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Should Being a Victim of a Crime Be a Defense to the Same or a Different Crime?

Russell L. Christopher*

Should being a victim of a crime be a defense to the same or different crime? The claim of being a victim is widely and easily made as a bid for exculpation.[1] But, the criterion for a victimhood defense that I would like to propose is fairly narrow. Where one and the same conduct renders an actor simultaneously a victim of a crime and a perpetrator of the same or a different crime, the actor should have a defense to criminal liability. The rationale for such a defense, simply stated, is that the criminal law cannot coherently define the very same conduct as that of an oppressed victim worthy of the law's *protection* and simultaneously that of an oppressing victimizer worthy of the law's *punishment*.

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1. Let us consider what is not meant here as victimhood being a defense. When apprehended or prosecuted for a crime, one often hears a defendant claim that he or she has been the "victim" of aggressive police tactics or a prosecutorial rush to judgment. But here the invocation of victimhood is only informal. In addition, a defendant might more formally claim to be the victim of entrapment. But the claim is still not to that of being the victim of a crime—entrapment is not a crime.

The victimhood defense is also not that of having *previously* been a victim of crime. If charged with child abuse, a defendant is often heard to claim by way of a defense that he or she was abused as a child, and that in some way this causes or correlates to revisiting this abuse on other children. Even if true, this regrettable cycle of violence does not qualify as the type of defense proposed here. Perhaps it is a story that arouses the sympathy of the jury or is a factor that is taken into account in sentencing. But being a previous victim of a crime does not and should not provide a basis for a defense to committing a crime.

One must *currently* be a victim of a crime while one commits conduct that is charged to be a crime in order to be eligible for the proposed defense. But that is still not sufficient. One might be the victim of having one's home burglarized while one is away burgling another's home. Surely, that one is currently a victim of crime while one is separately and independently committing conduct charged to be a crime should not be a defense.

Rather, the issue is whether the very same conduct by which one perpetrates or is charged with perpetrating a crime also renders one simultaneously a victim of a crime.

This brief essay takes the first tentative steps toward sketching a defense for victimhood. First, the essay illustrates the need for the defense by considering two examples concerning the intersection of rape by fraud and statutory rape. Second, the essay attempts to explain the rationale for the defense. Third, the essay explores the extent to which the criminal law recognizes the defense in some fashion. Fourth, the essay considers specific situations of victimhood claimed by commentators to warrant a defense. And finally, the essay considers a possible counter-example to the proposed defense. The essay concludes that while the defense may be strongly warranted in some situations, it may resist uniform application.

Consider the following examples of an actor's conduct which simultaneously renders the actor a victim of a crime and a perpetrator of a crime. These examples will serve to explain how this issue has arisen, as well as what is motivating this exploration of the issue.

Suppose a minor, who is below the age of consent, but reasonably appears to be above the age of consent, affirmatively represents being above the age of consent in order to obtain intercourse with an adult. The traditional and still majority rule in America is that statutory rape is a strict liability crime with respect to the element of the minor's age.[2] Thus, an adult's honest and reasonable mistake of fact as to the minor's age will not be a defense.[3] Moreover, the adult is criminally liable for statutory rape despite that the minor's misrepresentation induced the adult to engage in intercourse with the minor.[4] As a result, under the traditional and still majority view, the adult is the perpetrator of and the minor the victim of statutory rape.

In contrast to this traditional and majority view, I (along with my co-author) have recently argued that a minor obtaining intercourse with an adult by means of uttering an affirmative and false representation of being above the age of consent com-

2. *E.g.*, Owens v. State, 724 A.2d 43, 49 (Md. 1999) (noting that the strict liability approach to statutory rape is the majority rule).

3. *See, e.g.*, State v. Jadowski, 680 N.W.2d 810, 817 (Wis. 2004) (The majority rule is to bar a mistake of age defense to statutory rape "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.").

