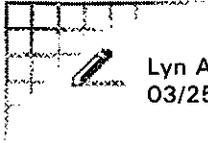


**NLWJC - Kagan**

**DPC - Box 011 - Folder 045**

**Crime - Statutory Rape Report  
Strategy**

Crime - Statutory Rape



Lyn A. Hogan  
03/25/97 07:18:24 PM

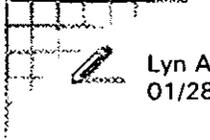
Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP

cc:

Subject: Statutory Rape report

I finally talked to Grace. She just received the draft interim report but hasn't looked at it yet. After edits, the clearance process, etc. it will be ready for our use in about 3 weeks, maybe four.



Lyn A. Hogan  
01/28/97 02:27:29 PM

Record Type: Record

To: REED\_B @ A1 @ CD @ LNGTWY, Elena Kagan/OPD/EOP  
cc: BURKE\_D @ A1 @ CD @ LNGTWY  
Subject: Statutory Rape

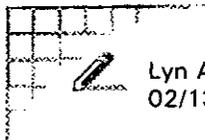
FYI, there are disagreements within the Justice Department over some of the content in their statutory rape report. They will probably not have it ready until March 1 or thereabout. Justice is still interested in doing a radio address around this so we should keep it on the radar.

Lyn -

As we discussed, can we  
set up a meeting on this?

Thanks

Elena



Lyn A. Hogan  
02/13/97 04:14:18 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP  
cc: Elena Kagan/OPD/EOP, Dennis K. Burke/OPD/EOP  
Subject: Yesterday's statutory rape report meeting

Bruce, Elena may have filled you in, but in case not:

We met with Grace and L.D. Since I received the December draft and you and I first talked about a possible event, the report has changed dramatically. Most of the interesting information on states' best practices and toughened state laws has been removed, because, according to LD, the state programs in the report had not been vetted. The current report is far too scant to pull news from.

However, the information removed from the earlier draft is going through a peer review next week, after which some new and more accurate information on state practices and plans will be available. We got LD to agree to draft an interim, event-gearred report with the new information. She and Grace think something will be ready by mid-March, but will give me a firm date next week.

MEMORANDUM

To:  Elena Kagan  
Dennis Burke

From: Lyn Hogan

Date: February 6, 1997

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Attached, as promised, is a copy of the most recent draft report from DOJ on statutory rape. It would be helpful for both of you to read this before Monday's meeting. We will explore the following questions at the meeting: a) Whether the report contains newsworthy information, b) whether the report should be expanded from its current form (I have earlier drafts and am prepared to comment more extensively on this point), c) ways the White House might use the report, and d) by what date we should receive the final report from DOJ.

The meeting is scheduled for Monday, Feb. 10 at 2:30 p.m. in Elena's office.

cc: Bruce Reed

check  
date  
pages

U.S. Department of Justice  
Washington, D.C. 20530

Correct  
Draft

**DRAFT**

Kent  
Markus

**PROGRESS REPORT ON  
IMPLEMENTATION OF SECTION 906  
OF THE WELFARE REFORM ACT  
ENFORCEMENT OF STATUTORY RAPE LAWS**

March 1

67263



**DRAFT**

**DRAFT**

912159

**JANUARY 1997**

**Progress Report on  
Implementation of Section 906 of the Welfare Reform Act  
Enforcement of Statutory Rape Laws**

**I. Introduction**

Section 906 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWOA)<sup>1</sup> expresses the sense of the Senate that state statutory rape laws should be aggressively enforced.<sup>2</sup> The provision directs the Attorney General to establish and implement a program by January 1, 1997 that:

- 1) studies the linkage between statutory rape and teen pregnancy, particularly by older predatory 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 teen pregnancy.

The provision also directs the Attorney General to ensure the Justice Department's Violence Against Women initiative addresses statutory rape, with an emphasis on the commission of repeat offenses by predatory older men.<sup>3</sup>

As Section 906 suggests, statutory rape has broad health and social welfare implications reaching far beyond the criminal justice system. The role it may play in the high rate of teen pregnancy has prompted much interest among social welfare professionals and has prompted a number of recent state legislative reforms.<sup>4</sup> Statistics about high

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<sup>1</sup> 42 U.S.C. § 14016 (1996).

<sup>2</sup> Since only four states (Georgia, Missouri, North Carolina, and Tennessee) actually use the term "statutory rape" in their laws, we use the term herein generically to include any unlawful sexual act involving sexual penetration of a minor below the age of consent. Ga. Code Ann. § 16-6-3 (1996); Mo. Ann. Stat. § 566.032 (Vernon 1995); N.C. Gen. Stat. § 14-27-7A (1995); Tenn. Code Ann. § 39-13-506 (1996).

<sup>3</sup> On October 3, 1996, President Clinton instructed the Attorney General and the Secretary of Health and Human Services to investigate the impact of statutory rape (as well as domestic violence and sexual assault) on the safety and self-sufficiency of poor families.

<sup>4</sup> The Justice Department's emphasis, however, is on the illegality and consequences of exploitative sexual relationships between teenage or younger girls and adult men, including but not limited to pregnancy.

DRAFT 1/15/97 10:00 a.m.

pregnancy rates among preteen and young teenage girls coupled with the recent data on "older fathers"<sup>5</sup> have prompted a number of state policymakers, prosecutors and legislators to revisit the issue of statutory rape. (See Appendix B). New state laws and administrative initiatives in Delaware, California, Florida, Georgia, and Connecticut aim to enhance penalties in cases involving older men (over the age of 20) having sex with young teen girls. (See Appendix B).

Section 906 was enacted in response to a growing perception that many young girls are susceptible to sexual relationships with older men. Although such a relationship may or may not be "voluntary" from the young woman's perspective, it is legally nonconsensual if her age is below the state statutory requirement.<sup>6</sup> The perception that there is an increasing incidence of these relationships, and the extent to which they involve adult men who engage in a pattern of exploitation or seduction, raises a number of troubling social issues. These include teen pregnancy and the victimization and exploitation of female minors whose health, academic and personal success may be impacted negatively by these relationships in a variety of ways.

An understanding of these issues, while in some respects beyond the scope of Section 906, is essential to the development of informed policy and practice about statutory rape, a complex and sensitive area. Indeed, very little is currently known about statutory rape and the complex dynamics and long-term consequences of these relationships.<sup>7</sup> Further research and exploration of the dynamics of statutory rape is a critical first step toward effective implementation of Section 906. With this research need in mind, this Progress Report identifies specific issues requiring further data collection, analysis, and exploration and summarizes the Department of Justice's implementation plan.

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<sup>5</sup> According to currently unreleased and confidential findings by the National Center for Health Statistics, two-thirds of teen births are fathered by men aged 20 or older. National Center for Health Statistics, U.S. Dep't of Health and Human Services, National Survey of Family Growth (1995)(survey of a nationally representative sample of women ages 15-44).

