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Indiana Law Journal

Volume 87 | Issue 2 Article 1

4-1-2012

The Paradox of Statutory Rape

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Recommended Citation
Christopher, Russell L. and Christopher, Kathryn H. (2012) "The Paradox of Statutory Rape," *Indiana Law Journal*: Vol. 87: Iss. 2, Article 1.
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The Paradox of Statutory Rape

RUSSELL L. CHRISTOPHER* & KATHRYN H. CHRISTOPHER**

What once protected only virginal girls under the age of ten now also protects sexually aggressive males under the age of eighteen. While thirteenth-century statutory rape law had little reason to address the unthinkable possibility of chaste nine-year-old girls raping adult men, twenty-first-century statutory rape law has failed to address the modern reality of distinctly unchaste seventeen-year-old males raping adult women. Despite dramatically expanding statutory rape's protected class, the minimalist thirteenth-century conception of the offense remains largely unchanged—intercourse with a juvenile. Overlooked is the new effect of this centuries-old offense—a sexually aggressive seventeen-year-old raping an adult now exposes the adult rape victim to statutory rape liability. By being raped, the adult rape victim satisfies the minimal elements of the offense, lacks any defenses, and thereby commits statutory rape of her juvenile rapist. Therefore, the offense of statutory rape criminalizes being raped; that is, it criminalizes being the victim of rape. Paradoxically, while the offense of rape prohibits committing rape, the offense of statutory rape prohibits being raped. What the law of rape seeks to protect us from—being raped—the law of statutory rape punishes us for.

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** J.D. 1995, katchristopher@ymail.com. Thanks to Catherine Carpenter, Jack Chin, Michelle Madden Dempsey, Joshua Dressler, Donald Dripps, James Fischer, Reid Fontaine, John Gardner, Stephen Garvey, Jonathan Herring, Carissa Hessick, Jeremy Horder, Laura Hoyano, Kay Levine, Ken Levy, Arnold Loewy, Catharine MacKinnon, Joan McGregor, Marc Miller, Jeffrie Murphy, Michelle Oberman, Peter Oh, Carolyn Ramsey, Carol Steiker, Shlomit Wallerstein, and Peter Westen for their helpful comments. Brandon Bickle, Whitney Davis, Eric Reynolds, Judith Small, Joshua Solberg, and Samantha Walley provided excellent research assistance. The University of Tulsa College of Law provided a generous research grant. We also thank participants in workshops of a previous version of this Article at The University of Arizona College of Law, Oxford University (Exeter College), Southwestern Law School, and The University of Tulsa College of Law.

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INTRODUCTION

If a juvenile rapes an adult, does the adult thereby commit statutory rape?[1] Intercourse obtained by force, coercion, or fraud that negates a victim's consent as well as intercourse with a factually consenting juvenile who is too young to legally consent easily qualify as types of rape.[2] The former is understood as rape and the latter as statutory rape. But how are we to understand the situation of a juvenile, who cannot legally consent, obtaining intercourse by, for example, force that negates the consent of an adult victim? Both engage in intercourse, but neither is consenting. Despite statutory rape law dating back to at least the thirteenth century in England[3] and the colonial era in America,[4] this simple question has apparently never been raised by a litigant, court, or commentator. What has gone overlooked for centuries is that, by virtue of being raped by a juvenile, the adult rape victim commits statutory rape of her juvenile rapist. This Article demonstrates that the offense of statutory rape criminalizes being the *victim* of rape and argues that the offense of statutory rape is fundamentally overbroad.

Consider the case of *Henyard v. State*.[5] Alfonza Smalls approaches Ms. Lewis and her two daughters (ages three and seven) in the parking lot of a grocery store.[6] Revealing a gun in his waistband, he orders them into her car.[7] Alfonza's friend, Richard Henyard, drives all of them to a deserted location outside of town and orders Ms. Lewis out of the car.[8] Fearing for her life and that of her daughters, Ms. Lewis complies without resistance.[9] She engages in intercourse with Richard and Alfonza on the trunk of her car while her daughters remain in the back seat.[10] Ms. Lewis then is ordered to sit on the ground where she is shot at close range four

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1. The term "statutory rape" refers to the criminal offense of engaging in intercourse with a person who is below a specified age of consent. *See, e.g.*, State v. Blake, 777 A.2d 709, 713 (Conn. App. Ct. 2001) ("All a person need do to violate [Connecticut's statutory rape law] is to (1) engage in sexual intercourse (2) with a person between the ages of thirteen and fifteen, and (3) be at least two years older than such person."). Varying by jurisdiction, the age of consent is as young as fourteen and as old as eighteen. *See, e.g.*, ARK. CODE ANN. § 5-14-103(a)(3)(A) (Supp. 2011) (fourteen years of age); CAL. PENAL CODE § 261.5(a) (West 2008) (eighteen years of age).

2. *See infra* Part II.A–D.

3. *E.g.*, State v. Yanez, 716 A.2d 759, 763 (R.I. 1998) ("[S]tatutory-rape was legislatively created in England during the thirteenth century . . . .").

4. *See, e.g.*, CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 11 (2004) ("Colonial American statutory rape law basically imported [the English statutory] language.").

5. 689 So. 2d 239 (Fla. 1997).

6. *Id.* at 242.

7. *Id.*

8. *Id.* at 242–43.

9. *Id.*

10. *Id.* at 243.

times in the head, face, and neck.[11] Rolling her unconscious body onto the side of the road, Richard and Alfonza drive off with the daughters and kill them with single shots to the head.[12] Ms. Lewis miraculously survives.[13] In addition to murder and other charges, Richard and Alfonza are convicted of rape with the use of a firearm.[14]

By the same act of intercourse by which Ms. Lewis was the victim of a nightmarish rape, did she herself commit a crime? Yes. Alfonza Smalls was fourteen-years-old. Ms. Lewis has committed statutory rape. But, one might object, Ms. Lewis, as a *victim* of rape, did not consent to the intercourse and thus cannot be criminally liable for statutory rape for that very intercourse. However, a statutory rape *perpetrator's* lack of consent is not a defense nor is her consent an element of the offense.[15]

Ms. Lewis satisfies the explicit elements of statutory rape. As one court succinctly explains, "Statutory rape is a strict liability crime. The only elements the Commonwealth must prove are (1) sexual intercourse . . . with (2) a child under sixteen years of age."[16] Most jurisdictions also add a third element: the perpetrator is at least *y* years of age (typically eighteen)[17] and/or at least *z* years older than the victim[18] (typically at least three years older).[19] Ms. Lewis satisfies these elements: she engaged in intercourse with a fourteen-year-old, and, as a mother of a seven-year-old, is presumably over eighteen years of age and sufficiently older than Alfonza.[20]

Despite satisfying the explicit elements of statutory rape, one might argue that surely the victim of a horrific rape, like Ms. Lewis, fails to satisfy some implicit element. Even with strict liability (as to the element of the victim's age), statutory rape may nonetheless include the implicit mens rea element of intention (as to the

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 243–44, 254.

15. And this is true not only for statutory rape but for rape as well. The issue of consent seems relevant only because we generally analyze a case of (nonstatutory) rape by considering whether the *victim* consented. In rape, the victim's nonconsent may be an element of the offense or the victim's consent may be a defense. Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 1000–01 (referencing statutes incorporating each approach). But in both rape and statutory rape law the *perpetrator's* consent or lack of consent is irrelevant. *See, e.g.*, *In re* Jessie C., 565 N.Y.S.2d 941, 944 (N.Y. App. Div. 1991) ("Although [the respondent is] . . . incapable of consenting to sexual intercourse . . . respondent is not a victim. Respondent is charged with perpetrating . . . [statutory rape]. Simply stated, respondent's consent is not an essential element of the crime." (citations omitted)).

16. Commonwealth v. Knap, 592 N.E.2d 747, 748–49 (Mass. 1992) (citation omitted).

17. *See, e.g.*, State v. Yanez, 716 A.2d 759, 766 n.5 (R.I. 1998) (identifying a perpetrator being "over the age of eighteen (18) years" as a requisite element).

18. *See supra* note 1.

19. *E.g.*, COCCA, *supra* note 4, at 33 (noting that the requisite age span between perpetrator and victim is generally three or four years).

20. Henyard v. State, 689 So. 2d 239, 242 (Fla. 1997). The facts of the case do not reveal Ms. Lewis's age.

intercourse) and the actus reus element of a voluntary act. While she clearly lacked the desire to engage in intercourse with Alfonza, she just as clearly did so voluntarily and intentionally because she preferred that to increasing the risk that she (or her daughters) would be killed.[21] As the Supreme Court declared, conduct under threat or "duress normally does not controvert any of the elements of the offense itself."[22] "[T]he defendant's illegal act is voluntary, indeed, intentional . . . ."[23] The threat may make the choice difficult, but actions under threat are nonetheless chosen, and "[a]ll chosen acts are voluntary."[24] As Joshua Dressler explains, "a coercive threat *creates* the intent; it does not negate it."[25] As a result, adults being raped by juveniles, like Ms. Lewis, satisfy both the explicit and implicit elements of statutory rape.

Defenses also fail to supply a solution. While Ms. Lewis and similar adult victims would qualify for defenses specific to statutory rape—that the perpetrator lacks a sexual interest or that the juvenile is unchaste—those defenses are not widely recognized, if at all.[26] While the general defenses of necessity, duress, and self-defense are widely recognized, Ms. Lewis and similar adult victims fall through the cracks of the various doctrinal requirements. Necessity requires, in some jurisdictions, that defendants choose the lesser evil in an emergency situation emanating from a natural rather than a human source.[27] While Ms. Lewis's decision to commit statutory rape in an attempt to save herself and her two children is clearly the lesser evil, the source of the emergency is human (the two juveniles) rather than natural. Unlike necessity, duress is applicable to human threats. However, duress, in some jurisdictions, is inapplicable as a defense to offenses against the person (including statutory rape).[28] Unlike duress, self-defense is applicable to offenses against the person. However, self-defense is inapplicable, in part, because self-defense requires the use of physical force.[29] Ms. Lewis did not use physical force. Unlike self-defense, necessity may not require the use of

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21. For further discussion of how actions undertaken under the threat of physical force are considered voluntary and intentional, see *infra* notes 183–87 and accompanying text.

22. Dixon v. United States, 548 U.S. 1, 6 (2006).

23. *Id.* at 24 (Breyer, J., dissenting).

24. Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 281 (1995).

25. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 307 (5th ed. 2009) (emphasis in original).

26. *See infra* Part I.C.

27. *E.g.*, WIS. STAT. ANN. § 939.47 (West 2005) (limiting necessity to "[p]ressure of natural physical forces"); United States v. Contento-Pachon, 723 F.2d 691, 695 (9th Cir. 1984) (denying necessity because defendant was "coerced by human, not physical forces").

28. *E.g.*, Moore v. State, 697 N.E.2d 1268, 1273 (Ind. Ct. App. 1998) (affirming defendant's conviction because "the defense of duress does not apply to offenses against persons"); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1342 (1989) (noting that courts are divided as to the availability of duress to rape).

29. *E.g.*, People v. Richards, 869 N.Y.S.2d 731, 737 (N.Y. Crim. Ct. 2008) (construing New York's self-defense provision as "limited to situations of actual . . . force"); MODEL PENAL CODE § 3.04(1) (Official Draft and Revised Comments 1985) (requiring defendant's "use of unlawful force").

force.[30] But this only brings us back full circle—as discussed above, necessity is also foreclosed. No defense quite seems to fit; being raped fails to fit into any defense box. As a result, Ms. Lewis and other similar adult rape victims commit statutory rape of their juvenile rapists.

How could we have created such a paradoxical crime—the crime of being raped? Briefly tracing the evolution of statutory rape supports a speculative conjecture. In short, while the class of persons protected by statutory rape laws (that is, the class of potential statutory rape victims) has dramatically expanded over time, the requisite conduct constituting the offense has remained unchanged. England's first statutory rape offense, enacted in 1275, protected only females under the age of twelve.[31] Almost three hundred years later, during the reign of Elizabeth I, the protected class was reduced to females under the age of ten.[32] The American colonies largely imported the English statutory scheme.[33] "The idea behind such laws at the time was less about . . . [protecting the female from sexual exploitation], and more about protecting white females and their premarital chastity—a commodity—as property . . . ."[34] As Justice William Brennan explained, "Because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the State's protection."[35] From this "exaltation of female chastity,"[36] a statutory rape victim being unchaste, promiscuous, or not a virgin[37] evolved into a defense that was soon "codified in every state."[38]

Not surprisingly, colonial-era jurisdictions had little reason to craft statutes precluding adults from statutory rape liability when raped by chaste girls of nine. The prospect of a chaste nine-year-old girl raping an adult was (and perhaps still is)

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30. *See* WAYNE R. LAFAVE, CRIMINAL LAW 539 n.2 (4th ed. 2003) (noting that when an actor avoids self-defense force by committing a nonforcible offense, the appropriate defense is necessity).

31. Statute of Westminster I, 1275, 3 Edw. 1, c. 13 (Eng.) ("The King prohibiteth that none do ravish, nor take away by force, any Maiden within Age [under twelve] . . . ."); COCCA, *supra* note 4, at 10 ("[The 1275 statute criminalized] sexual intercourse with a female under 12 . . . .").

32. The Common Informers Act, 1576, 18 Eliz., c. 7 (Eng.) (lowering the age of consent to ten); 4 WILLIAM BLACKSTONE, COMMENTARIES *212 (reporting that the statute criminalized "carnally knowing or abusing any woman child under the age of ten years" (citing 18 Eliz., c. 7)).

33. *E.g.*, Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 403 (1984) ("Statutory rape laws came to America with the common law of England.").

34. COCCA, *supra* note 4, at 11 (citation omitted).

35. Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 494–95 (1981) (Brennan, J., dissenting).

36. Rita Eidson, Comment, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757, 761 (1980).

37. *E.g.*, Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 25–26 (1994) ("[B]y extending legal protection only to virgins, early statutory rape law [allowed] . . . a man to have intercourse with a non-virgin . . . .").

38. COCCA, *supra* note 4, at 11.

inconceivable. But over time, the age of consent rose (to as high as eighteen today),[39] gender-specific statutes gave way to gender-neutral statutes extending protection to male juveniles,[40] and the promiscuity defense was abolished.[41] As a result, the new protected class includes not only chaste nine-year-old girls, but also sexually aggressive seventeen-year-old males. Of course, the prospect of a member of the new protected class raping an adult is entirely conceivable and has exponentially increased (as compared to a member of the original protected class).[42] Despite the dramatically different identity and capabilities of the new protected class, the essential and exceedingly minimalist conception of statutory rape—intercourse with a juvenile below the age of consent—has not changed. And this conception has become so ingrained over the centuries that the need for change has been obscured. As a result, we have overlooked the new effect of this centuries-old offense—a sexually aggressive underage male (perhaps as old as seventeen) raping an adult now exposes the adult rape victim to statutory rape liability.

The scope of this problem is quite broad. The law of statutory rape criminalizes being the adult victim of not only forcible rape but virtually every type of rape perpetrated by a juvenile.[43] And adults raped by juveniles are not only subject to statutory rape liability but are prosecuted as well. For this and other reasons, prosecutorial discretion, as will be discussed below,[44] is not a satisfactory solution. Consider *Garnett v. State*, a case read by many first-year law students.[45] The defendant, Raymond Garnett, was a twenty-year-old mentally disabled man, reading at a third-grade level, with an IQ of fifty-two.[46] "Raymond attended special education classes and for . . . [a] time was educated at home when he was afraid to return to school due to his classmates' taunting. [Unable to] understand the duties of the jobs given him, he failed to complete vocational assignments; he sometimes lost his way to work."[47] Raymond met Erica Frazier through a friend, and the two began talking over the telephone.[48] One night Raymond visited Erica's house, and Erica opened her bedroom window and "directed him to use a ladder to reach her window."[49] After willingly engaging in intercourse, they spent the night together

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39. *See supra* note 1.

40. *See infra* notes 86–88 and accompanying text.

41. *See infra* notes 123–25 and accompanying text.

42. For an account of a recent case of a fifteen-year-old male raping a woman on a busy street in "broad daylight" that drew national media attention, see *Ohio Teen Told Police He Raped Woman Along Road*, HUFFINGTON POST (Feb. 3, 2010, 12:14 PM), http://www.huffingtonpost.com/huff-wires/20100203/us-roadside-rape/ ("A teen accused of raping a woman along a street in Ohio in broad daylight told detectives a day later that he walked up behind her, grabbed her neck and raped her.").

