No. _____

In The
Supreme Court of the United States

MARK ALEXANDER FLEMING,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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September 2014

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QUESTION PRESENTED

Whether the State of Texas' "statutory rape" provision (Section 22.021 of the Texas Penal Code) is unconstitutional under the Due Process Clause of the Fourteenth Amendment: 1) due to its failure to require the State to prove for conviction that Petitioner had a culpable mental state ("mens rea") relating to his sexual partner's age; or 2) due to its failure to permit Petitioner to present an affirmative defense to conviction based on a subjectively and objectively reasonable belief that his sexual partner was of legal age.

PARTIES TO THE PROCEEDING

No parties other than those listed in the caption (Petitioner Mark Alexander Fleming and Respondent State of Texas) have been parties to the proceeding in the court whose judgment is sought to be reviewed.

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The Judgment and Opinion of the Court of Criminal Appeals of Texas from which review is sought, *Fleming v. State*, No. PD-125-12, 2014 WL 2895889 (Tex.Crim.App. June 18, 2014), is not yet published, but is reprinted in the Appendix at 1-14 (App. 1-14). The Judgment and Opinion of the Second District Court of Appeals of Texas, which affirmed the Trial Court's Judgment Overruling Petitioner's Constitutional Challenge, is published, *Fleming v. State*, 376 S.W.3d 854 (Tex.App.-Ft. Worth 2012), and is reprinted in the Appendix at App. 96-112.

JURISDICTION

The Judgment and Opinion of the Court of Criminal Appeals of Texas from which review is sought was entered on June 18, 2014, and in accordance with Rule 13.1, this Petition has been timely filed. Jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATUTE INVOLVED

The Texas statute challenged on this petition and under which Petitioner was convicted, Section 22.021(a)(1)(B)(iii) and (2)(B) of the Texas Penal Code, provides in relevant part that:

"a) A person commits an offense:

1) if the person:

(B) intentionally or knowingly:

(iii) causes the sexual organ of a child to contact . . . [the] sexual organ of another person, including the actor; [and]

2) if:

(B) the victim is younger than 14 years of age[.]"

Section 22.021(e) further provides that the foregoing offense constitutes a First Degree felony, which is punishable under Section 12.32 "by imprisonment . . . for life or any term of not more than 99 years or less than 5 years." *Ibid*.

STATEMENT OF THE CASE

In April of 2007, Petitioner Mark Alexander Fleming (hereinafter "Petitioner"), who was 24 years old at the time,[1] received a "text" message on his

[1] Clerk's Record, 9. Hereinafter, references to "CR" are to the "Clerk's Record", which will be followed by a specific page

(Continued on following page)

telephone, from a female, saying "hi," and asking him what his name was and how old he was.[2] The Petitioner responded by "text" message asking the person how she acquired his telephone number, and the female replied that she had obtained his number from a friend of hers at a bar.[3] When Petitioner asked the female her age, she told him she was 22 years old.[4] Thereafter, the female continued to correspond with Petitioner, and after an interval of a week or two, Petitioner and the female agreed to meet face-to-face for a date.[5]

On their first date, Petitioner and the female with whom he had been corresponding by electronic text, K.M., met at a shopping mall in Denton, Texas.[6] At that time, K.M. explained to Petitioner that her mother had dropped her off at the mall because her own motor vehicle was "in the shop."[7] On this first date, which occurred on a weekend, Petitioner and K.M. went to a movie and thereafter attended the races at a "drag strip" operated near Sanger, Texas.[8]

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number within the Clerk's Record; the Reporter's Record will be referred to as "RR", followed by a volume designation, *e.g.*, "IV", and page number, *e.g.*, "3."

[2] RR II, 12.

[3] *Ibid.*

[4] RR II, 13.

[5] RR II, 13.

[6] RR II, 14.

[7] RR II, 14.

[8] RR II, 15.

At around "12:00" (midnight) Petitioner took K.M. to her home near Justin, Texas; and no sexual relations occurred between Petitioner and K.M. on this first date.[9] When dropping K.M. off at her home, Petitioner asked her if she lived with anyone, and K.M. replied that she lived with her mother and step-father because they had "lost their house."[10]

Two weeks after their first date, Petitioner and K.M. went out on their second date, and went to dinner and a movie.[11] At this time Petitioner was temporarily living at a Denton motel, and at the end of the night he asked K.M. whether she wanted to go home or if she wanted to go with him to his motel.[12] K.M. replied that she wanted to go with Petitioner to his motel, but informed Petitioner that she was not ready at that time to have sexual relations with him.[13] The Petitioner respected K.M.'s wishes in that regard, and the two of them then went to Petitioner's motel.[14]

After arriving at Petitioner's motel room, Petitioner, who was expected at work early the next morning, went to bed not long afterwards.[15] Early the

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[9] RR II, 17.

[10] RR II, 15-16.

[11] RR II, 17.

[12] RR II, 18.

[13] *Ibid.*

[14] *Ibid*.

[15] RR II, 19.

next morning, Petitioner was awakened by K.M. "messing" with him in a manner that made him think she was interested in having sexual relations with him.[16] The Petitioner at this point asked K.M. "if she was sure" about having sex with him; she replied that she was,[17] and the two then had sexual relations.[18]

At the time that Petitioner had sexual relations with K.M. he reasonably believed, for a variety of reasons, that she was over 17 years of age.[19] First, Petitioner relied upon K.M.'s physical appearance and K.M.'s own statement to him that she was 22 years old.[20] The Petitioner had also spoken to a friend of K.M.'s, a young woman named "Britany," who had also informed Petitioner that K.M. was 22 years old.[21] Additionally, after receiving the first text message from K.M., Petitioner had independently gone "online," using the internet to determine whether K.M. had a webpage on either "Facebook" or "Myspace," two popular social networking sites available on the internet.[22] There, Petitioner located a webpage belonging to K.M., which included several photographs of K.M., and which also included information

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[16] RR II, 19.

[17] *Ibid*.

[18] RR II, 21.

[19] RR II, 19.

[20] RR II, 20.

[21] *Ibid*.

[22] RR II, 25.

presumably provided by K.M. stating that she was over 17 years of age.[23] Other information posted on K.M.'s Myspace page corroborated information K.M. had personally given Petitioner about herself, such as the fact that she was a college student seeking a criminal justice degree at the University of North Texas.[24]

In the late Spring or early Summer of 2007, possibly in April or May, Petitioner attended a cookout in Tioga, Texas, hosted by his close friend Ryan Fowler, and Fowler's wife, Victoria "Tori" Wells.[25] At this cookout Petitioner was asked by Fowler and Wells if he was seeing anyone, and Petitioner answered that he was indeed seeing a girl. When asked for further details about her, Petitioner stated, among other things, that the girl he was seeing was 22 years old.[26] Later in the day, while still at the cookout, Petitioner received a cell phone call from K.M.[27] After conversing with K.M. on the telephone for some period of time, Wells and Fowler then took turns speaking with K.M. on the phone.[28] Tori Wells, who spoke with K.M. before Fowler, invited K.M. to join them at the cookout.[29] K.M. declined, explaining again

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[23] RR II, 25-28.

[24] RR II, 28; Defendant's Trial Exhibit 1; RR II, 22-23.

[25] RR II, 40, 38, 154-156.

[26] RR II, 22.

[27] RR II, 24, 48, 157.

[28] RR II, 25, 48.

[29] RR II, 40.

that her motor vehicle was "in the shop."[30] Wells then suggested that she, her husband Fowler, K.M. and Petitioner, go on a double-date to a bar sometime.[31] K.M. replied that she was agreeable to that suggestion, and "most definitely" left Wells with the impression that she, K.M., was over 21 years old.[32]

When Ryan Fowler spoke with K.M. after Wells, he too suggested that she and Petitioner go on a double-date to a bar with him and Wells.[33] Fowler directly asked K.M. whether she was old enough to drink, and K.M. answered that she was 21 years old.[34] Fowler also understood at this time that K.M. was a college student at the University of North Texas, although he later became uncertain whether he had learned this fact from K.M. herself, or from Petitioner.[35]

Four or five months after having the aforementioned cell phone conversation with K.M., Wells learned for the first time, near the time of Petitioner's arrest in this case in November, 2007, that there was some question about K.M.'s true age.[36] Like the Petitioner before her, Wells went onto the internet to

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[30] *Ibid*.

[31] RR II, 41.

[32] *Ibid*; RR II, 158-159.

[33] RR II, 48-49.

[34] RR II, 49-50.

[35] RR II, 50.

[36] RR II, 160-161.

determine whether K.M. had a personal webpage on the Myspace social networking system; and at that time Wells discovered that K.M. did have such a webpage.[37] As when Petitioner had accessed K.M.'s Myspace page, when Wells discovered K.M.'s webpage in November of 2007, it stated, among other things, that K.M. was over 17 years of age, that she attended the University of North Texas, and that she was seeking a degree in criminal justice.[38] Wells further testified that, as a person personally familiar with the Myspace system herself, she knew that to post such personal information on a Myspace profile a person would have to know the password of the person to whom the webpage belonged.[39]

Following Petitioner's arrest on November 29, 2007, Petitioner was interviewed by Virginia Nichols, a Detective with the City of Denton Police Department.[40] During this interview, which was recorded on videotape,[41] Petitioner was cooperative[42] and candidly admitted to having sexual relations with K.M. The Petitioner, however, denied having had knowledge that K.M. was younger than 17 years old at the time of engaging in sexual relations with her.[43]

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[37] RR II, 161.

[38] RR II, 162-164; Defendant's Trial Exhibits 1 and 4.

[39] RR II, 164-166.

[40] RR II, 122, 132.

[41] RR II, 137-138; Defendant's Trial Exhibit 5 (video interview).

[42] RR II, 133.

[43] Defendant's Trial Exhibit 5 (video interview).

The Petitioner during this interview asked Detective Nichols how old K.M. was, and Nichols informed Petitioner (erroneously) that K.M. was 15 years old.[44] When asked by Detective Nichols whether anything had ever occurred that might have given him grounds for suspecting that K.M. was not being truthful, Petitioner recollected that late one night during his relationship with K.M., while he and K.M. were at Lake Ray Roberts near Sanger, Texas, a law enforcement officer had approached them for being in a prohibited area after hours.[45] As Petitioner testified at the pre-trial evidentiary hearing on his motion to quash, while being detained by a police officer on that occasion, the officer attempted to run a criminal history or background check on both Petitioner and K.M. While Petitioner's background check came back clear, the officer was unable to perform a background check on K.M. She claimed not to have a driver's license in her possession, and informed the officer that she was born in 1988.[46] After multiple, unsuccessful attempts to locate K.M. in the police computer data system, the officer eventually released Petitioner and K.M. with only a warning for being at the marina during prohibited hours, and advised them "to get a motel" room.[47]

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[44] *Ibid*.

[45] *Ibid.*

[46] RR II, 29-31.

[47] RR II, 31.

For her part, K.M. testified that she did not remember being stopped by the police while with Petitioner at Lake Ray Roberts.[48] K.M. also denied that she had ever told Petitioner that she was over 17 years of age,[49] or that she was "19, 20, 21 [or] 22,"[50] and denied that she had placed the misleading information about her age and college student status on her Myspace webpage.[51] K.M.'s explanation for the appearance of that misleading information on her Myspace webpage was that someone must have "hacked" into her Myspace account and placed that information there.[52] In this connection, K.M. further denied that she had ever noticed that the misleading information was on her webpage during the ten (10) months between April 2007 and January 2008,[53] and even denied that she had noticed the misleading information on her webpage when she deleted her Myspace account several months after Petitioner's arrest in November, 2007.[54] On direct examination by the State, however, K.M. admitted that, at the time she and Petitioner were having sexual relations,

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[48] RR II, 78.

[49] RR II, 82-83.

[50] RR II, 79.

[51] RR II, 84.

[52] *Ibid*.

[53] RR II, 84-85; 87.

[54] RR II, 94-95.

she did not know whether Petitioner knew she was "underage."[55]

On March 27, 2008, Petitioner was indicted on four counts of Aggravated Sexual Assault of a Child, with each count a First Degree felony offense in violation of § 22.021(a)(1)(B)(iii) and (2)(B) of the Texas Penal Code (hereinafter "Section 22.021").[56] The State's indictment in relevant part alleged that on four occasions Petitioner:

> . . . did then and there intentionally and knowingly cause the sexual organ of said [K.M.], a child younger than 14 years of age who was not the spouse of said defendant, to contact the sexual organ of the defendant.[57]

On June 23, 2008, Petitioner filed a motion to quash the indictment advancing two principal grounds for relief under the Due Process Clause of the Fourteenth Amendment.[58] First, Petitioner contended that the statutory offense for which he had been indicted, Section 22.021, was unconstitutional due to its failure to require the State to prove that he had a culpable mental state ("mens rea") relating to the alleged victim's age as an element of the offense.[59] Specifically, while the indictment alleged as an aggravating

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[55] RR II, 79.

[56] App. 1-2; CR, 11-12.

[57] CR, 11-12.

[58] App. 2; CR, 18.

[59] CR, 19.

element that the victim of Petitioner's offense "was younger than 14 years of age" pursuant to Section 22.021(a)(2)(B), Petitioner's first contention was confined to an argument that the statute was deficient due to its failure to require proof that he had knowledge that his victim "was younger than 17 years of age," as provided for conviction of the underlying substantive, non-aggravated offense under Sections 22.021(b)(1) and 22.011(c).[60] Secondly, and in the alternative, Petitioner contended that Section 22.021 was unconstitutional in that it did not recognize an affirmative defense based on Petitioner's reasonable belief that the alleged victim at the time was 17 years of age or older.[61]

On July 18, 2008, a non-evidentiary hearing was conducted in the Trial Court on Petitioner's motion to quash. At the conclusion of this hearing the Trial Court entered a written order denying Petitioner's motion to quash.[62] On June 15, 2009, the Trial Court granted Petitioner leave to present testimony and evidence in support of his earlier motion.[63] At the conclusion of that presentation, the Court once again denied

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[60] In other words, and in contrast to the appellant in *Massey v. State*, 933 S.W.2d 582, 585 (Tex.App.-Houston [1st Dist.] 1996), Petitioner did not (and does not) contend that *mens rea* or proof of knowledge is required when a victim's age is relevant only to the presence of an aggravating or enhancement element of an offense.

[61] App. 2; CR, 19.

[62] App. 2; CR, 103.

[63] RR II, 6-7.

Petitioner's motion.[64] Following the Trial Court's second adverse ruling, Petitioner entered a plea of "no contest" to the indictment and was sentenced to 10 years confinement, with his confinement suspended for a 10 year period of community supervision, in accordance with a plea bargain agreement with the State of Texas.[65] Under the terms of the plea bargain agreement Petitioner was permitted to preserve his right to appellate review of the Trial Court's denial of the constitutional challenges contained in his motion to quash the indictment.[66]

On August 12, 2012, the intermediate Second District Court of Appeals of Texas affirmed the Trial Court's denial of Petitioner's motion to quash the indictment and overruled Petitioner's constitutional challenges.[67] On discretionary review, a sharply divided Texas Court of Criminal Appeals rendered an opinion, accompanied by a lengthy dissent,[68] that likewise affirmed the Trial Court's decision to overrule Petitioner's constitutional challenges under the Due Process Clause of the Fourteenth Amendment.[69]

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[64] App. 2; RR II, 51.

[65] App. 2; RR III, 5-6, 10-16; CR, 162.

[66] App. 5; RR III, 5-6, 10-16; CR, 162.

[67] App. 96, 112; *Fleming v. State*, 376 S.W.3d 854, 862 (Tex.App.-Ft. Worth 2012).

[68] App. 29 (Keller, P.J., joined by Price and Johnson, JJ., dissenting).

[69] App. 1 (Opinion for the Court per Meyers, J., joined by Keasler, Hervey, Cochran, and Alcala, JJ.); App. 14 (Cochran, J., concurring); App. 15 (Alcala, J., concurring).

Under Texas law, a Trial Court's decision to deny a defendant's motion to quash an indictment constitutes a question of law subject to *de novo* review on appeal.[70] Whether a defendant is entitled to present an "affirmative defense" is confined to the question of whether admissible evidence would support the affirmative defense "regardless of whether that evidence is strong, weak, unimpeached or contradicted."[71]

REASONS FOR GRANTING THE WRIT

I. The Question Presented Constitutes an Important, Recurring Issue of Fundamental Due Process that Has Not Been, But Should be, Decided by this Court.

In the present case the Texas Court of Criminal Appeals has ruled that notwithstanding the Due Process Clause of the Fourteenth Amendment a person may be convicted of a First Degree felony offense under State law, carrying a potential punishment of life in confinement, without proof that the person knew or should have known that he engaged in conduct prohibited by law. The question presented by Petitioner is a constitutional one of first impression

[70] *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex.Crim.App. 2007).

[71] *Booth v. State*, 679 S.W.2d 498, 500 (Tex.Crim.App. 1984).

before the U.S. Supreme Court,[72] and involves, among other sources, English and American common law which preceded enactment of the Due Process Clause of the Fourteenth Amendment.

The offense of statutory rape can be traced back as far as the Code of Hammurabi (circa 2000 B.C.) and was first codified in English law during the early Thirteenth Century.[73] It naturally became a statutory or common law offense in early America, with the State of Virginia, for one, having enacted such a statute in 1789.[74] Similar to other criminal statutes generally, few if any American statutes, from colonial times to the present, have provided by their literal terms any guidance concerning whether a person may be convicted of the offense of "statutory rape" without proof, or *only* upon proof, that the defendant "knew" his sexual partner was under "legal age."

The confused status of current American law on the question of "strict liability" in this context derives from an English Court of Criminal Appeal decision, *Regina v. Prince*, 13 Cox Cr. Cas. 138 (Eng.Crim.App.

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[72] *Fleming v. State*, 341 S.W.3d 415 (Tex.Crim.App. 2011) (per curiam) (observing Petitioner's federal due process claims involve "an issue never decided by the Supreme Court of the United States").

[73] Eidson, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. Rev. 757, 762 n. 34 (1980).

[74] 13 Hening, *Laws of Virginia*, ch. XI, p. 10 (1823) (enacted Nov. 18, 1789) (prohibiting carnal knowledge with a female "under the age of ten years").

1876). In 1828 the English Parliament enacted the first "Offences Against the Person Act,"[75] and Article XVII of the Act provided in relevant part that:

> [I]f any Person shall unlawfully and carnally know and abuse any Girl under the age of Ten Years, every such Offender shall be guilty of Felony . . . ; and if any Person shall unlawfully and carnally know and abuse any Girl, being above the age of Ten Years and under the Age of Twelve years, every such Person shall be guilty of a Misdemeanor. . . .

Under a separate article that followed thereafter, Article XX of the "Offences Against the Person Act" further provided that:

> [I]f any Person shall unlawfully take, or cause to be taken, an unmarried Girl, being under the Age of Sixteen Years, out of the Possession and against the Will of her Father or Mother . . . every such Offender shall be guilty of a Misdemeanor. . . .

The foregoing three offenses were later redesignated without substantive change in the "Offences Against Persons Act of 1861" as Section 50 (carnal knowledge with girl under ten years of age); Section 51 (carnal knowledge with girl over ten and under twelve years of age); and Section 55 (removal of

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[75] 9 Geo. 4, ch. 31.

girl under sixteen years of age from possession of parent).[76]

Almost fifty years after enactment of the first "Offences Against the Person Act" the English Court of Criminal Appeal in *Regina v. Prince*, 13 Cox Cr. Cas. 138 (Eng.Crim.App. 1876) considered the case of a criminal defendant who had been convicted of unlawfully removing an unmarried girl from possession of her father in violation of Section 55 (former Article XX). In the trial court the jury had specifically found that the defendant when committing the offense held a "reasonable belief" that the female in question was over the age of sixteen.[77] The central issue on appeal was whether, as a matter of statutory construction, the statute that prohibited removal of an unmarried girl from possession of her father required a finding that the defendant had knowledge or *mens rea* that the girl was "under the age of sixteen."[78]

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[76] *See*, 42 & 25 Vict., ch. 100.

[77] The Reporter of Decisions states that "the jury found upon reasonable evidence, that before the defendant took her away she had told him that she was eighteen, and that the defendant *bona fide* believed that statement and that such belief was reasonable." *Regina v. Prince*, *supra*, 13 Cox Cr. Cas. at 138.

[78] Because the proof at trial established that the girl was nearly fourteen years of age at the time she was taken, the defendant could not have been convicted under either Section 50 or Section 51 for consensual carnal knowledge with the victim, even if the proof had established that fact. Cross, *Centenary Reflections on Prince's Case*, 91 Law Q. Rev. 540, 541 (1975).

In the Summer of 1876 the sixteen-member English Court of Criminal Appeal ruled to affirm the defendant's conviction in *Regina v. Prince*, but the legal rationale for its decision was somewhat complicated by the fact that two majority opinions were issued. One majority opinion per Judge Blackburn was joined by nine of his Brethren;[79] a second majority opinion per Baron Bramwell was joined by seven of his Brethren;[80] Judge Denman issued an opinion concurring with both majority opinions;[81] and Judge Brett issued an opinion dissenting from the Court's decision to affirm Prince's conviction.[82]

Judge Blackburn's majority opinion in *Regina v. Prince* concluded that the object of the Legislature in enacting the statute was to protect the "legal right" of a parent to possession of his or her offspring, and that because the defendant had knowledge that he was acting "without authority of the master, or mistress, or guardian" of the girl, no additional *mens rea* was required by the statute concerning the girl's actual

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[79] *Regina v. Prince*, *supra*, 13 Cox Cr. Cas. at 143. The other members of the Court who joined Judge Blackburn's opinion were Cockburn, Mellor, Lush, Denman, Pollock, Quain, Archibald, Field and Lindley.

[80] *Id.*, 13 Cox Cr. Cas. at 140. The other members of the Court who joined Baron Bramwell's opinion were Kelly, Cleasby, Grove, Pollock, Quain, Amphlett, and Denman. As indicated, Denman, Pollock and Quain joined both majority opinions.

[81] *Id.*, 13 Cox Cr. Cas. at 156.

[82] *Id.*, 13 Cox Cr. Cas. at 145.

age.[83] In a similar vein, Baron Bramwell compared Section 55 with its companion provisions, Sections 50 and 51, and ruled that because the "act forbidden" under Section 55, *i.e.*, the taking of a girl from possession of her parent, was a "wrong in itself," albeit a "moral wrong," the intent to do that wrong could properly be "transferred" to satisfy the *mens rea* element concerning the victims age.[84] In support of this conclusion, Bramwell noted that under Section 51 (carnal knowledge with girl over ten and under twelve years of age), "[t]he act done with a *mens rea* is unlawfully and carnally knowing the girl," and that, as "[i]n both cases the act is intrinsically wrong," the *mens rea* requirement was satisfied under Sections 50, 51 and 55, regardless of the defendant's knowledge of the girl's age.[85] This rationale, according to Baron Bramwell, gave "full scope to the doctrine of the *mens rea*."[86] Although not mentioned by Baron Bramwell in his opinion, during this period of history (Nineteenth-Century Victorian England), a man's "carnal knowledge" with a woman who was not his own spouse constituted "fornication," and this act was not only "morally wrong," but was itself an ecclesiastical offense under English canon law.[87]

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[83] *Regina v. Prince*, *supra*, 13 Cox Cr. Cas. at 145.

