STATUTORY RAPE AS A CRIME OF VIOLENCE FOR PURPOSES OF SENTENCE ENHANCEMENT UNDER THE UNITED STATES SENTENCING GUIDELINES: PROPOSING A LIMITED FACT-BASED ANALYSIS

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INTRODUCTION

Currently the United States circuit courts disagree whether statutory rape[1] is a "crime of violence" for purposes of sentence enhancement under the United States Sentencing Guidelines (USSG).[2] The USSG provide for a sentence enhancement for "career offenders."[3] Defendants who have two prior convictions for "crimes of violence" qualify for "career offender" status.[4] Courts also disagree as to which method should be used in determining whether a statutory rape conviction constitutes a crime of violence.[5]

The disparity among the circuits contravenes the goals of the United States Sentencing Guidelines. Furthermore, the different methods used by the circuits when making such determinations are flawed in that they lead to unfair results and waste judicial resources. This Note will propose a method by which courts can make crime of violence determinations that will fairly serve the goals of the

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1. For purposes of this Note, statutory rape is defined as sexual intercourse between an adult and a child. Statutes that include force as an element are not considered statutory rape laws in this Note. Not all statutes that prohibit sexual intercourse between an adult an a child are titled, "statutory rape." A variety of names are used for this conduct, including lascivious acts with children, sexual assault, and rape. For an overview of statutory rape laws in the United States, see Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 41-77 (1997). The Model Penal Code's approach to sex crimes against children distinguishes between sexual penetrative offenses and contact offenses. *See* MODEL PENAL CODE §§ 213.1-.4 (1980) Under the Model Penal Code, a male who engages in sexual intercourse with a female less than ten years old is guilty of felony rape, the most serious penetration offense in the Model Penal Code. *See id.* § 213.1. The Model Penal Code also makes it an offense to have sexual intercourse with a child under sixteen when the offender is more than four years older than the victim. *See id.* § 213.3(a). Under the Model Penal Code, it is an offense to have sex with a person under twenty-one years of age when that person is a ward of the offender. *See id.* § 213.3(b). The provisions of the code that set forth the sexual contact offenses mirror the provisions describing the sexual penetrative offenses. *See id.* § 213.4. For a discussion of the Model Penal Code's approach to sex crimes against children, see Phipps, *supra*, at 17-26.

2. United States v. Riley, 183 F.3d 1155, 1160 n.11 (9th Cir. 1999) (noting split).

3. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (1998).

4. *Id.*

5. *See, e.g.*, United States v. Bauer, 990 F.2d 373 (8th Cir. 1993) (using the categorical method); United States v. Shannon, 110 F.3d 382 (7th Cir. 1996) (en banc) (using the intermediate approach).

USSG, promote fairness to defendants, and conserve judicial resources.

Part I of this Note will describe the federal sentencing scheme prior to the promulgation of the USSG and the problems Congress identified in the old sentencing scheme. Part I will then discuss of the USSG and examine the guideline provisions that are pertinent to this discussion. Part II will discuss the three approaches courts employ when determining whether a prior statutory rape conviction is a crime of violence. It will then compare these approaches and discuss the strengths and weaknesses of each approach. Finally, Part III will propose a new method for making crime of violence determinations. This new method, referred to as the limited fact-based approach, alleviates many of the problems found in the approaches currently used by the courts. Part III will also discuss how the facts to be considered in this new method indicate whether a crime of violence has occurred. This Note will then discuss the benefits and anticipated criticisms of the limited fact-based approach.

I. THE SENTENCING GUIDELINES

Prior to the introduction of the federal sentencing guidelines, the federal criminal sentencing system was based largely on the rehabilitation model of punishment.[6] "The judge [was] supposed to set the maximum term of imprisonment and the Parole Commission [was] supposed to determine when to release the prisoner because he is 'rehabilitated.'"[7] The law did not contain a general sentencing provision; it merely pronounced the "maximum term of imprisonment and the maximum fine for each Federal offense in the section that describes the offense."[8] However, over time federal sentencing judges and the Parole Commission abandoned the rehabilitation model of punishment.[9] As a result, sentencing judges were left with unfettered discretion to sentence criminals based on their own notions of the purposes of sentencing.[10] This unfettered discretion resulted in federal judges giving "offenders with similar histories, convicted of similar crimes, committed under similar circumstances" an unjustifiable wide range of sentences.[11] Because of the disparity in sentences

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6. *See* Comprehensive Crime Control Act of 1984, REP. NO. 98-225, 98th Cong., 2d Sess. 37 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221.

7. *Id.*

8. *Id.* at 39, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3222.

9. *See id.* at 40, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3223. "[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." *Id.* at 38, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221.

10. *See id.*, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221.

11. *Id.* This disparity is shown by a study conducted in the Second Circuit in 1974. In this study, fifty district court judges were given twenty identical cases and asked to impose sentences for the offenders in those cases. The offenses in these cases were representative of the offenses seen in the district courts of the Second Circuit. The study found large disparities in the sentences imposed by the different judges in identical cases. For example, in a case concerning extortionate

imposed by judges and the second guessing that occurred between sentencing judges and parole officials, "prisoners and the public [were] seldom certain about the real sentence a defendant [would] serve."[12]

In response to the problems created by this system of sentencing, Congress implemented sentencing reform in the Comprehensive Crime Control Act of 1984.[13] This reform introduced the first comprehensive federal sentencing law.[14] The goals for this sentencing reform legislation included assuring that "sentences are fair both to the offender and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all Federal criminal cases."[15] Congress also intended that the sentencing legislation "assure that the offender, the Federal personnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it."[16]

The Sentencing Reform Act of 1984, included in the Comprehensive Crime Control Act of 1984, created the United States Sentencing Commission.[17]

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credit transactions and income tax violations, the most severe sentence imposed was twenty years in prison and a $65,000 fine. The median sentence imposed by the judges was ten years in prison and a $50,000 fine. The least severe sentence imposed was three years in prison. *See* Comprehensive Crime Control Act of 1984, H.R. REP. NO. 98-225, 98th Cong., 2d Sess. 37, 41-44 n.22 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3224-3227.

12. *Id.* at 39, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3222.

13. *See id.* at 37, *reprinted in* 1984 U.S.C.C.A.N. 3220.

14. *See id.* This new sentencing law was the "culmination of a reform effort begun more than a decade [earlier] by the National Commission on Reform of Federal Criminal Laws" as well as by many notable judges, professors, and senators. *Id.*

15. *Id.* at 39, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3222.

16. *Id.* In total, five goals were stated for the legislation. Two goals are stated in the text above. The remaining are:

> First, sentencing legislation should contain a comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served by the sentencing system and a clear statement of the kinds and lengths of sentences available for Federal offenders.
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> [The legislation] should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case.
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> . . .
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> [Finally, the legislation] should assure that each stage of the sentencing and corrections process, from the imposition of sentence by the judge, and as long as the offender remains within the criminal justice system, is geared toward the same goals for the offender and for society.

Id.

