# THE INTERPLAY OF DOUBLE JEOPARDY, THE DOCTRINE OF LESSER INCLUDED OFFENSES, AND THE SUBSTANTIVE CRIMES OF FORCIBLE RAPE AND STATUTORY RAPE

## I. INTRODUCTION

In *Collins v. State*,[1] the defendant Collins was convicted of the forcible rape of a thirteen-year-old girl who testified that she struggled with the defendant before being raped in the back of his truck.[2] The two were acquaintances, and the defendant maintained that the incident was consensual and that the victim had lied about her age.[3] Collins appealed his conviction, claiming the lower court erred by refusing to instruct on the crime of statutory rape, which carried a lower penalty than the forcible rape offense.[4] Because statutory rape was not a lesser included offense of forcible rape and the mistake-of-age defense was not available in Mississippi at the time of trial, the court held that an instruction was not warranted.[5] In contrast, other jurisdictions allow prosecutors to charge, judges to instruct, and even juries to convict for both forcible rape and statutory rape arising from a single act of sexual intercourse without violating the Double Jeopardy Clause of the Fifth Amendment.[6]

Rape is a "perplexing, controversial and emotionally charged" area of criminal law.[7] Protection from double jeopardy is a fundamental guarantee dating back to Greco-Roman tradition[8] and appearing frequently in popular culture.[9] Yet this constitutional guarantee is a complex and often misunderstood area of the law.[10] Even

1. 691 So. 2d 918 (Miss. 1997).

2. *Collins*, 691 So. 2d at 921.

3. *Id.*

4. *Id.* at 920.

5. *Id.* at 925–26.

6. *E.g.*, Burtram v. State, 733 So. 2d 921, 923 (Ala. Crim. App. 1998) (explaining that, because Alabama's forcible rape and statutory rape definitions each contained an essential element not found in the other statute, defendant could be convicted on both charges based on a single incident without violating the Double Jeopardy Clause).

7. Commonwealth v. Rhodes, 510 A.2d 1217, 1222 (Pa. 1986).

8. David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 241 (2005) (citing Benton v. Maryland, 395 U.S. 784, 795–96 (1969)).

9. For example, Ashley Judd and Tommy Lee Jones starred in a 1999 movie called *Double Jeopardy*, about a woman who seeks to kill her husband after she was wrongfully convicted for his murder, which he faked. DOUBLE JEOPARDY (Paramount Pictures 1999).

10. *See* Albernaz v. United States, 450 U.S. 333, 343 (1981) (describing double jeopardy jurisprudence as "veritable Sargasso Sea"); James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 117 (1995) (noting many problems with clause, despite its "'deceptively plain language'" (quoting Crist v. Bretz, 437 U.S. 28, 32 (1978))).

more confusing is the doctrine of lesser included offenses.[11] When the crime of rape collides with double jeopardy principles and the doctrine of lesser included offenses, the results are unpredictable and at times surprising. Yet very little attention has been given to the intersection of these areas of the law.[12]

This Comment examines the interplay between the crimes of forcible rape and statutory rape with the Double Jeopardy Clause of the United States Constitution and the doctrine of lesser included offenses. Part II discusses the split among courts over whether statutory rape is a lesser included offense of forcible rape, and whether the Double Jeopardy Clause bars multiple prosecutions and/or multiple punishments in the same prosecution for forcible rape and statutory rape arising from the same act of intercourse. Part II.A provides an overview of the double jeopardy protection and the test used to determine if two offenses are the "same" for purposes of the Clause. Part II.B offers an overview of the doctrine of lesser included offenses, including the tests used to define lesser included offenses; when a jury instruction on a lesser included offense is permissible, mandated, or prohibited; and how the doctrine relates to the Double Jeopardy Clause.

Part II.C discusses the substantive offenses of statutory rape and forcible rape, including the origins of the crime of statutory rape, statutory rape statutes, the elements of statutory rape in general, the elements of forcible rape in general, and how the crimes relate to one another. Part II.D examines the opinions of various courts that have considered double jeopardy challenges to multiple punishments and prosecutions for statutory rape and forcible rape arising from a single act. This section also examines cases addressing whether statutory rape is a lesser included offense of forcible rape and the reasoning behind these decisions.

Part III evaluates the reasoning of courts that have addressed the double jeopardy and lesser included offense doctrines in the context of statutory rape and forcible rape. Part III.A discusses criticisms of the statutory elements approach in the context of forcible rape/statutory rape prosecutions. Part III.B explores the definitions of force promulgated by some courts considering charges for both forcible rape and statutory rape. Part III.C proposes that forcible rape and statutory rape be treated as the "same offense" for double jeopardy purposes, and that statutory rape be treated as a lesser included offense of forcible rape. Part III.C also includes a statutory proposal for the remodeling of forcible rape and statutory rape laws, with explicit language governing the relationship between the two. In conclusion, this Comment advocates a more practical approach whereby double jeopardy bars multiple convictions for statutory rape and forcible rape, and statutory rape is a lesser included offense of forcible rape.

11. Many commentators refer to the doctrine "as a 'Gordian Knot' and a 'many-headed hydra.'" Christen R. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445, 445–46 (1984) (quoting Comment, *The Lesser Included Offense Doctrine in Iowa: The Gordian Knot Untied*, 59 IOWA L. REV. 684 (1974); Dorean Koenig, *The Many-Headed Hydra of Lesser Included Offenses: A Herculean Task for the Michigan Courts*, 1975 DET. C.L. REV. 41, 41–42).

12. Searches reveal little scholarly work on double jeopardy challenges and the doctrine of lesser included offenses in the statutory rape/forcible rape context. Similarly, cases on this issue are few in number and often brief.

## II. OVERVIEW

Part II explores the interplay between the crimes of statutory rape and forcible rape. Double jeopardy principles dictate whether a criminal defendant can receive multiple convictions for statutory rape and forcible rape arising from the same transaction,[13] and whether a defendant who has been convicted or acquitted of one offense can face a second prosecution for the other.[14] The doctrine of lesser included offenses helps courts determine whether an instruction on statutory rape should be given in a prosecution for forcible rape where the victim was underage.[15] This Part also provides an overview of double jeopardy, the doctrine of lesser included offenses, and the substantive offenses of statutory rape and forcible rape.[16] The last section of this Part examines case law regarding double jeopardy challenges and lesser included offense questions in the forcible rape/statutory rape context.

### *A. Double Jeopardy Principles*

The Fifth Amendment of the Constitution states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[17] Generally, the Double Jeopardy Clause "serves 'a constitutional policy of finality'"[18] for defendants and insulates defendants from "prosecutorial overreaching."[19] The Federal Double Jeopardy Clause is traditionally interpreted as providing three protections: protection against a second prosecution for the same offense after acquittal, protection against a second prosecution after conviction, and protection against multiple punishments for the same offense.[20] Due to the growth in number and specificity of statutory offenses, prosecutors increasingly charge multiple offenses arising from a single criminal act or

13. See *infra* Part II.D.1 for a discussion of case law dealing with statutory rape and forcible rape in the multiple punishment scenario.

14. See *infra* Part II.D.2 for a discussion of case law dealing with double jeopardy challenges in the successive prosecution context.

15. See *infra* Part II.D.3 for a discussion of courts finding that statutory rape is not a lesser included offense of forcible rape, with a minority of courts holding the opposite.

16. See *infra* Part II.A for an overview of the double jeopardy doctrine and Part II.B for a discussion of lesser included offenses in general. For an introduction to the substantive offenses of forcible rape and statutory rape that this Comment will focus on, see *infra* Part II.C.

17. U.S. CONST. amend. V, cl.2.

18. Brown v. Ohio, 432 U.S. 161, 165 (1977) (quoting United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion)).

19. Garrett v. United States, 471 U.S. 773, 795 (1985) (O'Connor, J., concurring).

20. *Brown*, 432 U.S. at 165 (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

transaction.[21] Therefore, this fundamental protection is increasingly dependent on the definition of "same offense."[22]

In *Blockburger v. United States*,[23] the Supreme Court held that the test to determine whether offenses are the same for double jeopardy purposes depends on whether each statute requires proof of a fact that the other does not.[24] Thus, the government cannot bring a second prosecution after acquittal or conviction if the offenses do not pass the *Blockburger* test.[25] The analysis in the context of multiple charges and punishments in a single prosecution is somewhat different.[26] If a single act or transaction implicates two different statutes, the Double Jeopardy Clause does not prohibit multiple charges and punishments if "'clearly expressed legislative intent' supports the imposition of cumulative punishments."[27] But while some statutes may explicitly state how they relate to others, most are silent.[28] In the absence of clear legislative intent, courts must then look to *Blockburger*.[29] If the prosecution seeks multiple charges and punishments from a single act or transaction under the same statute, the rule of lenity dictates that only one punishment may be imposed unless the legislature has clearly expressed otherwise.[30] Although many commentators have criticized the *Blockburger* test and the resulting dependence on legislative intent in this area,[31] the Supreme Court has consistently reaffirmed it.[32]

21. *Double Jeopardy*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 432, 444 (2007) (citing Ashe v. Swenson, 397 U.S. 436, 446 n.10 (1970)); s*ee also* Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 635 (2005) (criticizing present-day criminal codes for "the proliferation of numerous new offenses that duplicate, but may be inconsistent with, prior existing offenses"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–19 (2001) (noting that due to increasing number of statutory offenses, defendants who would have committed single crime at common law now face potential liability for many different offenses).

22. Shellenberger & Strazzella, *supra* note 10, at 121 (citing Whalen v. United States, 445 U.S. 684, 700 (1980) (Rehnquist, J., dissenting)).

23. 284 U.S. 299 (1932).

24. *Blockburger*, 284 U.S. at 304 (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).

25. *Double Jeopardy*, *supra* note 21, at 444–45.

26. *Id.* at 450–51. Compared to the successive prosecution context, the multiple punishments analysis is slightly more dependent on legislative intent. *Id.* Double jeopardy analysis in the multiple punishments analysis also differs slightly depending on whether the offenses are found within the same statute, or two different statutes. *Id.* at 451–52.

27. *Id.* at 450 (quoting Missouri v. Hunter, 459 U.S. 359, 368–69 (1983)).

28. For example, some federal courts have looked to specific language authorizing multiple punishments in the statute itself. *See, e.g.*, United States v. Patel, 370 F.3d 108, 115 (1st Cir. 2004) (finding legislative intent to impose multiple punishments based on clear language that when defendant uses fire to commit felony, defendant "shall, *in addition to the punishment provided for such felony*, be sentenced to imprisonment for 10 years"); United States v. Riggio, 70 F.3d 336, 338–39 (5th Cir. 1995) (finding intent to impose multiple punishments for conspiracy to commit arson and use of fire to commit arson based on statute providing that individuals convicted of using fire in commission of felony will receive additional sentence); United States v. Mohammed, 27 F.3d 815, 819 (2d Cir. 1994) (finding legislative intent to impose multiple punishments based on the statutory language, "*in addition to the punishment provided for*").

29. *Double Jeopardy*, *supra* note 21, at 450–51.

30. *Id.* at 451–52.

31. *See generally* Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1185, 1214–15 (2004) (offering criticisms of *Blockburger*); Tom Stacy, *Relating Kansas Offenses*, 56 U. KAN. L. REV. 831, 856–57 (2008) (offering critique of legislative intent

In addition to the Federal Double Jeopardy Clause, several other sources of law can affect double jeopardy cases in state court. Every state includes some form of protection against double jeopardy in its state constitution or common law that is equal or greater than the protection afforded by the Federal Constitution.[33] States can also have statutory provisions governing cumulative punishment.[34] Finally, some state courts rely on the common law doctrine of merger when dealing with multiple sentences stemming from a single act, allowing the court to merge multiple punishments under certain circumstances.[35] Most courts, however, have either abolished the doctrine as unnecessary or treat merger analysis as identical to the double jeopardy "same offense" analysis.[36]

### *B. Lesser Included Offenses*

The lesser included offense doctrine is generally a confusing area of law.[37] Courts face a two-part analysis when considering lesser included offense issues: first, does the offense meet the definition of a lesser included offense; and second, if it is a lesser included offense, should an instruction be given to the jury?[38] This section will examine how lesser included offenses are defined, using the forcible rape/statutory rape combination as an example.[39] It will also discuss when a lesser included offense

approach); Jeffrey M. Chemerinsky, Note, *Counting Offenses*, 58 DUKE L.J. 709, 716–17 (2009) (same); Alex Tsiatsos, Note, *Double Jeopardy Law and the Separation of Powers*, 109 W. VA. L. REV. 527, 555 (2007) (same).

32. *See* Shellenberger & Strazzella, *supra* note 10, at 122 (noting that *Blockburger* has been reaffirmed after multiple attacks).

33. Rudstein, *supra* note 8, at 241. The Federal Double Jeopardy Clause applies to the states through incorporation, but states are free to provide a greater level of protection for their own criminal defendants. *Id.* at 239–40 (citing Benton v. Maryland, 395 U.S. 784 (1969)).

34. *E.g.*, 18 PA. CONS. STAT. ANN. § 109 (West 2010) (governing successive prosecutions for same criminal provision); *id.* § 110 (regarding successive prosecutions for different criminal provisions); *id.* § 111 (prohibiting prosecution in Pennsylvania courts following prosecution by federal government or another state in limited circumstances).