<sup>6</sup> Currently unreleased and confidential findings from the National Survey of Family Growth indicate the youngest teenage girls are more likely than older teenagers to report that their first intercourse was involuntary. Id. Of all women surveyed, almost 8 percent reported their first intercourse was involuntary and over 16 percent of women who reported they were under age 16 at the time of their first intercourse reported the intercourse was involuntary. The data also indicate the age of first intercourse has been falling. The highest age bracket of women interviewed (women 40-44 years old at the time of the survey), reported an average age of first intercourse of 18.7 years; women ages 35-39 reported an average age of 18.1 years; women ages 18-19 reported an average age of 15.6 years; and women ages 15-17 reported an average age of 14.5 years at first intercourse. Id., see also Appendix B.

<sup>7</sup> There are no reliable *national* data on the annual incidence of statutory rape. See Appendix A for a summary of several studies on teen pregnancy (Males and Chew study) and the age discrepancies between teen mothers and the fathers of their children (Alan Guttmacher Institute study), findings that support theories about the activities indicative of statutory rape.

## **II. Implementation**

### **A. Research**

Effective implementation of Section 906 requires accurate and detailed information about the incidence of statutory rape, the parties involved and the criminal justice system's current approach to the crime of statutory rape. It is impossible to design an effective prevention or enforcement strategy without better information. The Justice Department's Office of Policy Development (OPD), Office for Victims of Crime (OVC) and National Institutes of Justice (NIJ) are collaborating with the directors of two ongoing research projects and the Department of Health and Human Services (HHS) to facilitate the development of this information in ways that will inform our implementation of Section 906.

#### **1. Identifying Current Prosecution and Prevention Activities**

The Department of Justice is working closely with the directors of an American Bar Association-Progressive Foundation study of predatory sexual activity directed at young females. This 16-month study is examining statutory rape of very young teenage girls (aged 12 to 14) who have partners over the age of 18.

The current phase of the ABA-Progressive Foundation study involves an extensive review of all available statutory and scholarly material relating to statutory rape. The study will identify policies and practices relating to criminal justice sanctions for adult males engaged in unlawful sexual intercourse with young teens, and will include such outcomes as probation, establishment of paternity, child support obligations, adjudication without disposition, counseling, marriage, and incarceration. Project researchers will survey experts in adolescent health and sexuality to determine the best methods of providing information and support to girls in relationships with older men, and researchers will survey prosecutors in order to identify barriers to victim identification and intervention. The first phase of the project will be completed in May 1997.

Beginning immediately thereafter, a follow-on study funded by the Office for Victims of Crime will identify promising practices within the criminal and juvenile justice systems by interviewing prosecutors, victim advocates, police, judges and social service providers in four communities identified through the first study. The project staff will prepare a technical assistance compendium for prosecutors, victim advocates, law enforcement officers, and judges to use in supporting young girls who are involved with older men. The compendium will contain specific guidance on issues accompanying the enforcement of statutory rape laws, including the effect of mandatory reporting on social welfare workers, the extent to which pregnancy should aggravate or mitigate a sentence, and the relationship between statutory rape laws and sex offender registry and community notification laws.

## **2. Framing Questions for Future Research**

Working in conjunction with members of the ABA-Progressive Foundation Research team, NIJ and OVC are designing a research strategy aimed primarily at exploring the contribution statutory rape makes to teen pregnancy rates, with a particular focus on predatory older men committing repeat offenses and the incidence, if any, of battering in these relationships. NIJ and OVC will sponsor a Research Study focus group to bring together researchers and practitioners to discuss issues related to the prosecution of statutory rape and frame questions for further research. The work of this multi-disciplinary focus group, which will include health, welfare and adolescent development experts, will inform future development of promising prosecutorial practices and prevention strategies and related recommendations and options. Information developed from the focus group will also supplement OVC's current and future studies, and will be utilized by OPD as implementation progresses.

## **3. Ongoing Data Collection**

The National Survey of Family Growth (NSFG), a project of HHS's National Center for Health Statistics, will, in early 1997, provide the first nationwide federal data regarding the incidence of sexual intercourse by age of both partners. The NSFG includes an unprecedented examination of whether the females believed they had consented to intercourse, regardless of whether such consent was legally vitiated by their age. This data will substantially inform statutory rape decisionmaking and increase our understanding of the national scope of this problem, and OPD and NIJ are working with the NSFG researchers on ways to best utilize this information.

## **B. Outreach, Education and Training**

### **1. Prosecutorial Practices and Prevention Strategies**

As Congress recognized, the majority of statutory rape prosecutions are brought at the state and local level. State and local prosecutors have vast experience handling these kinds of cases. The most useful and appropriate federal role will be to compile and disseminate information provided by state and local prosecutors and others in the field about the most effective prosecution strategies and prevention tools in this area. Initial research and analysis by the ABA-Progressive Foundation study about the effectiveness of various approaches to combatting statutory rape will be completed by May of 1997. The OVC-sponsored follow-on study will include a compendium of promising practices.

### **2. Current Practices Symposium**

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With information compiled by the first phase of the ABA-Progressive Foundation study and a working paper prepared by the NIJ/OVC focus group, the Justice Department will sponsor a "Current Practices" Symposium to be comprised of representatives from NDAA and NAAG and other practitioners currently engaged in both the prosecution of statutory rape and related prevention activities at the state and local level.

This "Current Practices" Symposium of a multidisciplinary group of practitioners will be the most immediately effective and credible approach to meeting the statutory goal of educating state and local law enforcement about this crime, including the predilections of predatory older men and the link, if any, to teenage pregnancy. This event, slated for the Summer of 1997, will follow on the heels of completion of the first phase of the ABA-Progressive Foundation study and kick off the OVC-funded follow-on study.

### **3. Violence Against Women Initiative**

As directed under Section 906, the Department's Violence Against Women Initiative is incorporating the statutory rape issue into ongoing grant programs and cooperative training initiatives.

#### *Correspondence with State Officials*

Violence Against Women Office (VAWO) Director Bonnie Campbell raised the issue of statutory rape in a letter to state Governors highlighting October as national domestic violence awareness month. Similar letters to Governors and state administrators of VAWA STOP (Services, Training, Officers, Prosecutors) grant funds will encourage states to consider developing state protocols on enforcement of statutory rape laws.

#### *Training Curricula*

Other Violence Against Women Grant Office (VAWGO) sponsored efforts include adding information and protocols about promising statutory rape prosecution strategies to presentations at a series of regional problem-solving workshops for prosecutors in fiscal year 1997, cosponsored by NDAA and APRI. In collaboration with the COPS Office, VAWGO has entered into a cooperative agreement with the Police Executive Research Forum to develop a training curriculum for police officers on violence against women issues. The chapter on sexual assault will be expanded to bring attention to the issue of statutory rape and to focus on investigating such cases in cooperation with local prosecutors.

### **4. Interagency Outreach**

The Justice Department will explore related activities, research, and prevention initiatives of non-DOJ federal agencies including the Departments of Health and Human

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Services, Housing and Urban Development, Education, and Defense and will work with these agencies to identify and develop prevention and education strategies.