43. *See infra* Parts II.B–D. And juveniles are routinely held criminally liable for serious crimes such as rape. *See, e.g.*, Henyard v. State, 689 So. 2d 239 (Fla. 1997); *infra* note 96.

44. *See infra* Part III.D.4.

45. 632 A.2d 797 (Md. 1993).

46. *Id.* at 798.

47. *Id.* at 798–99.

48. *Id.* at 799.

49. *Id.* at 800.

before Raymond departed in the morning.[50] Erica was thirteen years old.[51] Despite conceding "that it is uncertain to what extent Raymond's intellectual and social retardation may have impaired his ability to comprehend imperatives of sexual morality," the Maryland Court of Appeals affirmed his conviction for statutory rape.[52]

But the roles of perpetrator and victim could be reversed. Rather than Raymond the perpetrator and Erica the victim of statutory rape, Erica arguably committed second-degree rape of Raymond[53] under Maryland's criminal code by engaging in "intercourse with another if the victim is a mentally defective individual."[54]

As illustrated by *Henyard* and *Garnett*, the law of rape and the law of statutory rape are in conflict. This conflict has far-reaching practical and conceptual consequences disproportional to the relative infrequency of adults prosecuted for statutory rape of their juvenile rapists.[55] First, the conflict subverts the very design of the law of rape. What the law of rape seeks to protect us from—being raped—the law of statutory rape subjects us to punishment for. Why enact one law that protects us from the very conduct that another law punishes us for? That is, why enact one law that prohibits committing rape and another law that prohibits being raped? Second, it deters rape victims from seeking the protection of the law. In order to report and press charges for being raped by a juvenile, a rape victim must self-incriminate to a charge of statutory rape.

Third, the conflict threatens to undermine hard-fought reform efforts to abolish the resistance requirement. Traditionally, a rape conviction could not be secured without evidence that the victim resisted.[56] Perhaps the signature achievement effected by the dramatic transformation of rape law over the last thirty years has been the large-scale elimination of the resistance requirement[57] in response to the devastating critiques by feminists and rape reformers.[58] For example, referring to

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50. *Id.* at 799.

51. *Id.*

52. *Id.* at 802, 805.

53. *Id.* at 816 n.17 (Bell, J., dissenting) ("Indeed, in this case there is every reason to question whether the victim was the petitioner [Raymond], rather than the minor female [Erica]."). Catherine Carpenter similarly observes that "students who read *Garnett* in my first year Criminal Law class often view Raymond as the victim." Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 318 n.106 (2006).

54. MD. CODE ANN., CRIM. LAW § 3-304(a)(2) (LexisNexis Supp. 2011).

55. For examples of adult rape victims prosecuted for statutory rape of their juvenile rapists, see *supra* notes 45–54, *infra* notes 201–07, 270–84 and accompanying text.

56. *E.g.*, Anderson, *supra* note 15, at 962 ("Rape law has traditionally emphasized a woman's physical resistance . . . . At common law, the state had to prove beyond a reasonable doubt that the woman resisted her assailant to the utmost of her physical capacity to prove that an act of sexual intercourse was rape." (footnote omitted)).

57. *See, e.g.*, CATHARINE A. MACKINNON, SEX EQUALITY: RAPE LAW 802 (2001) ("All United States jurisdictions have abolished explicit resistance requirements, whether statutory or common law.").

58. *See, e.g.*, Commonwealth v. Berkowitz, 609 A.2d 1338, 1345 n.5 (Pa. Super. Ct. 1992) ("The effect of the reforms [eliminating the resistance requirement] was dramatic."); JOAN MCGREGOR, IS IT RAPE?: ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT

resistance requirements as "primitive"[59] and having "no place in a modern system of jurisprudence,"[60] the California Supreme Court interpreted California's rape provision as abolishing any resistance requirement.[61]

But by criminalizing being raped by a juvenile, the offense of statutory rape reintroduces (covertly and presumably unintentionally) a resistance requirement. By prohibiting being raped by a juvenile, statutory rape law imposes a duty on an adult not to be raped by a juvenile. To fulfill this duty, an adult must prevent or resist being raped by a juvenile. Failure to prevent or resist being raped by a juvenile may result in statutory rape liability. Thus, the offense of statutory rape contains a hidden resistance requirement.

As "pernicious,"[62] "malicious,"[63] and "disastrous"[64] as the traditional resistance requirement has been, and still is in some states,[65] statutory rape law's hidden resistance requirement is worse. Under the traditional resistance requirement, a rape victim failing to resist risks the perpetrator's acquittal.[66] In contrast, under statutory rape law's hidden resistance requirement, failing to resist risks criminal liability for statutory rape. If the traditional resistance requirement placed victims in the "cruel dilemma"[67] of "[r]esist and die; submit and live [but risk acquittal of your rapist],"[68] statutory rape law's hidden resistance requirement places adult victims in a dilemma that is yet crueler: resist and die; submit and live, but risk criminal liability for statutory rape of your juvenile rapist.

Statutory rape's hidden resistance requirement potentially places rape law reformers, courts, and legislatures in a dilemma. How can one attack rape law's traditional resistance requirement as being impermissible while defending the status quo of statutory rape law that makes resistance legally obligatory? Consistency mandates that opposition to the less-worse traditional resistance requirement entails

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SERIOUSLY 28 (2005) ("Feminist legal theorists have criticized standard doctrines in rape law, pointing out that . . . the requirements of physical resistance . . . are not rational for the legitimate ends of criminal law and are blatantly unfair to women.").

59. People v. Barnes, 721 P.2d 110, 117 (Cal. 1986) (quoting People v. McIlvain, 130 P.2d 131, 135 (Cal. Ct. App. 1942)).

60. *Barnes*, 721 P.2d at 121.

61. *Id.* (noting that one purpose was relieving victims of "the potentially dangerous burden of resisting an assailant in order to substantiate allegations of forcible rape").

62. Commonwealth v. Rhodes, 510 A.2d 1217, 1223 n.11 (Pa. 1986).

63. MCGREGOR, *supra* note 58, at 31 (describing resistance standards that both endangered the victim and induced acquittals of the defendant).

64. *Id.* at 41.

65. *See, e.g.*, David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 358 n.161 (2000) ("Currently only a few states use the term 'resistance' anywhere in their rape statutes.").

66. *E.g.*, People v. Barnes, 721 P.2d 110, 117 (Cal. 1986) (noting that "courts refused to uphold a conviction of rape by force where the complainant had exhibited little or no resistance"); SUSAN ESTRICH, REAL RAPE 41 (1987) ("The resistance requirement . . . afforded courts a convenient vehicle to reverse convictions . . . .").

67. People v. Dorsey, 429 N.Y.S.2d 828, 831 (N.Y. Sup. Ct. 1980) (observing that resolving this "cruel dilemma . . . was not demanded of the victim of any other crime" (citation omitted)).

68. Sally Kalson, *Rape Wisdom Doesn't Mean Neglect Wits*, PITTSBURGH POST-GAZETTE, June 6, 1994, at C1.

opposition to the status quo of statutory rape law with its even-worse hidden resistance requirement. Conversely, the price for defense of statutory rape's status quo is endorsement of the traditional resistance requirement.

The law of statutory rape also suffers unfortunate consequences. First, prohibiting being raped by a juvenile undermines the moral authority and rational coherence of the offense. That statutory rape law imposes a duty to resist on a victim of a horrific rape, like Ms. Lewis, borders on the absurd. With her two young children present and a gun pointed at her head, the law of statutory rape commands Ms. Lewis to physically resist her juvenile rapist under threat of statutory rape liability for *her*. The apparent, but presumably unintended, message of statutory rape law is that Ms. Lewis must risk her own life and employ physical force against her juvenile rapist in order to protect him from her sexual exploitation of *him*. But surely, if there is any sexual exploitation, it is not by her of him; rather, it is by him of her. Second, punishing both adults who consensually engage in intercourse with juveniles and adults who do so nonconsensually (because raped by a juvenile) dilutes the stigmatizing (and thus deterrent) effect of statutory rape. If innocent rape victims like Ms. Lewis and Mr. Garnett commit statutory rape, what degree of stigma attaches to the commission of the crime? Third, application of statutory rape's strict liability rule regarding the age of the victim[69] to adults who commit statutory rape of their juvenile rapists demonstrates the illegitimacy of strict liability's rationale. The arguably plausible rationale of the strict liability rule is that by choosing to engage in intercourse with one who might turn out to be underage, one culpably assumes the risk that one's partner will turn out to be underage.[70] Even so, the rationale's implausibility is exposed when applied to adult victims of rape: one does not culpably assume the risk of being raped and thus one does not culpably assume the risk that one's rapist will turn out to be underage.

After supplying an overview of statutory rape law, Part I presents the elements of the offense of statutory rape and defenses that might preclude adults' liability for statutory rape of their juvenile rapists. It demonstrates that such adult victims satisfy both the explicit and implicit elements. Neither specific nor general defenses satisfactorily preclude statutory rape liability. No individual offense element or defense suffices.

Part II applies these offense elements and defenses to specific examples of four types of rape perpetrated by a juvenile against an adult: (i) rape by threat of physical force, (ii) rape by coercion, (iii) rape by fraud, and (iv) rape of a mentally disabled person. In at least some cases of each of these types of rape, no combination of offense elements and/or defenses satisfactorily precludes liability for statutory rape. When an adult is raped by a juvenile, the offense of statutory rape imposes criminal liability on the adult for the same intercourse by which the adult is a victim of rape.

After explaining why statutory rape liability is undeserved for adult rape victims and identifying how statutory rape law's fundamental overbreadth subverts the purposes and principles of the laws of both rape and statutory rape, Part III proposes a possible solution. The solution redefines the scope of a statutory rape

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69. *See infra* notes 90–95 and accompanying text.
70. *See infra* note 242 and accompanying text.

victim's traditional incapacity to consent by building on a recent doctrinal shift in statutory rape law. Finally, this Part anticipates and counters possible objections. This Article concludes that statutory rape has paradoxically become the crime of being raped.

I. STATUTORY RAPE LIABILITY

After sketching a brief overview of the law of statutory rape, this Part presents both the explicit and implicit elements of the offense, defenses specific to statutory rape, and defenses of general application. It demonstrates that some adults raped by juveniles satisfy both the explicit and implicit elements of statutory rape, but satisfy neither specific defenses nor general defenses. By being raped by a juvenile, an adult commits statutory rape of her juvenile rapist.

A. Overview

Statutory rape[71] is perhaps the only offense thought to be overbroad by both its perpetrators and victims. Perpetrators find it overbroad because the offense can be committed despite the absence of any force (or fraud or coercion), despite the presence of the victim's factual consent,[72] despite the absence of the defendant's mens rea,[73] and despite the presence of the defendant's honest and reasonable mistake that the victim is above the age of consent.[74] Some victims find it overbroad because the offense goes so far *overboard* in protecting their negative sexual autonomy (freedom from unwanted intercourse) as to violate their positive autonomy (freedom to engage in wanted intercourse).[75] Victims who view

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71. While popularly known as statutory rape, most jurisdictions use other terms to designate the offense. *See* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 314 n.2 (2003) (observing that statutory rape is variously termed as "sexual abuse of a minor," "sexual conduct with a minor," "felony carnal knowledge of a juvenile," and "statutory sexual seduction," among others). As Wayne LaFave explains, "[T]his variety of rape came to be known as 'statutory rape,' apparently because it was originally engrafted onto the common law by statute." LAFAVE, *supra* note 30, at 874.

72. *See, e.g.*, State v. Anthony, 516 S.E.2d 195, 197 (N.C. Ct. App. 1999) (contrasting the nonforcible and (factually) consensual intercourse involved in statutory rape with rape "by force and against the will" of the victim); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 708 (2006) ("The law against statutory rape . . . is meant to target the sex partners of older teens . . . who engage in factually consensual sex (i.e., they do not employ 'force' within the meaning of the rape law).").

73. Many jurisdictions define statutory rape without explicitly requiring mens rea. *See infra* notes 90–95 and accompanying text. And the majority of jurisdictions have explicitly ruled that mens rea is not required as to the element of the victim's age. *See infra* note 95 and accompanying text. But mens rea may implicitly be required as to the element of intercourse. For a discussion of this possibility, see *infra* Part I.B.2.

74. *See infra* notes 90, 95 and accompanying text.

75. *See, e.g.*, Arnold H. Loewy, *Statutory Rape in a Post* Lawrence v. Texas *World*, 58 SMU L. REV. 77, 87 (2005) (suggesting that minors might understandably feel "that the very

themselves as near-adults (eighteen is the age of consent in some jurisdictions),[76] if not full adults, are deemed legally incapable of engaging in what they may consider, and what the Supreme Court hinted, to be a fundamental human right—factually consensual intercourse that causes no harm.[77]

The articulated rationale for the offense of statutory rape is that persons below the age of consent lack the maturity and judgment to give sufficiently informed consent.[78] Although juveniles may factually consent to intercourse, the law of statutory rape treats them as incapable of giving legal consent.[79] While the offense

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nature of sexual privacy requires that the participant and not the State choose [her sexual partners]"); Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 331 (2003) ("Sixteen-year-old Amanda Winkler was jailed for contempt of court for refusing to testify against her lover [who was twenty-one and who she subsequently married] when he was tried for having consensual intercourse with her."); Susannah Miller, Note, *The Overturning of* Michael M.*: Statutory Rape Law Becomes Gender-Neutral in California*, 5 UCLA WOMEN'S L.J. 289, 296–97 (1994) (summarizing feminist arguments that "statutory rape laws violate a female minor's right to privacy and to consent to sexual intercourse"). For a discussion of positive and negative sexual autonomy, see ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 125 (2003). For a similar discussion of the two sides or facets of sexual autonomy, see STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 99 (1998).

76. *See supra* note 1.

77. Based on *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), which found a right of liberty for adults to engage in consensual intercourse with other adults in the privacy of the home, Arnold Loewy argues that statutory rape laws unconstitutionally violate a minor's right to privacy. Loewy, *supra* note 75, at 81–88. In a previous case, Justice Brennan suggested that statutory rape laws, by criminalizing factually consensual intercourse, might not survive a constitutional challenge based on the right to privacy:

> [O]ur cases would not foreclose such a privacy challenge. . . . We have stressed, however, that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."
>
> Minors, too, enjoy a right of privacy in connection with decisions affecting procreation. Thus . . . it is not settled that a State may rely on a pregnancy-prevention justification to make consensual sexual intercourse among minors a criminal act.

Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 491 n.5 (1981) (Brennan, J., dissenting) (emphasis in original) (citation omitted) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)). Unlike the U.S. Supreme Court, the Florida Supreme Court did not merely hint, but actually held, that the prosecution of an underage juvenile for factually consensual intercourse with another underage juvenile did violate the defendant's constitutional right to privacy under the Florida state constitution. B.B. v. Florida, 659 So. 2d 256, 259 (Fla. 1995).

78. *See, e.g.*, MACKINNON, *supra* note 57, at 871 (explaining that minors cannot legally consent "because they may not know what they are doing or what is being done to them, or the meaning of what they are asked or told to do; partly because they will do what adults ask, whether they want to or not").

79. *See, e.g.*, N.Y. PENAL LAW § 130.05(3) (McKinney 2009) ("A person is deemed incapable of consent when he or she is: (a) less than seventeen years old . . . ."); People v. Giardino, 98 Cal. Rptr. 2d 315, 325 n.6 (Cal. Ct. App. 2000) (noting "the statutory presumption that a person under 18 years of age is incapable of giving legal consent").

may primarily serve to protect juveniles from the exploitation of older, more experienced sexual predators, it also serves to protect juveniles from themselves[80] because they lack a sufficient understanding and appreciation of the risks and harms of intercourse.[81]

Some feminists and critics counter that the motive and effect of statutory rape law may be more paternalistic than protective.[82] Statutory rape laws "reflect and reinforce archaic assumptions about the . . . weakness and naïveté of young women."[83] Frances Olsen describes the dilemma that statutory rape laws present to feminists: "On one hand, they protect females . . . . [T]hey reduce abuse and victimization. On the other hand, statutory rape laws restrict the sexual activity of young women and reinforce the double standard of sexual morality."[84] On this view, statutory rape law's protection of young women's freedom from unwanted, exploitative intercourse undermines their freedom to engage in wanted, rewarding intercourse. To the sexually active underage female, statutory rape law is "both protective (if indeed a young female is being abused) and punitive (if the relationship is a consensual one)."[85]

But statutory rape law's traditional and exclusive focus on the protection of young females has shifted. Previously, by statute, the class of perpetrators was exclusively male and the class of victims exclusively female.[86] Despite gender-specific statutes surviving a constitutional challenge under the equal protection clause,[87] today statutory rape statutes are gender-neutral with respect to both the class of perpetrators and the class of victims in almost all, if not all, states.[88] And increasingly the offenders are female and the victims are male.[89]

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80. State v. Jadowski, 680 N.W.2d 810, 817 (Wis. 2004) ("The state has a strong interest in the ethical and moral development of its children, and this state has a long tradition of honoring its obligation to protect its children from predators and from themselves."); Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1261 (1998) ("Paternalism motivates this understanding of statutory rape: adolescent females must be protected from themselves.").

