ARTICLES

CHILDREN, ADULTS, SEX AND THE CRIMINAL LAW: IN SEARCH OF REASON

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Parts One, Two, Three, Five and Six of this article were prepared under a grant from the Office of Juvenile and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice. Part Four of this article was supported by the U.S. Department of Health and Human Service's National Center on Child Abuse and Neglect through a contract from the National Clearinghouse on Child Abuse and Neglect. Points of view in this document are those of the author and do not necessarily represent the official position of the U.S. Department of Justice or the U.S. Department of Health and Human Services.

I. Introduction

Heightened public awareness of sexual crimes against children has resulted in increased attention to child sexual abuse legislation in recent years. After a series of high profile abductions, rapes and murders in the 1990s alerted the public to the dangerousness of sex offenders,[1] nearly every state passed laws allowing public notification of the release of sex offenders.[2] In 1996, the U.S. Congress brought attention to sexual crimes against children when it passed legislation encouraging states to more vigorously enforce "statutory rape"[3] laws as a tool to de-

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[1] *See, e.g.*, William Glaberson, *Man at Heart of Megan's Law Convicted of Her Grisly Murder*, N.Y. TIMES, May 31, 1997, § 1, at 1 (discussing conviction of released sex offender who molested and murdered Megan Kanka in New Jersey); Ken Hoover, *Polly's Killer Guilty on All Counts*, S.F. CHRON., June 19, 1996, at A1 (discussing conviction of man who abducted, molested and murdered twelve-year-old Polly Klaas).

[2] *See* Dep't of Health and Human Services, Child Abuse and Neglect State Statute Series: Public Notification of the Release of Sex Offenders (1997) (compiling all public notification laws through December 31, 1996). *See also* W.P. v. Poritz, 931 F. Supp. 1199 (Dist. N.J. 1996) (holding New Jersey's public notification statute constitutional and citing cases analyzing public notification laws).

[3] *See* Patricia Edmonds, *Teen Pregnancy Revives Laws on Statutory Rape*, USA TODAY, Mar. 28, 1996, at 1A. Sexual penetration offenses involving child victims

crease the birth of children to teenagers in need of public assistance. Contemporaneously, nationally publicized cases in which young men were prosecuted for sexual activity with their underage girlfriends raised questions about the very existence of such laws.[4] In 1997, the Supreme Court upheld the constitutionality of an approach taken by many states to place dangerous sexual predators in indefinite, involuntary civil commitment.[5]

In spite of intense public awareness of sexual offenses against children, the most common occurrence of child sexual abuse – molestation by a friend, relative or parent figure[6] – remains largely out of the public eye. Laws will be incomplete if they are passed only to address highly publicized issues without consideration of factors present in the vast majority of cases.[7]

This article presents a broad picture of sexual crimes against children by examining past and current law and recommending specific changes to substantive criminal law prohibiting sexual activity between adults and children. Part Two reviews the development of sexual crimes against children in Western society generally and in the United States specifically. Part Three discusses the theoretical foundation of the criminal law and the historical rationale for criminalizing sexual conduct between adults and children. Part Four presents an analysis of

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have been given labels such as "carnal knowledge of a child," "statutory rape," and "common law rape," all of which have been used without precision. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 201 (3d ed. 1982). Offenses involving illegal sexual contact with minors have been given similarly non-illuminating titles such as "sexual assault," "sexual battery," and "lewd and lascivious conduct." Except when quoting others, I attempt to avoid such titles and the accompanying confusion and more precisely define the conduct.

[4] *See* Roberto Suro, *Town Faults Law, Not Boy In Sex Case*, WASH. POST., May 11, 1997, at A1 (discussing community reaction to prosecution of an 18-year-old in Wisconsin who impregnated his 15-year-old girlfriend).

[5] *See* Kansas v. Hendricks, 138 L. Ed. 2d 501 (U.S. June 23, 1997).

[6] *See* Lucy Berliner & Diana M. Elliott, *Sexual Abuse of Children, in* THE APSAC HANDBOOK ON CHILD MALTREATMENT 52 (John Briere, et al., eds., 1996) (strangers account for only five to 15 percent of sexual abuse cases).

[7] It is not my intent to minimize the horrific nature of crimes committed by sexual sadists or to imply that public attention to these dangerous predators is misplaced. Legislation should be passed to appropriately punish such criminals and protect the public. Legislators must also be aware of the common occurrences of sexual crimes against children to ensure that victims of all sexual crimes are protected and all perpetrators appropriately punished.

sexual crimes against children in all fifty states. Part Five describes the psychological literature regarding the effects of sexual abuse on children, adults and society. Based on this history, theory, practice and research, Part Six presents recommendations for policy makers who modify sexual offenses against children.

II. History of Sex Crime Laws

A. *Development of Sex Crimes Against Children in Western Society*

The rape of an adult has long been recognized as a serious offense. Laws punishing the rape of adult women date as far back as the Code of Hammurabi in approximately 1750 B.C.[8] and have been consistently present during the growth of Western society.[9] In contrast, ancient laws prohibiting sexual conduct with children are much more difficult to find,[10] with ancient Roman law among the first to specifically forbid sex with

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[8] THE HAMMURABI CODE § 130, at 46 (Chilperic Edwards trans., reissued 1971) (1904). "If a man has forced the wife of another man, who has not known the male, and who still resides in the house of her father, and has lain within her breasts, and he is found, that man shall be slain; that woman is guiltless.". *Id.* The Hammurabi Code also addressed incest. *See id.* § 154 at 51.

[9] *See* JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 14, 47 (1987). Brundage notes, however, that "early Roman law appears to have tolerated rape – at least surviving legal documents do not suggest that forcible sex was severely punished." *Id.* at 47. Since later Roman times, however, Western society has consistently penalized rape. *See id.*

[10] Brundage, who provides one of the most thorough historical treatments of ancient sex crimes, does not identify any laws prior to ancient Roman laws which specifically proscribe sexual conduct with children. One author interprets the Code of Hammurabi as creating a "statutory rape" crime in its offense of the rape of a betrothed virgin. *See* Rita Eidson, Note, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757 (1980). However, I could find no documentation by a historian of crimes earlier than the Roman offenses in which a victim's status as a child – as opposed to being a betrothed virgin, a family member, or other status – was the basis of the offense.

The absence of documentation does not necessarily reflect the absence of laws, but may simply indicate that modern historians have not examined child abuse when interpreting ancient documents. Certainly any mention of child sexual abuse by Brundage is entirely tangential. His focus is on the influence of Christian morality upon the regulation of sex during the Middle Ages, not on the historical treatment of children by the law. *See id.* at 6.; *see also* Lloyd deMause, *The Evolution of Childhood, in* THE HISTORY OF CHILDHOOD 43-50 (Lloyd deMause, ed., 1974) (discussing the history of sexualized treatment of children).

children. Roman doctrine is summarized as follows:

> The law imposed capital punishment upon those who 'ravished a boy or a woman or anyone through force.' Successful seduction of minors, when accomplished by persuasion and blandishments, rather than by crude force, was also punishable by death, while an unsuccessful attempt to seduce a minor merited the milder penalty of exile.[11]

Rape was perceived as a crime against the family – in particular the father – rather than against the victim, and the father of the victim had the option of seeking damages as an alternative to criminal sanctions.[12]

Documentation of sex crimes against children during the first few centuries A.D. is found primarily in religious canons. Ecclesiastical canons from approximately 300 A.D.[13] specifically prohibited sexual relations with young boys,[14] and church laws against pederasty[15] were in place at the end of the first millennium.[16] The jurist Gratian, in a treatise on canon law from approximately 1140,[17] recognized civil law penalties for "sexual corruption of either boys or girls," although he did not comment further on these offenses.[18] Gratian also discussed the age of consent to marry – which gained importance in later years as the age at which a young person could consent to intercourse – indicating that the "free and uncoerced" consent of both parties was essential to marriage. He believed children could give

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[11] BRUNDAGE, *supra* note 9, at 47 (citing sources primarily from the first century B.C.). *See also id.* at 108, n.151 (citing a fragment of the writings of the Roman jurist Paulus from the second century B.C. forbidding the seduction of free boys).

[12] *See* Brundage, *supra* note 9, at 48.; *see also* FLORENCE RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 16-55 (1980) (discussing the treatment of women and children as property in Greek and Judeo-Christian society).

[13] *See* BRUNDAGE, *supra* note 9, at 69 n.102.

[14] *See* BRUNDAGE, *supra* note 9, at 74.

[15] The word "pederasty," which refers to anal intercourse between males, derives from a Greek word meaning "lover of boys." Thus, while it can mean anal intercourse between adult males, it is usually understood to refer to anal intercourse between an adult male and a boy. *See* WEBSTER'S COLLEGIATE DICTIONARY 856 (ed. 1994).

[16] *See* BRUNDAGE, *supra* note 9, at 213.

[17] GRATIAN, A HARMONY OF CONFLICTING CANONS (Concordia discordantium canonum) (quotation from Brundage's description; cited and discussed at length by BRUNDAGE, *supra* note 9, at 229).

[18] BRUNDAGE, *supra* note 9, at 250.

meaningful consent at seven years of age.[19] By the fourteenth century, the generally accepted age of consent to marry was twelve for girls and fourteen for boys, although there seems to have been some flexibility with this rule.[20]

The first significant discussion of sexual crimes against children occurred during the maturation of canon law in the Middle Ages. Teachers of canon law[21] taught that sexual intercourse with a girl who was under the age of consent to marry was rape even if the girl consented and failed to protest the intercourse.[22] This innovation was consistent with attempts by these teachers to differentiate among severity of rape offenses based on the amount of force used in the coercion.[23] Canon law from the fourteenth to fifteenth centuries continued to prohibit sexual intercourse with children, with one statute making sexual intercourse by a man with a girl under the age of ten a capital offense, though sexual activity not amounting to intercourse resulted only in a fine.[24] Other legal experts from the same era taught that any sexual molestation of a girl who had not yet reached puberty should be a capital offense.[25]

Apart from religious canon, the existence of sexual crimes against children emerges most clearly in the thirteenth century. The earliest statute, Westminster I from 1275, classified rape as a misdemeanor offense constituting a trespass "punishable by two years imprisonment and fine at the king's pleasure."[26] In addition to punishing non-consensual intercourse with an adult female, Westminster I made it an offense to "ravish" a "maiden within age," whether with or without her consent.[27] Sir Edward Coke interpreted the phrase "within age" to mean "her age of consent, that is twelve years old, for that is her age of consent to

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[19] *See* BRUNDAGE, *supra* note 9, at 238.

[20] *See* BRUNDAGE, *supra* note 9, at 433-34. Some writers considered any child able and willing to consummate a marriage as old enough to marry. *See id.* at 434; *see also infra* notes 40-41 and accompanying text.

[21] This group of teachers from 1140 – 1190 were known as decretists.

[22] *See* BRUNDAGE, *supra* note 9, at 311.

[23] *See* BRUNDAGE, *supra* note 9, at 311.

[24] *See* BRUNDAGE, *supra* note 9, at 518.

[25] *See* BRUNDAGE, *supra* note 9, at 531.

[26] Mortimer Levine, *A More than Ordinary Case of "Rape," 13 and 14 Elizabeth I*, 7 AM. J. LEGAL HISTORY 159, 162 (1963).

[27] *See* Statute of Westminster I, 3 Edw., ch. 13 (Eng.).

marriage."[28]

Blackstone stated that the leniency of Westminster I was "productive of the most terrible consequences,"[29] and in 1285, the Statute of Westminster II made non-consensual intercourse with an adult woman a felony punishable by death.[30] Because Westminster II did not address non-forcible intercourse with a child, a plain reading of the two statutes would lead one to believe that intercourse with a girl under twelve years – regardless of her consent – would be a misdemeanor under Westminster I and forcible intercourse with a female twelve or over would be a capital offense under Westminster II.

However, in a case tried at the Queen's Bench in 1571 interpreting these statutes, the court held that the rape of a seven-year-old was no offense since "the court doubted of rape in so tender a child."[31] The court went on to say "if she had been nine years or more, it would have been otherwise," apparently concluding that neither Westminster I nor Westminster II applied to a girl under the age of nine.[32] In an attempt to explain the reasoning of this peculiar opinion, Levine postulates that Westminster I was held inapplicable to girls under nine because the justices believed rape was possible only if procreation were possible. Because a child under nine could not procreate, the court held the offense of rape inapplicable.[33] Consequently, the rule at the time seems to have been that sexual intercourse

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[28] SIR EDWARD COKE, SECOND INSTITUTE 182 (4th ed. London 1671). *See also* Levine, *supra* note 26, at 163.

[29] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 212 (William S. Hein 1992) (1769) (cited in Regina v. Ferguson, 36 C.C.C. 507, 514 (British Columbia Ct. App. 1987)).

[30] Statute of Westminster II, 13 Edw., ch. 34 (Eng.). Levine indicates that this statute applied only to women of age. *See* Levine, *supra* note 26, at 162-63.

[31] 1 REPORTS FROM THE LOST NOTEBOOKS OF SIR JAMES DYER 65 (J.H. Baker, ed. 1994). Levine suggests that it would have been reasonable for the court to dismiss the case on the grounds that the indictment was flawed. The defendant was indicted for having "feloniously ravished" the victim, yet the only offense applicable – Westminster I – was a misdemeanor. *See* Levine, *supra* note 26, at 163. However, this does not appear to be the grounds upon which the ruling was based. *See id.*

[32] Levine, *supra* note 26, at 163.

[33] *See* Levine, *supra* note 26, at 163. Again, almost any justification of the opinion is entirely speculative as the court did not provide its reasoning and Westminster I on its face appears to clearly apply to any child under twelve. Unfortunately, the early commentators do not elucidate the issue either.

with a girl under nine was no offense, intercourse with a girl aged nine to eleven was a misdemeanor under Westminster I, and intercourse with a girl twelve and over was a felony under Westminster II only if the intercourse was non-consensual.

It is relatively certain that as a direct result of this case,[34] an act of 1576 created a felony offense for a person to "unlawfully and carnally know and abuse any woman child under the age of ten years."[35] Unfortunately, this new law created an additional problem of statutory interpretation. While 18 Elizabeth applied to any sexual conduct with children under ten and Westminster II applied to forcible conduct with girls aged twelve or over, it was unclear which offense applied to children aged ten or eleven. Hale believed that intercourse with a girl under twelve was a felony, apparently based on a combined reading of Westminster I (establishing the age of consent at twelve) and 18 Elizabeth (making intercourse with a child a felony).[36] However, the prevailing view was that non-forcible sexual intercourse with a girl aged ten or eleven remained a misdemeanor under Westminster I.[37] Not until 1861 was this confusion removed by 24 & 25 Victoria c. 100, which repealed the earlier statutes and specifically created a felony offense for carnal knowledge of a girl under 10 and a misdemeanor offense for carnal knowledge

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[34] *See* SIR EDWARD COKE, THIRD INSTITUTE 60 (4th ed. London 1669).

[35] 18 Elizabeth, c. 7, 4 Stat. Realm 618.

[36] 1 SIR MATTHEW HALE, PLEAS OF THE CROWN 630-31 (P.R. Glazebrook, ed. 1971) (1736). Hale stated:

> By the statute of 18 Eliz. cap. 7. it is declared and enacted, 'That if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, it shall be felony without the benefit of clergy.'
>
> My lord Coke adds the words, either with her will or against her will, as if were she above the age of ten years, and with her will, it should not be rape; but the statute gives no such intimation, only declares that such carnal knowledge is rape.
>
> And therefore it seems, if she be above the age of ten years and under the age of twelve years, tho she consent, it is rape, 1. Because the age of consent of a female is not ten but twelve. 2. By the statute of Westm. I. cap. 13.

