



1995

Notes: Maryland's Child Pornography Statute Holds Photographers Strictly Liable for the Use of under — Age Subjects but Leaves Open the Possibility of the Mistake of Age Defense. *Outmezguine v. State*, 335 Md. 20, 641 A.2d 870 (1994)

Charles L. Simmons Jr.
University of Baltimore School of Law

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [Law Commons](#)

Recommended Citation

Simmons, Charles L. Jr. (1995) "Notes: Maryland's Child Pornography Statute Holds Photographers Strictly Liable for the Use of under — Age Subjects but Leaves Open the Possibility of the Mistake of Age Defense. *Outmezguine v. State*, 335 Md. 20, 641 A.2d 870 (1994)," *University of Baltimore Law Review*: Vol. 25: Iss. 1, Article 6.
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol25/iss1/6>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

MARYLAND'S CHILD PORNOGRAPHY STATUTE HOLDS PHOTOGRAPHERS STRICTLY LIABLE FOR THE USE OF UNDER-AGE SUBJECTS BUT LEAVES OPEN THE POSSIBILITY OF THE MISTAKE OF AGE DEFENSE. *Outmezguine v. State*, 335 Md. 20, 641 A.2d 870 (1994).

I. INTRODUCTION

There exists a delicate balance between citizens' First Amendment protections and the states' power to regulate speech in an effort to shelter children from the dangers of pornography. Many states have responded to the problems of child pornography by enacting legislation criminalizing the production and distribution of such materials.¹ In an attempt to eradicate pornography's harmful effects on

-
1. All fifty states and the District of Columbia have enacted legislation making criminal the production of materials depicting minors engaged in sexually explicit activity. See ALA. CODE § 13A-12-197 (1994); ALASKA STAT. § 11.61.123 (Supp. 1995); ARIZ. REV. STAT. ANN. § 13-3508 (1989 & Supp. 1995); ARK. CODE ANN. § 5-27-303 (Michie 1993 & Supp. 1995); CAL. PENAL CODE § 311.3 (West 1988 & Supp. 1995); COLO. REV. STAT. ANN. § 18-6-403 (West 1990); CONN. GEN. STAT. ANN. §§ 53a-196a (West 1994); DEL. CODE ANN. tit. 11, § 1108 (1989 & Supp. 1994); D.C. CODE ANN. § 22-2012 (1989); FLA. STAT. ch. 27.071 (1994); GA. CODE ANN. § 16-12-100 (1992 & Supp. 1995); HAW. REV. STAT. §§ 707-750 (1985); IDAHO CODE § 18-1506 (1987 & Supp. 1995); ILL. REV. STAT. ch. 720 para. 5/11-20.1 (1993); IND. CODE ANN. § 35-49-3-2 (Burns 1994); IOWA CODE ANN. § 728.12 (West 1993 & Supp. 1995); KAN. STAT. ANN. § 21-3516 (Supp. 1994); KY. REV. STAT. ANN. §§ 531.320 to .370 (Baldwin 1995); LA. REV. STAT. ANN. § 14:81.1 (West 1986 & Supp. 1995); ME. REV. STAT. ANN. tit. 17, §§ 2921-2923 (West 1983 & Supp. 1994); MD. ANN. CODE art. 27, § 419A (1993); MASS. GEN. LAWS ANN. ch. 272, §§ 29A-29B (West 1990); MICH. COMP. LAWS ANN. § 750.145(c)(3) (West 1991 & Supp. 1993); MINN. STAT. ANN. § 617.246 (1987); MISS. CODE ANN. § 97-5-33 (Supp. 1995); MO. REV. STAT. § 568.060 (Vernon 1979 & Supp. 1995); MONT. CODE ANN. § 45-5-625 (1985); NEB. REV. STAT. §§ 28-1463.01 to .05 (1989); NEV. REV. STAT. ANN. §§ 200.700-.760 (Michie 1992); N.H. REV. STAT. ANN. § 650:2(II) (1986); N.J. STAT. ANN. § 2C:24-4(b) (West 1995); N.M. STAT. ANN. § 30-6-1 (1978); N.Y. PENAL LAW §§ 263.00-.15 (McKinney 1989); N.C. GEN. STAT. § 14-190.6 (1993); N.D. CENT. CODE §§ 12.1-27.1-02 to -03 (1985 & Supp. 1991); OHIO REV. CODE ANN. § 2907.321 (Baldwin 1993); OKLA. STAT. tit. 21, § 1021.2 (1989); OR. REV. STAT. §§ 163.665-.695 (1993); 18 PA. CONS. STAT. ANN. § 6312 (Supp. 1995); R.I. GEN. LAWS § 11-9-1.1 (1994); S.C. CODE ANN. § 16-15-335 (Law. Co-op. Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 22-22-22 to -25 (1988 & Supp. 1995); TENN. CODE ANN. § 39-17-902 (1991); TEX. PENAL CODE ANN. § 43.25 (West 1994); UTAH CODE ANN. §§ 76-59-1 to -4 (1995); VA. CODE ANN. §§ 18.7-374.1 (Michie 1988 & Supp. 1995); VT. STAT. ANN. tit. 13, § 2822 (Supp. 1994); WASH. REV. CODE ANN. §§ 9.68A.001 to .910 (West 1988 & Supp. 1995); W. VA. CODE § 61-8C-3 (1992); WIS. STAT. § 940.203 (Supp. 1994); WYO. STAT. § 27-6-114 (1995).

children, the Maryland General Assembly has enacted article 27, section 419A (section 419A).²

In *Outmezguine v. State*³ (*Outmezguine III*), a recent challenge to section 419A, the Court of Appeals of Maryland held that photographers were strictly liable for the use of minors as subjects and declined to read a scienter element into the statute.⁴ In so holding, the court necessarily decided that the interests of protecting children from sexual exploitation outweighed an individual's right to photograph sexually explicit conduct.⁵ In an effort to uphold the statute's constitutionality, however, the court implied that the affirmative defense of mistake of age may be available to one charged with violating the statute.⁶

The importance of *Outmezguine III* lies in the court's apparent indifference to the restriction of expression historically protected by the First Amendment. The court's alarming decision presents two areas of concern to those engaged in the lawful activity of photographing adult sexually explicit conduct. Of foremost concern, the court determined that Maryland's child pornography statute was a strict liability offense despite its impact on First Amendment freedoms.⁷ Second, but more surprisingly, the court increased defendants' burden of production for raising affirmative defenses by requiring

2. MD. ANN. CODE art. 27, § 419A (1992) [hereinafter § 419A]. Pursuant to the statute, a minor is defined as anyone under 18 years of age. *Id.* § 419A(a). The statute makes criminal the photographing or filming of a minor engaged in sexually explicit or obscene conduct. *Id.* § 419A(c). Convictions under the statute carry maximum fines of \$25,000, 10 years imprisonment or both. *Id.* § 419A(e)(1).

