University of Chicago Legal Forum

Volume 1998 | Issue 1 Article 17

Toward a Fact-Based Analysis of Statutory Rape under the United States Sentencing Guidelines

Susan Fleischmann
Susan.Fleischmann@chicagounbound.edu

Toward a Fact-Based Analysis of Statutory Rape Under the United States Sentencing Guidelines

Susan Fleischmann†

A seventeen-year-old boy is convicted of statutory rape for sleeping with his long-term, fourteen-year-old girlfriend. Years pass and he finds himself in federal court on gun possession charges. The jury convicts him. During his sentencing hearing, the old statutory rape conviction resurfaces and the judge increases the defendant's sentence because the ancient conviction for statutory rape indicates that he poses a threat to society.

The term "crime of violence" plays a large role in federal sentencing. The United States Sentencing Guidelines[1] (the "Guidelines") use the term to describe acts which merit enhanced punishment. Congress promulgated the Guidelines under the Sentencing Reform Act of 1984 (the "Act").[2] In response to Congressional concern over the number of crimes committed by released criminals,[3] the Guidelines endorse heightened punishment for certain dangerous defendants in order to protect the general community from recidivism.[4] However, individual judges retain the discretion to decide whether statutory rape falls into the "crime of violence" category. Some judges categorically define statutory rape as a crime of violence. Others look to the facts behind each case to determine the defendant's dangerousness. Still others employ an intermediate approach, looking to the facts alleged in the statutory rape indictment, but no further. Accordingly, the method judges use to define statutory rape has a great impact on the future of the defendants before them.

This Comment argues that judges cannot accurately determine the dangerousness of a convicted statutory rapist without

---

† A.B. 1994, Harvard University; J.D. Candidate 1999, University of Chicago.

[1] United States Sentencing Commission, *Guidelines Manual* (Nov 1997) ("USSG").

[2] Sentencing Reform Act of 1984, Pub L No 98-473, 98 Stat 1987 (1984), codified at 18 USC § 3551 et seq (1994). The Sentencing Reform Act of 1984 is Chapter II of Title II of the Comprehensive Crime Control Act of 1984, Pub L No 98-473, 98 Stat 1976 (1984), codified at 18 USC § 3001 et seq (1994).

[3] Comprehensive Crime Control Act of 1984, S Rep No 147 98th Cong 3 (1983), reprinted in 1984 USSCAN 3185.

[4] Id at 50, 1984 USSCAN at 3223.

closely examining the facts surrounding his statutory rape conviction.[5] Factors such as the relationship between the two parties involved in the sexual act, the circumstances under which the act took place, whether physical injury occurred, and who initiated the act will inform a conclusion about whether the defendant poses a threat to the community.[6] Categorizing statutory rape as a crime of violence without scrutinizing the facts underlying the act can result in enhanced sentences for defendants who pose no threat to society.

Part I of this Comment examines the methods courts use to determine whether statutory rape constitutes a crime of violence for sentencing purposes. It describes the purposes underlying the Sentencing Guidelines, in particular the Sentencing Commission's creation of "Career Offender" status and the implications of that designation for defendants facing sentencing under the Guidelines. The term "crime of violence" plays a direct role in assigning career offender status. Part I also discusses how sentencing courts determine whether a past conviction constitutes a crime of violence for purposes of enhancing a career offender's sentence.

Part II of this Comment lays out the different factors that courts should consider when determining whether an act of statutory rape constitutes a crime of violence. It argues that courts should look to the nature of the girl's consent to sex, whether she risked injury, and whether punishing statutory rapists serves the legislative purpose of protecting community safety. This Comment argues that gauging a defendant's threat to the community requires close consideration of the particular facts surrounding his statutory rape conviction before subjecting him to heightened punishment.

I. THE SENTENCING GUIDELINES

The Sentencing Reform Act of 1984, Title II of the Comprehensive Crime Control Act, created the United States Sentencing

---

[5] This Comment discusses statutory rapists, not child molesters. The boundaries between these two types of defendants may blur. However, molestation has several distinct characteristics. For example, pedophiles are commonly relatives of their victims. See George W. Barnard, et al, eds, *The Child Molester* 40 (Brunner/Mazel 1989). In addition, while a strict age cutoff may not determine whether an act of statutory rape is violent, the ages of the parties can help distinguish molestation from statutory rape.

