

# INCOMPREHENSIBLE CRIMES: DEFENDANTS WITH MENTAL RETARDATION CHARGED WITH STATUTORY RAPE

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*Criminal law generally assumes that all defendants are alike. Social science research, however, has demonstrated that most defendants with mental retardation are unlike their peers of average intelligence in their cognitive and behavioral capacities—a difference with profound effects on their blameworthiness. The law acknowledges these differences in a few limited areas, most notably in the Supreme Court’s recent decision excluding defendants with mental retardation from death penalty eligibility. But while that decision arguably has begun to percolate into the rest of criminal law, consideration of the unique circumstances facing defendants with mental retardation has not yet reached the law of statutory rape.*

*When framed as a strict liability offense, statutory rape precludes the fact-finder from considering the defendant’s state of mind altogether. This exclusion of mens rea is an anomaly in criminal law, where a finding of guilt typically requires proof not only of an “evil act,” but also of an “evil mind.” Commentators have criticized strict liability but have ignored its increased injustice when applied to defendants with mental retardation.*

*A close analysis of statutory rape law reveals several assumptions which are thought to justify departing from a mens rea requirement for such a significant offense: Would-be defendants are presumed to have notice that sex with underage partners is unlawful; to be in the best position to prevent any harm from occurring; and to be deviant, immoral aggressors. When examined in light of research about mental retardation, however, these assumptions collapse. Further, punishing persons with mental retardation without regard to their awareness of the law, social cues, and the nature of their conduct may also run afoul of constitutional due process and proportionate sentencing principles.*

*This Article therefore argues that legislators, prosecutors, and judges should modify the ways that defendants with mental retardation may be prosecuted for statutory rape. In particular, the government should have to prove that a defendant with mental retardation had the appropriate mens rea. This Article also recommends formalizing the existing ways of addressing differences in culpability of defendants with mental retardation through charging and sentencing.*

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## INTRODUCTION

In early winter, a mutual friend introduced twenty-year-old Raymond Garnett to Erica Frazier.<sup>1</sup> Erica and her friends told Raymond that she was sixteen years old. Raymond and Erica began talking occasionally by telephone. A few months after their meeting, Raymond, seeking a ride home, approached Erica's house at about 9:00 in the evening. Erica opened her bedroom window, invited him up, and told him how to get a ladder to reach her room. The two talked and had voluntary sexual intercourse. Raymond left at about 4:30 the following morning. He later learned that Erica was, in fact, just thirteen years old.

Although it is readily apparent that Erica was a victim of statutory rape under state law, might Raymond, who was convicted of a felony offense, be considered a victim as well? Does it matter that he had an IQ of 52, a score in the lowest 0.7% of the population,<sup>2</sup> on the borderline between mild and moderate mental retardation?<sup>3</sup> That he

<sup>1</sup> This account comes from *Garnett v. State*, 632 A.2d 797 (Md. 1993).

<sup>2</sup> See STEPHEN A. RICHARDSON & HELENE KOLLER, TWENTY-TWO YEARS: CAUSES AND CONSEQUENCES OF MENTAL RETARDATION 71 (1996) (describing results of study finding 6.8 per 1000 subjects testing at an IQ of 59 or below).

<sup>3</sup> While the definition of mental retardation is the subject of much debate, two leading authorities define mental retardation similarly as an intellectual disability that (1) originates before age eighteen, (2) is characterized by significant limitations in intellectual functioning, and (3) is accompanied by significant adaptive functioning limitations in a range of every day social and practical skills. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000) [herein-

read on the third-grade level, did arithmetic on the fifth-grade level, and interacted with others in his county public school at the level of someone eleven or twelve years of age?<sup>4</sup> According to the highest court in Maryland, which reviewed the case, the only victim in these circumstances was Erica, and Raymond's mental retardation was irrelevant to the determination that he raped her. The jury never got to hear evidence regarding Raymond's cognitive disability or that he had been told she was older. Some judges and commentators have struggled with this result.<sup>5</sup> Even the *Garnett* majority noted that "it is uncertain to what extent Raymond's intellectual and social retardation may have impaired his ability to comprehend imperatives of sexual morality."<sup>6</sup> Yet the court's decision upholding the conviction, consistent with policies in thirty jurisdictions across the country,<sup>7</sup> turned only on whether Erica was under the age of consent and whether she and Raymond had had sex. The court found that, in a statutory rape case, what Raymond might have believed about Erica's

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after DSM-IV-TR] (listing these as core elements of diagnosis); AM. ASS'N ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* 36–37 (10th ed. 2002) (identifying pre-eighteen onset, reduced intellectual ability, and limitations in everyday functioning as diagnostic criteria). The limitation on intellectual functioning is frequently assessed through IQ testing. According to the DSM-IV-TR, "Mild Mental Retardation" corresponds to an IQ level of "50–55 to approximately 70"; "Moderate Retardation" corresponds to an IQ level of "35–40 to 50–55"; "Severe Mental Retardation" corresponds to an IQ level of "20–25 to 35–40"; and "Profound Mental Retardation" reflects an IQ level below "20 or 25." DSM-IV-TR, *supra*, at 42.

<sup>4</sup> The practice of estimating the "mental" or "functional" age of a person with mental retardation is persistent but controversial. Among major organizations that define mental retardation, only the World Health Organization's classifications include estimated "mental age." WORLD HEALTH ORG., *INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS* (10th rev., 2007 ed.), <http://www.who.int/classifications/apps/icd/icd10online> (follow "F00-F99" hyperlink; then follow "F70-F79" hyperlink). For further discussion of this issue, see *infra* note 123.

<sup>5</sup> See, e.g., *Owens v. State*, 724 A.2d 43, 57 (Md. 1999) (Eldridge, J., concurring) (observing that "[t]here is no indication that the General Assembly intended that criminal liability attach to one who . . . was unable to appreciate" risk of engaging in sexual activities with young person because of his mental impairment); *Garnett*, 632 A.2d at 816 n.17 (Bell, J., dissenting) ("[I]n this case there is every reason to question whether the victim was the petitioner, rather than the minor female."); Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 318 n.106 (2006) ("[S]tudents who read *Garnett* in my first year Criminal Law class often view Raymond as the victim.").

<sup>6</sup> *Garnett*, 632 A.2d at 802. Even the court's reference to the defendant as "Raymond," rather than Garnett, suggests an impression by the court that Garnett was younger (and thus less culpable) than his twenty years might have indicated. Cf. *Owens*, 724 A.2d 43, 45 (referring to twenty-year-old statutory rape defendant who was not mentally retarded by his last name).

<sup>7</sup> See Carpenter, *supra* note 5, at 317 (describing thirty jurisdictions in which no mistake-of-age defense is allowed and another eighteen which only permit such defense if complainant is close to age of consent).

age, ability to consent, and actual willingness to have sex—however reasonable—would not constitute a defense.<sup>8</sup> Despite his mental retardation, Raymond was treated just like any other twenty-year-old charged with statutory rape because strict liability offenses require no mens rea.<sup>9</sup>

This Article argues that because Raymond's mental retardation diminished his culpability, he should have been treated differently from other defendants. To the extent that statutory rape laws ignore important differences between defendants with mental retardation and those of "average" intelligence, these laws contravene legal theories justifying strict liability's unusually low standard of criminal intent, contradict what psychologists know about how individuals with mental retardation function in the world, and present potential constitutional problems. As a result, this Article recommends systemic changes to the charging, prosecution, and sentencing of statutory rape for defendants with mental retardation.

Definitions of mental retardation vary and are controversial.<sup>10</sup> Two leading authorities define mental retardation as an intellectual disability that (1) originates before age eighteen, (2) is characterized by significant limitations in intellectual functioning, and (3) is accom-

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<sup>8</sup> *Garnett*, 632 A.2d at 803–04. Statutory rape is defined as “[u]nlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person’s will.” BLACK’S LAW DICTIONARY 1288 (8th ed. 2004). Some states permit a defense of reasonable mistake of fact as to the complainant’s age. See *infra* note 23 for examples.

<sup>9</sup> A person is held “strictly liable” when a court or statute disregards his mens rea for either a given offense or a particular element of it. See Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 840 (1999) (noting that offenses such as statutory rape impose strict liability “because the defendant may be convicted regardless of his or her mental state with respect to a material element of the offense”). Statutory rape is generally referred to as a “strict liability offense” because it has no mens rea requirement with regard to the consent or age of the complainant, often the most controversial elements. Technically, however, the government still has to prove that the defendant had a general intent to engage in sexual activity with the complainant. Thus, a mistake of fact could potentially be a defense to statutory rape, albeit one hard to imagine in most circumstances. See, e.g., *People v. Perez*, No. 255430, 2005 WL 1490093, at \*4 (Mich. Ct. App. June 23, 2005) (indicating that alleged mistake of fact as to complainant’s identity could have negated culpability if jury had believed it, where defendant testified he believed sleeping female he fondled was his girlfriend, not his girlfriend’s daughter’s underage friend); *State v. Tevay*, 707 A.2d 700, 701–02 (R.I. 1998) (acknowledging mistake of fact as allowable defense where defendant testified that in his sleep, he believed he was pulling his wife, not his underage stepdaughter, into bed with him).

<sup>10</sup> Even the nomenclature of “mental retardation” is outdated among many advocates, who have adopted the term “intellectual disability.” Because the criminal law continues to use “mental retardation,” however, I use that term throughout this Article. For an in-depth discussion of this changing terminology, see Robert L. Schalock et al., *Perspectives: The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116 (2007).

panied by significant adaptive functioning limitations in a range of everyday social and practical skills such as personal interactions, communication, and work.<sup>11</sup> Individuals diagnosed with mental retardation may have greatly different adaptive behaviors or capacities and different levels of integration into the community—variations only partially captured by the traditional division of people with mental retardation into four levels of severity: mild, medium, severe, and profound.<sup>12</sup>

In limited areas, criminal law already acknowledges that defendants with mental retardation may differ from their counterparts of “average intelligence.”<sup>13</sup> Most prominently, the presence or absence of mental retardation may be part of a court’s threshold inquiry into a defendant’s competence to participate in his own defense.<sup>14</sup> While some defendants’ retardation is sufficiently severe that they are not competent to proceed, many of these individuals are processed through the criminal justice system.<sup>15</sup> Among this group, the defendant’s mental retardation is a factor weighed in determining the voluntariness of confessions and declarations of consent during interrogations and searches under the Fourth and Fifth Amendments.<sup>16</sup> It may also be part of a court’s inquiry into a defendant’s sanity,<sup>17</sup> as well as a mitigation factor at sentencing.<sup>18</sup> Most recently,

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<sup>11</sup> See *supra* note 3.

<sup>12</sup> While the use of IQ tests remains a particularly contentious means to measure intellectual functioning, such use persists, especially as an indicator of the level of mental retardation. See *supra* note 3 (discussing DSM-IV-TR approach).

<sup>13</sup> The law does not, however, draw legal distinctions based on severity categories or variations in IQ.

<sup>14</sup> See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (stating that findings of competency require district judge to analyze defendant’s ability to consult rationally with his attorney); see also *State v. Garfoot*, 558 N.W.2d 626, 632 (Wis. 1997) (“[A] defendant may be incompetent based on retardation alone if the condition is so severe as to render him incapable of functioning in critical areas.”).

<sup>15</sup> People with mental retardation include those with a wide range of abilities, even within the same severity category. Accordingly, I frequently refer to how people with mental retardation “may,” “often,” or “typically” conduct themselves, without differentiating between levels of retardation, unless the research cited makes such a distinction.

<sup>16</sup> See *Colorado v. Connelly*, 479 U.S. 157, 165 (1986) (stating that “mental condition is surely relevant to an individual’s susceptibility to police coercion” during interrogation); *Schneekloth v. Bustamonte*, 412 U.S. 218, 226–27 (1973) (including “low intelligence” as factor relevant to coercion in police interrogation and noting that “similar considerations” are critical to assessment of voluntariness of individual’s consent to search).

<sup>17</sup> See, e.g., *People v. Shahideh*, 758 N.W.2d 536, 542 (Mich. 2008) (stating that “legal insanity” can be shown by demonstrating that defendant lacked “substantial capacity,” due to mental retardation or other cause, to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law).

<sup>18</sup> See *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (requiring that mental retardation be considered as mitigating factor in sentencing for capital crimes), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

in its landmark decision in *Atkins v. Virginia*, the Supreme Court declared that a defendant with mental retardation cannot constitutionally be sentenced to death.<sup>19</sup>

*Atkins* has had some ripple effects in the area of capital litigation.<sup>20</sup> For the most part, however, courts and legal scholars have been slow to acknowledge the decision's relevance—and the relevance of mental retardation more generally—outside the capital context.<sup>21</sup> But there are a myriad of other ways in which mental retardation affects how a significant subpopulation of defendants interacts with the criminal justice system.<sup>22</sup>

Statutory rape, when treated as a strict liability offense, demonstrates how the failure to consider defendants' mental retardation is problematic.<sup>23</sup> Of course, it is impossible to estimate how many defen-

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<sup>19</sup> *Atkins*, 536 U.S. at 304.

<sup>20</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 567, 575 (2005) (analogizing diminished culpability of people with mental retardation to diminished culpability of youth and finding analogy basis to constrain execution of individuals who committed crimes before age eighteen); Andrea D. Lyon, *But He Doesn't Look Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After Atkins v. Virginia*, 57 DEPAUL L. REV. 701, 713–17 (2008) (discussing strategies for jury selection when mental retardation is offered as mitigating evidence in capital cases).

<sup>21</sup> But see Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1181 (2009) (asserting that Court's arguments regarding capital sentencing in *Atkins* suggest diminished culpability for mentally retarded individuals in noncapital contexts as well); Timothy Cone, *Developing the Eighth Amendment for Those "Least Deserving" of Punishment: Statutory Mandatory Minimums for Non-Capital Offenses Can Be "Cruel and Unusual" When Imposed on Mentally Retarded Offenders*, 34 N.M. L. REV. 35, 43 (2004) (arguing that *Atkins* supports relevance of mental retardation to proportionality and thus to constitutionality in noncapital sentencing for same reasons as in capital sentencing).

<sup>22</sup> There is no consensus as to the number of individuals in the criminal justice system who have some degree of mental retardation. Studies show that as few as two percent and as many as forty percent of offenders may have intellectual disabilities. Jessica Jones, *Persons with Intellectual Disabilities in the Criminal Justice System*, 51 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 723, 724 (2007). There is not even consensus as to the proportion of people with intellectual disabilities among incarcerated populations. A 1996 survey of all state and federal prison administrators reported that approximately 4.2 percent of inmates were mentally retarded and an additional 10.7 percent had learning disabilities. Joan Petersilia, *Justice for All? Offenders with Mental Retardation and the California Corrections System*, 77 PRISON J. 358, 365–66 (1997) (citing Lewis Veneziano & Carol Veneziano, *Disabled Inmates*, in ENCYCLOPEDIA OF AMERICAN PRISONS 255, 257 tbl.2 (Marilyn D. McShane & Frank P. Williams III eds., 1996)). Notably, however, such figures do not account for what is likely a larger percentage of people with mental retardation in jails. See Robert Dinerstein, *The Criminal Justice System and Mental Retardation: Defendants and Victims*, 97 AM. J. ON MENTAL RETARDATION 715, 716 (1993) (book review) (“[T]here are virtually no reliable data on the number of inmates with mental retardation in local jails, where arrestees and those convicted of misdemeanors would normally be housed, let alone data on all arrestees . . .”).

<sup>23</sup> Not all states prosecute statutory rape exclusively as a strict liability crime, as some allow for a defense of reasonable mistake of age. Compare, e.g., LA. REV. STAT. ANN.

dants like Raymond Garnett exist, given the unreliability of data regarding the prevalence of mental retardation in prison populations or the number of people with mental retardation charged with particular offenses.<sup>24</sup> There are an estimated 15,700 cases of statutory rape reported annually,<sup>25</sup> but even states that do attempt to track mental retardation among prison inmates do not categorize them according to offense.<sup>26</sup> Yet, many of those who practice in the criminal justice system are aware of these cases and the troubling way in which they are managed.

Statutory rape is an important area in which to examine these issues for two additional reasons. First, statutory rape criminalizes conduct—sexual intercourse—that is legal under most circumstances but is rife with subtlety. In contrast to the context of, say, robbery or assault, here the line between legality and illegality will often be murky. Confusion is particularly likely to arise in statutory rape cases because the age of consent varies from jurisdiction to jurisdiction and because the mental age of the defendant may be less than the actual age of the complainant.<sup>27</sup>

Second, as *Garnett* illustrates, a strict liability standard means that a defendant can be convicted whether or not he is able to com-

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§ 14:80(3)(C) (2004) (“Lack of knowledge of the juvenile’s age shall not be a defense.”), with MINN. STAT. ANN. § 609.344(b) (West 2009) (permitting defense only when complainant is over thirteen and no more than ten years younger than defendant), OHIO REV. CODE ANN. § 2907.04(A) (West 2006) (requiring prosecution to prove knowledge or recklessness with respect to age of child complainant between ages of thirteen and sixteen), and *People v. Hernandez*, 393 P.2d 673, 677 (Cal. 1964) (allowing mistake of fact defense).

<sup>24</sup> Such unreliability is not surprising. A 1988 survey found that none of the responding forty-eight states had a statewide, systematic procedure for identifying defendants with mental retardation. James K. McAfee & Michele Gural, *Individuals with Mental Retardation and the Criminal Justice System: The View from the States’ Attorneys General*, 26 MENTAL RETARDATION 5, 8 (1988). To the extent that corrections systems do seek to identify these inmates, screening procedures vary widely and, accordingly, produce different prevalence rates. See Mark Nichols et al., *Analysis of Mentally Retarded and Lower-Functioning Offender Correctional Programs*, CORRECTIONS TODAY, Apr. 2003, at 119, 120 (describing states’ different identification methods and numbers reported). For example, a 2003 survey found that some states reported having no mentally retarded inmates, while Louisiana estimated that it had only 7, and New York estimated it had 1206. *Id.* at 120, 121.

<sup>25</sup> See Karyl Troup-Leasure & Howard N. Snyder, *Statutory Rape Known to Law Enforcement*, OJJDP JUV. JUST. BULLETIN, Aug. 2005, at 2 (estimating 15,700 statutory rapes reported to U.S. law enforcement agencies in 2000).

<sup>26</sup> Prevalence figures for statutory rape indicate that thirteen percent of girls reported a first sexual experience with an adult male three or more years older. Denise A. Hines & David Finkelhor, *Statutory Sex Crime Relationships Between Juveniles and Adults: A Review of Social Scientific Research*, 12 AGGRESSION AND VIOLENT BEHAV. 300, 303 (2007).

<sup>27</sup> See *infra* note 125 (discussing additional education necessary for many individuals with mental retardation to learn safe expression of sexuality).

prehend the circumstances or facts that made his conduct illegal.<sup>28</sup> This is a rarity in criminal law, where “[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”<sup>29</sup> Indeed, it is “no provincial or transient notion”<sup>30</sup> that every criminal act requires not only an *actus reus* (“guilty act”), but also a *mens rea* (“guilty mind”).<sup>31</sup> We tend not to hold people criminally liable—much less subject them to imprisonment—based solely on their actions; rather, criminal law generally requires “first, a vicious will; and secondly, an unlawful act consequent upon such vicious will.”<sup>32</sup> There is an ongoing debate about whether strict liability is ever an appropriate standard in criminal law, particularly for non-administrative offenses.<sup>33</sup> This Article sidesteps that debate while addressing the particular problems that strict liability poses for defendants with mental retardation. These defendants, who qualify as legally competent to stand trial despite their mental disability, may nonetheless be unable to understand the wrongfulness of their conduct, particularly when it comes to sex.

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<sup>28</sup> Throughout this Article, I refer to defendants using male pronouns and complainants using female ones. While of course it is possible for the defendant to be female in individual cases, these offenses remain gender-specific in some jurisdictions. *Compare, e.g.*, IDAHO CODE ANN. § 18-6101(1) (2004) (defining “Rape”—*i.e.*, rape of a female by a male—to include voluntary sex with any female under age eighteen), *with id.* § 18-6108 (defining “Male rape”—*i.e.*, rape of one male by another—only in terms of voluntariness, with no age-based prohibition). Furthermore, prosecutions for statutory rape overwhelmingly involve male defendants, and the policy justifications for statutory rape laws often assume male defendants and female complainants. *See infra* Part I.C (discussing judicial recognition of gender assumptions underlying some statutory rape laws). Indeed, the vast majority of reported incidents involve male defendants and female complainants. *See Troup-Leasure & Snyder, supra* note 25, at 1 (describing analysis of National Incident-Based Reporting System data revealing that among the twenty-one states for which statutory rape data was available, ninety-five percent of cases involved female complainants and virtually all of those involved male offenders).

<sup>29</sup> *Staples v. United States*, 511 U.S. 600, 605 (1994) (alteration in original) (citation omitted).

