacted to divorce the concepts of "immoral" and "illegal." "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."[186] Third, notions of what constitutes immoral behavior evolve temporally, and with the case of sexual activity, premarital relations between consenting adults cannot be deemed immoral to the point of requiring that they be criminal.[187] In fact, the Supreme Court recently held that, as between "two adults who, with full and mutual consent from each other, engage[ ] in sexual practices," a state may not "control their destiny by making their private sexual conduct a crime."[188]

Finally, if we accept the idea that premarital sex is not immoral in and of itself, as a majority of states appear to have done by

---

183. Reiss, *supra* note 60, at 382.

184. Admittedly, if one engages in sexual relations with a child under thirteen operating under the mistaken fact that the alleged victim is between the ages of thirteen and seventeen, the adult would be committing a lesser legal wrong of Statutory Rape. TENN. CODE ANN. § 39-11-502 (2003). This conflict will be resolved *infra*. Part IV.

185. *See, e.g.*, Myers, *supra* note 7, at 128 ("It must be recognized that different individuals and groups in a heterogeneous community have widely divergent opinions with respect to the morality of extra-marital intercourse. Although certain groups, and perhaps the law itself, may judge such conduct to be wrong, it may be in complete conformity with the standards of the actors' peer group.").

186. Reiss, *supra* note 60, at 382; *see also* LAFAVE, *supra* note 1, 5.6(c), at 288 ("Moral duties should not be identified with criminal duties." (quoting Graham Hughes, *Criminal Responsibility*, 16 STAN. L. REV. 470, 481 (1964))).

187. *See* Reiss, *supra* note 60, at 382-83 ("Events in . . . history, such as the sexual revolution, the advent of the birth control pill, and television advertisements for condoms evidence [a] change in public opinion [of what is moral]."); *see also* Garnett v. State, 632 A.2d 797, 813 (Md. 1993) (Bell, J., dissenting) ("[S]exual intercourse between consenting unmarried adults and minors who have reached the age of consent is not now clearly considered to be immoral . . . .").

188. Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 2484 (2003).

eliminating fornication from their criminal codes, should a person be held "morally" accountable when that is the only activity in which he intended to engage? It is nearly universally accepted that a person who engages in sexual relations with a child is morally repugnant, but that repugnance is due most likely not to the act itself, but to the intent (or mere desire) to engage in that activity. If an individual's intent is to engage in sexual relations with a consenting adult, he intends to commit an act that is, if not moral, not immoral. If a person honestly and reasonably believes certain facts that would make his conduct fall within *Lawrence*'s constitutionally protected private sphere, he should not be criminally punished for an act committed under this mistaken belief.

3. Failing To See the Revolution Through—The Disingenuousness of the Model Penal Code

Removing mental culpability from child rape crimes cannot be supported under the public welfare rationale, nor can it be supported currently under the lesser legal wrong or moral wrong rationales. Both the American Law Institute (ALI), in promulgating its Model Penal Code, and Larry Myers, in crafting his article cited frequently throughout this Note, were aware of the unsatisfactory justifications for making the child rape crimes strict liability offenses.[189] In its Comment to the M.P.C. mistake of age provision, the ALI remarked:

> [T]he actor who reasonably believes in the existence of facts that, if true, would render his conduct non-criminal has substantial claim for exculpation. Even if society chooses to set the age of consent very low, the actor who reasonably believes that his partner is above that age lacks culpability with respect to the factor deemed critical to liability. Punishing him anyway simply because his intended conduct would have heen immoral under the facts as he supposed them to be postulates a relation between criminality and immorality that is inaccurate on both descriptive and normative grounds. The penal law does not try to enforce all aspects of community morality, and any thoroughgoing attempt to do so would extend the prospect of criminal sanctions far into the sphere of individual liberty and create a regime too demanding for all save the best among us.[190]

The Model Penal Code, which, as noted previously, philosophically requires a finding of culpability for every element of every crime and limits strict liability to civil "violations," attempts to "effect[ ] a compromise between the traditional rule disallowing mistake in the law of statutory rape and a general policy against strict liability crimes."[191] Instead, when a mistake of age defense is being offered by an accused, the M.P.C. shifts the burden to the defendant to

189. *See* MODEL PENAL CODE § 213.6 cmt. 2 (1980); Myers, *supra* note 7, at 127-29.

190. § 213.6 cmt. 2.

191. *Id.*

"establish both the fact and reasonableness of his mistake by a preponderance of the evidence."[192] This requirement of reasonableness, according to the Code's drafters, ensures that the mistake does not amount to a conscious disregard of community standards.[193] This also would avoid placing on the prosecution the "virtually impossible" burden of proving beyond a reasonable doubt the absence of a mistake.[194]

The Model Penal Code, in other words, allows the prosecution to prove that an accused engaged in sexual relations with a child under the statutory age, thereby creating a rebuttable presumption that the accused acted with a culpable mens rea. This presumption can be rebutted upon an accused's proof by a preponderance of the evidence that he committed the actus reus under a reasonable belief that his partner was a consenting adult. In other words, an accused's defense will be successful if he can prove that a reasonable person would have made the same mistake.