35. Bruce A. Antkowiak, *Picking up the Pieces of the Gordian Knot: Towards a Sensible Merger Methodology*, 41 NEW ENG. L. REV. 259, 262 (2007). For an example of merger in the forcible rape/statutory rape context, see *Wofford v. State*, 486 S.E.2d 697, 699 (Ga. Ct. App. 1997).

36. *Antkowiak*, *supra* note 35, at 263 (citing Commonwealth v. Anderson, 650 A.2d 20, 23 (Pa. 1994) (holding that constitutional double jeopardy analysis and common law merger doctrine are identical)). After *Anderson*, Pennsylvania enacted a statute codifying the merger doctrine. *See* 42 PA. CONS. STAT. ANN. § 9765 (West 2010) (stating that "[n]o crimes shall merge for sentencing purposes" except those arising from single act that are "same offense" based on statutory elements).

37. See *supra* note 11 and accompanying text for commentary on the doctrine's confusing nature.

38. Michael H. Hoffheimer, *The Future of Constitutionally Required Lesser Included Offenses*, 67 U. PITT. L. REV. 585, 589 (2006).

39. For a discussion of the three main tests used to define lesser included offenses, see *infra* Part II.B.1. For a more detailed discussion of the substantive crimes of forcible rape and statutory rape, see *infra* Part II.C.

instruction is warranted, mandated, or prohibited,[40] and how the lesser included offense doctrine relates to double jeopardy.[41]

1. Definitions of Lesser Included Offenses

There are generally three tests to determine whether one offense is a lesser included offense of another offense.[42] The first approach is the statutory elements test, which was the traditional approach at common law and is used today in federal courts and a growing number of states.[43] Under the statutory elements test, a lesser included offense must contain all the elements of the statute defining the greater offense.[44] Under this approach, statutory rape would generally not be a lesser included offense of forcible rape, depending on the language of the state statutes, because statutory rape statutes typically contain an age element lacking in the statute defining forcible rape.[45] The principal criticisms of the statutory elements test are that it provides inadequate protection for defendants, is overly dependent on legislative intent, and provides incentives for prosecutors to advocate a "strained construction of elements" to circumvent the test.[46]

A second approach is the evidentiary approach.[47] Under this analysis, a lesser included offense would rely on the same evidence actually presented at trial as the

40. See *infra* Part II.B.2 for a discussion of the rules governing when trial courts give lesser included offense instructions.

41. See *infra* Part II.B.3 for an introduction to the interplay between double jeopardy and the lesser included offense doctrine.

42. Shellenberger & Strazzella, *supra* note 10, at 8. The Model Penal Code also proposes an offense be treated as included in a greater offense if it includes the same or less than all the same facts, it is an attempt or solicitation of the greater offense, or it only differs by requiring a less culpable state of mind or lesser degree of harm. MODEL PENAL CODE § 1.07(4) (2001).

43. *Schmuck v. United States* established the statutory elements approach as the federal test. 489 U.S. 705, 716 (1989). In *Schmuck*, the defendant was charged with mail fraud based on a scheme of lowering the mileage on odometers of used cars and reselling them to other dealers. *Id.* at 707. The trial court held he was not entitled to an instruction on odometer tampering because it was not a lesser included offense of mail fraud. *Id.* at 708. Mail fraud was a broad offense, and none of the elements of odometer tampering were required for mail fraud. *Id.* at 721–22.

44. Shellenberger & Strazzella, *supra* note 10, at 122–23. Shellenberger and Strazzella use the example of discharging a deadly weapon as a lesser included offense of assault with a deadly weapon, if the discharge statute contains all of the elements found in the statute for assault with a deadly weapon. *Id.* at 10. If the defendant were charged instead with simple assault, discharge of a deadly weapon would not be a lesser included offense because the simple assault statute would likely not include an element regarding a weapon. *Id.*

45. Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 335 (2003). For further discussion of the statutory elements of forcible rape and statutory rape in general, see *infra* Part II.C.2–4.

46. Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 371 (2005). In contrast, proponents often praise the statutory elements test as predictable and easy to apply. *Id.* at 366–67 (citing State v. Wright, 622 N.W.2d 676, 680 (Neb. 2001) (adopting elements test because of predictability and uniformity); People v. Mendoza, 664 N.W.2d 685, 698 (Mich. 2003) (Cavanagh, J., concurring) (noting supposed ease of application as rationale for adoption)).

47. Shellenberger & Strazzella, *supra* note 10, at 12–13.

greater offense.[48] Under this approach, statutory rape could be a lesser included offense of forcible rape if the evidence at trial demonstrated that the accused had sexual intercourse with an underage victim, which may or may not have involved force.[49] The main criticisms of the evidentiary approach are that it is "frustrated by the difficulty of determining what evidence is necessary for a conviction[]" and that outcomes differ widely on a case-by-case basis.[50]

A third approach is the cognate-pleading test.[51] This test is a hybrid between the stricter statutory elements test and the more open-ended evidentiary approach.[52] Under this approach, a lesser included offense need not contain all the same elements as the greater offense, but it must contain certain shared elements.[53] This approach focuses on the pleadings in the case, allowing the trial court to examine the specific charging document instead of relying on the abstract statutory elements.[54] Using this test, statutory rape could be a lesser included offense of forcible rape if the indictment charging forcible rape alleges the victim's underage status.[55] Critics believe the pleadings approach is overly dependent on the skill of the individual prosecutor writing the charging document and, like the evidentiary approach, is an unpredictable approach that differs greatly from case to case.[56]

2. Lesser Included Offense Instructions

If an offense meets the definition of a lesser included offense, the next question is whether an instruction is mandated, warranted, or prohibited.[57] The prosecution may want an instruction on applicable lesser included offenses to save time and resources by avoiding the need to bring another prosecution.[58] The prosecution may also want the

48. *Id*. Under this approach, discharge of a deadly weapon could be a lesser included offense of simple assault based on evidence at trial that the defendant shot the victim in the leg during the course of the assault, even though the simple assault statute did not contain a weapon element. *Id.* at 13.

49. *See, e.g.*, Hill v. Georgia, 451 U.S. 923, 924–25 (1981) (Marshall & Brennan, JJ., dissenting from denial of certiorari) (arguing that statutory rape be treated as lesser included offense of forcible rape, based on fairness and actual evidence of case); Shellenberger & Strazzella, *supra* note 10, at 12 (citing State v. Keffer, 860 P.2d 1118, 1129 (Wyo. 1993) (explaining evidentiary approach)).

50. Hoffheimer, *supra* note 46, at 364.

51. Shellenberger & Strazzella, *supra* note 10, at 11–12.

52. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 24.8(c) (4th ed. 2004).

53. Shellenberger & Strazzella, *supra* note 10, at 11–12. According to Shellenberger and Strazzella, discharging a weapon would be a lesser included offense of simple assault if the charging document specifically alleged that the defendant shot the victim in the leg to cause bodily injury. *Id.* at 12.

54. *Id.* at 11–12.

55. *See, e.g.*, Young v. State, 846 N.E.2d 1060, 1062–63 (Ind. Ct. App. 2006) (finding criminal trespass is lesser included offense of residential entry based on charging language); People v. Scott, 100 Cal. Rptr. 2d 70, 76–79 (Ct. App. 2000) (stating generally that accusatory pleading test may be used to find defendant guilty of lesser included offense).

56. Hoffheimer, *supra* note 46, at 364.

57. *See* Shellenberger & Strazzella, *supra* note 10, at 6–7 (noting first step is "legal determination" whether crime meets lesser included offense definition and second step is "evidence step" to decide whether trial evidence warrants instruction). According to the authors, there must be a "rational factual dispute" about the elements that distinguish the lesser and greater offenses. *Id.* at 7.

58. Hoffheimer, *supra* note 46, at 356.

instructions at the first trial because a second trial after acquittal or conviction would be barred by double jeopardy.[59] The accused may desire a lesser included offense instruction to allow the jury to return a "compromise verdict" by acquitting on the greater offense while convicting on an offense with a lighter penalty.[60] Both sides might stand to benefit or lose from an all-or-nothing situation created by a lack of lesser included offense instructions.[61] Some states mandate instructions on all applicable lesser included offenses.[62] The majority of states, along with the federal system, mandate lesser included offense instructions only in cases where supported by the factual record.[63] States following this approach differ on the amount of evidence needed to mandate the instructions.[64] This approach is not constitutionally mandated, although in some limited circumstances due process entitles a criminal defendant to a lesser included offense instruction.[65]

3. How the Lesser Included Offense Doctrine Relates to Double Jeopardy

The statutory elements approach used by a majority of jurisdictions and the federal system is identical to the test for determining which offenses are the "same offense" for double jeopardy purposes[66] as handed down in *United States v. Blockburger*.[67] Any offense that is a lesser included offense of a greater offense under the statutory elements test would also be the "same offense" under *Blockburger*.[68] Therefore, punishments for both a greater and lesser included offense would be prohibited by the Double Jeopardy Clause.[69] The government would not be able to bring a second prosecution for the greater offense after the defendant was acquitted or convicted of the lesser included offense.[70] Courts also could not impose multiple

59. For an example of this scenario, see *Brown v. Ohio*, 432 U.S. 161, 166 (1977). In *Brown*, the defendant pled guilty to operating a vehicle without the owner's consent. *Id.* at 162. The government later brought a second prosecution for theft of the same automobile. *Id.* at 162–63. The Supreme Court held that the first crime was a lesser included offense of the theft crime, and therefore double jeopardy barred a second prosecution for the greater offense. *Id.* at 168–70.

60. For example, a defendant might request an instruction on statutory rape arising from sexual intercourse with an adolescent victim where he is charged with forcible rape. This would allow the jury to acquit on forcible rape but convict on a less severe statutory rape charge, based on a lack of finding force beyond a reasonable doubt. *See* Collins v. State, 691 So. 2d 918, 920 (Miss. 1997) (noting defendant's claim that trial court erred by failing to instruct on statutory rape as lesser included offense, as part of "mistake of age" defense, after being convicted for forcible rape).

61. *See generally* Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257, 300–03 (1999) (discussing benefits and drawbacks of all-or-nothing doctrine).

62. Hoffheimer, *supra* note 38, at 588.

63. *See id.* at 588–89 (stating courts must determine whether formal charge contains lesser included offenses, and whether instructions on lesser included offenses are required under facts of case).

64. *Id.* at 589.

65. *Id.* Lesser included offense instructions are only constitutionally mandated in capital cases where the evidence could support a conviction. Beck v. Alabama, 447 U.S. 625, 638 (1980).

66. LAFAVE ET AL., *supra* note 52, § 24.8(c).

67. Blockburger v. United States, 284 U.S. 299, 304 (1932).

68. LAFAVE ET AL., *supra* note 52, § 24.8(c).

69. *Id.*

70. *Id.*

convictions and/or sentences for both the greater and lesser included offenses.[71] Other tests that define lesser included offenses more broadly than the statutory elements test do not align with the *Blockburger* test, and therefore "invite frequent questions concerning double jeopardy violations."[72]

### *C. Introduction to the Underlying Substantive Offenses: Statutory Rape and Forcible Rape*

This Comment will focus on double jeopardy challenges to convictions for both forcible rape and statutory rape arising from a single act of intercourse with an underage victim and whether statutory rape can be considered a lesser included offense of forcible rape.[73] Although there has been extensive scholarly treatment of double jeopardy law and the doctrine of lesser included offenses as it relates to offenses such as murder and manslaughter or attempted murder,[74] or the felony murder rule,[75] the combination of rape and forcible rape has not been the focus of as much scholarly debate. This section will provide background information on the origins of the crime of statutory rape, statutory rape elements, and statutes in general.[76] It will also discuss the elements of forcible rape in general and offer an introduction to how the crimes of statutory rape and forcible rape relate to each other.[77]

#### 1. Origins of Statutory Rape

Statutory rape was first codified in English law in 1275, prohibiting sexual intercourse with girls under ten or twelve years of age.[78] In addition to the protection of

71. *Id.*

72. *Id.* (citing Rutledge v. United States, 517 U.S. 292 (1996)); *see also* Shellenberger & Strazzella, *supra* note 10, at 171–77 (detailing confusion among courts and commentators regarding how broader state law tests for lesser included offenses and *Blockburger* test relate). For example, in states using the broader evidentiary or pleading approaches to lesser included offenses, a larger number of offenses may be presented to the jury. Shellenberger & Strazzella, *supra* note 10, at 176. These presented offenses will be barred from re-prosecution under double jeopardy although they do not meet the *Blockburger* "same offense" definition. *Id.* Although the application can lead to some confusion, states are nonetheless constitutionally free to set their own lesser included offense tests. *Id.* at 171–74.

73. See *infra* Part II.D.1 for a discussion of cases considering double jeopardy challenges to multiple punishments in the same trial and *infra* Part II.D.2 for a discussion of cases dealing with double jeopardy challenges in the successive prosecution context. For a discussion of whether statutory rape is a lesser included offense of forcible rape, see *infra* Part II.D.3.

74. *See, e.g.*, Hoffheimer, *supra* note 46, at 423–31 (discussing attempts by state courts to define when manslaughter could be lesser included offense of murder, and discussing when double jeopardy could be invoked).

75. *See id.* at 369–70 (citing Harris v. Oklahoma, 433 U.S. 682, 682–83 (1977) (per curiam) (holding that robbery was lesser included offense of felony murder, although any underlying felony could satisfy lesser included offense rule)). For a recent discussion of the interplay between double jeopardy and the felony murder rule, see generally *People v. Ream*, 750 N.W.2d 536 (Mich. 2008).

