NOTES

NOW SIXTEEN COULD GET YOU LIFE: STATUTORY RAPE, MEANINGFUL CONSENT, AND THE IMPLICATIONS FOR FEDERAL SENTENCE ENHANCEMENT

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John White is a forty-three-year-old former appliance store owner from White Plains, New York.[1] He is married and has three children. Upon suffering financial losses in 1996, White became involved with a friend's "business," selling narcotics in New York and New Jersey. After arrest, indictment, and federal conviction on a single count of possession with intent to distribute, White faced a harsh sentence—life imprisonment with no parole. White's criminal record to that date consisted of two 1974 convictions for statutory rape,[2]

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1 This story is based on true events. See Mirta Ojito, Old Crime Returns to Haunt an Immigrant; Facing Deportation, Dominican May Become Test Case for New Law, N.Y. Times, Oct. 15, 1997, at B1 (reporting story of legal alien confined and facing deportation after Immigration and Naturalization Service discovery of two 1974 statutory rape convictions).

2 Statutory rape laws historically prohibited sexual conduct between persons above and below a codified "age of consent." Today, they are generally strict liability crimes, although some courts have allowed a mistake of age defense. See, e.g., People v. Hernandez, 393 P.2d 673, 677 (Cal. 1964) (allowing mistake of age defense to statutory rape charge where defendant held "reasonable belief" that female complainant had reached age of consent, and where complainant apparently affirmatively misrepresented her age to defendant).

Various jurisdictions have asserted a wide variety of state interests in promulgating statutory rape laws over the years. Most involve protecting young women (and their parents and future husbands) from "white slavery," "sexual impurity," teenage pregnancy, and sexually transmitted disease. See, e.g., Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 474 (1981) (upholding California's gender-specific statutory rape law on basis of substantial state interest in preventing teenage pregnancy); Mary E. Odem, Delinquent Daughters: Protecting and Policing Adolescent Sexuality in the United States 1885-1920, at 25 (1995) (discussing various state interests advanced by age of consent laws). Despite *Michael M.*, most states now have gender-neutral statutory rape laws, and often consider statutory rape as a degree of sexual assault. See, e.g., Haw. Rev. Stat. Ann. § 707-730 (Michie 1997) ("A person commits the offense of sexual assault in the first degree if . . . [t]he person knowingly subjects to sexual penetration another person who is less than fourteen years old."). But cf. N.Y. Penal Law § 130.20 (McKinney 1998) ("A person is guilty of sexual misconduct when . . . [b]eing a male, he engages in sexual intercourse with a female

charges based on sexual activity between the then-nineteen-year-old White and his fifteen-year-old girlfriend. After serving time in prison for those convictions, White lived quietly, working and raising a family, with no further involvement in criminal conduct until 1996. The 1974 convictions, however, classified White as a recidivist violent offender and qualified him for life imprisonment under the Violent Crime Control and Law Enforcement Act of 1994[3] (VCCLEA). Following VCCLEA, White's sentencing judge had no choice but to send him to prison for the rest of his life.[4]

John White received his life sentence because the court believed his 1974 convictions to be "crimes of violence," a federal law term of art[5] meaning crimes involving the use of force or risk of serious injury to other persons or property.[6] Since White's two convictions arguably fit the statutory definition of a "crime of violence," federal law enforcement agencies targeted him as a recidivist violent criminal. As a recidivist, he received a more severe punishment than a first-time offender would for the same offense.[7] While legislators have made strong arguments that the federal government has an interest in con-

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without her consent."); id. § 130.05(3) ("A person is deemed incapable of consent when he or she is . . . less than seventeen years old . . . ."). Gender-neutral statutes acknowledge that male minors are also at risk for some harms associated with sexual conduct. See, e.g., Alice Susan Andre-Clark, Note, Whither Statutory Rape Laws: Of *Michael M.*, The Fourteenth Amendment, and Protecting Women from Sexual Aggression, 65 S. Cal. L. Rev. 1933, 1959 (1992) (discussing how risks of sexually transmitted diseases, psychological harm, and teenage parenthood exist for both male and female minors).

[3] 18 U.S.C.A. § 3559 (West Supp. 1998) (punishing with life imprisonment criminals with three predicate convictions for "crimes of violence").

[4] See 18 U.S.C.A. § 3559(c) (West Supp. 1998) ("[A] person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if . . . the person has been convicted . . . of 2 or more serious violent felonies."). "Serious violent felonies" here carries the same statutory definition as "crime of violence" does elsewhere. See infra notes 34-35 and accompanying text.

[5] See, e.g., United States v. Poff, 926 F.2d 588, 593 (7th Cir. 1991) (en banc) (Easterbrook, J., dissenting) (describing federal statutory "crime of violence" as "term of art").

[6] This Note will discuss the "crime of violence" definitions found in the Armed Career Criminal Act of 1984 §§ 1801-03, 18 U.S.C.A. § 924(c) (West Supp. 1997), the Violent Crime Control and Law Enforcement Act of 1994 § 70001(2), 18 U.S.C.A. § 3559(c) (West Supp. 1998), and the U.S. Sentencing Guidelines Manual § 4B.1-.2 (1997). See infra notes 20-35 and accompanying text.

[7] See United States Sentencing Guidelines Ch.4, Pt.A Introductory Commentary at 283 (1998) [hereinafter U.S.S.G.]:

> A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered.

ferring recidivist, or "career offender,"[8] status upon persons with multiple criminal convictions,[9] the government's interest in including statutory rape convictions as "crimes of violence" is far more debatable.[10]

In 1997, the Seventh Circuit Court of Appeals, sitting en banc, articulated the most thorough judicial decision yet regarding whether statutory rape convictions should be considered crimes of violence for the purpose of enhancing sentences for subsequent federal criminal convictions. In *United States v. Shannon*,[11] Chief Judge Richard Posner concluded that a seventeen-year-old male defendant's conviction under a Wisconsin sexual assault statute for engaging in vaginal/genital intercourse with a thirteen-year-old female was a per se "crime of violence."[12] This determination meant that the defendant was considered a career offender under the United States Sentencing Guidelines, and thus added years to his federal sentence.[13] Judge Posner reached this holding, however, based on a theory that might allow convictions for sexual conduct between adults and adolescents older than the *Shannon* complainant to be judged nonviolent crimes.[14] This

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[8] See U.S.S.G. § 4B1.1:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

See infra notes 29-33 and accompanying text for further discussion of the Guidelines.

[9] See Armed Career Criminal Act Amendments: Hearing Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 99th Cong. 19 (1986) [hereinafter ACCA Hearing] (statement of Sen. Specter) ("I have long been convinced that if we could put 200,000 career criminals in jail in this country, we could reduce violent crime by 50 percent.").

[10] See Ojito, supra note 1, at B2 (reporting how Congresspersons Nydia M. Velasquez and Major R. Owens wrote letters to INS on behalf of alien facing deportation based on statutory rape convictions); infra Part II.

[11] 110 F.3d 382 (7th Cir.) (en banc), cert. denied, 118 S. Ct. 223 (1997).

[12] See id. at 384 (citing Wis. Stat. Ann. § 948.02(2) (West 1996)).

[13] See id. at 389 (stating that, depending on defendant's criminal history, difference could be between sentencing range of 27 to 33 months and range of 51 to 63 months).

[14] See id. at 387 (holding that sexual intercourse with *13-year-old* female minor creates per se risk of serious injury, and hence is per se "crime of violence"). For a discussion of how the federal "crime of violence" definition could allow this result, see infra notes 75-85.

Judge Posner had previously expressed the opinion that much regulation of adolescent sexuality should be reformed. See, e.g., Richard A. Posner, Sex and Reason 403 (1992):

> It is curious to reflect that if the age of consent for homosexual relations were lowered to 15, which is the age of consent for girls in Sweden, most pederasty would be legalized. This might be a sensible reform .... "Pederasty" has an awful sound in American ears; the sense of revulsion that the practice inspires, in all but the pederasts themselves, lies deeper than any reason that could be offered. Most Americans would if asked pronounce it a far worse crime than

opinion brings the Seventh Circuit into conflict with a number of other federal appellate courts which have held that all statutory rape convictions, regardless of the complainant's age or the specific sexual contact proscribed, are per se crimes of violence and therefore sentence enhancing. [15]

Judge Posner's reasoning, as well as that of those courts finding statutory rape a categorical "crime of violence," is flawed. Posner based his argument on a model of adolescent sexuality that makes presumptions based on chronological age, not on the ability of an adolescent to make meaningful choices about sexual activity. Courts following this model will reach inaccurate results in some cases, wrongly adding years to federal sentences. This Note argues that statutory rape is a "crime of violence" when there is any nonconsensual sexual contact, and that only meaningful consent[16] can defeat this presumption of violence. Noting both various theoretical critiques of consent and recent empirical data on adolescent sexuality, this Note will also argue that while not all adolescents are capable of giving meaningful consent to sexual activity with older persons, many of them are. Thus courts should inquire into whether consent was given in a particular case when deciding whether a statutory rape conviction should be considered a federal "crime of violence."[17] Getting this determination

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marital rape. No one could convince them that it probably is less harmful to its victims.

Whether one agrees with Posner or not, his book has greatly influenced legal analysis of sexual conduct and regulation. A recent LEXIS search found 275 references to the book in law review articles since its publication. Search of LEXIS, LAWREV Library, ALLREV File (Aug. 7, 1998).

[15] See, e.g., United States v. Velazquez-Overa, 100 F.3d 418 (5th Cir. 1996) (holding that statutory rape is a per se "crime of violence"); United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993) (same); United States v. Bauer, 990 F.2d 373 (8th Cir. 1993) (same); United States v. Rodriguez, 979 F.2d 138 (8th Cir. 1992) (same). But see United States v. Meader, 118 F.3d 876 (1st Cir. 1997) (following *Shannon*).

[16] See Heidi Kitrosser, Meaningful Consent: Toward a New Generation of Statutory Rape Laws, 4 Va. J. Soc. Pol'y & L. 287, 291 (1997) (discussing meaningful consent in terms of autonomy and "a [young] woman's . . . right to say 'no'"). Determining whether adult/minor sexual conduct involved meaningful consent by *both* parties requires an inquiry into the circumstances of the conduct. See infra Part III.A.

[17] This Note will not directly treat the validity of statutory rape laws. For general criticism of statutory rape laws, see, e.g., Kitrosser, supra note 16, at 289 ("[I]t is far too simplistic to suggest that adolescent girls are incapable of making consensual sexual choices in all instances."); Frances Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 Tex. L. Rev. 387 (1984) (critiquing statutory rape laws as paternalistic protection of young women).

States have made many arguments for the necessity of such laws to protect minors from various injuries, such as teenage sexually transmitted disease and pregnancy. See, e.g., James Dao, New AIDS Guide Approved by State, Angering Bishops, N.Y. Times, June 10, 1995, at 25 (reporting on New York State Department of Education's adoption of new H.I.V. prevention guide); Martin Tolchin, More States Trying to Curb Teen-Age

right is all the more important now, as states are initiating new efforts to expand and enforce statutory rape laws.[18]

Part I of this Note will look at the "crime of violence" definition used in various federal sentence enhancement statutes and at the two approaches the federal courts have taken to deciding whether statutory rape convictions constitute "crimes of violence." Part II will deconstruct the term "crime of violence" in this context by examining how law and society have come to understand the "violence" of sexual assault and how conceptions of adolescents' ability to consent to a variety of social interactions have changed. Part III will develop a model for courts to use in identifying adolescent "consent" and apply this model to the facts of some of the cases treating this issue. This Note will argue that statutory rape should not be considered a per se "crime of violence." Rather, in fairness to defendants facing enhanced sentences, and in recognition of the sexual autonomy of adolescents, courts should evaluate the presence or absence of meaningful consent when making many "crime of violence" determinations in statutory rape cases.

I
STATUTORY RAPE AS A "CRIME OF VIOLENCE" IN THE FEDERAL COURTS

While classification of statutory rape as a "crime of violence" is a relatively recent phenomenon, construction of the phrase in the

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Pregnancies, N.Y. Times, June 17, 1990, at 24 (reporting that two-thirds of states are making efforts to reduce incidence of teenage pregnancies). Sexual activity between adults and preadolescents presents special concerns; many states have criminal statutes with heightened penalties specifically targeting the perpetrators of such abuse. See, e.g., N.Y. Penal Law § 130.65 (McKinney 1998) (defining sexual abuse in first degree as class D felony: "A person is guilty of sexual abuse in the first degree when he subjects another person to sexual contact . . . [w]hen the other person is less than eleven years old.").

[18] For example, Georgia has raised its age of consent from 14 to 16 and increased penalties for adults aged 21 and older convicted of statutory rape. See Ga. Code Ann. § 16-6-3(a) (1996). Florida has amended its statutory rape law to prohibit sexual intercourse between a person aged 24 or older and a minor aged 16 or 17. See Fla. Stat. Ann. § 794.05(1) (West Supp. 1998); see also Terry Pristin, New Jersey Daily Briefing: Higher Consent Age Sought, N.Y. Times (N.J. edition), May 31, 1996, at B1, available in LEXIS, News Library, NYT File (reporting introduction of New Jersey legislation raising age of consent from 16 to 18). For commentary on renewed state efforts to strengthen and enforce statutory rape laws, see Patricia Donovan, Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?, Family Planning Perspectives, Jan.-Feb. 1997, at 30.

Nationally, the new federal welfare law urges that "[s]tates and local jurisdictions . . . aggressively enforce statutory rape laws" and requires state welfare plans to develop training programs for counselors, educators, and law enforcement officers focusing on statutory rape. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 906(a), 42 U.S.C.A. § 14016(a) (West Supp. 1998).

broader sense has been an ongoing process over the last fifteen years. Examining this history reveals why courts have expanded the definition to include statutory rape convictions.

A. *The Federal "Crime of Violence" Definition and Its Use In Sentence Enhancement*

Three different federal statutes currently provide for sentence enhancement when a defendant's record includes one or more "crimes of violence." The "crime of violence" definition has its genesis in 1986 amendments to the Armed Career Criminal Act of 1984[19] (ACCA). In its original form, ACCA made carrying a firearm after being convicted of three or more robberies or burglaries a federal offense punishable by a mandatory minimum of fifteen years imprisonment.[20] ACCA's express purpose was to deter violent crimes committed by recidivist criminals.[21] Because it only included robberies and burglaries as qualifying predicate offenses, however, the original formulation resulted in few incarcerations of recidivists.[22] In 1986, various members of Congress made calls to expand ACCA's scope to include other predicate "crime of violence" convictions.[23] Although legislators differed over how the definition should change,[24] eventually Congress

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19 See Career Criminal Amendments Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-39 (1986) (codified as amended at 18 U.S.C. § 924(e) (1994)).

20 See 18 U.S.C. § 924(e) (1994).

21 See, e.g., H.R. Rep. No. 98-1073, at 1 (1984) (discussing purpose of ACCA of 1984: "This bill is designed to increase the participation of the Federal law enforcement system in efforts to curb armed, habitual (career) criminals.").

22 See, e.g., ACCA Hearing, supra note 9, at 9 (testimony of Deputy Assistant Attorney General James Knapp) (reporting that as of 1986, only 14 people had been imprisoned under ACCA).

23 See id. at 1 (statement of Sen. Specter) ("The time seems ripe . . . to expand the armed career criminal bill to include other offenses . . . ."); id. at 7 (statement of Rep. Wyden) ("[W]e must constantly look for ways to come to the aid of hard-pressed state and local law enforcement officials who . . . are clearly losing the war against drugs and violent crime. . . . The Armed Career Criminal Act Amendments would add one more arrow to the law enforcement quiver.").

24 Senator Specter and Representative Wyden introduced bills in the Senate and the House respectively that would have omitted mention of burglaries or robberies from the original version of ACCA, substituting the phrase "crime of violence," defined as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or any felony that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," thus expanding ACCA's scope. See S. 2312, 99th Cong. (1986); H.R. 4639, 99th Cong. (1986). In opposition, Representatives Hughes and McCollum introduced a bill that would also have changed ACCA's scope, omitting mention of burglaries or robberies while substituting the phrase "violent felony," meaning only state and federal felonies that have as an element the "use, attempted use, or threatened use of physical force against the person of another." H.R. 4768, 99th Cong. (1986).

enacted a new version of the "crime of violence" definition.[25] 18 U.S.C. § 924(e) defines a "crime of violence" as any felony that "has as an element the use, attempted use, or threatened use of force against the person of another," or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[26] The definition thus presents three categories of potential federal "crimes of violence": enumerated crimes from the list above; crimes that include a force element in their statutory definition; and, under the "otherwise" category, crimes that inherently involve a serious risk of physical injury.[27]

The amended ACCA "crime of violence" definition has been adopted by other federal sentence enhancement initiatives.[28] The United States Sentencing Commission, established in 1984,[29] counted among its mandates the deterrence of recidivist criminal acts.[30] After ACCA's amendment in 1986, the Commission amended the United States Sentencing Guidelines to include the new "crime of violence" definition as part of a determination of career offender status.[31] The Commission thought the new Guidelines definition both more specific and more justifiable as a replication of the exact language approved

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[25] See Career Criminal Amendments Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-39 (1986) (codified as amended at 18 U.S.C. § 924(e) (1994)).