[84] *Id.*, 13 Cox Cr. Cas. at 141.

[85] *Id.*, 13 Cox Cr. Cas. at 142.

[86] *Ibid.*

[87] Green, *Fornication: Common Law Legacy and American Sexual Privacy*, 17 Anglo-Am. L. Rev. 226, 226-227 (1988).

In his separate opinion concurring in both majority opinions, Judge Denman essentially adopted the reasoning of Baron Bramwell and stated in part as follows:

> The [defendant's] belief that [the girl] was eighteen would be no justification to the defendant for taking her out of [her father's] possession and against his will. By taking her, even with her own consent, he must at least have been guilty of aiding and abetting her in doing an unlawful act – *viz*., in escaping against the will of her natural guardian from his lawful charge and care.[88]

Finally, in his lengthy dissent to the two majority opinions, Judge Brett argued that *mens rea* was required not merely in relation to some "moral wrong," but in relation to an act that was itself a "criminal offense." Summarizing this view Judge Brett stated in closing:

> I come to the conclusion that a mistake of facts on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse.[89]

While the fragmented nature of the various opinions in *Regina v. Prince* rendered the Court's decision something less than a model of clarity, the Court's

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[88] *Regina v. Prince*, *supra*, 13 Cox Cr. Cas. at 157.

[89] *Id.*, 13 Cox Cr. Cas. at 148.

subsequent decision in *Queen v. Tolson*, 23 Q.B. 168 (1889) resolved any ambiguities. In *Tolson*, the Court encountered an appeal from a conviction for bigamy wherein a female defendant, as found by the jury, had remarried after being informed by reliable sources that her first husband had perished at sea. The question on appeal was whether the jury's finding that the defendant reasonably believed her first husband to have been dead, at the time she remarried, foreclosed a finding of guilt for bigamy due to the absence of *mens rea* that her first husband was still alive. In four separate opinions by Judges Wills, Cave, Hawkins and Coleridge, the case of *Regina v. Prince* was distinguished by a majority of the Court, and Tolson's conviction was quashed. Explaining the true import of the Court's *mens rea* ruling in *Regina v. Prince*, *supra*, and his vote to quash Tolson's conviction, Judge Wills observed:

> [G]uilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute – fornication or seduction, for instance – which nevertheless no one would hesitate to call wrong; and the intention to do an act wrong in this sense

> at the least must as a general rule exist before the act done can be considered a crime.[90]

In his opinion in support of quashing Tolson's conviction, Judge Cave likewise found *Regina v. Prince* distinguishable. In his view the legal dispute between the dissenting opinion and the majority opinions in *Prince* boiled down to whether the defense of "honest and reasonable mistake" required the defendant to show that his mistake rendered his act "not only not criminal, but also not immoral."[91] Concluding that the aforementioned legal dispute between the judges in *Prince* was "immaterial" in the case then before the Court, Judge Cave voted to quash Tolson's conviction because the jury's finding of a "reasonable belief" rendered Tolson's act of remarrying "not only not criminal, but also not immoral."[92]

In support of his opinion that Ms. Tolson should have been acquitted, Judge Hawkins, for his part, was direct and to the point:

> The ground upon which I have arrived at this conclusion is simply this; that, having contracted her second marriage under an honest and reasonable belief in the existence in a state of things which, if true, would have afforded her a complete justification, both

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[90] *Queen v. Tolson*, *supra*, 23 Q.B. at 172.

[91] *Id.*, 23 Q.B. at 181-182.

[92] *Id.*, 23 Q.B. at 182.

> legally and morally, there is an absence of that *mens rea* which is an essential element in every charge of felony.[93]

Finally, Chief Judge Coleridge found himself "unable to answer the view of the proviso which ha[d] been put forth by [his] brother Cave," and therefore came to the conclusion "with some reluctance . . . that the reasoning of the judgments of the majority [wa]s in this case correct."[94]

In 1877, Joel Prentice Bishop published the 6th edition of his widely respected work entitled *Commentaries on the Criminal Law*. Among other things, Bishop in this edition of his treatise informed his readers that:

> Rape is generally treated of, in England, as a statutory offense. . . . In our own country [America], it is, at least, an offense at the common law in the sense that English statutes were accepted by the settlers as of common law force.[95]

In the second edition of his work *Commentaries on the Law of Statutory Crimes*, which he published in 1883 as a companion to his previous *Commentaries on Criminal Law*, Bishop was able, with support from

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[93] *Queen v. Tolson*, *supra*, 23 Q.B. at 193.

[94] *Id*., 23 Q.B. at 202.

[95] 2 Bishop, *Commentaries on the Criminal Law*, 614, § 1108 (Boston, 6th ed. 1877).

decisional law of two American States,[96] to describe the American "common law" derived from English "statutory" law as follows:

> While, within principles explained in another connection, no one is ever punishable for any act in violation of law whereto, without his fault or carelessness, he was impelled by an innocent mistake of facts, this rule does not free a man from guilt of this offense [statutory rape] by reason of his believing, on whatever evidence, that the girl is of statutory age. His intent to violate the laws of morality and the good order of society, though with the consent of the girl, and though in the case where he supposes he shall escape punishment, satisfies the demands of the law, and he must take the consequences.[97]

The two decisions cited by Bishop in support of the foregoing statement of law, *Lawrence v. Commonwealth*, 30 Gratt. 845, 1878 WL 5901 (Va. 1878), and *State v. Newton*, 44 Iowa 45, 1876 WL 664 (Iowa 1876), both reveal that, at the time the Fourteenth Amendment was ratified,[98] proof of a defendant's

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[96] Citing *Lawrence v. Commonwealth*, 30 Gratt. 845, 1878 WL 5901 (Va. 1878); and *State v. Newton*, 44 Iowa 45, 1876 WL 664 (Iowa 1876).

[97] Bishop, *Commentaries on the Law of Statutory Crimes*, 361, § 490 (2nd ed., 1883).

[98] Ratification of the Fourteenth Amendment was certified by Secretary of State Seward on July 28, 1868. *See*, 15 Stat. 708-711 (Proclamation No. 13).

"knowledge" that he was, in any event, violating other written "laws" (whether "criminal" or "moral"), would allow for his conviction of statutory rape notwithstanding his lack of knowledge that his minor consort was under a prescribed legal age. The same is true with regard to Texas decisional law, insofar as it would reveal the status of the *mens rea* requirement in the Nineteenth Century.

The earliest Texas decision to consider whether *mens rea* was required in this context is *Edens v. State*, 43 S.W. 89 (Tex.Crim.App. 1897). *Edens* further illustrates the status of Nineteenth-Century American law generally. In *Edens*, the Texas Court of Criminal Appeals was confronted with the question of whether the trial court had erred when ruling inadmissible certain testimony proffered by the defendant. The statutory offense for which the defendant in *Edens* had been convicted, Article 633 of the Texas Penal Code (1895), provided that:

> Rape is the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud, or the carnal knowledge of a female under the age of 15 years, other than the wife of the person, with or without consent, and with or without the use of force, threats or fraud.

The testimony excluded by the trial court in *Edens*, which was submitted by the defendant in his bill of exception, would have shown that the defendant had reason to believe, and did reasonably believe based on information provided to him by his

"victim," that she was "over the age of fifteen years" when the alleged acts of consensual intercourse occurred. The Court, quoting the foregoing passage from Bishop's treatise verbatim, adopted the rule stated by Bishop and overruled the defendant's complaint. Immediately preceding its quotation from Bishop however, the *Edens* Court further clarified that:

> Connection with a child under the age of consent being criminal, one who has connection with a female *which would, in any event, be unlawful*, must know at his peril whether her age is such as to make the act a rape.[99]

At the time of the decision in *Edens* a "connection with a female" was, "in any event," unlawful in certain circumstances under Texas statutory law. Article 357 of the Texas Penal Code (1895) defined the criminal offense of "fornication" as "the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, both being unmarried."[100] Under the "uncontradicted facts" stated in *Edens* it was apparent that neither the defendant nor the victim was married, and that they had repeatedly engaged in sexual intercourse "at intervals for several

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[99] *Edens v. State*, *supra*, 43 S.W. at 89 (italics added).

[100] *See*, *Cannedy v. State*, 125 S.W. 81 (Tex.Crim.App. 1910). Texas statutory law at this time also criminalized "adultery," wherein one or both of the persons engaging in sexual relations were married. Tex.Pen.Code, Article 353 (1895).

months."[101] Thus, even had the alleged "reasonable but mistaken belief" of the defendant in *Edens* proved true, that belief, which concerned only a mistake regarding the victim's age, would not have rendered the defendant's actions "legal" under the "common law" rule announced in *Regina v. Prince*, *supra*. In other words, the defendant's culpable mental state, *i.e.*, knowledge he was committing another offense (fornication), provided the *mens rea* necessary for conviction in lieu of the otherwise required showing he knew, or should have known, that his sexual partner was not of legal age.

The rule stated in *Edens*, derived directly from the English decision in *Regina v. Prince*, was followed by the Texas Court of Criminal Appeals in *Zachery v. State*, 122 S.W. 263, 265 (Tex.Crim.App. 1909) ("[O]ne who has connection with a female *which would, in any event, be unlawful*, must know at his peril whether her age is such as to make the act a rape.") (italics added). As recently as 1982, the *Prince/Edens* rule was described as "the majority law of this nation in statutory rape cases." *Martinez v. State*, 634 S.W.2d 929, 939 (Tex.App.-San Antonio 1982) (Butts, J., concurring). Over time however, beginning in the early part of the Twentieth Century (and prior to the decision in the instant case), State courts across the Nation began to dispense with the "transferred intent" theory expressed in *Prince* and *Edens*, and

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[101] *Edens v. State*, *supra*, 43 S.W. at 89.

adopted a truly "strict liability" interpretation of statutory and common law that eliminated any requirement of proof concerning the defendant's knowledge of age, or even proof of a defendant's knowing commission of another offense in lieu thereof.

In contrast to the purely "strict liability" departure of American decisional law of the early Twentieth Century (which, like in a game of "telephone," uncritically failed to recognize the limited exception to *mens rea* expressed by *Prince*), for more than 50 years academic authorities and legal commentaries have recognized that the exception to the *mens rea* requirement in this context, as derived from *Regina v. Prince*, *supra*, rested on a theory of "transferred intent." *See*, Rollin M. Perkins, *Criminal Law*, 127 (1957); Wayne R. LaFave & Austin W. Scott, Jr., *Handbook on Criminal Law*, 360-361 (1972); and, MODEL PENAL CODE AND COMMENTARIES, §213.6, at p. 414 n. 6 and accompanying text (1980), citing *Commonwealth v. Murphy*, 42 N.E. 64 (Mass. 1896) (knowledge of fornication may substitute for lack of knowledge concerning victim's true age). And since 1955, both the United States Congress, and the American Law Institute ("made up of 4,000 lawyers, judges, and law professors of the highest qualifications"),[102] have recognized that *mens rea* must be proven by a prosecutor unless no reasonable mistake of fact issue can be raised, *as a matter of law*,

[102] *See*, The American Law Institute ("About ALI"), http://www.ali.org (online) (last visited Sept. 2, 2014).

concerning whether the defendant reasonably believed the victim had attained a designated age of consent at the time of the offense. MODEL PENAL CODE: Tentative Draft No. 4, Commentary § 207.4(11), at p. 253 (1955) (*mens rea* required unless victim under ten years of age); MODEL PENAL CODE AND COMMENTARIES, § 213.6, at pp. 414-417 (1980) (extended discussion of why proof of *mens rea* must be required unless victim is under ten years of age); and, H.R. Rep. No. 594, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 6186, 6195-6196 and n. 59 (1986); and *id*., at 6197-6198 (proof of *mens rea* required unless victim under twelve years of age).[103]

In the wake of this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), a criminal defendant's knowledge that he or she is engaging in fornication or adultery, however "immoral," can no longer constitutionally provide a form of culpability that may be used as a substitute for the defendant's lack of knowledge that a sexual partner is not of legal age. App. 64-65; 2014 WL 2895889, *19, and n. 131 (Keller, P.J., dissenting); Arnold Loewy, *Statutory Rape in a Post-Lawrence v. Texas World*, 58 SMU L. Rev. 77, 77, 90 (2005).

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[103] This report by a committee of the U.S. House of Representatives was published in connection with enactment of the Sexual Abuse Act of 1986, 18 U.S.C. § 2241(c).

Finally, the Texas statute at issue does not qualify as a "public welfare" provision. The conduct proscribed by Section 22.021 does not threaten an entire "community's health or safety." The complete elimination of any *mens rea* requirement by the lower court is ostensibly designed only to protect a discrete (and presumably small) class of persons under the age of seventeen, who reasonably appear seventeen years of age or older, and who deliberately conceal or affirmatively mislead others concerning their true age. While in some sense all criminal statutes seek to secure "the public welfare," the "public welfare" exception to the *mens rea* requirement is far more limited, and is confined in its application to statutes that condemn individual acts "capable of inflicting widespread injury" on the community-at-large. Section 22.021 is not one of them. *See*, *State v. Guest*, 583 P.2d 836, 838 (Alaska 1978) ("Statutory rape may not appropriately be categorized as a public welfare offense.").

As a matter of Federal constitutional law, a penal statute that condemns the act of engaging in consensual sex with another, and which completely dispenses with any *mens rea* requirement concerning a defendant's knowledge of the age of the "other," is void. Moreover, it is questionable whether the exception to *mens rea* approved by the English court in *Regina v. Prince*, *supra*, having been decided in England in 1876, is even relevant to ascertaining the intent of the American Framers who originally

adopted the Due Process Clause at the First Congress in 1789,[104] or the intent of the People who by constitutional amendment made the Due Process Clause fully applicable to the States in 1868.[105] For that matter, the Victorian decision in *Regina v. Prince*, which treated *mens rea* as merely a "canon" of statutory interpretation,[106] must figure to have even less relevance when ascertaining the meaning and protective scope of *mens rea* as it was adopted during the realm of King Henry the First (circa A.D. 1118);[107] as it was confirmed in Chapter 39 of Magna Carta (circa A.D. 1215);[108] or as it was understood by Sir Edward Coke in his *Third Institutes* (circa A.D. 1641).[109]

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[104] *See*, 2 Schwartz, *The Bill of Rights: A Documentary History*, 855-856, 983, 1009, 1027, 1053, 1110, and 1123 (1971). Official notice of the ratification of the Bill of Rights, which included the Due Process Clause as part of the Fifth Amendment, was given by Secretary of State Jefferson on March 1, 1792. *Id*., at 1203.

[105] Ratification of the Fourteenth Amendment was certified by Secretary of State Seward on July 28, 1868. *See*, 15 Stat. 708-711 (Proclamation No. 13).

[106] *Regina v. Prince*, *supra*, 13 Cox Cr. Cas. at 144 (Op. per Blackburn, J.) ("We need not inquire whether th[is] canon of construction goes so far . . . ").

[107] *Leges Henrici Primi*, §28 (A.D. 1118) ("Reum non facit nisi mens rea.").

[108] *See*, Howard, *Magna Carta: Text and Commentary*, 23-24 (Rev. ed., 1998).

[109] Coke, *The Third Part of the Institutes of the Laws of England*, Chapter I, *10 (1641) ("Et actus non facit reum, nisi mens sit rea."). *See also*, 2 Pollock & Maitland, *The History of English Law*, 476 n. 5 (2nd ed., 1899).

The U.S. Supreme Court has ruled that to come within the Due Process Clause a claim to protection must involve "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201-202 (1977). The Court has further held that "historical practice" is the "primary guide in determining" whether a State penal offense is prohibited by Due Process. *Montana v. Egelhoff*, 518 U.S. 37, 43-44 (1996). When viewed through the prism of "historical practice" there can be no doubt that Section 22.021(a)(1)(B)(iii) and (2)(B) of the Texas Penal Code offends a deeply rooted fundamental principle. By completely dispensing with a *mens rea* requirement concerning a sexual partner's age, and by imposing as punishment a potential life sentence to confinement, it is offensive to principles "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, *supra*, 432 U.S. at 201.

II. State Courts of Last Resort and Legislatures Nationwide Are Divided Over Whether a Criminal Defendant's Knowledge of His Sexual Partner's Age Is Relevant or Necessary for Conviction of the Offense of "Statutory Rape."

As observed by Presiding Judge Keller in her lengthy dissent below, State courts of last resort and State Legislatures across the Nation have reached diametrically divergent conclusions regarding whether

a criminal defendant's knowledge of his sexual partner's age is relevant or legally necessary for conviction of the offense of "statutory rape."[110] Where, as here, the fundamental right to engage in consensual *adult* sexual relations[111] is chilled by those States that have adopted purely "strict liability" offenses, but is not similarly chilled by those States which have not, the Supreme Court's intervention to resolve this constitutional disparity is surely warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 2014

[110] App. 45-46 (Keller, P.J., dissenting).

[111] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1250-12

MARK ALEXANDER FLEMING, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND COURT OF APPEALS, DENTON COUNTY

MEYERS, J., delivered the opinion of the Court, in which KEASLER, HERVEY, COCHRAN, and ALCALA, JJ., joined. COCHRAN, J., filed a concurring opinion. ALCALA, J., filed a concurring opinion. KELLER, P.J., filed a dissenting opinion in which PRICE and JOHNSON, JJ., joined. WOMACK, J., concurred.

OPINION

Appellant, Mark Alexander Fleming, was charged with four counts of aggravated sexual assault under

Texas Penal Code Section 22.021(a)(1)(B)(iii), (2)(B).[1] He filed a motion to quash the indictment on the basis that the statute is unconstitutional for failing to require the State to prove that he had a culpable mental state related to the victim's age and for failing to recognize an affirmative defense based on the defendant's reasonable belief that the victim was 17 years of age or older. The trial court denied the motion. Appellant entered a plea of "no contest," filed an application for community supervision, and invoked his right to have the jury determine punishment. On the second day of testimony, one of the jurors informed the court that his son had dated the victim. In order to avoid a mistrial, the State and Appellant entered into a plea agreement for a ten-year probated sentence. Appellant appealed the trial court's denial of his motion to quash. The court of appeals overruled Appellant's federal constitutional claims and affirmed the trial court's judgment. We remanded the case to the court of appeals to consider Appellant's state constitutional claims, and the court of appeals again affirmed the trial court. Appellant filed a petition for discretionary review, which we granted to consider whether Penal Code Section 22.021 is unconstitutional under the Due Process Clause of the Fourteenth Amendment and the Due Course of Law provision of the Texas Constitution because it fails to require the State to prove that the defendant had a culpable

[1] Unless otherwise noted, all references to Sections refer to the Texas Penal Code.

mental state regarding the alleged victim's age, and fails to recognize an affirmative defense based on the defendant's reasonable belief that the alleged victim was 17 years of age or older. We will affirm the court of appeals.

FACTS

Appellant testified that in April of 2007 he received a text message from a girl, K.M, who said that she had obtained his phone number from her friend. When Appellant asked her age, she replied that she was 22 years old. K.M. was actually 13 years old. The two corresponded by text message and talked on the phone for a week or two and then arranged to meet at the mall for a date. Both Appellant and K.M. testified that on their first date they went to a movie and drag races at a race track, after which Appellant drove K.M. home. Appellant stated that K.M. told him that her mother and step-father lived with her because they had lost their home. After their second date to dinner and a movie, Appellant asked K.M. if she wanted to spend the night with him at the hotel where he had been staying. Appellant testified that K.M. said that she did want to go to his hotel but that she was not ready for them to have sexual relations at that time. Appellant said that he agreed and that they went to sleep upon arrival at the hotel. Appellant testified that when he awoke early the next morning, K.M. was "messing with" him in a way that indicated that she wanted to have sex. He asked her if she was sure, and she said that she was. Appellant and K.M.

continued dating and having sex from April to May of 2007. Later that year, K.M.'s mom found a love letter that Appellant had written to K.M. Appellant, who was 25 years old at the time, wrote in the letter, "I no you 4 years or 5 years younger then me but I love you." When her mom confronted her about the letter, K.M. initially denied the relationship. When K.M. admitted that she did have sex with Appellant, her mom called the police. Appellant was cooperative during questioning by the police and told the officer about the relationship. He told the officer that he did not know that K.M. was under age when he dated her. At trial, Appellant testified that he believed that K.M. was 22 years of age because both K.M. and her friend had told him that she was 22 years old, and because K.M. had told him that she was a student at the University of North Texas majoring in criminal justice. He also testified that he had seen on her MySpace page, which was entered into evidence by the defense, that she was 20 years old and was a student at UNT. The MySpace page entered into evidence by the defense also contained photos of K.M. that were taken around the time she was dating Appellant. K.M. denied having told Appellant that she was 22 years old and testified that someone else must have changed her MySpace page. She said she did not know if Appellant knew that she was under age when they dated. The State presented evidence that Appellant had previously dated a friend of K.M.'s mom, who sometimes babysat K.M. when she was younger. The State said that K.M. would have been 11 years old when Appellant first met her at her mom's house.

K.M. said that Appellant had been to her mother's house in the past but she did not know if he remembered meeting her then.[2]

Appellant agreed to a ten-year probated sentence and retained the right to appeal the trial court's denial of his motion to quash. He appealed, arguing that Penal Code Section 22.021 is unconstitutional due to its failure to require proof that he had knowledge that his victim was younger than 17 years of age and for not recognizing an affirmative defense based on the defendant's reasonable belief that the victim was 17 years of age or older.

COURT OF APPEALS

On remand from this Court, the court of appeals held that Section 22.021 does not offend notions of Due Process or Due Course of Law. The court stated that the texts of both the Due Course of Law provision and the Due Process Clause are virtually identical and that the Due Course of Law provision provides the same protections as the Due Process Clause. The court reasoned that the strict-liability aspect of statutory-rape laws is widely known and is a recognized exception to the general requirement of *mens rea* in criminal statutes. The court of appeals rejected Appellant's reliance on *United States v. X-Citement Video*, 513 U.S. 64, 73 (1994), and said that the reasoning

[2] The house Appellant had previously visited was not the same house where he dropped off K.M. after their dates.

from *X-Citement* does not apply here because Section 22.021 involves personal contact with the underage victim and the ability to ascertain true age, while the possession of visual depictions of minors does not. The court of appeals determined that there is not a fundamental right to a *mens rea* component or a mistake-of-age defense in a statutory rape statute. Thus, as long as the statute is reasonably related to a legitimate state objective, it does not impinge on a substantive due-process right. The court of appeals concluded that strict liability regarding the age of the minor furthers the legitimate government interest in protecting children from sexual abuse by placing the risk of mistake on the adult actor. The court of appeals overruled Appellant's points of error and affirmed the judgment of the trial court.

