Logical Incongruities In The Law of Strict Liability Statutory Rape

chet palumbo, Appalachian School of Law
LOGICAL INCONGRUITIES IN THE LAW OF STATUTORY RAPE IN STRICT LIABILITY JURISDICTIONS

I. INTRODUCTION

Our laws are designed to help keep peace, maintain order, and protect people from others whom may harm them. Our laws often reflect our views of morality and tend to conform to current social norms. When is it appropriate for these morals or social conventions to become codified into law and imposed upon the general public? When do outcome oriented reactions motivated by paternalistic feelings over step the appropriate bounds of law? Can the precisely same interaction between two people give rise to a felony conviction to one and civil liability to the other?

This article will deal with those questions with respect to the law of strict liability statutory rape. This article will examine what justifications exist for imposing these laws and then examine how those justifications hold up to logical and pragmatic scrutiny. We will focus, as a case study, on a California criminal case which was appealed to the United States Supreme Court where a 17 year old male was convicted of statutory rape of a 16 year old female in which the Court affirmed the conviction.1

II. CURRENT STATE OF THE LAW

“Because statutory rape is solely contingent upon the victim being under the age of consent, whether the perpetrator uses force or the threat of force is irrelevant, making statutory rape a strict liability crime.”2

---

It is reasonable to say that an adult is not allowed to have sex with a child. The principle of *mens rea* however, would lead one to the conclusion that in order to be guilty of statutory rape, one must possess actual or constructive knowledge as to the age of the minor. However, “the majority of courts that have considered the issue have rejected the reasonable mistake of age defense to statutory rape absent some express legislative directive.” Even if one were to accept the lack of any real mens rea requirement, one may naturally assume that these statutes would apply to both males and females equally. You would be wrong. As we shall see, the U.S. Supreme Court has held that a gender-specific statute criminalizing consensual intercourse is constitutional.

In order to accomplish the objective of criminal law, common sense tells us that there must be a substantial age difference between the two parties before imposing criminal liability on the older party. This is not the case in California. The case of *M. v. Sonoma Co.* will illustrate this point.

III. HISTORY OF STATUTORY RAPE

At English common law it was a felony to carnally know and abuse a woman under the age of 10. This law was based on the premise that sexual intercourse with a female under the age of 10 would physically injure her genitals. Proof of an actual injury to the female’s genitals however, was not necessary for a conviction at common law. This law later came to be known as statutory rape.

---

3 *U.S. v. Ransom*, 942 F.2d 775,776 (10th Cir. 1991).
5 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
Early statutory rape laws in this country were designed to protect young female’s chastity as a way to preserve their eligibility for marriage.\textsuperscript{10} “At the turn of the century the statutory rape laws were used as a way to control the sexuality of the working class girls laboring in the new urban centers.”\textsuperscript{11}

III. POLICY JUSTIFICATIONS

Today there are two preeminent policy goals behind statutory rape.\textsuperscript{12} One is the desire to prevent teenage girls from consenting to sex in an uninformed manner and the other is to deter men from preying on young females and coercing them into sexual relationships.\textsuperscript{13}

These policy objectives are certainly valid. However, it is ignorant to think that all minors have the same cognitive ability. It is as equally ignorant to think that all minors of a certain age have the same level of maturity that would enable them to understand the consequences of their actions.

It stands to reason that a minor who obtains a fake identification card which indicates that the minor is above the age of majority and then enters a bar and represents themselves as being above the age of majority would certainly understand the consequences of their actions. If the minor did not understand the consequence of age, then they would not have seen the necessity in representing themselves as a particular age older than what they actually were. (By analogy, an individual not familiar with our system of currency, would lack any motivation in attempting a bank robbery in hopes of ascertaining these seemingly worthless pieces of paper)