<sup>30</sup> *Morissette v. United States*, 342 U.S. 246, 250 (1952).

<sup>31</sup> BLACK’S LAW DICTIONARY 41, 1075 (9th ed. 2009).

<sup>32</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*21.

<sup>33</sup> *Compare, e.g.*, Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 954–58 (1999) (critiquing trend toward “liability without fault”), Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 425–27 (1993) (outlining retributivist and utilitarian objections to strict liability), and Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 78–83 (1933) (arguing that strict liability should be limited to offenses with “really slight” penalties), *with* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 757, 763–65 (2000) (discussing importance of strict liability as strategy for protecting vulnerable population from sexual exploitation), and Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 406–07 (1984) (presenting range of feminist responses to statutory rape, including argument that it properly protects young women).

Because the ways in which mental retardation can affect a person's culpability vary depending on the nature of the crime at issue, I start with consideration of the statutory rape offense itself. In Part I, I identify the classic justifications for why certain categories of crime are subject to a strict liability standard. I then present a new, more detailed model of the assumptions regarding defendants which underlie the strict liability standard in the statutory rape context. I argue that strict liability offenses in general, and statutory rape in particular, are premised on a particular view of the awareness, maturity, and character of the defendants whom these laws seek to regulate. Statutory rape laws thus presume defendants (1) have notice that sex with underage partners is unlawful; (2) are in the best position to prevent the sex and any resulting harm from occurring; and (3) are deviant, immoral aggressors who must be distinguished from the innocent victims of "tender years" with whom they engage in sexual activity.

Part II shows that even if these assumptions are valid for defendants of average intelligence, they do not apply to defendants with mental retardation. Defendants with mental retardation may not have notice that certain sexual situations are inappropriate; may have difficulty controlling impulses; may have difficulty with communication; may have difficulty understanding the consequences of their actions; may be less likely to register social cues, such as evaluation of a potential partner's age; and may be more likely to be misled by others (including younger people).

These and other qualities render defendants with mental retardation less blameworthy than other defendants, even where their conduct is the same. Further, while adults with mental retardation can sometimes be educated to understand, appreciate, and appropriately express their sexuality within the bounds of the law, what often distinguishes them from their peers of average intelligence is their dependence on others to receive this education and training. Defendants with mental retardation have a limited capacity to comprehend the nuances involved in a sexual encounter, even a legally consensual one, which challenges statutory rape laws' often irrebuttable presumption about who can knowingly consent to sex and who needs protection from exploitation.

Part III shows that prosecuting defendants with mental retardation under statutory rape law also raises problems under the Fifth and Fourteenth Amendments' Due Process Clauses and the Eighth Amendment's mandate that punishment be proportional to the underlying offense. The doctrine of constitutional avoidance points toward changing existing statutory rape law as it relates to this class of defen-

dants. However, because the courts have shown little willingness to address these issues constitutionally, I argue that the more likely—and more powerful—fix lies in legislative action.

In Part IV, I argue that we must fundamentally shift the approach to statutory rape for defendants with mental retardation. First, prosecutors should have to prove that a defendant with mental retardation had the *mens rea* to commit the offense. Specifically, I contend that the prosecution should have to prove that the defendant understands that people below a certain age cannot legally consent to sexual activity and that the particular complainant was underage. Second, charging and sentencing decisions should formally recognize the difference in culpability of defendants with mental retardation. This remedy would account for differences in the severity of mental retardation because it would compel factfinders to consider the awareness and comprehension of particular defendants.

Finally, I conclude by addressing the implications of mental retardation in other areas of criminal law. Beyond the extreme situation of strict liability, where the mental state of the defendant is excised from analysis, what lessons can be applied to other areas of criminal jurisprudence? Strict liability is, arguably, one of the easier cases—one of the few areas where people with mental retardation and people of average intelligence stand in roughly the same position because everyone's state of mind is irrelevant to the legal question. The deeper problem is that the criminal law is generally unwilling to acknowledge the role that mental retardation plays in a person's culpability except in minor ways or very extreme circumstances.

## I

### ASSUMPTIONS OF THE STRICT LIABILITY MODEL

Because strict liability veers so far from typical requirements of criminal blameworthiness, strict liability offenses are generally limited to what courts and commentators have defined as two principal categories: public welfare offenses and lesser legal or moral wrongs. Public welfare offenses, which arose in the wake of the industrial revolution,<sup>34</sup> comprise the bulk of these crimes and include offenses ranging from distributing adulterated food to vehicle safety violations to criminal nuisances.<sup>35</sup> Courts and commentators justify the absence of a *mens rea* requirement for these strict liability crimes because they are

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<sup>34</sup> *Morissette*, 342 U.S. at 253–55 (explaining development of public welfare offenses, including expansion of strict liability offenses following industrial revolution).

<sup>35</sup> Sayre, *supra* note 33, at 55, 62–67, 72–73.

essentially regulatory in nature and result in only minor penalties or reputational effects for convicted defendants.<sup>36</sup>

The second category of strict liability offenses is rooted in conduct thought to involve “moral turpitude” and includes crimes such as bigamy, adultery, conduct contributing to the delinquency of a minor, and statutory rape.<sup>37</sup> The theory historically justifying the absence of a mens rea requirement for these common law crimes is that, although the defendant may not have had a specific intent to commit the given crime, his conduct necessarily included an intent to commit an illegal, wrongful, or just clearly immoral act.<sup>38</sup> While there may be no mens rea requirement for bigamy, for instance, the underlying intentional conduct of adultery or even fornication is considered, at least historically, as sufficiently wrongful to impose liability for the greater wrong.<sup>39</sup>

Many have challenged strict liability in general and its application to statutory rape in particular. Although courts have generally rejected the argument, defendants have contended that the strict liability standard violates their right to put on a full and fair defense by precluding them from offering evidence about their state of mind. In the statutory rape context, defendants raising this claim seek to present evidence that they (reasonably) believed the complainant to be above the age required to legally consent to sexual activity.<sup>40</sup> Com-

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<sup>36</sup> See *Morissette v. United States*, 342 U.S. 246, 255–56 (1952) (citing minimal punishment and reputational damage as characteristic of public welfare offenses); Sayre, *supra* note 33, at 56 & n.5, 72–73 (coining term “public welfare offenses” and cataloguing low-level crimes).

<sup>37</sup> Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 115–16, 119 (1965).

<sup>38</sup> See Jarrod Forster Reich, Note, “No Provincial or Transient Notion”: *The Need for a Mistake of Age Defense in Child Rape Prosecutions*, 57 VAND. L. REV. 693, 703–04 (2004) (explaining lesser legal wrong and moral wrong theories).

<sup>39</sup> Ironically, the bases for these crimes, the so-called lesser wrongs, are no longer themselves crimes. See Kadish, *supra* note 33, at 970 (“Intimacies between married partners have been decriminalized almost everywhere and the old crimes of adultery and fornication are now rarities.”); Arnold H. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77, 92–93 (2005) (arguing that because fornication is now protected constitutional right, non-negligent exercise of that right via sex with minor reasonably believed to be above the age of consent is entitled to mistake-of-age defense); see also *infra* Part I.A (discussing justification of strict liability on basis that underlying activity is widely known to be regulated).

<sup>40</sup> See, e.g., *United States v. Juvenile Male*, 211 F.3d 1169, 1171 (9th Cir. 2000) (rejecting juvenile defendant’s arguments that constitutional provisions of due process and equal protection entitled him to present evidence that he believed eleven-year-old complainant was thirteen); *United States v. Ransom*, 942 F.2d 775, 776–78 (10th Cir. 1991) (ruling that defendant had no constitutional entitlement to reasonable-mistake-of-age defense); *Owens v. State*, 724 A.2d 43, 45, 56 (Md. 1999) (finding no due process right to present mistake-of-age evidence).

mentators, too, have questioned whether strict liability is consistent with standards of justice, particularly for an offense as serious as statutory rape.<sup>41</sup>

Whichever framework legislators, courts, and proponents use to justify strict liability, a richer analysis uncovers the basic assumptions thought to underlie the application of the strict liability standard in criminal cases. Most of these assumptions apply to would-be defendants: We are justified in holding a person strictly liable because he has sufficient notice that the conduct he chooses to engage in is wrongful; because he is in the best position to avert the harm; and because he will be deterred from engaging in particularly risky activities. For the crime of statutory rape, there are particular assumptions regarding defendants and their underage partners: He understands what it means to engage in sex (and, no matter what his underage partner says or does, she does not); he does not need protection (but she does); he will not be injured (but she will). These assumptions embody virtually all of the rationales for maintaining the strict liability standard in statutory rape cases.<sup>42</sup>

While courts and commentators have generally relied on the public welfare and lesser legal and moral wrong theories to explain (or critique) the continued use of strict liability in criminal law, this section argues that other assumptions about the defendant are at work. The argument draws on three values used to justify criminalizing certain behavior: fairness, efficiency, and moral blameworthiness.

### A. Fairness

Courts have found strict liability to be an appropriate standard of intent for criminal offenses where the general area of activity being

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<sup>41</sup> See WAYNE R. LAFAVE, *CRIMINAL LAW* § 5.6(c), at 287–89 (4th ed. 2003) (arguing that lesser legal wrong and moral wrong theories do not satisfy goals of deterrence, retribution, and reform); Kadish, *supra* note 33, at 954–58 (criticizing strict liability); Levenson, *supra* note 33, at 425–27 (summarizing arguments that strict liability is “inconsistent with both utilitarian and retributivist theories of punishment”); Loewy, *supra* note 39 (arguing for constitutional right to engage in private sexual relations with person non-negligently believed to be adult); Myers, *supra* note 37 (arguing for mistake-of-age defense to statutory rape); Reich, *supra* note 38 (arguing that denial of mistake-of-age defense for statutory rape is unconstitutional). Despite these criticisms and support from the Model Penal Code, see MODEL PENAL CODE § 213.6(1) (Proposed Official Draft 1962) (recommending mistake-of-age defense when victim is older than ten), the reasonable-mistake-of-age defense remains the minority rule, 6 AM. JUR. 2D *Proof of Facts* § 4 (Supp. 2005).

<sup>42</sup> For instance, while a commentator may justify the standard based on a legislative desire to protect a vulnerable population from the dangers of sex and the related concern of limiting the social cost of statutory rape, particularly teenage pregnancy, Oberman, *supra* note 33, at 704–05, the assumptions about statutory rape defendants that are discussed *infra* underlie these perspectives.

targeted is so inherently dangerous, well regulated, or just plain wrong that any individual should know that related conduct would also be subject to regulation. This “risky territory” argument rests on assumptions regarding notice, specifically that “persons of ordinary intelligence and experience have a reasonable opportunity to know what actions are prohibited so that they may conform their conduct according to the law.”<sup>43</sup> In other words, basic fairness requires some warning to defendants of potential criminal liability.

In cases where the Supreme Court has rejected the strict liability standard, the defendant’s awareness of the risk before acting has often figured prominently.<sup>44</sup> In *Lambert v. California*, for example, the Court overturned the conviction of a woman charged with violating a California statute requiring anyone convicted of a felony to register with the police within five days of entering the state.<sup>45</sup> Because the Court found no evidence that the *Lambert* defendant, who failed to register upon moving to California, actually knew of the registration requirement, and no evidence of circumstances that might have led her to inquire into such a requirement, it held that application of the strict liability registration statute violated her due process rights under the Fourteenth Amendment and reversed her conviction.<sup>46</sup>

Similarly, the Supreme Court has held that a gun owner must be aware that regulation of gun possession is likely to exist before he can be held strictly liable for failing to register a gun.<sup>47</sup> The Court cited the “long tradition of widespread lawful gun ownership by private individuals in this country” and “the common experience that owning a gun is usually licit and blameless conduct,” as it reasoned that the “simple transaction” involved in buying a gun would not alert an individual to regulation any more than would the purchase of a car.<sup>48</sup> Accordingly, the Court rejected the strict liability standard for gun registration in *Staples v. United States*.<sup>49</sup>

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<sup>43</sup> *Owens*, 724 A.2d at 51 (finding defendant was “reasonably on notice” that having sex with complainant might cause him to “run afoul of the law” because it “involve[d] conscious activity” and because extensive public regulation of sexual activity with minors alerted him to riskiness of his conduct).

<sup>44</sup> This section addresses only the policy-based concerns underlying the notice issue. In Part IV.A, *infra*, I consider the potential constitutional questions relating to notice (and the limited reach of the doctrine) when applied to defendants with mental retardation.

<sup>45</sup> *Lambert v. California*, 355 U.S. 225 (1957).

<sup>46</sup> *Id.* at 229–30.

<sup>47</sup> *Staples*, 511 U.S. at 612, 619; *cf.* *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”).

<sup>48</sup> *Staples*, 511 U.S. at 610, 612–14.

<sup>49</sup> *Id.* at 619.

By contrast, the Court has routinely held that activity that a person should know is highly regulated and poses a threat to public health or safety may fairly be subjected to the strict liability standard.<sup>50</sup> This doctrine, often overlapping with “public welfare” offenses, assumes that an individual should generally be aware that he may be prosecuted regardless of his actual state of mind when, for instance, he starts selling prescription drugs (because they might be adulterated, misbranded, or require particular order forms);<sup>51</sup> bringing home hand grenades (because they might be unregistered);<sup>52</sup> or transporting acids (because they may require certain shipping paperwork).<sup>53</sup> As the Supreme Court has observed, “where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”<sup>54</sup>

Even conduct that is not highly regulated but that is considered inherently morally or legally wrong may raise the specter of dangerousness to the average person, giving him notice of possible criminal liability. This is the basis for the lesser moral wrong category of strict liability offenses. Thus, courts have found that a man may be fairly convicted of the crime of abandoning his pregnant wife, whether or not he knows she is pregnant, because the abandonment itself is a “simple wrong” (albeit not a legal one) of which he should be aware.<sup>55</sup> And, in the most famous historical case on this point, a young man was convicted of taking a sixteen-year-old girl from her father’s house

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<sup>50</sup> See, e.g., *Liparota v. United States*, 471 U.S. 419, 433 (1985) (“In most . . . instances [where the Court has upheld strict liability], Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.”); *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (finding strict liability standard warranted for “deleterious devices” and “obnoxious waste” because of high probability of regulation); *United States v. Freed*, 401 U.S. 601, 609 (1971) (upholding strict liability for possession of hand grenades); *United States v. Balint*, 258 U.S. 250, 254 (1922) (upholding strict liability for selling “inhibited” drugs).

<sup>51</sup> See *United States v. Dotterweich*, 320 U.S. 277, 278, 284–85 (1943) (holding that pharmaceutical company that repackaged drugs from manufacturers and distributed them to doctors and others may be prosecuted for shipping misbranded or adulterated products even if corporate officer had no knowledge that drugs were mislabeled or adulterated); see also *Balint*, 258 U.S. at 250–52 (upholding defendants’ conviction for failure to fill out Internal Revenue Service form, even though defendants argued that indictment failed to allege that company employees knew products were drugs).

<sup>52</sup> *Freed*, 401 U.S. at 609.

<sup>53</sup> *Int’l Minerals*, 402 U.S. at 564–65.

<sup>54</sup> *Id.* at 565.

<sup>55</sup> See, e.g., *White v. State*, 185 N.E. 64, 65 (Ohio Ct. App. 1933) (observing that abandonment constitutes a “simple wrong” and analogizing it to “at best . . . immoral” act of fornication underlying statutory rape).

without her parents' consent, even though he thought she was eighteen (and beyond the reach of the law) because the conduct he clearly intended—taking a “girl” from her father's custody—was “wrong in itself,” no matter her exact age.<sup>56</sup>

Under this reasoning, one who has notice—actual or implied—that his conduct may be wrongful and yet engages in the risky business anyway does so “at his peril” and may be held strictly liable for his actions.<sup>57</sup> Not surprisingly, this is the sort of notice that courts have required—and found implicit—in statutory rape offenses. For example, the highest court in Maryland noted that the state's strict liability law against statutory rape could be distinguished from the law found unconstitutional in *Lambert* because statutory rape involves “conscious activity which gives rise to circumstances that place a reasonable person on notice of potential illegality.”<sup>58</sup> Accordingly, the court reasoned that potential defendants would likely have received notice from a range of government interventions: a prior court decision, longstanding state laws criminalizing child sex, and state laws prohibiting other kinds of sexual behavior, all of which were sufficient to notify the defendant that miscalculating the complainant's age could be incredibly risky.<sup>59</sup>

Widely held cultural norms are also thought to justify the use of strict liability in some circumstances. An Ohio court, for example, emphasized in a challenge to that state's statutory rape law that essentially no defendant in the country could argue persuasively that he lacked notice of the danger involved in having sex with a young person, even if she had reached puberty.<sup>60</sup> As the court stated, “American culture might glorify youthful sex appeal, but is at the same time rife with warnings against sexual conduct with children.”<sup>61</sup> Noting that the word “jailbait” appears in a standard dictionary, the

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<sup>56</sup> *R. v. Prince*, L.R. 2 C.C.R. 154, 174 (1875).

<sup>57</sup> *United States v. Balint*, 258 U.S. 250, 252 (1922); *State v. Pistole*, 476 N.E.2d 365, 366 (Ohio App. 1984); *White*, 185 N.E. at 65; see also *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 493 (E.D.N.Y. 1993) (noting that under strict liability, “when [a defendant] knows certain facts, [he] must find out at his peril whether the other facts are present which would make the act criminal”) (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 75 (1881)).

<sup>58</sup> *Owens v. State*, 724 A.2d 43, 51 (Md. 1999).

<sup>59</sup> *Id.*; see also *State v. Stokely*, 842 S.W.2d 77, 81 (Mo. 1992) (en banc) (finding that state statute precluding mistake-of-age defense “clearly notifies potential offenders” that they will be held strictly liable with regard to age element of statutory rape). *But see* *Carpenter*, *supra* note 5, at 323–24 (arguing that because *Lawrence v. Texas*, 539 U.S. 558 (2003), restricted legislative regulation of consensual sexual activity between adults, it undermined the notice that theoretically attaches to heavily regulated activity).

<sup>60</sup> *Ohio v. Haywood*, No. 78276, 2001 Ohio App. LEXIS 2545, at \*16 (Ohio Ct. App. June 7, 2001).

<sup>61</sup> *Id.*

court continued, “*Any person* contemplating sexual conduct with a child [around age 12] should be cautious—the existence of statutory rape laws is hardly a secret.”<sup>62</sup> At times, courts have considered evidence that a particular defendant was aware that his conduct was potentially illegal to rule out his claim of insufficient notice.<sup>63</sup> The fact that courts seem to reject notice challenges to statutory rape laws in statutory rape cases, however, suggests that judges tend to share the Ohio court’s disbelief that a defendant could plausibly be unaware that having sex with a young person is legally risky.<sup>64</sup> It is on that assumption that strict liability laws pass legal muster.

### B. Efficiency

A related justification for strict liability in the criminal area is that, like its tort law counterpart, strict liability places the burden of compliance on the “best cost avoider.”<sup>65</sup> The justification assumes that the defendant is in the best position to ascertain the relevant facts and therefore prevent the harm or crime from occurring in the first place. Because of this high burden, the strict liability standard is thought to deter—or even over-deter—undesirable conduct.<sup>66</sup> Thus, the Supreme Court noted that “[i]n the interest of the larger good,” the statute at issue “puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger” by holding those who ship drugs in interstate commerce liable for the safety of the drugs.<sup>67</sup> Similarly, a producer of pornography might be held strictly liable for using underage performers because the producer would have the opportunity to ascertain the actors’ age,

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<sup>62</sup> *Id.* (emphasis added).

<sup>63</sup> *E.g.*, *State v. Tague*, 310 N.W.2d 209, 211–12 (Iowa 1981) (rejecting defendant’s claim that he lacked notice because evidence showed that, after having sex with complainant, he told her of his concern that she might be underage).

<sup>64</sup> *See, e.g.*, *State v. Jadowski*, 680 N.W.2d 810, 821 & n.42 (Wis. 2004) (asserting that “[a]dults are well aware of the strict liability aspect of statutory rape laws” and noting that “‘Sixteen will get you twenty!’ is a common exclamation expressing the widespread awareness of statutory rape laws and the strict liability aspect of the offense”); *Stokely*, 842 S.W.2d at 81 (rejecting defendant’s argument that statutory rape law was too vague to provide notice).

<sup>65</sup> *See* GUIDO CALABRESI, *THE COST OF ACCIDENTS* 175 (1970).

<sup>66</sup> *See* Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 423 (2007) (noting that one “explanation [for strict liability] provides that, by holding actors liable even when they lack culpability, strict liability discourages such actors from engaging in the activity underlying the criminal offense”); Dan M. Kahan, *Is Ignorance of Fact an Excuse Only for the Virtuous?*, 96 MICH. L. REV. 2123, 2126 (1998) (“Strict liability can ‘overdeter’: when even reasonable mistakes do not excuse, some uncertain actors will refrain from engaging in borderline conduct that actually lies outside the reach of the law out of fear that they might be misapprehending the real facts.”).