81. The risks and harms cited in justifying the offense include illegitimate teenage pregnancies, *Michael M.*, 450 U.S. at 470, and venereal diseases, Owens v. State, 724 A.2d 43, 52 (Md. 1999) (noting "especially the HIV virus . . . and . . . permanent damage to a child's organs").

82. *See, e.g.*, Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 757 (2000) (describing the "tension between the protective and the patriarchal impulses underlying statutory rape law").

83. Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* FEMINIST LEGAL THEORY 9, 18 (D. Kelly Weisberg ed., 1993).

84. Olsen, *supra* note 33, at 401–02.

85. COCCA, *supra* note 4, at 27.

86. *See, e.g.*, Carpenter, *supra* note 53, at 313 (noting that the offense of statutory rape was "[o]riginally gender-specific"). For a chart showing the year-by-year breakdown of states' adoption of gender-neutral statutory rape statutes, see COCCA, *supra* note 4, at 74 tbl.3.2.

87. *See* Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 472–73 (1981) (upholding the constitutionality of California's statutory rape law, which only prohibited the conduct of male perpetrators).

88. *See* RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W.

One of many controversial aspects of statutory rape law is the strict liability rule as to the victim's age. That is, under strict liability, the prosecution need not prove that the defendant had any mens rea as to the victim's age, and a defendant's honest and reasonable belief as to the victim's age is not a defense.[90] For almost 100 years after the 1875 English case, *Regina v. Prince*,[91] strict liability as to the victim's age was uniformly followed in America.[92] But in 1964, in *People v. Hernandez*,[93] California recognized a defendant's honest and reasonable belief that the victim was over the age of consent as a defense.[94] Though approximately twenty jurisdictions now recognize the *Hernandez* defense, strict liability remains the majority rule.[95]

B. Elements of Statutory Rape

This section presents the explicit and implicit elements of the offense of statutory rape. After demonstrating that adult victims of rape perpetrated by juveniles[96] satisfy all of these elements, this section concludes that such adult victims commit statutory rape of their juvenile rapists.

LOW, CRIMINAL LAW 400 (2d ed. 2004) (noting that the "vast majority" of statutory rape provisions are gender-neutral); Carpenter, *supra* note 53, at 313 n.81 (citing Idaho as the only state retaining a gender-specific statute).

89. *See, e.g.*, Kay L. Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357, 380–88 (2006) (chronicling the increased frequency of female perpetrators and male victims); Kate Zernike, *The Siren Song of Sex with Boys*, N.Y. TIMES, Dec. 11, 2005, § 4, at 3 (same).

90. *See, e.g.*, Owens v. State, 724 A.2d 43, 49 (Md. 1999) (observing that statutory rape is a strict liability offense because it precludes a defense based on mistake of age of the victim); DRESSLER, *supra* note 25, at 147 (noting that statutory rape is recognized as a strict liability offense because it does not require a "*mens rea* element regarding the defendant's knowledge of the female's underage status" (emphasis in original)).

91. (1875) 2 L.R.C.C.R. 138, 145 (affirming defendant's conviction for taking an unmarried girl below the age of sixteen from the custody of her father despite the jury finding that the girl "told the prisoner that she was eighteen years of age, that he believed that she was eighteen years of age, and that he had reasonable grounds for so believing").

92. *See* Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 111 (1965) ("Despite having been soon overruled [in England], *Prince* initiated a trend which was universally followed in American jurisdictions for the next eighty-nine years; statutory rape in America thus fell into a class of cases at variance with the reasonable-mistake-of-fact doctrine.").

93. 393 P.2d 673, 677–78 (Cal. 1964) (reversing defendant's conviction for statutory rape and recognizing a defense based on the defendant's honest and reasonable belief that the victim was above the age of consent).

94. *See* State v. Jadowski, 680 N.W.2d 810, 822 n.49 (Wis. 2004) (identifying *Hernandez* as "the first case to allow the defense [to statutory rape based on mistake of age]").

95. *See, e.g.*, Garnett v. State, 632 A.2d 797, 802–03 (Md. 1999) (observing that twenty-one jurisdictions have some kind of mistake of age defense to statutory rape).

96. Juveniles are commonly held criminally liable for rape. *See, e.g.*, Laura L. Finley, *The Central Park Jogger: The Impact of Race on Rape Coverage*, *in* 5 FAMOUS AMERICAN CRIMES AND TRIALS: 1981–2000, 123, 132–37 (Frankie Y. Bailey & Steven Chermak eds., 2004) (chronicling perhaps the most famous case of juveniles, ranging from fourteen to sixteen, being held criminally liable for rape). Some states allow criminal court jurisdiction

1. Explicit Elements

The typical formulation of statutory rape defines the explicit elements of the offense minimally. Under this minimalist conception, the offense of statutory rape consists of nothing more than (i) intercourse with or penetration of (ii) a juvenile below the age of *x* (typically sixteen).[97] Most jurisdictions also include the following additional element: (iii) by a perpetrator at least *y* years of age (typically eighteen)[98] and/or at least *z* years older (typically three) than the juvenile.[99]

By being raped by a juvenile, the adult victim commits statutory rape under this minimalist conception. Suppose that *Juvenile*, who is less than *x* years of age, rapes *Adult*, who is at least *y* years of age and at least *z* years older than *Juvenile*. By virtue of being raped by *Juvenile*, *Adult* has intercourse with *Juvenile*. As a result, *Adult* would satisfy the explicit elements—intercourse with a person below the age of consent by a person sufficiently older. The next section demonstrates that such an adult victim also satisfies the possible implicit elements of the offense.

2. Implicit Elements

A fuller conception of the offense includes both explicit and implicit elements. It is almost axiomatic in criminal law that any serious offense includes both a voluntary act (or omission) and some mental culpability or blameworthiness.[100] That a particular formulation of statutory rape might be a strict liability offense with respect to one element—the age of the victim—does not preclude the requirement of mens rea with respect to some other element[101]—for example,

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over juveniles regardless of the juvenile's age and/or the seriousness of the offense. SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM 206–07 (2006). Others permit it based on a minimum age of the juvenile or the seriousness of the offense. *E.g.*, 705 ILL. COMP. STAT. ANN. 405/5-805(3)(a) (West 2007 & Supp. 2010) (allowing criminal court jurisdiction for any offense for juveniles thirteen years of age or older); *cf.* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 203 (5th ed. 2006) ("In England and Wales the minimum age of criminal responsibility is 10 . . . .").

97. *See, e.g.*, Commonwealth v. Knap, 592 N.E.2d 747, 748–49 (Mass. 1992) ("Statutory rape is a strict liability crime. The only elements the Commonwealth must prove are (1) sexual intercourse . . . with (2) a child under sixteen years of age." (citation omitted)).

98. *See supra* note 17.

99. For a chart showing the requisite age differentials between the age of the perpetrator and victim in each state, see COCCA, *supra* note 4, at 23–24 tbl.1.1.

100. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 251 (1952) (predicating criminal liability on proof of "an evil-meaning mind with an evil-doing hand"); DRESSLER, *supra* note 25, at 199 ("A crime contains an actus reus and, usually, a mens rea. More specifically, a person may not be convicted of an offense unless the . . . defendant, with the requisite mental state, performed a voluntary act . . . ." (emphasis omitted)). The early roots of this principle can be seen in William Blackstone's account: "[T]o make a complete crime, cognizable by human laws, there must be both a will and an act." 4 BLACKSTONE, *supra* note 32, at 21.

101. *See, e.g.*, Douglas N. Husak, *Varieties of Strict Liability*, 8 CAN. J. L. & JURISPRUDENCE 189, 191 (1995) ("[S]trict liability should not be construed as a property of whole offenses. . . . Liability may be strict for some but not all of the elements of . . . an offense." (footnote omitted)).

intention to engage in, or knowledge of, the intercourse itself.[102] And the presence of a voluntary act is an element of, or its absence is a defense to, even strict liability offenses.[103] The voluntary act requirement in criminal law is quite technical. Much conduct ordinarily termed involuntary is construed as voluntary for purposes of the actus reus requirement.[104] A voluntary act is conventionally defined as a willed bodily movement,[105] or a willed muscular contraction[106] or conduct "within the control of the actor."[107] Involuntary acts involve a "lack of control over one's movements"[108] and are not a "product of the effort or determination of the actor."[109]

An adult being raped by a juvenile may satisfy this fuller conception of the offense including both implicit elements. For example, as discussed above, Ms. Lewis and Mr. Garnett both acted voluntarily within the meaning of the voluntary act requirement and satisfied the mens rea of both intention and knowledge as to the intercourse.[110] One might object that a rape victim fails to affirmatively act during intercourse. But this is mistaken; rape victims do commit various bodily movements or muscular contractions or otherwise satisfy the act requirement.[111] As

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102. A few jurisdictions treat mens rea as to intercourse not as an implicit element but as an explicit element. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1405A (2010) (requiring a mens rea of either intention or knowledge); COLO. REV. STAT. § 18-3-402(1) (West 2010) (requiring a mens rea of knowledge).

103. *See* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 262 (8th ed. 2007) ("[T]he absence of a voluntary act . . . [is] a defense to a strict liability offense."); 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 265 (1984) ("[T]he treatment of involuntary conduct as a general excuse[] clarifies that the excuse remains available even where the imposition of strict liability is supported by a strong public policy interest.").

104. *See, e.g.*, Jeffrie G. Murphy, *Involuntary Acts and Criminal Liability*, 81 ETHICS 332, 333 n.3 (1971) ("[T]he *legal* use of the involuntary-voluntary distinction differs from our ordinary use. According to the law, we have a voluntary act whenever the *actus reus* requirement is satisfied, and only cases like seizures and convulsions (negating *actus reus*) are called involuntary.").

105. *E.g.*, ANTONY DUFF, INTENTION, AGENCY & CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 118 (1990) (noting that "a voluntary act is, on one common account, a *willed* bodily movement—a movement caused by a mental act of volition"); MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 28 (1993).

106. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (1881) ("The act is not enough by itself. . . . It is a muscular contraction, and something more. A spasm is not an act. The contraction of the muscles must be willed.").

107. MODEL PENAL CODE § 2.01 cmt. 1 at 215 (Official Draft and Revised Comments 1985).

108. Murphy, *supra* note 104, at 333; *accord* Meir Dan Cohen, *Actus Reus*, *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 15, 18 (Sanford H. Kadish ed., 1983) (noting that in committing an involuntary act, "the defendant completely lacks control over his bodily movements in a way that makes the legally mandated conduct impossible").

109. MODEL PENAL CODE § 2.01(2)(d).

110. *See supra* notes 21–25 and accompanying text, and text accompanying notes 45–52.

111. The objection that a rape victim fails to affirmatively act and thereby fails to satisfy an implicit act requirement for statutory rape is unpersuasive for five reasons. First, by

will be demonstrated in Part II, the implicit elements fail to preclude statutory rape liability for an adult victim in at least some instances of almost every type of rape perpetrated by a juvenile.

C. Defenses Specific to Statutory Rape

Though satisfying both the explicit and implicit elements, the adult rape victim might still escape statutory rape liability by asserting a defense. This section presents two defenses specific to the offense of statutory rape.[112] The first defense—that the perpetrator is not motivated by a sexual interest—only exculpates in some instances of only some types of rape that a juvenile might perpetrate against an adult victim. The second defense—that the juvenile is unchaste or promiscuous—would be more effective. It would exculpate in some instances of *every* type of rape that a juvenile might commit against an adult. However, neither defense is widely recognized.

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engaging in intercourse, a rape victim, even if largely passive, inevitably makes minor bodily movements or muscular contractions if only to accommodate the actions of the rapist and to lessen the victim's pain or discomfort thereby satisfying an act requirement. Second, even if *some* rape victims remain perfectly passive during intercourse and literally do not move a muscle, surely *not all* (non-resisting) rape victims remain perfectly passive during the intercourse. And for such rape victims, an act requirement would not preclude liability for statutory rape. Third, in at least some rapes, a rapist may direct the victim to make specific movements during the intercourse or to perform certain acts. To avoid further harm, the victim complies. By doing so, the victim's actions would satisfy an act requirement. Fourth, if it is possible to engage in intercourse and nonetheless remain perfectly passive and literally not commit any actions, then an unfortunate loophole opens in the law of statutory rape. Any statutory rapist (not merely adult victims of rape) may claim as a defense that he remained perfectly passive during the intercourse and thus did not commit any actions and thus fails to satisfy an act requirement and thus cannot be held criminally liable for statutory rape. (The claim would be particularly difficult for the prosecution to rebut where the juvenile victim, as is sometimes the case, objects to the prosecution and would corroborate the defendant's claim of perfect passivity.) To avoid opening this egregious loophole, surely the better view is that by engaging in intercourse one necessarily commits affirmative acts satisfying an act requirement. Fifth, possibly to close such a loophole, at least one jurisdiction perhaps even dispenses with the requirement of an affirmative act for statutory rape. *See, e.g.*, IND. CODE ANN. § 35-42-4-9(a) (LexisNexis 2009) ("A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, *performs or submits* to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor." (emphasis added)). The statute is satisfied if the defendant merely "submits" to intercourse. One might "submit" to intercourse with very little or even no affirmative action. Under such a provision, a defendant's lack of affirmative action would perhaps not preclude statutory rape liability.

112. Two other defenses specific to statutory rape will not be discussed because they are inapplicable to the situation of an adult committing statutory rape of her juvenile rapist. First, the juvenile and perpetrator being married is a defense. *See* COCCA, *supra* note 4, at 165 n.23 ("[A]ll states exempt married partners from prosecution."). Second, the penetration being undertaken for a valid medical purpose may be a defense in some jurisdictions. KEITH BURGESS-JACKSON, RAPE: A PHILOSOPHICAL INVESTIGATION 166 (1996).

1. Perpetrator Not Motivated By a Sexual Interest

A statutory rape perpetrator's lack of sexual interest or absence of a purpose of sexual gratification is a defense that could exculpate adults raped by juveniles. For example, Arizona supplies a defense to statutory rape where "the defendant was not motivated by a sexual interest."[113] The defense, however, is not a satisfactory solution for several reasons. First, it is only recognized in a small minority of jurisdictions.[114] Second, even where recognized, adult victims of some types of rape, as perpetrated by a juvenile, would fail to qualify. While a victim like Ms. Lewis would qualify,[115] a victim like Raymond Garnett would not. As will be demonstrated in Part II, adult victims of rape by fraud or rape by virtue of mental disability might well be motivated by a sexual interest.[116] Third, wider adoption of the defense may be unwise for policy reasons.[117]

2. Unchaste or Promiscuous Juvenile Victim

Traditionally, that a juvenile victim was promiscuous or unchaste provided a complete defense to statutory rape.[118] While some jurisdictions classified a merely

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113. ARIZ. REV. STAT. ANN. § 13-1407E (2010). For a case construing the defense, see *In re* Maricopa County Juvenile Action No. JV-121430, 838 P.2d 1365, 1368 (Ariz. Ct. App. 1992) (holding that a defendant's showing of a lack of abnormal or unnatural sexual interest is insufficient to satisfy the defense of lack of sexual interest). Similarly, a small minority of jurisdictions require as an element of the offense that the perpetrator be motivated by sexual interest or have a purpose of sexual gratification. *E.g.*, IDAHO CODE ANN. § 18-1506(1) (2004) (requiring defendant's "intent to gratify the lust, passions, or sexual desire of the actor, minor child or third party"). For a recent case construing this element, see State v. Marsh, 119 P.3d 637, 642 (Idaho Ct. App. 2004) (finding that direct evidence of intent to gratify sexual desire was not required; it may be inferred from the surrounding circumstances). Perhaps the paradigmatic example of a penetration effected without sexual interest is a penetration for a valid medical purpose. *See supra* note 112.