76. See *infra* Part II.C.1 for a discussion of the origins of statutory rape law and *infra* Part II.C.2 for a discussion of statutes defining the crime of statutory rape and their elements.

77. See *infra* Part II.C.3 for a discussion of the crime of forcible rape in general and *infra* Part II.C.4 for an introduction to how forcible rape and statutory rape relate to each other.

78. Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 754 (2000).

vulnerable youth, these laws were primarily designed to protect a father's property interest in his daughter's chastity and desirability for marriage.[79] While some American states established similar statutes, others allowed prosecution based on common law with the same reasoning, even in the absence of a statute.[80] Statutory rape got its name "because it was originally engrafted onto the common law by statute"[81] and was intended to fill a gap in the law.[82] As American states raised the age of consent to fourteen or higher, a problem with culpability developed as there was less consensus on whether this was harmful or morally wrong conduct.[83] Modern justifications for statutory rape law include avoiding the risk of teenage pregnancy, disease, and psychological or physical harm due to a lack of fully developed judgment.[84]

2. Statutes Defining Statutory Rape

The general elements of statutory rape are (1) sexual intercourse, (2) with a person below a certain age.[85] Lack of consent is not an element, as the victim is deemed incapable of consent by reason of age.[86] A majority of jurisdictions hold that statutory rape is a strict liability offense, with no defense regarding mistake of age.[87] A minority of states require a mens rea and allow a mistake-of-age defense.[88] A third category of states allow a mistake-of-age defense depending on the age of the victim.[89] Penalties for statutory rape vary widely, from probation to life imprisonment.[90] States now use a variety of titles for the traditional crime of statutory rape.[91]

79. *Id.*

80. WAYNE R. LAFAVE, CRIMINAL LAW § 17.4(c) (4th ed. 2003).

81. *Id.*

82. *See* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 102 (1998) (declaring that "statutory rape" label signals that crime is only considered rape by operation of statute and is not the same as forcible rape).

83. LAFAVE, *supra* note 80, § 17.4(c).

84. Carpenter, *supra* note 45, at 334.

85. *Id.* at 335–36.

86. *Id.* at 335.

87. *Id.* at 343–44. According to Carpenter's research, Alabama, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, and Wisconsin follow the strict liability approach, with no available mistake-of-age defense. *Id.* app. at 385–91.

88. *Id.* at 343–44. Carpenter found that Alaska, Indiana, and Kentucky require a mens rea and allow some defense regarding mistake of age. *Id.* app. at 385–91.

89. *Id.* at 344. Carpenter identified a third "hybrid" category allowing a mistake-of-age defense in limited circumstances in Arizona, Arkansas, California, Colorado, Illinois, Maine, Minnesota, Missouri, Montana, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wyoming. *Id.* app. at 385–91.

90. *Id.* at 315 n.11.

91. *Id.* at 313, 314 n.2 (citing ALASKA STAT. § 11.41.434 (2008) ("sexual abuse of a minor"); ARIZ. REV. STAT. ANN. § 13-1405 (2001) ("sexual conduct with a minor"); IND. CODE ANN. § 35-42-4-3 (West 2004) ("child molesting"); LA. REV. STAT. ANN. § 14:80 (2004) ("felony carnal knowledge of a juvenile"); ME. REV. STAT. ANN. tit. 17-A, § 253 (2006) ("gross sexual assault"); NEV. REV. STAT. § 200.368 (LexisNexis 2006) ("statutory sexual seduction"); TEX. PENAL CODE ANN. §§ 22.011, 22.021 (West 2003) ("sexual assault" and "aggravated sexual assault")).

3. Forcible Rape[92]

At common law, rape was defined as unlawful carnal knowledge of a woman, by force and without her consent.[93] The crime of rape therefore contains elements that statutory rape does not: lack of consent, which is generally precipitated by the element of force, threat of force, duress, intoxication, or drug use.[94] Although force and consent are distinct elements, courts sometimes confuse the two and treat them as one element.[95] Some jurisdictions include statutory rape and forcible rape in the same section of the criminal code,[96] whereas others do not.[97]

4. How Forcible Rape Relates to Statutory Rape

Forcible rape and statutory rape "share[] a complicated and symbiotic relationship."[98] The two offenses are often designed to complement each other, either by placement in the same section of the criminal code[99] or by similar structures or cross-referencing.[100] Some courts exclude or simply ignore evidence of force in statutory rape cases, precluding the possibility that the defendant may be charged or

92. To distinguish from statutory rape, this Comment will use the term "forcible rape" to refer to common law rape, which is rape by force or threat of force. LAFAVE, *supra* note 80, § 17.4.

93. 4 WILLIAM BLACKSTONE, COMMENTARIES *210.

94. Carpenter, *supra* note 45, at 336 n.133.

95. Joshua Mark Fried, Comment, *Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape*, 23 PEPP. L. REV. 1277, 1290–91 (1996).

96. *See, e.g.*, IDAHO CODE ANN. § 18-6101 (2008) (defining rape under Idaho statute as intercourse in several circumstances, including by force or where female is less than eighteen years old).

97. Hoffheimer, *supra* note 46, at 369. For example, Pennsylvania repealed its statute entitled "statutory rape" in 1995. 18 PA. CONS. STAT. ANN. § 3122 (West 1983) (repealed 1995). The crime is now referred to as "statutory sexual assault" and prohibits sexual intercourse with someone under the age of sixteen, where the accused is at least four years older than the complainant and they are not married to each other. 18 PA. CONS. STAT. ANN. § 3122.1 (West 2010). The crime of rape is defined as intercourse by force or threat of force or with someone who is unconscious, impaired by drugs or intoxication, or suffers from a mental disability. *Id.* § 3121(a). The statute contained a sixth alternative, sexual intercourse with someone who is under thirteen years old, which was deleted in 2002. 18 PA. CONS. STAT. ANN. § 3121(a)(6) (West 2000) (deleted by amendment 2002). Intercourse with someone who is less than thirteen years old is now defined as rape of a child and appears in a different subsection of the statute. 18 PA. CONS. STAT. ANN. § 3121(c) (West 2010). Tennessee has separate statutes for rape by force or coercion, TENN. CODE ANN. § 39-13-503 (West 2009), and for mitigated statutory rape, statutory rape, and aggravated statutory rape where the complainant is between thirteen and eighteen years old, with varying penalties depending on the age of the victim and the age of the defendant. *Id.* § 39-13-506. Yet another Tennessee statute defines rape of a child, who is less than thirteen years old, where the defendant is three or more years older. *Id.* § 39-13-522. North Carolina includes intercourse with a victim less than thirteen years old with rape by force in its first-degree rape statute, and has a separate statutory rape provision for victims between thirteen and fifteen years old. N.C. GEN. STAT. ANN. §§ 14-27.2,14.27.7A (2007). Alabama defines first-degree rape as sexual intercourse by force or with someone less than twelve, and has a separate statute for second-degree rape where the victim is between twelve and sixteen years old. ALA. CODE §§ 13A-6-61, 13A-6-62 (2008). Georgia similarly has separate provisions for statutory rape and forcible rape. GA. CODE. ANN. §§ 16-6-3, 16-6-1 (2007).

98. Carpenter, *supra* note 45, at 336.

99. The Model Penal Code includes the two offenses in the same section, defining rape as sexual intercourse by force or threat, use of drugs or alcohol to impair resistance, with a female who is unconscious, or with a female less than ten years old. MODEL PENAL CODE § 213.1 (1985).

100. Carpenter, *supra* note 45, at 336.

convicted of forcible rape in addition to statutory rape.[101] Other courts not only consider evidence of force in statutory rape cases, but lessen the force requirement to define it as dependent on a variety of factors, including the relative ages of the parties.[102] Other jurisdictions explicitly reject this approach.[103]

In some jurisdictions, a prosecutor may charge both statutory rape and forcible rape, and a defendant may be convicted on both charges.[104] Sometimes statutory rape is alleged as a lesser included offense of forcible rape.[105] This can benefit the prosecution, by allowing a "fallback position" for conviction when there is difficulty proving force beyond a reasonable doubt.[106] This can also benefit the defendant by allowing the jury to return a verdict on statutory rape only, which generally carries a lighter penalty than forcible rape.[107] In other situations, the defendant may be tried and acquitted for forcible rape, only to face a subsequent prosecution for statutory rape.[108] Finally, a

101. *See* Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 310 n.65 (2006) (citing Michael M. v. Superior Court, 450 U.S. 464, 466 (1981) (upholding conviction for statutory rape despite evidence of violent force during act); State v. Carlson, 767 A.2d 421, 423 (N.H. 2001) (upholding conviction for statutory rape despite victim's testimony of fear during sexual encounter); Reid v. State, 290 P.2d 775, 779–80 (Okla. Crim. App. 1955) (detailing conflicting accounts by underage victim and defendant regarding issue of consent); State v. Searles, 621 A.2d 1281, 1284 (Vt. 1993) (allowing evidence of force in statutory rape trial)); *see also* Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 42 n.177 (1997) (suggesting that discussions of force are inappropriate in statutory rape cases).

102. *See, e.g.*, Commonwealth v. Rhodes, 510 A.2d 1217, 1227 (Pa. 1986) (finding sufficient evidence of force based on factors including age and size of parties instead of relying on testimony of victim or physical evidence of injuries); *see also* Powe v. State, 597 So. 2d 721, 725–27 (Ala. 1991) (applying *Rhodes* and *Etheridge* to find that first-degree rape element of forcible compulsion could be satisfied by totality of circumstances instead of evidence of physical force); State v. Etheridge, 352 S.E.2d 673, 682 (N.C. 1987) (holding constructive force and child's fear of parent can satisfy force requirement for second-degree rape).

103. *See, e.g.*, *In re* T.A.J., 73 Cal. Rptr. 2d 331, 337 (Ct. App. 1998) (noting that statutory rape statutes "'generally operate without regard to force, fear, or consent'" (quoting People v. Scott, 885 P.2d 1040, 1045 (Cal. 1994))); People v. Reed, 591 N.E.2d 455, 460–61 (Ill. 1992) (noting that sexual activity with minor is crime determined without reference to consent of victim); *see also* Collins v. State, 495 S.E.2d 59, 61 (Ga. Ct. App. 1997) (holding that age of victim alone cannot supply element of force necessary to sustain conviction for forcible rape); State v. Saluter, 715 A.2d 1250, 1258–59 (R.I. 1998) (finding that instruction based on *Rhodes* made jury's determination of force or coercion frivolous by removing state's burden of proof on force element); Pierce v. Wall, 941 A.2d 189, 195–98 (R.I. 2008) (rejecting lower court's jury instructions regarding definition of force that paralleled definition in *Rhodes*).

104. Carpenter, *supra* note 45, at 337. Research shows that jurisdictions are split on whether a defendant can be convicted for both forcible rape and statutory rape arising from a single act of sexual intercourse. *Compare* Burtram v. State, 733 So. 2d 921, 923–24 (Ala. Crim. App. 1998) (holding double jeopardy does not bar multiple convictions for forcible rape and statutory rape arising from a single act), Drinkard v. Walker, 636 S.E.2d 530, 535 (Ga. 2006) (same), *and Rhodes*, 510 A.2d at 1229 (same), *with* Brown v. United States, 576 A.2d 731, 734 (D.C. 1990) (suggesting statutory rape and forcible rape are alternate theories, not separate offenses), State v. Banks, 740 P.2d 1039, 1041–42 (Idaho Ct. App. 1987) (same), *and* State v. Ridgeway, 648 S.E.2d 886, 894–95 (N.C. Ct. App. 2007) (same).

105. Carpenter, *supra* note 45, at 337.

106. *Id.* at 337–38.

107. *Id.*

108. *Compare* Gray v. Lewis, 881 F.2d 821, 823 (9th Cir. 1989) (holding double jeopardy does not bar subsequent prosecution for statutory rape after acquittal for forcible rape), *with* State v. Lafferty, 716 N.W.2d 782, 785–86 (S.D. 2006) (finding double jeopardy bars second prosecution for statutory rape after acquittal for forcible rape).

prosecutor may attempt to use the youth of the victim to prove not just the age element of statutory rape, but also the element of force to prove forcible rape.[109] This Comment will examine a number of different scenarios and the success of double jeopardy challenges in each situation.

### *D. Case Law: Statutory Rape, Forcible Rape, Double Jeopardy, and Lesser Included Offenses*

Several courts have examined the interplay of double jeopardy principles and the doctrine of lesser included offenses with the substantive offenses of statutory rape and forcible rape.[110] Many courts hold that double jeopardy does not prohibit multiple convictions and sentences for forcible rape and statutory rape arising from a single act.[111] Other courts, however, hold that double jeopardy does bar multiple convictions for statutory rape and forcible rape when the charges stem from a single transaction.[112] Courts are similarly split when deciding whether double jeopardy bars subsequent prosecutions for statutory rape after an acquittal for forcible rape.[113] A majority of courts hold that statutory rape is not a lesser included offense of forcible rape, although there is some authority to the contrary.[114] This section will examine these decisions and the reasoning for both sides.