<sup>67</sup> *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

but a shipper or purveyor of printed pornographic materials may not have this same access and thus would not be subject to the resultant strict liability.<sup>68</sup>

In the statutory rape context, the strict liability standard places the burden on the adult to determine the age of his sex partner and, where there is any possibility that the partner may be underage, to avoid sexual interaction altogether.<sup>69</sup> As a plurality of the Supreme Court indicated when it upheld California's (then) gender-based statutory rape law, a strict liability standard may effectively deter men from engaging in sexual activity with young women.<sup>70</sup> In this way, the law seeks a heightened level of protection for girls.

The language that courts use to account for shifting the "onus"<sup>71</sup> of preventing the harm onto the defendant makes clear these assumptions: Statutory rape defendants are held to a strict liability standard because they are considered "older, more sophisticated adults,"<sup>72</sup> "more mature,"<sup>73</sup> and "more experienced."<sup>74</sup> Analyzing one strict lia-

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<sup>68</sup> *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.2 (1994); *see also* *United States v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 858 F.2d 534, 543–44 n.6 (9th Cir. 1988) ("Those who arrange for minors to appear in sexually explicit materials are in a far different position from those who merely handle the visual images after they are fixed on paper, celluloid or magnetic tape. . . . [P]roducers are in a position to know or learn the ages of their employees."). Notwithstanding this distinction, in *U.S. District Court for the Central District of California*, the court refused to hold the defendant pornography producers strictly liable because they had apparently gone to great lengths to ascertain the minor's age while she and her agents had gone to great lengths to suggest that she was older than her actual age. *Id.* at 539–41.

<sup>69</sup> *See* Levenson, *supra* note 33, at 419 (asserting that strict liability doctrine "shifts the risks of dangerous activity to those best able to prevent a mishap"); Myers, *supra* note 37, at 122 (discussing difficulty of assessing age); *see also* *Commonwealth v. Dunne*, 474 N.E.2d 538, 545 (Mass. 1985) (noting legislative intent to put burden on defendant to find out "whether his contemplated act is prohibited, and of refraining from it if it is").

<sup>70</sup> *See* *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 473 (1981) ("[T]he risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly 'equalize' the deterrents on the sexes."). In 1993, the California legislature amended the statute to make it gender-neutral. CAL. PENAL CODE § 261.5 (West 2008).

<sup>71</sup> *See* *Commonwealth v. Albert*, 758 A.2d 1149, 1153 (Pa. 2000) (quoting Commonwealth's argument that legislature drafting statutory rape statute "properly . . . [places] [t]he onus of sexual responsibility . . . on the older more mature individual in the relationship").

<sup>72</sup> *People v. Gonzales*, 561 N.Y.S.2d 358, 361 (Westchester Cnty. Ct. 1990) (contrasting these defendants with "often naïve minors" who would be victims of statutory rape).

<sup>73</sup> *United States v. Ransom*, 942 F.2d 775, 777 (10th Cir. 1991) (finding federal statutory rape provision "protects children from sexual abuse by placing the risk of mistake as to a child's age on an older, more mature person").

<sup>74</sup> *State v. Elton*, 680 P.2d 727, 732 (Utah 1984); *see also* *Hernandez v. State*, 754 S.W.2d 321, 326 (Tex. App. 1988) (noting that purpose of statutory rape law in question "was to prevent imposition upon females under the age of seventeen by older and presumably more experienced males").

bility case, a commentator argued that the resulting burden on the defendant is really quite manageable:

The defendant in a statutory rape case does not lack the ability to comply with the law, he must simply abstain from sexual intercourse when there is even the remotest possibility that his partner is below the statutory age. . . . If the law expects the defendant to calculate his partner's age with sufficient care to ensure that she is over eighteen, a failure to do so reveals the defendant's deliberate disregard of a social command.<sup>75</sup>

Like the terms used to describe the party best positioned to bear the risk, this conclusion presumes that a person subject to the strict liability standard for statutory rape can understand that sex is appropriate only with partners of a certain age, that he can calculate that age accurately (and, possibly, know how it compares to his own), and that he can control any untoward impulses. According to this theory, because the potential defendant is already on notice that sex can be risky business, he will seek to gather information and proceed with caution, if at all. Thus, he will be deterred from acting in a socially undesirable way. In this view, a potential defendant will fail to exercise such control only if he intentionally chooses to do so.

### C. *Morality*

The most common argument supporting the use of the strict liability standard for statutory rape involves deference to legislative determinations of proper public policy. Courts that seem hesitant to impose the standard in the criminal context themselves sometimes find that they are nonetheless bound to follow the judgment of the legislature. As one court noted, its decision to uphold a defendant's conviction was "not concerned with the wisdom of Maryland's policy of imposing strict criminal liability on those who engage in sexual intercourse with children under age 14. Absent any constitutional prohibition, it is within the 'legislative power to define crimes and to fix their punishment.'" <sup>76</sup> Similarly, the Supreme Court has emphasized that it is up to the legislature to determine the elements of a particular criminal offense, including whether a particular mens rea will be among them.<sup>77</sup>

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<sup>75</sup> Recent Case, *Criminal Law—Mental Element—Defendant's Reasonable Belief that Prosecutrix Was Above the Age of Consent Is a Defense to a Charge of Statutory Rape* (People v. Hernandez, Cal. 1964), 78 HARV. L. REV. 1257, 1258–59 (1965).

<sup>76</sup> Owens v. State, 724 A.2d 43, 48 (Md. 1999) (quoting Scarlett v. State, 93 A.2d 753, 757 (1953)).

<sup>77</sup> See Liparota v. United States, 471 U.S. 419, 424 (1985).

When statutes are less explicit as to whether or not mistake of age is a permissible defense or where defendants contend that the court must read a scienter element into a statutory offense, courts tend to make the policy arguments supporting the strict liability standard themselves. Such discussions reveal a focus on morality and on what judges think about these particular criminal defendants, rather than on administrative efficiency, procedural fairness, or some other justification for the low standard of proof.<sup>78</sup> Certainly, criminal law generally presumes that a person's bad acts reveal his or her bad moral character.<sup>79</sup> Inaccuracies created by that presumption are thought to be cured through evidence that mitigates, but does not typically erase, culpability.<sup>80</sup> In the case of statutory rape, there is even greater expressive value to legally identifying the older person as a criminal, a wrongdoer, or a rapist, in that the designation stands in contrast to the younger person, who in turn becomes an innocent victim in need of protection.

This argument for strict liability resembles the efficiency argument above in that it relies on certain assumptions about potential defendants made in opposition to assumptions about potential victims. But here, the assumptions reflect qualitative judgments of the parties' respective characters. Thus, courts upholding a strict liability standard characterize potential complainants as people of "tender years"<sup>81</sup> who cannot "understand the consequences of their actions"<sup>82</sup> and are at

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<sup>78</sup> *But see* Jones v. State, 640 So. 2d 1084, 1086 (Fla. 1994) (finding that legislature enacted statutory rape code provision "based on a 'morally neutral judgment' that sexual intercourse with a child under the age of sixteen, with or without consent, is potentially harmful to the child" (quoting Stall v. State, 570 So. 2d 257, 261 (Fla. 1990))).

<sup>79</sup> *See* George Vuoso, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661, 1663 (1987) ("[I]t is a plain fact that in practice our criminal law is such that people are generally held criminally responsible only when they would also be held morally responsible."). *But cf.* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1014–15 (2003) (discussing fallacy of this assumption with regard to teenagers' still-developing moral character).

<sup>80</sup> *See* United States v. Moore, 486 F.2d 1139, 1184 (D.C. Cir. 1973) ("The needs of society require overriding the subjective good faith of the individual as a legal defense, remitting his position to mitigation of punishment and executive clemency." (citing ROLLIN M. PERKINS, *CRIMINAL LAW* 924–25 (2d ed. 1969))); *see also* 6 AM. JUR. 2D *Proof of Facts* § 1 (1975) ("[I]n some jurisdictions the defendant's reasonable mistake as to the female's age, although not affecting guilt, may be considered as a mitigating factor when punishment is imposed.").

<sup>81</sup> *See, e.g.,* People v. Douglas, 886 N.E.2d 1232, 1243 (Ill. App. Ct. 2008) (collecting cases holding that "the State has a legitimate interest in protecting children of tender years from sexual involvement and in putting on the adult the burden of determining the age of the child").

<sup>82</sup> United States v. Ransom, 942 F.2d 775, 777 (10th Cir. 1991).

once “inevitably vulnerable,”<sup>83</sup> “virtually defenseless,”<sup>84</sup> “incapable of judgment and discretion,”<sup>85</sup> and “too unsophisticated to protect themselves”<sup>86</sup> (or, potentially, their chastity).<sup>87</sup> As the Michigan Supreme Court put it, statutory rape laws reflect a public policy to protect those whose “immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct.”<sup>88</sup> These complainants are irrebuttably presumed to be incapable of giving or withholding consent to sex as adult women are typically authorized to do.<sup>89</sup> Such minors require the state to “protect” them from their would-be “aggressors.”<sup>90</sup> On the other side of the equation stand the adult defendants, who presumably seek to “abuse,”<sup>91</sup> exploit,<sup>92</sup> or manipulate<sup>93</sup> the girls. The defendants are therefore not only better

<sup>83</sup> *Jones*, 640 So. 2d at 1086.

<sup>84</sup> *Gaines v. State*, 118 S.W.3d 102, 109 (Ark. 2003) (quoting *McGuire v. State*, 706 S.W.2d 360, 362 (1986)).

<sup>85</sup> BLACKSTONE, *supra* note 32, at \*212.

<sup>86</sup> *Commonwealth v. Robinson*, 438 A.2d 964, 966 (Pa. 1981) (noting “legislative desire to protect those who are too unsophisticated to protect themselves” is “primary consideration” in statutory rape law).

<sup>87</sup> *Michael M. v. Superior Court*, 450 U.S. 464, 470 (1981) (observing that some legislators may have voted for gender-based statutory rape law to protect young women from loss of chastity).

<sup>88</sup> *People v. Cash*, 351 N.W.2d 822, 826–27 (Mich. 1984).

<sup>89</sup> *See, e.g., Commonwealth v. Dunne*, 474 N.E.2d 538, 545 n.17 (Mass. 1985) (“The law conclusively presumes that those under sixteen years of age are not sufficiently mature to understand fully the physical, mental, and emotional consequences of sexual intercourse, and are therefore incapable of making a rational decision about whether to consent to such conduct.”).

<sup>90</sup> *C.C.H. v. Philadelphia Phillies, Inc.*, 940 A.2d 336, 348 (Pa. 2008) (“[T]he legislature . . . intended to protect young children as a class from being sexually exploited who, due to their youth or inexperience, lack the judgment necessary to protect themselves from sexual aggressors.”); *see also Jones v. State*, 640 So. 2d 1084, 1086 (1994) (“[T]he State intervened in an effort to protect the health, safety, and welfare of children who are inevitably vulnerable to the sexual misconduct of others.”).

<sup>91</sup> *See, e.g., United States v. Ransom*, 942 F.2d 775, 778 (10th Cir. 1991) (holding that federal statute prohibiting sexual act with child under twelve years of age “legitimately furthers the government’s interest in protecting children from sexual abuse”); *see also 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) (“[I]t seems obvious that young people are vulnerable to abuse and exploitation in their sexual encounters, and that the law must play some role in regulating and protecting against that abuse.”).

<sup>92</sup> *See Garnett v. State*, 632 A.2d at 797, 801–02 (Md. 1993) (“Voluntary intercourse with a sexually mature teen-ager lacks the features of[,] [inter alia] . . . exploitation . . . that accompanies such conduct with children.”); *see also Wright v. State*, 739 So. 2d 1230, 1232 (Fla. Dist. Ct. App. 1999) (adopting sister court’s finding that legislative purpose behind statute prohibiting twenty-four-year-old person from engaging in sexual activity with person sixteen or seventeen years old was “protecting minors from sexual exploitation”).

<sup>93</sup> *See State v. Thorp*, 2 P.3d 903, 914 (Or. Ct. App. 2000) (“[T]he record shows that defendant is highly manipulative, even in his dealings with adults.”); *United States v. Rice*, 61 F. App’x 14, 20 (4th Cir. 2003) (“Typically, there are vast differences . . . in physical size

positioned to avert the harm, but also deserving of state sanction and punishment as the inevitably bad, immoral actors.

Another set of policy concerns underlying statutory rape laws relates to the potential for physical harm to the complainants. In some cases, courts have emphasized the risks of pregnancy and physical injury that come from sex between an older defendant and an underage partner, as well as the social costs that flow from these harms. It is rare, however, that courts raise these issues in support of the strict liability standard generally, and they almost never suggest that these are the exclusive reasons for imposing such a low standard of intent. Rather, these are justifications included, if at all, in a string of potential legislative or judicial concerns.<sup>94</sup> Only in cases where states have sought to maintain gender-specific statutory rape laws against an equal protection challenge does the prevention of teenage pregnancy<sup>95</sup> or (to a lesser extent) physical injury<sup>96</sup> figure prominently as an important state interest rationalizing the gender distinction.

Even cases involving equal protection challenges to statutory rape laws, however, frequently adopt the assumption that defendants are corrupt and deserving of punishment in a way that the complainants are not. These cases just add the (irrefutable) assumption that the bad actor is male. In *Michael M.*, for instance, the defendant argued that the state's gender-based law unconstitutionally "presume[d] that as between two persons under eighteen, the male is the *culpable aggressor*."<sup>97</sup> The plurality opinion rejected this assertion, however,

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and strength; mental and emotional development; life experience and, in particular, sexual experience . . . [which] amount to an increased danger of physical injury to the juvenile, whether unintended or not, and an increased likelihood of psychological manipulation.").

<sup>94</sup> See, e.g., *Owens v. State*, 724 A.2d 43, 52–53 (Md. 1999) (including risk of physical harm among potential dangers of sexual activity involving children); *People v. Gonzales*, 561 N.Y.S.2d 358, 361–62 (Westchester Cnty. Ct. 1990) (adding "prospects of transmission of venereal disease . . . , trauma[,] and permanent damage which may be caused to physical structures" to list of "ample" state interests in prohibiting sexual conduct between person over age twenty-one and one under age seventeen).

<sup>95</sup> See *Michael M. v. Superior Court*, 450 U.S. 464, 470, 472–73 (1981) (upholding gender-specific statutory rape law as legitimate articulation of State's "strong interest" in preventing teenage pregnancy); see also *State v. LaMere*, 655 P.2d 46, 49–50 (Idaho 1982) (recognizing prevention of unwanted pregnancy as "legitimate purpose" behind Idaho's gender-specific rape statute).

<sup>96</sup> See, e.g., *Rundlett v. Oliver*, 607 F.2d 495, 502–03 (1st Cir. 1979) (justifying gender-specific statutory rape laws on basis of physical risk to young girls); *State v. Yanez*, 716 A.2d 759, 766 (R.I. 1998) ("[T]he child-molestation sexual assault statutes' silence with regard to a mens rea is designed to subserve the state interest of protecting female children from the severe physical and psychological consequences [of underage sex]." (internal quotation omitted)); *State v. Ware*, 418 A.2d 1, 4 (R.I. 1980) ("It can be inferred . . . that the statute is designed to subserve the state interest of protecting female children from the severe physical and psychological consequences of [underage sex].").

<sup>97</sup> *Michael M.*, 450 U.S. at 475 (emphasis added).

maintaining that it was a legitimate legislative strategy to prevent teenage pregnancy by electing statutorily to “punish” only males (of any age), given that females already bear the “sanction[ ]” of pregnancy and its consequences.<sup>98</sup> In some sense, then, these equal protection cases offer even more pronounced assumptions about the culpability and malevolence of defendants charged with statutory rape.<sup>99</sup>

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With these assumptions, a portrait of the statutory rape defendant emerges. He is aware of himself and his culture such that he knows or should know that conduct in which he engages is illegal; he is mature enough to prevent the conduct from occurring at all (or at least is better able to do so, compared to the complainant); and he is a threat, morally and perhaps physically, to a more naïve, innocent, and unsophisticated partner.

These assumptions undergird and account for the unusually low standard of proof inherent in strict liability offenses. Undoubtedly, not all defendants charged and convicted of statutory rape fit this mold. Indeed, accepting the strict liability framework means that society is willing to accept that, in casting the net widely, the law may catch some of those defendants who took all the precautions they could to assure themselves that they were not running afoul of the law. These defendants may not even be considered “bad actors.” They believed they were engaging in fully consensual intercourse, perhaps even as a

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<sup>98</sup> *Id.* at 473. The California statute at issue prohibited sexual intercourse with a female under age eighteen unless she was the wife of the perpetrator. *Id.* at 466. In *Michael M.*, both parties were under eighteen. *Id.* The defendant was one year and eighteen days older than the complainant. *Id.* at 485 (Blackmun, J., concurring in the judgment). Given the tone, language, and logic of its opinion, it is hard not to see the plurality “protesting too much” in an effort to justify the moral and legal indictment of males over females. More persuasive is Justice Stevens’s dissent, which notes that the statute “requires that one, and only one, of two equally guilty wrongdoers be stigmatized by a criminal conviction.” *Id.* at 501 (Stevens, J., dissenting).

<sup>99</sup> Even where there has been no legislative distinction based on gender, such distinctions can arise in the context of enforcement. In *Commonwealth v. Bernardo B.*, 900 N.E.2d 834 (Mass. 2009), the Supreme Judicial Court of Massachusetts considered the case of a boy charged with statutory rape and other non-gender-specific offenses based on his alleged non-forcible sexual activity with three girls. *Id.* at 837–38. All four youth involved in the case were under the age of consent in Massachusetts. *Id.* at 837. The prosecutor affirmatively refused to prosecute the girls, *id.* at 846, but offered no general policy regarding its charging decisions in cases where both parties were arguably victims of statutory rape, *id.* at 841. Accordingly, the boy sought discovery to demonstrate that the Commonwealth selectively prosecuted boys. *Id.* The court has ordered the Commonwealth to comply with his request for discovery. *Id.* at 848.

part of loving relationships.<sup>100</sup> But it is plain that some among this group, through accident, guile, or carelessness, were nonetheless illegally engaging in sex with underage partners. To those defendants we say, “Tough luck.”<sup>101</sup> Lamentable or not, defendants who do not have mental retardation may still be appropriately held to the strict liability standard. In one case, a defendant who had been living with a girl who told him she was nineteen and who was working at a grocery store that only hired employees aged seventeen or older, was not insulated from prosecution when it turned out she was only fifteen.<sup>102</sup> In another, a defendant whose sexual relationship with a fifteen-year-old began when fourteen was the age of consent in Georgia was convicted of statutory rape once the legislature raised the age of consent some time after their relationship began.<sup>103</sup> And another defendant was sentenced to sixteen years in prison, in part for having sex with a complainant who testified that she had told him she was sixteen or seventeen—old enough to legally consent—but that she was not sure of her birth date because she had been adopted and had no birth certificate.<sup>104</sup>

Despite the law’s acceptance of strict liability for defendants of “average” intelligence, the question remains whether there are some classes of individuals—particularly those with mental retardation or other cognitive disabilities—to whom the above assumptions never apply. These individuals differ in that they would likely be unaware of the risk and unlikely to take the precautions necessary. They could often be considered naïve, inexperienced, and vulnerable. The next Part discusses the problem of casting the strict liability net so widely that it traps those who, factually, are not similarly situated and should not be subject to its harsh standard.

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<sup>100</sup> Many commentators have criticized the fact that statutory rape prosecutions often proceed in spite of defendants’ reasonable beliefs regarding age. *See generally* Myers, *supra* note 37 (calling for mistake-of-age defense). Even the majority opinion in *Garnett* catalogued, in great detail, scholarly opposition to the strict liability standard. *Garnett v. State*, 632 A.2d 797, 801 (Md. 1993).

<sup>101</sup> Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 267 (1987).

<sup>102</sup> *Walker v. State*, 768 A.2d 631, 632 (Md. 2001).

<sup>103</sup> *Phagan v. State*, 486 S.E.2d 876, 878, 885 (Ga. 1997).

<sup>104</sup> *Jenkins v. State*, 877 P.2d 1063, 1067 (Nev. 1994) (Springer, J., dissenting). Even the complainant in *Jenkins* did not know her real age. *Id.* at 1064. The government’s sole evidence of age was her adoption certificate, which stated her age as fourteen, a number “made up for her by the state.” *Id.* at 1067 (Springer, J., dissenting).