[26] 18 U.S.C. § 924(e) (1994). Judge Posner has noted that the phrase "potential risk" appears to be a redundancy. See United States v. Shannon, 110 F.3d 382, 385 (7th Cir.) (en banc), cert. denied, 118 S. Ct. 223 (1997).

[27] See 18 U.S.C. § 924(e).

[28] See supra note 7. The federal "crime of violence" definition has also been used in statutes with civil remedies for victims of violent crimes. See, e.g., Violence Against Women Act of 1994, 42 U.S.C. § 13981(d)(2) (1994).

[29] See Comprehensive Crime Control Act (CCCA) of 1984, Pub. L. No. 98-473, 98 Stat. 2017 (codified as amended at scattered sections of 18 U.S.C.) (creating United States Sentencing Commission).

[30] See Comprehensive Crime Control Act of 1983: Hearing Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong. 1 (1983) (statement of Sen. Kennedy) ("No other area of Federal criminal law is in greater need of immediate reform than sentencing. . . . [S]ociety is the loser whenever violent defendants are returned to the streets to repeat their crimes and renew their violent ways."); see also 28 U.S.C. § 991(b) (1994) (stating purposes of United States Sentencing Commission); Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 Hofstra L. Rev. 1, 4 (1988) (discussing legislative intent behind establishment of federal sentencing commission).

[31] The Guidelines originally took their definition of "crime of violence" from an amendment to the Comprehensive Crime Control Act which defined this term of art for the entire federal criminal code. See 18 U.S.C. § 16 (1994) (defining "crime of violence" as either "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "any . . . offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property . . . may be used in the course of committing the offense.").

by Congress in 18 U.S.C. § 924(e), thereby making the definition more acceptable to Congress and to federal sentencing judges.[32]

More recently, ACCA's "crime of violence" definition was adopted by the authors of the Violent Crime Control and Law Enforcement Act of 1994[33] (VCCLEA). VCCLEA is the federal version of "three strikes" laws, those statutes that sentence defendants with three predicate convictions for crimes of violence to mandatory life imprisonment.[34] VCCLEA represents a bolder attempt than either ACCA or the Sentencing Guidelines to deter defendants from committing multiple violent crimes. Because VCCLEA makes a life sentence the mandatory minimum punishment in these cases, however, if a court errs in making a "crime of violence" determination, the defendant suffers a much greater loss of liberty.

B. Conflicting Rules for Making "Crime of Violence" Determinations

Federal courts have generally not inquired into the conduct underlying a predicate conviction when making "crime of violence" determinations. They have instead examined the statutory definition of the crime or, on occasion, statements contained in the information or indictment.[35] In so doing, courts have followed the Supreme Court's only holding on "crime of violence" determinations, *United States v.*

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[32] See United States Sentencing Commission, Career Offender Work Group Report 24 (1987):

> The [work] group's general feeling is that because the penalties imposed by this guideline are so severe, linking the definitions of predicate crimes to those already approved, defined and joined together by Congress for the heavy sanction of § 924(e) would facilitate both the acceptance of the guideline and its proper application.

[33] See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 3559 (1994)). The VCCLEA "serious violent felony" definition follows 18 U.S.C. § 16 in explicitly including the risk of force inherent in the crime rather than the inherent risk of serious injury. See 18 U.S.C. § 3559(c)(2)(F)(ii) (1994).

[34] See, e.g., Cal. Penal Code § 667(e)(2)(A) (West Supp. 1998) (mandating "indeterminate term of life imprisonment" for third-time felons); Tex. Penal Code Ann. § 12.42 (West 1994) (stating that, if defendant's record contains two prior felonies, third conviction will be punished by life imprisonment). Forty-seven states have enacted some form of "three-strikes" law. See Meredith McClain, Note, "Three Strikes and You're Out": The Solution to the Repeat Offender Problem?, 20 Seton Hall Legis. J. 97, 100 n.15 (1996) (listing states that have enacted "three strikes" laws).

[35] See, e.g., United States v. Shannon, 110 F.3d 382, 384 (7th Cir.) (en banc), cert. denied, 118 S. Ct. 223 (1997) (making "crime of violence" determination based on descriptive statements from information for charged crime). In *Shannon*, the defendant was previously convicted in Wisconsin, a jurisdiction which does not submit criminal charges to a grand jury for evaluation and subsequent indictment, but rather issues charges through informations.

Taylor.[36] In *Taylor*, the Court held that in making "crime of violence" determinations, federal courts should not inquire into the underlying charged conduct, but instead look only to the generic definitions of the offenses underlying the convictions—a "categorical" approach.[37] The Court reasoned that an inquiry into the circumstances of the criminal conduct would be too great a drain on judicial resources and would defeat Congress's intent to standardize sentencing for career criminals.[38]

Despite the *Taylor* Court's attempt to clarify the federal "crime of violence" determination, judges continue to struggle with the question of whether certain offenses are crimes of violence and thus sentence-enhancing. The courts have faced the issue with defendants whose past crimes include burglary of structures that are not dwellings,[39] attempted burglaries,[40] threatened acts of violence,[41] felony drunk driving,[42] escape from federal custody,[43] and, most important here, statutory rape.[44]

Courts deciding whether statutory rape convictions should be considered crimes of violence have faced a wide variety of underlying state statutes. These statutes differ by name, relevant ages of both defendant and complainant, and type of conduct proscribed.[45] The

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36 495 U.S. 575 (1990) (reviewing 864 F.2d 625 (8th Cir. 1989), which followed a Missouri state statute, Mo. Rev. Stat. 569.170 (1979), and defined second degree burglary as a "crime of violence" under ACCA).

37 See *Taylor*, 495 U.S. at 588.

38 See id. at 601.

39 See, e.g., United States v. Hascall, 76 F.3d 902, 906 (8th Cir. 1996) (holding that burglaries of commercial properties qualify as predicate crimes of violence for sentence-enhancement purposes).

40 See, e.g., United States v. Weekley, 24 F.3d 1125, 1127 (9th Cir. 1994) (holding that trial court did not commit reversible error in refusing to count attempted burglary as predicate "crime of violence").

41 See, e.g., United States v. Poff, 926 F.2d 588, 593 (7th Cir. 1991) (en banc) (holding that writing threatening letters to public officials is "crime of violence").

42 See, e.g., United States v. Rutherford, 54 F.3d 370, 377 (7th Cir. 1995) (upholding conviction for vehicular assault while intoxicated as "crime of violence").

43 See, e.g., United States v. Dickerson, 77 F.3d 774, 777 (4th Cir. 1996) (upholding conviction for felony attempted escape from custody as "crime of violence" since it involves conduct that presents serious risk of physical injury to others).

44 See, e.g., United States v. Shannon, 110 F.3d 382, 387 (7th Cir.) (en banc), cert. denied, 118 S. Ct. 223 (1997) (upholding conviction for participating in sexual intercourse with thirteen-year-old female complainant as "crime of violence").

45 Compare, e.g., Ariz. Rev. Stat. Ann. § 13-1405 (West 1997) (identifying felony for adult to engage in sexual intercourse or oral sexual contact with any person who is under eighteen), with S.D. Codified Laws § 22-22-1 (Michie 1997) (stating that it is felony for adult to engage in sexual penetration with person under 16 if offender is at least 3 years older than victim, or to engage in sexual penetration with child under 10). A survey of state statutory rape laws shows that state ages of consent range from 10 to 18; that codified age differentials between defendants and complainants (relevant as a circumstance of some

federal appellate courts have developed two approaches to treating these differing statutes in the "crime of violence" context. Some courts have followed the lead of the Eighth Circuit in *United States v. Rodriguez*[46] and *United States v. Bauer*,[47] proposing a categorical approach to the issue: *All* prior statutory rape convictions are crimes that "involve[ ] conduct that presents a serious potential risk of physical injury to another,"[48] and therefore are crimes of violence. Other courts, including the Ninth Circuit in *United States v. Wood*[49] and the Seventh Circuit in *United States v. Shannon*,[50] have argued for a more fact-specific approach, holding that although some statutory rape crimes may be crimes of violence, it is impossible to declare that all such crimes are per se violent crimes.

1. *The* Rodriguez-Bauer *Per Se Approach to Determining Whether Statutory Rape is a "Crime of Violence"*

In *Rodriguez* and *Bauer*, the Eighth Circuit analyzed the original Sentencing Guidelines "crime of violence" definition, which emphasized inherent risk of *force*[51] and the amended definition, which follows ACCA in emphasizing inherent risk of *serious injury*.[52] *Rodriguez* decided whether punishment for illegal reentry to the United States by a previously deported alien should be enhanced if the defendant was deported after conviction for a statutory rape crime.[53] The government argued that Rodriguez's prior Iowa conviction for lascivious acts with a child, statutorily defined as "fondl[ing] or touch[ing] the pubes or genitals of a child,"[54] was a sentence-

sexual assault crimes) range from 2 to 10 years; and that statutory language signifying sexual conduct includes "sexual intercourse," "sexual contact," "sexual penetration," "lewd and lascivious conduct," "indecent liberties," and "illicit connection." For an overview of state age of consent laws, see Richard A. Posner & Katherine B. Silbaugh, A Guide to America's Sex Laws 44 (1996).

46 979 F.2d 138 (8th Cir. 1992)

47 990 F.2d 373 (8th Cir. 1993).

48 18 U.S.C. § 924(e)(2)(B)(ii) (1994).

49 52 F.3d 272 (9th Cir. 1995).

50 110 F.3d 382 (7th Cir.) (en banc), cert. denied, 118 S. Ct. 223 (1997).

51 See U.S. Sentencing Guidelines Manual § 4B1.2 commentary (1987) ("'Crime of violence' is defined in 18 U.S.C. § 16 to mean an offense . . . that is a felony and that by its nature involves a substantial risk that physical force against the person or property of another may be used in committing the offense.").

52 See U.S.S.G. § 4B1.2 (1997) ("The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . involves conduct that presents a serious potential risk of physical injury to another.").

53 See *Rodriguez*, 979 F.2d at 139. The court was thus construing whether Rodriguez's conviction qualified for increased punishment under U.S. Sentencing Guidelines Manual § 2L1.2 (1997), which uses the same "crime of violence" definition as does § 4B1.2.

54 Iowa Code Ann. § 709.8 (West 1997). The code defines "child" as any person under the age of 14. See id. § 702.5.

enhancing "crime of violence."[55] The court agreed, holding that the trial court was correct in determining that *any* such conduct with a minor inherently involved a substantial risk that physical force against the person could be used in the course of committing the offense;[56] whether the conduct actually caused harm was irrelevant.[57] The conduct thus satisfied the "crime of violence" definition.

A few months later, the same court in *United States v. Bauer*[58] extended this reasoning to a decision involving career offender enhancement under Sentencing Guidelines § 4B1.1.[59] Bauer's prior conviction was under Iowa's statutory rape law, which punished by imprisonment for not less than five years those who "carnally know and abuse any female child under the age of sixteen years."[60] The court followed language in *Rodriguez* that stated: "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."[61] This reasoning, conflating the potential risk of injury with the potential risk of force, allowed the court to hold that Bauer's conviction, as well as all other statutory rape convictions, fell under the "otherwise" clause of § 4B1.2(1)(ii), which classifies offenses that present a serious risk of physical injury as crimes of violence.[62]

Other circuits have followed the Eighth Circuit in determining that statutory rape crimes are per se sentence-enhancing crimes of violence. In *United States v. Velazquez-Overa*,[63] the Fifth Circuit followed the reasoning in *Rodriguez* and *Bauer* in determining that a Texas conviction for "sexual contact"[64] with a child under the age of seventeen was a "crime of violence" under Sentencing Guidelines § 2L1.2(a).[65] Thus, such a conviction could enhance punishment for a

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55 See *Rodriguez*, 979 F.2d at 140.

56 See id.

57 See id. at 141.

58 990 F.2d 373 (8th Cir. 1993) (per curiam).

59 See supra note 8.

60 See Iowa Code Ann. § 698.1 (1977) (repealed 1978). The current version of this statute, Iowa Code Ann. § 709.4 (West Supp. 1997), is gender-neutral. For a discussion of the development of gender-neutral statutory rape laws, see supra note 2.

61 *Rodriguez*, 979 F.2d at 141.

62 The court noted that the "crime of violence" definitions to be satisfied were different in *Rodriguez* and *Bauer*, but stated that "any distinction is without consequence to our decision." *Bauer*, 990 F.2d at 374.

63 100 F.3d 418 (5th Cir. 1996).

64 Tex. Penal Code Ann. § 21.11(a)(1) (West 1997). "Sexual contact" here was defined as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." Tex. Penal Code Ann. § 21.01(2) (West 1997).

65 See U.S. Sentencing Guidelines Manual § 2L1.2 (1996):

subsequent criminal conviction.[66] The *Velazquez-Overa* court agreed that such contact always involves a risk of the use of force:

> We think it obvious that such crimes typically occur in close quarters, and are generally perpetrated by an adult upon a victim who is not only smaller, weaker, and less experienced, but is also generally susceptible to acceding to the coercive power of adult authority figures. A child has very few, if any, resources to deter the use of physical force . . . . In such circumstances, there is a significant likelihood that physical force may be used to perpetrate the crime.[67]

2. *A Fact-Based Approach to Determining Whether Statutory Rape is a "Crime of Violence"*

Other federal appellate courts have taken a less categorical approach to this issue, though none has reached a different result. In 1995, the Ninth Circuit, in *United States v. Wood*,[68] held that a prior conviction under Washington's now-amended indecent liberties statute[69] was a "crime of violence" under Sentencing Guidelines § 4B1.2 when the adult defendant engaged in sexual conduct with a four-year-old.[70] The court took the age of the complainant into account because

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(1) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows . . .
(B) If the conviction was for . . . three or more misdemeanor crimes of violence or misdemeanor controlled substance offenses, increase by 4 levels.

[66] See *Velazquez-Overa*, 100 F.3d at 423 (holding that prior "crime of violence" conviction enhanced punishment for illegal reentry to United States).

[67] Id. at 421. The court further stated that it had previously held that burglary is also a per se "crime of violence" under § 2L1.2: "[I]f burglary, with its tendency to cause alarm and to provoke physical confrontation, is considered a violent crime . . . then surely the same is true of the far greater intrusion that occurs when a child is sexually molested." Id. at 422. For a discussion of conceptual comparisons of property crimes and sexual assault crimes, see infra note 81.

Finally, the court noted that the "crime of violence" definition under § 2L1.2, emphasizing the risk of force, was different from that required for the career offender provision under § 4B1.2, emphasizing the risk of serious injury, but claimed that decisions holding that statutory rape crimes fall under the "otherwise" clause of the career offender definitions (i.e., *Bauer*) "reinforce" its categorical conclusion. See id. at 421 n.4.

[68] 52 F.3d 272 (9th Cir. 1995).

[69] See Wash. Rev. Code § 9A.44.100(1)(b) (1986) (amended by Wash. Rev. Code Ann. §§ 9A.44.083, 9A.44.086, 9A.44.089 (West Supp. 1997)). The statute outlawed sexual contact between adults and minors under fourteen. "Sexual contact" was defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." Wash. Rev. Code § 9A.44.100(2) (1986) (defining "sexual contact"). For discussion of the amended version of the Washington indecent liberties statute, see infra note 73.

[70] See *Wood*, 52 F.3d at 275.

previous Ninth Circuit holdings allowed inquiry into the circumstances of the conduct described in the information or indictment of the past crime, the defendant's plea agreement, or jury instructions.[71] The court then noted that it might be possible to engage in conduct that violated the statute that "did not end in violence."[72] Nevertheless, in the circumstances of this case, where a nineteen-year-old babysitter molested a four-year-old child, the power disparity between defendant and complainant, as measured by differences in physical size, age, and authority position, made the conviction a "crime of violence" because it posed a serious risk of physical injury to the victim.[73] The conviction thus fell under the "otherwise" clause of the "crime of violence" definition.

