University of Missouri School of Law Scholarship Repository

Faculty Publications

2000

Statutory Rape Law and Enforcement in the Wake of Welfare Reform

Rigel C. Oliveri

University of Missouri School of Law, OliveriR@missouri.edu

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>

Part of the [Law and Gender Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Rigel Oliveri, Statutory Rape Law and Enforcement in the Wake of Welfare Reform, 52 Stan. L. Rev. 463 (2000)

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

NOTES

Statutory Rape Law and Enforcement in the Wake of Welfare Reform

Rigel Oliveri*

The recent national efforts at reforming the welfare system and new research on the connection between teen pregnancy and statutory rape have led many states to enact stricter laws against statutory rape and to increase the enforcement of existing laws. Punitive statutory rape laws are being viewed more and more as a mechanism for shrinking the welfare rolls by reducing teen pregnancy. Rigel Oliveri documents the resurgence of statutory rape law and enforcement and explores the ramifications it will have on teen parents. In particular, Oliveri approaches the issue from several analytical frameworks, discussing arguments for consent-based standards, the privacy and substantive due process rights of both teens and offenders, and the practical needs of parenting teens. She also examines some of the theoretical tensions and pitfalls inherent in the criminal prosecution of teen pregnancies. This discussion leads to suggestions for possible improvements in the prosecution of statutory rape cases, as well as to the more radical proposal to eliminate many statutory rape laws altogether.

Marguerite is just a few weeks shy of her sixteenth birthday. Her son is two-and-one-half years old. Her mother, already in poverty with an unstable living situation, kicked Marguerite out of the house when she became pregnant. Now Marguerite lives in the home of a family friend, relying on welfare benefits and Food Stamps to support herself. She attends school sporadically, and will probably stop altogether.

The baby's father, Tomas, is in his early twenties. Tomas used to be Marguerite's boyfriend. When Marguerite became pregnant at thirteen, Tomas indicated his willingness to help care for the child. Despite the fact that their relationship was occasionally violent, Marguerite hoped the two

* Clerk for the Honorable Stephanie K. Seymour, Tenth Circuit Court of Appeals. J.D., Stanford Law School, 1999. B.A., University of Virginia, 1994. I am grateful to Jenny Horne of the Teen Parents' Project for her assistance, insight, and guidance, and for inspiring me through her work with teens. My thanks also to George Fisher for his supervision of this project, as well as to Barbara Babcock, Dorothy Roberts, and Lois Weithorn for their input and observations. Finally, I would never have been able to complete this note without the constant support and encouragement I received from Terry Gray.

would get married and start a family. But as her due date came closer Tomas became distant, and they eventually stopped seeing one another. Now he lives nearby with a new, older girlfriend and has nothing to do with Marguerite or the child. She obtained a court-ordered paternity test, which indicates that he is indeed the father. Still, Tomas has never paid child support, and refuses to acknowledge paternity.

Marguerite is hurt, furious, broke, and alone in the task of raising her son. Her benefits may be cut off soon because of a new provision of the welfare law that requires teen parents to live with a relative to be eligible for assistance. She needs help retaining her benefits and obtaining a child support order against Tomas. Unfortunately, even if an order is issued, it is unlikely that he will ever pay. He is unemployed, undocumented, and a gang member. Marguerite desperately wants Tomas brought to court. She asks if he can be arrested for getting her pregnant when she was so young and then abandoning her. "All I really wish," she says, "is for him to come in and for the judge to tell him that he was wrong for what he did to me—that he should be helping to raise his son and that he shouldn't just ignore me like nothing ever happened."

* * * *

Allison has just turned sixteen. She had her first baby when she was thirteen, and at fifteen she gave birth to twins. Allison's father was unable to take care of her after she became pregnant the first time. He was already receiving welfare benefits and raising her younger siblings. Her mother has a history of drug abuse, and Allison does not know her whereabouts. Allison lives in a tiny one-bedroom apartment with the children and their father, twenty-two-year-old Marcus. He is an undocumented immigrant who supports the family through odd jobs. Every dollar he earns goes to pay the rent. Allison also receives welfare benefits and Food Stamps for herself and the children.

Allison stays home and cares for the children while Marcus works. He helps her with the housework, and his sisters occasionally stop by to keep her company or watch the children. The couple plan to marry as soon as they get her father's legal consent.

Allison needs legal help to facilitate the parental consent to marriage and because she is in danger of having her benefits terminated. A new provision in the welfare law requires that she both attend school and live with a relative, unless she is married. She has not been to school in three years—since the eighth grade—and is terrified at the prospect of returning. Social services has been closely involved with her case. While there has been talk of the large age difference between the two parents, all those involved are reluctant to report Marcus to the authorities because he plays such an im-

*portant role in the family. As her three children wail in concert, Allison asks for help: "I want to stay here and not go back to school. And I want to marry Marcus. Please don't let them report us. We do OK here. We are trying."*¹

INTRODUCTION

The stories of Marguerite and Allison share many common elements: both were impregnated at a young age by adult men; neither lives with a parent; both are indigent and receive welfare benefits; both are in danger of losing these benefits due to changes in welfare eligibility; and neither is likely to graduate from high school. Most significant for the purposes of this note is the fact that both girls have been the victims of felony statutory rape as it is defined by their state's penal code. If prosecuted, both Tomas and Marcus could face lengthy prison sentences, thousands of dollars in civil penalties, and deportation. There is, however, one crucial difference: For Marguerite, a statutory rape prosecution of Tomas would be a vindication of her suffering, a punishment imposed upon him for the pain and hardship he has caused her. For Allison, a statutory rape prosecution of Marcus would be a nightmare, depriving her of a crucial source of income and support. This difference, and what to do about it, defines the contours of some of the most difficult policy debates in America today.

This note examines the dilemma of statutory rape in light of the recent nationwide trend toward stricter statutory rape laws and stepped-up enforcement activity. Part I contains a brief historical overview of statutory rape laws, with a focus on the changing normative goals underlying the laws in different historical contexts. Part II locates the origins of the current legislative and enforcement trends in the recent movement to reform the country's welfare system. It discusses the impact of the federal legislation on teen parents, and examines sociological data on the correlation between teen pregnancy and statutory rape. Part III surveys various states' legislative and enforcement efforts to "get tough" on statutory rape.

Part IV examines some of the analytical difficulties presented by stricter statutory rape laws and their aggressive enforcement. Specifically, this Part looks at: the issues of teens' capacity for consent and the role that they should play in the prosecution decision; the privacy and substantive due process rights of both teens and offenders; and the practical needs of parenting teens. These issues lead to a modest proposal for changing the way in which statutory rape cases are prosecuted.

1. These two stories are based on encounters that I had while working for the Teen Parents' Project in San Mateo County, California during the spring of 1998. I have changed only the names in each story to respect the privacy of the individuals involved.

Part V explores the inherent problems and paradoxes in the current legislative and enforcement trends. In particular, it examines the conflicting goals of aggressively punitive policies, the disconnect between the law in theory and the law as it is applied, and the fact that stricter laws and policies are unlikely to have a significant effect. These findings lead to a bolder suggestion: that we may instead want to reconsider whether to have statutory rape laws at all.

I. STATUTORY RAPE LAW, PAST AND PRESENT

Throughout history, societies have used statutory rape laws to accomplish a variety of normative goals. Examining the details and purposes of a particular society's laws against statutory rape can reveal a great deal about that society's conception of gender roles, morality, and sexuality. Who is targeted, who is protected, and why can reveal the scope and details of a community's priorities and assumptions as well as a history book.

Statutory rape laws have existed for thousands of years in one form or another, with some authors arguing that they appear in the ancient Code of Hammurabi.² Statutory rape laws were incorporated into English law in the thirteenth century, and later absorbed into the American legal system from the English common law.³ Several factors indicate that the primary purpose behind these early laws was to protect the chastity of vulnerable, virtuous young women, treating them as "special property in need of special protection."⁴ First, early statutory rape laws were gender specific, criminalizing adult sexual relations with girls, but not boys. In addition, defendants could raise a promiscuity defense, arguing that no crime occurred if the victim was herself sexually experienced—thus possessing no chastity to steal. This has led some scholars to conclude that statutory rape law served more to protect girls' chastity than to actually punish men who coerced sex from them.⁵

The late nineteenth century saw a wave of statutory rape law reform. Concerned about the spread of disease and protecting young girls from abuse, an odd coalition of Victorian feminists, Socialists, religious groups,

2. See Rita Eidson, Comment, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757, 762 (1980) (discussing the history of statutory rape). Other scholars disagree, dating statutory rape laws back to ancient Rome. See Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 7 n.10 (1997).

3. See Eidson, *supra* note 2, at 762.

4. Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 25 (1994).

5. See *id.* at 27 (arguing that the early law was geared toward protecting virginity, not punishing coercive sex with minors). For a more recent articulation of this purpose, see *State v. Vicars*, 183 N.W.2d 241, 243 (Neb. 1971) ("The object of the [statutory rape] statute is to protect the virtuous maidens and the undefiled virgins of the State and not the unchaste female.").

and Progressives mobilized to strengthen the laws and raise the age of consent.⁶ They succeeded, and these achievements were a victory for the moral reform movement, which had "social purity" and uplift of the lower classes as its primary concerns.⁷ Such movements in the Victorian Era were simultaneously self-righteous and protective, motivated as much by the fear of licentiousness among the poor as concern for their well-being.⁸

Little changed in statutory rape law until the 1970s. In the wake of the sexual revolution and at the beginning of the modern feminist movement, statutory rape laws across the country were both liberalized and modernized. The atmosphere of sexual liberation and women's empowerment may have caused some feminists, if anything, to want to expand girls' sexual freedom and options and to abandon outdated expectations of chastity for teen girls.⁹ Many states began passing gender-neutral statutory rape laws. Several states decriminalized sex among teenagers, and set up a framework in which sex would only be prohibited if the victim were under the age of consent and there was a significant age gap between the parties. Other states abandoned the "promiscuity" defense altogether, although several retained it.¹⁰ It was at this point that a new rationale emerged for statutory rape laws, particularly the ones that remained gender specific. As the Supreme Court made clear in perhaps the best-known of all statutory rape cases, *Michael M. v. Sonoma County Superior Court*, the state's interest in preventing out-of-wedlock teen pregnancy was now considered an important purpose of statutory rape law.¹¹ The Court specifically found the state had an interest in reducing the negative "social, medical, and economic consequences for both the mother and her child," as well as in lowering the high abortion rate for teens.¹²

Despite the pregnancy prevention rationale, with the increased level of sexual activity and more permissive social mores of the next two decades, existing statutory rape laws fell into disuse. Like other laws pertaining to sexual morality, they were infrequently enforced and often not taken seriously. For example, in *Michael M.*, Justice Brennan, in his dissent, noted that during the three year period from 1975 to 1978 an annual average of 413

6. See Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 402-03 (1984) (describing the statutory rape reform movements in nineteenth century England and America).

7. Oberman, *supra* note 4, at 27.

8. See, e.g., Olsen, *supra* note 6, at 403 (arguing that "conservative antvice elements dominated the reform movement and coopted feminists' efforts"); Oberman, *supra* note 5, at 27 (commenting on the repressive and moralistic nature of the nineteenth century movements).

9. See Oberman, *supra* note 4, at 31 (arguing that statutory rape law "seemed anachronistic to those who favored 'sexual liberation'" during the sexual revolution of the 1970s).

10. Interestingly, the Model Penal Code retained it. See MODEL PENAL CODE § 213.6(3) (1980).

11. 450 U.S. 464, 470 (1981) (finding that California's gender-specific statutory rape statute was motivated by a strong interest in preventing "illegitimate" teenage pregnancies).

12. *Id.* at 470-71.

men and boys were arrested for statutory rape in California, despite approximately 50,000 pregnancies among women ages thirteen to seventeen during 1976 alone.¹³

Currently, however, statutory rape laws are experiencing a comeback.¹⁴ Across the country, prosecutors' offices and police are increasing their enforcement activity, and state legislatures are drafting stricter laws with higher penalties. Congress is calling for tougher enforcement of statutory rape laws, and the Attorney General will be involved in studying the problem in great detail. This trend would seem anomalous, considering that social mores are still permissive regarding sexuality, and that the last few decades have seen more extensive protection of teens' privacy rights as they relate to matters such as contraception and abortion. As the following Part demonstrates, the explanation for this renewed emphasis can be found, quite clearly, in the rancorous debate over welfare reform.

II. BACKGROUND ON TEEN PREGNANCY AND WELFARE REFORM

Much of the current focus on strengthening and enforcing statutory rape laws can be traced to the welfare reform movement that swept through the country in the mid-1990s, culminating in the passage of The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996.¹⁵ Ending welfare as we know it became a national priority, and there was widespread consensus that doing so would require aggressively tackling the problem of teen pregnancy. This is evident in the strong emphasis that PRWORA placed on reducing teen pregnancy, and the direct and indirect effects its provisions have on teen parents. As explained below, two influential studies that emerged just as the welfare debate began suggested the use of statutory rape laws as a means of reducing teen pregnancy.

A. *The Emphasis on Teen Pregnancy*

Preventing teenage pregnancy was a central issue in the efforts to reform welfare. For decades, childbearing by teens had been viewed as one of the most pervasive and insidious social problems in America, linked to poverty, increased school drop-out rates, crime, and a host of other social ills.¹⁶ The

13. See *id.* at 493 n.8 (Brennan, J., dissenting).

14. See *infra* Part IV for a more detailed look at the various legislative and law enforcement efforts.

15. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.).