\textsuperscript{10} Wayne R. LaFave, \textit{Criminal Law}, 778 (3\textsuperscript{rd} ed. West 2000)
\textsuperscript{11} \textit{Id.}
\textsuperscript{12} \textit{Id}
\textsuperscript{13} \textit{U.S. v. Ransom}, 942 F.2d 775 at 776.
Another policy justification for current statutory rape law is that “the statute rationally furthers a legitimate governmental interest. It protects children from sexual abuse by placing the risk of mistake as to a child’s age on an older, more mature person who chooses to engage in sexual activity with one who may be young enough to fall within the statute's purview.”\textsuperscript{14} FN 12

The above policy would then primarily serve as a deterrent to the adult who wishes to engage in intercourse with another adult whom is in fact above the age of consent but simply appears younger since there is no legal protection against liability for misrepresentation of age. Therefore, even when the adult who appears younger communicates to the other that they are in fact above the age of consent, the other adult can still not be sure as to the legitimate status of the other.

And since a reasonable mistake of age is no defense in most states\textsuperscript{15}, what surety does the adult have when he questions the potential sexual partner as to their age and then even goes as far as to see a form of identification? For all he knows, even with that level of investigation as to the other’s age, he could still be committing a felony.

There are certainly many instances when we would want to prohibit younger people from being seduced and possibly abused by adults. And we certainly do not want to subject our youth to sex pre-maturely. However, “a recent study by the Reproductive Health Research Unit of the University of the Witwatersrand … found that children are having sex at a younger age”.\textsuperscript{16} As Jean Cohen said in her book \textit{Regulating Intimacy}, “…targeting undesirable side effects of modernization is ineffective and tends to shift legal doctrine from juridical conflict resolution to

\textsuperscript{14} U.S. v. Ransom, 942 F.2d 775.
\textsuperscript{15} Id.
more of a legal policy orientation, turning law into a form of social technology for which it is poorly suited.17

IV. M. V. SONOMA COUNTY CASE STUDY

The California case of *M. v. Sonoma County* is especially troubling with respect to the Court’s policy justification for the California Statutory Rape law. California’s statutory rape law says that “Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.”18

In this case, the defendant was a 17.5 year old male and the “victim” was a 16.5 year old female.19 “Prior to trial, petitioner sought to set aside the information on both state and federal constitutional grounds, asserting that [the California Statute] unlawfully discriminated on the basis of gender.”20 The court responded by saying “In any event, a gender-neutral statute would frustrate the State's interest in effective enforcement since a female would be less likely to report violations of the statute if she herself would be subject to prosecution.”21

This statute fails to accomplish the purported “state interest” since the interest is actually to prevent illegitimate pregnancies and not merely the reporting of the male whom conceived the child. The only goal being furthered by this particular statute is the reporting of half of the parties necessary for the conception of an “illegitimate” child, and not the actual “prevention” of the pregnancy.

---

19 *M. v. Sonoma Co.*, 450 U.S. 464
20 *Id*
21 *Id*
The defendant argued that the statute falsely assumes that men are always the sexual aggressor.\textsuperscript{22} The court responds that the “statute does not rest on such an assumption, but instead is an attempt to prevent illegitimate teenage pregnancy by providing an additional deterrent for men.”\textsuperscript{23} In light of this policy justification, it is worth mentioning that the California Uniform Parentage Act, was a law enacted many years after the \textit{Sonoma} decision, designed “to eliminate the legal distinction between legitimate and illegitimate children.”\textsuperscript{24}

A particular jurisdiction cannot logically abrogate the legal distinction between legitimate and illegitimate child, yet continue to use that same distinction as a main policy justification for a particular criminal statute. Justice Brennan, White and Marshall dissented and noted with respect to the issue of the State’s interest that

\begin{quote}
(1) in order to meet its burden of proving that the statute was substantially related to the achievement of an important governmental objective, the state had to show that a gender-neutral statute would be a less effective means of achieving that goal, and (2) the state had not met that burden since it had neither proven its assertion that a gender-neutral law would create enforcement difficulties nor shown that, assuming such a statute would be more difficult to enforce, those enforcement problems would make such a statute less effective than a gender based statute in deterring minor females from engaging in sexual intercourse.\textsuperscript{25}
\end{quote}

The Court also reasoned that “because virtually all of the significant harmful and identifiable consequences of teenage pregnancy fall on the female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct.”\textsuperscript{26}

\begin{footnotes}
\item[22] Id
\item[23] Id
\item[26] Id at 473.
\end{footnotes}
The Court here must make the false assumption that every teenage pregnancy, when the mother is not married, is unwanted.