Allowing a defense like this seems a reasonable and effective means of overcoming the problem of convicting a person of a serious felony when he lacked any mental culpability. This defense is not available in all cases, however. Both the ALI and Myers, as well as the majority of states that have either adopted the M.P.C. or followed its direction, while appreciating the need for punishing only those who possess the criminal intent to commit the crime, still stop short of making available the mistake of age defense in all child rape prosecutions.[195] The M.P.C. allows the defense if the criminality of the offense depends on a child victim being below a critical age other than ten, but if criminality depends on a child victim being below the age of ten, "it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10."[196] Myers, who would set the age of consent at sixteen, would impose strict liability if the child was under thirteen, but would allow the defense of an honest and reasonable mistake of fact if the child was between the ages of thirteen and fifteen.[197]

---

192. *Id.*

193. *Id.*; *see also* MODEL PENAL CODE § 2.02(2)(d) (1985) (defining "negligence").

194. MODEL PENAL CODE § 213.6 cmt. 2 (1980).

195. For a list of states that have a two-tiered statutory approach regarding the Mistake of Age defense, see *supra* note 164.

196. § 213.6(1).

197. Myers, *supra* note 7, at 132. Myers chooses this age because "[w]hen a girl is sixteen, she has become a young woman, and the consensual act loses its quality of abnormality, heinousness, and physical danger to her." *Id.*

Both the drafters of the M.P.C. and Myers explain their two-tiered approach biologically, but for slightly different reasons. Myers argues that "it is in this period of pre-puberty and initial puberty that the girl is just gaining the physical capacity to engage in intercourse, but remains seriously deficient in comprehension of the social, psychological, emotional, and physical significance of sexuality."[198] The Comment to the M.P.C., on the other hand, reasons that "no credible error regarding the age of a child in fact less than ten years old would render the actor's conduct anything less than a dramatic departure from societal norms . . . for no credible error of perception would be sufficient to recharacterize a child of such tender years as an appropriate subject of sexual gratification."[199]

In order to advance his two-tiered approach, Myers cites findings from the Kinsey Institute establishing sixteen as the "beginning of adult life"—physically, socially, and intellectually.[200] He does not explain, however, how he chooses thirteen as the critical strict liability age, except to note that "very few girls enter the period of sexual awakening before the thirteenth year."[201]

A person that engages in sexual relations with a child between the ages of thirteen and sixteen, according to Myers, contravenes not physical standards but moral standards of the community.[202] In other words, Myers constructs his rape/mistake/nonrape framework based on the victim's abilities to physically engage in sexual intercourse and to comprehend the "social, psychological, emotional, and physical significance of sexuality."[203] If this is indeed Myers's critical distinction, his argument seems disingenuous. He determines the age of consent at sixteen based on empirical findings, but would impose strict liability if a child is in the "pre-puberty and initial puberty stages" (below thirteen) while allowing the mistake of age defense for a child in "middle to later adolescence."[204] Such a distinction is created in order to give "full credence to a realistic age dichotomy when the man is genuinely mistaken."[205] Yet by noting that "very few" girls enter their "period of sexual awakening" before age thirteen,

198. *Id.*
199. § 231.6(1) cmt. 2.
200. Myers, *supra* note 7, at 132-33.
201. *Id.* at 132.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

Myers is conceding that there are cases where a girl may be "sexually awake" at that young age.[206]

Based on Myers's thesis that a reasonable mistake of age is a needed defense in child rape prosecutions and his critique of the "misguided morality" of strict liability in this context, it should follow that a person who engages in sexual intercourse with one of those very few pubescent children under any critical age should be entitled to at least offer his reasonable mistake of age at trial.[207] The same argument could be advanced with the Model Penal Code's critical age of ten—although it is extremely unlikely that a child under that age could be reasonably mistaken for an adult of the age of consent, there indeed may be instances, however extreme and implausible, where that unlikely event occurs.[208] "Precocious puberty," or pubertal development at an early age and an accelerated rate, has long been recognized as a serious, if infrequent, medical problem.[209] However, in recent years, the prevalence of young girls entering pubescence at an earlier age has increased.[210] In 1999, the American Academy of Pediatrics, relying on a 1997 study involving 1,500 pediatricians and 17,000 girls between the ages of three and twelve, concluded that puberty is normal in girls as young as six.[211] Although the causes are unknown, childhood obesity and advances in nutritional supplements may be responsible.[212] The result is that more girls experience puberty at an early age and can appear much more developed than their actual years.

All concerns about the uncertain timing of the onset of puberty in children aside, the Model Penal Code's mistake of age provision is

---

206. *Id.*

207. *Id.* at 105-19, 132.

208. MODEL PENAL CODE § 213.6(1) (1980).

209. *See, e.g.*, Grace Brooke Huffman, *Reassessing the Age Limit of Precocious Puberty in Girls*, 61 AM. FAM. PHYSICIAN 1850 (Mar. 15, 2000) ("Standard textbooks usually define precocious puberty as 'development of secondary sexual characteristics' in girls less than eight years of age.").

