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ADULT IMPERSONATION: RAPE BY FRAUD AS A DEFENSE TO STATUTORY RAPE

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INTRODUCTION

"But s/he said that s/he was eighteen." That this defense will probably be unsuccessful is as old a story as the 1875 case that every first-year law student reads in Criminal Law.[1] The story goes something like this. A fifteen-year old, who plausibly looks eighteen, tells a nineteen-year old that s/he is eighteen. Reasonably relying on the juvenile being above the age of

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[1] *See* R v. Prince, (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 victim "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").

consent, the nineteen-year old agrees to engage in intercourse with the fifteen-year old. As any issue-spotting first-year law student might instantly surmise, this is a story about statutory rape[2] and the strict liability[3] rule that a mistake about the victim's age, even when induced by the victim's false representation, is no defense.[4] In "the immemorial tradition of the common law,"[5] and in most jurisdictions today, the nineteen-year old will be guilty of statutory rape.[6]

But this story also depicts another type of rape—with the roles of perpetrator and victim reversed—that has never before been noticed. By one and the same act of intercourse, the fifteen-year old victim of statutory rape is simultaneously a perpetrator of rape. By obtaining intercourse with the nineteen-year old through a false representation of a significant or material

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[2] The term "statutory rape" commonly refers to the criminal offense of engaging in sexual intercourse with a person below a specified number of years of age, varying by jurisdiction, but typically below sixteen. *See, e.g.*, ARK. CODE ANN. § 5-14-103(a)(3)(A) (1997 & Supp. 2005) (below fourteen years of age); CAL. PENAL CODE § 261.5 (West 1999 & Supp. 2006) (below eighteen years of age); OHIO REV. CODE ANN. § 2907.04 (West 1997 & Supp. 2005) (below sixteen years of age); Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 61 (1997) (noting that "the most common age of consent is sixteen (i.e., the consent of victims up to the age of fifteen is irrelevant)"); Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 314 (2003) (same). Some jurisdictions also require the perpetrator to be a specified number of years older than the victim. *See, e.g.*, N.J. STAT. ANN. § 2C:14-2(c)(4) (West 2005) (defining sexual assault as including where "[t]he victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim"). For a further discussion of statutory rape, see *infra* Part III.A.

[3] While there may be no single accepted conception, strict liability commonly refers to an offense that does not require proof of mens rea for at least one of its elements. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 143 (3d ed. 2001) (noting that strict liability offenses "do not require a mens rea requirement for one or more of the elements of the actus reus"); Douglas N. Husak, *Varieties of Strict Liability*, 8 CAN. J. L. & JURIS. 189, 191 (1995) (same). Statutory rape is widely considered a strict liability offense because it typically does not require proof of mens rea regarding the element of the age of the victim. *See, e.g.*, Owens v. State, 724 A.2d 43, 49 (Md. 1999) (commenting that statutory rape is a strict liability crime because it bars a defense based on mistake of age of the victim); DRESSLER, *supra*, at 145 (explaining that the offense is typically termed strict liability because it does not require a "*mens rea* element regarding the defendant's knowledge of the female's underage status").

[4] *See, e.g.*, State v. Yanez, 716 A.2d 759, 784 (R.I. 1998) (Flanders, J., dissenting) (noting that the majority rule is that the defendant's honest and reasonable mistake as to the victim's age will not be a defense to statutory rape); State v. Jadowski, 680 N.W.2d 810, 822 n.49 (Wis. 2004) ("A minority of states allow some form of a 'belief about age' defense by judicial decision or by statute."); Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 316–17 (2003) (same). For a further discussion, see *infra* Part III.A.

[5] State v. Stiffler, 788 P.2d 220, 226 (Idaho 1990) (McDevitt, J., concurring) (referring to the long-standing rule that statutory rape is a strict liability offense precluding a defense for mistake of age).

[6] *See supra* notes 2–5; *see also Jadowski*, 680 N.W.2d at 818–19 (denying an affirmative defense to statutory rape for a mistake as to victim's age even when based on victim's intentional misrepresentation of age); WAYNE R. LAFAVE, CRIMINAL LAW 779 (3d ed. 2000) ("The traditional approach initially accepted in virtually every state has been to view the crime of statutory rape . . . so that the defendant had no defense because of his mistaken belief as to age, no matter how reasonable the belief and no matter whether it was based upon the girl's own representations or her mature appearance."); *infra* Part III.A.

matter,[7] the fifteen-year old commits rape by fraud.[8] The age of one's sexual partner is a crucially significant and material matter when it makes the difference between lawful intercourse and criminal intercourse (statutory rape).[9] Exposure to criminal liability for statutory rape, and the possibility of punishment of up to twenty-years' imprisonment,[10] or even imprisonment for life,[11] is as significant and material as virtually any consequence imaginable.

Fraud, along with force and coercion, is one of the three principal means by which a person can commit rape.[12] Obtaining intercourse through fraud, just as through force and coercion, constitutes rape because it vitiates the consent of the victim.[13] But the particular focus on consent differs.[14]

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[7] Whether a particular fraud is material is one of a number of standards used to determine whether obtaining intercourse by fraud constitutes rape by fraud. *See, e.g.*, LAFAVE, *supra* note 6, at 768 (noting that the materiality of the fraud is among the variety of approaches that scholars have advanced); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1182 (1986) (advocating that intercourse obtained by "deceptions of material fact" should constitute rape). Although there are a wide variety of conceptions of materiality, perhaps the most fundamental understanding is that a material fraud is a sufficiently significant fraud. *See, e.g.*, Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 833 (1988) (contrasting material frauds with those frauds that "will be dismissed as insignificant"). A material fraud used to obtain intercourse will tend to be viewed as vitiating the consent of the defrauded party and thereby constituting rape by fraud. *See, e.g.*, State v. Vander Esch, 662 N.W.2d 689, 694 (Iowa Ct. App. 2002) ("The victims had consented to one thing, and the defendant did something materially different."). For a further discussion of the materiality standard, see *infra* Part II.A.2.c.

[8] *See infra* notes 12–13. For a further discussion of rape by fraud, see *infra* Part I.

[9] In referring to a statutory rape statute where liability is determined by whether the victim is below a certain age and whether the age differential between the victim and perpetrator exceeds a specified number of years, the New Mexico Supreme Court found that knowing the correct age of the victim is material. *See* Perez v. State, 803 P.2d 249, 251 (N.M. 1990) ("[Where statutory rape liability] is determined not only by the child's age, but by the relative age of the defendant . . . [and w]hen the law requires a mathematical formula for its application, [one] cannot say that being provided the wrong numbers is immaterial.").

[10] *E.g.*, Garnett v. State, 632 A.2d 797, 799 (Md. 1993) (noting that the maximum punishment for statutory rape is twenty years' imprisonment); State v. Yanez, 716 A.2d 759, 769 (R.I. 1998) (explaining that the *minimum* prison sentence for intercourse with a person fourteen years of age or younger is twenty years); *Jadowski*, 680 N.W.2d at 821 n.42 (noting that the common understanding that intercourse with a sixteen-year old may subject the perpetrator to incarceration for twenty years is reflected in the saying, "'Sixteen will get you twenty!'").

[11] *See* MASS. GEN. LAWS ANN. ch. 265, § 23 (West 2002) ("Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under sixteen years of age shall, for the first offense, be punished by imprisonment in the state prison for life or for any term of years . . . .").

[12] *See, e.g.*, MODEL PENAL CODE § 213.1 cmt. at 301 (Official Code and Revised Comments, 1985) ("[R]ape has traditionally included not only intercourse by force or threat, but also sexual imposition on an unconscious or otherwise incapacitated female, intimacy achieved by certain fundamental kinds of deception, and intercourse with a mentally incompetent or underage female."); Joel Feinberg, *Victims' Excuses: The Case of Fraudulently Procured Consent*, 96 ETHICS 330, 333 (1986) (noting that "rape can be committed by fraud as well as by violence or coercion").

[13] *See, e.g.*, People v. Crosswell, 13 Mich. 427, 437 (1865) (upholding defendant's conviction for rape by fraud and explaining that "[t]he outrage upon the woman . . . is just as great in these cases as if actual force had been employed; . . . the act can[not] be . . . any less against the will of the woman when her consent is obtained by fraud, than when it is extorted by threats or force"); SISSELA BOK, LYING:

Rape by physical force has generated the well-known position that the victim's affirmative denial of consent entails legally effective non-consent—"no means no."[15] In contrast, rape by fraud triggers the issue of whether a victim's fraudulently induced consent to intercourse is legally effective consent. As Stephen Schulhofer predicts, "the next generation of issues [in rape law] will center on when or whether 'yes' . . . mean[s] 'yes.'"[16]

The two most prevalent types of rape by fraud transpire in the contexts of medical treatment fraud and marital relations.[17] In the typical fraudulent medical treatment case, a patient consents to penetration by a medical instrument (often for gynecological purposes), but instead receives sexual intercourse.[18] In the typical spousal impersonation case, a spouse consents to intercourse with someone whom s/he believes is his or her spouse (typically the victim is in the dark and barely awake), but instead receives intercourse with a non-spouse.[19] Although the specific rationales for each archetype of

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MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 18 (1978) (observing that deception, as well as force, can be coercive); Chamallas, *supra* note 7, at 814 (noting the view that "consent is not considered freely given if secured through physical force, economic pressure, or deception").

[14] *See, e.g.*, PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 188 (2004) ("Wrongful force and fraud . . . both operate to undermine . . . consent, but they do so in distinct ways."); Joseph H. Beale, Jr., *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 321 (1895) ("A seeming consent extorted by force or terror differs from consent obtained by fraud. In the latter case the mind is deceived into agreement; in the former, the body is forced to act without a real agreement of the mind.").

[15] SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO 102–03 (1987) ("'Consent' should be defined so that no means no. . . . Reasonable men should be held to know that no means no . . . .").

[16] Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 135 (1990); *see also* Jeffrie G. Murphy, *Some Ruminations on Women, Violence, and the Criminal Law*, *in* IN HARM'S WAY: ESSAYS IN HONOR OF JOEL FEINBERG 209, 212 (Jules L. Coleman & Allen Buchanan eds., 1994) (noting "the problem that 'yes' does not always mean 'yes'").

[17] *See, e.g.*, Anne 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."); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 119 (1998) (identifying "the two archetypal rape by fraud cases, fraudulent medical treatment and husband impersonation"); Ernst Wilfred Puttkammer, *Consent in Rape*, 19 U. ILL. L. REV. 410, 422 n.45 (1925) (noting that spousal impersonation cases "form the bulk of the fraud cases").

[18] *See, e.g.*, People v. Ogunmola, 238 Cal. Rptr. 300, 304–05 (Cal. Ct. App. 1987) (affirming rape by fraud conviction of gynecologist who obtained intercourse with patient by fraudulently purporting to effect penetration by medical instrument); People v. Quinlan, 596 N.E.2d 28, 31 (Ill. 1992) (affirming sexual assault conviction of respiratory therapist who obtained digital penetration of patient by fraudulently purporting to perform diagnostic test); Heidi Hurd, *Was the Frog Prince Sexually Molested?: A Review of Peter Westen's* The Logic of Consent, 103 MICH. L. REV. 1329, 1332 (2005) (book review) (noting that "a woman who acquiesces to penetration believing herself to be having a gynecological examination does not consent to sexual intercourse").

[19] *See, e.g.*, State v. Navarro, 367 P.2d 227, 230 (Ariz. 1961) (affirming defendant's conviction for rape by fraud for obtaining intercourse by entering sleeping victim's bed at night and impersonating her husband); Pinson v. State, 518 So. 2d 1220, 1224 (Miss. 1988) (same).

rape by fraud may differ, the overarching rationale is that victims give consent to some act, but instead receive something entirely different.[20] They consent to *an* act, but not *the* act.[21]

This Article argues that obtaining intercourse by what we term "adult impersonation"—falsely representing one's age as above the age of consent—constitutes rape by fraud. The issue of adult impersonation as rape by fraud has never before been raised.[22] Nevertheless, adult impersonation already qualifies as rape by fraud under the existing standards, tests, and rationales for rape-by-fraud liability.[23] The victim of adult impersonation consents to one act, but receives something entirely different.[24] More specifically, the rationale for criminalizing adult impersonation closely comports with the rationale for criminalizing spousal impersonation. In both, victims consent to innocent and lawful intercourse, but instead receive unlawful intercourse.[25]

Moreover, the justification for criminalizing spousal impersonation as rape by fraud applies with greater force to adult impersonation. The nature of the intercourse, in which the spousal impersonation victim is fraudulently induced to engage, constitutes at most the comparatively minor criminal of-

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[20] *See, e.g.*, People v. Harris, 155 Cal. Rptr. 472, 478 (Cal. Ct. App. 1979) ("Consent that act X may be done is not consent that act Y be done."); State v. Vander Esch, 662 N.W.2d 689, 694 (Iowa Ct. App. 2002) ("The victims had consented to one thing, and the defendant did something materially different."); R v. Clarence, (1888) 22 Q.B.D. 23, 44 ("[C]onsent in such cases [of fraud used to obtain intercourse] does not exist at all, because the act consented to is not the act done."); R v. Dee, [1884] 15 Cox CC 579, 587 (Ir. Cr. Cas. Res.) ("The act she [the victim] permitted cannot be properly regarded as the real act which took place.").

[21] *See* Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 167 (1996) ("[I]n cases of false belief, there may be consent to *an* act, but there is no consent to *the* act."); Heidi Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 127 (1996) (noting similarly that "there may be consent to *an* act, but there may be no consent to *the* act").

[22] What has previously been raised is that a juvenile falsely representing being of the age of consent constitutes fraud. Recently, two defendants unsuccessfully attempted to establish a defense to statutory rape by characterizing as fraud the juvenile's misrepresentation of being of age. *See* State v. Blake, 777 A.2d 709, 711–12 (Conn. App. Ct. 2001) (referring to the juvenile's alleged false claim of being of age as "fraudulent misrepresentation"); State v. Jadowski, 680 N.W.2d 810, 816 (Wis. 2004) (arguing that "he was not mistaken about the victim's age; he was defrauded by the victim"). But neither defendant argued that the juvenile's fraudulent misrepresentation constituted rape by fraud.

Independently, in the fall of 2004, a first-year student at The University of Tulsa College of Law, Ms. Christina Jenkins, raised the same issue by asking, "Isn't the juvenile committing fraud?" Ms. Jenkins' flash of insight sparked this Article. Once one views the juvenile's misrepresentation as fraud, it is but a small conceptual leap to view the juvenile obtaining intercourse by this fraud as committing rape by fraud.

[23] *See infra* Part II.

[24] *See supra* notes 20–21.

[25] *See, e.g.*, Boro v. Superior Court, 210 Cal. Rptr. 122, 124–25 (Cal. Ct. App. 1985) (finding spousal impersonation to be rape by fraud "'since the woman's consent is to an innocent act of marital intercourse while what is actually perpetrated on her is an act of adultery'" (quoting ROLLIN M. PERKINS & RONALD M. BOYCE, CRIMINAL LAW 1081 (3d ed. 1982))); LAFAVE, *supra* note 6, at 767 (same); Coughlin, *supra* note 17, at 32 (same).

fenses of adultery and fornication.[26] And with the repeal of adultery and fornication statutes in many jurisdictions[27] and the dramatic decrease in their prosecution in the remaining jurisdictions,[28] the victim of spousal impersonation is perhaps not even committing a prosecutable criminal offense. In contrast, the victim of adult impersonation is fraudulently induced into engaging in intercourse constituting the much more serious offense of statutory rape.[29] As a result, if spousal impersonation constitutes rape by fraud because the fraud renders the victim unaware of engaging in a borderline criminal act, then *a fortiori* adult impersonation constitutes rape by fraud. Adult impersonation renders the victim unaware of engaging not merely in an antiquated, minor criminal offense, but rather in the serious criminal offense of statutory rape.

There are a variety of possible reasons why the issue of adult impersonation as rape by fraud has never arisen. First, our natural mindset perceives a juvenile as the victim of rape, and that status as victim obscures our view of the juvenile as a perpetrator of rape. But, of course, a juvenile may commit and be held criminally liable for rape.[30] Second, we naturally as-

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[26] *See, e.g.*, MODEL PENAL CODE § 213.1 cmt. at 301 (Official Code and Revised Comments, 1985) (noting that "fornication . . . has always been treated as a minor offense"); *id.* § 213.6 cmt. at 434 ("Median authorized maximum terms were six months for a single act of fornication . . . and one and a half years for adultery.").

[27] *See, e.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 157 (1998) ("Adultery is no longer a criminal offense in most states . . . ."); Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1213 (2005) ("[C]ourts and legislatures in recent years have dismantled criminal laws against consensual sodomy, fornication, and adultery."). For a list of jurisdictions that prohibit neither adultery nor fornication in their recently revised criminal codes, see MODEL PENAL CODE § 213.6 cmt. at 439 n.31. For a list of the jurisdictions that continue, at least by statute, to criminalize adultery and fornication, see Carpenter, *supra* note 4, at 362 n.275; Coughlin, *supra* note 17, at 22 nn.78 & 80. For a list of the jurisdictions that continue, at least by statute, to criminalize fornication, see Owens v. State, 724 A.2d 43, 53 n.13 (Md. 1999).

[28] *See, e.g.*, Garnett v. State, 632 A.2d 797, 812 n.8 (Md. 1993) (Bell, J., dissenting) ("American penal statutes against fornication are generally unenforced . . . ."); MODEL PENAL CODE § 213.6 cmt. at 434 (Official Draft and Revised Comments, 1985) ("American penal statutes against fornication and adultery are generally unenforced."); RICHARD POSNER, SEX AND REASON 261 (1992) (observing that existing statutes prohibiting adultery "are rarely enforced"). *But cf.* Coughlin, *supra* note 17, at 23–26 (discussing that the assumed demise of adultery and fornication prosecutions is probably exaggerated).

[29] In some jurisdictions, the punishment for statutory rape is up to twenty-years' imprisonment. *See supra* note 10; *see also* DRESSLER, *supra* note 3, at 146 & n.17 (citing statutory rape as an example of a strict liability offense resulting in "severe punishment").