## II

## THE ASSUMPTIONS COLLAPSE

The assumptions described in Part I include a certain level of perceptibility, rationality, and power on the part of defendants such that they will be effectively deterred from unwanted behavior (and punished in accordance with due process if they are not). But individuals with mental retardation, who may be competent enough to stand trial or “sane” enough to be held criminally responsible for their actions, may nonetheless fall far short of these expectations. As this Part explains, the strict liability framework is simply inappropriate for this population of alleged offenders. They should not be presumed to have notice, to be capable (even relative to the younger partner) of preventing the activity, or to be exploitative or otherwise morally culpable.

The notion that defendants with mental retardation, even those who are competent for trial, are different from defendants with average cognitive and social functioning—and that criminal law should somehow account for that difference as it metes out justice—is certainly not new. There is an extensive history of efforts to respond to the challenges people with mental retardation or other cognitive issues present. The law’s treatment of this population has ranged from the assumption that they, like children, could never be competent<sup>105</sup> to the assumption that they were extremely dangerous and prone to violence and other criminality.<sup>106</sup> More recently, courts have sought to strike a balance between protecting this potentially vulnerable class and holding people accountable for their criminal conduct. As the Supreme Court observed in *Atkins v. Virginia*, the case in which it barred the imposition of the death penalty on defendants with mental retardation, “Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”<sup>107</sup>

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<sup>105</sup> Donald H.J. Hermann et al., *Sentencing of the Mentally Retarded Criminal Defendant*, 41 ARK. L. REV. 765, 765–66 (1988); see also Anthony Michael Platt & Bernard L. Diamond, *The Origins and Development of the “Wild Beast” Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. HIST. BEHAV. SCI. 355, 366 (1965) (discussing law’s ‘infancy’ concept of mental illness).

<sup>106</sup> Hermann, *supra* note 105, at 765–66; see also PATRICIA AINSWORTH & PAMELA BAKER, UNDERSTANDING MENTAL RETARDATION 53 (2004) (explaining that incarcerated populations administered early intelligence tests at beginning of twentieth century tended to score in mild range of mental retardation, causing “unfortunate result . . . that mild mental retardation and ‘psychopathy’ or criminal behavior began to be linked in the opinions of many policy makers”).

<sup>107</sup> 536 U.S. 304, 318 (2002).

As courts have examined the validity of constitutional rights waivers,<sup>108</sup> sentencing mitigation,<sup>109</sup> the death penalty,<sup>110</sup> and even competence to consent to sexual activity<sup>111</sup> with respect to persons with mental retardation, they have relied on scientific and social scientific research and expertise. Application of these legal and extra-legal insights to the assumptions underlying the use of the strict liability standard in statutory rape cases makes clear that there may be other areas where our criminal jurisprudence should take into account differences based on mental capacity.

### A. Fairness

Because individuals should know of the criminality of their conduct before they may be held strictly liable for it in court, the law presumes that potential defendants are aware that particularly hazardous or immoral activity is patently risky and likely illegal. Case law has suggested that longstanding laws, court decisions, and other government intervention might be sufficient to put citizens on notice of the existence of a legal or moral taboo.<sup>112</sup> Strict liability offenses based on a legal or moral wrong also presume an awareness of cultural mores and norms.<sup>113</sup> However, people with mental retardation cannot be presumed to have such knowledge.

As a preliminary matter, understanding cultural and social norms themselves requires a certain level of intellectual functioning. People of different levels of mental retardation may not always have the

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<sup>108</sup> See *People v. Braggs*, 209 Ill. 2d 492, 509–11 (2003) (contending, based on psychological research, that “[t]he same rationale that requires modification of the reasonable person standard to take into account the general characteristics of juveniles also militates in favor of such a modification where the mentally retarded are concerned”).

<sup>109</sup> Even when the Supreme Court upheld the death penalty for people with mental retardation in 1989, it found that the constitutionality of its application required the jury be able to “consider and give effect to” a defendant’s mitigating evidence, including his mental retardation. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), *overruled on other grounds by Atkins*, 536 U.S. at 304.

<sup>110</sup> *Atkins*, 536 U.S. at 318–21 (relying on scientific evidence to hold that execution of defendants with mental retardation violates Eighth Amendment).

<sup>111</sup> See, e.g., *Baise v. State*, 502 S.E.2d 492, 496–97 (Ga. Ct. App. 1998) (finding that expert psychological testimony on extent of complainant’s mental retardation and its effect on her capacity to consent to sex were properly admitted in forcible rape trial); *State v. Ash*, No. A07-0761, 2008 WL 2965555, at \*4 (Minn. Ct. App. Aug. 5, 2008) (relying in part on social science research about capacities of people with mental retardation in finding that complainant did not have capacity to consent to sex, and encouraging prosecutors to use expert testimony in similar cases); see also Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 356–57 & n.261 (1997) (citing studies showing that people with mental retardation are sexually victimized at disproportionately high rates).

<sup>112</sup> See *supra* notes 50–62 and accompanying text.

<sup>113</sup> See *supra* notes 55–56 and 61–62 and accompanying text.

capacity to read, understand, or appreciate these norms. Indeed, a limited intelligence is one of the main features of mental retardation.<sup>114</sup> Even those with “mild” mental retardation who receive all the necessary support and training are unlikely to achieve academic skills beyond the sixth-grade level; those with “moderate” retardation will probably not progress beyond second-grade work.<sup>115</sup> Depending on his intelligence level, a person with mental retardation may have limited or no ability to read, much less an ability to understand and remember, material accessible to people of average intelligence.<sup>116</sup> As psychiatry professors John J. McGee and Frank J. Menolascino have explained, “[P]eople with mental retardation encode information in an extremely limited manner, and . . . lose[] information at a much faster rate” than their non-retarded peers.<sup>117</sup>

More significantly, given both the intellectual and adaptive behavior limitations that may accompany mental retardation, an individual with mental retardation may be restricted in his or her ability to comprehend the significance of legal or moral rules and to apply those rules in practice. For instance, scholars studying the effectiveness of giving Miranda warnings to people with mental retardation have found that people with mental retardation simply cannot understand the warnings, including both the meaning of individual words (even when the vocabulary was simplified) and the concepts behind them.<sup>118</sup> Even those test subjects whose IQs exceeded the standard cutoff for mild mental retardation by up to eighteen points generally failed to

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<sup>114</sup> See *supra* note 3.

<sup>115</sup> DSM-IV-TR, *supra* note 3, at 43.

<sup>116</sup> See *Atkins*, 536 U.S. at 320 (including “diminished ability to understand and process information” and “to engage in logical reasoning” among cognitive and behavioral impairments of people with mental retardation); ROSALYN KRAMER MONAT, *SEXUALITY AND THE MENTALLY RETARDED* 33 (1982) (“[E]xtreme concreteness of language [is needed] when working with the mentally retarded. *Abstraction* in language ability develops slowly and sometimes not at all.”); see also Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 514 (2002) (explaining that individual with mental retardation who has been arrested may refuse phone call not because he is uninterested in speaking with anyone, but rather because he may not remember any phone numbers, may be unable to read a phone book, or may not even know how to operate the phone).

<sup>117</sup> John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in *THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION* 55, 58 (Ronald W. Conley et al. eds., 1992) (citations omitted).

<sup>118</sup> Cloud, *supra* note 116, at 495, 532. These results are similar to those of other studies of mentally retarded individuals’ understanding of the Miranda warnings. Caroline Everington and Solomon M. Fulero found not only that people with mental retardation do not have a complete understanding of the warnings, but also that they are extremely suggestible and will respond to the suggestions of their interlocutor. Caroline Everington & Solomon M. Fulero, *Competence To Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 *MENTAL RETARDATION* 212, 217–18 (1999).

understand both the warnings and the rights they describe.<sup>119</sup> These results differed dramatically from those of the members of a control group, which included people with average or above average intelligence, nearly all of whom demonstrated a vastly greater understanding of the warnings.<sup>120</sup> Furthermore, many defendants with mental retardation may not appreciate the legalities of age-appropriate sexual consent, which vary from jurisdiction to jurisdiction. If true, this observation renders the concept of “notice” essentially moot.

Moreover, people with mental retardation may have difficulty applying lessons learned on one occasion to a subsequent context.<sup>121</sup> Even if an adult with mental retardation were taught that he could not engage in sex with people under a certain age, he might not have the ability to use that information upon meeting or interacting with a particular young person. As described below, however, the assumption that a person with mental retardation would receive such education may well be unwarranted.

In terms of their social and sexual experience, some people with mental retardation may not be significantly different from children who “play doctor,” who have curiosity but no knowledge, and whom virtually no one would criminalize.<sup>122</sup> However, people with mental retardation who are subject to strict liability statutes are by definition

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<sup>119</sup> Cloud, *supra* note 116, at 538.

<sup>120</sup> *Id.* at 538–39. The disabled group, which included individuals in a range of mental retardation levels, including those whose IQ score exceeded the typical cutoff for mild mental retardation by up to 18 points, scored an average of 20 percent on the Vocabulary Test, compared to 83 percent for the control group. On the Warnings Test, the disabled group scored 27 percent, compared to 90 percent for the control group, and on the Concepts Test, the disabled group scored 38 percent compared to 87 percent for the controls. *Id.*

<sup>121</sup> McGee & Menolascino, *supra* note 117, at 58 (citations omitted).

<sup>122</sup> See *Compassionate Protection of the Community from Mentally Retarded Persons Who Pose a Risk of Violence to Themselves or Others Act of 2002: Hearing on Bill 14-616 Before the Comm. on the Judiciary Council*, Council Period 14 (D.C. 2002) (statement of Laura E. Hankins, Chief Legis. Counsel, Public Defender Service for the District of Columbia) [hereinafter “Hankins testimony”] (asserting that there is “great difference” in potential harm to child from other child versus mentally retarded adult but that mentally retarded adult, like child and unlike pedophile, can learn appropriate behaviors); see also Susan Hayes, *Sex Offenders*, 17 J. INTELL. & DEVELOPMENTAL DISABILITY 221, 222–23 (1991) (citing “important diagnostic issue” of determining whether behavior is “deviant sexual response, or whether it is a reflection of the individual’s functional age and may not involve ‘arousal’ so much as curiosity and sexual exploration”); John F. Simonds, *Sexual Behaviors in Retarded Children and Adolescents*, 1 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 173, 175 (1980) (noting that cohort of adolescents with mental retardation appearing in case studies “tended to become involved in [sexual] behaviors that might not be upsetting to adults if performed by a 6-year-old”).

teens or adults, not children.<sup>123</sup> While they undergo puberty alongside their non-retarded peers and experience the sexual needs and desires that go along with teenage hormones,<sup>124</sup> they often have not had the education or training they need to understand anything beyond those instincts.<sup>125</sup> Social science research has shown that even people with mild intellectual disabilities have only “partial, inaccurate, inconsistent, and even improbable” knowledge of sexual matters.<sup>126</sup> Unlike their nondisabled peers—people of average intelligence who may be exposed to sex education in schools, in the home, and in the media<sup>127</sup>—people with mental retardation are often given no formal sex education.<sup>128</sup> To the contrary, this population is often kept in the

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<sup>123</sup> There is considerable dispute over the use of the term “mental age” (or “functional age”) in the description or diagnosis of a person with mental retardation. While people with mental retardation are often described as having the “mental age” of a child, a “mental age of seven” technically means that a person has scored what a typical seven-year-old would score on an IQ test. It does not necessarily reflect the person’s physical, emotional, and learning experiences, all of which may be quite different from that of a seven-year-old. Dorothy Griffiths, *Sexuality and People Who Have Intellectual Disabilities*, in *A COMPREHENSIVE GUIDE TO INTELLECTUAL & DEVELOPMENTAL DISABILITIES* 573, 573 (Ivan Brown & Maire Percy eds., 2007). Other researchers have noted that a twenty-year-old mildly retarded male might have the mental age of an eleven-year-old but age-appropriate physical development and be sexually competent “in terms of biological capacity, desire, and the psychological significance [he] attribute[s] to sexual relations.” Paul R. Abramson, Tracee Parker & Sheila R. Weisberg, *Sexual Expression of Mentally Retarded People: Educational and Legal Implications*, 93 *AM. J. MENTAL RETARDATION* 328, 332 (1988) (citation omitted). *But see* McGee & Menolascino, *supra* note 117, at 60 (citing research showing that people with mental retardation have moral judgment comparable to that of “mentally age-matched persons without mental retardation”).

<sup>124</sup> Research shows that the sex drive of people with mild mental retardation is virtually the same as that of those with average intelligence and that “[s]exual impulses, desires and fantasies of the retarded and nonretarded are similar.” Simonds, *supra* note 122, at 173.

<sup>125</sup> MONAT, *supra* note 116, at 6 (explaining that people with mild retardation have sexual desires but have “not learned the social amenities that will allow them to meet these needs without being abusive to themselves or others”); *see also* ANSWORTH & BAKER, *supra* note 106, at 97–98 (discussing development of young people’s sexuality alongside parents’ difficulty in addressing the issue, particularly with developmentally disabled children).

<sup>126</sup> Marita P. McCabe & Agi Schreck, *Before Sex Education: An Evaluation of the Sexual Knowledge, Experience, Feelings and Needs of People with Mild Intellectual Disabilities*, 18 *AUSTL. & N.Z. J. DEVELOPMENTAL DISABILITIES* 75, 76 (1992).

<sup>127</sup> *See* DOUGLAS KIRBY, NAT’L CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, EMERGING ANSWERS 2007: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY AND SEXUALLY TRANSMITTED DISEASE 102–23 (2007) (describing effects of pregnancy prevention and sex education programs on mainstream populations); *see also* Jane D. Brown & Elizabeth M. Witherspoon, *The Mass Media and American Adolescents’ Health*, 31 *J. ADOLESCENT HEALTH* 153, 157 (2002) (citing study showing more than half of teenagers learn about contraception and pregnancy from movies and television and more than half of teen girls say they learned about sex from magazines).

<sup>128</sup> One study estimated that only seven percent of children with mental retardation receive sex education at school. Edward T. Turner, *Attitudes of Parents of Deficient Children Toward Their Child’s Sexual Behavior*, 40 *J. SCH. HEALTH* 548, 549 (1970).

dark about sexuality well into puberty and adulthood.<sup>129</sup> Parents and other caretakers of people with mental retardation can be so overprotective that their children may develop so-called “‘functional’ retardation in addition to their intrinsic mental disability,” meaning that they fail to develop initiative, social skills, and other independent behaviors because of a learned fear of and inexperience with independence.<sup>130</sup> When people with mental retardation do receive sex education, they often demonstrate much improved sexual knowledge,<sup>131</sup> but they are wholly dependent on others to gain this education and training.<sup>132</sup>

To the extent that a person becomes socially isolated due to his mental retardation, he may also lack awareness of social mores. People with intellectual disabilities “have historically been denied, through isolation from the general public and especially from people of the opposite sex, the usual cultural experiences through which to learn about, and understand, their sexuality.”<sup>133</sup> Indeed, persons with mental retardation often otherwise lack a peer group and thus socialize largely with family and younger children.<sup>134</sup> This not only makes it less likely that an individual with mental retardation will learn through peers what is and is not appropriate sexual behavior,

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<sup>129</sup> See, e.g., Griffiths, *supra* note 123, at 574 (finding that people with intellectual disabilities have often been treated as asexual by family members and society, and noting that isolation from the general public and members of opposite sex has historically prevented these individuals from learning about their sexuality through casual cultural experiences); see also AINSWORTH & BAKER, *supra* note 106, at 98 (describing parents’ struggle to accept sexuality of adult children with mental retardation).

<sup>130</sup> AINSWORTH & BAKER, *supra* note 106, at 124.

<sup>131</sup> See Marita P. McCabe, *Sex Education Programs for Persons with Mental Retardation*, 31 MENTAL RETARDATION 377, 384 (1993) (listing several examples of successful sex education programs for mentally retarded).

<sup>132</sup> Even the prosecution in *Atkins* acknowledged that people with mental retardation improve their level of functioning only “as a result of effective supports and services” or if “given sufficient time to learn coping skills and if they have support of other persons.” Brief of Respondent at 24–25, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) (citations omitted).

<sup>133</sup> Griffiths, *supra* note 123, at 574; see also SARAH F. HAAVIK & KARL A. MENNINGER, II, *SEXUALITY, LAW, AND THE DEVELOPMENTALLY DISABLED PERSON* 152 (1981) (“Developmentally disabled people typically lack social skills and have not had the same opportunities or peer group contact so critical in the development of appropriate social behavior that normal individuals have had.”); Elizabeth J. Reed, Note, *Criminal Law and the Capacity of Mentally Retarded Persons To Consent to Sexual Activity*, 83 VA. L. REV. 799, 811 (1997) (“[T]hose with mental retardation are at increased risk because they often do not receive information about sexual exploitation and how to avoid it.”).

<sup>134</sup> See AINSWORTH & BAKER, *supra* note 106, at 114–15 (discussing potential for limited social options for people with mental retardation and their resulting dependence on family members or paid caregivers for recreation and socialization); ROBERT PERSKE, *UNEQUAL JUSTICE?: WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM* 18 (1991) (indicating that adults with retardation often “fail to relate well with those their age” and are likely to relate best to children or elderly adults).

but also makes it more likely that all of his social interactions, including sexual ones, will be with his intellectual and social peers, who may be significantly younger.

Experts in mental retardation and sexuality emphasize that people with mental retardation can be educated to understand what is and is not appropriate sexual conduct.<sup>135</sup> But the critical assumption underlying the strict liability standard—that adults should and do know that having sex with underage partners is wrong and illegal—simply does not apply to adults with mental retardation. While training opportunities exist, teaching a person with mental retardation about sexuality is a lifelong process, and people with mental retardation often do not have these resources for a host of reasons beyond their own control.<sup>136</sup> Some of the basic sources for transmission of notice about appropriate and inappropriate sexual behaviors are often simply unavailable to people with mental retardation.

### B. Efficiency

It is hard even to make the argument that a person who is unaware that sex with a young person is inappropriate (assuming he can even identify her age accurately) is in a better position to prevent that sex from occurring than his underage partner. For statutory rape defendants with mental retardation, efficiency arguments are likely to fail because of the prevalence of two alternative scenarios. First, the underage partner may be—as policymakers and judges often presume—young, inexperienced, and unable to understand fully what it means to consent to sex. In such a case, the underage partner may be functionally different from the adult with mental retardation only in biological age.<sup>137</sup> Alternatively, the underage partner may be more aware of and experienced with sex than the older partner with mental retardation. In either of these scenarios, the efficiency argument sup-

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<sup>135</sup> See AINSWORTH & BAKER, *supra* note 106, at 97–103, 115–17 (emphasizing importance of sex education for this population); HAAVIK & MENNINGER, *supra* note 133, at 151–54 (same); MONAT, *supra* note 116, at 27 (same); Abramson et al., *supra* note 123, at 331 (“Research has indicated that sex education greatly increases contraceptive, reproductive, and hygienic knowledge; improves social skills; and reduces inappropriate behavior of mentally retarded people.”).

<sup>136</sup> See McGee & Menolascino, *supra* note 117, at 60 (“Most studies have indicated that a disproportionate percentage of incarcerated offenders with mental retardation . . . come from economically impoverished families and are poor and unemployed themselves.” (citation omitted)); see also LYDIA FEGAN & ANNE RAUCH, *SEXUALITY AND PEOPLE WITH INTELLECTUAL DISABILITY 2* (1993) (“[T]he only real difference [between mentally retarded people and their non-intellectually disabled peers] is their access to information . . . about appropriate expression of sexuality, and appropriate communication of sexual needs.”).

<sup>137</sup> See *supra* note 123 for further discussion of mental age.

porting the strict liability standard—that holding the older participant strictly liable will deter his conduct and, accordingly, efficiently prevent the harm—is unfounded. Thus, even where the adult with mental retardation has notice that the conduct is wrongful or illegal, other characteristics common to people with mental retardation can still undermine his ability to forestall the conduct.

As noted in both scenarios above, the presumption in statutory rape law that the adult is invariably more mature, experienced, and sophisticated is turned on its head when the defendant has mental retardation. These defendants may lack the tools necessary to navigate complex intimate relationships. People with mental retardation have difficulty recognizing social cues, understanding the reactions of others, or comprehending their own role in relation to another.<sup>138</sup> Based on these diminished capabilities, they may not be able to distinguish a person of inappropriate age from a person of appropriate age, or even fully understand the nature and limits of a particular relationship. Indeed, insofar as a person with mental retardation has difficulty making moral judgments or reasoning abstractly,<sup>139</sup> he may not be able to make the decision that certain conduct is wrongful—a necessary step before he could even venture to prevent it from happening. Given the lack of socialization among this population, individuals with mental retardation also may confuse platonic and sexual gestures.<sup>140</sup>

Challenges related to communication and assertiveness common to this population can exacerbate the problem.<sup>141</sup> The law assumes that the defendant can direct a discussion regarding age (and, in some cases, relative age), along with the appropriateness and legality of sex in a particular situation. The defendant is held to a burden of self-possession and assertiveness that would enable him to actually prevent illicit intercourse from occurring.