210. *See generally* Sandra G. Boodman, *Girls and Puberty: How Young Is Too Young?; New Guidelines Say Signs of Development as Early as Age 6 May Not Be Abnormal*, WASH. POST, Oct. 26, 1999, at Z07; Jane E. Brody, *Yesterday's Precocious Puberty Is Norm Today*, N.Y. TIMES, Nov. 30, 1999, at F8; Tara Parker-Pope, *Rise in Early Puberty Causes Parents to Ask, "When Is It Too Soon?,"* WALL ST. J., July 20, 2000, at B1.

211. Paul B. Kaplowitz et al., *Reexamination of the Age Limit for Defining When Puberty Is Precocious in Girls in the United States: Implications for Evaluation and Treatment*, 104 PEDIATRICS 936, 936-40 (1999) (relying on data obtained in Marcia Herman-Giddens et al., *Secondary Sexual Characteristics and Menses in Young Girls Seen in Office Practice: A Study from the Pediatric Research in Office Settings Network*, 99 PEDIATRICS 505 (1997)). The study bases its conclusion upon its findings that 7 percent of white and 25 percent of African-American females begin to develop breasts before the age of eight. *Id.*

212. *See id.* at 937.

also troublesome because it is inconsistent with the Code's philosophical framework requiring a showing of mental culpability for every element of every offense and abolishing strict liability for all but "violations."[213] This is in direct conflict with the Code's "frontal attack" on strict liability in which the drafters "superimposed on the entire corpus of the law" a requirement of no penal sanctions without mental culpability except in the narrow instance of regulatory violations.[214] After all, rape of a child less than ten years old is a second-degree felony in the Code—the only felony that does not require a culpable mental state.[215] The ALI even acknowledges this contradiction, noting that it is "debatable whether the rule of strict liability is satisfactory" in child rape prosecutions, and admitting its proposal is a compromise between the Code's philosophical framework and traditional abhorrence of crimes against children.[216]

The drafters of the M.P.C. advance two additional reasons for crafting their rule as chosen: (1) even if an accused could assert a defense, his conduct, by its nature, is a gross deviation of community standards; and (2) it would be otherwise impossible for a prosecutor to prove beyond a reasonable doubt that an accused was not mistaken.[217] Again, neither of these justifications is satisfactory. As to the former, the remainder of the Code makes it clear that a person who operates under a mistake of fact cannot be criminally liable if the mistake negates the requisite intent of a given element of the offense.[218] The latter justification is completely in conflict with notions of due process. It is constitutionally mandated that in order for a deprivation of an accused's liberty to occur, the prosecution must generally prove beyond a reasonable doubt every element of the offense.[219]

---

213. MODEL PENAL CODE §§ 2.02(1), 2.05 (1985).

214. § 2.05 cmt. 1.

215. MODEL PENAL CODE § 213.1(1) (1980).

216. § 213.6 cmt. 2.

217. *Id.*

218. MODEL PENAL CODE § 2.04(1)(a) cmt. 1 (1985); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 73-74 (1994) (holding that the Constitution mandates a presumption of scienter for every element of an offense that would criminalize otherwise innocent conduct). At issue in *X-Citement Video* was the mental state required as to the age element of the Protection of Children Against Sexual Exploitation Act of 1977 (18 U.S.C. § 2252 (2000)), which made criminal the interstate transportation, shipping, receipt, distribution, or reproduction of pornographic materials depicting children in a sexually lewd and lascivious manner. *Id.* at 65-66. Although a "most natural grammatical reading" of the statute would not apply the mental state "knowingly" to the age element of the offense, the Court read the statute as requiring knowledge of the age of the children depicted in the pornographic materials. *Id.* at 68-74. A reading of the statute as written would have criminalized lawful conduct, namely the First Amendment right to view and produce sexually explicit materials. *Id.* at 73-74.

219. Francis v. Franklin, 471 U.S. 307, 313 (1985) ("The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a

The Code demonstrates the importance of the compound concept of criminal law and the severity of penal liability. The mistake of age provision is inapposite to the Code's otherwise consistent application of this philosophy. Because there may be a person who both honestly and reasonably believes that his sexual partner is of the age of consent, regardless of her true age, it would be more consistent for the Code to allow that person to offer that defense to a jury. The Code allows the defense if the victim's critical age is over ten, but mistake of age can exist regardless of whether the child is above or below the critical age. It is important to note that the mistake would only exonerate an accused if a jury found that a reasonable person would have likewise been mistaken about the child's age. Given the findings by Myers and the social norms enunciated by the Code, it is extremely unlikely that a jury would so find. However, in the instances where they may so find, it is imperative that a morally blameless defendant not be convicted of a serious felony. It is axiomatic that "it is far worse to convict an innocent man than to let a guilty man go free," and it necessarily follows that a morally innocent man should not be deprived of his liberties.[220]

D. An Answer from Above? The Alaska Supreme Court and Mistake Jurisprudence

Of the jurisdictions that permit the mistake of age defense in at least some form, only one has held that such a defense is constitutionally guaranteed to an accused. Only the Alaska Supreme Court has held unconstitutional a statute disallowing the mistake of age defense. A pair of Alaska decisions, *State v. Guest*[221] and *State v. Fremgen*,[222] caused that state to follow and then advance the *Hernandez* principle beyond the limitation of legislative abrogation of a mens rea requirement.