17. *See* 28 U.S.C. § 994(a) (1994). The United States Sentencing Commission consists of seven voting members and one nonvoting member. The President appoints the voting members with the advice and consent of the Senate. At least three of the members are federal judges chosen by the President from a list of judges recommended by the Judicial Conference of the United States. *See* 28 U.S.C. § 991(a) (1993).

Congress's stated purpose in establishing the Sentencing Commission was to provide "adequate deterrence to criminal conduct . . . " and "protect the public from further crimes of the defendant."[18] The purposes of the Sentencing Commission also include establishing sentencing policies and practices that "provide certainty and fairness in meeting the purposes of sentencing [and] avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."[19]

The Sentencing Commission developed the USSG, which took effect on November 1, 1987.[20] The USSG provide a suggested sentence, based in part on the defendant's criminal history.[21] Under the guidelines, "career offenders" receive enhanced sentences.[22]

> 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.[23]

When a defendant in federal court meets the first two requirements of the "career

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18. 18 U.S.C. § 3553(a)(2)(B)-(C) (1993). There are four purposes for sentencing set forth in 18 U.S.C. § 3553(a)(2). Two of the purposes are stated above. The other two stated purposes of sentencing are "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *Id.* § 3553(a)(2)(A), (C).

19. 28 U.S.C. § 991(b)(1)(B) (1993). This section further states that the Commission is to establish sentencing policies that provide certainty, fairness, and avoid unwarranted sentencing disparities but maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." *Id.*

20. *See* Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574, 1575-76 (1997). Although the guidelines were enacted on November 1, 1987, they did not go into effect nationally until 1989 when they successfully withstood constitutional challenges. *See* United States v. Mistretta, 488 U.S. 361 (1989).

21. *See* Comprehensive Crime Control Act, H.R. REP. NO. 98-225, at 78-79, *reprinted in* 1984 U.S.C.C.A.N. 3261-62.

22. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (1998). *See* U.S. SENTENCING GUIDELINES ch.4, pt. A, introductory cmt. at 283 (1998):

> 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.

23. *Id.* § 4B1.1.

offender" definition, the sentencing judge must then look to the defendant's prior convictions to determine if the convictions were for crimes of violence or controlled substance offenses. A crime of violence is defined in the USSG as:

> any offense under federal or state law punishable by imprisonment for a term exceeding one year, that (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[24]

The courts consider the latter part of this provision, consisting of the "otherwise" clause, when determining whether a particular conviction for statutory rape is a conviction for a crime of violence.

II. STATUTORY RAPE AS A CRIME OF VIOLENCE

When the statutory rape statute under which a defendant is convicted does not contain use, attempted use, or threatened use of physical force as an element, the court must decide whether the statutory rape conviction "involves conduct that presents a serious potential risk of physical injury to another" to determine if that conviction is a conviction for a crime of violence.[25] If the court finds that the conviction does involve "conduct that presents a serious potential risk of physical injury to another," that conviction will be considered a conviction for a crime of violence.[26] Just as the federal circuit courts disagree on whether statutory rape satisfies the crime of violence provision,[27] they also disagree on the appropriate method for making this determination.[28]

"Courts deciding whether statutory rape convictions should be considered crimes of violence . . . face[] a wide variety of underlying state statutes. These statutes differ by name, relevant ages of both defendant and complainant, and type of conduct proscribed."[29] This variety among statutory rape statutes may account for the variety of methods courts use for determining whether statutory rape is a crime of violence. There are three different approaches employed by the courts in determining this issue: the categorical approach, the intermediate approach, and the fact-based approach.[30]

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24. *Id.* § 4B1.2(a).

25. *See* United States v. Sacko, 178 F.3d 1 (1st Cir. 1999).

26. *See id.* at 2.

27. *See* United States v. Riley, 183 F.3d 1155, 1160 n.11 (9th Cir. 1999).

28. *See* Susan Fleischmann, Comment, *Toward a Fact-based Analysis of Statutory Rape Under the United States Sentencing Guidelines*, 1998 U. CHI. LEGAL F. 425, 428 (1998); *see also* Lewis Bossing, Note, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205, 1213 (1998).

29. Bossing, *supra* note 28, at 1213.

30. *See* Fleischmann, *supra* note 28, at 428-29.

A. Court Approaches

Some courts use the categorical approach.[31] Under this approach, a court looks solely to whether conduct that would lead to a conviction under the statute necessarily "presents a serious risk of physical injury to another."[32] A court using this approach does not examine the defendant's actual conduct, but examines the minimum conduct necessary for a conviction under the statute.

Other courts use an intermediate approach,[33] where the sentencing court will consult more than just the statute in making crime of violence determinations. Courts using this approach examine the facts relating to the underlying conviction are contained in the charging papers, the indictment[34] or information,[35] when determining whether an offense involves conduct that presents a serious potential risk of physical injury to another.

The third approach used by courts is the fact-based approach.[36] Under this approach, courts examine any and all facts surrounding the prior conviction and do not limit their inquiry to any specific documents. Courts may review the record of the prior proceeding or may even hold evidentiary hearings to determine whether the previous conviction was for a crime of violence.

B. Comparison of the Approaches

Each approach has strengths, weaknesses, and varying degrees of support. This Note will discuss the strengths and weaknesses of each approach focusing on the extent to which each approach promotes efficiency, fairness, uniformity, and certainty in sentencing.

1. Categorical Approach.—This approach is supported by the only United States Supreme Court decision regarding crime of violence determinations, *Taylor v. United States*.[37] In *Taylor*, the Court considered whether a Missouri

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31. *See, e.g.*, United States v. Bauer, 990 F.2d 373 (8th Cir. 1993) (holding statutory rape is a crime of violence).

32. *See id.* at 374; *see also* United States v. Rodriguez, 979 F.2d 138 (8th Cir. 1992).

33. *See, e.g.*, United States v. Shannon, 110 F.3d 382 (7th Cir. 1996).

34. An indictment is an "accusation in writing found and presented by a grand jury, legally convoked and sworn, to the court in which it is impaneled, charging that a person therein named has done some act, or been guilty of some omission, which by law is a public offense, punishable on indictment." BLACK'S LAW DICTIONARY 772 (6th ed. 1990).

35. An information is "an accusation exhibited against a person for some criminal offense, without an indictment." *Id.* at 779. An information differs from an indictment only "in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath." *Id.*

36. *See, e.g.*, United States v. Flores, 875 F.2d 1110 (5th Cir. 1989). The Fifth Circuit upheld the district court's reliance on a pre-sentence report that was based on interviews of county clerks in determining if the defendant's burglary convictions were for burglaries of dwellings. *See id.* at 1112-13.