Id. at 630-31 (italics in original).

[37] *See* EDWARD HYDE EAST, PLEAS OF THE CROWN 436 (P.R. Glazebrook, gen. ed. 1987) (1803); *see also* Levine, *supra* note 26, at 164; 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW § 9, at 632 n.3 (1948); 2 WILLIAM RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 929 (1979) (1865 ed.).

of a girl under twelve.[38] An Act of 1875 raised the age of consent for a felony offense to twelve and created a misdemeanor offense of carnal knowledge of a girl above twelve and under thirteen years old.[39]

Other statutory crimes involving sexual penetration existed as early as the sixteenth century, although the majority of these offenses were crimes against morality rather than crimes against the person. In particular, sodomy and the crime against nature were felonies punishable by death in the mid-1500s, but the act itself was the reprehensible conduct. The fact that a child was engaged in such an act was merely tangential to the conduct. For example, if an adult and a child under the age of fourteen were engaged in sodomy, only the adult could be prosecuted. However, this was the result of a legal presumption that a boy under the age of fourteen was physically incapable of engaging in sexual intercourse.[40] The rule reflects the belief that boys were not able to commit the offense and does not represent an effort to protect children from being victims of a crime.[41]

When an adult's conduct with a child amounted to sexual contact not involving penetration, common law criminal offenses were limited and the child's consent[42] typically served as a defense to prosecution. The most directly applicable offense was assault with intent to commit rape.[43] Because common law

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[38] *See* Offences against the Person Act, 24 & 25 Vict. c. 100, §§ 50 & 51 (1861) (Eng.).

[39] *See* The Offences against the Person Act, 1875, 38 & 39 Vict., c. 94 (Eng.); *see also* Regina v. Ferguson, 36 C.C.C.3d 507, 516-17 (British Columbia Ct. App. 1987) (Anderson, J.A.) (dissenting).

[40] *See* 25 Hen. 8, c. 6 (1533); 2 & 3 Edw. 6, c. 29 (1548); 5 Eliz. c. 17 (1562); 1 RADZINOWICZ, *supra* note 37, § 9, at 632.

[41] *See* McKinny v. State, 10 So. 732 (Fla. 1892) (citing common law authorities and rejecting an irrebuttable presumption for Florida, but placing the burden on the state to prove a boy's capacity); *see also* State v. Hornavius, 31 Ohio L. Abs. 460 (1940) (in prosecution of 30-year-old female for contributing to delinquency of 13-year-old boy, court held the presumption referred to the capacity to emit semen and such a rule had no relevance to contributing to delinquency offense).

[42] *See infra* text accompanying notes 175-77 for an explanation of my use of the word "consent" in this context.

[43] Battery also was a potential crime to be charged, but the consent of the victim was a complete defense. *See infra* note 68 and accompanying text. While offenses such as fornication or incest could apply, these offenses were based on the status of the offender as a relative or married person, not on one party's status as a child. Thus, they cannot be viewed as laws prohibiting sexual activity between adults and

assault was defined as an "attempt or offer with force and violence to do a corporal hurt to another,"[44] the prevailing English rule held that the consent of any person, whether adult or child, negated the element of force and as a result there was no assault.[45] If assault could not be proven, no other offense was available until 1861 when the English created an offense of indecent liberties with children under sixteen which specifically prohibited any sexual contact with children regardless of the child's consent.[46]

B. *Early Development of Sex Crimes Against Children in the United States*

1. Sexual Penetration Offenses

By the early nineteenth century, the crime of rape was well defined in the United States, through the common law in some states and by statute in others.[47] Similarly, sexual penetration offenses involving child victims were well established,[48] with some states setting the age of consent at ten in keeping with the prevailing English rule, while other states followed Hale's view and set the age of consent at twelve.[49] Miller reports that in the early 1900s, the age of consent in some states was as high as eighteen.[50] As the statutory offense developed, several elements received a substantial amount of attention from the courts.

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children.

[44] JOHN WILDER MAY, THE LAW OF CRIMES § 205, at 296 (Harry Augustus Bigelow, ed., 3d ed. 1905).

[45] *See* 2 RUSSELL, *supra* note 37, at 1023 ("attempting, therefore, to have connection with a girl between the ages of ten and twelve, or under ten years of age, if done with the girl's consent, is not an assault").

[46] *See* Offences against the Person Act, 24 & 25 Vict. c. 100, §§ 42, 52, 62 (1861) (Eng.); *see also* MODEL PENAL CODE § 213.4 cmt. 1 at 398.

[47] *See* 1 FRANCIS WHARTON, WHARTON'S CRIMINAL LAW § 710, at 955 (J.C. Ruppenthal ed., 12th ed. 1932).

[48] *See History of the Changes in the Law on the Age of Consent*, 11 Va. L. Rev. 81 (1925) (discussing history of Virginia's age of consent).

[49] *See* JUSTIN MILLER, HANDBOOK OF CRIMINAL LAW § 96, at 296-97 (1934).

[50] *Id.* at 297. *See also* Jane E. Larson, *"Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America*, 9 YALE J. L. & HUMAN. 1 (1997) (discussing the work of women's organizations in raising the age of consent during the latter part of the 19th Century).

a. Age

The burden was placed on the state to prove the victim's age.[51] In some cases the statute failed to specify an age, identifying the offense as one committed against a "female child." In such cases, courts were required to determine whether "female child" referred to a specific age or to the onset of puberty, with most courts holding that such language referred to a specific age.[52]

b. Consent

The consent of the victim was immaterial and proof of force not necessary.[53] In cases in which force was alleged and not proven at trial, some courts held that such failure to prove an allegation required acquittal.[54] More courts, however, held that proof of force was irrelevant whether or not it was alleged.[55]

c. Mistake of age

A defendant's mistake as to the age of the victim was not an accepted defense even if the defendant honestly believed the victim to be of age and even if the girl represented herself as being of age. As noted by Wharton: "Every man acts at his peril in this class of offenses, and must ascertain beyond all doubt whether the female is over the statutory age, and whether the act contemplated comes within the legislative prohibition."[56]

d. Penetration

In general, the rule applied in forcible rape cases requiring

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[51] *See* 1 WHARTON, *supra* note 47, § 713 at 961.

[52] *See id.* § 719 at 964. *See* State v. Flath, 228 N.W. 847 (N.D. 1929) (providing extensive discussion of cases from other jurisdictions and finding "child" in North Dakota's indecent liberties statute to refer to a minor under the age of 18).

[53] *See* 1 WHARTON, *supra* note 47, § 712 at 956, n.7; *see also* State v. Flath, 228 N.W. 847 (N.D. 1929) (holding indecent liberties statute applicable regardless of whether child consents); Annotation, *Prosecutrix in Incest Case as Accomplice or Victim*, 74 A.L.R.2D 705 (1960), 74 LATER CASE SERVICE 285 (1986 & Supp. 1996) (citing cases discussing ability to consent in context of accomplice liability).

[54] *See* 1 WHARTON, *supra* note 47, § 712 at 960.

[55] *See* 1 WHARTON, *supra* note 47, § 712 at 959-60.

[56] 1 WHARTON, *supra* note 47, § 714 at 960.

proof of penetration, however slight, was followed in cases involving children.[57] However, some states eliminated the requirement of proof of penetration, holding instead that "any injury, however slight, to the sexual organs of the female, or abuse of them, though there was no penetration, warrants conviction."[58] The wording of the statute affected this interpretation, as in some states the offense was "carnal abuse" rather than "carnal knowledge," thus indicating a broader scope.[59]

e. Chastity of the Victim

Chastity of the rape victim was not a requirement at common law,[60] although by the early 1900s several states imposed a special condition by statute that child victims, particularly older adolescents, be of previous chaste character.[61] In states without such a statutory provision the reputation of the victim was not material.[62]

f. Seduction

The statutory crime of seduction became popular as another means of punishing an adult male for having sexual intercourse with an underage female. This crime had three basic elements: (1) intercourse must have been accomplished after a "taking" of the girl; (2) the intercourse must have taken place "under promise of marriage;" and (3) the female must have been of previous chaste character.[63] The conduct in its civil con-

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[57] *See* 1 WHARTON, *supra* note 47, § 712 at 959 n.10.

[58] 1 WHARTON, *supra* note 47, § 712 at 958, n.9. *See also* State v. Hummer, 65 A. 249 (N.J. 1906) (carnal abuse does not require proof of penetration, whereas carnal knowledge does); Castleberry v. State, 33 So. 431 (Ala. 1903) (abuse of female under the age of 14 is any hurting during attempted carnal knowledge); James L. Rigelhaupt, Annotation, *What Constitutes Penetration in Prosecution for Rape or Statutory Rape*, 76 A.L.R.3D 163 (1977 & Supp. 1996) (reviewing cases involving proof of penetration).

[59] *See* 1 WHARTON, *supra* note 47, § 712 at 959 n.9.

[60] *See* PERKINS & BOYCE, *supra* note 3, at 205.

[61] *See* State v. Dacke, 109 P. 1050 (Wash. 1910) (applying new carnal knowledge statute requiring a victim to be of previously chaste character).

[62] *See* 1 WHARTON, *supra* note 47, § 717 at 962-63.

[63] "[T]here must doubtless be something more than sexual intercourse to establish the guilt of the defendant. There must be the seduction. A female of previous chaste character must be led astray from the paths of virtue." Flick v. Common-

text was perceived as committed against the seduced girl's father, not against the child.[64] Seduction was limited to female victims under the ages of 18 or 21 in some states, though many states did not have this limitation.[65]

g. Classification

Sexual penetration of a child was considered a lesser felony than common law rape,[66] and many states developed a second tier of an even lower category offense for sexual penetration of an adolescent.[67]

2. Sexual Contact Offenses

Unwanted sexual contact could always be prosecuted as battery at common law, but this required proof of a non-consensual touching.[68] To prosecute purportedly consensual touching of children, most jurisdictions were limited to charging assault with intent to rape under a theory that since the completed act would be rape because a child cannot consent to sexual intercourse, the attempt to complete the act would also be an offense regardless of the child's consent.[69]

The majority of American jurisdictions accepted the argument that assault with attempt to rape could be charged regardless of a child-victim's consent.[70] For example, in *State v.*

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wealth, 34 S.E. 39, 41 (Va. 1899). There were many variations among the state statutes defining the offense. *See* 2 WHARTON, *supra* note 47, §§ 2120 - 2131, at 2428-2426.

[64] *See* Dunlap v. Linton, 22 A. 819 (Pa. 1891) (civil action for loss of service after the seduction of plaintiff's daughter); Plummer v. Webb, 19 F. Cas. 894 (D. Maine 1825) (discussing the principle of loss of service of a minor child who is seduced). *Cf.* Marshall v. Taylor, 32 P. 867 (Cal. 1893) (victim awarded substantial money damages against her seducer). *But see* Note, *Abolition of Actions for Breach of Promise, Enticement, Criminal Conversation, and Seduction*, 22 VA. L. REV. 205 (1935).

[65] *See* MODEL PENAL CODE § 213.3 cmt. 5 at 393.

[66] *See id.* § 711, at 956.

[67] *See id.* § 213.1, cmt. 2 at 279.

[68] Battery is defined as "the unlawful touching of the person of another by the aggressor. . . . The intended injury may be to the feelings or mind, as well as to the corporeal person." Wood v. Commonwealth, 140 S.E. 114 (Va. 1927) (quoting 2 Am. & Eng. Ency. L. 953, 955).

[69] *See* MODEL PENAL CODE § 213.4 cmt. 1 at 399.

[70] *See supra* notes 42-46 and accompanying text.

Hunter,[71] the defendant was convicted of assault with intent to rape an eight-year-old child. He argued on appeal that the prosecution must prove non-consent, as this offense – unlike the offense of statutory rape – was a common law offense not limited by an age of consent. The Washington Supreme Court refused to accept this argument:

> There are a few – and only a few – American cases which hold that the statute which makes the child's consent immaterial in defense of the substantive crime does not extend to the assault, upon the common-law theory that violence consented to does not constitute an assault. We do not think that there is, in principle, any sound basis for the distinction.[72]

The minority American view held that willing participation of a child negated force and therefore no assault occurred.[73] A few additional courts refused to recognize attempted intercourse with a child based on the theory that since the legislature failed to create a statutory offense, no chargeable crime existed.[74]

In addition to the problem of interpretation, the crime of assault with intent to rape had the defect of being inapplicable in the context of sexual contact offenses when an intent to rape was not proven. For example, in *Cromeans v. State*,[75] the victim refused defendant's request to have sexual intercourse with her whereupon the defendant "attempted to detain her by taking

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[71] 52 P. 247, 249 (Wash. 1898).

[72] State v. Huntee, 52 P. 247, 249 (Wash. 1898) (citations omitted); *accord* People v. Verdegreen, 39 P. 607 (Cal. 1895). The issue persisted well into the 20th Century. *See* People v. Gibson, 134 N.E. 531 (N.Y. Ct. App. 1922) (ruling that consent is not a defense to an assault on a child); State v. Wilson, 161 S.E. 104 (S.C. 1931) (the majority of a divided court rejected the common law approach); MAY, *supra* note 44, § 208, at 200-01 (stating that in most states consent is no defense to assault with intent to commit statutory rape); Annotation, *Assault with Intent to Ravish or Rape Consenting Female Under Age of Consent*, 81 A.L.R. 599, 601 (1932) (stating that the majority view in the U.S. allowed prosecution even though the victim consents). *But see* 1 WHARTON, *supra* note 47, § 809, at 1105 (citing the common law rule that "where there is actual intelligent assent, even by a child of seven years, an indictment for assault cannot be maintained").

[73] *See* State v. Allison, 124 N.W. 747 (S.D. 1910); Croomes v. State, 51 S.W. 924 (Tex. Crim. App. 1899); Croomes v. State, 53 S.W. 882 (Tex. Crim. App. 1899) (rehearing denied) (Henderson, J., clarifying his earlier concurrence).

[74] *See* Smith v. State, 12 Ohio St. 466 (Ohio 1861) (holding that no statutory offense addressed the issue of attempted intercourse with a child).

[75] Cromeans v. State, 129 S.W. 1129, 1135 (Tex. Crim. App. 1909).

her arm." The court held that there was proof only that he intended to detain her and "make further solicitation," and therefore a conviction of assault with intent to rape was improper.[76]

A second option when sexual conduct between an adult and a child did not involve penetration was to file charges under an indecent liberties statute. Only a few American jurisdictions adopted the 1861 English statute creating an indecent liberties offense,[77] and the majority of states continued to prosecute sexual contact offenses under assault statutes.[78] The problem of imprecise drafting of legislation, an issue prevalent in rape statutes, also plagued indecent liberties statutes.[79]

C. *Model Penal Code approach to sex crimes against children*

The Model Penal Code is the product of a major effort by the American Law Institute during the 1950s and 1960s to reexamine substantive criminal law.[80] The primary purpose of the Code is "to provide a reasoned, integrated body of material" for

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[76] *See id.* While it seems likely that the intent to rape element would preclude prosecution for many acts involving sexual contact alone, such problems are not commonly reported, perhaps because sexual contact with a child was not prosecuted or because sexual contact was nearly always seen as a precursor to intercourse and successfully prosecuted as an assault with intent to rape. *See* Cliver v. State, 45 N.J.L. 46, 4 Am. Crim. Rep. 532 (1883); *see also* Annotation, *supra* note 72.