### **C. Federal Action Working Group**

Enforcement of statutory rape laws at the federal level extends to the federal government's special maritime and territorial jurisdiction, Indian country and the District of Columbia.<sup>8</sup> A Justice Department Promising Practices working group will assess the impact of recent changes to federal law and current practices regarding federal prosecution of statutory rape and the range of sentencing issues identified by the U.S. Sentencing Commission Report and other sources. The group will assess the need, if any, for federal statutory changes including penalty enhancements and other sentencing guidelines issues. The Attorney General's Advisory Committee (AGAC) has designated U.S. Attorneys John Kelly and John Raley to represent U.S. Attorneys. (See Appendix D).

### **D. Long Term Implementation Options**

Advancing our understanding of the dynamics of statutory rape and a host of related issues is an essential part of fulfilling the objectives of Section 906 to educate state and local law enforcement on the prosecution and prevention of this crime, focus on the actions of older men who commit repeat offenses, understand the link between statutory rape and teen pregnancy, and tie all of these issues into the larger project of combatting violence against women.

Depending upon the findings and recommendations developed through initial research, a range of additional follow up projects may be advisable. For example, once more is known, the Department may consider developing model state codes or additional prosecutorial guidance; designing a related general or targeted public education campaign; possible federal legislation; or other federal leadership initiatives. The Violence Against Women Office and Violence Against Women Grants Office will also coordinate with OJJDP, BJA, OVC and the COPS Office to identify other federal programs and initiatives through which the issue of statutory rape can be addressed once basic policy recommendations have been determined.

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<sup>8</sup> See Appendix D for a more detailed discussion of federal jurisdiction, statutes and sentencing issues.

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## **APPENDIX A**

### **THE INCIDENCE OF STATUTORY RAPE**

#### **United States Sentencing Commission**

In the absence of national data on child sexual abuse cases brought in state courts, the U.S. Sentencing Commission has estimated that there are approximately 8,660 convictions in state courts for the rape of a minor in a given year.<sup>1</sup>

#### **BJS Data on Sexual Assault and Statutory Rape**

According to a recent BJS survey, two-thirds of prisoners convicted of rape or sexual assault had committed their crime against victims under 18 years of age.<sup>2</sup> Another BJS survey of 15 states found that in the 12 states reporting, 51 percent of female rape victims were under the age of 18.<sup>3</sup> In Michigan and Delaware, about one in four rape victims was under age 10.

BJS also collected data in 1991 on the ages of offenders serving prison time for statutory rape. More than 40 percent of these statutory rapists were over age 40 at the time of arrest; another 40 percent were between ages 25 and 34. Although this data set on statutory rapists is small, it indicates that wide age gaps exist between these offenders and their victims.

#### **Data on Teen Pregnancy and Births**

Information about teen sexual activity and teen pregnancy is set forth below, but, as a preliminary matter, several caveats about its significance to statutory rape analysis are necessary. Most teen pregnancy research focuses on live births, an inquiry that obviously fails to capture teen sexual activity that does not result in pregnancy, as well as teen pregnancies that end prematurely. In addition, since the majority of state statutory rape laws include the age of the perpetrator as a criminal element, information about teen pregnancy is

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<sup>1</sup> United States Sentencing Commission, Report to Congress: Sex Offenses Against Children; Findings and Recommendations Regarding Federal Penalties (1996).

<sup>2</sup> Bureau of Justice Statistics, U.S. Dep't of Justice, Child Victimized: Violent Offenders and Their Victims (March 1996).

<sup>3</sup> Bureau of Justice Statistics, U.S. Dep't of Justice, Child Rape Victims, 1992 (June 1994).

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not useful absent data on the age of the male partners. To the extent that recent studies of teenage mothers document significant age discrepancies between teen mothers and the fathers of their children, such findings support theories about the prevalence of statutory rape. Currently, no reliable national data exist on the age of fathers of babies born to teenage mothers.<sup>4</sup>

***Trends in the Well-Being of America's Children and Youth: 1996.*** This recent report by the Department of Health and Human Services indicates that a significant number of teenage mothers identify the father as being more than 20 years old. Forty percent of 15-year old girls report the father is older than 20 years; for 16-year-old girls 47 percent do; and at 17 years old, 55 percent of mothers report the father is older than 20 years.<sup>5</sup>

***Alan Guttmacher Institute Study (1995).***<sup>6</sup> This study estimated the ages of fathers of all live births in 1988 to women 15 to 49 years of age using birth certificates, mail surveys to new mothers, and data from the National Maternal and Infant Health Survey.

The results demonstrate frequent significant age discrepancies between fathers and mothers and that age differences are most pronounced for the youngest (ages 15 to 17) and oldest mothers (age 40 and over). Additional findings concerning teenage mothers include the following:

- Half of the fathers of babies born to girls aged 15 to 17 years were age 20 or older; almost two-thirds of fathers of babies born to girls aged 15 to 19 were age 20 or older.
- About 60 percent of 15 to 17 year-old mothers had partners 3 or more years older than they, as did half of the 18 to 19 year-old mothers.
- Almost 20 percent of mothers aged 15 to 17 had partners who were 6 or more years

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<sup>4</sup> Unreleased and confidential results from the National Survey of Family Growth do include data on the partners of unmarried pregnant teenage girls. Among girls whose age at first pregnancy was 15 or younger, 52 percent had a partner aged 18 years or older; 30 percent of these girls report a partner age 18 or 19 years and 23 percent report a partner age 20 or older. Among girls whose age at first pregnancy was 16 or 17, nearly 40 percent had partners aged 20 years or older. National Center for Health Statistics, U.S. Dep't of Health and Human Services, National Survey of Family Growth (1995). These data should be interpreted with caution, since they are reported by teen mothers and are not corroborated by the fathers.

<sup>5</sup> 1988 National Maternal and Infant Health Survey tabulations by the Alan Guttmacher Institute, calculations by Child Trends, Inc. in Office of the Assistant Secretary for Planning and Evaluation, U.S. Dep't. of Health and Human Services, Trends in the Well-Being of America's Children and Youth: 1996 174-75 (1996).

<sup>6</sup> David Landry & Jacqueline Forrest, How Old Are U.S. Fathers? 27 Fam. Plan. Persp. no. 4 at 159-65 (July/August 1995).

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older.

- Approximately 12 percent of mothers who gave birth in 1988 were teenagers and only 5 percent of the fathers were.

*Males and Chew (1996).*<sup>7</sup> One bellwether study of California teenage pregnancy estimated the father's age in over 30,000 live births in 1993 to school-age mothers. The study found that the younger the mother, the wider the age gap. For the youngest bracket of mothers (ages 10 to 14), an average 6.7 years difference existed between the father's and teenage mother's ages.

About two-thirds (65.5 percent) of teenage mothers gave birth after a liaison with an adult partner who was on average more than 4 years older. Thirteen percent of the males were at least 25 years old. Males and Chew conclude that statutory rape may be a more serious problem than had been previously recognized:

*The 2-year age gap estimated in earlier studies may be grossly understated. The gap is especially significant because teenage mothers with much older partners are disproportionately the childhood victims of sexual assault by an adult man. The possibility that much early childbearing represents an extension of rape or sexual abuse by male perpetrators averaging one to two decades older remains a serious question.*

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<sup>7</sup> Mike Males & Kenneth Chew, The Ages of Fathers in California Adolescent Births, 1993, 87 Am. J. Pub. Health no. 4 at 565-68 (April 1996).