37. 495 U.S. 575 (1990).

conviction for second degree burglary was a conviction for a violent felony.[38] The Court ruled that in making such determinations, courts should "look only to the fact of conviction and the statutory definition of the prior offense."[39] Examining a prior conviction for burglary, the Court ruled that sentencing courts should find that a violent felony occurred if the statute under which the defendant was convicted has the basic elements of, what the Court called, "generic burglary."[40] Although the Court used a categorical approach, it was dealing with a conviction for burglary, one of the offenses that is enumerated in the statute. Therefore, the decision in *Taylor* does not instruct courts on how to determine whether crimes not enumerated in the statute are crimes of violence, nor does it explain how a court should determine if a defendant's conduct "presents a serious potential risk of physical injury to another."[41]

The Eighth Circuit uses the categorical approach when making crime of violence determinations. In *United States v. Rodriguez*,[42] the court rejected the defendant's request to examine the facts surrounding his prior statutory rape conviction.[43] The court ruled that a "sentencing court is not required to consider the underlying circumstances at the time of the crime in determining that a defendant has been convicted of a 'crime of violence.'"[44] In *United States v. Bauer*,[45] the Eighth Circuit followed its decision in *Rodriguez* and found that a conviction for lascivious acts with children in violation of the Iowa law was per se a crime of violence.[46]

The categorical approach promotes the conservation of judicial resources. The Court in *Taylor* noted the approach's efficiency as a reason for preferring the

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38. *See id.* at 578. The defendant had received an enhanced sentence under section 1402 of Subtitle I of the Anti-Drug Abuse Act of 1986, 18 U.S.C. § 924(e). Although the Court did not analyze a sentence enhancement under the sentencing guidelines, this case is relevant because the definition for "violent felony" in 18 U.S.C. § 924(e) does not significantly differ from the definition of "crime of violence" in the USSG. The only difference in the definitions is that burglary is enumerated as a violent felony in 18 U.S.C. § 924(e), whereas burglary *of a dwelling* is enumerated as a crime of violence under USSG section 4B1.2.

39. *Taylor*, 495 U.S. at 602.

40. *Id.* at 599.

41. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a).

42. 979 F.2d 138 (8th Cir. 1992).

43. *See id.* at 140-41.

44. *Id.*

45. 990 F.2d 273 (8th Cir. 1993).

46. *See id.* at 374-75. The court analyzed Bauer's conviction under an Iowa law, which provided:

> If any person ravish and carnally know any female by force or against her will, or if any person carnally know and abuse any female child under the age of sixteen years, or if any person over the age of twenty-five years carnally know and abuse any female under the age of seventeen years, he shall be imprisoned in the penitentiary for life, or any term of years, not less than five.

IOWA CODE § 698.1 (repealed 1976).

categorical approach to a factual approach.[47] Under the categorical approach, courts do not spend valuable time and resources retrying prior convictions.

However, this approach seems to sacrifice sentencing uniformity, fairness, and accuracy in exchange for efficiency. It does not promote the goal of uniform sentencing. For example, if two defendants engage in identical behavior in different jurisdictions, one defendant's conduct could be deemed a crime of violence and the other's not a crime of violence. This disparity results because, under this approach, the crime of violence determination is based upon the language of the statute under which the defendant was previously convicted, not the defendant's conduct. Moreover, this approach does not protect society from recidivist violent offenders. A defendant who engages in conduct "that presents a serious potential risk of physical injury to another"[48] could be given a lesser sentence than he should simply because, under the wording of the statutory rape statute, the "potential risk" was not inherent in the elements of the crime.

In addition to underinclusive results, the categorical approach may lead to overinclusiveness by giving enhanced sentences to defendants who are not recidivist violent offenders. The Iowa statutory rape law in *Bauer* provides a cogent example. The statute prohibited "any person [to] carnally know and abuse any female child under the age of sixteen years."[49] Under this statute, it is possible that a seventeen-year-old male could be convicted for having sex with his fifteen-year-old girlfriend. Because this conviction would be under section 698.1 of the Iowa Code, Eighth Circuit courts following *Bauer* would consider it a conviction for a crime of violence for purposes of sentence enhancement. Not only does this result seem unfair, but seventeen-year-old males having sexual relations with fifteen-year-old females with whom they are in a relationship are not the type of criminals the "career offender" provision was designed to target. Therefore, the categorical approach can result in enhanced sentences for defendants who pose no added threat to the public.[50]

2. Intermediate Approach.—The Seventh Circuit used the intermediate approach in *United States v. Shannon*.[51] In *Shannon*, the court, sitting en banc, refused to examine the complaint or hold evidentiary hearings to determine whether the defendant's conviction for second-degree sexual assault was a crime of violence.[52] The court confined its examination of the defendant's conduct to the facts contained in the information.[53]

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47. *See Taylor*, 495 U.S. at 601 ("[T]he practical difficulties and potential unfairness of a factual approach are daunting.").

48. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a).

49. IOWA CODE § 698.1 (repealed 1976).

50. *See* Bossing, *supra* note 28, at 1205; *see also* Fleischmann, *supra* note 28, at 425. Both articles note the possibility that defendants who are adolescent boyfriends of adolescent "victims" will receive enhanced sentences as a result of the categorical approach and suggest a fact-based approach as a solution to this problem.

51. 110 F.3d 382 (7th Cir. 1997) (en banc).

52. *See id.* at 384-85.

53. *See id.* at 385. For a definition of "information," see *supra* note 35.

The intermediate approach is also supported by the *Taylor* decision. In *Taylor*, the Court held that in a narrow range of cases, a court may examine the facts contained in the "indictment or information and jury instructions."[54]

The Application Notes to the USSG also lend support to this approach.[55] Application Note 1 to section 4B1.2 states that "[o]ther offenses are included as 'crimes of violence' if . . . the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted . . . , by its nature, presented a serious threat of potential risk of physical injury to another."[56] Courts have interpreted the language "expressly charged" as indicating that a sentencing court's inquiry should be limited to the conduct expressly charged in the indictment or information.[57] Similarly, Application Note 2 lends support to the intermediate approach by stating that "in determining whether an offense is a crime of violence . . . for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry."[58] The commentary indicates that a sentencing court should focus its inquiry on the facts contained in the charging papers, rather than every fact in the record or facts merely alleged in the complaint.[59]

Because determinations made under this approach are based on the defendant's conduct, and not just on the wording of the statute, it is more fair than the categorical approach. Like the categorical approach, the intermediate approach promotes conservation of judicial resources. When using the intermediate approach, a court does not hold evidentiary hearings to make crime of violence determinations. Rather, the court's inquiry is restricted to certain documents.

However, this approach perpetuates "arbitrariness in decision-making."[60] By restricting the court's inquiry to the information or indictment, the information the court receives is dependent upon nuances in state law. In some states, a document labeled "complaint" is the only charging document used in a criminal proceeding.[61] Under particular circumstances there is neither an information nor an indictment.[62] If, when using the intermediate approach, a defendant's statutory rape conviction relied only on a complaint, the federal sentencing judge cannot inquire into any of the facts underlying the conviction because there is not

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54. Taylor v. United States, 495 U.S. 575, 602 (1990).

55. *See* United States v. Lee, 22 F.3d 736, 738-40 (7th Cir. 1994).

56. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, application note 1 (1998).