ARGUMENTS OF THE PARTIES

Appellant presents a facial challenge to the statute's lack of a *mens rea* as to the victim's age. He raises an as-applied challenge to the court's failure to allow him to present a mistake-of-fact defense. Specifically, he argues that he had an objectively and subjectively reasonable belief that the victim in this case was over the age of 17. Appellant states that under early English and American Common Law, the knowing act of engaging in consensual sex with another when not sanctioned by the legal bonds of marriage was a legal and moral wrong, and that legal wrong sufficed as a substitute for *mens rea* in the statutory rape context. Appellant argues that,

because such acts are no longer legally wrong, there is nothing to substitute for a *mens rea* element in Section 22.021 and it is unconstitutional to enforce the statute without the *mens rea* element that is essential in every felony charge. Appellant claims that in *Lawrence v. Texas*, 539 U.S. 558 (2003), the United States Supreme Court extended the Due Process Clause's protection of liberty to the intimate choices of unmarried persons. Appellant cites *X-Citement*, stating that when a statute is completely bereft of a scienter requirement as to the age of the victim, and the age of the victim is the crucial element separating legal innocence from wrongful conduct, the statute raises serious constitutional doubts. Appellant argues that, because the physical act identified in Section 22.021(a)(1)(B)(iii) is entitled to constitutional protection, the complete absence of a *mens rea* requirement as to the age of the victim renders the statute constitutionally void. Appellant states that the framers of the Texas Constitution would have considered an ignorance-of-fact defense as a fundamental right so as to not punish those who, through no fault of their own, have been misled. Finally, Appellant argues that it is unfair for him to be considered a "sexual predator" when no evidence exists of any intent to do a legal or moral wrong and no evidence exists to indicate that he is a threat to the community.

The State argues that the court of appeals properly concluded that Appellant's fundamental rights were not implicated and that Section 22.021 serves a legitimate state purpose. The State says that the

cases cited by Appellant do not support his argument that Section 22.021 is unconstitutional. For example, the State argues that the reasoning from *X-Citement Video* does not apply here because, unlike a defendant who does not know the age of a person depicted in a video, Appellant spent a significant amount of time with the victim and had ample time to ascertain her age. The State says that *Lawrence v. Texas* supports the constitutionality of Section 22.021 because the Court in *Lawrence* emphasized that it was recognizing the right of *adults* to engage in consensual conduct. The State argues that the Due Course of Law Clause and the Due Process Clause afford the same protection and that neither the history nor the application of the Due Course of Law provision supports a conclusion that Section 22.021 violates the Texas Constitution. The State notes that, although some states allow a mistake-of-age defense, the majority rule is that excluding knowledge of the victim's age as an element of the statutory rape offense does not violate Due Process. Finally, the State argues that the legislature has an interest in protecting the safety of children and that only the legislature should make changes to a statute that serves to protect children from sexual abuse.

CASE LAW

The mistake-of-age defense was raised and rejected in the 1876 English case of *Regina v. Prince*. 13 Cox, Criminal Cases 138 (Eng. Crim. App. 1876). In *Prince*, the defendant was charged with unlawfully

taking a girl under the age of 16 out of the possession of her father against his will. The defendant claimed that he acted on the reasonable belief that the girl was 18 years of age. The court held that it was no defense that he thought he was committing a different kind of wrong from that which he was, in fact, committing, it being wrong to remove a daughter, even one over the age of 16, from her father's household. *Id*. at 141-42. Citing previous cases, the court stated that "any man who dealt with an unmarried female did so at his own peril, and if she turned out to be under sixteen years old he was liable under this statute." *Id*. at 139. Although the issue in *Prince* was mistake of age as to abduction, early American courts applied *Prince* to statutory rape as well. The reasoning from *Prince* has been used to justify denying the mistake-of-age defense and imposing strict liability against those accused of statutory rape.[3]

In *Morissette v. United States*, 342 U.S. 246 (1952), the Supreme Court discussed strict liability offenses and noted that, while there must usually be

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[3] *See*, *e.g.*, *Brown v. State*, 74 A. 836, 841 (Del. 1909) (finding that statements of age made by the statutory rape victim and the defendant's reasonable belief about her age were "irrelevant and immaterial"); *State v. Baskett*, 19 S.W. 1097 (Mo. 1892) (refusing a reasonable mistake-of-age defense for statutory rape of a twelve-year-old girl); *Lawrence v. Commonwealth*, 71 Va. 845, 854-55 (1878) (finding that the lower court did not err by refusing to give jury instructions that the defendant could not be found guilty of statutory rape based on a reasonable mistake-of-age defense).

a "vicious will" to constitute a crime, there are exceptions to this rule, including rape cases in which age is the determinative factor, despite the defendant's reasonable belief that the victim was over the age of consent. For strict liability crimes, there is no "guilty mind" requirement, and the actor does not have to possess the *mens rea* to commit any crime. In such strict-liability offenses, the actor's state of mind is irrelevant, and he is guilty of the crime at the moment he commits the prohibited act. Most strict liability statutes are associated with the protection of public health, safety, or welfare, such as those involving air and water pollution, sale of adulterated food, and traffic and motor-vehicle laws. *Id*. at 254-55. Statutory rape, however, is distinguishable in that the act of sexual intercourse is not a crime except in certain circumstances, such as when the other person has not consented to the act or when the other person is deemed unable to consent due to his or her age.

DISCUSSION

Mens rea as to the age of the victim

While it is indeed widely known that "16 will get you 20," and precocious young girls have commonly been referred to as "jail bait," such colloquialisms address only the understanding that even consensual sex with someone underage is a violation. These phrases indicate knowledge of the sexual partner's young age as opposed to an understanding that knowledge of the age is unnecessary. Texas Penal Code

does not specify that *mens rea* as to the age of the victim is unnecessary, however, under federal law, "the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years." *See* 18 U.S.C. § 2241(d). *See also* 18 U.S.C. § 2243(d) ("In a prosecution for sexual abuse of a minor between the ages of 12 and 16, the Government need not prove that the defendant knew the age of the other person engaging in the sexual act").

It is clear that the Texas legislature intends for age to be an aggravating element in certain offenses and does not intend for the State to be required to prove that the defendant knew the age of the victim. For example, the sexual assault statutes delineate the severity of the offense based in part on the age of the victim. Specifically, Penal Code Section 22.011(a)(2) covers sexual assault of a child under the age of 17. However, when the victim is younger than 14 years of age, the offense is *aggravated* sexual assault under Penal Code Section 22.021. Similarly, murder under Penal Code Section 19.02 may increase to capital murder under Section 19.03 if the victim is under 10 years of age. There is no *mens rea* as to age listed in either the sexual assault or murder statutes and there is no fundamental right to a *mens rea* element regarding the age of the victim in these contexts.[4] Because this statute serves the legitimate

[4] We note that Penal Code Section 19.03(a)(1) requires the State to prove that the defendant knew that the victim was a

(Continued on following page)

state objective of protecting children, we will not read a *mens rea* element into the statute and do not believe that failure to require *mens rea* as to the victim's age violates the federal or state constitution. The statutory prohibition of an adult having sex with a person who is under the age of consent serves to protect young people from being coerced by the power of an older, more mature person. The fact that the statute does not require the State to prove *mens rea* as to the victim's age places the burden on the adult to ascertain the age of a potential sexual partner and to avoid sexual encounters with those who are determined to be too young to consent to such encounters. If the adult chooses not to ascertain the age of a sexual partner, then the adult assumes the risk that he or she may be held liable for the conduct if it turns out that the sexual partner is under age.

Mistake-of-fact defense

While both the sexual assault and the murder statutes specify a more severe punishment based on the age of the victim, neither offense contains a provision that allows for a mistake-of-fact defense as to the age of the victim. Under Penal Code Section 8.02(a), "It is a defense to prosecution that the actor

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peace officer or fireman in order for the offense to increase from murder to capital murder. This indicates to us that when the legislature wants to require the State to prove that the offender knew the status of the victim, such a requirement is clearly stated in the statute.

through mistake formed a reasonable belief about a matter of fact *if his mistaken belief negated the kind of culpability required for the commission of the offense*." Because Section 22.021 requires no culpability as to the age of the victim, there is nothing for the defendant's mistaken belief to negate, and his mistake cannot be a defense to prosecution.

Appellant asks for an affirmative defense so that he may claim that even though the allegations in the indictment are true, he should not be convicted due to his assertion that he did not know that K.M. was 13 years of age. The legislature's intent of protecting children from sexual assault is clear, and it outweighs any claim of the right to present a mistake-of-age defense. When a defendant voluntarily engages in sexual activity with someone who may be within a protected age group, he should know that there may be criminal consequences and there will be no excuse for such actions. When it comes to protecting those who are unable, due to their tender age, to consent to sexual activity, the legislature simply does not allow any variance.

It would be unconscionable for us to allow a 25-year-old man who was having sex with a 13-year-old child to claim that his actions were excused because he reasonably believed that he was having sex with an adult. Such a defense is precluded by the overriding interest in protecting children.

CONCLUSION

Texas Penal Code Section 22.021 is not unconstitutional under the Due Process Clause of the Fourteenth Amendment or the Due Course of Law provision of the Texas Constitution for failing to require the State to prove that the defendant had a culpable mental state regarding the victim's age or for failure to recognize an affirmative defense based on the defendant's belief that the victim was 17 years of age or older. The decision of the court of appeals is affirmed.

Delivered: June 18, 2014
Publish

COCHRAN, J., filed a concurring opinion.

For the reasons set out in my concurring opinions in *Celis v. State*[1] and *Farmer v. State*,[2] I believe that the Texas statutory mistake-of-fact defense already applies to the offense of consensual statutory rape. Nonetheless, I recognize that this is not the current state of the law in Texas, and therefore I reluctantly join the majority opinion.

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[1] 416 S.W.3d 419, 441-58 (Tex. Crim. App. 2013) (Cochran, J., concurring).

[2] 411 S.W.3d 901, 908-18 (Tex. Crim. App. 2013) (Cochran, J., concurring).

Filed: June 18, 2014
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ALCALA, J., filed a concurring opinion.

CONCURRING OPINION

I wholeheartedly join the majority opinion's affirmance of the conviction of Mark Alexander Fleming, appellant, for aggravated sexual assault of a child. I write separately to further discuss why I believe that (1) this Court's decision is consistent with Supreme Court precedent, (2) emerging technology may be less consequential in these cases than it may appear at first blush, (3) permitting a mistake-of-fact defense would negatively impact the reporting and prosecution of this type of crime, and (4) appellant's claim of mistake of fact is unreasonable even if this Court were to recognize the propriety of a such a defense.

I. The Majority Opinion is Consistent With Supreme Court Precedent

Although, as a general principle, criminal intent must be proven beyond a reasonable doubt to sustain a conviction, the Supreme Court has repeatedly observed that proof of the age of a child in a prosecution for statutory rape is an exception to that general rule. *See Morissette v. United States*, 342 U.S. 246, 251, 72 S. Ct. 240, 244 (1952). In *Morissette*, the Supreme Court described the historical recognition

by common-law commentators that there are "a few exceptions" to the "sweeping statement that to constitute any crime there must first be a 'vicious will.'" *Id*. It stated, "Exceptions came to include sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent." *Id*. at 251 n.8. Decades after the *Morissette* decision, the Supreme Court reaffirmed this principle in *United States v. X-Citement Video, Inc*., 513 U.S. 64, 72 n.2, 115 S. Ct. 464, 469 (1994). In *X-Citement Video*, the Supreme Court stated, "*Morissette*'s treatment of the common-law presumption of *mens rea* recognized that the presumption expressly excepted 'sex offenses, such as [statutory] rape[.]'" *Id*. (quoting *Morissette*, 342 U.S. at 251 n.8). Distinguishing, on one hand, child-pornography distribution offenses, which would require proof of criminal intent as to the age of the child, from statutory rape, which, on the other hand, would not require proof of that intent, the Supreme Court explained that the rapist "confronts the underage victim personally and may reasonably be required to ascertain that victim's age." *Id*. In each of these instances, the Supreme Court has suggested that a defendant who has had personal sexual contact with a child-complainant is unreasonable in claiming that he was unaware that the child was not an adult. *See id*. In none of these cases has the Supreme Court suggested that it is unconstitutional to place the burden on the adult to affirmatively determine that a sexual partner is actually an adult rather than a child. *See id*.

In its more recent decision in *Lawrence v. Texas*, the Supreme Court did not suggest that due process would require a mistake-of-fact defense as to the age of the child in a prosecution for a sexual offense. *See Lawrence v. Texas*, 539 U.S. 558, 569, 123 S. Ct. 2472 (2003). Rather, in deciding whether due process would extend to protect the right of homosexual adults to engage in consensual sex, the Supreme Court in *Lawrence* described the difference between Texas's sodomy law that Texas was enforcing against two consenting adults as compared to the historical origin of sodomy laws. It explained that, in the 19th century,

> [l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against *those who could not* or did not consent, *as in the case of a minor* or the victim of an assault. . . . Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

Id. (emphasis added). In deciding that the enforcement of sodomy laws against two consenting adults violated due process, the Supreme Court distinguished that situation from 19th-century laws that prohibited sexual acts with children or non-consenting adults,

which were not unconstitutional. *Id*. at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."). Texas's view in enforcing sodomy laws against two consenting adults, therefore, was inconsistent with the historical application of those laws to protect a child from having sexual relations with an adult, as here. *Id*.

Furthermore, and of particular relevance to the issues presently before this Court, nothing in *Lawrence* suggests that a defendant has a constitutional right to a mistake-of-fact defense as to his belief about the age of a child who was thirteen years old at the time of a sexual offense. *Id*. at 578-79. The issue in *Lawrence*, as described by the Supreme Court, was "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty" under due process. *Id*. at 564. The Court emphasized that "as a general rule," the State should avoid "defin[ing] the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects," and it further noted that its decision was rooted in the principle "that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons." *Id*. at 567. The Court concluded that its ruling did not involve minors, non-consenting or coercive relationships, public conduct, or prostitution, but rather "two adults who, with full and mutual consent from each

other, engaged in sexual practices common to a homosexual lifestyle." *Id*. at 578. The holding in *Lawrence* was thus limited to a situation involving two consenting adults, a matter in which there is "no legitimate state interest," but that decision cannot rationally be used as a basis to argue that the same standard should apply when the State has a legitimate interest at stake, that of protecting children from sexual abuse. *See id*. In *Lawrence*, as in its earlier decisions, the Supreme Court has carefully drawn lines to ensure that the State remains free to enact legislation that gives effect to its legitimate interest in the protection of children. *See id*. Because a mistake-of-age defense is not constitutionally required, only a minority of jurisdictions permit this defense under similar facts.[1]

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[1] For example, the Model Penal Code allows the defense of reasonable mistake as to age when the victim is over the age of ten, and federal law allows for a mistake-of-age defense when the minor is between the ages of twelve and sixteen. *See* Model Penal Code § 213.6; 18 U.S.C. § 2243(c)(1). But, viewed in a different light, this also means that the Model Penal Code does not allow a mistake-of-fact defense when the victim is ten or younger, and federal law does not allow it when the victim is eleven or younger. Here, the complainant was thirteen years old. The difference between the Model Penal Code and federal law and the situation here, therefore, is not that those laws allow a mistake-of-age defense in all cases, but instead that those laws would allow the defense for complainants who are older than ten or eleven years old. The question before us then comes down to a matter of degree: Given that the mistake-of-age defense is not permitted for children ages ten and eleven and under in several other jurisdictions, is it unconstitutional if it is not permitted for

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Consistent with Supreme Court precedent, Texas's aggravated-sexual-assault statute does not prescribe any mental state as to the age of a child in a prosecution under that statute. *See* TEX. PENAL CODE § 22.021(a)(1)(B). Under Texas law as dictated by the Legislature, the offense of aggravated sexual assault of a child does not require the State to provide evidence that the defendant was aware of a child-complainant's age at the time of the offense, nor does it allow a defendant to raise a defense on that basis. *See id*.[2] This Court has repeatedly observed that the

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children ages thirteen and under in Texas? I cannot conclude that the federal Constitution would draw a bold line here. I also note that only seventeen states permit the mistake-of-age defense, with at least twenty-three jurisdictions characterizing "statutory rape" as a strict-liability offense. *See United States v. Rodriguez*, 711 F.3d 541, 557 (5th Cir. 2013) (citing Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 385-91 (2003)). The majority rule in the United States, therefore, is to not permit a defense on mistake as to the age of a child-victim. *Id*.

[2] Under Texas law, a defendant commits aggravated sexual assault of a child, a first-degree felony, if he has sexual relations with a child thirteen years of age or under, and a lesser offense of sexual assault of a child, a second-degree felony, if he has sexual relations with a child fourteen to sixteen years of age. *See* TEX. PENAL CODE §§ 22.011(a); 22.021(a). By punishing offenders who victimize children thirteen years of age and younger at the highest punishment range available, regardless of the reasonableness of the actor's belief about the child's age, the Texas Legislature has determined that these younger children deserve society's greatest protection. *See id*. Under Texas law, children ages thirteen and under may never consent to sexual relations under any circumstances. *See id*. In contrast, teenaged children at ages fourteen through sixteen may consent to sexual relations

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statutory language neither requires proof of *mens rea* as to the child's age nor provides for a mistake-of-age defense.[3] I conclude that this Court must abide by Supreme Court precedent and Texas law as written, rather than legislate from the bench by creating a non-statutory defense where none is required.[4] I, therefore,

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with a spouse or a person around their same age. *See id*. § 22.011(e). The Texas Legislature, therefore, has drawn an absolute line of no consent under any circumstances at thirteen years of age or younger. *See id*. § 22.021(a). The Legislature has "not acted unreasonably or arbitrarily" in determining that children thirteen years of age and younger are deserving of special protection. *See Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002) (examining for unreasonable and arbitrary acts of Legislature to determine whether statute is unconstitutional).

[3] *See Black v. State*, 26 S.W.3d 895, 898 (Tex. Crim. App. 2000) (per curiam) ("No scienter with respect to the lack of consent in sexual assault and aggravated sexual assault is required when the victim is a child. Nor is mistake of fact with respect to the victim's age a defense to either form of sexual assault.") (citations omitted); *see also Vasquez v. State*, 622 S.W.2d 864, 866 (Tex. Crim. App. 1981) (stating that, under well-established Texas law, "it had consistently been held that a female under the age fixed by statute was deemed in law to be incapable of consenting to an act of sexual intercourse, and one who had committed the act on her was guilty of rape, notwithstanding the fact that he had obtained her actual consent, or was ignorant of her age, or even though she invited or persuaded him to have intercourse with her").

[4] I note here that part of the rationale offered by the dissenters in support of permitting a mistake-of-fact defense under these circumstances is that the Legislature has enacted sex-offender-registration laws that apply to a defendant "even if the finder of fact believed that the defendant was entirely blameless with respect to whether he was dealing with a child." But the view that an individual can be "blameless" when he has

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agree with the majority opinion that, under Supreme Court precedent, the federal Constitution does not require that a defendant be afforded a mistake-of-fact defense as to a child-complainant's age and that this is a matter solely for the Texas Legislature to determine.

II. Existence of Emerging Technology May Be Inconsequential

Anyone can easily see that children now, unlike historically, have unprecedented access to emerging technology, cell phones, texts, and social media web sites. And children may falsify their ages on a web site or take Glamour Shots that make them appear older. Had this complainant and appellant never met in person, facts like these would likely be a good reason to explain how technological developments might impact this case. But this is not a situation where impersonal communication took place over an electronic medium, or under circumstances in which an adult may have been unaware that the person on the other end of the electronic communication was a child. Here, appellant and the complainant met in

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sexual intercourse with a child under fourteen years of age runs contrary to the legislative determination that the burden of ensuring that a sexual partner is of legal age falls squarely on the defendant, who must verify that the person with whom he is intimate is not a child. In failing to meet his burden under Texas law to ascertain that his intimate partner is legally capable of consent, a defendant who has sexual intercourse with a child under the age of fourteen can hardly be called "blameless."

person and engaged in sexual intercourse on multiple occasions. The fact that some children will misstate their age on web sites and that this may consequently mislead someone who has never met them as to their age presents a completely different situation from one involving a defendant who engages in person-to-person, intimate sexual contact with a child. Sexual intercourse between an adult and a minor that occurred in the pre-cell phone era is fundamentally no different than the nature of its occurrence now. Nothing about this intimate sexual contact has changed an adult's historical burden to make himself aware of the age of the child. It is the adult's responsibility to ascertain the true age of the child, particularly one who is thirteen years of age or younger. *See* TEX. PENAL CODE § 22.021(a)(2)(B). The Supreme Court's description of the situation is as applicable now as it was six decades ago: The rapist "confronts the underage victim personally and may reasonably be required to ascertain that victim's age." *X-Citement Video*, 513 U.S. at 72 n.2 (citing *Morissette*, 342 U.S. at 251 n.8).

Although I remain unpersuaded that emerging technology compels us to constitutionally require a mistake-of-fact defense under these circumstances, as a matter of public policy, it may be appropriate for the Legislature to consider whether to permit such a defense for older, high-school-aged teenagers with a limited right of consent. Here, the dissenting opinion is advocating for a mistake-of-fact defense that would apply to situations involving younger, middle-school-aged children. Assuming a child begins kindergarten

at the age of five, that child will be thirteen years old at the beginning of eighth grade, which is in middle school in Texas, and will be fourteen years old at the beginning of ninth grade, which is in high school. As a matter of law, no adult should be able to claim that he was reasonably mistaken that a middle-school-aged child was an adult. I continue to believe that this defense is inappropriate in cases involving children who are thirteen years of age and younger because those children are statutorily incapable of giving any kind of consent. *See* TEX. PENAL CODE § 22.021(a)(2)(B). In any event, this determination is ultimately for the legislative branch alone to make, rather than the judicial branch.

III. Permitting a Mistake-of-Fact Defense Would Negatively Impact Reporting and Prosecution of Child Sex Offenses

It is suggested that if this Court were to permit it, the mistake-of-fact defense would apply only in rare cases when a defendant could produce evidence demonstrating that he harbored a reasonable but mistaken belief as to the age of the child with whom he engaged in sexual contact. This suggestion underestimates the probable impact of this Court's adoption of such a defense, which, if permitted, would be raised in virtually any case in which a defendant could plausibly claim that he was unaware of the complainant's age. At trial, knowing that he would be acquitted if a jury believed his testimony, a defendant could testify that he believed the child-complainant,

even one as young as ten years of age, appeared to be above the age of consent. His defense strategy would be to show that his belief was reasonable by asking questions of the child and her family designed to convince the jury that she did things to make herself look and sound older than her actual age. Furthermore, if the mistake-of-fact defense were constitutionally required as suggested by the dissenting opinion, the trial court would be compelled to permit the defense attorney to ask the following types of questions of the complainant: whether she wore makeup; how she wore her hair; whether she wore skinny jeans or mini skirts; whether she had been through puberty, was developed, and wore a bra, and, if so, what size; what types of books, movies, videos, and music she enjoyed; whether she had a cell phone or texted people; whether she had a Facebook page and what kinds of pictures she posted there; what her friends looked like and how old they were; whether she was permitted to date; whether she ever broke her parents' rules; and other personal and embarrassing questions. The trial would be converted from one that judges the defendant's conduct to one that places the victim and her family on trial. Avoiding this type of victim-bashing was precisely why rape shield laws were passed decades ago. *See* TEX. R. EVID. 412 (prohibiting evidence of past sexual behavior of sexual-assault victim). Rape shield laws became necessary because the possible introduction at trial of embarrassing details about a rape victim's sexual history was deterring victims from reporting crimes and testifying in court. If this Court were to permit a mistake-of-fact

defense under the misguided belief that it was constitutionally required, then trial-court judges would be similarly constitutionally required to permit defense interrogations posed to young children and their families about embarrassing personal matters. The likely result would be the re-victimization of these young sexual-assault victims at each of their respective trials. The farther reaching consequence would be to deter children and their families from reporting sex offenses out of fear that they too would be subjected to humiliation and embarrassment in the courtroom. Absent any constitutional imperative that would require it to do so, this Court should not permit a mistake-of-fact defense when such a ruling would have the practical effect of diminishing protections for victims and their families and deterring reporting of sex crimes.