As Justice Stevens said in his dissent

(1) the fact that a female confronts a greater risk of harm than a male is a reason for applying the statute to her rather than exempting her, (2) no acceptable justification had been shown for punishing only the male when both male and female are equally responsible or when the female is the more responsible of the two, and (3) even if there were some speculative basis for treating equally guilty males and females differently, any such speculative justification would be outweighed by the paramount interest in even-handed enforcement of the law.\(^{27}\)

The Supreme Court in *Reed v. Reed* held, with respect to gender biased state laws, that such a classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”\(^{28}\) Since it takes a male and a female to conceive a child, both the male and the female are then “similarly circumstanced” as to prevent a pregnancy by simply withholding participation in the intercourse.

The Court in *Reed* also held that the 14\(^{th}\) Amendment does “…deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.”\(^{29}\)

\(^{(\text{FN 24})}\) *Id.*

If the objective of the statute is wholly related to preventing unwanted pregnancies, then the statute purporting to do this should govern or even mandate the use of contraceptives for minors during sexual intercourse. Such legislation would most likely present no privacy

\(^{27}\) *Id* at 499
\(^{28}\) *Reed v. Reed*, 404 U.S. 71, 76 (1971).
violations under the most recent case of *Lawrence v. Texas* since that case exclusively protected the sexual privacy of adults.\(^{30}\)

The Court in *M. v. Superior Court* held that “the age of the man is irrelevant since young men are as capable as older men of inflicting the harm sought to be prevented.”\(^{31}\) This suggests that the California statute does not rely on the policy of protecting younger females from predatory older males with the additional concern of preventing illegitimate pregnancies, but instead solely on the illegitimate pregnancy issue. This stands in stark contrast with the policy concerns behind most all other statutory rape laws.

There is a consistent policy to protect the young against sexual acts. “Michigan's policy behind the statutory rape laws is to protect minors.”\(^{32}\) It is presumed that minors are incapable of making decisions and appreciating the consequences of their choices regarding sexual intercourse.”\(^{33}\) FN 30

“Key in statutory rape is the acknowledgement that while the activity may be voluntary, it is nonetheless criminalized because the state maintains a strong interest in protecting its minors from sexual exploitation by older individuals, unwanted pregnancies, and physical and emotional trauma due to early sexual activity.”\(^{34}\)

Opining that the California statute clearly intends to criminalize illicit sex with minor females, the Court notes that “Precisely why the legislature desired that result is of course

---


\(^{33}\) *Id*

somewhat less clear.” No discussion as to the meaning of the word “illicit” was given either. However, the Court reasoned that “...inquiries into congressional motives or purposes are a hazardous matter,” FN 32

The Supreme Court in U.S. v. O’Brien commented on how they are less willing to delve into the purpose behind a particular law when “…asked to void a statute that is, under well-settled criteria, constitutional on its face.” The statute in question however, is not constitutional on its face.

Current federal case law seems to presume that gender biased laws are per se discriminatory. Discussing the Court’s direction on treatment of gender biased laws the Court mentions that “…the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. “Gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of those objectives.” “The justification must be genuine, not hypothesized or invented post hoc in response to litigation.” The Supreme Court in M. v. Sonoma however, pointed to no evidence indicating an express legislative intent by the California Legislature supporting the state interests purported to being the basis of the statute. This is an example of what the Court in U.S. v. Virginia was referring to as “post hoc” justification.

The majority in M. v. Sonoma held that “the statute protects women from sexual intercourse and pregnancy at an age when the physical, emotional, and psychological

35 M. v. Sonoma Co., 450 U.S. 464
36 Id
39 Id at 524.
40 Id
consequences are particularly severe.” Sexual intercourse is typically a necessary but not sufficient condition for pregnancy, (absent artificial insemination). With that said, abstinence and contraceptive devices protect women from pregnancies, not statutes.