#### 1. Multiple Convictions for Statutory Rape and Forcible Rape from the Same Act

Courts are split on whether multiple convictions for statutory rape and forcible rape violate double jeopardy when the defendant is on trial for a single sexual act. A number of jurisdictions hold that the Double Jeopardy Clause does not prohibit multiple convictions for statutory rape and forcible rape arising from the same act. In *Commonwealth v. Rhodes*,[115] the Pennsylvania Supreme Court held that a defendant could be sentenced for both forcible rape and statutory rape arising from a single act of intercourse without violating double jeopardy principles or the doctrine of lesser

109. Carpenter, *supra* note 45, at 337.

110. See *infra* Part II.D.1–2 for a discussion of courts examining double jeopardy challenges in the forcible rape/statutory rape context.

111. See *infra* notes 115–29 and accompanying text for a discussion of courts in Pennsylvania, Alabama, Georgia, California, and Washington holding that double jeopardy does not bar multiple punishments imposed in one trial for forcible rape and statutory rape arising from a single sexual act.

112. See *infra* notes 130–39 and accompanying text for a discussion of courts in North Carolina, the District of Columbia, and Idaho holding that double jeopardy bars multiple punishments for statutory rape and forcible rape arising from a single act.

113. See *infra* notes 140–48 and accompanying text for a discussion of Arizona and Ninth Circuit cases holding that double jeopardy does not forbid successive prosecutions for forcible rape and statutory rape arising from a single act. See *infra* notes 149–56 and accompanying text for a discussion of a court in South Dakota holding that double jeopardy prohibits successive prosecutions for forcible rape and statutory rape based on the same act.

114. See *infra* Part II.D.3 for a discussion of courts in Georgia, Tennessee, Mississippi, and Arizona holding that statutory rape is not a lesser included offense of forcible rape, and courts in Massachusetts holding that statutory rape is a lesser included offense of forcible rape.

115. 510 A.2d 1217 (Pa. 1986).

included offenses.[116] In *Rhodes*, the defendant was a neighbor and family acquaintance who approached the eight-year-old victim and asked her to accompany him to an abandoned house, where he raped her.[117] Rhodes was convicted of multiple crimes, including forcible rape and statutory rape.[118] In addition to Pennsylvania, courts in Alabama,[119] Georgia,[120] California,[121] and Washington[122] have also held that double jeopardy does not prohibit multiple convictions for forcible rape and statutory rape arising from a single act of intercourse.

Courts finding that double jeopardy does not forbid multiple convictions for forcible rape and statutory rape often begin the analysis by applying the *Blockburger* statutory elements test.[123] These courts generally find that each crime requires proof of a statutory element not contained in the other; namely, the element of forcible compulsion included in forcible rape and the age of the victim necessary for a finding of statutory rape.[124] Therefore, according to these courts, defendants can be convicted of both under *Blockburger* without violating the doctrine of double jeopardy.[125] These courts also look to double jeopardy provisions in their state constitution or common law, and interpret these provisions as coextensive with the Federal Double Jeopardy Clause instead of providing criminal defendants greater protection.[126]

Courts also look to other state statutory provisions explicitly prohibiting multiple convictions for closely related offenses only if one offense was a lesser included

116. *Rhodes*, 510 A.2d at 1229.

117. *Id.* at 1218.

118. *Id.* at 1219.

119. *See, e.g.*, Burtram v. State, 733 So. 2d 921, 924 (Ala. Crim. App. 1998) (noting that, because statutory rape and forcible rape require distinct statutory elements, they are distinct offenses which do not violate Double Jeopardy Clause despite arising from same act).

120. *See, e.g.*, Drinkard v. Walker, 636 S.E.2d 530, 535 (Ga. 2006) (refusing to merge statutory rape and incest convictions into rape conviction because proof of each conviction required additional facts that were not required in other two).

121. *See, e.g.*, People v. Lohbauer, 627 P.2d 183, 186 (Cal. 1981) (noting previous decision overturning multiple convictions for forcible rape and statutory rape was abrogated by legislative enactment). The California Supreme Court had previously held that forcible rape and statutory rape were not separate offenses, but rather alternate means under which sexual intercourse constitutes the general crime of rape. People v. Collins, 351 P.2d 326, 328 (Cal. 1960), *superseded by statute*, CAL. PENAL CODE § 261.5 (West 2008).

122. State v. Hughes, 173 P.3d 983, 986–87 (Wash. Ct. App. 2007), *aff'd in part, rev'd in part*, 212 P.3d 558 (Wash. 2009).

123. *See Burtram*, 733 So. 2d at 923 ("'[T]he test in determining whether the charges run afoul of the Double Jeopardy Clause is whether each crime contains a statutory element not contained in the other.'" (quoting Blockburger v. United States, 284 U.S. 299 (1932))); *Drinkard*, 636 S.E.2d at 531–32 (overruling use of actual evidence test and adopting *Blockburger*'s "required evidence" test in double jeopardy context).

124. *Burtram*, 733 So. 2d at 923; *see also Drinkard*, 636 S.E.2d at 532 (holding that statutory rape could not be included in forcible rape because statutory rape required showing of victim's age while forcible rape did not).

125. *E.g.*, *Burtram*, 733 So. 2d at 923 (denying defendant relief under double jeopardy principles even though each crime he was convicted of arose from single incident).

126. *See, e.g.*, *Drinkard*, 636 S.E.2d at 532–33 (noting that *Blockburger* test reflects provisions of Georgia double jeopardy statute and U.S. Constitution more accurately than previously adopted actual evidence test).

offense of the other.[127] In addition, these courts rely on the placement of the forcible rape and statutory rape statutes in separate sections of the criminal code to justify their decisions.[128] Finally, some of these courts reason that granting the defendant's double jeopardy challenge to multiple convictions for forcible rape and statutory rape would be equivalent to giving the defendant a "free pass" to violate multiple statutes simply because some crimes were committed in the same transaction.[129]

In contrast, other jurisdictions hold that double jeopardy prohibits multiple convictions for statutory rape and forcible rape arising from a single act of intercourse. In *State v. Ridgeway*,[130] the defendant raped and murdered his live-in girlfriend's fourteen-year-old daughter.[131] At trial, the lower court allowed the jury to consider the evidence of rape and sexual offense under the alternative theories of statutory rape and forcible rape.[132] The North Carolina Court of Appeals held that the trial court had discretion to allow the jury to consider the case under alternative theories of forcible rape and statutory rape if warranted by the evidence, but that multiple convictions for both statutory rape and forcible rape violated double jeopardy.[133] Courts in the District of Columbia[134] and Idaho[135] have reached similar conclusions.

Courts finding that multiple convictions for forcible rape and statutory rape arising from a single transaction are not permissible generally refuse to strictly rely on

127. *See, e.g.*, *Drinkard*, 636 S.E.2d at 533–34. In *Drinkard*, the court looked to statutory provisions the legislature specifically enacted to fill potential gaps in the *Blockburger* analysis. *Id.* Under the Georgia statute, one crime is included in the other where it is established by "proof of . . . a less culpable mental state," where it differs only in that it involves a "less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability," or where "one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." GA. CODE ANN. §§ 16-1-6(1), (2), 7(a)(2) (2007); *see also* MODEL PENAL CODE § 1.07 cmt. 2(a), cmt. 5 (1985) (providing the same model).

128. *See Burtram*, 733 So. 2d at 923 (indicating that rape by forcible compulsion and statutory rape are separate offenses under different sections of state statutes); Commonwealth v. Rhodes, 510 A.2d 1217, 1229 (Pa. 1986) (same); State v. Hughes, 173 P.3d 983, 986 (Wash. Ct. App. 2007) (same), *aff'd in part, rev'd in part*, 212 P.3d 558 (Wash. 2009). *But see* Rutledge v. United States, 517 U.S. 292, 304 n.14 (1996) (explaining that two offenses appearing in different Code sections does not rise to level of clear legislative intent to impose multiple punishments).

129. *See Drinkard*, 636 S.E.2d at 533–34 (indicating that under actual evidence test, defendant might escape punishment for some of his crimes which were committed in single act).

130. 648 S.E.2d 886 (N.C. Ct. App. 2007).

131. *Ridgeway*, 648 S.E.2d at 889.

132. *Id.* at 894.

133. *Id.* at 894–95. The court has also failed to reach the issue in several cases due to appellate waiver. *See* State v. Mathis, No. COA05-454, 2006 WL 387973, at *2 (N.C. Ct. App. Feb. 21, 2006) (upholding two concurrent sentences for statutory rape and forcible rape of fourteen-year-old girl, where defendant did not raise issue in lower court); State v. Fuller, 603 S.E.2d 569, 575 (N.C. App. Ct. 2004) (upholding convictions for forcible rape and statutory rape, where defendant failed to raise his double jeopardy argument in lower court).

134. *See* Brown v. United States, 576 A.2d 731, 734 (D.C. 1990) (noting statutory rape and forcible rape are not separate crimes, but alternative theories under which defendant can be convicted of rape).

135. *See* State v. Banks, 740 P.2d 1039, 1041–42 (Idaho Ct. App. 1987) (affirming conviction on statutory rape charge that was added mid-trial to complaint charging forcible rape because two charges are alternative theories of same crime).

the *Blockburger* statutory elements test.[136] Instead, these courts make an independent assessment of legislative intent and find that the legislature did not intend to authorize multiple convictions for both offenses when a single act has occurred.[137] In these jurisdictions, forcible rape and statutory rape are generally found in the same section of the criminal code, separated by an "or."[138] Courts interpret this as indicative of legislative intent to create a scheme of alternative methods of committing the general crime of rape, and not to create distinct crimes.[139]

2. Successive Prosecutions Involving Forcible Rape and Statutory Rape

Courts are also split regarding whether re-prosecution after acquittal or conviction in the forcible rape/statutory rape context violates double jeopardy.[140] At least one court has held that acquittal for forcible rape is not a bar to a second prosecution for statutory rape for the same act of sexual intercourse.[141] In *State v. Carrico*,[142] the Arizona Supreme Court held that statutory rape is not a lesser included offense of forcible rape, but is instead one of several ways in which sexual intercourse can constitute rape.[143] The court determined that the appellant knew the victim's age and therefore was on notice that he could face charges for statutory rape as well as forcible rape.[144] Thus, although the defendant was acquitted of forcible rape, this was not held to be a bar to a subsequent prosecution for statutory rape.[145]

The *Carrico* court, along with the Ninth Circuit, applied the *Blockburger* test to Arizona's forcible and statutory rape provisions, finding that each requires proof of an element that the other does not.[146] These courts also relied heavily on the fact that the two offenses are located in distinct sections of the criminal code.[147] This reasoning is

136. *Brown*, 576 A.2d at 733–34 (citing Albernaz v. United States, 450 U.S. 333, 336 (1981) (noting that legislative intent predominates analysis of whether one transaction constitutes multiple crimes)); *see also Ridgeway*, 648 S.E.2d at 894–95 (holding that legislature intended to provide alternative methods to prove same crime of rape under theories of statutory and forcible rapes).

137. *Brown*, 576 A.2d at 734; *Ridgeway*, 648 S.E.2d at 894–95.

138. *See* People v. Collins, 351 P.2d 326, 327 n.1, 328 (Cal. 1960) (noting that forcible rape and statutory rape are alternative elements that can constitute rape), *superseded by statute*, CAL. PENAL CODE § 261.5 (West 2008). *See generally Brown*, 576 A.2d at 732–33; *Banks*, 740 P.2d at 1042.

139. *Banks*, 740 P.2d at 1042; People v. Craig, 110 P.2d 403, 403–04 (Cal. 1941).

140. *Compare* Gray v. Lewis, 881 F.2d 821, 823 (9th Cir. 1989) (applying Arizona law and holding that double jeopardy does not bar subsequent prosecution for statutory rape after acquittal for forcible rape), *and* State v. Carrico, 570 P.2d 489, 490 (Ariz. 1977) (holding double jeopardy does not bar subsequent conviction for statutory rape after trial for forcible rape), *with* State v. Lafferty, 716 N.W.2d 782, 785–86 (S.D. 2006) (finding double jeopardy bars second prosecution for statutory rape after acquittal for forcible rape).

141. *Carrico*, 570 P.2d at 490.

142. 570 P.2d 489 (Ariz. 1977).

143. *Carrico*, 570 P.2d at 490.

144. *Id.*

145. *Id.*

146. Gray v. Lewis, 881 F.2d 821, 823 (9th Cir. 1989); *Carrico*, 570 P.2d at 490.

147. *Gray*, 881 F.2d at 822–23; *Carrico*, 570 P.2d at 490.

similar to that used by courts finding that double jeopardy does not prohibit multiple convictions for forcible rape and statutory rape in the same prosecution.[148]

In contrast, South Dakota courts have held the opposite. In *State v. Lafferty*,[149] the defendant was acquitted of forcible rape.[150] The State then filed a second indictment charging the defendant with statutory rape for the same act of sexual intercourse with a fifteen-year-old.[151] The court concluded that the defendant was put in jeopardy twice for the same offense, violating his rights under the state and federal constitution that are intended to protect the finality of judgments and protect against prosecutorial overreaching.[152]

The court's reasoning was similar to that used by courts finding double jeopardy violations in the context of multiple convictions in the same prosecution.[153] The court looked primarily to legislative intent and statutory language, finding that because each subsection of the rape statute in question was separated by an "or," the legislature therefore intended to create one offense which could be accomplished in seven different manners.[154] The court thus rejected the prosecution's argument that because statutory rape required proof of an additional fact as distinguished from the charge of rape of an intoxicated victim, these were two separate offenses under *Blockburger*.[155] Instead the court concluded that the *Blockburger* test was not dispositive in the face of clear legislative intent to the contrary.[156]

3. Is Statutory Rape a Lesser Included Offense of Forcible Rape?

A majority of courts hold that statutory rape is not a lesser included offense of forcible rape.[157] In *Hill v. State*,[158] the defendant was convicted of murdering and

148. See *supra* notes 123–29 and accompanying text for a discussion of reasoning used by courts upholding multiple convictions for forcible rape and statutory rape during trial.