[30] *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/5-805(3)(a) (West 1999 & Supp. 2005) (permitting criminal court jurisdiction over juveniles thirteen years of age or older charged with any offense); N.J. STAT. ANN. § 2A:4A-26a (West 1987 & Supp. 2005) (requiring, on motion of the prosecutor, criminal court jurisdiction over juveniles fourteen years of age or older charged with sexual assault); VA. CODE ANN. § 16.1-269.1 (2003) (permitting criminal court jurisdiction over juveniles fourteen years of age or older charged with any felony and requiring such jurisdiction over juveniles charged with rape, on motion of the prosecutor); *see also* MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 239–40 (2003) ("[M]ost jurisdictions authorize juvenile courts to waive jurisdiction over certain youthful offenders to criminal court."). Samuel Davis explains that to hold a juvenile criminally liable, "[m]ost jurisdictions require that the child be over a certain age and charged with a particularly serious offense . . . ."

sume that if a juvenile is deemed legally incapable of consenting to intercourse,[31] then a juvenile should not be charged as a perpetrator of rape. But a rape perpetrator's lack of consent is not a defense; similarly, a rape perpetrator's consent is not an element of the offense of rape.[32] Thus, even if a juvenile is deemed legally incapable of consenting to intercourse, a juvenile still may be criminally liable for that intercourse.[33] Third, since a juvenile's misrepresentation as to age generally has been treated as irrelevant for purposes of statutory rape liability,[34] we naturally assume that it is irrelevant in general. But its irrelevance for one type of rape (statutory rape) does not preclude its relevance for another type of rape. Obtaining intercourse through material and false representations is precisely what constitutes rape by fraud.[35]

In addition to constituting a new category of rape by fraud, adult impersonation may lay the foundation for a defense to the strict liability[36] offense of statutory rape. To understand this foundation, consider the following examples of juveniles raping adults. If a juvenile rapes an adult by a threat of physical force (for example, at gunpoint), should the adult be prosecuted for statutory rape? If a juvenile rapes an adult by coercion (for example, by threatening to falsely press criminal charges),[37] should the adult be prosecuted for statutory rape? If a juvenile rapes an adult by fraud (for example, by impersonating the adult's spouse), should the adult be prosecuted for statutory rape? The answer in all three of these examples is, presumably, of course not—the adult victim of rape should not be criminally liable for statutory rape. Similarly, if, as this Article argues, a juvenile obtaining intercourse by adult impersonation constitutes rape by fraud, then the adult victim should not be criminally liable for statutory rape. Criminal liability should not attach to one who becomes a perpetrator of statutory

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SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM 204 (2006). Some states permit criminal court jurisdiction regardless of the offense charged, and others without regard to the age of the juvenile. *Id.* at 206–07. And in some states, "statutes grant exclusive jurisdiction to criminal courts in cases where minors are charged with designated offenses, generally serious felonies." GARDNER, *supra*, at 196; *see also infra* notes 203–05.

[31] *See supra* note 2; *infra* notes 202, 219–20.

[32] *See infra* notes 204–05 and accompanying text.

[33] *See infra* Part II.D.2.

[34] *See supra* notes 4–6; *infra* notes 246, 248.

[35] *See supra* notes 12–13 and accompanying text; *infra* Part I.

[36] *See supra* note 3.

[37] *See, e.g.*, N.J. STAT. ANN. § 2C:14-2(c)(1) (West 2005) (prohibiting the use of coercion to obtain intercourse); *id.* § 2C:14-1(j) (defining coercion as including 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"); 18 PA. CONS. STAT. § 3121(a)(2) (West 2000 & Supp. 2005) (prohibiting intercourse obtained "[b]y threat of forcible compulsion that would prevent resistance by a person of reasonable resolution"); *id.* § 3101 (defining "forcible compulsion" as "[c]ompulsion by use of physical, intellectual, moral, emotional, or psychological force"); MODEL PENAL CODE § 213.1(2)(a) (Official Code and Revised Comments, 1985) (prohibiting intercourse where the actor "compels her [the victim] to submit by any threat that would prevent resistance by a woman of ordinary resolution").

rape because s/he became a victim of rape by fraud. In broader terms, one should not be criminally liable as a perpetrator of statutory rape for the very act of intercourse by which one is a victim of rape.

Until *People v. Hernandez*,[38] in 1964, statutory rape was uniformly treated as a strict liability offense, with respect to the age of the victim, in all fifty states.[39] Following *Hernandez*, over twenty states now recognize as a defense some form of honest and reasonable mistake as to the age of the victim.[40] Strict liability remains the majority rule, however, which bars mistake of age, even when due to the victim's false representation, as a defense.[41]

Being a victim of rape by fraud (via adult impersonation) is both a stronger and narrower defense than that which convinced *Hernandez* and its progeny to depart from strict liability for statutory rape. Not only is the victim of rape by fraud (i) honestly and reasonably mistaken as to the age of the juvenile, and (ii) the mistake is due to the juvenile's false representation, but also (iii) the juvenile's false representation rises to the level of criminal fraud, and (iv) the criminal fraud is sufficiently serious to warrant condemnation as the crime of rape. Satisfaction of these additional elements will have the effect of restricting the defense to an appreciably narrower class of defendants. In this way, what seems to effect a radical transformation of statutory rape law is actually a more modest and limited defense than that recognized since 1964 and now accepted in over twenty jurisdictions. And unlike the mistake-of-age defense, this new defense is applicable even under a strict liability conception of statutory rape.[42] While strict liability imposes on the adult the assumption of risk of an underage sexual partner, it cannot impose on the adult the assumption of risk of being raped. As a result, even jurisdictions disallowing the mistake-of-age defense would have compelling reasons to adopt this defense.

After Part I provides an overview of the law of rape by fraud, Part II demonstrates that obtaining intercourse by adult impersonation constitutes rape by fraud under statutory standards, caselaw rationales, and suggested approaches advanced by rape scholars. Adult impersonation is applied to

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[38] 393 P.2d 673, 678 (Cal. 1964) (reversing defendant's conviction for statutory rape and allowing a defense based on the defendant's honest and reasonable mistake as to the victim's age).

[39] *See, e.g.*, State v. Yanez, 716 A.2d 759, 763 (R.I. 1998) ("Characterizing statutory-rape as a strict-liability offense remained the law in every American jurisdiction until 1964."); State v. Jadowski, 680 N.W.2d 810, 822 n.49 (Wis. 2004) (noting that *Hernandez* was "apparently the first case to allow the defense [to statutory rape based on mistake of age]").

[40] *See, e.g.*, *Yanez*, 716 A.2d at 784 (Flanders, J., dissenting) ("[T]wenty-three American jurisdictions, nearly half, now explicitly recognize some form of the mistake-of-age defense."); Garnett v. State, 632 A.2d 797, 802–03 (Md. 1993) (noting that twenty-one jurisdictions have some form of mistake-of-age defense to statutory rape).

[41] *See supra* notes 4–6.

[42] Strict liability only precludes defenses negating mens rea; other defenses are applicable. *See supra* note 3.

four general standards of fraud, the rationales of two context-specific types of fraud—identity fraud and spousal impersonation—and two conceptions of consent. In many jurisdictions and under most approaches, adult impersonation will qualify more clearly as rape than existing, accepted types of rape by fraud. After anticipating and answering five possible objections, Part II concludes that adult impersonation qualifies as rape by fraud, under existing statutes and caselaw, in over thirty jurisdictions.

Part III explores the significance of our analysis of adult impersonation for the law of statutory rape. After furnishing a brief overview of the law of statutory rape, Part III reveals how adult impersonation constituting rape by fraud may lay the foundation for a new defense to the strict liability offense of statutory rape. This new defense is shown to be both stronger and narrower than the defense already accepted in a substantial minority of jurisdictions. The viability of this new defense is further assessed by raising and rebutting four possible objections. This Article concludes that adult impersonation supplies both a new form of the offense of rape by fraud and a new defense to statutory rape.

I. OVERVIEW OF THE LAW OF RAPE BY FRAUD

The traditional organizing principle for classifying what types of fraud vitiate consent, and thus constitute rape, and what types of fraud do not, is the distinction between fraud in the factum and fraud in the inducement.[43] Fraud in the factum consists of a deception or fraud as to the fact, or act, or nature of the act, itself. Fraud in the inducement consists of a deception or fraud neither to the fact, nor act, nor nature of the act, nor "to the thing done, but [rather] . . . to some collateral matter."[44] Martha Chamallas provides the following concise account of the distinction:

> [In f]raud in the factum . . . the victim consents to the doing of act *X* and the perpetrator of the fraud, in the guise of doing act *X*, actually does act *Y*. [In] . . . fraud in the inducement . . . the victim is fraudulently induced to consent to the doing of act *X* and the perpetrator of the fraud does indeed commit act *X*.[45]

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[43] *See, e.g.*, Falk, *supra* note 17, at 157 ("The traditional formula for distinguishing legally valid from invalid consent in fraud cases is the dichotomy between fraud in the factum and fraud in the inducement."); Murphy, *supra* note 16, at 212 (same); People v. Harris, 155 Cal. Rptr. 472, 478 (Cal. Ct. App. 1979) ("On the issue of consent, from an analytic standpoint, there are two kinds of fraud: fraud in the fact and fraud in the inducement.").

[44] PERKINS & BOYCE, *supra* note 25, at 215.

[45] Chamallas, *supra* note 7, at 831 n.224. For a largely identical account of the distinction, see *Harris*, 155 Cal. Rptr. at 478. For other accounts, see, for example, DAVID ARCHARD, SEXUAL CONSENT 49–50 (1998) ("[T]o be deceived in the *factum* is to be completely misled about an important, indeed probably crucial, aspect of the act. To be deceived in the inducement is to be less than completely misled about the act."); WESTEN, *supra* note 14, at 198 ("To deceive a subject *S* about the *act itself* . . . constitutes 'fraud in the factum.' Yet deceptions that . . . mislead her about the benefits of engaging in it constitute 'fraud in the inducement.'"); Feinberg, *supra* note 12, at 332 (explaining the distinction as

Construed most narrowly, if, as a result of the fraud, the victim is unaware of engaging in sexual intercourse, the fraud is classified as fraud in the factum.[46] If the victim is aware of engaging in sexual intercourse, but has been induced to do so for a fraudulent reason, the fraud is classified as fraud in the inducement.[47] Typically, obtaining intercourse by fraud in the factum vitiates consent and thus results in rape liability; fraud in the inducement does neither.[48]

Two variations on the fraudulent medical treatment archetype aptly illustrate the distinction. Suppose a doctor obtains sexual intercourse with a patient by fraudulently representing that penetration will serve a medical purpose. In one variation, where the victim is unaware of the intercourse (perhaps believing penetration to be by a medical instrument), the fraud is in the factum.[49] In the other, where the victim is aware of the intercourse (believing the intercourse itself to be of medical benefit), the fraud is in the inducement.[50] Courts have traditionally found only the first type of fraud—fraud in the factum—to support rape liability.[51]

"rest[ing] on an apparent contrast between no consent at all to what is done by the deceiver (fraud in the *factum*) and consent that is less than voluntary because of defective belief induced by deception (fraud in the inducement)").

[46] *See* Puttkammer, *supra* note 17, at 423 ("If there is any use in speaking of the fundamental distinctions the line would seem most naturally to be drawn between knowledge that it is a sexual act and absence of such knowledge . . . .").

[47] *See, e.g.*, Boro v. Superior Court, 210 Cal. Rptr. 122, 125–26 (Cal. Ct. App. 1985) (holding that since the victim was aware of the act to which consent was given—sexual intercourse—the defendant's fraud was merely fraud in the inducement which did not vitiate the victim's consent and the defendant could not be prosecuted for rape); DRESSLER, *supra* note 3, at 585 (explaining that where "the victim knew that she was consenting to sexual intercourse; the fraud was in the inducement"); LAFAVE, *supra* note 6, at 767 (same).

[48] *See, e.g.*, People v. Ogunmola, 238 Cal. Rptr. 300, 304 (Cal. Ct. App. 1987) (noting that generally fraud in the factum vitiates consent but fraud in the inducement does not); People v. Cicero, 204 Cal. Rptr. 582, 596–97 (Cal. Ct. App. 1984) (same); WESTEN, *supra* note 14, at 195 (same); Feinberg, *supra* note 12, at 333 ("For sexual relations induced by fraud in the *factum* the perpetrator will be held criminally liable for rape . . . whereas if the fraud is merely in the inducement, he may not be criminally liable at all . . . ."); PERKINS & BOYCE, *supra* note 25, at 215 (same).

[49] *See, e.g.*, *supra* notes 18 and 20.

[50] *See, e.g.*, *Boro*, 210 Cal. Rptr. at 125–26 (finding fraud in the inducement, and thus no rape liability, because the victim was aware of the act—intercourse—where defendant fraudulently induced victim to believe intercourse was necessary to cure a fatal disease and thus save her life); Moran v. People, 25 Mich. 356, 363–64 (1872) (reversing defendant's rape conviction where the victim was aware of the act—intercourse—but believed, due to defendant's fraudulent representations, that it was necessary medical treatment).

[51] Stephen Schulhofer supplies the following account of the two variations:

> If a doctor tells a patient he needs to insert a medical instrument into her vagina, and then inserts his penis instead, the law treats his conduct as rape. But if the doctor falsely tells his patient that she needs to have intercourse with him in order to improve her health, his conduct is not considered a crime.

SCHULHOFER, *supra* note 27, at 152; *see also* DRESSLER, *supra* note 3, at 585 (same); Falk, *supra* note 17, at 158 (same).

Perhaps the most difficult application of the distinction is to cases of spousal impersonation.[52] Some older cases have found spousal impersonation to be fraud in the inducement, and therefore not rape by fraud, because the victim is aware of the act of intercourse.[53] "[O]ther courts, with better reason," conclude that spousal impersonation is fraud in the factum (and therefore rape by fraud) because the victim is unaware of the *nature* of the act.[54] The nature of the act to which the victim consented was marital intercourse, but instead s/he received adulterous intercourse.[55] S/he gave consent to one thing, but received something entirely different—an act of a different nature.[56]

The spousal impersonation scenario exemplifies the ambiguity and arbitrariness[57] of the factum–inducement distinction.[58] Spousal impersonation is or is not fraud in the factum depending on how the act or nature of the act is construed. How do we determine whether a victim is defrauded as to an integral part of the act or merely to a collateral matter? What exactly is the act or the nature of the act? Depending on the application of a thick or thin description of the act or the nature of the act, a given type of fraud may or may not make the victim unaware of the act or the nature of the act.[59] The

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[52] *See, e.g.*, DRESSLER, *supra* note 3, at 585 ("Courts have struggled with the question of [spousal impersonation]."); LAFAVE, *supra* note 6, at 767 (noting that spousal impersonation "has proved difficult to classify"); Feinberg, *supra* note 12, at 334 (describing spousal impersonation as an "intermediate sort of case in which the fraud is harder to classify"). For a brief discussion of spousal impersonation, see *supra* note 19 and accompanying text; for a more expansive discussion, see *infra* Part II.B.2.

[53] *See, e.g.*, People v. Evans, 379 N.Y.S.2d 912, 919 (N.Y. Sup. Ct. 1975) (stating, in dicta, that with "the nature of the act being understood, it is not rape . . . even if a woman has intercourse with a man impersonating her husband"); R v. Barrow, (1868) 1 L.R.C.C.R. 156, 158 (reversing defendant's rape conviction for obtaining intercourse by spousal impersonation on the basis that the victim was awake and aware of engaging in intercourse).

[54] PERKINS & BOYCE, *supra* note 25, at 1080.

[55] *See, e.g.*, Boro v. Superior Court, 210 Cal. Rptr. 122, 125 (Cal. Ct. App. 1985) (stating, in dicta, that spousal impersonation is fraud in the factum and therefore rape); LAFAVE, *supra* note 6, at 767 (noting that spousal impersonation has been found to be fraud in the factum because the victim "perceived the situation as one of lawful intercourse with her husband rather than adultery"); PERKINS & BOYCE, *supra* note 25, at 1080–81 (explaining that spousal impersonation is fraud in the factum (and therefore rape) because the victim's "consent is to an innocent act of marital intercourse while what is actually perpetrated upon her is an act of adultery").

[56] *See, e.g.*, R v. Clarence, (1888) 22 Q.B.D. 23, 44 ("Consent to [sexual intercourse] with a husband is not consent to adultery."); R v. Dee, [1884] 15 Cox CC 579, 594 (Ir. Cr. Cas. Res.) ("The person by whom the act was to be performed was part of its essence. The consent of the intellect, the only consent known to the law, was to the act of the husband only . . . ."); *see also supra* notes 20–21.

[57] *See, e.g.*, WESTEN, *supra* note 14, at 198 (terming the distinction "ambiguous"); Feinberg, *supra* note 12, at 333 n.7 (explaining "the essential arbitrariness" of the distinction). For further criticism of the distinction, see *infra* notes 64–65.

[58] *See, e.g.*, WESTEN, *supra* note 14, at 198–99 (illustrating the elasticity of the distinction by its application to cases of spousal impersonation).

[59] *See, e.g.*, ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 206 (2003) ("Everything turns on the way in which a case is described, and there is no reason to think that the intercourse/non-intercourse distinction is the only plausible factual basis on which to distinguish one case from an-

thicker the description of the act or the nature of the act—that is, the more features, circumstances, and aspects that constitute the act or the nature of the act beyond sexual intercourse itself—the more likely a given type of fraud will be construed as fraud in the factum.[60] Regarding spousal impersonation, if the act is defined as including the victim's non-spousal relationship to the impersonator, then the fraud is in the factum.[61] The thinner the description of the act or nature of the act—for example, sexual intercourse per se—the more likely a given type of fraud will be construed as fraud in the inducement. If the act is defined to be merely intercourse, thereby excluding the victim's non-spousal relationship with the impersonator, then spousal impersonation is fraud in the inducement.[62] Courts and commentators regard the marital versus adulterous (and thus lawful versus criminal) status of the intercourse as an integral part of the act or nature of the act and therefore categorize spousal impersonation as fraud in the factum.[63]

Because of the malleability[64] and arbitrariness of what constitutes the act or nature of the act versus what constitutes merely a collateral matter, the factum–inducement distinction is heavily criticized[65] and its influence is "eroding."[66] Some jurisdictions have expressly abolished the distinction

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other."); Feinberg, *supra* note 12, at 345 (concluding that, after examining several cases as to their proper classification as fraud in the factum or inducement, the "issue reduces to that of deciding on relevant act-descriptions for the conduct consented to, and the conduct that actually took place").

[60] For example, with respect to spousal impersonation, "[i]f the identity of the person doing the act is part of the essence [of the act], then a mistake regarding his identity is an essential mistake." Puttkammer, *supra* note 17, at 423. That is, if the identity of the person is part of the act to which the victim consented, then a victim of spousal impersonation was defrauded as to the act itself, which is fraud in the factum and, therefore, rape.

[61] WESTEN, *supra* note 14, at 199.

[62] *Id.*

[63] *See, e.g.*, Crosswell v. People, 13 Mich. 427, 437 (1865) (commenting that cases upholding convictions of rape by fraud for spousal impersonation "seem to us to stand upon the much better reasons, and to be more in accordance with the general rules of criminal law"); PERKINS & BOYCE, *supra* note 25, at 215–16 (same). For authorities viewing spousal impersonation as fraud in the factum, see *infra* notes 162–73 and accompanying text.