This is especially interesting since the court relies on the circumstances of a pregnancy which are “…at an age when the physical, emotional, and psychological consequences are particularly severe” as opposed to a pregnancy that is simply “unwanted.” The Court is implying that when ANY woman below the age of 18 has a child, the inevitable result is “severe physical, emotional, and psychological consequences.”

This statute fails to takes into account the nine months it takes to have a child after conception. It is then theoretically possible, that a female could have sex, and conceive, the day prior to her eighteenth birthday and not actually give birth until she is eighteen and nine months old. (being closer in age to 19 than 18) Yet the male with which she had intercourse with could be guilty under the California statute. Yet if the act of intercourse were to occur the day after her birthday, the male would be without any criminal liability and the state would seem to believe that this female would not suffer at all from the consequences of pregnancy.

But at the same time, California law seems to allow any “adult” adopt a child as long as they meet basic eligibility requirements. FN 40. So then an “adult” single female who turned 18 two months prior, can adopt a child, yet the law says that a single female adult who has her child seven months after her 18th birthday faces “inevitable hardships?” The court therefore presumes that any woman who would have sex below the age of 18 is an unfit parent.

43 M. v. Sonoma Co., 450 U.S. 464
44 Id at 472.
45 Id.
An interesting if not humorous finding of the court in *M. v. Sonoma Co.* was that “males alone can "physiologically cause the result which the law properly seeks to avoid.'” The court here is applying a “cause and effect” analysis. Webster’s Third New International Dictionary defines a “cause” as a “person, thing, fact, or condition that brings about an effect or that produces or calls forth a resultant action or state.” The court here seems to be arbitrarily focusing on the physical contribution of the male during intercourse, ignoring many other “causes” which may have led to the engaging in the intercourse itself and then, through a series of various biological events, the conception being caused.

In response to the equal protection argument of the defendant with respect to discriminatory enforcement, the concurring opinion in *Sonoma* rationalized that “females may be brought within the proscription of [the statute] itself, since a female may be charged with aiding and abetting its violation.” This justification directly undermines and contradicts the majority’s opinion which held that “a gender-neutral statute would frustrate the State’s interest in effective enforcement since a female would be less likely to report violations of the statute if she herself would be subject to prosecution.” This leaves the question as to “whether or not it is right for the female to be punished for the act or not” unresolved and the Court’s answer ambiguous and contradictory.

Under California law “All persons concerned in the commission of a . . . felony . . . and whether they directly commit the act constituting the offense, or aid and abet in its commission .

---

51 *Id* at 473.
. . are principals in any crime so committed."\textsuperscript{52} It stands to reason that the female would be equally less likely to report a violation if she were subjected to criminal charges as an accomplice.

Commenting on most of the laws regulating sexual behavior Jean L. Cohen notes that “the problem is that it undermines instead of foster[s] the liberty it seeks to equalize because it increases arbitrariness and paternalism.”\textsuperscript{53} In the \textit{Sonoma} case it is important to note that the defendant allegedly struck the victim in the face initially for resisting his advances and it was only then that she consented.\textsuperscript{54} Feelings of paternalism towards a 16 year old girl whom had been assaulted for not consenting to sex may have motivated the justices to interpret the statute with an outcome oriented objective which desired to punish the male. But as Cohen’s book points out “Anachronistic or ad hoc regulatory responses too often substitute for reasoned reflection regarding the underlying assumptions and effects of legal intervention in the shifting and increasingly uncharted domain of intimacy.”\textsuperscript{55}

The assertion that the negative social stigma attached to those individuals, whom have sex with younger women, often leads to unjust rulings is not without merit. In the case of \textit{State v. Anthony} the defendant was driving the victim home and “on the way to the victim’s house, defendant pulled behind a trailer and, according to the victim, forced her to have sexual intercourse.”\textsuperscript{56} After arriving home, the victim told her mother that she told the defendant “no”

\textsuperscript{52} People v. Greenberg, 111 Cal. App. 3d 181, 185 (Cal. App. 4th Dist. 1980). (California case interpreting state criminal accessory liability)

\textsuperscript{53} Jean L. Cohen, Regulating Intimacy, Supra at 152.

