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SEXUAL EXPLOITATION AND THE ADULTIFIED BLACK GIRL

MIKAH K. THOMPSON[†]

INTRODUCTION

Blue Ivy Carter, daughter of entertainers Sean “Jay Z” Carter and Beyoncé Knowles Carter, celebrated her eighth birthday in January of 2020.¹ To commemorate the occasion, Blue’s grandfather, Matthew Knowles, posted a picture of Blue on Instagram.² Fans and journalists alike marveled that Blue looked so much like her famous mother, and many noted that she looked much older in the photograph.³ E! News tweeted Blue’s picture along with a question: “Can someone please explain to us when Blue Ivy became an adult?”⁴ The post went viral, and many people criticized E! News for referring to eight-year-old Blue as an adult, with some arguing that blurring the line between childhood and adulthood “‘perpetuates pedophilia.’”⁵

[†] Associate Professor of Law, University of Missouri-Kansas City. I would like to thank my colleagues at the UMKC School of Law for all of your support throughout the years. The editors of the *St. John’s Law Review* provided superb editorial suggestions, and I thank them for their hard work and patience during the editing process. All errors are mine. This piece is dedicated to Patricia Roberson Lipsey, my mother and my first love. Thank you for teaching me to embrace the beauty and complexity of my blackness and my womanhood. Finally, I would like to thank my husband, Brandon P. Thompson, and our four children, Rashai, Myah, Maxwell, and Ethan. You are my greatest blessings. Thank you for always being my champions.

¹ See Kimberly Zapata, *Blue Ivy is Beyoncé’s Mini-Me in This Rare Birthday Instagram Photo*, OPRAH MAGAZINE (Jan. 8, 2020), <https://www.oprahmag.com/entertainment/a30443370/blue-ivy-birthday-photo-beyonce-twin/> [https://perma.cc/BM97-ZWEG].

² *Id.*

³ See, e.g., *id.* (“[A] recent picture of Blue Ivy has rendered us speechless. Why? Because in it she looks grown—and just like her mom.”). See also Olivia Blair, *Blue Ivy Carter Looks So Grown Up in Eighth Birthday Photo Shared by Beyoncé’s Dad*, ELLE (Aug. 1, 2020), <https://www.elle.com/uk/life-and-culture/a30439021/blue-ivy-carter-birthday-photo/> [https://perma.cc/9TQN-NZM5].

⁴ *Fans Aren’t Having It After Blue Ivy Carter Gets Called an ‘Adult’ on 8th Birthday*, ACESHOWBIZ (Jan. 8, 2020), <https://www.aceshowbiz.com/news/view/00147145.html> [https://perma.cc/X5JC-74E2].

⁵ *Id.*

Others asserted that referring to a Black girl as an adult is especially dangerous because it reinforces the perception that Black girls are adult-like.⁶ E! News eventually deleted the tweet.⁷

A recent research study confirms that society tends to view Black girls as older and more adult-like than they actually are.⁸ Thus, E! News' description of Blue Ivy may reflect a larger problem that can have devastating effects for Black girls. This piece asserts that a two-tiered justice system exists for victims of sexual exploitation⁹ depending on their race. As we commemorate the one hundredth anniversary of the passage of the Nineteenth Amendment, which granted white women the right to vote but kept Black women disenfranchised,¹⁰ we must address the racial disparities that persist among girls and women today.

Part I of this piece describes adultification bias, a societal phenomenon that can result in the unfair treatment of Black girls who experience sexual exploitation, including statutory rape. Part II discusses the traditional and contemporary policy reasons that underpin the nation's statutory rape laws. Part II also defines reasonable mistake of age, an affirmative defense to a charge of statutory rape, and addresses the effectiveness of the defense where the alleged victim is an adultified Black girl. Part III of this piece examines the policy reasons that support the continued use of the mistake of age defense when the alleged victim is a teenager and the alleged offender a minor or a young adult. Part III concludes with my proposal for the enactment of a limited mistake of age defense that would be available to young defendants who may be more likely to overestimate the age of any sexual partner but unavailable to defendants who are significantly older than their alleged victims. This proposal

⁶ *Id.*

⁷ *Id.*

⁸ *See infra* Part I.

⁹ I use the term "sexual exploitation" to reference the act of taking sexual advantage of another person, oftentimes where a power differential exists between victim and offender. I assert that the age differential between victim and offender is a factor in determining whether the sexual relationship is exploitative. *See infra* Section II.A.

¹⁰ *See* Judge Willie J. Epps Jr. & Jonathan M. Warren, *Sheroes: The Struggles of Black Suffragists*, 59 JUDGES' J. 10, 10 (2020) ("Women of color received a raw deal on voting rights. One hundred years ago, the Nineteenth Amendment explicitly recognized that the right to vote could not be denied to any citizen on account of sex with one implicit omission: women of color.").

increases protections for the adultified Black girl while recognizing the sexual autonomy of teen girls and avoiding the potential weaponization of statutory rape laws against young Black defendants.