16. See generally, e.g., KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* (1996) (reviewing the historical and present day effects of teenage pregnancy in America); CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980*, 124-34 (1984) (analyzing the statistics and social impact of being an unwed mother); Sue Woodman, *How*

legislative findings which accompany PRWORA indicate quite clearly that Congress was deeply concerned about teen pregnancy and its perceived link to out-of-wedlock childbearing and poverty.¹⁷ The findings include:

- Young women 17 and under who give birth outside of marriage are more likely to go on public assistance and to spend more years on welfare once enrolled.¹⁸
- Between 1985 and 1990, the public cost of births to teenage mothers under the aid to families with dependent children program, the food stamp program, and the Medicaid program has been estimated at \$120,000,000,000.¹⁹
- Children of teenage single parents have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves.²⁰

Ironically, PROWRA was enacted at a time when the teen birth rate was steadily declining. Between 1991 and 1996, the teen birth rate declined twelve percent nationwide, with declines observed in all states.²¹ However, while the overall teen birth rate declined, the rate of out-of-wedlock teen childbearing increased dramatically. Ironically, teens actually make up a very small percentage of people receiving direct cash assistance. Only seven percent of mothers receiving cash benefits in 1995 were teens, and only two percent were minors under the age of eighteen.²² Nevertheless, teen pregnancy remains a concern because roughly half of the families receiving welfare benefits were begun while the mother was a teenager.²³ In addition, even if teen pregnancy rates are on the decline, the numbers are still quite high. In 1992, there were an estimated 112 pregnancies per 1000 girls between the ages of fifteen and nineteen—which means that eleven percent of

Teen Pregnancy Has Become a Political Football, MS., Jan.-Feb. 1995, at 90 (discussing the link between welfare reform and teen pregnancy as political issues).

17. For a persuasive criticism of the assumptions that teen pregnancy causes poverty and that teens are primarily responsible for the rise in out-of-wedlock childbearing, see Megan Weinstein, *The Teenage Pregnancy "Problem": Welfare Reform and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 13 BERKELEY WOMEN'S L.J. 117, 127-39 (1998). See also Deborah Jones Merritt, *Ending Poverty by Cutting Teenaged Births: Promise, Failure, and Paths to the Future*, 57 OHIO ST. L.J. 441, 455-61 (1996) (arguing that teenage pregnancy does not cause poverty and other negative outcomes, but rather is correlated with them).

18. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, § 101(8)(A), 110 Stat. 2105, 2111 (1996).

19. *Id.* § 101 (9)(G), 110 Stat. at 2112.

20. *Id.* § 101 (9)(I), 110 Stat. at 2112.

21. See NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *TEENAGE BIRTHS IN THE UNITED STATES: NATIONAL AND STATE TRENDS, 1990-96* (1989); see also Patricia Donovan, *Falling Teen Pregnancy, Birthrates: What's Behind the Declines?*, 1 THE GUTTMACHER REPORT ON PUBLIC POLICY 5, Oct. 1998, at 6.

22. See Jodie Leven-Epstein, *Teen Parent Provisions in the New Law*, THE CENTER FOR LAW AND SOCIAL POLICY (visited Nov. 11, 1998) <<http://www.clasp.org/pubs/teens/teens.html>>.

23. See *id.*

HeinOnline -- 52 Stan. L. Rev. 469 1999-2000

all girls in this age group had a pregnancy that ended in 1992.²⁴ Out of the 112 pregnancies, sixty-one ended in births, thirty-six in abortions, and fifteen in miscarriages.²⁵

Whatever the data actually reveal about teen pregnancy, the *perception* of teen pregnancy on the part of legislators and the public became the more important motivating factor in the welfare reform debate. Teen pregnancy was viewed as a growing and increasingly threatening problem which could (and should) be dealt with through changing welfare policies. As a result, many of the provisions of the PRWORA either indirectly or directly affect teen childbearing.

B. *Changes in Welfare Policy*

The PRWORA marked the most fundamental shift in welfare policy since the passage of the Social Security Act of 1935. It established the Temporary Aid to Needy Families (TANF) block grant, which replaced the Aid to Families with Dependent Children (AFDC) program. In doing so, the PRWORA transferred primary responsibility for determining welfare policy and administering the program from the Federal Government to the states, encouraging them to develop innovative approaches.²⁶

The federal legislation sought to achieve two broad goals, one programmatic and one normative. First, it eliminated the cash entitlement to needy families that had been the hallmark of the AFDC program, and set time limits and work requirements for the receipt of aid. Second, it "aimed at 're-forming' sexual behavior and 'restoring' traditional family norms" by specifying that federal funds be used to promote abstinence among the unwed and to strengthen two-parent families.²⁷

1. *Indirect effects.*

Some reforms indirectly affect teen parents by trying to reduce the size and number of low-income, single-parent families (which are likely to include many teen-headed households) through individual and state-level in-

24. See Stanley K. Henshaw, *Teenage Abortion and Pregnancy Statistics by State, 1992*, 29 FAM. PLAN. PERSP. 115, 116 (1997). These data were computed according to the girls' ages at the time of the pregnancy outcome, not at the time of conception. When births, abortions, and miscarriages are measured according to the girl's age at conception, the rate rises to 130 pregnancies per 1000 girls aged 15 to 19. See *id.*

25. See *id.*

26. See, e.g., THE ALAN GUTTMACHER INSTITUTE, ISSUES IN BRIEF: WELFARE REFORM, MARRIAGE AND SEXUAL BEHAVIOR 1 (1997) [hereinafter AGI ISSUES IN BRIEF] (discussing administrative and programmatic changes).

27. *Id.*

centive structures. For example, the PRWORA creates an "illegitimacy bonus," which rewards states that lower their out-of-wedlock childbirth rates while simultaneously lowering their abortion rates.²⁸ The Federal Government established few guidelines or rules to follow in competing for the bonus; in the trend towards decentralized programming, strategies are left up to the states. Many states have embarked on creative pilot programs, which run the gamut from providing unwed couples with incentives to marry, to expanding the availability of contraceptives through federally funded clinics, to providing poor women with financial disincentives for continued childbearing.

The most extreme of these financial disincentives are known as "family caps," which limit the total amount of monthly assistance a family can receive.²⁹ Once a family reaches its monetary limit, its benefits are capped, even if the mother has additional children. Such provisions were initially an explicit part of the PRWORA, but they were removed at the last minute, in part because of the concern they caused with pro-life members of Congress who feared that they would create incentives for women to have abortions.³⁰ However, states are free to enact them, and at least nineteen already have.³¹ Given the large percentages of teen parents who are unwed, these policies, and others which states implement to lower the rate of out-of-wedlock childbearing, may have a disproportionate impact on teen parents.

2. *Direct effects.*

Several provisions of the PRWORA directly target teen parents. Minor teen parents are required both to stay in school and to live in adult-supervised settings as a condition of receiving TANF benefits.³² Early versions of the

28. See PRWORA, Pub. L. No. 104-193, § 403(a)(2)(B)(i)-(ii), 110 Stat. 2105, 2118 (1996). In each of four years, beginning in 1999, the five states that achieve the greatest decreases in out-of-wedlock births and also reduce their abortion rate below the 1995 level will receive \$20 million each. States are encouraged to place special emphasis on reducing the number of out-of-wedlock teenage pregnancies. See *id.* § 402(a)(1)(A)(v), 110 Stat. at 2113-14.

29. For criticisms of this policy and the deleterious effects that it may have on poor women's reproductive decision-making, see Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155 (1996); Yvette Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 LAW & INEQ. J. 1 (1995).

30. See H.R. Rep. No. 104-725, at 2673 (1996); see also 142 CONG. REC. S8395, S8399 (July 22, 1996) (statement of Sen. Ford) (requesting that a letter from the Catholic Bishops' Conference, which expresses concern that family caps will encourage abortions, be printed in the Record); 142 CONG. REC. H7796, H7813 (July 18, 1996) (statement of Rep. Smith) (expressing concern that family cap policies will encourage abortions).

31. See AGI ISSUES IN BRIEF, *supra* note 26, at 1.

32. See PRWORA, Pub. L. No. 104-193, § 408(a)(4), 110 Stat. 2105, 2135-36 (1996) (denying assistance for teenage parents who do not attend high school or other equivalent training program); *id.* § 408(a)(5), 110 Stat. at 2137 (denying assistance for teenage parents not living in adult supervised settings).

PRWORA would have prevented teen parents from ever qualifying for benefits unless the mother married the child's biological father or another man who would adopt the child.³³ Congress modified this provision to allow minors to collect vouchers for child-care related goods and services, and later to let them collect cash TANF benefits when they attained the age of majority.³⁴ When President Clinton signed the bill into law, however, he eliminated this provision in favor of the education and living requirements. In addition, the PRWORA grants fifty million dollars for states to use to implement abstinence education programs, primarily targeted at teens and administered through schools.³⁵ Finally—and most significantly for the purposes of this note—the PRWORA contains two provisions relating to statutory rape. First, it requires the Attorney General to:

[E]stablish and implement a program that—

(1) studies the linkage between statutory rape and teenage pregnancy, particularly by predatory older men committing repeat offenses; and

(2) educates State and local criminal law enforcement officials on the prevention and prosecution of statutory rape, focusing in particular on the commission of statutory rape by predatory older men committing repeat offenses, and any links to teenage pregnancy.³⁶

Second, it offers a “sense of the Senate that States and local jurisdictions should aggressively enforce statutory rape laws.”³⁷ Given these admonitions and the amount of programmatic leeway that states have in competing for the Illegitimacy Bonus, it is not surprising that many are looking at statutory rape laws as a way to reduce both out-of-wedlock and teen births.

C. *Influential Studies*

Two influential studies on the patterns of teen sexuality, released just as the debate over welfare reform was heating up, galvanized the PRWORA's focus on the connection between teen pregnancy and statutory rape. The first, a national study conducted by the Alan Guttmacher Institute (AGI), found that half of the fathers of babies born to mothers between the ages of fifteen and seventeen were twenty or older.³⁸ Almost twenty percent of the fathers were six or more years older, and, in general, the younger a mother

33. See H.R. 4, 104th Cong. § 105(a) (1995).

34. See *id.* § 405(a)(4)(C) (allowing teens to receive vouchers); H.R. 1214, 104th Cong. § 405(a)(4)(A) (1995) (allowing teen mothers to collect cash benefits once they turn eighteen - later incorporated into H.R. 4).

35. See PRWORA, Pub. L. No. 104-193, § 912, 110 Stat. 2105, 2353-54 (1996).

36. *Id.* § 906(b)(1)-(2), 110 Stat. at 2349-50.

37. *Id.* at § 906(a), 110 Stat. at 2349.

38. See David J. Landry & Jacqueline Dorroch Forrest, *How Old Are U.S. Fathers?*, 27 FAM. PLAN. PERSP. 159, 160 (1995).

was, the greater the age difference between her and her partner.³⁹ The second study, conducted by researchers at the University of California, Irvine, documented the extent of adult male involvement in births among California adolescents. It found that in 1993, two-thirds of babies born to school-age mothers were fathered by men of post-high school age.⁴⁰ For eighteen-year-old mothers, the median adult father was 4.2 years older; for mothers between the ages of ten to fourteen, the median adult father was 6.7 years older.⁴¹ Among California mothers aged ten to fourteen, sixty percent of the fathers were between the ages of fifteen and nineteen and thirty-six percent were twenty or over.⁴² For California mothers aged fifteen to seventeen, fifty percent of the fathers were twenty or over.⁴³

Additional research indicated that such early sexual encounters were more likely to involve force or coercion; the majority of sexual experiences occurring before age fourteen were described by the girls as "non-voluntary."⁴⁴ In addition, early sexual activity characterized by a large gap in the ages of the parties was less likely to involve contraceptive use than when the parties were closer in age.⁴⁵ Finally, studies revealed that between fifty four to sixty percent of adolescents who became pregnant had previously been victims of childhood sexual abuse or incest.⁴⁶

These findings dramatically altered the way policy-makers, politicians, and the public viewed teen pregnancy. They prompted a reevaluation of prevention policy and explained why so many earlier attempts at reducing the levels of teen pregnancy had been unsuccessful. Most of the previous prevention efforts focused on abstinence education programs within high schools or targeted teens exclusively, with less than impressive results.⁴⁷

39. *See id.* at 161.

40. *See* Mike Males & Kenneth S.Y. Chew, *The Ages of Fathers in California Adolescent Births*, 1993, 86 AM. J. PUB. HEALTH 565, 567 (1996).

41. *See id.*

42. *See id.* at 566 tbl. 1.

43. *See id.*

44. KRISTIN A. MOORE, BRENT C. MILLER, BARBARA W. SUGLAND, DONNA RUANE MORRISON, DANA A. GLEI, & CONNIE BLUMENTHAL, CHILD TRENDS, INC., BEGINNING TOO SOON: ADOLESCENT SEXUAL BEHAVIOR, PREGNANCY, AND PARENTHOOD vii (1995).

45. *See id.*

46. *See* Debra Boyer & David Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy and Child Maltreatment*, 24 FAM. PLAN. PERSP. 4, 10 (1992); *see also* Janice R. Butler and Linda M. Burton, *Rethinking Teenage Childbearing: Is Sexual Abuse a Missing Link*, 39 FAM. REL. 73, 73 (1990).

47. The most ambitious and comprehensive of these programs was California's widely-heralded and often-imitated Education Now And Babies Later (ENABL) Program. California abruptly terminated the Program in February of 1996, when it was determined that, after four years of intense efforts, youths who participated in ENABL were equally likely to have become sexually active as teens who did not participate and had the same rates of pregnancy and sexually transmitted diseases. *See, e.g.,* Helen H. Cagampang, Richard P. Barth, Meg Korpi & Douglas Kirby, *Education Now and Babies Later (ENABL): Life History of a Campaign to Postpone Sexual Involvement*,

Such failures could be explained when viewed in light of the new sociological data on statutory rape. Most obviously, teen-targeted programs failed to reach an important segment of the population—the adult men who were involved in many of the relationships. Furthermore, by emphasizing a “just say no” message, abstinence programs failed to prepare teen girls for the greater levels of coercion that they were experiencing from the adult men.

In addition, the sociological evidence allowed society to shift the blame for teen pregnancy, out-of-wedlock childbearing, and welfare receipt—from the teen to the adult male. Previously, it was often assumed that teen parents were simply promiscuous and irresponsible, engaging in unprotected sex with other teens and casually having babies in order to receive welfare benefits.⁴⁸ After these studies were released, it began to look more as though large numbers of teens were being exploited by much older “predatory males” and that the teens’ sexual activity, lack of contraceptive use, and pregnancies were less a product of free will than the sad result of criminal victimization.