3. 335 Md. 20, 641 A.2d 870 (1994). The case decided by the Court of Appeals of Maryland and the case decided by the Court of Special Appeals of Maryland are identically named. Further references to the Maryland court of appeals's opinion are identified as "*Outmezguine III*." Similarly, the Maryland court of special appeals's decision is referenced as "*Outmezguine II*."

4. *Outmezguine III*, 335 Md. at 43, 641 A.2d at 882.

5. *Id.* at 38, 641 A.2d at 879. As defined by the Maryland legislature, sexual conduct is "human masturbation, sexual intercourse, or any touching of or contact with genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals." MD. ANN. CODE art. 27, § 416A(d) (1992 & Supp. 1994).

6. *Outmezguine III*, 335 Md. at 47, 641 A.2d at 883. While never expressly assessing the validity of a mistake of age defense, the court determined that it was "arguable" that the legislature intended to permit the defense of one charged with violation of § 419A. *Id.*

7. *Id.* at 45, 641 A.2d at 883. Due to its determination that photographers were in a better position to ascertain the age of photographic subjects, the court proclaimed that photographers of explicit materials were entitled to less protection under the First Amendment than were distributors and consumers of child pornography. *See id.* at 44, 641 A.2d at 882.

evidence beyond that historically required to preserve such an issue for appeal.⁸

Elan Outmezguine, who was twenty-five years old at the time of the incident in question, was in the home-cleaning business.⁹ As a hobby, Outmezguine occasionally photographed dancers and models.¹⁰ Jennifer, the alleged victim, assisted Outmezguine on cleaning jobs.¹¹ During one such occasion, Jennifer saw an album of models whom Outmezguine had recently photographed.¹² After viewing the photos, Jennifer expressed an interest in modeling and photography.¹³ Jennifer's boyfriend ("R.C.") allegedly inquired about using Outmezguine's camera and equipment to take photographs of Jennifer.¹⁴ Outmezguine stated that he lent photographic equipment to R.C. but was never personally involved in taking photos of Jennifer.¹⁵

Jennifer, who was fifteen at the time, used drugs and alcohol and was admittedly sexually promiscuous.¹⁶ She contended that Outmezguine promised her drugs and money in exchange for sex and for posing for nude photographs.¹⁷ The photos depicted Jennifer in various stages of undress.¹⁸ In some photographs, Jennifer was touching her bare breasts and buttocks.¹⁹ In one graphic photo, Jennifer was portrayed lewdly displaying her genitalia.²⁰ Jennifer testified that she posed for the defendant three times and that she had sexual relations with him on multiple occasions.²¹

In January of 1991, Jennifer's mother, concerned about the substantial change in her daughter's lifestyle, read Jennifer's diary and discovered her daughter's substance abuse problem.²² Jennifer was subsequently admitted to an inpatient drug and alcohol rehabilitation program.²³ While in treatment, Jennifer participated in coun-

8. *Id.* at 52, 641 A.2d at 886. During the trial, Outmezguine proffered the following defenses: "'I did not take the pictures' and, in the alternative, 'I did not know how old she was.'" *Id.* at 51, 614 A.2d at 886.

9. *Id.* at 24, 641 A.2d at 872.

10. *Id.*

11. *Outmezguine II*, 97 Md. App. 151, 154, 627 A.2d 541, 542 (1993).

12. *Outmezguine III*, 335 Md. at 25 n.4, 641 A.2d at 872 n.4.

13. *Id.*

14. *Id.* Jennifer's boyfriend also worked with Appellant in his cleaning business. *Id.*

15. *Id.* at 25, 641 A.2d at 873.

16. *Id.* at 24, 641 A.2d at 872.

17. *Outmezguine III*, 335 Md. at 26, 641 A.2d at 873. According to Outmezguine, he and Jennifer never had any type of sexual involvement. *Id.* at 26 n.6, 641 A.2d at 873 n.6.

18. *Id.* at 26, 641 A.2d at 873.

19. *Id.*

20. *Id.*

21. *Id.* at 25-26, 641 A.2d at 873.

22. *Outmezguine III*, 335 Md. at 26, 641 A.2d at 873.

23. *Id.*

seling sessions, during which she confessed that she had engaged in sexual relations with Outmezguine and had posed for the nude photographs.²⁴ Jennifer's counselor informed the police, who soon thereafter obtained a search warrant for Outmezguine's residence.²⁵ Upon lawful execution of the warrant, the police found cameras, lingerie, a photo album and loose photographs of Jennifer.²⁶

The police charged Outmezguine with violating section 419A.²⁷ At trial, Outmezguine challenged section 419A(c) as unconstitutional because it did not require the state to prove that the defendant knew that his subject was a minor.²⁸ During the two-day proceeding, Outmezguine testified that he neither photographed Jennifer nor knew her age.²⁹ However, and most importantly, Outmezguine failed to claim that he thought Jennifer was at least eighteen years of age.³⁰

At the conclusion of the proceeding, Defendant's counsel submitted four proposed jury instructions, all of which centered on the requirement of a knowledge element to convict under section 419A.³¹ The circuit court rejected the proposed instructions and instructed the jury that Maryland's child pornography statute did not contain a knowledge element.³² The jury returned a guilty verdict, and Outmezguine was sentenced to eight-years imprisonment.³³

24. *Id.*

25. *Id.*

26. *Id.* Photos seized during the execution of the warrant depicted Jennifer engaged in conduct proscribed by § 419A. *Id.*

27. *Outmezguine III*, 335 Md. at 27, 641 A.2d at 873.