[64] *See, e.g.*, WESTEN, *supra* note 14, at 198 ("The interchangeability of [various standards of fraud in the factum] . . . enables courts and commentators to conceptualize *any* fraud that they regard as sufficient to invalidate acquiescence as a fraud in the factum."); Joan McGregor, *Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes*, 2 LEGAL THEORY 185, 200–01 (1996) (same).

[65] *See, e.g.*, WERTHEIMER, *supra* note 59, at 197 ("I do not find this distinction particularly helpful."); Falk, *supra* note 17, at 69, 159 (referring to the distinction's "problematic elasticity" and explaining how the distinction is "objectionable on several grounds"); Murphy, *supra* note 16, at 212 (questioning whether it is "a morally coherent distinction"); *id.* at 221 (suggesting, at least as applied to some cases, that it is "absurd"); Puttkammer, *supra* note 17, at 423 ("[T]here is little profit . . . in speaking of 'fundamental differences' as contrasted with 'merely collateral circumstances'; the dividing line may too easily be drawn where the speaker wishes and the arbitrary nature of his choice be covered by such terms of mere camouflage.").

[66] RICHARD J. BONNIE ET AL., CRIMINAL LAW 294 (2d ed. 2004); *see* Falk, *supra* note 17, at 171 (chronicling the trend among legislators and commentators away from "adherence to a formalistic distinction" and toward "a more thorough examination of the basis of victim consent").

and purport to criminalize all types of fraud used to obtain intercourse.[67] Other jurisdictions invoke the distinction but construe fraud in the factum quite broadly, employing a variety of tests.[68] As Peter Westen explains, "[t]o avoid reaching normatively untenable results, courts and commentators tend implicitly to adopt a broad standard" of fraud in the factum.[69] Many jurisdictions prohibit specific categories of fraud—identity fraud,[70] spousal impersonation,[71] and fraudulent medical treatment[72]—without reference to the distinction. And still other jurisdictions ignore the distinction and instead consider the effect of the fraud in relation to some other aspect or standard governing rape law, such as whether the victim consented.[73]

In addition to the factum–inducement distinction, criminal liability for adultery and fornication has influenced the development of the law of rape by fraud. As Anne Coughlin explains, the emergence of rape-by-fraud liability dovetailed with the need to supply defenses for those charged with the criminal offenses of adultery and fornication.[74] To such charges, a married woman who acquiesced to non-marital intercourse nonetheless could

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[67] *See, e.g.*, State v. Oshiro, 696 P.2d 846, 849 n.2 (Haw. Ct. App. 1985) (affirming defendant's third-degree rape conviction and stating, in dicta, that "[a]lthough this distinction [between fraud in the factum and fraud in the inducement] is recognized in many jurisdictions, Hawaii is not one of them"); *see also* LAFAVE, *supra* note 6, at 768–69 (citing both Tennessee and Hawaii as jurisdictions that have abolished the distinction). For a discussion of ten other jurisdictions in which the distinction may have been abolished, see *infra* Part II.C.1.

[68] *See, e.g.*, People v. Chang, No. D042603, 2004 WL 2058377, at *5 n.3 (Cal. Ct. App. Sept. 15, 2004) (approving the trial court's jury instruction "that fraud in fact is a false representation of 'the essential characteristics of the act'" (quoting CALJIC No. 10.33 (2004))); People v. Ogunmola, 238 Cal. Rptr. 300, 303–04 (Cal. Ct. App. 1987) (finding fraud in the factum despite victim being aware of the intercourse because victim was unaware of the nature of the act). For a discussion of three of these tests, see *infra* Part II.A.2.a–c.

[69] WESTEN, *supra* note 14, at 198.

[70] *See, e.g.*, NEB. REV. STAT. § 28-318(8)(a)(iv) (1995) (providing that the victim's consent to intercourse is absent where intercourse is obtained "through deception as to the identity of the actor"). For a discussion of identity fraud as rape by fraud and whether adult impersonation constitutes identity fraud, see *infra* Part II.B.1.

[71] *See, e.g.*, COLO. REV. STAT. § 18-3-402(1)(c) (2004) (defining rape by fraud as including obtaining intercourse with the victim where the "actor knows that the victim submits erroneously, believing the actor to be the victim's spouse"). For other jurisdictions finding spousal impersonation to be rape by fraud without reference to the factum–inducement distinction, see *infra* notes 164–65.

[72] *See, e.g.*, KAN. STAT. ANN. § 21-3502(a)(3) (Supp. 2004) (criminalizing "sexual intercourse with a victim when the victim's consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a medically or therapeutically necessary procedure"); N.Y. PENAL LAW § 130.05(3)(h) (McKinney 2004) ("[T]he act of sexual conduct occurs during a treatment session, consultation, interview, or examination."); R.I. GEN. LAWS § 11-37-2(4) (2002) ("The accused engages in the medical treatment or examination of the victim for the purpose of sexual arousal, gratification, or stimulation.").

[73] For a discussion of two conceptions of consent, and how fraud affects the victim's consent, see *infra* Part II.C.1–2.

[74] *See* Coughlin, *supra* note 17, at 30 ("[T]he traditional elements of rape begin to mimic perfectly the substantive arguments that we would expect a woman to make if she were trying to defend herself against an accusation of fornication or adultery.").

gain an acquittal by persuasively claiming that either she was unaware of the intercourse itself or she was unaware that the intercourse was not with her husband.[75] An unmarried woman who acquiesced to intercourse, and was charged with fornication, only could invoke the defense that she was unaware that she was engaging in intercourse.[76]

A number of factors have led modern rape law to more widely recognize intercourse obtained by fraud as rape.[77] First, due to the sweeping reconceptualization of rape as a violation of one's sexual autonomy rather than a crime of violence, consent (which fraud vitiates) has increasingly supplanted the element of force as the focal point of rape law.[78] Second, Susan Estrich has influentially called for the same standard of fraud that applies in criminalizing financial transactions to also apply in rape law.[79] Third, a consensus has emerged among commentators for broadening the scope of rape-by-fraud liability.[80] Last, and perhaps most importantly, the

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[75] *See id.* at 32 ("[A] mistake of fact argument might prevail where the woman believed that the sex act constituted marital (i.e., lawful) intercourse because she believed that she was having sex with her husband, when in fact the paramour was someone else.").

[76] *See id.* ("[W]here the woman showed that she reasonably believed that her conduct was nonsexual, such as participating in a routine medical procedure, but the man had used the procedure as a subterfuge to perpetrate sexual intercourse[, the woman would have a defense to a charge of fornication].").

[77] *See supra* text accompanying notes 66–72.

[78] *See, e.g.*, People v. Cicero, 204 Cal. Rptr. 582, 590 (Cal. Ct. App. 1984) ("[T]he law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent. . . . '[F]orce' plays merely a supporting evidentiary role."); MODEL PENAL CODE § 213.1 cmt. at 301 (Official Code and Revised Comments, 1985) ("The law of rape protects the female's freedom of choice and punishes unwanted and coerced intimacy."); ESTRICH, *supra* note 15, at 29 ("[N]onconsent has long been viewed as the key element in the definition of rape."); Lucy Reed Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 644 (1976) (remarking that "the role of fraud in rape law demonstrates that freedom of sexual choice rather than physical protection is the primary value served by criminalization of rape").

[79] ESTRICH, *supra* note 15, at 102–03 ("The 'force' or 'coercion' that negates consent ought to be defined to include . . . misrepresentations of material fact. . . . [T]he threshold of liability . . . should be understood to include at least those nontraditional rapes where the woman . . . submits only in response to lies or threats which would be prohibited were money sought instead [of intercourse]."). For a measure of the influence of Estrich's view, see SCHULHOFER, *supra* note 27, at 155 ("Many therefore share Susan Estrich's view that a lie used to induce sexual consent should be punished as a serious criminal offense, under the same standards that apply to fraud used to obtain money."); Donald Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1783 (1992) (referring to Estrich as penning "the leading treatment of rape to issue from the American legal academy"); Falk, *supra* note 17, at 45 ("[Estrich's] suggestion spawned the latest cycle of discussion about this age-old conundrum in the American legal academic community."). For a critique of Estrich's recommendations, see Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 76–77 (1988) (book review) (finding Estrich's approach too broad because it criminalizes trivial forms of fraud—for example, obtaining intercourse by the false representation of "'I love you'"—as rape).

[80] *See, e.g.*, DRESSLER, *supra* note 3, at 585 (suggesting that the criminalization of spousal impersonation as rape should be broadened to impersonation in general); SCHULHOFER, *supra* note 27, at 159 (advocating that some instances of fraud typically found to be fraud in the inducement and traditionally excluded from being rape, should constitute rape); Feinberg, *supra* note 12, at 335, 341 (suggesting that

factum–inducement distinction is increasingly viewed as arbitrary and its influence is waning.[81]

Although the scope of rape-by-fraud liability has broadened somewhat, the criminal law persists in refusing to recognize some types of fraud used to obtain intercourse—paradigmatic instances of fraud in the inducement—as rape.[82] Fraud as to the degree of the perpetrator's affection for, or romantic commitment to, the victim is commonly not treated as rape.[83] Obtaining intercourse by false representations of "I love you," "I'll respect you in the morning," or "I only want to be with you," is dismissed as endemic to the illusions that courtship and romance often foster and as insufficiently serious to be deemed rape.[84] As one author notes, "What is being in love, in fact, if not harboring certain illusions about love, about oneself, and about the person with whom one is in love?"[85] A Canadian Supreme Court Justice likewise opined that such deceptions "have from time immemorial been the by-product of romance and sexual encounters. . . . Thus far in the history of civilization, these deceptions, however sad, have been left to the domain of song, verse, and social censure [but not the protection of the criminal law]."[86] Similarly, fraud as to one's societal status, wealth, or physical appeal is generally not treated as rape.[87] Obtaining intercourse by wearing

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some fraud in the inducement cases should be rape if the fraud is harmful or substantially reduces the voluntariness of the consent of the victim); Murphy, *supra* note 16, at 222 (some fraud in the inducement should be rape). For commentators agreeing with Estrich's call for an expansion of the type of frauds that suffice for rape based on the type of frauds that suffice for theft, see, for example, WERTHEIMER, *supra* note 59, at 213–14; Falk, *supra* note 17, at 180; Jane E. Larson, *Women Understand So Little, They Call My Good Nature 'Deceit,'* 93 COLUM. L. REV. 374, 438–53 (1993); Robin West, *Legitimating the Illegitimate: A Comment on Rape*, 93 COLUM. L. REV. 1442, 1450 (1993). For a brief survey of suggestions to expand the scope of rape by fraud liability, see LAFAVE, *supra* note 6, at 768; Falk, *supra* note 17, at 162–69.

[81] *See supra* note 65.

[82] *See, e.g.*, Chamallas, *supra* note 7, at 832 ("False promises of marriage, false representations of sterility, or false professions of love will not vitiate the deceived party's consent."); Murphy, *supra* note 16, at 222 (considering the example of obtaining intercourse by the false promise of a gift of a mink coat, Murphy observes that neither commentators nor legislators treat this as rape).

[83] *See, e.g.*, SCHULHOFER, *supra* note 27, at 154 ("A prosecution for a minor misrepresentation ('I love the color of your eyes') would be absurd.").

[84] *See, e.g.*, United States v. Booker, 25 M.J. 114, 116 (C.M.A. 1987) ("Clearly, fraud in the inducement includes such general knavery as: 'No, I'm not married'; 'Of course I'll respect you in the morning'; 'We'll get married as soon as . . . .' Whatever else such tactics amount to, they are not rape."); SCHULHOFER, *supra* note 27, at 155 (suggesting that the difficulty of ascertaining whether such misrepresentations "('I love you'; 'I want to spend my life with you') were false and whether the person making them knew at the time that they were false" may explain the law's refusal to condemn them as rape).

[85] WERTHEIMER, *supra* note 59, at 198 (quoting ANDRE COMTE-SPONVILLE, A SMALL TREATISE ON THE GREAT VIRTUES 241 (Catherine Temerson trans., 2001)).

[86] R v. Cuerrier, [1998] 162 D.L.R.4th 513, 537 (Can.) (McLachlin, J., concurring).

[87] Vivian Berger expresses the prevailing view as to why such fraud does not suffice for rape:

> I must confess to minimal sympathy for the idea that the law should protect, via criminal sanctions, the cheated expectations of women who sought to sleep their way to the top but discovered,

"alluring make-up or a false moustache,"[88] or by false representations that one drives a Ferrari or owns a mansion on the French Riviera is deemed, like misleading advertising, as seller's puffery and too trivial to be classified as rape.[89] As a New York court put it, "[i]t 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."[90] For these types of misrepresentations, it seems the criminal law's posture is that all's fair in love and war.[91] "*Caveat amator*!"[92]

While a wide variety of false representations used to obtain intercourse have been litigated,[93] curiously one type of fraud that arises with surprising frequency[94] has apparently never been claimed to qualify as rape by fraud.

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too late, that they were dealing with swindlers. . . . [T]he notion that rape, one of the gravest possible infringements of human integrity, should be expanded to include situations where the woman attempts to sell her body and fails to receive the bargained-for price simply makes a mockery of women's long efforts to achieve autonomy, respect, and equality.

Berger, *supra* note 79, at 76.

[88] *Cuerrier*, 162 D.L.R.4th at 540 (McLachlin, J., concurring).

[89] Jeffrie Murphy explains that the criminal law's reluctance to treat such cases as rape is based on the nature of the fraudulent inducement revealing that the "victim does not value sexuality in the way characteristic of the norms we seek to protect." Murphy, *supra* note 16, at 222 (emphasis omitted). That is, a victim who would barter away his or her sexuality for a gain in wealth or status does not deserve the criminal law's protection.

[90] People v. Evans, 379 N.Y.S.2d 912, 922 (Sup. Ct. 1975).

[91] Richard Posner defends the criminal law's refusal to criminalize such arguably innocuous misrepresentations by contrasting them with spousal impersonation and misrepresentations in the medical context:

> Seduction, even when honeycombed with lies that would convict the man of fraud if he were merely trying to obtain money, is not rape. The thinking may be that if the woman is not averse to having sex with a particular man, the wrong if any is in the lies (and we usually do not think of lying in social settings as a crime) rather than in an invasion of her bodily integrity. It is otherwise if the man is impersonating the woman's husband or claims to be administering medical treatment to the woman rather than to be inserting his penis in her. In both cases the act itself, were the true facts known to the woman, would be disgusting as well as humiliating, rather than merely humiliating as in the case of the common misrepresentations of dating and courtship.

POSNER, *supra* note 28, at 392–93.

[92] WERTHEIMER, *supra* note 59, at 197 (implicitly comparing the maxim, *caveat emptor*, or let the buyer beware, with the maxim, *caveat amator*, or let the lover beware).

[93] *See, e.g.*, Barbara A. v. John G., 193 Cal. Rptr. 422, 433 (Ct. App. 1983) (reversing dismissal of tort action for battery based on plaintiff's pregnancy resulting from defendant's false representation of sterility); Neal v. Neal, 873 P.2d 871, 876–77 (Idaho 1994) (ruling that a wife's battery claim against her husband for obtaining intercourse with her by his false representation of sexual fidelity was actionable because his fraud vitiated her consent); *Cuerrier*, 162 D.L.R.4th at 567 (ruling that defendant who fraudulently obtained intercourse by failing to disclose that he was HIV-positive could be prosecuted for aggravated assault because the fraud vitiated the consent of the victim); Falk, *supra* note 17, at 179–80 (noting "the gradual proliferation of archetypical fraudulent treatment cases occurring in ever-broadening professional circumstances and husband impersonation scenarios spilling over into assorted non-marital contexts, as well as the steady accumulation of fraudulent . . . sex cases more closely resembling commercial-like fraud, property-like offenses, and authoritative abuse").

[94] For cases in which the statutory rape victim was found to have falsely represented being above the age of consent, see *infra* note 248. Of course, presumably most statutory rape victims do not misrep-

At first blush, adult impersonation might seem to fall under the rubric of "all's fair in love and war" and not constitute a serious enough form of fraud to be rape. But adult impersonation exposes the victim to very serious consequences—criminal liability for statutory rape which may be punished by twenty years of incarceration.[95] This fraud does not engender, under any standard, consequences too trivial to be rape by fraud.

II. ADULT IMPERSONATION CONSTITUTING RAPE BY FRAUD

This Part presents a typology of standards, tests, and rationales that various jurisdictions use to determine whether obtaining intercourse by fraud will be criminalized as rape.[96] These divide into three principal groupings: (i) general standards of fraud, (ii) context-specific types of fraud, and (iii) conceptions of consent (that may be vitiated by fraud). Each of the various standards is then applied to our scenario of adult impersonation. The scenario assumes the following: (i) the juvenile reasonably appears to be, and affirmatively misrepresents his or her age as being, above the age of consent, and (ii) in reliance on the misrepresentation, the adult engages in intercourse with the juvenile under the honest and reasonable belief that the juvenile is above the age of consent.[97] Although each jurisdiction imposes its own requirements for rape-by-fraud liability, an instance of adult impersonation not satisfying one of the above conditions might well not qualify as rape by fraud. After anticipating and answering possible objections, this Part concludes that obtaining intercourse by adult impersonation constitutes rape by fraud under existing standards in over thirty jurisdictions.

Even apart from satisfying specific, existing legal standards, adult impersonation satisfies perhaps the most fundamental basis for rape-by-fraud liability—serious harm befalling the defrauded victim. This prospect of severe criminal punishment for the defrauded victim, unique to adult impersonation among types of fraud, makes hollow the oft-voiced concern of line-drawing difficulties in recognizing new forms of rape by fraud. As a

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resent their age. And even where there is credible evidence of a misrepresentation of age, not all statutory rape defendants engage in intercourse in reliance on that misrepresentation.

[95] *See supra* note 10.

[96] Not all jurisdictions designate fraudulently obtaining sexual intercourse, contact, or conduct, as rape by fraud. Some jurisdictions criminalize this conduct under various terms including, for example, "sexual assault," *see infra* note 111 and accompanying text, "sexual misconduct," *see infra* note 98 and accompanying text, and "sexual battery," *see infra* note 178. For simplicity's sake, this Article uses the term rape by fraud to encompass all such offenses involving sexual intercourse, contact, or conduct obtained by fraud.

[97] The scenario also assumes that the juvenile, though below the age of consent, is above the age at which juveniles may be prosecuted as adults and held criminally liable for their crimes. The typical age of consent is sixteen, but may be as old as eighteen. *See supra* note 2. The typical age at which one may be prosecuted as an adult and held criminally liable for crimes committed is above the age of thirteen. *See supra* note 30. Thus, this scenario assumes a juvenile that typically will be fourteen or fifteen years of age but may be as old as seventeen.

result, adult impersonation more convincingly qualifies as rape by fraud than currently accepted forms of rape by fraud.