[6] Because this Comment focuses on the dangers associated with teenage pregnancy, it considers only male defendants who have sex with teenage girls. The issues connected with same-sex or woman/boy statutory rape are beyond the scope of this Comment.

Commission,[7] "whose duty is to promulgate sentencing guidelines and policy statements,"[8] in order to establish a comprehensive federal sentencing law.[9] Before passage of the Crime Control Act, judges and parole commissions had sentencing discretion, a system which led to arbitrary and unfair sentences.[10] To eradicate these problems, Congress established a new procedure under which federal courts sentence offenders according to the type of crime they have committed, compounded with their criminal history.[11]

Although the Guidelines provide a structure to which the sentencing judge can refer, he retains discretion to depart from the Guidelines if he so chooses.[12] In considering what sentence to impose, the judge examines a presentence report that includes the defendant's criminal history.[13] He then imposes the appropriate sentence established by the Guidelines.[14]

A. Career Offenders

"Career Offenders" receive enhanced sentences under the Guidelines.[15] A career offender's criminal record must include "at least two prior felony convictions of either a crime of violence or a controlled substance offense."[16] The Sentencing Commission defines a "crime of violence" as:

> [A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . (1) has as an element the use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious poten-

---

[7] 28 USC § 994(a) (1994).

[8] Comprehensive Crime Control Act of 1984, S Rep No 98-225, 98th Cong, 2d Sess 63 (1984), reprinted in 1984 USSCAN 3246.

[9] Id at 37, 1984 USSCAN 3220.

[10] Id at 38, 1984 USSCAN 3221.

[11] See USSG Ch 5, Pt A. For a comprehensive history of the Sentencing Guidelines, see Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW U L Rev 1574 (1997).

[12] Comprehensive Crime Control Act, S Rep No 98-225 at 78–79, reprinted in 1984 USCCAN 3261–62. See also Whiteside, 91 NW U L Rev at 1590.

[13] USSG § 6A1.1. See also 18 USC §§ 3552, 3553(a)(1) (1994).

[14] 18 USC § 3553(a)(4). For a description of how sentences are calculated under the Guidelines, see Whiteside, 91 NW U L Rev at 1585–86.

[15] USSG § 4B1.1.

[16] Id at § 4B1.1(3).

tial risk of physical injury to another.[17]

According to the Sentencing Commission, the term "'[c]rime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling."[18] Career offenders should receive a sentence "at or near the maximum term authorized."[19] The career offender category pinpoints those criminals who pose a high risk of danger to society and thus deserve greater punishment.[20]

B. Sentencing Courts Interpreting "Crime of Violence"

Sentencing courts differ on how to determine whether a defendant's past conviction constitutes a crime of violence.[21] The various methods can be grouped into three general approaches: categorical, intermediate, and fact-based.

Some courts use a "categorical" approach. Under this approach, courts consider only the nature of the crime committed, deeming irrelevant all facts surrounding the commission of the crime.[22]

Other courts use an "intermediate" approach, examining the record in the prior proceedings to determine whether the defendant has committed a crime of violence.[23] In these cases, the judge considers the indictment or charging document.[24] If the indictment contains certain facts, such as the ages of the parties involved, the court will consider them when making its determination. However, even if the charging document fails to allege

---

[17] Id at § 4B1.2(a).

[18] Id at § 4B1.2 (Commentary).

[19] 28 USC § 994(h) (1994).

[20] *United States v Johns*, 984 F2d 1162, 1164 (11th Cir 1993) quoting *United States v John*, 936 F2d 764, 766–67 n 2 (3d Cir 1991) ("The career offender scheme of using a defendant's criminal record in considering both his offense level and his criminal history under the Sentencing Guidelines bears a rational relationship to a legitimate governmental purpose — 'to prevent repeat offenders from continuing to victimize society.'").

[21] See *United States v Garcia*, 42 F3d 573, 576 (10th Cir 1994) (noting split).

[22] See, for example, *United States v Powell*, 813 F Supp 903, 909–10 (D Mass 1992).

[23] See, for example, *United States v Young*, 990 F2d 469, 472 (9th Cir 1993) (reviewing information in state court proceeding to determine that possession of a deadly weapon by a prison inmate constituted a crime of violence); *United States v Leavitt*, 925 F2d 516, 517 (1st Cir 1991) (examining indictment in state court proceeding to determine that conviction for "High and Aggravated Oral Threatening" constituted crime of violence).