4. *Id.*

mits rape by fraud.[5] Though not yet recognized by any court, the minor's obtaining intercourse through a material misrepresentation qualifies as rape by fraud under the existing principles and standards in over thirty jurisdictions.[6] Moreover, because the adult is defrauded into committing the very serious crime of statutory rape, which is punishable by up to and exceeding twenty years' imprisonment,[7] the minor's "adult impersonation" more strongly qualifies as rape by fraud than most widely recognized types of rape by fraud.[8] While the traditional and majority rule views the adult as the perpetrator of and the minor the victim of statutory rape, we argue that the minor is the perpetrator and the adult the victim of rape by fraud. The resulting situation is that the adult is simultaneously a perpetrator of statutory rape against the minor and a victim of rape by fraud as perpetrated by the minor. The minor is simultaneously a perpetrator of rape by fraud against the adult and a victim of statutory rape as perpetrated by the adult.

As the victim of rape by fraud as perpetrated by the minor, the adult should have a defense to statutory rape. We argued as follows:

> 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 statutory rape. 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 as a perpetrator of statutory rape for the very act of intercourse by which one is a victim of rape.[9]

In still broader terms, being a victim of a crime supplies a defense to a crime. That is, a defense should be available to a

5. *See* Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75 (2007).

6. *Id.* at 91-105, 122.

7. *See id.* at 77 nn.10-11.

8. *Id.* at 99-102, 104-05.

9. *Id.* at 116-17 (citation omitted).

crime that one perpetrates by the very same conduct by which one simultaneously became a victim of a crime.

But, adult impersonation qualifying as rape by fraud is a radical claim that is unrecognized by any court. As such, our conclusion that because adults deserve a rape by fraud defense in the case of misrepresentation of age there should be a general defense for victims of crime is perhaps less reliable. Let us then consider a comparatively more conventional case.

Suppose a minor, below the age of consent, obtains intercourse with an adult by impersonating her husband. By engaging in intercourse with the minor, the adult wife would be committing statutory rape against the minor under the laws of all fifty states.[10] The adult is the perpetrator and the minor is the victim of statutory rape. Under the majority rule of strict liability, the adult wife has no defense that she honestly and reasonably believed that the minor was above the age of consent (because she honestly and reasonably believed that the minor was her husband).

But in at least sixteen states,[11] and perhaps as many as a majority of states, obtaining intercourse by spousal impersonation is a form of rape by fraud.[12] As a result, in these jurisdictions, the minor commits rape by fraud against the adult. The adult is simultaneously a perpetrator of statutory rape against the minor and a victim of rape by fraud as perpetrated by the minor. The minor is simultaneously a perpetrator of rape by fraud against the adult and a victim of statutory rape as perpetrated by the adult.

In a jurisdiction both following the strict liability rule of statutory rape and recognizing spousal impersonation as rape by fraud, should the adult have a defense to the crime of statutory rape? Yes. As discussed above, "one should not be criminally liable as a perpetrator of statutory rape for the very act of

10. *See, e.g.*, State v. Blake, 777 A.2d 709, 713 (Conn. App. Ct. 2001) ("All a person need do to violate [Connecticut's statutory rape law] is to (1) engage in sexual intercourse (2) with a person between the ages of thirteen and fifteen, and (3) be at least two years older than such person.").

11. *See* Christopher & Christopher, *supra* note 5, at 100 nn.164-65.

12. *E.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 585 (4th ed. 2006); PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 199 (2004).

intercourse by which one is a victim of rape."[13] Or, put more broadly, one should have a defense to a crime that one commits through the same conduct that simultaneously makes one the victim of crime. The adult perpetrates statutory rape by the very same conduct through which she becomes a victim of rape by fraud: engaging in intercourse with a spousal impersonator who is below the age of consent.

In other jurisdictions, however, this proposed defense would not apply. In a jurisdiction that both follows the strict liability rule of statutory rape and does *not* recognize spousal impersonation as rape by fraud, the adult would not have the defense. In both types of jurisdictions, the actions of the minor and the adult are the same. But, in the latter type of jurisdiction, the minor's conduct would not be classified as rape by fraud. Thus, the adult would not be recognized as a victim of rape by fraud and could not claim that defense to a charge of statutory rape.

Why the difference as to the availability of the defense? Why is the actor in a jurisdiction that recognizes spousal impersonation eligible for the defense and the actor in a jurisdiction not recognizing spousal impersonation as rape by fraud not eligible for the defense? After all, the adult is identically induced into engaging in intercourse with a minor by the same false and material representation in both types of jurisdiction. Should not the availability of a defense turn on the actual facts, circumstances, and conduct of the parties? Why should it turn on the criminality of the fraud? If the juvenile's fraud rises to the level of criminal fraud, the adult is a victim of rape by fraud. If the juvenile's fraud is non-criminal, the adult is not a victim of rape by fraud or any crime. Ultimately, it matters because of victimhood.