A. General Standards of Fraud

This section explains various jurisdictions' general standards of fraud sufficient for rape liability and applies these standards to adult impersonation. Some jurisdictions refrain from imposing any apparent limitation on the type of fraud that will suffice for rape liability. Other jurisdictions limit liability to situations where the fraud renders the victim unaware of (i) the nature of the act of intercourse, (ii) the essential characteristics or fundamental aspects of the act, or (iii) a material fact.

1. Fraud without Limitation.—Numerous jurisdictions criminalize obtaining intercourse by any fraud. For example, under an Alabama statute, intercourse "where consent was obtained by the use of *any* fraud or artifice" constitutes the crime of sexual misconduct.[98] Hawaii, Tennessee, and Virginia prohibit intercourse "induced by deception,"[99] "accomplished by fraud,"[100] and obtained by "ruse,"[101] respectively. These prohibitions place no limitation on the requisite type of fraud. For example, Tennessee defines fraud "as used in normal parlance and includes, but is not limited to, deceit, trickery, misrepresentation and subterfuge, and shall be broadly construed."[102] Three jurisdictions—Michigan, Rhode Island, and Utah—have largely identical statutes criminalizing intercourse obtained by "concealment."[103] Even in the absence of express statutory language, Nevada's Supreme Court ruled, in *McNair v. State*, that the language of Nevada's sexual assault statute "is sufficiently broad and explicit to encompass conduct . . . occurring as a result of fraud and deceit."[104]

Hawaii and Tennessee seemingly have removed all of the historically recognized limitations on fraud by abolishing the fraud in the factum–fraud

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[98] ALA. CODE § 13A-6-65(a)(1) (LexisNexis 2005) (emphasis added).

[99] HAW. REV. STAT. § 702-235 (1993).

[100] TENN. CODE ANN. § 39-13-503(a)(4) (2003 & Supp. 2005).

[101] VA. CODE ANN. § 18.2-67.4A(i) (2004).

[102] TENN. CODE ANN. § 39-11-106(a)(13) (2003).

[103] *See* MICH. COMP. LAWS ANN. § 750.520b(1)(f)(v) (West 2004) (criminalizing, as first degree criminal sexual conduct, intercourse "[w]hen the actor, through concealment or by the element of surprise, is able to overcome the victim"); R.I. GEN. LAWS § 11-37-2(3) (2002) (similar); UTAH CODE ANN. § 76-5-406(3) (2003) (similar). For a case construing the term "concealment" as encompassing fraud, see People v. Crippen, 617 N.W.2d 760, 764 (Mich. Ct. App. 2000) (concluding that "the evidence that defendant disguised himself, and took advantage of the complainant's misidentification of him as her fiancé to induce her to submit to his sexual advances, was sufficient to establish the requisite coercion by concealment").

[104] 825 P.2d 571, 574 (Nev. 1992) ("[W]hen a physician succeeds in the penile penetration of a patient under the guise of performing a medical examination, a sexual assault is committed by fraud and deceit without the victim's consent.").

in the inducement distinction.[105] In *State v. Oshiro*, a Hawaiian court observed that "[a]lthough this distinction is recognized in many jurisdictions, Hawaii is not one of them."[106] A Tennessee court's comment also suggests that, in effect, the distinction has been abolished: "[W]ith respect to the offense of rape the legislature has provided that fraud in either the act of sexual penetration or in the inducement of the sexual act so vitiates the victim's consent that the act of sexual penetration is considered non-consensual."[107]

Obtaining intercourse by adult impersonation convincingly qualifies as rape by fraud in the above jurisdictions. By placing no express limitation on the requisite fraud, each of these jurisdictions adopts a broad view of the fraud sufficing for rape by fraud. Even if we might suspect that the standard of fraud is not quite as broad as these jurisdictions represent, adult impersonation is sufficiently serious[108] to constitute rape by fraud in these eight jurisdictions.

2. Limitations on Fraud.—The following standards limit the types of fraud that suffice for rape by fraud. They delineate various conceptions of the aspects of the act, beyond sexual intercourse itself. These comparatively thicker or broader descriptions of the act[109] encompass situations where the victim is aware that s/he is engaging in sexual intercourse but is unaware of some aspect or circumstance of the act sufficiently significant to be deemed an integral part of, or constitutive of, the act itself or thing done. Adult impersonation satisfies these standards by rendering the victim unaware of the act's criminality.

a. Nature of the act.—Obtaining intercourse by a fraud that renders the victim unaware of the nature of the act[110] constitutes rape by fraud. For example, Arizona criminalizes nonconsensual intercourse as the offense of sexual assault.[111] Nonconsensual intercourse includes where "[t]he victim is intentionally deceived as to the *nature* of the act."[112] In addition,

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[105] *See* LAFAVE, *supra* note 6, at 768–69 (citing both Tennessee and Hawaii as jurisdictions that have abolished the distinction). For a discussion of ten other jurisdictions in which the distinction may have been abolished, see *infra* Part II.C.1.

[106] 696 P.2d 846, 849 n.2 (Haw. Ct. App. 1985).

[107] State v. Batts, No. M2001-00896-CCA-R3-CD, 2002 WL 31039378, at *1 (Tenn. Crim. App. Jan. 27, 2003) (citing State v. Tizard, 897 S.W.2d 732, 742 (Tenn. Crim. App. 1994)) (affirming defendant's rape conviction where defendant obtained intercourse by fraudulently posing as a security guard). For another case suggesting the distinction has been abolished, see State v. Mitchell, III, No. M1996-00008-CCA-R3-CD, 1999 WL 559930, at *6 (Tenn. Crim. App. July 30, 1999) (explaining that "the fraud may go directly to the penetration itself, or may relate to the inducement of the sexual act").

[108] *See supra* notes 9–11 and accompanying text; *see also infra* Part II.D.1.

[109] For a discussion of thick and thin, or broad and narrow, conceptions of the act of which the fraud renders the victim unaware, see *supra* notes 59–62 and accompanying text.

[110] For a discussion of the "nature of the act" standard of fraud as applied to spousal impersonation, see *supra* notes 52–56 and accompanying text.

[111] ARIZ. REV. STAT. ANN. § 13-1406A (2001).

[112] *Id.* § 13-1401(5)(c) (emphasis added).

California and Idaho,[113] as well as Nebraska,[114] utilize this standard. The Model Penal Code Commentary perhaps best articulates the underlying premise of liability in these types of provisions by explaining that a person "who is deceived as to the nature of the act does not give meaningful consent to intercourse."[115]

Therefore, adult impersonation readily qualifies as rape by fraud in the above four jurisdictions.[116] The victim of adult impersonation is certainly unaware of the nature of the act. The defrauded victim believes that s/he is engaging in lawful intercourse but is in fact engaging in statutory rape.

b. Essential characteristics of the act.—Fraud rendering the victim unaware of essential characteristics[117] of the sexual intercourse constitutes rape by fraud. In California, rape includes engaging in intercourse with a victim who is "not aware, knowing, perceiving, or cognizant of the *essential characteristics* of the act due to the perpetrator's fraud in fact."[118] This statutory language was construed in *People v. Chang* in which a massage therapist, under the guise of therapeutic treatment, digitally penetrated a patient.[119] Despite the victim's awareness of the digital penetration,[120] the defendant was convicted of rape by fraud. On appeal, the defendant contended that the evidence only supported fraud in the inducement and did not support the requisite "'fraud' in fact."[121] Upholding the conviction, the ap-

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[113] *E.g.*. CAL. PENAL CODE § 261(a)(4) (West 1999 & Supp. 2006) (defining rape to include intercourse with a victim who "is unconscious of the nature of the act"); IDAHO CODE ANN. § 18-6101(5) (2004) (defining rape as penetration accomplished "[w]here she is at the time unconscious of 'the nature of the act'"); *see also* MODEL PENAL CODE § 213.1 cmt. at 330 (Official Code and Revised Comments, 1985) (construing the phrase "'unconscious of the nature of the act' . . . to cover instances of deception as well as cases of literal unconsciousness").

[114] NEB. REV. STAT. § 28-319(1)(a) (1995) (criminalizing intercourse where "any person subjects another to sexual penetration without consent of the victim"); *id.* § 28-318(8)(a)(iv) (emphasis added) (declaring that the term "[w]ithout consent means the consent, if any was actually given, was the result of the actor's deception as . . . to the *nature* or purpose of the act").

[115] MODEL PENAL CODE § 213.1 cmt. at 330.

[116] *See supra* notes 111–14 and accompanying text.

[117] Similar to the essential characteristics standard, fraud rendering the victim unaware of a "fundamental aspect" of the sexual intercourse may also constitute rape by fraud. DRESSLER, *supra* note 3, at 585. Joshua Dressler explains "[m]ost courts" treat spousal impersonation "as fraud-in-the-factum (and, therefore, rape), on the ground that the attendant circumstance that the male was not the female's husband was a *fundamental aspect* of the sexual act; therefore, the female did not know what it was that she was consenting to do." *Id.* (emphasis added).

[118] CAL. PENAL CODE § 261(a)(4)(C) (West 1999 & Supp. 2006) (emphasis added).

[119] No. D042603, 2004 WL 2058377, at *1 (Cal. Ct. App. Sept. 15, 2004). For another case construing this statutory language, see *In re* Billy L., No. A104452, 2005 WL 459057, at *4 (Cal. Ct. App. Feb. 28, 2005) (affirming the adjudication of a minor as a ward of the court for obtaining oral copulation by fraud). The court ruled that the victim was "'not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud.'" *Id.* (quoting CAL. PENAL CODE § 261(a)(4)(C)).

[120] *Chang*, 2004 WL 2058377, at *1.

[121] *Id.* at *2 (quoting CAL. PENAL CODE § 261(a)(4)(C)).

pellate court ruled that the victim "was not aware of the essential characteristics of the act due to Chang's fraudulent representation he was massaging her groin in order to relieve her back pain."[122] The appellate court also upheld the trial court's jury instruction on the requisite fraud:[123] "[F]raud in fact is a false representation of the essential characteristics of the act."[124]

Adult impersonation persuasively qualifies as rape by fraud under this standard. That the defrauded victim's act constitutes statutory rape, possibly subjecting the defrauded victim to twenty years of imprisonment, is clearly an essential characteristic of the act. Could the prospect of such serious punishment be considered an inessential or trivial aspect of the act? Since the victim of adult impersonation is unaware of an essential characteristic of the intercourse (its criminal nature), obtaining intercourse by adult impersonation constitutes rape by fraud under this standard.[125]

c. Materiality.—Obtaining intercourse by a misrepresentation of a material fact constitutes rape by fraud.[126] For example, in upholding the defendant's rape-by-fraud conviction for obtaining intercourse with the victim by impersonating her fiancé, a Tennessee court adopted a definition of fraud requiring that the defendant "'intentionally misrepresent[] an existing, material fact.'"[127] That the defendant was not the victim's fiancé, the court held, was a material fact.[128] Courts in Iowa, Nevada, and Indiana upheld convictions for inducing sexual conduct under the guises of scientific experimentation and medical treatment by applying the same materiality standard—"[t]he victims had consented to one thing, and the defendants did

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[122] *Id.* at *3.

[123] The trial court defined fraud in the fact without distinguishing it from fraud in the inducement: "'The term 'fraud in fact,' as used in the preceding instruction, means a false representation of a matter of fact, whether by words or by conduct, which deceives and is intended to deceive another person.'" *Id.* at *5 n.3 (quoting from the trial court's jury instruction).

[124] *Id.*

[125] Dressler's analysis of why spousal impersonation constitutes fraud in the factum and thus rape by fraud, *see supra* text accompanying note 117, applies equally well to adult impersonation. Consider the following paraphrase of Dressler's rationale: adult impersonation constitutes fraud in the factum on the ground that the attendant circumstance that the juvenile is not above the age of consent (and thus that the intercourse is not lawful) is a fundamental aspect of the sexual act. Therefore, the victim of adult impersonation did not know what it was that s/he was consenting to do. As a result, to the extent that most courts treat spousal impersonation as rape by fraud on the ground that the victim was unaware of a fundamental aspect of the intercourse, these same courts should also treat adult impersonation as rape by fraud. For a further discussion of spousal impersonation, see *infra* Part II.B.2.

[126] Martha Chamallas furnishes the most fundamental conception of materiality—a representation that is significant. *See* Chamallas, *supra* note 7, at 833 (contrasting material misrepresentations with those "which will be dismissed as insignificant").

[127] State v. Mitchell, III, No. M1996-00008-CCA-R3-CD, 1999 WL 559930, at *5 (Tenn. Crim. App. July 30, 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992)) ("'A person acts fraudulently when (1) the person intentionally misrepresents an existing, material fact, or produces a false impression, in order to mislead another or to obtain an undue advantage, and (2) another is injured because of reasonable reliance on that representation.'"), *aff'd*, 88 S.W.3d 561 (Tenn. 2002).

[128] *Mitchell, III*, 1999 WL 559930, at *1.

something materially different."[129] Despite the above victims' awareness of the sexual conduct itself, the defendants' misrepresentations still rendered the victims unaware of material facts.

Numerous commentators also have advanced conceptions of a materiality standard for the requisite fraud in rape by fraud.[130] Susan Estrich, perhaps the first commentator to advocate a materiality standard,[131] argues that any state's rape law should prohibit "exactly the same deceptions as that state's law of false pretences or fraud."[132] Stephen Schulhofer agrees that the standard used for fraud in property transactions—"the misrepresentation is material and the other party could justifiably rely on it"—also should apply to intercourse obtained by fraud.[133] Patricia Falk[134] and Jane Larson[135] require, for a misrepresentation to be material, that the victim's reliance on it be reasonable. Other commentators focus on the importance of the misrepresentation in the victim's decision to acquiesce to the intercourse.[136]

Adult impersonation convincingly qualifies as a material fraud. The victim consented to one thing (lawful intercourse) but received something materially different (unlawful intercourse). Clearly, a misrepresentation that makes the crucial difference between lawful intercourse and statutory rape is a misrepresentation that is sufficiently significant[137] and nontrivial to be material.[138] Adult impersonation could also satisfy the numerous other

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[129] State v. Vander Esch, 662 N.W.2d 689, 694 (Iowa Ct. App. 2002) (citing McNair v. State, 825 P.2d 571, 574 (Nev. 1992)) (affirming defendant's conviction on four counts of sexual abuse in the third degree for obtaining semen sample collections from victims by fraudulently representing such collection was for scientific research); *McNair*, 825 P.2d at 574 (quoting R v. Flattery, 2 Q.B.D. 410, 413 (1877)); Pomeroy v. State, 94 Ind. 96, 102 (1884) (affirming defendant's rape conviction for obtaining intercourse by fraudulently purporting to perform a medical operation). The Indiana Supreme Court articulated the standard slightly differently—"'[s]he consented to one thing, he did another materially different.'" *Id.* (quoting R v. Case, 1 Den. Cr. C. 580, 582 (1850)).

[130] *See* LAFAVE, *supra* note 6, at 768 (noting this standard as among the approaches that scholars have advanced); Falk, *supra* note 17, at 166–68 (surveying approaches to the materiality standard).

[131] ESTRICH, *supra* note 15, at 102–03 (arguing that "[t]he 'force' or 'coercion' [elements of the traditional conception of rape] that negates consent ought to be defined to include extortionate threats and material misrepresentations of material fact").

[132] Estrich, *supra* note 7, at 1182.

[133] SCHULHOFER, *supra* note 27, at 154–55 (emphasis omitted). "Where these requirements [of materiality] are clearly met . . . , the deceived woman has suffered serious harm, and there is little reason to tolerate the defendant's misconduct." *Id.* at 155.

[134] Falk, *supra* note 17, at 166 (characterizing the materiality standard as comprising the following three components: "(1) the misrepresentation must be material, (2) the victim's reliance must be reasonable, and (3) the actor must have intended to mislead when making the misrepresentation").

[135] Larson, *supra* note 80, at 453 (proposing the standard, for tort liability for intercourse obtained by fraud, of whether a reasonable person would acquiesce to the intercourse due to the fraud).

[136] LAFAVE, *supra* note 6, at 768 (describing the standard as "the materiality of the misrepresentation to the victim's decision-making process"); Feinberg, *supra* note 12, at 341–42 (cataloguing the standards for materiality based on how central the misrepresentation is to the victim's decision to acquiesce—dispositive, a sufficient condition, a necessary but insufficient condition, or a mere factor).

[137] *See supra* note 126.

[138] *See supra* note 9.

criteria advanced by commentators: (i) the misrepresentation was sufficiently central in the victim's decision to acquiesce to intercourse,[139] (ii) the victim reasonably[140] and justifiably[141] relied on the misrepresentation, and (iii) the defrauding party intentionally misled the victim.[142] As a result, adult impersonation qualifies as rape by fraud under the criteria for materiality in the four jurisdictions above, as well as under commentators' approaches.

B. Context-Specific Types of Fraud

The two context-specific types of fraud most relevant to adult impersonation are spousal impersonation and impersonation in general, or identity fraud. In both, the fraud renders the victim unaware not of the intercourse itself, but of the identity, or some specific aspect of the identity, of the victim's sexual partner. Both spousal impersonation and adult impersonation are subsets of identity fraud and thus might be criminalized in any jurisdiction criminalizing identity fraud. And by satisfying the rationale of spousal impersonation as rape, adult impersonation qualifies as rape in the same jurisdictions that criminalize spousal impersonation.

1. Identity Fraud or Impersonation.—Several jurisdictions broadly criminalize identity fraud used to obtain intercourse.[143] For example, Nebraska criminalizes intercourse obtained by "deception as to the identity of the actor."[144] Recent cases in at least three other jurisdictions, as well as in England, have found rape liability where the defendant fraudulently obtained intercourse by posing as the victim's fiancé[145] or lover.[146] Most commentators agree.[147]

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[139] *See* sources cited *supra* note 136.

[140] *See* sources cited *supra* notes 134–35.

[141] *See supra* note 133 and accompanying text.

[142] *See supra* note 134.

[143] The recognition of identity fraud, in general, as a basis for rape by fraud is fairly recent. As late as 1982, Perkins and Boyce noted that identity fraud does not constitute rape by fraud. PERKINS & BOYCE, *supra* note 25, at 216. For a discussion of why spousal impersonation might constitute an even stronger basis for establishing rape by fraud liability than identity fraud, see *infra* note 169.

[144] NEB. REV. STAT. § 28-318(8)(a)(iv) (1995). Under the Nebraska statutory scheme, among the ways sexual assault can be committed is sexual contact "without the consent of the victim." *Id.* § 28-320(1)(a) (1995). Nebraska defines absence of consent as including where the victim's "consent, if any was actually given, was the result of the actor's deception as to the identity of the actor." *Id.* § 28-318(8)(a)(iv) (1995). Apparently, there are no reported Nebraska decisions construing this statutory language.