114. *See supra* note 113.

115. Victims of rape by threat of physical force or rape by coercion are more likely to qualify for this defense. Rather than sexual interest, the adult victim of either of those types of rape is instead motivated by the threatened force or coercion.

116. *See infra* Part II.C–D.

117. The defense might cause more problems than it avoids. It would create a significant loophole. The defense would invite a defendant to claim that the motivation was not sexual but rather, degradation, determining if the victim was a virgin, medical, or procreation. As a result, wider adoption of the defense may be unadvisable.

118. For example, see the following Pennsylvania provision, now repealed, barring statutory rape liability if the juvenile victim was "not of good repute":

> Upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen (16) years, if the jury shall find that such woman child was not of good repute, and that the carnal knowledge was with her consent, the defendant shall be acquitted of [statutory] rape . . . .

Act of June 24, 1939, P.L. 872, § 721, 18 P.S. 949, 950 (repealed 1979). For an account of the traditional defense and its continued use into the 1990s, see Oberman, *supra* note 37, at 31–36.

nonvirginal juvenile as unchaste, other jurisdictions required more than nonvirginity.[119] As one court noted, "a single other instance of a sexual act does not constitute promiscuity within the meaning of [the statute]. Promiscuity connotes a variety of consensual sexual conduct with a variety of partners continuing over a reasonable period of time."[120] The Model Penal Code (MPC) retains this defense to statutory rape when the "victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others."[121] The rationale is that "proof of prior sexual promiscuity rebuts the presumption of naivete and inexperience that supports the imposition of criminal liability."[122] In their recently drafted codes, few states have followed the MPC in supplying the defense.[123] And with the 1998 repeal of Mississippi's requirement that a victim be chaste as an element of statutory rape,[124] perhaps no state recognizes chastity of the victim as an element or promiscuity of the victim as a defense.[125]

This defense is not a satisfactory solution for three reasons. First, as discussed above, it is not recognized in all jurisdictions and possibly even in no jurisdiction. Second, even if recognized, the defense would not be satisfied by all adult victims of rape perpetrated by juveniles. True, most juveniles sexually aggressive enough to rape an adult are presumably unchaste. But suppose an adult is raped by a chaste juvenile. Or suppose a juvenile rapist is unchaste but not sufficiently "promiscuous" within the meaning of the defense. Or suppose a juvenile rapist is sufficiently promiscuous but the adult defendant cannot obtain sufficient evidence of such promiscuity. In all three situations the adult would not satisfy the defense and would still be subject to statutory rape liability. Finally, reinstating the promiscuity defense may be unwise for policy reasons.[126]

D. General Defenses

This section presents three general defenses—necessity, duress, and self-defense. Unlike the defenses specific to statutory rape, these general defenses are widely recognized. None of these defenses, however, supplies a satisfactory

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119. *See* Oberman, *supra* note 37, at 33.

120. Rankin v. State, 821 S.W.2d 230, 234 (Tex. App. 1991) (citation omitted).

121. MODEL PENAL CODE § 213.6(3) (Official Draft and Revised Comments 1985).

122. *Id.* § 213.6(3) cmt. 4 at 420.

123. *See id.* ("Most of the recently drafted codes and proposals have not included a similar defense. Such a provision can be found in several older statutes, however, and has been included in a few comprehensive revisions." (footnotes omitted)).

124. MISS. CODE ANN. § 97-5-21 (1984), *repealed by* Ch. 549, § 7, 1998 Miss. Laws 821, 825 (criminalizing intercourse with a victim under eighteen years of age provided that the victim is "of previous chaste character").

125. *See* COCCA, *supra* note 4, at 12 (noting that, following the 1998 repeal of Mississippi's chastity element and the 1993 repeal of Texas's promiscuity defense, "no state now retains this language").

126. *See, e.g.*, Oberman, *supra* note 37, at 35 & n.109 (arguing that sexually experienced juveniles need more, not less, protection as they "may in fact be survivors of childhood rape and incest, and thus may be exceptionally vulnerable to abuse in sexual situations"); *accord* LAFAVE, *supra* note 30, at 874.

solution. These defenses fail to preclude liability for statutory rape in at least some instances of almost every type of rape perpetrated by a juvenile against an adult.

1. Necessity

Necessity, also termed lesser evils or choice of evils, generally justifies committing a crime where committing it causes less harm than not committing it.[127] For example, "property may be destroyed to prevent the spread of a fire. A speed limit may be violated in pursuing a suspected criminal. An ambulance may pass a traffic light. Mountain climbers lost in a storm may take refuge in a house or may appropriate provisions."[128]

Necessity, however, is not a satisfactory solution for three reasons.[129] First, the defense would not be available to adult victims of all types of rape perpetrated by a juvenile. As Part II will demonstrate, the defense would be entirely inapplicable where the adult is the victim of rape by fraud or rape of a mentally disabled person. A victim of such rapes is in no way making a choice among evils by committing statutory rape. While an adult victim of rape by coercion (by threat of non-physical harm)[130] is making a choice among evils, nonetheless it is quite difficult to conclude that committing statutory rape to avoid a non-physical harm is the lesser evil.

Second, even if the adult is a victim of rape by threat of physical force,[131] necessity will not apply in all circumstances. If the force threatened by the juvenile is death or substantial bodily harm, then engaging in intercourse with the juvenile is likely the lesser evil. But if the force threatened is slight or moderate, then engaging in intercourse with the juvenile and committing statutory rape is not clearly the lesser evil.

Third, some jurisdictions bar application of the defense to emergencies created by human (as opposed to natural) sources.[132] For example, a defendant charged with trespass may successfully claim necessity to avoid a tornado but not to escape

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127. *See, e.g.*, MODEL PENAL CODE § 3.02 (Official Draft and Revised Comments 1985) ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . . ."); DRESSLER, *supra* note 25, at 290 ("[I]f circumstances require a choice among various evils, an actor is justified if he chooses the least harmful option . . . ."). Following the MPC, almost half of the states have codified a necessity defense; the other states employ a common law defense. *Id.* at 291.

128. MODEL PENAL CODE § 3.02 cmt. 1 at 9.

129. Additionally, the defense is not routinely granted. *See* DAVID ORMEROD, SMITH AND HOGAN CRIMINAL LAW 316 (11th ed. 2005) ("Despite the explicit recognition of the defence the courts adopt a persistently restrictive approach to the defence.").

130. For a discussion of this type of rape, see *infra* Part II.B.

131. For a discussion of this type of rape, see *infra* Part II.A.

132. *E.g.*, WIS. STAT. ANN. § 939.47 (West 2005) (limiting necessity to "[p]ressure of natural physical forces"); United States v. Contento-Pachon, 723 F.2d 691, 695 (9th Cir. 1984) (denying a necessity defense because the defendant's "acts were allegedly coerced by human, not physical forces"); PAUL H. ROBINSON, CRIMINAL LAW 408 (1997) (explaining that some jurisdictions follow the traditional rule requiring natural forces).

from an armed robber.[133] The emergency created by the juvenile rapist that requires the adult to commit statutory rape is human, not natural. Consequently, in jurisdictions limiting the necessity defense to emergencies created by natural forces, the defense would be inapplicable to an adult raped by a juvenile.

For the above three reasons necessity fails to satisfactorily preclude adults' liability for statutory rape of their juvenile rapists. Necessity would be inapplicable to each and every adult victim of three types of rape[134] and some adult victims of one type of rape.[135] The next section considers the defense of duress. In one respect, duress is more promising. Unlike necessity, duress requires the threat to emanate from a human source.

2. Duress

Duress excuses criminal conduct where the defendant is coerced by a threat of sufficient gravity.[136] The MPC grants the defense to one who commits an offense because "coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist."[137] Under the majority rule only a threat of death or serious bodily harm suffices for the duress defense.[138] Under the minority and MPC rule a threat of merely unlawful force may suffice.[139]

Duress, however, fails to provide a satisfactory solution for four reasons.[140] First, the defense is inapplicable to adult victims of all types of rape perpetrated by

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133. DRESSLER, *supra* note 25, at 293; *see also id.* ("Likewise, *D*, a prison inmate may be able to claim necessity if he flees a prison as the result of a fire, but not if another inmate threatens to assault him.").

134. That is, rape by coercion, rape by fraud, and rape of the mentally disabled.

135. That is, rape by threat of physical force.

136. *See* Finkelstein, *supra* note 24, at 254 (identifying seven conditions for the defense); Dressler, *supra* note 28, at 1336–43 (identifying three additional requirements).

137. MODEL PENAL CODE § 2.09(1) (Official Draft and Revised Comments 1985); *see also* Dressler, *supra* note 28, at 1344–45 (comparing the MPC and common law formulations).

138. *See, e.g.*, DRESSLER, *supra* note 25, at 304 (explaining that "the coercer must threaten to cause death or serious bodily harm" (emphasis omitted)); Finkelstein, *supra* note 24, at 254 ("The defendant must be threatened with significant harm—death or serious bodily injury.").

139. *See* MODEL PENAL CODE § 2.09 cmt. 4 at 381 ("[A] majority [of states] define more narrowly than does this section the kinds of threats to one's person that will suffice [for the duress defense] . . . .").

140. Additionally, the duress defense is not routinely granted. *See, e.g.*, Dixon v. United States, 548 U.S. 1, 27 (2006) ("[T]he strict contours of the duress defense . . . substantially narrow the circumstances under which the defense may be used."); Laurie Kratky Doré, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 747 (1995) ("Courts and commentators frequently describe traditional duress as a rare and exceptional defense, the limits of which are both narrowly drawn and extraordinarily demanding."). Thanks to Michael Dorff for sharpening our arguments against the defense of duress as a satisfactory solution to the paradox of statutory rape.

juveniles. Victims of rape by coercion, rape by fraud, or rape of a mentally disabled person would fail to qualify.[141] In effecting those types of rape, the juvenile uses neither actual physical force nor the threat of physical force.[142] Even where a juvenile does perpetrate rape by threat of force, duress would not apply to the adult victim, under the majority rule, if the juvenile threatened less than serious bodily harm.[143]

Second, many states bar duress as a defense to particular crimes or types of crime.[144] Joshua Dressler notes that "[c]ase law is divided regarding the applicability of the defense to rape."[145] At least one state, Indiana, bars duress entirely as a defense to a charge of statutory rape. Indiana's duress provision states that the defense "does not apply to a person who . . . [c]ommitted an offense against the person."[146] Included among Indiana's offenses against the person is the offense of statutory rape—termed "Sexual misconduct with a minor."[147]

Third, the duress defense may be fundamentally inapplicable to the atypical situation of a duressor (the party applying the duress) being also the victim of the duressee's (the party subjected to the duress) crime. Typically, duress applies to three-party situations: *A* threatens *B* to commit a crime against innocent *C*.[148] One of the principal rationales for the defense depends on such a tripartite relationship: even if *B*, the victim of the threat or duress, is exculpated, there is still a party for the criminal justice system to hold criminally liable for innocent *C*'s

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141. For the view that coercion or threats of nonphysical harm do not suffice for the duress defense, see MODEL PENAL CODE § 2.09 cmt. 4 at 381 ("All agree with the Code in not permitting threats to property or reputation to be the basis for the defense . . . ."); DRESSLER, *supra* note 25, at 304 ("A lesser threat, such as a threat to cause property damage, economic hardship, or to damage another person's reputation, is insufficient.").

142. *See infra* Part II.B–D.

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

144. *E.g.*, MODEL PENAL CODE § 2.09 cmt. 4 at 381 ("Most [recently revised state criminal codes] exclude some offenses from the ambit of the defense."). While the most typical offense to which duress is not a defense is murder, some states bar duress from being a defense to lesser offenses as well. *See, e.g.*, *id.* at 381 n.54 (identifying jurisdictions that bar the defense to "offenses against the person" and offenses "causing physical injury").

145. Dressler, *supra* note 28, at 1342.

146. IND. CODE ANN. § 35-41-3-8(b) (LexisNexis 2009). Offenses against the person are set out in section 35-42. *See id.* § 35-42. This bar on the duress defense has been applied, and upheld on appeal, to several offenses against the person. *E.g.*, Moore v. State, 697 N.E.2d 1268, 1273 (Ind. Ct. App. 1998) (felony murder); Jefferson v. State, 484 N.E.2d 22, 23–24 (Ind. 1985) (robbery); Armand v. State, 474 N.E.2d 1002, 1004–05 (Ind. 1985) (attempted robbery).

147. IND. CODE ANN. § 35-42-4-9(a).

148. *See, e.g.*, Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 843 (2003) ("In contrast to necessity and self-defense . . . duress invariably consists of three-party relationships."); *see also* Doré, *supra* note 140, at 749 (noting that the party asserting the duress defense avoids the threatened harm by "misconduct directed against an third party"). *But see* Jeremy Horder, *Self-Defence, Necessity and Duress: Understanding the Relationship*, 11 CAN. J. L. & JURISPRUDENCE 143, 149 (1998) (suggesting that duress might be applicable to two-party cases).

victimization—*A*.[149] In contrast, in two-party situations, including a juvenile raping an adult by threat, *A* threatens *B* into committing a crime against noninnocent *A*. (The juvenile threatens the adult into committing the crime of statutory rape against the noninnocent juvenile.) The rationale for granting a duress defense to the duressee (*B*, the adult) no longer applies. Granting a duress defense to *B* (the adult) does not leave the criminal justice system with a party to prosecute for the statutory rape. *A* (the juvenile) presumably cannot be prosecuted for committing statutory rape of himself. Numerous courts have barred the defense in such two-party situations.[150] For example, in *Long v. State*, the court stated that a two-party situation "presents a claim in the nature of self-defense, not a claim of duress. . . . [W]here the victim is also the same person claimed to be exerting duress, the issue is self-defense."[151]

And fourth, as an excuse (as opposed to a justification) defense, duress is inappropriate.[152] George Fletcher concisely explains the justification/excuse distinction: "A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act."[153] While either type of defense equally leads to an acquittal, as Dressler explains, the labeling of a defense as a justification or an excuse is critical to the criminal law's function of supplying a guide to permissible and impermissible conduct: "People should take justifiable, rather than wrongful-but-excusable, paths."[154] Paul Robinson agrees that an excuse "represents a legal conclusion that the conduct is wrong and undesirable, that the conduct ought not to be tolerated and ought to be avoided in the future, even in the same situation."[155] Limiting adult rape victims to the excuse of duress as a defense

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149. *See, e.g.*, MODEL PENAL CODE § 2.09 cmt. 3 at 379 (explaining that duress may be limited to situations where "the basic interests of the law may be satisfied by prosecution of the agent of unlawful force"; duress may not be available where "no one is subject to the law's application"); DRESSLER, *supra* note 25, at 316 (acknowledging, as a rationale of duress, that "society's valid interest in punishing someone for wrongful behavior" may be satisfied by prosecuting the duressor for the crime committed by the duressee (emphasis omitted)).

150. Several state courts maintain that "[d]uress envisions a third person compelling a person by the threat of immediate physical violence to commit a crime against another person." State v. Belyeu, 795 P.2d 229, 233 (Ariz. Ct. App. 1990) (quoting State v. Lamar, 698 P.2d 735, 742 (Ariz. Ct. App. 1984)); *see also* State v. New, 640 S.E.2d 871, 873 (S.C. 2007) ("[D]uress envisions a third person compelling another to commit a crime."); Rankin v. State, 541 So. 2d 577, 582 (Ala. Crim. App. 1988) (denying defendant's duress defense because "there was no evidence that the appellant was under duress from some third party").

151. 74 P.3d 105, 108 (Okla. Crim. App. 2003) (denying duress in the absence of a third party coercing the defendant).

152. Duress is generally considered an excuse defense. *See, e.g.*, DRESSLER, *supra* note 25, at 306 ("[M]ost scholars, courts, and states' criminal codes that draw distinctions between justifications and excuses, treat duress as an excuse defense."); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 830 (1978) ("Duress is a paradigmatic example of an excuse."). *But see* Westen & Mangiafico, *supra* note 148, at 947–48 (arguing that duress should be classified as a justification).