II. THE ADULTIFIED BLACK GIRL

Researchers have confirmed the tendency of adults to view Black girls as more adult-like than they actually are. In 2017, the Georgetown Law Center on Poverty and Inequality released a study entitled *Girlhood Interrupted: The Erasure of Black Girls' Childhood*.¹¹ The study's authors "surveyed 325 adults from various racial and ethnic backgrounds" to determine their perceptions and beliefs about the development of Black and white girls.¹² The researchers determined that adults view Black girls as less innocent than their white counterparts at almost all stages of childhood.¹³ The study concluded that "Black girls were more likely to be viewed as behaving and seeming older than their stated age; more knowledgeable about adult topics, including sex; and more likely to take on adult roles and responsibilities than what would have been expected for their age."¹⁴ While this difference in the perception of Black girls starts as early as age five, it peaks between the ages of ten and fourteen and continues through age nineteen.¹⁵

The *Girlhood Interrupted* study found that modern-day perceptions of Black girls originate in slavery-era stereotypes.¹⁶ Specifically, researchers concluded that contemporary stereotypes of Black girls as loud, aggressive, controlling, and hypersexual are consistent with slavery-era stereotypes of Black girls and women, including the Sapphire, Jezebel, and Mammy stereotypes.¹⁷

¹¹ REBECCA EPSTEIN ET AL., GEO. L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 1, 2 (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> [https://perma.cc/H67F-C68U].

¹² *Id.* at 7.

¹³ *Id.* at 8.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 5.

¹⁷ *Id.* The study authors define Sapphire as "emasculating, loud, aggressive, angry, stubborn, and unfeminine"; Jezebel as "hypersexualized, seductive[,] and exploiter of men's weaknesses"; and Mammy as "self-sacrificing, nurturing, loving, asexual." *Id.*

The findings of the study confirm the existence of an “adultification bias” affecting Black girls that is consistent with a societal tendency to perceive Black boys as older and more adult-like than they actually are.¹⁸ According to Monique Morris, the adultification of Black girls is a form of age compression:

Along this truncated age continuum, Black girls are likened more to adults than to children and are treated as if they are willfully engaging in behaviors typically expected of Black women—sexual involvement, parenting or primary caregiving, workforce participation, and other adult behaviors and responsibilities. This compression is both a reflection of deeply entrenched biases that have stripped Black girls of their childhood freedoms and a function of an opportunity-starved social landscape that makes Black girlhood interchangeable with Black womanhood.¹⁹

The adultification of Black girls can impact their treatment in many areas, including the criminal justice system, school disciplinary processes, and the juvenile justice system.²⁰ With regard to the justice system’s treatment of Black girls who suffer sexual exploitation in the form of statutory rape, the *Girlhood Interrupted* study indicates that the players in the justice system may harbor adultification bias: “[T]he perceptions of Black girls as more knowledgeable about sex and adult topics, among other factors, may influence officials to inaccurately attribute complicity to victims of sexual harassment or assault, resulting in blaming and ultimately criminalizing Black girls for their victimization.”²¹

The next Part considers the policy reasons that support the criminalization of sex with minors and posits that society’s adultification of Black girls creates large gaps in the protections

¹⁸ See Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. OF PERSONALITY & SOC. PSYCH. 526, 539–40 (2014) (finding that Black boys are less likely to be perceived as innocent, more likely to be seen as culpable for their actions, and more likely to be misperceived as older as compared to their white counterparts). See also EPSTEIN ET AL., *supra* note 11, at 13 (“In light of this new evidence, we suggest that, consistent with studies of the adultification of Black boys, police officers may view Black girls as older and hold them more culpable for their actions.”).

¹⁹ MONIQUE W. MORRIS, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS* 34 (2016).

²⁰ See EPSTEIN ET AL., *supra* note 11, at 8 (“[A]dultification may serve as a contributing cause of the disproportionality in school discipline outcomes, harsher treatment by law enforcement, and the differentiated exercise of discretion by officials across the spectrum of the juvenile justice system.”).

²¹ EPSTEIN ET AL., *supra* note 11, at 13.

provided by the nation's statutory rape laws. In essence, the statutory rape laws in many jurisdictions decriminalize sex with adultified Black girls because they are perceived as adults, and these jurisdictions do so even where the offender is much older than the girl.

II. STATUTORY RAPE

Before addressing the lack of protection the nation's statutory rape laws provide to adultified Black girls, it is important to explore the policy arguments that justify the criminalization of sex with minors. This Part provides a summary of the nation's statutory rape laws and considers whether the traditional policy reasons supporting these laws remain compelling today.

A. *Statutory Rape Laws—Policies and Purposes*

Michelle Oberman, a prolific scholar on the topic of statutory rape, asserts that the English criminalized sex with minors for two purposes: (1) "to protect those who are too young to protect themselves from exploitation" and (2) to "secur[e] male control over womens' and girls' bodies and sexuality."²² The English enacted statutory rape laws, which were sex-specific, to ensure a girl's virginity prior to marriage as well as a proper dowry for her father.²³

Statutory rape laws became a part of the American common law system and remained unchanged until feminist groups in the late nineteenth and early twentieth centuries successfully convinced state legislatures to raise the age of consent from ten to an average age of sixteen.²⁴ These activists sought to protect adolescent girls from coercive and exploitative sexual encounters

²² See Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 800 (2001).