In 1997, the Seventh Circuit, in *United States v. Shannon*,[74] also intimated that statutory rape convictions may not be per se crimes of violence. In *Shannon*, the information stated that the seventeen-year-old male defendant had previously pleaded guilty to a violation of Wisconsin statutory rape law[75] for having sexual intercourse with a thirteen-year-old female complainant.[76] Chief Judge Posner first noted that in the Seventh Circuit, unlike the Ninth Circuit, neither the sentencing court nor the reviewing court were allowed to "peek behind" the predicate charging document to investigate more fully the conduct underlying the conviction.[77] The government argued that any

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[71] See id.; see also United States v. Kilgore, 7 F.3d 854, 855 (9th Cir. 1993) (holding that courts may examine defendant's guilty plea statement when making "crime of violence" determination under ACCA); United States v. Sahakian, 965 F.2d 740, 742 (9th Cir. 1992) (holding that sentencing court may examine "actual charged" conduct of defendant to make "crime of violence" determination under Sentencing Guidelines § 4B1.2).

The courts in *Rodriguez* and *Velazquez-Overa* also gained some knowledge of circumstances of the prior convictions from looking at the information or other relevant documents. These courts, however, reached categorical holdings covering any conviction under the relevant state statutes. See supra Part I.B.1.

[72] See *Wood*, 52 F.3d at 276 (citing In the Matter of Juveniles A, B, C, D, E, 847 P.2d 455, 456 (Wash. 1993) (convicting 16-year-old male "D" under child molestation statute for apparently consensual sexual contact with 11-year-old female)).

[73] See id. The court found support for its conclusion in the successor statutes to the Washington indecent liberties statute, which now distinguishes three separate degrees of child molestation based upon the age of the complainant. See Wash. Rev. Code Ann. §§ 9A.44.083, 9A.44.086, 9A.44.089 (West Supp. 1997) (statutes proscribing child molestation in first, second, and third degrees). Washington's sentencing guidelines now refer to the degree of child molestation contested in *Wood*, where the victim is under twelve years old, as a "violent offense." See Wash. Rev. Code Ann. § 9.94A.030(36)(a) (West Supp. 1997).

[74] 110 F.3d 382 (7th Cir.) (en banc), cert. denied, 118 S. Ct. 223 (1997).

[75] See id. at 384 (describing violation of Wis. Stat. Ann. § 948.02(2) (West 1996)).

[76] See id.

[77] See id. (citing United States v. Lee, 22 F.3d 736, 738 (7th Cir. 1994) (holding that federal courts making "crime of violence" determination may only look to conduct expressly charged in count of which defendant was convicted)).

violation of the statute should be deemed a per se "crime of violence"—since the minor complainant was legally incapable of giving consent to the conduct, the crime necessarily involved force.[78] Alternatively, the government argued that a violation of the statute presented a per se serious risk of physical injury, following *Bauer* and *Velazquez-Overa*.[79]

Judge Posner rejected both arguments but still classified the conviction as a "crime of violence."[80] He first argued that an inference of force, and hence violence, cannot be made from "mere unconsented-to physical contact."[81] He then held that, although violation of the Wisconsin statute as written might not pose a serious risk of physical injury to the complainant in all circumstances, penetrative sexual intercourse with a thirteen-year-old girl always presents a risk of physical injury because of the risks of pain and the risk of "injuries" of pregnancy or sexually transmitted disease.[82] According to Judge Posner, therefore, Shannon's conviction should be classified as a

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[78] See id. at 385. This argument conflates the use of force with lack of consent. Professor Dripps has argued against such a conflation. See Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 Colum. L. Rev. 1780, 1803 (1992) (proposing two separate model rape statutes, one prohibiting sexual conduct coerced by force, other prohibiting conduct completed "over the verbal protests of the victim without purposely or knowingly putting her in fear of physical injury").

[79] See *Shannon*, 110 F.3d at 386.

[80] See id. at 387.

[81] Id at 385. Posner stated that to do so would transform any crime involving physical contact without consent, like pickpocketing, into a "crime of violence," a result already rejected by both the Seventh Circuit and other federal appellate courts. See *Lee*, 22 F.3d at 740-41 (holding that defendant's conviction for "'theft from the person of another'" was categorically not "crime of violence" (quoting Wis. Stat. Ann. 943.20(3)(d)(2) (West 1996))); United States v. Mathis, 963 F.2d 399, 409 (D.C. Cir. 1992) (holding that pickpocketing is not "violent felony"); Lowe v. United States, 923 F.2d 528, 530 (7th Cir. 1991) (stating, in dicta, that pickpocketing is not "violent felony"). But see United States v. Mobley, 40 F.3d 688, 696 (4th Cir. 1994) (holding that pickpocketing is "violent felony" because serious risk of injury exists when initial "stealthy seizure" is unsuccessful); United States v. McVicar, 907 F.2d 1, 2 (1st Cir. 1990) (holding that conviction for "larceny from the person" is "crime of violence" because of risk that physical injury may follow criminal conduct).

For another comparison of robbery and sexual touching, see Susan Estrich, Rape, 95 Yale L.J. 1087, 1152 (1986) ("[T]o say that forcibly fondling a woman's body, or forcing her to fondle and stimulate a man's, is . . . the criminal equivalent of surreptitiously grabbing her wallet from her pocketbook is to denigrate the personal integrity of men and women.") (citation omitted).

[82] See *Shannon*, 110 F.3d at 387-88 ("A 13 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.").

"crime of violence."[83] Judge Posner specifically did not reach the question of whether either sexual contact other than penetrative intercourse or sexual intercourse with a complainant older than the *Shannon* complainant would also be a "crime of violence." Instead he urged the Sentencing Commission to clarify this section of the Guidelines.[84]

II

CONSENT AS A BASIS FOR DECIDING THE "CRIME OF VIOLENCE" QUESTION

Neither the per se approach of *Rodriguez*, *Bauer*, and *Velazquez-Overa*, nor the partially fact-specific approach of *Wood* and *Shannon*, adequately addresses whether statutory rape should be considered a "crime of violence." This Note will now deconstruct the term "crime

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[83] In response, Circuit Judge Coffey wrote a long, indignant opinion concurring with the majority's holding, but rejecting its reasoning. He first argued that limiting courts to review of only a predicate crime indictment or information could cause errors regarding whether a prior conviction falling under the "otherwise" clause of § 4B1.2 is a "crime of violence" because courts will not have clear evidence of the circumstances of the crime. Coffey argued for overturning United States v. Lee, 22 F.3d 736 (7th Cir. 1994):

> The rule in *Lee* . . . lacks support in either the Guidelines or case law . . . . [T]he court should set *Lee* aside (overturn) and adopt the more sensible approach . . . permit[ting] the sentencing judge to be well-informed and consider all 'easily produced and evaluated court documents, including the judgment of conviction, *charging papers*, plea agreement, presentence report adopted by the court, and the findings of a sentencing judge.'

Id. at 396, 404 (Coffey, J., concurring) (quoting United States v. Spell, 44 F.3d 936, 939 (11th Cir. 1995)). He then castigated the majority for not following Wisconsin's determination that any violation of its second-degree sexual assault statute is a felonious "sexually violent offense," arguing that the federal judiciary lacked the authority to reject Wisconsin's reasoning regarding the gravity of this crime. See id. at 405. Coffey responded angrily and at great length to his perception that the *Shannon* majority was disparaging the Wisconsin legislature's intent regarding its statutory rape laws. See id. at 410, 414:

> I am at a loss to understand the majority's suggestion that § 948.02(2) of Wisconsin's Criminal Code, which serves to protect children from sexual exploitation, is somehow *old-fashioned* . . . . [Social revisionists] would be better off preaching their sermon in Las Vegas, New York City, San Francisco, or in other isolated pockets of sexual permissiveness where the majority's stated sexual mores seem to be more socially acceptable.

(Coffey, J., concurring). Coffey would thus have reached an anomalous result: following *Wood* in allowing judges to look at documents other than the indictment or information in making a "crime of violence" determination regarding any "otherwise" offense, but also following *Bauer* in holding that any violation of a statutory rape statute is a per se "crime of violence." See id. at 415-16 (Coffey, J., concurring).

[84] See id. at 389. As of August 7, 1998, the Commission has not announced that § 4B1.2 is under consideration for amendment. See United States Sentencing Commission, Amendments to the Sentencing Guidelines for United States Courts, 63 Fed. Reg. 602 (1998) (providing notice of proposed amendments). Nor will the Supreme Court settle the issue in the near future; on appeal, the Court denied certiorari in *Shannon*. See Shannon v. United States, 118 S. Ct. 223 (1997).

of violence" and then begin to develop a workable model to evaluate whether, based on the circumstances of the underlying conduct, a statutory rape conviction should serve to enhance a federal prison sentence.

A. Nonconsent as the Determinative Factor in Making Sexual Conduct "Violent"

Outside of the context of the federal "crime of violence" definition, our general understanding of what makes rape a "violent" crime has changed over time. At common law, rape was seen as a property crime, where a woman's "honor," "purity," or "virginity" were stolen from her husband or father.[85] This characterization of rape changed with the advent of Freudian psychoanalytic theory at the turn of the twentieth century.[86] Law and society moved from thinking about rape as a property crime to considering it a crime of sexual passion or perversion.[87] Under this theory, a rapist desires sexual intimacy but may only achieve it by nonconsensual conduct.[88] It is only over the last three decades that feminist scholars have challenged the characterization of rape as a crime of passion, arguing instead that rape is primarily a "crime of violence" and aggression.[89] These scholars disagree over the extent and nature of the violence, debating whether it should

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[85] See generally Susan Brownmiller, Against Our Will 17 (1975) (describing historical view of rape as theft of man's property).

[86] See, e.g., Sigmund Freud, Three Essays on the Theory of Sexuality 74 (James Strachey trans. & ed., 4th ed. 1962) (arguing that those persons who fail to conduct their sexual lives exclusively within marriage are suffering arrested development). Freud was preceded by Krafft-Ebing, who saw rapists as perverts. See, e.g., Richard von Krafft-Ebing, Psychopathia-Sexualis 435 (Harry E. Wedeck trans., G.P. Putnam' Sons 1965) (1886) ("It is a fact that rape is very often the act of degenerate male imbeciles, who, under some circumstances, do not even respect the bond of blood. Cases as a result of mania, satyriasis and epilepsy have occurred, and are to be kept in mind.") (citation omitted).

[87] See, e.g., Note, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 Yale L.J. 55, 66-67 (1952) (following Freud in arguing that women may show some resistance to sexual overtures as part of increasing sexual enjoyment).

[88] Some commentators apparently still consider this a fair characterization of rape. See Posner, supra note 14, at 384 ("[R]ape appears to be primarily a substitute for consensual sexual intercourse rather than a manifestation of male hostility toward women or a method of establishing or maintaining male domination.").

[89] The first famous proponent of this theory was Susan Brownmiller, who wrote persuasively about rape as a "crime of violence." In *Against Our Will*, Brownmiller traced the prevalence of rape in history, describing the phenomenon as "a societal problem resulting from a distorted masculine philosophy of aggression." Brownmiller, supra note 85, at 400; see also Estrich, supra note 81, at 1089, 1092 ("The history of rape, as the law has been enforced in this country, is a history of . . . sexism. . . . [T]he law has reflected, legitimized, and enforced a view of sex and women which celebrates male aggressiveness . . . ."); Catherine MacKinnon, Feminism Unmodified 85 (1987) ("[R]ape is a crime of violence, not sexuality . . . .").

be measured by the force often accompanying rape and causing physical and psychological injury,[90] the sundering of the victim's network of social relationships by response to the publication of the rape,[91] or the manifestation of society's institutionalized violation of all women by sex and sex role stereotyping.[92] In general, however, most commentators today agree that rape should be characterized as a "crime of violence" rather than as a crime of passion.[93] This characterization of

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[90] See, e.g., Cynthia Ann Wickton, Note, Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws, 56 Geo. Wash. L. Rev. 399, 400 (1988) (quoting A. Nicholas Groth et al., Rape: Power, Anger, and Sexuality, 134 Am. J. Psychiatry 1239, 1240-41 (1977)):

> Rape is a "pseudo-sexual act, a pattern of sexual behavior that is concerned much more with status, aggression, control, and dominance than with sensual pleasure or sexual satisfaction." . . . "[S]ex becomes a weapon, and rape is the means by which he can use this weapon to hurt and degrade his victim."

Rape of male complainants is also physically and psychologically harmful. See generally, e.g., Michael Scarce, Male on Male Rape (1997) (discussing effects of rape on male complainants, including shame, depression, and hostility).

[91] See, e.g., Mustafa T. Kasubhai, Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on Its Head, 11 Wis. Women's L.J. 37, 44 (1996) ("The victim's friends, partners, and families may add to the victim's maltreatment, in many cases blaming the victim for the violation. Such blaming of the victim perpetuates the victim's silent subordination to the attacker.").

[92] See, e.g., MacKinnon, supra note 89, at 86:

> What women experience does not so clearly distinguish the normal, everyday things from those abuses from which they have been defined by distinction. . . . What we are saying is that sexuality in exactly these normal forms often *does* violate us. So long as we say that those things are abuses of violence, not sex, we fail to criticize what has been made of *sex*, what has been done to us *through* sex . . . .

This argument has been adopted by critics of statutory rape law. See, e.g., Michelle Oberman, Turning Girls into Women: Re-evaluating Modern Statutory Rape Law, 85 J. Crim. L. & Criminology 15, 18 n.18 (1994) (arguing that societal eroticization of young women has made coercive sexual conduct more likely); see also infra text accompanying notes 113-17.

MacKinnon and other feminist scholars have been criticized by some commentators for universalizing women's experiences in a culturally imperialistic way. See, e.g., Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 588 (1990) (citation omitted):

> [I]n feminist legal theory, as in the dominant culture, it is mostly white, straight, and socioeconomically privileged people who claim to speak for all of us. Not surprisingly, the story they tell about "women," despite its claim to universality, seems to black women to be peculiar to women who are white, straight, and sociologically privileged . . . .

[93] See, e.g., Kitrosser, supra note 16, at 288 ("[T]his Article acknowledges the existence of a social and, to a large extent, legal framework that deems male aggressiveness and female passivity the norm in sexual relations."). But see Kasubhai, supra note 91, at 37 ("The debate over whether rape is an act of violence or an act of sex continues to this day."). Kasubhai may be referring to the continuing preference of some law and economics theorists to characterize rape as a crime of sexual theft. See Posner, supra note 14, at 386 ("[A] rational model of 'normal' human behavior can be used to analyze the behavior of rapists . . . . [This model] finds rapists to be approximately as responsive to incentives . . .

rape has been almost completely accepted by society at large.[94] In addition, the status of rape as a "crime of violence" appears to be reinforced in the law by courts' continued emphasis on the violative nature of the crime.[95] Also, most state legislatures have amended existing rape statutes to rename rape as "sexual assault"[96] and have moved statutory definitions of rape closer to those of assault and battery.[97] These reformed rape laws generally incorporate this new thinking about sexual assault by emphasizing the defendant's use of "force" as an element of the offense.[98]

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as persons who commit property offenses, such as auto theft and other forms of larceny."); Dripps, supra note 78, at 1799 (characterizing one category of a sexual assault crime as one of "sexual expropriation"); Panel Discussion: Men, Women and Rape, 63 Fordham L. Rev. 125, 139 (1994) (featuring colloquy between Professors Dripps and West over how to characterize crime historically known as rape).

94 See, e.g., Dana Priest, Conduct Unbecoming; In the Navy, Sexual Harassment Has Reached Titanic Proportions, Playboy, July, 1996, at 62, 150 (reporting how, in wake of Tailhook Scandal, Chief of Naval Operations Admiral Jeremy Boorda asked senior Navy officers to remind enlistees that rape is violent crime). Societal perceptions of rape as a crime of violence were reflected in the passage of the Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.). See Majority Staff of the Senate Judiciary Committee, 103rd Cong., The Response to Rape: Detours on the Road to Equal Justice (1993) (quoting Senator Biden: "Women in America suffer all the crimes that plague the nation . . . . But there are also some crimes—namely rape and family violence—that disproportionately burden women. . . . [T]he committee has studied this violence in an effort to determine what steps we can take to make women more safe.").