These skills can hardly be presumed to exist among people with mental retardation. One of the key behavioral issues that distinguishes these individuals from their non-mentally retarded peers is a tendency

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<sup>138</sup> See McGee & Menolascino, *supra* note 117, at 59 (explaining difficulties individuals with mental retardation have with social understanding).

<sup>139</sup> *Id.* at 59–60.

<sup>140</sup> See Lynne Muccigrosso, *Sexual Abuse Prevention Strategies and Programs for Persons with Developmental Disabilities*, 9 *SEXUALITY & DISABILITY* 261, 262 (1991) (noting that lack of socialization of persons with developmental disabilities might impair their ability to distinguish between affectionate and exploitative contact).

<sup>141</sup> See DSM-IV-TR, *supra* note 3, at 41 (listing communication as potential adaptive functioning limitation). Researchers have also recognized that disabled individuals are often trained to be extremely compliant. Dick Sobsey & Tanis Doe, *Patterns of Sexual Abuse and Assault*, 9 *SEXUALITY & DISABILITY* 243, 252 (1991); see also Reed, *supra* note 133, at 810–11 (noting that people with mental retardation often lack assertiveness and decisionmaking abilities because of dependence on caregivers).

to act impulsively.<sup>142</sup> Indeed, this is a trait that the Supreme Court has used to find diminished culpability—and a resulting lower ceiling for sentences—for both juveniles and people with mental retardation.<sup>143</sup> Of course, a tendency to be impulsive renders a defendant with mental retardation the opposite of the rational, mature actor that the justifications for strict liability envision.

Finally, a low standard of mens rea will not deter people with mental retardation from undesirable conduct. As the Supreme Court stated in *Atkins*, rationales based in deterrence do not apply to these defendants because the attendant cognitive and behavioral deficits make it almost impossible for them to understand risk, much less perform a cost-benefit analysis, before engaging in illegal activity.<sup>144</sup>

### C. *Morality*

The third assumption about statutory rape defendants that is thought to justify the strict liability standard is that they are simply bad people seeking to manipulate, prey upon, or otherwise take advantage of the naïveté and youth of innocent young victims, typically girls. The political interest and expressive value giving rise to such a binary demarcation, however, makes little sense in most instances where the defendant has mental retardation. As I argue in this Section, although people with mental retardation have historically been represented as oversexed individuals with insatiable sexual appetites, the reality is that people with mental retardation (particularly those classified as mildly mentally retarded) tend to have sex drives comparable to those of their peers of average intelligence and are even less likely to pose a threat of sexual aggression. Some of the qualities associated with people who are mentally retarded that are described above—difficulty with communication, sexual ignorance, and a lack of acuity in social interactions—not only debunk the notion that people with mental retardation are the best risk avoiders but also refute the argument that they are so morally corrupt that they are deserving of sanction regardless of their actual intent or knowledge.<sup>145</sup> Indeed, discussions of sexuality among people with mental retardation

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<sup>142</sup> See McGee & Menolascino, *supra* note 117, at 58 (discussing limitations to impulse control).

<sup>143</sup> See *Roper v. Simmons*, 543 U.S. 551, 568–69 (2005) (abolishing death penalty for juveniles in part because of their “impetuous and ill-considered actions and decisions” (citation omitted)); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (citing “abundant evidence” that people with mental retardation “often act on impulse rather than pursuant to a premeditated plan”).

<sup>144</sup> *Atkins*, 536 U.S. at 320.

<sup>145</sup> See *supra* Part I.C for more on moral culpability and criminal law.

tend to focus on the population as potential victims rather than victimizers.<sup>146</sup>

The notion that people with mental retardation are likely to be sexual predators is a vestige of historical fears concerning their alleged hypersexuality.<sup>147</sup> At the turn of the twentieth century, newly developed intelligence testing led to a belief in the psychopathy of criminal behavior and a common misperception that mild mental retardation was both a precursor to antisocial behavior and a hereditary condition related to “loose sexual behavior.”<sup>148</sup> These fears reached their peak with the forced sterilization laws of the early twentieth century. Such legislation, influenced by the eugenics movement, sought to control the sexual behavior of people with mental retardation (particularly those in institutions) and prevent them from procreating.<sup>149</sup>

Contemporary culture recognizes that people with mental retardation are more apt to be victims of crime than perpetrators, particularly with respect to sexual crimes. Researchers cite a number of factors leading to the risk of sexual abuse for people with mental disabilities, including their insufficient knowledge about sex and sexuality, their limitations in verbal communication skills, their isolation within service environments, the inadequacy of services staff, the insufficiency of screening procedures, the laxity of policy enforcement within

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<sup>146</sup> See, e.g., Denno, *supra* note 111, at 320 (noting that people with mental retardation are victimized at four to ten times the rate of the general population); Ruth Luckasson, *People with Mental Retardation as Victims of Crime*, in *THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS*, *supra* note 117, at 209 (“No one is immune to criminal victimization, but it appears that people with mental retardation are at higher risk than others.”); Reed, *supra* note 133, at 806 (discussing “fundamental tension between the mentally retarded individual’s need for sexual freedom and her need for protection from harm”); Sobsey & Doe, *supra* note 141, at 252 (describing pattern of sexual abuse of vulnerable populations, including adults with disabilities); cf. Denno, *supra* note 111, at 338–39 (analyzing historical and current emphasis in laws limiting social and sexual expression and especially sexual intercourse among people with mental retardation).

<sup>147</sup> Interestingly, this stereotype often coexisted with the equally misguided stereotype that people with mental retardation were devoid of sexuality or sexual needs. See HAAVIK & MENNINGER, *supra* note 133, at 34 (explaining rationale for legal restrictions on marriage among people with mental retardation, including “common perception” that such individuals were “eternal child[ren]” and noting that this view “denied mentally retarded people’s sexuality and contributed to a belief that sex . . . was something mentally retarded people could not appreciate”).

<sup>148</sup> AINSWORTH & BAKER, *supra* note 106, at 53.

<sup>149</sup> See JAMES W. TRENT, JR., *INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES 192–202* (1994) (discussing history of sterilization). Perhaps the most notorious defense of eugenics was written by one of our nation’s most celebrated Justices, Oliver Wendell Holmes. See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.”).

service agencies, and the use of psychotropic medications.<sup>150</sup> As many scholars have contended, society's stigmatization of people with mental retardation may also lead members of the group to experience low self-esteem and crave acceptance,<sup>151</sup> an important risk factor for sexual victimization.<sup>152</sup>

People with mental retardation often respond to such treatment by trying to "pass" as a person of average intelligence.<sup>153</sup> To avoid conflict or questioning, these adults often have an especially strong interest in pleasing others and seeking to do what they think is expected of them, regardless of context.<sup>154</sup> Some researchers have posited that caretakers and parents foster this behavior because a cooperative student or child is easier to manage.<sup>155</sup> Others have referred to this trait as a generalized "desire to please"<sup>156</sup> or a "psychological propensit[y] to comply."<sup>157</sup>

This passivity and willingness to agree to almost anything contradicts the predator image upon which the strict liability standard relies. Just as psychologists have demonstrated that teenagers are particularly vulnerable to peer pressure because their identity and moral sensibility are not yet fully formed,<sup>158</sup> so too is there evidence that people with mental retardation are much more likely to be followers than leaders.<sup>159</sup> Because of this, people with mental retardation are not

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<sup>150</sup> Sobsey & Doe, *supra* note 141, at 253–55.

<sup>151</sup> Jones, *supra* note 22, at 729; *see, e.g.*, Sobsey & Doe, *supra* note 141, at 253 (discussing damage of stigmatization to individuals' self-image).

<sup>152</sup> *See* Sobsey & Doe, *supra* note 141, at 253 (discussing idea that stigmatized people "allow themselves to be victimized as a result of their perceived inferiority"); *see also* MONAT, *supra* note 116, at 8 ("The mildly mentally retarded are often viewed as having very poor self imagery and self worth. Consequently, they sometimes sell themselves short or cheap, literally, with respect to sexuality.").

<sup>153</sup> This behavior is often referred to as a "cloak of competence." *E.g.*, James R. Patton & Denis W. Keyes, *Death Penalty Issues Following Atkins*, 14 EXCEPTIONALITY 237, 241 tbl.2, 252 (2006).

<sup>154</sup> Researchers demonstrated this phenomenon of "acquiescence," a form of response bias, when they found that people with mental retardation tended to answer "yes" even when asked absurd questions. For example, seventy-three percent answered in the affirmative when asked, "Does it ever snow here [in Texas] in the summer?" Everington & Fulero, *supra* note 118, at 213 (citing Carol K. Sigelman et al., *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53–58 (1981)).

<sup>155</sup> *See* Muccigrosso, *supra* note 140, at 263 ("It's easier to have a super-cooperative son/daughter/student. . . . Assertiveness is not often reinforced.").

<sup>156</sup> Cloud et al., *supra* note 116, at 512; Patton & Keyes, *supra* note 153, at 241 tbl.2.

<sup>157</sup> Cloud et al., *supra* note 116, at 546.

<sup>158</sup> *See* Roper v. Simmons, 543 U.S. 551, 570 (2005) ("[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.").

<sup>159</sup> Hubert R. Wood & David L. White, *A Model for Habilitation and Prevention for Offenders with Mental Retardation*, in THE CRIMINAL JUSTICE SYSTEM AND MENTAL

likely to be intentionally engaged in sexual degradation of a minor, and they may even be especially vulnerable to such manipulation themselves. Due to their limited cognitive capacity, those with mild mental retardation “tend to react basically on the pleasure principle” and therefore may be easily “coerced into behavior that otherwise might be considered abusive or inappropriate.”<sup>160</sup> Consider the case of Raymond Garnett, the defendant introduced at the outset of this Article. While he apparently argued that he and the complainant engaged in voluntary (i.e., non-forcible) sexual intercourse, the facts of the case might be read to suggest that the complainant manipulated him—or, at least, to challenge the presumptive notion that he was morally blameworthy.<sup>161</sup> Indeed, other areas of criminal law acknowledge the differences that mental retardation can make in a person’s capacity for blameworthiness and even vulnerability, particularly in sexual circumstances.<sup>162</sup>

Certainly, even a defendant who is not mentally retarded could object to the idea that he and he alone is the morally suspect participant in a sexual relationship, particularly when the parties are close in age. Indeed, men challenging gender-specific statutory rape laws (or gender-based enforcement of non-gender-specific statutes) often

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RETARDATION: DEFENDANTS AND VICTIMS, *supra* note 117, at 153, 157, 162 (discussing prevalence of peer influence in criminal involvement of people with mental retardation); *see also* *Atkins v. Virginia*, 536 U.S. 304, 318 (“[T]here is abundant evidence that [persons with mental retardation] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.”); *Everington & Fulero*, *supra* note 118, at 212–13 (noting that mentally retarded persons often seek to please others).

<sup>160</sup> *MONAT*, *supra* note 116, at 8.

<sup>161</sup> In *Garnett v. State*, Raymond’s counsel asserted that the teenaged complainant (and her friends) lied to Garnett about her age, invited him up to her bedroom at night, and told him how to use a ladder to evade her father’s detection. 632 A.2d 797, 800 (Md. 1993). Dissenting from the majority, Judge Eldridge argued, “It is unreasonable to assume that the Legislature intended for one to be convicted [of statutory rape] . . . regardless of his or her mental state.” *Id.* at 807 (Eldridge, J., dissenting).

<sup>162</sup> General differences in vulnerability and susceptibility to manipulation are fundamental tenets underlying the Court’s elimination of the death penalty for people with mental retardation. *See Atkins*, 536 U.S. at 318 (recognizing that mental retardation can make person follow, rather than lead, and thus be less culpable than other offenders). Statutory rape laws that make it a crime to have sex with a person with mental retardation if the person without the mental disability either knows or has reason to know of the complainant’s mental retardation are based on a premise that members of this population, like underage individuals, may not have the capacity to consent to sex. *See Abramson et al.*, *supra* note 123, at 328–30 (citing case law and statutes concerning sexual consent laws “designed as a protection against sexual coercion” of mentally retarded individuals but arguing that such laws should not preclude sexual expression among this population); *Denno*, *supra* note 111, at 340–45, 403–14 tbl.c (cataloguing state statutory rape laws concerning sex with person who has mental disabilities and discussing different jurisdictions’ tests for capacity to consent).

resist this notion.<sup>163</sup> The difference is that even if the presumption is valid in most statutory rape cases with defendants of average intelligence, it is contrary to the social science literature about most defendants with mental retardation. Applying the same normative construct to those with mental retardation allows the exception to swallow the rule, with serious consequences. For defendants, these consequences can vary from complete liberty deprivation to lifetime registration to public opprobrium. For our system of justice, this means imposing criminal liability in contravention of any justifiable theory of culpability and perhaps in contravention of the Constitution.<sup>164</sup>

This is not to say that all people with mental retardation fall outside the assumptions underlying the strict liability standard in statutory rape cases. Some individuals with mental retardation have only slight levels of cognitive or behavioral impairment. Others, even those who have some of the traits and cognitive or behavioral deficits described above, are able to recognize the risk of criminal sanctions or moral judgment attached to intimate contact with a minor.<sup>165</sup> Indeed, advocates for people with mental retardation might suggest that there is something valuable in letting them experience “the dignity of risk.”<sup>166</sup> The potential for criminal liability assumes a level of autonomy that people with mental retardation and their advocates seek as they pursue more complete community integration. As one expert on mental retardation has said, “[I]t is dehumanizing to remove all danger from the lives of the retarded and handicapped. After all, we take for granted that there is risk and danger in our lives, and the lives of our nonhandicapped children!”<sup>167</sup> Whether and to what extent the criminal justice system should acknowledge a statutory rape defendant’s mental retardation is the question addressed in Part IV of this Article.

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<sup>163</sup> See *supra* notes 95–99 and accompanying text for discussion of such cases.

<sup>164</sup> See *infra* Part III for discussion of constitutional issues.

<sup>165</sup> See Fegan & Rauch, *supra* note 136, at 110 (noting that some individuals with mental retardation may know or be taught “to deal appropriately with their sexual feelings”).

<sup>166</sup> Robert Perske, *The Dignity of Risk*, in WOLF WOLFENSBERGER ET AL., *THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES* 194, 196 (1972) (advocating “allow[ing] the impaired to assume a fair and prudent share of risk commensurate with their functioning”); see also WOLFENSBERGER, *supra*, at 27 (arguing for “normalization,” which urges maximum integration of people with mental retardation into conditions and norms of mainstream society).

<sup>167</sup> WOLFENSBERGER, *supra* note 166, at 204–05.

### III CONSTITUTIONAL CONCERNS

In addition to raising policy and fairness concerns, applying the strict liability standard to defendants with mental retardation may also raise constitutional questions. The Supreme Court has not yet faced the issue squarely, and, lacking direct precedent, lower courts have tended to rely more on policy arguments than constitutional text or precedent. Indeed, it is because the policy arguments are stronger, and more likely to be successful, that this Article recommends policy-based reform, rather than litigation.<sup>168</sup> Yet, there are both precedent and principles which suggest that convicting and sentencing this class of defendants under a strict liability standard may violate the Fifth, Fourteenth, and Eighth Amendments. Collectively, these constitutional provisions provide a range of potential arguments for statutory rape defendants with mental retardation: (1) that the law fails to provide them sufficient notice of the criminality of their conduct, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments; (2) that the law criminalizes their conduct even though they cannot form criminal intent, also a due process violation; and (3) that the law imposes a disproportionate sentence, violating the Eighth Amendment ban on cruel and unusual punishment. To the extent that courts have considered these questions, they have not done so in the context of defendants with mental retardation, whose circumstances should raise greater constitutional concerns than the “average” defendant. Further, the potential success of these arguments—and the interest in avoiding a constitutional issue if at all possible—provides another reason for policymakers to define clearly if and when a person with mental retardation should be held criminally liable for having sex with an underage partner.

#### A. *Right to Notice*

The Supreme Court has held that punishing an individual for violating a rule that he or she does not know about may, under some circumstances, run afoul of due process principles. In *Lambert v. California*, for example, the Court found that a woman had neither actual nor probable notice of her obligation to register as a felon upon moving to Los Angeles.<sup>169</sup> According to Justice Douglas, who penned the majority opinion in the case, due process “places some limits” on the legislature’s ability to criminalize unwitting conduct: “Engrained

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<sup>168</sup> See *infra* Part IV.

<sup>169</sup> 355 U.S. 225 (1957).

in our concept of due process is the requirement of notice.”<sup>170</sup> The Court accordingly reversed Lambert’s conviction for violating the registration statute, noting that if it held otherwise, “the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.”<sup>171</sup>

Courts examining sufficiency of notice under the Due Process Clause consider two questions. First is the extent to which the criminal prohibition at issue is (or should be) within the likely ken of average citizens, as in *Lambert*.<sup>172</sup> Second is whether a particular statute as written is sufficiently clear that a defendant should have understood the particular conduct it forbade.<sup>173</sup> While *Lambert* is still good law, courts and commentators have generally viewed it as a narrow exception to the criminal law maxim that “ignorance of the law is no excuse.”<sup>174</sup> Indeed, instead of ushering in an era where due process enshrined the concept of personal culpability into criminal law, *Lambert* has become more of an outlier, typically cited positively only in other registration cases.<sup>175</sup> In generic statutory rape cases, lower courts have tended to reject constitutional notice claims, typically finding that the defendant knew or should have known of the impro-

<sup>170</sup> *Id.* at 228.

<sup>171</sup> *Id.* at 230; *see also* United States v. Foley, 598 F.2d 1323, 1335 (4th Cir. 1979) (acknowledging that “there are undoubtedly due process restrictions on the legislature’s power to define certain conduct as criminal absent particular scienter requirements”); United States v. Mancuso, 420 F.2d 556, 559 (2d Cir. 1970) (“When there is no knowledge of the law’s provisions, and no reasonable probability that knowledge might be obtained, no useful end is served by prosecuting the ‘violators.’”).

<sup>172</sup> 355 U.S. at 229.

<sup>173</sup> *See, e.g.*, People v. Holmes, 959 P.2d 406, 418 (Colo. 1998) (en banc) (finding defendant had insufficient notice that possession of cigarettes and matches in detention facility constituted criminal violation simply because they were listed as “prohibited” items); *see also* Bouie v. City of Columbia, 378 U.S. 347, 350 (1964) (holding that defendants could not be convicted of trespass because criminal statute did not provide fair warning).

<sup>174</sup> In his dissenting opinion, Justice Frankfurter predicted as much: “I feel confident that the present decision will turn out to be an isolated deviation from the strong current of precedents . . . .” *Lambert*, 355 U.S. at 232 (Frankfurter, J., dissenting); *see also* Louis D. Bilonis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1270 (1998) (“The curse that Justice Frankfurter cast upon the majority in his dissent in *Lambert* appears to have stuck, for the case indeed ‘turn[ed] out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law.’”) (alteration in original).

<sup>175</sup> *See, e.g.*, Bartlett v. Alameida, 366 F.3d 1020, 1025 (9th Cir. 2004) (holding that “*Lambert* required the state to prove that Bartlett knew or probably knew of his lifelong duty to register as a sex offender”); State v. Garcia, 752 P.2d 34, 35–37 (Ariz. Ct. App. 1987) (reversing conviction for failure to register as sex offender because defendant had no knowledge of registration requirement). For an insightful take on the Supreme Court’s failure to constitutionalize fault as a required element in criminal law, see Kadish, *supra* note 33, at 964–66.

priety of his conduct, which, unlike the conduct at issue in *Lambert*, was more than a failure to act.<sup>176</sup>

As argued in Part II of this Article, however, this presumption of knowledge does not necessarily follow for defendants with mental retardation, who may not have adequate notice because of cognitive, cultural, or social factors beyond their control. In this respect, the fairness considerations discussed above track the constitutional issue of notice exactly. A defendant with mental retardation could well have more success with a *Lambert*-style challenge than his peer with average intelligence, as the case of *State v. Young* suggests.<sup>177</sup> There, the court found that even actual notice to the defendant of a state sex offender registration law was functionally “irrelevant” and constitutionally insufficient, largely due to his cognitive limitations.<sup>178</sup> The court emphasized the difference between the appropriate standards for sufficient notice which applied to the “reasonable and prudent man” and to defendant Young, who lived with his mother in the community but who had been adjudged civilly incompetent.<sup>179</sup> Ultimately, the court urged the legislature to revisit its registration statute to account for such defendants.<sup>180</sup> As set forth in Part IV, revising mens rea requirements for defendants with mental retardation is one key way to cure a potential constitutional infirmity.