28. *Id.* at 27, 641 A.2d at 874.

29. *Id.* at 27, 641 A.2d at 873. Jennifer testified that she had told "Outmezguine her age and that she was a high school student." *Id.* at 27, 641 A.2d at 874.

30. *Id.* at 27, 641 A.2d at 873-74.

31. *Id.* at 28, 641 A.2d at 874. Outmezguine submitted the following proposed instructions:

(1) The word 'knowingly' as used in a criminal statute, generally speaking, means that state of mind which exists when the accused person is in possession of facts under which he is aware he cannot lawfully do a particular act, but nevertheless proceeds to do it. The word 'scienter' is also sometimes used synonymously with 'knowledge.'

(2) "All the acts described in this Section are made criminal only if they are committed knowingly."

(3) "Scienter or knowledge must be proven by the State."

(4) "Knowingly means having knowledge of the character and content of the subject matter."

Id. at 27 n.7, 641 A.2d at 874 n.7.

32. *Outmezguine III*, 335 Md. at 28, 641 A.2d at 874. During deliberations, the jury sent a note to the judge requesting clarification on the knowledge element. The court reaffirmed to the jury that knowledge of the victim's age was not an element of the offense. *Id.*

33. *Id.* at 23, 641 A.2d at 872.

On appeal, the Court of Special Appeals of Maryland, in *Outmezguine v. State*³⁴ (*Outmezguine II*), affirmed the trial court's determination that knowledge of a subject's age was not an element of the offense.³⁵ The court in *Outmezguine II* tracked the legislative history of section 419A and opined that the General Assembly did not intend to include a knowledge element for the crime of photographing minors engaged in sexually explicit conduct.³⁶ The court explained that Outmezguine failed to raise the issue of mistake of age at trial and, therefore, the court declined to make the affirmative defense available.³⁷

II. BACKGROUND

A. Historical Development

The Maryland General Assembly originally enacted section 419A in 1978.³⁸ Maryland's statute was passed in response to its federal counterpart, enacted only three months prior.³⁹

A review of the legislative history reveals that section 419A has undergone at least two major changes since its inception.⁴⁰ The first round of changes to section 419A came in 1985 and 1986, in response to the Supreme Court's decision in *New York v. Ferber*.⁴¹ At that time, Maryland extended coverage of its child pornography regulation to proscribe not only obscene materials involving minors but also those materials depicting minors engaged in sexually explicit conduct.⁴²

34. *Outmezguine v. State*, 97 Md. App. 151, 627 A.2d 541 (1993). This case is referenced in the text as *Outmezguine II*. See *supra* note 3.

35. *Outmezguine II*, 97 Md. App. at 165, 627 A.2d at 548.

36. *Id.* at 161-67, 627 A.2d at 546-49.

37. *Id.* at 167, 627 A.2d at 549.

38. *Id.* at 162, 627 A.2d at 546. This original legislation made it criminal to "solicit, cause, induce, or 'knowingly permit'" a child to appear as a subject in an obscene photograph or film. *Id.*

39. *Id.*

40. See, e.g., SENATE JUDICIAL PROCEEDINGS COMMITTEE, BILL ANALYSIS OF S. 554, 1985 Sess. (Md. 1985); Senate Judicial Proceedings Committee, Bill Analysis of H.R. 790, 1986 Sess. (1986); SENATE JUDICIAL PROCEEDINGS COMMITTEE, BILL ANALYSIS OF H.B. 243, 1989 Sess. (Md. 1989).

41. 458 U.S. 747 (1982).

42. S. 554, 1985 Sess. § 8 (Md. 1985); H.R. 790, 1986 Sess. § 1(d) (Md. 1986). In addition to extending coverage of the regulation to sexually explicit conduct, the 1985 and 1986 amendments increased the fine for a violation of the statute to a maximum of \$25,000 and allowed the trier of fact to determine the age of the photographic subject through means other than the direct testimony of the child. S. 554, 1985 Sess. § 8 (Md. 1985); H.R. 790, 1986 Sess. § 1(d) (Md. 1986).

The legislature further amended section 419A in 1989.⁴³ The amendment raised the age of those prohibited from appearing in sexually explicit materials from sixteen and under to any age under eighteen.⁴⁴ The language of the 1989 amendment originally included a provision that eliminated the availability of the affirmative defense of mistake of age.⁴⁵ After reviewing testimony from the American Civil Liberties Union (ACLU) that denounced the provision as unconstitutional, the legislature removed the limiting language from the amendment.⁴⁶

B. Case Law Survey

Historically, challenges to child pornography statutes have centered on the possible infringements of First Amendment protection.⁴⁷ In response to constitutional challenges, some courts have found it necessary to delineate between protected and unprotected speech.⁴⁸

43. H.R. 243, 1989 Sess. (Md. 1989).

44. *Id.* § 1(A). The legislature also increased the fine and incarceration period for subsequent offenses to a maximum of \$50,000 and 20 years imprisonment. *Id.* § 1(E)(2).

45. *Id.* § 1(E)(3). In response to the proposed amendment, the Attorney General's office issued an opinion pursuant to a letter from Delegate Anne MacKinnon in which she compared a proposed version of § 419A(c) to the text and judicial decisions surrounding its federal counterpart. Letter from Kathryn M. Rowe, Assistant Attorney General, to Delegate Anne MacKinnon (Feb. 20, 1989). Therein, Kathryn M. Rowe, an Assistant Attorney General, opined that Maryland need not include knowledge as an element of the offense. *Id.* In addition, the opinion declared that mistake of age need not be available as an affirmative defense. *Outmezguine II*, 97 Md. App. at 165, 677 A.2d at 548.