95 See, e.g., Coker v. Georgia, 433 U.S. 584, 597 (1977) ("Short of homicide, [rape] is the 'ultimate violation of self.'") (quoting U.S. Dep't of Justice, Law Enforcement Assistance Administration, Rape and Its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies 1 (1975)); State in the Interest of M.T.S., 609 A.2d 1266, 1278 (N.J. 1992) (discussing with approval definition of rape as "'a heinous crime primarily because it is a violent assault on a person's bodily security, particularly degrading because that person is forced to submit to an act of the most intimate nature'") (quoting Note, Recent Statutory Developments in the Definition of Forcible Rape, 61 Va. L. Rev. 1500, 1529 (1975)).

96 See, e.g., 720 Ill. Comp. Stat. Ann. 5/12-12 (West Supp. 1997), as discussed in James P. Carey, The New Illinois Criminal Sexual Assault Statute, 16 Loy. U. Chi. L.J. 757, 757-58 (1985) (discussing repeal of Illinois rape law with accompanying enactment of criminal sexual assault statutes); see also N.J. Stat. Ann. 2C:14-2 (West 1995) (defining crime of sexual assault).

97 Almost all state rape statutes have now been rewritten to eliminate an exemption for cases of marital rape, to eliminate the requirement that the complainant have shown resistance, and to emphasize the use of force as an element of the crime, much as assault and battery statutes do. Michigan's reform statute was an early example of this trend. See Mich. Comp. Laws Ann. §§ 750.520a, 750.520b (West 1991) (punishing sexual penetration as first degree felony if it is achieved by use of physical force or threat of physical force). Many other states have followed suit. See Posner & Silbaugh, supra note 45, at 5 (listing such states).

98 See, e.g., 720 Ill. Comp. Stat. Ann. 5/12-13 (West 1993) ("The accused commits criminal sexual assault if he or she: (1) commits an act of sexual penetration by the use of force or threat of force . . . ."). The statute defines "force" or "threat of force" as:

Despite this trend, a complainant's consent to sexual conduct has been and continues to be the primary factor in determining whether the conduct was rape. At English common law, rape was defined as the "unlawfull and carnall knowledge and abuse of any woman above the age of ten years *against her will*."[99] Most American states codified the spirit of this definition through statutes that made nonconsent, as shown through proof of a complainant's utmost resistance, the defining element of rape.[100] Even where state legislatures adopted statutes without nonconsent as an explicit element of the crime, the statutes often retained the complainant's consent to sexual activity as a defense;[101] if they did not, many state courts allowed a consent defense anyway.[102]

More recently, in cases involving "date rape," or "acquaintance rape," where the type and level of force used may be unclear,[103] the legal system has recognized that it is the lack of consent to sexual activity that makes particular conduct violent. This focus may be discerned in the decisions of those courts that have followed the New Jersey Supreme Court's decision in *State in the Interest of M.T.S.*[104] In *M.T.S.*, the complainant alleged that the defendant engaged in vagi-

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> [T]he use of force or violence, or the threat of force or violence, including but not limited to the following situations:
> (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute the threat: or
> (2) when the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement.

720 Ill. Comp. Stat. Ann. 5/12-12(d) (West Supp. 1997).

99 Sir Edmund Coke, The Third Part of the Institutes of the Laws of England 60 (1670) (emphasis added).

100 See generally Brownmiller, supra note 85 (discussing history of American rape law); Leigh Bienen, Rape III—National Developments in Rape Reform Legislation, 6 Women's Rts. L. Rep. 170, 181-82 (1980) (reporting elimination of "utmost resistance" clauses in many state rape statutes).

101 See, e.g., 720 Ill. Comp. Stat. Ann. 5/12-17(a) (West 1993) (codifying affirmative consent defense).

102 See, e.g., People v. Hearn, 300 N.W.2d 396, 398 (Mich. Ct. App. 1980) (reversing conviction under Michigan's sexual assault statute because trial court did not offer jury instruction on consent); see also State in the Interest of M.T.S., 609 A.2d 1266, 1279 (N.J. 1992) (holding that, if there is evidence to suggest that defendant reasonably believed "affirmative permission" to engage in sexual conduct had been given, State must prove beyond reasonable doubt that defendant did not actually hold belief, or belief was unreasonable under circumstances).

103 See, e.g., Commonwealth v. Berkowitz, 609 A.2d 1338, 1340 (Pa. Super. Ct. 1992):

> [He] put me down on the bed. It was kind of like—he didn't throw me on the bed. It's hard to explain. It was kind of like a push but no . . . . It wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle.

104 609 A.2d 1266 (N.J. 1992).

nal-genital intercourse with her while she was asleep; when she awoke, she asked the defendant to stop, which he did.[105] The court held that the defendant's conduct was a sexual assault under New Jersey's reformed rape statute.[106] Here the only force deemed necessary to meet the statute's force requirement was that force necessary to accomplish the sexual contact itself; what was in dispute was whether the contact was consensual.[107] Implicit in such a holding is the concept that any sexual conduct is potentially violent because it can be an infringement of personal autonomy.[108] It is the meaningful

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[105] See id. at 1268.

[106] See id. at 1279 (interpreting N.J. Stat. Ann. § 2C:14-2 (West 1995) ("An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances: (1) The actor uses physical force or coercion . . . .")).

[107] See id. at 1277-78. Other courts have followed this holding. See, e.g., United States v. Webster, 37 M.J. 670, 675 n.8 (C.G.C.M.R. 1993) (approving *M.T.S.* holding, stating "Although we have found sufficient evidence of force and lack of consent . . . a better alternative would be explicit recognition of the trend toward defining rape as a sexual assault requiring only the lack of consent of the victim . . . ."); Florida v. Sedia, 614 So. 2d 533, 535 (Fla. Dist. Ct. App. 1993) (holding that legislative intent behind Florida sexual battery statute was that state need prove use of only that force necessary to accomplish penetration to fulfill force element). But see *Berkowitz*, 609 A.2d at 1347-48 (holding that evidence of nonconsent alone did not support finding of forcible compulsion to sexual conduct).

[108] See, e.g., Robin L. West, Legitimating the Illegitimate: A Comment on *Beyond Rape*, 93 Colum. L. Rev. 1442, 1448 (1993):

> *From the victim's perspective*, unwanted sexual penetration involves unwanted force, and unwanted force *is* violent—it is physically painful, sometimes resulting in internal tearing and often leaving scars. [In distinguishing between sexual assault and sexual expropriation, Professor] Dripps omits this central feature of the experience. The offense that he calls "expropriation" is *itself* a forceful, physical, and in a word, assaultive penetration of one person's body by another. It is not in any way a "larcenous taking." . . . [It is] experienced, and typically described, as more like spiritual murder than either robbery or larceny.

M.T.S. and statutes based on similar principles focusing on nonconsent rather than force have been criticized for making all sexual activity presumptively criminal. See, e.g., Katie Roiphe, The Morning After 61-68 (1993) (critiquing feminist approaches to reforming rape laws to account for date rape). Some commentators, however, believe that sexual assault law should be changed to require affirmative consent in order to change the way society looks at sexual negotiations. See, e.g., Maya Manian, Book Note, 20 Harv. Women's L.J. 333, 340 (1997) (reviewing Date Rape: Feminism, Philosophy, and the Law (Leslie Francis, ed. 1996)).

M.T.S. has also been criticized for returning to a regime where the complainant's conduct, rather than the defendant's conduct, becomes the focus of the inquiry into whether a sexual assault occurred. See, e.g., Recent Case, 106 Harv. L. Rev. 969, 972 (1993) ("[T]he [*M.T.S.*] court interpreted a nonconsent element right back into the statute and . . . put the focus back on the victim's conduct . . . ."). The *M.T.S.* court attempted to ameliorate this effect by holding the defendant's response to perceived consent to a reasonableness standard:

> [T]he factfinder must decide whether the defendant's act of penetration was undertaken in circumstances that led the defendant reasonably to believe that

consent of both partners that defeats the presumption of violence and saves the conduct from criminal sanction.[109]

B. Adolescents Are Capable of Meaningful Consent to Sexual Activity

Many jurisdictions have followed the reasoning of *M.T.S.* and reestablished consent as the primary factor determining whether so-called "forcible rape" has taken place.[110] In many cases, the same

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> the alleged victim had freely given affirmative permission to the specific act of sexual penetration. . . . In applying that standard . . . the focus of attention must be on the nature of the defendant's actions. The role of the factfinder is not to decide whether reasonable people may engage in acts of penetration without the permission of others.

M.T.S., 609 A.2d at 1278. In addition, both *M.T.S.* and *Webster* allude to a "totality of the circumstances" test, whereby all the relevant facts, including the defendant's use of force and the complainant's response given that force, the complainant's fear, and the location of the activity in question, should be considered in determining whether sexual assault has taken place. See id. ("[T]he factfinder must decide whether the defendant's act of penetration was undertaken *in circumstances* that led the defendant reasonably to believe that the alleged victim had freely given affirmative permission . . . ."(emphasis added)); see also *Webster*, 37 M.J. at 674 (listing circumstances specific to date or acquaintance rape).

For a discussion of safeguards for complainant privacy when making a "crime of violence" determination for sentence enhancement purposes, see infra notes 212-18 and accompanying text. For a discussion of "circumstances" which, if present, make statutory rape a "crime of violence," see infra Part III.A.

109 See, e.g., Lois Pineau, Date Rape: A Feminist Analysis, in Date Rape: Feminism, Philosophy, and the Law 1, 19-20 (Leslie Francis ed., 1996) (proposing "communicative" standard for adjudging acquaintance rape); Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. Cal. L. Rev. 777, 815 (1988) (proposing egalitarian "mutuality" standard for judging criminality of male/female sexual relations).

It may be argued that legal sexual conduct may include acts of violence as long as consent is present. Consensual sadomasochistic sex often includes elaborate mechanisms for establishing continuing consent. See, e.g., Charles Moser & J.J. Madeson, Bound to Be Free: the SM Experience 43 (1996) (describing mutual negotiations over boundaries for S&M sex); William N. Eskridge, Jr., The Many Faces of Sexual Consent, 37 Wm. & Mary L. Rev. 47, 64-65 (1995) (discussing sadomasochistic sexual practices as challenge to societal notions of consent, and more specifically as challenge to feminist concerns about replicating male/female power disparities).

110 See, e.g., Or. Rev. Stat. § 163.425(1) (1997) ("A person commits the crime of sexual abuse in the second degree if the person subjects another person to sexual intercourse and . . . the victim does not consent to thereto."); Wis. Stat. § 940.225(3) (1993-94) ("Whoever has sexual intercourse with a person without the consent of that person is guilty of a class D felony."). Thirteen other states make nonconsensual sexual contact an offense without an additional requirement of use of force. See Ala. Code § 13A-6-65(a)(1), (2) (1994); Colo. Rev. Stat. § 18-3-404(1) (1986); Conn. Gen. Stat. Ann. § 53a-73a(a)(2) (West 1994); Haw. Rev. Stat. § 707-731(1)(a), 707-732(1)(a) (1994); Kan. Stat. Ann. § 21-3517(a) (1995); La. Rev. Stat. Ann. § 14:43.1(A) (West Supp. 1997); Md. Ann. Code art. 27, § 464C(a)(1) (1997); Mo. Rev. Stat. § 566-040 (1994); Nev. Rev. Stat. § 200.366(1) (1997); S.D. Codified Laws § 22-22-7.4 (Michie Supp. 1996); Tenn. Code Ann. § 39-13-503(a)(2) (1997); Utah Code Ann. § 76-5-402(1) (1995); Vt. Stat. Ann. tit. 13, § 3252(a)(1)(A) (Michie Supp. 1997).

statutes that proscribe forcible rape also implicitly factor consent into a determination of whether statutory rape has taken place.[111] Historically, persons under the "age of consent"—specifically minor women—were presumed unable to consent to sexual activity; any sexual conduct minors engaged in with persons over the age of consent was considered coerced.[112] While there were many other state interests involved when "age of consent" laws were first enacted[113] and then amended to protect older adolescents,[114] protection from presumably coerced sexual activity was a major focus.[115] Academics and

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111 Today, statutory rape crimes are often codified as specific sections of more generalized sexual assault statutes. Many of the reformed rape statutes make the specific ages of the defendant and complainant one of several possible circumstantial elements of the crime that must be proved in order to prove criminal liability. See, e.g., N.C. Gen. Stat. § 14-27.2 (1993) (calling first-degree rape either sexual conduct coerced by force *or* sexual conduct with complainant under age 13 where defendant is at least 12 years old and is at least 4 years older than the complainant).

All statutory rape laws base their codified ages on a questionable presumption that minors cannot consent to sexual activity with adults. See discussion infra notes 113-24 and accompanying text.

112 See, e.g., In the Matter of the Welfare of M.A.B., No. CO-96-2166, 1997 WL 406615, at *4 (Minn. Ct. App. July 22, 1997) (reversing trial court holding that sexual conduct between two minors was "consensual"); State v. Chase, 343 N.W.2d 695, 697 (Minn. Ct. App. 1984) (reviewing belief of trial court that victims of statutory rape were "particularly vulnerable" due to their age); People v. Gonzales, 561 N.Y.S.2d 358, 361 (N.Y. Sup. Ct. 1990) ("It has long been recognized that the State has the authority to regulate the sexual conduct of its minors by setting age limits to establish whether the individual is sufficiently mature to make intelligent and informed decisions and to consent to certain activities.") (citations omitted); Odem, supra note 2, at 3 (discussing how statutory rape law reformers wanted to protect young women from sexual harm by male seducers). But see State v. Rush, 942 P.2d 55, 57 (Kan. Ct. App. 1997) (taking "aggressive act" and "sexual sophistication" of minor into account in sentencing defendant convicted of statutory rape); Odem, supra note 2, at 24 (describing alternative use of statutory rape laws to control sexuality of young working class women).

113 See, e.g., Odem, supra note 2, at 13 (reporting how in 1885, before enactment of reformed statutory rape laws, codified age of consent in most American states was either 10 or 12, coinciding with onset of puberty).

114 See, e.g., id. at 14-15 (showing that, by 1920, age of consent in most states had been raised to between 16 and 18).

115 See id. at 16. Professor Odem recounts the many alternative purposes for raising the age of consent. These included protecting the virginity of young women, preventing female adolescents from suffering unwanted pregnancies, inhibiting the transmission of sexually transmitted disease, and protecting the property interests of fathers and future husbands. Still, especially as psychology took hold in the United States at the end of the nineteenth century, adolescence came to be thought of as "a turbulent period of physical, emotional, and sexual development during which youths needed to be shielded from adult duties and expectations." Id. at 101 (discussing G. Stanley Hall, Adolescence: Its Psychology and Its Relations to Physiology, Anthropology, Sociology, Sex, Crime, Religion, and Education (1904)).

policy makers addressing the need for statutory rape laws continue to express concern with consent and coercion.[116]

Nevertheless, society's expectations of how and to what sexual activity adolescents may "consent" have changed in light of new psychological and sociological data. Recent studies show that adolescents make meaningful choices through rational thinking about possible social behaviors.[117] Studies from the 1970s and 1980s claim that four-

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116 See Oberman, supra note 92, at 18 ("Although it is conceivable that a teenage girl might 'consent' to sexual intercourse in some circumstances, the seemingly facile conclusion that so long as she consents, any act of intercourse with her is freely chosen . . . is troubling."). Professor Oberman draws from the works of Carol Gilligan and other sociologists investigating female adolescents to argue for enforcement of statutory rape laws because meaningful consent can be a tenuous concept for this population:

> The stories girls tell about the "consensual" sex in which they engage reflect a poignant subtext of hope and pain. Girls express longing for emotional attachment, romance, and respect. At the same time, they suffer enormous insecurity and diminished self-image. . . . Girls negotiate access to the fulfillment of these emotional needs by way of sex. A girl who wants males to find her attractive . . . might reasonably consent to sex with a popular boy . . . . [A] male may commit "sexual fraud," by inducing consent by misrepresenting his intentions. Even if they defy legal categorization, construing these sexual encounters as anything but scary, painful, shaming, and/or unpleasurable for the minor girls involved requires people to strain their imaginations.

Id. at 65-67. Still, other sociologists question whether all adolescent women are as unable to make independent decisions about sexual activity as Professor Oberman suggests. See, e.g., Susan Moore & Doreen Rosenthal, Sexuality in Adolescence 99 (1993) (citing study showing that 31% of adolescent boys, as opposed to 9% of adolescent girls, felt unable or very uncertain about being able to refuse sexual advance made by partner). Anecdotal evidence cuts both ways. Compare Karin A. Martin, Puberty, Sexuality, and the Self 87 (1996) (quoting Elaine, age 16: "I didn't know, you know, I was really scared. I didn't know what, I didn't know what was supposed to happen or anything like that so . . . . Now that he left I wish that we never did.") with Losing It: The Virginity Myth 188 (Louis M. Crosier ed., 1993) (quoting Bea, age 14: "I finally decided I wanted Paul (age 22) as my first lover. I didn't talk my decision over with anyone. . . . I knew things had gone well.").