III. OVERVIEW OF ENFORCEMENT EFFORTS

Many states have taken Congress’ suggestion and developed a variety of steps to “get tough” on statutory rape. These efforts—which I will collectively refer to as “get tough” policies or measures—take three basic forms, and many states are utilizing more than one. First, several states have undertaken legal reforms, such as raising the age of consent or increasing the penalties for certain types of statutory rape. For example, Florida passed laws making it a third degree felony (technically child abuse) for a man older than twenty-one to impregnate a girl younger than sixteen,⁴⁹ and a second degree felony for any person who is twenty-four or older to engage in sexual activity with a sixteen or seventeen-year-old.⁵⁰ Georgia raised its age of consent from fourteen to sixteen.⁵¹ A bill that would raise Washington’s age of consent from sixteen to eighteen passed unanimously in the state’s house of representatives, but has since foundered in the state senate.⁵² Delaware

29 FAM. PLAN. PERSP. 109 (1997); Douglas Kirby, Meg Korpi, Richard P. Barth & Helen H. Cagampang, *The Impact of the Postponing Sexual Involvement Curriculum Among Youths in California*, 29 FAM. PLAN. PERSP. 100 (1997).

48. See, e.g., Ellen Goodman, *A Criminal Record or a Wedding Band?*, BOSTON GLOBE, Sept. 12, 1996, at A15 (“Maybe [teen mothers] are not just sexually immoral or calculating little economists having babies for welfare checks.”).

49. See FLA. STAT. ANN. § 827.04(3) (West 1998).

50. See *id.* § 794.05(1).

51. Compare GA. CODE ANN. § 16-6-3(a) (1996) with *id.* § 16-6-3 (1992).

52. See Debera Carlton Harrell, *A Call to Raise Age of Consent*, SEATTLE POST-INTELLIGENCER, Dec. 2, 1997, at A1.

passed the "Sexual Predator Act," which increased prison time for offenders.⁵³ California enacted a mandatory reporting requirement, under which all youth service providers, health care workers, and educators will be criminally liable if they fail to report a suspected statutory rape of a minor under the age of sixteen,⁵⁴ and created civil penalties ranging from \$2000 to \$25,000 for statutory rape offenders.⁵⁵

Second, some states are increasing the enforcement of existing laws. Some jurisdictions are merely voicing a renewed commitment to more aggressive enforcement. In Louisiana, state and federal prosecutors have promised to support the state's Initiative on Teen Pregnancy and Prevention by increasing prosecutions for statutory rape.⁵⁶ Similarly, prosecutors in Richmond, Virginia announced a partnership between the city's health, police, and social services departments, in the hope that this will increase the number of statutory rape cases reported, referred, and prosecuted.⁵⁷ Other states have developed more comprehensive enforcement strategies, creating specialized prosecution units to focus exclusively on statutory rape cases. California's initiative, the Statutory Rape Vertical Prosecution (SRVP) Program is the most ambitious of these, currently operating in fifty-four of the state's fifty-eight counties, with a budget of \$8.4 million.⁵⁸ Connecticut has implemented a similar program on a smaller scale,⁵⁹ and counties in New York are getting statutory rape cases referred to them from social services and setting up new bureaus to investigate the crimes.⁶⁰ California's SRVP Program provides funding for specialized prosecutors in the district attorneys' offices to follow each case all the way through the judicial process. The funds also provide for specially-trained investigators and victim advo-

53. See DEL. CODE ANN. tit. 11, § 773 (1996); 70 Del. Laws 600 (1996) ("[I]t is the intent of the General Assembly to enhance the penalty for statutory rape . . .").

54. Compare CAL. PENAL CODE § 11165.1 (West Supp. 1999) with *id.* § 11165.1 (West 1992). See generally *id.* § 11166 (West 1992 & Supp. 1999) (defining the duty to report).

55. See CAL. PENAL CODE § 261.5(e)(1)(A)-(D) (West Supp. 1999).

56. See Bill Voelker, *Prosecutors to Support Teen Pregnancy Program*, NEW ORLEANS TIMES-PICAYUNE, May 24, 1997, at B8 ("First Assistant District Attorney Camille Buras promised more state prosecutions for statutory rape.").

57. See Dorine Bethae, *Agencies to Target 'Sexual Predators': City's Goal to Enforce Statutory Rape Law*, RICHMOND TIMES-DISPATCH, Apr. 4 1997, at B1 ("[C]ity officials announced yesterday a four-agency partnership to go after 'sexual predators,' . . .").

58. See THE GOVERNOR'S OFFICE OF CRIMINAL JUSTICE PLANNING, STATUTORY RAPE VERTICAL PROSECUTION: THIRD YEAR REPORT 1 (1999) [hereinafter OCJP REPORT].

59. See Stephen Ohlemacher, *Campaign Gives Men a Warning: Statutory Rape Will Not Be Tolerated*, HARTFORD COURANT, Oct. 8, 1997, at A3 (reporting on the recent addition of a detective to the special prosecution unit); *State's Top Prosecutor Appoints Two Women to Enforce Statutory Rape Laws*, NEWS-TIMES, (Oct. 25, 1996) <<http://www.newstimes.com/archive96/oct2596/rga.htm>> (describing the state's formation of a special prosecution unit consisting of a prosecutor and an investigator).

60. See Jon R. Sorensen, *Pataki Welfare Reform Seeks to Reduce Illegitimate Births*, BUFFALO NEWS, Nov. 10, 1996, at A1.

cates, operating expenses, and equipment to support the prosecution program.⁶¹ In its first three years, the SRVP Program has dramatically increased the number of statutory rape cases filed and prosecuted in the state of California. Prior to the creation of the SRVP Program, most California jurisdictions reported little or no enforcement of statutory rape law. In the SRVP Program's third year of operation, prosecutors filed 2796 statutory rape cases, with 1066 more awaiting filing pending completion of an investigative phase.⁶² The vast majority of these cases (eighty-eight percent) resulted in a conviction. Seventy-four percent of these convictions were for felonies, and ninety-four percent of those convicted received prison, jail, or probation sentences.⁶³ From the SRVP Program's inception in 1995 to June 30, 1998, prosecutors have achieved a total of 3818 convictions for statutory rape.⁶⁴ In Santa Clara County, which receives the largest amount of SRVP Program grant money, prosecutions jumped from 35 to 200 annually in the first two years, with a conviction rate of ninety-eight percent.⁶⁵

Finally, a few states are also using innovative tactics to raise awareness and target potential offenders and victims. Georgia has printed thousands of "Sex Cards" to apprise citizens of the statutory rape law and its penalties.⁶⁶ Over 400,000 Sex Cards have been distributed to "churches, health agencies, judges, police chiefs, and politicians" statewide.⁶⁷ Similarly, in one Arizona county, motorists who are pulled over for traffic violations also receive a pamphlet urging the public to report suspected "predatory males" to the police.⁶⁸ In New York, California, and Connecticut, massive public relations campaigns employ billboards and radio ads to warn adults that sex with minors is against the law.⁶⁹

All states are required by the PRWORA to submit plans to the Secretary of the Department of Health and Human Services as a condition of receiving federal TANF funds. Each plan must contain, among other things, how the state plans to "[c]onduct a program, designed to reach State and local law

61. See OJCP REPORT, *supra* note 58, at 2.

62. See *id.* at 3.

63. See *id.*

64. See *id.* at 9.

65. See Richard Whitmire, *Enforcing Statutory Rape Laws Bringing Unintended Results*, GANNETT NEWS SERVICE, July 24, 1997, at 1, available in 1997 WL 8832861.

66. See Christy Oglesby, *Wallet Card's Warning: Sex Can Land You in Jail*, ATLANTA J.-CONST., Jan. 10, 1998, at D5.

67. *Id.*

68. See Patrick Graham, *Adolescent Girls See Hunk, but Police See Child Molester*, HOUSTON CHRON., Aug. 31, 1997, at 39.

69. See, e.g., Ohlemacher, *supra* note 59 (Connecticut); Sorensen, *supra* note 60 (New York); Cheryl Wetzstein, *California Fights Statutory Rape with Media, Cops*, WASH. TIMES, Sept. 17, 1997 at A2 (California).

enforcement officials, the education system, and relevant counseling services, that provides education and training on the problem of statutory rape so that teenage pregnancy prevention programs may be expanded in scope to include men."⁷⁰ More than half of the states' plans merely track the language in the PRWORA and indicate that the state will conduct a statutory rape education program. The remaining states outline strategies that range from the aggressive enforcement measures discussed above to the development of task forces to study the problem.⁷¹

It appears from these efforts, and from the welfare debate background, that the legal and public model of dealing with teen pregnancy has changed from years past. Gone is the complaint that girls are left vulnerable targets of male aggression to which society turns a blind eye. Instead, the predatory male has become public enemy number one. This may be so, however, not necessarily because of the danger he poses to girls, but because of the costs he creates for society.

IV. ANALYTICAL CONSIDERATION

While there is consensus that adult males' sexual involvement with teen girls is problematic, it is less clear whether the problem should be addressed through the "get tough" measures outlined above. The intervention of the criminal justice system may not always be appropriate or effective, particularly when a pregnancy has already occurred. This Part attempts to isolate and examine the factors that make intervention problematic according to three analytical frameworks: the use of consent-based models, the privacy and substantive due process rights of both parties, and the practical considerations for parenting teens. Ultimately, I offer a modest proposal for reforming the enforcement of statutory rape laws that takes these factors into account.

A. *Consent-Based Standards*

There are several arguments for introducing a consent-based approach to statutory rape enforcement.⁷² Some focus on protecting offenders who can be seen as less culpable and not deserving of unduly harsh punishment. Oth-

70. PRWORA, Pub. L. No. 104-193, § 402(a)(1)(vi), 110 Stat. 2105, 2114 (1996).

71. For a complete list of state TANF plans regarding statutory rape, see Leven-Epstein, *supra* note 22.

72. Of course, using the term "consent" here is somewhat misleading, because statutory rape laws presuppose the inability of minors to legally consent to sex, making the notion of consent-based standards to statutory rape a contradiction in terms. However, the term "consent" in a nonlegal context refers to a willingness on the part of the minor to engage in sex. In the following discussion, I use the word "consent" in terms of the latter sense—willingness of the minor, despite a legal inability to consent.

ers look to the nature of teens' capacity for meaningful consent and the need to recognize their sexual autonomy.

1. *Mitigating harsh results.*

Consent-based standards are appealing because the strict application of statutory rape laws may have surprisingly harsh effects on offenders whom we may not view as particularly culpable or dangerous. Depending on the specific provisions of their state's statute, offenders may face decades of prison time⁷³ and thousands of dollars in fines.⁷⁴ These effects can be magnified when connected with corollary punitive policies. For example, many states require that an individual convicted of statutory rape register as a sex offender. Indeed, survey data indicate that thirty-three percent of prosecutors often push for registration as part of a defendant's punishment.⁷⁵ In one highly publicized case, an eighteen-year-old Wisconsin man who impregnated his fifteen-year-old girlfriend as a result of consensual sex was convicted as a sex offender and required to have no contact with the girl, even though the couple planned to marry.⁷⁶ Statutory rape may also count as a "strike" for the purposes of federal and state "three strikes" laws.⁷⁷ For example, in the SRVP Program's third year of operation, 107 defendants were charged under California's three-strikes law, and sixty-seven received second or third strike convictions.⁷⁸ Statutory rape counts as an aggravated felony for deportation purposes, and may be considered a "crime of violence" under the Federal Sentencing Guidelines' career offender penalty enhancement structure.⁷⁹

73. For example, in Georgia a twenty-one-year-old who has sex with a fifteen-year-old faces a minimum of 10 and a maximum of 20 years in prison. See GA. CODE ANN. § 16-6-3(b) (1999).

74. For example, in California a twenty-one-year-old who has sex with a fifteen-year-old could be fined up to \$25,000. See CAL. PENAL CODE § 261.5(e)(1)(D) (West 1999).

75. A national survey of prosecutors indicates that one-third of them recommend "post-conviction sexual offender registration with local law enforcement and/or community notification." SHARON G. ELSTEIN AND NOY DAVIS, AMERICAN BAR ASS'N CENTER ON CHILDREN AND THE LAW, SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES 27 (1997) [hereinafter ABA STUDY].

76. See Annys Shin, *A New Twist on an Old Law*, MS., May-June 1998, at 27.

77. See 18 U.S.C.A. § 3559 (West 1999) (federal statute punishing individuals with three predicate convictions for "serious violent felonies" which includes "aggravated sexual abuse" with life imprisonment); 18 U.S.C.A. § 2241(c) (West 1999) (federal statute defining aggravated sexual abuse as including statutory rape).

78. See OJCP REPORT, *supra* note 58 at 5.

79. See 8 U.S.C.A. § 1228(a)(1) (West 1999) (authorizing the attorney general to deport aliens convicted of "any criminal offense covered in section 1227(a)(2)(A)(iii) . . . of this title"); *id.* § 1227(a)(2)(A)(iii) (including "aggravated felony" as a crime which can trigger deportation); *id.* § 1101(a)(43)(A) (defining "aggravated felony" to include "murder, rape or sexual abuse of a minor"); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (1997) (deportation); *id.* § 4B1.1 (career

The fact that the sex between the parties may have been "consensual" does not mitigate these results.⁸⁰ Nevertheless, while some sexual relationships between adult men and teen girls are undoubtedly harmful, some undoubtedly are not. If a couple is engaged in a consensual relationship that is not characterized by physical or emotional abuse, and if the girl is somewhat mature in her decision-making ability, it is entirely possible that the relationship is not injurious to her, particularly if the age difference between the two is not very large. Many factors, discussed in the following paragraphs, indicate that such unions are not inherently harmful, and that society has never imposed a blanket prohibition on them.

Much of the culpability that society places on statutory rape offenders stems from the perception of large age differences between the men and their victims. Cases with truly dramatic age differences often get a great deal of media attention and provoke justifiable outrage from the public. However, the stereotypical statutory rape relationship, in which a man in his thirties or forties is having sex with a girl in her early teens, does not accurately describe the majority of cases. In fact, the vast majority of men who are committing—and being prosecuted for—statutory rape, are in their teens or early twenties. In California, 71.5% of fathers of babies born to teens are under the age of twenty-four, and almost thirty percent are teens themselves.⁸¹ Fifty-eight percent of the defendants prosecuted through the SRVP Program in its third year were under the age of twenty.⁸² Nationwide, eighty percent of fathers of babies born to mothers aged fifteen to nineteen are less than five years older than their partners (meaning that they are twenty-four years old or younger).⁸³ To the extent that legislative and enforcement efforts to "get tough" on statutory rape are driven by the perception that much older men are the culprits, it is important to note at the outset that the majority of these men are actually teenagers and young adults themselves.