\textsuperscript{54} M. v. Sonoma Co., 450 U.S. 464 (see generally).

\textsuperscript{55} Jean L. Cohen, Regulating Intimacy, Supra at 151.

\textsuperscript{56} State v. Anthony, 133 N.C. App. 573, 574 (1999).
to his advances. The defendant admitted to having sexual intercourse but asserted that the victim was a willing partner.

The court admitted evidence of the defendant having previously raped the victim’s female friend. The defendant argued that should the court interpret the statutory rape law as imposing strict liability, then the purpose for admitting the prior rape under 404(b) is irrelevant since the defendant admitted the prohibited act. The interesting outcome is that the court did find that the evidence was irrelevant but that its admission was “harmless”.

The court noted that “the party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission.” The court went on to hold that even if the admission of his prior act was inadmissible under 404(b) that he was not prejudiced because he admitted the prohibited act of intercourse and that that admission was essentially a confession, therefore he was not ‘legally’ prejudiced.

The Supreme Court in *U.S. v. Barry* held that “It has been undisputed, of course, since the 17th century, that a jury has the power to acquit a defendant with impunity for any or no reason.” Since the jury has the power to acquit a defendant for ANY reason, the admission of not only highly prejudicial but also irrelevant evidence may have substantially diminished the possibility of the jury exercising this power to the detriment of the defendant.

These two cases illustrate instances where a defendant happens to be an individual whom most people would find reprehensible and the court, with the objective of incarcerating this

---

57 Id.
58 Id.
59 Id.
60 Id.
61 Id.
62 Id.
63 Id.
65 Id.
individual in mind, allows evidence in to trial and which is plainly inadmissible and an appellate
court then fails to reverse the obviously prejudicial ruling.

VI. DO THESE LAWS ACOMPLISH THEIR PURPOSE?

In order for us to know whether or not a certain criminal sanction is effective we must understand the purposes of criminal law. A pragmatic analysis of most existing statutory rape laws will show that “much criminal law making by legislatures is done without consideration of the real purpose or function of criminal law.” Professors LaFave and Scott discuss the theories of punishment in their book on Criminal Law. LaFave and Scott suggest six different theories of punishment. Those theories are prevention, restraint, rehabilitation, deterrence, education, and retribution. The author will examine each theory and discuss how and if strict liability statutory rape laws accomplish these goals.

Prevention and Deterrence. “Prevention aims to deter the criminal himself from committing further crimes by giving him an unpleasant experience he will not want to endure again.” “Deterrence attempts to deter others from the same fate as the one who was punished.” Criminal sanctions for statutory rape as a strict liability crime do not accomplish these two purposes for the following reason: We cannot deter someone from committing an act that they themselves do not even know they are committing.

Commenting on the increased harshness of criminal sanctions in the United States in the late 20th century, Patrick A. Langan noted that “as the risk of legal punishment rose, crime fell,

66 Wayne R. LaFave, Criminal Law, at 23.
67 Id.
68 Id.
69 Id.
70 Id.
71 Id at 24.
which suggests, but by no means proves, a causal connection.”\textsuperscript{72} This may very well be true with respect to crime in general. However, this is not applicable in the case of strict liability statutory rape. We can certainly deter someone from robbing a bank, from murdering someone, or shoplifting. But we cannot deter someone from having sex with a consenting individual whom reasonably appears to be an adult. This would require hormonal and genetic manipulation.

\textit{Restraint.} “Restraint is the idea that society may protect itself from persons deemed dangerous because of past criminal activity.”\textsuperscript{73} The obvious flaw in this justification for strict liability statutory rape is that it assumes its own conclusion. This theory assumes that society should protect itself from anything that is “illegal.”

“If it is against the law to do \textit{y}, then we must prevent people from doing \textit{y}.” But in this equation, what if \textit{y} equaled eating carrots? Society would have no real interest in preventing people from eating carrots.