[24] The indictment, which replaces the prosecutor's criminal complaint at the trial stage, is brief. It sets forth the allegation against the accused without an elaboration of the facts surrounding that allegation. See Yale Kamisar, Wayne R. LaFave and Jerold H. Israel, eds, *Modern Criminal Procedure* 26, 30 (West 8th ed 1994).

any use of force, the court may determine that the crime underlying a defendant's conviction constitutes a crime of violence.[25]

Still other courts adopt a "fact-based" approach, extending their inquiry beyond the record in the prior proceedings to consider the facts surrounding the conviction.[26] Indeed, the Seventh Circuit encourages elaborate review of the defendant's record in the sentencing context.[27]

C. Applying the Guidelines to Statutory Rapists

Some courts have used the categorical approach to determine that statutory rape and other sexual offenses involving minors constitute crimes of violence.[28] These courts hold that the risk of physical force against a minor makes statutory rape inherently violent.

United States v Bauer[29] adopted the reasoning of an earlier child abuse case.[30] In *Bauer*, the court refused to consider the

---

[25] See *United States v Shannon*, 110 F3d 382 (7th Cir 1997) (en banc) (holding statutory rape a crime of violence for sentencing purposes); *United States v Meader*, 118 F3d 876 (1st Cir 1997) (finding prior convictions of statutory rape constitute crimes of violence for career offender status under the Guidelines). If an indictment included use of force, defining that act of statutory rape as a crime of violence would be understandable. This Comment addresses only those situations in which the charging documents do not allege an element of force and the court refuses to delve into the circumstances behind the act of statutory rape.

[26] See, for example, *United States v Chapple*, 942 F2d 439 (7th Cir 1991) (assessing underlying facts of a state weapons conviction); *United States v Flores*, 875 F2d 1110, 1112 (5th Cir 1989) (allowing probation officer to testify in current proceeding in order to determine whether prior burglary convictions constituted crimes of violence).

[27] *United States v Coonce*, 961 F2d 1268, 1275 (7th Cir 1992) ("[A] sentencing judge can and must consider a defendant's *entire* history in order that he might make an informed decision as to the proper punishment.").

[28] Sentencing is not the only context in which the categorical approach to statutory rape presents problems of over-inclusiveness. Under the Bail Reform Act of 1983 (the "BRA"), codified in 18 USC § 3142 et seq (1984), a judge can deny a defendant pretrial release from jail if his record contains a conviction for a crime of violence. 18 USC § 3142(e). The legislative history of the BRA does not yield a list of crimes that Congress envisioned the term "crime of violence" would cover. See Comprehensive Crime Control Act of 1984, S Rep No 98-225 at 3–36 (1984), reprinted in 1984 USCCAN 2185–3219. At least one court has expressed frustration over this omission, stating, "while the government must allege that the case involves a crime of violence. . . . [T]he absence of a requirement that the judicial officer actually conclude that the crime involved in the case is one of violence creates a considerable ambiguity." *United States v Yeaple*, 605 F Supp 85, 87 (M D Pa 1985). According to the statute, even though courts do not have to assess whether a defendant's past conviction correctly places him in front of them under the BRA, they must nonetheless decide whether the past conviction indicates a potential for recidivism, necessitating detention of the defendant. 18 USC § 3142(g)(3)(A).

[29] 990 F2d 373 (8th Cir 1993).

[30] *United States v Rodriguez*, 979 F2d 138, 141 (8th Cir 1991)

("[T]he elements of the underlying offense need not include use, attempted use, or threatened use of force to be considered a 'crime of vio-

defendant's claim that an act of sexual intercourse was consensual.[31] The court held that the defendant, who had intercourse with a girl not related to him but under the age of sixteen, had committed a crime of violence for sentence enhancement purposes because the act involved a substantial risk of physical harm.[32]

Unlike the Eighth Circuit, the Seventh Circuit applies the intermediate approach to statutory rape. Noting that courts should not always apply the categorical approach, the Seventh Circuit in *United States v Shannon* examined the facts charged in the information against the defendant.[33] *Shannon* presents the most extensive discussion justifying the intermediate approach when defining statutory rape as a crime of violence.