[77] *See* State v. Comeaux, 60 So. 620 (La. 1913) (holding Louisiana's indecent assault statute invalid because it did not define indecent assault); People v. Dowell, 99 N.W. 23 (Mich. 1904) (citing indecent liberties statute that removed the requirements of lack of consent and proof of intent to rape); State v. West, 40 N.W. 249 (Minn. 1888) (discussing indecent liberties statute); State v. Kunz, 97 N.W. 131 (Minn. 1903) (citing indecent liberties statute that removed the lack of consent requirement); Dekelt v. People, 99 P. 330 (Colo. 1908) (holding indecent liberties statute did not require proof of non-consent); Milne v. People, 79 N.E. 631 (Ill. 1906) (invalidating indecent liberties statute); People v. Butler, 109 N.E.2d 677 (Ill. 1915) (discussing indictment under indecent liberties statute of 1907). *See also* 2 WILLIAM L. BURDICK, THE LAW OF CRIME § 493 (1946).

[78] *See* MODEL PENAL CODE § 213.4 cmt. 1 at 398.

[79] *See* State v. Flath, 228 N.W. 847 (N.D. 1929) (interpreting definition of "child," relevancy of consent, and conduct prohibited by indecent liberties statute).

[80] Drafts to the code were written from 1953 to 1961 and the final version of the code was adopted by the American Law Institute in 1962. Beginning in 1980 the code was republished and the commentary significantly expanded. *See* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.1, at 4 n.9 (1986).

legislators to consider when drafting state codes.[81] Although the commentary to the Model Penal Code provides less than exhaustive discussion of sexual crimes against children, it provides a solid foundation upon which to build further analysis of these crimes. The following discussion summarizes the Model Penal Code's proposed statutory language and commentary related to sexual crimes against children.

1. Sexual Penetration Offenses

a. Rape

Rape, the most serious penetration offense in the Model Penal Code, is defined in section 213.1. The Model Penal Code largely adopts the definition of rape of a child which existed prior to the Code. Specifically, the Model Penal Code provides: "A male who has sexual intercourse with a female not his wife is guilty of rape if: . . . (d) the female is less than 10 years old."[82] Two aspects of this definition are worth noting. First, the gender-exclusivity of the Model Penal Code results in unequal punishment for comparable conduct against males. Normally a second degree felony, rape is raised to first degree status if the victim receives serious bodily injury as a result of the rape or if the defendant is a stranger.[83] Because section 213.1 is gender exclusive, a female offender can never be charged with the most serious form of rape and a male adult who sexually pene-

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[81] *Id.* § 1.1, at 5 (quoting Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code*, 42 A.B.A.J. 321 (1956)).

[82] MODEL PENAL CODE § 213.1.

[83] *See id.*

> Rape is a felony in the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

Id. at § 213.1(1). To interpret the "voluntary social companion" as a stranger is somewhat of an overstatement, though it appears to be the intent of the drafters of the Model Penal Code. *See id.* § 213.1 cmt. 9 at 355 (describing this aggravating factor as "the absence of any prior relationship between actor and victim"). *But see* State v. Hamilton, 501 A.2d 778 (Del. Super. Ct. 1985) (holding that a parent is not a voluntary social companion because a child is not free to choose his or her place of residence).

trates a boy under the age of ten and causes physical injury commits deviate sexual intercourse, only a second degree felony.[84] The commentary asserts that gender-neutral section 213.2 would apply to female-female and male-male conduct with a child, and that a disparity would only occur in the case of the infliction of serious bodily injury.[85] It is also noteworthy that consensual vaginal intercourse between an adult female and an underage male is not covered by any felony provision of the Model Penal Code.[86] All such activity is a misdemeanor.[87]

The second notable aspect of the definition of rape is the age of children to which the section applies. The drafters lowered the age to ten years old, even while recognizing in the 1980 commentary that "no state now continues the common-law rule of 10 years."[88] The drafters were worried about the seductive powers of adolescents as well as the application of a rule of strict liability and they wanted to draw a clear line for the most serious offense.[89] According to the 1980 commentary:

> [I]t is at least conceivable that some girls under the age of twelve might act and appear to be as old as 16. Assigning punishment for rape to the male who has intercourse with such a child under the honest and reasonable misimpression that she

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[84] *See* MODEL PENAL CODE § 213.2. There is no enhancement under the deviate sexual intercourse statute for penetration of a boy by a stranger or penetration of a boy that causes serious bodily injury.

[85] *See id.* § 213.1 cmt. 8(a) at 335. However, given the ambiguity of the definitions in section 213.0, this is not the unavoidable conclusion that could be drawn from the language of the code. *See infra* notes 93-100 and accompanying text.

[86] Neither section 213.1 (victim under 10) nor 213.3(1)(a) (victim under 16) is available since the provisions related to vaginal intercourse apply only to male perpetrators. While section 213.2 (deviate sexual intercourse) contains gender neutral language and would apply to other penetrative conduct by a female perpetrator, it would not apply to vaginal intercourse. *See* MODEL PENAL CODE § 213.1 cmt. 8(a) at 337. The drafters of the commentary did not feel the Model Penal Code was alone with this policy, stating: "no state appears to hold an older woman responsible for intercourse with a young male under a statute specifically directed to that objective." *Id.* § 213.1 cmt. 8(a) at 334.

[87] *See* MODEL PENAL CODE *at* § 213.4(6). The drafters of the 1980 commentary note that if the Model Penal Code were to be re-drafted it might be written in gender-neutral language. However, they also state that such language would be primarily "symbolic," indicating a fundamental belief that such offenses do not occur and are not serious when they do occur. *See id.* § 213.1 cmt. 8(a) at 337.

[88] *Id.* § 213.1 cmt. 6 at 324. *See also infra* Part III (discussing the drafters' rationale).

[89] *See id.* § 213.1 cmt. 6 at 326-29.

> is significantly older marks too great a departure from the general principle that the criminal law should require a subjective basis for liability.[90]

As a result, the Model Penal Code made the age of consent for this offense extraordinarily low.

b. Deviate Sexual Intercourse

Deviate sexual intercourse by force or imposition is the Model Penal Code's equivalent of traditional sodomy statutes, mirroring the rape offense in format.[91] This section is similar to section 213.1,[92] except that it applies to male victims, female defendants, and causing another to engage in deviate sexual intercourse. As mentioned above, there is no provision for elevating the offense to first degree status if it results in serious bodily injury to the victim or if the offender is a stranger.

c. Definition of Sexual Intercourse

Because sexual intercourse is defined as "intercourse per os or per anum,"[93] the offenses of rape and deviate sexual intercourse address conduct beyond penile-vaginal penetration. The 1980 commentary indicates that this language was intended primarily to refer to conduct included within traditional sodomy statutes, such as anal intercourse.

Yet, while the commentary implies that the language was intended to include other conduct such as cunnilingus (an act of sex committed with the mouth of one person and the female sex organ of another) and fellatio (an act of sex in which the mouth or lips of one person come into contact with the penis of another person),[94] the wording is ambiguous.[95] For example,

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[90] *Id.* at 329. *See infra* notes 466-75 and accompanying text.

[91] MODEL PENAL CODE § 213.2. "A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the second degree if: . . . (d) the other person is less than 10 years old." *Id.*

[92] *See id.* § 213.2 cmt. 3 at 374. The structure of this section "renders largely irrelevant the substantial overlap in coverage which is achieved by the Section 213.0 definition of sexual intercourse in the law of rape to include intercourse per os and per anum." *Id.*

[93] *See id.* § 213.0(2). Per os means by the mouth.

[94] *See id.* § 213.2 cmt. 1 at 359.

the language leaves open whether "intercourse" means only penile intercourse or whether it also refers to digital intercourse. Similarly, it is unclear whether "per os" means only penile penetration of a female's mouth, or whether it refers also to a person who commits cunnilingus,[96] and whether "per os" includes performing fellatio upon a male victim.[97]

The only appellate court to directly address these issues concluded that the Model Penal Code language broadly covers a variety of sexually penetrative conduct. In *Commonwealth v. Westcott*,[98] defendant argued that the state statute – an adoption of Model Penal Code section 213.2 – was limited to penile penetration of the mouth and anus. The court rejected this argument, holding that "deviate sexual intercourse" includes acts of cunnilingus as well as other acts of digital or object penetra-

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[95] Imprecise statutory language inevitably leads to courts defining the conduct. *See, e.g.* Rose v. Locke, 423 U.S. 48 (1975) (holding that "crimes against nature" statute gave adequate warning that cunnilingus was included); United States v. Barnes, 2 C.M.R. 797 (A.F.B.R. 1952) (holding cunnilingus not included within sodomy statute); Roundtree v. United States, 581 A.2d 315 (D.C. Ct. App. 1990) (finding cunnilingus to be included within the sodomy statute); Dixon v. State, 268 N.E.2d 84 (Ind. 1971) (very broad holding that cunnilingus and other sexual acts are included within crime against nature statute); Commonwealth v. Gallant, 369 N.E.2d 707 (Mass. 1977) (adult rape case interpreting "unnatural sexual intercourse" to include "oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person's body or other object into the genital or anal opening of another person's body"); State v. Morrison, 96 A.2d 723 (N.J. Super. 1953) (holding sodomy statute inapplicable to cunnilingus or fellatio).

The real reason for much imprecise language was forthrightly confronted by a New Jersey court in *State v. Morrison*, 96 A.2d 723, 724 (N.J. Super. Ct. Law Div. 1953):

> [The sodomy statute] suffers . . . from the great concern for delicacy that has usually marked the treatment of this crime both at common law and in legislation. The offense has always been regarded as something so base and defiling as to be dealt with only in veiled terms. . . . All in all, this calculated avoidance of indelicacy has resulted in quite some obscurity and uncertainty in dealing with a most heinous crime.

Id.

[96] In addition is the question of, if the Model Penal Code language is intended to refer to cunnilingus, whether it requires proof of penetration. *See* State v. Ludlum, 281 S.E.2d 159 (N.C. 1981) (holding that penetration is not an essential element of cunnilingus).

[97] *See* Commonwealth v. Bruner, 527 A.2d 575 (Pa. Super. Ct. 1987) (interpreting deviate sexual intercourse statute based on the Model Penal Code to include defendant's act of fellatio upon a five-year-old boy).

[98] 523 A.2d 1140 (Pa. Super. Ct. 1987).

tion of the sexual organs of a female.[99] The court's reasoning stretches the language of the Model Penal Code considerably. In fact, the 1980 commentary makes it clear that the drafters did not consider the definition to be as expansive as the *Westcott* court interpreted it to be. The commentary states:

> The statutes that have been revised since the promulgation of early drafts of the Model Code fall into three categories: those that continue the narrow notion that rape should punish only genital copulation; those that agree with the Model Code that rape laws should be expanded to include anal and oral copulation; and those that go beyond the Model Code to include digital or mechanical penetration as well as genital, anal, and oral sex.[100]

This language indicates the Model Penal Code was not intended to include those acts which other states chose to include. For purposes of this article, it is sufficient to highlight this language as an example of the importance of precise statutory definitions.

d. Corruption of Minors and Seduction

The Model Penal Code's corruption of minors offense is divided into four subsections.[101] Subsection (a) covers sexual penetration offenses against a victim who is under sixteen years

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[99] *See id.* at 1147.

[100] MODEL PENAL CODE § 213.1 cmt. (8)(d) at 346 (footnotes omitted). This commentary is discussing the rape statute – § 213.1 – and this quote is discussing the definition of sexual intercourse provided in § 213.0 that includes intercourse "per os or per anum." Since the only difference between the definitions of sexual intercourse and deviate sexual intercourse in § 213.0 is the gender of the victim, the language of this commentary should apply to both rape and deviate sexual intercourse.

[101] *Id.* § 213.3.

> A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse, is guilty of an offense if: (a) the other person is less than 16 years old and the actor is at least 4 years older than the other person; or (b) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or (c) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or (d) the other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.

Id.

old by one who is at least four years older than the victim. The section is intended to incorporate the trend of American jurisdictions to classify offenses against children into different grades based on the age of the victim. Because the drafters of the Code perceive a less serious offense when the victim is an adolescent, they create an entirely new section and grade the offense a misdemeanor. In addition, the Model Penal Code adds the element of an age difference between the offender and victim to exclude "sexual experimentation between contemporaries from the penal law."[102]

In subsection (b), the Model Penal Code drafters recognize the inherent harm when a guardian or a person "otherwise responsible for general supervision of his welfare" has intercourse with a ward. The commentary states that this section is intended to apply to people such as camp supervisors and not intended to cover relationships such as student-teacher and doctor-patient. In fact, the drafters specifically rejected as too broad a provision encompassing anyone responsible for "care, treatment, protection, or education,"[103] and the 1980 commentary notes other "broad" language punishing abuse by one with a "legal duty and authority."[104] While narrowing application of the provision, the Model Penal Code raises the age of the victim to 21 to reflect:

> the realistic assumption that a much older child may be subject to imposition and domination by one who occupies a position of authority and control. Moreover, the guardian or person similarly situated bears a special responsibility for guidance of his ward. Betrayal of that obligation by sexual intimacy is decidedly wrongful even if the child is old enough to take care of himself in most situations.[105]

In subsection (c), the Model Penal Code creates an offense for abuse by one who has "supervisory or disciplinary authority" over a victim who is "in custody of law or detained in a hospital or other institution." Again, this subsection is intentionally drafted narrowly to exclude relationships such as those existing

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[102] *Id.* § 213.1 cmt. 6 at 327.

[103] *See id.* § 213.3 cmt. 3 at 387.

[104] *See id.* § 213.3 cmt. 3 at 388.

[105] MODEL PENAL CODE § 213.3 cmt. 3 at 388

between a student and a teacher. The authors of the 1980 commentary state that "[c]overage of every instance of sexual relations with an employee, student, or other person under one's supervision would reach too far,"[106] even while recognizing that a number of states had enacted significantly more severe provisions prohibiting abuse by one "in a position of authority."[107]

In subsection (d), the Model Penal Code defines the crime of seduction, but the 1980 commentary recognizes the obsolescence of both the reasoning and the existence of such statutes.[108]

e. Abuse by One in a Position of Authority

Prior to the drafting of the Model Penal Code, little attention was given to the rationale that those who abuse a position of authority over a child need to be punished for this abuse.[109] The drafters of the Model Penal Code, however, recognize abuse by a guardian as a problem that should be specifically addressed. As a result, the Model Penal Code creates a specific offense for engaging in sexual intercourse with a ward under the age of twenty-one. The drafters of the 1980 commentary recognize that sexual abuse by a stepfather against a stepdaughter is a common form of abuse, and create an offense to punish one who takes advantage of this relationship, stating: "This provision punishes such conduct for what it is – not incest, but aggravated illicit intercourse achieved by misuse of a position of authority and control."[110]

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[106] *Id.* § 213.3 cmt. 4 at 389.

[107] *Id.* § 213.3 cmt. 4 at 390.

[108] *Id.* § 213.3 cmt. 5 at 393. "Essentially, [the crime of seduction] posits that the female engages in intercourse only to oblige the male and thus might trade that favor for a promise of marriage. Whatever the case may have been in earlier times, this position hardly describes reality today." *Id. See also id.* § 213.3 cmt. 5 at 397 (stating that only three recent state statutory revisions included offenses comparable to a seduction offense).

[109] *See* State v. Gant, 33 S.W.2d 970 (Mo. 1930) (prosecution under Missouri statute prohibiting carnal knowledge of a child under the custody, protection, or employment of another).

[110] MODEL PENAL CODE § 213.3 cmt. 3 at 387.