57. *See Lee*, 22 F.3d at 740; *see also* United States v. Joshua, 976 F.2d 844, 856 (3rd Cir. 1992), *abrogated by* Stinson v. United States, 508 U.S. 36 (1993); United States v. Young, 990 F.2d 469, 472 (9th Cir. 1993).

58. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, application note 2 (1998).

59. *See Lee*, 22 F.3d at 738.

60. United States v. Shannon, 110 F.3d 382, 391 (7th Cir. 1997) (Coffey, J., dissenting).

61. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-46 (1994); HAW. R. PENAL P. 7 (1999); KAN. STAT. ANN. § 22-2905 (1995).

62. *See Shannon*, 110 F.3d at 402 (Coffey, J., dissenting).

an information or an indictment.[63] Furthermore, states that do require an indictment or information for convictions may not require the documents to contain extensive factual information.[64] Facts vital to crime of violence determinations, such as the victim's age, may not be contained in the information or indictments of some states,[65] whereas other indictments or information may contain many relevant, helpful facts. Therefore, under the intermediate approach, the decision making process of federal sentencing courts is dictated by the kinds of charging documents required by state law and the facts contained therein.

3. Fact-based Approach.—In *United States v. Flores*,[66] the Fifth Circuit upheld a district court's use of the fact-based approach in determining if the defendant's prior convictions were crimes of violence.[67] In examining the defendant's prior convictions, the district court heard testimony from the probation officer who prepared the defendant's pre-sentence report.[68] The pre-sentence report was based on the interviews of three county clerks.[69] The circuit court upheld the district court's use of these sources for determining if the defendant's convictions were for crimes of violence.[70]

Some judges and scholars view the fact-based approach as the optimal approach for making crime of violence determinations because it allows courts to examine all the available facts surrounding the previous conviction.[71] A fact-based approach appears to lead to fair results because it bases crime of violence determinations on the defendant's conduct, not the elements of the statute or facts contained in specific documents.

However, this approach does not always lead to fair results, as a court may base its crime of violence determinations on facts that have merely been alleged.[72] The facts in the complaint may be contested, and if there was a plea bargain, they may not have been subject to a fact-finding process.[73] Therefore, by allowing a sentencing court to consider facts merely alleged in a complaint, the results may be both inaccurate and unfair.[74] This unfairness may be compounded in instances where there is a plea bargain.[75] A defendant who entered a plea to a lesser charge than what was indicated in the complaint may

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63. *See id.*

64. *See id.* at 393-94.

65. *See id.*

66. 875 F.2d 1110 (5th Cir. 1989).

67. *See id.* at 1112-13. The court had to determine if the defendant's burglary convictions were for burglaries of dwellings. *See id.*

68. *See id.* at 1112.

69. *See id.*

70. *See id.* at 1113.

71. *See, e.g.*, *Shannon*, 110 F.3d at 390-416 (Coffey, J., dissenting). *See generally* Bossing, *supra* note 28; Fleischmann, *supra* note 28.

72. *See Shannon*, 110 F.3d at 384-85.

73. *See id.*

74. *See id.*

75. *See* Taylor v. United States, 495 U.S. 575, 601-02 (1990).

then receive a sentence enhancement based on facts contained in the complaint to which he did not admit and that were never the subject of a judicial finding.

Another source of problems for the fact-based approach is the availability of evidentiary hearings to assist the court in making crime of violence determinations. Under this approach the court may use an evidentiary hearing to examine any and all facts concerning the prior conviction. The previous conviction may have occurred many years before the federal sentencing proceeding. Retrying the facts of the prior conviction places an undue burden on defendants forced to defend themselves against old allegations. Evidentiary hearings needed to make crime of violence determinations under this approach could be burdensome on victims as well. A court could make a statutory rape victim go through the trauma of testifying about an incident years later.[76]

The fact-based approach also makes it possible for crime of violence determinations to be based on the availability of evidence and witnesses from the prior conviction. If a court cannot receive testimony because a witness is dead or unavailable given the limited information, the court may determine that a conviction was for a crime of violence; whereas, if they heard the evidence, their determination might have been otherwise. This result is patently unfair to defendants.

Furthermore, an inquiry into the facts underlying a previous conviction is a strain on judicial resources and would pose a heavy burden on sentencing courts.[77] In support of the intermediate approach over the fact-based approach, Judge Posner of the Seventh Circuit noted that "[i]f the district judge were required to go behind the charging document to determine the defendant's criminal history, the evidentiary burden of exploring the circumstances of old crimes would potentially be borne in every case in which the defendant had a criminal history."[78] The burden on sentencing courts would be great because of the frequency with which federal defendants have criminal histories and because the convictions the court would have to explore may have occurred many years ago in a jurisdiction "remote from that of the current sentencing."[79]

The factual approach suggested by Lewis Bossing in *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, is a good example of a fact-based approach that would lead to enormous strains on judicial resources.[80] Bossing suggests that the court's focus be on the victim's consent when making crime of violence determinations.[81] Under Bossing's approach, factors to be considered in determining whether the complainant gave meaningful consent to the sexual

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76. *Contra* Bossing, *supra* note 28, at 1249-50.

77. *See Shannon*, 110 F.3d at 385.

78. *Id.*

79. *Id*.

80. *See* Bossing, *supra* note 28. In his Note, Bossing admits that "[i]nvestigation through a presentencing report and/or additional testimonial evidence may be necessary" for a determination under his approach. *Id.* at 1233.

81. *See id.* at 1231-46.

activity include the self-esteem of the complainant and the extent to which the individual "minor was aware that he or she could choose not to participate in sexual activity."[82] Delving into the psyche of the individual victim in the way suggested by Bossing would be a tremendous strain on a court, if not an impossible task for a court to accomplish.

Lastly, a fact-based approach is unfair to the defendant because it does not put the defendant on notice that federal courts will consider a previous statutory rape conviction a crime of violence. One of the purposes of the USSG is to deter criminal conduct.[83] After receiving two convictions for crimes of violence, a defendant may be deterred from engaging in further criminal conduct in order to avoid receiving an enhanced sentence by virtue of his status as a career offender. However, deterrence cannot occur if the defendant does not know his conviction will be considered a crime of violence. According to deterrence theory, crimes and punishments must be articulated in advance in order for an individual to determine whether the particular activity is worth its consequences.[84] Under a fact-based approach a defendant does not know what facts concerning the prior conviction the court will examine or what facts will indicate to the court that a crime of violence has occurred. Hence, under the fact-based approach, a defendant could not be deterred because he could not be certain as to whether a federal sentencing court would consider his prior statutory rape conviction a crime of violence.

III. A LIMITED FACT-BASED APPROACH

Neither the fact-based, categorical, or intermediate approach leads to results that are fair, accurate, or efficient. This Note proposes a method for determining if a prior statutory rape conviction is a conviction for a crime of violence that is fair to defendants, leads to uniform sentencing, leads to certainty in sentencing and promotes efficient use of judicial resources. Under this method, courts would limit their inquiry to facts from which a "serious risk of physical injury to another" could be inferred. If such facts are present, then the court should deem the prior statutory rape conviction a crime of violence. Under this approach, the facts to be considered are not likely to be contested. Therefore, a court may look to any source for these facts.