117 Much of the scholarship in this area follows the thinking of the leading theoretician of adolescent cognitive development, Jean Piaget. See generally Bärbel Inhelder & Jean Piaget, The Growth of Logical Thinking from Childhood to Adolescence 341, 348 (1958) (noting "adolescent's new capacity to orient himself toward what is abstract" which makes adolescence "the age at which growing individuals take their place in adult society"). According to Piaget, during early adolescence, roughly 11 to 15 years, adolescents make a leap in intellectual organization. See, e.g., George R. Holmes, Helping Teenagers into Adulthood 35 (1995) ("[Y]oungsters who are very bright at 12 or 13 are making the transition to what Piaget . . . calls formal operations. They are becoming very different people in terms of their cognitive ability. . . . [T]hose youngsters who have made the shift can think about the world in an adult fashion."); Patricia H. Miller, Theories of Adolescent Development, in The Adolescent as Decision-maker 33 (Judith Worell & Fred Danner eds., 1989) (explaining that according to Piaget, "Adolescents think like a scientist: identifying the possibly relevant variables in a problem, mentally generating all possible outcomes of combinations of the variables, formulating a hypothesis concerning the most likely outcome, and testing the hypothesis by systematically manipulating these variables."). Other scholars do not explicitly invoke Piagetian principles, but reach similar conclusions. See, e.g., Carol J. Eagle & Lillian Schwartz, Psychological Portraits of Adolescents 75 (1994) ("The

teen-year-olds demonstrate adult levels of competency on various measures when making decisions about medical treatment, that fifteen- and sixteen-year-olds generally have a great capacity for abstract and ideological political thought, and that the ability to reason logically may be present as early as ages eleven or twelve.[118]

This reasoning capability often extends to decisionmaking about sexual activity; more recent studies indicate that half of minors engaging in sexual activity initiated the activity.[119] Other studies and anec-

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hallmark of the cognitive process during these years [ages 14-16] is in their 'testing.' They test their ideas, values, interests, and goals against adult standards. . . . Their cognitive integrity is increasingly more stable as formal logical operations and secondary processes become more solidly available."); Daniel Keating, Adolescent Thinking, in At the Threshold: The Developing Adolescent 62 (S. Shirley Feldman & Glen R. Elliott eds., 1990) ("Several potential changes in brain development related to adolescent cognition have been proposed. The first of these focuses on possible brain growth spurts at about the time of puberty . . . .").

These cognitive developments often lead to improved psychosocial skills. See, e.g., Armando de Armas & Jeffrey A. Kelly, Social Relationships in Adolescence, in Worell & Danner, supra, at 101 (relating successful social skills training for adolescents driven by problem solving techniques); Anne C. Peterson & Nancy Leffert, What is Special About Adolescence?, in Psychosocial Disturbances in Young People 3, 12 (Michael Rutter ed., 1995) ("In adolescence, friendships are formed on the mutual sharing of ideas, feelings, and experiences, and this new intimacy is the first evidence we have of true adultlike relationships."). Not all adolescents, it should be noted, advance in cognitive and psychosocial development at the same pace. See Holmes, supra, at 55 ("[G]oing through adolescence can stir up powerful emotional experiences for some adolescents. They can experience fear, anxiety, and sadness over various issues such as relationships with parents and peers, sexual urges [or] general health concerns . . . ."). That many do advance, however, makes generalizations about adolescent development problematic.

Piaget has been criticized for not distinguishing the differences in the social contexts in which female minors make decisions. See, e.g., Carol Gilligan, Moral Orientation and Moral Development, in Women and Moral Theory 19, 21 (Eva Feder Kittay & Diana T. Meyers eds., 1987) (criticizing Piaget for conducting tests of cognitive skills of male and female preadolescents by observing games of marbles).

118 See Hyman Rodman et al., The Sexual Rights of Adolescents: Competence, Vulnerability, and Parental Control 82-85 (1984) (summarizing various studies of cognitive development in adolescence).

119 See Holmes, supra note 117, at 119 (discussing study results as symptomatic of how "sexual experiences that were usually seen later are now occurring earlier"); see also the Alan Guttmacher Institute (AGI), Sex and America's Teenagers 28 (1994) (reporting that, although 60% of women under age 15 polled reported self-identified coerced sexual experience, 26% reported only voluntary sexual experience and an additional 14% reported that at least some of their experiences were voluntary). The AGI study did not reveal the ages of the women's partners. Nevertheless, the participants' assertions of participation in uncoerced sex speaks against a per se rule judging all adolescents as incapable of meaningful consent.

Some have questioned, however, whether minors give informed answers to questions about sexual coercion. See, e.g., Gail Elizabeth Wyatt et al., Sexual Abuse and Consensual Sex 26 (1993) (criticizing self-report questionnaires for not allowing interviewee and interviewer to establish rapport); Rick S. Zimmerman & Lilly M. Langer, Improving Estimates of Prevalence Rates of Sensitive Behaviors: The Randomized Lists Technique and Consideration of Self-Reported Honesty, 32 J. Sex Res. 107, 107 (1995) (questioning validity of

dotal evidence also tend to show that many adolescents are making uncoerced choices to engage in sexual conduct.[120]

The outcomes of these studies and other evidence are paralleled by the changing legal status of adolescents, including changes in laws giving adolescents authority to consent to contraceptive care, prenatal care, mental health counseling, and other medical care.[121] In jurisdic-

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self-reports of sexual behaviors). Many researchers argue that these flaws can be corrected with supplementary face-to-face interviews or questions regarding honesty. See, e.g., Wyatt, supra, at 27 ("[F]ace-to-face interviews that allow [adolescent respondents to questionnaires] to build a rapport with their interviewers and to have questions about sexual terminology answered [are necessary] if we are to obtain accurate and useful information about adolescent sexuality."); Zimmerman & Langer, supra, at 109 (reporting favorable results of face-to-face interviews including questions about honesty). If data suggest that adolescents often make independent decisions about sexual behavior, however, they should be presumed able to report accurately this behavior to researchers. See, e.g., Martin, supra note 116, at 88 (suggesting that many young women in study relate sexual experiences in ways that allow for independent agency); Zimmerman & Langer, supra, at 109 (citing study showing that 83% of junior high school students surveyed reported that they had been honest in answering earlier questions about sexual behavior).

120 See Wyatt, supra note 119, at 23 (reporting that 50% of adolescent women have experienced consensual sexual intercourse by either age 17 or age 19); Robert Bauserman & Bruce Rind, Psychological Correlates of Male Child and Adolescent Sexual Experiences with Adults: A Review of the Nonclinical Literature, 26 Archives of Sexual Behavior 105, 122 (1997) (reviewing studies exploring effects of sexual conduct between male minors and male and female adults and noting that, in many cases, minors reported consenting to sexual relationships and setting limits on sexual activity). These consensual sexual relationships may be most likely to take place in the context of ongoing social relationships. See, e.g., Andrew Boxer, et al., Adolescent Sexuality, in Worrell & Danner, supra note 117, at 224-25 (recounting studies finding that 44% of male minors and 30% of female minors had sexual intercourse prior to age 16, and that 60% of females reported first engaging in coitus with "someone toward whom they felt a commitment," while 40% of male minors reported friendships with their sexual partners).

Tales of sexual conduct to which minors give meaningful consent are a consistent theme of gay male and lesbian "coming out" nonfiction and oral histories. See, e.g., Paul Monette, Becoming a Man 21-22, 51-52 (1992); Farm Boys: Lives of Gay Men from the Rural Midwest 287 (Will Fellows ed., 1996) (quoting, among others, "Ken" telling story of consensual sex at age 14); Two Teenagers in 20: Writings by Gay and Lesbian Youth (Ann Heron ed., 1994) (recounting oral histories of lesbian and gay teenagers).

121 See, e.g., 410 Ill. Comp. Stat. Ann. 210/4 (West 1997) (allowing minors 12 and over to seek confidential treatment for sexually transmitted diseases); Mich. Comp. Laws Ann. § 330.1498(d)(3) (West 1992) (allowing minors 14 and over to request hospitalization for mental health treatment); see also AGI, Teenagers' Right to Consent to Reproductive Health Care (visited June 23, 1998) <http://www.agi-usa.org/pubs/fb21.html> (summarizing research into various state laws giving minors consent to medical care related to sexual activity).

Some commentators consider these laws to be efforts to prevent adolescents from harm after poor social and sexual decisionmaking. See, e.g., Walter Wadlington, Medical Decision Making for and by Children: Tensions Between Parent, State, and Child, 1994 U. Ill. L. Rev 311, 324 (describing "mature minor" laws as necessary for situations where minors need medical care but may be unwilling to seek consent from their parents). Still, many researchers claim that adolescents have the cognitive skills necessary to make reasonable decisions about the consequences of sexual activity. See, e.g., Anita J. Pliner &

tions both with and without these statutes, courts have adopted "mature minor" rules which allow minors deemed sufficiently intelligent and mature to consent to medical care, including contraceptive care, without parental permission.[122] It thus appears that in many situations adolescents are found able to make independent choices about issues of personal autonomy based on the totality of circumstances, including, in some cases, the ages of their sexual partners.[123]

III
CONSTRUCTING A NEW MODEL FOR DETERMINING MEANINGFUL CONSENT

"Forcible" rape is a violent crime because it concerns the infringement of personal autonomy in the face of expressed nonconsent. Prosecutors have argued that statutory rape is by definition a violent crime because personal autonomy is necessarily violated where a minor is presumed unable to consent.[124] Because state statutory rape

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Suzanne Yates, Psychological and Legal Issues in Minors' Rights to Abortion, 48 J. of Soc. Issues 203, 214 (1992) (stating that "most adolescents have achieved a sufficient level of competence by the age of 15 to enable them to make mature and informed decisions regarding health related issues").

122 See, e.g., Bellotti v. Baird, 443 U.S. 622, 647 (1979) (holding that minor is entitled to confidential abortion if she understands her situation, understands risks attendant to abortion procedures, and affirmatively articulates request to have abortion); Carey v. Population Servs. Int'l, 431 U.S. 678, 697 (1977) (defining minors' right to contraceptive care). One scholar proposes that a factor driving decisions such as these has been the fact that the minor in question was an older adolescent considered to have sufficient mental capacity to understand the nature and importance of the medical care in question. See Walter Wadlington, Minors and Health Care: The Age of Consent, 11 Osgoode Hall L.J. 115, 119 (1973). In general, minors are beginning to be judged capable of making many personal and professional decisions. See, e.g., Dodson v. Shrader, 824 S.W.2d 545, 549 (Tenn. 1992) (holding that minor may not recover amount paid for automobile without allowing vender to recover for depreciation of automobile due to negligently incurred damages); Homer H. Clark, Jr., The Law of Domestic Relations in the United States 310 (2d ed. 1988) (reporting on rights of minors to own property in many states). For a discussion of "mature minor" rules in various contexts, see Oberman, supra note 92, at 46-53.

123 This judgment is reflected in the revised statutory rape laws of some states. See, e.g., Del. Code Ann. tit. 11, § 775 (1995):

> (a) A person is guilty of unlawful sexual intercourse in the first degree when the person intentionally engages in sexual intercourse with another person and any of the following circumstances exist . . .
>
> (4) The victim is less than 16 years of age and the defendant is not the victim's voluntary social companion on the occasion of the crime.

See also Wis. Stat. Ann. § 948.09 (West 1996) (making "sexual intercourse with a child . . . who has attained the age of 16 years" misdemeanor rebuttable through showing of consent).

124 See United States v. Shannon, 110 F.3d 382, 385 (7th Cir.) (en banc), cert. denied, 118 S. Ct. 223 (1997) ("The government argues that *any* felonious sexual act with a minor should be deemed . . . to involve force, because the minor is incapable of giving legally recognized consent . . . .").

laws presume nonconsent, however, does not mean that nonconsent must be presumed in determining whether a statutory rape conviction is a sentence-enhancing federal "crime of violence."[125] For adult/minor sexual conduct, the presumption of nonconsent, and therefore "violence," should be rebuttable through a showing of meaningful consent. If the defendant makes such a showing, the federal sentencing court should find the predicate statutory rape conviction to fall short of the "crime of violence" standard. To this end, Congress and federal courts should consider developing a set of criteria to help determine whether meaningful consent to sexual conduct occurred. Such a test would help to ensure accurate federal sentencing in light of changing definitions of statutory rape and differences among state statutory rape laws.[126] Examining meaningful consent would also serve fairness interests by protecting defendants with statutory rape convictions who did not coerce minors into sexual conduct from enhanced sentences. The inquiry also incorporates respect for the sexual autonomy of those adolescents who are capable of making informed decisions about consent.[127]

Although justice for defendants requires a reevaluation of whether adolescents may give meaningful consent to sexual activity with older persons, efficiency interests may require some per se rule regarding an age below which an inquiry into consent is undesirable.

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125 As Judge Posner states in *Shannon*, 110 F.3d at 387:

> [T]he well-known failure of state legislatures to keep their sex laws up to date with the changing sexual mores of the American people make it difficult to impute a single goal to statutory rape laws .... To decide this case, however, we need not characterize the goals or grounds of the Wisconsin statute or for that matter of any other specific law punishing sex with minors.... The Wisconsin statute covers a lot of ground, and some of it may not be crime of violence ground.

For a discussion of findings on adolescent ability to consent in a variety of social contexts, see supra notes 117-23 and accompanying text.

126 See infra Part III.A. This inquiry could be written into the various "crime of violence" statutes. See infra note 172.

127 An inquiry into consent at sentencing might defeat the stated purposes of the Sentencing Commission in uniform sentencing. See, e.g., 28 U.S.C. § 991(b)(1)(B) (1994) ("The purposes of the United States Sentencing Commission are to establish sentencing policies and practices for the Federal criminal justice system that ... avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct...."). Still, given the unhappiness of many federal judges with the rigidity of the guidelines, many judges may be willing to conduct ad hoc reviews of the circumstances underlying predicate convictions. See, e.g., Patti B. Saris, Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective, 30 Suffolk U. L. Rev. 1027, 1029 (1997) ("[A]ppellate and district judges applying the guidelines may have failed to recognize warranted disparity.... [N]ot all seemingly similar offenders are in fact similar, and there are atypical situations when justice is best served by different sentences for different people.").

It would be inefficient for courts to undertake such an inquiry when, under a certain complainant age, the result will almost always be a finding of coerced conduct or uninformed consent. The *Shannon* court may have attempted to use risk of serious injury as an acceptable proxy for a per se age.[128] However, not all statutes separate penetrative sexual intercourse from other forms of sexual contact such as fondling or touching.[129] The *Shannon* rule would therefore fail to appropriately punish some adults engaging in certain sexual behaviors with minors younger than the *Shannon* complainant. This Note proposes a meaningful consent standard for determining whether sexual conduct qualifies as a "crime of violence." Studies suggest that below a certain age adolescents and preadolescents are not able to make an independent judgment about whether to engage in sexual activity.[130] Analyzing this data to establish a per se age of consent would allow courts to reach a more accurate result about whether particular sexual conduct is indeed a "crime of violence."

A. Defining "Consent" in Adult/Minor Sexual Conduct

If our construction of the term "crime of violence" in the context of statutory rape convictions is to be based on the theory that violence can be negated by consent, it is crucial to define consent in a way that reflects circumstances specific to these crimes. Some of the circumstances suggesting that meaningful consent has or has not taken place are similar in all instances of sexual conduct, whether among minors, among adults, or between minors and adults. Other concerns apply primarily to those occasions when adolescents make choices about sexual conduct. This Note argues that an inquiry into consent requires the development of a model including both general and adolescent-specific factors.

Such a model would include dispositive factors such as physical or emotional coercion which, if present, would abbreviate the inquiry

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128 See *Shannon*, 110 F.3d at 387.

129 See, e.g., Ohio Rev. Code Ann. § 2907.02 (Banks-Baldwin 1997) ("No person shall engage in sexual *conduct* with another . . . when . . . [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person.") (emphasis added).