153. FLETCHER, *supra* note 152, at 759.

154. DRESSLER, *supra* note 25, at 219.

155. ROBINSON, *supra* note 132, at 479.

to statutory rape signals the criminal law's conclusion that the adult rape victim has chosen the wrong path. But Ms. Lewis's conduct was not wrongful; it was entirely innocent. Precisely what should Ms. Lewis have done differently to avoid committing purportedly wrongful, undesirable, and intolerable conduct? Apparently, the answer from a system of criminal law that provides only a duress excuse to such victims is this: do not be raped by a juvenile. Or this: by being the victim of a horrifically violent rape, one culpably assumes the risk that one's rapist will turn out to be a juvenile.

For the above four reasons, duress does not satisfactorily preclude statutory rape liability for adult rape victims. Duress would be inapplicable to each and every adult victim of three types of rape[156] and some adult victims of one type of rape.[157] The next section will consider the defense of self-defense. In some respects, self-defense is more promising. Unlike duress, self-defense is both designed for two-party situations and is a justification defense.

3. Self-Defense

The defense of self-defense justifies a nonaggressor's use of force if she reasonably believes that such force is necessary to protect against the imminent use of unlawful force.[158] The MPC provides that "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."[159] An adult raped by a juvenile faces three hurdles to successfully asserting a defense of self-defense to a charge of statutory rape.[160] Because not all adult rape victims will (i) face a threat of force and bodily harm, (ii) use force, and (iii) commit a crime involving force, self-defense fails to satisfactorily preclude liability for statutory rape.

The first hurdle is that one must face physical force or a threat of physical force from an aggressor.[161] A juvenile perpetrator of rape by coercion, rape by fraud, or rape of the mentally disabled is neither using nor threatening physical force. As a result, an adult victim of any of these types of rape would be ineligible for the defense of self-defense.[162]

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156. That is, rape by coercion, rape by fraud, and rape of the mentally disabled. *See infra* Part II.B–D.

157. That is, rape by threat of physical force. *See infra* Part II.A.

158. *See, e.g.*, N.Y. PENAL LAW § 35.15(1) (McKinney 2009) ("A person may . . . use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person . . . ."); State v. Norman, 378 S.E.2d 8, 12 (N.C. 1989) (explaining that deadly force in self-defense is justified if the defendant "believed it to be necessary to kill the decedent to save herself from imminent death or great bodily harm").

159. MODEL PENAL CODE § 3.04(1) (Official Draft and Revised Comments 1985).

160. Thanks to Gary Allison for raising self-defense as a possible defense for the adult rape victim charged with statutory rape.

161. *See supra* notes 158–59 and accompanying text.

162. Adult victims of rape by threat of physical force would clear this hurdle. However,

Second, one must actually use "force."[163] For example, the MPC requires an actor's "use of force."[164] Additionally, state self-defense provisions, judicial decisions, and commentators all agree that self-defense involves the use of force.[165] While the MPC somewhat broadens what qualifies as force,[166] some state codes explicitly limit self-defense to the employment of "physical force."[167] For example, the court in *People v. Pons* construed New York's self-defense provision and found that the "[j]ustification based on self-defense pertains only to the use of physical force."[168] But many adult rape victims, like Ms. Lewis, fail to use force because they do not resist. As a result, at least some adult victims of each of the four types of rape would be ineligible to obtain the defense of self-defense.

Third, in perhaps most jurisdictions, self-defense may only be raised as a defense to a charge of an offense involving physical force. For example, in *Pons*, the court upheld the trial court's refusal to instruct the jury on the defense of self-defense to a weapon possession charge: "[B]ecause possession of a weapon does not involve the use of physical force, there are no circumstances when justification can be a defense to the crime . . . ."[169] Even a court finding self-defense to be applicable as a defense to nonforcible offenses[170] was able to cite only three states in agreement[171] and acknowledged that seven "modern penal codes limit discussion of self-defense to the sections on homicide and assault and battery."[172] This court conceded that "self-defense has generally been limited to situations in which the defendant is charged with an assaultive crime."[173] Statutory rape neither requires, nor even typically involves physical force, or a threat of physical force.[174] LaFave specifically excludes statutory rape from the class of

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at least some would fail to clear the other two hurdles. *See infra* notes 163–75 and accompanying text.

163. *See* Horder, *supra* note 148, at 144 (acknowledging, but criticizing, the traditional rule limiting self-defense "to the use of force").

164. MODEL PENAL CODE § 3.04(1).

165. *See supra* notes 158, 163 and accompanying text.

166. MODEL PENAL CODE § 3.11(1) (defining "unlawful force" as "including confinement").

167. *See, e.g.*, N.Y. PENAL LAW § 35.15(1) (McKinney 2009).

168. People v. Pons, 501 N.E.2d 11, 11 (N.Y. 1986) (citation omitted).

169. *Id.* at 13 (citation omitted); *see also* State v. Goins, Nos. 01C01-9809-CR-00360, M1998-00758-CCA-R3-CD, 2000 WL 218206, at *8 (Tenn. Crim. App. Feb. 25, 2000) ("[T]he defense [of self-defense] is limited to the threat or use of force against another person by the criminal defendant. The appellant's [offense of] departure from the scene of the accident . . . did not involve the threat or use of force against another person." (citation omitted)).

170. Boget v. State, 74 S.W.3d 23, 31 (Tex. Crim. App. 2002) (affirming reversal of defendant's conviction because self-defense is applicable to crimes not involving the use of force against other persons).

171. *Id.* at 30 n.40 (referencing Alaska, Illinois, and Wisconsin).

172. *Id.* at 28 & n.27 (referencing California, Mississippi, Nevada, New Mexico, Oklahoma, South Dakota, and Vermont).

173. *Id.* at 28; *cf.* JONATHAN HERRING, CRIMINAL LAW: TEXT, CASES, AND MATERIALS 632 (3d ed. 2008) (noting that some British cases limit the defense of self-defense to offenses involving force, but others do not).

174. *See supra* note 72 and accompanying text.

crimes to which self-defense applies: self-defense does not apply to "crimes which do not involve a threat of harm . . . to bodily security (e.g., treason, perjury, statutory rape)."[175] As a result, at least some adult victims of each of the four types of rape would be ineligible for the defense of self-defense to a charge of statutory rape.

The defense of self-defense poses a catch-22 for Ms. Lewis and similar rape victims. If Ms. Lewis had used force, even deadly force, in self-defense, it would have been justified.[176] Moreover, if Ms. Lewis had used force in self-defense, she would have been resisting the rape. Force used by her juvenile rapist to overcome her resistance would then render her conduct involuntary (thereby not satisfying the implicit element of a voluntary act), and thus she would not need the defense of self-defense. But by not employing any force in self-defense, her conduct is voluntary (thereby satisfying the implicit element of a voluntary act), and thus she needs the defense of self-defense. The catch-22 for Ms. Lewis is that if she used self-defense force she would not need the defense of self-defense; but, by not employing self-defense force, she needs the defense of self-defense and cannot

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175. LAFAVE, *supra* note 30, at 563. LaFave notes that self-defense may be asserted as a defense to only a limited number of charged offenses such "as murder and manslaughter, attempted murder, assault and battery," *id.* at 539, and "mayhem," *id.* at 563.

One might argue that even if an adult rape victim, like Ms. Lewis, does not use extrinsic force against the juvenile, the intercourse itself constitutes force. Alternatively, because the juvenile cannot legally consent to the intercourse, the nonconsensual intercourse is itself force. A few jurisdictions have found that forcible rape requires no extrinsic force and that nonconsensual intercourse suffices as force. *See, e.g.*, State *in re* M.T.S., 609 A.2d 1266, 1267 (N.J. 1992) (holding that "the element of 'physical force' is met simply by an act of non-consensual penetration involving no more force than necessary to accomplish that result"). In those jurisdictions, adult victims, like Ms. Lewis, who commit statutory rape of their juvenile rapists, are using force and are thus eligible for the defense of self-defense to a charge of statutory rape.

There are a number of problems with this argument. First, and most importantly, the solution would only apply in a minority of jurisdictions (the majority of jurisdictions still require extrinsic force to satisfy the force element). LAFAVE, *supra* note 30, at 858 (referring to "the more common extrinsic force rule"). A claimed solution that still leaves adult victims of rape subject to statutory rape liability in the vast majority of jurisdictions is not an adequate solution. Second, there is no authority for extending the doctrine—nonconsensual intercourse is force—beyond the law of forcible rape to statutory rape. Third, where nonconsensual intercourse suffices as force, the intercourse is both factually and legally nonconsensual. In statutory rape, however, the intercourse is factually consensual and legally nonconsensual. It is more difficult to construe factually consensual intercourse as force than factually nonconsensual intercourse. Fourth, the law of self-defense may view what suffices as force differently than the law of rape. As a result, even if nonconsensual intercourse suffices as force in rape law, it might not suffice as the requisite use of force for the law of self-defense. Fifth, for a statutory rape defendant to even make the argument that the nonconsensual intercourse suffices as force, the defendant risks self-incriminating to a greater charge of forcible rape. For these five reasons, the possible argument that committing statutory rape constitutes the use of force rendering Ms. Lewis or a similar adult victim eligible for the defense of self-defense to a charge of statutory rape is not a satisfactory solution.

176. *See supra* note 158.

have it. One possible way out of the catch-22 is the defense of necessity. LaFave suggests that when an actor avoids the use of force in self-defense by instead committing a nonforcible crime, the appropriate defense is not self-defense but necessity.[177] But this only brings us back full circle—as discussed above, necessity is also foreclosed.

As a result, neither self-defense,[178] nor any other general defense, nor any specific defense provides a satisfactory solution. While the general defenses are recognized in every jurisdiction, at least some adult victims of virtually any type of rape committed by a juvenile would fail to satisfy them. While such adult victims would more readily satisfy the specific defenses, few jurisdictions recognize them. This Part demonstrated, in general, that no individual offense element or defense satisfactorily precludes statutory rape liability. The next Part will establish this liability with respect to specific examples of four types of rape and will show that no combination of elements and/or defenses satisfactorily precludes liability.

II. STATUTORY RAPE LAW CRIMINALIZES BEING RAPED

This Part demonstrates that the law of statutory rape criminalizes being an adult victim of the following types of rape (when perpetrated by a juvenile): (i) rape by threat of physical force, (ii) rape by coercion, (iii) rape by fraud, and (iv) rape of a mentally disabled person. Although cases of juveniles raping adults in the first category arise with greater frequency, depict more egregious facts, and feature perhaps more sympathetic victims, it is important to analyze all four categories to fully appreciate the scope of the problem and illustrate the inability of existing elements of, and defenses to, statutory rape to supply a solution.

A. Rape by Threat of Physical Force

In rape by threat of physical force, the perpetrator threatens sufficient physical force so that the victim engages in intercourse to avoid the threatened harm. Under many statutory formulations, whether actual force is imposed or merely threatened is irrelevant; the same crime of forcible rape is committed whether force is actually exerted or merely threatened.[179] What type of threat suffices is subject to "considerable uncertainty"[180] and variation among jurisdictions.[181]

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177. LAFAVE, *supra* note 30, at 539 n.2. LaFave arrives at this view by considering the suggestion, by another commentator, that "when A attacks B, B may in self-defense justifiably take C's car in which to escape from A." *Id.* (emphasis omitted) (citing JEROME HALL AND GERHARD O. W. MUELLER, CRIMINAL LAW AND PROCEDURE 663 (2d ed. 1965)). LaFave disagrees and responds that "[i]t is doubtless true that B is justified in taking C's car, so he is not guilty of larceny thereof, but his defense is necessity, rather than self-defense." *Id*. (emphasis omitted) (citation omitted).

178. The defense of self-defense is inapplicable to *all* adult victims of three types of rape—rape by coercion, rape by fraud, and rape of a mentally disabled person—as well as *some* adult victims of rape by threat of physical force.

179. *See, e.g.*, DRESSLER, *supra* note 25, at 587 ("Forcible rape prosecutions may be based on a threat of serious force rather than its infliction."); ROBINSON, *supra* note 132, at 752 ("[N]othing in the definition of rape as 'forcible intercourse' requires that the victim

When raped by a juvenile threatening physical force, an adult satisfies the explicit elements of statutory rape. Consider the earlier example of fourteen-year-old Alfonza raping Ms. Lewis at gunpoint.[182] That the intercourse was compelled by threat of force does not diminish that Ms. Lewis had intercourse with the juvenile. Therefore, Ms. Lewis satisfies the explicit elements.

Ms. Lewis and similar victims would also satisfy the implicit voluntary act and mens rea elements of statutory rape. While conduct under threat or duress is often informally and incorrectly described as involuntary and unintentional, the threat or duress negates neither the voluntary act nor mens rea element of an offense.[183] As LaFave succinctly explains, even if under threat or duress, the defendant "has done the act the crime requires and has the mental state which the crime requires."[184] The Sixth Circuit has held that duress or a threat "has no relation to the voluntary act requirement[, which] . . . is easily satisfied even when a person acts under duress."[185] As Dressler puts it, conduct under threat "may be unwilling, but it is not unwilled."[186] Similarly, one who commits a crime under threat intends to do so "for the simple reason that she wants to avoid the harm threatened by the coercer."[187]

In addition to satisfying both the explicit and implicit elements, the defenses specific to statutory rape fail to preclude liability for Ms. Lewis and similar victims. Admittedly, Ms. Lewis would easily qualify for the lack of sexual interest defense

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have physically resisted the attack; it need only be shown that the attacker 'compels' . . . by force or by threat.'" (alteration in original)).

180. LAFAVE, *supra* note 30, at 860 ("[F]ear of death is not necessary . . . a threat of force with a weapon is likely to suffice, but beyond this there is considerable uncertainty." (footnotes omitted)).

181. Traditional formulations tend to require that the threat produce within the victim a fear of a requisite degree of harm, that the fear was reasonable in relation to the threat, and that the fear preclude resistance. *E.g.*, MODEL PENAL CODE § 213.1 cmt. 4(b) at 308–10 (Official Draft and Revised Comments 1985) (explaining that the traditional approach determines the sufficiency of the threat by the sufficiency of the fear it produces in the victim); ROBINSON, *supra* note 132, at 753 (same). The MPC rejected these requirements and broadened the range of requisite threatened harm. The types of threatened harm that suffice under the MPC are "imminent death, serious bodily injury, extreme pain or kidnapping." MODEL PENAL CODE § 213.1(1)(a). "About half of the states specify the threats in the same or a similar fashion." LAFAVE, *supra* note 30, at 861.

182. *See supra* text accompanying notes 5–14.

183. *See, e.g.*, Doré, *supra* note 140, at 740–41 (explaining that coercive threats fail to negate the actus reus and mens rea elements of an offense).

184. LAFAVE, *supra* note 30, at 492; *see also* ORMEROD, *supra* note 129, at 298 ("[D]uress is not inconsistent with a voluntary act or with an intention to do that act and to cause the results which the actor knows will follow.").

185. Takacs v. Engle, 768 F.2d 122, 126 (6th Cir. 1985) ("The voluntary act requirement is a narrow one, removing only truly uncontrollable physical acts from criminal liability, and is easily satisfied even when a person acts under duress."); *see also* Dressler, *supra* note 28, at 1359–60 ("[The actor under duress] *chooses* to violate the law. He chooses to commit the criminal offense rather than to accept the threatened consequences. He would not have chosen to commit the crime but for the threat, but it *is* still his choice, albeit a hard and excruciatingly difficult choice." (emphasis in original)).

186. Dressler, *supra* note 28, at 1360.

187. DRESSLER, *supra* note 25, at 307.

and would presumably qualify under the unchaste juvenile defense. But neither defense is widely recognized.[188]

Though widely recognized, the general defenses are also not a solution. While Ms. Lewis clearly chose the lesser evil, she would not obtain the necessity defense in some jurisdictions because the emergency emanated from a human, rather than the requisite natural, threat.[189] Unlike necessity, the duress defense requires a human threat[190] but poses additional obstacles. First, in some jurisdictions, duress is unavailable as a defense to statutory rape.[191] Second, the duress defense may be inapplicable in a two-party situation where the party applying the duress is also the victim of the crime committed under duress.[192] That is, Alfonza is both applying the duress and is also the victim of the crime (statutory rape) committed under duress. And third, as an excuse defense, duress inappropriately concedes that Ms. Lewis's conduct was wrongful, and that she should have done something else. But her conduct was not wrongful; she was the innocent victim of a horrific rape. Unlike duress, self-defense is both a justification and applies to two-party situations. But like duress, it also fails. First, self-defense generally requires that the self-defender use physical force.[193] Ms. Lewis did not use force. Second, self-defense is inapplicable, in some jurisdictions, as a defense to offenses—like statutory rape—which do not involve physical force.[194]

No defense or combination of defenses supplies a satisfactory solution. While Ms. Lewis and similar adult victims presumably qualify for the defenses specific to statutory rape, they are not widely recognized. While the general defenses are widely recognized, Ms. Lewis and similar adult victims fail to qualify for the defenses and/or the defenses are inappropriate. By satisfying both the explicit and implicit elements but satisfying neither general nor (recognized) specific defenses, some adult victims of rape by threat of physical force commit statutory rape of their juvenile rapists.