²³ *Id.* at 802. Oberman explains that non-virgins garnered a lower dowry, thereby providing fathers with a financial incentive to ensure that their daughters remained virgins. *Id.* at 802–03 ("In sum, historically speaking, statutory rape laws aimed to protect the father's property interest in his daughter, and were an embodiment of the legal perception of women and girls as 'special property in need of special protection.'" (quoting James McCollum, *Gender-Based-Classification Regarding Statutory Rape Law Is Not Violative of the Equal Protection Clause of the Fourteenth Amendment*, 25 HOW. L. J. 341, 355 (1982))).

²⁴ *Id.* at 803. The campaign was led by the Women's Christian Temperance Union. *Id.*

that would be deemed “consensual” under then-existing forcible rape laws.²⁵ At the same time, they understood that raising the age of consent would increase “patriarchal control over girls’ sexuality.”²⁶

Today, the age of consent in a majority of states is sixteen, but other factors including the age of the offender, the age differential between the victim and the offender, and the marital status of the parties can affect the criminalization of sex with a minor.²⁷ Oberman argues that modern statutory rape laws, which are not sex-specific,²⁸ serve three purposes: (1) to protect adolescents from sexual exploitation;²⁹ (2) to prevent teen pregnancy and out-of-wedlock births;³⁰ and (3) to provide a necessary alternative to conventional rape laws that do not offer sufficient protection against coercive sexual encounters.³¹

The law’s criminalization of sex with minors based on the age differential between the parties supports the notion that statutory rape laws exist in part to protect against sexual exploitation by much older offenders. Leslie Y. Garfield Tenzer places the nation’s statutory rape laws into two categories: “age-differential” laws and “arbitrary prosecution” laws.³² In the thirty-four age-differential states, prosecutors may only file charges where the alleged offender is “older than the [alleged] victim by a legislatively-mandated number of years.”³³ Tenzer indicates that this age range is usually three years, but may be up to five years in some states.³⁴ She argues that age-differential

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *Statutory Rape: A Guide to State Laws and Reporting Requirements. Sexual Intercourse with Minors*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Dec. 15, 2004), <https://aspe.hhs.gov/report/statutory-rape-guide-state-laws-and-reporting-requirements-summary-current-state-laws/sexual-intercourse-minors> [<https://perma.cc/X33K-AF46>].

²⁸ See Oberman, *supra* note 22, at 809 (noting that contemporary statutory rape laws bar sexual contact with a child regardless of gender).

²⁹ *Id.* at 821 (“Statutory rape laws provide society with a mechanism for setting limits around a population that is particularly vulnerable to sexual predation.”).

³⁰ *Id.* at 806.

³¹ *Id.* at 821. See also *id.* at 820 (“Prosecutors may be reluctant to charge the acquaintance rapist with forcible rape and risk losing the case because of society’s tendency to blame the victim. Rather, the prosecutor may charge the rapist with statutory rape . . . and thus be assured a conviction.”).

³² See Leslie Y. Garfield Tenzer, #MeToo, *Statutory Rape Laws, and the Persistence of Gender Stereotypes*, 2019 UTAH L. REV. 117, 121 (2019).

³³ *Id.*

³⁴ *Id.* at 121–22.

laws recognize that teens can sometimes consent to sexual activity.³⁵ In the sixteen arbitrary prosecution states, the law draws no distinction based on the age difference between the alleged offender and the alleged victim.³⁶ Thus, these states allow for the prosecution of a teenager who engages in sexual activity with another teen.³⁷

Legal scholars assert that the criminalization of sex between teens is harmful because it deprives teen girls of their sexual autonomy, particularly in light of the fact that prosecutors enforce sex-neutral statutory rape laws against males at much higher rates compared to females.³⁸ Moreover, the criminalization of teen sex fails to recognize the fact that at least forty-four percent of today's high-school students are sexually active.³⁹

I acknowledge that an adultified Black girl, especially a girl over the age of thirteen, may make the choice to enter into a consensual sexual relationship with an older teen. Therefore, this piece does not advocate for stricter enforcement of the nation's statutory rape laws in situations where a small age differential exists between teen sexual partners. Rather, I assert that the law provides less protection to an adultified Black girl in situations where the sexual relationship is likely exploitative in nature, and I believe the risk of exploitation grows as the age differential between sexual partners increases. For the adultified Black girl, the gap in protection is most apparent where a much older offender is able to avoid criminal liability by asserting that the girl appears to be older than her actual age.

³⁵ *Id.* at 122.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Michele Goodwin, *Law's Limits: Regulating Statutory Rape Law*, 2013 WIS. L. REV. 481, 516 ("Scholars urging reform in [statutory rape law] caution that casting girls as victims of their sex deprives young women 'control over [their] own sexual autonomy.'" (quoting Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 484 (2000))). See also Tenzer, *supra* note 32, at 122 (stating that prosecutors in both age-differential and arbitrary prosecution states charge males at significantly higher rates compared to females).