Although I believe that it is deeply felt, the intuition that being a victim of a crime should be a defense to a crime is not easy to articulate. There is something counterintuitive about holding an actor criminally liable for the very conduct that makes the actor a victim of crime. Perhaps the best articulation of this intuition is that the criminal law cannot coherently define particular conduct as both worthy of protection and worthy

13. *See* Christopher & Christopher, *supra* note 5, at 82.

of punishment. Conduct rendering one a victim of a perpetrator's criminal conduct suggests the victim's conduct should be worthy of protection. If so, how could conduct that is worthy of protection also be worthy of punishment?

If the conduct of the adult wife renders her a victim of rape by fraud via spousal impersonation, then that very same conduct cannot logically be punished as the perpetration of statutory rape. By treating the conduct of the perpetrator of the rape by fraud as worthy of condemnation and punishment, the criminal law is treating the victim's conduct as worthy of protection. Where the very conduct that renders one a victim of crime also renders one a perpetrator of a crime, being a victim of a crime should be a defense. Similarly, if the conduct of an adult renders him or her a victim of adult impersonation (assuming that adult impersonation is recognized as a form of rape by fraud), then that very same conduct cannot coherently be punished as the perpetration of statutory rape. The criminal law cannot classify the very same conduct to be that of an oppressed victim worthy of the law's protection and simultaneously to be that of an oppressing victimizer worthy of the law's punishment.

To what extent does the criminal law already recognize a defense for being the victim of a crime? A scenario from the film *Beverly Hills Cop*[14] illustrates one such defense. Axel Foley, as played by the actor Eddie Murphy, is a police officer from Detroit questioning a prominent Beverly Hills businessman in his posh office in regard to a murder investigation. Apparently not liking the tenor of the questions, the suspect directs his henchmen to escort Axel from the premises. The henchmen throw Axel through the plate glass window of the building's lobby and onto the sidewalk. As Axel sits up amid the glass debris, the Beverly Hills police arrive. Axel says, "Did you see this. . . ? I can describe all of them." Instead of taking down the descriptions of Axel's victimizers, the Beverly Hills police begin to arrest him. Incredulous, Axel exclaims, "You guys are arresting me for getting thrown out of a . . . window? I got thrown out of a window, man! Tell me something, what's the charge?" The police inform Axel that he is being arrested for disturbing the peace. Again incredulous, Axel replies, "Disturbing the peace?

14. BEVERLY HILLS COP (Paramount Pictures 1984).

I got thrown out of a window. What's the . . . charge for getting pushed out of a moving car—jaywalking?" It is the one and the same conduct—being thrown through the glass window—that renders Axel both a victim of a crime (i.e., battery) and a perpetrator of a crime (disorderly conduct).

Should the fact that Axel is a victim of a crime be a defense to disorderly conduct? Perhaps, but we need not reach that issue because the criminal law already provides a defense to Axel in that situation. Axel could presumably assert a successful defense of lack of a voluntary act.[15] Axel being thrown through a window was either not an act at all on Axel's part or was an involuntary act. Either way, his lack of a voluntary act would bar his criminal liability.

Principles of accomplice liability and conspiracy also might serve to supply a defense to a victim of crime who is charged with a crime. As Joshua Dressler explains: "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."[16] Consider the example of a juvenile below the age of consent who willingly acquiesces to intercourse with an adult and is thus a victim of statutory rape. Despite aiding the offense in a sense, by willingly acquiescing and voluntarily participating, the juvenile victim could not be charged as an accomplice in her own statutory rape.[17]

Similarly, the victim of a Mann Act violation—the person transported, knowingly by the transporter, across state lines for prostitution or any other immoral purpose[18]—cannot be convicted of engaging in a conspiracy to violate her own Mann Act

15. *See, e.g.*, MODEL PENAL CODE § 2.01(1)-(2) (1985).

16. DRESSLER, *supra* note 12, at 526. *See also* MODEL PENAL CODE § 2.06(6) (1985) ("[A] person is not an accomplice in an offense committed by another person if: (a) he is a victim of that offense . . . .").