### B. Right to Proof of Intent

The right to proof of intent is closely linked to the right to notice. Both are rooted in the Due Process Clause, and both relate to the defendant’s state of mind. Those who have sought to vindicate this right have argued that due process requires not only that defendants have notice that certain activities are unlawful but also that they possess some level of intent in order to sustain a criminal conviction;

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<sup>176</sup> See, e.g., *Garrison v. Trombley*, No. 05-74453, 2009 WL 311102, at \*13 (E.D. Mich. Feb. 9, 2009), *reh’g denied*, 2009 WL 540964 (E.D. Mich. Mar. 4, 2009) (“Unlike the ordinance in *Lambert*, the sexual intercourse proscribed by the Michigan statute can hardly be characterized as passive; it involves conscious activity which gives rise to circumstances that place a reasonable person on notice of potential illegality.”); *Owens v. State*, 724 A.2d 43, 47 (Md. 1999) (distinguishing from *Lambert* on basis of defendant’s active rather than passive conduct); *State v. Tague*, 310 N.W.2d 209, 212 (Iowa 1981) (same).

<sup>177</sup> 535 S.E.2d 380 (N.C. App. 2000).

<sup>178</sup> *Id.* at 387–88. Defendant Young, who had been convicted of a sex offense, failed to register his change of address with the police, even though a probation officer had warned him to do so and he had signed a document indicating that he understood the requirement. Nonetheless, the court found the registration statute unconstitutional as applied because it failed to afford Young sufficient notice under the Fifth and Fourteenth Amendments. *Id.* at 381.

<sup>179</sup> *Id.* at 385.

<sup>180</sup> *Id.* at 388.

proof of conduct alone is not enough.<sup>181</sup> Not surprisingly, in landmark historical cases where the Supreme Court has rejected convictions under the strict liability standard, the Court has emphasized the “universal and persistent”<sup>182</sup> importance of finding a “guilty mind”<sup>183</sup> or “vicious will”<sup>184</sup> on the part of a defendant. But while courts have sought to avoid criminalizing apparently innocent conduct,<sup>185</sup> the Supreme Court has never indicated that mens rea is a constitutionally required element for all criminal offenses.<sup>186</sup>

In statutory rape cases, some defendants argue on due process grounds that their intent should be at issue. In particular, these defendants contend that they did not intend to violate the law and that they were reasonably mistaken about the age of the complainant.<sup>187</sup> Thus far, however, most courts have not looked very favorably upon such mistake-of-fact claims.<sup>188</sup> Still, for an offense as serious as statutory rape—with potentially significant penalties and reputational effects for defendants—the need to find intent on the part of the defendant seems far weightier than it would for the sort of regulatory or “public welfare” offenses most often associated with strict liability.

Disregarding the state of mind of defendants with mental retardation—defendants who may be cognitively incapable of gleaning the age of others, understanding social conventions around sexuality, or otherwise forming an intent to rape—is a particularly precarious legal

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<sup>181</sup> See, e.g., *Owens v. State*, 724 A.2d 43, 58 (Md. 1999) (Bell, C.J., dissenting).

<sup>182</sup> E.g., *Morissette v. United States*, 342 U.S. 246, 250 (1952).

<sup>183</sup> *Id.* at 257; *Staples v. United States*, 511 U.S. 600, 608 n.3 (1994).

<sup>184</sup> *Clark v. Arizona*, 548 U.S. 735, 766 (2006) (quoting 4 BLACKSTONE, *supra* note 32, at \*21); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) (quoting 4 BLACKSTONE, *supra* note 32, at \*21).

<sup>185</sup> E.g., *Staples*, 511 U.S. at 610.

<sup>186</sup> *Powell v. Texas*, 392 U.S. 514, 535 (1968) (plurality opinion); see also *Montana v. Egelhoff*, 518 U.S. 37, 58–59 (1996) (Ginsburg, J., concurring in judgment) (citing *Powell* and noting that Due Process Clause does not prohibit states from “defining the elements of criminal offenses,” including definition or elimination of mens rea).

<sup>187</sup> See *supra* note 40 for examples of such cases. Defendants have at times characterized this claim as a right to “present a defense.” See, e.g., *Owens v. State*, 724 A.2d 43, 62 (Md. 1999) (Bell, C.J., dissenting).

<sup>188</sup> See, e.g., *United States v. Brooks*, 841 F.2d 268, 270 (9th Cir. 1988) (noting that most courts reject reasonable mistake-of-age defense); *State v. Superior Court of Pima County*, 454 P.2d 982 (Ariz. 1969) (rejecting defense of good faith belief that complainant was over eighteen); *State v. Stiffler*, 763 P.2d 308, 310 (Idaho Ct. App. 1988) (“[T]he United States Supreme Court [has not] suggested that a state may no longer place the risk of mistake as to the victim’s age on the accused.”); *People v. Cash*, 351 N.W.2d 822, 826 (Mich. 1984) (refusing to read mistake-of-fact defense into statutory rape law silent on element of intent); *State v. Browning*, 629 S.E.2d 299, 304 (N.C. Ct. App. 2006) (rejecting mistake-of-fact defense where legislature did not create one explicitly); *State v. Searles*, 621 A.2d 1281, 1283 (Vt. 1993) (holding, in part, that it would not imply knowledge of victim’s age as element of sexual assault of minor or permit defense of reasonable mistake about victim’s age to that charge without legislative mandate to do so).

fiction. For individuals in this population, a right to have the fact-finder hear about their disability would offer them the opportunity to present evidence not only on a specific factual issue (their awareness of the complainant's age), but also on their inability to form intent generally. Either way, the defendant would be able to complete the factual picture for the decisionmaker.

As noted in the discussion of morality in Part I.C, criminal law typically presumes that people with mental retardation are incapable of even consenting to sex, much less initiating it.<sup>189</sup> Reading the facts of *Garnett*, one cannot help but be struck by the apparent belief on the part of the court—even the majority—that the defendant was morally blameless.<sup>190</sup> Holding him nonetheless criminally liable and depriving him of his liberty seems a clear violation of due process principles. Professor Sayre's criticism of the strict liability standard thus seems particularly powerful for defendants with mental retardation: "To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice . . . ." <sup>191</sup>

### C. *Right to a Proportionate Sentence*

Sentencing also has a constitutional dimension for defendants with mental retardation, as the Eighth Amendment precludes sentences that are so "grossly disproportionate" as to constitute "cruel and unusual" punishment.<sup>192</sup> Given that in many jurisdictions, statutory rape may be punishable by significant terms of incarceration,<sup>193</sup> sentencing a defendant who is morally blameless gives rise to serious constitutional issues. Recent Supreme Court case law invoking the Eighth Amendment specifically to protect defendants with mental

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<sup>189</sup> See *supra* note 162 for discussion of statutory rape laws making it illegal under some circumstances for a person of average intelligence to have sex with a mentally retarded person.

<sup>190</sup> See *supra* notes 5–6 and accompanying text (discussing recognition of defendant's limited culpability by *Garnett* court and commentators).

<sup>191</sup> Sayre, *supra* note 33, at 72.

<sup>192</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part) ("Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle. . . . [that] applies to noncapital sentences.").

<sup>193</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-1705(A) (2001 & Supp. 2009) (life sentence with no eligibility for release before thirty-five years if offender is at least age eighteen and complainant is under twelve years old); GA. CODE ANN. § 16-6-3(b) (2007) (10- to 20-year sentence if offender is over 21 years old); IND. CODE ANN. §§ 35-42-4-3(a)(1), -50-2-4 (West 2004) (20- to 50-year sentence if offender is at least 21 years old and complainant is under 14 years of age); W. VA. CODE § 61-8B-3(a)(2)-(b) (LexisNexis 2005) (15- to 35-year sentence if offender is at least 14 years old and complainant is less than 12 years old).

retardation makes this the most compelling of potential legal challenges to statutory rape laws as applied to this class of defendants.<sup>194</sup>

While not deciding the issue definitively, courts have acknowledged the applicability of the Eighth Amendment to strict liability cases with sympathetic facts. In Maryland, for example, the Court of Appeals indicated that one statutory rape defendant, who reasonably believed his girlfriend was above the age of consent, might have an Eighth Amendment claim if he were sentenced to the maximum of twenty years' imprisonment.<sup>195</sup> More generally, even as the dissent in *Lambert* contended that the defendant's lack of notice should not have excused her failure to register, it noted that "a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment . . . ."<sup>196</sup>

For a defendant with mental retardation, there is even more support for the claim that a statutory rape punishment is unconstitutionally "excessive." In *Atkins v. Virginia*, the Court made clear that a sentence may be disproportionate not simply due to the nature of the offense but also due to the nature of the defendant.<sup>197</sup> No matter how egregious the facts of Atkins's crime, the Court reasoned, a death sentence would be unconstitutional because society views him, like all defendants with mental retardation, as "categorically less culpable than the average criminal."<sup>198</sup>

The Court based its ruling in *Atkins* on an Eighth Amendment proportionality review to determine whether the punishment meets "evolving standards of decency . . . ."<sup>199</sup> In accordance with its contemporary approach to this issue, the Court considered (1) "objective" factors (primarily, action in state legislatures banning the execution of people with mental retardation) and (2) the Court's independent judgment.<sup>200</sup> The Court not only found a "consensus" among the states against imposing capital punishment on defendants

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<sup>194</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (ruling death penalty unconstitutional punishment under the Eighth Amendment for defendants with mental retardation).

<sup>195</sup> *Owens v. State*, 724 A.2d 43, 50 n.8 (Md. 1997) ("[W]e do not reach the issue of whether, had the trial judge in this case sentenced Owens to the maximum of 20 years of imprisonment, such a sentence would violate Owens' due process or Eighth Amendment rights.").

<sup>196</sup> *Lambert v. California*, 355 U.S. 225, 231 (1957) (Frankfurter, J., dissenting).

<sup>197</sup> *Atkins*, 536 U.S. at 316.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 312 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>200</sup> *Atkins*, 536 U.S. at 312; see also, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008) (articulating proportionality review standard based on both "objective indicia" of national consensus and Court's own understanding of precedent and Eighth Amendment interpretation); *Coker v. Georgia*, 433 U.S. 584, 593-97 (1977) (same).

with mental retardation, but also repeatedly attributed that consensus to a shared understanding that offenders with mental retardation are less blameworthy than others and that their execution advances no legitimate penological purpose.<sup>201</sup>

Much of the Court's reasoning in *Atkins* could be extended to protect defendants with mental retardation convicted of statutory rape. The research regarding disabilities in reasoning, judgment, socialization, and impulse control that the Court accepted in drawing its conclusions tracks much of the scholarship discussed in Part II.<sup>202</sup> Further, as in *Atkins*, harsh punishment of a person with mental retardation under a strict liability standard is unlikely to significantly advance the legitimate purposes of punishment. As noted above, cognitive limitations make it unlikely that a person with mental retardation will be deterred from proscribed conduct. In addition, the retributive aspect of punishment must reflect the culpability of the defendant.<sup>203</sup>

In the wake of *Atkins*, the Court has continued to emphasize that "impaired intellectual functioning is inherently mitigating," even in cases where there appears to be no nexus between the person's mental retardation and the offense.<sup>204</sup> Commentators have noted that there is no principled reason for treating sentencing decisions in non-capital cases differently from those in capital cases when it comes to defendants with mental retardation.<sup>205</sup> Litigants could rely on the principles enunciated in *Atkins* to argue that people with mental retardation whose cognitive abilities limit their capacity to control and understand their conduct should not be subject to sentencing that so exceeds their moral blameworthiness.<sup>206</sup>

There are distinctions, however, between cases of statutory rape involving defendants with mental retardation and death cases involving such individuals, and these distinctions may limit the strength of any Eighth Amendment claim based on *Atkins*. First, the

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<sup>201</sup> *Atkins*, 536 U.S. at 306, 316–17, 320.

<sup>202</sup> *See id.* at 318.

<sup>203</sup> Incapacitation is the third commonly given penological purpose, and one which could be served by a sentence of incarceration, though it is less often discussed in the context of capital cases and not mentioned at all in the *Atkins* opinion. *See* Gregg v. Georgia, 428 U.S. 153, 183 n.28 (1976) (describing incapacitation as purpose of punishment).

<sup>204</sup> *See* Tennard v. Dretke, 542 U.S. 274, 287 (2004).

<sup>205</sup> *E.g.*, Barkow, *supra* note 21, at 1181 (extending Court's culpability logic to non-capital cases); Cone, *supra* note 21, at 43 (describing mental retardation as mitigator in non-capital cases).

<sup>206</sup> *See* Stephen F. Smith, Essay, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 146 (2009) (arguing that because our legal system "aspires to limit criminal punishment in accordance with moral blameworthiness," available punishment should "fit" the crime).

objective prong of the Eighth Amendment inquiry—state legislative action—points toward upholding statutory rape laws, including their application to defendants with mental retardation. Second, whereas incapacitation may not justify a death sentence (presumably because incarceration could also achieve that goal), it may be sufficient to justify a non-death sentence. Finally, the Supreme Court's contention that "death is different" from any other criminal sanction suggests that any lessons learned or legal rules established in the context of the death penalty may not be applicable in non-capital cases.<sup>207</sup>

More generally, the proportionality principle has been described as "narrow" in its application to non-capital cases,<sup>208</sup> and successful application of the Eighth Amendment in such a context has been deemed "exceedingly rare."<sup>209</sup> In recent years, the Supreme Court has virtually never invalidated a non-capital sentence on Eighth Amendment grounds.<sup>210</sup> Moreover, while there has been a smattering of examples of successful proportionality challenges below the Supreme Court in the most extreme statutory rape cases,<sup>211</sup> courts have generally rejected such claims.<sup>212</sup> Interestingly, the court which

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<sup>207</sup> Dissenting in *Atkins*, Justice Scalia referred to the decision as "the pinnacle of our Eighth Amendment death-is-different jurisprudence." *Atkins*, 536 U.S. at 337 (Scalia, J., dissenting); see also *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) ("[T]here is no doubt that [d]eath is different."); *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (opinion of Stevens, Stewart, and Powell) ("[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country.").

<sup>208</sup> *Harmelin v. Michigan*, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in judgment).

<sup>209</sup> *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

<sup>210</sup> See, e.g., *Lockyer v. Andrade*, 538 U.S. 63 (2003) (holding that three-strike sentence of twenty-five years to life for theft of 150 dollars' worth of videotapes did not violate Eighth Amendment); *Ewing v. California*, 538 U.S. 11 (2003) (holding that sentence of twenty-five years to life based on three-strike conviction for grand larceny of three golf clubs did not violate Eighth Amendment); *Harmelin*, 501 U.S. at 957 (rejecting claim that life sentence for possession of more than 650 grams of cocaine violates Eighth Amendment's prohibition of cruel and unusual punishment).

<sup>211</sup> See *State v. Davis*, 79 P.3d 64, 66–67 (Ariz. 2003) (en banc) (finding mandatory minimum sentence of fifty-two years without possibility of parole to be grossly disproportionate to offense of four counts of statutory rape where twenty-year-old defendant had voluntary sex with two "post-pubescent teenage girls"); *State v. Bartlett*, 830 P.2d 823, 827, 832 (Ariz. 1992) (finding sentence of forty years without possibility of parole to be in violation of Eighth Amendment, where twenty-three-year-old defendant was convicted of statutory rape of two fourteen-year-old girls who testified that they had "voluntary sexual intercourse" with defendant).

<sup>212</sup> See, e.g., *Hall v. McKenzie*, 537 F.2d 1232, 1235–36 (4th Cir. 1976) (rejecting Eighth Amendment challenge to imposition of ten- to twenty-year sentence for statutory rape of thirteen-year-old girl); *Hunter v. State*, 589 S.E.2d 306, 309 (Ga. Ct. App. 2003) (finding no Eighth Amendment violation where defendant received twenty-five-year sentence for two counts of aggravated child molestation and one count of statutory rape, despite claim that defendant had no criminal record and "victim aggressively pursued the sexual

upheld the proportionality challenge was, in both cases, the Arizona Supreme Court, albeit in cases a decade apart, and in both instances, the court pointed to the immaturity<sup>213</sup> or “low intelligence”<sup>214</sup> of the defendant as a factor in the proportionality analysis. Opinions in both cases, however, also focused more intently on the inordinate length of the mandatory sentence, a circumstance unique to Arizona.<sup>215</sup> As a practical matter, then, an Eighth Amendment challenge to a sentence for statutory rape outside Arizona is likely to fail, whether or not the defendant is mentally retarded, provided that the sentence complies with statutory parameters.

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Thus far, the Court has declined to enter the fray in the debate concerning statutory rape’s strict liability standard on either a due process or excessive punishment front. Nonetheless, the constitutional arguments outlined above are consistent with existing precedent and principles and carry particular logical and moral force given the defendant population at issue.

Even if courts are unlikely to challenge the constitutionality of strict liability laws directly, legislators and judges should adjust the letter and interpretation of strict liability laws with an eye toward potential constitutional problems. Courts often avoid wading into murky constitutional waters by finding nonconstitutional ways of disposing of cases or by reading ambiguous statutes in ways that avoid constitutional questions.<sup>216</sup> I have argued that applying a strict liability standard to defendants with mental retardation raises serious problems rooted in considerations of both policy and the Constitution.

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encounters”); *State v. Bonner*, 577 N.W.2d 575, 583 (S.D. 1998) (rejecting Eighth Amendment disproportionality claim based on sentence imposed for statutory rape, finding that “[a]lthough the fifteen year sentence for third degree rape was severe it was not grossly disproportionate to the offense”).

<sup>213</sup> *Bartlett*, 830 P.2d at 828.

<sup>214</sup> *Davis*, 79 P.3d at 72 (“There is evidence in the record that Davis’s intelligence and maturity level fell far below that of a normal young adult.”).

<sup>215</sup> *See id.* at 74 (“In no other state would a sentencing judge be required to impose such a severe sentence.”); *see also Bartlett*, 830 P.2d at 831 (finding sentence to be grossly disproportionate to crimes because it was harsher than sentences for more severe offenses in Arizona and far harsher than minimum sentences for similar offenses in other jurisdictions).

<sup>216</sup> *See, e.g., Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.” (internal quotation marks and citation omitted)); *Bartlett v. Strickland*, 129 S. Ct. 1231, 1247 (2009) (plurality opinion) (invoking canon of constitutional avoidance in interpreting Section 2 of Voting Rights Act).

Accordingly, in Part IV, I offer recommendations for changes which will rectify the infirmities of existing law.

#### IV PROPOSALS FOR CHANGE

Having established that the assumptions underlying the strict liability standard for statutory rape are generally inapplicable to defendants with mental retardation and that the application of such a standard raises serious constitutional issues, I turn to the question of how the criminal justice system should respond. In this Part, I consider different proposals for how to prosecute statutory rape that would acknowledge the differences between defendants with mental retardation and their peers of average intelligence.

There are at least three different options for dealing with defendants with mental retardation charged with statutory rape, and each addresses a different point in the legal process. First, judges and prosecutors could use their discretion to pursue the prosecution only of defendants who are truly morally culpable. Second, legislators could modify sentencing schemes applied to these defendants. Finally, judges or legislators could interpret or change the governing rule of statutory rape (or the elements of the crime) to require consideration of the effect of a defendant's mental retardation.

All three of these options have limitations, not the least of which is the determination of when a defendant is or should be considered mentally retarded.<sup>217</sup> Each option, however, improves the current model of holding a defendant strictly liable—and often subject to significant penalties—regardless of his mental capacity and blameworthiness. I argue that the first two of these options are variations on the

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<sup>217</sup> The threshold question of which defendants should be considered mentally retarded for purposes of criminal punishment is not insignificant. In excluding defendants with mental retardation from the death penalty, for instance, the Supreme Court left it to the states to make this determination, creating considerable controversy. *See, e.g.*, Judith M. Barger, *Avoiding Atkins v. Virginia: How States Are Circumventing Both the Letter and Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215, 236 (2008) (arguing that continuing to include developmental origin as an element of the mental retardation analysis "will result in an unconstitutionally narrow definition of the term, excluding individuals with the same cognitive and behavioral deficits as defendants fitting the clinical mental retardation definition"); Anna M. Hagstrom, *Atkins v. Virginia: An Empty Holding Devoid of Justice for the Mentally Retarded*, 27 LAW & INEQ. 241, 242 (2009) ("By leaving states the tasks of defining mental retardation and implementing procedures for determining whether a defendant is mentally retarded, the *Atkins* Court merely recognized a constitutional violation without providing either a remedy or a way to prevent further violations."); Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 350–52 (2010) (analyzing problem of states using underinclusive judicial formulations, instead of accepted clinical definitions, to mental retardation for death penalty eligibility purposes).

status quo and, by themselves, are insufficient responses to the issues raised in this Article. The third option, however—injecting a mens rea element into statutory rape for defendants with mental retardation—is an effective way to address the policy and constitutional concerns underlying the prosecution and sentencing of defendants with mental retardation for statutory rape described above. In these cases, the government should have to prove that a defendant with mental retardation actually knew the complainant was underage and that her age meant she could not legally consent to sex. In essence, this burden merely requires the government to demonstrate that the assumptions underlying the strict liability standard are well founded. Significantly, if the prosecutor cannot make this case, the defendant may not necessarily be completely free, for the government could always seek supervision of the individual through civil commitment.