³⁹ Tenzer, *supra* note 32, at 152. Tenzer notes that many jurisdictions also allow for a "Romeo and Juliet" defense that would lessen the punishment for statutory rape where there is small difference in age between the alleged offender and the alleged victim. *Id.* at 152 n.256. The problem with the "Romeo and Juliet" defense, according to Tenzer, is that it is not a complete defense to a charge of statutory rape. *Id.*

B. Mistake of Age

Until the 1960s, all jurisdictions treated statutory rape as a strict liability crime.⁴⁰ Like other strict liability offenses, statutory rape laws generally did not require the prosecution to prove both *actus reus*, a guilty act, and *mens rea*, a guilty mind.⁴¹ Instead, if the prosecution proved sexual intercourse or contact between the defendant and a minor, the crime of statutory rape was established.⁴² In the 1964 case *People v. Hernandez*, the California Supreme Court became the first to hold that reasonable mistake of age was a proper defense to a charge of statutory rape.⁴³ The court reasoned that where a defendant is able to prove that he took reasonable steps to determine the age of his sexual partner, the state cannot establish the defendant's intent to commit the crime of statutory rape.⁴⁴

Today, at least twenty states recognize some form of the mistake of age defense.⁴⁵ In Illinois, for example, individuals accused of certain statutory rape offenses may assert the

⁴⁰ See Case Comment, *Mistake of Age as a Defense To Statutory Rape*, 22 WASH. & LEE L. REV. 119, 119–120 (1965) (citing *People v. Hernandez*, 393 P.2d 673, 677 (Cal. 1964)) (stating that mistake of age was not a defense to a charge of statutory rape until the California Supreme Court validated the defense). See also *Garnett v. State*, 632 A.2d 797, 803–804 (Md. 1993) (stating that statutory rape is a strict liability offense).

⁴¹ *Garnett*, 632 A.2d at 800 (noting that although “it is well understood that generally there are two components of every crime, the *actus reus* or guilty act and the *mens rea* or the guilty mind or mental state accompanying a forbidden act,” since the mid-nineteenth century, legislatures have created strict liability crimes that require no *mens rea*, often times in response to “the demands of public health and welfare arising from the complexities of society after the Industrial Revolution”).

⁴² See *Oberman*, *supra* note 22, at 820 (stating that the “only required proof” in a statutory rape case is that there was sexual contact with a minor).

⁴³ *Hernandez*, 393 P.2d at 677.

⁴⁴ *Id.* at 676. Notably, *Hernandez* involved an alleged victim who was seventeen years and nine months old at a time when California's age of consent was eighteen. *Id.* at 674.

⁴⁵ See ARIZ. REV. STAT. ANN. § 13-1407(B) (2020); ARK. CODE. ANN. § 5-14-102 (2020); COLO. REV. STAT. ANN. § 18-3-503(1) (2020); 720 ILL. COMP. STAT. ANN. 5/11-1.70(b) (2020); IND. CODE ANN. § 35-42-4-3(d) (2020); KY. REV. STAT. ANN. § 510.030 (2020); ME. REV. STAT. ANN. tit. 17-a, § 254.2 (2019); MINN. STAT. ANN. §§ 609.344–609.345 (2020); MO. ANN. STAT. § 566.020 (2020); MONT. CODE ANN. § 45-5-511(1) (2019); N.D. CENT. CODE ANN. § 12.1-20-01.1 (2019); OHIO REV. CODE ANN. § 2907.04 (2020); OR. REV. STAT. ANN. § 163.325 (2020); 18 PA. STAT. AND CONS. STAT. § 3102 (2020); WASH. REV. CODE ANN. § 9A.44.030 (2020); W. VA. CODE ANN. § 61-8B-12 (2020); WYO. STAT. ANN. § 6-2-308 (2020). In addition to the seventeen state laws that recognize the defense, courts in Alaska, California, and New Mexico have found mistake of age to be a valid defense to a charge of statutory rape. See *Perez v. State*, 803 P.2d 249, 251 (N.M. 1990); *State v. Guest*, 583 P.2d 836, 839 (Alaska 1978); *Hernandez*, 393 P.2d at 677.

affirmative defense that they “reasonably believed the person to be [seventeen] years of age or over.”⁴⁶ The defense is available in the following situations: (1) where there has been sexual contact between an alleged offender who is under the age of consent and an alleged “victim who is at least [nine] years of age but under [seventeen] years of age”;⁴⁷ (2) where there has been sexual contact between an alleged “victim who is at least [thirteen] years of age but under [seventeen] years of age” and an alleged offender who “is less than [five] years older than the victim”;⁴⁸ and (3) where there has been sexual contact between an alleged “victim who is at least [thirteen] years of age but under [seventeen] years of age” and an alleged offender who “is at least [five] years older than the victim.”⁴⁹

Although the Illinois legislature’s limitation on the use of the mistake of age defense recognizes the reduced likelihood of sexual exploitation where both victim and offender are minors or where there is a small age differential between victim and offender, it is both perplexing and concerning that the legislature allows the use of the defense where the offender is more than five years older than the victim so long as the victim is at least thirteen years old. For the adultified Black girl, who society deems to be older than her actual age, the Illinois mistake of age defense increases the likelihood that a much older offender might take sexual advantage of a teen and face no legal consequences.

In Montana, where the age of consent is sixteen, the legislature allows the use of the mistake of age defense if the victim is fourteen years of age or older.⁵⁰ The Montana law places no other limitation on the use of the defense, thus allowing a defendant to assert mistake of age regardless of the age differential between victim and defendant.⁵¹ Montana’s Criminal Law Commission Comments indicate that the defense might be appropriate in “cases of . . . fourteen (14) year old girls and even very young prostitutes who might be the ‘victimizers,’ rather

⁴⁶ See 720 ILL. COMP. STAT. ANN. 5/11-1.70(b).