IV. Appellant Has Failed to Show that He Acted Reasonably

Assuming that this Court permitted a mistake-of-fact defense as to a statutory rape victim's age, to show its applicability here, appellant would have had to provide at least a scintilla of evidence to support his argument that he formed a reasonable belief that the complainant was an adult over seventeen years of age. *See Allen v. State*, 253 S.W.3d 260, 267 (Tex. Crim. App. 2008); TEX. PENAL CODE §§ 8.02(a) (defense exists where a mistaken, "reasonable belief" about a matter of fact "negate[s] the kind of culpability" required for the offense), 1.07(a)(42) ("reasonable belief" is that

which "would be held by an ordinary and prudent man in the same circumstances as the actor"). The record indicates that at the time when he committed the offense, appellant was twenty-four years of age and the complainant was more than a decade his junior at thirteen years of age. Even according to his own evidence, appellant was reckless and unreasonable about determining whether the complainant was actually over seventeen years of age. According to appellant's theory, the complainant lied about her age, telling him she was twenty-two but showing that her age was twenty on her MySpace page. She lived with her parents. Appellant wrote a love letter claiming that he knew that she was four or five years younger than he, which further indicates that he did not attempt to determine how old she really was and, in fact, knew that she was much younger. The fact that other people who had limited contact with the complainant may also have been reckless about failing to determine her correct age does not change appellant's recklessness into reasonable conduct. *See Montgomery v. State*, 588 S.W.2d 950, 953 (Tex. Crim. App. 1979) ("The mistake of fact defense . . . is based on the mistaken belief of the accused, and it looks to the conduct of others only to the extent that any such conduct contributes to the mistaken belief."); *Lasker v. State*, 573 S.W.2d 539, 542 (Tex. Crim. App. 1978). Appellant had extensive contact with the complainant, so the reasonableness of his belief should be judged by a different standard than the beliefs of those who had limited contact with the complainant. Furthermore, group recklessness by a defendant's friends and

others should not amount to a license to prey upon children who are thirteen and younger under the veil of reasonableness. Appellant's own theory, therefore, shows that he did not ever directly ascertain from the complainant her actual age and that he remained recklessly ignorant about that fact. In short, his evidence of his mistaken belief fails to show that he was reasonably mistaken about the complainant's true age.

V. Conclusion

Society recognizes that young children ages thirteen and under are especially vulnerable to adults, who can easily overpower them physically and mentally. Furthermore, these young children lack the judgment to assess and avoid potentially dangerous situations. These young children, therefore, may exhibit bad judgment in deceiving others about their age, coming home late, or spending the night away from home without permission. The question is not whether young children lack judgment; they do. The question is whether the federal Constitution requires us to recognize an affirmative defense based on the defendant's reasonable but mistaken belief that a child thirteen years old or under was an adult capable of consent. By declining to impose a mental-state requirement as to the age of the child, the Legislature has squarely placed the burden on the adult to determine that the person he is having sex with is not actually thirteen years old or younger. The severe penalties for getting it wrong are the Legislature's

way of incentivizing due diligence and ensuring that it is adults, not children, who are encumbered with this responsibility. I conclude that the elevated punishments imposed by the Texas Legislature in response to the victimization of young children strengthen rather than subvert my conclusion that a defendant's due-process rights do not encompass the entitlement to a mistake-of-fact defense in an aggravated-sexual-assault case.

With these comments, I respectfully concur.

Filed: June 18, 2014

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KELLER, P.J., filed a dissenting opinion in which PRICE and JOHNSON, JJ., joined.

I would hold that, after *Lawrence v. Texas*,[1] in a limited number of child sex cases, due process requires the submission of an affirmative defense of reasonable mistake of age. I would also hold that such a defense is not automatically precluded by the fact that the complainant is under the age of fourteen.

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

I. SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[2] The Supreme Court has interpreted the Due Process Clause as having both substantive and procedural components.[3] The substantive component protects the individual against government action that either lacks a rational basis or unduly infringes on a fundamental right or liberty interest.[4] A statute that infringes upon a fundamental right or liberty interest violates the substantive component of the Due Process Clause "unless the infringement is narrowly tailored to serve a compelling state interest."[5] A substantive-due-process analysis that is based upon the infringement of a fundamental right or liberty interest must provide a "careful description of the asserted fundamental liberty interest."[6] A fundamental right or liberty interest is one that is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed."[7] In addition to specific freedoms

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[2] U.S. CONST., Amend. 14, § 1, cl. 3.

[3] *Reno v. Flores*, 507 U.S. 292, 301-02, 306-07 (1993).

[4] *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

[5] *Id*. at 721; *Flores*, 507 U.S. at 302.

[6] *Glucksberg*, 521 U.S. at 721 (internal quotation marks omitted).

[7] *Id*. at 720-21 (citations and internal quotation marks omitted, bracketed material substituted for original).

protected by the Bill of Rights,[8] the Supreme Court has recognized a number of fundamental rights, such as the right to marry, the right to have children, the right to marital privacy, and the right to bodily integrity.[9]

II. FUNDAMENTAL RIGHT

A. Overview

As will be seen in the following discussion, one of the two fundamental rights implicated in the present case is the right to be free from harsh punishment when mental culpability is entirely absent. In this context, mental culpability is entirely absent if the defendant (1) harbors no culpable mental state with respect to an element of the offense that is crucial to imposing criminal liability *and* (2) harbors no culpable mental state with respect to the existence of facts that place him on notice of the probability of strict regulation requiring him to ascertain whether he is engaging in conduct that violates the law. For purposes of this discussion, culpable mental states include not only the ones listed in the Penal Code – intent, knowledge, recklessness, and criminal negligence[10] –

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[8] The first ten amendments to the United States Constitution.

[9] *Glucksberg*, 521 U.S. at 720 (citing cases).

[10] *See* TEX. PENAL CODE § 6.03.

but other culpable mental states such as wilfulness and ordinary negligence.[11]

B. Fundamental Nature of Mental Culpability

The idea that some mental culpability must attach to conduct before it can be a crime "is no provincial or transient notion."[12] "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."[13] The Supreme Court has explained that a relation "between some mental element and punishment . . . is almost as instinctive as the child's familiar exculpatory" statement "But I didn't mean to."[14] The general requirement of some *mens rea* for a crime is firmly embedded in the common law and is "the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[15] There are exceptions to the general requirement of *mens rea*: offenses that are sometimes called "strict-liability

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[11] *See State v. Hazelwood*, 946 P.2d 875 (Alaska 1997) (discussing ordinary negligence as a minimum mental-culpability standard sometimes required by due process).

[12] *Morissette v. United States*, 342 U.S. 246, 250 (1952).

[13] *Id*.

[14] *Id*. at 250-51.

[15] *Staples v. United States*, 511 U.S. 600, 605 (1994) (quoting *United States v. Gypsum Co*., 438 U.S. 422, 436 (1978)); *see also Smith v. California*, 361 U.S. 147, 150 (1959).

crimes."[16] But, as the following discussion will show, two characteristics generally associated with such offenses mitigate against their harshness: (1) they typically have light penalties, and (2) despite their name, they typically do not entirely dispense with mental culpability.

C. Doctrine of Strict Liability

Historically, strict-liability offenses have most often been what courts have called "regulatory" or "public welfare" offenses.[17] Typically, these offenses carried "only light penalties" such as "fines or short jail sentences,"[18] and conviction of the offense did "no grave damage to an offender's reputation."[19] In a system like ours that generally requires a "vicious will" to establish a crime, "imposing severe punishments for offenses that require no *mens rea* would seem incongruous."[20] The Supreme Court has recognized that the "public welfare offense" label "hardly seems apt" when the crime is a felony.[21]

Whether or not it is a public-welfare offense, it is generally true that a so-called strict-liability offense does not entirely dispense with mental culpability.

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[16] *Staples*, 511 U.S. at 607 n.3.

[17] *Id*. at 616-17; *United States v. Freed*, 401 U.S. 601 (1971).

[18] *Staples*, 511 U.S. at 616.

[19] *Id*. at 617-18; *Morissette*, 342 U.S. at 256.

[20] *Staples*, 511 U.S. at 616-17.

[21] *Id*. at 618.

From a Texas perspective, the Supreme Court's cases generate some confusion because they often define *mens rea* narrowly to encompass only an actual awareness of the circumstances that make the act criminal.[22] The Supreme Court has referred to *mens rea* as a "vicious will,"[23] and that Court has suggested that crimes of negligence or omission of duty are instances in which a "vicious will" are absent.[24] In Texas, however, "criminal negligence" is a statutorily recognized culpable mental state,[25] and we commonly refer to negligence as a form of *mens rea*.[26]

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[22] *Id*. at 607 n.3 ("Under such statutes we have not required that the defendant know the facts that make his conduct fit the definition of the offense. Generally speaking, such knowledge is necessary to establish *mens rea*.").

[23] *Id*. at 616-17; *Freed*, 401 U.S. at 607; *Morissette*, 342 U.S. at 251.

[24] *Staples*, 511 U.S. at 606-07 (discussing legislation that "dispenses with the conventional requirement for criminal conduct – awareness of some wrongdoing"); *Morissette*, 342 U.S. at 251 n.8 ("Most extensive inroads upon the requirement of intention, however, are offenses of negligence, such as involuntary manslaughter or criminal negligence and the whole range of crimes arising from omission of duty."); *United States v. Balint*, 258 U.S. 250, 252 (1922) (ignorance or good faith not a defense to certain regulatory crimes).

[25] TEX. PENAL CODE § 6.03(d).

[26] *See*, *e.g.*, *Montgomery v. State*, 369 S.W.3d 188, 191 (Tex. Crim. App. 2012); *Watson v. State*, 369 S.W.3d 865, 871 (Tex. Crim. App. 2012); *Williams v. State*, 235 S.W.3d 742, 751-53 (Tex. Crim. App. 2007). *See also Hazelwood*, 946 P.2d at 878-79 (characterizing ordinary negligence as a *mens rea*).

Regardless of the status of negligence as a *mens rea*, the Supreme Court has indicated that strict-liability offenses generally impose liability only if the defendant is aware of certain facts that place him on notice of "the probability of strict regulation" requiring him to "ascertain at his peril whether his conduct comes within the inhibition" of the law.[27] If, for example, a person is in the business of selling drugs or food,[28] or he deals in hazardous materials such as

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[27] *Staples*, 511 U.S. at 607. *See also United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971) (with respect to transporting sulfuric acid, "[T]he probability of regulation is so great that anyone who is aware that he is in possession . . . must be presumed to be aware of the regulation."); *Freed*, 401 U.S. at 609 ("This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that the possession of hand grenades is not an innocent act."); *United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943) (regarding prosecution of corporate officer whose company shipped adulterated food, "Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."); *Balint*, 258 U.S. at 252-53 (regarding sale of drugs, "[W]here one deals with others and his mere negligence may be dangerous to them . . . the policy of the law may, in order to stimulate proper care, require punishment of the negligent person, though he be ignorant of the noxious character of what he sells.").

[28] *See Balint*, 258 U.S. at 252-53 (drugs); *Dotterweich*, 320 U.S. at, 284-85 (food).

explosives or sulfuric acid,[29] then he is on notice that the burden may be on him to ascertain that he is complying with all government laws relating to the matter. Essentially, the same reasoning holds in the area of compound crimes and transferred intent, where a person who commits a predicate crime is held responsible for an unintended consequence of that crime, as in the case of felony murder:

> It is unusual to impose criminal punishment for the consequences of purely accidental conduct. But it is not unusual to punish individuals for the unintended consequences of their unlawful acts. . . . The felony-murder rule is a familiar example: If a defendant commits an unintended homicide while committing another felony, the defendant can be convicted of murder.[30]

Commission of the predicate crime is the dangerous activity that places the defendant on notice that he better be careful or he may be liable for another crime.[31] The Supreme Court has acknowledged that "the term 'strict liability' is really a misnomer" in the context of dangerous or highly regulated activities.[32] "True strict liability might suggest that the defendant

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[29] *See Freed*, 401 U.S. at 608-09 (hand grenades); *Int'l Minerals & Chem. Corp*., 402 U.S. at 564-65 (sulfuric acid).

[30] *Dean v. United States*, 556 U.S. 568, 575-76 (2009).

[31] *See Lomax v. State*, 233 S.W.3d 302, 305 & n.7 (Tex. Crim. App. 2007).

[32] *Staples*, 511 U.S. at 607 n.3.

need not know that he was dealing with a dangerous item," but the Supreme Court has "avoided construing criminal statutes to impose [this] rigorous form of strict liability."[33]

D. Due-Process Implications

Most of the time, the Supreme Court's discussion of strict-liability offenses occurs in the context of statutory construction because the Court will often read a culpable mental state into a federal statute even if the statutory language is silent.[34] But there is one case from the Supreme Court that has found a due-process violation, and there are other cases from the Court that discuss in *dicta* the due-process implications of imposing a "rigorous" form of strict liability.

In *Lambert v. California*, the Supreme Court addressed an ordinance that required a person who was previously convicted of a felony to register with the City of Los Angeles if the person stayed in the city for more than five days or came into the city on five

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[33] *Id.*; *see also Hazelwood*, 946 P.2d at 884 n.16 ("In other words, even strict liability crimes do not dispense with the requirement of criminal intent. Rather, because they rest on a fair presumption of unreasonableness, they do not require that negligence be shown separately.").

[34] *See Staples*, 511 U.S. at 605-06 ("[W]e have noted that the common-law rule requiring *mens rea* has been followed in regard to statutory crimes even where the statutory definition did not in terms include it.").

or more occasions during a thirty-day period.[35] The Court held that the registration statute violated due process when it was applied to a person who had no actual knowledge of his duty to register and where no showing was made "of the probability of such knowledge."[36] "Engrained in our concept of due process," the Court held, "is the requirement of notice."[37] Although notice is an important component of procedural due process in defending against a criminal charge, it is also a consideration in determining whether certain behavior can even be considered a criminal law violation.[38]

In *Powell v. Texas*, the Supreme Court recognized its holding in *Lambert* but nevertheless stated that the "Court has never articulated a general constitutional doctrine of *mens rea*."[39] It is true that the Court focused on the fact that the crime in *Lambert* was one of "omission."[40] But the Court also noted that there was no suggestion that the defendant in the case before it – who was arguing that he lacked *mens rea* due to his alcoholism – "was not fully aware of the

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[35] 355 U.S. 225, 226 (1957).

[36] *Id*. at 227-30. *See also Smith*, 361 U.S. at 150 (citing *Lambert* and observing that, while the States had the power to create strict-liability offenses, "there is precedent in this Court that this power is not without limitations").

[37] *Lambert*, 355 U.S. at 228.

[38] *Id*.

[39] 392 U.S. 514, 535 & n.27 (1968).

[40] *Id*. at 535 n.27.

prohibited nature of his conduct and of the consequences of taking his first drink."[41]

While *Lambert* dealt with what the Court called a defendant's "wholly passive" behavior,[42] the Supreme Court has in later cases suggested that due process may apply to more active behavior if the activity engaged in is not the sort that would place the defendant on notice of the probability of regulation. In *United States v. Int'l Minerals & Chem. Corp*., the Supreme Court explained that, while the dangerous nature of drugs, hand grenades, and sulfuric acid are sufficient to place a person on notice of regulation, more innocuous products such as "[p]encils, dental floss, [and] paper clips . . . may be the type of products which might raise substantial due process questions if Congress did not require . . . *mens rea* as to each ingredient of the offense."[43] In that case, the Court also observed that a person who believed in good faith that he was shipping water instead of sulfuric acid was not covered by terms of the statute that required the defendant to know what substance he was transporting.[44] In *United States v. Freed*, the Court contrasted the case before it with *Lambert*, saying "an agreement to acquire hand grenades is hardly an agreement innocent in itself" because hand grenades

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[41] *Id*.

[42] *Lambert*, 355 U.S. at 228. *See also Powell*, 392 U.S. at 535 n.27.

[43] 402 U.S. at 564-65.

[44] *Id*. at 563-64.

are highly dangerous weapons, "no less dangerous than the narcotics involved in *United States v. Balint*."[45]

E. Illustrative Texas Cases

Two of our own recent cases, though not dealing with constitutional issues, illustrate how a mental element of sorts comes into play with respect to what is denominated a strict-liability offense. In *Farmer v. State*, a defendant accused of driving while intoxicated (DWI) contended that he was entitled to a jury instruction on "voluntariness" because he did not intentionally consume an intoxicating substance.[46] The defendant in that case took prescription medications on a daily basis – taking Ultram, and sometimes Soma, in the morning and taking Ambien at night.[47] However, on the day of the incident, the defendant took Ambien in the morning and was later involved in an auto accident.[48] The defendant contended that he was entitled to a defensive instruction on voluntariness because there was evidence that he took the Ambien by mistake, thinking it was Soma.[49]

We explained that DWI is a strict-liability crime, "meaning that it does not require a specific mental

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[45] *Freed*, 401 U.S. at 609 & n.14.

[46] 411 S.W.3d 901, 902 (Tex. Crim. App. 2013).

[47] *Id*.

[48] *Id*.

[49] *Id*. at 902-03.

state (e.g., intentionally, knowingly, or recklessly intending to operate a motor vehicle while intoxicated), only a person on a public roadway voluntarily operating a motor vehicle while intoxicated."[50] Rejecting the defendant's claim, we found in essence that the defendant was at least negligent with respect to whether he was taking an intoxicating substance.[51] We contrasted the defendant's case with *Torres v. State*, where we had held that the defendant was entitled to an instruction on involuntary intoxication because there was evidence that someone had, without her knowledge, slipped an intoxicating substance into her beverage.[52] Because the defendant in *Farmer* had some culpability for consuming an intoxicating substance, he was in a similar position to someone who consumed "that first drink" and, therefore, was responsible for ascertaining whether he was or would be intoxicated when he drove.[53]

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[50] *Id*. at 905.

[51] *Id*. at 907-08 ("Stated another way, this is not a case of unknowingly or unwillingly taking pharmaceutical medication (similar to *Torres*); this is a case of knowingly taking pharmaceutical medication but mistakenly taking the wrong one. While we may be sympathetic to a 'mistake,' Appellant was involved in two accidents because of his 'mistake.' Even if Appellant took the medication in error, that error was made because Appellant did not take the time to verify the medication he was taking, although he knew that he was prescribed medications that could have an intoxicating effect.").

[52] *Id*. at 907-08 & n.9; *Torres v. State*, 585 S.W.2d 746, 748-49 (Tex. Crim. App. [Panel Op.] 1979).

[53] *See Lomax*, 233 S.W.3d at 305 n.7. *See also Powell*, 392 U.S. at 535 n.27.

We agreed in *Farmer* that a defendant such as the one in *Torres*, who was not culpable with respect to consuming an intoxicating substance, should be entitled to a defensive instruction.[54] Regardless of whether our statutes require such a result, I think that due process does. Inflicting harsh punishment for the offense of DWI upon a person who lacks any culpability for consuming an intoxicating substance and also lacks any culpability for driving while intoxicated violates fundamental notions of justice.

The second case that I find instructive is *Celis v. State*, where the defendant was charged with falsely holding himself out as a lawyer.[55] The defendant in that case contended that he was entitled to a culpable-mental-state instruction or a mistake-of-fact instruction on whether he believed that he was licensed to practice law.[56] He claimed that such an instruction was raised by evidence that he believed himself to be authorized to practice law in Mexico.[57] We rejected the defendant's claim in part because "[a]cting as a lawyer is highly regulated conduct" and, therefore, the legislature has "placed the burden of complying with conditions imposed for the protection of the public upon those who hold themselves out as lawyers for profit, rather than placing upon the public the burden of determining whether an individual is qualified and

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[54] *Farmer*, 411 S.W.3d at 907 n.9.

[55] 416 S.W.3d 419, 421 (Tex. Crim. App. 2013).

[56] *Id*. at 422.

[57] *Id*. at 421.

eligible to provide legal services."[58] A defendant who holds himself out as a lawyer acts with at least some degree of mental culpability because he should be aware of the probability of strict regulation of the legal profession, even if he lacks a culpable mental state with respect to whether he is validly licensed.[59]

F. Summary

To summarize, every person in this country has a fundamental right to be free from harsh criminal punishment when mental culpability is entirely absent. Mental culpability is entirely absent if, and only if, the person lacks a culpable mental state with respect to (1) an element of the offense that is crucial to imposing criminal liability, *and* (2) the existence of facts that would place him on notice of the probability of strict regulation that would impose a duty to ascertain whether his conduct violates the law. The term "culpable mental state" in this context is broadly defined, including more than simply those that are statutorily recognized and embracing even the concept of ordinary negligence. Many so-called strict-liability offenses contain at least an implied culpable mental state with respect to facts that give notice of the

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[58] *Id*. at 425-27.

[59] The statute does not explicitly assign a culpable mental state to the act of holding oneself out to be a lawyer, *see* TEX. PENAL CODE § 38.122(a), but it is hard to imagine how someone could hold himself out to be a lawyer without knowing that he is doing so, much less without at least a culpable mental state of negligence with respect to that conduct.

probability of strict regulation. When that is the case, the strict-liability offense in question does not involve a fundamental right because it does not impose criminal liability on a person who entirely lacks any mental culpability. But some offenses do not require any mental culpability at all. This latter type of offense imposes a "rigorous" form of strict liability and implicates a fundamental right if the offense carries harsh penalties and the offense is applied to a person who entirely lacks any mental culpability. When a fundamental right is implicated, application of a rigorous strict-liability offense violates due process unless it is narrowly tailored to serve a compelling state interest.

III. CHILD SEX OFFENSES

A. Status Throughout the Nation

I begin my discussion of child sex offenses by acknowledging that the Supreme Court has recognized sex offenses as an exception to the deeply rooted notion that criminal liability must depend upon a "vicious will."[60] This exception may be less than it appears when one considers that the term "vicious will" was not necessarily understood by the Supreme Court to encompass all types of mental culpability – it meant an "evil-meaning mind," not necessarily a negligent mind.[61]

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[60] *Morissette*, 342 U.S. 246, 251 & n.8.

[61] *Id. See also* this opinion, *ante*.

Nevertheless, "[p]rior to 1964, it was the universally accepted rule in the United States that a defendant's mistaken belief as to the age of a victim was not a defense to a charge of statutory rape."[62] California was the first to break with such precedent, holding that a good-faith and reasonable belief that a victim was over the age of consent was a defense to statutory rape.[63] The Court of Appeals for the Armed Forces has noted that one state imposes a culpable mental state with respect to age as an element of the crime (Ohio) while twenty other states currently allow for some form of mistake-of-age defense for sex offenses involving children[64] – although only four (Alaska, Indiana, Kentucky, and Washington) allow such a defense regardless of the child's actual age.[65] Just four states – Alaska, California, New Mexico, and Utah – have ever recognized a mistake-of-age defense without specific statutory authorization.[66] Of those four states, California and New Mexico remain the only

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[62] Colin Campbell, *Mistake or lack of information as to the victim's age as defense to statutory rape*, 46 A.L.R.5th 499, summary (1997, 2013).