The defendant, Shannon, was charged with being a felon in possession of a firearm.[34] Several years earlier, at the age of seventeen, he had been convicted of statutory rape for having sexual intercourse with a thirteen year old girl.[35] The girl became pregnant as a result of the act.[36] While the indictment did not allege force,[37] the Seventh Circuit found that sexual intercourse with a girl aged thirteen or younger poses a risk of physical injury great enough to render the act a per se crime of violence.[38] For the majority, Judge Posner acknowledged that "a serious risk of physical injury cannot be *automatically* inferred from the existence of a statutory-rape law."[39] However, he distinguished cases involving sex with prepubescent children or other aggravating factors.[40] Because *Shannon* did not include any such factor, Posner deemed the categorical approach inappropriate.

Nevertheless, Posner declined to consider facts that would provide a more accurate assessment of the sexual act between Shannon and the girl, instead opting to apply the intermediate

---

lence'. . . . All crimes which by their nature involve a substantial risk of physical force share the *risk* of harm. It matters not one whit whether the risk ultimately causes actual harm.").

[31] 990 F2d at 374.

[32] Id at 375, citing *Rodriguez*, 979 F2d at 140–41.

[33] 110 F3d 382, 387 (7th Cir 1997).

[34] Id at 383.

[35] Id at 384.

[36] Id at 388.

[37] 110 F3d at 384. The court based its determination that the defendant did not use force on the charging document filed against Shannon in the sexual assault charge. However, the original complaint reveals that Shannon did use force. Id at 391 (Coffey concurring in part, dissenting in part).

[38] Id at 387 (majority opinion).

[39] Id at 386.

[40] Id.

approach.[41] Arguing that sex with a thirteen-year-old presents a risk of physical injury, Posner focused on the idea that thirteen-year-olds do not know enough about contraception and sexually transmitted diseases to make an informed, rational choice to have premarital sex.[42] Concluding his opinion, Posner urged the Sentencing Commission to promulgate a concrete definition of statutory rape under the Guidelines, admitting that "[w]e cannot be certain that we have gotten it right."[43]

The First Circuit echoed Posner's concern a few months later. In *United States v Meader*,[44] the defendant was convicted for distribution of cocaine, using a firearm in connection with drug trafficking, and being a felon in possession of a firearm.[45] The defendant's record contained a conviction for statutory rape of a thirteen-year-old girl.[46] Basing its decision solely on the age disparity between the defendant and the girl, the court held that the defendant deserved sentence enhancement because the statutory rape constituted a crime of violence.[47] However, the court noted that they had "bypassed a number of troubling and complex issues that would need to be addressed before statutory rape at its most categorical level — *i.e.*, regardless of the conduct charged — could be classified as a crime of violence for federal sentencing purposes."[48]

II. STATUTORY RAPISTS ARE NOT NECESSARILY DANGEROUS

The authority to enhance a defendant's sentence has its roots in a concern for community safety.[49] It is therefore important that before sentencing defendants, judges correctly ascertain which defendants actually pose a threat to the community. This Comment advocates a case-by-case approach to statutory rape because of the potential over-inclusiveness of the categorical and intermediate approaches to defining statutory rape.

While deleterious consequences may result from young girls having sex, punishing statutory rapists to eradicate such consequences does not ensure community safety as Congress and the

---

[41] 110 F3d at 384.
[42] Id at 387.
[43] Id at 389.
[44] 118 F3d 876 (1st Cir 1997).
[45] Id at 878.
[46] Id at 881.
[47] Id at 884.
[48] 118 F3d at 884.
[49] See note 20.

Sentencing Commission intended.

The fact-based approach suits Congress's purpose because it allows the sentencing judge to more accurately determine whether a particular defendant truly poses a danger to society. Under a fact-based approach, courts should consider three aspects of an act of statutory rape before imposing an enhanced sentence. First, applying the Guidelines' definition of crime of violence and its inclusion of the element of injury, courts should ask whether the sexual act caused the girl injury. Second, courts should ascertain whether she consented to the sexual act. Finally, courts should consider whether the dangers associated with teen girls having sex, such as the risk of pregnancy and disease, merit categorizing their sexual partners as societal dangers. This third prong would not require reconsideration every time a court confronted a statutory rape conviction. Rather, courts should establish a fixed policy toward statutory rapists based on a determination of whether teen pregnancy and sexually transmitted disease are the types of dangers Congress contemplated when promulgating the Guidelines and the career offender category.

A. Injury

Ascertaining whether physical injury has occurred may help courts determine whether a defendant constitutes a threat to the community. In *Shannon*, Judge Posner's focus on the risk of physical injury centered on the potential for impregnation or the spread of sexually transmitted diseases.[50] Posner found that the medical complications of pregnancy and the pain of childbirth are forms of physical injury.