⁴⁷ See *id.* 5/11-1.50(b).

⁴⁸ See *id.* 5/11-1.50(c).

⁴⁹ See *id.* 5/11-1.60(d).

⁵⁰ See MONT. CODE ANN. § 45-5-511 (1) (“When criminality depends on the victim being less than [sixteen] years old, it is a defense for the offender to prove that the offender reasonably believed the child to be above that age. The belief may not be considered reasonable if the child is less than [fourteen] years old.”).

⁵¹ *Id.*

than the victims.”⁵² The perception that fourteen- and fifteen-year-old girls might sometimes be the victimizers of older men is long-standing. In a 1923 statutory rape case involving alleged sexual intercourse between a fourteen-year-old girl and an adult man, the Missouri Supreme Court described the girl in the following manner:

This wretched girl was young in years but old in sin and shame. A number of callow youths, of otherwise blameless lives so far as this record shows, fell under her seductive influence. They flocked about her, if her story is to be believed, like moths about the flame of a lighted candle and probably with the same result. The girl was a common prostitute as the record shows. The boys were immature and doubtless more sinned against than sinning. They did not defile the girl. She was a mere “cistern for foul toads to knot and gender in.”⁵³

The narrative that a teen girl can sometimes act as a vixen who places men under her spell is problematic for all female victims of statutory rape, but especially for the adultified Black girl. This narrative harkens back to the slavery-era stereotype of the Jezebel, defined as an immoral, hypersexual Black woman who is essentially unrapeable.⁵⁴ The Jezebel is “alluring and seductive as she either indiscriminately mesmerizes men and lures them into her bed, or very deliberately lures into her snares those who have something of value to offer her.”⁵⁵ As highlighted in the *Girlhood Interrupted* study, society views Black girls as

⁵² Mont. Crim. L. Comm'n Comments, § 45-5-511 (citing MODEL PENAL CODE § 213.6 (AM. L. INST. 1962)).

⁵³ State v. Snow, 252 S.W. 629, 632 (Mo. 1923).

⁵⁴ See Carolyn M. West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN 1, 2 (2013) (describing the stereotype that “Black women’s innate hypersexuality made them ‘unrapeable’ and undeserving of protection or sympathy”); see also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 10–11 (2017) (noting that the Jezebel stereotype was named after the biblical wife of King Ahab, a woman who was a “purely lascivious creature: not only was she governed by her erotic desires, but her sexual prowess led men to wanton passion”).

⁵⁵ Marilyn Yarbrough & Crystal Bennett, *Cassandra and the “Sistahs”: The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER, RACE & JUST. 625, 636 (2000). Notably, White society’s stereotypes about Black sexuality during slavery also affected their perceptions of enslaved children, with some Whites believing that the warm climate of Africa accelerated the physical development of Black children. See William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051, 1063 (1993) (citing State v. Sam, 60 N.C. 300, 302 (1864)).

adults due in part to the influence of the Jezebel stereotype.⁵⁶ I believe that societal perceptions of Black girls, including the belief that they may act as victimizers or bad actors due to their perceived knowledge of sex, might serve as convincing evidence supporting the mistake of age defense.

Moreover, the physical appearance of adultified Black girls may function as evidence that goes to prove reasonable mistake of age. *People v. Gonzalez*,⁵⁷ an Illinois case, provides an instructive example. There, the state alleged that a twenty-three-year-old man had impregnated a fourteen-year-old girl.⁵⁸ Defendant did not deny the allegations and instead asserted the mistake of age defense.⁵⁹ The trial court did not instruct the jury on the defense, and the *Gonzalez* court held that the trial court erred by failing to do so.⁶⁰ The instruction was necessary, according to the court, because the victim gave conflicting testimony about whether she had shared her age with the defendant.⁶¹ The court found that if the mistake of age instruction had been given, “[t]he jury would have . . . been able to observe [the alleged victim’s] appearance and demeanor to aid them in deciding what to believe and in deciding whether defendant’s belief as to her age was reasonable.”⁶² Other courts have found that evidence such as photographs of the alleged victim and witness testimony regarding the alleged victim’s apparent age is relevant when a defendant asserts reasonable mistake of age.⁶³ Additionally, courts have admitted evidence

⁵⁶ See *supra* text accompanying notes 17–18.

⁵⁷ 895 N.E.2d 982 (Ill. App. Ct. 2008).

⁵⁸ *Id.* at 984.

⁵⁹ *Id.* at 983.

⁶⁰ *Id.* at 988. The *Gonzalez* court also found that the jury should have been instructed that the state has the burden of disproving the mistake of age defense once a defendant properly asserts it. *Id.* at 987–88.

⁶¹ *Id.* at 986–87.

⁶² *Id.* at 988.