While most state laws prohibit unions between girls and men even a few years older—and others prohibit unions between girls and boys of the same

offender); *id.* § 4B1.2 ("crime of violence" defined). For criticism of the Federal Sentencing Guidelines' treatment of statutory rape for enhancement purposes, see Lewis Bossing, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205 (1998) (arguing the current model leads to inaccurate and overly harsh results); Susan Fleischmann, Comment, *Toward a Fact-Based Analysis of Statutory Rape Under the United State Sentencing Guidelines*, 1998 U. CHI. LEGAL. F. 425 (pushing for a case-by-case review of recidivist enhancements for statutory rape convictions).

80. 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, regardless of whether the victim consented); *United States v. Reyes-Castro*, 13 F.3d 377 (10th Cir. 1993) (same); *United States v. Rodriguez*, 979 F.2d 138 (8th Cir. 1992) (same).

81. See Shari Roan, *The Invisible Men*, L.A. TIMES, July 10, 1995, at E1 (citing statistics from the California Department of Health Services for 1993).

82. See OJCP REPORT, *supra* note 58, at 4.

83. See Landry & Forrest, *supra* note 38, at 161.

age, in general, "the pattern of fathers being slightly older than mothers fits squarely within societal norms."⁸⁴ Research indicates that women between twenty-one and thirty have babies with men who are, on average, three years older than they are.⁸⁵ While such age differences clearly become both more dramatic and more problematic the younger one partner is (i.e., the three year difference between a twenty-five-year-old woman and her twenty-eight-year-old boyfriend, as opposed to a fourteen-year-old girl and her seventeen-year-old boyfriend), the fact remains that such patterns are widespread in American culture and are likely to persist.

Developmental psychology and anecdotal evidence offer an explanation for this trend: Simply put, young adult males are more likely to exhibit immature characteristics than young adult females. The immature adult male is not as socially adept, economically stable, or educationally developed as one would expect from a man of his chronological age. Researchers speculate that older men who date teens are likely to "possess developmental or psychosocial deficits" which result in their having elevated high school dropout and unemployment rates than men who are involved with women closer to their own ages.⁸⁶ One California youth service provider describes the typical older men her clients are involved with as follows:

Most of the guys are in what you would call a low socio-economic status—most are poor and not well-educated. These are not college-bound guys. Basically, most of the guys I deal with are totally immature. They are childish in their thinking. They seem younger than they really are. They are not realistic about relationships or parenthood.⁸⁷

From a developmental standpoint, the immature twenty-year-old man may have more in common with a mature sixteen-year-old girl than with a woman his own age. Significantly, youth service providers indicate that such relationships are not inherently harmful to the teen, and that these immature men often genuinely care about their girlfriends.⁸⁸

84. Laura Duberstein Lindberg, Freya L. Sonenstein, Leighton Ku & Gladys Martinez, *Age Differences Between Minors Who Give Birth and Their Adult Partners*, 29 FAM. PLAN. PERSP. 61, 61 (1997).

85. *Id.*

86. *See id.* at 64.

87. Interview with Jenny Horne, Creator and Director of the Teen Parents' Project in San Mateo County, Redwood City, Cal. (Oct. 9, 1998) (on file with the *Stanford Law Review*).

88. *See, e.g.*, Interview with Erin Scott, staff attorney at Legal Advocates for Children and Youth (LACY), in San Francisco, Cal. (Oct. 30, 1998) [hereinafter Scott Interview] (describing some of the adult partners of her teen clients as "nice guy[s] who just happen[] to be older"); ABA STUDY, *supra* note 75, at 11, 27 (noting that youth service providers classify some statutory rape offenders as "nurturing" and "responsible," and prosecutors described some of the men as being in "love relationship[s]").

Marriage patterns of only a few decades ago indicate that teenage girls commonly married and started families with older men.⁸⁹ Even today, marriage is a defense to statutory rape in every state.⁹⁰ Finally, the ages of consent vary considerably from state to state, indicating that there is little consensus over the point at which a relationship becomes criminal, and implicitly harmful, to the girl. Hawaii places the age as low as at fourteen,⁹¹ while California and many other states have set it as high as eighteen.⁹² Thus, a twenty-year-old having sex with a fifteen-year-old in Hawaii is legally acceptable, while in California this relationship is a felony warranting severe punishment.

Even courts and legislatures express ambivalence about the inability of teen to consent to sex with men close to their age, and about the questionable blameworthiness of some young offenders. The words of one California Appeals Court opinion are telling. The court was reviewing a civil suit brought by the parents of a sixteen-year-old girl, who had been impregnated by her seventeen-year-old boyfriend (whom she later married), against the boy's parents. Denying the girl's parents' claim that the boy's parents should be held liable for his "willful misconduct," the court stated that it was "not inclined to dwell on outdated legal fictions concerning the ability of underage females to consent to sex."⁹³ The court went on to state that "[t]he fact of the matter is that in the latter part of the 20th Century, a substantial percentage of minors of both sexes are engaging in sexual activity. . . . To cling to vestiges of a bygone era is to ignore the contemporary realities of nature."⁹⁴ Similarly, in a California Senate Committee report, the Senate Committee on Public Safety expressed some ambivalence about the culpability of statutory rape offenders. Reviewing a proposal to add statutory rape to the list of offenses requiring mandatory sex offender registration, the committee was concerned that:

[W]hile technically not consensual (since minors cannot consent to sexual relations in this context), statutory rape is a non-forcible offense. . . . Thus, regardless of the circumstances, maturity or respective immaturity of the parties, a 22 year-old, for example, would be required to register for life as a sex offender under this bill.⁹⁵

89. See Roan, *supra* note 81 (citing historical research which indicates that "there is nothing new about adult men fathering the babies of teens," and suggesting that it has only become a cause for concern because this no longer takes place in the context of marriage).

90. Of course, in order for a minor to marry, she must first either obtain the consent of a parent or be legally emancipated.

91. See HAW. REV. STAT. ANN. § 707-730(1)(b) (Michie 1998).

92. See, e.g., CAL. PENAL CODE § 261.5(a) (West 1999).

93. Cynthia M. v. Rodney E., 279 Cal. Rptr. 94, 98 n.14 (Ct. App. 1991).

94. *Id.*

95. SENATE COMM. ON PUBLIC SAFETY, COMMITTEE REPORT FOR 1997 CALIFORNIA SENATE BILL NO. 1888 (1998).

These issues have led some commentators to suggest that judges need to examine a variety of consent-based factors when analyzing a statutory rape case. One argues that "[t]houghtful, self-manifested consent turns otherwise potentially harmful acts into acts of affection and self-actualization," and that courts should therefore consider whether or not the teen gave meaningful consent by analyzing the nature of the relationship between the parties and the nature of the sexual encounter.⁹⁶ Another argues that "[f]actors such as the relationship between the two parties involved in the sexual act, the circumstances under which the act took place, whether physical injury occurred, and who initiated the act will inform a conclusion about whether the defendant poses a threat to the community."⁹⁷ Without such an inquiry, courts may risk imposing punishments that are wildly disproportionate to the actual amount of harm a man has caused, or to his actual culpability.

Heidi Kitrosser argues for a system in which consent could serve as an affirmative defense to statutory rape within certain age spans, with the rebuttable presumption of non-consent.⁹⁸ Recognizing that there are many emotional, social, and psychological factors which may make teens more vulnerable to coercion than adults, Kitrosser recommends that a more progressive understanding of "consent" be employed which takes these factors into account in order to assure that the teen's consent is truly meaningful.⁹⁹

Consent-based arguments have understandably met with opposition. First, some argue that women of all ages are already vulnerable to sexual violence and oppression, and that laws against forcible rape are already inadequate to protect them. Evidentiary rules which require a showing of force, sexist juror attitudes, and the emotional difficulty of going through a rape trial all work to prevent the legal system from meeting the needs of victims of forcible rape.¹⁰⁰ Often, victims of statutory rape have been victims of a more-difficult-to-prove forcible rape as well.¹⁰¹ With statutory rape avail-

96. Bossing, *supra* note 79, at 1250. See also Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287, 289 (1997) ("[I]t is far too simplistic to suggest that adolescent girls are incapable of making consensual sexual choices in all instances."); Alice Susan Andre-Clark, *Whither Statutory Rape Laws: Of Michael M., the Fourteenth Amendment, and Protecting Women From Sexual Aggression*, 65 S. CAL. L. REV. 1933, 1992 (1992) ("Although the feminist concern that young women are being forced into sex before they are ready is legitimate, the answer does not lie in laws that punish young men who engage in consensual acts.").

97. Fleischmann, *supra* note 79, at 426.

98. See Kitrosser, *supra* note 96, at 330-33.

99. See *id.* at 333.

100. Cf. Oberman, *supra* note 4, at 37 (describing how statutory rape laws enable prosecutors to obtain convictions in cases where there is insufficient evidence of non consent to sustain a forcible rape charge).

101. Interestingly, it seems clear that the victim in *Michael M.* was actually the victim of forcible rape. See 450 U.S. 464, 483 n.* (1981) (Blackmun, J., concurring) (citing portions of the

able to them, prosecutors may be able to obtain a conviction quickly, with a minimum amount of participation by the victim. Introducing a consent-based standard into the analysis would create the same problems for victims and prosecutors as those seen in forcible rape cases, and may open victims up to the same distasteful attacks on character, behavior, and chastity that forcible rape victims frequently face.

Furthermore, because of complicated social and psychological forces, consent may be rendered a meaningless concept as it applies to teen girls, or at least one too complex and problematic for juries to decide.¹⁰² Recent studies indicate that some teen girls suffer from very high levels of debilitately low self-esteem, engage in risky and self-destructive behavior in order to gain social acceptance, and are extremely vulnerable to the sexual coercion of older boys and men.¹⁰³ These girls may thus engage in apparently consensual sexual activity that is both dangerous and demoralizing, because they are operating within a constrained and warped system of options.¹⁰⁴ Introducing a consent standard here would mean treating uniquely vulnerable teen girls like fully-matured women, and would make it difficult to protect girls against subtle sexual coercion by adults.

While these arguments have some force, it is important to note that none suggest that all teen girls are incapable of giving meaningful consent. Rather, they seem to focus on the difficulty of determining which girls need protection and which may not, and the danger that anything less than a bright-line rule leaves the ones who do need protection at risk. The fact remains that meaningful consent is possible for teens, and that this profoundly influences the nature of the statutory rape relationship.

trial court transcript in which the victim testified that she told the defendant to stop his sexual advances, that he hit her in the face, and that she sustained bruises). Nonetheless, the State prosecuted—and the Court regarded—the case as one of consensual statutory rape, not forcible rape. *See id.* at 466.

102. *See* Oberman, *supra* note 4, at 68-70 (arguing that a consent-based model fails to take the vulnerabilities of adolescent girls into consideration).

103. *See generally, e.g.,* PEGGY ORENSTEIN, *SCHOOLGIRLS: YOUNG WOMEN, SELF-ESTEEM, AND THE CONFIDENCE GAP* 51-66 (1994) (describing the difficulties that girls have in developing healthy, autonomous sexual attitudes in a climate of hostility, peer pressure, and double standards); MARY PIPHER, *REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS* (1994) (discussing the pressures society places upon adolescent girls and the deleterious effects observed).

104. Oberman illustrates this point with the example of the infamous Los Angeles "Spur Posse" gang of 1993. Older, popular boys preyed on their younger classmates, subjecting them to humiliating sexual episodes. The boys set up a scoring system for their sexual conquests, and later referred to their victims as "whores." Despite the degrading nature of many of the encounters, the prosecutor determined that they were technically "consensual," and for that reason declined to prosecute the gang members for statutory rape. *See* Oberman, *supra* note 4, at 15-18.

2. *Victim empowerment.*

The aggressive prosecution of statutory rape cases where the teen victim both consented to the activity and is mature enough to give meaningful consent deprives the girl of control over her own sexual autonomy. Furthermore, the way cases are handled further deprives the teen of control over events which may have a significant impact on her life. Most teens are reluctant to see their older boyfriends prosecuted. While every jurisdiction and district attorney's office has a different policy on the matter, the general consensus is that the teen victim's wishes about whether to move forward with a statutory rape prosecution have little bearing on what actually happens. A national survey of prosecutors indicates that only one-third say they are "always or almost always successful in overcoming the girl's reluctance" to prosecute.¹⁰⁵ Of course, it may be difficult for a case to go forward without the victim's cooperation. However, when a child or pregnancy has resulted, prosecutors have all of the proof they need, and it is much more likely that they will move forward regardless of the victim's wishes.¹⁰⁶ One advocate for teens describes the process as "really agenda driven. . . . [t]he whole experience is NOT empowering for them. I would almost say that the whole process amounts to a revictimization of the teen."¹⁰⁷

Teens may also have the upsetting experience of being forced to testify about their sexual activity in court, or be questioned about it by police, investigators, or prosecutors. In lives which are already filled with difficulty, chaos, and poverty, a prosecution may cause even more turmoil. In the words of one teen parent:

[Prosecution] causes more problems than what's necessary. That means [my boyfriends is] going to be dragged to court, then I'm probably going to have to come in or say something to somebody and then it's going to go on for months and months and months. And that's going to cause more complications in my life.¹⁰⁸

Prosecuting men for statutory rape when the parties were in a consensual relationship—and particularly when they have a baby—can cause the teens emotional trauma. Moreover, prosecutors are unlikely to be in a position to help teens deal with the long-term impact that the prosecution will have on their lives. One advocate complains:

105. ABA STUDY, *supra* note 75, at 26.

106. *See id.* (finding that close to one-half of prosecutors say that pregnancy provides them with evidence of the illegal sex, and makes it easier for them to prosecute cases involving an uncooperative victim).