2. Sexual Contact Offenses

All sexual contact crimes against children not involving penetration are combined in the Model Penal Code offense of sexual assault.[111] Following the structure of the rape section, sexual assault is an offense when committed against a child under ten years old, a child under sixteen (and the defendant is more than four years older) or when the person is under twenty-one and a ward of the offender. The primary elements of the offense are the age of the victim, a touching of a sexual or an intimate part, and a sexual intent on the part of the offender.

While the definition of the offense is comparable to most current statutes, there are two serious discrepancies in the Model Penal Code offense, both related to sentencing. First is the abandonment of the policy of grading the seriousness of the offense based on the age of the victim. All sexual contact crimes against children are treated the same, regardless of whether the victim is three or fifteen years old. The second problematic aspect of the sexual contact offense is the fact that all such offenses are classified as misdemeanors. The drafters grade the offense at such a low level because they perceive the harm of such conduct to be minimal and because they believe

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[111] MODEL PENAL CODE § 213.4.

> A person who has sexual contact with another not his spouse, or causes such other to have sexual conduct with him, is guilty of sexual assault, a misdemeanor, if: . . . (4) the other person is less than 10 years old; or . . . (6) the other person is less than 16 years old and the actor is at least four years older than the other person; or (7) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare . . . Sexual contact is any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

Id.

The Model Penal Code as reprinted in the 1980 commentary in the first sentence uses the phrase "causes such other to have sexual *conduct* with him." However, nowhere in the code is there a definition of "sexual conduct." In contrast, the appendix to the 1986 edition of LaFave and Scott reprinting the Model Penal Code reads "causes such other to have sexual *contact* with him" and some courts referring to this section of the Model Code use the language "sexual contact." In re Juvenile Appeal No. *74802-2*, 790 P.2d 723, 732 (Ariz. 1990); State ex rel. J.L.S., 610 P.2d 1294, 1296 (Utah 1980). *But see* In re P.M., 592 A.2d 862, 868 (Vt. 1991) (using the phrase "sexual conduct"). This apparent error would be significant only if states directly incorporated this language into their codes, which none appear to have done.

the conduct is often "trivial" or of "ambiguous import."[112] The authors of the 1980 commentary recognize the near universal rejection of this by the states, which treat the offense as less serious than penetration offenses, yet more seriously than simple misdemeanors.[113]

3. Summary

The Model Penal Code introduces two significant changes to sexual crimes against children in the United States. First, it solidifies the notion that rape should be divided into at least two categories by creating a more serious offense for intercourse with very young children (under ten), and another, less serious offense for intercourse with adolescents (ages ten to fifteen). Second, in the case of children aged ten through fifteen, the Model Penal Code imposes an age difference requirement between the offender and victim in order to avoid prosecution of consensual sex between contemporaries. While the Model Penal Code often reflects assumptions that today are known to be inaccurate,[114] the Code nonetheless represents a significant step in the development of sexual crimes against children.

III. Punishment Theory

> The broad aim of the criminal law is, of course, to prevent harm to society – more specifically, to prevent injury to the health, safety, morals and welfare of the public.[115]

The reasons traditionally articulated for punishing sexual crimes against children have been uniformly weak. Perhaps because of the overwhelming consensus of its inherent wrongfulness, little thought has gone into justifications for making sexual conduct between adults and children criminal.[116] For this reason the following section presents a framework for analyzing sexual crimes against children by first examining jurispruden-

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[112] *See* MODEL PENAL CODE § 213.4 cmt. 4 at 403.

[113] *See id.* § 213.4 cmt. 4 at 403-05.

[114] *See infra* notes 434-79 and accompanying text.

[115] 1 LAFAVE & SCOTT, *supra* note 80, § 1.2(e), at 14.

[116] *But see* DAVID FINKELHOR, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 14 (1984) (proposing a thoughtful framework for analyzing sexual crimes against children).

tial theories supporting substantive criminal law generally, and then by examining specific rationales that have been presented for prohibiting sexual crimes against children.

A. *The Philosophical Underpinnings for Making Conduct Criminal*

1. Moral Justifications for Imposing Punishment

Moral justifications for imposing criminal punishment have been discussed for as long as society has claimed as one of its responsibilities the definition of crime and the punishment of criminals.[117] Most of these theories can be condensed into two primary perspectives: utilitarian and retributivist.[118]

Founded on the assumption that – above all else – people want to maximize pleasure and minimize pain in their lives, the ultimate goal of a utilitarian is to achieve the greatest good for the greatest number of people.[119] Social decisions are made on the basis of whether certain actions will make most members of society happier or will lessen pain to the majority. Punishment can be justified if the unhappiness caused by the punishment of a few is outweighed by the positive effects the punishment has on making society as a whole happier.[120] As stated by Jeremy Bentham, one of the most noted classical utilitarians: "The art of legislation has two general objects or purposes in view: the one direct and positive, to add to the happiness of the community: the other indirect and negative, to avoid doing anything by

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[117] A very few individuals have argued that society does not, in fact, have the right to punish other members of society. *See* Ronald J. Rychalack, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 300 (1990).

[118] For the Supreme Court's application of utilitarian and retributivist theories in the context of death penalty cases, *see* Gregg v. Georgia, 428 U.S. 153, 183-87 (1976); *id.* at 233-41 (Marshall, J., dissenting); Tison v. Arizona, 481 U.S. 137, 149 (1987); *id.* at 180-81 (Brennan, J., dissenting). *See also* Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343 (1983) and C.L. TEN, CRIME, GUILT, AND PUNISHMENT (1987) (reviewing utilitarian and retributive theories).

[119] *See* Greenawalt, *supra* note 118, at 350-51; *see also* JEREMY BENTHAM, OF LAWS IN GENERAL 32 (H.L.A. Hart, ed., 1970). "The common end of all laws as prescribed by the principle of utility is the promotion of the public good." *Id.*

[120] *See* Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 291 (1993).

which that happiness may be diminished."[121]

In contrast, retributivists strongly object to the idea that treatment of the individual is controlled by what makes the majority feel good. Rather, the retributivist believes that humans should be seen as rational beings who are able to make rational choices and who should be treated as having intrinsic worth as humans. The goal of a retributivist is "not to maximize the welfare of any person or group of people, but to respect the intrinsic worth of individuals as rational beings."[122] Instead of punishing a person because it will increase society's well-being, the retributivist punishes an individual because that person deserves to be punished. While retributivists must defend their process for determining when a person deserves punishment,[123] the core theory posits that individuals must be treated on their own merits as rational human beings, not merely as dispensable detractors from the majority's happiness.

2. Purposes to be Achieved by Punishment

A variety of goals have been advanced as the tangible purposes society hopes to realize through imposing criminal punishment on those who violate designated societal norms of conduct. The goals most commonly discussed are deterrence, incapacitation, rehabilitation, and retribution.[124] While the im-

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[121] BENTHAM, *supra* note 119, at 289. Retributivists cite as one of the major flaws with utilitarianism the disregard of individual rights. As stated by Muller:

> It should be fairly obvious that [a utilitarian] society would not be a particularly pleasant place to run afoul of the law. The defendant is, after all, but one person, and to the extent that society as a whole is made better off by inflicting any manner of punishment on him, society's benefit will prevail over his. The defendant can seek no refuge in a claim that society is violating his individual rights, because the society in which he lives does not recognize such rights. . . . Utilitarianism thus makes a clear statement about the relationship of the individual to his society. That statement is that society may – indeed, should – treat the individual in whatever manner is most likely to increase its welfare. The individual is a means to society's ends.

Muller, *supra* note 120, at 291-92.

[122] Greenawalt *supra* note 118, at 352.

[123] While the retributivist's core belief is that certain conduct is intrinsically right or wrong, there is no objective standard for determining rightness or wrongfulness. *See* Muller, *supra* note 120 (discussing retributivists' attempts to do so).

[124] *See* TEN, *supra* note 118, at 7-8. LaFave & Scott add education and prevention

portance of one or another of these goals will be influenced by a person's philosophical perspective,[125] all four are carried out in varying degrees regardless of the underlying philosophy.[126]

The first goal, deterrence, comes in two forms, specific and general deterrence. Specific deterrence holds that criminal sanctions impose such hardship on the criminal that he or she will not want to suffer again and will thus cease engaging in such conduct. This approach is criticized by those who point to high recidivism rates, which seem to indicate that the criminal system does not effectively deter individuals.[127] The theory of general deterrence presumes that punishment of the few deters society as a whole from committing crime.[128]

Through the second goal, incapacitation, society protects itself from criminals by separating them from society. This goal is at tension with the third goal – rehabilitation – which posits that society has a responsibility to help cure criminals of their criminal tendencies. Those who argue for incapacitation are criticized for merely delaying future criminal conduct if they do nothing to rehabilitate the offender. Of course, rehabilitation is

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as purposes. 1 LAFAVE & SCOTT, *supra* note 80, § 1.5(a)(6), at 31. Both of these purposes are subsumed here under the deterrence goal.

[125] Deterrence, for example, is the hallmark of a utilitarian, while retribution (properly defined) is the key purpose of a retributivist. *See* Muller, *supra* note 120, at 293-94. "Whereas utilitarianism counsels a criminal punishment system centered around deterrence, retributivism demands a system built around the concepts of rights, desert, merit, moral responsibility, and justice." *Id. See also* TEN, *supra* note 118, at 7-8 (identifying deterrence, rehabilitation, and incapacitation as the main utilitarian effects of punishment).

[126] In a classic article on the criminal law, Henry M. Hart states:

> A penal code that reflected only a single basic principle would be a very bad one. Social purposes can never be single or simple, or held unqualifiedly to the exclusion of all other social purposes; and an effort to make them so can result only in the sacrifice of other values which also are important.

Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMPORARY PROBLEMS 401 (1958).

[127] *See* 1 LAFAVE & SCOTT, *supra* note 80, § 1.5, at 31. Of course, a response to this criticism is that there is no base against which to measure current recidivism rates. That is, it is impossible to measure the level crime would be at if there were no criminal sanctions.

[128] LaFave & Scott include education as an additional goal – witnessing the effects of the criminal process teaches members of society what is considered good and bad conduct. *See* 1 LAFAVE & SCOTT, § 1.5, at 34-35.

criticized for being completely ineffective.[129]

Finally, the goal of retribution is variously expressed. To a utilitarian, retribution may be nothing more than bare vengeance. Formal punishment increases the happiness of victims and keeps them from being "frustrated if no such response is forthcoming."[130] The retribution is not related to the intrinsic rightfulness or wrongfulness of the conduct, but rather to the relative happiness of the parties and society. In contrast, a retributivist considers this the cornerstone justification, but not at all for reasons related to vengeance. As one author states:

> [T]he central purpose of punishment is to return the parties and society to the position of equipoise that existed before the wrongdoer committed his wrongful act. . . . [P]unishment is harsh treatment that the wrongdoer deserves as a consequence of his actions and that society has a right to visit upon him. It is not harsh treatment that is calculated simply to increase society's future well-being.[131]

3. Determining Whether Particular Conduct is Criminal

Criminal conduct historically has been analyzed by looking at two main elements: mens rea and actus reus – the evil mind and the bad act. As expressed by the Model Penal Code, the evil mind element – also commonly referred to as intent or fault – requires a person to purposely, knowingly, recklessly, or negligently commit an act in order to be held criminally liable.[132] The actus reus element ensures that a person cannot be penalized for merely thinking evil thoughts; an act must occur before the person can be punished.[133]

Expanding on the traditional elements of mens rea and actus reus, Professor Arnold Loewy provides a helpful framework for deciding which conduct should be deemed criminal. Loewy argues that three factors – culpability, harm, and dangerousness

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[129] *See* David I. Shapiro, Note, *Sentencing the Reformed Addict*, 91 COLUM. L. REV. 2051, 2054 (1991) (citing critics of a rehabilitative model).

[130] Greenawalt, *supra* note 118, at 352.

[131] Muller, *supra* note 120, at 294-95.

[132] MODEL PENAL CODE § 210.1.

[133] *See* 1 LAFAVE & SCOTT, *supra* note 80, §3.2, at 272-82.

– are balanced in determining the criminality of conduct.[134] Loewy first agrees that while a few purely strict liability crimes exist, a person's culpability – mens rea – is a necessary element of a criminal act.[135] However, some crimes require only a minimal level of culpability, and are defined more by their level of harm or dangerousness; most sexual crimes against children are of this type. For example, a typical definition of rape of a child is sexual intercourse with a child under the age of thirteen. In most states, a person's mistaken belief that an eight-year-old is actually seventeen is no defense even when such belief is objectively reasonable; a person's culpability is secondary to the harm caused by sexual intercourse with a child. In fact, "the only intent required is the intent to have intercourse."[136] A state may therefore determine that for sexual crimes against children, culpability is minimized because the harm or dangerousness alone are the more serious elements.

Loewy's second element – harm – corresponds to the element traditionally termed actus reus. An act is outlawed because it has negative consequences to an individual or society at large. While codes are not entirely consistent in determining what type of harm should result in criminal liability, it is almost universally accepted that harm is a significant consideration in defining a crime.[137] In some cases, harm is clearly recognized. For example, murder results in the death of another and rape of a five-year-old results in severe trauma. However, in some situations, identifying the harm is more difficult. Loewy gives the example: "[I]f E surreptitiously enters F's room while F is

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[134] Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law is Predicated*, 66 N.C. L. REV. 283 (1988).

[135] *Id.* at 285-86. *See also infra* notes 214-31 and accompanying text (for a more extended discussion of mental state required in proving sex crimes against children).

[136] *See* Loewy, *supra* note 134, at 286. Loewy gives a different example:

[G]rand larceny may be defined as the theft of property worth at least five hundred dollars. Under such a statute, it is no defense that the thief acted on the reasonable belief that the property was worth less than five hundred dollars. Similarly a nighttime burglar who acts on the honest and reasonable but mistaken belief that it is daytime will be convicted of nighttime burglary. In these cases, the subordination of culpability to harm (larceny) or dangerousness (burglary) is deemed proper because of the culpability inherent in the basic larcenous or burglarious state of mind.

Id. at 286.

[137] *See* Loewy, *supra* note 134, at 288.

sleeping and has sexual intercourse with F, which much to E's surprise pleases F, E will not be guilty of rape."[138] Because the end result is not harmful, there is no offense. Building on this atypical hypothetical, a more typical situation occurs with sexual offenses against adolescents: if a twenty-one-year-old man has sexual intercourse with a fifteen-year-old and the fifteen-year-old participates willingly, claims to enjoy it, and appears to suffer no adverse consequences, should the apparent lack of harm negate criminal liability? Or, is the harm a more general societal harm when standards regarding age of consent are loosened?[139] Legislatures are faced with the decision of determining the level of harm in the individual case, but also must take into account broader societal goals that are advanced by prohibiting such conduct regardless of apparent lack of harm in an individual case.

Harm and culpability are the traditional elements of a crime. Loewy argues that a third element – dangerousness – should be added to the calculation.[140] Typically, this element is an aggravating factor to a crime. For example, simple assault is a crime in itself, but assault with a deadly weapon amounts to aggravated assault because of the increased dangerousness of the offender. Similarly, a person who forcibly rapes and kills a child is treated much more seriously than one who seduces and sexually touches a child.

A person's theory of punishment affects the importance attached to culpability, harm, and dangerousness. A retributivist is concerned with an offender's culpability and responsibility for harm.[141] Less important to the retributivist is the actual harm to society.[142] A retributivist would object to strict liability crimes

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[138] Loewy, *supra* note 134, at 289.

[139] *See infra* notes 483-96 and accompanying text.

[140] The Model Penal Code also identifies these three factors:

> With respect to grading, the Model Code is drafted on the premise that three major factors should control: the culpability and dangerousness manifested by the actor; the presence or absence of factors objectively verifying these conditions in the actor; and the degree of harm inflicted upon the victim.