[145] People v. Crippen, 617 N.W.2d 760, 764 (Mich. Ct. App. 2000) (affirming conviction of defendant for rape by fraud for fraudulently impersonating victim's fiancé in order to obtain intercourse); State v. Mitchell, III, No. M1996-00008-CCA-R3-CD, 1999 WL 559930, at *16 (Tenn. Crim. App. July 30, 1999).

[146] United States v. Booker, 25 M.J. 114, 117 (C.M.A. 1987) (affirming conviction of defendant, a naval fireman, for rape by fraud by fraudulently impersonating victim's lover to secure intercourse); R v. Elbekkay, [1995] Crim. L. R. 163, 164 (holding that defendant's impersonation of victim's boyfriend

The rationale is that the identity of the victim's sexual partner is part of the act to which the victim consents. In upholding the defendant's rape conviction for obtaining intercourse by impersonating the victim's lover in *United States v. Booker*, the United States Court of Military Appeals considered whether impersonation constitutes fraud in the factum or in the inducement.[148] Identity fraud constitutes fraud in the factum, according to the court, because consent to the act is based on "both the nature of the act and some knowledge of the identity of the participant."[149] The court concluded that impersonation, as fraud in the factum, constitutes rape by fraud because it vitiates the victim's actual consent to the intercourse.[150]

While recognition of identity fraud properly broadens rape by fraud beyond spousal impersonation cases,[151] there may be limits. *Booker* de-

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to obtain intercourse constitutes rape by fraud). Impersonation is also a basis for rape by fraud liability in Canada. *See* R v. Cuerrier, [1998] 162 D.L.R.4th 513, 534 (Can.) (McLachlin, J., concurring) ("Canadian courts for over a hundred years accepted that fraud as to identity could negate consent . . . .").

For a case hinting at rape by fraud liability for identity fraud, see People v. Hough, 607 N.Y.S.2d 884, 886–87 (Dist. Ct. 1994) (granting motion to dismiss charge of sexual misconduct for obtaining intercourse by impersonating victim's lover). The court intimated that though fraud would not vitiate the consent of the victim for the specific offense of sexual misconduct, identity fraud might constitute the offense of sexual abuse. *Id.* at 887. For the crime of sexual abuse, the conception of the victim's lack of consent is broader and is "extended to 'any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct.'" *Id.* (quoting N.Y. PENAL LAW § 130.05(2)(c) (McKinney 2004)). The court observed that "the District Attorney's office has charged the defendant with the wrong crime," *id.* at 887, and invited the prosecutor to charge "the defendant with another crime that encompasses the defendant's conduct." *Id.*

[147] *See, e.g.*, DRESSLER, *supra* note 3, at 585 ("Seemingly, it should constitute rape to impersonate anyone with whom the victim has been sexually intimate."); SCHULHOFER, *supra* note 27, at 159 (maintaining that "impersonation is an especially serious form of deception" that is deservedly criminalized); *id.* at 284 (criminalizing, in his Model Criminal Statute for Sexual Offenses, intercourse obtained by an actor "leading the victim to believe that he is a person with whom the victim has been sexually intimate"); Falk, *supra* note 17, at 70 (arguing that rather than trying to fit identity fraud within the fraud in the factum–inducement dichotomy, "a superior approach may be simply to outlaw fraud as to identity in securing sexual compliance"); Jocelynne A. Scutt, *Fraudulent Impersonation and Consent in Rape*, 9 U. QUEENSLAND L.J. 59, 65 (1975) (arguing that differential treatment of spousal impersonations and impersonations of a non-married person raises issues of unfair discrimination).

[148] 25 M.J. at 116–17.

[149] *Id.* at 116. The court explains that "while it is arguable that there may be people who are willing to hop into bed with *absolutely* anyone, we take it that even the most uninhibited people ordinarily make some assessment of a potential sex partner and exercise some modicum of discretion before consenting to sexual intercourse." *Id.*

[150] As the concurring opinion characterizes the majority opinion, "purported consent to intercourse is invalid if the woman has misidentified the man with whom she has intercourse because the identity of the sex partner is part of the nature of the act to which the woman agrees." *Id.* at 119 (Sullivan, J., concurring).

[151] As a recent English case put it, in erasing the distinction between spousal and other types of impersonation and finding impersonation to be rape by fraud, "[w]e see no reason to distinguish between consent obtained by impersonating a husband and consent obtained by impersonating another man, so that latter case should also constitute rape." R v. Linekar, (1995) Q.B. 250, 255 (A.C.).

clares that neither obtaining intercourse by the "use of a false name"[152] nor posing as unmarried suffices as rape by fraud.[153] In suggesting the exclusion of celebrity impersonation from rape-by-fraud liability, Joel Feinberg offers the following hypothetical. Suppose a defendant fraudulently poses as "rock star Johnny Limbo" to obtain intercourse with an ardent fan.[154] Feinberg argues that celebrity impersonation, as opposed to spousal impersonation, is fraud in the inducement and thus not rape by fraud for a number of reasons.[155] First, unlike the victim of spousal impersonation, the victim of celebrity impersonation is not tricked into an unlawful act, like adultery.[156] Second, the victim of spousal impersonation will "suffer a greater harm, or at least more severe psychological trauma" as opposed to the mere "disappointment" of the celebrity impersonation victim.[157] Third, Feinberg concludes, while the spousal impersonation victim suffers an "evil," the celebrity impersonation victim receives a "mere nonbenefit," or foregoes "a good."[158]

Is being underage sufficiently part of one's identity for adult impersonation to qualify as identity fraud constituting rape? Because adult impersonation generates the very serious consequence of exposure to criminal liability for statutory rape for the defrauded victim, knowledge that one's partner is underage might satisfy *Booker*'s requisite "some knowledge of the identity of the participant."[159] Such knowledge would clearly be more relevant than knowledge of the participant's true name and marital status—the two examples disqualified by *Booker* as rape by fraud.[160] In addition, adult impersonation, like spousal impersonation, compares favorably with celebrity impersonation for constituting rape by fraud. The victim of adult impersonation is tricked into committing an unlawful act and suffers serious harm if criminal liability attaches rather than merely being disappointed by a nonbenefit.[161] On this basis, adult impersonation probably qualifies as identity fraud, and thus as rape by fraud, in the above four jurisdictions.

2. Spousal Impersonation.—While some authorities maintain that the majority of jurisdictions recognize spousal impersonation as rape by

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[152] 25 M.J. at 116 (explaining that the "use of a false name may well amount to fraud in the inducement, but it does not alone vitiate consent").

[153] *Id.* (noting that obtaining intercourse by posing as unmarried is only fraud in the inducement, and thus does not constitute rape by fraud).

[154] Feinberg, *supra* note 12, at 344 (explaining that the ardent fan "has heard all his records but has never seen his photographs").

[155] *Id.* at 345.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *See supra* note 149 and accompanying text.

[160] *See supra* notes 152–53 and accompanying text.

[161] *See supra* note 158 and accompanying text.

fraud,[162] only sixteen explicitly do so.[163] By statute, eleven jurisdictions, as well as the Model Penal Code, explicitly recognize spousal impersonation as rape by fraud.[164] And in five others, the courts explicitly recognize it despite the absence of a specific statutory provision.[165]

The primary rationale for spousal impersonation constituting rape by fraud is that the victim consents to lawful, marital intercourse, but instead

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[162] *See* Boro v. Superior Court, 210 Cal. Rptr. 122, 125 (Cal. Ct. App. 1985) ("In California, of course, we have by statute adopted the majority view that such fraud [spousal impersonation] is in the *factum*, not the inducement, and have thus held it to vitiate consent."); DRESSLER, *supra* note 3, at 585 ("Most courts, however, treat this deception [spousal impersonation] as fraud-in-the-factum (and, therefore, rape)."); WESTEN, *supra* note 14, at 199 ("California has concluded, as most jurisdictions have, that spouse-impersonators ought to be punished, and it has done so by stating that victims of spouse-impersonation are victims of fraud in the factum."). *But see* People v. Evans, 379 N.Y.S.2d 912, 918–19 (Sup. Ct. 1975) ("The prevailing view in this country is that [obtaining intercourse by spousal impersonation is not rape]."); Commonwealth v. Culbreath, No. 88103, 1995 WL 1055824, at *1 (Va. Cir. Ct. Apr. 4, 1995) ("The law in Virginia and in the majority of states is that no rape occurs where a person impersonates another in order to obtain the victim's consent to sexual intercourse.").

[163] *See infra* notes 164–65 and accompanying text.

[164] *See, e.g.*, OHIO REV. CODE ANN. § 2907.03(A)(4) (West 1997 & Supp. 2005) ("No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: . . . (4) The offender knows that the other person submits because the other person mistakenly identifies the offender as the other person's spouse."). The following statutes contain largely identical language: ARIZ. REV. STAT. ANN. § 13-1401(5)(d) (2000); CAL. PENAL CODE § 261(5) (West 1999 & Supp. 2006); COLO. REV. STAT. § 18-3-402(1)(c) (2004); IDAHO CODE ANN. § 18-6101(6) (2004); LA. REV. STAT. ANN. § 14:43(3) (2004); OKLA. STAT. ANN. tit. 21, § 1111(A)(6) (West 2002); UTAH CODE ANN. § 76-5-406(7) (2003); WYO. STAT. ANN. § 6-2-303(a)(iv) (2005); P.R. LAWS ANN. tit. 33, § 4061(e) (2004); MODEL PENAL CODE § 213.1(2)(c) (Official Draft and Revised Comments, 1985). Although Alabama's statute does not explicitly criminalize spousal impersonation, the official statutory commentary expressly states that the provision does encompass spousal impersonation as rape by fraud. *See* ALA. CODE § 13A-6-65(a)(1) (LexisNexis 2005) (statutory commentary) ("This subsection includes the offense of carnal knowledge of a married woman by falsely personating her husband . . . .").

[165] *See* State v. Shepard, 7 Conn. 54, 54–56 (1828) (affirming defendant's conviction of assault with an intent to commit rape accomplished via spousal impersonation); Pinson v. State, 518 So. 2d 1220, 1224 (Miss. 1988) (affirming defendant's conviction for rape via spousal impersonation and rejecting defendant's argument that spousal impersonation is something less than rape as "ludicrous"); State v. Atkins, 292 S.W. 422, 426 (Mo. 1926) (stating, in dicta, that spousal impersonation constitutes rape in Missouri on the basis that the fraud vitiates the consent of the victim); State v. Williams, 37 S.E. 952, 953 (N.C. 1901) (affirming defendant's conviction for rape accomplished via spousal impersonation even in the absence of verbal, fraudulent representations); State v. Bancroft, 137 N.W. 37, 39 (N.D. 1912) (noting, in dicta, that spousal impersonation constitutes rape in North Dakota).

receives unlawful, adulterous intercourse.[166] That is, the victim consents to one act, but receives something entirely different[167]:

> The act of marital intercourse and the act of adultery are as far apart as day and night and it is atrocious to suggest that willing submission by a wife to what is supposed by her in good faith, and on good grounds, to be *lawful* intercourse with her husband, is consent to an act of adultery with another.[168]

The unlawful quality of the intercourse is such a fundamental feature of the act that it is an integral part of the act or nature of the act.[169] Since the victim is unaware of the unlawful nature of the intercourse—an integral part of the act—the victim is unaware of the very act or nature of the act. As Perkins and Boyce argue, "it is quite unsound to hold that the woman [the victim of spousal impersonation] is not deceived as to the very act done."[170] Since the victim is unaware of the act or nature of the act, the fraud consti-

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[166] *See, e.g.*, LAFAVE, *supra* note 6, at 767 ("[Spousal impersonation] has been characterized as fraud in the factum, apparently on the ground that it should suffice that she [the victim] perceived the situation as one of lawful intercourse with her husband rather than adultery."); PERKINS & BOYCE, *supra* note 25, at 1080–81 (explaining that spousal impersonation constitutes rape by fraud because the victim's "consent is to an innocent act of marital intercourse while what is actually perpetrated upon her is an act of adultery"); Falk, *supra* note 17, at 66–67 ("[H]usband impersonation cases really involve fraud in the factum because the woman has consented to marital intercourse not adultery and, therefore, the impersonator's fraud vitiates her consent.").

[167] *See supra* notes 20–21 and accompanying text.

[168] PERKINS & BOYCE, *supra* note 25, at 216 (emphasis added).

[169] *See, e.g.*, DRESSLER, *supra* note 3, at 585 (explaining that the perpetrator not being the victim's spouse is "a fundamental aspect of the sexual act"). To see this point more clearly compare a case of spousal impersonation with a case of a wife who is expecting her adulterous lover but instead is defrauded into intercourse with another (neither her husband nor her lover):

> [Consider] the rogue who, in the dark, got into bed with a married woman who knew he was not her husband but submitted to sexual intercourse in the belief that he was her paramour with whom she had arranged a meretricious tryst. Although he had learned of the tryst, detained the paramour elsewhere with a false message and fraudulently imposed upon the woman, he had not committed rape. This was not fraud in the *factum*. There was nothing comparable to the difference between marital intercourse and adultery. The woman consented to the adulterous intercourse, having been induced to consent because deceived as to the person—fraud in the inducement. She would have no defense to a prosecution for adultery, where that is a punishable offense, nor to a charge of adultery in a divorce action, although the woman who submitted believing the man was her husband would have a complete answer to both.

PERKINS & BOYCE, *supra* note 25, at 216. Thus, fraud which induces a victim into intercourse that s/he believes is adulterous intercourse and is, in fact, adulterous intercourse constitutes, according to Perkins and Boyce, only fraud in the inducement and is not rape by fraud. But where the victim is defrauded into believing that the intercourse is permissible marital intercourse but is, in fact, impermissible adulterous intercourse, the fraud constitutes fraud in the factum and is rape by fraud. In the former case, the victim was not defrauded as to the legal nature of the act—s/he correctly believed it to be impermissible (adulterous) intercourse. In the latter case, the victim was defrauded as to the legal nature of the intercourse—s/he believed it to be permissible (marital) intercourse but instead engaged in impermissible (adulterous) intercourse.

[170] PERKINS & BOYCE, *supra* note 25, at 215.

tutes fraud in the factum.[171] As fraud in the factum, spousal impersonation vitiates the consent of the victim and constitutes rape by fraud.[172]

The rationale for spousal impersonation constituting rape by fraud not only applies to adult impersonation, it applies even more strongly. The victims of both consent to innocent and lawful intercourse, but instead receive unlawful intercourse.[173] The unlawful nature of the intercourse is fundamental to the nature of the act and thus the victims are deceived as to the very act done. Therefore, both frauds constitute fraud in the factum. And if spousal impersonation constitutes rape by fraud on this basis, then *a fortiori* adult impersonation constitutes rape by fraud. The victim of adult impersonation is defrauded into committing a much more serious crime (statutory rape) than is the victim of spousal impersonation (adultery). As a result, adult impersonation convincingly qualifies as rape by fraud in at least the above sixteen jurisdictions.

C. Conceptions of Consent

While the last two sections canvassed general standards of fraud and context-specific types of fraud, this section addresses fraud's effect on consent. Under two consent standards—"global consent"[174] and knowing and voluntary consent—fraud vitiates the victim's consent to intercourse, thereby transforming the intercourse into rape.

1. Global Consent Statutes.—As many as twelve states follow the Model Penal Code in promulgating global consent provisions declaring that deception renders the victim's consent legally ineffective.[175] For example,

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[171] *See supra* notes 43–47 and accompanying text.

[172] *See, e.g.*, PERKINS & BOYCE, *supra* note 25, at 1080–81 (maintaining that spousal impersonation constitutes rape by fraud because it constitutes fraud in the factum); Falk, *supra* note 17, at 66–67 (explaining that because spousal impersonation is fraud in the factum, the fraud vitiates the victim's consent); *see also supra* notes 54–56 and accompanying text.

[173] Consider the following paraphrase of Perkins and Boyce's explanation of why spousal impersonation constitutes rape by fraud, *see supra* text accompanying note 168, as applied to adult impersonation: the act of lawful intercourse and the act of statutory rape are as far apart as night and day and it is atrocious to suggest that willing submission by the defrauded victim to what is supposed in good faith, and on good grounds, to be lawful intercourse, is consent to an act of statutory rape.

[174] So-called "global consent" or "generic" consent provisions are meant to apply not merely to consent in sexual offenses but to a jurisdiction's entire penal code. *See* LAFAVE, *supra* note 6, at 768 (terming them definitions of "global consent"); Falk, *supra* note 17, at 114 ("Some states have generic consent provisions applying to all types of criminal offenses not just sexual crimes.").

[175] MODEL PENAL CODE § 2.11(3)(d) (Official Draft and Revised Comments, 1985) ("Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense."). Two states adopt the language of the Model Penal Code provision verbatim. *See* N.J. STAT. ANN. § 2C:2-10(c)(3) (West 2005); 18 PA. CONS. STAT. § 311(C)(4) (West 1998). Eight additional states declare consent to be ineffective by adopting the Model Penal Code language, "if it is induced by force, duress or deception." *See* ALA. CODE § 13A-2-7(c)(4) (LexisNexis 2005); COLO. REV. STAT. § 18-1-505(3)(d) (2004); DEL. CODE ANN. tit. 11, § 453(4) (2001); HAW. REV. STAT. § 702-

Missouri defines consent as invalid "if it is induced by force, duress, or deception."[176] Under these global consent provisions, the requisite type of deception or fraud is without specific limitation. These global consent provisions may even, in effect, abolish the distinction between fraud in the factum and fraud in the inducement.[177] Therefore, inducing the victim's consent by deception or fraud renders the victim's consent legally ineffective and may subject the perpetrator to liability for rape by fraud.

Adult impersonation, by vitiating the consent of the defrauded victim, qualifies as rape by fraud under these statutory global consent provisions. The victim's consent to the intercourse is ineffective because of the juvenile's fraudulent representation as to being of age. As a result, adult impersonation plausibly constitutes rape by fraud under the Model Penal Code and the twelve jurisdictions largely adopting the Model Penal Code's global consent provision.

2. Knowing and Voluntary Consent.—Fraud likewise renders the victim's consent ineffective under a knowing and voluntary consent standard. By statute, Florida, Wisconsin, Illinois, and California criminalize intercourse in the absence of the victim's "intelligent, knowing and voluntary consent,"[178] "informed consent,"[179] "knowing consent,"[180] and "knowledge

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235(4) (1993); ME. REV. STAT. ANN. tit. 17-A, § 109(3)(C) (1983); MO. ANN. STAT. § 556.061(5)(c) (West 1999 & Supp. 2006); MONT. CODE ANN. § 45-2-211(2)(c) (2005); N.D. CENT. CODE § 12.1-17-08(2)(c) (1997). Two additional states have similar provisions stating that fraud renders the victim's consent ineffective. *See* TENN. CODE ANN. § 39-11-106(a)(9)(A) (2003) ("Consent is not effective when: Induced by deception . . . ."); TEX. PENAL CODE ANN. § 1.07(a)(19)(A) (Vernon 2003 & Supp. 2005) ("Consent is not effective if: induced by . . . fraud."). For cases construing these global consent provisions, see, for example, State v. Oshiro, 696 P.2d 846, 849 (Haw. Ct. App. 1985) (affirming defendant's third-degree rape conviction where defendant's fraud vitiated victim's consent within the meaning of the global consent provision); Smith v. State, 873 S.W.2d 66, 72 (Tex. App. 1993) (affirming defendant's sexual assault conviction and applying both the broad global consent provision and the narrower definition of consent within the sexual assault provision).