In *Guest*, the court held that a defendant can defend against a charge of statutory rape by showing that he operated under an honest and reasonable mistake of fact as to the victim's age.[223] Noting that "consciousness of wrongdoing is an essential element of penal

reasonable doubt of every fact necessary to constitute the crime with which he is charged." (internal quotations omitted)).

220. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

221. 583 P.2d 836 (Alaska 1978).

222. 914 P.2d 1244 (Alaska 1996).

223. *Guest*, 583 P.2d at 840.

liability,"[224] the court held that it would be a "deprivation of liberty without due process of law to convict a person of a serious crime without the requirement of criminal intent."[225] The court held that such a requirement could only be excepted for public welfare offenses, the *Morissette*-type regulatory offenses that impose small penalties and minimal social stigma.[226] Since a conviction for statutory rape in Alaska carried a potential sentence of twenty years (if the defendant was under nineteen years old) or life imprisonment (if the defendant was nineteen years of age or older), the court held that it "may not appropriately be categorized as a public welfare offense. It is a serious felony."[227] The statute, as it existed before *Guest*, was silent as to a requisite mens rea and, "where the particular statute 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."[228] In an effort to construe the statute as constitutional, the court held it "*necessary* . . . to infer a requirement of criminal intent."[229]

After *Guest*, the Alaska legislature rewrote its child rape statutes, creating an age-dependent statutory rape scheme whereby it considered sexual relations with a person under thirteen years of age to be sexual abuse of a minor in the first degree, but, if an alleged victim was between the ages of thirteen and fifteen, the crime was a lesser offense.[230] Additionally, the legislature amended its mistake of age provision to prohibit the defense for those faced with the first-degree charge, providing that in sexual abuse offenses defined upon a victim's 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 victim was under 13 years of age at the time of the alleged offense*."[231] In *Fremgen*, the Alaska Court of Appeals was asked to determine the constitutionality of this statute and, in light of *Guest*, held that it unconstitutionally violated an accused's due process rights.[232] The Alaska Supreme Court approvingly affirmed the lower court's ruling and dismissed the State's appeal.[233]

---

224. *Id.* at 838.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 839.

229. *Id.* (emphasis added).

230. ALASKA STAT. §§ 11.41.434(a)(1)-.436(a)(1) (Michie 2000).

231. State v. Fremgen, 889 P.2d 1083, 1083-84 (Alaska Ct. App. 1995) (citing former § 11.41.445(b)).

232. *Id.* at 1083, 1085.

233. State v. Fremgen, 914 P.2d 1244, 1245 (Alaska 1996).

The defendant in *Fremgen* was charged with sexual abuse of a minor in the first degree for engaging in a sexual relationship with a girl under thirteen years old.[234] The defendant advanced the defense that he reasonably believed the girl to be over sixteen, and the trial judge, after finding "a substantial basis that [the child] exhibited a sexual and physical maturity which could lead a reasonable person to believe that she was older than her actual age of just under thirteen years," permitted Mr. Fremgen to present as an affirmative defense his honest and reasonable mistake of the child's age.[235] The court of appeals affirmed the trial court's decision to allow the defense.[236] However, while the trial judge limited his ruling to the statute's constitutionality as it applied to Mr. Fremgen, the court of appeals held the statute prima facie unconstitutional.[237] It reasoned that "convicting [the defendant] . . . without allowing him to present the affirmative defense of a reasonable mistake of age would violate his right to due process of law under the Alaska Constitution."[238] In reaching its decision, the court of appeals relied on the *Guest* rule that a criminal statute proscribing activity other than a public welfare offense can only be constitutional if a requisite criminal intent is either enumerated or inferable.[239] Since the mistake of age statute eliminated criminal intent, it could not pass constitutional muster.[240] In a brief opinion dismissing the State's appeal of the lower court's ruling, the Alaska Supreme Court held that "it would be a deprivation of liberty without due process of law to convict a person of a serious crime without the requirement of criminal intent"[241] and that "except for public welfare type of offenses, strict criminal liability without some form of mens rea is violative of Alaska's Constitution."[242]

These Alaska cases held that an accused is entitled to present a defense of mistake or ignorance regardless of the underlying felony offense, and that any statutory preclusion from so doing violates its state constitution. They are instructive on how best to solve the

234. *Fremgen*, 889 P.2d at 1083.

235. *Id.* at 1084.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 1085 ("The clear language of *Guest* is sweeping, and unmistakably requires the state to prove criminal intent for the conviction of a serious crime.").

241. *Fremgen*, 914 P.2d at 1245.