MODEL PENAL CODE, § 213.1 cmt. 2 at 280.

[141] *See* Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 6 n.20 (1987).

[142] The theories become more complicated when the victim's personhood is also

because the individual's choice is diminished. To the utilitarian, appropriate punishment depends on demonstrable harm to society, regardless of the inherent moral blameworthiness of the conduct.[143] A utilitarian is therefore comfortable with strict liability crimes; if the conduct to be avoided is beneficial to society, the importance of the individual's culpability is diminished.[144]

B. *Reasons Historically Given for Punishing Sexual Penetration Crimes Against Children*

While general themes have been enunciated for several hundred years, a detailed presentation of the rationale underlying sexual crimes against children is elusive. The fundamental theme articulated throughout the years is the understanding that the wrongfulness of sexual conduct with young children is so obvious that courts and legislatures have little need to expand on the premise. While this basic tenet, discussed below, is foundational to understanding sexual crimes against children, other reasons that have been articulated will be examined as well.

1. Protecting Children

One of the most consistently expressed reasons for prohibiting sexual conduct between adults and children is that children below a certain age are incapable of making significant, life-altering decisions. Blackstone stated more than two hundred years ago: "[T]he consent or non-consent is immaterial, as

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taken into account. A true retributivist considers not only the worth of the offender, but also the worth of the victim as a person and therefore must determine a sentence fair to both the victim and offender. This sense of fairness distinguishes retribution from vengeance, in which a victim's worth is affirmed but the offender is debased. *See* Muller, *supra* note 120, at 298.

[143] *See* Muller, *supra* note 120, at 295.

For the strict utilitarian, the important link is between punishment and some set of future consequences like the crime rate. There is no necessary connection between the amount of punishment and the egregiousness of the criminal's behavior, so long as the punishment deters. Neither is there a connection between the amount of punishment and the discomfort the punishment causes the criminal, so long as the punishment deters.

Id.

[144] *See* Greenawalt, *supra* note 118, at 359-60.

by reason of her tender years she is incapable of judgment and discretion."[145] The drafters of the Model Penal Code stated that pre-pubescent children "are plainly incapable of giving any kind of meaningful consent to intercourse and manifestly inappropriate objects of sexual gratification."[146] In one of the more extensive discussions of the issue in reported cases, the Kentucky Supreme Court stated:

> The conclusive presumption of inability to consent is not of recent vintage. It has been with us at least from the reign of Queen Elizabeth of England (1558-1603). Coming to this country as a part of our common law, the doctrine has universally been spoken to by the state legislative bodies. The truth of the facts upon which the presumption has been based are beyond cavil. The state has a recognized interest in the welfare of its citizens who, by reason of age or physical or mental disability, cannot care for themselves. So it is with children of tender years. The conclusive presumption that children less than sixteen years of age are unable to consent to sex acts is but a further extension of the protective arm of government which is universally followed.[147]

While such clear and forceful statements are but occasionally found in reported opinions and society often wavers from the basic tenet of protecting children because they cannot protect themselves, this view of society's responsibility clearly permeates American public opinion and legal reasoning.[148]

2. Protecting the Weaker Sex

The view that the state has a duty to protect those who cannot protect themselves is widely accepted as sufficient rationale when the child victim is very young. For older children, however, courts have posited additional rationale justifying a

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[145] 4 BLACKSTONE, *supra* note 29, at 212.

[146] MODEL PENAL CODE § 213.1 cmt. 6 at 327-28.

[147] Payne v. Commonwealth, 623 S.W.2d 867, 875 (Ky. 1981). *See* Nider v. Commonwealth, 131 S.W. 1024, 1027 (Ky. Ct. App. 1910) (stating that "[t]he statute was enacted to protect female children who are of such tender years as to be unable to appreciate the enormity of this offense"); Goodrow v. Perrin, 403 A.2d 864 (N.H. 1979) (discussing the vulnerability of children to harm and the inability of children to make mature judgments about important matters). *See also infra* notes 492-496 and accompanying text for discussion of rationale provided by modern courts.

[148] *See infra* notes 492-97 and accompanying text.

per se prohibition of sexual conduct between adults and children. This rationale often parts ways from the fundamental premise of protecting children simply because they are children.

The first step down this path is reflected in numerous opinions that express the gender stereotype of young girls as inherently susceptible to abuse and in need of the protection of the state.[149] Numerous courts and commentators have had only female victims in mind, with their views influenced by perceptions of female sexuality and vulnerability.[150] Courts with this mindset hold that girls discover their sexuality during puberty and need to be protected from unscrupulous men who prey on them during this age of weakness:

> The purpose of the . . . statute is to prohibit a girl, while passing through the years of adolescence, from voluntarily becoming the author of her own shame, and set her apart from the lusts of men. The effect of the statute is to render her in law incapable of giving her consent . . . and to punish the man for gratifying his passion with one who in law is incapable of becoming the medium through which the lecherous desire is appeased.[151]

In addition to viewing older girls as inherently weak, courts historically have viewed female virginity in need of special protection. In the view of some courts, the very core of civilization would be destroyed by the loss of female virginity: "[W]henever it shall be true of any country, that the women, as a general fact, are not chaste, the foundations of civil society will be wholly

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[149] There is almost no discussion in American case law of protecting boys from abuse. *But see* Deas v. State, 161 So. 729 (Fla. 1935) (finding that sexual battery statute was "designed to protect the youth of this State of both sexes from the initial violation of the actual condition of sexual chastity, rather than from the consequences of their subsequent voluntary indulgence in unmorality").

[150] *See* MODEL PENAL CODE § 213.1 cmt. 6 at 327-28:

> The Model Code takes the position that special treatment of consensual intercourse with children is warranted both to protect immature females from older males who would take advantage of them and to prevent outrage to parental and community sentiment.

Id.

[151] Parsons v. Parker, 170 S.E. 1, 2 (Va. 1933). *See also* State v. Henderson, 114 P. 30, 32 (Idaho 1911) (finding the purpose to be "to protect girls under the age of eighteen years from conscienceless men, as far as possible").

broken up."[152] Male promiscuity is rarely mentioned and historically has not been considered a reflection of moral decadence.

Courts also have expressed the desire to protect females because they are perceived as emotionally and intellectually incapable of consenting. For example, in *State v. Huntsman*,[153] the complainant was a married 17-year-old who had intercourse with a man other than her husband. The court held that even though she was old enough to consent to marry, she was not old enough to consent to sexual intercourse with a man not her husband. Using interesting reasoning, the court stated:

> The purpose of the statutes establishing the age of consent is to protect young girls from the illicit acts of the opposite sex, but what a woman does by agreeing to marry, and by indulging in intercourse with her husband after marriage, is not either illegal or considered immoral, and is not the kind of sexual acts that the statutes establishing the age of consent is intended to avoid. But such a married woman still is immature and still needs the protection of this kind of law.[154]

As the concurrence intimated, the court may have been better off deciding the case simply on the plain language of the statute without venturing into the realm of female immaturity.[155]

Complicating the desire to protect girls from older men has been the belief of many courts and commentators that adolescent girls often are instigators rather than victims. This conflict is dramatically seen in the Model Penal Code commentary. On the one hand, the commentary expresses the view that older adolescents deserve the protection of the state: "[T]here are post-pubescent girls who may have both appetite for sexual

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[152] People v. Brewer, 27 Mich. 134, 137-38 (1873). *Accord* People v. Kehoe, 55 P. 911 (Cal. 1898); Ledbetter v. State, 199 S.W.2d 112 (Tenn. 1947); People v. Gibson, 134 N.E. 531, 532 (N.Y. Ct. App. 1922) (stating that "[t]he intention of the law [assault on a child] is to protect unmarried girls from carnal copulation, such intercourse being fraught with peril to the morals of the community and to the well-being of the individual").

[153] 204 P.2d 448, 451 (Utah 1949).

[154] *Id.*

[155] *See id.* at 452. "I am unable to see where the consent of the female enters into the question of whether the male has committed carnal knowledge. Whether or not a girl between 13 and 18 consents to the intercourse, the male is guilty." *Id.*

intercourse and rudimentary understanding of it but who are likely to remain seriously deficient in comprehension of the social, psychological, emotional, and even biological consequences of sexuality."[156] On the other hand, the commentators are less than convincing in their support of such laws:

> [T]he chief significance of sexual intimacy [in older adolescents] may be not imposition or constructive assault on an immature girl but rather contravention of prevailing moral standards of the community. Extension of penal sanctions to this case raises all of the problems generally associated with the use of the criminal law to enforce a majoritarian ethical norm that, even on an abstract level, does not command the uniform support of society and that in any event is often belied by common social practice.[157]

3. Preventing Pregnancy

A relatively recent argument justifying the prohibition of sexual intercourse with adolescent girls has focused on the state's interest in preventing teenage pregnancy.[158] This factor was emphasized by the U.S. Supreme Court in one of the few instances in which the Court has addressed the rationale behind laws prohibiting sexual conduct with children. In *Michael M. v. Superior Court*,[159] the Supreme Court held that California's gender-exclusive statutory rape law[160] did not violate the Equal Protection Clause of the U.S. Constitution. The plurality extensively discussed the problems of teenage pregnancy to demonstrate its belief that preventing pregnancy was a reasonable justification for applying the law only to male defendants.

Recognizing that "inquiries into congressional motives or purposes are a hazardous matter,"[161] the plurality cited various

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[156] MODEL PENAL CODE § 213.1 cmt. 6 at 327-28.

[157] *Id.*

[158] *See* State v. Stiffler, 788 P.2d 220 (Idaho 1990) (reviewing the cases).

[159] 450 U.S. 464 (1981).

[160] *Id.* at 466. The crime of unlawful sexual intercourse was defined as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." *Id.* (quoting CAL. PENAL CODE § 261.5 (West Supp. 1981)). The language was amended to be gender-neutral in 1993. *See* Susannah Miller, *The Overturning of Michael M.: Statutory Rape Law Becomes Gender-Neutral in California*, 5 UCLA WOMEN'S L. J. 289 (1994).

[161] 450 U.S. at 469 (brackets and citations omitted).

reasons legislators may have had in enacting the law: "Some legislators may have been concerned about preventing teenage pregnancies, others about protecting young females from physical injury or from the loss of chastity, and still others about promoting various religious and moral attitudes towards premarital sex."[162] The Court held that it would defer to the California Supreme Court's finding that deterring pregnancy was the justification for the law. The Court then found the state's purpose in deterring teenage pregnancies to be a valid reason for the statute:

> Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of its conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly "equalize" the deterrents on the sexes.[163]

In dissent, Justice Brennan disagreed with the plurality's acceptance of the state court's justification for the statute, noting that "[i]t was only in deciding Michael M. that the California Supreme Court decided, for the first time in the 130-year history of the statute, that pregnancy prevention had become one of the purposes of the statute."[164] Justice Brennan asserted:

> [T]he law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable for consenting to an act of sexual intercourse. Because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the State's protection. In contrast, young men were assumed to be capable of making such decisions for themselves; the law therefore did not offer them any special protection.[165]

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[162] *Id.* at 470.

[163] *Id.* at 473.

[164] *Id.* at 496.

[165] *Id.* at 494-96. The case also is useful for Justice Brennan's analysis of pregnancy statistics in California. He notes that there were nearly 50,000 pregnancies of girls

A permutation on the pregnancy prevention argument surfaced in the context of Medicaid reform during the 104th Congress. The Personal Responsibility, Work Opportunity, and Medicaid Restructuring Act of 1996 included a provision directing the Department of Justice to conduct research on the relationship between statutory rape and teenage pregnancy and expressing the "sense" of the Senate that states should "aggressively enforce statutory rape laws."[166] These amendments reflect the sentiment in Congress that sexual intercourse between adult males and teenage females results in significant cost to the country in terms of public assistance. As stated by one Senator: "Budget specialists and community leaders emphasized the necessity of dealing with two underlying welfare problems – teen pregnancy and statutory rape. In examining these problems, we answered two necessary questions: First, who is on welfare? and Second, how did they get there?"[167] The presumptive answer is that a significant portion of teenagers receiving public assistance become pregnant by a man who could be prosecuted for a sex crime against a child. Congress believed that more vigorous enforcement of these laws would result in fewer teen pregnancies and thus fewer children and their unwed mothers needing public assistance.[168]

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aged 13 to 17 in 1976, and approximately 400 males were arrested for statutory rape each year between 1975 and 1978. He concludes from this that "a comparison of the number of arrests for statutory rape in California with the number of acts of sexual intercourse involving minor females in that State would likely demonstrate to a male contemplating sexual activity with a minor female that his chances of being arrested are reassuringly low." *Id.* at 494 n.8.

[166] *See* Pub. L. No. 104-193, § 906, 110 Stat. 2105, 2349-50 (1996) (codified at 42 U.S.C. § 14016).

[167] 141 CONG. REC. S8419 (July 22, 1996) (statement of Sen. Lieberman).

[168] *See* Pub. L. No. 104-3734, § 906, 110 Stat. 2105, 2349-50 (1996).

> It is the sense of the Senate that States and local jurisdictions should aggressively enforce statutory rape laws. . . . [T]he Attorney General shall establish 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 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.

Id. Efforts also have been made by states to lower public expenditures by connecting child support to sex crimes charging statutes. *See, e.g.* DEL. CODE ANN. tit. 11, § 773 (Supp. 1996) ("in cases where acts in violation of this section [unlawful sexual inter-

C. *Reasons Historically Given for Punishing Sexual Contact Crimes Against Children*

Sexual contact crimes not involving penetration have historically been perceived as involving less harm than penetration offenses, with the primary harm seen as "an invasion of individual dignity."[169] Demonstrating the mindset that sexual contact crimes are not as serious as penetrative offenses, the drafters of the Model Penal Code classify sexual assault as a misdemeanor and provide the following commentary:

> The justification for the Model Code position on this point is that sexual contact involves far less chance of serious harm, either physical or emotional, than does oral or anal intercourse or genital copulation. Additionally, it was thought wise to preclude imposition of felony sanctions for kinds of conduct that may be trivial or of ambiguous import.[170]

In contrast to the Model Penal Code perspective, the California Supreme Court has recognized the serious nature of all sexual crimes against children. The court stated that California's statute prohibiting lewd and lascivious acts with children:

> recognizes that children are uniquely susceptible to such abuse as a result of their dependence upon adults, smaller size, and relative naiveté. The statute also assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire. It seems clear that such concerns cannot be satisfied unless the kinds of sexual misconduct that result in criminal liability are greatly expanded where children

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course] have resulted in the birth of a child who is in the custody and care of the victim or the victim's legal guardians, the court shall order that the defendant, as a condition of any probation imposed pursuant to a conviction under this section, timely pay any child support ordered by the Family Court for such child"); FLA. STAT. ANN. § 794.05 (West Supp. 1997) ("If an offense under this section [unlawful sexual activity with certain minors] directly results in the victim giving birth to a child, paternity of that child shall be established. . . . If it is determined that the offender is the father of the child, the offender must pay child support pursuant to the child support guidelines [of Florida statutes]"). Florida also created a felony offense for a man 21 years of age or older to impregnate a girl under 16 years of age. *See id.* § 827.04(3).

[169] *See* MODEL PENAL CODE § 213.4 cmt. 1 at 399.

[170] *Id.* § 213.4 cmt. 1 at 403. The 1980 commentary recognizes that classifying sexual contact offenses against a child as a misdemeanor "departs from the law in many jurisdictions," particularly indecent liberties statutes that provide significant penalties for sexual contact between adults and children. *Id.*

are concerned.[171]

While some courts have taken the view of sexual contact offenses expressed by the California court, many more courts and policy makers have not seriously considered these offenses or provided appropriate remedies for such conduct.