### A. *Change the Gatekeeping*

One potential solution to the problems explored above is to rely on prosecutors and judges to use their discretion to prosecute only those defendants revealed to be truly culpable. In some ways, designating prosecutors and judges as gatekeepers makes sense as a solution to the issues outlined in Part II of this Article: It allows for individualized determinations, takes advantage of prosecutors' and judges' unique perspectives within the system, and can draw upon existing institutional tools. Yet in the final analysis, this "solution" is ineffective, in large part because there are too many incentives for these institutional actors not to act on behalf of this class of defendants.<sup>218</sup>

Scholars widely acknowledge that prosecutors already exercise a gatekeeping function in virtually all criminal prosecutions.<sup>219</sup> In their decision to charge a crime at all, or to treat it as a misdemeanor,

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<sup>218</sup> There is no data documenting the number of cases not charged or dismissed due to prosecutorial or judicial discretion. As discussed further below, we can only detect the flaws in the system through anecdotal information, research, and the cases which do proceed to trial, adjudication, and publication.

<sup>219</sup> See, e.g., Stephen B. Bright, *The Failure To Achieve Fairness: Race and Poverty Continue To Influence Who Dies*, 11 U. PA. J. CONST. L. 23, 24 (2008) ("[P]rosecutors—not judges or juries—have most of the power with regard to how cases are resolved. Prosecutors decide what charges to file, whether to seek enhanced penalties, such as death sentences or mandatory minimums, and whether to agree to plea bargains that resolve the cases with less severe sentences than those originally sought."); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 397, 408–10 (2001) (analyzing the unfettered discretion and lack of accountability of prosecutors and noting that "[t]he charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion"); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV.

felony, or case for diversion, prosecutors regularly exercise vast discretion. Further, at least in theory, the prosecutor's mission "is not that [he] shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer."<sup>220</sup> This mission, along with knowledge of the defendant, the factual allegations, and the victim, arguably places prosecutors in the best position to make a decision as to which defendants are most appropriate for prosecution. According to this logic, a case in which a person with mental retardation was not fully aware of the meaning and consequences of his actions would be highly unlikely to work its way through the justice system at all, as prosecutors would decline to prosecute either through dismissal of the case or diversion of the defendant. As Justice Frankfurter wrote about charging decisions in one strict liability case, "In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on 'conscience and circumspection in prosecuting officers.'"<sup>221</sup>

In accordance with Frankfurter's exhortations, in cases that have progressed past the filing of charges, judges, too, could be brought to exercise a gatekeeping function. Judges have the ability to urge prosecutors to consider alternative dispute mechanisms such as diversion or mental health courts,<sup>222</sup> to lower an offense level, or to dismiss a case.<sup>223</sup> But judges also have their own means of dismissing cases or reducing charges in the interests of justice<sup>224</sup> or where a defendant's

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1521, 1524–37 (1981) (discussing breadth of prosecutorial discretion, especially in charging decision).

<sup>220</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>221</sup> *United States v. Dotterweich*, 320 U.S. 277, 285 (1943). Justice Murphy countered Justice Frankfurter's optimism in dissent, stating that placing such reliance on court officers (rather than legislators) to determine whether a particular offense requires proof of intent on the part of a defendant "is precisely what our constitutional system sought to avoid." *Id.* at 292 (Murphy, J., dissenting).

<sup>222</sup> See COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, *MENTAL HEALTH COURTS: A PRIMER FOR POLICYMAKERS AND PRACTITIONERS* 4 (2008) ("A mental health court is a specialized court docket for certain defendants with mental illnesses [and/or mental retardation] that substitutes a problem-solving model for traditional criminal court processing.").

<sup>223</sup> ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY* 24 (1981).

<sup>224</sup> See *People v. Tankleff*, 49 A.D.3d 160, 179 (N.Y. App. Div. 2007) ("Thus, this Court's jurisdiction is not limited to reviewing errors of law, but extends to the power to reverse or modify a judgment on the facts and as a matter of discretion in the interest of justice . . .").

character and conduct merit a more lenient case disposition than that sought by the government.<sup>225</sup>

Unfortunately, the “good sense” and “wise guidance” that Frankfurter expected from prosecutors and judges may often be lacking. While there are no statistics concerning the number of defendants with mental retardation charged with (or convicted of) statutory rape, it is clear that such discretion is frequently not exercised. Cases such as *Garnett*, *Blackstock*, and *McMullen*—all involving prosecution of defendants with mental retardation<sup>226</sup>—make clear that defendants with mental retardation are routinely prosecuted, as do the tens of thousands of people with mental retardation in prisons<sup>227</sup> (and untold others in jails).<sup>228</sup> More often than not, when the parties realize that a defendant has mental retardation, there is no consistent institutional response.<sup>229</sup> Certainly, there is little in the way of formal or informal

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<sup>225</sup> The Model Penal Code provides a helpful example of this approach. Noting the distinct vantage point of the judge to “regard . . . the nature and circumstances of the crime and . . . the history and character of the defendant,” the Model Penal Code empowers judges to reduce the degree of an offense or even convert a felony to a misdemeanor. MODEL PENAL CODE § 6.12, *supra* note 41. My thanks to Professor Sara Sun Beale for offering this example in a discussion of this Article.

<sup>226</sup> In *Garnett v. State*, 632 A.2d 797, 804–05 (Md. 1993), the defendant was tried and convicted of second degree rape (“statutory rape”), notwithstanding the defendant’s cognitive disability and alleged mistake-of-fact regarding the complainant’s age. In *State v. Blackstock*, 19 S.W.3d 200, 203–04 (Tenn. 2000), the evidence showed that the defendant had an IQ of fifty-five and functioned at the level of a five- to nine-year-old child but was found competent to stand trial for sexual assault of a child. In *People v. McMullen*, 414 N.E.2d 214, 218 (Ill. App. 1980), the defendant was convicted of rape despite his mental incapacity. Interestingly, the court found that the complainant’s mental incapacity rendered her unable to consent to sex but refused to even consider evidence of the defendant’s mental disability. *Id.* at 219 (Craven, J., dissenting).

<sup>227</sup> Some estimates suggest that mentally retarded individuals constitute between two and ten percent of the population of U.S. prisons. Cloud, *supra* note 116, at 504–05 n.40. Others contend that the figure is between 3.5 and 5 percent. Dee Reid, *Unknowing Punishment*, STUDENT LAW., May 1987, at 18, 18. As of December 31, 2008, there were 2,304,115 people incarcerated in state and federal American prisons. WILLIAM J. SABOL ET AL., U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULL. NO. NCJ-228417, PRISONERS IN 2008, at 8 tbl.8 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>. Estimates for death row offenders with mental retardation vary between four and twenty percent. Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 86 (2003) (citations omitted). There were 3261 people on death row in the United States as of January 1, 2010. CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. AND EDUC. FUND, DEATH ROW U.S.A. 1 (2010), available at [http://www.naacpldf.org/files/publications/DRUSA\\_Winter\\_2010.pdf](http://www.naacpldf.org/files/publications/DRUSA_Winter_2010.pdf).

<sup>228</sup> See Dinerstein, *supra* note 22, at 716 (“[T]here are virtually no reliable data on the number of inmates with mental retardation in local jails . . .”).

<sup>229</sup> McAfee & Gural, *supra* note 24, at 5 (concluding, after surveying states’ attorneys general, that “the criminal justice system appears to have adopted an informal, inconsistent and inequitable response to the problems of individuals with mental retardation who are accused of a crime”).

law or policy regarding defendants with mental retardation in statutory rape cases.

Some skeptics, believing the population of people with mental retardation in the criminal justice system to be relatively insignificant, might argue that the numbers do not justify a full prosecutorial or judicial policy, particularly if the policy is limited to statutory rape cases. But without a formal policy change, a prosecutor has virtually no incentive to abandon a strict liability standard in these cases. As some commentators and courts have noted, the standard “affords both an efficient and nearly guaranteed way to convict defendants.”<sup>230</sup> In a statutory rape case, a strict liability standard alleviates the prosecutor’s burden to prove intent—often the most difficult element of a criminal case—as well as force or lack of consent.<sup>231</sup> Of course, prosecutors, many of whom are elected, face political pressure to enhance their office’s record of convictions and to prosecute crime vigorously.<sup>232</sup> Nowhere is this more true than with regard to defendants alleged to have raped a child, where public pressure often compels an aggressive response.<sup>233</sup>

The root of the problem with any discretionary solution is that nothing compels prosecutors or courts even to consider the cognitive capacity of a defendant in a case where the defendant’s mental status is excluded from the elements of the crime, much less to dismiss the case.<sup>234</sup> Leaving the matter to the discretion of a prosecutor or judge—who almost inevitably has no training on issues relating to

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<sup>230</sup> Levenson, *supra* note 33, at 404; *see also* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 337 (2003) (“[S]ometimes statutory rape serves as ‘the fallback position’ for a winnable prosecution.”); Sayre, *supra* note 33, at 79 (warning that one danger in growth of strict liability offenses is that courts may relax mens rea requirement “particularly in the case of unpopular crimes, as the easiest way to secure desired convictions”).

<sup>231</sup> In the seminal case of *Morissette v. United States*, Justice Jackson acknowledged this prosecutorial advantage: “The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution’s path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.” 342 U.S. 246, 263 (1952).

<sup>232</sup> *See* Smith, *supra* note 206, at 153 n.106 (quoting U.S. Department of Justice policy of seeking to charge and convict defendant of most serious offense, as well as maximum supportable sentence); *see also* Levenson, *supra* note 33, at 433 (“[T]he pursuit of strict liability crimes can often assure the prosecutor of an impressive conviction box score.”).

<sup>233</sup> Howard Witt, *Texas Teen Serving 100-year Term: He Admitted Assaulting 7-year-old, But Teen’s Mental Retardation Was Not Considered; A Retrial Looms*, CHI. TRIB., Apr. 6, 2009, at 14; *see also* Hankins Testimony, *supra* note 122, at 4 (reporting “cry for the passage of emergency [civil commitment] legislation” in response to threat “based more on hysteria than reality”).

<sup>234</sup> The exception to this rule, of course, is in capital cases, where the court must hear mitigating evidence of mental incapacity. *Atkins v. Virginia*, 536 U.S. 304, 352 (2002); *Penry v. Johnson*, 532 U.S. 782, 787 (2001) (overruled on other grounds).

mental retardation, and whose focus on the alleged victim (and, for prosecutors at least, a conviction) likely makes him or her sympathetic to the assumptions underlying the strict liability standard—is a poor solution to the problem.<sup>235</sup>

### B. *Change the Sentencing Scheme*

Altering the sentencing scheme as applied to defendants with mental retardation is another possible way for the criminal justice system to account for the fact that people with mental retardation who are convicted of statutory rape are likely to be different from defendants of average intelligence in ways that affect their individual moral culpability. As with the other alternatives, however, there are both advantages and disadvantages to seeking change through sentencing. While I recommend that sentencing adjustments be made in addition to modifications to the elements constituting the crime of statutory rape, even by themselves, sentencing tools could be used to improve outcomes for this class of defendants.

Addressing differences among crimes—differences involving both the egregiousness of the act and the relative blameworthiness of the defendant—through sentencing allows for some degree of individualization. Indeed, the broad consideration of mitigating and exacerbating factors is familiar territory for sentencing judges. In some cases of statutory rape where defendants have raised claims of mistake-of-fact, judges have noted their reliance on sentencing to palliate the judgment of guilt.<sup>236</sup> Discretion in sentencing further allows for crea-

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<sup>235</sup> In a few jurisdictions, juries, instead of judges, may impose even noncapital sentences, but the problem of unbridled discretion and ignorance regarding the effects of mental retardation is, if anything, heightened among jurors, whose experience even with the criminal justice system is especially limited. *See, e.g., Atkins*, 536 U.S. at 321 (“[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.”).

<sup>236</sup> *See, e.g., Owens v. State*, 724 A.2d 43, 55 (Md. 1999) (“Defendant’s assertion that he made a reasonable mistake regarding the victim’s age is best considered as a mitigating circumstance at sentencing, which is what occurred in this case.”); *People v. Cash*, 351 N.W.2d 822, 828 (Mich. 1984) (“A better procedure would be to permit any mitigating and ameliorating evidence in support of a defendant’s mistaken belief as to the complainant’s age to be considered by the trial judge at the time of sentencing.”); *State v. Elton*, 657 P.2d 1261, 1262 (Utah 1982) (superseded by statute) (rejecting defendant’s proffered mistake-of-fact defense but noting that such evidence could be (and was) considered during “mitigating and ameliorating process” of sentencing). Commentators have also noted that courts “inject . . . flexibility by mitigating the punishment of statutory rape defendants when they perceive the sentence to be out of alignment with the defendant’s actual culpability” for reasons apart from mental retardation, including consideration of the sexual aggression of the complainant. *E.g., Britton Guerrina, Comment, Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1252 (1998).

tive options such as continued monitoring, ongoing sex education, restorative justice activities, or other conditions to try to prevent a recurrence of the illicit activity or help determine whether one might be likely.

Current sentencing schemes, however, vary in the degree to which a person's mental retardation may temper his sentence. In some cases, the existence of mandatory minimum sentences makes the exercise of such discretion impossible.<sup>237</sup> Even where guidelines indicate that mental retardation may be considered as a mitigating factor, the decisionmaker's discretion to lower a sentence can be sharply circumscribed. The advisory federal sentencing guidelines, for instance, restrict downward departures based on mental condition to the most extreme cases<sup>238</sup> and forbid a "diminished capacity" departure for some child sex offenses.<sup>239</sup> Some states include mental retardation as a mitigating factor for sentencing purposes or exclude people with mental retardation from mandatory minimums.<sup>240</sup> But even where state sentencing guidelines direct decisionmakers to consider particular factors, the trial court has the discretion to determine the weight of any enhancement or mitigation.<sup>241</sup> The ability to consider mental capacity as a mitigating factor thus does not translate into a mandate to do so.

As with the gatekeeping solution, the danger is that the reliance on discretion—particularly unfettered discretion—does not guarantee that justice will be done. Indeed, there may be reason to fear that jurors, or even judges, will sentence more, rather than less, harshly because of the defendant's mental retardation if they have the option

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<sup>237</sup> In *State v. Yanez*, for instance, the defendant faced a mandatory twenty-year sentence for statutory rape in Rhode Island. 716 A.2d 759, 771 (R.I. 1998) (Flanders, J., dissenting). In Connecticut, a sentence for statutory rape may not be less than nine months. CONN. GEN. STAT. ANN. § 53a-71(b) (West 2009).

<sup>238</sup> U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.3, 5K2.0 cmt. 3(C) (2007).

<sup>239</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2007) (prohibiting departure for offenses under chapters 71, 109A, 110, and 117 of title 18 of U.S.C., all of which include sex offenses against children).

<sup>240</sup> See *People v. Watters*, 595 N.E.2d 1369, 1373–74, 1378 (Ill. App. Ct. 1992) (holding that trial court had discretion to disregard mandatory sentence of incarceration for sexual assault where defendant had IQ of about 60).

<sup>241</sup> See *State v. Blackstock*, 19 S.W.3d 200, 211 (Tenn. 2000) (describing trial court's discretion to mitigate sentence by providing examples of statutory mitigating factors, including whether defendant's culpability was reduced due to mental or physical condition and whether unusual circumstances of offense show that intent was unlikely). Tennessee law requires judges determining a sentence to consider evidence offered in mitigation but does not mandate that particular factors be considered or particular weight be given to such factors. TENN. CODE ANN. §§ 40-35-113, 210(b)(5) (West 1997).

to do so.<sup>242</sup> The difficulty is in ensuring that judges, juries, and litigants are appropriately trained to deal with people with mental retardation and that their discretion is cabined with guidelines that encourage or mandate—rather than merely permit—mitigation due to a defendant’s mental retardation. For this to occur, there may well need to be some policy or legislative change through training, statutes, or administrative rules.

Adjustments to sentencing practice or policy would complement modifications made at other points in the criminal process. Making a defendant’s mental retardation a mitigating factor could partially compensate for a criminal law which still ensnares some mentally retarded defendants who do not fully understand the wrongfulness of their conduct. In rare cases, even if a jury convicted a defendant under my proposed rule changes, a sentencing adjustment based on mental retardation might still be appropriate. For example, a defendant operating under a veil of sexual ignorance, perhaps one imposed by parents or caregivers, may be guilty but nonetheless not be the sort of predator whom the statutory rape laws seek to punish. A sentencing scheme which accounts for this possibility comes much closer to making sure that the sanction fits both the offense and the offender.

There are dangers to focusing exclusively on sentencing reform as a remedy because sentencing comes at the end of the criminal justice process. First, this means that a defendant will be subjected to a traumatic criminal justice process that he may have failed to fully understand.<sup>243</sup> Second, while sentencing reform may ameliorate some of the concerns regarding the imposition of a strict liability standard on defendants with mental retardation, it does not address those concerns as directly as would a rule adding a subjective mens rea element to the crime of statutory rape. Finally, convictions for criminal offenses come with a wide array of so-called “collateral” sanctions.<sup>244</sup> For almost any sex offense, such repercussions can include lifetime

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<sup>242</sup> See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“[R]eliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.”).

<sup>243</sup> See PERSKE, *supra* note 134, at 21 (describing various individuals on death row who demonstrated obliviousness to criminal process by drawing pictures or speaking out “loudly and aimlessly” during trial; by indicating long after conviction that imprisonment was punishment for being unable to read or write; or by describing plans to play basketball with fellow inmate after being executed).

<sup>244</sup> See generally Michael Pinard & Anthony C. Thompson, *Offender Reentry and Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 593–99 (2006) (detailing wide array of indirect sanctions that flow from criminal sentences and arguing that these consequences pose special challenges to successful community reintegration of individuals released from incarceration).

registration as a sex offender.<sup>245</sup> For a person who has already been excluded from mainstream society due to his cognitive and functional limitations, such a label can be even more devastating, as it may further restrict social or rehabilitative options that have already been limited.

### C. *Change the Rule*

The best remedy for the problematic strict liability standard for statutory rape is to modify the liability rule for people with mental retardation who are accused of the offense. To accomplish such a change, courts or legislatures could (1) create a blanket, per se rule absolving all people with mental retardation of criminal responsibility for statutory rape (making them subject to prosecution only under “regular” rape laws) or (2) change the elements of the offense specifically for people with mental retardation. The next section considers the advantages and disadvantages of each possibility and concludes that the only meaningful way to address the difference in culpability of most people with mental retardation is to require prosecutors to prove that defendants exhibited a truly “guilty” mind.

#### 1. *Establish a Per Se Rule*

The first option is a per se rule precluding prosecution for statutory rape of any defendant with mental retardation. In *Atkins*, the Supreme Court adopted a per se rule approach in the death penalty context. Largely due to its finding that defendants with mental retardation are less culpable than their peers without cognitive and behavioral impairments, the *Atkins* Court declared that the Eighth and Fourteenth Amendments prevent states from executing persons with mental retardation.<sup>246</sup> Using similar logic, we could create one of two per se rules for these defendants when they are charged with statutory rape. The first option would be a rule declaring people with mental retardation ineligible for prosecution under statutory rape laws for having sex with underage partners, leaving them subject only to the different standards and sentencing schemes of adult rape laws. The second option would make them ineligible only for strict liability pros-

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<sup>245</sup> See Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 Nw. U. L. REV. 788, 794–814 (1996) (describing requirements of sex offender registration and penalties associated with registration and failure to register).

<sup>246</sup> The *Atkins* majority argued that simply considering mental retardation as a mitigating factor in a death penalty case was an insufficient response to the overall difference in the culpability of mentally retarded defendants, particularly given the increased likelihood that these defendants would be at risk of wrongful conviction. 536 U.S. at 320–21.

ecutions. Under either formulation, the rule would apply to all defendants with mental retardation and would limit, at least to some extent, their exposure to criminal liability.