130 Piaget and his disciples might make 13 the age below which minors are per se unable to make independent decisions about sex. See Keating, supra note 117, at 65 (reporting results of study identifying age 12 as crucial turning point in cognitive development); Miller, supra note 117, at 32 (describing age 11 as beginning of "the period of formal operational thought"). Nevertheless, a judicial or administrative determination of any per se age will result in errors regarding the individual circumstances of some minor/adult sexual activity. A per se age determination should be made only after careful investigation of data regarding adolescent cognition and social decisionmaking.

into consent. These factors would be easily identifiable under a regime following *United States v. Wood*,[131] in which the sentencing court would be allowed to look at evidence including the statutory definition of the crime, as well as the conduct charged in the indictment or information, plea agreement, or jury instructions.[132] If none of these dispositive factors were present in the instance of adult/minor sexual conduct in question, courts would examine other, nondispositive factors. Investigation through a presentencing report and/or additional testimonial evidence may be necessary before a determination of consent, and thus the presence of violence, is made.[133]

1. Dispositive Factors Suggesting Emotional or Physical Coercion

Some social relationships between adults result in a power disparity that makes coerced sexual conduct more likely.[134] Similarly, some biological and social relationships between statutory rape defendants and complainants may make a full inquiry into meaningful consent unnecessary. In some cases of statutory rape, the complainant and the defendant are biologically related.[135] Studies indicate that meaningful consent is rarely, if ever, possible in parent/child relationships or in other relationships between adult and minor biological relatives.[136]

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131 52 F.3d 272 (9th Cir. 1995).

132 See id. at 275 (describing what sentencing courts may consider when determining if past conviction is "crime of violence").

133 For a proposed procedural model for this inquiry, see infra Part III.C.

134 Workplace supervisor/employee relationships are perhaps particularly susceptible to a power dynamic involving coercion. See, e.g., Faragher v. City of Boca Raton, No. 97-282, 1998 U.S. Lexis 4216, at *52 (June 26, 1998) (describing supervisory sexual abuse of employee where "victim may well be reluctant to accept the risks of blowing the whistle on a supervisor").

135 See, e.g., United States v. Passi, 62 F.3d 1278, 1281 (10th Cir. 1995) (finding that defendant's stipulation that victim of sexual abuse was his biological daughter classified crime as aggravated incest); United States v. Reyes-Castro, 13 F.3d 377, 378, 380 (10th Cir. 1993) (holding sexual abuse of 12-year-old female by father "aggravated felony" for deportation purposes); State v. Etheridge, 352 S.E.2d 673, 681-82 (N.C. 1987) (finding that father effected sexual relationship with minor daughter through fear).

136 See, e.g., Richard Green, Sexual Science and the Law 151 (1992) (reporting increased trauma accompanying sexual involvement between father and child); id. at 157 (reporting that physical abuse was more likely to accompany incestuous sexual experiences than sexual conduct between nonbiologically related persons); David Finkelhor & Angela Browne, Assessing the Long-Term Impact of Child Sexual Abuse: A Review and Conceptualization, in Handbook on Sexual Abuse of Children 55 (Leonore E. Auerbach Walker ed., 1988) (discussing long term harmful effects of incest on minors, including depression, poor self-esteem, and self-destructive behavior including self-mutilation and suicide).

These studies support the *Etheridge* court's intuitive response to the possibility of coercion in an incestuous sexual experience:

> Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults. . . . The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a

The same is true for adult/minor social relationships with evident power disparities such as stepparent/stepchild, teacher/student, or babysitter/sittee.[137] Many states have specifically criminalized sexual activity within the context of these relationships, finding that coercion is inherent in such relationships because of the power disparity between the participants.[138] If facts revealing these potentially coercive social relationships are uncovered in charging papers, then no further inquiry into consent should be made.

Another dispositive factor for courts to consider is whether physical force was used to coerce sexual conduct. Courts deciding sexual assault cases often infer from a disparity in size and physical strength between defendant and complainant that physical force was used to induce participation in sexual activity.[139] These disparities in physical size and corresponding strength may be greater in many—though per-

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> unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose.

Etheridge, 352 S.E.2d at 681. But see Posner, supra note 14, at 398 ("We cannot be certain in the case of incest whether it is the sexual act itself that inflicts harm or the family situation that gave rise to the act.").

137 See, e.g., David Finkelhor, Child Sexual Abuse: New Theory and Research 25 (1984) (explaining that having a stepfather doubles stepdaughter's vulnerability to sexual victimization); Sexual Offenses Against Children: Report of the Committee on Sexual Offenses against Children and Youths, vol. 1 at 529-32 (1984) (reporting harms to minors engaged in sexual activity with biologically related family members, guardians, and family friends).

138 See, e.g., Iowa Code Ann. § 709.4(2)(c)(3) (West 1997) (sexual abuse in third degree); Mich. Comp. Laws Ann. § 750.520(b)(1)(b)(iii) (West 1997) (first degree criminal sexual conduct); Minn. Stat. Ann. § 28.788(5) (Law Co-op. 1997) (criminal sexual conduct in fourth degree). These statutes make both complainant age and social relationship of complainant and defendant elements of the crime:

> A person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances . . .
>
> 2. The act is between persons who are not at the time cohabiting as husband and wife and if any of the following are true . . .
>
> c. The other participant is fourteen or fifteen years of age and any of the following are true . . .
>
> (3) The person is in a position of authority over the other participant and uses that authority to coerce the other participant to submit.

Iowa Code Ann. § 709.4 (West 1997).

These relationships also form the basis for traditional statutory rape prosecutions. See, e.g., Bill Hewitt, et al., Out of Control, People, Mar. 30, 1998, at 44 (detailing story of statutory rape convictions stemming from relationship between sixth-grade teacher Mary Kay Letourneau and her former student).

139 See, e.g., United States v. Hicks, 24 M.J. 3, 6 (C.M.A. 1987) (holding that factors in sexual conduct which indicated coercive atmosphere included respective sizes of defendant and complainant). Jurisdictions making this inference may appear to require a showing of force to obtain a sexual assault conviction. This Note argues that only a showing of lack of meaningful consent should be necessary to convict a defendant for "forcible" rape or to classify statutory rape as a "crime of violence" for sentencing purposes.

haps not all—statutory rape situations.[140] Further, many statutory rape cases involve the use of force beyond that necessary to achieve sexual contact.[141] Although this additional force would seem to qualify this conduct for charges of forcible rape, prosecutors may face difficulties in proving the use of force when charging forcible rape[142] or may believe that defendants will be subject to harsher penalties if convicted of statutory rape.[143] In making a federal sentencing determination, a showing of force greater than that necessary to achieve sexual contact should end the inquiry into consent.[144] In the context of statutory rape, a showing of force makes meaningful consent impossible.

2. *Nondispositive Factors to Be Balanced in an Extended Inquiry into Meaningful Consent*

Various critiques of sexual regulation suggest nondispositive factors to consider as part of an inquiry into meaningful consent. Feminist critiques of the legal model of consent have focused on a woman's

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140 See, e.g., United States v. Wood, 52 F.3d 272, 275 (9th Cir. 1995) ("The government emphasizes as well that the risk of violence is implicit in the *size* . . . of the adult in dealing with a child. We agree.") (emphasis added).

141 See, e.g., United States v. Taylor, 98 F.3d 768, 772-73 (3d Cir. 1996), cert. denied, 117 S. Ct. 1016 (1997) ("Count two of the indictment, the statutory rape count for which defendant was convicted, specifically alleged that defendant did grab the [victim] off the street onto the ballfield . . . threw her on the ground, got on top of [her], and attempted to have sexual intercourse with her . . . .").

142 See, e.g., United States v. Shannon, 110 F.3d 382, 394 (7th Cir.) (en banc) (Coffey, J., concurring in part, dissenting in part) (discussing how, under Wisconsin law, prosecutors may charge adult defendant accused of sexual conduct with a minor with second degree sexual assault of child whether force was used or not, "thus avoiding the need for prosecutors to establish that force was used in order to obtain a conviction."), cert. denied, 118 S. Ct. 223 (1997).

Some commentators feel that prosecutors should be encouraged to discontinue the use of statutory rape as a lesser included offense to forcible rape charges. See Interview with Sylvia A. Law, Professor at New York University School of Law, in New York, N.Y. (Feb. 10, 1998). Still, given the renewed emphasis on statutory rape prosecutions, see supra note 19, law enforcement officials will probably continue to seek these convictions even where physical force is used to coerce sexual activity.

143 For example, compare Georgia's felony child molestation statute, Ga. Code Ann. § 16-6-4 (1996), which punishes "any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person" with a sentence of between 5 and 20 years, with its misdemeanor sexual battery statute, Ga. Code Ann. § 16-6-22.1 (1996), which punishes engaging intentionally in "physical contact with the intimate parts of the body of another person without the consent of that person" with usual sentence under one year. Thus, if a defendant used physical coercion to fondle a minor or force the minor to fondle himself or herself, a prosecutor would have the option of charging the defendant with either molestation or sexual assault, but could punish the defendant more harshly under the molestation statute.

144 See supra note 107 and accompanying text.

right to sexual autonomy.[145] Persons advocating this right have won the increased availability of birth control, including contraceptives and abortion, for all women, both above and below the age of consent.[146] Queer theory[147] scholarship has also argued for an autonomy or privacy right to engage in private, consensual sexual conduct.[148] The concept of a right to such private sexual conduct has been upheld by

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[145] See, e.g., Chamallas, supra note 109, at 798 ("Feminists argued that [marital rape] represented a severe incursion on sexual freedom of women, and was a clear example of how the legal notion of sexual privacy operated to legitimate the sexual dominance of males."); Estrich, supra note 81, at 1122 ("Rape is unique . . . in the definition which has been accorded to consent. That definition makes all too plain that the purpose of the consent rule is not to protect female autonomy and freedom of choice, but to assure men the broadest sexual access to women.").

[146] See, e.g., Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding constitutional right to privacy that includes married persons' access to contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (extending *Griswold* right to unmarried persons); Carey v. Population Servs. Int'l, 431 U.S. 678, 687, 694 (1977) (extending *Griswold* and *Eisenstadt* to unmarried female minors); Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that constitutional right to privacy encompasses woman's right to choose abortion); Bellotti v. Baird, 443 U.S. 622, 647 (1979) (allowing female minor "judicial bypass" to choose abortion without parental consent).

[147] This Note defines queer theory as thinking and writing about the construction of sexual identity by and through politics, law, and culture. Although it has its genesis in gay and lesbian studies, much queer theory writing explicitly rejects identity by sexual orientation or any other supposedly universal characteristic. See, e.g., Steven Seidman, Identity and Politics in a "Postmodern" Gay Culture: Some Historical and Conceptual Notes, in Fear of a Queer Planet 105, 120-22 (Michael Warner ed., 1993):

> Lesbian[s] and gay men of color have contested the notion of a unitary gay subject and the idea that the meaning and experience of being gay are socially uniform. . . . [Also, while] [s]ome individuals who identify as bisexual aim to legitimate this identity alongside a heterosexual or homosexual one. . . . For others . . . bisexuality challenges the privileging of . . . sexual object-choice . . . as the basis of sexual identity.

For a brief overview of the current state of queer theory, see Richard Goldstein, It's Here! It's Queer! It's Too Hot For Yale! Gay Studies Spawns A Radical Theory of Desire, Village Voice (N.Y.), July 29, 1997, at 38; see also infra note 157.

Queer theory is useful to this inquiry because it helps us analyze circumstances present in both same-sex and differing-sex statutory rape cases.

[148] The Supreme Court rejected this argument in Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (finding that Constitution does not confer "a fundamental right upon homosexuals to engage in sodomy"). For an in-depth study of these arguments and their effects, see William N. Eskridge, Jr., Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981, 25 Hofstra L. Rev. 817, 843-45 (1997) (outlining extraction of sexual privacy arguments from arguments for contraceptive privacy); see also Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431, 1449-60 (1992) (discussing limits of Supreme Court privacy doctrine as protection for consensual sexual activity).

several states under state constitutions.[149] In at least one state, Florida, such a right has been explicitly extended to minors.[150]

A minor's interest in participating in consensual sexual activity should be given substantial weight as part of an inquiry into consent. To establish the strength of the minor's interest, the arbiter of consent must ask whether the minor complainant affirmatively expressed the desire to participate in the sexual activity and to what extent the minor was aware that he or she could choose not to participate in the sexual activity. If it is determined that the minor did not affirmatively express the desire to participate in sexual activity, the possibility of meaningful consent is diminished.[151]

The minor's expressed interest in participating in sexual conduct should be given further weight if it was shown to be accompanied by knowledge of risks of pregnancy and sexually transmitted disease.[152] Evidence of such knowledge on the part of the complainant, as well as the defendant, would tend to show meaningful consent.

Feminist and queer theory is also concerned with the ways in which personal identity is formed, either by gender or by sexual orientation.[153] Social interactions and sexual activity with older persons

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149 See, e.g., Commonwealth v. Wasson, 842 S.W.2d 487, 491-92 (Ky. 1992) (holding that state sodomy statute violated privacy guarantees of Kentucky state constitution).

150 See, e.g., In re T.W., 551 So. 2d 1186, 1193 (Fla. 1989) (holding that minors have state constitutional right to sexual privacy and abortion). For commentary, see Anthony M. Amelio, Note, Florida's Statutory Rape Law: A Shield or a Weapon?—A Minor's Right of Privacy Under Florida Statutes § 794.05, 26 Stetson L. Rev. 407 (1996).

151 See, e.g., State in the Interest of M.T.S., 609 A.2d 1266, 1277 (N.J. 1992) ("[P]ermission to engage in sexual penetration must be affirmative and it must be given freely.... Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.").

152 See, e.g., Jacqueline L. Stock et al., Adolescent Pregnancy and Sexual Risk-Taking Among Sexually Abused Girls, Family Planning Perspectives, Sept.-Oct. 1997, at 200-03 (discussing evidence of higher incidence of unintended pregnancy and a higher risk of HIV infection in adolescent women experiencing coerced sexual activity).

153 Feminist theory critiques the formation of stereotypical gender identities. These critiques have often focused on the ways in which women are often forced into adopting feminine behaviors in order to conform to male expectations. Many feminists argue that regulation of sexual behavior should be reformed to address this historical bias. See, e.g., Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1, 36-75 (1995) (discussing how societal recognition of inappropriate masculine or feminine behaviors leads to sexual harassment or job related gender bias).

Queer theory also explores construction of sexual and social identity, basing many of its ideas on the foundational work of Michel Foucault. See Michel Foucault, The History of Sexuality: Volume I: An Introduction (1978) (tracing historical constructions of sexualities); see also Ritch C. Savin-Williams, Gay and Lesbian Youth: Expressions of Identity 3 (1990) ("Sexual identity ... represents a consistent, enduring self-recognition of the meanings that sexual orientation and sexual behavior have for oneself.") (emphasis omitted).

may be part of this process of gender and sexual identity construction.[154] The interest of the minor participating in sexual activity with adults in constructing his or her own sexual identity should be considered in analyzing the meaningfulness of the consent. Anecdotal evidence suggests many lesbian and gay adolescents self-identify by same-sex sexual orientation before participating in sexual conduct, or believe they participated in sexual activity as a means of constructing sexual identity.[155] Implicit in such sexual experimentation as part of a process of identity construction is a decisionmaking process, a conscious choice to explore the self through sexual activity. Thus, the inquiry into consent may involve questioning the complainant about whether he or she self-identified by sexual orientation before the sexual conduct took place,[156] and, if not, whether he or she considered the sexual activity important to the construction of sexual identity.[157]

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154 See, e.g., Kevin Jennings, I Remember, in One Teacher in 10: Gay and Lesbian Educators Tell Their Stories 18, 21 (Kevin Jennings ed., 1994):

> I know now that Mr. Korn must have been gay. And I know that this is what I was asking when I queried after his children. What I was truly asking for, however, was not information about his sexual orientation. I was asking for information about me. I was asking him to tell me that I was going to be all right, that I was going to grow up and be gay and be okay.

See also Savin-Williams, supra note 153, at 5 (arguing that "'pre-gay and pre-lesbian'" adolescents are more likely than other adolescents to engage in homosexual behavior and to do so for longer period of time).

Experts in psychological development have identified these searches for identity as common to all adolescents. See, e.g., Susan Moore & Doreen Rosenthal, supra note 116, at 32 (discussing Marcia's identification of four stages of identity development, including "identity moratorium," where "[t]here could be experimentation with different styles of relating to the opposite sex, with different sexual values, and with different sexual orientations").

155 Gay male adolescents often see sexual conduct, sometimes with older persons, as a means of discovering sexual identity and community. See, e.g., James T. Sears, Growing Up Gay in the South: Race, Gender, and Journeys of the Spirit 121 (1991) (quoting "Jacob" describing sexual relationship with older person as part of "coming out" process). Lesbian adolescents report differing experiences that also may include sexual activity with older persons. For example one anthology quotes:

> My parents . . . feel that I was too young to make such a decision in high school. Now I am eighteen and they still think I am too young to decide that I am emotionally, mentally, and physically attracted to women. I am not, nor was I ever, too young to make the decisions I have made.