IV. Current Sex Crime Laws

Because each state has the power to regulate conduct to protect the health, safety and morals of people within its borders,[172] there is no uniform approach to defining sexual crimes against children in the United States.[173] Rather, each state fashions its criminal code to carry out its policy objectives, and the states do not attempt to conform to a common structure. Consequently, comparing codes is necessarily an imprecise process. Despite the difficulty inherent in comparing fifty statutory schemes using widely variant language, the fundamental elements of sexual crimes against children can be culled from state codes and placed into three broad categories: conduct, mental state, and age of the victim. In addition to these common elements, important variations existing in many states are examined.[174]

A. *Fundamental Elements*

1. The Act

Two clarifications need to be made relating to the act itself. First is a linguistic difficulty arising from use of the terms "consensual/non-consensual" and "forcible/non-forcible." Neither modifier is accurate in the context of a child victim because the very nature of the offense recognizes that a child is

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[171] People v. Martinez, 903 P.2d 1037, 1042 (Cal. 1995).

[172] *See* Plumley v. Massachusetts, 155 U.S. 461, 478 (1894).

[173] Differences among the states are dramatic. For example, intercourse between a 15-year-old child and an adult is a crime in Georgia resulting in a minimum 10 year sentence. *See* GA. CODE ANN. § 16-6-3(b) (Supp. 1997). The same conduct in Colorado is no offense (unless the adult is a person in a position of trust with respect to the victim). *See* COLO. REV. STAT. § 18-3-403 (1986 & Supp. 1996).

[174] The analysis provided in this section is based on statutes collected through September 1997.

incapable of consenting or resisting; thus, an adult who has intercourse with a child is always engaged in forcible and nonconsensual conduct. Nonetheless, these terms are used frequently. In its most inappropriate usage, claims of "consensual" sex are used to lessen the apparent egregiousness of a defendant's conduct.[175] Use of the term in this sense is inaccurate and not useful. More difficult is the use of these terms either to distinguish sexual crimes against children from rape of an adult or to explain whether a defendant uses physically violent force to compel compliance. "Consent" in this context actually means "a child who expresses willingness to engage in sexual activity with an adult or who does not appear to object to the activity;"[176] and force means "physically violent force beyond the inherent coercion present in any adult-child sexual activity."[177] Because use of

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[175] *See, e.g.*, Mike Tharp, *Tracking Sexual Impulses*, U.S. NEWS & WORLD REPORT, July 7, 1997 (mother of 18-year-old male stating that her son's intercourse with 13-year-old was consensual).

[176] Joel Feinberg recommends using the phrase "expresses willingness." 3 JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 331 (1986). However, this phrase alone is not accurate since in most cases children do not express willingness, but simply fail to protest the act.

[177] Proof of force is not an element of child sexual abuse statutes. However, proof of force may be required if the child sexual abuse statute does not apply because of the age of the child or if the prosecutor charges under a forcible rape statute that provides greater punishment. In providing an otherwise useful discussion on issues of force and consent when the victim is an adolescent, one author repeatedly uses the term "statutory rape" when referring to forcible rape of an adolescent. *See* Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287 (1997). For example, Kitrosser proposes to "further reform statutory rape law," *id.* at 326, by "abolishing the force requirement." *Id.* at 327. By definition, statutory rape laws create a statutory rule that a child below a specific age is incapable of consenting to any sexual activity, forcible or not. Since there is no force requirement with statutory rape, it cannot be abolished. To the extent that Kitrosser is arguing that "it is far too simplistic to suggest that adolescent girls are incapable of making consensual sexual choices in all instances," *id.* at 289, and that, therefore, the consent of the (female) adolescent should be an issue in some cases, a label other than "statutory rape" should be assigned to this new offense. *See also* Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15 (1994) (focusing on "de jure and de facto reforms" of recent years that result in a requirement of proof of non-consent in cases of "statutory rape," *id.* at 19, and arguing for a more careful analysis and definition of consent when the female victim of a sexual offense is a minor).

Demonstrating the difficulty of defining force when the victim of a sexual offense is a child, a divided Seventh Circuit in *United States v. Shannon*, 110 F.3d 382 (7th Cir. 1997) (en banc), discusses many of the policy issues related to child sexual abuse while attempting to discern whether a sexual offense against a minor is a

these phrases is at times semantically impractical, I continue to use the words "forcible/non-forcible" and "consensual/non-consensual" although I intend to convey the more accurate meaning of the above definitions.

A second clarification relates to the scope of this article, which is limited to conduct involving sexual touching between an adult and a child. Excluded, then, are crimes such as exhibition, child pornography, child prostitution,[178] and solicitation of a child, all of which are sexual crimes against children and to a large extent overlap with the crimes discussed herein.[179] The following discussion analyzes only statutes prohibiting sexual touching between adults and children.

a. Penetration

Penetrative conduct prohibited by the states includes vaginal intercourse, anal intercourse,[180] cunnilingus (an act of sex committed with the mouth and the female sex organ), fellatio (an act of sex in which the mouth or lips come into contact with the penis), digital penetration, and object penetration (an act of sex committed with an object – usually defined by statute as inanimate – and the vaginal or anal cavity of another). Some states avoid the use of technical terms and attempt to define the conduct in contemporary language. For example, the Alabama Code states that deviate sexual intercourse is "[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of

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crime of violence within the meaning of the federal sentencing guidelines. *See id.*

[178] While the act of prostitution involves touching, the conduct at issue is not the touching but the act of selling the child for the sexual gratification of another. *See, e.g.*, MINN. STAT. § 609.322 - 609.324 (Supp. 1997).

[179] Child prostitution and child pornography have received significant attention in the legal literature. *See, e.g.*, Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 Fordham Int'l L.J. 163 (1994); Patricia D. Levan, Note, *Curtailing Thailand's Child Prostitution Through an International Conscience*, 9 AM. U. J. INT'L L. & POL'Y 869 (1994); Eddy Meng, Note, *Mail-Order Brides: Gilded Prostitution and the Legal Response*, 28 U. MICH. J.L. REF. 197 (1994); Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849 (1995).

[180] In this article, anal intercourse refers to penile penetration of the anus. Another term for this conduct is sodomy, but because sodomy also can encompasses cunnilingus and fellatio, I do not use this term except when quoting others.

another."[181] Regardless of the language, every state forbids these acts with children with many states clearly defining the conduct.[182]

Some states create one broad offense encompassing all conduct involving sexual penetration of body orifices. Other states retain the older classification, with a rape statute applicable only to vaginal intercourse and other statutes such as sodomy or deviate sexual conduct applicable to all other penetration offenses.[183] In most cases, the penalties are comparable, whether all like offenses are grouped together or separated.

A few states retain in their rape statutes the gender-exclusive language recommended by the Model Penal Code.[184] Most of these states create a comparable offense applicable to male victims, in which case a prosecutor must charge rape when the victim is a girl and sodomy when the victim is a boy.[185] The

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[181] ALA. CODE § 13A-6-60(2) (1994).

[182] *See, e.g.*, ALA. CODE § 13A-6-60(2) (1994); ALASKA STAT. § 11.81.900 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-1401 (West Supp. 1996); ARK. CODE ANN. § 5-14-101 (Michie 1993); COLO. REV. STAT. § 18-3-401 (1990 & Supp. 1996); CONN. GEN. STAT. ANN. § 53a-65 (West 1994 & Supp. 1997); DEL. CODE ANN. tit. 11 § 761 (1995 & Supp. 1996); FLA. STAT. ANN. § 794.011 (West Supp. 1997); HAW. REV. STAT. ANN. § 707-700 (Michie 1994); 720 ILL. COMP. STAT. § 5/12-12 (West 1993); IND. CODE § 35-41-1-9 (Supp. 1996); IOWA CODE § 702.17 (West 1993 & Supp. 1997); KAN. STAT. ANN. § 21-3501 (1995); KY. REV. STAT. ANN. § 510.010 (Banks-Baldwin 1995); ME. REV. STAT. ANN. tit. 17-A, § 251 (West 1983); MD. ANN. CODE art. 27, § 461 (1996); MICH. COMP. LAWS ANN. § 520a (West 1991); MINN. STAT. § 609.341 (Supp. 1997); MO. REV. STAT. § 566.010 (Supp. 1996); MONT. CODE ANN. § 45-2-101(66) (1995); NEB. REV. STAT. § 28-318 (1995); N.H. REV. STAT. ANN. § 632-A:1 (1996); N.C. GEN. STAT. § 14-27.1 (1993); N.D. CENT. CODE § 12.1-20-02 (1985); OHIO REV. CODE ANN. § 2907.01 (Anderson 1996); OR. REV. STAT. § 163.305 (1995); 18 PA. CONS. STAT. ANN. § 3101 (Supp. 1997); R.I. GEN. LAWS § 11-37-1 (1994); S.C. CODE ANN. § 16-3-651 (Law. Co-op. 1985); S.D. Codified L. § 22-22-2 (Michie Supp. 1996); TENN. CODE ANN. § 39-13-501 (Supp. 1996); TEX. PENAL CODE ANN. § 21.01 (West 1994); VT. STAT. ANN. tit. 13, § 3251 (Supp. 1996); WASH. REV. CODE § 9A.44.010 (Supp. 1997); W. VA. CODE § 61-8B-1 (1992); WIS. STAT. ANN. § 948.01 (West 1996); WYO. STAT. ANN. § 6-2-301 (Michie Supp. 1996).

[183] *See* N.Y. PENAL LAW §§ 130.20, .35, & .50 (McKinney 1987 & Supp. 1997).

[184] MODEL PENAL CODE § 213.1 (1994). Rape is limited to "a male who has sexual intercourse with a female not his wife". *Id.* Idaho and New York retain a gender exclusive construction that does not provide for equal punishment of the same offense committed against a male. *See* IDAHO CODE § 18-6101 (Supp. 1996); N.Y. PENAL LAW §§ 130.20 & 130.35 (McKinney 1986 & Supp. 1996); State v. LaMere, 655 P.2d 46 (Idaho 1982) (upholding constitutionality of the Idaho law).

[185] *See* ALA. CODE §§ 13A-6-61 & 13A-6-62 (1994) (rape); ALA. CODE §§ 13A-6-63 & 13A-6-64 (1994) (sodomy).

vast majority of states have elected to create offenses that apply regardless of the gender of the victim.[186]

Other issues raised occasionally include proof of penetration,[187] liability of an actor when the victim performs the act upon the defendant or when the victim performs the act with another at the defendant's direction,[188] and the meaning of

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[186] ALASKA STAT. §§ 11.41.434 to .440 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 13-1404 to -1417 (West Supp. 1996); ARK. CODE ANN. §§ 5-14-103 to -121 (Michie 1993 & Supp. 1995); CAL. PENAL CODE §§ 261.5-289 (West Supp. 1997); COLO. REV. STAT. §§ 18-3-403 to -405 (1990 & Supp. 1996); CONN. GEN. STAT. ANN. §§ 53a-70 to -73a (West 1994 & Supp. 1997); DEL. CODE ANN. tit. 11 §§ 761-778 (1995 & Supp. 1996); FLA. STAT. ANN. §§ 794.05-827.04 (West Supp. 1997); GA. CODE ANN. §§ 16-6-3 and 16-6-4 (Supp. 1997); HAW. REV. STAT. ANN. §§ 707-730 and 707-732 (Michie 1994); 720 ILL. COMP. STAT. §§ 5/12-13 to -16 (West 1993 & Supp. 1997); IND. CODE §§ 35-42-4-3 to -9 (Supp. 1996); IOWA CODE §§ 709.1-709.12 (West 1993 & Supp. 1997); KAN. STAT. ANN. §§ 21-3502 to -3506 (1995); KY. REV. STAT. ANN. §§ 510.010 to .130 (Banks-Baldwin 1995); LA. REV. STAT. ANN. §§ 14:42 to :81.2 (West 1986 & Supp. 1997); ME. REV. STAT. ANN. tit. 17-A, §§ 251-255 (West 1983 & Supp. 1996); MD. ANN. CODE art. 27, §§ 463-464C (1996); MASS. GEN. LAWS ANN. ch. 265, §§ 13B & 22A-24B (West 1990); MICH. COMP. LAWS ANN. §§ 520b-520e (West 1991); MINN. STAT. §§ 609.341 to .345 (Supp. 1997); MISS. CODE ANN. §§ 97-3-65 to -95 (1994); MO. REV. STAT. §§ 566.032 to .068 (Supp. 1996); MONT. CODE ANN. §§ 45-5-501 to -503 (1995); NEB. REV. STAT. §§ 28-319 and 28-320.01 (1995 & Supp. 1996); NEV. REV. STAT. §§ 200.364 to .368 (1995); N.H. REV. STAT. ANN. §§ 632-A:1 to A:4 (1996); N.M. STAT. ANN. §§ 30-9-11 to -13 (Michie Supp. 1996); N.C. GEN. STAT. §§ 14-27.2 to -27.7 (1993 & Supp. 1996); N.D. CENT. CODE §§ 12.1-20-01 to -07 (1985 & Supp. 1995); OHIO REV. CODE ANN. §§ 2907.01 to .06 (Anderson 1996); OKLA. STAT. ANN. tit. 21, §§ 888 & 1111 to 1123 (West Supp. 1997); OR. REV. STAT. §§ 163.355 to .445 (1995); 18 PA. CONS. STAT. ANN. §§ 3122.1 to 3126 (Supp. 1997); R.I. GEN. LAWS §§ 11-37-6 to -8.3 (1994); S.C. CODE ANN. §§ 16-15-140 and 16-3-655 (Law. Co-op. 1985 & Supp. 1996); S.D. Codified L. §§ 22-22-1 to -30.1 (Michie Supp. 1996); TENN. CODE ANN. §§ 39-13-504 to -522 (Supp. 1996); TEX. PENAL CODE ANN. §§ 21.11, 22.011 and 22.021 (West 1994 & Supp. 1997); UTAH CODE ANN. §§ 76-5-401 to -406 (1995 & Supp. 1996); VT. STAT. ANN. tit. 13, §§ 3251 to 3253 (Supp. 1996); VA. CODE ANN. §§ 18.2-61 to -67.10 & 18.2-370 to -370.1 (Michie Supp. 1996); WASH. REV. CODE §§ 9A.44.073 to .096 (Supp. 1997); W. VA. CODE §§ 61-8B-1 to -9 & 61-8D-5 (1992 & Supp. 1996); WIS. STAT. ANN. §§ 948.01 to .09 (West 1996); WYO. STAT. ANN. §§ 6-2-301 to -305 (Michie Supp. 1996).

[187] *See* Rigelhaupt, *supra* note 58.

[188] *See, e.g.*, ALA. CODE § 13A-6-60 (1994) (deviate sexual intercourse is "[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another"); KY. REV. STAT. ANN. § 510.010(1) (Banks-Baldwin 1995) (deviate sexual intercourse is "[a]ny act of sexual gratification involving the sex organs of one person and the mouth or anus of another"); MINN. STAT. § 609.341(12) (1996) (sexual penetration includes "intrusion however slight into the genital or anal openings . . . of the body of the actor or another person by any part of the body of the complainant or by any object used by the complainant for this purpose"); N.J. STAT. ANN. § 2C:14-1(c) (West 1996) (sexual

"object" for purposes of object penetration.[189] Most such issues can be avoided by clear language in the text of sex crimes statutes.

b. Contact

Sexual contact is any touching of the intimate parts of another with sexual intent,[190] with "intimate parts" typically defined as the breast, sexual organs, groin area, and buttocks. States may include within their definition of sexual contact causing a victim to touch the defendant's sexual organs;[191] causing the victim to touch the victim's own genitals;[192] or touching the victim with an object.[193] Many states include language specifying that touching intimate parts with sexual intent through

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penetration is "vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor's instruction").