## APPENDIX B

### Delaware

Alarmed by statistics from the National Center for Health Statistics indicating that two-thirds of children born to teenage mothers are fathered by men aged 20 or older, Delaware passed the Sexual Predator Act of 1996.<sup>1</sup> The law doubles the penalties for statutory rape from 0-10 years to 2-20 years when a girl under age 16 has sex with a man at least 10 years older or when the girl is under age 14 and the man is at least 19 years old.<sup>2</sup>

As originally drafted, the Sexual Predator Act of 1996 included pregnancy as an element of the crime of statutory rape.<sup>3</sup> Two primary concerns led lawmakers to delete the pregnancy element from the final bill: 1) officials feared that the pregnancy requirement would cause older men to force abortions upon young women in order to escape prosecution; and 2) officials determined that it was critically important to make the sex act itself illegal in these situations. While the impregnation of young women is of enormous concern, officials feared that by prosecuting only in the event of pregnancy, many cases would elude punishment.

### California

Recent California state legislative findings include statistics indicating that, in California, females under age 18 gave birth to 28,065 children in 1994. Sixty-six percent of the fathers of those children were adult males, 10,768 of whom were between ages 20 and 29 years. In the United States, 1 in every 16 girls between the ages of 15 and 19 years has a child. In California, one in every eight children is born to a teenage mother.<sup>4</sup>

In response to this trend, California has taken steps to enhance prosecution of statutory rape. Governor Pete Wilson allocated \$8.4 million (\$150,000 to each of 16 counties) to create Underage Sex Offenses units to prosecute men engaging in sex with

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<sup>1</sup> 70 Del. Laws 600, § 4 (1996).

<sup>2</sup> Id.

<sup>3</sup> Telephone conversation with member of Gov. Carper's staff (Oct. 16, 1996).

<sup>4</sup> 1996 Cal. Legis. Serv. 789 (West).

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underage girls.<sup>5</sup> New legislation also authorizes district attorneys to bring actions to recover civil penalties in the event of statutory rape.<sup>6</sup> Under the Teenage Pregnancy Act of 1995, penalties range from \$2,000 to \$25,000 depending on the age differential between the defendant and the victim.<sup>7</sup> The dollar amount increases as the age gap widens.<sup>8</sup> The law also provides that a portion of the judgment be used to cover prosecution costs. Any remaining monies are deposited in the Underage Pregnancy Prevention Fund.

## Florida

Florida has enacted several new provisions targeting older predatory men who have sex with young girls. The reforms include mandatory prison time for offenders over the age of 24 who have had sex with 16 or 17 year old teens.<sup>9</sup> The new law further requires the offender to pay child support and restitution to the victim. It also increases criminal penalties for sex with minors when drugs or alcohol are involved or if sexual diseases are transmitted. In an effort to improve reporting of statutory rape, another new provision provides that cases of statutory rape involving victims under age 15 be defined as "child abuse" -- a crime with a mandatory reporting requirement.

## Georgia

Georgia's Governor Zell Miller has signed a bill increasing the penalties for statutory rape. Previous law imposed sentences of one to 20 years in cases where the child was under the age of consent (16 years) and the adult was 21 years or older. The minimum penalty is now 10 years.<sup>10</sup>

## Connecticut

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<sup>5</sup> Leslie Bernstein, O.C. Courts Bless Minors' Weddings, The Orange County Register, September 14, 1996, at A1.

<sup>6</sup> Cal. Penal Code § 261.5 (West 1996).

<sup>7</sup> Id.

<sup>8</sup> For example, civil penalties imposed on an adult engaging in unlawful sexual intercourse with a minor fewer than 2 years younger than the adult cannot exceed \$2,000. In comparison, when an adult over age 21 engages in an act of sexual intercourse with a minor under 16 years old, the adult may be required to pay up to \$25,000. Id.

<sup>9</sup> Fla. Stat. Ann. § 794.05 (West 1995). Other Florida statutes cover statutory rape involving victims under age 16.

<sup>10</sup> Ga. Code Ann. § 16-6-3 (1996).

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Connecticut is allocating federal funds available through the Violence Against Women Act (VAWA), for prosecuting statutory rape cases. The Connecticut Chief States Attorney has received approval to use VAWA STOP (Services, Training, Officers, Prosecutors) grant monies to create a statutory rape prosecution unit. The unit will operate state-wide out of the Chief States Attorney's office and focus initially on one or two States Attorney units prosecuting significant numbers of statutory rape cases involving 5 to 10 year age gaps between victims and offenders. The unit will also work with local sexual assault crisis unit advocates to deal with the particular problems of statutory rape victims, especially as these problems relate to prosecution. Connecticut has adopted a zero tolerance policy focusing on adult males who prey on young females. The statutory rape unit will work with state agencies to identify teen mothers and probable offenders.

## APPENDIX C

### LEGAL ISSUES: State Statutory Rape Laws

Most state laws regarding sexual acts involving children below the age of consent have evolved over time. Each of the 50 states and the District of Columbia has some sort of statutory rape law although the terminology used and the handling of issues regarding age of consent, age differentials, sanctions, and defenses vary from state to state.<sup>1</sup>

#### Terminology

There is little uniformity in the terminology states use in reference to statutory rape. Only a few states use the term *statutory rape*; many have chosen instead to use the term *rape*. *Sexual assault* is another term commonly used.

Less widespread is use of different terms<sup>2</sup>, including: *unlawful sexual intercourse*,<sup>3</sup> *unlawful sexual contact*,<sup>4</sup> *unlawful carnal intercourse*,<sup>5</sup> *sexual abuse*,<sup>6</sup> *sexual misconduct*,<sup>7</sup> *sexual battery*,<sup>8</sup> *criminal sexual conduct*,<sup>9</sup> *carnal intercourse or carnal abuse*,<sup>10</sup> *lewd and*

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<sup>1</sup> Much of this statutory research was initially conducted by staff members at the American Bar Association's Center for Children and Law, as part of the ABA-Progressive Foundation study.

<sup>2</sup> Even when states utilize similar terminology to define the crime of statutory rape, the definitions for those terms vary considerably to include sexual penetration, sodomy, cunnilingus, anilingus, and object penetration.

<sup>3</sup> Cal. Penal Code § 261.5 (West 1996); Utah Code Ann. § 76-5-401 (1995).

<sup>4</sup> Del. Code Ann. tit. 11, §768 (1995)

<sup>5</sup> Fla. Stat. Ann. §794.05 (1996)

<sup>6</sup> Alaska Stat. §11.41.434 (1989 & Supp. 1995); D.C. Code Ann. §22-4108 (1996); Idaho Code §18-1506 (Supp. 1995); Ill. Ann. Stat. ch. 720, para 5/12-15 (Smith-Hurd 1996); Iowa Code Ann. §709.3 (West 1995); Me Rev. Stat. Ann. tit. 17A, §254 (West Supp. 1995).

<sup>7</sup> Ala. Code § 13A-6-65 (1994); Ark. Code Ann. § 5-14-107 (Michie 1993); Ind. Code Ann. § 35-42-4-9 (Burns Supp. 1996); Or. Rev. Stat. § 163.445 (1995); Wash. Rev. Code Ann. § 9A.44.093 (West Supp. 1996).