A. Facts to Be Considered

1. Age of the Victim.—The age of the victim should be a factor considered when making crime of violence determinations because young children are

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82. *Id.* at 1237.

83. *See* 18 U.S.C. § 3553(a)(2)(B) (1993).

84. *See* RICHARD J. BONNIE ET AL., CRIMINAL LAW 36 (1997) (stating deterrence theory holds that humans are rational and hedonistic, and "individual conduct presumably [is] based on a utilitarian calculation of pain and pleasure, [and] criminal acts [can] be deterred by a credible threat of a penalty sufficient to outweigh the expected gain from wrongdoing").

incapable of meaningful consent to sexual activity.[85] In considering the age of the victim, the court should select[86] an age at which most children are incapable of meaningfully consenting to sex.[87] If the victim of the statutory rape was younger than this age and the offender was over eighteen years of age at the time of the offense, the conviction for that statutory rape should be considered a conviction for a crime of violence. For example, if the court selects the age of twelve, then the statutory rape of an eleven-year-old by someone above the age of eighteen would be considered a crime of violence. In such settings, the application of force or coercion can be inferred. Moreover, as force or coercion was present in the sexual encounter, a serious risk of physical injury can be equally inferred.

The assertion that a child is "incapable of consenting or resisting; [and] thus, an adult who has intercourse with a child is always engaged in forcible and non-consensual conduct" is well supported.[88] The inability of young children to consent to sexual activity has long been recognized.[89] "Blackstone stated more than two hundred years ago: '[T]he consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion.'"[90] The Kentucky Supreme Court has similarly noted the long history of the law's recognition that children are incapable of consent, stating:

> The conclusive presumption of inability to consent is not of recent

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85. *See* Phipps, *supra* note 1, at 117.

86. The word "select" is used here tentatively because the courts themselves should not have to select or determine the age at which a child is incapable of consent. Rather, the United States Sentencing Commission should select the age for two reasons. First, the courts' resources are limited, and the Sentencing Commission is better equipped to digest scientific data and consider policy issues necessary in selecting an appropriate age. Second, the goals of uniformity and certainty in sentencing are better served if the Commission selects the age instead of the courts. If courts select the age, each circuit or district court may select different ages. However, even if courts select the age themselves, there will at least be uniform decisions within that court, which is an improvement over the approaches courts currently use.

87. Because individual children become emotionally and psychologically mature at different ages, the age selected by the Commission should be a rather young age to ensure as much as possible that the age is one at which most children in the population will be incapable of giving meaningful consent. *See* Phipps, *supra* note 1, at 118 nn.474-75. Because of the limited knowledge and resources to determine this age, this Note does not propose any particular age for the courts to adopt. However, from the limited research reviewed, this Note is written with an approximate age in mind, somewhere in early adolescence, from ten to twelve years old. *See* Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1253 (1998) ("Below [the] ages [of ten and twelve], sexual activity is generally conceded to be socially undesirable, in part because it is physically and emotionally dangerous for the young female involved.") (internal citation omitted).

88. Phipps, *supra* note 1, at 42.

89. *See id.* at 33-34.

90. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *212).

> vintage. It has been with us at least from the reign of Queen Elizabeth of England (1558-1603). Coming to this country as a part of our common law, the doctrine has universally been spoken to by the state legislative bodies. The truth of the facts upon which the presumption has been based are beyond cavil. The state has a recognized interest in the welfare of its citizens who, by reason of age or physical or mental disability, cannot care for themselves. So it is with children of tender years.[91]

Young children are incapable of giving meaningful consent because they lack the "knowledge of sexual activity to understand the nature of their consent"[92] and the maturity to understand the consequences involved with sexual activity.[93] For example, in ruling that statutory rape of a victim below the age of thirteen is a crime of violence, Judge Posner of the Seventh Circuit noted the limited knowledge and understanding of thirteen-year-old children.[94] By comparison, the law presumes children to be incompetent in a variety of other areas. "For example, girls and boys under sixteen generally may not drink alcohol, buy tobacco products, marry, drive, or vote."[95] Also, the common law allows minors to avoid their contracts in order to protect minors from their own immaturity and to discourage adults from taking advantage of the vulnerable minors.[96]

Force or coercion can also be inferred from a sexual encounter between an adult and a young child because of the disparity in bargaining power between the adult and the child. Children's lack of knowledge about sexual experiences and the consequences of those experiences, as discussed above, contribute to this disparity. The difference in physical size between the adult and the child also leads to unequal bargaining power.[97] Furthermore, the power structure that exists between children and adults leads to unequal bargaining power.[98] "Adults

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91. Payne v. Commonwealth, 623 S.W.2d 867, 875 (Ky. 1981). The court made this statement in justification of the state's statute that deems persons less than sixteen years old incapable of consenting to sex. *See id*.

92. Phipps, *supra* note 1, at 120. (citing DAVID FINKELHOR, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 17 (1984)).

93. *See* JUDITH ENNEW, THE SEXUAL EXPLOITATION OF CHILDREN 62 (1986); Seymour L. Halleck, *Emotional Effects of Victimization*, *in* SEXUAL BEHAVIOR AND THE LAW 673, 677 (Ralph Slovenko ed., 1965).

94. *See* United States v. Shannon, 110 F.3d 382, 387-88 (7th Cir. 1997). "A [thirteen] year old is unlikely to have a full appreciation of the disease and fertility risks of intercourse, an accurate knowledge of contraceptive and disease-preventative measures, and the maturity to make a rational comparison of the costs and benefits of premarital intercourse." *Id.* at 387 (citations omitted).

95. Guerrina, *supra* note 87, at 1261-62.

96. *See* ALLAN FARNSWORTH, CONTRACTS § 5.6, at 377-80 (2d ed. 1990).

97. *See* ENNEW, *supra* note 93, at 62.

98. This disparity in bargaining power between adults and children is the rationale behind the common law practice of allowing minors to rescind their contracts. *See* Guerrina, *supra* note 87, at 1262-64.

control all of a child's resources (food, shelter, money, clothing), children are taught to obey adults, adults exercise extensive physical control over children, and adults are authority figures who punish children."[99] Because of this disparity in bargaining power between children and adults, it is impossible for a young child to give meaningful consent to sexual activity with an adult, because a young child is not truly capable of saying "no" to that adult.[100]

An acknowledged problem with the "age of victim" factor in the limited fact-based approach is that it requires the court, the sentencing commission, or other policy body to take up the difficult task of determining an age at which meaningful consent cannot be given.[101] State legislatures have struggled with this responsibility in forming their own statutory rape laws, as is evidenced by the variety of "ages of consent" among jurisdictions.[102] However, the difficulty in determining the age at which children are incapable of giving meaningful consent should not override the goal of giving enhanced sentences to those offenders who have engaged in "conduct that presents a serious potential risk of physical injury to another."[103] An adult who has sex with a young child who is incapable of consenting has explicitly engaged in conduct that presents a serious potential risk of physical injury to another.