149. 716 N.W.2d 782 (S.D. 2006).

150. *Lafferty*, 716 N.W.2d at 783–84.

151. *Id.*

152. *Id.* at 786 (citing Garrett v. United States, 471 U.S. 773, 795 (1985) (O'Connor, J., concurring)).

153. See *supra* notes 136–39 and accompanying text for a discussion of courts' reasoning when finding that multiple convictions for forcible rape and statutory rape during a single trial violate double jeopardy when arising from a single act.

154. The South Dakota rape statute was broad, encompassing seven different means of committing rape linked by the word "or." *Lafferty*, 716 N.W.2d at 784–85. The statute states that rape is an act of sexual penetration accomplished when (1) the victim is less than ten years of age; (2) through the use of force, coercion, or threats of immediate, serious bodily harm against the victim or other persons within the victim's presence, accompanied by apparent power of execution; (3) where the victim is incapable of giving consent for mental or physical reasons; (4) where the victim is incapable of giving consent due to drugs, alcohol, or hypnosis; (5) if the victim is ten years of age, but less than sixteen years of age, and the perpetrator is at least three years older than the victim; (6) within a relationship defined by South Dakota law as incestuous; or (7) if the victim is ten years of age but less than eighteen years of age and is the child of a spouse or former spouse of the perpetrator. *Id.*

155. *Id.* at 785–86.

156. *Id.* at 783–84.

157. *E.g.*, State v. Carrico, 570 P.2d 489, 490 (Ariz. 1977) (holding statutory rape is not lesser included offense of forcible rape); Hill v. State, 271 S.E.2d 802, 807 (Ga. 1980) (same); Collins v. State, 691 So. 2d 918, 925 (Miss. 1997) (same); State v. Stokes, 24 S.W.3d 303, 305–06 (Tenn. 2000) (same).

forcibly raping a twelve-year-old girl.[159] The court held that statutory rape was not a lesser included offense of forcible rape and that each are distinct offenses, with statutory rape requiring an age element that forcible rape does not.[160] In *Collins v. State*,[161] the Supreme Court of Mississippi also found that statutory rape was not a lesser included offense of forcible rape.[162] In addition to Georgia and Mississippi, courts in Tennessee[163] and Arizona[164] have held that statutory rape is not a lesser included offense of forcible rape. All of these courts have applied the statutory elements approach to lesser included offenses, instead of relying on the actual evidence approach[165] or the cognate pleading approach.[166] In contrast, Massachusetts courts hold that statutory rape is a lesser included offense of forcible rape.[167] And while not directly addressing the lesser included offense issue, South Dakota courts have held that the prosecution may amend an indictment charging forcible rape to include statutory rape.[168]

## III. DISCUSSION

As discussed in Part II of this Comment, courts split fairly evenly on whether the Double Jeopardy Clause bars multiple punishments for statutory rape and forcible rape in the same prosecution,[169] and whether a conviction or acquittal for one precludes a

158. 271 S.E.2d 802 (Ga. 1980).

159. *Hill*, 271 S.E.2d at 805.

160. *Id.* at 807.

161. 691 So. 2d 918, 925 (Miss. 1997).

162. *Collins*, 691 So. 2d at 925. *But see* Brown v. State, 492 S.E.2d 555, 557 (Ga. Ct. App. 1997) (rejecting defendant's challenge on lesser included offense grounds and holding defendant was not prejudiced by judge's instruction on statutory rape after indictment charged forcible rape only), *overruled by* Curtis v. State, 571 S.E.2d 376, 379 (Ga. 2002) (holding that illegality of multiple punishments for lesser included offenses as grounds for appeal cannot be waived by failure to raise in lower court).

163. State v. Stokes, 24 S.W.3d 303, 305–06 (Tenn. 2000).

164. State v. Carrico, 570 P.2d 489, 490 (Ariz. 1977).

165. *See* Hill v. Georgia, 451 U.S. 923, 924–25 (1981) (Marshall & Brennan, JJ., dissenting from denial of certiorari) (arguing that statutory rape be treated as lesser included offense of forcible rape, based on fairness and actual evidence of the case). For a discussion of the evidentiary approach to lesser included offenses in general and criticisms of its use, see *supra* notes 47–50 and accompanying text.

166. See *supra* notes 51–56 and accompanying text for a discussion of the cognate pleadings approach, including how the test operates and criticisms regarding its use.

167. *E.g.*, Commonwealth v. Thayer, 634 N.E.2d 576, 578 (Mass. 1994) (citing Commonwealth v. Franks, 309 N.E.2d 879, 881–82 (Mass. 1974) (holding that statutory rape is lesser included offense of forcible rape of child)).

168. *See, e.g.*, State v. Chernotik, 671 N.W.2d 264, 272–73 (S.D. 2003). In *Chernotik*, the court noted that statutory rape is not a different offense from forcible rape, but merely one of six alternative ways sexual intercourse can constitute the general crime of rape. *Id.* at 272 (citing State v. LaMere, 655 P.2d 46, 49 n.4 (Idaho 1982)).

169. *Compare* Burtram v. State, 733 So. 2d 921, 924 (Ala. Crim. App. 1998) (holding double jeopardy does not bar multiple convictions for forcible rape and statutory rape arising from single act), Drinkard v. Walker, 636 S.E.2d 530, 535 (Ga. 2006) (same), Commonwealth v. Rhodes, 510 A.2d 1217, 1218–29 (Pa. 1986) (same), *and* State v. Hughes, 173 P.3d 983, 986–87 (Wash. Ct. App. 2007) (same), *aff'd in part, rev'd in part*, 212 P.3d 558 (Wash. 2009), *with* Brown v. United States, 576 A.2d 731, 734 (D.C. 1990) (suggesting statutory rape and forcible rape are alternate theories, not separate offenses), State v. Banks, 740 P.2d 1039,

second prosecution for the other.[170] A majority of courts addressing the issue hold that statutory rape is not a lesser included offense of forcible rape, and that therefore a defendant charged with forcible rape of an underage victim is not entitled to a jury instruction on statutory rape.[171] Part III.A will discuss the main criticisms of the statutory-elements approach used by courts to foreclose double jeopardy challenges to multiple convictions and prosecutions for forcible rape and statutory rape.[172] Part III.B will also examine the definition of force promulgated by the Pennsylvania Supreme Court in *Commonwealth v. Rhodes*,[173] how that definition has gained favor in several jurisdictions,[174] and how the use of that definition interacts with the strict use of the statutory elements test set forth in *Blockburger v. United States*.[175] Part III.C will conclude with a proposal that forcible rape and statutory rape be considered the same for double jeopardy purposes,[176] and that statutory rape be considered a lesser included offense of forcible rape.[177] If courts are unwilling or unable under state or federal law to consider these proposals,[178] Part III.C also proposes that state legislatures consider redrafting rape statutes to include explicit language addressing the issue.[179]

### *A. Criticisms of Statutory Elements Approach*

Courts on both sides of the issue generally apply the *Blockburger* same elements test when considering double jeopardy challenges to multiple convictions or prosecutions for statutory rape and forcible rape.[180] Use of this test has led some courts

1041–42 (Idaho Ct. App. 1987) (same), *and* State v. Ridgeway, 648 S.E.2d 886, 894–95 (N.C. Ct. App. 2007) (holding double jeopardy bars multiple convictions for forcible rape and statutory rape arising from single act).

170. *Compare* Gray v. Lewis, 881 F.2d 821, 823 (9th Cir. 1989) (holding double jeopardy does not bar subsequent prosecution for statutory rape after acquittal for forcible rape), *with* State v. Lafferty, 716 N.W.2d 782, 785–86 (S.D. 2006) (finding double jeopardy bars second prosecution for statutory rape after acquittal for forcible rape).

171. *Compare* State v. Carrico, 570 P.2d 489, 490 (Ariz. 1977) (holding statutory rape is not a lesser included offense of forcible rape), Hill v. State, 271 S.E.2d 802, 807 (Ga. 1980) (same), Collins v. State, 691 So. 2d 918, 925 (Miss. 1997) (same), *and* State v. Stokes, 24 S.W.3d 303, 307 (Tenn. 2000) (same), *with* Commonwealth v. Thayer, 634 N.E.2d 576, 578 (Mass. 1994) (holding statutory rape is lesser included offense of forcible rape).

172. See *infra* Part III.A for a discussion of the main criticisms of the *Blockburger* statutory-elements test as applied to the forcible rape/statutory rape context.

173. 510 A.2d 1217 (Pa. 1986).

174. See *infra* notes 241–44 and accompanying text for a discussion of courts adopting the *Rhodes* definition of force in the context of sexual acts with minors.

175. 284 U.S. 299 (1932).

176. See *infra* Part III.C.1 for a discussion of this proposal.

177. See *infra* Part III.C.2 for a discussion of how to implement this approach and why it is warranted.

178. See *supra* Part II.A for a discussion of double jeopardy principles that are constitutionally mandated by the Supreme Court and *supra* Part II.B.1 for a discussion of approaches states use to define lesser included offenses.

179. See *infra* Part III.C.3 for a discussion of how statutes can be reworked to include specific language addressing the relationship between forcible rape and statutory rape, so that courts are not left to guess at legislative intent.

180. See *supra* Part II.D.1–2 for a discussion of courts' reasoning in both the multiple punishment and successive prosecution context.

to reject double jeopardy challenges[181] while other courts find the opposite.[182] This subsection will discuss some of the main criticisms of the *Blockburger* test in the unique context of statutory rape and forcible rape.[183]

1. Strict Use of the *Blockburger* Statutory Elements Test Is Inconsistent with Modern Criminal Law

The statutory elements approach mandated by the Supreme Court in *Blockburger v. United States*[184] in the double jeopardy context and used by a growing number of jurisdictions to define lesser included offenses[185] is inconsistent with modern criminal law codes.[186] The *Blockburger* approach was created at a time when the criminal law codes of most states were still based on a relatively small number of common law offenses.[187] Today, legislatures define an increasingly large number of offenses in very specific language, creating a plethora of crimes which differ in only minor respects from each other.[188] The specificity with which many crimes are defined means that any combination of offenses will increasingly each contain an element that the other lacks.[189] Thus, the *Blockburger* statutory elements test will almost never prohibit multiple punishments in light of modern criminal law codes.[190]

181. *See, e.g.*, Burtram v. State, 733 So. 2d 921, 923 (Ala. Crim. App. 1998) (finding under *Blockburger* that statutory rape and forcible rape are not same offense); Drinkard v. Walker, 636 S.E.2d 530, 535 (Ga. 2006) (same).

182. *See* Brown v. United States, 576 A.2d 731, 734 (D.C. 1990) (finding that convictions for statutory rape and assault with intent to commit rape constituted double jeopardy); State v. Ridgeway, 648 S.E.2d 886, 894–95 (N.C. Ct. App. 2007) (finding double jeopardy in case of convictions for forcible rape and statutory rape); State v. Lafferty, 716 N.W. 2d 782, 785–86 (S.D. 2006) (finding double jeopardy violation in context of successive prosecution).

183. See *infra* Part III.A for a discussion of how use of the *Blockburger* test is inconsistent with the modern scheme of statutory sexual offenses, leaves courts dependent on ambiguous legislative intent and small differences in statutory construction, is inconsistent with the goals of statutory rape law, and makes a fundamental protection meaningless.

184. 284 U.S. 299 (1932).

185. LAFAVE ET AL., *supra* note 52, at 24.8(c).

186. Poulin, *supra* note 31, at 1214–15; *see also* Shellenberger & Strazzella, *supra* note 10, at 118 (noting that increasing number and complexity of substantive criminal offenses complicates application of double jeopardy doctrine).

187. Poulin, *supra* note 31, at 1214–15.

188. *Id.*; *see also* Robinson & Cahill, *supra* note 21, at 635 (criticizing present-day criminal codes for "the proliferation of numerous new offenses that duplicate, but may be inconsistent with, prior existing offenses"); Stuntz, *supra* note 21, at 518–19 (noting that due to increasing number of statutory offenses, defendants who would have committed single crime at common law now face potential liability for many different offenses).

189. Poulin, *supra* note 31, at 1214–17.

190. *Id.* at 1214–15; *see also Double Jeopardy*, *supra* note 21, at 450 n.1145 (citing United States v. Hansen, 434 F.3d 92, 104 (1st Cir. 2006) (upholding multiple convictions for committing violent crime with use of firearm and committing violent crime not prohibited by double jeopardy although arising from single act); United States v. Salameh, 261 F.3d 271, 277–78 (2d Cir. 2001) (per curiam) (imposing two consecutive sentences for carrying bomb and use of bomb stemming from same criminal act); United States v. Riddick, 156 F.3d 505, 511 (3d Cir. 1998) (upholding multiple punishments for distribution of cocaine in school zone and participation in continuing criminal enterprise for same act)).