<sup>8</sup> Fla. Stat. Ann. § 794.011 (West Supp. 1996); Idaho Code § 18-1508A (supp. 1995); Kan. Stat. Ann § 21-3517 (1995); La. Rev. Stat. Ann §14:43.1 (West 1986 & Supp. 1996); Va. Code Ann. § 18.2-67.3 (Michie Supp. 1995).

*lascivious*,<sup>11</sup> and *corruption of a minor or contributing to the delinquency of a minor*.<sup>12</sup> Kansas and North Carolina prohibit the *taking of indecent liberties*.<sup>13</sup> Montana's code refers to *sexual intercourse without consent*.<sup>14</sup> Most state laws are gender neutral with respect to both victims and defendants.<sup>15</sup> Nevertheless, for this analysis, we have chosen to define sexual intercourse as any penetration, however slight, of the vagina by a penis.<sup>16</sup>

### Age of Consent

Statutory rape is often discussed in terms of *age of consent*,<sup>17</sup> that is, a statutorily established age at which one is presumed capable of consenting to sexual activities.<sup>18</sup> *Conditional age of consent* may be a more appropriate term because most state statutes condition the so-called age of consent on various factors, including age of the defendant, age

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<sup>9</sup> Ariz. Rev. Stat. Ann. § 12-1405; Mich. Comp. Laws Ann. § 750.520b (West 1991); Minn. Stat. Ann. § 609.342 (West Supp. 1996); S.C. Code Ann. § 16-3-655 (Law Co-op. 1995).

<sup>10</sup> Ark. Code Ann. § 5-14-104 (Michie Supp. 1995); La. Rev. Stat. Ann. § 14.80 (West Supp. 1996); Va. Code. Ann. § 18.2-63 (Michie Supp. 1995).

<sup>11</sup> For examples of lewd and lascivious conduct statutes which seem to include sexual intercourse in their definitions, see Cal. Penal Code § 288 (West Supp. 1996); Fla. Stat. Ann. § 800.04 (West Supp. 1996); Idaho Code § 18-1508 (Supp. 1995).

<sup>12</sup> N.D. Cent. Code. § 12.1-20-05 (1985); Ohio Rev. Code Ann. § 2907.04 (Baldwin 1996); Or. Rev. Stat. § 163.435 (1995); Va. Code. Ann. § 18.2-371 (Michie 1993).

<sup>13</sup> Kan. Stat. Ann. § 21-3504 (1995); N.C. Gen. Stat. § 14-202.1 (1993).

<sup>14</sup> Mont. Code Ann. § 45-5-503 (1995).

<sup>15</sup> But see Ala. Code § 13A-6-65 (1994); Idaho Code, § 18-1601 (1995); N.Y. Penal Law § 130.35 (Consol. 1996).

<sup>16</sup> This term will not be used to include sodomy or oral sex.

<sup>17</sup> A review of statutory rape laws from an "age of consent" perspective raises some interesting issues. For example, in light of the consensual nature of some teen/adult relationships, the use of the term "consent" itself is misleading. To some extent, "consent" merely reflects a determination by the legislature that certain relationships are inappropriate, and thus, while the teenager may consider herself willing to engage in sexual activity, the state legally removes her ability to consent until she reaches a specific age.

<sup>18</sup> If an adult engages in sexual intercourse with an individual younger than the age of consent, he may be charged with statutory rape.

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differences between the participants and relationships between the parties.<sup>19</sup> The validity of the consent is contingent on these factors. A preliminary analysis of states' and the District of Columbia's statutory rape statutes found that the conditional age of consent ranges from 14 to 18 years old. The majority of states set the conditional age of consent at 16; 14 states set the age at 18.

Most states exempt from criminal sanctions sexual activity between teenage partners. Peer activity exclusions are statutorily constructed through required age differentials between the teen and the perpetrator. By linking a minimum age for defendants to a required age differential between parties, states have distinguished teen behavior from exploitative adult/teen sexual relationships. A three year age differential is the most common means of ensuring that teens engaging in interage dating relationships avoid punishment. In Alaska, for example, sexual abuse of a minor is committed when an offender, age 16 or older, engages in sexual penetration with a person aged 13, 14, or 15 who is at least 3 years younger than the perpetrator.<sup>20</sup> In some states such peer relationships are not subject to prosecution. Other statutes relaxed the severity of sanctions as the age differentials between parties diminish. Some states crafted laws which simply limit the maximum amount of jail time permitted for crimes involving sexual activity between parties not more than 48 months apart in age. For example, in Minnesota, Criminal Sexual Conduct in the Third degree is punishable by fifteen years or less and/or \$30,000 as long as the 48 month age differential is satisfied. However, if the defendant is less than 48 months older than the adolescent victim, the maximum sentence is statutorily limited to five years.<sup>21</sup> On the other hand, older fornication and statutory rape laws are being used in some jurisdictions to specifically target teenage peer relationships which result in pregnancy in an effort to deter sexual activity by unmarried minors.<sup>22</sup>

In contrast, some states have determined that certain relationships and circumstances warrant raising the age of consent and punishment. This is true, for example, in cases where

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<sup>19</sup> For example, Alabama's statute provides in pertinent part: "A person is deemed incapable of consent if he is less than 16 years old." Ala. Code § 13-A-6-70 (1996). From this language, one may assume that age 16 marks the statutory rape threshold. However, pursuant to § 13A-6-62, the crime of second degree rape is committed if a male, 16 years or older, has sexual intercourse with a female who between age 12 to 16, provided that the male perpetrator is at least 2 years older than the female. Therefore, according to this statute, if a 16 year old male engages in sexual intercourse with a 15-year-old female, the sexual act is not a crime. Ala. Code § 13A-6-62.

<sup>20</sup> Alaska Stat. § 11.41.436 (1995).

<sup>21</sup> Minn. Stat. Ann. § 609.344 (West 1995).

<sup>22</sup> Idaho Code § 18-6603. Douglas Berry, Idaho's Gem County Prosecutor, charges teenagers under Idaho law prohibiting sexual intercourse between unmarried people. Dateline NBC (NBC television broadcast Nov. 15, 1996).

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a teenager has a relationship with an adult who occupies a position of authority or trust.<sup>23</sup>

### Sanctions

Given the complexity of statutory rape laws and sanctions, it is difficult to summarize the range of punishments among states. Every state penal code includes incarceration as potential punishment for statutory rape. Most states are moving toward a system of tiered sanctions; punishment worsens as the victim's age decreases and the defendant's age increases. In some states, adult offenders may be subject to life sentences<sup>24</sup> or capital punishment<sup>25</sup> for having engaged in sex with adolescents aged 14 or younger. Monetary sanctions are also a fairly standard penalty for statutory rape convictions. Fines typically are imposed in addition to or in lieu of prison sentences, and the dollar amounts tend to correspond directly to the severity of the offense.