242. *Id.* at 1246. The Alaska Constitution's Due Process Clause contains language nearly identical to its federal analogue. ALASKA CONST. art. 1, § 7 ("No person shall be deprived of life, liberty, or property, without due process of law."); *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .")

seeming conflict between the compound concept and child rape prosecutions. In light of *Morissette*, the right to present a defense cases, and the philosophical framework of the Model Penal Code, child rape should not (and constitutionally must not) be classified as a strict liability offense. Although *Fremgen* carries no precedential weight beyond Alaska's borders, it should be influential because it makes sense as good policy and constitutional theory.[243]

IV. REVIVING THE COMPOUND CONCEPT: PROPOSALS FOR CURRENT AND FUTURE CHILD RAPE PROSECUTIONS

In light of the advances and shortcomings of the Model Penal Code's reforms, the current statutory and jurisprudential landscape of strict liability in child rape prosecutions, and *Fremgen*'s constitutional interpretations, a solution to the problem of forsaking the compound concept in favor of policy considerations can be reached. This Part will provide such a solution by proposing amendments to the Tennessee Code's rape of a child and mistake of fact provisions. The amendments would take into account the Blackstonian "vicious will" requirement, and the policy justifications advanced for strict liability in this context. As noted previously, Tennessee is merely the model with which this Note is working; the proposed solution is not limited to that state.[244]

---

243. Additionally, it is worth noting that many states find broader protections within their constitutions than have been found under the Bill of Rights *See, e.g.*, State v. Crump, 834 S.W.2d 265, 268 (Tenn. 1992) (finding broader protections in Article I, Section 9 of the Tennessee Constitution than the Fifth Amendment to the United States Constitution regarding self-incrimination).

244. An attorney practicing in Tennessee may wish to advance the argument that statutory construction and Tennessee case law require that the State prove beyond a reasonable douht that a defendant accused of committing Rape of a Child act at least recklessly with regard to the victim's age. Although the Mistake of Fact defense has been statutorily eliminated for Rape of a Child and Aggravated Sexual Battery of a Child offenses, the age elements of each offense are not strict liability elements. The Court of Criminal Appeals has consistently held that a person accused of Aggravated Sexual Battery of a Child can only be convicted if he acts recklessly toward the victim's age. *See, e.g.*, State v. Howard, 926 S.W.2d 579 (Tenn. Crim. App. 1996), *overruled on other grounds by* State v. Williams, 977 S.W.2d 101 (Tenn. 1998). In *State v. Howard*, the defendant was convicted of Aggravated Sexual Battery of a Child. *Id.* at 581. Such an offense is defined as the "unlawful sexual contact with a victim by the defendant . . . [when, inter alia] the victim is less than thirteen (13) years of age." TENN. CODE ANN. § 39-13-504(a)(4) (2003). The Court of Criminal Appeals found that the statute in question "neither pr[o]scribes nor 'plainly dispenses with' " the culpable mens rea as to whether the victim is less than thirteen years old. *Howard*, 926 S.W.2d at 587. As such, the Court held that intent, knowledge, or recklessness as to the age of the victim is necessary to sustain a conviction for Aggravated Sexual Battery of a Child. *Id.*

Although the incidents at issue in *Howard* took place prior to the 1995 Amendment, subsequent cases, whose opinions and facts occurred after the Amendment, have upheld the

In crafting a solution that furthers the compound concept of the criminal law and meets due process mandates while also recognizing the social ahhorrence of sex crimes against children, it is important to remember that implementation of a mistake of age defense does not create acceptance of an accused's actions, nor does it trivialize the horrific effects of sexual assaults on victim and society alike. The purpose of allowing a defense is to reaffirm the Anglo-American requirement of a culpable mental state for every material element of an offense.

Howard rule. *See* State v. Salcido, No. M1999-00501-CCA-R3-CD, 2001 WL 227357, at *10 (Tenn. Crim. App. Mar. 8, 2001) (holding that in a prosecution for Aggravated Sexual Battery of a Child, "reckless conduct applie[s] . . . to the element regarding age"); State v. Black, No. 02C01-9803-CR-00081, 1999 WL 280810, at *3 (Tenn. Crim. App. May 7, 1999) ("The *mens rea* required for aggravated sexual battery involving a victim less than 13 years of age has been held to include intentional, knowing, or reckless conduct.").

The only two offenses for which the Mistake of Fact defense is statutorily prohibited are Rape of a Child and Aggravated Sexual Battery of a Child. § 39-11-502. The *Howard* line of cases hold that when one is charged with Aggravated Sexual Battery of a Child, the State must prove that the defendant acted at least recklessly with regard to the victim's age. *Salcido*, 2001 WL 227357, at *10; *Black*, 1999 WL 280810, at *3; *Howard*, 926 S.W.2d at 587. Since Aggravated Sexual Battery of a Child requires scienter for the victim's age regardless of tbe unavailability of the Mistake of Fact defense, it could be argued that a similar mental element is required for one accused of Rape of a Child. Neither statute "plainly dispenses with" the mental state, and the jury instructions for both offenses require that the State prove beyond a reasonable doubt that "the defendant acted either intentionally, knowingly, or recklessly." §§ 39-11-301(h)-(c), 39-13-504(a)(4), -522(a); TENN. PATTERN JURY INSTR. §§ 10.03(3), -.12(3). It follows, therefore, that because the 1995 Amendment did not make Aggravated Sexual Battery of a Child a strict liability offense as to the alleged victim's age, it did not make Rape of a Child a strict liability offense as to the alleged victim's age as well. As such, the argument would go, an accused cannot be convicted unless the State proves beyond any reasonable doubt that he acted at least recklessly as to the victim's age.