[189] *See* People v. Keeney, 24 Cal. App. 4th 886 (Cal. Ct. App. 1994) (defendant who forced victim to penetrate her own vagina properly convicted of penetration by a foreign object); State v. Bryant, 670 A.2d 776 (R.I. 1996) (defendant who directed child to insert her finger in her vagina could not be prosecuted for first degree child molestation because he did not engage in sexual penetration). *See also* Rigelhaupt, *supra* note 58 (discussing these and other issues).

[190] *See, e.g.*, ALA. CODE § 13A-6-60(3) (1994); ALASKA STAT. § 11.81.900(53) (Michie 1996); ARK. CODE ANN. § 5-14-101(8) (Michie Supp. 1995); COLO. REV. STAT. § 18-3-401(4) (1990 & Supp. 1996); DEL. CODE ANN. tit. 11, § 761(f) (1995); HAW. REV. STAT. ANN. § 707-700 (Michie 1994); 720 ILL. COMP. STAT. § 5/12-12(e) (West 1993); IOWA CODE § 709.12(2) (West 1993); ME. REV. STAT. ANN. tit. 17-A § 251(D) (West 1983 & Supp. 1996); MICH. COMP. LAWS ANN. § 750.520a(k) (West 1991); MINN. STAT. § 609.341(11)(a)(iv) (Supp. 1997); NEB. REV. STAT. § 28-318(5) (1995 & Supp. 1996); N.H. REV. STAT. ANN. § 632-A:1(IV) (1996); N.J. STAT. ANN. § 2C:14-1(d) (West 1996); N.Y. PENAL LAW § 130.00(3) (McKinney 1987 & Supp. 1997); R.I. GEN. LAWS § 11-37-1(7) (1994); TENN. CODE ANN. § 39-13-501(6) (Supp. 1996); VA. CODE ANN. § 18.2-67.10(6) (Michie Supp. 1996); W.VA. CODE ANN. § 61-8B-1(6); WIS. STAT. ANN. § 948.01(5) (West 1996); WYO. STAT. ANN. § 6-2-301(a)(vi) (Michie Supp. 1996).

[191] *See, e.g.*, ALASKA STAT. § 11.81.900(53) (Michie 1996); MINN. STAT. § 609.341(11)(a)(ii) (Supp. 1997) (sexual contact includes "the touching by the complainant of the actor's, the complainant's or another's intimate parts"); OHIO REV. CODE ANN. § 2907.01(b) (Anderson 1996) ("'sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person"); OR. REV. STAT. § 163.305(6) (1995) ("'sexual contact' means any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor").

[192] *See* ALASKA STAT. § 11.81.900(53) (Michie 1996).

[193] *See* ARIZ. REV. STAT. ANN. § 13-1401(2) (West Supp. 1996).

clothing constitutes an offense.[194] Countless other variations exist and new approaches are created regularly.[195]

c. Indecent Liberties

A third category of statutes does not define conduct expressly in terms of sexual contact or sexual penetration. Rather, these statutes broadly prohibit taking "immodest, immoral or indecent liberties" with a child.[196] The offense of indecent liberties can include virtually any sexual conduct with children that violates standards of decency, including (but not limited to) sexual penetration and contact offenses. As defined by an appellate court interpreting Massachusetts' indecent assault and battery statute: "A touching is indecent when, judged by the normative standard of societal mores, it is violative of social and behavioral expectations in a manner which is fundamentally offensive to contemporary moral values and which the common sense of society would regard as immodest, immoral and improper."[197]

In some states, the indecent liberties statute is the only statute criminalizing sexual contact with children.[198] The policy

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[194] *See* 720 ILL. COMP. STAT. § 5/12-12(e) (West 1993).

> [A]ny intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, for the purpose of sexual gratification or arousal of the victim or the accused.

Id.

[195] *See e.g.*, WIS. STAT. ANN. § 948.01(5)(b) (West 1996). In 1995, Wisconsin amended its sexual contact statute to include:

> Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

Id.

[196] *See* GA. CODE ANN. § 16-6-4 (Supp. 1997) (child molestation defined as "any immoral or indecent act to or in the presence of any child"); N.C. GEN. STAT. § 14-202.1 (1993) (indecent liberties); WYO. STAT. ANN. § 14-3-105 (Michie Supp. 1996) (immoral or indecent acts).

[197] Commonwealth v. Lavigne, 676 N.E.2d 1170 (Mass. App. Ct. 1997) (quotations and citations omitted) (finding that touching the inner thigh of a fully clothed boy within three inches of his genitals was an indecent touching).

[198] *See, e.g.*, GA. CODE ANN. § 16-6-4 (Supp. 1997); S.C. CODE ANN. § 16-15-140

objectives as enunciated by courts in these states often are equally as broad as the language of the statute: "We perceive the law against child molestation to proscribe acts which offend against the public's sense or propriety as well as to afford protection to a child's body in those cases where the act or acts are more suggestive of sexually oriented misconduct than simply assaultive in nature."[199]

In other states the offense is distinct from sexual penetration or sexual contact offenses, with courts explicitly recognizing the indecent liberties statute as encompassing broader policy objectives. For example, California Penal Code section 288 prohibits lewd or lascivious acts "upon or with the body, or any part or member thereof, of a child who is under the age of 14 years."[200] The California Supreme Court held that the statute covers any touching of a child with sexual intent, not just touching of a child's intimate parts,[201] finding that in contrast to other sex offenses that describe the conduct in "precise and clinical terms,"[202] section 288 was intended to be cast in general terms to provide special protection to children. As a result, touching any part of the body of a child with sexual intent can be an offense in California.

When such statutes are challenged as unconstitutionally overbroad, courts examine whether they describe the conduct "with reasonable certainty and in a fashion whereby a person of ordinary intelligence is given fair notice that his contemplated conduct is forbidden."[203] Courts have had little difficulty determining that people of ordinary intelligence would know that sexual penetration and sexual contact offenses involving children violate a societal "standard of morality."[204]

(Law. Co-op. Supp. 1996); WYO. STAT. ANN. § 14-3-105 (Michie Supp. 1996).

[199] Chapman v. State, 318 S.E.2d 213 (Ga. 1984) (child molestation is defined by statute as an immoral or indecent act).

[200] CAL. PENAL CODE § 288 (West Supp. 1997). Indecent liberties statutes typically do not limit the conduct to activity involving touching. To that extent, the California statute is more narrow than indecent liberties statutes in many states.

[201] *See* People v. Martinez, 903 P.2d 1037 (Cal. 1995).

[202] *See id.* at 1041.

[203] Sorenson v. State, 604 P.2d 1031, 1034 (Wyo. 1979).

[204] *See id.* (sexually touching the breast of a twelve-year-old); *see also* Chapman v. State, 318 S.E.2d 213 (Ga. Ct. App. 1984) (pulling 10-year-old girl's shirt off during burglary constituted immoral or indecent act); Commonwealth v. Conefrey, 640

d. Continuous Abuse

A few states specify that an offender who repeatedly abuses a child over a period of time commits a continuous abuse offense.[205] These statutes are an attempt to remedy the problem of young children who are repeatedly abused, yet who are unable to specify dates within which the acts occur. By charging the more general offense of continuous abuse, the prosecution does not have to prove the date of each act.[206] At issue is not the individual acts of penetration or contact, but the continuous course of such conduct.[207]

Wording of existing statutes varies slightly. Some states require that the offender reside in the home, have continuous access to the child,[208] or commit a specified number of offenses against the child during a specified period of time.[209] Other

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N.E.2d 116 (Mass. App. Ct. 1994) (defendant's placing eight-year-old daughter's hand on his penis and rubbing penis against her constituted indecent assault and battery); People v. Hicks, 56 N.W. 1102 (Mich. 1893) (proof that defendant touched the child's private parts is not necessary to constitute indecent liberties); State v. Elam, 273 S.E.2d 661 (N.C. 1981) (sexually touching and placing mouth over penis of twelve-year-old boys constituted indecent liberties); Ochoa v. State, 848 P.2d 1359 (Wyo. 1993) (sexual intercourse with a minor proscribed by indecent liberties statute); Lovato v. State, 901 P.2d 408 (Wyo. 1995) (anal intercourse proscribed by indecent liberties statute); Roberts v. State, 912 P.2d 1110 (Wyo. 1996) (defendant's lying in bed with daughter, rubbing her side, and nuzzling her neck with his mouth and nose constituted indecent liberties for purposes of revocation of probation).

[205] *See, e.g.* ARIZ. REV. STAT. ANN. § 13-1417 (West Supp. 1996) (continuous sexual abuse); CAL. PENAL CODE § 288.5 (West Supp. 1997) (continuous sexual abuse); COLO. REV. STAT. § 18-3-405(d) (1990 & Supp. 1996); DEL. CODE ANN. tit. 11, § 778 (Supp. 1996); HAW. REV. STAT. § 703-733.5 (Michie Supp. 1997); N.D. CENT. CODE § 12.1-20-03.1 (Supp. 1997); WIS. STAT. ANN. § 948.025 (West 1996).

[206] *See* People v. Barron, 34 Cal. App. 4th 1003, 1013 (1995). Quoting the legislative history to California's continuous abuse statute, the court stated that:

> the child, because of age or the frequency of the molestations, or both, often is unable to distinguish one incident from another in terms of time, place, or other particulars, and as a consequence prosecutors are unable to provide the specificity of charges necessary to overcome the constitutional due process problems.

Id.

[207] *See* People v. Barron, 34 Cal. App. 4th 1003, 1014 (1995). "The focus of the statute is on the repetitive nature of the molestations . . . and not . . . on the individual components." *Id.*

[208] *See* CAL. PENAL CODE § 288.5 (West Supp. 1997); DEL. CODE ANN. tit. 11, § 778 (Supp. 1996) (requiring the defendant to reside in the home or have recurring access to the child); HAW. REV. STAT. § 707-733.5 (Michie Supp. 1997).

[209] *See* ARIZ. REV. STAT. ANN. § 13-1417 (West Supp. 1996) (three or more acts

statutes are drafted more broadly, requiring only that a certain number of assaults be committed against a child during any period of time.[210] The statutes indicate that the prosecution need not achieve jury unanimity on specific acts with specific dates, but rather need only achieve unanimity on the fact that multiple acts occurred within the time parameter.[211] Statutes also instruct that if a continuous acts offense is proven, the defendant cannot be charged with the underlying offenses occurring during the same time period.[212] Similarly, an acquittal in a case charged under a continuous abuse statute will likely bar recharging for any offenses committed during the charged period, even if the prosecutor can later establish a specific event during that time. The practical effect of these statutes varies. For example, if sufficient evidence exists to prove the individual offenses, the combined penalties may be greater than the penalty for a single continuous abuse offense.[213] Moreover, by filing

committed over a period of three months or more); CAL. PENAL CODE § 288.5 (West Supp. 1997) (acts committed over a period of time not less than three months in duration); N.D. CENT. CODE § 12.1-20-03.1 (Supp. 1997) (three or more acts during three or more months).

[210] *See* WIS. STAT. ANN. § 948.025 (West 1996) (requiring only that three or more offenses occur "within a specified period of time").

[211] *See* ARIZ. REV. STAT. ANN. § 13-1417(C) (West Supp. 1996); CAL. PENAL CODE § 288.5(b) (West Supp. 1997); COLO. REV. STAT. § 18-3-405(d) (1990 & Supp. 1996); DEL. CODE ANN. tit. 11, § 778 (Supp. 1996); HAW. REV. STAT. § 707-733.5 (Michie Supp. 1997); N.D. CENT. CODE § 12.1-20-03.1 (Supp. 1997); WIS. STAT. ANN. § 948.025(2) (West 1996). *See* People v. Barron, 34 Cal. App. 4th 1003, 1014 (1995); People v. Avina, 14 Cal. App. 4th 1303 (1993).

[212] *See* ARIZ. REV. STAT. ANN. § 13-1417(D) ; CAL. PENAL CODE § 288.5(c) (West Supp. 1997); HAW. REV. STAT. § 707-733.5 (Michie Supp. 1997); N.D. CENT. CODE § 12.1-20-03.1 (Supp. 1997); WIS. STAT. ANN. § 948.025(3) (West 1996). Arizona and California allow the state to charge the underlying offenses in the alternative. A California court has interpreted this to mean that the defendant may be convicted of both the continuous abuse offense and the underlying offenses, but may not be punished for both convictions. *See* People v. Valdez, 23 Cal. App. 4th 46, 49 (1994).

[213] *Compare* WIS. STAT. ANN. § 948.025 (West 1996) (repeated sexual assault, a class B felony punishable by incarceration up to 40 years) *with* WIS. STAT. ANN. § 948.02(1) (West 1996) (single act of sexual assault of a child under the age of 13, a class B felony). However, for offenses involving children between 13 and 16, charging continuous abuse may be more advantageous. *See* WIS. STAT. ANN. § 948.02(2) (West 1996) (single act of sexual assault of a child aged 13-16 a class C felony punishable by incarceration up to 10 years).

In general, prosecutors charge the individual counts if the child is able to articulate different acts and continuous abuse if the child is only able to articulate general events. *See* AMERICAN PROSECUTORS RESEARCH INSTITUTE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 207-08 (2d ed. 1993).

individual charges, double jeopardy issues may be avoided if there is insufficient evidence to convict on one of the charges.

2. Mental State

a. Mental State and the Victim's Age

Sexual crimes against children often are referred to as strict liability crimes, which, unlike most other criminal offenses,[214] do not require proof of the actor's intent. While the label of "strict liability" has the potential to cause confusion – since the prosecution may be required to prove defendant's mental state as to other elements – it is accurate to state that the prosecution is generally not required to prove the actor knows the age of the victim.[215] Thus, a defendant is held strictly liable as to this element of the offense.

Strict liability as to age has been repeatedly challenged by defendants asserting a defense of reasonable mistake of age.[216] A vast majority of states preclude defendants from raising this defense for sexual penetration or contact offenses committed against children.[217] In such cases, courts hold that the age of the victim is so low that "an honest belief that the victim was somewhat older is deemed insufficient to alter the character of the actor's conduct."[218] Although still not widely accepted in the United States, the defense is more likely to be available to those

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[214] For example, a prosecution for simple assault requires proof that the defendant purposely, knowingly or recklessly caused bodily injury to another. *See* MODEL PENAL CODE § 211.1.

[215] *But see* OHIO REV. CODE ANN. § 2907.04 (Anderson 1996) (requiring proof of a knowing or reckless mental state with regard to the victim's age for victims 13 to 15 years old).

[216] The leading English case is Regina v. Prince, 13 Cox C. C. 138 (1875), in which the court held that a reasonable mistake of age was no defense to taking a girl under the age of 16 from her father. For a discussion of the history of the mens rea requirement in England *see* Regina v. Hess, 59 C.C.C. 3d 161 (Can. 1990) (overturning statutory rape statute on grounds that there must be showing of mens rea). For a general discussion of the history of mens rea, *see* Paul E. Raymond, *The Origin and Rise of Moral Liability in Anglo-Saxon Criminal Law*, 15 OR. L. REV. 93, 110 (1936) (stating that the concept was first enunciated by St. Augustine: "Nothing makes the tongue guilty, but a guilty mind" (*reum linguam non facit nisi mens rea*)).

[217] *See* Rosanna Cavallaro, *Criminal Law: A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 819 n.21 (1996).