Like any absolute rule, a *per se* rule has the advantage of administrative clarity. It could, however, invite the sort of protracted litigation over whether a person is mentally retarded that has arisen in the death penalty context after *Atkins*.<sup>247</sup> However, courts are equipped to manage these questions, just as they regularly handle competency evaluations and civil commitment proceedings.<sup>248</sup>

Either of these *per se* rules would eliminate the problems with the existing approach—namely, that defendants with mental retardation may not be aware of social and legal standards regarding statutory rape, may not be in the best position to prevent the harm from occurring, and may not be morally blameworthy. Yet, preventing defendants with mental retardation from ever being held liable for statutory rape seems to be an overly broad response, particularly given the differences in cognition and functional abilities within the mentally retarded population. Some people with mental retardation, perhaps even many, have the capacity and sexual education required to understand the risk and wrongfulness associated with sex with minors.<sup>249</sup> Where the potential sanction is not as severe as death, such

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<sup>247</sup> See Patton & Keyes, *supra* note 153, at 242–43 (noting legal, diagnostic, and policy issues involved in death penalty ineligibility claims based on defendants' mental retardation); see also, e.g., *State v. Kennedy*, 957 So. 2d 757 (La. 2007), *rev'd*, 128 S. Ct. 2641 (2008). At the Louisiana trial court, the case offered an interesting example of the litigation which may ensue when a defendant raises an issue about mental retardation. In the case, three different experts examined the defendant to determine whether he had a cognitive disability; the defendant himself alternately denied that he had mental retardation and refused to be examined in some instances and then claimed he should have been able to defend himself based on his mental retardation. 957 So. 2d 757 app. at \*29–30. When this case reached the Supreme Court, however, it concerned only the proportionality of the death penalty for the offense of raping a child. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008). The issue of mental retardation was mentioned briefly in only one party's brief. See Brief for Respondent at 44 n.42, *Kennedy*, 128 S. Ct. 2641 (No. 07-343) (noting briefly that Louisiana Supreme Court indicated that pre-trial testimony supported finding that Petitioner was not mentally retarded); Reply Brief for Petitioner, *Kennedy*, 128 S. Ct. 2641 (No. 07-343) (including no mention of defendant's mental retardation). Since *Atkins*, many death row inmates have petitioned to have their sentences reduced because of mental retardation. For a list of successful reductions, see JOHN BLUME, DEATH PENALTY INFO. CTR., DEFENDANTS WHOSE DEATH SENTENCES HAVE BEEN REDUCED BECAUSE OF A FINDING OF "MENTAL RETARDATION" SINCE *Atkins v. Virginia* (2002) (2008), <http://www.deathpenaltyinfo.org/sentence-reversals-intellectual-disability-cases>.

<sup>248</sup> Even though courts manage these issues, the question of whether they do so consistently and effectively remains unanswered. See *supra* note 217 and accompanying text (discussing conflict concerning state-created definitions of mental retardation).

<sup>249</sup> See MONAT, *supra* note 116, at 15, 17, 89–91 (asserting that people with mental retardation respond to programming and training concerning statutory rape and age of consent that helps them appropriately and lawfully express their sexuality). Of course, not

an extreme solution is also unnecessary and tilts the pendulum too far in the other direction, leaving a whole class of complainants without any legal protection apart from non-statutory rape statutes, which generally place the burden on the prosecutor to prove both the victim's non-consent and, in many instances, the defendant's use of force or coercion.<sup>250</sup>

Moreover, a rule that disregards the differing circumstances and capacities among defendants with mental retardation denies those with sufficient abilities from enjoying the "dignity of risk."<sup>251</sup> A complete bar to the prosecution of defendants with mental retardation may have the unintended consequence of keeping people with mental retardation from the equality that comes with being held to the same standards and responsibilities as their peers of average intelligence.<sup>252</sup>

## 2. *Modify the Elements*

Eliminating the strict liability standard for people with mental retardation is a narrower fix that strikes a greater balance between the need to protect these defendants and the need to protect underage complainants.<sup>253</sup> If, as I have argued (and criminal law generally makes clear), people (including those with mental retardation) are only truly blameworthy if they understand the risk and wrongfulness of their actions, then the burden to prove criminal intent should fall on the prosecutor. For the offense of statutory rape, there are two potential pieces of knowledge relevant to the defendant's state of mind: (1) knowledge of the complainant's age and (2) knowledge that the complainant's age made her consent impossible.

At a minimum, prosecutors should have to prove that the defendant knew the complainant's age. Indeed this is the proposal that

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all people with mental retardation, particularly those without resources, are able to obtain such services. *See supra* note 136 and accompanying text (observing that many mentally retarded defendants lack financial resources).

<sup>250</sup> *See, e.g., CAL. PENAL CODE* § 261 (West 2008) (generally requiring evidence of "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another").

<sup>251</sup> *See supra* notes 166–67 and accompanying text (discussing "dignity of risk").

<sup>252</sup> Professor Deborah Denno uses the same "dignity of risk" terminology to support her argument that people with mental retardation should not be presumed incapable of consenting to sex, as they are by some state law definitions of rape. Denno, *supra* note 111, at 359.

<sup>253</sup> Because my proposal involves a change to the elements of the statutory rape offense, it would be clearest and cleanest if it were established through legislation spelling out the heightened scienter requirement for defendants with mental retardation. Since, in some cases, what constitutes "knowledge" or mens rea is a matter for the courts' interpretation, however, it is possible that a court could create common law through judicial interpretation of a more ambiguous statutory rape law.

critics of the strict liability standard for statutory rape have most supported—although the critics generally raise it as an affirmative defense, which would place the burden on the defendant.<sup>254</sup> It is also the fix that several jurisdictions<sup>255</sup> and the Model Penal Code<sup>256</sup> have adopted, at least when the complainant falls within certain age ranges.

There are two problems with focusing on the defendant's knowledge of the complainant's age exclusively. First, requiring proof of mens rea would typically allow the prosecutor to satisfy her burden not only by proving that the defendant actually knew the complainant was underage, but also by satisfying the lower standard that "he should have known."<sup>257</sup> This objective standard may be unrealistic when applied to defendants with mental retardation, given their typical cognitive and social limitations.<sup>258</sup> As an illustration, there was no evidence in the record to suggest that Erica, the complainant in *Garnett v. State*, looked underage.<sup>259</sup> It is entirely possible that Garnett may have believed her claim to be sixteen, while none of his chronological peers would have been similarly duped. His belief therefore would not have been objectively reasonable, but it may well have been subjectively so, given his mental retardation and that she

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<sup>254</sup> See, e.g., Carpenter, *supra* note 230, at 320 (asserting that defendants in statutory rape cases should be able to "mount a reasonable mistake-of-age defense"); Myers, *supra* note 37, at 135–36 (advocating adoption of mistake-of-fact defense as necessary corollary to statutory rape's strict liability standard); Reich, *supra* note 38, at 695 (arguing it is unconstitutional for states to preclude mistake-of-age defense in statutory rape cases); see also Michael McGillicuddy, Note, *Criminal Law: Mistake of Age as Defense to Statutory Rape*, 18 U. FLA. L. REV. 699, 702–03 (1966) (urging addition of mistake-of-age defense to Florida statutory rape law when minor is under fourteen and defendant is under twenty-four); cf. Benjamin L. Reiss, Note, *Alaska's Mens Rea Requirements for Statutory Rape*, 9 ALASKA L. REV. 377, 377–78 (1992) (arguing that Alaska's due process jurisprudence requires that prosecutors bear burden of proving culpable mens rea for statutory rape, rather than simply mistake-of-fact defense).

<sup>255</sup> E.g., *State v. Hoehne*, 717 P.2d 237, 238–39 (Or. Ct. App. 1986) (limiting mistake-of-fact defense to offenses in which complainant is older than sixteen but younger than eighteen); MINN. STAT. ANN. § 609.344(a) (West 2009) (permitting mistake-of-age defense only when complainant is over thirteen); 18 PA. CONS. STAT. ANN. § 3102 (West 2000) (permitting mistake-of-fact defense when criminality depends on child being under some critical age older than fourteen).

<sup>256</sup> The Model Penal Code allows a mistake-of-age defense when the complaining witness is over ten years old. MODEL PENAL CODE, *supra* note 41, at § 213.6(1).

<sup>257</sup> The Model Penal Code, for example, requires that the defendant prove both that he was mistaken as to the complainant's age and that his mistake was reasonable. See MODEL PENAL CODE, *supra* note 41, at § 213.6(1) (providing defense when actor "reasonably believed the child to be above the critical age").

<sup>258</sup> See *supra* Part II (discussing implications of mental retardation for individuals' functioning in social and sexual situations).

<sup>259</sup> 632 A.2d 797, 816 n.17 (Bell, J., dissenting) ("The prosecutrix and her friends told the petitioner that she was 16 and the record does not suggest that she did not appear to be that age.").

and her friends all told him that she was sixteen (two years above the statutory minimum for consent).<sup>260</sup> A reasonableness standard ignores the fact that people with mental retardation often think and are socialized differently than their peers, and that these differences make for a level of understanding unlike that of defendants of average intelligence.

The second problem with limiting the mens rea requirement to proving knowledge of the complainant's age is that such a rule would not fully account for the cognitive and adaptive deficits of many people with mental retardation. Recall that statutory rape law not only presumes that those under a certain age cannot consent to sex, but also that adults understand age to be a proxy for such inability to consent.<sup>261</sup> This is why the law rightfully assumes notice on the part of non-mentally retarded defendants facing the strict liability standard. As detailed in Part II, however, social alienation, exclusion from sex education, and other factors make it particularly difficult for a person with mental retardation to understand the subtleties involved in sexual activity, especially those not involving force. Moreover, unlike offenses such as robbery or assault, sex is an activity that is only unlawful in certain limited circumstances.<sup>262</sup> Even if Erica gave Raymond her real age, it is not clear that he would have understood the significance of that fact. A rule which only acknowledges mistake of fact based on age would be insufficient. A rule which truly appreciates the potential limitations of a person with mental retardation would require proof that the defendant understood the nexus between age and inability to consent. In effect, this is a mistake-of-law defense.<sup>263</sup>

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<sup>260</sup> *Id.* at 799. Such a scenario is especially likely because people with mental retardation can be particularly vulnerable to believing what others say. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 432 (1985).

<sup>261</sup> Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399, 408 n.9 (2000) (“[C]hronological age is a proxy for immaturity and incapacity to give meaningful consent.”); Carpenter, *supra* note 230, at 339 (“[T]he victim’s age is a critical factor in a statutory rape case. It serves two purposes: it establishes the victim’s lack of capacity to consent, and it represents notice to defendant that the conduct is prohibited.”); see also Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1259–60 (1998) (noting that legislators creating statutory rape laws have two interrelated policy goals: (1) protecting young girls from “consenting to sex in an uninformed manner” and (2) deterring adult men from coercing those girls into sexual relationships).

<sup>262</sup> See Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1093 (2008) (discussing how statutory rape criminalizes “essentially non-harmful act[s] based on the circumstances of [their] commission”).

<sup>263</sup> In keeping with my emphasis on integration of people with mental retardation who are capable of accepting the dignity of risk, I would only permit a mistake-of-law defense

Of course, solving this problem can raise others. First, any move from a strict liability offense to one requiring proof of intent places an increased burden on prosecutors. As noted above, one frequent defense for the strict liability standard is that it obviates the need to prove some of the elements that are more difficult to establish.<sup>264</sup> Certainly, such a claim could be made in the case of statutory rape. The convenience derives, however, from not having to prove a fact that, in the case of other defendants, may be legitimately presumed. Even in the “tough luck” cases where defendants of average intelligence thought their partners were of age, there is no indication that the defendants were unaware that some people might be too young to consent.<sup>265</sup> Furthermore, the added burden on prosecutors in this category of cases might provide an incentive for them to exercise their gatekeeping function judiciously.

Allowing a mistake-of-law defense may be troubling when the situation involves an especially young complainant with a significantly older defendant. One could imagine, for example, a four-year-old who truly does not understand what is being asked of her, who might appear to consent to—or at least not refuse or oppose—a sexual encounter with an older defendant. In this scenario, allowing a mistake-of-law defense would free a defendant who did not understand that a four-year-old is incapable of consenting to sex. Conceptually, this outcome is consistent with what I have argued: The defendant in such a case cannot be presumed to be acting with real notice, relative control, or blameworthiness.

In practice, however, the extreme youth of the complainant may make this outcome emotionally or politically untenable. There are a few ways in which policymakers could address the situation. First, they could shift the burden of proof, requiring defendants to prove lack of knowledge in the form of an affirmative mistake-of-fact defense (regarding the age) and mistake-of-law defense (regarding the significance of the age), rather than requiring the prosecutor to prove defendant’s knowledge. This may not change the outcome in the above hypothetical case, but it might make the government more likely to prevail.

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concerning the lawfulness of engaging in sex with particularly young partners generally. A misunderstanding only as to the actual cut-off age of the statute in a particular jurisdiction (say, a belief that the statutory age of consent was sixteen rather than seventeen) would not be a defense for a person with mental retardation any more than it would be for a defendant of average intelligence.

<sup>264</sup> See *supra* notes 230–33 and accompanying text (discussing how strict liability standard relieves prosecution of burden of proving intent).

<sup>265</sup> See *supra* notes 102–04 and accompanying text (providing examples where defendants asserted they reasonably had mistaken age of complainant).

Alternatively, prosecutors could elect to charge the offense as non-statutory rape or sexual assault instead of statutory rape. This would impose on them, however, the burden of proving that the complainant did not consent to sex without standard indicia of nonconsent. Of course, a jury might well look at the facts and make its own determination that a four-year-old could not have consented to sex—just as the legislature intended by making statutory rape a crime in the first place. Certainly, there is no guarantee that the defendant in such a case would be held criminally liable, but such a risk may be necessary in a paradigm shift where we refuse to assume the culpability of certain defendants based only on their conduct.

Finally, policymakers could limit the proposed rule change to minimize the risk of such a scenario. Most obviously, they could set an age below which proof of the defendant's mens rea is no longer necessary. The difficulty here is that everyone has a different notion as to what would constitute "extreme youth": At what age is it unthinkable that a person might have the capacity to consent to sex? Four? Fifteen? Eighteen? This is why jurisdictions vary so much in their definition of the age of consent.<sup>266</sup>

That these issues may arise also points to the insufficiency of relying only on changing the rule to address the blameworthiness of defendants with mental retardation. If a person is convicted notwithstanding his lack of understanding about the circumstances and legality of his behavior (say, because prosecutors were relieved of the mens rea requirement due to the complainant's extreme youth), judges will need other tools, such as sentencing, to ensure that the law has an opportunity to account for both the conduct and the defendant's state of mind.

My proposed rule leaves some questions unanswered. Who could raise the issue of mental retardation and how, procedurally, would a case progress in that event? Would it be a pretrial issue or a trial issue, and, if the latter, would it be the judge or jury who would make the determination of which rule to apply? Would a hearing be required? Who would bear the burden of proof and by what standard? In

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<sup>266</sup> The problem here is not unlike the problem of prosecuting defendants with mental retardation who appear to function socially at a much lower age: Arguably, neither the complainant nor the defendant "knew what he or she was doing," yet only one side is prosecuted. An alternative way of looking at this non-force scenario is through the standard for rape that Professor Stephen Schulhofer advocates. He argues that rape law should ask "whether each participant in a sexual encounter had a meaningful opportunity to choose, and whether a meaningful choice was in fact made, before sexual penetration occurred." STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 103* (1998). Under this standard, which essentially considers both parties' state of mind, an acquittal might also occur.

*Atkins*, the Court left similar questions to the states to decide in a manner consistent with the announced constitutional principles.<sup>267</sup> Here, too, flexibility on the part of the states to develop and impose a special rule for defendants with mental retardation should be constrained by federal constitutional limitations.<sup>268</sup>

Additionally, it should be noted that even if a prosecutor fails to convict a defendant with mental retardation, there are ways of protecting the individual and the community outside of the criminal process. If a person truly poses a danger to children, perhaps because he does not understand the wrongfulness of his conduct, prosecutors may have to rely instead on the civil commitment system. Typically, the government may compel a person to submit to involuntary treatment, supervision, or services if it can demonstrate that an individual is a danger to himself or others due to mental retardation.<sup>269</sup> While many would rightfully contend that the civil commitment system has its own set of problems and is hardly an attractive alternative to the prison system,<sup>270</sup> criminal prosecution and punishment is not an appropriate remedy for the failures of the public mental health system, particularly where the defendant is not morally culpable.

#### CONCLUSION

For most crimes, we have a sense that society should not punish people who lacked criminal intent. When we do punish without regard to a person's intent, we call it a strict liability crime and cabin the standard to a few offenses, including statutory rape. Strict liability

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<sup>267</sup> *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

<sup>268</sup> One important lesson from *Atkins* is that so-called procedural rules can begin to eviscerate the constitutional principles they were meant to implement. As Carol and Jordan Steiker argue, for instance, the Court's failure to define or at least guide the definition of "mental retardation" in *Atkins* left a procedural hole that states can manipulate (by, say, making the defendant bear the burden to prove his mental retardation beyond a reasonable doubt in front of jurors who have already sentenced the defendant to death) to undermine the substantive due process right that is meant to preclude execution of people with mental retardation. Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 722-31 (2008).

<sup>269</sup> See *Heller v. Doe*, 509 U.S. 312, 314-15 (1993) (upholding Kentucky statute permitting commitment of "mentally retarded" individuals). This Article does not enter the contentious debate over the civil commitment process for sexual predators who do not have mental retardation, which is outlined in *Kansas v. Hendricks*, 521 U.S. 346 (1997).

<sup>270</sup> See, e.g., Joel Haycock, David Finkelman & Helene Presskreischer, *Mediating the Gap: Thinking About Alternatives to the Current Practice of Civil Commitment*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 265, 269-70 (1994) ("As currently practiced in Massachusetts and elsewhere, involuntary civil commitment is most often a disempowering, devaluing, coercive and counter-productive means of attempting to secure another person's cooperation for psychological treatment.").

offenses are the exception, not the rule. We justify such a low standard of intent based on the nature of the offense, assumptions about the defendant, and criminal justice theories like deterrence or victim protection. As I have argued in this Article, however, none of these justifications suffices when it comes to defendants with mental retardation charged with statutory rape. People in this population are unlikely to know what conduct is prohibited under these laws, are unlikely to be deterred from illicit intercourse (or to serve as a deterrent to others), and are not generally blameworthy from a moral perspective. Further, unlike many strict liability offenses, the offense or potential punishment is not so slight that we can look the other way for the purpose of administrative efficiency. Indeed, punishing a person with mental retardation without regard to his awareness of his conduct not only fails to meet the justifications for strict liability on its own terms but also may run afoul of constitutional due process and proportionate sentencing principles.

Formalizing policies regarding such defendants is a first, if insufficient, step toward acknowledging the effect that mental retardation can have on a defendant's culpability. In particular, prosecutors and judges should systematically consider whether cases against such individuals should go forward and, if they do proceed, should have to consider evidence of mental retardation as a mitigating factor at sentencing. More importantly, the law should require prosecutors to demonstrate *mens rea* for defendants with mental retardation charged with statutory rape. In these cases, factfinders would have to decide that the defendant knew the age of the complainant and understood that, under the law, a person of such an age is not capable of consenting.

Some would argue that all defendants, including those of average intelligence, should be entitled to such a standard, and that none should be convicted without evidence of a "guilty mind." Indeed, the irony of making changes to statutory rape law to acknowledge differences in cognitive capacity is that strict liability offenses may be the one area where defendants with mental retardation and those without are treated equally. As unfair as it may be, for these crimes, mental state is irrelevant for everyone. But what about other offenses, ones that require proof of intent? Is the problem solved for crimes where there is a *mens rea* element? Are there lessons that can be taken from this Article that might apply more broadly to other areas of criminal law?

The answer to this question depends on the sort of intent that an offense requires. For general intent crimes, the answer may be "yes."

Typically, the general intent standard is easily met.<sup>271</sup> We are normally willing to make certain assumptions about a person's moral responsibility or intent based on conduct alone. Thus, a person who punches her neighbor is presumed to have knowingly—and wrongfully—committed assault, without much further investigation into her state of mind. As with strict liability, however, the underlying assumptions that justify the cursory review of intent in general intent cases may well play out differently for people with mental retardation, who may not always understand what they are doing, be able to control their impulses, or understand the consequences of their actions. Yet when a person acts because of his mental retardation—for example, by following “friends” who have convinced him to commit a burglary while not fully understanding the consequences of his actions—he is likely to be held just as criminally liable as those without mental retardation. Instead of finding him less blameworthy due to his cognitive disability, he may be swept up in the tide of offenders who are truly blameworthy. In a sense, his mental retardation, instead of serving as a lifesaver, becomes an anchor.

The problem with both strict liability and a general intent requirement is that these standards of intent obscure any real inquiry into individual moral responsibility. Courts and court officers act as if all defendants are the same. But not all twenty-year-olds are alike: Those with mental retardation may actually think and act more like eight-year-olds. For this reason, I have proposed a different standard for them when it comes to the crime of statutory rape. The larger question is why criminal law pretends that people with mental retardation, aside from those found incompetent or insane, formulate intent just as anyone else would. The question is too large to answer here—but for defendants with mental retardation, the answer is “no provincial or transient notion.”<sup>272</sup> There is no dignity in the risk that they will be convicted for a crime that they could not really comprehend.

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<sup>271</sup> See, e.g., *U.S. v. Gonyea*, 140 F.3d 649, 653 (6th Cir. 1998) (“The violation of a general intent crime . . . requires only that a defendant intend to do the act that the law proscribes.” (citations omitted)).

<sup>272</sup> *Morissette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).