107. Scott Interview, *supra* note 88 (emphasis in original).

108. ABA STUDY, *supra* note 75, at 38.

The DA's Office basically comes in, tells the girls they are victims, does a "surgical strike" by prosecuting And then the DA's Office is out of the picture. Does this really serve these girls for the rest of their lives? There is nobody there to help the girl deal with the consequences that the whole experience is going to have on her child. I mean, what is she supposed to tell her kid, "Daddy went to jail because you were born"? . . . No one stays around to help the girl figure out the role that the dad is going to play in the child's life¹⁰⁹

As a result of these difficulties, commentators have suggested that statutory rape laws be amended to give minors greater control over the prosecution decision. Frances Olsen proposes an enforcement structure that would either "permit charges to be brought only upon the [minor's] complaint or require that they be dropped upon her request."¹¹⁰ She argues that such an enforcement model would reduce the negative and repressive aspects of statutory rape laws without leaving teens wholly unprotected.¹¹¹

Opponents of giving teens greater control over the prosecution decision also contend that this merely gives statutory rapists an opportunity to coerce their victims into not cooperating with the authorities. Additionally, giving teens greater control runs counter to the predominant assumption underlying statutory rape law in the first place, namely that teens are incapable of rendering such judgments. Indeed, if teens are considered too immature to consent to sex, it is unlikely that they will be seen as mature enough to make decisions about prosecution. Finally, in any criminal prosecution, the state, not the victim, is technically the party to the case. While an individual victim may wish to have a case dismissed, society still has an interest in punishing lawbreakers.¹¹²

The analytical difficulty with introducing a consent standard and victim empowerment into statutory rape law ultimately centers on the gray area between consent and coercion in which many teen sexual encounters take place.¹¹³ This is compounded by another gray area: the continuum between childhood and adulthood that all teens move across at varying speeds. Every teen and every sexual encounter is different. However, the law currently makes broad generalizations about the maturity of teens and their ability to make decisions about sexuality, despite the fact that any one teen or sexual encounter might not fit into the model. Thus, statutory rape is one of the few strict-liability criminal offenses in contemporary American law, with an age

109. Scott Interview, *supra* note 88.

110. Olsen, *supra* note 6, at 408 (footnote omitted).

111. *See id.*

112. For an example of this argument as it applies to domestic violence, see Machaela M. Hootor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 648 (1997) ("By making domestic violence a crime against the state, mandatory arrest will take the criminal justice system's focus off the victim and place it where it belongs—on the person who has violated the laws . . .").

113. *See, e.g.,* Olsen, *supra* note 6, at 427 ("[T]hese two categories constitute a continuum of sexual relations; there is no bright line between them.").

cut-off which cannot countenance the mitigating influence of consent. The harsher the penalties for statutory rape become, and the higher states set their ages of consent, the more this model may call out for revision.

B. *Substantive Due Process*

The personal issues surrounding statutory rape—particularly when it results in a pregnancy—are numerous. A teen may be making choices about sex, contraceptive use, abortion, childbearing, child rearing, and the nature of her continued relationship with the man. Of course, as the data indicate, not all teens are making free and informed decisions in these areas. But some undoubtedly are. Thus, it is worth exploring how personal privacy and substantive due process rights factor in to the situation. I focus in this analysis on relationships which are “consensual”—meaning willingly entered into by the teen and lacking in any physical, sexual, or emotional abuse. In such situations, the teen’s privacy rights, while limited, still exist. Furthermore, in situations where the statutory rape has resulted in pregnancy, the teen has many substantive due process rights connected to the pregnancy and child. In fact, the father may also have rights connected to the child, although this argument is more difficult to make.

1. *Privacy in making sexual decisions.*

The issue of privacy arises whenever the law affects deeply personal areas such as sexual activity and procreative decision-making. While it is true that minors are subject to more restrictive state control than adults, they also retain certain rights of privacy and decisional autonomy. Some of these rights are articulated in the Supreme Court’s jurisprudence on abortion and contraception, as well as in the so-called “mature minor” provisions in state laws governing access to medical care. For example, in *Carey v. Population Services International*, the Court held that minors have a right to privacy in procreational matters, and that they must be permitted to obtain contraceptives without parental consent.¹¹⁴ In *Planned Parenthood of Central Missouri v. Danforth*, the Court found unconstitutional a state requirement that minors obtain the consent of a parent before seeking an abortion.¹¹⁵ The Court later declared in *Bellotti v. Baird* that states which required parental consent could only do so if they also provided a judicial bypass mechanism.¹¹⁶ This device would permit the minor to go before a judge and either demonstrate her maturity to make the decision, or argue that, despite her lack

114. 431 U.S. 678 (1977).

115. 428 U.S. 52 (1976).

116. 443 U.S. 622 (1979).

of maturity, the procedure would be in her best interest.¹¹⁷ In addition, all the states have laws that permit minors to consent to receive care for sexually transmitted diseases and many also allow minors to consent to treatment for alcohol and substance abuse and psychiatric care.¹¹⁸ These laws and decisions indicate that, even for minors, there are areas of sexuality, health, and reproduction which are too private to warrant state interference.¹¹⁹

While no court has found that minors have the privacy right to engage in sex with adults, some state courts have reached opposing results when addressing the privacy right of minors to engage in consensual sexual activity with one another. For example, in *People v. T.A.J.*, a California appellate court upheld the misdemeanor conviction of a sixteen-year-old boy accused of having sex with a fourteen-year-old girl.¹²⁰ The court rejected the boy's argument that, as a juvenile who was intended to be protected by the statute, he could not be charged under it.¹²¹ More significantly, the court ruled that, despite the fact that minors have privacy rights under California's constitution—and regardless of the fact that many teenagers are sexually active—minors in California do not have a constitutionally protected right of privacy to engage in sexual intercourse.¹²²

In contrast, in *B.B. v. State*, the Florida Supreme Court held that minors do have a privacy right to engage in consensual sex, and that, although the state has a compelling state interest in regulating the activity, criminal sanctions were not the least intrusive means of doing so.¹²³ Under challenge by a sixteen-year-old boy convicted of a felony for engaging in consensual sex with a 16-year old girl, the court reasoned that intimate personal activities such as marriage, procreation, contraception, abortion, and family relationships were protected privacy rights. The court found that, while the state has a compelling interest in controlling these activities as they relate to minors, sexual activity does fall generally within the zone of minors' privacy rights. The state argued that its ban on sex between minors was a "shield" that would protect them, but the court found that the law was actually being used as a "weapon" against them.¹²⁴ The court ultimately determined that a criminal statute (making this behavior a second-degree felony) was not the least intrusive means necessary to achieve the state's interest.

117. *See id.* at 643-44.

118. *See Oberman, supra* note 4, at 48-50 (surveying a variety of "mature minor" laws).

119. *See id.* at 47 (arguing that the privacy rights of minors are not necessarily driven by the "sense that minors are mature enough to make such decisions, but rather, by a belief that certain forms of treatment are so important that the law should facilitate access to them").

120. 73 Cal. Rptr. 2d 331 (Ct. App. 1998).

121. *See id.* at 339-41.

122. *See id.* at 338.

123. 659 So. 2d 256, 259 (Fla. 1995).

124. *Id.* at 260.

Only one court has gone so far as to suggest that minors have a privacy right to engage in sexual activity with adults, and vice versa. In 1992, a Florida trial court dismissed statutory rape charges against two men because it found that the law violated the provisions for privacy in the state's constitution.¹²⁵ This decision was later overruled in *Jones v. State*, in which the state's court of appeals held that the privacy rationale does not give minors the right to consent to sexual intercourse with adults.¹²⁶

While it is important to consider the privacy rights of teens, it is equally important to recognize that privacy as a concept exists within a preexisting normative framework which may privilege a white, middle-class family structure, and may differentially affect women of color. For example, minority women may feel a greater need to protect their partners from a law enforcement apparatus that may seem racist and oppressive. Indeed, one commentator points out that, in the context of domestic violence, "[t]he conceptualization of privacy . . . and its implications for women in the family, are different for Black women than for white women, because the potential for state intervention and governmental coercion into the private sphere of the family is of greater concern for Black women than for white women."¹²⁷

In addition, cultural practices regarding patterns of sexuality and family structures may vary across racial and ethnic lines. For example, experts who work in the Latino community recognize that Latino culture condones relationships between girls and older men.¹²⁸ The director of a family health center in Santa Ana, California notes that, "[i]n Latino culture it is very acceptable to be sexually active at 12 or 13 Usually, what we will see is a 16-year-old girl and an 18-year-old boy. Often they are cohabiting, and the parents approve. This is a culturally acceptable thing."¹²⁹ Particularly in California, where many people emigrate from South America, Central America, and Mexico, some couples arrive only to find that their relation-

125. See Mike Clary, *Should a Minor Have the Right to Say Yes?*, S.F. CHRON., Nov. 15, 1992, at 3 (discussing the case).

126. 619 So. 2d 418 (Fla. Dist. Ct. App. 1993), *aff'd*, 640 So. 2d 1084 (Fla. 1994).

127. Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 185 (1994). Kimberle Crenshaw also discusses the differential impact of laws and policies on women of color in her writings on "intersectionality." See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (investigating violence against women of color through the lenses of race and gender).

128. See Patricia Donovan, *Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?*, 29 FAM. PLAN. PERSP. 30, 33 (1997) ("Providers also point out that in some cultures it is accepted, even encouraged, for young girls to have relationships with much older men.").

129. Leslie de la Flor, *quoted in* Matt Lait & Dexter Filkins, *Views on Statutory Rape Aren't as Clear-Cut as Law*, L.A. TIMES, Sept. 19, 1996, at A1.

ships are criminal.¹³⁰ This note does not argue that cultural relativism should excuse potentially harmful behaviors.¹³¹ Rather, it merely points out that these practices may be more concentrated in a particular culture and thus may have greater potential for implicating the privacy rights of those involved.

Of course, as many feminists have noted, privacy can be a double-edged sword for women.¹³² While aggressive and inflexible statutory rape prosecution may subject teens to an untoward level of state control, the failure to enforce statutory rape laws in the name of privacy may also leave teens vulnerable to exploitation.¹³³ As Francis Olsen observes, "[e]very effort to protect young women against private oppression by individual men risks subjecting women to state oppression, and every effort to protect them against state oppression undermines their power to resist individual oppression."¹³⁴

Thus, the degree to which teens' privacy interests should be taken into account is unclear. However, we can reach a few conclusions: teens have some right to make personal decisions regarding sexuality and pregnancy; there are many sensitive issues involved, including cultural practices and community differences; and there are risks inherent both in too much infringement on privacy rights and in too much deference to them.

2. Parental rights.

The Supreme Court has articulated, in a long line of cases, significant substantive due process interests in parenting and child rearing.¹³⁵ Obvi-

130. See Matt Lait, *Agency Helps Some Girls Wed Men Who Impregnated Them*, L.A. TIMES, Sept. 1, 1996, at A1 (describing how Latina girls and their families sometimes "enlist the help of the Mexican Consulate to get married"). For example, Erin Scott of LACY describes a couple who were married in an unofficial ceremony in a remote village in Mexico and then immigrated to the United States. Authorities were notified about the couple because the girl was a minor and there was a large age difference between them. The man was charged with statutory rape and threatened with deportation. The couple had to rush to the Mexican Consulate in order to make the marriage official before his court date. See Scott Interview, *supra* note 88.

131. See Lait, *supra* note 130 (quoting a social worker who argues that condoning such relationships "smacks of racism and sexism" and that "the justification for allowing [girls] to continue to be abused is that it is 'cultural'").

132. See, e.g., Olsen, *supra* note 6, at 390 ("Some feminists focus on the sexist nature of social control and assert that in practice it means social control of women. Other feminists focus on the sexist nature of sexual freedom and point out that freedom means freedom for men to exploit women.").

133. See, e.g., *Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991) ("[S]exual exploitation of children is a particularly pernicious evil that sometimes may be concealed behind the zone of privacy that normally shields the home.").

134. Olsen, *supra* note 6, at 412.

135. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) ("The intangible fibers that connect parent and child . . . are sufficiently vital to merit constitutional protection in appropriate cases."); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (recognizing the rights of parents to direct their

ously, these interests are distinct from the issue of criminal liability for intra-family acts. A family member who commits a crime against another family member may or may not be deprived of his or her parental rights, depending on a variety of factors.¹³⁶ However, in the case of statutory rape, where the offense itself produces the parental relationship, the issues become murkier. Both parties have some degree of parental and familial rights which should be considered in an analysis of the appropriate legal response to the statutory rape.¹³⁷

If the statutory rape has resulted in a child, the teen's rights are clear. As long as she is capable of being an adequate caregiver, she is allowed to retain custody of her child and raise it as she sees fit. Concomitant with her parental responsibilities, the teen mother acquires a host of rights regarding her child, which include the decisional autonomy to direct the child's education, upbringing, and religious training. It is not such a stretch to argue that the custodial mother—even though she is a teen—should also have some say in the role that the child's father will play in her life and in the life of their child (cabined, of course, by his own rights to make these decisions).

The parental rights potentially retained by the adult father are more ambiguous. An analysis of several cases indicates that these rights hinge on the nature of the relationship between the father and child and on the purposes for which the father is asserting his rights. For example, in *In re Adoption of Michael H.*, the California Court of Appeals found that a man who conceived a child in the course of a statutory rape should not lose his parental rights to the child as a result.¹³⁸ For the court, the decision turned on whether or not the intercourse was consensual. The court determined that it had been, and ruled that the fact that the man had committed statutory rape was not alone enough to terminate his parental rights to the child, who had been placed for adoption.¹³⁹ The California Supreme Court ultimately terminated the man's parental rights, not because of the statutory rape, but because it determined

children's upbringing and religious training); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (upbringing); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (education).

136. The term "parental rights" encompasses a variety of rights, including legal and physical custody, visitation, and the mere ability to claim the existence of a legal, filial relationship.

137. The following discussion and examples focus on parental relationships created by "consensual" intercourse, *see supra* note 72, and are in no way intended to support the proposition that a man who fathers a child through non-consensual intercourse (i.e., rape) should have any parental rights to his offspring.

138. 11 Cal. Rptr. 2d 261, 264-65 (Ct. App. 1992), *rev'd on other grounds*, 43 Cal. Rptr. 2d 445 (1995).