46. *Outmezguine v. State*, 335 Md. 20, 46-47, 641 A.2d 870, 883 (1994) (citing Letter from Stuart Comstock-Gay, Executive Director, American Civil Liberties Union of Maryland, to the Senate Judicial Proceedings Committee (Feb. 7, 1989)). ACLU testimony was directed toward the proposed removal of the mistake of age defense: "We believe the bill would unconstitutionally remove any necessity of scienter from the section of the law, by stating that 'a mistake of age is not a defense to prosecution under this section.'" *Id.* Three weeks after the ACLU's appearance, the legislature removed the limiting language. *Id.* at 47, 641 A.2d 883.

47. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. "[F]reedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, 268 U.S. 652, 666 (1925); see also *Eanes v. State*, 318 Md. 436, 569 A.2d 604, cert. denied, 496 U.S. 938 (1990).

48. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene." *Roth v. United States*, 354 U.S. 476, 485 (1957) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

For example, in *Roth v. United States*⁴⁹ the Supreme Court held that "obscenity is not within the area of constitutionally protected speech or press."⁵⁰ In *Miller v. California*,⁵¹ the Court attempted to clarify the definition of obscenity for the purpose of identifying obscene materials.⁵² In its effort to further protect children from the dangers of pornography, the Court, in *New York v. Ferber*, extended *Miller* by including non-obscene, sexually explicit materials containing child subjects in the category of unprotected speech.⁵³

Although states have the authority to regulate unprotected speech, they must avoid drafting regulations that have a chilling effect on those individuals who would otherwise engage in lawful activities.⁵⁴ To that end, statutes that regulate unprotected speech must be narrowly drawn and must not unnecessarily infringe upon First Amendment freedoms.⁵⁵

Regulations that chill speech are normally analyzed within the rubric of the overbreadth doctrine.⁵⁶ The overbreadth doctrine is a remedy to statutes which impermissibly restrict First Amendment protection.⁵⁷ "In the First Amendment context, [defendants may] challenge statutes on overbreadth grounds, regardless of whether the individual defendant's conduct is constitutionally protected."⁵⁸ The argument is that even though the challenger's actions are not protected, the statute is written so broadly as to have an unconstitutional, chilling effect on those who would engage in lawful conduct.⁵⁹

49. 354 U.S. 476 (1957).

50. *Roth*, 354 U.S. at 485. The Court fashioned a definition of obscenity as follows: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* at 489.

51. 413 U.S. 15 (1973).

52. The Court created a three-part test to identify materials subject to regulation. *Id.* at 24. The first prong of the test is the definition expounded in *Roth v. United States*. See *supra* note 50. The second prong focused on work that "depict[ed] or describe[d], in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Miller*, 413 U.S. at 24. Finally, the third prong targeted work that lacked "serious literary, artistic, political, or scientific value." *Id.*

53. *New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982).

54. *Outmezguine III*, 335 Md. at 36, 641 A.2d at 878.

55. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (holding a local ordinance, which prohibited solicitation of contributions where less than 75% of the proceeds were used for the charitable purpose, unconstitutionally overbroad).

56. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990).

57. *Id.*

58. *Id.* at n.8.

59. See, e.g., *United States v. Raines*, 362 U.S. 17 (1960); *Barrows v. Jackson*, 346 U.S. 249 (1953). When the doctrine is invoked, it necessitates that the regulation be struck down or rewritten within constitutional tolerances. See

Maryland has held that only those regulations that substantially impact upon protected expression will be held unconstitutional.⁶⁰

Beyond the evaluation of the potential chilling effect on free expression, courts often attempt to weigh an individual's right to engage in protected speech against a state's interest in safeguarding children.⁶¹ The more a statute infringes upon personal liberties, the greater a state's interest must be in order to preserve the regulation's constitutionality.⁶² In *Ferber*, the Court concluded that a state's interest in protecting children from pornography was of "surpassing importance."⁶³ The Court determined that the potential harm to children was manifest and that New York State's interest in eliminating the dissemination of child pornography outweighed the regulation's nominal impact on the legal distribution of sexually explicit materials.⁶⁴

Once a court determines that a state has the right to regulate certain forms of explicit media, the question turns to the nature and language of the statute. In particular, most First Amendment challenges of criminal statutes that regulate pornographic material center on the nature or lack of a scienter element.⁶⁵ Many courts have declined to read scienter elements into child pornography statutes that fail to address the issue.⁶⁶ Such regulations impose strict liability on one convicted of engaging in the proscribed activity.⁶⁷

Osborne, 495 U.S. at 112. For this reason, it is infrequent that an overbreadth challenge is successful. *See id.*

60. *Curran v. Price*, 334 Md. 149, 167, 638 A.2d 93, 102 (1994). The *Price* court defined "substantial impact" situations as those in which there exists "'realistic danger that the statute itself will significantly compromise' recognized First Amendment rights." *Id.* (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)).

61. *New York v. Ferber*, 458 U.S. 747, 756 (1982).

62. *Id.* at 756-57.

63. *Id.* at 757. In describing New York's responsibility for the welfare of its children, the state explained: "The care of children is a sacred trust." *Id.*

64. *Id.*

65. *See generally* *United States v. Brown*, 862 F.2d 1033 (3rd Cir. 1988) (holding that the scienter element in the federal law proscribing the purchase of child pornography merely requires knowledge of the character of the material); *United States v. Kleiner*, 663 F. Supp. 43 (S.D. Fla. 1987) (holding that the knowledge element of the federal statute prohibiting the transportation and distribution of child pornography does not refer to the age of the actors contained in such material).

66. *See, e.g., United States v. United States Dist. Court for Cent. Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988) (holding that in determining the culpability of adult film manufacturers, knowledge of age need not be an element of the offense but that there must exist the availability of the affirmative defense of mistake of age); *State v. Fan*, 445 N.W.2d 243 (Minn. Ct. App. 1989) (affirming a conviction against an adult night club owner and holding that neither

Challengers of strict liability regulations often request that the judiciary read a knowledge element into the offense.⁶⁸ In recent cases, Maryland courts have read scienter elements into offenses only when necessary to correct inadvertent omissions of the legislature.⁶⁹ Conversely, Maryland courts have allowed strict liability offenses to stand when it is clear that the legislature intended the regulation to be applied in such a manner.⁷⁰

While some courts have permitted strict liability regulations, other courts have held that it is improper to impose criminal liability without some level of knowledge of criminal conduct.⁷¹ In the context of anti-pornography statutes, many jurisdictions require only knowledge of the nature and character of the proscribed material and not knowledge of age as an element of the offense.⁷² Because at least some level of knowledge is required, these offenses take on only a pseudo-strict liability flavor. In an effort to maintain the constitutionality of these pseudo-strict liability offenses, some jurisdictions

knowledge of age nor the affirmative defense as to mistake of age are included in the statute).