[176] MO. ANN. STAT. § 556.061(5)(c) (West 1999 & Supp. 2006).

[177] *See* LAFAVE, *supra* note 6, at 769 (commenting that global consent statutes are "likely to be interpreted as superceding the factum–inducement distinction"). For cases abolishing the distinction, see *supra* notes 106–07 and accompanying text.

[178] FLA. STAT. ANN. § 794.011(1)(a) (West 2000 & Supp. 2006). Under Florida's statutory scheme, "a person who commits sexual battery . . . without that person's consent . . . commits a felony of the second degree." *Id.* § 794.011(5). The term "'sexual battery'" is defined as sexual "penetration." *Id.* § 794.011(1)(h). "The term 'consent' means intelligent, knowing, and voluntary consent . . . ." *Id.* § 794.011(1)(a). For an interpretation of Florida's consent provision, see, for example, Coley v. State, 616 So. 2d 1017, 1023 (Fla. Dist. Ct. App. 1993) (reversing defendant's conviction for sexual battery based on defendant's lack of awareness that victim was unable to give knowing consent). The court explained the requisite standard for knowing consent as "a showing that the victim was unable to give a knowing and voluntary consent, and—in order to charge defendant with criminal responsibility—that the inability to consent was known or apparent to the defendant." *Id.*

[179] WIS. STAT. ANN. § 940.225(4) (West 2005). Under Wisconsin's statutory scheme, a person who "has sexual intercourse with a person without the consent of that person is guilty" of felonious third-degree sexual assault. *Id.* § 940.225(3). Consent is defined as "words or overt actions by a person who

of the nature of the act,"[181] respectively. Several courts have construed this consent standard's application to fraud.[182] For example, in *People v. Whitten*, an Illinois court defined knowing consent as "a willingness, voluntariness, free will, reasoned or intelligent choice . . . unclouded by fraud, duress, or mistake."[183] The Illinois Supreme Court upheld the conviction of a respiratory therapist for a sexual assault perpetrated by fraud in *People v. Quinlan*.[184] The court ruled that the victim's consent was to "an invasive medical procedure, not to sexual acts."[185] Since the victim received sexual penetration rather than medical treatment, the victim "did not give knowing consent."[186] Similarly, the court in *Wisconsin v. Dantes*[187] ruled that the victim consented to treatment from a hypnotist for weight loss, but not to sexual contact.[188] Since the victim received bodily touching of a sexual nature rather than treatment, the victim did not give "'informed consent.'"[189]

Adult impersonation, by vitiating knowing and voluntary consent, qualifies as rape by fraud. The victim of adult impersonation submits to intercourse because the juvenile misrepresents being of age. Therefore, the defrauded victim does not give informed and knowing consent to the inter-

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is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." *Id.* § 940.225(4).

[180] 720 ILL. COMP. STAT. ANN. 5/12-13(a)(2) (West 2002) ("The accused commits criminal sexual assault if he or she: commits an act of sexual penetration and the accused knew that the victim . . . was unable to give knowing consent.").

[181] CAL. PENAL CODE § 261.6 (West 1999) ("In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, 'consent' shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."). For an explanation of the various sexual offenses committed under California law by a perpetrator who engages in intercourse without the victim's consent, see People v. Giardino, 98 Cal. Rptr. 2d 315, 320 (Cal. Ct. App. 2000).

[182] For cases construing Illinois' knowing consent standard apart from its application to fraud, see, for example, People v. Beasley, 732 N.E.2d 1122, 1128 (Ill. App. Ct. 2000) (affirming defendant's criminal sexual assault conviction for intercourse with victim who was unable to give knowing consent on the basis that the "State need only establish that due to circumstances beyond her [the victim's] control she was unable to give knowing consent."); People v. Fisher, 667 N.E.2d 142, 148 (Ill. App. Ct. 1996) (affirming defendant's conviction of criminal sexual penetration committed against a victim unable to give knowing consent that included "freely given agreement"); *id.* ("Whether one *did not* freely agree to intercourse, or whether one was, for whatever reason, *unable* to freely agree to intercourse, the definition of 'consent' remains the same.").

[183] 647 N.E.2d 1062, 1067 (Ill. App. Ct. 1995) (affirming defendant's conviction of criminal sexual assault for intercourse with victim who was unable to give knowing consent).

[184] 596 N.E.2d 28, 31 (Ill. App. Ct. 1992) ("Knowing consent 'presupposes an intelligence capable of understanding the act, its nature and possible consequences.'" (quoting People v. Blunt, 65 Ill. App. 2d 268, 274 (1965))).

[185] *Id.* at 31.

[186] *Id.*

[187] No. 83-1596-CR, 1984 WL 180541, at *1 (Wis. Ct. App. Apr. 5, 1984) (affirming defendant's fourth-degree sexual assault conviction for obtaining sexual contact without the victim's consent).

[188] *Id.*

[189] *Id.* (quoting WIS. STAT. ANN. § 940.225(4) (West 2005)).

course. As a result, obtaining intercourse by adult impersonation convincingly qualifies as rape by fraud in the above four jurisdictions.

D. Objections

This section anticipates the following five possible objections to treating intercourse obtained by adult impersonation as rape by fraud. First, recognizing any new form of rape by fraud triggers line-drawing difficulties. That is, recognizing a new form of rape by fraud opens a Pandora's box that cannot be closed. Second, a juvenile's legal incapacity to consent precludes a juvenile's criminal liability for rape. Third, the general rule that a victim of a crime cannot be an accomplice to that very crime bars a statutory rape victim from criminal liability for rape. Fourth, as the victim of rape, the juvenile cannot be the perpetrator of rape. And fifth, recognizing adult impersonation as rape by fraud will chill statutory rape prosecutions. We will rebut each of these possible objections.[190]

1. Line-Drawing Concerns.—The shared concern of both defenders and critics of the law's trend toward expanding the scope of rape-by-fraud liability is where to draw the line between fraud that is deserving of criminalization and fraud that is not.[191] While most agree that spousal impersonation and fraudulent medical treatment should be criminalized, courts and commentators have struggled with delineating principles and standards that would be sufficiently inclusive to accommodate serious fraud while excluding exaggerations of affection, romantic commitment, societal status, and wealth.[192] Thus the most formidable obstacle any candidate for rape by fraud must overcome is the common refrain—if we allow this to be rape by fraud, where do we draw the line?[193] Skeptics fret that any expansion of rape-by-fraud liability beyond its narrow, historic categories will open a

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[190] For resolutions to other possible objections, see *supra* notes 30–35 and accompanying text.

[191] *See, e.g.*, DRESSLER, *supra* note 3, at 585 (noting that the law of rape by fraud poses "difficult matters of line-drawing"); LAFAVE, *supra* note 6, at 768 ("The difficulty, of course, is in drawing clear lines without giving protection to interests not worthy of being protected by criminal sanctions . . . ."); WERTHEIMER, *supra* note 59, at 198 ("[I]t may, in fact, be difficult to distinguish between those deceptions that are not seriously wrong and certainly should not be illegal and those that are legitimate candidates for prohibition.").

[192] *See, e.g.*, WERTHEIMER, *supra* note 59, at 198–99 ("So the problem is this. If some sexual deceptions are to be regarded as morally and legally permissible whereas others are not, how can we distinguish between those two categories?"); Feinberg, *supra* note 12, at 335 (noting that "conceptual boundary lines are hard to draw"); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2176 (1995) (commenting that "the boundary problem is acute").

[193] *See, e.g.*, MODEL PENAL CODE § 213.1 cmt. at 331 (Official Draft and Revised Comments, 1985) (noting the difficulty of distinguishing some possibly legitimate candidates for rape by fraud liability "from many instances of ordinary seduction"); WERTHEIMER, *supra* note 59, at 214 ("[A]n attempt to provide civil remedies or criminal sanctions for sexual deception is likely to encounter a range of genuine line-drawing and evidentiary difficulties."); Chamallas, *supra* note 7, at 833 ("Perhaps the principal impediment to criminalizing rape by fraud is the desire to avoid the difficult task of choosing which lies will be treated as material and which will be dismissed as insignificant.").

Pandora's box that cannot be closed.[194] With respect to adult impersonation, however, this concern is groundless.

Adult impersonation features a unique rationale for qualifying as rape by fraud. Consequently, its recognition will not furnish a conceptual toehold for recognizing other types of fraud. The most fundamental basis warranting adult impersonation's inclusion as rape by fraud is the very serious consequence and harm suffered by the victim—the prospect of severe criminal punishment.[195] Commentators maintain that the harmful consequences suffered by the defrauded victim are, if not dispositive, one of the most important factors in determining whether an instance of fraud suffices for rape-by-fraud liability.[196] For example, Alan Wertheimer stresses that "[i]t is the *consequences* of deception that worry us, not the deception itself."[197] In general, the greater the degree of harm suffered by the victim of the misrepresentation, the comparatively more likely it constitutes rape by fraud.[198] Few, if any, candidates for rape by fraud entail the *degree* of harm suffered by the victim of adult impersonation. But this alone is not what makes adult impersonation unique.

No other candidate for rape-by-fraud liability entails the *type* of harm suffered by the adult impersonation victim—criminal liability and punishment. While fraud imposing a metaphorical "sentence" of harm is used to justify rape-by-fraud liability,[199] only adult impersonation imposes the prospect of serious criminal punishment. Moreover, even among accepted types

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[194] *See, e.g.*, Boro v. Superior Court, 210 Cal. Rptr. 122, 126 n.5 (Cal. Ct. App. 1985) ("[W]here consent to intercourse is obtained by promises of travel, fame, celebrity and the like—ought the liar and seducer to be chargeable as a rapist? Where is the line to be drawn?"); R v. Cuerrier, [1998] 162 D.L.R.4th 513, 545 (Can.) (McLachlin, J., concurring) ("The argument is made that to go beyond these criteria [the victim being unaware of either the intercourse itself or the identity of the perpetrator] would be to open the door to convictions for assault [or rape] in the case, for example, where a man promises a woman a fur coat in return for sexual intercourse . . . ."); Berger, *supra* note 79, at 76 (posing the question, "What, finally, would be the limits of liability for rape by fraud?").

[195] *See supra* notes 10–11 and accompanying text.

[196] *See, e.g.*, SCHULHOFER, *supra* note 27, at 155–57 (utilizing repeatedly the criterion of harm suffered by the defrauded victim to sort out which cases of fraud suffice to establish rape liability); Feinberg, *supra* note 12, at 336–37, 339–41, 344–45 (employing a standard of comparative harm to determine in several cases which types of fraud warrant rape by fraud liability). For example, Feinberg compares the case of a patient who is fraudulently induced into having intercourse by a doctor who offers the patient money for intercourse and then fails to pay with the case of a patient who is fraudulently induced to have intercourse under the pretext of a gynecological exam. *Id.* at 336–37. According to Feinberg, the unpaid patient is not the victim of rape by fraud, in part, because "she has not suffered a clear harm when she is not paid." *Id.* at 336. But the gynecological patient may well be the victim of rape by fraud because, in part, she "could have been severely harmed" by the fraud. *Id.* at 337. For an additional example, see *supra* notes 154–58 and accompanying text.

[197] WERTHEIMER, *supra* note 59, at 195.

[198] *See, e.g.*, WERTHEIMER, *supra* note 59, at 195, 200–04; Feinberg, *supra* note 12, at 344–45.

[199] *Cuerrier*, 162 D.L.R.4th at 546 (McLachlin, J., concurring) (justifying defendant's rape by fraud liability for obtaining intercourse by failing to inform his partner that he was HIV-positive on the basis that the fraud imposed a "potential sentence of disease or death").

of rape by fraud, none entails the significant possibility of criminal liability and severe punishment.[200] Adult impersonation's unique combination of the type and degree of harmful consequence suffered by the defrauded victim not only affords a stronger basis for rape-by-fraud liability than widely accepted forms of rape by fraud, but also forecloses any line-drawing problems.[201]

2. Juvenile's Legal Incapacity to Consent.—A general precept of the law of statutory rape is that a person below the age of consent is deemed legally incapable of consenting.[202] Therefore, juveniles obtaining intercourse by adult impersonation are legally incapable of consenting to the intercourse and thus, one might argue, cannot be criminally liable for rape by fraud.

But lack of consent, whether from legal incapacity or otherwise, is not a bar to criminal liability for rape. A rape perpetrator's lack of consent is not a defense.[203] Similarly, a perpetrator's consent is not an element of the offense of rape.[204] As a result, a juvenile's lack of consent to the intercourse is irrelevant to the juvenile's liability for perpetrating rape by fraud.[205]

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[200] True, the recognized category of spousal impersonation does entail for the victim the slim possibility of criminal liability for adultery or fornication. But prosecution of adultery or fornication is exceedingly unlikely and even if convicted, a defendant would not receive the severe punishment that might befall the victim of adult impersonation—twenty years of incarceration for statutory rape. *See supra* notes 10, 26–29 and accompanying text.

[201] *See, e.g.*, Puttkammer, *supra* note 17, at 422 n.45 (acknowledging that obtaining intercourse by spousal impersonation could constitute rape by fraud because it can "be confined within clear and knowable limits").

[202] *See, e.g.*, N.Y. PENAL LAW § 130.05(3)(a) (McKinney 2004) ("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, 324 n.6 (Cal. Ct. App. 2000) (noting "the statutory presumption that a person under 18 years of age is incapable of giving legal consent" (citing CAL. PENAL CODE § 261.5 (West 1999 & Supp. 2006))); McBride v. Commonwealth, 605 S.E.2d 773, 775 (Va. Ct. App. 2004) (explaining that a juvenile under the age of fifteen "'cannot legally consent to the act [of intercourse]'" (quoting Buzzard v. Commonwealth, 114 S.E. 664, 666–67 (1922))); *see also supra* note 2; *infra* notes 219–20.

[203] Alan Wertheimer explains how a minor may be held criminally liable for intercourse to which s/he is legally incapable of consenting:

> Consider the distinction between consent and culpability. We may think that a minor does not have the capacity to consent to some transaction, but that she can be held responsible for violating the law or a moral principle . . . . [V]alid consent may require the capacity to understand and act upon one's long-term interests, whereas culpability may require only the capacity to understand and follow a law or principle.

WERTHEIMER, *supra* note 59, at 222.

[204] *See, e.g.*, *In re* Jessie C., 565 N.Y.S.2d 941, 944 (N.Y. App. Div. 1991) ("Although victims under the age of 17 are deemed incapable of consenting to intercourse . . . respondent [a 13-year-old charged with statutory rape] is not a victim. Respondent is charged with perpetrating sexual intercourse. Simply stated, respondent's consent is not an essential element of the crime."). Consider, for example, Oregon's rape statute which, like other states' statutes, does not include the perpetrator's consent to the intercourse as an element of the offense:

> (1) A person who has sexual intercourse with another person commits the crime of rape in the first degree if:

3. No Accomplice Liability for Statutory Rape Victims.—A general principle of criminal law is that one cannot be both accomplice to and victim of the same criminal offense.[206] This principle applies to statutory rape victims:[207] "statutory rape law was enacted to protect young females from immature decisions to have sexual intercourse; the legislature considers her to be the victim of the offense. It would conflict with legislative intent, therefore, if she could be prosecuted as a secondary party to her own statutory rape."[208] One might argue that this principle bars a juvenile from rape-by-fraud liability arising from the same intercourse by which s/he is a victim of statutory rape.

But claiming that a victim should not be criminally liable as a *perpetrator* of a *different* crime misapplies the principle. The principle is that a victim of a crime should not be criminally liable as an *accomplice* to *that* crime. Thus, the principle that bars a statutory rape victim from criminal liability as an accomplice to the very same statutory rape does not extend to barring criminal liability as a perpetrator for a crime distinct from statutory rape—rape by fraud.

4. The Rape Victim Cannot Be the Rape Perpetrator.—One cannot be both a victim and perpetrator of rape with respect to the same act of intercourse. When a juvenile and an adult engage in intercourse, the law of statutory rape treats only the juvenile as the victim.[209] Thus, one might ar-

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(a) The victim is subjected to forcible compulsion by the person;

(b) The victim is under 12 years of age;

(c) The victim is under 16 years of age and is the person's sibling, of the whole or half blood, the person's child or the person's spouse's child; or

(d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.

OR. REV. STAT. ANN. § 163.375 (2003).

[205] If a juvenile's incapacity to consent to intercourse were a bar to rape liability, then no juvenile could ever be criminally liable for rape. Because juveniles are, in fact, held liable for rape, *see supra* note 30, their incapacity to consent is not a defense. For an account of perhaps the most well known instance of juveniles being held criminally liable for raping an adult, see Laura L. Finley, *The Central Park Jogger: The Impact of Race on Rape Coverage*, *in* 5 FAMOUS AMERICAN CRIMES AND TRIALS: 1981–2000, at 123, 132–37 (Frankie Y. Bailey & Steven Chermak eds., 2005) (chronicling juvenile defendants, ranging in age from fourteen to sixteen, being convicted for raping a twenty-eight-year-old woman). Four of the juveniles served seven years of their sentence before their convictions were vacated when another person confessed to committing the crime. *Id.* at 136, 138.

[206] *See, e.g.*, MODEL PENAL CODE § 2.06(6) (Official Draft and Revised Comments, 1985) ("[A] person is not an accomplice in an offense committed by another person if: (a) he is a victim of that offense . . . ."); DRESSLER, *supra* note 3, at 486 ("A person may not be prosecuted as an accomplice in the commission of a crime if he is a member of the class of persons for whom the statute prohibiting the conduct was enacted to protect.").

[207] *See, e.g.*, *In re* Meagan R., 49 Cal. Rptr. 2d 325, 328 (Cal. Ct. App. 1996) (holding that a statutory rape victim "cannot be liable as either an aider or abettor or coconspirator to the crime of her own statutory rape").

[208] DRESSLER, *supra* note 3, at 486.

[209] *See supra* text accompanying note 208.

gue that a juvenile victim of statutory rape perpetrated by an adult cannot, by the same act of intercourse, perpetrate rape by fraud against that adult.