17. *In re* Meagan R., 49 Cal. Rptr. 2d 325, 328 (Ct. App. 1996) (finding that a statutory rape victim cannot be criminally liable as an accomplice "to the crime of her own statutory rape"); DRESSLER, *supra* note 12, at 526 ("For example, the 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.").

18. 18 U.S.C. § 2421 (2005).

rights.[19] That is, the victim of a Mann Act violation cannot be charged as a conspirator in his or her own Mann Act violation.

In some states, being a victim of statutory rape precludes prosecution for statutory rape. These states preclude liability for so-called "peer on peer"[20] or "Romeo and Juliet" situations[21] in a variety of ways. A New York court barred prosecution of a defendant who was below the age of consent "in the interest of justice."[22] Other states require the defendant to be of a minimum age,[23] say eighteen, which is above the age of consent, or require the defendant to be a number of years older than the victim,[24] which effectively requires the defendant to be above the age of consent.[25]

In other situations, commentators have argued that the criminal law should recognize a defense for a victim of a crime. Consider the situation of a prostitute who is below the age of consent and who engages in intercourse with an adult customer. The very conduct that renders the minor the victim of statutory rape—engaging in intercourse with the adult customer—also renders the minor criminally liable for prostitution. Some commentators argue that the minor's status as a statutory rape victim in any prostitution transaction should bar the minor from criminal liability for perpetrating prostitution:

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19. Gebardi v. United States, 287 U.S. 112, 122-23 (1932); DRESSLER, *supra* note 12, at 494.

20. Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 314 (2006).

21. *Id.* at 314 n.84.

22. *In re* Jessie C., 565 N.Y.S.2d 941, 944 (App. Div. 1991).

23. Carpenter, *supra* note 20, at 314 & n.85 (citing, for example, Nebraska and New York).

24. *Id.* at 314 & n.86 (citing, for example, Michigan).

25. But in some situations a victim of a crime that is charged with a crime might not have a generalized, accepted defense to assert that bars liability. For example, with respect to statutory rape, some states do prosecute victims of statutory rape for statutory rape of another. That is, despite being a juvenile below the age of consent, such persons are nonetheless held criminally liable for statutory rape. Carpenter, *supra* note 19, at 314 & nn. 85-87 (citing, for example, Alabama, South Dakota, Georgia, and Rhode Island). In this context of two underage persons engaging in intercourse with each other, the very conduct that makes one a victim of statutory rape (engaging in intercourse) is the very conduct that makes one a perpetrator of statutory rape and criminally liable. But how can one and the same conduct make one both a victim and a perpetrator? How can one and the same conduct make one an oppressed victim worthy of the law's protection and simultaneously an oppressing victimizer worthy of the law's punishment?

> A contradiction arises where juveniles are arrested, prosecuted, and incarcerated for having sex for money or other consideration under the same penal code that declares they have no legal capacity to consent to sex at all. If minors are incapable of sexual consent, how does the legal community justify punishing them for their commercial sexual exploitation?[26]

Keith Aoki similarly declares holding minors criminally liable for prostitution as illustrative of "shameful contradictions in our laws."[27]

A dissenting opinion of the Supreme Court of Nevada makes the opposite argument.[28] A minor's status as a prostitute precludes her from being a statutory rape victim.[29] That is, while perpetrating prostitution with an adult customer, an underage prostitute cannot be statutorily raped by that adult customer.[30]

In one sense, the commentators and the dissenting opinion make opposite arguments: the former argue that statutory rape victimhood bars prostitution liability, and the latter argues that prostitution liability bars statutory rape victimhood. But in another sense, both argue that a minor engaging in intercourse with an adult paying customer cannot simultaneously be perpetrating prostitution and be the victim of statutory rape. That is, both agree that the minor cannot be both perpetrating a crime and be the victim of a crime by performing the same conduct.

Wendi Adelson addresses the interaction of perpetration and victimhood with respect to the crimes of human trafficking and child prostitution.[31] Adelson poses the question: "Is child

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26. *See* Pantea Javidan, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN'S L.J. 237, 238 (2003) (arguing that the application of prostitution laws against minors "cannot be reconciled with statutory rape laws that define the age of consent.").