> A thirteen year old is unlikely to have a full appreciation of the disease and fertility risks of intercourse, an accurate knowledge of contraceptive and disease-preventive measures, and the maturity to make a rational comparison of the costs and benefits of premarital intercourse. . . . Furthermore, a very young girl who becomes pregnant is quite likely not to take good care of herself and her fetus, and so the pregnancy will be more dangerous to both than if she were older.[51]

---

[50] 110 F3d 382 (7th Cir 1997).

[51] Id at 387–88. This focus on the physical consequences of teen pregnancy raises the point that same-sex statutory rape or intercourse between an older woman and a boy does

Even if Judge Posner's assessment of physical harm is correct, judges cannot assume that all statutory rape results in teen pregnancy or venereal disease.[52] If either Shannon or the girl had successfully used a means of birth control and she had not become pregnant or contracted a sexually transmitted disease, this sexual act may not have constituted a crime of violence under Posner's analysis. In order to ascertain whether this injury occurred, the court must look to the facts of the case, rather than merely at the indictment.

One could argue that for a sex act to constitute a crime of violence under the Guidelines, it need only pose a slight risk of pregnancy or disease; the girl need not actually get pregnant, infected, or even substantially risk either outcome. However, precautions before sex may appreciably cut down these risks.[53] True, few teens use contraceptives,[54] and even if they did, accidents sometimes occur.[55] Regardless, the information that a couple used contraception, even if it failed, would indicate that a particular male may not pose a threat to the general public. Those males who attempt to avoid impregnating or infecting their partners may not be as dangerous as men who recklessly engage in unprotected sex with teens, which should mitigate the punishment imposed. Before condemning a defendant for violent crime, courts should consider the facts of each case in order to determine whether the defendant risked injuring the girl.

B. Consent

Judge Posner argued, because of her age, the girl in *Shannon* could not weigh the risks associated with intercourse adequately and therefore could not have consented to sex.[56] Posner may have focused on age to ascertain whether she consented because of the difficulty of defining consent in concrete terms. Consensual sex

---

not involve a similar risk of physical injury: neither of these situations will yield the pregnancy of a minor. The older woman may get pregnant, but she is better able to cope with the consequences of pregnancy according to Posner, and thus is not injured. Of course, sexually transmitted diseases remain a risk in these relationships.

[52] In 1982, 44 percent of America's sixteen-year-old girls were sexually active. Susan Moore and Doreen Rosenthal, *Sexuality in Adolescence* 1 (Routledge 1993). According to current estimates, 60 percent of unmarried eighteen-year-olds are sexually active, with younger girls active in lower percentages. Id at 2. In contrast, only one out of ten women aged 15–19 becomes pregnant each year in the United States. Id at 145.

[53] See Peter Bromwich and Tony Parsons, *Contraception: The Facts* 20 (Oxford 2d ed 1990).

[54] Moore and Rosenthal, *Sexuality in Adolescence* at 16.

[55] Bromwich and Parsons, *Contraception* at 139.

[56] 110 F3d 382, 387 (7th Cir 1997).

implies a lack of physical force.[57] By definition, statutory rape does not include the element of force included in most rape laws.[58] In contrast to rape or sexual assault, both parties ostensibly consent to an act of statutory rape.[59]

However, when a girl is particularly young, as was the case in *Shannon*, absence of force may not equal consent.[60] In *Shannon*, Posner held that thirteen-year-old girls cannot rationally consent because of their immaturity.[61] Adolescents may make decisions based on factors such as status, popularity, or the search for sexual experience.[62] Sexual experimentation may also

---

[57] Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 Va J Soc Pol & L 287, 306 (1997).

[58] See, for example, Ala Code §§ 13A-6-61 (1994) ("A male commits the crime of rape in the first degree if: (1) He engages in sexual intercourse with a female by forcible compulsion; or (2) He engages in sexual intercourse with a female who is incapable of consent by reason of being physically helpless or mentally incapacitated"); Idaho Code §§ 18-6101(2)(3) (1997)

> ("Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis accomplished with a female . . .[w]here she is incapable, through any unsoundness of mind, whether temporary or permanent, of giving legal consent or where] she resists but her resistance is overcome by force or violence.")