This is equally true of modern-day sexual offenses. For example, the Tennessee Criminal Code contains a separate section for statutory rape, dividing the crime into three separate degrees depending on the victim's and the defendant's ages.[191] The Code contains another section for forcible rape, which includes sexual penetration: by force or threat of force, without the consent of the victim, through fraud, or where the defendant knows the victim to be mentally defective or incapacitated.[192] The Code also contains a separate provision for rape of a child, where the victim is more than three but less than thirteen years old.[193] Another section defines aggravated rape of a child, where the victim is three years old or less.[194] Yet another section prohibits statutory rape by an authority figure, where the victim is at least thirteen but less than eighteen years old, the defendant is at least four years older than the victim, and the defendant occupied a position of trust, parental, or custodial control when the rape occurred.[195] Therefore, multiple statutes can cover a single act of sexual intercourse.

Consider a scenario where the defendant is a school teacher in his late twenties, and the victim is seventeen years old.[196] The victim testifies to the use of force or the threat of force, while the defendant claims the sexual encounter was "consensual."[197] Under the *Blockburger* statutory elements test, the defendant could face multiple convictions for statutory rape, forcible rape, and statutory rape by an authority figure.[198] He might also be tried for forcible rape and acquitted, only to later face a second prosecution for statutory rape for the same sexual encounter.[199] Because statutory rape contains an age element, statutory rape by an authority figure contains an element requiring the defendant to occupy a position of trust, and forcible rape contains an element of force, all three crimes would not be the "same offense" under *Blockburger*.[200] Therefore, the prohibition on double jeopardy would offer no protection for multiple punishments or prosecutions for a host of sexual offenses arising from a single act of sexual intercourse.[201] This hypothetical demonstrates how

191. TENN. CODE ANN. § 39-13-506 (West 2009).

192. *Id.* § 39-13-503.

193. *Id.* § 39-13-522.

194. *Id.* § 39-13-531.

195. *Id.* § 39-13-532.

196. For an example of a case where the defendant occupied a position of trust relative to the victim, see *State v. Etheridge*, 352 S.E.2d 673, 681–82 (N.C. 1987), in which a father was convicted of forcibly raping both his son and his daughter.

197. See *Collins v. State*, 691 So. 2d 918, 921 (Miss. 1997) for an example of conflicting testimony in a capital rape case of a thirteen-year-old by a twenty-four-year-old where the victim claimed there was force but the defendant claimed there was consent.

198. See *supra* notes 191–95 and accompanying text for an overview of current Tennessee sexual offenses.

199. See *supra* notes 141–48 and accompanying text for a discussion of courts allowing successive prosecutions after acquittal in the forcible rape/statutory rape scenario.

200. See *supra* notes 115–29 and accompanying text for a discussion of courts using similar reasoning to uphold multiple convictions arising from a single act of sexual intercourse.

201. For an example of multiple convictions arising from a single sexual act, see *Commonwealth v. Rhodes*, 510 A.2d 1217 (Pa. 1986). In *Rhodes*, the trial court found the defendant guilty of forcible rape, statutory rape, involuntary deviate sexual intercourse, indecent assault, indecent exposure, and corruption of

given the modern-day number and specificity of sexual crimes, strict reliance on *Blockburger* will almost never bar multiple punishments for a single sexual act.[202]

2. Courts Strictly Relying on the *Blockburger* Statutory Elements Test Are Overly Dependent on Ambiguous Legislative Intent and Statutory Construction

Courts often point to legislative intent that is, in reality, nonexistent when considering double jeopardy challenges to cumulative punishments or successive prosecutions in the forcible rape/statutory rape context.[203] Although courts hide behind the guise of "legislative intent," they often provide no direct reference to any actual record.[204] This is likely because state legislative history is often sparse or confusing, leaving courts to guess at the intent behind changes.[205] For example, the Pennsylvania legislature has made several changes to the statutory scheme defining sexual offenses in the last two decades. In 1995, the legislature added a provision to the general forcible rape section to include sexual intercourse with someone less than thirteen years old, making the statute similar to the Model Penal Code approach.[206] In 2002, the legislature moved this language within the forcible rape statute,[207] defining it as rape of a child, as it currently reads today.[208] In 1995, the legislature also repealed the statutory rape section of the criminal code[209] used in *Rhodes*,[210] and created a new section defining sexual intercourse with a complainant less than sixteen years old as statutory sexual assault.[211] This change in statutory language might have led to a different result in *Rhodes*,[212] yet there is little record of whether the legislature was motivated, at least in part, by double jeopardy concerns.

minors. *Id.* at 1219. The appellate court sustained all convictions except for the forcible rape conviction, which the state supreme court reinstated. *Id.* at 1219–20, 1231.

202. See *supra* notes 184–95 and accompanying text for a discussion of how modern criminal codes in general are inconsistent with strict reliance on *Blockburger*.

203. See *supra* Part II.D.1–2 for a discussion of courts' reasoning on both sides of the debate, including their reliance on legislative intent.

204. None of the court decisions surveyed in this Comment actually referenced any direct quotes or statements made by legislators in reference to forcible rape or statutory rape statutes. *See, e.g.*, Burtram v. State, 733 So. 2d 921, 924 (Ala. Crim. App. 1998) (referring to legislative intent but not citing any particular record); *Rhodes*, 510 A.2d at 1221–24 (same); *see also* Chemerinsky, *supra* note 31, at 717 (noting that in absence of real guidance, courts generally "offer little beyond conclusory language" that legislature intended to impose multiple punishments).

205. *See, e.g.*, Chemerinsky, *supra* note 31, at 714–15 (explaining legislative intent approach to counting offenses is "deeply problematic" because it is "undemocratic," "unreliable," and "incoherent" (internal quotation marks omitted)); Tsiatsos, *supra* note 31, at 555 (noting that courts cannot simply ask legislatures about their intent).

206. 18 PA. CONS. STAT. ANN. § 3121(a)(6) (West 2000) (repealed 2002).

207. *Id.*

208. 18 PA. CONS. STAT. ANN. § 3121(c) (West Supp. 2009).

209. 18 PA. CONS. STAT. ANN. § 3122 (1994) (West 1983) (repealed 1995).

210. Commonwealth v. Rhodes, 510 A.2d 1217, 1218–19 (Pa. 1986).

211. 18 PA. CONS. STAT. ANN. § 3122.1 (West Supp. 2009).

212. If the forcible rape statute in operation at the time of *Rhodes* read as it does today, the element of the victim's age (eight) would have fallen under the same section as rape by force, making it less likely that the court would uphold multiple punishments for violation of the same statute.

Courts on both sides of the issue are also overly dependent on small differences in the wording of forcible rape and statutory rape statutes.[213] Many of the jurisdictions holding that double jeopardy bars multiple punishments and/or prosecutions for statutory rape and forcible rape rely on the fact that the offenses are found in the same section of the state criminal code, linked by the word "or."[214] In contrast, jurisdictions allowing multiple punishments and/or prosecutions for statutory rape and forcible rape point to the fact that the offenses are found in different sections of the state criminal code to bolster their holdings.[215] Allowing multiple convictions for both rape and statutory rape arising from the same act can have enormous implications.[216] Although these are severe consequences, the fate of the defendant facing these charges will therefore often depend on whether the legislature included the word "or" and whether rape is included in the same section as statutory rape.[217] These are small distinctions and might be unreliable when dealing with the amount of protection granted to defendants by state and federal Double Jeopardy Clauses, in the absence of other meaningful legislative guidance.[218]

### 3. Multiple Punishments and Prosecutions for Forcible Rape and Statutory Rape Are Inconsistent with the Original Goals of Statutory Rape Law

Punishing defendants for both forcible rape and statutory rape for a single sexual act is inconsistent with the goals of statutory rape law for two reasons, based on both the common law origins of statutory rape and the modern-day operation of statutory

213. *See, e.g.*, Rutledge v. United States, 517 U.S. 292, 304 n.14 (1996) (explaining that legislative intent to impose cumulative punishments was ambiguous, and fact that two offenses appear in different Code sections does not rise to level of clear legislative intent). See *supra* Part II.C.4 for a discussion of how forcible rape and statutory rape statutes relate to one another. See *supra* Part II.D.1–2 for examples of courts on both sides relying on statutory language when considering double jeopardy challenges to multiple punishments and successive prosecutions.

214. *E.g.*, State v. Banks, 740 P.2d 1039, 1041–42 (Idaho Ct. App. 1987) (finding single offense because forcible rape and statutory rape were merely different circumstances "under which a crime of rape may be charged"); State v. Lafferty, 716 N.W.2d 782, 784–85 (S.D. 2006) (noting that use of disjunctive "or" is indicative of legislative intent to define seven circumstances under which single offense of rape could occur).

215. *See, e.g.*, *Rhodes*, 510 A.2d at 1220 (noting offenses of forcible rape and statutory rape are located in different sections of state criminal code).

216. For example, in some cases multiple convictions will change the applicable maximum penalty and therefore result in a longer period of incarceration. *See, e.g.*, *Rhodes*, 510 A.2d at 1220 (noting that sentence for forcible rape was longer than that of statutory rape). Even where sentences run concurrently, offenders face additional stigma, different treatment for parole considerations, and other collateral consequences from multiple convictions. *E.g.*, State v. Birgen, 651 P.2d 240, 241 (Wash. Ct. App. 1982) (noting "punitive effects arising from the social and legal stigma of the conviction itself"), *abrogated by* State v. Calle, 888 P.2d 155, 158–61 (Wash. 1995) (en banc) and State v. Hughes, 212 P.3d 558, 562–63 (Wash. 2009) (en banc); State v. Ridgeway, 648 S.E.2d 886, 895 (N.C. Ct. App. 2007) (noting that multiple convictions can have collateral consequences).

217. See *supra* note 28 and accompanying text for examples of federal courts dealing with more specific statutory language when imposing multiple punishments.

218. *See* Hoffheimer, *supra* note 46, at 372 (noting critics of *Blockburger* statutory elements test state it is overly dependent on legislative intent and inadequately protects defendants); Stacy, *supra* note 31, at 856 (noting that relating offenses "involves nuanced and context-dependent legal issues" and lamenting "minimization of judicial oversight").

rape laws.[219] First, statutory rape was originally intended to fill a gap and complement forcible rape law, not operate in addition to it.[220] There are problems with culpability when dealing with the wide variety of factual scenarios in these cases. While some of these cases deal with a teenage victim or a closer age gap between the defendant and the victim,[221] others deal with victims who are clearly children, where a mistake-of-age defense, even if admissible, might be found unreasonable.[222] Statutory rape was originally intended to complement forcible rape law and generally deemed less blameworthy than rape by force.[223] Although these are all terrible crimes, by putting a single act under both the forcible rape and the statutory rape labels, courts blur the traditional distinction between the two crimes.[224]

Second, modern-day statutory rape laws are intended to cover both forcible and non-forcible encounters, and therefore a second conviction or prosecution for forcible rape can be seen as superfluous if the defendant is also convicted of statutory rape.[225] Statutory rape law was created to protect a group society deems incapable of resisting or consenting to sexual encounters due to age.[226] Many of the jurisdictions upholding multiple convictions for both forcible rape and statutory rape rely on the fact that punishment of the offenses serves different societal goals.[227] While rape laws protect women from nonconsensual sex regardless of age, statutory rape laws are intended to protect a distinct group of people because of their age.[228] But by their very nature, most modern statutory rape statutes are designed to cover both consensual, nonforcible *and* nonconsensual, forcible sexual encounters.[229] Therefore, charges of forcible rape might

219. See *supra* Part II.C.1 for a discussion of the traditional and modern-day policies behind statutory rape law.

220. *See* LAFAVE, *supra* note 80, § 17.4(c) (noting that statutory rape was engrafted onto common law); Carpenter, *supra* note 45, at 336 (noting how statutory rape and forcible rape are interrelated).

221. *Compare* State v. Birgen, 651 P.2d 240, 247 (Wash. Ct. App. 1982) (refusing to impose multiple convictions for forcible rape and statutory rape arising from single act of intercourse with fifteen-year-old), *abrogated by* State v. Calle, 888 P.2d 155, 158–61 (Wash. 1995) (en banc) and State v. Hughes, 212 P.3d 558, 562–63 (Wash. 2009) (en banc), *with* Collins v. State, 691 So. 2d 918, 920–21 (Miss. 1997) (imposing multiple convictions for single act of intercourse with thirteen-year-old).

222. *See, e.g.*, Commonwealth v. Rhodes, 510 A.2d 1217, 1230 (Pa. 1986) (imposing multiple convictions for forcible rape and statutory rape where defendant knew victim was eight years old); Wofford v. State, 486 S.E.2d 697, 699 (Ga. Ct. App. 1997) (rejecting multiple convictions where victim was eleven-year-old friend of defendant's children).

223. *See* SCHULHOFER, *supra* note 82, at 102 (declaring that term "statutory rape" is only made equal to forcible rape by operation of statute and is otherwise a different offense).

224. *Rhodes*, 510 A.2d at 1231 (Nix, C.J., concurring); *see also* Phipps, *supra* note 101, at 42 n.177 (suggesting discussions of force are inappropriate in statutory rape cases). For a discussion of the role of evidence of force in cases involving minors, see *infra* Part III.B.