[63] *Id.*; *People v. Hernandez*, 61 Cal. 2d 529, 393 P.2d 673 (1964).

[64] *United States v. Wilson*, 66 M.J. 39, 43-44 & n.8 (C.A.A.F. 2008).

[65] *See id*. (citing statutes from Alaska, Indiana, and Kentucky). The Court of Appeals for the Armed Forces stated that only three states have done so, but my research indicates that a fourth state – Washington – allows a defense regardless of the child's actual age. WASH. REV. CODE ANN. § 9A.44.030(2), (3).

[66] *Wilson*, 66 M.J. at 43 (citing *Hernandez*; *Perez v. State*, 111 N.M. 160, 803 P.2d 249 (N.M. 1990); *State v. Elton*, 680 P.2d 727 (Utah 1984); *State v. Guest*, 583 P.2d 836 (Alaska 1978)).

states operating under a judicially created mistake-of-age defense.[67] Alaska has codified its defense[68] while Utah has statutorily disallowed such a defense.[69] Utah's Supreme Court subsequently upheld as constitutional the statute disallowing a mistake-of-age defense.[70] Alaska is the only jurisdiction that has suggested that a mistake-of-age defense is constitutionally required,[71] and the Supreme Court of Alaska later clarified that its due-process holding was based upon its state constitution.[72] Meanwhile, we have long construed various statutes proscribing child sex offenses as not allowing for a mistake-of-age defense.[73]

Deciding that the submission of a mistake-of-age defense is sometimes required by the Due Process Clause of the United States Constitution would be

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[67] *Id*. The Court of Appeals for the Armed Forces stated that California is the only remaining state, *id*., but my research has failed to uncover a statutory source of authority for New Mexico's defense beyond the New Mexico Supreme Court's holding in *Perez*.

[68] *Wilson*, 66 M.J. at 43-44 & n.8.

[69] *Id*. at 43-44 & n.9. *See also State v. Jimenez*, 284 P.3d 640, 643 n.4 (Utah 2012).

[70] *State v. Martinez*, 52 P.3d 1276, 1280-81 (Utah 2002).

[71] *See Guest*, 583 P.2d at 838-39.

[72] *State v. Fremgen*, 914 P.2d 1244, 1245-46 (Alaska 1996). *See also Martinez*, 52 P.3d at 1281 n.8 (referring to Alaska's holding as based on its state constitution); *Owens v. State*, 352 Md. 663, 675 n.6, 724 A.2d 43, 49 n.6 (1999) (same).

[73] *See Black v. State*, 26 S.W.3d 895, 898-99 (Tex. Crim. App. 2000); *Zachary v. State*, 57 Tex. Crim. 179, 182-83, 122 S.W. 263, 265-66 (1909).

breaking new ground, but doing so would be necessary if logic and precedent seem to require it and if such a holding were based, at least in part, upon a relatively new development in the law. As I shall further explain, logic and precedent do seem to require such a holding, and there is at least one relatively new, relevant development in the law: *Lawrence v. Texas*.

B. Harsh Punishment

In this country, people have a fundamental right not to be punished harshly when mental culpability is entirely absent. The first question to address, then, is whether the Texas legislative scheme imposes harsh punishments for the commission of child sex offenses. I also consider whether this is a new development.

Historically, Texas law included rape of a child within the offense of rape, which carried heavy penalties. As early as 1879, the offense of rape, including rape of a child with or without consent, carried a punishment range of "death or . . . confinement in the penitentiary for life, or for any term of years not less than five."[74] The modern Penal Code has spread out the proscribed conduct into several different provisions with punishments that range from two years to life, depending on the age of the victim and the seriousness of the conduct.[75]

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[74] TEX. PENAL CODE arts. 528, 534 (1879).

[75] *See* TEX. PENAL CODE §§ 21.02 (25 to 99 years or life), 21.11(a)(1), (d) (second-degree felony), 22.011(a)(2), (f) (first- or

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One relatively new development that has made convictions for sex offenses more burdensome to offenders is the registration system.[76] That system, which often requires registration for life,[77] damages an offender's reputation by giving notice to the public and law-enforcement agencies of the defendant's sex-offender status. Further, if a jury were inclined to be lenient with respect to punishment because it believed that the defendant made a reasonable mistake about the child's age, it could not do anything about the burdens imposed by the registration system. Even without the registration system, child sex offenses are and have always been serious crimes in Texas. They are a far cry from mere public-welfare offenses that carry only light penalties.[78] Thus, for the purpose of determining whether a fundamental right is involved, Texas does indeed impose harsh punishments for child sex offenses. And though harsh punishment itself is not new, the burden of registration is relatively new.[79]

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second-degree felony), 22.021(a)(1), (2)(A), (B), (e), (f) (first-degree felony, minimum 25 year sentence under certain circumstances); 43.25(b), (c) (second-degree felony, first-degree felony if child under age 14). *See also id*. §§ 12.32 (5 to 99 years or life for first-degree felony), 12.33 (2 to 20 years for second-degree felony).

[76] *See* TEX. CODE CRIM. PROC., Ch. 62, generally.

[77] *See id*. art. 62.101.

[78] *See Staples*, 511 U.S. at 618 ("public welfare" label not apt for offense that is a felony). *See also Guest*, 583 P.2d at 838 ("Statutory rape may not appropriately be categorized as a public welfare offense. It is a serious felony.").

[79] As I have explained above, the registration requirement is a burden the finder of fact can do nothing about, and that is

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C. Mental Culpability

1. *Rationales for Strict Liability*

The next question to address is whether child sex offenses impose a rigorous form of strict liability – liability without any mental culpability whatsoever. I also consider whether this is a new development. A number of reasons for imposing strict liability for child sex offenses have been articulated, but they generally fall within two overarching types of rationales: (1) that the defendant in such a situation knows or should know that his conduct is, in some manner, wrongful or risky, and (2) that children need to be

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true even if the finder of fact believed that the defendant was entirely blameless with respect to whether he was dealing with a child. Responding to my comments regarding sex offender registration, Judge Alcala's concurring opinion takes issue with the idea that a defendant who has sexual relations with a child under fourteen could ever be blameless because, in her view, that idea is contrary to what the legislature has enacted. Elsewhere, the concurring opinion contends that the legislature has not acted unreasonably or arbitrarily in this regard. As has been discussed above, and will be further discussed below, the legislature is not always the final word on what constitutes blameworthy behavior. The legislature does not have *carte blanche* to impose criminal liability on those who are factually blameless. And as will be seen below, the concurring opinion uses the wrong standard when it asks whether the legislature has "acted unreasonably or arbitrarily." That is the standard for a "rational basis" review, which is inapplicable if the law infringes upon a fundamental right. In any event, I do not contend that the severity of punishment is sufficient, by itself, to require the imposition of an affirmative defense of mistake of age. There is far more to my substantive-due-process argument, which I expound upon further below.

protected.[80] The first type of rationale relates to whether the defendant possesses some sort of mental culpability, and thus, to whether a fundamental right is implicated. If he knows or should know that his conduct is wrongful or risky, then he may be said to possess some mental culpability, under the broad constitutional definition, even if he does not possess a specific culpable mental state regarding the age of the child. The second type of rationale – protecting children – does not speak to whether the defendant possesses any mental culpability and, therefore, is not relevant to whether a fundamental right is implicated. Rather, the protecting-children rationales are relevant to the next step in the substantive-due-process analysis: whether legislation is narrowly tailored to serve a compelling state interest. Consequently, I focus first on the wrongful-conduct rationales to determine whether a fundamental right is even implicated.

Wrongful-conduct rationales take various forms, but most of them share a similar focus, and, as a group, I will call them the "peril" rationales. These are the rationales that are generally used to justify strict-liability offenses, and they say that something about

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[80] *See Collins v. State*, 691 So. 2d 918, 923 (Miss.1997) ("Historically, there have been two basic rationales for statutory rape laws. The first rationale is the need for strict accountability to protect young girls. The second rationale is the premise that the defendant's intent to commit statutory rape can be derived from his intent to commit the morally or legally wrongful act of fornication.").

the defendant's conduct places him on notice that he acts at his peril and must take care to avoid violating the law.[81] Some courts have said that a person who engages in sexual relations with an individual who is not his spouse is engaging in conduct that constitutes the crime of fornication, and because the defendant knows or should know that such conduct is a crime, he assumes the risk that he may be committing a crime involving someone under the age of consent.[82] In an early case, we also articulated this rationale.[83]

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[81] *See also* this opinion, part IIC.

[82] *Holton v. State*, 28 Fla. 303, 308, 9 So. 716, 717 (1891) ("It is unlawful per se to carry on such practices with any female not the lawful wife of the malfeasor, and we think that the offense here, so far as intent is involved, comes within the rule, that a man shall be held responsible for all the consequences of his wrongdoing. By having illicit intercourse with any female he violates the law; should it turn out that the partner in his crime is within the prohibited age, he will not be allowed to excuse himself by asserting ignorance as to her age."); *Commonwealth v. Murphy*, 165 Mass. 66, 70, 42 N.E. 504, 505 (1895) ("The defendants in the present cases knew they were violating the law. Their intended crime was fornication at the least. It is a familiar rule that, if one intentionally commits a crime, he is responsible criminally for the consequences of his act if the offence proves to be different from that which he intended."); *Collins*, 691 So. 2d at 923 (intent to commit statutory rape derived from the legally or morally wrongful act of fornication). *See also Guest*, 583 P.2d at 839 (referring to, but rejecting, position of other jurisdictions that conduct can be punished as rape because the actor at least understood that he was committing the crime of fornication); *Elton*, 680 P.2d at 730 (same).

[83] *Edens v. State*, 43 S.W. 89, 89 (Tex. Crim. App. 1897) (quoting McClain, Cr. Law, § 451: "Where the offense is in having connection with a child under the age of consent, belief

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Other courts, including our Court, have taken the position that fornication at least violates societal morals, causing the actor to assume the risk that his consort is underage:

> While, within principles explained in another connection, no one is ever punishable for any act in violation of law whereto, without his fault or carelessness, he was impelled by an innocent mistake of facts, this rule does not free a man from guilt of his offense by reason of him believing, on whatever evidence, that the girl is above the statutory age. His intent to violate the laws of morality and the good order of society, though with the consent of the girl, and though in a case where he supposes he shall escape punishment, satisfies the demands of the law, and he must take the consequences.[84]

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on the part of the defendant that she was over the age of consent, and that, therefore, consent on her part would prevent the act from being criminal, cannot be shown. Connection with a child under the age of consent being criminal, one who has connection with a female which would, in any event, be unlawful, must know at his peril whether her age is such as to make the act a rape.").

[84] *Zachary*, 57 Tex. Crim. at 183, 122 S.W. 265-66 (quoting Bishop, *Statutory Crimes*, § 490); *Edens*, 43 S.W. at 89 (same); *Territory v. De los Santos*, 42 Haw. 102, 106 (1957) (same); *State v. Houx*, 109 Mo. 654, 661, 19 S.W. 35, 37 (1891) (quoting second sentence only, from Wharton on Criminal Evidence, § 724). *See also Collins*, 691 So. 2d at 923 (citing 6 Am. Jur.2d, *Proof of Facts*, § 2 (1975)); *State v. Wade*, 224 N.C. 760, 761, 32 S.E.2d 314, 315 (1944) (quoting 44 Am. Jur., § 41, p. 926: "In any event, he has committed a moral wrong [sexual intercourse with an

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Nebraska takes the position that a reasonable mistake about a victim's age is no defense because it is not unfair "to require one who gets perilously close to an area of proscribed conduct to take the risk that he may cross over the line."[85] It is not clear what constitutes "getting perilously close to proscribed conduct" with respect to the victim's age, but the statement was derived from a case in which the issue was whether there should be a defense based upon a reasonable mistake of fact regarding whether the underage victim was "chaste."[86] A defendant who had sexual relations with an underage female took his chances on whether she was chaste.[87]

Citing *Bowers v. Hardwick*,[88] Maryland's high court has suggested an even broader form of "peril" rationale, in line with holdings for public-welfare offenses: "that a person has no constitutional right to engage in sexual intercourse, at least outside of marriage, and sexual conduct is frequently subject to state regulation."[89] The Supreme Court of Massachusetts

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unmarried female], and he was bound to know, at his peril, that her age was such that consent on her part would prevent the act from being rape.").

[85] *State v. Campbell*, 239 Neb. 14, 19, 473 N.W.2d 420, 425 (1991); *State v. Navarrete*, 221 Neb. 171, 175, 376 N.W.2d 8, 11 (1985).

[86] *State v. Vicars*, 186 Neb. 311, 312-14, 183 N.W.2d 241, 242-43 (1971).

[87] *Id*.

[88] 478 U.S. 186 (1986).

[89] *Owens*, 352 Md. at 683, 724 A.2d at 53.

has also suggested a relationship between the rule of strict liability for child sex offenses and the rationale for strict liability for public-welfare offenses.[90]

Aside from the "peril" rationales, there is another rationale that I will call the "empirical" rationale. This rationale holds that, as an empirical matter, an adult who observes and interacts with a child knows or should know from that observation and interaction that the child is underage. The Maryland court seems to have taken this position, arguing that strict liability with respect to the victim's age is permissible in part because a perpetrator who "confronts the underage victim personally . . . may reasonably be required to ascertain that victim's age."[91] As will be discussed later, the main drawback of the empirical rationale is that it is not true in every case.

2. *Statutory Developments*

Three statutory developments in Texas may undercut these rationales. The first is the abolition of the offense of fornication. The legislature repealed the statutes outlawing fornication and adultery in

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[90] *Murphy*, 165 Mass. at 70, 42 N.E. at 505.

[91] *Owens*, 352 Md. at 680, 724 A.2d at 51. The Maryland court elaborated, "Indeed, it is hard to imagine when a defendant, necessarily four years older than the victim . . . would be 'morally blameless' when he or she engages in sexual intercourse with a child as young as age 13." *Id*. at 680-81, 724 A.2d at 51-52.

1973.[92] To the extent that one might, in the past, have argued that a person necessarily possessed a mental culpability with respect to risky or dangerous circumstances because engaging in sexual relations with a non-spouse was a crime, that rationale no longer applies. But as explained above, our Court also explicitly articulated a rationale based on societal morals rather than merely on the illegality of fornication.

The second development is the fact that the age of consent has risen throughout the years. In 1879, sexual relations with a consenting child was rape only if the child was "a female under the age of ten."[93] In 1895, such conduct became rape only if the child was a "female under the age of fifteen years, other than the wife" of the actor.[94] In 1925, such conduct became rape if the child was a female under the age of eighteen and was not the wife of the actor, but it was a defense if the actor could show that the child was at least fifteen, consented, and "was not of previous chaste character."[95] In 1974, various child sex offenses proscribed various forms of sexual conduct

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[92] *See City of Sherman v. Henry*, 910 S.W.2d 542, 551 n.4 (Tex. App.-Dallas 1995) (citing TEX. PENAL CODE ANN. art. 503 (Vernon 1925), repealed by Act of June 14, 1973, 63d Leg., R.S., ch. 399, § 1973 Tex. Gen. Laws 883, 992 (fornication); TEX. PENAL CODE ANN. art. 499 (Vernon 1925), repealed by Act of June 14, 1973, 63d Leg., R.S., ch. 399, § 1973 Tex. Gen. Laws 883, 992 (adultery)).

[93] TEX. PENAL CODE art. 528 (1879).

[94] TEX. PENAL CODE art. 633 (1895).

[95] TEX. PENAL CODE art. 1183 (1925).

with a child younger than seventeen (who was not a spouse), but it was a defense that the child was at least fourteen and had a history of engaging promiscuously in the sexual conduct.[96] The promiscuity defense was deleted from the various child sex offenses in 1994.[97] Our state's modern child-sex-offense statutes generally provide an age of consent of seventeen,[98] with younger ages resulting in an aggravated offense or an aggravated punishment,[99] but one Texas statute criminalizes sexual conduct involving a child under age eighteen.[100] Texas retains a defense for consensual sexual relations with a child fourteen years or older who is the spouse of the actor.[101]

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[96] TEX. PENAL CODE §§ 21.09, 21.10, 21.11 (Vernon's 1974).

[97] Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994 (amending TEX. PENAL CODE §§ 21.11, 22.011).

[98] TEX. PENAL CODE §§ 21.11(a), 22.011(c)(1).

[99] *Id*. §§ 21.02(b)(2) (age 14), 22.021(a)(2)(B), (f)(2) (same), 22.021(f)(1) (age 6).

[100] TEX. PENAL CODE § 43.25(b) ("A person commits an offense if, knowing the character and content thereof, he . . . induces a child younger than 18 years of age to engage in sexual conduct. . . ."). At one time, it was an affirmative defense to prosecution under this provision if the actor "in good faith, reasonably believed that the child . . . was 18 years of age or older." *See* TEX. PENAL CODE § 43.25(f)(1) (West 2000). This affirmative defense no longer exists. *See* TEX. PENAL CODE § 43.25, *passim* (current).

[101] *Id*. §§ 21.11(b-1), 22.011(e)(1), 43.25(f)(1). *See also id*. §§ 21.02, 22.021 (applying to children under age 14 and providing no spousal defense). The discussion of defenses here is historical and illustrative and is not an attempt to comprehensively catalogue the various defenses that apply to sexual offenses involving children.

It appears that the rising age of consent has been a trend in other states as well.[102] The Supreme Court of California has suggested that the purpose of the rule that a defendant acts "in peril" with respect to the child's age has been undermined by statutory increases in the age of consent.[103] In *Hernandez*, that court noted that the Model Penal Code prescribes a mistake-of-age defense when the criminality of any conduct depends on the child being under a specified age that is higher than ten.[104] The court also quoted from a commentator who criticized the logic of applying strict liability after the age of consent had been raised above ten:

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

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[102] *People v. Cash*, 419 Mich. 230, 244, 351 N.W.2d 822, 827-28 & n.11 (1984).

[103] *Hernandez*, 61 Cal. 2d at 533, 393 P.2d at 675-76.

[104] *Id*. at 533 n.2, 393 P.2d at 676 n.2.

> men and boys who are no more dangerous than others of their social, economic and educational level. . . . Even if the girl looks to be much older than the age of consent fixed by the statute, even if she lies to the man concerning her age, if she is a day below the statutory age sexual intercourse with her is rape. The man or boy who has intercourse with such girl still acts at his peril. *The statute is interpreted as if it were protecting children under the age of ten*.[105]

Michigan's high court has rejected the argument that the increased age of consent has undermined the rationale for strict-liability offenses,[106] and other courts have expressly declined to follow the California Supreme Court's ultimate holding in *Hernandez*.[107]

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[105] *Id*. at 534 n.3, 393 P.2d at 676 n.3 (quoting Plascowe, SEX AND LAW, 184-85 (1951)) (emphasis in *Hernandez*).

[106] *Cash*, 419 Mich at 244, 351 N.W.2d at 827-28.

[107] *State v. Superior Court of Pima County*, 104 Ariz. 440, 442-43, 454 P.2d 982, 984-85 (1969); *State v. Silva*, 53 Haw. 232, 232-33, 491 P.2d 1216, 1216-17 (1971); *State v. Stiffler*, 117 Idaho 405, 409, 788 P.2d 220, 224 (1990); *Garnett v. State*, 332 Md. 571, 583-85, 632 A.2d 797, 803-04 (1993); *Commonwealth v. Miller*, 385 Mass. 521, 522-23, 432 N.E.2d 463, 464-65 (1982); *State v. Morse*, 281 Minn. 378, 384-85, 161 N.W.2d 699, 703 (1968); *Navarrete*, 221 Neb. at 174-75, 376 N.W.2d at 11; *Goodrow v. Perrin*, 119 N.H. 483, 488-89, 403 A.2d 864, 868 (1979); *State v. Yanez*, 716 A.2d 759, 763-66 (R.I. 1998); *State v. Fulks*, 83 S.D. 433, 436-37, 160 N.W.2d 418, 419-20 (1968), *overruled on other grounds by State v. Ree*, 331 N.W.2d 557 (1983); *State v. Jadowski*, 272 Wis. 2d 418, 441 n.49, 680 N.W.2d 810, 822 n.49 (2004).

Furthermore, *Hernandez* was not decided on constitutional grounds.[108] I do not believe that the rise in the age of consent is alone sufficient to undermine the "peril" rationales, but it is a factor to consider.

A third potentially relevant statutory development in Texas is the dramatic increase in the length of the period of limitations applicable to child sex offenses. In 1974, all sex offenses had a limitation period of one year.[109] The short limitation period might have provided a certain amount of protection for someone who reasonably, but mistakenly, believed that he was dealing with an adult.[110] But limitation periods have progressively lengthened for child sex offenses.[111] Now

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[108] *Hernandez*, 61 Cal. 2d at 536, 393 P.2d at 677 ("We hold only that, in the absence of a legislative direction otherwise, a charge of statutory rape is defensible wherein a criminal intent is lacking.").

[109] *See* TEX. CODE CRIM. PROC. ANN. art. 12.01, historical note (Vernon's 1977) (referring to 1975 amendment deleting subd. (4), which had read: "one year from the date of the commission of the offense: any felony in Penal Code Chapter 21 (Sexual Offenses)").

[110] This might have occurred through the exercise of prosecutorial discretion. *See Morse*, 281 Minn. at 385, 161 N.W.2d at 703 ("There may be cases where an application of [a law providing that criminal intent does not require proof of knowledge of the age of a child] leads to an unjust result. This is not one of them. In fact situations where the underage female is the aggressor and her male partner the real victim, it is likely that the good judgment of prosecutors and jurors will prevent a miscarriage of justice.").

[111] *See* TEX. CODE CRIM. PROC. ANN. art. 12.01, historical note (Vernon's 1977) (1975 amendment removed one-year provision so that sex offenses would fall within catch-all provision

(Continued on following page)

there is no limitation for the prosecution of most child sex offenses.[112]

I do not question the wisdom of the legislature in enacting various changes in the law with respect to child sex offenses. Much more information exists now than in the past about child sex offenses that might support the wisdom of, among other changes, higher ages of consent and longer periods of limitation, including grooming conduct engaged in by perpetrators and the characteristics of child-sex-abuse victims.[113] I mean only to point out that, in accomplishing otherwise laudable purposes, some of these changes have stripped away certain protections from those who acted reasonably and in good faith. This is not determinative of the issue before us but provides some background to assess what I see as the truly new and important legal development that changes the fundamental-rights analysis in this case.

3. *Lawrence v. Texas*

That development is the Supreme Court's decision in *Lawrence v. Texas*. To understand the impact

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prescribing three-year limitation period for felonies); TEX. CODE CRIM. PROC. art. 12.01(4)(C) (1996) (five-year limitation period); TEX. CODE CRIM. PROC. art. 12.01(5)(C) (1998) (for aggravated sexual assault of a child, limitation period of ten years from victim's eighteenth birthday).

[112] TEX. CODE CRIM. PROC. art. 12.01(1)(B), (D), (E).