Some states hold perpetrators of statutory rape accountable for longer-term consequences of their actions. In Delaware, if a child results from the sexual crime, the defendant is required to pay timely child support as a condition of probation.<sup>26</sup> In Rhode Island and South Dakota, a defendant may be ordered to pay for necessary medical treatment for the child.<sup>27</sup> Florida has enhanced penalties for transmission of sexually transmitted diseases during the commission of statutory rape.<sup>28</sup>

State legislatures have recognized that adolescent children are more vulnerable in situations where a potential perpetrator occupies a position of authority or resides in the same household. Because of the potentially coercive or exploitative nature of such relationships,

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<sup>23</sup> Ind. Code Ann. § 35-42-4-7 (West 1996); Me. Rev. Stat. Ann. tit. 17-A, § 253 (West 1995); Miss. Code Ann. § 97-3-95 (1995); Ohio Rev. Code Ann. § 2907.03 (Baldwin 1996).

<sup>24</sup> D.C. Code Ann. § 33-4108 (1996); Idaho Code § 18-508 (1996); Mass. Gen. Laws Ann. ch. 265, § 243 (West 1996); Mich. Comp. Laws Ann. § 750.520b (1995); Utah Code Ann. § 76-5-402 (1996); Mo. Ann. Stat. § 566.032 (Vernon 1995); Vt. Stat. Ann. tit. 13, § 3253 (1995).

<sup>25</sup> Fla. Stat. Ann. § 794.011 (West 1995) (victim age 12 or below and defendant over age 18 or in position of authority); La. Rev. Stat. Ann. § 14:42 (West 1995) (victim age 12 or below); Miss. Code Ann. § 97-3-65 (1995) (victim age 14 or below and defendant over age 18); Okla. Stat. Ann. tit. 21, § 1114 (West 1996) (victim below 14 and defendant over age 18).

<sup>26</sup> Del. Code Ann. tit. 1, § 773 (1995).

<sup>27</sup> R.I. Gen. Laws § 11-37-8.6 (1995); S.D. Codified Laws Ann. § 23A-28-12 (1996).

<sup>28</sup> Fla. Stat. Ann. § 921.0016 (West 1996).

most states have raised the age of legal consent and severity of punishment in such cases.<sup>29</sup>

### Defenses

A majority of states statutes set forth affirmative defenses to statutory rape. Mistake of age, age differentials, consent, marriage, and lack of chastity are the most common defenses available to a perpetrator charged with statutory rape.

Under the typical "mistake-of-age" provision, a defendant must affirmatively prove that he "reasonably believed" that the age of the victim matched or exceeded the "age of consent." States often specify certain circumstances or language that may be considered for the mistake-of-age defense. In Kentucky, the defendant may show that he did not know the facts or conditions relevant to the victim's age.<sup>30</sup> A defendant in Washington may assert that he reasonably believed the victim was a certain age based on her declarations.<sup>31</sup>

While some states incorporate a reasonable-belief standard into their mistake-of-age defense, others clearly limit the use of the defense by setting minimum age parameters below which mistake-of-age is not a viable defense to statutory rape. Montana permits the mistake-of-age defense when the victim is over 16, but deems the defense unreasonable if the victim is under 14 years old.<sup>32</sup> Likewise, Arizona's mistake-of-age defense may apply to victims 14 to 17 years old; for victims below age 14, it does not serve as a defense.<sup>33</sup> Other states allow the mistake-of-age defense based on the sex offense charged.<sup>34</sup> At least three states imply the reasonable mistake-of-age defense through use of statutory language requiring a *mens rea* as to the age of the victim.<sup>35</sup>

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<sup>29</sup> See *infra* notes 44, 48 (statutes spelling out severe penalties/distinctions when perpetrator is in a position of trust or authority).

<sup>30</sup> Ky. Rev. Stat. Ann. § 510.030 (Baldwin 1995).

<sup>31</sup> Wash. Rev. Code Ann. § 9A.44.030 (West Supp. 1996).

<sup>32</sup> Mont. Code Ann. § 45-5-503 (1995).

<sup>33</sup> Ariz. Rev. Stat. Ann. § 13-1405 (1996).

<sup>34</sup> Ill. Stat. Ann. ch. 420, para 5/12-17 (Smith-Hurd 1996); Me. Rev. Stat. Ann. tit. 17A, § 254 (West Supp. 1995); Minn. Stat. Ann. §§ 609.344 - 609.345 (West Supp. 1996); Ohio Rev. Code Ann. § 2907.04 (Baldwin 1996).

<sup>35</sup> Haw. Rev. Stat. § 707-730 (1993) ("knowingly"); Ohio Rev. Code Ann. § 2907.04 (Baldwin Supp. 1996) ("the offender knows"); Tex. Penal Code. Ann. § 22.011 (West 1994) ("intentionally or knowingly").

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Although the defense of reasonable mistake of fact is generally allowed in criminal cases, particularly for violations of statutes that use "knowingly" or "intentionally" language, some states have legislated sexual offenses that do not require the state to prove criminal intent, thereby holding the defendant strictly liable.<sup>36</sup> Several states specifically prohibit mistake of age as a defense in certain circumstances.<sup>37</sup> In addition, where age differentials are involved, the defendant's age may also serve as a defense.<sup>38</sup>

Many states expressly provide that consent to sexual activity with an adult is not a defense to statutory rape. Given the consensual nature of many of the sexual relationships between teens and adults, without such provisions, it would be impossible to prosecute statutory rape crimes. Some states deviate from the norm by incorporating complicated consent defenses into their statutes. The defenses generally correspond to teenage dating exceptions to statutory rape. For example, Title 21, § 1112 of the Oklahoma Statutes Annotated provides that a person cannot be convicted of engaging in consensual sex with a 14 year old unless the perpetrator is over age 18. Delaware permits consent as an affirmative defense when the victim is younger than 16 years and engages in consensual sex with a "voluntary social companion" who is no more than 4 years older.<sup>39</sup> Arizona mandates that consent is a defense to "sexual conduct with a minor" if the victim is 15, 16, or 17 years old and the defendant is younger than 19 or attending high school and no more than 24 months older than the victim.<sup>40</sup>

The majority of states have purged the requirement that the victim be of "previous chaste character" as an element of the crime of statutory rape. This past summer, the Florida legislature eliminated the chastity requirement from their statutory rape statute in response to a 1995 ruling by the Florida Supreme Court.<sup>41</sup> In 1993, Texas repealed the portion of its

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<sup>36</sup> See Garnett v. State, 632 A.2d 797 (Ky. 1993); Commonwealth v. Knap, 592 N.E.2d 747 (Mass. 1992); Jenkins v. State, 877 P.2d 1063 (Nev. 1993).

<sup>37</sup> D.C. Code Ann. § 22-4111 (1996); La. Rev. Stat. §§ 14:42; 14:80 (West 1996); Minn. Stat. § 609.342 (West 1996); Wash. Rev. Code § 9A.44.030 (West Supp. 1996) (no mistake unless based upon declarations by child).

<sup>38</sup> See Ark. Code Ann. § 5-14-103 (1995); Or. Rev. Stat. § 163.345 (1995).

<sup>39</sup> Del. Code Ann. tit. 11 § 762 (1995).

<sup>40</sup> Ariz. Rev. Stat. Ann. § 13-1407 (1996).