67. See *United States Dist. Court for Cent. Dist. of Cal.*, 858 F.2d at 536.

68. *E.g., id.*

69. See, e.g., *State v. McCallum*, 321 Md. 451, 583 A.2d 250 (1991) (reading a scienter element into a statute criminalizing driving with a suspended driver's license by finding that the legislature intended, but had neglected, to expressly define a scienter element); *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041 (1988) (reading a scienter element into a statute criminalizing the possession of a controlled dangerous substance when the court determined that the statute had an implied knowledge requirement of the presence and general character of a controlled dangerous substance).

70. See *Garnett v. State*, 332 Md. 571, 632 A.2d 797 (1993). The court in *Garnett* considered a challenge to Maryland's statutory rape provision. *Id.* In determining that the legislature intended to impose strict criminal liability, the court noted that adjacent subsections of the criminal statute expressly included a scienter element whereas the subsection in question did not. *Id.* at 585-88.

71. See *New York v. Ferber*, 458 U.S. 747, 765 (1982) (comparing a similar limitation on obscenity provisions). In 1992, the United States Court of Appeals for the Ninth Circuit held that the federal child pornography statute was facially unconstitutional because it lacked any requirement of scienter. *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1288-92 (9th Cir. 1992). The Supreme Court recently overturned the Ninth Circuit's determination. *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). The Court reversed the prior decision because it found that the knowledge requirement of the first subsection of the statute modified the remaining prohibitive subsections, thereby maintaining the constitutionality of the provision. *Id.*

72. See *Hamling v. United States*, 418 U.S. 87 (1974). The Court affirmed the conviction of a group of defendants charged with attempting to distribute an illustrated government report on pornography. *Id.* at 97. The Court held that it was sufficient that the distributors knew the contents, character, and nature of the distributed materials, despite the claim that the defendants were unaware that what they distributed was characterized as pornography. *Id.* at 123.

allow one charged with violating a child pornography regulation to raise the affirmative defense of mistake of age.⁷³

In states that recognize the mistake of age defense, questions often arise concerning the procedural aspects of raising the defense at trial.⁷⁴ Some jurisdictions require a criminal defendant to bear the burden of production as to the affirmative defenses.⁷⁵ In these jurisdictions, the defendant must meet a threshold burden of production.⁷⁶ Thereafter, the burden shifts to the state to prove, beyond a reasonable doubt, that the defense is inapplicable.⁷⁷ Other jurisdictions require the defendant to bear both the burden of production and the burden of persuasion as to the affirmative defense.⁷⁸

In jurisdictions that place the burden of production on the criminal defendant, only "some evidence" of the defense is necessary to raise the issue at trial and, if necessary, to preserve the issue for appeal.⁷⁹ Maryland follows those jurisdictions that place the burden of production, but not the burden of persuasion, on a criminal defendant to raise an affirmative defense at trial.⁸⁰

III. THE INSTANT CASE

The Court of Appeals of Maryland first addressed *Outmezguine's* challenge that the child pornography statute acted as a strict liability offense and was, therefore, unconstitutional.⁸¹ The court relied on *Ferber*⁸² for its determination that Maryland had the right to regulate sexually explicit material that depicted under-age subjects.⁸³ The Maryland court found, as did the Supreme Court in *Ferber*, that the state had a compelling interest in protecting children and that the state was empowered to proscribe child pornography, even if the

73. See *United States v. United States Dist. Court for Cent. Dist. of Cal.*, 858 F.2d 534, 540-41 (9th Cir. 1988).

74. See generally *State v. Fan*, 445 N.W.2d 243 (Minn. Ct. App. 1989).

75. See *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

76. *Id.* at 702-03.

77. *Id.* at 702, 703.

78. See *Patterson v. New York*, 432 U.S. 197 (1977).

79. See *State v. Martin*, 329 Md. 351, 358, 619 A.2d 995, 995 (1993). In a previous case, the Maryland court of appeals defined the phrase "some evidence" as it applied to the level of production necessary to raise an affirmative defense. *Dykes v. State*, 319 Md. 206, 571 A.2d 1251 (1990). The court stated: "Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says—'some,' as that word is understood in common, everyday usage." *Id.* at 216-17, 571 A.2d at 1257.

80. See *Martin*, 329 Md. at 358-59, 619 A.2d at 995.

81. *Outmezguine III*, 335 Md. at 30, 641 A.2d at 875.

82. 458 U.S. 747, 757 (1982).

83. See *Outmezguine III*, 335 Md. at 35, 641 A.2d at 877-78.

content of the materials in question did not rise to the level of "obscene" as defined in *Miller*.⁸⁴

After explaining that the state had the power to prohibit child pornography, however, the court expressed its concern that statutes such as section 419A had the potential to chill protected speech.⁸⁵ The court recognized the possibility that a photographer might refrain from engaging in lawful conduct for fear that he would be subject to severe criminal penalties.⁸⁶ The court reaffirmed that regulations with the potential to chill speech would be scrutinized closely⁸⁷ and cited with approval *Village of Schaumburg v. Citizens for a Better Environment*⁸⁸ and *Bantam Books, Inc. v. Sullivan*.⁸⁹

In *Outmezguine v. State*, the court used the *Ferber* balancing test to assess the extent of overbreadth inherent in section 419A.⁹⁰ The court weighed the state's interest in protecting children against the individual's right to engage in constitutionally protected speech.⁹¹ Additionally, the court examined defendants' burden to ascertain the age of their photographic subjects.⁹² Comparing the strengths of each argument, the court held that the state's interest outweighed the regulation's nominal impact on individual rights.⁹³ This decision was premised upon a belief that it was not an unwarranted burden for a photographer to make a reasonable effort to request appropriate identification before he photographed a subject.⁹⁴

The court then analyzed the United States Court of Appeals for the Ninth Circuit's decision in *United States v. United States District*

84. *Id.* at 38, 641 A.2d at 879. For the *Miller* Court's definition of obscenity, see *supra* note 52.