2. Age Disparity.—If a great disparity in age between the statutory rape victim and the defendant exists, a serious risk of physical injury to the victim can be inferred, because of the difference in size and power between the victim and the defendant.[104] The inclusion of age disparity as a factor in the limited fact-based approach allows sentence enhancements for adults who use their greater size, knowledge, or experience to coerce a child into engaging in sexual activity

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99. Phipps, *supra* note 1, at 120.

100. *See id.* at 119. "Consent is only possible if a person knows what he or she is consenting to and has the freedom to say yes or no. With children, neither of these conditions can be fulfilled." *Id.*

101. *See supra* note 86. Until the United States Sentencing Commission determines the appropriate age, courts should determine the age that they will use in determining whether a statutory rape conviction was a crime of violence.

102. For example, in two states the most serious penetration offense applies when the victim is under ten years of age, whereas in one state the most serious penetration offense applies when the victim is under eighteen years of age. *See* Phipps, *supra* note 1, at 57-58 tbl.1. See *id.* at 55-62 for an illustration and discussion of the disparity in "ages of consent" among state statutory rape provisions, including a state-by-state breakdown of the age under which sexual penetration of a child by an adult is a crime, also known as the age of consent.

103. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (1998).

104. Again, it will be difficult to determine an appropriate age disparity that reflects a situation in which, for the majority of the population at the prescribed age difference, the offender would have such an advantage over the victim in size, power, knowledge, and/or experience that his/her conduct could be construed as coercive. Because the size, power, knowledge, and experience of the members of the population vary, this Note suggests erring on the side of making the age disparity too large. Therefore, there should be a requirement that the victim be under the age of fourteen and the offender be at least six years older than the victim.

while respecting the sexual autonomy of older adolescents to engage in sexual conduct with their peers. This factor may prevent defendants who were "barely" adults when they were convicted of statutory rape for having sex with their under-aged girlfriends from being given enhanced sentences and give enhanced sentences to those who coerced a child into having sex.[105] The inclusion of this factor reflects a trend in modern statutory rape law in which an age difference between the defendant and the complainant is required.[106]

3. Relationship of the Parties.—If a familial[107] or guardian relationship exists between the statutory rape victim and the defendant, use of force or coercion can be inferred.[108] The same issues of disparity in bargaining power discussed in regard to age disparity are even more profound if the adult is in a position of authority over the child, such as a parent, uncle, or guardian.[109] The Model Penal Code's "Corruption of Minors and Seduction" provision recognizes that even much older children and young adults can be subject to domination by someone who occupies a position of control and disciplinary authority over them.[110] This provision prohibits guardians or people "otherwise responsible for the general supervision of [a person's] welfare" from having sexual intercourse with that person if he or she is less than twenty-one years old.[111] Research indicates that there is greater harm to the victim if he or she has a relationship to the offender.[112] Because force or coercion can be inferred from a parental, familial, or guardian relationship with the victim, a serious potential risk of physical injury to the victim can be inferred.

Determining precisely what relationships should fall within this category

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105. Incidents in which boyfriends have sex with their girlfriends who are their peers are routinely prosecuted as statutory rape in some jurisdictions. *See* Phipps, *supra* note 1, at 121 n.490. "The Model Penal Code commentators consider it 'harsh and unreasonable' to punish a person for engaging in sexual activity with a willing partner 'whom society regards as a fit associate in a common educational and social endeavor.'" *Id.* at 62 (quoting MODEL PENAL CODE § 213.3 cmt. 2 (1980)).

106. Many states include an age difference between the defendant and the victim as an element in the state's statutory rape provisions. *See* Phipps, *supra* note 1, at 62.

107. Research indicates that in about twenty-five percent of all cases of "statutory rape," the abuser is a relative of the victim. *See* Phipps, *supra* note 1, at 132.

108. Several jurisdictions have enacted "statutory rape" statutes that make the relationship of the offender to the victim an aggravating factor, warranting increased punishment. *See id.* "A few states have created specific offenses applicable only to family members in a custodial relationship with the victim, but the language of most statutes includes family members and non-family members." *Id.* at 68-69 (internal citations omitted).

109. *See id.* at 120.

110. MODEL PENAL CODE § 213.3 (1980).

111. *Id.* § 213.3 cmt. 3 at 388. "[T]he guardian or person similarly situated bears a special responsibility for guidance of his ward. Betrayal of that obligation by sexual intimacy is decidedly wrongful even if the child is old enough to take care of himself in most situations." Phipps, *supra* note 1, at 23 (citations omitted).

112. *See* Phipps, *supra* note 1, at 132.

may be difficult. State law addressing this question vary.[113] "In some states the provision applies only to parental figures. In others it extends to permanent or temporary caregivers, such as school teachers and youth leaders. In some states broad language covers many additional people in a position to exert authority over the child."[114]

B. Benefits of the Limited Fact-Based Approach

The limited fact-based approach alleviates many of the problems present in the approaches courts currently use to make crime of violence determinations. The problems raised by the other three methods can be grouped into two basic categories: inefficiency and unfairness. The traditional fact-based method is inefficient because it requires that courts examine all the facts surrounding the previous statutory rape conviction.[115] Examining all the facts surrounding the prior conviction is also unfair, because it leads to uncertainty about the sentence that will be imposed.[116] Furthermore, the traditional fact-based approach is unfair because, in essence, it allows the sentencing courts to retry defendants prior convictions.[117] The intermediate and categorical approaches are similarly unfair because they lead to arbitrary and potentially inaccurate decisions.[118] The limited fact-based approach alleviates these problems and furthers the goal of uniform sentencing.

1. Efficiency.—The limited fact-based approach is an efficient method for determining whether a defendant's prior statutory rape conviction is a conviction for a crime of violence. In contrast to the traditional fact-based approach, the limited fact-based approach conserves the court's time and resources by limiting its inquiry to specific facts indicative of conduct that present a serious potential risk of physical injury to another. The court may look to any source to ascertain whether a statutory rape conviction is a conviction for a crime of violence, but should only consider: (1) the age of the victim; (2) the age disparity between the victim and the offender; and (3) the relationship between the victim and the offender.

Furthermore, the limited fact-based approach is efficient because courts are likely to more easily obtain the facts that are determinative in the approach. Discovering the age of the victim, the age of the offender, and the relationship between the victim and the offender is not likely to be overly burdensome on sentencing courts. The court should be able to discover these facts with a minimal use of judicial resources.

The sentencing court should be able to easily discover the victim's age

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113. *See id.*

114. *Id.*

115. *See* discussion *supra* Part II.B.3.

116. *See id.*

117. *See id.*

118. *See* discussion *supra* Parts II.B.1-2.

because the age of the victim is an element of the crime of statutory rape.[119] For example, sometimes the age of the victim is contained in the charging papers.[120] The age of the victim may also be in the record of the prior trial, if such a record exists.