139. *See id.*; *see also* *Craig V. v. Mia W.*, 116 A.D.2d 130 (N.Y. App. Div. 1986) (holding that a father who had committed statutory rape was not precluded from bringing a paternity proceeding, because the state law only barred a paternity petition if the man had committed rape by forcible compulsion).

that he had not demonstrated a full commitment to his parental responsibilities and that the child would be better off in the adoptive family.¹⁴⁰

Similarly, in *Doe v. Brown*, the South Carolina Supreme Court found that a seventeen-year-old man who impregnated a twelve-year-old girl was not precluded from the right to notice and consent when the child was placed for adoption simply because he was guilty of statutory rape.¹⁴¹ Specifically, the court found that "public policy is served by recognizing a legal relationship, albeit limited, between the 'criminal parent' and the child," when the father has undertaken to support the child.¹⁴² However, the court denied the man's paternity rights because it found that he had failed to undertake financial or other parental responsibilities.¹⁴³

Peña v. Mattox involved a man who had conceived a child through statutory rape and was arrested and prosecuted for the crime.¹⁴⁴ While he was in jail, and unbeknownst to him, his girlfriend delivered the baby, which was put up for adoption. Eighteen months later, he filed a civil rights claim against the prosecutor and the judge, claiming damages for the deprivation of his parental rights. The Seventh Circuit denied his claims, stating that the plaintiff had committed a serious crime, and "should not be rewarded . . . by receiving parental rights which he may be able to swap for the agreement of the victim's family not to press criminal charges."¹⁴⁵ One important factor in the court's decision was its finding that the man had not established any relationship with his child. Indeed, the man was not seeking to establish the right to have a relationship with the child—he was merely seeking damages for the fact that the adoption had taken place without his consent. Significantly, Judge Posner recognized that the existence of a relationship between father and son (beyond the merely genetic) might have altered the outcome, stating that "[a] statutory rapist who has managed somehow to establish a relationship with his child . . . may have a claim to parental rights."¹⁴⁶

A few courts, however, have found that a man's parental rights may be terminated, regardless of his subsequent behavior regarding the child, on the basis of the statutory rape. In *Christian Child Placement Service v. Vestal*, the New Mexico Court of Appeals denied a man's challenge to a statute which denied parental rights to individuals convicted of sexual abuse.¹⁴⁷ The

140. See 898 P.2d 891, 901 (Cal. 1995).

141. 489 S.E.2d 917 (S.C. 1997).

142. *Id.* at 920; see also *In re Michael P.*, 1997 WL 816183, at *4 (Conn. Super. Ct. Sept. 19, 1997) (terminating parental rights of a man who had been incarcerated on a statutory rape conviction because he had "failed to support [the] child or [to] manifest any reasonable parental interest").

143. See *Doe v. Brown*, 489 S.E.2d at 921.

144. 84 F.3d 894 (7th Cir. 1996).

145. *Id.* at 900.

146. *Id.* at 901.

147. 962 P.2d 1261, 1266 (N.M. Ct. App. 1998).

court found that the statute at issue was rationally related to the state's interest in protecting children from sexual exploitation and ordered the child placed for adoption.¹⁴⁸

It is important to note that many of the above-discussed cases involved fact-specific inquiries into the nature (or lack) of a parenting relationship. Almost all of the cases which deal with this issue imply that a father who has committed statutory rape may retain parental rights if he establishes either an emotional or financial relationship with his child. It is also relevant that all of the men in these cases were seeking to assert their parental rights in the context of complete family breakdown. These cases all arose in situations in which the man no longer had a relationship with the child's mother. In fact, in all of these cases, the girl herself had relinquished her rights to the child, and the child had either been placed in foster care or adopted. In each case, granting the man parental rights would have interfered with the child's being placed into a more stable home.

Thus, it seems fairly clear that a father who has committed statutory rape can lose his paternal rights—like any father—if he fails to establish a relationship with the child. This is especially likely if the child has already been placed in an adoptive or foster home. However, there are very few judicial pronouncements that a man should lose parental rights automatically based on the fact that the child was conceived as the result of a statutory rape. This may be based on the importance of the right at stake: Parental rights are an enduring and significant component of substantive due process. However, it is more likely due to the notion that recognizing paternal involvement—either emotional or financial—may be in the best interests of the child. The Supreme Court has yet to clarify the issue.

C. *The Family and Practicality*

Stepping back from a rights-based analysis, it is also important to look at statutory rape through the analytical framework of family needs. This Part is concerned exclusively with statutory rape cases in which a pregnancy and childbirth have resulted, and thus a "family" has been formed. While many people object to the notion that a crime such as statutory rape can create a family,¹⁴⁹ this reaction should not prevent policymakers from taking a hard look at the impact of "get tough" policies on the interests of individual teens and their offspring. If the primary motivation for cracking down on statutory

148. See *id.*; see also *Ann M.M. v. Rob S.*, 500 N.W.2d 649 (Wis. 1993) (holding that a state statute denying a man convicted of statutory rape the opportunity to contest a petition to terminate his parental rights did not violate his due process or equal protection rights).

149. See, e.g., *Goodman*, *supra* note 48 (decrying attempts to "make . . . a family out of a felony").

rape is the well-being of pregnant and parenting teens,¹⁵⁰ it follows that we should analyze the effect that “get tough” policies actually have on them.

It is important to note at the outset that pregnancy and childbirth usually signal cases in which prosecutors, law enforcement, and legislators are more likely to “get tough” on statutory rape. Some prosecutors’ offices have stated policies of pursuing only those cases of statutory rape in which a pregnancy has occurred, because such cases are viewed as more serious. For example, some California counties administering the Statutory Rape Vertical Prosecution (SRVP) Program, such as San Diego, only accept cases for prosecution when there is both a large age difference between the parties and a pregnancy has resulted.¹⁵¹ Riverside County District Attorney Dennis Stout says that most of his office’s statutory rape cases involve a pregnancy, because the SRVP Program grants “were intended as a way to crack down on teen pregnancy.”¹⁵² Some state laws contain stricter penalties for statutory rapes that result in pregnancies.¹⁵³ Finally, most low-income teens who get pregnant become involved with social services, which then triggers reporting requirements, making it more likely that the case will be brought to the attention of authorities. In the SRVP Program’s third year, fifty-seven percent of the statutory rape cases filed involved a pregnancy.¹⁵⁴

If our only concern were punishing the adult, then such policies would not be problematic. However, if the victim is a new mother she may rely on the man or his family for monetary assistance, housing, emotional support, child care, or in-kind support.¹⁵⁵ Research indicates that a greater number of statutory rape offenders seek to take responsibility for their families than popularly believed. One large-scale study of parenting minors with adult partners found that thirty-five percent had been cohabiting during the pregnancy, and forty-nine percent were living with their partner up to thirty months after the birth.¹⁵⁶ While these relationships may not last longer than a few years, they may span the most “difficult” period for the girl—when she is still relatively young and her baby is an infant. And some of these relationships may actually work in the long term, with the age difference be-

150. This assumption is called into question in Part V.

151. See Donovan, *supra* note 128, at 33 (noting that the San Diego District Attorney’s Office only prosecutes cases “in which a pregnancy has occurred and the man is at least six years older than the underage woman”).

152. Tina Dirmann, *Sex Crimes: Special Target*, RIVERSIDE PRESS-ENTERPRISE (Riverside, CA), July 3, 1997, at B1.

153. See notes 49-55 *supra* and accompanying text.

154. See OJCP REPORT, *supra* note 58, at 4.

155. See Donovan, *supra* note 128, at 34 (noting that young mothers often receive crucial cash and in-kind support from their children’s fathers, and quoting one advocate as saying “I don’t see where it’s human logic or nature that would motivate her to send that father to jail”).

156. See Lindberg et. al., *supra* note 84, at 63-64 (footnote omitted).

coming less noticeable and problematic as the parties grow older.¹⁵⁷ The director of one teen clinic sums the dilemma up well: "Adult [men] impregnating teenage girls is a troublesome phenomenon that is . . . unacceptable, . . . but we have to be very careful here We're talking about someone who has a baby to raise, and she needs resources to help raise that baby and she needs a father to help raise that baby."¹⁵⁸ Prosecutors, however, may still intervene. One national survey found that nearly one-fourth of prosecutors would pursue charges against the male even if he were willing to acknowledge paternity and accept responsibility.¹⁵⁹

Parenting teens often have troubled backgrounds and unstable family situations, meaning that the typical statutory rape victim may not have many other avenues of support in raising her child. Close to one-half of youth service providers surveyed nationally responded that the families and homes of their pregnant and parenting teen clients are in disarray.¹⁶⁰ Typical situations involved the teen girl living "with extended family members, with a variety of relatives and half- or step-relatives, in a foster care situation (either a home or a residential center), with her boyfriend, or with her boyfriend and his family."¹⁶¹ They further indicated that their clients are often faced with "[f]amilial breakdown, lack of a stable father-figure, economic disadvantage, abuse, neglect, and an intergenerational history of teen pregnancy."¹⁶²

In the face of these difficult realities, it may actually make sense for a teen to remain in a relationship with her older partner—provided, of course, that he is not abusive and is willing to help support her. Social service and law enforcement agencies have a hard time reconciling these cases with a strong punitive approach to statutory rape. For example, during a two-year period after the implementation of California's SRVP Program, Orange County social workers made recommendations to juvenile court judges that at least fifteen pregnant and parenting teens under their supervision be permitted to marry or resume living with their adult male partners.¹⁶³ One of the most controversial of these unions was the marriage of a pregnant thirteen-year-old and her twenty-year-old boyfriend. Social workers recommended

157. See, e.g., Matt Lait, *Living Proof That Teen-Adult Marriage Can Work*, L.A. TIMES, Sept. 29, 1996, at A1 (reporting on a loving and financially stable family that began when the girl was sixteen and the man was twenty-one, and noting that the couple's marriage had lasted thirteen years).

158. Lois Salisbury, Executive Director of Children Now, *quoted in* Donovan, *supra* note 151, at 34.

159. See ABA STUDY, *supra* note 75, at 26. The survey did not indicate the type of responsibility—financial, emotional, or both.

160. See *id.* at 10.

161. *Id.*

162. *Id.* at 12.

163. See Lait, *supra* note 130.

that the two be allowed to wed when they learned that the girl had been a drug abuser and had associated with gang members before going to live with the man, and that he supported her and planned to help raise their child.¹⁶⁴

This policy sparked tremendous controversy when it became public. One commentator argued that the policy was equivalent to reintroducing a marital rape exemption into the law and that it allowed teens to be sexually victimized under the auspices of a legally sanctioned marriage.¹⁶⁵ The head of California's Department of Social Services called on the officials to end the policy, arguing that girls should be separated from the men who impregnate them, be given intensive counseling, and be encouraged to give their babies up for adoption. As for the men, she argued that they should be incarcerated if they failed to provide for the infant.¹⁶⁶ An attorney who specializes in these matters counter-argued:

Unfortunately, the people who are saying [it's wrong in every case] don't have to live with the aftermath . . . It's like cutting off your nose to spite your face. What if the guy wants to do what's right, and that is to marry the girl? . . . At some point we have to make that trade-off, between our principles and what's right for society at large.¹⁶⁷

Even a spokesman for the Governor was forced to admit that "[t]his is a complicated issue. We may have to weigh the positives of a prosecution with disuniting the male figure from a functioning family."¹⁶⁸ Ultimately, the policy of social workers recommending marriage to juvenile court judges was ordered to be discontinued, although the judges can still rule independently to allow such unions.¹⁶⁹

Whether or not the couple is given permission to marry, the potentially harsh punishments that an offender faces if convicted of statutory rape may make it extremely difficult for him to contribute financially or emotionally to the well-being of his family. If the man is imprisoned or deported—either because of the statutory rape itself or because of the corollary punitive policies that statutory rape prosecution entails—it is very unlikely that he will be able to contribute to his family. Even if he is released, or serves no time, a felony conviction on his record makes it harder to get a job, particularly if the man is a registered sex offender. A legal advocate for teens notes that:

164. See Matt Lait & Lee Romney, *She's 13, He's 20; Is It Love or Is It Abuse?*, L.A. TIMES, Sept. 1, 1996, at A1.

165. See Kelly C. Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 240 (1997).

166. See Matt Lait, *Teen-Adult Weddings Draw More Criticism*, L.A. TIMES (Orange Cty. Ed.), Sept. 11, 1996, at A1 (citing comments by Eloise Anderson).

167. Jess Araujo, *quoted in* Matt Lait, *O.C. Teen Wedding Policy Raises Stir*, L.A. TIMES, Sept. 2, 1996, at A1.

168. Sean Walsh, *quoted in id.*

169. See Matt Lait, *O.C. Agency Alters Policy on Underage Marriages*, L.A. TIMES, Jan. 24, 1997, at A1.

A big [problem] is that the guy gets locked up and there goes [the teen's] child support. Not just while he's in jail but after he gets out. A lot of these guys aren't in the running for great jobs anyway, but with a felony conviction it's almost impossible for even the most motivated ones to get good jobs. . . . A guy's job prospects just plummet when he has a felony conviction on his record."¹⁷⁰

Finally, in light of the fact that prosecutors almost always recommend that the male stay away from the girl, it will be difficult for a man who wants to spend time with his offspring and contribute child care, housing, or other support, to do so.¹⁷¹

Supporters of "get tough" policies make several arguments against encouraging such male involvement. They claim that the men are not very good providers anyway, due to their immaturity. Furthermore, they argue that a man who would commit statutory rape is a bad influence on the girl and her offspring, and that he should not be rewarded for his conduct by becoming part of the family. These arguments have some resonance, but only if we assume that the relationship is abusive or exploitative, or that the girl does not want the man to assist her. If the girl wants and depends on the man's involvement, if he is willing to be involved, and if the relationship is not harmful to the girl, it becomes more difficult to justify criminal sanctions. The man is being asked not merely to reap the intangible benefits of having a new family, but also to shoulder burdens and responsibilities as well. This should carry some weight, particularly given the origins of the "get tough" policies in a welfare reform bill that was concerned with encouraging two-parent families and fostering paternal responsibility.

D. *A Modest Proposal*

The previous parts discuss the difficulties posed by teens' uncertain capacity to consent to sexual relationships, their privacy and parental rights, and the economic and social realities that many teen parents face when trying to raise their children. Several points become clear in this analysis. First, the area of statutory rape enforcement is fraught with analytical difficulties. On the one hand, teens as a group are more vulnerable to exploitation than adults, in need of more protection at the expense of privacy, and less capable of making mature reproductive decisions. On the other hand, some teens are capable of giving meaningful consent to sexual activity, and their decisions

170. Scott Interview, *supra* note 88. Scott describes one case in which a man was convicted of statutory rape after impregnating his girlfriend. Although the couple lived together, and the man intended to support his new family, the conviction prevented him from ever getting a job in his field—teaching. *See id.*

171. *See* ABA STUDY, *supra* note 75, at 27 (reporting that 100% of prosecutors surveyed recommended to the judge that the defendant have no contact with the victim).

for dealing with the consequences are protected by their right to privacy. Furthermore, many teens are already pregnant and/or parenting. For them, abstract notions of privacy and protection become comparatively unimportant in light of their very "adult" concerns about how best to provide for their children. Another point which emerges in this analysis is that aggressive, one-size-fits-all strategies for enforcing statutory rape laws may sometimes be detrimental—to teens and to their children.