In contrast, statutory rape statutes do not include this element of force. See Ala Code §§ 13A-6-61(3) (1997) ("A male commits the crime of rape in the first degree if . . . he, being 16 years or older, engages in sexual intercourse with a female who is less than 12 years old"); Idaho Code §18-6101(1) (Rape occurs "[w]here the female is under the age of eighteen (18) years"). For a discussion of the difference between force and lack of consent in the context of rape, see Richard A. Posner and Kathryn B. Silbaugh, *Guide to America's Sex Laws* 6–7 (Chicago 1996).

[59] A court looking back at prior convictions for statutory rape will not, upon finding that consent did not occur, redefine the sexual act as rape even though statutory rape implies that consent occurred. Thus, even though the Seventh Circuit found that the girl in *Shannon* could not have consented to sex with the defendant due to her age, the court did not consider the defendant's past act a rape.

[60] For a discussion of the vague distinction between force and nonconsent in the context of rape law, see Donald Dripps, *Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent*, 92 Colum L Rev 1780 (1992) (arguing that legislatures should replace rape law with a variety of statutory offenses that would more clearly define criminal liability for conduct aimed at causing other individuals to engage in sexual acts). See also Kitrosser, 4 Va J Soc Pol & L at 307–10 (noting that only eight jurisdictions have defined consent and arguing against judicial discretion to imply consent from non-resistance to force).

[61] 110 F3d at 387–88 (7th Cir 1997).

[62] Sharon Thompson, *Going All the Way* 17–78 (Hill and Wang 1995). Adolescents are a little-studied group, at least in terms of their social and sexual development. Thompson compiled hundreds of interviews in which teenage girls discuss their experiences with sex. Using these interviews, Thompson explores the adolescent girl's search for popularity, status, experience, and love through sexual experience.

In particular, Thompson's book devotes a chapter to adolescent girls pursuing older men with whom to have sex. Id at 215–44. These girls are looking for experienced teachers with whom to lose their virginity, as well as long-term partners who are more worldly than the girls' peers. Id at 219–21. Whether they have one-night stands or long-term

arise from a girl's wish to gain independence from her parents and begin the process of assuming adult roles.[63] Courts to whom these motivating factors seem unimportant may question the legitimacy of her consent:

> [A] decision as to what conduct constitutes consent in any particular context may mask value judgments implicit in the choice of definition. A determination of sexual consent may, for example, serve as a proxy for moral judgments about the behavior of the parties or as a shorthand method for classifying certain forms of sexual behavior as normal.[64]

Therefore, arguing that a girl's lack of maturity renders her consent to sex illegitimate may make a moral judgment about the reasons the girl decides to have sex. As Kristin Luker argues, many people have moral objections to the idea of "casual" sex, yet regard adolescents as too young to enter serious, long-term sexual relationships focused on marriage and settling down.[65] The short-term sexual relationships Luker considers appropriate for teenagers — sex for pleasure, not procreation — "run counter to the basic values espoused by many adults."[66] Thus, if a teen's relationship rests on short-term goals and pursuit of pleasure, adults regard her consent to sex as illegitimate.

Larger social factors may influence a girl's decision to have sex, including family dynamics, or lack of education or prospects.[67] She may seek emotional fulfillment through sex by convincing herself that she is in love,[68] or by having a baby.[69] The defendant who has sex with the girl affected by these pressures is not culpable; he is merely passively opportunistic, in the right place at the right time. Indeed, Sharon Thompson's interviews reveal that many girls play the aggressor in early sexual relationships, whether they are targeting members of their peer

---

relationships with these men, the girls come away with heightened self esteem and, in many cases, knowledge about the risks of unprotected sex that they might not have learned from their inexperienced male peers. Id at 242–43.

[63] Kitrosser, 4 Va J Soc Pol & L at 323 (cited in note 57).

[64] Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S Cal L Rev 777, 795 (1988).

[65] Kristin Luker, *Dubious Conceptions: The Politics of Teenage Pregnancy* 91 (Harvard 1996).

[66] Id.

[67] Moore and Rosenthal, *Sexuality in Adolescence* at 13–15, 62–80 (cited in note 52).

[68] Thompson, *Going all the Way* at 17–46 (cited in note 62).