\textit{Rehabilitation.} “This theory seeks to change the behavior of the offender which caused their initial incarceration.”\textsuperscript{74} With respect to the above noted theory of restraint, “It is also noted that resort to restraint without accompanying rehabilitative efforts is unwise, since a vast majority of offenders will eventually be released back into the public.”\textsuperscript{75} I am not sure how one could be “rehabilitated” from having sex with a consenting partner whom reasonably appeared to be of legal age.

\textit{Education.} “The educational purpose of punishment is to educate the public as to crimes which are not generally known, often misunderstood, or contrary to existing morals.”\textsuperscript{76} This

\textsuperscript{73} Wayne R. LaFave, \textit{Criminal Law}, at 23.
\textsuperscript{74} \textit{Id.} at 24.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at 25.
justification actually requires that the deterrent effect be valid. This is because there is no point in promulgating a law to the public if that law would have little to no deterrent effect. Also, this seems more like a justification for the existence of public trials in our country, and not for the laws themselves.

Retribution. “This theory purports to punish the wrongdoer simply for the sake of punishment.”\textsuperscript{77} “Typical criticism is that this theory is a form of retaliation, and as such is morally indefensible.”\textsuperscript{78}

“It is claimed that retributive justice is needed to maintain respect for the law and to suppress acts of private vengeance.”\textsuperscript{79} If enacting certain criminal laws primarily to suppress acts of private vengeance is an acceptable policy, then it would stand to reason that we should likewise have laws prohibiting such acts as inter-racial dating, being a homosexual, or having an abortion.

This is so because all those acts have historically caused much “private vengeance” in the form of hate crimes by intolerant people. In fact according to the National Crime Prevention Council “…of the single bias hate crimes committed in 2006, 51.8 percent were racially motivated, almost 19 percent of the incidents were motivated by religious bias, and 15.5 percent resulted from bias against sexual orientation.”\textsuperscript{80}

If we justify criminal sanctions with the idea that those sanctions are “preventing private acts of vengeance,” presumably from the “victim’s” family, then all we are doing is legitimizing retaliatory response of family members frequently acting out of displacement behavior. The

\textsuperscript{77} Id. at 26. 
\textsuperscript{78} Id. 
\textsuperscript{79} Id. 
American Psychological Association defines displacement behavior as “A behavior in which an individual substitutes one type of action for another when the first action is unsuccessful or when two competing motivations are present that leads to incompatible actions.”^81

The parents very well may have morally objected to that behavior as well as having inculcated the child with morals contrary to the act of intercourse. The parents would most likely feel very hurt, let down and possibly even embarrassed if word were to get out as to what their “little girl” did. It is here that the displacement behavior would cause the parent’s feelings of anger and embarrassment of the child as well as their own feelings of inadequacy as parents to be displaced on the individual with whom their child had sex and subsequently want to press criminal charges. It certainly seems easier to view your child as a “victim” than one whom lacks chastity.

VII. CIVIL INCONGRUTIES

Let us examine the civil implications of one whom misrepresents their age and as a result causes the other harm in the form of pecuniary loss.

FRAUDULENT MISREPRESENTATION

The Second Restatement of Torts tells us that one who “fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.”^82

The situation where a minor female tells an older male that she is of age to consent for the purpose of a sexual relationship should in all fairness fall into this category. The minor

---

^81 APA Dictionary of Psychology 290 (Gary VandenBos ed. APA 2007).
^82 Restat 2d of Torts, § 525
would have fraudulently misrepresented her age. The Restatement tells us that a representation is fraudulent when “the maker knows or believes that the matter is not as he represents it to be…”\textsuperscript{83} The purpose for the minor’s misrepresentation is to cause the adult to believe that she is of age to consent, and in relying on this representation, causing him to engage in adult behavior.

The Restatement tells us that “the recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including ‘…pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation.’”\textsuperscript{84}

A defendant in a statutory rape case, whom relied upon the statements of the younger minor, would certainly incur attorneys fees, loss of future income for time he was incarcerated and any jobs for which he is now precluded from holding because of his status as a convicted felon, as well emotional distress from the stigma of having such a felonious sexual conviction. These damages, theoretically, should all be compensated to the criminal defendant.