[113] *See Morris v. State*, 361 S.W.3d 649 (Tex. Crim. App. 2011) and *Cohn v. State*, 849 S.W.2d 817 (1993).

of *Lawrence*, we must first understand the decision it overruled, *Bowers v. Hardwick*. In 1982, Hardwick was charged with violating a Georgia statute criminalizing sodomy for committing that act with another adult male in the bedroom of his home.[114] In addressing the case, the Supreme Court framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy"[115] and held that it did not.[116] The Court stated that the claimed right to engage in homosexual sodomy did not bear any resemblance to rights of privacy that had previously been recognized as protected by due process because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[117] In response to Hardwick's argument that the majority of the Georgia's electorate's belief that homosexual sodomy is immoral did not constitute a rational basis for a law outlawing the practice, the Supreme Court noted that, "The law . . . is constantly based on notions of morality."[118]

In *Lawrence*, the Supreme Court reversed course and overruled *Hardwick*.[119] The Court criticized the

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[114] *Hardwick*, 478 U.S. at 187.

[115] *Id*. at 190.

[116] *Id*. at 191.

[117] *Id*. at 190.

[118] *Id*. at 196.

[119] *Lawrence*, 539 U.S. at 578.

Hardwick decision's framing of the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy" as "disclos[ing] the Court's own failure to appreciate the extent of the liberty at stake."[120] The *Lawrence* Court pointed to what it called "an emerging awareness" from the past half-century "that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[121] The Court found that this liberty belongs to all adults, whether male or female, heterosexual or homosexual:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[122]

And the Court found that this liberty belongs not only to married persons but also to unmarried persons:

> [I]ndividual decisions by married persons, concerning the intimacies of their physical

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[120] *Id*. at 566-67.

[121] *Id*. at 571-72.

[122] *Id*. at 567.

> relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.[123]

Addressing the point made in *Hardwick* that "for centuries there have been powerful voices to condemn homosexuality as immoral," the Court responded, "Our obligation is to define the liberty of all, not to mandate our own moral code."[124] Although a violation of the Texas statute outlawing homosexual conduct was punished as a mere Class C misdemeanor (fine-only offense), the Court observed that the conviction would nevertheless be on the defendant's record and it would come within the sex-offender registration laws of at least four States.[125] The Court found that this fact "underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition."[126]

Finally, the Court emphasized that the case before it involved consenting adults in a private setting.[127] The case did not involves minors, public

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[123] *Id*. at 578 (quoting Justice Stevens's dissent in *Hardwick* and concluding, "Justice Stevens'[s] analysis, in our view should have been controlling in [*Hardwick*] and should control here.").

[124] *Id*. at 571.

[125] *Id*. at 575-76.

[126] *Id*. at 576.

[127] *Id*. at 578.

conduct, injury or coercion, relationships where consent might not easily be refused, or prostitution.[128]

The rationale for holding a defendant strictly liable because he should have at least realized that he was committing the illegal, immoral, or risky conduct of fornication with an adult has been negated entirely by the holding in *Lawrence*. Under *Lawrence*, consensual sexual activity between adults, married or unmarried, is constitutionally protected.[129] Such activity can no longer be outlawed, and moral considerations with respect to such activity are no longer legally relevant. After *Lawrence*, "consensual sexual activity between adults is no longer subject to strict legislative regulation,"[130] and, thus, a defendant does not necessarily act at his peril when he reasonably believes that he is having sexual relations with an adult. The holding in *Lawrence* has led at least two law professors to contend in published law review articles that due process requires that a defense be available to an individual who engages in sexual

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[128] *Id*.

[129] *Cf. Owens*, 352 Md. at 684, 724 A.2d at 53 (pre-*Lawrence* decision stating that "[t]he crime of statutory rape also does not implicate other constitutional rights that heighten our level of inquiry").

[130] Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 320-21 (2003).

intercourse with a person that he non-negligently believes is an adult.[131]

Few jurisdictions have addressed the impact of *Lawrence* on a defendant's eligibility for a mistake-of-age defense in "statutory rape" type prosecutions (i.e. prosecutions for child sex offenses that impose liability on the basis of the child's age for what would otherwise be consensual sexual conduct). The Supreme Court of Wisconsin's *Jadowski* case addressed a mistake-of-age due-process claim within a year after *Lawrence* was decided but did not cite it.[132] The Supreme Court of North Dakota has recently rejected a mistake-of-age due-process claim without mentioning *Lawrence*.[133] In *Wilson*, the Court of Appeals for the Armed Forces cited *Lawrence* but decided the mistake of-age question as a matter of federal statutory law.[134] The Supreme Court of New Hampshire discussed *Lawrence* and maintained that the imposition

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[131] Arnold Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77, 77 (Winter 2005); Carpenter at 321. *See also* Jarrod Foster Reich, Note, *"No Provincial or Transient Notion": The Need for a Mistake of Age Defense in Child Rape Prosecutions*, 57 VAND. L. REV. 693, 723-25 (March 2004) ("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.").

[132] *See Jadowski*, 272 Wis. 2d at 438-442, 680 N.W.2d at 820-22.

[133] *State v. Vandermeer*, 843 N.W.2d 686, 691 (N.D. 2014).

[134] *Wilson*, 66 M.J. at 41 & *passim*.

of strict liability for child sex offenses was permissible because such imposition was grounded in part on reasons other than the intent to commit the wrongful act of fornication,[135] though it appears that the court may not have been responding to a constitutional claim.[136] Aside from the court below, I am aware of two intermediate appellate courts that have held that *Lawrence* did not affect a defendant's eligibility for a mistake-of-age instruction because the sexual conduct was in fact committed against a minor and *Lawrence*'s holding does not apply to minors.[137]

But the courts that say simply that *Lawrence* does not apply when a minor is involved have missed

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[135] *State v. Holmes*, 154 N.H. 723, 727-28, 920 A.2d 632, 635-36 (2007) ("We decided *Goodrow*, however, assuming, without deciding, that the plaintiff *had* a constitutionally protected privacy right to engage in consensual heterosexual intercourse with other adults. . . . Thus, the developments in the law since we decided *Goodrow* would not change our analysis. Moreover, intent to commit the then-legally wrongful act of fornication was only one of the rationales for statutory rape laws.").

[136] *Id*. at 725, 727, 920 A.2d at 634, 635 ("The defendant first contends that we failed to interpret the statutory rape provision . . . and its predecessors, correctly in our prior cases because we did not take into account another provision of the Criminal Code. . . . The defendant next asserts that because adult consensual sexual relationships are not as regulated as they were when we decided our prior cases, there is no longer any justification for permitting strict liability for statutory rape.").

[137] *State v. Browning*, 177 N.C. App. 487, 492, 629 S.E.2d 299, 303, *review denied*, 360 N.C. 578, 635 S.E.2d 902 (2006); *United States v. Bazar*, 2012 CCA LEXIS 242, *20-21 (A.F.C.C.A. June 29, 2012, review denied).

the point – making the same mistake ascribed by the *Lawrence* court to the *Hardwick* decision: having an overly narrow concept of the right at stake. If the defendant non-negligently believed that he was having consensual sex with an adult, then he non-negligently believed in the existence of circumstances that would constitutionally protect him from liability under *Lawrence*. Such a non-negligent belief would negate the existence of even the most minimal sort of mental culpability. In any event, at least three of the post-*Lawrence* cases involved a defendant who believed that the complainant was *seventeen*.[138] As I shall explain below, a belief that the complainant was under age eighteen but over the age of consent does not qualify, for constitutional purposes under *Lawrence*, as a belief that the complainant was an adult.

4. *Limits of Lawrence's Holding*

Lawrence's holding was limited to adults. While the Court's opinion in *Lawrence* did not explicitly say what age qualifies as adulthood, the United States Constitution and Supreme Court jurisprudence draw a distinct line at the age of eighteen. One must be at least eighteen years of age to vote.[139] Persons under eighteen years of age are considered juveniles for Eighth Amendment purposes, rendering them ineligible

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[138] *Vandermeer*, 843 N.W.2d at 691; *Holmes*, 154 N.H. at 723, 920 A.2d at 632; *Bazar*, 2012 CCA LEXIS 242, *20.

[139] U.S. CONST., Amend. 26, § 1.

for the death penalty, for life without parole in non-homicide cases, and for automatic life without parole in any case.[140] Age eighteen also appears to be the line drawn for First Amendment purposes in determining what constitutes legally proscribable child pornography.[141] The Supreme Court has stated that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood."[142] An eighteen-year-old has a right to exercise a certain social independence that generally does not belong to persons under that age.[143]

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[140] *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Graham v. Florida*, 560 U.S. 48, 81-82 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

[141] *United States v. Wilson*, 565 F.3d 1059, 1067 (8th Cir. 2009) ("Although the First Amendment protects non-obscene adult pornography, sexually explicit materials involving persons under the age of 18 enjoy no constitutional protection.") (citing *New York v. Ferber*, 458 U.S. 747, 764 (1982)).

[142] *Simmons*, 543 U.S. at 574. Age eighteen is also the line drawn for determining whether the onset of mental disability qualifies a person as mentally retarded. *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004).

[143] *See Navarro v. Pfizer Corp*., 261 F.3d 90, 107 (1st Cir. 2001) (Campbell, J., dissenting) (referring to "the typical scenario in which, at and after age 18, a child may be regarded as having achieved substantial independence and self-sufficiency so as to be able to live on her own, support herself, and be ministered to by others than her parents"); *Tyson v. Heckler*, 727 F.2d 1029, 1032 (11th Cir. 1984) (Kravitch, J., concurring) ("in light of the Twenty-sixth Amendment and the legislative trend toward using eighteen years of age as the age of majority, twenty-one no longer is a reliable benchmark of an individual's independence from his parents").

The statutory age of consent is irrelevant in deciding what the Constitution requires. Constitutionally, it does not matter that a defendant lacked a culpable mental state with respect to the age of consent, if that age is younger than eighteen. The constitutional alchemy[144] kicks in only when the defendant lacks a culpable mental state with respect to whether the child was in fact a child. For the "peril" rationales to be negated under *Lawrence*, a person must non-negligently believe that his sexual partner is eighteen years of age or older. A person who knows or should know that he is dealing with a child – that is, someone under age eighteen – continues to act at his peril that the child may be younger than he supposes.

For this reason, we should not quarrel with the *results* in the three post-*Lawrence* cases involving defendants who believed that their victims were seventeen years old because those defendants were at least culpable with respect to whether their victims

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[144] In her article, "Texas Holds Him," for Slate.com (posted October, 10, 2007), Dahlia Lithwick used the words, "That's where the real constitutional alchemy kicks in," to describe Solicitor General Paul Clement's position in *Medellin v. Texas* that President Bush's memo to the Attorney General was the key factor that made a judgment by the International Court of Justice under the Vienna Convention treaty enforceable in Texas courts. The Supreme Court subsequently rejected Clement's position in *Medellin v. Texas*, 552 U.S. 491 (2008).

were children. The results in a number of older cases could also be upheld on this basis.[145]

The holding in *Lawrence* is limited in a few other respects, including the fact that it applies only to activity that is consensual and that it does not apply to prostitution.[146] If a defendant commits a factually non-consensual sexual assault (e.g., by force) or hires

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[145] *See Gaines v. State*, 354 Ark. 89, 99, 118 S.W.3d 102, 108 (2003) (defendant argued that "there appears to be no rationale why a victim['s] age is easier to ascertain when they are younger than fourteen as opposed to being fourteen or older"); *Owens*, 352 Md. at 667, 674, 724 A.2d at 45, 48 (victim told police officer that she was sixteen years old, issue before the court was "whether due process requires that Owens be allowed to defend the charge of statutory rape on the grounds that he reasonably believed that the victim was above the age of 13"); *Murphy*, 165 Mass. at 70, 42 N.E. at 504 (defendant asked for instruction that he could not be convicted unless he "knew or had good reason to believe that the girl was under sixteen years of age"); *Cash*, 419 Mich. at 236, 351 N.W.2d at 824 (defendant claimed that victim had said she was seventeen); *Houx*, 109 Mo. at 661, 19 S.W. at 37 (defendant sought to present testimony "tending to prove that he had reason to believe that the prosecutrix was . . . over the age of twelve years"); *Yanez*, 716 A.2d at 766 (defendant claimed that victim told him that she was sixteen years old); *Wade*, 224 N.C. at 761, 32 S.E.2d at 315 (defendant testified that the victim told him that she was twelve); *Zachary*, 57 Tex. Crim. at 182, 122 S.W. at 265 (defendant claimed that victim had told him that she was over the age of fifteen years); *Lawrence v. Commonwealth*, 71 Va. 845, 855 (1878) (defendant sought instruction that the jury cannot find him guilty if it believed that the victim "stated to him she was twelve years old, and that he had reasonable cause to believe that she was twelve years old").

[146] *Lawrence*, 539 U.S. at 578.

a prostitute,[147] the holding in *Lawrence* will not be available to negate his mental culpability. The various limitations of *Lawrence* also mean that *Lawrence* cannot be used to justify the submission of a lesser-included offense. If, even under the facts believed by him or that he ought to believe, the defendant's conduct would not be protected under *Lawrence*, then *Lawrence*'s holding is not available to negate the defendant's mental culpability, and the defendant can be held to have acted in peril that the facts are even worse than he supposes.

5. *The Empirical Rationale*

The holding in *Lawrence* leaves room for what I have termed the empirical rationale for imposing strict liability for child sex offenses: that a person knows or should know from observing and interacting with an underage individual that the individual is in fact a child.[148] There are undoubtedly ages at which, under all or most circumstances, it is simply not possible for a child to be reasonably mistaken for an adult. In responding to appellant's facial challenges to the aggravated-sexual-assault statute, the amicus

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[147] The trafficking of children for the purpose of prostitution is a recognized subject of international conventions. *Velez v. Sanchez*, 693 F.3d 308, 323 (2d Cir. 2012).

[148] As the earlier discussion indicates, the post-*Lawrence* question is *not* whether, as an empirical matter, a person could mistake a child for an older child, e.g. a thirteen-year-old for a fourteen-year-old.

brief[149] offers the hypothetical of an adult male who causes his sexual organ to penetrate the anus or sexual organ of a two-year-old child. The amicus is exactly right that no reasonable adult would mistake the two-year-old for an adult. And the amicus is exactly right that this hypothetical, by itself, causes appellant's facial challenges to fail.[150]

The amicus brief emphasizes that the offense at issue in the present case is *aggravated* sexual assault, involving a child under age fourteen, and the amicus argues that no fundamental right is involved in such a case. There is some support for this position. The Supreme Court of California, which first recognized a mistake-of-age defense to statutory rape, has indicated that children under age fourteen are considered "infants" or "of tender years" and that a mistake-of-age defense may "be untenable when the offense involved a child that young."[151] On the other hand, the

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[149] Submitted by the 35th Judicial District Attorney's office.

[150] A statute that does not implicate First Amendment freedoms can be held unconstitutional on its face only if it is unconstitutional in all of its applications. *State v. Rosseau*, 396 S.W.3d 550, 557-58 (Tex. Crim. App. 2013). *See also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (stating that, under *United States v. Salerno*, 481 U.S. 739 (1987), a party must establish that no set of circumstances exists under which the statute would be valid, and that while some members of the Court have criticized the *Salerno* formulation "all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.' ").

[151] *People v. Olsen*, 36 Cal. 3d 638, 645-46, 205 Cal. Rptr. 492, 685 P.2d 52, 56-57 (1984).

California court's holding concerned the offense of lewd or lascivious conduct, and the court held that "the public policy considerations in protecting children under the age of 14 from lewd or lascivious conduct are substantial – *far more so than those associated with unlawful sexual intercourse*."[152] The Court of Appeals of Maryland has noted that "Maryland's statutory rape law is less likely than a number of other state statutes to reach noncriminal sexual conduct since the victim in Maryland must be under fourteen years of age, while other states have adopted older ages of consent."[153] In any event, most states that allow a mistake-of-age defense disallow such a defense when the child's age drops below a certain threshold.[154] There seems to be no unanimity as to the

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[152] *Id*. at 649, 685 P.2d at 59 (emphasis added).

[153] *Owens*, 352 Md. at 686 n.15, 724 A.2d at 54 n.15.

[154] ARIZ. REV. STAT. § 13-1407(B) (age 15); ARK. CODE ANN. § 5-14-102(b), (c), (d) (age 14 if actor is at least age 20); COLO. REV. STAT. § 18-1-503.5 (age 15); 720 ILL. COMP. STAT. 5/11-1.60(c), (d) & 5/11-1.70(b) (age 13); ME. REV. STAT. tit. 17-A §§ 253(1)(B), 254(1)(A), (2) (age 14); MINN. STAT. §§ 609.343(1)(a), 609.344(1)(a), (b) (age 13 or age 16 depending upon the relative age of the actor); MO. ANN. STAT. § 566.020(1), (2) (age 14); MONT. CODE ANN. § 45-5-511(1) (age 14); *Perez*, 111 N.M. at 162, 803 P.2d at 251 (age 13); N.D. CENT. CODE § 12.1-20-01 (age 15); OHIO REV. CODE ANN. §§ 2907.02((b), 2907.04(a) (age 13); OR. REV. STAT. § 163.325(1), (2) (age 16); 18 PA. CONS. STAT. § 3102 (age 14); TENN. CODE ANN. §§ 39-11-502(a), 39-13-504(a)(4), 39-13-522(a) (age 13); W. VA. CODE ANN. §§ 61-8B-3, 61-8B-7, 61-8B-12 (age 12); WYO. STAT. § 6-2-308 (age 14).

threshold age, however, with ages ranging from twelve to sixteen.[155]

Moreover, it is commonly known that some children enter puberty and mature before the age of fourteen and may look like an adult.[156] As explained

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[155] *See* this opinion, previous footnote.

[156] *See Olsen*, 36 Cal. 3d at 645-46, 685 P.2d at 56 (court of appeals "recognizing that some females reach puberty below the age of 14"); *United States v. Langley*, 549 F.3d 726, 731-32 (8th Cir. 2008) (Beam, J., concurring) (government's attorney stated in oral arguments, "[I]f you're dealing with a child over the age of twelve or thirteen and puberty has hit . . . the government does not charge those cases unless you have someone to definitely state the age because it is difficult once a female in particular hits puberty to know exactly what age they are."); *Free Speech Coalition v. Holder*, 957 F. Supp. 2d 564, 578 (E.D. Pa. 2013) (government witness, a medical doctor, testified that the classic literature suggests that girls reach full maturation between ages fourteen and sixteen, but he further testified that he had published literature suggesting that maturation for girls is actually occurring earlier, and he testified that determining one's age by visual inspection alone is an inexact science, with a two to five year margin of error, and that margin is greater for members of the public); *Timothy J. v. Superior Court*, 150 Cal. App. 4th 847, 854, 58 Cal. Rptr. 3d 746, 749 (Cal. App. 3rd Dist. 2007, req. denied) (clinical and forensic neuropsychologist testified that a person reaches puberty around the ages of eleven, twelve, and thirteen); *Frederic v. State*, 770 So. 2d 719, 720 (Fla. App. 4th Dist. 2000), *pet. dism'd*, 817 So. 2d 846 (2002) (victim's pregnancy showed that she had already reached puberty at age thirteen); *Commonwealth v. Walter R.*, 414 Mass. 714, 717-18, 610 N.E.2d 323, 325 (1993) (holding in a juvenile-delinquency case that "there is no sound legal or medical basis for a presumption that an individual under fourteen is incapable of rape, as defined at common law" and commenting that medical information suggests that "[o]ver the past century, the onset of puberty has gradually

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above, there are ages – such as age two – about which we can say, *by virtue of the age alone*, that it is simply not possible to reasonably mistake the child for an adult. But age thirteen is not such an age. It is true that the younger the child, the less *likely* it is that a mistake as to adulthood could reasonably be made. But the fundamental-rights question here – involving the defendant's mental culpability – does not turn upon what may generally be true about children of a certain age; it turns upon the defendant's mental culpability with respect to the child in question.[157]

D. Compelling Interests and Narrow Tailoring

It is beyond dispute that the State has a compelling interest in safeguarding the physical and

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occurred at a younger age, and currently begins between the ages of ten and twelve"); *In re Frederick*, 63 Ohio Misc. 2d 229, 232 n.1, 622 N.E.2d 762, 764 n.1 (Court of Common Pleas, Cuyahoga Co., Juvenile Div. 1993) (stating that the "average age of puberty for females is eleven to eleven and a half years, and as young as nine years is considered within the range of normal. The average age of puberty for males is twelve and a half to thirteen years").

[157] There are situations in which a somewhat arbitrary line with respect to a child's age can be drawn in a statute, such as when criminal conduct becomes a greater offense or is punished more severely if the child is below a certain age. *See Black*, 26 S.W.3d at 897-98 (capital murder of a child under age six). Arbitrary line drawing in those situations is permitted for policy reasons. *Id*. Such policy reasons are inapplicable to the question of whether, as a factual matter, a fundamental right is implicated because the defendant entirely lacked any mental culpability with respect to the complainant's status as a child.

psychological well-being of children.[158] Protecting children is a widely articulated rationale for imposing strict liability for child sex offenses.[159] Courts have

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[158] *United States v. Stevens*, 559 U.S. 460, 471 (2010); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (quoting *New York v. Ferber*, 458 U.S. 747, 756 (1982)); *Black*, 26 S.W.3d at 897 (citing *Henderson v. State*, 962 S.W.2d 544, 562 (Tex. Crim. App. 1997) (plurality op.)).

[159] *See Gaines*, 354 Ark. at 102, 118 S.W.3d at 109 ("[T]he state has an interest in the general welfare of children, and one of the most obvious duties is to protect children from sexual crimes against which children are virtually defenseless."); *Owens*, 352 Md. at 681-82, 724 A.2d at 52 ("The case law testing the constitutionality of strict liability statutory rape law is unanimous in recognizing the significance of the potential harm caused by sexual activity involving children, even with their consent."); *Cash*, 419 Mich. at 242, 244, 351 N.W.2d at 827, 828 (articulating "the need to protect children below a specified age from sexual intercourse on the presumption that their immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct" and the need to protect children from the "possible physical or psychological harm from engaging in sexual intercourse"); *Collins*, 691 So. 2d at 923 (articulating one basic rationale for statutory rape law as "the need for strict accountability to protect young girls"); *Holmes*, 154 N.H. at 727-28, 920 A.2d at 636 (quoting *Collins* (see above), citing other out-of-state cases, and quoting *Goodrow*, 119 N.H. at 486, 403 A.2d at 866: "It is well established that the State has an independent interest in the well-being of its youth. One reason for this heightened interest is the vulnerability of children to harm. Another reason for the State's concern is that minors below a certain age are unable to make mature judgments about important matters."); *Commonwealth v. Robinson*, 497 Pa. 49, 54, 438 A.2d 964, 966 (1981) (referring to "the legislative desire to protect those who are too unsophisticated to protect themselves"); *Yanez*, 716 A.2d at 766 (absence of *mens rea* "is designed to subserve the state interest of protecting female children from

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variously held that strict-liability laws for child sex offenses are needed to prevent the exploitation of children by predators,[160] to protect children from physical injury,[161] to prevent teenage pregnancy,[162] to protect children from sexually transmitted diseases,[163] and to protect children from psychological injury and stigma.[164] Strict-liability statutes have been said to achieve this goal of protecting children by deterring

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the severe physical and psychological consequences of engaging in coitus before attaining the age of consent"); *Fulks*, 83 S.D. at 436, 160 N.W.2d at 420 ("The arbitrary age of consent in these cases has been established by our legislature as a matter of public policy for the obvious protection of young and immature females."); *Jadowski*, 272 Wis. 2d at 431, 680 N.W.2d at 817 ("The statute is intended to protect children. The state has a strong interest in the ethical and moral development of its children, and this state has a long tradition of honoring its obligation to protect its children from predators and from themselves.").