225. Oberman, *supra* note 78, at 707.

226. See *supra* Part II.C.1 for a discussion of the purposes of statutory rape laws.

227. *See, e.g.*, *Rhodes*, 510 A.2d at 1229–30 (imposing multiple convictions on grounds that separate injuries were inflicted by separate crimes); State v. Hughes, 173 P.3d 983, 986 (Wash. Ct. App. 2007) (noting two distinct purposes served by separate crimes), *aff'd in part, rev'd in part*, 212 P.3d 558 (Wash. 2009).

228. *See, e.g.*, *Rhodes*, 510 A.2d at 1229–30 (stating that both offenses protect separate interests and result in separate injuries); *Hughes*, 173 P.3d at 986 (stating that crime of "child rape" serves to protect on basis of age, regardless of ability to consent).

229. Oberman, *supra* note 78, at 707.

be unnecessary if courts can generally rely on statutory rape law to protect underage victims, without needing to prove force or lack of consent beyond a reasonable doubt.[230]

#### 4. Strict Reliance on the *Blockburger* Statutory Elements Test Makes a Fundamental Protection Meaningless and Unpredictable

Strict reliance on the narrow *Blockburger* statutory elements test negates much of the protection afforded by the language of the Double Jeopardy Clause.[231] As already discussed, because forcible rape and statutory rape generally each have an element that the other does not have,[232] the *Blockburger* test almost never bars multiple punishments or successive prosecutions for these offenses.[233] The *Blockburger* test makes courts so reliant on statutory construction and legislative intent that it essentially "empowers lawmakers to overrule the Double Jeopardy Clause."[234] Thus, depending on the state in which the defendant is prosecuted, state legislators can leave criminal defendants with virtually no double jeopardy protection whatsoever.[235] This is inconsistent with the fundamental, constitutional nature of the guarantee.[236]

### *B. Several Definitions of Force Are Inconsistent with Reliance on the* Blockburger *Statutory Elements Test*

Some of the cases analyzed in this Comment put the defendant at an unfair disadvantage by forcing him to defend against multiple charges for a single act while at the same time lessening the burden for the prosecution on the element of force.[237] For

230. *See, e.g.*, Phipps, *supra* note 101, at 42 n.177 (emphasizing absence of force requirement in statutory rape laws).

231. Shellenberger & Strazzella, *supra* note 10, at 123–24. Professors Shellenberger and Strazzella note that the *Blockburger* test means "a constitutional protection . . . is controlled by legislative intent" and thereby "becomes a protection against prosecutorial action, not legislative action." *Id.*

232. See *supra* Part II.C.3–4 for a discussion of the elements of forcible rape and statutory rape statutes in general, and how the two relate.

233. See *supra* notes 123–25, 146–48 and accompanying text for a discussion of courts' reliance on *Blockburger* to find that double jeopardy does not bar multiple punishments or successive prosecutions for forcible rape and statutory rape from the same act of sexual intercourse.

234. Hoffheimer, *supra* note 46, at 371; *see also* Susan R. Klein, *Double Jeopardy's Demise*, 88 CALIF. L. REV. 1001, 1048 (2000) (book review) (suggesting that this approach empowers legislators to redefine Double Jeopardy Clause so as to "deprive the Clause of any function").

235. Hoffheimer, *supra* note 46, at 371; Klein, *supra* note 234, at 1048.

236. *See, e.g.*, Hoffheimer, *supra* note 46, at 371 (claiming that *Blockburger* test "improperly" gives legislature power to legislate around Double Jeopardy Clause); Klein, *supra* note 234, at 1048 (noting that, despite wording of Double Jeopardy Clause remaining intact, ability of legislators to interpret clause effectively "deprive[s] [it] of any function"); Poulin, *supra* note 31, at 1214 (noting that *Blockburger* test is "easily circumvented" by minor differences in statutes). See *supra* notes 8–10 and accompanying text for a discussion of the fundamental nature of the guarantee against double jeopardy, and *supra* Part III.A.4 for a discussion of how the narrow statutory elements test promulgated by *Blockburger* makes this constitutional guarantee virtually non-existent.

237. *See, e.g.*, Commonwealth v. Rhodes, 510 A.2d 1217, 1227 (Pa. 1986) (describing burden on prosecution to establish force).

example, in *Commonwealth v. Rhodes*[238] the Pennsylvania Supreme Court adopted a new definition of force in cases involving children, making it dependent on a variety of factors including the age of the victim.[239] This definition has gained favor in several jurisdictions.[240] In *State v. Etheridge*, the North Carolina Supreme Court also adopted this definition, finding that a child's fear of a parent is equivalent to the force element in a forcible sexual assault, despite an absence of evidence that the defendant used physical force or express threats.[241]

Alabama courts have also adopted the definition of force promulgated by *Rhodes* and *Etheridge*. In *Powe v. State*,[242] the court found sufficient evidence of the forcible compulsion necessary to sustain a first-degree rape conviction, where the victim testified—not to physical force or express threats—but to a general fear of her father.[243] The court adopted the definition of forcible compulsion used in *Rhodes* and *Etheridge*, holding that the special relationship between children and adults in a position of authority can be considered when determining the element of force.[244]

Using the definition of force promulgated in *Rhodes* lessens the burden for the prosecution in forcible rape charges, while at the same time forcing defendants to face multiple punishments arising from a single act of intercourse with a minor.[245] Courts in Pennsylvania and Alabama hold that because statutory rape contains an age element lacking in forcible rape statutes, and forcible rape contains a force element lacking in statutory rape statutes, the two are not the same offense for double jeopardy challenges.[246] These courts also rely on evidence of the victim's age to justify a finding of force sufficient to sustain a conviction for forcible rape, instead of relying on testimony of the victim or physical evidence of injuries sustained by the victim.[247] Therefore, the court draws the force and age elements closer together, making the crimes seem more like the "same offense" in a colloquial sense. Yet because *Blockburger* relies on the same "statutory elements," the offenses remain distinct for double jeopardy.[248] Thus, these courts lessen the burden for the prosecution by making force easier to prove in cases involving children while also making defendants defend

238. 510 A.2d 1217 (Pa. 1986).

239. *Rhodes*, 510 A.2d at 1227.

240. *See, e.g.*, Powe v. State, 597 So. 2d 721, 726–28 (Ala. 1991) (relying on *Etheridge* and *Rhodes*'s totality of the circumstances analysis to conclude sufficient evidence existed to support jury's finding of force); State v. Etheridge, 352 S.E.2d 673, 682 (N.C. 1987) (holding that existence of parent-child relationship, coupled with use of parental authority, is sufficient to infer finding of force).

241. *Etheridge*, 352 S.E.2d at 673, 682.

242. 597 So. 2d 721 (Ala. 1991).

243. *Powe*, 597 So. 2d at 728.

244. *Id.* at 728.

245. *See* Brown v. State, 492 S.E.2d 555, 556 (Ga. Ct. App. 1997) (characterizing prosecution's theory that force element was satisfied by victim's age as "wanting to 'have your cake and eat it too'"), *overruled by* Curtis v. State, 571 S.E.2d 376 (Ga. 2002).

246. Commonwealth v. Rhodes, 510 A.2d 1217, 1230 (Pa. 1986).

247. *Rhodes*, 510 A.2d at 1232 (Zappala, J., concurring).

248. *E.g.*, *Powe*, 597 So. 2d at 728 (finding evidence fulfilling forcible and statutory rape elements sufficient to convict on both crimes); *Rhodes*, 510 A.2d at 1232 (discussing distinction between common law and statutory rape).

against multiple convictions for a single act.[249] In comparison, if courts followed a more flexible approach like the actual evidence test, the use of age to prove force would make the offenses more likely to be found to be the "same," and therefore multiple punishments would be barred.[250]

### *C. Proposal: Adopt a Flexible Approach to Double Jeopardy Challenges and Lesser Included Offense Issues in the Forcible Rape and Statutory Rape Context, or Legislatures Must Directly Address the Issue*

For the reasons discussed in Part III.A, the current analysis used by courts considering double jeopardy challenges to multiple charges or prosecutions for forcible rape and statutory rape is problematic. Many of the opinions are brief and offer little analysis beyond a short application of *Blockburger*, leaving defendants with little double jeopardy protection and blurring the traditional distinctions between forcible rape and statutory rape. Part III.C.1 proposes that courts offer more thoughtful analysis of the problem by considering a different "same offense" analysis, or by considering the common law doctrine of merger to address the issue. Part III.C.2 considers how courts can address the problem through a broader test for lesser included offenses. Part III.C.3 proposes that if courts are unwilling or unable to address the issue, legislators can redraft statutes and include explicit language dealing with the multiple punishments problem.

#### 1. Treat Statutory Rape and Forcible Rape as Same Offense for Double Jeopardy Purposes

For equitable reasons, multiple convictions or prosecutions for forcible rape and statutory rape should be considered a violation of double jeopardy.[251] Courts could implement this change in several ways. First, courts could use a different test to define "same offense."[252] Instead of strictly relying on the *Blockburger* statutory elements test, courts could use a more flexible approach, relying on the actual evidence produced at trial or the pleadings.[253] Another persuasive proposal is a two-part approach: first, to adopt a broader definition of "same offense" for double jeopardy challenges, and second, to conduct a balancing test to allow the court discretion to overcome the first step if "sufficiently weighty" governmental interests are involved.[254] *Blockburger* could be used as "a floor rather than a ceiling," with courts giving greater consideration

249. *See, e.g.*, State v. Etheridge, 352 S.E.2d 673, 681–32 (N.C. 1987) (stating that three convictions arising from same transaction did not violate double jeopardy, while drawing all inferences as to force in favor of the state).

250. See *supra* notes 47–50 and accompanying text for a discussion of how the evidentiary approach is applied in the context of lesser included offenses.

251. See *supra* Part III.A for a criticism of imposing multiple punishments or prosecutions for forcible rape and statutory rape under the *Blockburger* test.

252. See *supra* notes 23–30 and accompanying text for a discussion of the current approach under *Blockburger* to defining "same offense."

253. See *supra* notes 47–56 and accompanying text for an overview of the evidentiary and cognate pleadings approaches in the context of the lesser included offense doctrine.

254. Poulin, *supra* note 31, at 1234.

to the underlying facts of each case rather than analyzing the abstract statutory elements.[255]

As a practical matter, proof of forcible rape by an adult defendant against an underage victim will almost always establish statutory rape.[256] Following a more flexible, evidentiary-based test for double jeopardy issues in the forcible rape/statutory rape scenario will be more consistent with the modern day expansion of statutorily defined sexual offenses.[257] It will also allow courts to make independent assessments instead of relying on small differences in statutory language and nonexistent records of legislative intent.[258] Furthermore, this approach will also be more consistent with the traditional justifications for statutory rape law and the goals of modern statutory rape law, which is intended to operate regardless of force.[259] Finally, a broader, evidentiary-based approach could restore greater meaning to the fundamental guarantee against double jeopardy, instead of leaving defendants at the mercy of the little-to-no protection provided under the narrow statutory elements approach.[260]

But because *Blockburger* is constitutionally mandated and unlikely to be overruled anytime soon, this solution may be infeasible.[261] As an alternative, courts could rely on the common law doctrine of merger to foreclose multiple sentences for forcible rape and statutory rape from a single act.[262] Although not a constitutional solution, this approach could be viable for jurisdictions that have not abolished the merger doctrine and define the doctrine differently than the *Blockburger* "same offense" analysis.[263] Because the group of jurisdictions in which a merger solution would be available is likely small,[264] changes to state interpretations of the lesser

255. King v. State, 574 So. 2d 921, 931 (Ala. Crim. App. 1990) (Bowen, J., concurring specially) (internal quotation marks omitted).

256. *See* State v. Hughes, 173 P.3d 983, 987–88 (Wash. Ct. App. 2007) (Schultheis, A.C.J., dissenting) (arguing there is no difference in actus reus or mens rea of either crime: both have common defense of lack of knowledge, and both serve state goals of protecting against unconsensual sexual intercourse), *aff'd in part, rev'd in part*, 212 P.3d 558 (Wash. 2009).

257. See *supra* Part III.A.1 for a discussion of the expansion in number and specificity of modern criminal law statutes, and how the continued use of *Blockburger* is inconsistent with this expansion.

258. See *supra* Part III.A.2 for a discussion of how the current *Blockburger* analysis leaves courts to speculate regarding legislative intent in the complete absence of any record and gives controlling effect to small differences in the placement and wording of forcible rape and statutory rape statutes.

259. See *supra* Part III.A.3 for a discussion of the original goals of statutory rape law, and how modern-day statutory rape laws are designed to cover both consensual, non-forceful and non-consensual, forceful encounters.

260. See *supra* notes 17–20 and accompanying text for a discussion of the fundamental nature of the guarantee against double jeopardy, and *supra* Part III.A.4 for a discussion of how the narrow statutory elements test promulgated by *Blockburger* makes this constitutional guarantee virtually non-existent.

261. *See* Shellenberger & Strazzella, *supra* note 10, at 122 (noting that *Blockburger* has survived a number of attacks and has been repeatedly reaffirmed).

262. See *supra* notes 35–36 and accompanying text for an overview of the merger doctrine.

263. *See* Antkowiak, *supra* note 35, at 262–63 (noting that many jurisdictions have abolished merger doctrine or apply it identically to *Blockburger* statutory elements test used in double jeopardy analysis). In *Wofford v. State*, 486 S.E.2d 697, 699 (Ga. Ct. App. 1997), the court applied the merger doctrine to forcible rape and statutory rape by noting that the crimes merged factually.