<sup>41</sup> In B.B. v. State of Florida, 659 So.2d 256, (Fla. 1995), rehearing denied (August 24, 1995), the Supreme Court of Florida determined that Fla. Stat. Ann. §794.05 (West Supp. 1996) was unconstitutional as applied to two consenting 16-year-old teens but held that the law was constitutional on its face. In his concurrence, Justice Kogan wrote, "one of the assumptions of this statute -- that children engaging in serial promiscuity are less deserving --

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Indecency with a Child statute that had allowed a defense that the victim had previously engaged in sexual intercourse.<sup>42</sup> Tennessee repealed the promiscuity defense in 1994.<sup>43</sup> Perhaps in recognition of the near demise of the chastity defense, most states also hold the victim's prior sexual conduct inadmissible through contemporary rape shield laws. The victim's chastity is still an element of statutory rape in Massachusetts and Mississippi, and then only in two specific statutes.<sup>44</sup>

A few other defenses to statutory rape are worth mentioning. Marriage serves as a defense in several states.<sup>45</sup> In Virginia, the subsequent marriage of the parties is a defense to consensual "carnal knowledge of a child."<sup>46</sup> A "victim's" emancipation is a defense to unlawful sexual activity in Florida.<sup>47</sup> Maine and Ohio also allow voluntary intoxication as a

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strikes me as patently absurd and self-defeating. If anything, such children are all the more in danger and thus all the more in need of assistance." *Id.* at 261. He suggested that the legislature reevaluate §794.05 to determine its effectiveness in protecting children from sexual predation.

<sup>42</sup> Tex. Penal Code Ann. § 21.11 (West 1994).

<sup>43</sup> Tenn. Code Ann. § 39-13-506 (1996).

<sup>44</sup> Mass. Gen. L. ch. 272, § 4 (1996); Miss. Code Ann. § 97-3-67 (1995). In *McBrayer v. State*, 467 So.2d 647 (Miss. 1985), denied rehearing, May 8, 1985, the Supreme Court of Mississippi reversed the defendant's conviction under the fondling statute, Miss. Code Ann. § 97-5-23 (1995). The matter involved a 46-year-old defendant who had engaged separately in both fondling and intercourse with an "unchaste" 13-year-old female. Section § 97-5-23 has no requirement relating to the victim's chaste character and thus, the victim's past sexual history did not bar a conviction under the fondling statute. However, the court held that the occasions of sexual intercourse required that the matter be reviewed under the statutory rape statute. In contrast to prosecutions under § 97-5-23, a successful prosecution under the statutory rape law, Miss. Code Ann. § 97-3-67 (1995), requires the victim to be of "previously chaste character." Describing the act as "wholly consensual sexual intercourse" in an "ongoing romantic relationship" with a victim who had "been intimate with at least two other men," the Mississippi court determined the fondling statute was not meant to "subsume" the statutory rape law, § 97-3-67. As a result of the victim's apparent lack of chaste character, the defendant's conviction was reversed. In a strong dissent, Justice Walker characterized the defendant as a "lustful and licentious dirty old man" and asserted the acts of fondling and intercourse were separate and distinct chargeable offenses.

<sup>45</sup> Ariz. Rev. Stat. Ann. § 13-1407 (1996); Ark. Code Ann. §§ 5-14-104, 5-14-109, 5-14-120 (Michie 1995); Ga. Code Ann. § 16-6-3 (1996); Ind. Code Ann. § 35-42-4-9 (West 1996); Ky. Rev. Stat. Ann. § 510.035 (Baldwin 1995); Me. Rev. Stat. Ann. tit. 17-A, § 253 (West 1995); N.H. Rev. Stat. Ann. § 632-A:2 (1995); N.Y. Penal Law § 130.30 (Consol. 1996); Pa. Stat. Ann. tit. 18 § 3122.1 (1995).

<sup>46</sup> Va. Code Ann. § 18.2-66 (Michie 1996).

<sup>47</sup> Fla. Stat. Ann. § 794.05 (West 1996). But see *State v. Plude*, 621 A.2d 1342 (Conn. Super. Ct. 1993) (the common law defense of emancipation was unavailable to defendant who engaged in sexual contact with person under age 16).

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defense negating the necessary mens rea.<sup>48</sup>

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<sup>48</sup> Me. Rev. Stat. Ann. tit. 17-A, § 253 (West 1995); Ohio Code Ann. § 2907.02 (Baldwin 1996).

## APPENDIX D

### The Federal Experience

Federal jurisdiction over sex offenses extends to Indian Country and the special maritime and territorial jurisdiction of the United States.<sup>1</sup> Federal prosecutions of sex offenses may be brought under a range of federal provisions. The Sexual Abuse Act of 1986<sup>2</sup> added chapter 109A Title 18 of the U.S. Code, which defines federal sexual abuse crimes, including aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, abusive sexual contact, and sexual abuse resulting in death.<sup>3</sup> There is federal jurisdiction over offenses related to child pornography under chapter 110, and over certain sex offenses involving interstate or international movement of the victim or the offender under chapter 117 of Title 18 of the U.S. Code. Offenses committed by members of the armed forces are prosecuted in court martial proceedings under the Uniform Code of Military Justice.<sup>4</sup> The federal government is also responsible for prosecuting felonies and certain misdemeanors, including sex offenses, in the District of Columbia under the provisions of the D.C. Code.

Due to limited federal jurisdiction, federal cases involving sex offenses against children are few compared to the number of state cases. According to a recent U.S. Sentencing Commission Report on federal penalties for sex offenses against children,<sup>5</sup> federal sexual abuse convictions "represent a small proportion of nationwide convictions for sexual abuse of minors." Sex offenses against children similarly comprise a relatively small subset of all federal criminal sentencings.<sup>6</sup> The Sentencing Commission Report found that 322 defendants were sentenced under 18 U.S.C. §§ 2241-2244 in 1994-1995. Children were

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<sup>1</sup> 18 U.S.C. § 7.

<sup>2</sup> 18 U.S.C. §§ 2241-2248.

<sup>3</sup> 18 U.S.C. §§ 2241-2245. The maximum statutory penalties for these provisions range from six months imprisonment to life imprisonment and the death penalty. The Violent Crime Control and Law Enforcement Act of 1994 doubled the statutory penalties for violations of these provisions by any defendant who has one or more prior federal or state convictions for similar crimes. 18 U.S.C. § 2247.

<sup>4</sup> 10 U.S.C. § 920.

<sup>5</sup> United States Sentencing Commission, Report to Congress: Sex Offenses Against Children Findings and Recommendations Regarding Federal Penalties (1996) [hereinafter "Sentencing Commission Report"].

<sup>6</sup> *Id.* at 2.

the victims in 285 (88.5 percent) of those cases.<sup>7</sup>

Sections 2241(c) of Title 18 (aggravated sexual abuse with children), 18 U.S.C. § 2243(a)(sexual abuse of a minor), and 18 U.S.C. § 2423 (transportation of a minor for purposes of engaging in criminal sexual activity and interstate travel with intent to engage in criminal sexual activity with a minor) are three federal provisions that expressly cover offenses involving sexual abuse of young children and teenagers and closely track the state statutory rape laws discussed elsewhere in this report. The Amber Hagerman Child Protection Act of 1996, passed in the final days of the 104th Congress, amended both sections 2241(c) and 2243(a).<sup>8</sup> It should be noted that rape offenses, regardless of the victim's age, may be prosecuted under § 2241(a)-(b) or 2242. Other sexual abuse offenses, including sexual contact, may be prosecuted under § 2244, regardless of the victim's age.