Furthermore, the age of the victim is not likely to be contested. Although a defendant accused of statutory rape may contend that he did not know the victim's age or that he thought the victim was older, the actual fact of the victim's age is not likely to be a contested fact. Even if the only way to determine a victim's age is by having her testify at an evidentiary hearing, the testimony should not take a great amount of time. The only question she needs to answer is "What is your date of birth?" Furthermore, when the victim only has to testify as to her age, testifying for the sentencing court should not be traumatic or painful for her. In contrast, under the traditional fact-based approach, testifying during the federal sentencing proceeding may be traumatic for the statutory rape victim because the testimony may consist of all the facts surrounding the prior crime. Even so, it is unlikely that the victim's testimony at an evidentiary hearing will be the only means of ascertaining the victim's age.

Attaining the age of the offender and the age difference between the offender and the victim should also be easy. The defendant's age or date of birth is likely contained in police records. If the defendant's age is not found in the police records, the sentencing court could require the defendant to show proof of his date of birth. Furthermore, if the defendant's statutory rape conviction was rendered under a statute in which a particular age difference between the offender and the victim was an element, the difference between the defendant's age and the age of his victim might be indicated by the statutory language.

Determining the relationship between the parties may require more judicial resources than the prior two factors. If the defendant's previous conviction was under a statute in which the relationship of the parties was an element, the relationship between the victim and the offender would be found in the statutory language or in the information or indictment.[121] However, if the information could not be discovered by any other source, the court may examine family records or hear testimony to determine the relationship of the parties.

2. Fairness.—The limited fact-based approach is fair because the facts examined under the approach are indicative of whether the defendant's conduct presented a serious potential risk of physical injury.[122] In contrast to the intermediate approach, which examines facts detailed in information or indictments as required by varying state laws, the limited fact-based approach examines facts that will indicate only those offenders who are truly culpable and dangerous.

Crime of violence determinations made using the limited fact-based approach would also be fair because they would give enhanced sentences to the most

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119. *See* Phipps, *supra* note 1, at 52.

120. *See, e.g.*, United States v. Shannon, 110 F.3d 382, 384 (7th Cir. 1997).

121. *See supra* note 108 and accompanying text.

122. *See* discussion *supra* Part III.A.1-3.

culpable statutory rapists. Those adults who engage in sex with young children are deemed more culpable than those who engage in sex with older adolescents. This idea is supported by the modern trend in American statutory rape law to grade statutory rape offenses according to the age of the victim.[123] "[M]ost states now divide sex offenses against children into two or three categories, ranging from the most serious offenses applicable to only the youngest children to the less serious offenses applicable to the oldest adolescents . . . ."[124] The Model Penal Code's provisions concerning sexual activity with minors also recognizes the increased culpability of those who engage in sex with young children as compared with those who engage in sex with adolescents.[125] In the Model Penal Code, the most serious offense, rape, applies to "consensual" sexual intercourse with children less than ten years old.[126] By setting the age of consent for rape remarkably low, the drafters of the Model Penal Code drew a clear line for the most culpable offenders.[127] The drafters of the 1980 commentary to the Model Penal Code felt that "those who engage in intercourse with adolescents are neither as dangerous nor as morally reprehensible as those who engage in such conduct with very young children."[128]

As well as giving enhanced sentences to the most culpable offenders, the limited fact-based method avoids giving statutory enhancements to less culpable offenders, those who engage in consensual sex with their peers. Because of the age disparity factor, this method should prevent defendants who were "barely" adults when they were convicted of statutory rape from being given enhanced sentences.[129] Giving enhanced sentences to individuals who engage in consensual sexual activity with their peers is not only unfair but ignores the

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123. *See* Phipps, *supra* note 1, at 55.

124. *Id.*

> In Virginia, for example, non-forcible sexual intercourse with a child under the age of thirteen is rape, intercourse with a child aged thirteen or fourteen is carnal knowledge, and intercourse with a child who is fifteen, sixteen, or seventeen is "causing or encouraging acts rendering children delinquent." The older the age, the less serious the offense, with offenses involving children above the age of fourteen classified as misdemeanors.

Id. at 57-59. In most states, the most serious offense applies when the victim is under thirteen or fourteen years old. *See id.* at 57.

125. *See* MODEL PENAL CODE § 213.1 (1980).

126. *See id.*

127. *See* Phipps, *supra* note 1, at 19-20.

128. MODEL PENAL CODE § 213.3 cmt. 2 at 379 (1980).

129. This Note does not propose that prosecution for statutory rape based on sexual conduct between peers is wrong or unjustified. Rather it merely proposes that such conduct does not warrant an enhanced sentence for a future crime. If the defendant has two or more other previous convictions for crimes of violence (exclusive of any statutory rape convictions), he should receive an enhanced sentence irrespective of his conduct concerning the statutory rape conviction. This Note merely asserts that an enhanced sentence should not be imposed because of a statutory rape conviction that was based on sexual activity with a peer.

reality of adolescent sexuality.[130] The limited fact-based approach respects the autonomy of adolescents to sexually experiment with their peers while giving enhanced sentences to those who are truly culpable.

In addition to being more culpable, adults who have sex with young children are more dangerous because their recidivism rates are high and psychological "rehabilitative" treatment appears to be ineffective. One study found that forty-three percent of the 136 extrafamilial child molesters examined in the study committed a new violent or sexual offense within less than six and a half years after release from a maximum security psychiatric institution.[131] Likewise, fifty-eight percent of the study's subjects were arrested for an offense of some kind or were returned to the psychiatric institution during the study's time period.[132] The study also found that inappropriate age choice in a sexual target was related to repeat convictions for sexual offenses.[133] In addition, the study found that behavioral treatment had no effect on recidivism.[134] By giving enhanced sentences to defendants who engage in sexual intercourse with young children, courts using the limited fact-based method would be giving enhanced sentences to defendants from whom society needs increased protection.

The limited fact-based approach also alleviates a problem that exists in the categorical method, wherein crime of violence determinations turn on the wording of state statutes. Under the limited fact-based approach, crime of violence determinations would not be based on the wording of the statutory rape statute under which the defendant was convicted, but on the defendant's own conduct. Defendants who engage in the same behavior in different jurisdictions will be treated the same, even though the language of the statutes under which they were convicted is different.

This approach is fair to defendants because it will not require that prior convictions be retried, as did the traditional fact-based approach. If evidentiary hearings are needed under the limited fact-based approach, they will most likely be brief. Courts will look only to the objective factors, which can be easily found, when making crime of violence determinations. Furthermore, the

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130. Eighty-two percent of teenagers have experienced sex. *See* Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 60 n.256 (1994) (citing ALAN GUTTMACHER INSTITUTE, SEX AND AMERICA'S TEENAGERS (1994)). Fifty-three percent of females aged fifteen to nineteen have had sexual intercourse. *See id.* "Other sources report even higher incidents of sexual activity: three-quarters of American teens having had sex by the time they reach age [twenty]; . . . and among [fifteen]-year-olds, one-third of boys and [twenty-seven percent] of girls have had sexual intercourse." *Id.* (citing Nancy Gibbs, *How Should We Teach Our Kids About Sex?*, TIME, May 24, 1993, at 60).