85. *Outmezguine III*, 335 Md. at 36, 641 A.2d at 878.

86. *Id.*

87. *Id.* at 35-36, 641 A.2d at 878.

88. 444 U.S. 620 (1980).

89. 372 U.S. 58 (1963) (finding that the censorship activities of a legislatively created commission violated the First Amendment).

90. See *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); see text accompanying *supra* notes 61-64.

91. See *Ferber*, 458 U.S. at 756-57 and text accompanying *supra* notes 61-64.

92. *Outmezguine III*, 335 Md. at 37, 641 A.2d at 878. The court determined that a photographer, because of his unique position in the distribution chain, would be in the best position to ascertain the true age of photographic subjects. *Id.*

93. *Id.* at 37-38, 641 A.2d at 879. Application of the balancing tests yielded the following unequivocal statement from the court: "[W]e hold that the First Amendment does not require scienter to be an element of the offense, nor does it require that a reasonable mistake of age defense be available to defendants who are prosecuted under § 419A(c)." *Id.* at 38, 641 A.2d at 879. Despite this seemingly definitive pronouncement, the court continued its analysis of the appropriateness of finding a scienter element in the statute.

94. *Id.* at 37, 641 A.2d at 878. The court suggested that photographers examine driver's licenses and birth certificates before allowing individuals to participate as subjects in sexually explicit media. *Id.*

Court for Central District of California,⁹⁵ which expounded the principle that child pornography statutes were unconstitutional if, by applying a strict liability standard for criminality, they "seriously" chilled protected speech.⁹⁶ The Ninth Circuit held that scienter need not be an element of statutes that prohibit the photography of child subjects engaged in explicit activity.⁹⁷ The Court of Appeals of Maryland compared the Ninth Circuit's holding with the holding from the Court of Appeals of Minnesota in *State v. Fan*.⁹⁸ In *Fan*, the Minnesota court held that the First Amendment was not offended by a state regulation that expressly denied the availability of the defense for mistake of age to one convicted of violating the state's child pornography regulation.⁹⁹

Concluding its analysis of the constitutionality of the strict liability regulation, the court acknowledged that some form of scienter was necessary in all such regulations.¹⁰⁰ In *Outmezguine*, the court held that only knowledge of the nature and character of the sexually explicit materials was necessary for conviction.¹⁰¹ The "nature and character" test had been formerly utilized only in cases involving the purchase, transportation, and distribution of child pornography.¹⁰² The court opined that *Outmezguine* need only have known that the conduct photographed was of the type proscribed by the regulation.¹⁰³ The court warned that one who tested the boundaries of "sexual conduct" did so at his own risk.¹⁰⁴

The court then analyzed section 419A and applied traditional rules of statutory construction.¹⁰⁵ Utilizing the plain language test,

95. 858 F.2d 534 (9th Cir. 1988).

96. *United States Dist. Court for Cent. Dist. of Cal.*, 858 F.2d at 540.

97. *See United States v. United States Dist. Court for Cent. Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988); *State v. Fan*, 445 N.W.2d 243 (Minn. Ct. App. 1989).

98. 445 N.W.2d 243 (Minn. App. 1989).

99. *Id.* at 247-48. The *Fan* court distinguished its holding from that of *United States Dist. Court for Cent. Dist. of Cal.* by stating that the statute expressly denied the availability of the mistake of age defense, thereby eliminating the need for the Minnesota judiciary to determine the defense's availability. *Id.* at 247.

100. *New York v. Ferber*, 458 U.S. 747, 765 (1982).

101. *Outmezguine III*, 335 Md. 20, 40, 641 A.2d 870, 880 (1994).

102. *See Hamling v. United States*, 418 U.S. 87 (1974).

103. The prohibited conduct is defined in MD. ANN. CODE art. 27, § 416A (1992).

104. *Outmezguine III*, 335 Md. at 40, 641 A.2d at 880; *see also Hamling*, 418 U.S. at 123 (finding that a defendant need not know that materials are "obscene" to be guilty of violating a statute prohibiting such material).

105. *Outmezguine III*, 335 Md. at 41, 641 A.2d at 880. In a recent Maryland case, the court of appeals outlined many of the relevant principles of statutory construction. *See Condon v. State*, 332 Md. 481, 632 A.2d 753 (1993). The primary goal of statutory construction is to carry out the intent of the

the court emphasized the law's silence as to any knowledge element.¹⁰⁶ In response to Outmezguine's challenge that the judiciary had, on several occasions, read scienter elements into statutes where none existed, the court declined to rewrite the statute and determined that the state's child pornography regulation would be treated similarly to the state's regulation concerning statutory rape.¹⁰⁷ The court concluded that only in those situations where the legislature had inadvertently omitted a scienter element had the judiciary felt the necessity to create one.¹⁰⁸

Reading the statute as a whole, the court determined that the General Assembly consciously omitted the scienter element.¹⁰⁹ The court recognized that the legislature included a knowledge element in two of the companion subsections to section 419A.¹¹⁰ The court also noted that the bill, when it was first examined by the Maryland legislature, contained a variety of options, some containing scienter elements and some not.¹¹¹ The legislature had both alternatives before it and chose not to include a scienter element.¹¹²

Next, the court addressed Outmezguine's contention that the legislature, although it chose not to include a scienter element, nonetheless wished to make available a mistake of age defense.¹¹³ The legislative history revealed a proposed version of the 1989 amendment that would have expressly prohibited the mistake of age defense.¹¹⁴ After ACLU testimony denouncing the elimination of a defendant's ability to raise the defense as unconstitutional, the legislature removed the prohibitive language from the regulation.¹¹⁵

legislature. *Id.* at 491, 632 A.2d at 757. In an effort to determine legislative intent, the courts look first to the wording of a statute. *Id.* at 491, 632 A.2d at 758. All provisions of a statute should be read together when determining the regulation's intent. *Id.* Where the provisions of a statute are unclear, courts look to the legislative history in an attempt to glean the legislature's true intent. *See id.* at 491-92, 632 A.2d at 757-58.