Though the law of statutory rape does make the juvenile the victim, the law of rape by fraud does not. Under the law of rape by fraud, obtaining intercourse by adult impersonation may render the juvenile the perpetrator, and the adult the victim. As a result of the operation of the law of both types of rape, the juvenile is both victim (of statutory rape) and perpetrator (of rape by fraud); the adult is also both victim (of rape by fraud) and perpetrator (of statutory rape). But in no way does the juvenile's status as a victim under statutory rape law preclude the juvenile from being a perpetrator under rape-by-fraud law.[210]

5. Chilling Effect on Statutory Rape Prosecutions.—One might argue that recognizing adult impersonation as a basis for rape by fraud will chill the prosecution of statutory rape. A juvenile will be less likely to press statutory rape charges if doing so subjects the juvenile to prosecution for rape by fraud.

Even assuming arguendo such a chilling effect, existing forms of rape trigger the same effect. A juvenile pressing statutory rape charges is already potentially subject to accusations by the statutory rape defendant that the juvenile raped the adult by force, coercion, or fraud (apart from adult impersonation). Whatever chilling effect these have on statutory rape prosecutions is apparently not deemed a sufficient basis to abolish or refuse to recognize these types of rape. As a result, the prospect of a chilling effect on statutory rape prosecutions is similarly an insufficient basis to refuse to recognize adult impersonation as a form of rape by fraud.[211]

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[210] For a discussion of why the adult's status as rape by fraud victim should provide a defense to statutory rape, but the juvenile's status as statutory rape victim should not provide a defense to rape by fraud, see *infra* note 250 and accompanying text.

[211] The recognition of adult impersonation as rape by fraud may create the positive effect of chilling the incidence of juveniles engaging in intercourse as well as the negative effect of chilling statutory rape prosecutions. The harm of chilling statutory rape prosecutions is that it may undermine the deterrent effect on engaging in intercourse with juveniles thereby undermining the protection statutory rape laws provide to juveniles from the adverse physical and psychological consequences of intercourse. *See infra* notes 221–23 and accompanying text. But recognizing adult impersonation as a form of rape by fraud may enhance the deterrent effect on engaging in intercourse with juveniles. Juveniles will be deterred from misrepresenting their age as above the age of consent. This will decrease the incidence of juveniles engaging in intercourse and thereby reduce the incidence of juveniles suffering from the harmful physical and psychological effects of intercourse. Thus, it is unclear whether recognizing adult impersonation as rape by fraud will enhance or undermine the protection of juveniles from the harmful consequences of intercourse.

Even if the negative chilling effect outweighs the positive chilling effect, this is not a sufficient basis for refusing to recognize adult impersonation as rape by fraud. The threat of prosecution for statutory rape will similarly create a negative chilling effect on adult victims of rape by fraud (via adult impersonation) from coming forward and pressing charges. But that negative chilling effect is, of course, an insufficient basis to refuse recognition of statutory rape liability. Likewise, a negative chilling effect on

E. Conclusion

Obtaining intercourse by adult impersonation qualifies as rape by fraud under the existing principles, standards, and tests employed in over thirty jurisdictions.[212] Moreover, under many of these approaches adult impersonation more convincingly qualifies as rape by fraud than currently accepted forms of rape by fraud. In particular, to the extent that most jurisdictions recognize spousal impersonation as rape by fraud,[213] then *a fortiori* most jurisdictions will recognize adult impersonation as rape by fraud. Even apart from satisfying specific, existing legal standards, adult impersonation satisfies perhaps the most fundamental basis for imposing rape-by-fraud liability—serious harm befalling the defrauded victim. This prospect of severe criminal punishment for the defrauded victim, unique to adult impersonation among types of fraud, bypasses the oft-voiced concern of line-drawing difficulties in recognizing new forms of rape by fraud. Given the considerable support in existing caselaw and statutes for recognizing adult impersonation as rape by fraud, the next Part considers the significance outside the law of rape by fraud.

III. A NEW DEFENSE TO STATUTORY RAPE

Recognition that obtaining intercourse by adult impersonation constitutes rape by fraud lays the foundation for a new defense to the strict liability offense of statutory rape. No statutory rape defendant has ever argued for a defense based on being the victim of rape by fraud perpetrated by the statutory rape victim. This Part broadly outlines the basis for this new defense.[214] It supplies a more persuasive basis for exculpation than the honest and reasonable mistake-of-age defense already adopted in over twenty jurisdictions.[215] But while the mistake-of-age defense requires a departure from the strict liability rule, our new defense does not. By applying even within a strict liability approach, it would succeed where the mistake-of-age defense has failed. Before explicating this new defense, the next section presents an overview of statutory rape law.

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juvenile victims of statutory rape is also an insufficient basis to refuse recognition of adult impersonation as rape by fraud.

[212] *See supra* Part II.A–C. For a list of the jurisdictions in which obtaining intercourse by adult impersonation qualifies as rape by fraud, see *infra* Appendix.

[213] *See supra* note 162 and accompanying text.

[214] A more comprehensive analysis of how recognizing adult impersonation as rape by fraud might furnish a defense to statutory rape will be the focus of a future article.

[215] *See supra* note 40.

A. Overview of the Law of Statutory Rape

The offense of statutory rape[216] consists of intercourse with a person younger than a specified age, typically sixteen.[217] The offense is committed regardless of whether the perpetrator uses force or the underage victim acquiesces to the intercourse.[218] The underlying rationale is that a person younger than the specified age lacks the maturity to give sufficiently informed consent.[219] As a result, juveniles are often deemed legally incapable of giving valid, effective consent.[220] The purpose of the offense is to protect juveniles both from older, more experienced sexual predators as well as from themselves.[221] Although juveniles may have some interest in intercourse, the law affords them protection from their own interests because

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[216] "[T]his variety of rape came to be known as 'statutory rape,' apparently because it was originally engrafted onto the common law by statute, and that term is so used even today notwithstanding the fact that now statutes virtually everywhere encompass the totality of the crime of rape." LAFAVE, *supra* note 6, at 778. Few jurisdictions, however, actually designate this crime as statutory rape, but instead use a variety of other terms. *See* Carpenter, *supra* note 4, at 314 n.2 (noting that statutory rape is variously termed as "sexual conduct with a minor," "sexual abuse of a minor," "statutory sexual seduction," and "felony carnal knowledge of a juvenile," among others). For an interesting account of three theories underlying statutory rape law—conservative, liberal, and radical—see, Keith Burgess-Jackson, *Statutory Rape: A Philosophical Analysis*, 8 CAN. J.L. & JURISPRUDENCE 139, 145–51 (1995).

[217] *See* 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 (those between fourteen and seventeen) who engage in factually consensual sex (i.e., they do not employ 'force' within the meaning of the rape law)."); *see also supra* note 2.

[218] While the traditional conception of rape is intercourse by force and without the consent of the victim, *see, e.g.*, MODEL PENAL CODE § 213.1 cmt. at 275 (Official Code and Revised Comments, 1985) (noting that rape was traditionally understood as intercourse "by force and against her will"), the offense of statutory rape may be committed in the absence of both. *See, e.g.*, State v. Anthony, 516 S.E.2d 195, 198 (N.C. Ct. App. 1999) (contrasting rape "by force and against the will" of the victim with statutory rape which may involve consensual intercourse); CATHARINE MACKINNON, SEX EQUALITY 871 (2001) ("Under laws criminalizing sex with children, childhood substitutes for both force and lack of consent.").

[219] *See, e.g.*, MODEL PENAL CODE § 213.1 cmt. at 276 (explaining that the original rationale for the offense "was that a child under a certain age should be regarded by the law as incapable of giving effective consent"). Noted rape scholar Catharine MacKinnon articulates the law's understanding of immaturity, as measured by chronological age, precluding the capacity for consent to intercourse:

> At law, children are considered incapable of withholding or giving consent to sex: partly because they may not know what they are doing or what is being done to them, or the meaning of what they are being asked or told to do; partly because they will often do what adults ask, whether they want to or not. Whatever the reason their will is considered incompetent or immaterial.

MACKINNON, *supra* note 218, at 871.

[220] *See, e.g.*, State v. Jadowski, 680 N.W.2d 810, 817 (Wis. 2004) ("The [statutory rape] statute is based on a policy determination by the legislature that persons under the age of sixteen are not competent to consent to sexual contact or sexual intercourse."); *see also supra* notes 2, 202.

[221] *See, e.g.*, *Jadowski*, 680 N.W.2d at 817 ("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.").

they may not fully understand the risks or consequences of pregnancy,[222] procreation, and venereal disease.[223]

Some critics and feminists counter that *criminalizing* intercourse with juveniles, not intercourse per se, is what harms juveniles. Statutory rape laws are said to smack of "[p]aternalism,"[224] "reflect and reinforce archaic assumptions about the . . . weakness and naiveté of young women,"[225] and could undermine abortion rights.[226] Frances Olsen captures the dilemma confronting feminists:

> These laws pose a classic political dilemma for feminists. On one hand, they protect females; like laws against rape, incest, child molestation, and child marriage, statutory rape laws are a statement of social disapproval of certain forms of exploitation. To some extent they 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.[227]

On this account, statutory rape laws protect as they disempower.[228]

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[222] For example, the United States Supreme Court found that prevention of teenage pregnancies is one of the principal purposes of California's statutory rape law:

> The justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies . . . .
>
> We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the "purposes" of the statute, but also that the State has a strong interest in preventing such pregnancy.

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 470 (1981); *see also* Levine, *supra* note 217, at 709 ("In the mid-1990s, states across the United States took a closer look at their statutory rape laws as part of a broader campaign to reduce teenage pregnancy and welfare reliance.").

[223] *E.g.*, *Michael M.*, 450 U.S. at 470 ("Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of 'chastity,' and still others about promoting various religious and moral attitudes towards premarital sex."); Owens v. State, 724 A.2d 43, 52 (Md. 1999) (noting that statutory rape laws are designed to minimize the risks to the victims that include "potential physical harm, including the risk of venereal diseases, especially the HIV virus, trauma, and even permanent damage to a child's organs"); People v. Gonzalez, 561 N.Y.S.2d 358, 361–62 (Westchester County Ct. 1990) (same).

[224] Guerrina, *supra* note 221, at 1261.

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

[226] *See, e.g.*, Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 75 (1994) ("[Statutory rape] laws which treat minors as insufficiently mature to consent to sex might easily become ammunition for those wishing to restrict minors' access to reproductive health care.").

[227] Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 401–02 (1984).

[228] *See* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 757 (2000) (chronicling the "tension between the protective and the patriarchal impulses underlying statutory rape law"). Although traditionally statutory rape law limited the class of offenders to males and the class of victims to females, "[t]oday, the vast majority of these laws are neutral with respect to the gender of potential offender and victim." BONNIE ET AL., *supra* note 66, at 400. For accounts noting that increasingly the perpetrators are female and the victims are male, see Kay L. Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357, 380–88 (2006); Kate Zernike, *The Siren Song of Sex with Boys*, N.Y. TIMES, Dec. 11, 2005, § 4, at 3.

Also controversial is the application of strict liability. Under strict liability, a defendant's mens rea is irrelevant. While other defenses are still applicable, defenses negating the defendant's mens rea are not.[229] Since the landmark 1875 English case, *Regina v. Prince*,[230] statutory rape was uniformly considered a strict liability offense in America with respect to the element of the age of the victim.[231] That is, a defendant's honest and reasonable mistake as to the age of the victim is not a defense.[232] For example, in a jurisdiction prohibiting intercourse with persons younger than sixteen years of age, a defendant who has intercourse with a fifteen-year old, but who honestly and reasonably believes the juvenile is seventeen, would nonetheless commit statutory rape.[233]

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[229] *See supra* note 3. For a discussion of the ambiguity surrounding the term strict liability, see, for example, Husak, *supra* note 3, at 189–90 (identifying at least seven different varieties of strict liability and suggesting that "it may seem sensible to recommend that the term 'strict liability' should be banished from the legal vocabulary"); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 417 (1993) ("The precise meaning of 'strict liability offenses' is unclear.").

[230] (1875) 2 L.R.C.C.R. 138. For a brief discussion of the case, see *supra* note 1 and *infra* note 231.

[231] *See, e.g.*, 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, *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."). For further critical discussion of *Prince*'s influence on statutory rape law in America, see Garnett v. State, 632 A.2d 797, 812–14 (Md. 1993) (Bell, J., dissenting) (criticizing the theory of the case as unpersuasive); State v. Yanez, 716 A.2d 759, 781 (R.I. 1998) (Flanders, J., dissenting) (concluding that "[a] united front of modern legal commentators lambastes [*Prince*'s reasoning] . . . as without precedent or foundation in the criminal law."). For defenses of *Prince*, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 653–56 (1984); Dan M. Kahan, *Is Ignorance of Fact an Excuse Only for the Virtuous?*, 96 MICH. L. REV. 2123, 2123–26 (1998).

[232] *See supra* notes 4–6 and accompanying text.

[233] Some jurisdictions require that the perpetrator be a specified number of years older than the victim. *See supra* note 2. If such a jurisdiction required an age differential of, for example, more than three years, then the defendant could only be convicted if s/he is nineteen years of age or older. Some states adopt a "two-tiered approach" featuring both absolute age and age differential elements. WERTHEIMER, *supra* note 59, at 216 ("A female under a specified age (say fourteen) may be unable to give transformative [legally effective] consent whatever the age of her partner. But if the female is within a certain age range (say fourteen to sixteen), she cannot give legally transformative consent to a partner who is significantly older . . . .").

This strict liability rule has been much criticized by commentators[234] and was even abrogated in England only ten years after *Prince*.[235] Many object that strict liability is anathema to the criminal law[236] and violates "the venerable principle that *actus non facit reum, nisi mens sit rea*."[237] Even where strict liability is grudgingly accepted, it is generally reserved for public welfare and regulatory offenses[238] that typically entail fines or other

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[234] *See, e.g.*, GEORGE FLETCHER, RETHINKING CRIMINAL LAW 728 (1978) ("The courts seem no longer to reason about the issue. The claims of the defense [as to mistake of age] are rejected with a ritualistic allusion to protecting young females and defendants' acting at their peril. . . . [L]egislative reform appears to be the only likely path for ameliorating the influence of *Prince* . . . ."); Carpenter, *supra* note 4, at 320 (arguing that "statutory rape should no longer be treated as a strict liability crime, and defendants should be able to mount a reasonable mistake-of-age defense"); Myers, *supra* note 231, at 136 ("Judicial responsibility is long overdue in exposing statutory rape laws as an 'ethereal structure of fictions' which for so long has artificially protracted American childhood."); Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 78–79 (1952) (arguing against strict liability for statutory rape and advocating an affirmative defense based on the victim's actual consent being sufficiently informed to be legally effective).

[235] *See* Criminal Law Amendment Act of 1885, 48 & 49 Vict. c. 69 § 5, *reprinted in* 5 HALSBURY'S STATUTES OF ENGLAND 907–08 (2d ed. 1948) (supplying an express defense for mistake of age of the victim for the offense of defilement of a girl between the ages of thirteen and sixteen).

[236] *E.g.*, Morissette v. United States, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted . . . [with mens rea] is no provincial or transient notion. It is . . . universal and persistent in mature systems of law."); MODEL PENAL CODE § 2.05 cmt. at 282 (Official Code and Revised Comments, 1985) ("[The Code] makes a frontal attack on . . . strict liability in the penal law."); DRESSLER, *supra* note 3, at 146 ("Most modern criminal law scholars look unkindly upon the abandonment of the *mens rea* requirement."); FLETCHER, *supra* note 234, at 729–30 ("[Many] instances of strict liability ignore the principles of just and proportional punishment. . . . Punishing according to the degree of objective wrong, regardless of the actor's accountability for the wrong, is to mock the classical principles of just punishment."); Husak, *supra* note 3, at 189 ("Little about strict liability has evoked much agreement among commentators except for their opposition to it."); *cf.* Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107 ("*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes.").

[237] State v. Yanez, 716 A.2d 759, 775 (R.I. 1998) (Flanders, J., dissenting). Consider the following invocation of the principle to criticize the decision to treat statutory rape as a strict liability offense:

> This decision . . . spurns one of the most fundamental principles of the criminal law.
>
> The essence of our system of criminal justice, familiar to any first-year law student, is the venerable principle that *actus non facit reum, nisi mens sit rea*; or in other words, a criminal act flows only from the "concurrence of an evil-meaning mind with an evil-doing hand."

Id. (quoting *Morissette*, 342 U.S. at 251).

[238] Joshua Dressler supplies the following concise account of the rise of *malum prohibitum*, public welfare offenses:

> Until the middle of the nineteenth century, Anglo-American crimes almost exclusively involved conduct *malum in se* (inherently wrongful), such as murder, rape, and robbery. Conviction for such offenses, which required *mens rea*, was gravely stigmatizing, and the penalties for their violation were severe.
>
> With the advent of the Industrial Revolution . . . Congress and state legislatures enacted laws, most of which contained no express *mens rea* requirement, that came to be characterized as "public welfare offenses." Such offenses, in contrast to traditional crimes, involve conduct *malum prohibitum* (wrong because it is prohibited). Examples include statutes that prohibit the manufacture or sale of impure food or drugs to the public, anti-pollution environmental laws, as well as traffic and motor-vehicle regulations.

forms of mild punishment.[239] But statutory rape is a very serious *malum in se*[240] crime subjecting a defendant to possibly twenty years' imprisonment,[241] or even longer.[242] Defenders of strict liability argue, as statutory rape scholar Catherine Carpenter explains, "that it 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] But, as Laurie Levenson notes, "the dominant view appears to be that in the Anglo-American culture, the use of strict liability crimes is arbitrary and unreasonable."[244]

Despite these objections, strict liability with respect to the age of the victim remains the majority rule for statutory rape.[245] The majority rule denies a defense not only where the fact-finder determines that the defendant

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DRESSLER, *supra* note 3, at 144–45.

[239] The following account expresses the view that as a non-public-welfare offense, statutory rape should not be a strict liability offense:

> To lump such a crime [statutory rape] with petty gambling or commercial mislabeling belittles the gravity of [statutory rape] . . . . Conversely, the degree of punishment and societal opprobrium befitting [statutory rape] . . . cannot be so cavalierly imposed without regard to the culpable intention of the actor as can the light fines and slap-on-the-wrist penalties attached to typical public-welfare offenses.

Yanez, 716 A.2d at 781 (Flanders, J., dissenting); *see also* DRESSLER, *supra* note 3, at 146 ("[S]trict liability non-public-welfare offenses [the principal example of which is statutory rape] are aberrant and especially controversial.").

[240] For a discussion of the distinction between *malum in se* offenses and *malum prohibitum* offenses, see *supra* note 238.

[241] *E.g.*, Garnett v. State, 632 A.2d 797, 801 (Md. 1993) ("Statutory rape, carrying the stigma of felony as well as a potential sentence of 20 years in prison, contrasts markedly with the other strict liability regulatory offenses and their light penalties.").