A jury instruction alerting the jury of the State's necessity to prove a culpable mens rea as to the age element would accomplish many of the same goals as a pure Mistake of Fact defense instruction. The purpose of the Mistake of Fact defense is obvious: unless the defendant committed the actus reus while exhibiting a culpable mens rea, he can be found guilty of no crime. The Mistake of Fact statute merely codifies this universal tenet of common law. As made clear by the post-Amendment case, *Salcido*, a defendant can only be convicted of Aggravated Sexual Battery of a Child if the State proves beyond a reasonable doubt that he acted at least recklessly as to the victim's age. *Salcido*, 2001 WL 227357, at *10. This is remarkably similar, if not completely identical, to a mistake of fact defense if not explicitly called such a defense.

As Professor LaFave illustrates, using the Mistake of Fact defense is analogous to demonstrating that the prosecution did not meet its burden of proving the defendant's culpable mens rea. LAFAVE, *supra* note 1, § 5.6(a), at 282-83. Under Tennessee Law, perhaps nonsensically, the former is proscribed from a defendant charged with Rape of a Child while the latter is available. TENN. CODE ANN. §§ 39-11-502, -13-522 (2003). In other words, a defendant cannot use the Mistake of Fact defense, but his mistaken belief as to the circumstance element will prevent the State from proving a culpable mens rea. It seems, therefore, that the Tennessee Code proscribes the Mistake of Fact defense for Rape of a Child in name only; the principles of, justifications for, and effects of such a defense, à la the LaFave view, can all be achieved by a jury instruction regarding the State's burden of proving mens rea culpability.

The solution itself is simple enough: allow an accused to present a defense that he engaged in sexual intercourse under the reasonable and honest mistake that his partner was of the age of consent. In other words, states that follow the Model Penal Code's bifurcated critical age model should allow the mistake defense for sex crimes regardless of the victim's age. However, since all but four jurisdictions preclude the use of the mistake of age defense entirely when the victim is under some critical age, it is apparent that a blanket use of the defense is both problematic and undesirable.[245] Instead, the mistake defense should be one that requires both extrinsic evidence and a heightened burden of persuasion.[246]

Giving defendants an opportunity to present a mistake of age defense forces a confrontation with the concerns expressed by the drafters of the M.P.C. regarding community standards and making conviction harder to obtain.[247] Further, if the age element were read, as argued previously, as requiring the subjective recklessness standard, the reasonableness of the mistake would not matter. Rewriting the statute so that the age element required mere negligence would accomplish three things: (1) it would mandate that the mistake of age be *reasonable* such that members of a jury must ask themselves whether, if they were in the same situation, they would mistake the child for being of the age of consent; (2) it would make it easier for a prosecutor to meet his burden of proving that the accused should have known that his partner was below the statutory age; and (3) it keeps the burden of proof on the prosecution without creating an unconstitutional presumption of guilt.[248] Once the prosecution proves that the accused acted at least negligently, however, a "reverse presumption" of guilt is made—that is, the

245. *See supra* Part III.B.

246. *See* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 435-50, 462-69 (1993) (surveying commonwealth countries' availability of the "good faith" defense to strict liability offenses and crafting an American model that would allow a defendant charged with such an offense to prove an honest and reasonable mistake of fact). Professor Levenson argues that a defendant should be allowed to proffer evidence that be operated under a mistake after undertaking reasonable efforts to learn the true facts and was mistaken only by deception. *Id.* at 462-63. In order to prevent meritless defenses and preserve the statutory presumption of intent by the very commission of the proscribed act, she would require the defendant meet a higher burden of proof in advancing his defense. *Id.* at 465-68.

247. MODEL PENAL CODE § 213.6 cmt. 2 (1980).

248. Francis v. Franklin, 471 U.S. 307, 317-18 (1985) (holding unconstitutional a jury instruction creating a rebuttable presumption that shifted the burden of persuasion of intent to the defendant in a murder trial after the prosecution proved that the underlying act was committed).

defendant will be presumed guilty unless he proves a lack of mental culpability.[249]

Such a reverse presumption, however, would not be irrebuttable. The M.P.C. allows a presumption to be rebutted by a preponderance of the evidence. Another modification to a blanket mistake provision would be to raise the burden of persuasion to clear and convincing evidence.[250] A raised burden of proof would require the accused to provide ample extrinsic evidence that his mistake of age was reasonable and would also help offset concerns that a rapidly maturing victim could appear older during trial than at the time of the alleged offense, thereby making an erroneous defense easier to prove.

The last issue to address is the lesser legal wrong rationale. The Tennessee mistake statute provides that when a person mistakenly believes he is committing one crime yet commits another, he can be convicted only of that which he thought he was committing.[251] If an accused presents testimony that he believed his partner was between the ages of thirteen and seventeen, under the mistake provisions he would be guilty of statutory rape and could serve as little as eighty-one days in prison.[252] Given the stark contrast in sentences and the ever-maturing physical appearance of the victim, this could yield a rise in disingenuous but credible mistake of age

249. Levenson, *supra* note 246, at 467 ("The good faith defense is in essence a reverse presumption. Ordinarily, we presume that a defendant who commits a particular act is not guilty unless he does so with a culpable intent. The presumption in strict liability cases is exactly the opposite.").