106. *Outmezguine III*, 335 Md. at 41, 641 A.2d at 881.

107. *Id.* at 43, 641 A.2d at 881 (citing *Garnett v. State*, 332 Md. 571, 585-86, 632 A.2d 797, 804 (1993)).

108. *Outmezguine III*, 335 Md. at 41-42, 641 A.2d at 881 (citing with approval *State v. McCallum*, 321 Md. 451, 456-57, 583 A.2d 250, 252 (1991) and *Dawkins v. State*, 313 Md. 638, 645-48, 547 A.2d 1041, 1044-46 (1988)).

109. *Id.* at 44-45, 641 A.2d at 882.

110. Maryland holds criminally liable anyone who "knowingly" permits a minor to engage in sexually explicit conduct for the purposes of photographic media. MD. ANN. CODE art. 27, § 419A(b) (1992). Additionally, any person who "knowingly promotes, distributes, or possesses" child pornography will be subject to the strictures of § 419A(e).

111. *See* S. 248, 1978 Sess. (Md. 1978); H.R. 35, 1978 Sess. (Md. 1978).

112. *Outmezguine II*, 97 Md. App. 151, 162, 627 A.2d 541, 546 (1993).

113. *Outmezguine III*, 335 Md. at 46-47, 641 A.2d at 883.

114. *See supra* note 45 and accompanying text.

115. *See supra* note 46 and accompanying text.

Outmezguine contended that this was a clear indication of the legislature's desire to incorporate the defense into the criminal statute.¹¹⁶ Outmezguine further maintained that if an affirmative defense of mistake of age existed, then it followed that knowledge was an element of the offense.¹¹⁷

The court enumerated three possible interpretations of section 419A: (1) Knowledge was not an element of the offense, and the affirmative defense of mistake of age was not available, (2) knowledge was not an element of the offense, but the mistake of age defense was available, or (3) knowledge was an element of the offense that the state had to prove in its case in chief.¹¹⁸ The court adopted the interpretation that it felt the legislature had intended to enact¹¹⁹—that scienter need not be proven but that it was possible that the affirmative defense of mistake of age could be available to one charged with violating the statute.¹²⁰

The court concluded its opinion by addressing Outmezguine's preservation argument.¹²¹ The court determined that, although the defense of mistake of age could be available, Outmezguine had failed to preserve the issue of mistake of age for appeal.¹²² Outmezguine argued that once the trial court determined that knowledge of age was not an element of the offense, any evidence that showed reasonable belief of age would have been inadmissible.¹²³ The court was not persuaded and reiterated its position that if the trial judge erred, the defense counsel was required to preserve its objection on the record.¹²⁴

116. *Outmezguine III*, 335 Md. at 31, 641 A.2d at 876.

117. *Id.* at 49, 641 A.2d at 884. Outmezguine reasoned that a mistake of age defense was "only relevant to a crime involving a culpable mental state," and that if the court recognized the availability of the defense, the court was necessarily recognizing a knowledge element. *Id.*

118. *Id.*

119. *Id.* at 47, 641 A.2d at 883. The court never affirmatively stated that the legislature intended that the mistake of age defense be available: "[I]t is *arguable* that the [l]egislature did not want to eliminate the availability of a mistake of age defense, but rather intended to permit a defendant indicted under § 419A(c) to argue that he was reasonably mistaken about a child's age." *Id.* (emphasis added).

120. *Outmezguine III*, 335 Md. at 47, 641 A.2d at 883.

121. *Id.* at 51, 641 A.2d at 886.

122. *Id.* at 52, 641 A.2d at 886. Outmezguine failed to raise this issue at trial. The court did not adhere to its own standard that only "some evidence" is necessary to raise an affirmative defense at trial. A defense sufficiently raised at trial, but rejected, is still preserved for any subsequent appeal.

123. *Id.* at 51, 641 A.2d at 886.

124. *Id.* at 52, 641 A.2d at 886. The court determined that Outmezguine failed to "elucidate" the record as is necessary to preserve an issue for appeal. *Id.* (citing *Bobbitt v. Allied-Signal, Inc.*, 334 Md. 347, 639 A.2d 142 (1994)).

IV. ALTERNATIVE ANALYSIS

In *Outmezguine III*, the court of appeals chose a close case, in that Jennifer was not far below the age of majority, to take a tough stance on child pornography. The court determined that the state had the ability to regulate the speech in question and then balanced the state's interest against the degree of the potential chilling effect on protected speech. Although the court's constitutional analysis followed Supreme Court precedent,¹²⁵ the court failed to decide the most fundamental issue.¹²⁶

The court in *Outmezguine III* failed to affirmatively establish whether the defense of mistake of age was available for one charged with violating section 419A. The court stated only that "the First Amendment does not require [the availability of such an affirmative defense.]"¹²⁷ Conversely, when performing the statutory construction analysis, the court determined that the legislative history indicated that mistake of age might be available to a criminal defendant.¹²⁸ What the court failed to recognize was that its equivocation on the availability of the mistake of age defense has placed many photographers who engage in legal conduct in fear of criminal liability. Under the court's interpretation of the statute, a photographer who diligently checks identification could still violate the regulation if the identification provided is forged or inaccurate.

Under the court's interpretation of section 419A, a photographer who violates the statute faces greater criminal sanctions than does a male over the age of twenty-one who has sexual intercourse with a fourteen year old minor.¹²⁹ The weakness of the court's interpretation is also apparent when one compares the broad range of offenses that are subject to the same liability. A photographer who takes photographs of a topless, seventeen year old woman faces the same penalty as one who films sexually obscene activities that incorporate young children. This nonsensical result can be remedied by a legislative revamping of the current pornography statute and by modelling the statute after the state's sexual offense provisions,¹³⁰ which recognize different levels of culpability depending on the victim's age and the

125. See *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); see text accompanying *supra* notes 61-64.

126. See *Outmezguine III*, 335 Md. at 37-38, 641 A.2d at 879.

127. *Id.* at 38, 641 A.2d at 879.