27. Keith Aoki, *Does Nothing Ever Change; Is Everything New?: Comments on the "To Do Feminist Legal Theory" Symposium*, 9 CARDOZO WOMEN'S L.J. 415, 419 (2003).

28. Jenkins v. State, 877 P.2d 1063 (Nev. 1993) (Singer, J., dissenting).

29. *Id.* at 1067 (affirming defendant's conviction for statutory rape by rejecting defendant's honest and reasonable mistake of fact as to the age of the victim defense).

30. *Id.* at 1067-68.

31. Wendi J. Adelson, Abstract, *Child Prostitute or Victim of Trafficking?*, SOCIAL SCIENCE RESEARCH NETWORK, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078503 (last visited Jan. 23, 2008).

prostitution a crime committed by minors or against them?"[32] Adelson explains that "[f]ederal laws on trafficking consider child prostitution to be akin to the crime of human trafficking . . . ."[33] As a result, "state legislation criminalizing child prostitution should change in light of trafficking legislation that treats child prostitutes as victims of crime."[34] Adelson concludes that it is "counterintuitive to retain state statutes that punish minors who are prostitutes when those same minors might be protected victims" under federal anti-trafficking statutes.[35] Adelson is arguing that being the victim of trafficking precludes liability for child prostitution. That is, being a victim of one crime precludes liability for perpetrating another crime.

Our proposed victimhood defense requires that one and the same conduct renders one simultaneously both a victim and a perpetrator. That criterion is lacking here. One becomes a victim of human trafficking if one is transported and/or sold across borders for the purpose of sexual or forced labor.[36] One becomes a perpetrator of child prostitution by being a child who engages in intercourse in exchange for money or material consideration. But by the same conduct, one does not become a victim of human trafficking and a perpetrator of child prostitution. Rather, children who either in the past or future will engage in prostitution are victims of human trafficking. However, by virtue of that fact, they do not become perpetrators of child prostitution. That is, one may passively become a victim of trafficking, but one must do something active to perpetrate child prostitution.

One possible counterexample to our proposed defense is the relationship between the crimes of unlawful drug selling and purchasing. We might say that the victim of the crime of drug selling is the drug purchaser. But that the drug purchaser is a

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. For the recent and controversial view that many "victims" of trafficking are not true victims, see LAURA MARIA AGUSTIN, SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY (2008); Brendan O'Neill, *The Myth of Trafficking*, NEW STATESMAN, Mar. 27, 2008 (reviewing LAURA MARIA AGUSTIN, SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY (2007)), *available at* http://www.newstatesman.com/200803270046.

victim of the crime of drug selling does not preclude the criminal law's punishing the drug purchaser for perpetrating the crime of buying drugs. By one and the same act—purchasing drugs—one becomes a victim of the crime of drug selling and a perpetrator of the crime of drug purchasing. So, by our criterion, the drug purchaser's conduct makes him or her a victim of the crime of drug selling and a perpetrator of the crime of drug purchasing. For this reason, he or she should have a defense to the crime of drug purchasing. But, granting the defense to the drug purchaser is perhaps not intuitively persuasive. We do not seem to be troubled that the very conduct which renders a drug purchaser a victim of drug selling also renders a drug purchaser liable as a perpetrator of drug purchasing.

There are a number of possibilities as to the significance of the drug seller/drug purchaser context. First, as a counterexample, it suggests that our criterion (where the defendant's conduct simultaneously renders him or her both a victim and a perpetrator) for a victimhood defense is incorrect. Second, perhaps drug selling is a victimless crime. Or perhaps the drug purchaser is not the specific victim of the crime. Either way, that the drug purchaser does not seem to intuitively deserve the proposed defense does not cast doubt on the criterion for or the legitimacy of the proposed defense itself. Rather, the drug seller/drug purchaser context is not a counterexample after all. And third, even if there are some cases where the victimhood defense should apply, it is not a generalized and uniform rule. Although the drug purchaser presumably should not have a defense, it should not preclude other victims from having the defense. For example, the victims of rape by fraud (as perpetrated by a juvenile) should have the defense to statutory rape. Whether any of these possibilities are correct will require considerable further investigation into the viability of victimhood as a defense in the criminal law.