B. Rape by Coercion

Rape by coercion involves the perpetrator compelling the victim by threat of nonphysical harm sufficient to overwhelm the reasonable person.[195] For example,

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188. *See supra* notes 113–15, 123–25, and accompanying text.

189. *See supra* notes 132–35 and accompanying text.

190. In addition to satisfying the human threat requirement for duress, Ms. Lewis also clearly faced a sufficiently grave threat to which any reasonable person would have submitted.

191. *See supra* notes144–47 and accompanying text.

192. *See supra* notes 148–51 and accompanying text.

193. *See supra* text accompanying notes 163–68.

194. *See supra* text accompanying notes 169–75.

195. *See, e.g.*, N.H. REV. STAT. ANN. § 632-A:2 I(d) (LexisNexis 2007 & Supp. 2010) (prohibiting intercourse if "the actor coerces the victim to submit by threatening to retaliate against the victim"); *id.* § 632-A:1 II (defining "retaliate" as to "undertake action against the interests of the victim, including, but not limited to: . . . mental torment or abuse . . . extortion . . . [or] public humiliation or disgrace"); *see also* Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 119 (1998) (noting that

New Jersey prohibits the use of coercion to obtain intercourse,[196] and defines coercion, in part, as threatening to "[a]ccuse anyone of an offense," or "[e]xpose any secret which would tend to subject any person to hatred, contempt or ridicule."[197] The MPC prohibits obtaining intercourse by "compel[ling] her[, the victim,] to submit by any threat that would prevent resistance by a woman of ordinary resolution."[198] The MPC commentary explains that threats of nonphysical harm "may be sufficient to deny the freedom of choice that the law of rape and related offenses seeks to protect and to subject a woman to unwanted and degrading sexual intimacy."[199] Such threats may include, according to the MPC, "a threat to cause her to lose her job or deprive her of a valued possession."[200]

When raped by a juvenile employing coercion, an adult commits statutory rape. Consider the following example. Kenneth Porter blackmailed Kathleen Harden into engaging in intercourse with him by threatening to claim that she had intercourse with a juvenile, Larry Dunlap, and consequently she "would really be in trouble."[201] Harden was a married sixth-grade teacher.[202] Fearing the loss of her marriage and career, Harden succumbed to the threat and engaged in intercourse with Kenneth.[203] Despite Kenneth admitting, and the prosecutor conceding, that Kenneth obtained intercourse with her by blackmail,[204] and thus perpetrated rape by coercion of Harden,[205] the prosecutor charged Harden, not Kenneth. Harden's rapist, Kenneth, was fifteen.[206] Harden was prosecuted for statutory rape.[207]

"approximately twenty jurisdictions" formally recognize, by statute, rape by coercion).

196. N.J. STAT. ANN. § 2C:14-2c(1) (West 2005).

197. *Id.* § 2C:13-5a(2)–(3).

198. MODEL PENAL CODE § 213.1(2)(a) (Official Draft and Revised Comments 1985).

199. *Id.* § 213.1 cmt. 4(b) at 312.

200. *Id.*

201. Gary Rotstein, UNITED PRESS INT'L, Jan. 13, 1982 (quoting Ms. Harden's statement as to what Larry Dunlap threatened). This account is based on the admissions of the juveniles and the statements of the prosecutor. Thanks to Faye Hadley and Melanie Nelson for finding this case.

202. *Grade-School Teacher Acquitted of Statutory Rape*, BOS. GLOBE, Jan. 19, 1982.

203. Paul Maryniak, *Teacher Rape Trial Going to Jury Tomorrow*, PITTSBURGH PRESS, Jan. 17, 1982, at A3.

204. Paul Maryniak, *Teacher Innocent; Boys' Story Doubted*, PITTSBURGH PRESS, Jan. 19, 1982, at A1.

205. Pennsylvania, the jurisdiction charging Harden with statutory rape, prohibits obtaining intercourse "[b]y threat of forcible compulsion that would prevent resistance by a person of reasonable resolution." 18 PA. CONS. STAT. ANN. § 3121(a)(2) (West 2000). The statute defines "forcible compulsion" broadly: "use of physical, intellectual, moral, emotional or psychological force." *Id.* § 3101. Pennsylvania courts have applied this broad construction in upholding convictions where the defendants used threats of nonphysical harm—psychological force—to obtain intercourse from their victims. *See, e.g.*, Commonwealth v. Meadows, 553 A.2d 1006, 1013 (Pa. Super. Ct. 1989) (affirming defendant's conviction for rape of victim by the use of "psychological coercion"). Kenneth's use of blackmail to obtain intercourse would presumably qualify as the requisite compelling psychological and emotional force to establish his rape by coercion of Harden.

206. Rotstein, *supra* note 201.

207. *Id.*

Despite being the victim of rape by coercion and despite being acquitted of statutory rape in a jury trial,[208] Harden's alleged conduct nonetheless qualified as statutory rape. As a thirty-one-year-old adult engaging in intercourse with a juvenile, she satisfied the explicit elements of the offense. Harden also satisfied the implicit elements. Though facing the difficult choice[209] of loss of career and marriage or intercourse with Kenneth, she nonetheless voluntarily engaged in the intercourse and thus satisfied the voluntary act requirement.[210] That the choice was difficult and constrained does not preclude that there was a choice. Once the difficult choice was made, Harden engaged in intercourse intentionally and knowingly, thus satisfying any mens rea requirement.[211]

No defense satisfactorily precludes her statutory rape liability. Harden arguably would qualify for the lack of sexual interest and unchaste juvenile defenses, but these are not widely recognized. Harden would fail to qualify for the necessity defense because engaging in intercourse with one juvenile to avoid the threatened accusation of her intercourse with another juvenile fails to constitute the lesser evil. And because Harden neither was threatened with unlawful physical force nor did she employ physical force, the defenses of duress[212] and self-defense[213] are inapplicable. As a result, the offense of statutory rape imposes criminal liability on Harden and most adult victims of rape by coercion (perpetrated by a juvenile).

C. Rape by Fraud

Rape by fraud consists of a perpetrator obtaining intercourse by fraud or deception.[214] Not all deceptions are sufficiently material to constitute rape by fraud.[215] Exaggerations of one's wealth, status, prestige, or romantic commitment

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208. *Grade-School Teacher Acquitted of Statutory Rape*, *supra* note 202.

209. One might argue that her choice to have intercourse with Kenneth was not that difficult because, under Kenneth's version of the facts, she consensually engaged in intercourse with Larry prior to the blackmail. Rotstein, *supra* note 201. Nonetheless, if she did have intercourse with Kenneth it was only after the blackmail threat. *Id.* As a result, at the very least, she did face the difficult choice of Kenneth disclosing her purported intercourse with Larry or engaging in intercourse with Kenneth.

210. *See supra* notes 21–24, 104–09, 183–86 and accompanying text.

211. *See supra* notes 21–25, 104–05, 187 and accompanying text.

212. *See, e.g.*, ORMEROD, *supra* note 129, at 299 ("Threats of blackmail, no matter how effective, are not sufficient [to qualify the recipient of the threat for the duress defense]."); s*ee also supra* notes 136–39 and accompanying text; *supra* note 141.

213. *See supra* notes 161–68 and accompanying text.

214. *See, e.g.*, Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 91–110 (2007) (discussing the intersection of the laws of rape by fraud and statutory rape, and arguing for the recognition of a new form of rape by fraud).

215. *See, e.g.*, ESTRICH, *supra* note 66, at 102–03 ("The 'force' or 'coercion' that negates consent ought to be defined to include . . . misrepresentations of material fact."); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 833 (1988) (differentiating material frauds sufficient to establish rape by fraud liability from nonmaterial frauds that "will be dismissed as insignificant").

are deemed as seller's puffery and thought too trivial to warrant rape liability.[216] The most widely recognized forms of rape by fraud include deceptions as to the nature of the act that the victim performs and deceptions as to the identity of the victim's partner in intercourse.[217] Examples of these more serious deceptions include obtaining intercourse by deceiving the victim into believing that she is receiving a medical examination (typically this occurs in the gynecological context)[218] and by impersonating another's spouse (typically the perpetrator crawls into the victim's bed at night while the victim is asleep; upon waking the victim assumes the perpetrator to be his or her spouse).[219]

When raped by a juvenile employing fraud, an adult commits statutory rape. Consider the following example. Ben falls asleep waiting for his wife, Jane, to return home from working late at the hospital.[220] "He was awakened by someone massaging him, and then felt a hand go between his legs. The bedroom was kept very dark."[221] Ben asks her why she is back so late. A voice whispers, almost inaudibly, that work was crazy. Ben begins to have intercourse with the person he assumes to be his wife. "He then realized that the person was not his [wife]. He jumped up and turned on the light and saw the babysitter. . . . He told her to get out of the bed."[222] Despite Ben being the victim of rape by fraud,[223] the prosecutor charges Ben, not Ben's rapist. Ben's rapist is thirteen. Ben is charged with statutory rape of his juvenile rapist.

By being the victim of rape by fraud, Ben commits statutory rape. By engaging in intercourse with an underage juvenile, Ben satisfies the explicit elements. Ben

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216. *See, e.g.*, People v. Evans, 379 N.Y.S.2d 912, 922 (N.Y. Sup. Ct. 1975) ("It is not criminal conduct for a male . . . to assure any trusting female that, as in the ancient fairy tale, the ugly frog is really the handsome prince."); RICHARD A. POSNER, SEX AND REASON 392 (1992) ("Seduction, even when honeycombed with lies that would convict the man of fraud if he were merely trying to obtain money, is not rape.").

217. *See, e.g.*, Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 19 (1998) ("The traditional approach . . . [finds rape] by fraud in only two narrow contexts. The first . . . involves a man . . . deceiving the woman into thinking that she is submitting to a nonsexual act. The other tactic . . . involves a man who obtains intercourse by masquerading as the woman's husband."); Falk, *supra* note 195, at 119 (noting "the two archetypal rape by fraud cases, fraudulent medical treatment and husband impersonation").

218. *E.g.*, People v. Ogunmola, 238 Cal. Rptr. 300, 305 (Cal. Ct. App. 1987) (upholding conviction of gynecologist for rape by fraud for misrepresenting to a patient that penetration would be effected by medical instrument); People v. Quinlan, 596 N.E.2d 28, 31 (Ill. App. Ct. 1992) (upholding sexual assault conviction of respiratory therapist who effected digital penetration of patient by fraudulently misrepresenting it as a diagnostic test).

219. *E.g.*, OHIO REV. CODE ANN. § 2907.03(A)(4) (LexisNexis 2010) (prohibiting intercourse when "[t]he offender knows that the other person submits because the other person mistakenly identifies the offender as the other person's spouse"); Pinson v. State, 518 So. 2d 1220, 1224 (Miss. 1988) (upholding defendant's rape by fraud conviction for obtaining intercourse with victim by impersonating her husband).

220. The example is based on *Commonwealth v. Knap*, 592 N.E.2d 747, 748 (Mass. 1992), which upheld the defendant's conviction for statutory rape.

221. *Id.*

222. *Id.*

223. *See supra* notes 214–19 and accompanying text.

also satisfies the implicit elements. Though constrained by acting under conditions of ignorance, Ben's conduct is nonetheless considered voluntary for the purpose of the voluntary act requirement.[224] Ben also satisfies any mens rea requirement. Ben both intends to engage in intercourse (albeit with a different person—his wife) and knows that he is engaging in intercourse.[225]

No defense would satisfactorily preclude statutory rape liability for Ben. The lack of sexual interest defense would fail;[226] Ben was very much sexually interested. The unchaste juvenile defense might be raised, but it has been largely abolished.[227] Because Ben neither faced a choice of evils, nor was threatened, nor did he employ physical force, the defenses of necessity, duress, and self-defense would be inapplicable.[228] As a result, Ben and some other adult victims of rape by fraud commit statutory rape of their juvenile rapists.

D. Rape of the Mentally Disabled

Intercourse with a mentally disabled person constitutes rape despite the absence of force, coercion, or fraud because the victim is considered incapable of legally consenting.[229] The MPC criminalizes intercourse with a person who "suffers from a mental disease or defect" if the mental incapacity renders the victim "incapable of appraising the nature of her conduct."[230] State code formulations of the requisite standard for mental disability include "(i) whether the woman was capable of expressing any judgment on the matter; (ii) whether she had the ability to comprehend the moral nature of the act; and (iii) whether she had the capacity to understand the character and probable consequences of intercourse."[231]

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224. *See supra* notes 103–09 and accompanying text.

225. Not all adult victims of rape by fraud, as perpetrated by a juvenile, would satisfy a mens rea element of statutory rape. Suppose an adult consents to penetration by medical instrument by a licensed gynecologist. Instead, what the adult unknowingly receives is sexual intercourse with a juvenile. The adult has neither intent nor knowledge as to the intercourse. Either mens rea requirement would preclude statutory rape liability for an adult victim of this type of rape by fraud.

226. An adult victim of a different type of rape by fraud, as perpetrated by a juvenile, might well succeed under the lack of sexual interest defense. An adult who is consenting to a medical examination and unknowingly receives intercourse, *see supra* notes 217–18 and accompanying text, would lack sexual interest and thus would avoid liability for statutory rape under this defense. However, the availability of the defense is limited to only a few jurisdictions. *See supra* notes 113–14 and accompanying text.

227. *See supra* note 125 and accompanying text.

228. *See supra* notes 127–30, 136–42, 161–68 and accompanying text.

229. *See, e.g.*, State v. Ortega-Martinez, 881 P.2d 231, 239 (Wash. 1994) (en banc) (upholding defendant's conviction for intercourse with a victim incapable of consent by reason of a mental disability that prevented "meaningfully understanding the nature or consequences of sexual intercourse"); MCGREGOR, *supra* note 58, at 156–57 ("If there is no understanding about the nature of sex, its meaning in society, and its consequences, then that person cannot consent to sex.").

230. MODEL PENAL CODE § 213.1(2)(b) (Official Draft and Revised Comments 1985).

231. *Id.* § 213.1 cmt. 5(c) at 321 (footnotes omitted); *see also* Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 344–46 (identifying six

When raped by a juvenile, a mentally disabled adult commits statutory rape. Consider the earlier example of Raymond Garnett, a twenty-year-old mentally disabled man, reading at a third-grade level, with an IQ of fifty-two, whose conviction for statutory rape was upheld.[232] Despite being the victim of rape of a mentally disabled person,[233] Raymond satisfied both the explicit and implicit elements of statutory rape. Raymond voluntarily engaged in the intercourse thereby satisfying the voluntary act requirement. And Raymond had both knowledge and intent regarding the intercourse thereby satisfying any mens rea element.

No defenses applied. Because he neither faced a choice of evils, nor faced a threat of physical harm, nor employed physical force, neither necessity, duress, nor self-defense applied.[234] And because Raymond was clearly sexually interested, the lack of sexual interest defense did not apply. Though the juvenile may well have been unchaste, the unchaste juvenile defense may no longer be available in any state.[235] As a result, the offense of statutory rape imposes criminal liability on Raymond and similar adult victims of rape of the mentally disabled.[236]

E. Conclusion

This Part applied the explicit and implicit elements of the offense of statutory rape, defenses specific to statutory rape, and defenses of general application to examples of four types of rape perpetrated by a juvenile against an adult. Neither

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different tests jurisdictions employ to determine a mentally disabled person's legal capacity to consent).

232. *See supra* text accompanying notes 45–52.