**BATTERY**

The minor who misrepresents his/her age should be liable under a tort battery theory. “The tort of Battery protects a person’s bodily integrity, the right to be free from intentionally inflicted contact that is harmful or offensive.”\textsuperscript{85} For purposes of civil battery offensive contact is “… any bodily contact that offended a reasonable sense of personal dignity.”\textsuperscript{86}

The contact is the sexual intercourse between the adult and the minor. The offensiveness of the contact is the resulting incarceration and stigmatization as a felon. It certainly offends

\textsuperscript{83} Restatement (Second) of Torts, § 526 (1997).
\textsuperscript{84} Id.
\textsuperscript{85} Arthur Best & David W. Barnes, Basic Tort Law, 15 (2d ed. 2007).
\textsuperscript{86} Fuerschbach v. Southwest Airlines, 439 F.3d 1197, ??? (??? 2006).
one’s reasonable sense of dignity to have sex with a minor in a state where that act of sex can land one in prison for a significant period of time.

It does not matter that the minor did not know at the time of the sex that the adult would be incarcerated. “It is not essential that the precise injury which was done be the one intended.”

87 “The intent element of battery requires not a specific desire to bring about a certain result, but rather a general intent to unlawfully invade another’s physical well being through a harmful or offensive contact.” 88 The minor undoubtedly intentionally engaged in sexual intercourse with the adult which was a violation of the adult’s right to have sex with only those whom he lawfully consented to.

The minor had sexual intercourse with the adult without the lawful consent of the adult. The Florida Court of Appeals had an opportunity to address the issue of consent in the context of sexual contact in the case of Hogan v. Tavzel.89 In that case a man knew that he was infected with a venereal disease and failed to inform his partner of that condition, subsequently infecting her as well.90 The court in Hogan held that “one party’s consent to sexual intercourse is vitiated by the partner’s fraudulent concealment of the risk of infection with venereal disease.”91 A plaintiff’s consent, if without the knowledge that the defendant had a venereal disease would be the “equivalent of no consent, and would not be a defense to the battery charge if successfully proven.”92 “Consent to sexual intercourse is not the equivalent of consent to be infected with a venereal disease.”93 “Consent must be knowing, informed, and voluntary.”94

90 Id.
91 Id.
92 Id.
93 Id. (citing Restatement (Second of Torts Illus. 5 §892B).
94 Arthur Best & David W. Barnes, Basic Tort Law, 49 (2d ed. 2007).
The same reasoning that would invalidate the consent that the defendant in Hogan obtained should also invalidate the consent that adults give when they rely on information fraudulently misrepresented to them concerning the age of the sexual partner. The consent that an adult gives to engage in intercourse with a person he/she reasonably believes is above the age of consent due to the intentional misrepresentation by the minor is not a knowing and informed decision. In *Hogan* it was the fraudulent concealment of a material fact which led to the consent being vitiated. 95 Often in the case of statutory rape it is not just a concealment, but an outright affirmative misrepresentation as to a material fact.

Surely our law would not be so inequitable as to impute criminal liability for an act which simultaneously imputes civil liability on the “victim.” Our laws should not attempt to protect a citizen from perpetrating an illegality. If it is illegal for a minor to fraudulently misrepresent her age for the purposes of engaging in sexual intercourse with an adult then the government has no logical or equitable basis in protecting the right of that minor to do so.

**VIII. MODERN TREND DISFAVORING STRICT LIABILITY CRIMES**

Professor LaFave indicated in his book *Substantive Criminal Law* that, with respect to strict liability offenses, “the greater the possible punishment, the more likely some fault is required. The Michigan Court of Appeals has said that a “felony punishable by a maximum of 10 years and a 50,000 fine is not the type of punishment typical of a public welfare offense.” 96

The Colorado Court of Appeals held that failure to register as a sex offender was NOT a strict liability offense “given the seriousness of the felony.” 97 This is a situation in which the person obviously knows that he is a sex offender since he would have already had to of been convicted of such an offense. Similarly, the Washington Appellate Court held that, with respect

---

95 *Hogan v. Tavzel*, 660 So. 2d 350.
to a possession of firearms case, it was “dubious to suggest that a person who does not know that he possesses a dangerous firearm represents a danger to the public.” It is equally as dubious to suggest that a person who does not know that he is having consensual intercourse with a person below a statutory age is a danger to the public. This is especially as dubious when you consider the fact that any use of a firearm is inherently dangerous, as contrasted with intercourse between two consenting parties which is not inherently dangerous.