⁶³ See, e.g., *State v. Balbirnie*, 541 S.W.3d 702, 713 (Mo. Ct. App. 2018) (“Other witnesses testified that Victim appeared to be fourteen or fifteen years old. The State introduced Victim’s photograph into evidence, allowing the jury to judge for itself what age she appeared to be at the time of her death.”). See also *Commonwealth v. Venson*, No. 494 MDA 2019, 2020 WL 2617038, at *6 (Pa. Super. Ct. May 22, 2020) (stating that the prosecution rebutted defendant’s mistake of age defense by admitting a photograph of the alleged victim taken near the time of the sexual encounter).

regarding alleged victims' physical development where apparent age is an issue at trial.⁶⁴

In jurisdictions where the mistake of age defense is available to much older defendants, the law provides insufficient protection for adultified Black girls and allows these defendants to benefit from society's biased perceptions of Black girls. Entertainer Robert "R." Kelly, who has faced accusations of sexual exploitation against teen girls since the mid-1990s,⁶⁵ was charged in 2019 with various sexual abuse crimes, including statutory rape, child prostitution, and child pornography.⁶⁶ In 2019, in preparation for Kelly's trial, his attorneys stated that they planned to assert a mistake of age defense.⁶⁷ Based on societal perceptions of the adultified Black girl, Kelly's defense team tried to "paint [the Black] women who testified against Kelly as promiscuous," even though the Black girls were underage during

⁶⁴ See, e.g., *United States v. Yazzie*, 976 F.2d 1252, 1254 (9th Cir. 1992) (describing trial court testimony that the alleged victim, a minor, "was fully developed," "filled out," "had her curves," and "was well into her womanhood").

⁶⁵ See Shani Saxon, "Surviving R. Kelly": Powerful Docuseries Is a Reckoning for the Singer—And Us, *ROLLINGSTONE* (Jan. 3, 2019, 12:37 PM), <https://www.rollingstone.com/tv/tv-features/surviving-r-kelly-lifetime-docuseries-review-774317/> [<https://perma.cc/C54P-LWHQ>]; Kyle Eustice, *R. Kelly Secretly Marries 15-Year-Old Aaliyah 22 Years Ago Today*, *SOURCE* (July 31, 2016), <https://thesource.com/2016/07/31/r-kelly-secretly-marries-15-year-old-aaliyah-22-years-ago-today/> [<https://perma.cc/RC72-7BRT>]. See also Elexus Jionde, *How Young, Black Girls Were Hypersexualized in America—And How That Enables Predators*, *BUSTLE* (Jan. 9, 2019), <https://www.bustle.com/p/how-young-black-girls-were-hypersexualized-in-america-how-that-enables-predators-15727529> [<https://perma.cc/UZ66-XSEG>] (stating that copies of a video allegedly showing Kelly engaging in sex acts with a fourteen-year-old were sold in Black communities across America starting in 2002).

⁶⁶ See Sam Charles, *New York STD Laws are Unconstitutional, So Charges Against R. Kelly Should Be Dropped, Lawyer Says*, *CHI. SUN TIMES* (March 2, 2020, 6:32 PM), <https://chicago.suntimes.com/2020/3/2/21162264/r-kelly-steven-greenberg-new-york-sexually-transmitted-disease> [<https://perma.cc/FP9K-L2CC>] (stating that Kelly has been charged with federal racketeering, child pornography, and human trafficking crimes as well as Mann Act violations); Sam Charles, *R. Kelly Charged with Child Prostitution in Minnesota*, *CHI. SUN TIMES* (Aug. 5, 2019, 2:29 PM), <https://chicago.suntimes.com/2019/8/5/20755307/r-kelly-charged-child-prostitution-minnesota> [<https://perma.cc/7JRY-JUM6>] (stating that Kelly has been charged with two counts of underage prostitution in Minnesota); Michael Tarm, *R. Kelly Defense Emerges, Including Saying Accusers Are Lying*, *AP NEWS* (Mar. 22, 2019), <https://apnews.com/article/ae11b117d7a541639a8eae85ab322a52> [<https://perma.cc/TRJK-V3Y6>] (stating that R. Kelly has been charged with ten counts of aggravated sexual abuse of three underage girls and one adult in Illinois).

⁶⁷ See Tarm, *supra* note 66 (stating that Kelly's attorneys "intend to question the veracity of his accusers and argue that, if he had sex with them, it was consensual and he thought they were of age").

the time he harmed them.⁶⁸ Indeed, it may be true that Kelly was only able to maintain a successful career and avoid prosecution for so many decades *because* his accusers are Black.⁶⁹

The widespread use of the mistake of age defense results in a two-tiered system of justice wherein a defendant's criminal culpability for statutory rape will likely turn on a jury's subjective perceptions of the alleged victim. The next Part advocates for changes in the availability of the mistake of age defense that will result in more just outcomes for statutory rape victims who are exploited by much older offenders.

III. THE CONTINUED VIABILITY OF THE MISTAKE OF AGE DEFENSE

While pervasive use of the mistake of age defense can result in outcomes that vary depending on the adultification of the alleged victim, I do not advocate for a complete abrogation of the defense. This Part summarizes the policy reasons that favor continued use of the mistake of age defense in certain circumstances. I will also propose legislative changes that limit the defense based on the age differential between the alleged offender and the alleged victim.