[160] *Superior Court of Pima County*, 104 Ariz. at 443, 454 P.2d at 985 ("We do not think the predatory nature of man has changed in the last decade."); *Owens*, 352 Md. at 681-82, 724 A.2d at 52 (discussing the need to prevent the exploitation of children); *Cash*, 419 Mich. at 244, 351 N.W.2d at 828 (same); *Jadowski*, 272 Wis. 2d at 431, 680 N.W.2d at 817 (discussing the need to protect children from predators).

[161] *Cash*, 419 Mich. at 244, 351 N.W.2d at 828; *Yanez*, 716 A.2d at 766.

[162] *Stiffler*, 117 Idaho at 407, 788 P.2d at 222; *Owens*, 352 Md. at 682, 724 A.2d at 52.

[163] *Owens*, 352 Md. at 682, 724 A.2d at 52.

[164] *Id*. at 682-83, 724 A.2d at 52-53; *Cash*, 419 Mich. at 244, 351 N.W.2d at 828; *Yanez*, 716 A.2d at 766.

adults from engaging in the prohibited conduct[165] and by making prosecutions easier by eliminating difficulties of proof that may occur due to the rapid physical development of children or the difficulty in rebutting a defendant's claims of mistake.[166]

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[165] *Holton*, 28 Fla. at 307, 9 So. at 717 ("The object of the law is to deter men, by the severe penalty imposed, from voluntarily seeking intercourse with unmarried females within the prohibited age. Not only that the pure may be shielded from contamination, but that the fallen shall be deprived of the opportunity to further continue their life of sin."); *Owens*, 352 Md. at 685, 724 A.2d at 54 ("Deterrence is accomplished by placing the risk of error in judgment as to a potential sex partner's age with the potential offender."); *Collins*, 691 So. 2d at 923 ("If reasonable mistake were recognized as a defense, the very purpose of the statute would be frustrated and the deterrent effect considerably diminished."); *Holmes*, 154 N.H. at 728, 920 A.2d at 636 ("The statutes are designed to impose the risk of criminal penalty on the adult . . . [and] [i]n this way, these statutes accomplish deterrence"); *Jadowski*, 272 Wis. 2d at 431, 680 N.W.2d at 817 ("The statutes are designed to impose the risk of criminal penalty on the adult, when the adult engages in sexual behavior with a minor.").

[166] *Owens*, 352 Md. at 687, 724 A.2d at 55 (stating that strict liability "avoids the risk that the inevitably emotional statutory rape trial will focus unjustifiably on the child's appearance and level of maturity" and quoting from *Cash*: "The obvious problem is that because early adolescents tend to grow at a rapid rate, by the time of trial a relatively undeveloped young girl or boy may have transformed into a young woman or man."); *Cash*, 419 Mich. at 245, 351 N.W.2d at 828; *Jadowski*, 272 Wis. 2d at 431-32, 680 N.W.2d at 817 (stating that a mistake-of-age defense "would raise practical law enforcement problems. Age is difficult to ascertain, and actors could often reasonably claim that they believed their victims were adults"). *See also Dep't of H.U.D. v.*

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But a rule of *rigorous* strict liability – that flatly denies any defense based upon mistake of age, no matter how reasonable the defendant's mistake was nor what age he reasonably believed the complainant to be – is not narrowly tailored to achieve the goal of protecting children. Such a rule imposes liability on even the diligent defendant, who exercises all the reasonable caution that society would expect of him.[167] A defendant who is diligent about ascertaining that his sexual partner is an adult, and reasonably (but mistakenly) believes that to be so, is not a sexual predator, nor is his relationship with the child one of exploitation.[168]

Moreover, various mechanisms, other than rigorous strict liability, can be used to deter adults from choosing the very young as sexual partners. The law

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Rucker, 535 U.S. 125, 134 (2002) ("Strict liability maximizes deterrence and eases enforcement difficulties.").

[167] *See Hernandez*, 61 Cal. 2d at 534, 393 P.2d at 676 (referring to, as lacking criminal intent, the defendant who "has subjectively eliminated the risk [of sex with an underage person] by satisfying himself on reasonable evidence that the crime cannot be committed").

[168] *Stiffler*, 117 Idaho at 407, 788 P.2d at 222 ("We concede that the protection of girls from conscienceless men is a purpose that would not be violated by a requirement of specific intent before conviction. As to that purpose it is the conscience or state of mind of the perpetrator that is at issue. Likewise, exploitation focuses on the advantage gained by the perpetrator of the act. This is a state of mind of the perpetrator, not an effect on the female.").

can impose an explicit requirement of diligence.[169] The law can also require that the actor's reasonable, diligence-based, belief be that the child was an *adult*, not merely a child above the age of consent. An actor can thus be expected to look for social independence or other factors that signify adult status (e.g. attending university, having a of [sic] residence of one's own, paying bills). The law can also make the reasonable-mistake-of-age issue an affirmative defense, placing the burden upon the defendant to prove the circumstances that would exculpate him.[170] Placing such a burden on the defendant would preserve the heavy

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[169] *See Elton*, 680 P.2d at 729 (holding that the purpose of deterring persons from engaging in intercourse with the young can be accomplished by imposing liability upon proof of criminal negligence).

[170] The Supreme Court has held that the State can impose a burden on the defendant to prove a confession-and-avoidance type defense without violating due process. *Dixon v. United States*, 548 U.S. 1, 6-8 (2006) (duress); *Patterson v. New York*, 432 U.S. 197, 205-10 (1977) (extreme-emotional-disturbance defense in a murder case, which, if proven, would reduce the offense to manslaughter); *Id*. at 210 ("We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. . . . Proof of the non-existence of all affirmative defenses has never been constitutionally required."). Even the dissent in *Patterson* recognized the legitimacy of imposing the burden of proof on the defendant for some types of defensive issues, and it cited, as one example, the adoption in a number of states of a defense to statutory rape "if the defendant shows that he reasonably believed his partner was of age." *Id*. at 229-30 & n.14 (Powell, J., dissenting).

incentive to be cautious because a person would know that, if he were accused: (1) the State would only have to prove the age of the child for the prosecution to go forward, (2) the defendant would have the burden to produce evidence of and prove his reasonable-mistake defense, (3) the trial judge might choose not to submit the defense, on the basis that the defendant has not sufficiently met his burden of production on an element of his defense or the evidence conclusively demonstrates that an element of his defense is not met, and (4) even if the defense is submitted, the finder of fact might choose not to believe the defendant's evidence.

With respect to the asserted difficulties in proof due to a child's rapid physical development and a defendant's ability to plausibly assert a mistake, such concerns are alleviated in an age of digital cameras and camcorders, in which it has become much easier to create and retain images of one's children. The ease with which images can be created increases the likelihood that a finder of fact will be able to examine images of the child from the relevant time periods. In any event, placing the burden of production and persuasion on the defendant with respect to the mistake-of-age issue would also alleviate this concern because the defendant, not the State, would suffer the risk of loss if the finder of fact is uncertain about the genuineness or reasonableness of any mistake about the child's age.

Some courts have said that recognizing a reasonable-mistake-of-age defense would "considerably diminish[ ]"

the deterrent effect of child-sex-offense statutes,[171] but such conclusions appear to be mere speculation.[172] As explained above, twenty states have some form of mistake-of-age defense, and I am unaware of any evidence that those states have a higher incidence of child sex offenses, or a significantly lower incidence of successful prosecutions, than states that provide no such defense.[173] Although the mere speculative

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[171] *Holmes*, 154 N.H. at 728, 920 A.2d at 636; *Collins*, 691 So. 2d at 923. *See also Yanez*, 716 A.2d at 769 (quoting Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73-74 (1933): "The reason that mistake of fact as to the girl's age constitutes no defense is, not that these crimes like public welfare offenses require no *mens rea*, but that a contrary result would strip the victims of the protection which the law exists to afford. Public policy requires it. Unless defendants were made to determine at their peril whether or not their victims fall within the class peculiarly needing the protection of the law and thus set apart, there could be no real protection.").

[172] *See Pietila v. Congdon*, 362 N.W.2d 328, 334 (Minn. 1985) (referring to "[t]he extraordinary speculation inherent in the subject of deterrence of crime"); *Goldberg v. Housing Authority*, 38 N.J. 578, 590, 186 A.2d 291, 297 (1962) (referring to "the extraordinary speculation inherent in the subject of deterrence of men bent upon criminal ventures"); *State v. Thurman*, 846 P.2d 1256, 1264 n.7 (Utah 1993) ("We acknowledge that a determination of what must be done in the interest of deterrence must involve a fair degree of speculation until much more is known about the way deterrence works in fact than now seems knowable.") (internal quotation marks omitted).

[173] *See also* Loewy at 100 ("There is no evidence that those states that allow reasonable mistake of age as a defense have fewer statutory rape prosecutions or a significantly higher acquittal rate."). Furthermore, the amicus brief contends, "Most sexual assaults of children are committed by someone the child knows, such as a parent, parent figure, or a familiar and authoritative

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possibility of a greater deterrent effect would be sufficient to justify a rigorous strict-liability regime under the rational-basis test,[174] such speculation is not sufficient to establish narrow tailoring under the compelling-state-interest test that applies when a fundamental right is implicated.[175]

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adult." Amicus at 7 (citing Thomas D. Lyon and Julia A. Dente, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1203-05 (Fall 2012)). If that is true, then a mistake-of-age defense would not be available to most persons who are charged with sexual assaults of children because those persons would or should know the child's age.

[174] *Heller v. Doe*, 509 U.S. 312, 320 (1993) (Under the rational basis test, "[a] State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."); *Federal Communications Commission v. Beach Communications*, 508 U.S. 307, 314-15 (1993).

[175] *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest."); *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963) (We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. . . . The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. . . . [E]ven if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.").

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But if one considered the speculative possibility of an increase in deterrence, one would also want to consider how a rigorous-strict-liability regime could produce additional victims. The obvious example implicated in the present discussion is the essentially innocent defendant who is punished for a crime for which he entirely lacks any mental culpability. But other examples of the potential perverse effects of a rigorous-strict-liability regime can be conceived. An underage individual could lure an unsuspecting adult

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Judge Alcala's concurrence speculates that permitting a mistake-of-age defense would negatively impact the reporting and prosecution of child sex offenses, but I am aware of no evidence that jurisdictions that have recognized a mistake-of-age defense have had a decline in the reporting and prosecution of child sex offenses. The concurrence also contends that defense attorneys will be able to ask invasive questions of the child "in virtually any case in which a defendant could plausibly claim that he was unaware of the complainant's age." But if, as seems likely, the adult that has sexual relations with a young child is usually a family member, close family friend, familiar authority figure, or a kidnapper, then it will not be often that the defendant in a young-child case can plausibly claim reasonable, actual ignorance of the child's age. Further, the defendant has to raise the issue first, probably by his own testimony. So the victim would not be subject to such cross-examination during the State's case-in-chief, and any such questions would normally not be permissible unless and until they have been shown to be relevant to the defendant's allegations. And the defendant's evidence of mistake of age would have to indicate a mistake about whether the child was an *adult*, and not merely about whether the defendant perceived the child to be older than he or she actually was.

into a sexual liaison for the purpose of blackmail.[176] The existence of several cases involving blackmail about illicit sex – including one that involved a mistake of age – suggests that the scenario is not entirely far-fetched.[177]

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[176] *Elton*, 680 P.2d at 732 (referring to possibility that a youth will "seek[] to abuse the criminal law for his or her own sensual indulgences or for even more insidious purposes, such as blackmail").

[177] *See Blackwell v. State*, 2013 Tex. App. LEXIS 12606, *1-4 (Tex. App. – Houston [1st Dist.] October 10, 2013, pet. ref'd) (not designated for publication) (19-year-old male had sex with a 15-year-old female he met at a university party; he assumed that the girl was an adult because she had represented herself to be a university student; he was later informed that girl had an abortion and girl's stepfather threatened to involve the police and demanded $3000 to pay for the cost of the procedure); *Roberts v. State*, 278 S.W.3d 778 (Tex. App. – San Antonio 2008, pet. ref'd) (husband blackmailing four men with whom his wife had affairs); *Beasley v. State*, 2005 Tex. App. LEXIS 9334, *2 & n.2 (Tex. App. – Houston [1st Dist.] November 10, 2005, pet. ref'd) (not designated for publication) (tape recording of grandfather who threatened that his granddaughter would press charges of statutory rape if defendant, a jockey, chose to participate in that night's horse race); *Commonwealth v. Kean*, 382 Pa. Super. 587, 591, 556 A.2d 374, 376 (1989), *appeal denied*, 525 Pa. 596, 575 A.2d 563 (1990) ("Eventually, relations between the juveniles and the appellants took a turn for the worse. Alan and Steve borrowed the Keans' car without their permission and then became concerned that the Keans might notify the police. Alan and Steve were also afraid that Lucile Kean might falsely claim that the boys had forced her to participate in their sexual activities. Sometime during the summer of 1986, the boys decided to videotape one of their sexual encounters with the Keans. In this way, they hoped to gather evidence that Mrs. Kean's participation was consensual. They also reasoned that they could

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In an article, entitled "The Paradox of Statutory Rape," another troubling scenario has been suggested: that an adult rape victim of an underage attacker could be liable for rape under statutory-rape laws.[178] The authors argue that conduct by an adult rape victim of an underage attacker will often satisfy the literal elements of statutory rape and that the available defenses in many jurisdictions are insufficient to immunize the adult victim from criminal liability.[179] As one illustration, the authors discuss the facts of *Henyard v. State*,[180] in which an adult woman was raped at gunpoint by two males, Henyard and a fourteen-year-old.[181] Although the woman was the victim in that case, the authors contended that the woman's submission to the underage attacker literally satisfied the elements of the crime of statutory rape.[182]

In another illustration, the authors point to *Garnett v. State*, a Maryland case in which the defendant was mentally retarded.[183] In that case,

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use the tape to blackmail the Keans into not reporting the unauthorized use of their vehicle.").

[178] *See* Russell L. Christopher and Kathryn H. Christopher, *The Paradox of Statutory Rape*, 87 Ind. L.J. 505, 506 & *passim* (Spring 2012).

[179] *Id.*, *passim*.

[180] 689 So. 2d 239 (Fla. 1997).

[181] Christopher at 506-07; *Henyard*, 689 So. 2d at 242-43.

[182] Christopher at 507.

[183] *Id*. at 510.

Raymond Garnett, a twenty-year-old mentally retarded man with an I.Q. of fifty-two, who interacted socially at the level of age eleven or twelve, had sex with a thirteen-year-old girl of normal intelligence.[184] There was evidence that the girl invited him up to her room through an open window and told him that she was sixteen.[185] The authors of "The Paradox of Statutory Rape" point out that, under traditional rape law, Garnett could have been considered the victim because of his mental disability, and the thirteen-year-old could have been seen as the rapist.[186] The role reversal that results from "the paradox of statutory rape" may be more apparent if we consider a hypothetical fact situation in which an underage boy rapes a mentally retarded adult woman. Under a strict-liability regime, she would be the rapist and he the victim.

Imposing criminal liability on the rape victim simply because the attacker was underage would turn criminal law on its head. The possible existence of such a scenario under a rigorous strict-liability regime

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[184] *Garnett*, 332 Md. at 574, 577, 632 A.2d at 798, 800.

[185] *Id*. at 577, 632 A.2d at 800.

[186] Christopher at 511 & n.53 (also quoting Professor Catherine Carpenter as observing that "students who read *Garnett* in my first year Criminal Law class often view Raymond as the victim." Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. Rev. 295, 318 n.106 (2006)).

poses serious due-process concerns.[187] It may be that various defenses available in Texas – duress, necessity, and insanity[188] – would provide protection from criminal liability to any adult who is raped by an underage attacker. But the fact that we may need such defenses to perform that function points to the flaws of a rigorous strict-liability regime that ignores completely an actor's lack of actual blameworthiness.

The *Garnett* case is a real-world example that involves the mistake-of-age issue. The argument in that case was that the defendant was entitled to assert a defense of mistake of age because he thought the child was sixteen.[189] He was not entitled to such a defense under Maryland law.[190] Nor would *Lawrence* help him, under the principles that I propose today, because he believed the child to be under the age of eighteen. But the facts in Garnett's case suggest a related, though different, question of whether harsh punishment may be imposed upon a person who lacks mental culpability due to a mental disability. Although Maryland's high court upheld Raymond Garnett's conviction, it acknowledged that "it is uncertain to what extent Raymond's intellectual and social retardation

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[187] The potential for this scenario exists because, while the absence of consent by the complainant is an element of ordinary rape, the absence of consent by the defendant is not a defense, *per se*, to statutory rape.

[188] *See* TEX. PENAL CODE §§ 8.01, 8.05, 9.22.

[189] *Garnett*, 332 Md. at 577, 632 A.2d at 800.

[190] *Id*. at 588, 632 A.2d at 805.

may have impaired his ability to comprehend imperatives of sexual morality in any case."[191] Nevertheless, the court felt that its hands were tied, concluding, "extraordinary cases, like Raymond, will rely upon the tempering discretion of the trial court at sentencing."[192] How to handle child sex cases in which the defendant is a mentally retarded individual is not before us today, but such a scenario presents potentially serious due-process concerns that reinforce my conclusion that due process has a role to play in ensuring that the defendant possesses at least a minimal level of mental culpability for such a serious crime.

Based upon the above discussion, I conclude that a scheme of rigorous strict liability for child sex offenses is not narrowly tailored to serve the State's compelling interest in protecting children. Consequently, I would hold that, absent the availability of a mistake-of-age defense, child-sex-offense laws in Texas are unconstitutional as applied to an individual who demonstrates to the finder of fact by a preponderance of the evidence that he reasonably believed, after exercising appropriate diligence,[193] that his sexual partner was at least eighteen years old, so long as the

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[191] *Id*. at 582, 632 A.2d at 802.

[192] *Id*.

[193] I will discuss that type of diligence in further detail below.

individual's conduct would otherwise constitute protected activity under *Lawrence*.[194]

IV. REMEDY

The procedural component of the Due Process Clause requires that a defendant be afforded the opportunity to demonstrate that the statute is indeed unconstitutional as to him.[195] For that to occur, the defendant must be given the opportunity to offer evidence on the matter and, if the evidence raises the issue, to have a reasonable-mistake-of-age defense submitted to the finder of fact. The Penal Code does not contain a mistake-of-age defense, but courts are empowered to craft one to satisfy the demands of the Constitution.[196] I therefore address the content of that

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[194] Judge Alcala's concurring opinion contends that this Court must "abide by Supreme Court precedent and Texas law as written, rather than legislate from the bench." But the conclusion that I reach today flows logically and inexorably from the Supreme Court's holdings in *Lambert* and *Lawrence* and from the centuries-old notion, articulated in a number of Supreme Court cases, that heavy criminal punishment should not be imposed on someone who lacks even the most minimal sort of mental culpability for the crime.

[195] *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (right, rooted in part in due process, to present a defense); *Crane v. Kentucky*., 476 U.S. 683, 687-91 (1986) ("We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard.").

[196] *See State v. McPherson*, 851 S.W.2d 846, 850 (Tex. Crim. App. 1992) (A trial court has the authority to submit a non-statutory mitigation issue when the statute does not provide for one, to satisfy the demands of the Constitution.).

defense and the circumstances under which such a defense should be submitted. The following are the elements of a constitutionally required mistake-of-age defense:

> At the time of his conduct:
>
> (1) the defendant actually believed that the complainant was eighteen years of age or older, and the defendant was unaware of any substantial risk that the complainant was under the age of eighteen,
>
> (2) this belief and the lack of awareness was reasonable,
>
> (3) this actual, reasonable belief was based upon the exercise of diligence that a reasonable adult who contemplated sexual relations would exercise, and
>
> (4) but for the complainant's age, the defendant's conduct would constitute constitutionally protected consensual activity.

With respect to element (3), a defendant's exercise of diligence would not necessarily need to be based upon affirmative conduct on his part. The complainant might voluntarily supply the information needed, or the circumstances under which the defendant encounters the complainant might strongly suggest that the complainant is an adult.[197] But a reasonable belief

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[197] *See* Loewy at 80-81 (hypothetical involving an underage person who is a college sophomore).

that the complainant is an adult would not ordinarily be enough to warrant a mistake-of-age instruction if it is based upon mere fleeting or casual contact. A defendant would fail to meet element (4) if he hired the complainant as a prostitute or if his conduct would constitute a crime even if the complainant were an adult (*e.g.*, forcible rape or indecent exposure).[198]

As with all defenses, a defendant would be entitled to submission of this mistake-of-age defense only "if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true."[199] This is also known as making a *prima facie* case with respect to each element of the defense.[200] I would apply the usual analysis with the following caveats: With respect to element (2), a defendant's *prima facie* case would fail if the evidence of the complainant's appearance indisputably shows that the defendant could not have reasonably mistaken the complainant for an adult.[201] With respect to element (4), a defendant would make a *prima facie* showing by introducing evidence that the complainant actually

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[198] This is not necessarily an exclusive list of situations that fail to meet element (4).

[199] *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex. Crim. App. 2007).

[200] *Id*. at 657.

[201] *Elton*, 680 P.2d at 732 ("Clearly the physical appearance of the victim may be persuasive against a defendant. The physical appearance of a very young girl would, at least in some cases, negate any affirmative misrepresentation she might make.").

consented. However, the State could negate such a showing on element (4) by providing undisputed evidence that the defendant's conduct, even if consensual, would not be constitutionally protected (for some other reason).

I reiterate that this mistake-of-age defense would be an *affirmative* defense, which means that the defendant would shoulder both the burden of producing evidence and the burden of persuading the finder of fact.[202] The defendant's burden of persuasion would be by a preponderance of the evidence.[203] The constitutionally required mistake-of-age defense should not be confused with the statutory mistake-of-fact defense. The latter is a "defense," rather than an affirmative defense,[204] and there is some difference in the elements of the two defenses.[205]

V. DISPOSITION

In the present case, the court of appeals addressed the merits of appellant's constitutional complaints by holding, as a general matter, that the aggravated-sexual-assault statute's "lack of a mistake-in-fact defense does not offend notions of Due

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[202] *See* TEX. PENAL CODE § 2.04.

[203] *Id*., § 2.04(d).

[204] *See id*. §§ 2.03, 8.02.

[205] *See Celis*, 416 S.W.3d at 430-31 (holding that statutory mistake-of-fact defense is available only to negate a culpable mental state prescribed for the offense).

Process."[206] The court of appeals did not address a host of issues that may come into play after a holding that due process requires the submission of a mistake-of-age defense in an appropriate case. It did not consider the issue of procedural default, address whether the evidence raised the defense, or conduct a harm analysis.[207] Nor did the court consider whether evidence was excluded that would have been relevant to the defense, and it did not consider any attendant preservation and harm analyses associated with any such exclusion.[208] It did not need to, because its holding, if it had been correct, would have properly disposed of the case.[209] I would hold that it is appropriate for the court of appeals to address these issues in the first instance on remand.[210]

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[206] *See Fleming v. State*, 376 S.W.3d 854, 858-62 (Tex. App. – Fort Worth 2012, pet. granted).