[69] Luker, *Dubious Conceptions* at 151–54.

group or considerably older men.[70]

True, not all statutory rape defendants will be passive opportunists. The girl may be vulnerable to seduction because she believes sex can provide her with certain benefits.[71] The defendant may falsely promise security, love, or status to induce her to sleep with him. Defendants who fraudulently induce their girlfriends to have sex with them are certainly reprehensible at some level. Society may have an interest in keeping these men out of the community. Yet without assessing the facts behind each sexual act, a court cannot ascertain whether the defendant induced the girl to have sex with him, or if it was she who initiated the intercourse.

A factual inquiry into the nature of the relationship might determine the legitimacy of the girl's consent. Proof of contraceptive use could indicate the girl was mature enough to recognize the consequences of premarital sex. If the two individuals had consistently used contraception over the course of a long-term sexual relationship, the male may not be likely to impregnate many girls in the community.

Of course, one could argue that use of contraceptives does not prove mature decisionmaking. Contraceptives do fail.[72] Discounting failure rates may indicate a girl's immaturity. Perhaps a court could evaluate contraceptive use on a sliding scale, compounding risk of failure with age and its relative dangers of pregnancy to ascertain maturity. Under that analysis, many adults might be considered immature. Regardless, courts that choose to discount a girl's ability to make rational decisions based on her age must confront the feminist argument that statutory rape laws repress female sexuality.[73] True, courts may not be com-

---

[70] Thompson, *Going all the Way* at 217 (cited in note 62).

[71] See Elizabeth Rice Allgeier and Betty J. Turner Royster, *New Approaches to Dating and Sexuality*, in Elizabeth Grauerholz and Mary Koralewski, eds, *Sexual Coercion* 133, 135–38 (Lexington 1991) (discussing the roles that power and desire play in adolescent courtship).

[72] See note 55.

[73] See Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J Crim L & Criminol 15, 28–29 (1994). See also Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex L Rev 387 (1984) (examining the tension between statutory rape laws that protect women from oppressive male sexuality while restricting women's sexual freedom, that is, their ability to choose when to have sex). Some feminists argue that statutory rape laws impinge upon a young woman's autonomy because she cannot legally choose when to become sexually active. Historically, statutory rape laws protected the chastity of women, considering their virginity a thing of value requiring protection to increase their chances of marriage. Oberman, 85 J Crim L & Criminol at 24–25. Feminists argue that these laws, which protect a girl's worth as an object, damage her ability to achieve status equal to that of men in modern society. Olsen,

pelled by any argument advocating the autonomy of young girls and the importance of their development as sexual beings. Yet the legislative trend toward gender-neutral statutory rape laws[74] indicates that a woman's legal status is growing in importance relative to a man's.

C. Social Threat

Although historically statutory rape has not been prosecuted at a high rate,[75] Posner's focus on pregnancy may reflect the legal community's growing tendency to treat statutory rape seriously to combat high national teen pregnancy rates.[76] Nationally, 110.8 teens per thousand get pregnant every year.[77] In response to these numbers, states have begun to aggressively enforce laws which ban sex with minors.[78] For instance, in the past two years, California, Delaware, Florida and Georgia have passed new legislation strengthening existing laws prohibiting sex with girls under the age of consent.[79] California has allocated $8.4 million to prosecute adult men who have sex with underage girls, with prosecutors focusing on cases in which pregnancy occurs involving a mother aged fifteen or younger and a father over twenty-one.[80]

While the legislative history of the Guidelines does not mention statutory rape or teenage pregnancy,[81] these recently enacted state laws may indicate legislative response to a societal conception that teenage pregnancy is "dangerous." However, it is not clear that sex causes the type of danger the Guidelines should combat. As Luker points out:

> Although poverty alone is a strong predictor of early childbearing, teenage parents, compared with people who don't

---

63 Tex L Rev at 406.

[74] See Oberman, 85 J Crim L & Criminol at 32 (cited in note 73).

[75] Id at 16.

[76] Indeed, despite his assertion that he would not consider the facts behind Shannon's act, Posner did note the fact that Shannon, who is 17, had fathered five other children, at least one the product of statutory rape. See *Shannon*, 110 F3d 382, 388 (7th Cir 1997).

[77] Luker, *Dubious Conceptions* at 197 (cited in note 65).

[78] Catherine Elton, *Jail Baiting: Statutory Rape's Dubious Comeback*, New Republic 12 (Oct 20, 1997).

[79] Id.

[80] Gwen Daye Richardson, *Girls Without Fathers*, 8 Headway N 6 (Sept 30, 1996).