A. *The Value of the Mistake of Age Defense*

Most states do not recognize mistake of age as an affirmative defense to a charge of statutory rape.⁷⁰ These states reason that the justice system can provide maximum protection to minors by treating statutory rape as a strict liability crime in all

⁶⁸ Fabiola Cineas, *R. Kelly was Convicted. Are we Finally Listening to Black Women?*, VOX (Sept. 29, 2021), <https://www.vox.com/22698489/r-kelly-conviction-black-women-survivors> [<https://perma.cc/26PD-9VRA>] (“Only time will tell if Kelly’s conviction will be an outlier, or if it means that Black women and girls are truly being recognized and taken seriously in discussions about sexual abuse and assault. . . . [O]ne in four Black girls will be sexually abused before age 18, according to the American Psychological Association (APA).”).

⁶⁹ See Ben Beaumont-Thomas, “*No One Cared Because We Were Black Girls*”: *Is Time Finally Up for R Kelly?*, GUARDIAN (Jan. 17, 2019, 8:16 AM), <https://www.theguardian.com/music/2019/jan/17/no-one-cared-because-we-were-black-girls-is-time-finally-up-for-r-kelly> [<https://perma.cc/8FFE-R9HT>] (Professor Treva Lindsey notes that the Kelly case is “compounded by ‘a narrative around black women and girls being hypersexual. It’s such a fraught, racist history, specifically around sexual violence’”).

⁷⁰ See *State v. Holloway*, 916 N.W.2d 338, 346 (Minn. 2018). See also Section II.B.

circumstances.⁷¹ These states also assert that a strict liability approach reinforces the expectation that adults will verify the age of any potential sexual partner, a sentiment expressed by the Missouri Supreme Court more than a century ago:

It is a well-known fact that some girls at the ages of [ten], [twelve], [fourteen], and [fifteen] years appear to be several years older than they really are; and a man who desires to have sexual intercourse with such a girl must take notice of that fact and solve the doubt in favor of the law and morality; otherwise he must suffer the penalties of the law.⁷²

Although complete abrogation of the mistake of age defense would provide better protection for the adultified Black girl in some circumstances, this approach fails to recognize a teen's agency to enter into a consensual sexual relationship with another individual who is close in age. Also, abrogation of the mistake of age defense might result in unfairness to certain categories of defendants. For example, the Illinois mistake of age law is available to offenders who are minors as well as offenders who are less than five years older than a teenage victim.⁷³ In a jurisdiction that criminalizes teen sex regardless of age differential, reasonable mistake of age functions as a necessary defense for minor and young adult defendants who may have a credible argument that they incorrectly estimated the age of the victim. Indeed, these defendants may lack the life experience necessary to make an accurate assessment of age.⁷⁴

A full repeal of the mistake of age defense would also result in greater weaponization of statutory rape laws where a minor's parents disapprove of a consensual teenage sexual relationship. Based on her review of FBI statistics, case law, and anecdotal

⁷¹ See *Garnett v. State*, 632 A.2d 797, 805 (Md. 1993) (interpreting Maryland's statutory rape law as an affirmation of "the traditional view of statutory rape as a strict liability crime designed to protect young persons from the dangers of sexual exploitation by adults, loss of chastity, physical injury, and, in the case of girls, pregnancy").

⁷² *State v. Helderle*, 186 S.W. 696, 700 (Mo. 1916) (en banc) (Woodson, C.J., concurring). *Accord* *Fleming v. State*, 455 S.W.3d 577, 582 (Tex. Crim. App. 2014) ("When a defendant voluntarily engages in sexual activity with someone who may be within a protected age group, he should know that there may be criminal consequences and there will be no excuse for such actions.").

⁷³ See *supra* text accompanying notes 46–49.

⁷⁴ See *Yazzie*, 976 F.2d at 1255 (holding that lay witnesses can properly estimate the age of a person but noting that estimating age and describing why one believes that a person is a certain age can be difficult tasks). The *Yazzie* court stated, "[t]here is a certain intangible element involved in one's conclusion on such a question." *Id.*

stories, Tenzer asserts that “parents, mostly white parents, initiate law enforcement involvement where consensual teenage sex is concerned.”⁷⁵

Michele Goodwin argues that the enforcement of statutory rape laws, which is a matter of discretion for prosecutors and police officers, reflects both historical and contemporary racial bias against Black males who have sex with white females.⁷⁶ She cites the 2005 conviction of Genarlow Wilson as an example of the bias inherent in the enforcement of the statutory rape laws.⁷⁷ Wilson, a Black male, was charged with aggravated child molestation following an incident wherein a fifteen-year-old girl willingly performed oral sex on Wilson, who was seventeen at the time.⁷⁸ Goodwin notes that the girl was white.⁷⁹ Wilson was tried and convicted of aggravated child molestation and sentenced to ten years in prison.⁸⁰ He was also ordered to register as a sex offender and “could not live or work within 1,000 feet of any child care facility, church, or area where minors congregate.”⁸¹

Wilson’s case is an illustration of the injustices that might occur when states seek to punish teens for engaging in sexual activity with other teens. In jurisdictions that criminalize teen sex despite a small age differential between the parties, the mistake of age defense may be a helpful tool for young defendants who have legitimate grounds for asserting the defense.