This analysis therefore leads to a conclusion that is, in many ways, in opposition to the current trend in statutory rape enforcement law and policy: While current enforcement efforts are targeted toward situations in which the statutory rape has resulted in a pregnancy, these are in fact the precise cases in which law enforcement must tread most lightly. Once a child has been introduced into the picture, the teen's rights of personal and familial privacy become heightened. As a mother, she is no longer in the childlike position in which state intervention is completely warranted and beneficial; while she may still be in need of protection, she must also make many adult decisions.¹⁷² And while there are definitely situations in which criminal enforcement is appropriate, there are also those in which it is not. As a former domestic violence prosecutor observes, "we are often left in the untenable position of arguing that the state should only intervene in women's lives when it is 'good' for them and stay out when it is 'bad.'"¹⁷³

As the previous discussion makes clear, there are dangers in making a wholesale legislative shift towards incorporating victim consent into the calculus of statutory rape: Teens may be left more vulnerable to forcible rape and coercive sex; a consent defense may invite unwarranted scrutiny of the victim's character and conduct. In light of this, the more appropriate avenue for reform lies in the methods in which these cases are prosecuted.

Prosecutors have two broad ways of influencing the disposition of a case. First, they can decide whether to charge the offender at all, and second, they can make sentencing recommendations to the judge. Nationally, close to one-half of prosecutors surveyed say that they "always" or "almost always" file charges when a statutory rape case is referred to them from law enforcement.¹⁷⁴ Specialized prosecution units, such as those in California and Connecticut, may file charges even more frequently. Currently, many prosecutors in California's SRVP Program charge the majority of offenders who

172. For an interesting discussion of the dual role and status of teen parents, see Diana M. Pearce, "Children Having Children": *Teenage Pregnancy and Public Policy from the Woman's Perspective*, in *THE POLITICS OF PREGNANCY* 46, 46-58 (Annette Lawson & Deborah L. Rhode eds., 1993) (criticizing policies which overly infantilize young mothers by restricting their abilities to make decisions and operate their households).

173. Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1872 (1996).

174. ABA STUDY, *supra* note 75, at 26.

come to their attention and then rely on the sentencing phase to achieve individualized results.¹⁷⁵ However, as discussed above, the many negative corollary effects of a criminal—particularly a felony—conviction (e.g., deportation, a criminal record, sex offender registration, “strikes”) may be very serious, even if the sentence is relatively light. Therefore, I recommend that, at least when a pregnancy is involved, all prosecutors’ offices should develop flexible team-oriented charging policies, which involve making an initial determination at the investigative stage of the case, and which may result in charges not being brought at all.¹⁷⁶

The American Bar Association observes that prosecutors consider variables such as “the maturity levels of the girl and the man, whether the prosecution is in the best interests of the girl and/or her offspring, and whether the male has engaged in these relationships serially.”¹⁷⁷ More specifically, I recommend that, in making a charging decision, prosecutors should: 1) examine the offender, including his relationship with the girl, his willingness to support or care for the child, and whether or not he has a criminal record or prior history of statutory rape; and 2) consult social workers who may be familiar with the girl and her family situation. The involvement of social workers is important, because they often have a more complete understanding of the girl’s situation and are in a better position to evaluate the impact that a prosecution would have on her.¹⁷⁸ Evidence indicates that social workers are much less likely to see criminal intervention as the solution. A nationwide survey of youth service providers found that only one in five thought holding males accountable through prosecution was an appropriate response.¹⁷⁹

Prosecutors, victim advocates, and social workers should also focus on the longer-term well-being of the victim and her offspring by involving the victim in the process. The teen should be counseled by a victim advocate working in conjunction with the teen’s social worker to set up a plan for handling the case. The team could analyze what the teen’s living situation

175. See Telephone Interview with Joanne McCracken, Deputy District Attorney for Santa Clara County, Cal. (Oct. 2, 1998); Telephone Interview with Nancy O’Malley, Senior Deputy District Attorney for Alameda County, Cal. and Project Director for the SRVP (Oct. 9, 1998).

176. The policies of different prosecutors’ offices vary, and some may have adopted many or all of these suggestions. (The author does not know of any offices that have adopted all of them.)

177. ABA STUDY, *supra* note 75, at 25.

178. For a more thorough discussion of the ways in which social workers can assist lawyers in relating to their clients and thereby improve the delivery of legal services to these clients, see Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Reexamining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123 (1999).

179. ABA STUDY, *supra* note 75, at 11. The survey also found that two-thirds of youth service providers do not report relationships between their teen clients and adult males to law enforcement. See *id.* at 13.

will be, whether or not the relationship with the father is continuing, and what type of parental responsibilities he has assumed. If the man is willing to acknowledge paternity and support the child, then the team should work out the responsibilities he is willing to undertake, and refer him to social services as needed. The plan should include a monitoring component, to assure all of those involved that the relationship between the two is not exploitative or abusive and is not an attempt by the male to avoid prosecution. Also, it should be designed to educate the girl about her options and to ensure that she does not remain with the man out of fear or duress. The prosecutor should then dismiss the case with leave to re-file within the law's statute of limitations period if the man fails to meet the agreed upon conditions, if there is evidence that the man has abused the teen, or at the teen's request.

While this approach may not ultimately result in more convictions, the process may empower teens and assist offenders in defining and meeting their responsibilities. In short, it may help identify families that have a chance at functioning, and ensure that the law does not impede this chance.

V. PARADOXES, CONFLICTS, AND IRONIES

The current trend toward "get tough" statutory rape policies carries with it deeper theoretical difficulties. This Part will examine some of the paradoxical goals of "get tough" policies, the dangers inherent in using the criminal law to achieve these purposes, and the likelihood that more aggressive enforcement will fail to achieve these goals. In light of these paradoxes, I make a more extreme suggestion—that we may want to abolish statutory rape laws altogether.

A. *Paradoxical Priorities*

As discussed, the history behind the recent "get tough" policies indicates that they may have more to do with reducing welfare dependency than with protecting minors from sexual exploitation. It deserves repeating that these policies came about in the context of a welfare debate, not a discussion about sexual abuse or child protection. The quote of one senator is telling:

[T]here is not much we can do from Washington to deal with [statutory rape] except to . . . encourage the States [and] the local prosecuting attorneys . . . to be very aggressive in working with the welfare authorities to once again take statutory rape as a serious crime and to prosecute it, understanding that *this is done to deter adult men from committing a sexual act that will result in a child born to poverty*¹⁸⁰

180. 141 CONG. REC. S12,687, S12,700 (Sept. 6, 1995) (statement of Sen. Lieberman) (emphasis added).

Another politician, describing his district's renewed emphasis on statutory rape, proclaimed: "We will no longer sit back and wait for the welfare bills to roll in. We're going to be pro-active."¹⁸¹

If these goals—protection of teens and cutting welfare—coexisted peacefully, this "dual track" approach might not be objectionable. Unfortunately they do not, and when the goals conflict—and they inevitably will—it appears that it is the teens who lose. For example, recall that the early drafts of PRWORA would have prevented all teens (including victims of statutory rape) from *ever* receiving welfare benefits if they gave birth out of wedlock and did not subsequently marry the father or a man who would adopt the child.¹⁸² This harsh provision would have had unimaginable consequences on the quality of life of both the teen and her child. While this provision was eliminated, it remains true that the welfare reform movement as a whole runs contrary to the notion of increased support for teen parents. (Indeed, welfare reform has evinced a hostility toward support for any poor or unwed parent.) The motivating factor behind the movement is to shrink welfare rolls by reducing the number of children born out of wedlock and to teen parents. To accomplish this, the states are encouraged to provide "disincentives" for childbearing, which come in the form of reduced, capped, and time-limited financial support for single parents. The fewer benefits and support systems that a teen has to help her in the difficult task of single parenting, the worse off both she and her baby will be.

Nowhere is the conflict between these paradoxical goals more obvious than in the decisions of several state courts permitting boys who have been victims of statutory rape to be sued for child support by the older women that they have impregnated. The courts reason that a child has the right to receive support from both of its parents, even when one was the victim of statutory rape, and articulate a public policy argument against allowing such children to drain the state's welfare funds. For example, in *State ex rel. Hermesmann v. Seyer*, the Kansas Supreme Court held that a thirteen-year-old boy who was the victim of a statutory rape by his older babysitter had to pay child support for the offspring that resulted.¹⁸³ In ordering the boy to pay fifty dollars per month, the court found that, "[t]his State's interest in requiring minor parents to support their children overrides the State's competing interest in protecting juveniles from improvident acts, even when such acts may include criminal activity on the part of the other parent."¹⁸⁴

181. Jack Doyle, Executive, Monroe County, New York, *quoted in* Sorensen, *supra* note 60.

182. See notes 32-35 *supra* and accompanying text.

183. 847 P.2d 1273 (Kan. 1993).

184. *Id.* at 1279. In addition, the court found the boy jointly and severally liable for the \$7068 that the state's Department of Social and Rehabilitative Services had expended on his child since her birth. See *id.* at 1275. For a more complete discussion of this case, see John A. Greenbaum,

Several other state courts have made similar holdings.¹⁸⁵ Many of these decisions are also based on the notion that a consenting participant in sexual activity—albeit a minor—is not an innocent victim and should not be excused from responsibility for the consequences. For example, in *County of San Luis Obispo v. Nathaniel J.*, the California Court of Appeals found that a fifteen-year-old boy who had been the victim of statutory rape by a thirty-four-year-old woman, who became pregnant as a result, was obligated to pay her child support when he reached the age of eighteen.¹⁸⁶ The court specifically found that Nathaniel should not be excused from the responsibility to pay child support “because he is not an innocent victim of [the defendant’s] criminal acts,” and because he was “injured as a result of criminal conduct in which he willingly participated.”¹⁸⁷

Much of the rhetoric surrounding “get tough” statutory rape policies makes it sound as though the state has a purely benevolent, protective interest in the well-being of teens. As this discussion makes clear, however, the Government has strong ulterior motives which actually run contrary to this interest.

B. *Use of Statutory Rape Law to Accomplish Other Goals*

1. *Less invidious—social work, enforcing other laws.*

Given the origin of enforcement efforts in welfare reform, it is not surprising that prosecutors’ offices and state legislatures have been given a mandate similar to that of social services offices—namely to reduce teen pregnancy and welfare receipt. As a result, criminal laws may be used to address complex social problems that they were not necessarily designed to combat. These efforts may create an awkward and imperfect “fit” between the goals of prosecutors and the goals of policymakers. The vast majority of prosecutors are uncomfortable with the idea that they should be using their

Family Law—Holding a Male Statutory Rape Victim Liable for Child Support, 98 DICK. L. REV. 549 (1994).

185. See, e.g., *Schierenbeck v. Minor*, 367 P.2d 333 (Colo. 1961) (finding a 16-year-old victim of statutory rape liable for child support); *In re Parentage of J.S.*, 550 N.E.2d 257, 258 (Ill. App. Ct. 1990) (stressing that public policy dictated that the duty of parental support overrides the right of juveniles to be protected from their own improvident acts); *Jevning v. Cichos*, 499 N.W.2d 515, 518 (Minn. Ct. App. 1993) (finding that the child’s interest in receiving support supersedes the harm the minor father suffers from statutory rape); *Weinberg v. Omar E.*, 482 N.Y.S.2d 540, 541 (App. Div. 1984) (stating that the age of the father does not excuse support obligations); *Mercer County Dep’t of Soc. Serv’s ex rel. Imogene v. Alf M.*, 589 N.Y.S.2d 288, 290 (Fam. Ct. 1992) (holding a sixteen-year-old victim of statutory rape legally responsible for child support); *In re Paternity of J.L.H.* 441 N.W. 2d 273, 276-77 (Wis. Ct. App. 1989) (holding that, for the purposes of child support, voluntary sexual intercourse resulted in voluntary parenthood, even though the child’s father was only 15)a.

186. 57 Cal. Rptr.2d 843 (Ct. App. 1996).

187. *Id.* at 845.

offices to reduce teen pregnancy. In a nationwide survey, only four percent of those surveyed indicated that they saw reducing teen pregnancy as an appropriate goal of statutory rape prosecution.¹⁸⁸

In addition, this places a large burden on prosecutors' offices. Financial support and resources may be scarce. The "modest suggestion" I outlined in the previous Part would involve more resources and expertise than most offices can probably spare. Even if prosecutors had the budget and personnel to implement such a flexible, policy-oriented approach to statutory rape cases, we would be left wondering whether or not this was a truly efficient use of law enforcement and judicial resources. Furthermore, the attorneys must shift their focus from prosecuting crime to engaging in what may look more like social work.¹⁸⁹ It may be the case that attacking a complicated social issue through prosecution is possible, but, in the process, the prosecutor's role is altered beyond recognition.

As discussed above, in addition to serving as a mechanism to reduce teen pregnancy, current enforcement strategies may focus on punishing offenders for more difficult-to-prosecute crimes by using statutory rape laws. Because statutory rape is a strict liability, age-based offense, prosecutors already may view it as an easy way to secure a conviction for a man who has committed other crimes that are harder to prove. This is particularly common in the area of forcible rape, where legal requirements and juror attitudes make prosecuting cases difficult for attorneys and traumatic for victims.¹⁹⁰ Statutory rape may also be used in lieu of prosecutions for physical abuse and non-payment of child support. A legal advocate for teen parents characterizes the situation as follows:

The [clients] who want to go after the guy are usually mad about one of two things: Either there is domestic violence, and she wants him to be prosecuted for something, or he is not being responsible in terms of taking care of their child. I have never had a client complain about something that the [statutory rape] law was intended to prevent. Usually, everything that the client is mad about can be covered by other laws—[domestic violence] laws, child support enforcement, forcible rape laws, etc. . . .¹⁹¹

While this approach may make practical sense in the short-term, continually falling back on statutory rape to compensate for deficiencies in other areas of criminal enforcement makes it less likely that these deficiencies will be ex-

188. See ABA study, *supra* note 75, at 26.

189. See, e.g., *id.* at 25 (quoting a prosecutor who says she has to "engage in a lot of social work and hand holding" to prosecute statutory rape cases).