250. § 213.6(1) ("[I]t is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above tbe critical age."). Under Tennessee law, a jury finding of any reasonable doubt on the issue as to whether the defendant acted through ignorance or mistake of fact requires an acquittal. *See* TENN. CODE ANN. § 39-11-203(d) (2003); *cf.* Levenson, *supra* note 246, at 464-68 (arguing that states may require either clear and convincing evidence or proof beyond a reasonable doubt, but favoring the latter to insure that [o]nly in the extraordinary case could the defendant rebut that presumption [of guilt]"). It is important to note that Professor Levenson's argument is limited to "classic" strict liability offenses. *See id.* at 464 (using the example of speeding). In the child rape context, with such severe penalties, requiring the defendant prove beyond a reasonable doubt an honest and reasonable mistake seems too high a burden to meet. Conversely, the lower standards in both the M.P.C. and Tennessee Code could lead, as noted previously, to disingenuous defenses that would undermine the criminal justice system. Requiring clear and convincing evidence, it follows, raises the burden of proof high enough that it will prevent the success of virtually all meritless mistake defenses, but is not so high as to foreclose many if not all truly honest and reasonable ones.

251. TENN. CODE ANN. § 39-11-502(b) ("Although a person's ignorance or mistake of fact may constitute a defense to the offense charged, the person may be convicted of the offense for which the person would be guilty if the fact were as the person believed."). The Tennessee provision is analogous to the Model Penal Code's Mistake of Fact provision. MODEL PENAL CODE § 2.04(2) (1985).

252. *See supra* note 16.

defenses. If an accused engages in sexual intercourse with a twelve-year-old child, that child may look starkly different as a thirteen-year-old during trial. Presenting a mistake of age defense on the grounds that the accused operated under an honest and reasonable belief that the child was thirteen would enable the accused to effectively reduce his prison sentence by at least nineteen and a half years. This, therefore, presents a converse problem: should an accused who *did* operate under an honest and reasonable mistake of age but thought he was committing statutory rape be sentenced to twenty years in prison? Perhaps a solution to this conundrum would be to amend the rape of a child provision to provide that a person who mistakenly believed that he engaged in sexual intercourse with a child between the ages of thirteen and seventeen when the child was actually less than thirteen is guilty of a lower grade offense, such as a Class B Felony.[253] Such an amendment would treat such a mistake as a mitigating factor, and the higher burden of persuasion articulated above would minimize the instances of disingenuous mistake of age defenses from being effectively employed.[254]

In sum, Tennessee, like Alaska, should allow the mistake of age defense for all criminal offenses. In the context of rape of a child, however, the use of the mistake of age defense should be limited by: (1) changing the burden of proof of the age element to negligence; (2) heightening the defense's burden of proving his mistake to clear and convincing evidence; and (3) providing that an accused who asserts that he honestly and reasonably mistook his partner's age yet thought he was committing statutory rape will be guilty of a Class B Felony if the jury finds such a mistake by clear and convincing evidence. The statutes would then read as follows (modifications italicized):

---

253. Class B Felonies carry, for first-time offenders, a sentence from eight to twelve years. TENN. CODE ANN. § 40-35-112(a)(2). For Class B Felonies, the presumptive sentence is the minimum of the range, and those convicted of such offenses can receive 25 percent jail credit toward early release and would be eligible for parole after serving 30 percent of their sentence. §§ 41-21-236, 40-35-210(c).

254. At first blush, this proposal may seem in conflict with the thesis of this Note. Employing the lesser legal wrong theory in a way inconsistent with both the Tennessee and Model Penal Code is rather a means of harmonizing policy considerations with a defendant's right to present a defense. The goal of this Note is to allow the Mistake of Age defense to those defendants that honestly and reasonably operated under such a mistake; it is not to provide a defendant with a plausible, yet disingenuous defense. Although a conviction for Statutory Rape carries, after jail credit and automatic parole, a sentence of less than three months, a conviction for a Class B Felony would carry, after jail credits and discretionary parole, a sentence of 646 days, or approximately one year and nine and one-half months. §§ 41-21-236, 40-35-210(c). Using a mistake of Statutory Rape, therefore, seems an adequate compromise between the competing interests of society and a defendant.

Tenn. Code Ann. § 39-13-522:

(a) Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age *and the defendant negligently disregarded the victim's age.*

(b) Rape of a child is a Class A felony.

(c) ***

(d) *If the defendant would otherwise be guilty under Subsection (a) but asserts a Mistake of Age defense pursuant to Section 39-11-502(c)(2), he shall be guilty of a Class B felony.*

Tenn. Code Ann. § 39-11-502:

(a) Except in prosecutions for violations of §§ 39-13-504(a)(4) and 39-13-522, ignorance or mistake of fact is a defense to prosecution if such ignorance or mistake negates the culpable mental state of the charged offense. In prosecutions for violations of §§ 39-13-504(a)(4) and 39-13-522, ignorance or mistake of fact is a defense to prosecution pursuant to Subsection (c) of this Section.

(b) Although a person's ignorance or mistake of fact may constitute a defense to the offense charged, the person may be convicted of the offense for which the person would be guilty if the facts were as the person believed.