[81] Comprehensive Crime Control Act of 1984, S Rep No 98-225 at 117, 176 (1984) reprinted in 1984 USSCAN 3300, 3359. The legislative history concentrates on the dangers associated with drug offenses and violent crimes, but does not mention statutory rape or pregnancy as falling into these "dangerous" categories.

> become parents as teens, are much more likely to have many other problems in their lives even before they get pregnant: they are more likely to come from a single-parent family, to have trouble in school, to have been held back a grade, to come from a home that has been broken by divorce or separation, and to live in bad neighborhoods.[82]

Instead of enacting laws that incarcerate the men who get these girls pregnant, legislatures would better serve society by focusing on the problems that make these teens more likely to have unprotected sex.[83]

In addition, programs like California's, which attempt to chill sex between older men and younger women, may not eradicate teenage pregnancy because girls will have sex with boys closer to their own age.[84] In the United States, about 60 percent of unmarried eighteen-year-olds are sexually active, and many began experimenting with sex at an earlier age.[85] At least one state court has described the sexual activity of minors as a "serious problem," meriting a holding that prohibits such activity.[86] However, focusing on relationships between older men and young girls in the attempt to eradicate teen pregnancy is misinformed. The majority of girls having babies are eighteen or nineteen years old, not fifteen.[87] Further, girls who have sex with older men are more likely to use contraceptives than those who have sex with their peers.[88]

No one can deny that poverty and other social ills are linked with teenage pregnancy.[89] Motherhood compromises a girl's edu-

---

[82] Luker, *Dubious Conceptions* at 113 (cited in note 65).

[83] Indeed, if courts and prosecutors cracking down on statutory rape wish to eliminate the problems affiliated with teenage pregnancy, they should not incarcerate statutory rape defendants who have impregnated their partners. While felons do not make the most desirable fathers, at least while out of prison these men can provide for their children. For a discussion of the typical problems faced by single teenage mothers, see Luker, *Dubious Conceptions* at 110 (cited in note 65).

[84] Although girls often do choose older men as their first sexual partners, the average age of girls' sexual partners is nineteen. See Thompson, *Going all the Way* at 217 n 5 (cited in note 62). To an extent, teen girls' sexual partners are fungible. Id at 71.

[85] Kitrosser, 4 VA J Soc Pol & L at 322 (cited in note 57).

[86] *State v J. A. S.*, 686 S2d 1366, 1369 (D Fla 1997).

[87] Luker, *Dubious Conceptions* at 8, 207 n 20 (cited in note 65) (citing data from National Center for Health Statistics, 43(5) *Advance Report of Final Natality Statistics* 33 (1992) (Supp Oct 25, 1994)). See also Elton, *Jail Baiting* at 12 (cited in note 78).

[88] Thompson, *Going all the Way* at 238 (cited in note 62).

[89] Luker, *Dubious Conceptions* at 110 (cited in note 65).

cational options and her chances for success in life.[90] Yet it is not clear that the real solution for decreasing the rate at which teenage girls get pregnant is a broad attack on the men and boys who have sex with them.

Under the Guidelines, a pertinent conviction for statutory rape could have occurred years prior to the felony for which the defendant faces sentencing. Unless the defendant's record shows a pattern of statutory rape or a string of illegitimate children with teenage mothers, punishing him more severely will do little to protect society. In order to correctly assess which convicted statutory rapists pose a legitimate threat to society, the court should consider all of the facts underlying the statutory rape before classifying it as a crime of violence. The court should investigate whether the defendant and the girl were in a long-term monogamous relationship or whether the defendant was having random sex with many different girls at the time of his conviction. Courts should weigh evidence regarding either party's use of contraceptives, including whether the method used protects against sexually transmitted disease. Ultimately, the court's determination of a particular defendant's dangerousness rests on a myriad of considerations that it should examine each time it addresses a statutory rape case.

CONCLUSION

Congress promulgated the Sentencing Guidelines to protect society from the recidivism of convicted felons. Under the Guidelines, courts must determine whether a defendant deserves enhanced punishment because his prior conviction for statutory rape indicates that he poses a threat to society. While some statutory rape does threaten societal well-being, courts cannot determine whether a defendant poses any danger without fully examining all of the facts underlying his prior conviction. Thus, in order to avoid gratuitously punishing defendants, courts should use a fact-based, rather than a categorical or intermediate, approach to determine whether statutory rape constitutes a crime of violence.

---

[90] Id at 111.