233. By engaging in intercourse with a juvenile, Raymond is both a victim of rape of a mentally disabled person and a perpetrator of statutory rape. In Maryland, both are criminalized as second degree rape:

> (a) . . . A person may not engage in vaginal intercourse with another:
>
> . . .
>
> (2) if the victim is a mentally defective individual . . . or
>
> (3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.

MD. CODE ANN., CRIM. LAW § 3-304(a) (LexisNexis 2002); *id.* § 3-301(b) (defining "mentally defective individual" as one "who suffers from mental retardation or a mental disorder, either of which temporarily or permanently renders the individual substantially incapable of: (1) appraising the nature of the individual's conduct . . ."). Perhaps one might quibble that Raymond, though mentally disabled, is not sufficiently disabled to qualify as "mentally defective" and Erica's intercourse with him therefore does not qualify as second-degree rape. But, of course, we can easily imagine cases where a juvenile does engage in intercourse with a person who is undeniably "mentally defective." For a hypothetical example considered in *Garnett*, see Garnett v. State, 632 A.2d 797, 807 (Md. 1993) (Eldridge, J., dissenting).

234. *See supra* notes 127–30, 136–42, 161–68 and accompanying text.

235. *See supra* note 125 and accompanying text.

236. For additional cases of adult victims of rape of a mentally disabled person prosecuted for statutory rape of their juvenile rapists, see *infra* notes 270–84 and accompanying text. For an argument that Garnett and other similar adult victims should not be subject to liability for statutory rape, see Elizabeth Nevins-Saunders, *Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape*, 85 N.Y.U. L. REV. 1067, 1128 (2010).

the elements of the offense nor defenses, individually or collectively, preclude liability for statutory rape for the adult rape victim. In at least some instances of each of the four types of rape, the offense of statutory rape imposes criminal liability on the adult for the same intercourse by which the adult is a victim of rape.

III. EXCULPATING THE ADULT RAPE VICTIM

Part II demonstrated the paradox of statutory rape: the offense criminalizes being the victim of rape. Part III argues that this fundamental overbreadth is unacceptable. It both subjects adults to undeserved criminal liability for statutory rape of their juvenile rapists and subverts the purposes and principles of the laws of rape and statutory rape. Consequently, the law of statutory rape must be revised to preclude liability for being raped. Either the offense must be redefined or a new defense adopted. After proposing a possible solution, this Part anticipates and counters four objections.

A. Why Adult Rape Victims Do Not Deserve Liability

By criminalizing being raped, the law of statutory rape subjects adult rape victims to undeserved liability. This section presents two reasons why such adults do not deserve liability. First, by criminalizing being the victim of rape, the law of statutory rape goes beyond criminalizing merely innocent conduct—it criminalizes conduct that is both innocent *and* protected. Of course, that many criminal offenses are somewhat overbroad and reach innocent conduct is unremarkable. Some overbreadth is intentional as the inevitable and accepted price of avoiding excessive underbreadth. But by criminalizing being raped, the offense of statutory rape is unintentionally and unacceptably overbroad because it criminalizes conduct that is protected by law. The law of rape, by prohibiting obtaining intercourse by threat of physical force, coercion, fraud, etc., upon penalty of incarceration, deems it worthwhile to protect persons from becoming the victim of one of those crimes. But statutory rape law subjects us to punishment for that which rape law seeks to protect us from—being raped. Conduct that is protected by the law should not also punished by the law.

Second, the rationale for prohibiting intercourse with juveniles no longer applies when a juvenile rapes an adult. Perhaps the primary rationale is to protect juveniles from sexual exploitation by older adults who may be sexual predators.[237] But if a juvenile rapes an adult the concern of the risk of sexual exploitation is lessened if, not absent entirely. And if there is any sexual exploitation, it is by the juvenile of the adult. For example, are we really concerned that by brutally raping Ms. Lewis, Alfonza Smalls is being sexually exploited by his rape victim? Are we really concerned that by being the victim of Alfonza Small's brutal rape, Ms. Lewis is sexually exploiting her rapist?

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237. This is evidenced by the shift, in a majority of jurisdictions, from criminalizing peer-on-peer intercourse to exempting it from statutory rape liability by the use of requisite age spans between the ages of perpetrator and victim and/or minimum age requirements for perpetrators. *E.g.*, COCCA, *supra* note 4, at 29; s*ee also infra* notes 248–50 and accompanying text.

B. Consequences of Criminalizing Being Raped

The paradox of statutory rape has significant and unfortunate consequences for the laws of both rape and statutory rape. This section first demonstrates that criminalizing being raped frustrates the design and general purposes of both statutory rape and rape law. Second, it undermines the hard-fought efforts to abolish the much-criticized resistance requirement in the law of rape. Third, criminalizing being raped delegitimizes statutory rape's strict liability rule, still retained by a majority of jurisdictions.

1. Undermines Purposes of the Laws of Rape and Statutory Rape

The fundamental overbreadth of statutory rape generates a conflict between the law of rape and the law of statutory rape. By criminalizing being raped, the offense of statutory rape subjects us to punishment for what the law of rape seeks to protect us from. As a result, the law of statutory rape is undermining the very purpose of the law of rape. By imposing criminal liability for being raped, the law of statutory rape deters rape victims from seeking the protection afforded by the law of rape. In order for a victim of rape (perpetrated by a juvenile) to seek rape law's protection, the victim must risk self-incriminating to a charge of statutory rape.

The law of statutory rape also suffers. First, criminalizing being raped dilutes the stigma associated with committing statutory rape. What level of stigma resides in the commission of statutory rape if innocent victims like Ms. Lewis commit it? What degree of stigma attaches to a crime that one commits by being raped? Second, criminalizing being the victim of rape dilutes the moral authority and rational coherence of the offense. For example, while self-defense law *permits* Ms. Lewis to use any necessary force, even lethal force, against her juvenile rapist holding a gun to her head, it does not require the use of such force.[238] But by prohibiting being raped by a juvenile, the law of statutory rape *requires* Ms. Lewis to use any necessary force to resist or prevent the intercourse. As a result, if Ms. Lewis uses lethal force and prevents the intercourse from occurring with her would-be juvenile rapist, Ms. Lewis would be acting in justifiable self-defense and would neither be criminally liable for homicide nor statutory rape. But if she fails to use the force necessary to resist or prevent the intercourse, the offense of statutory rape imposes liability. The resulting implicit messages our criminal law sends are as follows:

> (i) Killing a juvenile rapist is lawful; submitting to a juvenile rapist is unlawful.
> (ii) Killing a (would-be) juvenile rapist spares the juvenile from sexual exploitation; submitting to a juvenile rapist subjects the juvenile to sexual exploitation.
> (iii) Therefore, better to kill a (would-be) juvenile rapist than to sexually exploit the juvenile rapist.

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238. *See supra* note 158.

Such implicit messages are unfortunate given that the ultimate purpose of the law of statutory rape is to protect juveniles from harm.

2. Undermines Abolition of Rape Law's Resistance Requirement

Statutory rape law's "hidden" resistance requirement[239] undermines efforts to rid rape law of its "pernicious" traditional resistance requirement.[240] By criminalizing being raped by a juvenile, statutory rape law imposes a duty on an adult to resist or prevent being raped by a juvenile. Failure to fulfill this duty subjects the adult to criminal liability for statutory rape. This hidden resistance requirement of statutory rape law is even worse than the traditional resistance requirement of rape law. While the legal consequence of failing to resist under the traditional resistance requirement is that the rape victim risks the acquittal of her rapist, the legal consequence of failing to resist under the hidden resistance requirement is that the adult rape victim risks criminal liability for statutory rape. Because existing statutory rape law entails this hidden resistance requirement, acceptance of the status quo of statutory rape law entails acceptance of the hidden resistance requirement. And if the even-worse hidden resistance requirement of statutory rape law is acceptable, then *a fortiori* the less-worse traditional resistance requirement is also acceptable.

This potentially presents rape law reformers, courts, and legislatures with a dilemma. How can one seek to abolish rape law's traditional resistance requirement as being impermissible while maintaining the status quo of statutory rape law that makes resistance legally obligatory? Consistency requires that acceptance of the status quo of statutory rape law with its even-worse hidden resistance requirement entails acceptance of the less-worse traditional resistance requirement. And undertaking to abolish the less-worse traditional resistance requirement entails a commitment to revise statutory rape law so as to eliminate the even-worse hidden resistance requirement. As a result, rape law reformers, courts, and legislatures must choose to either (i) accept the status quo of statutory rape law and abandon efforts to abolish the traditional resistance requirement or (ii) continue to seek abolition of the traditional resistance requirement and endeavor to revise the offense of statutory rape.

3. Undermines Statutory Rape's Strict Liability Rule

Criminalizing being raped jeopardizes the arguable legitimacy of the strict liability rule in statutory rape. Under strict liability, an actor's honest and reasonable belief that her underage partner is above the age of consent is not a defense.[241] Courts and commentators offer this justification: despite eliminating mens rea as to the victim's age, strict liability does not entirely dispense with the fault and culpability of the statutory rapist. By freely choosing to engage in intercourse with a young person who might turn out to be underage, one culpably

239. *See supra* text accompanying notes 56–68.
240. *See supra* note 62 and accompanying text.
241. *See supra* notes 90–95 and accompanying text.

assumes the risk that one's young partner will turn out to be underage.[242] Though not persuasive to all,[243] the claimed justification is, in general, arguably plausible.[244] But it is entirely implausible when applied to those who commit statutory rape only because they were raped by a juvenile. Moreover, such application of the strict liability rule exposes the illegitimacy of the justification. Adult rape victims neither freely choose to be raped nor freely choose to be raped by a juvenile. As a result, they do not culpably assume the risk that their rapist will turn out to be underage. Because one does not culpably assume the risk of being raped, one also does not culpably assume the risk that one's rapist may turn out to be underage.

A rationale offered by the Supreme Court, relied upon by the Maryland Court of Appeals, is also inapplicable to adults raped by juveniles: "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age."[245] While plausible when an adult consensually engages in intercourse with a juvenile, the rationale is implausible when the adult is raped. Is it truly "reasonable" to require an adult to ascertain the age of her youthful rapist to determine whether the law of statutory rape obligates her to refrain from intercourse? Is it truly "reasonable" to require Ms. Lewis to ascertain the age of the youthful rapist holding a gun to her head?

This places proponents of strict liability and courts and legislatures applying strict liability in a dilemma. Maintaining the justifiability of strict liability's application to statutory rape requires revising statutory rape law to exclude adults who commit statutory rape of their juvenile rapists from liability. And failing to so revise statutory rape law requires either jettisoning the strict liability rule or the

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242. *E.g.*, Garnett v. State, 632 A.2d 797, 807 (Md. 1993) (Eldridge, J., dissenting) (explaining the rationale for strict liability in statutory rape as "a defendant is able to appreciate the risk involved by intentionally and knowingly engaging in sexual activities with a young person"); Carpenter, *supra* note 53, at 321 ("[Strict liability] serves as an appropriate substitute for mens rea because the actor is not entirely blameless. Culpability arises from the actor's assumption of the risk in engaging in sexual intercourse with someone who might be underage.").

243. *E.g.*, Husak, *supra* note 101, at 189 ("Little about strict liability has evoked much agreement among commentators except for their opposition to it."); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 403 n.7 (1993) ("[T]he dominant view appears to be that in the Anglo-American culture, the use of strict liability crimes is arbitrary and unreasonable.").

244. For defenses of the strict liability rule, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 656 (1984) ("A defendant's mistaken belief regarding the victim's actual age may, consistently with the principle of mens rea, be deemed irrelevant to his legal duties . . . ."); Kyron Huigens, *Is Strict Liability Rape Defensible?*, *in* DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 196, 206, 217 (R. A. Duff & Stuart P. Green eds., 2005) (arguing that strict liability is consistent with the moral culpability of the offender); Dan M. Kahan, *Is Ignorance of Fact an Excuse Only for the Virtuous?*, 96 MICH. L. REV. 2123, 2123–26 (1998) (justifying strict liability when an offender is immoral and strategically attempts to exploit a loophole).

245. Owens v. State, 724 A.2d 43, 51 (Md. 1999) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 n.2 (1994)).

pretense that its application is justified by resort to the culpability of the offender. As a result, proponents of the strict liability rule for statutory rape should be among the most ardent advocates for recognizing an exception to statutory rape for adults raped by juveniles. Only by revising statutory rape law so as to exclude adult rape victims from the reach of the strict liability rule is the rationale of strict liability restored to arguable legitimacy.

C. A Possible Solution

The paradox of statutory rape—criminalizing being raped—arises in all fifty states, in jurisdictions both employing and rejecting strict liability, in model codes and statutes,[246] and even in foreign jurisdictions.[247] The problem is due not to some idiosyncratic formulation of the prohibition or careless drafting. It is systemic, recurring, and pervasive. The criminalization of being raped stems from the very concept of the offense of statutory rape. As a result, the nature of the solution should match the nature of the problem. While minimally (if at all) disruptive of existing law, the proposed solution is tailored to be broad enough to preclude perhaps any statutory rape offense from criminalizing being raped.

The solution borrows a concept from a recent reform of statutory rape law—the age span. The majority of jurisdictions now feature age-span provisions in which the perpetrator must be *x* years older than the juvenile victim.[248] This removes from the protection of statutory rape laws, and decriminalizes, so-called peer-on-peer intercourse where both parties are within a certain age range, typically three years.[249] The rationale of these age spans is that the greater the age differential, the greater the risk of coercion and exploitation of the younger party.[250] But where the two parties are within the same age range, the prospect of coercion and exploitation is minimal.

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246. *See* MODEL PENAL CODE § 213.3(1)(a) (Official Draft and Revised Comments 1985) (criminalizing intercourse with a juvenile less than sixteen by a perpetrator at least four years older than the victim); SCHULHOFER, *supra* note 75, at 283–84 (criminalizing, under a proposed model statute, § 202(c)(2), intercourse with a victim at least thirteen and less than sixteen by a perpetrator at least four years older than the victim). Both the MPC and Stephen Schulhofer's model provision would subject an adult to criminal liability for statutory rape of her juvenile rapist.

247. The same problem arises in the United Kingdom. *See* Sexual Offences Act, 2003, c. 42, § 9 (Eng.) (criminalizing sexual activity with a person under the age of sixteen by a person over eighteen). This provision subjects an adult to criminal liability for statutory rape of her juvenile rapist.

248. *See supra* note 99 and accompanying text.

249. *See, e.g.*, COCCA, *supra* note 4, at 23–24, 37 (citing eight states that criminalize peer-on-peer intercourse as statutory rape).

250. *See, e.g.*, Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1571 (1998) ("The purpose of the age limitation was and is to protect a younger person from an older person. . . . [It is] designed to protect against sexual exploitation and abuse."); *see also* COCCA, *supra* note 4, at 33 (depicting the age span as a "liberal feminist" compromise between "feminist sex radicals" who advocated for the elimination of barriers to female sexual autonomy, like statutory rape laws, and "radical feminists" who advocated for the construction of even greater barriers against all males, young and old).

As a result, in jurisdictions adopting these age-spans, juveniles no longer lack entirely the legal capacity to consent. Instead, we might term their legal capacity to consent as conditional. They only lack the legal capacity to consent when they engage in intercourse with a person sufficiently older than themselves, when the prospect for coercion and exploitation of the juvenile is substantial. But juveniles enjoy the legal capacity to consent when they engage in intercourse with those within their age-span, when the prospect for coercion and exploitation of the juvenile is minimal.

This principle of conditional legal capacity to consent suggests a solution. When a juvenile rapes an adult, the prospect of the juvenile being coerced and exploited is as minimal as when a juvenile engages in intercourse with another within the age-span.[251] And just as the partner within the age-span is not committing statutory rape of the juvenile because the juvenile is legally consenting, so also an adult would not be liable for statutory rape of her juvenile rapist because the juvenile would be understood as legally consenting. The resulting solution would be to expand the scope of the existing conditional legal capacity to consent doctrine: juveniles' legal capacity to consent is conditioned on intercourse with those inside the age-span or on raping those outside the age-span. Thus, a juvenile's adult rape victim would not be committing statutory rape because the juvenile rapist would be legally consenting.

D. Objections

This section anticipates and counters four possible objections to the argument that the law of statutory rape is fundamentally overbroad and requires revision.[252] The first three present some possible negative consequences of any solution revising statutory rape law to preclude adults' liability for statutory rape of their juvenile rapists. The fourth maintains that a procedural, rather than a substantive, solution is preferable. None of these objections, however, is persuasive.