(c) *Mistake of fact in violations of Aggravated Sexual Battery of a Child and Rape of a Child.*

(1) *In prosecutions for violations of §§ 39-13-504(a)(4) and 39-13-522, ignorance or mistake of fact regarding a victim's age is a defense to prosecution if the mistake was both honest and reasonable that the victim was of the age of consent.*

(2) *In prosecutions for violations of § 39-13-522, if the defendant engaged in the proscribed conduct under the honest and reasonable mistake that the victim was between the ages of thirteen (13) and seventeen (17), he will be punished according to § 39-13-522(d).*

(3) *A defendant must prove his honest and reasonable mistake of age under this Subsection by clear and convincing evidence.*

Similarly, the Model Penal Code Section 213.6 may be revised as follows:

> Whenever in [an enumerated sexual offense] the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age*; it is a defense for the actor to prove by clear and convincing evidence that he honestly and reasonably believed the child to be older than a critical age other than 10.* When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the

evidence that he reasonably believed the child to be above the critical age.

Such modifications would limit punishment to those who committed the actus reus with the requisite mental culpability while preserving the policy of punishing those who harm children. The low burden of proving the accused's negligence in ascertaining the child's age combined with the higher burden of persuasion of the honest and reasonable mistake will prove effective in exculpating only those defendants who engaged in sexual intercourse with one of Myers' "very few" sexually awakened children, and also honestly believed his partner was old enough to consent.[255]

Further, the mere assertion of the defense cannot lead to exculpation; the trier of fact must conclude that the accused's mistake was honest and that a reasonable person would have operated under the same honest mistake. Members of a jury, under the proposed scheme, would agree (figuratively) that they, too, would have taken the accused's paramour for a consenting adult in only the rarest of situations. Put another way, the policies advanced in favor of strict liability in child rape prosecutions can be effectuated simply by asking the trier of fact whether an accused's mistake of age was both honest and reasonable, because, quite frankly, such mistakes almost never will be. This pragmatic concession notwithstanding, the fact that the defense is available is important for the maintenance of both a defendant's rights and the Anglo-American "compound concept" of crime. A defendant is only likely to successfully assert a mistake of age defense in the most extreme circumstances, but it is in those circumstances that a mentally blameless defendant would, and should be, exonerated.

V. CONCLUSION

The requirement of a finding of a culpable mens rea concurrent with every element of a criminal offense is a bedrock foundational principle of Anglo-American criminal law. As Justice Jackson noted over a half-century ago, the "vicious will" requirement "is no provincial or transient notion . . . [but] 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."[256] In the context of child rape prosecutions, this axiom must be recognized and adhered to in order to preserve an

255. Myers, *supra* note 7, at 132.

256. Morissette v. United States, 342 U.S. 246, 250 (1952).

accused's due process rights. Embedded in law is a notion that deprivations of liberty are only forced upon those who are criminally liable for that which they are accused, and that such people are only those who were mentally as well as physically culpable for their actions. The Model Penal Code and *People v. Hernandez* began the "revolution" by recognizing the compound concept in child rape prosecutions, but the return of the vicious will requirement will not be complete until strict liability is no longer imposed for this offense. However, a blanket, constitutionally mandated mistake of age defense like the one required in *Fremgen* is problematic insofar as it ignores society's need to protect its children and prevent disingenuous exculpatory defenses. The statutory amendments proposed in this Note accomplish the dual task of allowing those mentally blameless defendants to advance an exculpatory defense while still promoting community and policy concerns.

Just as society would not tolerate sentencing an elderly woman who inadvertently takes another's coat to twenty years in prison, it should equally abhor doing the same to a man who engages in sexual intercourse with a partner he honestly and reasonably mistakenly believes is a consenting adult. Regardless of the underlying offense, the compound concept of criminal law is neither a provincial nor transient notion.

Jarrod Forster Reich[*]

---

[*] Recipient of the 2004 Myron Penn Laughlin Note Award. This Note is dedicated to Laura Dykes, Deputy Puhlic Defender for Metropolitan Davidson County, Tennessee, who taught me that liberty does not exist unless the rights of those accused of the most heinous crimes are defended and preserved. Her guidance and wisdom have furthered my legal and personal education in ways in which words cannot do justice; I am grateful to have had such an outstanding supervisor, teacher, and colleague, and am honored to have her name appear in the VANDERBILT LAW REVIEW alongside my own. A general thanks is due to the VANDERBILT LAW REVIEW Senior Board and Notes Department for believing that intellectual discourse cannot be advanced unless seemingly discomforting topics are discussed and explored, and thanks in particular to Mark Reeves, Robert Stone, and Jonathan Chally for their hard work with the text of this Note and Virginia Butler and her team of cite-checkers for their work "below the line." The thoughtful comments, critiques, and suggestions of Professors Donald Hall and Nancy King of the Vanderbilt University Law School, David Raybin, and Dr. Robert Wilson have proven invaluable. Lastly, but most importantly, I am forever indebted to my family—DeVette LoVerde and Fran, Terry, and Danielle Reich—for their never-ending inspiration, love, and support.