Heron, supra note 120, at 43.

156 See, e.g., Savin-Williams, supra note 153, at 4 ("Among 118 [self-identified lesbian and gay] youths, 9% of the boys and 6% of the girls had never experienced same-sex activity.").

157 While many adolescents may consider sex an identity affirming experience, some queer theorists would separate sexual activity from any particular identity. See, e.g., Judith Butler, Bodies That Matter 94 (1993) (noting that understanding sexuality as either constructed or determined does not "describe the complexity of what is at stake in any effort to take account of the conditions under which sex and sexuality are assumed. The 'performative' dimension of construction is precisely the forced reiteration of norms.");

Adolescent interests in autonomy and identity must be balanced against concerns about whether sexual activity was coerced by older adolescents or adults.[158] Sociologists have identified adolescent self-esteem concerns specific to both young women and young men.[159]

Judith Butler, Gender Trouble 30-34 (1990) (arguing for "subversive confusion" of "sexuality and identity within the terms of power itself"). They argue that sexual identity is fluid and/or malleable, and that whether or not one chooses to identify according to one's sexual conduct, the conduct itself should be permitted. The same concept would hold true for minors who experiment sexually. See Savin-Williams, supra note 153, at 8 (discussing minors' participation in homosexual activity as a phase of adult heterosexual development). Even if sexual conduct does not lead to sexual identity, active affirmative conduct, if uncoerced, should be viewed as an indication of consent. It may be impossible, of course, to gather adequate evidence regarding complainant interest in formation of sexual identity without interviewing the complainant. For a procedural model of how this interview could be conducted and used, see infra Part III.C.

158 For a discussion of relationships that involve inherent power disparities, see supra notes 137-38 and accompanying text.

159 Feminist scholars have used the work of Carol Gilligan and other sociologists who study adolescent social decisionmaking to argue that there is a generalized self-esteem gap between young men and young women. See, e.g., Oberman, supra note 92, at 55-56:

> The most pervasive finding of the "post-Gilligan" psychologists who have dedicated their research to the study of girls' development is that among girls, adolescence is a time of acute crisis, in which self-esteem, body image, academic confidence, and the willingness to speak out decline precipitously. . . . In one survey . . . researchers found that by high school only 29% of the girls, in contrast with 46% of the boys, reported feelings of high self-esteem.

Gilligan's work suggests that young women may be more likely to "consent" to sexual conduct as a means of bolstering self-esteem. See, e.g., Lyn Mikel Brown & Carol Gilligan, Meeting at the Crossroads: Women's Psychology and Girls' Development 2, 210 (1992) (describing female adolescence as time of "a relational crisis in women's psychology" in which girls lose their "sense of themselves and their character"). Gilligan's findings as to the susceptibility of adolescent girls to self-esteem problems and depression are echoed by other psychologists. See generally Anne C. Petersen et al., Adolescent Depression: Why More Girls?, 20 J. Youth & Adolescence 247, 265-67 (1991) (finding evidence that higher incidence of depression and poor coping skills among twelfth-grade girls than boys is due to experiences in early adolescence); Millicent E. Poole & Glen T. Evans, Adolescents' Self-Perceptions of Competence in Life Skill Areas, 18 J. Youth & Adolescence 147, 159 (1989) (finding that females "tended to underestimate their competence, compared with the males, generally expressing lower self-esteem and confidence").

Young men may also have self-esteem problems. See, e.g., Martin, supra note 116, at 50 ("At puberty boys begin to develop . . . bonds, many of which are of a joking or boasting nature. Although at a deeper level they may be a way of expressing uncertainty and a fear of inadequacy, these jokes and boasts encourage feelings of adult masculinity . . . ."); Savin-Williams, supra note 153, at 67-110, 170-71 (discussing results of study measuring self-esteem among gay adolescents which showed that gay male adolescents experience variation in self-esteem levels); Carey Goldberg, After Girls Get the Attention, Focus Shifts to Boys' Woes, N.Y. Times, April 23, 1998, at A1 (reporting statements of Professor Kindlon: "In the period of seventh, eighth, and ninth grade, boys learn that to show vulnerability is akin to death . . . . You talk to a 75-year-old man and he can still remember the names he was called then.").

Gilligan is criticized by Karin Martin, both for romanticizing an essentialist childhood where female preadolescents possess some universal, ideal "authentic self" and for failing to consider the effects of rigid societal gender norms on male and female adolescents. See

Older persons may take advantage of minors suffering from inadequate self-esteem.[160] While not dispositive, interactions that can be thus identified as opportunistic may indicate a lack of meaningful consent to the sexual activity in question.[161]

Adolescent interests may also be outweighed by the presence of economic coercion in the sexual negotiation between defendant and complainant. For the most part, although economic coercion of sexual activity has been punished through common law torts or civil sexual harassment statutes, such coercion has never been characterized as rape.[162] Statutory rape laws, on the other hand, were based in part on a desire to protect young women from prostitution.[163] Society in general still fears that minors will be coerced to participate in sexual activity through economic inducements.[164] Commentators disagree over whether the "selling" of sexual conduct, either explicitly through pros-

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Martin, supra note 116, at 8-12. Martin notes that "[i]n our culture it is generally more difficult for women to derive power, positive feelings of self, or agency from *adult* sexuality." Id. at 12 (emphasis added).

160 See, e.g., State in the Interest of B.G., C.A., and P.A., 589 A.2d 637, 643 (N.J. Super. Ct. App. Div. 1991) (discussing sexual assault of young developmentally disabled woman said by doctor to be "willing to do almost anything to gain some modicum of social acceptance").

161 Remember, though, that any judicial inquiry into the effects on consent of societal self-esteem disparities between male and female adolescents runs the risk of treating young women differently from young men in a way that encourages paternalistic views of adolescent females' ability to make independent decisions. See, e.g., Mary M. v. North Lawrence Comm. Sch. Corp., 131 F.3d 1220, 1228 (7th Cir. 1997) ("That Diane consented to sex with Fields does not mean she understood the risks associated with her actions. A thirteen year old girl cannot be said to understand the nature of her actions when she engages in sexual intercourse."). Questions addressed specifically to female self-esteem must be handled carefully, and the empirical evidence analyzed to avoid paternalistic stereotyping.

162 But see Rosemarie Tong, Women, Sex, and the Law 111 (1984) (discussing Virginia legislation that proposed criminal liability in cases where defendant abused his "position of authority" to obtain sex from a subordinate). Professor Chamallas questions the logic of making prostitution a crime in most states, while not characterizing economic coercion as a form of sexual assault. See Chamallas, supra note 109, at 826 ("[I]f prostitution is nonconsensual, it is presumably because a prostitute's solicitation of sex for money is not truly consensual. . . . [T]he characterization of prostitution as economically coerced sex would also make it unreasonable to impose criminal penalties on the prostitute herself, because she is the coerced party in the encounter.").

163 See Odem, supra note 2, at 10-11 (discussing abolition of prostitution as early goal of statutory rape laws); Oberman, supra note 92, at 27-28 (discussing mobilization of Victorian feminists to strengthen statutory rape laws to prevent child prostitution). Laws prohibiting prostitution also count the protection of young women as a goal. See Posner & Silbaugh, supra note 45, at 155 ("[T]he many reasons . . . put forward for prohibiting prostitution . . . have included . . . protecting minors who are coerced into a life of prostitution.").

164 Professor Oberman recounts an infamous example of the paradigm:

> "Your Honor, when this relationship began, I was not just a 16-year-old teenager taken to bed by a man twice my age. I was a 16-year-old teen-ager shown a world that I was not ready for, a world of elaborate spending and fast boats. This man took me to expensive restaurants and cheap motels. . . . I am sad to

titution or implicitly through the quid pro quo of sex in exchange for economic security, is unacceptable coercion, or whether it is the legitimate bargaining of one commodity for another.[165] Nonetheless, such evidence of economic coercion weighs heavily towards a determination that meaningful consent was not present in the sexual activity in question.

A final consideration, perhaps more specifically a lens through which to view other factors, has to do with identifying different constructions of sexual normalcy based on the practices and beliefs of differing cultures. Commentators have noted the various non-Western cultures where sexual activity between minors and adults historically has been accepted.[166] Within the continental United States, there may be cultural differences between the parties consenting to minor/adult sexual activity and the arbiter of consent that cloud the analysis.[167] For example, a highly educated heterosexual male judge may not be able to determine accurately whether a fourteen-year-old Latina has

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> say that he taught me well. He taught me to disrespect myself and to deceive my parents."

Oberman, supra note 92, at 38 (quoting Joey Buttafuoco Gets 6-Month Jail Sentence; Amy Fisher Makes Statement in Court, Houston Chron., Nov. 16, 1993, at A9 (quoting Amy Fisher)). Oberman generally supports the reform of statutory rape laws to further protect young women. See id. at 22 ("[L]aw makers must revive and reconfigure the crime of statutory rape.").

165 The colloquy between Professors West and Dripps is a fascinating example of this debate. Compare West, supra note 108, at 1455 ("This woman is 'having sex'—she is being physically penetrated—by someone who is at least willing to let her live in fear of cold and hunger, and, if the fear is justified, willing to render her homeless and hungry. . . . Clearly, sex obtained through such means is extremely damaging."), with Dripps, supra note 78, at 1801 ("[S]o long as the complex relationship is accepted as legitimate, the fact that only one party to sex found it enjoyable does not establish its illegitimacy, given compensation in some nonsexual form.").

The Model Penal Code makes a distinction between "coercion" and "bargain." Coercion is described as overcoming the victim's will, while a bargain is characterized as "an unattractive choice to avoid some unwanted alternative." Model Penal Code § 213.1 commentary at 314 (1962).

166 See, e.g., Robert J. Morris, Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy, 8 Yale J.L. & Human. 105, 127-30 (1996) (discussing Hawaiian cultural traditions involving same-sex relationships between minors and adults); Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 Calif. L. Rev. 1, 209-44 (1995) (describing non-Western same-sex sexual practices involving younger persons).

For criticism of these perspectives, see Angela P. Harris, Seductions of Modern Culture, 8 Yale J.L. & Human. 213, 218 (1996) (pointing out dangers of Morris's and Valdes's Western historical perspectives on non-Western cultural traditions).

167 Cf. Janice M. Irvine, Cultural Differences and Adolescent Sexualities, in Sexual Cultures and the Construction of Adolescent Identities 3, 10-11 (Janice M. Irvine ed., 1994) (discussing how different "sexual scripts" in gay community and African American community conflict).

consented to sexual activity with an older man,[168] or whether gay male teenagers have engaged in a meaningful consensual sexual relationship.[169] While there is generally no common law "cultural defense" for persons accused of committing crimes including sexual assault,[170] courts may use information about cultural norms in making appropriate sentencing determinations.[171] In the statutory rape context, the possibility of consent based on differing cultural norms should be factored into the meaningful consent equation.

B. Applying the Meaningful Consent Inquiry to Make "Crime of Violence" Determinations

Together, the factors above form an appropriately nuanced model for determining whether meaningful consent negated the "violence" in statutory rape cases. Applying this model will help determine whether meaningful consent to sexual activity took place in both easy cases and closer cases.[172] Application of the model requires an ade-

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168 See, e.g., Gloria Anzaldúa, Borderlands: La Frontera: The New Mestiza 16-23 (1987) (discussing cultural norms specific to women from Mexico); see also Donovan, supra note 18, at 33 (reporting that "in some cultures it is accepted, even encouraged, for young girls to have relationships with much older men [who then] help support the entire family"); Jill McLean Taylor, Adolescent Development: Whose Perspective?, in Sexual Cultures and the Construction of Adolescent Identities 29, 37 (Janice M. Irvine ed., 1994) (discussing Carol Stack's criticism of Gilligan as culturally normative). Of course, any treatment of "meaningful consent" is itself culturally specific. If a Caucasian male judge errs in making a meaningful consent determination in a case involving a defendant and complainant from Puerto Rico, it may be because the concept of "meaningful consent" does not travel between cultures.

169 See, e.g., Teemu Ruskola, Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist, 8 Yale J.L. & Feminism 269, 284-86 (1996) (discussing law's failure to address adolescent queer sexuality).

170 See, e.g., Katherine Bishop, Asian Tradition at War with American Laws, N.Y. Times, Feb. 10, 1988, at A18 (discussing application of kidnapping and rape laws to Southeast Asian cultural practices, including capturing of brides).

171 See, e.g., People v. Ton Moua, No. 315972-0 (Fresno County Super. Ct. Feb. 7, 1985) (offering reduced sentence to defendant based on appreciation of differing cultural traditions); People v. Kimura, No. 315972-0 (Fresno County Super. Ct. Feb. 7, 1985) (same); see also Holly Maguigan, Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?, 70 N.Y.U. L. Rev. 36, 57-58, 63 n.90 & 91 (1995) (proposing that sentencing decisions, as well as defenses at trial, take into account "outsider" cultural practices and discussing *Tou Moua* and *Kimura* cases as examples).

172 The model could be codified into the statutes. The commentary to Sentencing Guidelines § 4B1.2 lists crimes, including forcible rape, that courts have construed to be crimes of violence. See U.S.S.G. § 4B1.2 commentary (1996). Statutory rape could be listed in such notes or commentary, as well as some direction as to how to make a determination about when statutory rape convictions should be considered crimes of violence. For a discussion of how one statute outlines a procedural model for making a fact-based determination about whether a prior conviction is a "crime of violence," see infra notes 212-18 and accompanying text.

quate factual record. Following *Taylor*'s categorical approach, most of the federal trial courts making "crime of violence" determinations about statutory rape convictions have not described the facts of conduct underlying the convictions in question. This makes an inquiry into consent in these cases difficult.[173] But even with these underdeveloped factual records, the inquiry model developed above is helpful.

United States v. Passi,[174] from the Tenth Circuit, is an easy case. In *Passi*, the defendant stipulated as part of his guilty plea to charges of knowingly engaging in sexual acts with a minor on federal property that the complainant was his thirteen-year-old biological daughter.[175] The inquiry model above argues that an incestuous relationship between defendant and complainant negates meaningful consent.[176] In this case, given the stipulation, no further inquiry would be necessary.

Shannon, however, illustrates that skeletal facts may be misleading. The information in *Shannon* stated only that the seventeen-year-old male defendant engaged in sexual intercourse with a thirteen-year-old female complainant.[177] Based on these statements, the three judge panel first reviewing the defendant's sentence held that this statutory rape conviction was not a "crime of violence," since force was neither an element of the statutory rape crime with which the defendant was charged, nor did the crime involve conduct inherently presenting "an inherent risk of physical injury."[178] As the criminal complaint in the case showed, however, Shannon dragged the complainant down a flight of stairs, grabbed her by the arms when she attempted to escape, and threw her onto the floor, where she tried in vain to push him off.[179] The defendant in *Shannon* used more force than was necessary to achieve sexual intercourse. According to the inquiry into consent outlined above,[180] no further questions need be

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173 For example, in *Bauer* the defendant claimed that the sexual activity with the minor complainant underlying his statutory rape conviction was consensual. The court only looked at the fact that Bauer was convicted of having sexual intercourse with a female child under the age of 16 to make the "crime of violence" determination. See United States v. Bauer, 990 F.2d 373, 374 (8th Cir. 1993).

174 62 F.3d 1278 (10th Cir. 1995).

175 See id. at 1279.

176 See supra notes 136-38 and accompanying text.

177 See United States v. Shannon, 110 F.3d 382, 384 (7th Cir.) (en banc) (explaining that "Shannon was permitted to plead guilty to the information, which means that he admitted only the facts contained in it"), cert. denied, 118 S. Ct. 223 (1997).

178 See *Shannon*, 94 F.3d at 1069, 1070 (7th Cir. 1996) ("Here, Shannon was 17 and the girl 13 years, 10 months. Though both immoral and criminal, many teenagers have nonviolent, noncoercive sex with no hint of physical injury. Without something in the indictment or information suggesting otherwise, we cannot simply presume violence attends this crime."), rev'd en banc, 110 F.3d 382 (7th Cir.), cert. denied, 118 S. Ct. 223 (1997).

179 See *Shannon*, 110 F.3d at 391 (Coffey, J., concurring in part, dissenting in part).

180 See supra notes 141-71 and accompanying text.

asked. The complainant could not have given meaningful consent to the physically coerced conduct in question. Since the use of force is a dispositive factor in determining whether meaningful consent occurred, the defendant's conviction should be classified as a sentence-enhancing "crime of violence."