Many critics argue that allowing a reasonable mistake of age defense (in strict liability statutory rape cases) would impose too heavy a burden on the state in prosecuting the offense. It is interesting to note however that the Washington State Supreme Court held that possession of a short barreled shotgun was not a strict liability offense since “proving that a defendant knew the characteristics of his firearm would not place too heavy a burden on the State.”

It stands to reason that an individual who possesses a firearm should be charged with knowledge as to the length of the very gun he is possessing, and as such, strict liability would be an appropriate standard. (But only for that reason). The length of a firearm’s barrel is something that could quickly and easily be ascertained with nothing more than a ruler or a tape measurer. Ascertaining an individual’s ACTUAL age is not so easy.

Law makers need to consider the real implications of the laws which they pass. They need to look not only at the most common or most probable set of circumstances wherein that law would give rise to a prosecution, but also any possible yet unlikely set of circumstances wherein that law could potentially give rise to a prosecution. They need to then evaluate the pragmatism and underlying issues of justice as applied to the later set of circumstances.

If the less likely set of circumstances giving rise to a prosecution does not serve justice and does not accomplish the goal of the legislature, then the lawmakers need to go back to the drawing board and come up with something else. “Our laws should be logical, workable and fair.”\textsuperscript{100} This means that our laws and their underlying policy justifications should be able to withstand logical analysis. And when they fail to do so, the laws relying on the faulty logic should be discarded.

**IX. WHAT THE STATE OF THE LAW SHOULD BE**

The Model Penal Code “…affects a compromise between the strict liability of former law and normal culpability requirements by permitting a defense if it can be shown by a preponderance of the evidence that the actor reasonably believed the victim to be above the critical age.”\textsuperscript{101}

Even the federal Protection of Children against Sexual Exploitation Act of 1977 requires that an individual “knowingly” engage in some behavior of sexual exploitation, such as viewing, shipping or producing child pornography.\textsuperscript{102} This offense deals with the exploitation of children, which is a crime much more severe than that of a 19 year old having consensual intercourse with his 15 year old girlfriend. Why not say that anyone who views, ships or produces child pornography is guilty? Is child pornography not just as much if not more so an act which we are eager to prevent than consensual intercourse?

I propose that jurisdictions allow the defense of reasonable mistake of age in statutory rape cases. Circumstantial evidence would be the means by which defendants show that their


\textsuperscript{101} Model Penal Code § 213.1

\textsuperscript{102} 18 USCS § 2252. (Lexis 2005)
belief that the consenting minor was above the statutory age was reasonable and that they are not the type of individual that poses a real threat to the public.

Examples of such circumstantial evidence could be the presence of the minor at an exclusively adult function, the observable use and consumption of tobacco or alcohol by the minor, the brandishing of a falsified identification card with the minor’s picture on said card, the general appearance of the minor, the representation by the minor to the adult that she is in fact over a certain age and other circumstantial indicia of reasonableness as to the mistake of age. There could even be a presumption of guilt as long as this presumption was rebuttable by either a preponderance of or clear and convincing evidence.

X. CONCLUSION

In conclusion, strict liability for the offense of statutory rape should be abandoned and replaced with the requirement that the prosecution show at least a unreasonable mistake of age as to the consenting minor. The law should provide an avenue for defendants of whom are not the type needing to be incarcerated to escape criminal liability and a lifetime of labeling as a felon. The law should reflect a strong distaste for wrongs and reprehensible acts while still reflecting a desire for fairness and justice. We should not sacrifice one for the absolute preservation of the other. For a society which criminalizes any act undesirable to one, makes itself a society of criminals.