264. Antkowiak, *supra* note 35, at 262–63.

included offense doctrine or a legislative proposal could also provide alternative solutions.[265]

2. Treat Statutory Rape as a Lesser Included Offense of Forcible Rape

Instead of relying on the narrow and mechanical statutory elements test to define lesser included offenses, more courts could move towards a flexible approach to defining lesser included offenses in the context of statutory rape and forcible rape. Unlike the double jeopardy "same offense" analysis, states are free to choose their own tests defining lesser included offenses.[266] This could be accomplished by adopting the Model Penal Code definition of lesser included offenses, which is currently used in only nine states.[267] Under this approach a lesser offense is included in a greater offense when it is proven by the same or fewer than all the facts required to establish the greater offense, it consists of an attempt or solicitation to commit the greater offense, or it differs from the greater offense only by involving a lesser harm or culpability level.[268]

Under this approach, statutory rape could be a lesser included offense of forcible rape because all of the evidence used at trial to establish a forcible rape charge would necessarily include the evidence used for the statutory rape charge.[269] Defendants facing a forcible rape charge for an act of sexual intercourse with an underage complainant could then request a jury instruction on the crime of statutory rape.[270] While giving more power to the jury to possibly reach a "compromise verdict," this approach could decrease the all-or-nothing risks for both the prosecution and the defendant.[271] For better or worse, it could potentially decrease the bargaining power for prosecutors if defendants need not fear multiple convictions for the single act[272] *and* are able to advocate for jury instructions for a lesser charge.[273] This approach would also be more predictable and practical than the stricter statutory elements approach.[274]

265. See *infra* Part III.C.2–3 for a discussion of the lesser included offense doctrine proposal and a statutory proposal respectively.

266. See *supra* note 72 and accompanying text for a more detailed discussion of how the lesser included offense doctrine relates to double jeopardy.

267. Hoffheimer, *supra* note 46, at 408.

268. MODEL PENAL CODE § 1.07(4) (1985).

269. See *supra* notes 47–50 and accompanying text for an explanation of how the evidentiary test operates and criticisms of its use.

270. See *supra* Part II.B.2 for a discussion of how courts decide whether instructions are mandated, discretionary, or prohibited.

271. *See* Hoffheimer, *supra* note 38, at 594 (discussing advantages and disadvantages of lesser included offense instructions as they relate to jury compromise).

272. See *supra* Part III.C.1 for the proposal that statutory rape and forcible rape be treated as the same offense for double jeopardy purposes.

273. *See, e.g.*, Burtram v. State, 733 So. 2d 921, 925 (Ala. Crim. App. 1998) (upholding conviction for dual charges of forcible rape—called first degree rape under state code—and statutory rape—called second degree rape under state code). In *Burtram*, the defendant moved to withdraw his guilty plea, claiming his counsel coerced him into pleading guilty by telling him he could be convicted of both forcible rape and statutory rape at trial. *Id.* at 922. The appeals court denied the motion, holding that the counsel's advice was correct. *Id.* at 924.

274. *Id.*

Because the two offenses require different evidence and have different affirmative defenses, both defendants and prosecutors can be better prepared if they know ahead of time whether statutory rape can be included in the jury instructions.[275] Broadening the definition of lesser included offenses in this context could provide numerous benefits.[276]

3. Statutory Proposal: Redraft Statutes or Make the Relationship Explicit

State legislatures could address this issue directly by redrafting statutes defining forcible rape and statutory rape. One possible solution is to take the Model Penal Code approach to rape statutes. The Model Penal Code states:

> (1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if:
>
> (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
>
> (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
>
> (c) the female is unconscious; or
>
> (d) the female is less than 10 years old.[277]

This would allow prosecutors to charge an offense carrying the same potential punishment as forcible rape in situations where the defendant is deemed culpable by reason of the victim's extreme youth, instead of relying on dual charges for forcible rape and statutory rape.[278]

The Model Penal Code does not have a statutory rape provision.[279] This approach may be unacceptable in a large number of states, where legislators will still want to

275. For example, evidence of consent will be admissible as an affirmative defense only in forcible rape cases, whereas the prosecution may be required to show corroboration of the victim's testimony in a statutory rape case. *See, e.g.*, Brown v. State, 492 S.E.2d 555, 556 (Ga. Ct. App. 1997) (requiring corroboration of victim testimony in statutory rape cases, but not in forcible rape cases), *overruled by* Curtis v. State, 571 S.E.2d 376 (Ga. 2002). Similarly, the defendant will be able to introduce evidence regarding mistake of age in certain jurisdictions that would be irrelevant in cases involving forcible rape only. *See* State v. Chernotik, 671 N.W.2d 264, 272 (S.D. 2003) (noting defendant's argument that only forcible rape allows consent defense whereas statutory rape allows age defense).

276. For a discussion of the potential benefits of the doctrine of lesser included offenses in general, see Hoffheimer, *supra* note 46, at 356. Hoffheimer points out that the doctrine can provide notice to defendants of what crimes, not named in the charging document, might be prosecuted at trial. *Id.* It also allows prosecutors the flexibility to add less serious charges to the charging document easily, preserving time and money. *Id.* Finally, the doctrine gives defendants the opportunity to reduce their liability from a greater to a lesser offense, and gives greater discretion to the jury. *Id.*

277. MODEL PENAL CODE § 213.1 (1985).

278. *See, e.g.*, Commonwealth v. Rhodes, 510 A.2d 1217, 1229 (Pa. 1986) (upholding multiple convictions for forcible rape and statutory rape arising from sexual act with eight-year-old neighbor). If Rhodes were prosecuted under a statute adopting the Model Penal Code (similar to how the Pennsylvania statute reads today), the court could have imposed a penalty similar to that received under the forcible rape statute solely based on the victim's age, without the prosecution having to offer any evidence of force.

279. MODEL PENAL CODE § 213.1 (1985).

offer protection to adolescents from potentially coercive sexual relationships.[280] Instead of completely rejecting statutory rape, state legislators can enact or maintain existing statutes prohibiting statutory rape, with degrees based on the ages of the victim and the defendant.[281] But within those statutes, legislators can include language explicitly addressing whether or not statutory rape is intended to be punished in addition to any conviction for forcible rape.[282] If courts continue to apply the *Blockburger* test and focus on legislative intent when addressing double jeopardy issues, this explicit language will at least leave them with clearer guidance.[283]

## IV. CONCLUSION

Little attention has been given to double jeopardy and the doctrine of lesser included offenses in the context of forcible rape and statutory rape, and case law on both sides is limited.[284] Courts are divided on the issue of whether multiple punishments for statutory rape and forcible rape violate double jeopardy.[285] Courts are similarly split on the issue of whether the Double Jeopardy Clause precludes a second prosecution for statutory rape after acquittal for forcible rape.[286] Courts are not as split regarding whether statutory rape is a lesser included offense of forcible rape, with a large majority of jurisdictions applying the statutory elements approach to find that statutory rape is not a lesser included offense of forcible rape.[287]

280. *See* Carpenter, *supra* note 45, at 334 (explaining modern justifications for statutory rape law include avoiding risk of teenage pregnancy, disease, and psychological or physical harm due to lack of fully developed judgment).

281. *See, e.g.*, Phipps, *supra* note 101, at 58–59 (detailing tiered statutory scheme used in Virginia with degrees of punishment based on age of victim).

282. See *supra* note 28 and accompanying text for examples of federal statutes that include specific language addressing the relationship with other close offenses and whether punishment is intended to be cumulative.

283. See *supra* Part III.A.2 for a discussion of the problems courts face when relying on legislative intent to determine how offenses relate.

284. See *supra* notes 74–75 and accompanying text for a discussion of how little scholarly attention has been given to double jeopardy challenges in the context of forcible rape and statutory rape. See *supra* Part II.D for an overview of cases addressing how the offenses relate to one another.

285. *Compare* Burtram v. State, 733 So. 2d 921, 924 (Ala. Crim. App. 1998) (holding double jeopardy does not bar multiple convictions for forcible rape and statutory rape arising from single act), Drinkard v. Walker, 636 S.E.2d 530, 534–35 (Ga. 2006) (same), Commonwealth v. Rhodes, 510 A.2d 1217, 1229–30 (Pa. 1986) (same), *and* State v. Hughes, 173 P.3d 983, 986–87 (Wash. Ct. App. 2007) (same), *aff'd in part, rev'd in part*, 212 P.3d 558 (Wash. 2009), *with* Brown v. United States, 576 A.2d 731, 734 (D.C. 1990) (holding that double jeopardy bars multiple convictions for both statutory rape and assault with intent to commit rape), State v. Banks, 740 P.2d 1039, 1042 (Idaho Ct. App. 1987) (holding that Idaho rape statute outlines alternative circumstances sufficient for establishing single rape offense), *and* State v. Ridgeway, 648 S.E.2d 886, 894–95 (N.C. Ct. App. 2007) (same result).

286. *Compare* State v. Carrico, 570 P.2d 489, 490 (Ariz. 1977) (holding double jeopardy does not bar subsequent prosecution for statutory rape after acquittal for forcible rape), *with* State v. Lafferty, 716 N.W.2d 782, 785–86 (S.D. 2006) (finding double jeopardy bars second prosecution for statutory rape after acquittal for forcible rape).

287. *Compare Carrico*, 570 P.2d at 490 (holding statutory rape is not lesser included offense of forcible rape), Hill v. State, 271 S.E.2d 802, 807 (Ga. 1980) (same), Collins v. State, 691 So. 2d 918, 925 (Miss. 1997) (same), *and* State v. Stokes, 24 S.W.3d 303, 307 (Tenn. 2000) (same), *with* Commonwealth v. Thayer, 634 N.E.2d 576, 578 (Mass. 1994) (holding statutory rape is lesser included offense of forcible rape).

The *Blockburger* statutory elements test utilized by the majority of courts holding that double jeopardy does not bar multiple punishments and/or prosecutions is no longer useful in light of the complexity and specificity of modern criminal codes.[288] Courts on both sides are overly reliant on legislative history and statutory construction.[289] Imposing multiple punishments and prosecutions in this context is also inconsistent with the traditional purpose of statutory rape law and the modern-day operation of most statutory rape statutes.[290] Finally, a court's deference to the legislature in this area leaves defendants with inadequate protection from double jeopardy, rendering the Double Jeopardy Clause almost meaningless.[291]

Some of the courts rejecting double jeopardy challenges have also relaxed the requirements for force necessary to sustain a forcible rape conviction, making it dependent on a variety of factors including age.[292] This leaves defendants with even less protection, by not only allowing multiple convictions, but making the evidence used for both charges even more similar.[293] Because the actual evidence presented at trial is not taken into account under the *Blockburger* statutory elements test, defendants have no recourse.

Under the proposal set forth in this Comment, statutory rape and forcible rape would be treated as the "same offense" for double jeopardy purposes under a more practical, evidence-based approach.[294] This approach would reduce reliance on legislative intent and nuances of statutory construction while providing greater meaning to the goals of statutory rape law and the fundamental guarantee against double jeopardy.[295] Statutory rape would also be treated as a lesser included offense of forcible rape where the evidence demonstrates a single act of sexual intercourse with an underage victim.[296] Both prosecutors and defendants could benefit from this flexible approach to lesser included offenses in this context because it can save prosecutorial time and resources by allowing greater flexibility to amend charging documents while

288. See *supra* Part III.A.1 for a discussion of how the *Blockburger* strict statutory elements approach is anachronistic in light of modern criminal law codes.

289. See *supra* Part III.A.2 for a discussion of how many courts are left to speculate regarding legislative intent and the meaning of small differences in statutory language.

290. See *supra* Part III.A.3 for a discussion of this inconsistency and how modern statutory rape laws are designed to operate in both consensual and non-consensual situations. See also *supra* Part II.C.1 for a discussion of the origins of statutory rape law.

291. See *supra* Part III.A.4 for a discussion of how defendants are left with uneven results, making the ancient, fundamental guarantee against double jeopardy dependent on the jurisdiction in which the crime is prosecuted.

292. See *supra* Part III.B for a discussion of how courts employ varying standards of force in these cases.

293. See *supra* Part III.B for a discussion of how using different burdens of proof for prosecutors will lead to very different outcomes for defendants.

294. See *supra* Part III.C.1 for a discussion of treating forcible rape and statutory rape as the "same offense" for purposes of double jeopardy.

295. See *supra* Part III.A for a discussion of flaws in the current statutory elements approach on both sides of the double jeopardy argument.

296. See *supra* Part III.C.2 for further detail about the proposal to treat statutory rape as a lesser included offense of forcible rape.

providing the defendant with the possibility of conviction on the lesser offense only.[297] If courts are unwilling or unable under current state lesser included offense tests[298] or federal double jeopardy law[299] to accept this proposal, legislators could directly address the problem by including within the applicable statutes explicit language regarding the relationship of the offenses.[300] This will eliminate the need for courts to guess at legislative intent while providing greater certainty for defendants, judges, and prosecutors.

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297. *See* Hoffheimer, *supra* note 46, at 356 (discussing benefits of lesser included offense doctrine).

298. See *supra* Part II.B.1 for a discussion of the three general approaches states employ to define lesser included offenses.

299. See *supra* Part II.A for a discussion of the *Blockburger* test handed down by the Supreme Court to govern double jeopardy issues.

300. See *supra* Part III.C.3 for a discussion of how legislatures can address the relationship between forcible rape and statutory language.

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