[207] *See id*.

[208] *See id*.

[209] *State v. Plambeck*, 182 S.W.3d 365, 367 n.10 (Tex. Crim. App. 2005).

[210] *See Benavidez v. State*, 323 S.W.3d 179, 183 n.19 (Tex. Crim. App. 2010). The Court's opinion considers the facts of the present case, saying, "It would be unconscionable for us to allow a 25 year-old-man who was having sex with a 13-year-old child" to claim he was reasonably mistaken about whether he was having sex with an adult. And Judge Alcala's concurring opinion addresses whether, if a mistake-of-age defense were available, appellant in fact acted reasonably. But the court of appeals did not decide whether appellant actually acted reasonably. That court decided only that a mistake-of-age defense was never available under the statute. Appellant's petition for discretionary review challenges only that decision and his brief focuses only

(Continued on following page)

With these comments, I respectfully dissent.

Filed: June 18, 2014
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on the availability of a mistake-of-age defense as a general matter. This Court has never placed appellant on notice that the specific facts of his case would be an issue on discretionary review. We should not reach out to decide such an issue without at least affording him the opportunity to weigh in on the matter. *See Pena v. State*, 191 S.W.3d 133 (Tex. Crim. App. 2006). If we were to recognize a mistake-of-age defense, the court of appeals should address its applicability to appellant in the first instance. *See Hudson v. State*, 394 S.W.3d 522, 525 n.16 (Tex. Crim. App. 2013).

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-09-00215-CR

MARK FLEMING APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 158TH DISTRICT COURT
OF DENTON COUNTY

OPINION ON REMAND

I. INTRODUCTION

Appellant Mark Fleming entered a negotiated plea of guilty to four counts of aggravated sexual assault of a child younger than fourteen years of age.[1] The trial judge sentenced Fleming to ten years' confinement, suspended imposition of the sentence, and placed him on ten years' community supervision. Among the conditions of punishment, Fleming must register as a sex offender.

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[1] *See* Tex. Penal Code Ann. § 22.021(a)(1)(B)(iii), (2)(B) (West Supp. 2012).

Before trial, Fleming filed a motion to quash the indictment, challenging the constitutionality of Texas Penal Code section 22.021 under the Due Process Clause to the United States Constitution and the due course of law provision to the Texas Constitution.[2] In his motion, Fleming claimed that the statute is unconstitutional because it does not have a *mens rea* requirement and does not permit the affirmative defense of mistake of fact. The trial judge denied the motion.

Following sentencing, Fleming appealed the trial judge's ruling to this court. *Fleming v. State,* 323 S.W.3d 540 (Tex. App. – Fort Worth 2010), *vacated,* 341 S.W.3d 415 (Tex. Crim. App. 2011). We held that under the Due Process Clause, the statute is constitutional. *Id.* at 547. This court declined, however, to address Fleming's due course of law claim, holding that Fleming failed to preserve the issue for appeal because he failed to assert or brief "an argument that the due course of law analysis under the Texas constitution is different or provides greater protections" than the Due Process Clause. *Id.* at 542.

On June 13, 2011, the Texas Court of Criminal Appeals vacated this court's judgment, holding that our conclusion that Fleming had failed to preserve his due course of law argument "was improvident." *Fleming v. State,* 341 S.W.3d at 416. Because this

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[2] *See* U.S. Const. amends. V, XIV, § 1; Tex. Const. art. I, § 19.

court has already decided that the due course of law provision provides the same protections as the Due Process Clause, and because we conclude that Texas Penal Code section 22.021 does not violate Due Process, we will again affirm. *See Salazar v. State,* 298 S.W.3d 273, 277-78 (Tex. App. – Fort Worth 2009, pet. ref'd) (holding that the State constitution's due course of law provision does not provide a greater level of protection than the United States Constitution's Due Process Clause).

II. DISCUSSION

In four points,[3] Fleming argues that the Texas Penal Code provision under which he was convicted, section 22.021, is unconstitutional under the federal Due Process Clause and the Texas due course of law provisions because of its "failure to require the State to prove that [Fleming] had a culpable mental state ('*mens rea*') relating to the alleged victim's age when engaging in the conduct alleged" and "its failure to recognize an affirmative defense based on [Fleming's]

[3] After the court of criminal appeals vacated our original judgment, we asked for further briefing by the parties and again heard oral arguments. In coming to our analysis in this opinion, we have considered the parties' original briefs on the merits, the court of criminal appeals' instructions to us on remand, and the additional briefing on remand and oral arguments by the parties to this case. For the purposes of clarity, we are also addressing all four of Fleming's original points on appeal, not just his two points pertaining to his due course of law argument.

reasonable belief that the alleged victim at the time was 17 years of age or older."[4] We disagree.

The federal constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . U.S. Const. amends. V, XIV, § 1. Our state constitution provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. art. I, § 19.

A. Scope of the Due Course of Law Provision

This court has already had the occasion to address the question of whether this State's due course of law provision provides the same, more, or less protection than the federal Due Process Clause. *Salazar,* 298 S.W.3d at 277-78. As we stated in *Salazar,* this court's holding that the two provisions provide the same protections is predicated on the Supreme Court of Texas's holding that the two clauses are nearly identical and contain no meaningful distinctions in their respective clauses. *Id.* at 279-80 (*citing Univ. of Tex. Med. Sch. at Houston v. Than,* 901 S.W.2d 926, 929 (Tex. 1995)). Furthermore, this court and the majority of Texas courts of appeals have repeatedly held that the due course of law provision

[4] The judgment reads that the "age of the victim at the time of the offense was 13."

provides the same protections as the federal Due Process Clause. *See, e.g., State v. Vasquez,* 230 S.W.3d 744, 751 (Tex. App. – Houston [14th Dist.] 2007, no pet.); *Salazar v. State,* 185 S.W.3d 90, 92-93 (Tex. App. – San Antonio 2005, no pet.); *Jackson v. State,* 50 S.W.3d 579, 588-89 (Tex. App. – Fort Worth 2001, pet. ref'd); *State v. Rudd,* 871 S.W.2d 530, 532-33 (Tex. App. – Dallas 1994, no pet.); *Saldana v. State,* 783 S.W.2d 22, 23 (Tex. App. – Austin 1990, no pet.).

We conclude that nothing that Fleming briefed to this court, nor anything that he briefed in his motion to the trial court, nor anything that he briefed regarding this issue in his briefing on remand is distinct or different in any meaningful way from the arguments that this court has already considered on this issue when reaching our previous holdings. *See Salazar,* 298 S.W.3d at 277-78; *Jackson,* 50 S.W.3d at 588-89. Certainly, nothing in Fleming's arguments persuades us that our precedent on this matter should be overturned. *See Proctor v. State,* 967 S.W.2d 840, 844-45 (Tex. Crim. App. 1998) (reasoning that the doctrine of *stare decisis* should generally be followed because it promotes "judicial efficiency and consistency, . . . reliance on judicial decisions, and [it] contribute[s] to the actual and perceived integrity of the judicial process.").

Furthermore, this court agrees with Judge Keasler's position that even though the court of criminal appeals has never rendered an opinion on either the scope of the due course of law provision or "the substantive rights and protections" it provides,

given longstanding precedent that application of the due course of law provision be guided by cases from the Supreme Court of the United States, there exists "no reason to reach a contrary conclusion with respect to substantive rights and protections." *Fleming,* 341 S.W.3d at 416 (Keasler, J., concurring). This approach of treating procedural due process and substantive due process concerns with the equal application of law is founded on the axiomatic conclusion that the texts of both the due course of law provision and the Due Process Clause are virtually identical. *Than,* 901 S.W.2d at 929 ("While the Texas Constitution is textually different in that it refers to 'due course' rather than 'due process,' we regard these terms as without meaningful distinction."). Thus, it would make little sense to treat substantive due process claims any differently than procedural due process claims. We therefore will address Fleming's arguments regarding due course of law or due process under federal law, regardless of whether his claims are substantive or procedural in nature. *See Id.; Rose v. State,* 752 S.W.2d 529, 536-37 (Tex. Crim. App. 1987) (McCormick, J., dissenting), *superseded by statute; Thompson v. State,* 626 S.W.2d 750, 753 (Tex. Crim. App. [Panel Op.] 1981); *Ex parte Quintanilla,* 151 Tex. Crim. 328, 330, 207 S.W.2d 377, 378-79 (1947); *Huntsman v. State,* 12 Tex. App. 619, 625-50 (1882); *see also Nat'l Collegiate Athletic Ass'n v. Yeo,* 171 S.W.3d 863, 867-68 (Tex. 2005).

B. Substantive Due Process and Texas Penal Code 22.021

Even though Fleming does not refer to his claims as being either procedural or substantive due process arguments, he does not argue that the process depriving him of his liberty is deficient; rather, Fleming argues that the absence of a *mens rea* or mistake-of-age component to section 22.021 is a wrongful government action irrespective of the procedure in place to guarantee fairness. Thus, we interpret Fleming's arguments to be substantive due process claims. *See Zinermon v. Burch,* 494 U.S. 113, 124-25, 110 S. Ct. 975, 982-83 (1990).

Substantive due process protects citizens against arbitrary or wrongful state actions, regardless of the fairness of the procedures used to implement them. *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 845-46, 118 S. Ct. 1708, 1716 (1998). In assessing whether a government regulation impinges on a substantive due process right, the first step is to determine whether the asserted right is fundamental. *See Leebaert v. Harrington,* 332 F.3d 134, 140 (2d Cir. 2003) (discussing two-step process in analyzing a substantive due process claim). Rights are fundamental when they are implicit in the concept of ordered liberty or deeply rooted in this nation's history and tradition. *Immediato v. Rye Neck Sch. Dist.,* 73 F.3d 454, 460-61 (2d Cir.), *cert. denied,* 519 U.S. 813 (1996) (*citing Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S. Ct. 1932, 1938 (1977)). Where the right infringed is

fundamental, strict scrutiny is applied to the challenged governmental regulation. *Reno v. Flores,* 507 U.S. 292, 305, 113 S. Ct. 1439, 1448 (1993). But where the claimed right is not fundamental, the governmental regulation need only be reasonably related to a legitimate state objective to survive constitutional review. *Flores,* 507 U.S. at 306, 113 S. Ct. at 1449. Thus, our first inquiry is to determine whether there is a fundamental right entitling individuals to a *mens rea* component or a mistake-of-age defense in a statutory rape scheme.

It is a basic principle of criminal law that an actor should not be convicted of a crime if he had no reason to believe that the act he committed was a crime or that it was wrongful. *Morissette v. United States,* 342 U.S. 246, 252, 72 S. Ct. 240, 244 (1952). An intent requirement was the general rule at common law. *Id.* To be sure, the absence of a *mens rea* requirement in a criminal statute is a significant departure from longstanding principles of criminal law. *Staples v. United States,* 511 U.S. 600, 605, 114 S. Ct. 1793, 1797 (1994). Nevertheless, strict liability crimes – crimes defined without any culpable state of mind – are known at law. *Id.* When strict liability is imposed, the actor is deemed to have had sufficient notice concerning the risk of penal sanction inherent in the proscribed activity, and it is therefore just to impose criminal liability without the necessity of proving moral culpability. *United States v. Freed,* 401 U.S. 601, 613 n.4, 91 S. Ct. 1112, 1120 n.4 (1971). It has been written that "the existence and content of

the criminal prohibition in these cases are not hidden; the defendant is warned to steer well clear of the core of the offense (as in the statutory-rape case)." *United States v. Wilson,* 159 F.3d 280, 296 (7th Cir. 1998) (Posner, C.J., dissenting).

To this end, state legislatures have broad powers to promote the public welfare and to create criminal offenses and impose punishment, including the power to define an offense that excludes the element of mental culpability from its definition. *Lambert v. California,* 355 U.S. 225, 228, 78 S. Ct. 240, 242 (1957). Indeed, a state legislature is free to define a criminal offense and bar consideration of a particular defense so long as due process is not offended. *Montana v. Egelhoff,* 518 U.S. 37, 43, 116 S. Ct. 2013, 2017 (1996) (*quoting Patterson v. New York,* 432 U.S. 197, 201-02, 97 S. Ct. 2319, 2322 (1977)). And it is widely recognized that adults are well aware of the strict liability aspect of statutory rape laws. *See State v. Jadowski,* 680 N.W.2d 810, 821 n.42 (Wis. 2004) (discussing the colloquial phrase "[s]ixteen will get you twenty!" as a common exclamation expressing the widespread awareness of statutory rape laws and the strict liability aspect of the offense).

The strict liability crime of statutory rape, in which the victim's apparent maturity is not a defense, is a recognized exception to the general rule requiring *mens rea* in criminal statutes. *Jadowski,* 680 N.W.2d at 821. Traditionally, according to the weight of authority, "mistake as to age" has also not been a defense against the charge of statutory rape. *Morissette,* 342

U.S. at 251 n.8, 72 S. Ct. at 244 n.8; *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 72 n.2, 115 S. Ct. 464, 469 n.2 (1994).

Fleming argues that because the federal Due Process Clause and the state due course of law provisions were passed at a time when there existed a *mens rea* component to statutory rape laws in this nation, the lack of a mental culpability component offends "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." But the rule of tradition and conscience, or the guide of "historical practice," is not a first-in-time, bright-line rule. *Egelhoff,* 518 U.S. at 43, 116 S. Ct. at 2017. For example, the fundamental right to "engage in [sexual] conduct" without intervention of the government between consenting same-sex adults is hardly a concept that existed prior to the adoption of either due process provision; nonetheless, the Supreme Court, in overruling its previous holding, held this to be a fundamental right under substantive due process. *See Bowers v. Hardwick,* 478 U.S. 186, 191-92, 106 S. Ct. 2841, 2844 (1986), *overruled by Lawrence v. Texas,* 539 U.S. 558, 567, 123 S. Ct. 2472, 2478 (2003). This is so because this right is implicit in the concept of ordered liberty, even though "there have been powerful voices [condemning] homosexual conduct as immoral for centuries." *Lawrence,* 539 U.S. at 571, 123 S. Ct. at 2480. "Historical practice" is a probative guide to the ordered-liberty and deeply-rooted approach in determining fundamental rights, but it is a starting point only and

not the absolute determining guide to whether a right is fundamental. *Medina v. California,* 505 U.S. 437, 446, 112 S. Ct. 2572, 2577 (1992).

Fleming argues that *Lawrence v. Texas* actually supports his position because due process "extends to intimate choices by unmarried as well as married persons"; thus, according to Fleming, it is "simply unconstitutional" to penalize a person for making a mistake in fact concerning a minor's age while exercising this fundamental right. *Lawrence,* 539 U.S. at 578, 123 S. Ct. at 2483. But the *Lawrence* Court specifically indicated that its holding did not extend to cases involving minors, and we easily conclude that Fleming's reliance on *Lawrence* is misplaced. *Id.*

We also conclude that Fleming's attempts to find refuge for his position in the Supreme Court's case of *United States v. X-Citement Video* is equally unavailing. 513 U.S. at 72, 115 S. Ct. at 468. In *X-Citement Video,* an undercover police officer ordered pornographic tapes starring an underage actress from a video company. *Id.* at 66-67, 115 S. Ct. at 466. The company and its owner were indicted under a federal statute that criminalized the knowing receipt and transportation of child pornography. *Id.* The Supreme Court held that the term "knowingly" in the statute modified the phrase "the use of a minor" and required not only a knowing distribution of the pornographic material, but also knowledge of the performer's age. *Id.* at 71-83, 115 S. Ct. at 469-74. The *X-Citement Video* Court, however, also recognized that traditionally

> the presumption [of *mens rea*] expressly excepted "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." . . . [because] the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age. The opportunity for reasonable mistake as to age increases significantly once the victim is reduced to a visual depiction, unavailable for questioning by the distributor or receiver. *Id.* at 71-72 n.2, 115 S. Ct. at 469 n.2 (citations omitted).

Thus, *X-Citement Video* involves situations in which people usually would not confront the performer depicted in the material. *Id.* at 71-83, 115 S. Ct. at 469-74. Fleming, however, personally confronted the underage victim and could have learned her true age. Therefore, *X-Citement Video* is distinguishable from this case and does not suggest that the rights Fleming claims are fundamental.

Even if we were to assume Fleming's argument that statutory rape schemes that do not require a *mens rea* or disallow a mistake-of-age defense are statutory schemes that came into existence after the codification of both state and federal due process provisions, this position would not undermine section 22.021. An examination of current statutory rape schemes that recognize the exception to the requirement of criminal intent and the well-accepted legislative purpose for omitting scienter undermine

Fleming's argument that section 22.021 offends principles of justice deeply rooted in our nation's history and traditions. *See United States v. Ransom,* 942 F.2d 775, 777 (10th Cir. 1991), *cert. denied,* 502 U.S. 1042 (1992) (recognizing that the majority rule in the United States is that knowledge of age is not an essential element of statutory rape and this exclusion does not violate due process);[5] *see also* 65 Am. Jur. 2d Rape § 81 (2011) ("Generally, in the absence of statute, the defendant's knowledge of the age of the female is not an essential element of the crime of statutory rape, and therefore, it is no defense that the accused reasonably believed that the prosecutrix was of the age of consent.").

We acknowledge that there has been movement away from strict liability for statutory rape in recent years. *See, e.g., People v. Hernandez,* 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964) (apparently the first case to allow a mistake-of-age defense; ruling on lenity grounds); *see also Perez v. State,* 111 N.M. 160, 803 P.2d 249, 250-51 (1990) ("While a child under the age of thirteen requires the protection of strict liability, the same is not true of victims thirteen to sixteen years of age. We recognize the increased maturity and

[5] In his supplemental briefing on remand, Fleming contends that this court's previous opinion erroneously relied on *Ransom* in initially rejecting his contentions. This court correctly cited *Ransom* in its original opinion and does again in this opinion. *See Ransom,* 942 F.2d at 776-77. In fact, the proposition of law cited by this court that Fleming complains of is almost verbatim from *Ransom. Id.*

independence of today's teenagers and, while we do not hold that knowledge of the victim's age is an element of the offense, we do hold that under the facts of this case the defendant should have been allowed to present his defense of mistake of fact."). A minority of states allow some form of a "mistake of age" defense by judicial decision or by statute. *See Collins v. State,* 691 So.2d 918, 923 (Miss. 1997); *State v. Guest,* 583 P.2d 836, 837-39 (Alaska 1978) (due process requires that the defendant be allowed to introduce evidence regarding mistake as to age); Model Penal Code § 213.6(1) (Official Draft & Revised Comments 1985). Under the Model Penal Code, for example, the defense of mistaken belief should be available when the critical age is more than ten years of age. Model Penal Code § 213.6, cmt. 2 at 415. The theory is that the policies underpinning strict liability seem less compelling as the age of the minor increases; an accused who mistakenly but reasonably believes such a partner is above the critical age should have a defense because he "evidences no abnormality, no willingness to take advantage of immaturity, no propensity to corruption of minors." *Id.* Thus, ironically to Fleming's arguments, it may be the future, and not the past, that determines that strict liability in statutory rape cases ultimately offends concepts of ordered liberty. *But see Kelley v. State,* 187 N.W.2d 810, 815 (Wis. 1971) (specifically rejecting model penal code's mistake-of-age defense to statutory rape).

It is worthy of note that many of the cases upholding the constitutionality of statutory rape involve an adult's sexual contact with a person younger than that described in section 22.021. *See, e.g.,* Wis. Stat. Ann. § 948.02(1)(b) ("Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony"). But the majority rule in the United States is that the defendant's knowledge of the victim's age is not an essential element of statutory rape and that this exclusion does not violate due process. *See Ransom,* 942 F.2d at 776-77; *State v. Granier,* 765 So.2d 998, 1001 (La. 2000); *Owens v. State,* 724 A.2d 43, 48-49 (Md.), *cert. denied,* 527 U.S. 1012 (1999); *State v. Yanez,* 716 A.2d 759, 767 (R.I. 1998); *State v. Stokely,* 842 S.W.2d 77, 80-81 (Mo. 1992); *State v. Campbell,* 473 N.W.2d 420, 425 (Neb. 1991); *People v. Cash,* 351 N.W.2d 822, 828 (Mich. 1984); *Commonwealth v. Miller,* 432 N.E.2d 463, 466 (Mass. 1982); *State v. Tague,* 310 N.W.2d 209, 212 (Iowa 1981); *Goodrow v. Perrin,* 403 A.2d 864, 866-68 (N.H. 1979); *State v. Martinez,* 14 P.3d 114, 116-117 (Utah App. 2000).

Although the court of criminal appeals has never considered whether section 22.021 violates due process, the court of criminal appeals has determined that the lack of a *mens rea* component in section 22.021's statutory predecessor did not violate equal protection of the law. *Ex parte Groves,* 571 S.W.2d 888, 890 (Tex. Crim. App. 1978). Our sister court in Houston, however, addressed the very issue before us and held that section 22.021's predecessor did not

violate due process. *Scott v. State,* 36 S.W.3d 240, 242 (Tex. App. – Houston [1st Dist.] 2001, pet. ref'd). With these decisions and the backdrop of the majority rule in this nation regarding statutory rape in mind, we conclude that there is no fundamental right that a State is required to include a *mens rea* component or a mistake-of-age defense in a statutory rape statute. Thus, section 22.021 needs only to serve a legitimate state purpose to be constitutional against the backdrop of substantive due process. *Flores,* 507 U.S. at 306, 113 S. Ct. at 1449. We conclude that it does.

Strict liability regarding the age of the minor furthers the legitimate government interest in protecting children from sexual abuse by placing the risk of mistake on the adult actor. *See Ransom,* 942 F.2d at 777; *see also Byrne v. State,* 358 S.W.3d 745, 750 (Tex. App. – San Antonio 2011, no pet.) ("Strict liability sex crimes are a valid exercise of the state's authority and rationally support a legitimate state interest.").

Although sound reasons might be advanced on either side of the argument of whether a *mens rea* component should exist or whether a mistake-of-age defense should exist in section 22.021, determining the line that separates what is criminal from what is not lies peculiarly within the sphere of legislative discretion – especially, as here, where no fundamental right is at question. *See Lambert,* 355 U.S. at 228, 78 S. Ct. at 242. We have no authority to substitute our judgment for that of the legislature unless we find the classification to be arbitrary, capricious, and without

reasonable relationship to the purposes of the statute. *See Ransom,* 942 F.2d at 777. We conclude that section 22.021 is neither arbitrary nor capricious and that it furthers the legitimate government interest of protecting children. *See Flores,* 507 U.S. at 305-06, 113 S. Ct. at 1448-49 (reasoning that states have a legitimate purpose concerning welfare of minors); *Scott,* 36 S.W.3d at 242 (holding that Texas's statutory rape statute does not violate due process and furthers legitimate interest in protecting the health and safety of children). Thus, section 22.021's omission of a *mens rea* component or its lack of a mistake-in-fact defense does not offend notions of Due Process or due course of law. We overrule each of Fleming's four points.

III. Conclusion

Having overruled all of Fleming's points on appeal, we affirm the trial court's judgment.

BILL MEIER
JUSTICE

PANEL: GARDNER and MEIER, JJ.; and WILLIAM BRIGHAM (Senior Justice, Retired, Sitting by Assignment).

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DELIVERED: August 2, 2012