#### A. Aggravated Sexual Abuse, 18 U.S.C. § 2241

Section 2241(c) makes it an offense to knowingly engage or attempt to engage in a sexual act with a person under the age of 12.<sup>9</sup> In prosecutions under this section, the

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<sup>7</sup> Id. at 18.

<sup>8</sup> As amended section 2241(c) includes certain language from section 2243(a) and provides in pertinent part:

"(c) With Children.—Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than that person), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life or both. If the defendant has been previously convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison."

This amendment provides a higher maximum penalty (up to life imprisonment) than that provided by 18 U.S.C. 2423(b) (ten year maximum) for offenses against victims under 12, where jurisdiction is based on interstate travel. It also enacts a new "two strikes" provision mandating life imprisonment on a second conviction for the types of offenses covered by this subsection.

The Amber Hagerman Child Protection Act of 1996 also amended §2243(a) to include anyone who "crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years." If charged under § 2241(c) as amended, the same conduct would be covered under § 2241(c)'s higher maximum penalty.

<sup>9</sup> Section 2241(c) of Title 18 of the United States Code, "Aggravated Sexual Abuse" provided in pertinent part:

"(c) With children. — Whoever, in the special maritime and territorial jurisdiction of the United States or in a

government need not prove that the defendant was aware of the victim's age. 18 U.S.C. § 2241(d). This crime is punishable by a fine and up to life imprisonment. Under the United States Sentencing Guidelines § 2A3.1, aggravated sexual abuse has a base offense level of 27. There is a four-level increase if the victim was younger than 12 and a two-level increase if the victim was between 12 and 16. A two-level enhancement applies when the victim is entrusted to the defendant either temporarily or permanently. The commentary to §2A3.1 encourages broad application of this enhancement for defendants such as teachers, day care providers, babysitters, and other temporary caretakers who victimize a person in their custody, care, or supervisory control. The commentary also notes that an upward departure may be warranted if the victim was abused by more than one participant or if the defendant's criminal history includes a prior sentence for conduct similar to the instant offense.<sup>10</sup>

#### **B. Sexual Abuse of a Minor: 18 U.S.C. § 2243(a)**

Section 2243(a) sets forth the federal "statutory rape" offense. Entitled "Sexual Abuse of a Minor," this offense prohibits knowingly engaging in a sexual act, or attempting to engage in a sexual act, with another person who is (1) between the age of 12 and 16 and (2) is at least 4 years younger than the defendant.<sup>11</sup> Force, threat of force, or lack of victim consent are not required elements. Section 2243(c) sets forth two affirmative defenses: that the defendant reasonably believed the victim had attained the age of 16 or that the individuals were married at the time they engaged in the sexual act. 18 U.S.C. 2243(c). In prosecutions under this provision, the government need not prove the defendant knew the victim's age or that the requisite age differential existed between them. 18 U.S.C. 2243(d).<sup>12</sup>

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Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or attempts to do so, shall be fined under this title, imprisoned for any term of years or life or both."

Cf. preceding note regarding Amber Hagerman Act amendments to §2241(c).

<sup>10</sup> Sentencing Commission Report at 18. These changes were made in response to the Violent Crime Control and Law Enforcement Act of 1994, 110 Stat. 3093 (amending 42 U.S.C. § 14071(b)(6)).

<sup>11</sup> Section 2243 of Title 18 of the United States Code, "Sexual abuse of a minor or ward" provided in pertinent part:

(a) Of a minor.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both."

<sup>12</sup> However, Ninth Circuit jury instructions require the government to prove the defendant knew the requisite age differential.

In 1990, Congress raised the maximum prison term for this offense from 5 years to 15 years.<sup>13</sup> The applicable guideline §2A3.2 explicitly refers to this provision as "statutory rape." The base offense level is 15, but a two-level increase applies if the victim was in the custody, care, or supervisory control of the defendant. As in § 2A3.1, the commentary to §2A3.2 notes that an upward departure may be warranted if the defendant's criminal history includes a prior sentence for similar conduct. There is also a cross-reference to §2A3.1 if the conduct involved attempted or actual criminal sexual abuse as defined under sections 2241 or 2242.

A number of statutory rape prosecutions occur in Indian Country. Synopses of several federal prosecutions under 18 U.S.C. § 2243(a) in Indian country follow:

*A recent case in New Mexico involved a 13-year-old child who lived with her aunt and uncle as legal guardians. She had lived with them since infancy when she was born to an alcoholic mother. The victim conceived and delivered a baby as a result of contact with her uncle, but until paternity was affirmatively established, both the victim and her uncle denied ever having had intercourse. In this instance, the infant provided the proof for the prosecution and the government obtained a guilty plea.*

*In the District of South Dakota, the defendant pled guilty to sexual abuse of a minor in a case involving a 14 year-old foster child who was living with his family. The defendant was 20 years old at the time of the offense. The victim in this case suffered from fetal alcohol syndrome and had an I.Q. of 65 or less. The defendant was sentenced to 24 months in prison.*

*In the District of Wyoming, a 15-year-old victim disclosed that she had been engaging in intercourse with her stepfather and that she was pregnant as a result. The defendant later admitted to having intercourse with his step-daughter on 75 occasions, beginning when she was 12 years old. After a plea, the defendant was sentenced to 46 months imprisonment, a sentence which he later appealed.*

### C. Federal Sentencing Issues

In response to a Congressional directive contained in the Sex Crimes Against Children Prevention Act of 1995 (SCACPA),<sup>14</sup> the Sentencing Commission analyzed federal sentences imposed in 1994 and 1995 for all federal sex offenses committed against children. The analysis included a review of sentencing trends under guidelines sections 2A3.1,

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<sup>13</sup> Crime Control Act of 1990, Pub. L. No. 101-647. However, the U.S. Sentencing Guidelines calculation did not change.

<sup>14</sup> Pub. L. No. 104-71, 109 Stat. 774.

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criminal sexual abuse and attempted criminal sexual abuse, and 2A3.2, criminal sexual abuse of a minor (statutory rape), and attempts.<sup>15</sup> The recommendations regarding these provisions included: (1) adding a "pattern of activity" adjustment to the sexual abuse of a minor guideline, in order to account for repeat offenders; or (2) increasing the base offense level for the sexual abuse of a minor guideline, given that the cross-reference apparently is not being used as intended.<sup>16</sup>

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<sup>15</sup> In response to SCACPA's explicit mandate to increase certain penalties, the Commission in May 1996 submitted to Congress a set of amendments to the guidelines in April 1996. 61 Fed. Reg. 20306 (1996). These amendments became effective on Nov. 1, 1996.

<sup>16</sup> For more detail about the Commission's recommended changes, see Sentencing Commission Report at 40.