131. *See* Marnie E. Rice et al., *Sexual Recidivism Among Child Molesters Released from a Maximum Security Psychiatric Institution*, 59 J. CONSULTING & CLINICAL PSYCHOL. 381, 381-386 (1991).

132. *See id.*

133. *See id.* Inappropriate age choice was operationally defined in the study as either a juvenile age 15 or under, or juvenile at least five years younger than the offender. *See id.*

134. *See id.*

defendant will not be forced to present his defense to the statutory rape charge to the sentencing court because the court's focus will be on objective factors.

Furthermore, unlike the three approaches currently used by courts, the limited fact-based method furthers the United States Sentencing Commission's goal of providing uniform sentencing.[135] Once a court or the United States Sentencing Commission[136] determines the victim's age, the age disparity, and the relationship between the offender and the victim that are indicative of "conduct that presents a serious potential risk of physical injury"[137] each prior conviction that involves one of these factors will be considered a crime of violence. Neither the statutory language for statutory rape, the amount of information contained in the charging papers, nor the perogative of the sentencing judge will be variables.

Finally, the limited fact-based approach is fair because it provides certainty in sentencing. One of the primary flaws of the traditional fact-based analysis is that a defendant has no way of knowing what evidence will be available to the court,[138] what evidence the court will examine, and what factors the court will consider important in making crime of violence determinations. The problem of uncertainty is present in the intermediate and categorical approaches as well. Under these approaches, a defendant would not know what specific facts or statutory language will lead the court to conclude that the prior conviction is for a crime of violence.

By contrast, if courts adopt the limited fact-based approach, defendants will know exactly which facts the court will examine, and what weight each of the factors will have in determining whether the prior conviction should be deemed a crime of violence. Both the defendant and the public would know that a statutory rape conviction that involved any of the three objective factors discussed earlier would be considered a crime of violence.

In addition to providing fairness, this certainty furthers the sentencing goal of deterrence.[139] Under the limited fact-based approach, if a defendant knows his own age, the age of the victim, and their relationship, he can know whether his statutory rape offense will be considered a crime of violence. Because a defendant can know at the time of his statutory rape conviction whether that conviction will be considered a crime of violence by federal sentencing courts, the specter of the enhanced sentence that accompanies career offender status may deter him from committing future violent or controlled substance offenses.

C. Anticipated Criticisms of the Limited Fact-Based Approach

The limited fact-based approach proposes a bright-line rule. A statutory rape

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135. *See* 28 U.S.C. § 991(b)(1)(B) (1993).

136. *See supra* note 86 and accompanying text.

137. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (1998).

138. For example, a witness with relevant information may have died in the time between the statutory rape conviction and the federal sentencing proceeding.

139. *See supra* note 85 and accompanying text (discussing the importance of certainty for deterrence).

conviction in which the victim was below a certain age, a significant age difference between the victim and the offender existed, or a certain relationship between the victim and the offender existed will be considered a crime of violence. Bright line rules are often criticized as inflexible. While the limited fact-based method is inflexible, its inflexibility leads to certainty, uniformity, and fairness. While flexible rules are appealing, with flexibility comes other problems, such as unfairness, uncertainty, and non-uniformity. For example, the traditional fact-based approach is attractive because of its employment of flexibility and sensitivity to individual case facts. However, this case-by-case analysis also weakens the traditional fact-based method, as it leads to uncertain and non-uniform results.[140]

Furthermore, bright-line rules are favorably applied in other contexts, including imposing criminal liability for statutory rape.[141] However, the bright-line rule proposed in the limited fact-based analysis does not impose criminal liability. It is merely a tool to be used by the courts to determine which convictions are convictions for crimes of violence. Criminal liability for the statutory rape and for the current federal offense have already been imposed, and this rule takes no part in their imposition.

The limited fact-based approach might be criticized as being underinclusive, for only those statutory rapists who engaged in sexual intercourse with young children, children who were significantly younger than them, or children to whom they were related or of whom they were guardians, will be considered to have committed crimes of violence under this proposed method.

In response to this criticism, while the limited fact-based approach is a bright-line rule, it is better that such a rule be underinclusive than overinclusive. Because the court will focus on the victim's age, the age difference between the offender and the victim, and the relationship between the offender and the victim as indicators of her ability to consent, rather than inquiring as to the victim's capacity to consent, the rule should err on the side of underinclusiveness to ensure fairness to defendants.

Moreover, defendants facing an enhanced sentence have already been convicted of and served sentences for statutory rape. The limited fact-based method should only be used to determine which defendants are deserving of enhanced sentences for federal offenses under the USSG. This method does not change the sentence imposed for the statutory rape offense itself. Regardless of the outcome of the analysis of the defendant's conviction under this method, he is still guilty of statutory rape and has still been punished for it.

CONCLUSION

When Congress enacted the Sentencing Reform Act of 1984, it set forth

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140. *See* discussion *supra* Part II.B.3.

141. In many sexual penetration statutes, only proof of the age of the victim and proof of the act are required. *See* Phipps, *supra* note 1, at 52. Some jurisdictions allow a defense of reasonable mistake of age, but usually only when older adolescent victims are involved. *See id.* at 51.

goals for the newly formed United States Sentencing Commission.[142] The Sentencing Commission was to promulgate sentencing policies and practices that would lead to "adequate deterrence to criminal conduct,"[143] "provide certainty and fairness in . . . sentencing,"[144] and avoid "unwarranted sentencing disparities."[145] The United States Sentencing Commission drafted the career offender provision of the USSG with these goals in mind.[146] However, these goals are not being achieved. The methods courts use to determine whether a prior statutory rape conviction is a conviction for a crime of violence are faulty and lead to unfair, non-uniform, and uncertain results.

This Note proposes a method that provides fairness, certainty, and uniformity in the sentences imposed. By providing certainty, the limited fact-based method makes the commission's goal of deterrence to criminal conduct possible. In addition to furthering these goals, the limited fact-based approach also provides a method for making crime of violence determinations manageable for the court. This method does not require courts to examine every fact surrounding the prior conviction, but merely to examine three easily obtainable facts. In doing so, the limited fact-based approach conserves judicial resources.

Courts, posed with determining whether a prior statutory rape conviction is a conviction for a crime of violence, can meet the goals Congress set for the sentencing commission. The unfairness and inefficiency present in crime of violence determinations, which are made using the current methods, do not have to exist. Using the limited fact-based method, Congress's goals can be met in a way that is fair to defendants and manageable for the courts.

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142. *See* 28 U.S.C. § 991(b)(1) (1993).

143. 18 U.S.C. § 3553(a)(2)(B) (1993).

144. 28 U.S.C. § 991(b)(1)(B) (2000).

145. *Id.*

146. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 and ch.4, pt. A. introductory cmt. at 283 (1998).