[242] *See supra* note 11.

[243] Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 321 (2006); *see also infra* notes 262–63 and accompanying text.

[244] Levenson, *supra* note 229, at 403 n.7.

[245] *See supra* notes 3–6. Prior to *People v. Hernandez*, 393 P.2d 673, 677–78 (Cal. 1964) (reversing a conviction for statutory rape and allowing a defense based on the defendant's lack of criminal intent due to an honest and reasonable mistake as to the victim's age), statutory rape was regarded as a strict liability offense with respect to the age of the victim in all fifty states. *See, e.g.*, United States v. Brooks, 841 F.2d 268, 270 (9th Cir. 1988) ("[S]tatutory rape was universally regarded as a strict liability offense until well into the twentieth century."); State v. Jadowski, 680 N.W.2d 810, 817 (Wis. 2004) ("[T]he traditional approach [to statutory rape], originally accepted in virtually every state . . . is to impose strict liability regarding the age of the victim."); LAFAVE, *supra* note 6, at 779 ("[S]tarting in 1964, some courts began to recognize that a statutory rape defendant was entitled to a defense of reasonable mistake of fact regarding the victim's age." (citing *Hernandez*, 393 P.2d at 678)). For jurisdictions following *Hernandez* in allowing some form of honest and reasonable mistake-of-age defense to statutory rape, see, for example, State v. Guest, 583 P.2d 836, 838–39 (Alaska 1978) (finding a constitutional right of due process for the defendant to offer evidence as to mistake of age as a defense to statutory rape); Perez v. State, 803 P.2d 249, 251 (N.M. 1990) (holding that defendant may offer defense of mistake of age where the victim is between the ages of thirteen and sixteen); State v. Ballinger, 93 S.W.3d 881, 891 (Tenn. Crim. App. 2001) (reversing defendant's conviction for statutory rape where trial court refused to instruct jury on defendant's mistake-of-age defense).

honestly and reasonably believed the juvenile to be of age, but also even where the juvenile falsely represented being of age.[246] But the recognition that obtaining intercourse by adult impersonation constitutes rape by fraud may lay the foundation for a new defense.

B. Foundation for the New Defense

If a juvenile rapes an adult (for example, at gunpoint), should the adult be criminally liable for statutory rape for that very intercourse?[247] Of course not. Therefore, if a juvenile rapes by adult impersonation, the adult victim should not be criminally liable for statutory rape for that very intercourse. If charged with statutory rape, the adult victim should have a defense. The defense is based not only on an honest and reasonable mistake of age and the juvenile's false representation, but also that the juvenile's false representation rises to the level of fraud sufficiently serious to warrant condemnation as the crime of rape. Mistake of age and misrepresentation of age have been raised as defenses, both individually and jointly, and roundly rejected by the courts.[248] But these claims have never before been made in conjunction with the additional claim that the juvenile's misrepresentation is sufficiently material to constitute one of the law's most grave crimes—rape.[249]

One who is fraudulently induced into engaging in intercourse (and that fraud qualifies as rape by fraud), should not be criminally liable for that very act of intercourse. In reliance on the statutory rape victim's false representation, the statutory rape defendant agrees to engage in the intercourse. Only after, and because of, the juvenile's fraudulent and criminal conduct does the adult rape-by-fraud victim engage in the intercourse constituting

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[246] *See, e.g., Jadowski*, 680 N.W.2d at 817 (stating that the majority rule is to bar a mistake-of-age defense "no matter how reasonable the defendant's belief that the victim was old enough to consent, and no matter that the belief is based on the victim's own representations"); Carpenter, *supra* note 4, at 353 ("[C]ourts find it irrelevant that the victim may have actively concealed or lied about his or her age."); *see also supra* notes 4–6.

[247] *See supra* text preceding and following note 37.

[248] *E.g.*, Owens v. State, 724 A.2d 43, 45 (Md. 1999) (affirming conviction of statutory rape despite defendant's undisputed evidence that victim admitted falsely representing her age to defendant as being above the age of consent); *Garnett v. State*, 632 A.2d 797, 799 (Md. 1993) (upholding trial court's determination that victim's false representation of being above the age of consent is immaterial to charge of statutory rape); *Jadowski*, 680 N.W.2d at 823 (barring a defense to statutory rape "predicated on a child's intentional misrepresentation of her age"). For additional cases where the statutory rape victim falsely represented his or her age, see Carpenter, *supra* note 4, at 351–52, 352 n.217, 352 n.219, and 353 n.226; Carpenter, *supra* note 243, at 318 n.103.

One jurisdiction limits a mistake-of-age defense to when it is based on the victim's false representation of age. *See* WASH. REV. CODE ANN. § 9A.44.030(2) (West 2000) (allowing a mistake-of-age defense only if proved by a preponderance of the evidence that it was "based upon declarations as to age by the alleged victim").

[249] *See supra* note 22.

statutory rape.[250] Criminal liability should not attach to one who becomes a perpetrator of statutory rape because s/he became a victim of rape by fraud. In broader terms, one should not be criminally liable for statutory rape for the very act of intercourse by which one is a victim of rape.

C. Elements, Application, and Scope of Defense

Perhaps the best way to appreciate how this defense might practically apply is to compare it with the principal defense to statutory rape. Following *People v. Hernandez*, over twenty states now allow some form of mistake-of-age defense.[251] The only requisite element is that (1) the defendant honestly and reasonably believed that the victim was of age. Demonstrating that (2) the victim affirmatively misrepresented being of age to the defendant is helpful, but unnecessary. Also not a requisite element, the victim's misrepresentation has recently been characterized as (3) fraud.[252] So under the minority rule, satisfaction of only the first element is necessary to obtain a defense; under the majority rule of strict liability, satisfaction of even all three elements is insufficient.

Our new defense requires additional elements. The juvenile's fraudulent misrepresentation as to being of age must be (4) sufficiently serious and material to make the defrauded adult a victim of rape by fraud. Though jurisdictions' criteria for rape by fraud vary, some possible additional elements that a jurisdiction might impose could include that the misrepresentation was (4a) uttered to mislead the defendant, (4b) intended to induce the defendant to engage in intercourse with the juvenile, and (4c) relied on in forming the defendant's honest and reasonable belief that the juvenile was of age.[253] Also, a jurisdiction might well require that (5) the defendant proves the above elements by a preponderance of the evidence. A jurisdiction should not require, however, that the juvenile be convicted of, or even charged with, rape by fraud. The statutory rape defendant should remain eligible for the defense regardless. The defendant need only establish that the juvenile, in fact, committed rape by fraud.

As the above comparison demonstrates, this new defense is both stronger and narrower than the *Hernandez* mistake-of-age defense. It affords a stronger basis for a defense in that the defendant is not merely mistaken about the juvenile's age, but also is the victim of rape by fraud perpetrated by the juvenile. And by requiring these additional elements the

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[250] For this reason, (i) the adult's status as rape victim should be the basis for a defense to statutory rape liability; and, (ii) the juvenile's status as statutory rape victim should *not* be the basis for a defense to rape by fraud.

[251] 393 P.2d 673 (Cal. 1964). For a discussion of *Hernandez* and its influence, see *supra* notes 38–40 and accompanying text.

[252] *See supra* note 22.

[253] For a discussion of some of these possible requirements, see State v. Blake, 777 A.2d 709, 711–12 (Conn. App. Ct. 2001); *supra* Part II.A.2.c.

defense will apply to an appreciably narrower class of defendants. As a result, this seemingly radical defense is actually more modest and limited than the defense recognized for over forty years and accepted in over twenty jurisdictions.[254]

While available to a narrower class of defendants, this new defense is applicable in a greater number of jurisdictions, and it applies even under the majority rule of strict liability. In contrast, the mistake-of-age defense fails under strict liability because the defendant's mens rea regarding the age of the juvenile is irrelevant. As such, the assertion of a mistake that would negate the defendant's mens rea is also irrelevant. Thus, recognizing the *Hernandez* defense requires a jurisdiction to depart from strict liability. Recognizing the new defense, however, requires no such departure. Not predicated on negating mens rea, this new defense is not barred by strict liability. Even if strict liability fairly requires an adult to assume the risk that a sexual partner will turn out to be underage, it cannot require an adult to assume the risk of being raped.[255]

Because this defense is stronger, narrower, and works within a strict liability framework, it could succeed where the *Hernandez* defense has failed. Jurisdictions following the majority rule of strict liability could continue disallowing a mistake-of-age defense while allowing this new defense. Even under strict liability, one should not be criminally liable as a perpetrator of statutory rape for the very act of intercourse by which one is a victim of rape.

D. Objections

This section anticipates the following four possible objections to this new defense. First, being a rape victim is no defense to a charge of perpetrating statutory rape. That is, two wrongs do not make a right. Second, allowing this defense undermines the goals of criminalizing intercourse with juveniles. Third, the defense qualifies as blaming the victim. And fourth, by engaging in intercourse one assumes the risk that one's sexual partner will turn out to be underage. We will rebut each of these possible objections.

1. Two Wrongs Do Not Make a Right.—One might argue that the adult being the victim of rape by fraud as perpetrated by the juvenile should not (and does not) relieve the adult of criminal liability for statutory rape. An adult's reasonable reliance on a juvenile's material misrepresentation of being of age does not supply a defense under a strict liability approach. And it should not even if the juvenile making the material misrepresentation thereby perpetrates rape by fraud against the adult. Two wrongs do not make a right.

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[254] *See supra* notes 38–40, 245 and accompanying text.

[255] For an elaboration of this point, see *infra* Part III.D.4.

To assess this objection consider the following hypothetical. Suppose a juvenile commits rape by fraud against an adult wife by impersonating her husband.[256] By simply being the victim of this rape by fraud the adult wife perpetrates statutory rape.[257] But as the victim of rape by fraud, *should* the adult be liable for statutory rape? Did the adult affirmatively do anything that should subject her to statutory rape liability other than become a rape-by-fraud victim? The answer to both questions is, presumably, no. Since the adult victim of rape by fraud (via spousal impersonation) deserves a defense to statutory rape, then the adult victim of rape by fraud (via adult impersonation) likewise deserves a defense to statutory rape.

2. Undermines Policy Goal of Protecting Juveniles.—One might argue that allowing this new defense undermines the primary policy goal of criminalizing intercourse with juveniles. Criminalizing statutory rape deters intercourse with juveniles, thereby protecting them from the harmful physical and psychological consequences of intercourse.[258] Granting this new defense to statutory rape erodes the deterrent effect and the protection the offense affords to juveniles. Therefore, one might argue, public policy militates against recognizing the defense.

Even assuming arguendo the premise of the objection—that allowing the defense decreases the deterrent effect and reduces the protection of juveniles—the conclusion does not follow. Allowing this new defense undermines the goals of statutory rape law *less* than the existing, mistake-of-age defense to statutory rape. The mistake-of-age defense applies in much broader circumstances than being the victim of rape by fraud via adult impersonation.[259] The new defense is narrower and more modest. If the broader defense is not rejected as eroding the policy goals of statutory rape, then neither should be the narrower, more limited defense.[260]

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[256] Suppose further that this occurs in a jurisdiction recognizing intercourse obtained by spousal impersonation as rape by fraud. For a discussion of such jurisdictions, see *supra* Part II.B.2.

[257] This hypothetical assumes that the adult wife satisfies the requisite elements of the typical statutory rape offense by engaging in intercourse with an underage juvenile who is a sufficient number of years younger than the adult. *See, e.g.*, *Blake*, 777 A.2d at 713 ("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."). For a further discussion of the elements of statutory rape, see *supra* note 2 and text accompanying notes 216–218.

[258] *See supra* notes 221–23 and accompanying text.

[259] *See supra* Part III.C.

[260] Because this new defense is narrower and more modest, even jurisdictions rejecting the mistake-of-age defense might well recognize this new defense. Of course, this might not completely allay the concerns of jurisdictions rejecting a mistake-of-age defense. That the new defense undermines the protection of juveniles, even to some limited extent, militates against its recognition in such jurisdictions. But this limited loss of protection to juveniles must be balanced against the fundamental unfairness of criminalizing as statutory rape the status of being an adult victim of rape by fraud. The importance of avoiding such a fundamentally unfair result outweighs the limited loss of protection to juveniles. For an argument that recognizing adult impersonation as rape by fraud will promote the protection of juveniles, see *supra* note 211.

3. Blaming the Victim.—One might argue that by raising a defense to statutory rape based on the conduct of the statutory rape victim, the defendant is blaming the victim. By claiming that the statutory rape victim raped (by fraud) the statutory rape defendant, the defendant is engaging in the impermissible tactic of blaming the victim.

While perhaps impermissible to blame a blameless victim, blaming a blameworthy victim is permissible. For example, a defendant charged with battery or homicide might properly argue as a defense that the battery or homicide was a necessary and justifiable use of self-defense against the victim's unlawful and blameworthy aggression. Thus, the defense of self-defense qualifies as a permissible victim-blaming defense. Similarly, the law of rape by fraud might find that a juvenile obtaining intercourse by spousal impersonation is a blameworthy rapist. If charged with statutory rape the adult victim of the juvenile's rape by fraud (via spousal impersonation) might permissibly raise a defense by blaming the blameworthy juvenile statutory rape victim. So too, an adult victim of rape by fraud (via adult impersonation) might permissibly raise a defense by blaming the blameworthy juvenile rape-by-fraud perpetrator/statutory rape victim.[261]

4. Adult Assumes Risk that Juvenile Is Underage.—One rationale for applying strict liability to statutory rape is that the adult assumes the risk of an underage sexual partner.[262] Even where the partner both reasonably appears to be and claims to be of age, the adult assumes the risk that the partner is underage.[263] Since the adult assumes the risk, one might argue that the adult does not deserve a defense to statutory rape.

While the assumption of risk that one's partner is underage is perhaps understandable, assumption of the risk of being raped is not. Under the assumption-of-risk rationale, holding an adult victim of rape by fraud criminally liable for statutory rape is to impose on the adult the assumption of risk of being raped by an underage perpetrator. Since the law does not im-

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[261] In addition, the objection defeats itself. While the law of statutory rape declares the juvenile to be the victim, the law of rape by fraud may declare the adult (defrauded by adult impersonation) to be the victim. The adult victim of rape by fraud, if charged with statutory rape, could similarly argue that the statutory rape prosecution is blaming the victim. The very objection against blaming the victim applied to bar the adult's defense to statutory rape also applies to block a statutory rape prosecution of an adult rape by fraud victim. As a result, the objection neutralizes itself.

[262] *See, e.g.*, United States v. Ransom, 942 F.2d 775, 777 (10th Cir. 1991) ("[Statutory rape law] protects children from sexual abuse by placing the risk of mistake as to a child's age on an older, more mature person."); Myers, *supra* note 231, at 119 ("Because of supposed policy reasons, the 'wrongdoer' has traditionally been required to assume the risk of his actions in statutory rape."); *see also supra* text accompanying note 243.

[263] *See, e.g.*, Owens v. State, 724 A.2d 43, 54 (Md. 1999) ("Deterrence is accomplished by placing the risk of an error in judgment as to a potential sex partner's age with the potential offender."); State v. Jadowski, 680 N.W.2d 810, 822 (Wis. 2004) ("[S]trict liability regarding the age of the minor furthers the legitimate government interest in protecting children from sexual abuse by placing the risk of mistake on the adult actor.").

pose on one the assumption of risk of being raped, the law does not impose the assumption of risk that one's rapist may turn out to be underage.

CONCLUSION

Although the issue has never arisen, obtaining intercourse by adult impersonation already constitutes rape by fraud under the existing standards, tests, and rationales utilized in over thirty jurisdictions. All that remains is judicial recognition. And adult impersonation easily surmounts the chief obstacle: if we allow this to be rape by fraud, where do we draw the line? Adult impersonation's unique combination of degree and type of harmful consequence suffered by the defrauded victim—the prospect of severe criminal punishment for statutory rape—not only affords a stronger basis for rape-by-fraud liability than widely accepted forms of rape by fraud but also forecloses any line-drawing problems. The harmful consequence of criminal liability for statutory rape thus supplies both a principled basis for, and a practical limit on the scope of, rape-by-fraud liability.

Adult impersonation constituting rape by fraud also may lay the foundation for a new defense to the strict liability offense of statutory rape. If a juvenile rapes an adult, the adult victim should not be criminally liable for statutory rape for that very intercourse. Therefore, if a juvenile rapes by adult impersonation, the adult victim should not be criminally liable for statutory rape for that very intercourse. Criminal liability should not attach to one who becomes a perpetrator of statutory rape because s/he became a victim of rape by fraud. Even the strict liability form of statutory rape cannot impose on an adult the assumption of risk of being raped.

This Article concludes that what statutory rape law bars as a defense supplies the basis for a new form of rape by fraud; in turn, this new form of rape by fraud supplies the basis for a new defense to statutory rape. Adult impersonation both constitutes a new form of the offense of rape by fraud and lays the foundation for a new defense to the strict liability offense of statutory rape.

APPENDIX: JURISDICTIONS & STANDARDS UNDER WHICH OBTAINING INTERCOURSE BY ADULT IMPERSONATION MAY CONSTITUTE RAPE BY FRAUD[264]

Standards of Fraud and Consent

	Fraud w/o Limit.[265]	Nature of Act[266]	Essential Charac.[267]	Material-ity[268]	Identity Fraud[269]	Spousal Impers.[270]	Global Consent[271]	Knowing Consent[272]
Ala.	X					X	X	
Ariz.		X				X		
Cal.		X	X			X		X
Colo.						X	X	
Conn.						X		
Del.							X	
Fla.								X
Haw.	X						X	
Idaho		X				X		
Ill.								X
Ind.				X				
Iowa				X				
La.						X		
Me.							X	
Mich.	X				X			
Miss.						X		
Mo.						X	X	
Mont.							X	
Neb.		X			X			
Nev.	X			X				
N.J.							X	
N.C.						X		
N.D.						X	X	
Ohio						X		
Okla.						X		
Pa.							X	
R.I.	X							
Tenn.	X			X	X		X	
Tex.							X	
Utah	X					X		
Va.	X							
Wis.								X
Wyo.						X		
P.R.						X		
U.S.Mil.					X			
M.P.C.		X				X	X	

[264] Either via statute or caselaw, thirty-three states, Puerto Rico, the U.S. Military Code, and the Model Penal Code supply standards of fraud, types of fraud, or conceptions of consent that support criminalizing adult impersonation as rape by fraud.

[265] *See supra* Part II.A.1.

[266] *See supra* Part II.A.2.a.
[267] *See supra* Part II.A.2.b.
[268] *See supra* Part II.A.2.c.
[269] *See supra* Part II.B.1.
[270] *See supra* Part II.B.2.
[271] *See supra* Part II.C.1.
[272] *See supra* Part II.C.2.