Two recent court opinions not involving sentencing, but with more detailed recounting of facts, provide examples of how an inquiry into consent will help courts make more accurate, reasonable determinations of whether particular statutory rape convictions are crimes of violence. In *People v. M.K.R.*,[181] a sixteen-year-old male defendant was charged with sexual misconduct for engaging in sexual intercourse with a fifteen-year-old female.[182] Here the defendant was a young man with no history of delinquency, working at two parttime jobs to save money for college.[183] He met the complainant while they were both in high school.[184] The two parties had classes together and were tennis partners.[185] In court, the complainant testified that she agreed to a sexual relationship with the defendant, "stated that he was very kind and supportive, that she wished to continue to see him, and that she would feel guilty if anything happened to him [because] of their relationship."[186] She reported that no additional force was used to coerce sexual activity.[187] Her parents insisted that the prosecutor bring criminal charges against the defendant.[188]

Based on these facts, the inquiry model suggests that the complainant gave meaningful consent to sexual activity with the defendant. They were not involved in an incestuous relationship, nor one where there was a social power disparity. No physical force was used to coerce sex, nor does it seem economic coercion was possible. These two adolescents had a right to sexual privacy recognized in some states,[189] and, from what is known from the facts the court described, both desired physical intimacy. Here the inquiry leads to a conclusion that both parties meaningfully consented to sexual activity, which would disallow the characterization of the defendant's conviction as a "crime of violence."

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181 632 N.Y.S.2d 382 (N.Y. Sup. Ct. 1995).

182 See id. at 383.

183 See id. at 384.

184 See id.

185 See id.

186 Id.

187 See id.

188 See id.

189 See supra notes 149-50.

Compare *M.K.R.* with *Mary M. v. North Lawrence Community School Corp.*,[190] where a twenty-one-year-old male defendant was convicted under an Indiana child molestation statute for engaging in sexual intercourse with a thirteen-year-old female complainant.[191] Here the complainant was an eighth grade student at a rural junior high school; the defendant was employed in the school cafeteria.[192] The two met in the cafeteria; within weeks the defendant was passing suggestive notes to the complainant as she stood in the lunch line.[193] Shortly thereafter some witnesses reported that the defendant and complainant engaged in inappropriate hugging and kissing at a school dance where the defendant was a chaperone.[194] One month into their relationship, the defendant and complainant decided to skip work and school and spend the day together.[195] During the course of this day, the two parties engaged in their one and only act of sexual intercourse.[196] The defendant was arrested shortly thereafter, when the complainant "reluctantly" pressed charges.[197]

The inquiry model this Note has developed would help to analyze these facts to determine if the complainant gave meaningful consent to sexual conduct. Many of the facts here might suggest that meaningful consent was present in the relationship between the defendant and the complainant. The relationship was not incestuous, nor did it seem to be a coercive social relationship—cafeteria employees have no authority over students—based on an obvious power disparity. The defendant apparently did not use excessive force to coerce the complainant to participate in sexual activity. Nor, as far as we know, did the defendant economically coerce the complainant to engage in sexual intercourse. It appears from these facts that the complainant gave uncoerced consent to sexual activity.[198]

Balanced against these factors, however, are facts that call into question the meaningfulness of the *Mary M.* complainant's consent. The complainant may have been suffering some of the self-esteem re-

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190 131 F.3d 1220 (7th Cir. 1997) (describing facts of relationship that resulted in child molestation conviction for purposes of civil case against school district).

191 See id. at 1223.

192 See id. at 1221.

193 See id.

194 Other witnesses disputed these accounts. See id. at 1222.

195 See id.

196 See id. at 1223.

197 See id.

198 Note that the complainant's age here, 13, might fall beneath the per se age below which minors may not give meaningful consent to sexual activity with adults. See supra notes 128-30 and accompanying text. If this is the case, there is no need to inquire into consent.

lated concerns some critics have discussed.[199] Her relationship with the older defendant, the "talk of the eighth grade,"[200] resembles others where young women consent to sex in order to please older men who they hope will make them feel attractive and lovable.[201] The complainant also may have hoped the relationship would grant her higher social status among her peers.[202] Finally, the complainant's willingness to lie and miss classes in order to be with the defendant may signify immature behavior, suggesting she could not give meaningful consent to sexual activity.[203] Still, without evidence of physical, emotional, or economic coercion, and giving weight to the complainant's interest in sexual autonomy, the inquiry model developed above suggests that the sexual conduct in question was not a "crime of violence" meriting sentence enhancement.[204]

C. *Procedural Safeguards for Making a Fact-Based Inquiry into Meaningful Consent*

Two concerns in applying the consent inquiry to the facts of cases in this way must be addressed. First, any fact-specific model for making a "crime of violence" determination may run afoul of *Taylor*'s approval of categorical "crime of violence" determinations.[205] In response, it may be argued that the *Taylor* Court did not intend that a

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199 See supra note 159.

200 *Mary M.*, 131 F.3d at 1222 (referring to classroom gossip about relationship between defendant and complainant).

201 See supra note 134.

202 See, e.g., Oberman, supra note 92, at 66 n.302 ("Rochelle, who avoided boys early on . . . began to feel she had to get a boyfriend during her sophomore year in high school. . . . 'I just thought I had to stay with him because I needed a boyfriend to make my life complete.'") (quoting Deborah Tolman, Doing Desire: Adolescent Girls' Struggles For/With Sexuality (1993) (unpublished manuscript)).

203 The alternative explanation for this behavior, though, is that the complainant felt she had to misrepresent her whereabouts because she was not allowed to date *anyone*. See *Mary M.* 131 F.3d at 1222 ("Diane was careful to hide her relationship with Fields from her parents because she knew that her mother thought she was too young to date. According to [her mother], Diane's teachers were also aware of this fact.").

204 The *Mary M.* court opined: "A thirteen year old girl cannot be said to understand the nature of her actions when she engages in sexual intercourse." *Mary M.*, 131 F.3d at 1228. Reasonable minds differ on this point. See, e.g., Catherine Elton, Jail Baiting: Statutory Rape's Dubious Comeback, New Republic, Oct. 20, 1997, at 12 (quoting adolescent sexuality researcher Mike Males: "When you meet the 20-year-old and the 13-year-old you are surprised. . . . Thirteen-year-olds are portrayed as gum-chewing, braces-wearing twits and the 20-year-olds are supposed to be more mature. Very often this is not the case.").

205 United States v. Taylor, 495 U.S. 575, 600 (1990) ("The Courts of Appeals uniformly have held that [ACCA] § 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions. . . . We find the reasoning of these cases persuasive.").

categorical approach be required in all cases,[206] or that statutory rape does not lend itself to such analysis as readily as burglary does.[207] There are important policy concerns underlying *Taylor*, however: The Court stated that part of the legislative intent behind the ACCA "crime of violence" definition was to encourage efficient use of judicial resources through categorical determinations of "crime of violence" status.[208]

In addition to possible *Taylor* violations, any fact-based inquiry into past sexual conduct raises the concern that the complainant's conduct will be placed on trial years after the sexual activity in question. The perception that all rape complainants faced this trial-within-a-trial during rape proceedings was a motivation for the rape reform movement of the 1970s,[209] which included rape shield laws protecting a complainant's past sexual behavior from attack by defense counsel[210] and the rewriting of sexual assault statutes to emphasize defendant

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206 Commentators have pointed out that *Taylor* analyzed the intent of Congress only as it pertained to one of the enumerated crimes, burglary, in the ACCA "crime of violence" definition. See Douglas A. Passon, Note, Attempted Burglary as a "Violent Felony" Under the Armed Career Criminal Act: Avoiding a "Serious Potential Risk" of Confusion in the Wake of *Taylor v. United States*, 495 U.S. 575, 73 Wash. U. L.Q. 1649, 1650 (1995). Arguably, the Court never intended to limit sentencing courts in making accurate determinations of how "otherwise" convictions may have been violent crimes. See *Taylor*, 495 U.S. at 602 ("This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements *of generic burglary*.") (emphasis added). A review of legislative history for the amended ACCA "crime of violence" definition reveals no discussion of whether statutory rape convictions could be easily "standardized" for sentence-enhancing purposes. See ACCA Hearing, supra note 9; H.R. Rep. No. 99-849 (1986) (reporting on findings of House Committee on the Judiciary on 1986 compromise amendments to ACCA).

207 As a nonenumerated potential "crime of violence," statutory rape may not have a definitive generic definition. As Judge Posner points out in *Shannon*, the various state statutes outlawing sexual conduct with minors include a wide variety of complainant ages and sexual conduct. See United States v. Shannon, 110 F.3d 382, 385-86 (7th Cir.) (en banc), cert. denied, 118 S. Ct. 223 (1997); see also Posner & Silbaugh, supra note 45, at 44 (detailing state age of consent laws). The Model Penal Code, containing the generic burglary definition noted with approval in *Taylor*, includes a statutory rape section which leaves the complainant age up to the discretion of the adopting jurisdiction. See Model Penal Code § 213.3 (1962).

208 See *Taylor*, 495 U.S. at 601 (discussing Congressional "categorical" approach to sentence-enhancing predicate offenses).

209 See, e.g., Estrich, supra note 81, at 1100 ("The Michigan statute's emphasis on force or coercion attempts to shift the focus of rape prosecutions from what the victim does or does not do (consent or resist) to the actions of the defendant.").

210 See, e.g., Harriett R. Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minn. L. Rev. 763, 765-69 (1986) (discussing enactment of rape shield statutes in 48 states and U.S. military). Commentators have called for these statutes to cover instances of same-sex rape. See, e.g., Elizabeth J. Kramer, Note, The Application of Rape Shield Laws to Cases of Male Same-Sex Rape, 73 N.Y.U. L. Rev. 293, 330-31 (1998).

behavior rather than complainant resistance.[211] By necessity, a "crime of violence" determination featuring a factual inquiry into consent, including possible evidentiary hearings, reviews the complainant's conduct, undermining the goals of the rape reform statutes.

There is an existing model for a determination, however, which could be modified here to promote judicial efficiency while protecting witness privacy. VCCLEA, the federal "three strikes" law, allows a defendant to make an affirmative collateral challenge to a "crime of violence" determination.[212] Under VCCLEA, defendants are allowed to prove, by a "clear and convincing evidence" standard, that conduct underlying convictions falling under the "otherwise" clause did not include the use or threat of use of a firearm or other dangerous weapon, and that the conduct did not result in death or serious bodily injury.[213] Although courts have only recently begun to grapple with procedures for conducting this fact-based inquiry,[214] commentators

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211 See supra note 98.

212 See Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C.A. § 3559 (c)(3) (West Supp. 1998).

213 The collateral challenge provision reads as follows:

> (3) Nonqualifying felonies.
>
> (A) Robbery in certain cases. Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—
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> (i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and
>
> (ii) the offense did not result in death or serious bodily injury . . . to any person.
>
> (B) Arson in certain cases. Arson shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—
>
> (i) the offense posed no threat to human life; and
>
> (ii) the defendant reasonably believed the offense posed no threat to human life.

18 U.S.C.A. § 3559(c)(3) (West Supp. 1998). The definition of "serious bodily injury" here tracks that used in Sentencing Guidelines § 1B1.1, meaning "injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." See id.; U.S. Sentencing Guidelines Manual § 1B1.1 (1997). Courts construing "physical injury" under ACCA or the sentencing guidelines generally have not followed this definition explicitly. See, e.g., United States v. Shannon, 110 F.3d 382, 387 (7th Cir.) (en banc) (construing "serious injury" to include pregnancy and sexually transmitted disease), cert. denied, 118 S. Ct. 223 (1997).

214 See, e.g., United States v. Mixon, No. 96-40065-01-RDR, 1997 U.S. Dist. LEXIS 17695, at *8-*9 (D. Kan. Oct. 8, 1997) (holding that court correctly accepted presentence report that defendant claimed provided inadequate notice, but deciding that court erred in disregarding defendant's argument that he received ineffective assistance of counsel for his prior convictions), modified, No. 96-40065-01-RDR, 1997 U.S. Dist. LEXIS 21135, at *8-

have advocated an approach making initial determinations based on presentencing reports.[215] If the need for further evidentiary hearings is indicated after the court reviews the presentencing report, complainant or witness testimony may be heard.[216] If this procedure is used, most, if not all, of the information needed to make a "crime of violence" determination would be available through the presentencing report, sparing all parties from further proceedings.[217] If the court finds additional consent evidence necessary after reviewing the report, it may request that the parties handle evidence gathering through interrogatories or depositions instead of in-court testimony. Even if the court decides that the complainant should appear in court, testimony could be limited to the inquiry into consent, not reaching the complainant's past sexual activity with other persons.[218]

Finally, many complainants may not necessarily find the prospect of a consent inquiry painful. Many statutory rape convictions are brought by the state at the behest of the complainant's parents.[219] Studies suggest that some relationships between parties engaging in conduct underlying statutory rape are valuable to the complainants, who view the defendants with affection.[220] These complainants may

*10 (D. Kan. Dec. 17, 1997) (finding after review of record that defendant had received effective assistance of counsel in prior case).

215 See, e.g., R. Daniel O'Connor, Note, Defining the Strike Zone—An Analysis of the Classification of Prior Convictions Under the Federal "Three-Strikes and You're Out" Scheme, 36 B.C. L. Rev. 847, 880-81 (1995) (advocating establishment of database of information on previous felony convictions which courts could use as presentencing report).

216 See id. at 882-83. O'Connor argues that the procedural framework created by section 411 of the Controlled Substances Act, 21 U.S.C. §§ 801-904 (1994), which mandates the filing of a presentence report and a written response from the defendant denying the allegations in the report, would be an appropriate means of fairly apportioning judicial resources to an inquiry into conduct underlying possible "crime of violence" convictions under VCCLEA. See O'Connor, supra note 215, at 882-83.

217 For a discussion of what information would be useful in determining consent, see supra Part III.A.

218 Historically, the fact of a statutory rape complainant's past sexual conduct was a defense to a conviction. After engaging in prior sexual conduct, a complainant was seen as having lost the "purity" or virginity the "age of consent" laws were enacted to protect. See, e.g., Odem, supra note 2, at 71 (explaining how courts "deemed sexual intercourse with an 'unchaste' girl a less serious offense than the same act with a 'chaste' girl"). Inquiries into prior sexual conduct are generally no longer explicit. But see State v. Rush, 942 P.2d 55, 57 (Kan. App. 1997) ("[A] female adolescent's sexual sophistication may be properly considered in imposing punishment.").

219 See, e.g., People v. M.K.R., 632 N.Y.S.2d 382, 383 (N.Y. Sup. Ct. 1995) (reporting that statutory rape charges were brought at behest of complainant's parents); Good Morning America (ABC television broadcast, June 24, 1997) (quoting mother of female complainant after 18-year-old statutory rape defendant received 40-year sentence: "I believe that they both should pay some price for what they've done. But the sentencing that they're trying to push on him is just too much.").

220 See, e.g., Donovan, supra note 18, at 32, 34 (discussing many young women who love their older partners or rely on them for support); see also Frank Bruni, In an Age of Con-

wish to validate their relationship with the defendant through testimony regarding meaningful consent, or may wish to testify to prevent the defendant from suffering an overly severe penalty based on a conviction for a nonviolent crime.[221]

CONCLUSION

The existing federal "crime of violence" model is inadequate for helping courts make decisions about predicate statutory rape convictions because it produces inaccurate, unreasonably harsh results. Given the new data on adolescent sexuality and cognition that this Note has explored, John White's status as a violent recidivist meriting increased punishment is questionable. Older adolescents, though nominally or actually complainants in charges for statutory rape, are often capable of meaningful consent to sexual activity. Thoughtful, self-manifested consent turns otherwise potentially harmful acts into acts of affection and self-actualization. The model for determining consent described above balances these interests in sexual autonomy with the state interest in punishing this sexual conduct when appropriate and in keeping truly violent recidivists incarcerated. Federal courts using the meaningful consent model would reach more accurate and just results when making "crime of violence" determinations involving statutory rape.

sent, Defining Abuse by Adults, N.Y. Times, Nov. 9, 1997, B1 (citing experts discussing complexities of relationships between some adolescents and adults involved in sexual activity).

221 See, e.g., Ojito, supra note 1, at B2 (reporting how mother of statutory rape complainant wrote on behalf of defendant facing deportation: "Now I feel extremely guilty that what we did to him . . . has come back to cause him and his family such pain and hardship. . . . [The defendant] is not a criminal nor a violent or immoral person, and he does not deserve to be treated as such.").