128. *Id.* at 47, 641 A.2d at 883.

129. Maryland's third degree sexual offense statute imposes incarceration of not more than 10 years. MD. ANN. CODE art. 27, § 464B (1992 & Supp. 1995). In contrast, violators of § 419A may be imprisoned for not more than 10 years and, in addition, may be fined up to \$25,000. *Id.* § 419A(e)(1).

130. See MD. ANN. CODE art. 27, § 461, *et seq.* (1992 & Supp. 1995).

egregiousness of the conduct.¹³¹ The same type of sliding scale liability, if employed in the arena of child pornography statutes, would produce realistic sentences that would be commensurate with defendants' criminal activities.

In addition to the court's failure to definitively establish the defense, the court ignored its own precedent in determining the constitutional appropriateness of the mistake of age defense. It is the Court of Appeals of Maryland's practice not to determine issues on a constitutional basis if other factors are determinative.¹³² Here, the court determined that Outmezguine failed to raise the defense at trial.¹³³ The defendant's deficiency should have been dispositive of the issue; however, the court analyzed the constitutionality of the defense and determined that the First Amendment did not require its existence.¹³⁴ A possible interpretation of the court's action is that it wished to leave the door open to the legislature to amend section 419A and to eliminate the possibility of the defense. A letter from the Attorney General provided the court with further support that the elimination of the defense was permissible.¹³⁵ Recognizing that the legislature struck the limiting language only after ACLU testimony, the court reassured the legislature that it could eliminate the defense without fear that the revised statute would be rejected.¹³⁶ While not in direct conflict with the idea of separation of powers, the court injected its own view of the value of sexually explicit materials and thereby created the potential of influencing the decision-making process of the legislative branch.

The most disturbing aspect of the opinion was that it increased the amount of evidence necessary to generate an affirmative defense and to preserve the issue for appeal. At trial, Outmezguine testified that he was uncertain as to Jennifer's age.¹³⁷ Historically, "some" or any evidence of an affirmative defense was sufficient to raise the issue at trial and to preserve it for appellate review.¹³⁸ The dissent

131. *Id.*

132. *See, e.g.,* *Simms v. State*, 288 Md. 712, 421 A.2d 957 (1980) (determining that the court will avoid unnecessary decisions regarding constitutional issues); *Commissioner of Labor & Ind. v. Fitzwater*, 280 Md. 14, 371 A.2d 137 (1977) (stating that the court will not reach constitutional issues if other factors are dispositive).

133. *Outmezguine III*, 335 Md. 20, 52, 641 A.2d 870, 886 (1994).

134. *See id.* at 37-38, 641 A.2d at 879.

135. *Id.* at 46, 641 A.2d at 883. The letter from the Attorney General's office stated: "[L]ack of knowledge need not be recognized as a defense." Letter from Kathryn M. Rowe, Assistant Attorney General, to Delegate Anne MacKinnon (Feb. 20, 1989).

136. *Id.* at 45-49, 641 A.2d at 883-85.

137. *Outmezguine III*, 335 Md. at 52, 641 A.2d at 886.

138. *See supra* note 79 and accompanying text.

argued that the physical appearance of the victim combined with the defendant's testimony was enough to satisfy the low hurdle of the "some evidence" requirement.¹³⁹ Outmezguine's assertions should have been sufficient to meet the "some evidence" test.¹⁴⁰

A more appropriate analysis would have been for the court to make the affirmative defense of mistake of age available to the defendant. Since the trial court failed to recognize the defense, its decision was clearly erroneous, and the Court of Appeals of Maryland should have remanded the case for reconsideration. At the trial level, mistake of age would only have been available if Outmezguine had testified that he reasonably believed Jennifer to be of the age of majority. The burden of proof would then have shifted to the state to prove that Outmezguine knew or should have known that Jennifer was under eighteen years of age. In an effort to prove Outmezguine's mental culpability, the state could have relied on the victim's statements to the defendant in which she allegedly told him her age and grade level.¹⁴¹ This type of ruling would decrease the potential chilling effect on those who would engage in the activity of photographing sexually explicit, non-obscene conduct that is protected by the First Amendment. More egregious cases would not be affected, as the physical appearance of the victim would often eliminate the possibility of mistake of age as a defense.

V. CONCLUSION

In *Outmezguine v. State* (*Outmezguine III*) the Court of Appeals of Maryland expressed its intolerance with producers of child pornography by strictly sanctioning such abhorrent conduct. Despite the admirable goal of eliminating the harmful effects of pornography on children, the court's holding limits the protection guaranteed by the First Amendment. Additionally, the court failed to apply a mistake of age defense to the statute. Assuming that an affirmative defense exists, the court increased the standard of production necessary to raise the issue at trial.

While it may be inadvertent, this opinion chills the production of protected speech depicting sexually explicit conduct. It also sends a warning to those people who continue legally to ply their trade: Criminal liability may exist, even if the photographer is reasonably diligent in inquiring as to the age of a potential subject. While the state does have a legitimate interest in protecting children, it should not do so at the expense of unsuspecting, cautious, and law-abiding

139. *Outmezguine III*, 335 Md. at 55-56, 641 A.2d at 888 (Bell, J., dissenting).

140. See *supra* note 79 and accompanying text.

141. See *Outmezguine III*, 335 Md. at 27, 641 A.2d at 873.

citizens. The court chose to assert its judicial power in a case where the "child" was not far from the age of majority. The result is that the defendant, Elan Outmezguine, will be imprisoned for eight years, even though he may have believed that his conduct was reasonable and constitutionally protected. *Outmezguine v. State (Outmezguine III)* is just another in a long series of cases that continue to erode the fundamental constitutional freedoms guaranteed by the First Amendment.

Charles L. Simmons, Jr.