190. See notes 100-101 *supra* and accompanying text.

191. Scott Interview, *supra* note 88.

amined and addressed.¹⁹² Furthermore, it carries with it more serious risks, which are explored below.

2. *More invidious—discrimination against the already-marginalized.*

While it may seem convenient for prosecutors to attack deadbeat dads, physical abuse, forcible rape, and intergenerational poverty through statutory rape laws, using the wrong tool to accomplish a desirable social objective is fraught with danger. If the application of the law is disconnected from the law's ostensible purpose, the door is opened for arbitrary and discriminatory enforcement. The law can be used to scapegoat vulnerable parts of the population, such as low-income people and minorities.¹⁹³ Or it may be used as a vehicle for a particular prosecutor's political or social agenda, particularly in the welfare context. A related and disturbing example of this phenomenon occurred recently in Gem County, Idaho. In an attempt to crack down on teen pregnancy and welfare receipt, Prosecutor Douglas Varie began charging pregnant, unwed teens who had applied for welfare benefits, for violating the state's 1921 "anti-fornication" law.¹⁹⁴ The prosecutions were met with public outcry and intense media attention, but were allowed to stand nonetheless.¹⁹⁵ It is unlikely that many prosecutors will be as blatant in their anti-welfare biases as Varie. Nevertheless, the welfare rolls may make it easier for prosecutors to find low-income offenders.¹⁹⁶

An early empirical study by Martha Fineman indicating the tendency of prosecutors to use "anti-cohabitation" laws selectively may be instructive in this context.¹⁹⁷ After surveying prosecutions for violations of Wisconsin's seldom-enforced cohabitation law, Fineman notes that the "most prevalent

192. See, e.g., Kitrosser, *supra* note 96, at 289 ("[T]o place all sexual activity in certain age-based categories under the statutory umbrella of 'assault' or 'rape' misses the real issue, because it fails to isolate, name, and target those instances of sex that are coercive and that should, for that reason, be subject to criminal punishment.").

193. See, e.g., ABA STUDY, *supra* note 75, at 6 (recognizing that statutory rape laws implicate sensitive issues of class and culture); Stephanie Goldberg, *Jailbait: Politicians Dust off Old Sex Laws to Combat Teenage Pregnancy*, PLAYBOY, Jan. 1997, at 41 (warning that statutory rape laws "might be used selectively—to punish minority men" or as a "weapon that [draws] on an old prejudice—against unwed teenage mothers living in poverty").

194. See Quentin Hardy, *Pregnant Girls and Boyfriends Get Hauled Into Court; Welfare is the Real Issue*, WALL ST. J., July 8, 1996, at A1.

195. See Ellen Goodman, *Victims of the War on Sin*, BOSTON GLOBE, July 14, 1996, at Op. Ed. 43 (discussing the case). For an argument that fornication laws serve useful normative purposes and prevent disease and extramarital pregnancy, see Traci Shallbetter Stratton, Comment, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767 (1998).

196. See, e.g., ABA STUDY, *supra* note 75, at 6 (noting that girls who must rely on public social services are far more likely to have their unlawful relationships reported than girls who can pay for private services).

197. See Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275.

class of prosecutions . . . [involved] those initiated because the district attorney believed that some form of welfare fraud or abuse was occurring.”¹⁹⁸ She found that such prosecutions were usually used in two types of situations: 1) where authorities suspected that a woman receiving welfare was living with a man who was actually contributing to the household, but whose income was unreported; and 2) where the statute was used to coerce admissions of paternity when the couple had an illegitimate child.¹⁹⁹ In the latter instance, Fineman quotes a prosecutor as stating that “he employed the [cohabitation] statute in order to ‘stop the baby machine’ from producing additional mouths for the state to feed.”²⁰⁰ Finally, Fineman found that even in counties where there were no prosecutions for cohabitation, some district attorneys used threats of prosecution to coerce behaviors such as marriage, paternity acknowledgment, and acceptance of parental responsibilities.²⁰¹

One commentator argues that such “[i]nconsistent enforcement undermines respect for the rule of law and leads to charges that prejudices based on race, class, or other inappropriate criteria are driving enforcement decisions.”²⁰² This argument is particularly salient with regard to class, given the strong anti-welfare motivations behind the current wave of statutory rape enforcement.²⁰³

C. *Ironic Results*

Ironically, recent research has seriously called into question the feasibility of using statutory rape laws to address the problem of teen pregnancy. The early studies, discussed at the beginning of this note, contained shocking statistics about the age differences between teen mothers and their adult male partners. However, further analysis revealed that the problem, while widespread, was unlikely to be easily combated by “get tough” policies.

One reason for this lack of effectiveness is the vagueness of the term “teen.” The early, influential studies included all girls between the ages of twelve and nineteen in the term “teen.” However, a recent nationwide study found that nearly two-thirds of all teenagers who have babies are eighteen- or

198. *Id.* at 289.

199. *See id.* at 290-91.

200. *Id.* at 291.

201. *See id.* at 297 nn.89-91.

202. Michael W. Lynch, *Enforcing “Statutory Rape”?*, PUB. INTEREST, July 1, 1998, at 3.

203. Nevertheless, at least one state court has concluded that statutory rape is no more subject to abusive exercise of prosecutorial discretion or discriminatory enforcement practices than any other crime. *See State v. Barlow*, 630 A.2d 1299 (Vt. 1993). In fact, the court reasoned, statutory rape may be even less susceptible to such practices because of the clear-cut nature of the violation, arguing, “[n]othing more than a calendar and the person’s birth certificate are required to determine the statute’s applicability.” *Id.* at 1301.

nineteen-years-old, too old to be covered by any state's statutory rape law.²⁰⁴ In addition, close to one-quarter (twenty-three percent) of minors who have a child fathered by an older man are married at the time of the birth—a defense to statutory rape in every state.²⁰⁵ Finally, the study found that most of the age differences were small enough that many prosecutors' offices were likely to overlook them. For example, nationally only thirteen percent of non-marital births to girls between the ages of fifteen and nineteen involved girls aged fifteen to seventeen and men at least four years older.²⁰⁶ Only eight percent of these births involved girls between fifteen and seventeen and men at least five years older.²⁰⁷ Cases with the truly dramatic age differences usually occurred when girls were under fifteen—which account for fewer than three percent of all teenage births.²⁰⁸ When all of these factors are combined, the result is that far fewer teen pregnancies are affected by statutory rape law than was previously believed.

This new information caused some experts to distance themselves from the notion that criminal sanctions are a desirable way to fight teen pregnancy. Michael Males, author of one of the original studies which led to the increased enforcement trend²⁰⁹, stated forcefully: "We have a small and concentrated problem of girls having babies with older men . . . I think there is very little sexual predation and very little coercion. I would like to take the press and horsewhip them for the way they've let politicians take the numbers and hype it."²¹⁰ Laura Lindberg and the co-authors of a later study (discussed above) conclude that "get tough" policies "are unlikely to be the magic bullet to reduce rates of adolescent childbearing."²¹¹ It is important to recognize, however, that this information does not mean that the enforcement of statutory rape laws will have no effect on teen parents. As noted in the previous Part, even laws which are seldom enforced can be used as threats, or selectively used to target marginalized groups. Furthermore, the knowledge that their partners could be prosecuted may still deter teens from seeking social or medical services for fear of detection.²¹²

204. See Lindberg et al., *supra* note 84, at 63.

205. See *id.* at 65.

206. See *id.* at 65 n.†.

207. See *id.* at 65.

208. See *id.* at 66.

209. Males & Chew, *supra* note 40.

210. Michael Males, *quoted in Tougher Statutory Rape Laws Sought by Politicians*, CHARLESTON GAZETTE & DAILY MAIL, Apr. 6, 1997, at A14.

211. Lindberg et al., *supra* note 84, at 66.

212. See, e.g., Donovan, *supra* note 128, at 33 (quoting several youth service professionals who express the fear that teens will not seek medical care or other supportive services); ABA STUDY, *supra* note 75, at 21 (noting that awareness by girls that their relationships may be reported may deter them from seeking care related to contraception, prenatal care, and sexually transmitted diseases).

D. *A More Extreme Proposal*

From the previous sections, we can draw a few general conclusions: in the context of the anti-welfare origins of the "get tough" statutory rape policies, concern about the exploitation of teens may well give way to concerns over the public purse; statutory rape laws are susceptible to being used to accomplish goals (more or less invidious) for which they were not designed; and statutory rape laws, even if more vigorously enforced, are unlikely to impact teen pregnancy rates in any significant way.

Thus, I have a second, more extreme proposal for reforming the enforcement of statutory rape laws: Eliminate them, at least in their current form and as they apply to the majority of offenders. Instead, increase the penalties for and enforcement of the underlying behaviors which we find to be the real "crimes." The real "crime" that the welfare-reform-inspired "get tough" policies seek to punish is fathering a child and then failing to take responsibility for it. Society is also concerned about preventing relationships which are abusive, exploitative, and coercive for teens, such as those involving forcible rape, "chemical" rape (when a man provides a girl with drugs or alcohol in order to obtain sex), and physical abuse, or where the man is in a position of authority over the girl. These are the culpable behaviors that make most teen-adult sexual relationships of such concern. But each and every one of these culpable behaviors is already illegal, and so can be addressed through improving the enforcement of existing laws.

I propose making the fact that the victim is a minor an aggravating factor in the underlying offense, resulting in increased penalties.²¹³ For example, the fact that the girl is a minor in a domestic violence or rape case should result in a large sentencing enhancement. The fact that the girl is a minor should cause the state to increase the child support that the man must pay, at least until the girl reaches the age of majority (or even afterward, to reflect the impact that teen pregnancy may have had on her ability to complete school and get a good job).

States should still be able to create categorical prohibitions on specific types of sexual relationships. For example, legislatures could still define a cut-off age somewhere in the early teens (for instance, age fourteen) below

213. Another commentator has proposed a similar approach, recommending that legislatures lower the punishment for statutory rape "to a fairly minimal level." Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1274 (1998). They can then specify aggravating factors such as abusive behavior, large age differences between the victim and the offender, and whether the offender has a prior history of committing sex offenses, which courts can use to increase the penalty in order to correspond with the offender's "relative dangerousness and culpability." *Id.* However, as this note has argued, convictions may still have corollary negative consequences, impede the man's ability to provide for the family, and interfere with the couple's privacy and parenting rights, regardless of the leniency of the sentence.

which sexual activity counts as child abuse. States could also define a list of individuals in teens' lives—such as teachers, coaches, doctors, and camp counselors—who are always prohibited from engaging in sex with them due to the potential for coercion and improper use of authority. Recognizing that the potential for coercion and exploitation increases as the difference in ages between the parties increases, states could even prohibit sex between minors and adults who are more than a certain number of years (for instance, ten years) older than they are.

Given all the relationships that the law would still reach under this proposal, it is important to point out exactly the type of relationship that would not be covered: non-abusive, consensual relationships between teens (over age thirteen) and young adults who are themselves in their teens and early twenties (i.e., not more than ten years older), and who are not in positions of authority over the teen. While this sounds like a narrow category of relationships, it in fact accounts for the majority of relationships currently classified and prosecuted as statutory rape today.

This approach has many advantages. Unlike the current regime, which sweeps in consensual and supportive relationships, this approach targets exploitative and dangerous relationships. It is far less susceptible to arbitrary or discriminatory application because its application is congruent with its purpose—to prevent the abuse of teens by adults. Finally, such a focus may result in the strengthening and improvement of the laws and enforcement mechanisms surrounding forcible rape, domestic violence, and nonpayment of child support, which have too often been ignored when a statutory rape charge can be made. While this proposal may not be a very effective tool in reducing teen pregnancy, the existing system does not appear to be effective either. Of course, this framework still leaves open the possibility of relationships which society will find morally repugnant—for example, a naive fifteen-year-old and her selfish, twenty-three-year-old boyfriend. However, we are likely to find such relationships repugnant because we assume the girl is being coerced, or because she will be left with a baby and no one to help her care for it. If she is, then the existing laws should be used to punish him, with an “age-enhancement” that expresses society’s particular disapproval of such conduct as directed toward minors.

I do not reach this proposal lightly. I recognize that it diverges from the purpose of statutory rape law, which is to punish sex between minors and adults, regardless of pregnancy or the quality of their relationship. It is also true that this approach may ultimately discount the deleterious consequences that even non-abusive, consensual sexual relationships with adults can have for teens. Naturally, in an ideal world, fewer teens would be having sex and finding themselves pregnant, regardless of the age of their partners. However, it is one thing to recognize teen pregnancy and sexual involvement with older men as a serious issue worthy of attention, and quite another to address

this issue by making all such relationships serious crimes. This proposal may find use as an example of an alternative paradigm for dealing with the problem of statutory rape, one which takes an instrumental and analytical—rather than a purely normative—approach.

CONCLUSION

The low-income parenting teen is in an extremely difficult position. At the very least, she will probably need financial assistance, emotional support, and help completing school. At the most, she may need long-term child-care, parenting support, or housing. Turning to statutory rape law as a way to prevent the relationships that cause the pregnancies is an appealing solution for many people on both sides of the political aisle. But simplistic solutions to complex problems always call for scrutiny.

Harsh statutory rape laws and their aggressive enforcement deprive some teens of both a source of possible support and the ability to make meaningful decisions about their families and their futures. The current system may not be able to determine when intervention is appropriate and when it is not. State legislatures have the political incentive to come up with stricter laws and harsher penalties, so that they can win federal dollars and appear to be “solving” the teen pregnancy problem. In short, turning this area over to the criminal justice system rather than social services carries attendant risks. The response may be overly punitive, less appropriate to individual needs and situations, and less targeted to the more intractable issues of teen pregnancy and poverty.

Teen parents occupy a central position in many of today’s most contentious policy debates, yet they have almost no political power. Congress and the pundits have multiple avenues for expressing their disapproval and disgust, and imposing their policies for change. Teen parents, whom these policies most directly affect, have almost none. The issue is too important to be lost in the emotional, partisan fray of welfare politics. It would be beneficial to all of those involved—the teens whom these policies impact, as well as the policy makers who want their policies to be effective—if we could take a step back from the rancorous debate and take a hard, unbiased look at how “get tough” statutory rape policies will actually affect the lives of teen parents.