1. Undermines Deterrent Effect of Statutory Rape

One might argue that engrafting an exception or defense to statutory rape liability for adults raped by juveniles would undermine the deterrent effect of the prohibition against statutory rape. Adults will be more likely to commit the offense under the belief that they might satisfy an exception or defense. The objection is unpersuasive for three reasons. First, any such loss of deterrence is offset by a gain in deterrence achieved by maintaining a high level of stigma associated with the commission of the crime. Without an exemption for adults raped by juveniles, the stigmatizing effect of committing statutory rape is diminished. How much stigma attaches to committing statutory rape if by being the victim of a horrific rape, like Ms. Lewis, one commits statutory rape? But by recognizing an exemption, there is

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251. The prospect of coercion and exploitation of the juvenile is not merely minimal when a juvenile rapes an adult. It may be nonexistent. After all, by raping the adult, it is the juvenile that is coercing and exploiting the adult.

252. For responses to additional objections, see *supra* notes 111, 175 and accompanying text.

no loss of deterrence due to a loss of stigma associated with commission of the crime. As a result, any loss of deterrence due to limiting the scope of the prohibition is offset by a gain in deterrence due to maintaining a high level of stigma associated with committing the offense.

Second, even if there was a net loss of deterrence, it would be no greater than the loss of deterrence that we already accept from the recognition of a number of defenses and exceptions to statutory rape. Consider the following exceptions to the scope of statutory rape that are currently recognized: the perpetrator is insufficiently older than the victim, the perpetrator does not meet the requisite minimum age, the perpetrator had an honest and reasonable belief that the juvenile was above the age of consent, the perpetrator was not motivated by a sexual interest, the penetration was for a valid medical purpose, and the victim and perpetrator are married to each other.[253] All of these exceptions no doubt undermine deterrence to some extent, yet they are recognized despite their potential to diminish deterrence. Similarly, excluding adults raped by juveniles from the scope of statutory rape liability for the very same intercourse by which the adult was victimized should also be recognized.

And third, even if recognizing the proposed exception triggered a greater loss of deterrence than all the other existing exceptions to statutory rape, fundamental fairness may trump deterrence concerns. Perhaps any defense or exception to a criminal offense undermines the deterrent effect of that offense. For example, the defense of self-defense presumably undermines the deterrent effect of homicide offenses. But surely such loss of deterrence is not a sufficient basis to eliminate or refuse to recognize the defense. Fundamental fairness requires recognition of the defense despite any loss of deterrence. Similarly, fundamental fairness requires that adults not face criminal liability for statutory rape of their juvenile rapists.

2. Chills the Reporting of Statutory Rape

One might argue that excluding adults raped by juveniles from statutory rape liability would chill the incidence of statutory rape victims reporting the crime. Juveniles would be less likely to report the crime if they knew that the adult might well claim as a defense that the juvenile raped the adult, thereby exposing the juvenile to criminal liability.

Even if true, the objection is unpersuasive. Failing to exclude such adult rape victims from statutory rape liability also creates a chilling effect. Without an exemption, the incidence of reporting by an adult, of being raped by a juvenile, would be chilled. An adult raped by a juvenile would be reluctant to report being raped for fear of being exposed to criminal liability for statutory rape. To the extent that chilling of the incidence of statutory rape reporting militates against the exemption, then the chilling of the incidence of (adult) rape reporting militates toward recognizing the exemption. As a result, any diminution of the incidence of statutory rape reporting would be offset by the increased reporting of rape of adults perpetrated by juveniles.

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253. As to the latter two exceptions, see *supra* note 112.

3. Inconsistency with Statutory Rape's Strict Liability Approach

One might argue that excluding adults raped by juveniles from the reach of statutory rape liability is inconsistent with the adoption of strict liability. That is, statutory rape is a strict liability offense precisely because we wish to foreclose the defendant from asserting defenses where the defendant has satisfied the minimal elements of the offense. Before directly addressing the objection, two technical points should be made. First, the majority rule of strict liability for statutory rape is not followed in over twenty states.[254] As a result, the objection is entirely inapplicable in almost half of the states. Second, statutory rape is neither a strict liability offense as a whole nor is it an absolute liability offense. It is only strict liability as to one element—the age of the victim.[255] Defenses unrelated to the defendant's lack of mens rea as to the age of the victim would and do still apply.[256] As a result, strict liability as to one element of statutory rape does not preclude an exemption for adult rape victims.

More broadly, the objection also fails because the very rationale for applying strict liability to statutory rape is inapplicable where a juvenile rapes an adult. Application of the strict liability rule to adults who commit statutory rape of their juvenile rapists demonstrates the illegitimacy of the claimed justification for strict liability.[257] One neither culpably assumes the risk of being raped nor culpably assumes the risk that one's rapist will turn out to be underage. Rather than recognition of an exception being inconsistent with the strict liability rule, failing to recognize an exception exposes the illegitimacy of the strict liability approach to statutory rape.

4. Prosecutorial Discretion

One might concede the problem of statutory rape law's fundamental overbreadth, but argue that the preferable solution is procedural—reliance on prosecutorial discretion—rather than substantive. That is, adults committing statutory rape, by the same intercourse by which the juvenile raped them, would simply not be prosecuted.

Prosecutorial discretion is an unsatisfactory solution for several reasons. First, in general, sound and rational law is preferable to fundamental and glaring overbreadth mitigated by prosecutorial discretion.[258] As Herbert Wechsler, the

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254. *See supra* note 95.

255. *See supra* note 101 and accompanying text.

256. *See supra* notes 101–03 and accompanying text.

257. *See supra* Part III.B.3.

258. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 572 (2003) (invalidating a Texas statute criminalizing sodomy as applied to consensual acts between adults based, in part, on the harm of selectively enforced overbroad laws: "the laws were arbitrarily enforced and thus invited the danger of blackmail"). The harm of overbreadth plus prosecutorial discretion is particularly acute in statutory rape law. ASHWORTH, *supra* note 96, at 340 (noting, with regard to statutory rape, that "it is doubtful whether . . . [prosecutorial discretion in not prosecuting cases of innocent conduct that fall within a statute] constitutes sufficient protection for young people's right to respect for private life"); Richard Delgado, *Statutory*

principal drafter of the MPC, warned, prosecutorial discretion not only undermines the rule of law but is "the antithesis of law":[259] "[it] cannot be accepted as a substitute for a sufficient law."[260] More specifically, statutory rape scholar Kay Levine argues that prosecutorial discretion is anti-democratic because it precludes citizens and legislatures from appreciating that the formal law of statutory rape is "intolerable."[261] While prosecutorial discretion may be defended as a necessary evil when the law is unavoidably overbroad, its evil becomes indefensible if employed unnecessarily. This is the case here because the offense of statutory rape is *avoidably* overbroad. The proposed solution, discussed in the previous section, is modest, narrowly tailored, and minimally (if at all) disruptive of the goals of the offense. Such a simple, modest, narrowly tailored revision achieving a sound and rational law is preferable to reliance on prosecutorial discretion to mitigate the adverse effects of an unsound, irrational law.

Second, less glaring and less fundamental overbreadth has been resolved by recognizing numerous limitations on the scope of the offense, as listed above,[262] rather than reliance on prosecutorial discretion. If such examples of *less* fundamental overbreadth were not resolved by reliance on prosecutorial discretion, why should the *more* fundamental overbreadth be thought to be satisfactorily resolved by prosecutorial discretion?

Third, reliance on prosecutorial discretion fails to avoid many of the significant conceptual and practical consequences of criminalizing being raped.[263] It does not eliminate the conflict between the law of rape and the law of statutory rape that

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Rape Laws: Does It Make Sense to Enforce Them in an Increasingly Permissive Society?, A.B.A. J., Aug. 1996, at 86, 87 (arguing that the combination of overbreadth and prosecutorial discretion leads to arbitrary, selective, and discriminatory prosecution—those prosecuted for statutory rape are disproportionally African American and Hispanic, especially when the victim is white); Michael H. Meidinger, *Peeking Under the Covers: Taking a Closer Look at Prosecutorial Decision-Making Involving Queer Youth and Statutory Rape*, 32 B.C. THIRD WORLD L.J. (forthcoming 2012), *available at* http://ssrn.com/abstract=1920959 (contending that homosexual "youth may be selectively prosecuted for statutory rape because prosecutors are given broad discretion in whom they prosecute and heterosexual intimacy norms may be part of their decision-making process").

259. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 127 (2008).

260. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952).

261. Levine, *supra* note 72, at 746. Levine explains the difficulty with prosecutorial discretion as applied to statutory rape as follows:

> [W]hen dealing with controversial or overbroad laws like statutory rape, we need to insist on more disclosure about the formal law itself in order to fully exercise our democratic choices. We should lobby for increased publicity about the scope of the formal law in order to put prosecutorial practices in perspective. Only with this kind of information can citizens and legislators fairly evaluate whether the statute warrants modification. Only with this kind of information can we ensure that our criminal laws retain their claims to legitimacy . . . .

Id. at 747.

262. *See supra* text accompanying note 253.

263. *See supra* Part III.B.

frustrates the very purpose of the offense of rape: what the law of rape seeks to protect us from—being raped—the law of statutory rape punishes us for. It cannot resolve the inconsistency between the endeavor to abolish the traditional resistance requirement in rape law and a statutory rape law that makes resistance legally obligatory. Prosecutorial discretion fails to restore moral authority to a law of statutory rape that is unsound and irrational in criminalizing being raped by a juvenile. And it fails to reverse the dilution of the stigma associated with committing statutory rape when the victim of a brutal rape like Ms. Lewis satisfies the elements of the offense. Finally, prosecutorial discretion cannot legitimize a rationale for strict liability exposed as illegitimate when applied to adults who commit statutory rape of their juvenile rapists. Such adult victims culpably assume neither the risk of being raped nor the risk that their rapist will turn out to be underage. These unfortunate consequences of criminalizing being raped arise regardless of whether prosecutors forego prosecuting adults for statutory rape of their juvenile rapists.

Fourth, reliance on prosecutorial discretion is only as wise as the wisdom of the discretion. Unwise exercise of discretion comes in two forms—unwise prosecutions and unwise failures to prosecute. As an example of the latter, consider the case of the infamous Spur Posse gang where seventeen felony counts involving eight male defendants (fifteen to eighteen years old) and seven female victims (ten to sixteen years old) were reduced by the Los Angeles district attorney down to a single count.[264] Feminists and legal scholars supporting vigorous enforcement of statutory rape laws have criticized such prosecutorial discretion. Michelle Oberman terms the underprosecution of the Spur Posse gang as "astonishing."[265] Linda Hirshman and Jane Larson argue that statutory rape laws "should be enforced consistently and even-handedly, respecting the law as written. . . . [Otherwise] the legitimacy of a principled ban against adult sexual access to children is eroded."[266] Dismayed that statutory rape laws are "seldom enforced,"[267] Frances Olsen nonetheless maintains the importance of the statutory rape laws as law: "statutory rape laws affect ideology, and ideology affects behavior." [268] Consequently, if we maintain respect for the importance of statutory rape laws as law and reject prosecutorial discretion, then consistency requires rejecting prosecutorial discretion as a solution to statutory rape's overbreadth in criminalizing being the victim of rape.

As examples of unwise prosecutions, consider the following two recent statutory rape cases.[269] The defendant, Patricia Starlings, fifty-two, was "mentally retarded,

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264. *See, e.g.*, Oberman, *supra* note 37, at 15–17, 22–23 (describing and criticizing the Los Angeles district attorney's decision to not prosecute sixteen of the initial seventeen felony counts on the basis that the victims and perpetrators were roughly the same age and there was insufficient proof of force).

265. *Id.* at 15–16.

266. LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 275 (1998).

267. Olsen, *supra* note 33, at 406 n.90.

268. *Id.* (criticizing the insufficient enforcement of statutory rape laws).

269. Thanks to Kay Levine for pointing out these cases. For an example of an unwise exercise of prosecutorial discretion to prosecute in a (non-statutory) rape case, see generally

diabetic, schizophrenic and easily suggestible."[270] Ms. Starlings was living in the home of a family that included a fourteen-year-old boy.[271] One evening, while the boy's fourteen-year-old male cousin was visiting and the parents were away, Ms. Starlings allegedly had intercourse with the two boys.[272] She was charged with statutory rape.[273] No plea bargain was reached as the judge, prosecutor, and Ms. Starlings' public defender struggled to express the terms of the possible plea in "terms she could understand."[274] While the prosecutor argued that Ms. Starlings "seduced the youths," the public defender argued that "the boys decided to play with her that night . . . . The evidence will show she did not do a thing. She was sexually assaulted herself. . . . Her mistake was in feeling threatened and not going to the police."[275] Ms. Starlings was ultimately acquitted of all charges.[276]

In another case, the defendant, Angie Simon, twenty-seven, was legally blind and borderline mentally retarded with an IQ of seventy.[277] She had previously been the victim of child abuse, spousal abuse, and death threats from her husband.[278] Two boys, aged thirteen and fourteen, lied to obtain entry into her trailer home outside San Francisco, "telling her their ball had rolled underneath her trailer. Once inside, they began playing a game of Truth or Dare, encouraging her to perform sex acts."[279] After the police arrested Ms. Simon, the mother of one of the boys said, "I hope they throw the book at her . . . . I feel they need to make an example of her."[280] The district attorney obliged, charging her with fifteen felony counts that would result in a maximum seventy-year prison term if convicted.[281] Ms. Simon's defense attorney spent months arguing to the prosecutors that Ms. "Simon is a victim in the case, not a suspect, because of her mental disability."[282] A psychiatric social worker who typically provides expert trial testimony for the prosecution offered to testify for the defense that Ms. Simon was "a victim."[283] After the publication of a newspaper story regarding the case, "the district attorney's office was flooded with angry faxes and phone calls from Bay Area residents upset" with Ms. Simon's prosecution.[284] To avoid the threatened seventy-year prison term, Ms.

DON YAEGER WITH MIKE PRESSLER, IT'S NOT ABOUT THE TRUTH: THE UNTOLD STORY OF THE DUKE LACROSSE CASE AND THE LIVES IT SHATTERED (2007) (chronicling the abuses of prosecutorial discretion).

270. *Law and Order—Despite Suit, Tax Bills in the Mail*, ATL. J. & ATL. CONST., Sept. 13, 1997, at G1 [hereinafter *Law and Order*].

271. *Id.*

272. Celia Sibley, *Woman Faces Statutory Rape Charges; Public Defender Says Defendant Is Real Victim*, ATL. J. & ATL. CONST., Sept. 5, 1997, at D3.

273. *Id.*

274. *Id.*

275. *Id.* (second alteration in original).

276. *Law and Order*, *supra* note 270.

277. Charlie Goodyear, *Retarded Woman Spared Prison; 3 Years' Probation for Sex with 2 Teenage Boys*, S.F. CHRON., Sept. 30, 1998, at A16.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

Simon plead no contest to two counts of statutory rape and registered as a sex offender.

These exercises of prosecutorial discretion scarcely justify reliance on it as a solution to statutory rape's overbreadth in criminalizing being the victim of rape. As these cases show, prosecutorial discretion as a solution will not work because it has not worked. Not only were Ms. Simon and Ms. Starlings less than paradigmatic examples of sexual predators exploiting juveniles, but they were arguably victims of rape perpetrated by the juveniles. These and other abuses of prosecutorial discretion do not repay faith in prosecutorial discretion as a saving grace for dramatically overbroad statutory rape laws.

CONCLUSION

Statutory rape has become the crime of being raped. When an adult is raped by a juvenile, the offense of statutory rape imposes criminal liability on the adult for the same intercourse by which the adult is a victim of rape. In this way, the offense of statutory rape criminalizes being raped; it criminalizes being the victim of rape. It criminalizes the failure to prevent or resist being raped by a juvenile. And neither defenses specific to statutory rape nor defenses of general application satisfactorily preclude liability. As a result, the law of rape and the law of statutory rape are in conflict. While the offense of rape prohibits *committing* rape, the offense of statutory rape prohibits *being* raped. Paradoxically, what the law of rape seeks to protect us from—being raped—the law of statutory rape punishes us for. But it should not. Criminalizing being raped both subjects adult rape victims to undeserved statutory rape liability and subverts the principles and purposes of the laws of rape and statutory rape. This Article proposes a possible solution building on the concept of a juvenile's conditional legal capacity to consent.