In order to provide better protection to adultified Black girls without creating indiscriminate criminal culpability for alleged offenders regardless of their age, I propose the enactment of a mistake of age defense that is limited based on the age differential between the parties.

⁷⁵ Tenzer, *supra* note 32, at 143.

⁷⁶ See Goodwin, *supra* note 38, at 497 (“One powerful critique of statutory rape prosecutions is that the cases are subject to police and prosecutorial discretion, which often disfavors black males, and judges may be less sympathetic to black male defendants accused of sexually violating white women.”). See also *id.* at 498 (describing the nation’s “racialized roots of rape law”).

⁷⁷ *Id.* at 497.

⁷⁸ See *Humphrey v. Wilson*, 652 S.E.2d 501, 502 (Ga. 2007).

⁷⁹ See Goodwin, *supra* note 38, at 497.

⁸⁰ *Humphrey*, 652 S.E.2d at 502–03.

⁸¹ *Id.* at 503. The Georgia Supreme Court found that Wilson was entitled to habeas relief because his punishment was grossly disproportionate to his crime. *Id.* at 509.

B. Proposed Mistake of Age Defense

My proposed mistake of age defense is more expansive than current iterations in that I advocate for enactment of the defense in every state that criminalizes sex between teens of similar age. At the same time, the proposal is more limited in the following ways: (1) the defense would never be available where the victim is below the age of fourteen; (2) the defense would be available to minor defendants where the victim is fourteen or older; and (3) the defense would be available to adult defendants who are less than four years older than the victim as long as the victim is fourteen or older. Adult defendants who are at least four years older than the victim would never be able to assert the mistake of age defense.

I would prohibit use of the defense where the victim is below the age of fourteen in recognition of the fact that fourteen is the age at which most teens begin high school.⁸² During their high school years, many teens decide to enter into consensual sexual relationships with other teens.⁸³

My proposal recognizes the compelling arguments in favor of decriminalizing all sexual intercourse between teens.⁸⁴ In states that already decriminalize statutory rape based on the same age differentials I have identified, my proposal would function as a repeal of the mistake of age defense in all other circumstances.

This proposal protects teens from sexual exploitation by much older offenders while also accounting for the possible naiveté of young defendants. In Minnesota, where the age of consent is sixteen, the legislature limits the use of the mistake of age defense to defendants who are no more than 120 months older than the alleged victim so long as the victim is at least thirteen years old.⁸⁵ Although I believe Minnesota's ten-year age

⁸² See *Fleming v. State*, 455 S.W.3d 577, 587 (Tex. Crim. App. 2014) (Alcala, J., concurring) (“Assuming a child begins kindergarten at the age of five, that child will be thirteen years old at the beginning of eighth grade, which is in middle school in Texas, and will be fourteen years old at the beginning of ninth grade, which is in high school.”).

⁸³ See Goodwin, *supra* note 38, at 517–18 (citing Centers for Disease Control data from 2011 showing that just under 50% of surveyed high school students had engaged in sexual intercourse). See also Tenzer, *supra* note 32, at 152 (stating that “at least [44%] of today’s high-school students are enjoying intimate consensual intercourse”).

⁸⁴ See Goodwin, *supra* note 38, at 535–39 (arguing that sex between teenagers should be decriminalized and addressed as a public health matter).

⁸⁵ See MINN. STAT. ANN. §§ 609.344.1(b), 609.345.1(b) (West 2020).

differential is much too large, I agree with the legislature's purpose in limiting the use of the mistake of age defense:

[T]he Legislature recognized that an actor who is an older teenager or young adult might, in good faith, mistake a [fifteen]-year-old for a [sixteen]- or [seventeen]-year-old while pursuing a romantic relationship. Allowing only a limited mistake-of-age defense balances these legitimate interests, and furthers the overarching purpose of the criminal-sexual conduct statutes in a manner that is not manifestly arbitrary.⁸⁶

Most importantly, a mistake of age defense that is limited by the age differential between the parties ensures that much older defendants, who should be able to estimate age based on their life experience, will not escape criminal culpability by relying on a teen's appearance or physical development. I propose this solution in an effort to protect the adultified Black girl without allowing for greater weaponization of statutory rape laws against young Black males.

CONCLUSION

The changes I have proposed do not solve all of the problems identified in this piece. As long as courts allow evidence such as an alleged victim's appearance and physical development to be admitted at trial on the issue of apparent age, the adultified Black girl will face a major disadvantage. The potential use of juror education, jury instructions, and evidentiary exclusions to combat adultification bias is a topic for future research.

Those who seek to protect adultified Black girls have a difficult task. They must balance a variety of factors when crafting statutory rape laws and defenses. Those factors include adhering to the notion that the law should recognize teen girls' autonomy to enter into consensual sexual relationships while also protecting teens from exploitative relationships with much older offenders. Additionally, policymakers must avoid creating protections for the adultified Black girl in such a heavy-handed fashion that the law can be weaponized to punish Black boys and young men for their consensual interracial sexual relationships with white girls. My goal here is an intersectional⁸⁷ solution

⁸⁶ State v. Holloway, 916 N.W.2d 338, 349 (Minn. 2018).

⁸⁷ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) ("[M]any of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are

that takes into account the historical and modern-day biases that impact all Black people.

currently understood [T]he intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.”).