[218] *Id.* at 819 n.21.

offenses applicable to older adolescent victims.[219]

b. Mental State and the Act

While many sexual penetration statutes do not specifically provide that the act must be accomplished with sexual intent – only proof of the age of the victim and the act of penetration are required – it is not difficult to imagine situations of digital or object penetration in which proof of sexual intent would seem necessary.[220] For example, a physician prosecuted for sexual conduct involving a patient may argue that the penetration was accomplished for a bona fide medical purpose.[221] Similarly,

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[219] The leading case in the United States for states allowing a mistake of age defense is People v. Hernandez, 393 P.2d 673 (Cal. 1964) (allowing reasonable mistake of age in prosecution for rape of a child under the age of 18). For a more recent decision, *see* Garnett v. State, 632 A.2d 797 (Md. 1993) (not allowing reasonable mistake of age in prosecution of rape of a child under the age of 14 as a matter of statutory interpretation, but presenting an argument critical of those jurisdictions not allowing a mistake of fact defense); *see also infra* notes 510-518 and accompanying text (for additional discussion of reasonable mistake of age defense); MODEL PENAL CODE § 213.6(a) (allowing a reasonable mistake of age defense when the offense depends on the age child being an age above 10, but prohibiting such a defense when the age of the child for the offense is below 10); Cavallaro, *supra* note 217, at 819 n.21; Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993); Larry W. Myers, *Reasonable Mistake as to Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1966); W.E. Shipley, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 8 A.L.R. 3D 1100 (1966 & Supp. 1991); Richard Singer, *Strict Criminal Liability: Alabama State Courts Lead the Way into the Twenty-First Century*, 46 ALA. L. REV. 47 (1994).

[220] In contrast, when penile penetration of any bodily orifice or oral penetration of the anus or genitals is involved, it *is* difficult to imagine a scenario in which sexual intent would be disputable. As is often the case, though, reality surpasses imagination. *See* State v. Griffith, 660 A.2d 704 (R.I. 1995) (reading into a first degree child molestation sexual assault statute – an offense that may involve sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion – a requirement that the jury find the defendant acted for the purpose of sexual arousal or gratification); State v. Kargar, 679 A.2d 81 (Me. 1996) (court accepted defendant's argument that placing his mouth over the penis of his infant son was a cultural practice evincing no sexual intent even though a sexual act is defined by statute as "direct physical contact between the genitals of one and the mouth . . . of the other"). *Cf.* State v. Bryant, 670 A.2d 776, 784-85 (R.I. 1996) (Bourcier, J., dissenting) (arguing that first degree child molestation statute codifies common law rape and only requires proof of the age of the victim and penetration).

[221] *See* Michael Alexander, *Pediatrician Guilty of Fondling Patients*, NEWSDAY, June 16, 1992, at 26 (defendant argued his touching was in accordance with acceptable medical procedures). For discussion of issues related to abuse by doctors when the victim is an adult, see Jay M. Zitter, Annotation, *Conviction of Rape or Related Sexual*

a father prosecuted for digitally penetrating his daughter may argue he was teaching her proper hygiene or applying medication. While each of these scenarios is specifically addressed by statute in some states,[222] the lack of such language highlights a potential anomaly in other states.[223] Although it is highly unlikely that any prosecutor would proceed when penetration is accomplished for a legitimate hygienic or medical reason, precise drafting of the charging statute to cover this gap is advisable.

Whereas the scenarios described above are largely hypo-

Offenses on Basis of Intercourse Accomplished Under the Pretext of, or in the Course of, Medical Treatment, 65 A.L.R.4TH 1064 (1995).

[222] Many states define sexual penetration to exclude penetration performed for a bona fide medical reason. (The lists in this and the following footnote are representative only and not exhaustive). *See, e.g.*, DEL. CODE ANN. tit. 11, § 761(c) (1995) (object "does not mean a medical instrument used by a licensed medical doctor or nurse for the purpose of diagnosis or treatment"); KAN. STAT. ANN. § 21-3501(1) (1995) (sexual intercourse "does not include penetration of the female sex organ by a finger or object in the course of the performance of generally recognized health care practices or a body cavity search"); KY. REV. STAT. ANN. § 510.010(8) (Banks-Baldwin 1995) (sexual intercourse "does not include penetration of the sex organ or anus by a foreign object in the course of the performance of generally recognized health care practices"); N.C. GEN. STAT. § 14-27.1(4) (Supp. 1996) ("it shall be an affirmative defense that the penetration was for accepted medical purposes"); S.D. CODIFIED LAWS § 22-22-2 (Michie Supp. 1996) ("[p]ractitioners of the healing arts lawfully practicing within the scope of their practice, which determination shall be conclusive as against the state and shall be made by the court prior to trial, are not included within the provisions of this section"); VA. CODE ANN. § 18.2-67.2 (Michie Supp. 1996) (object sexual penetration an offense "other than for a bona fide medical purpose"). In 1996 Florida added an exception for conduct that would be hard to imagine ever constituting a bona fide medical purpose. FLA. STAT. ANN. § 794.05 (West Supp. 1997) ("'sexual activity' means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; however, sexual activity does not include an act done for a bona fide medical purpose").

Some states specifically require proof of sexual intent with digital or object penetration. *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 521(C) (West 1983 & Supp. 1996) (sexual act with an object must be "done for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact"); MD. ANN. CODE art. 27, § 461(e) (1996) (sexual act with an object must be "reasonably construed as being for the purposes of sexual arousal or gratification or for abuse of either party and if the penetration is not for accepted medical purposes"); MONT. CODE ANN. § 45-2-101(66) (1995) (sexual intercourse includes object penetration "for the purpose of arousing or gratifying the sexual desire of either party"); NEB. REV. STAT. § 28-318(6) (1995) (object penetration "which can be reasonably construed as being for nonmedical or nonhealth purposes").

[223] Many states have no explicit sexual intent requirement in the definition of object penetration. *See also* MINN. STAT. § 609.341(12) (1996) and N.H. REV. STAT. ANN. 632-A:1(V) (1995) (describing two examples).

thetical when sexual penetration is involved, proof of intent as to the act is common in the context of contact offenses. In contrast to sexual penetration statutes, sexual contact statutes specify that touching be done with sexual intent. For example, an Idaho statute states, in part: "It is a felony for any person eighteen years of age or older, with the intent to gratify the lust, passions, or sexual desire of the actor, minor child or third party, to cause or have sexual contact with such minor child."[224] Thus, a prosecutor must prove the "intent to gratify the lust, passions, or sexual desire" and must overcome claims that the touching was accidental or for a non-sexual purpose, such as touching while wrestling, teaching a child how to bathe, or touching accidentally.[225] Such cases are routinely proven and the sufficiency of the evidence rarely addressed in published opinions.[226]

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[224] IDAHO CODE § 18-1506 (Supp. 1996) (numbering and additional provisions omitted).

[225] *See* AMERICAN PROSECUTORS RESEARCH INSTITUTE, *supra* note 213, at 449.

[226] *See* State v. Fletcher, 554 N.W.2d 568 (Iowa 1996) (evidence that defendant touched his stepdaughter in the vaginal area with his hands sufficient to prove a "sex act" occurred); Parkinson v. State, 909 P.2d 647, 656 (Idaho 1996) (evidence that defendant rubbed victim's buttocks and breasts while she was in bed at night sufficient to prove an intent to gratify a sexual desire); State v. Ramos, 731 P.2d 837, 839 (Kan. 1987) (evidence sufficient to prove defendant's specific intent to "arouse or satisfy the sexual desires of either the child or the offender or both").

A Utah court provided a unique defense for a defendant convicted of a sexual contact offense. In *State v. Lindgren*, 910 P.2d 1268 (Utah Ct. App. 1996), defendant was convicted of aggravated sexual abuse based on three incidents involving his daughter: placing a lubricated vibrator in her vagina, having her take off her pants so he could show her where sperm goes, and having her expose her developing breasts to him more than 50 times. *See id.* The first two incidents formed the basis for a sexual abuse conviction and the repeated exposures of the breast provided the aggravating factor. *See id.* Defendant argued that he should have been allowed to present evidence that his sisters had been touched in the breasts in the same way while they were developing and therefore defendant thought his acts were for educational or medicinal purposes. *See id.* The appellate court agreed, finding the trial court's exclusion of such evidence reversible error. *See id.*

The defense of innocent touch is more commonly discussed in the context of examining whether other act evidence is admissible. *See, e.g.* FED. R. EVID. 404(b). When a defendant's specific sexual intent is at issue, prosecutors often attempt to introduce prior instances of the defendant's sexual conduct with children to show that the defendant has demonstrated a lustful intent for children in the past, thus reducing the likelihood that the present conduct was innocent. Some courts readily admit such evidence; others are more hesitant. *See* 2 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 6.18, at 39-51; David P. Bryden & Roger C. Park, *Other Crimes Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 553-54 (1994). In states where it is generally admissible, there is an additional issue of whether the

There are several variations among the states as to the intent required, with some states expanding the mental state element to non-sexual purposes. These purposes include intent to degrade or humiliate the victim,[227] intent to arouse or satisfy "aggressive desires,"[228] intent to "abuse either party,"[229] and intent to cause "substantial emotional or bodily pain."[230] Other states allow proof of the defendant's purpose to sexually arouse the victim as sufficient.[231] Whatever the terms of the statute, evidence specifically proving these purposes must be presented in order to obtain a conviction.

3. Age of the Victim

A commonly sought statistic is the age at which a child can consent to sexual activity with an adult in each of the fifty states. This question was more easily answered by Blackstone, examining one offense in one jurisdiction. Not only is there more than one offense to which the term could apply, there are multiple jurisdictions in which it is defined. Consequently, a higher degree of precision than is commonly afforded the term "age of consent" is necessary to clearly discuss the issue of age. Since most states now divide sex offenses against children into two or three categories, ranging from the most serious offenses applicable to only the youngest children to the less serious offenses applicable to the oldest adolescents, an examination of these categories is necessary.

a. Most Serious Offenses

Historically, the most serious penetration offense was called rape, statutory rape, or carnal knowledge of a child, and

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prosecution may introduce such evidence in its case-in-chief. *See* State v. Ondricek, 535 N.W.2d 872, 874 (S.D. 1995) (discussing the approaches of various jurisdictions).

227 *See* CONN. GEN. STAT. ANN. § 53a-65 (West 1994); N.J. STAT. ANN. § 2C:14-1(d) (West 1996).

228 *See* N.D. CENT. CODE § 12.1-20-02(4) (1985); MINN. STAT. § 609.341(11) (Supp. 1997).

229 *See* MD. ANN. CODE art. 27, § 461(f) (1996).

230 *See* UTAH CODE ANN. § 404.1 (Supp. 1996).

231 *See, e.g.* 720 ILL. COMP. STAT. § 5/12-12(e) (West 1993); IND. CODE §§ 35-42-4-3(b), 35-42-4-6 and 35-42-4-9(b) (Supp. 1996); KY. REV. STAT. ANN. § 510.010(7) (Banks-Baldwin 1995).

the age at which a child could consent was either ten or twelve.[232] While some states retain one of these low ages, most states have raised the age to thirteen or fourteen. Representative of the language is Virginia's rape statute:

> If any person has sexual intercourse with a complaining witness who is not his or her spouse or causes a complaining witness, whether or not his spouse, to engage in sexual intercourse with any person and such act is accomplished with a child under age thirteen as the victim, he or she shall be guilty of rape.[233]

In some states one offense covers all penetration offenses; others, like Virginia, have different offenses such as sodomy[234] covering other sexual penetration offenses.

Table One presents the age below which a child must be for a state's most serious sexual penetration offense to apply.[235]

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[232] *See supra* notes 37-38 and accompanying text.

[233] VA. CODE ANN. § 18.2-61 (Michie Supp. 1996) (numbering and subsections omitted).

[234] *See id.* § 18.2-67.1.

[235] UNDER 10: S.D. CODIFIED LAWS § 22-22-1 (Michie Supp. 1996); VT. STAT. ANN. tit. 13, § 3253 (Supp. 1996). UNDER 11: N.Y. PENAL LAW §§ 130.35 & 130.50 (McKinney 1987 & Supp. 1997); S.C. CODE ANN. § 16-3-655 (Law. Co-op. 1985). UNDER 12: ALA. CODE § 13A-6-61 (1994); FLA. STAT. ANN. § 794.011; IOWA CODE § 709.3 (West 1993); KY. REV. STAT. ANN. § 510.040 (Banks-Baldwin 1995); LA. REV. STAT. ANN. § 14:42 (West 1986 & Supp. 1997); OR. REV. STAT. § 163.375 (1995); WASH. REV. CODE § 9A.44.073 (Supp. 1997); W. VA. CODE § 61-8B-3 (1992); WYO. STAT. ANN. § 6-2-303 (Michie Supp. 1996). UNDER 13: ALASKA STAT. § 11.41.434 (Michie 1996); CONN. GEN. STAT. ANN. § 53a-70 (West Supp. 1997); 720 ILL. COMP. STAT. § 5/12-14.1 (West Supp. 1997); MICH. COMP. LAWS ANN. § 750.520b (West 1991); MINN. STAT. § 609.342 (Supp. 1997); N.H. REV. STAT. ANN. § 632-A:2(I) (1996); N.J. STAT. ANN. § 2C:14-2 (West 1996); N.M. STAT. ANN. § 30-9-11 (Michie Supp. 1996); N.C. GEN. STAT. § 14-27.2 (Supp. 1996); OHIO REV. CODE ANN. § 2907.02 (Anderson 1996); 18 PA. CONS. STAT. § 3125 (Supp. 1997); TENN. CODE ANN. § 39-13-522 (Supp. 1996); VA. CODE ANN. § 18.2-61 (Michie Supp. 1996); WIS. STAT. ANN. § 948.02 (West 1996). UNDER 14: ARK. CODE ANN. § 5-14-103 (Michie 1993); CAL. PENAL CODE § 288(a) (West Supp. 1997); DEL. CODE ANN. tit. 11, § 773 (Supp. 1996); HAW. REV. STAT. ANN. § 707-730 (Michie 1994); IND. CODE § 35-42-4-3 (Supp. 1996); KAN. STAT. ANN. § 21-3502 (1995); ME. REV. STAT. ANN. tit. 17-A, § 253 (West 1983 & Supp. 1996); MD. ANN. CODE art. 27, §§ 463 and 464A (1996); MISS. CODE ANN. § 97-3-65 (1994); MO. REV. STAT. § 566.032 (Supp. 1996); NEV. REV. STAT. § 201.195 (Supp. 1997); OKLA. STAT. ANN. tit. 21, § 1114 (West Supp. 1997); TEX. PENAL CODE ANN. § 22.021 (West 1994); UTAH CODE ANN. § 76-5-402.1 (Supp. 1996). UNDER 15: ARIZ. REV. STAT. ANN. § 13-1405 (West Supp. 1996) COLO. REV. STAT. § 18-3-403 (1990 & Supp. 1996); N.D. CENT. CODE § 12.1-20-03 (Supp. 1995); R.I. GEN. LAWS § 11-37-8.1 (1994). UNDER 16: GA. CODE ANN. § 16-6-3 (Supp. 1997); MASS. GEN. LAWS ANN. ch. 265, § 23 (West 1990); MONT. CODE ANN. § 45-5-503 (1995); NEB. REV. STAT. § 28-319 (1995). UNDER 18: IDAHO CODE § 18-6101 (Supp. 1996).

For purposes of comparison, this table examines the statute defining the most serious penetration offense for the state, regardless of whether the particular statute is limited to vaginal intercourse or inclusive of all sexual conduct involving intercourse or sodomy. As can be seen from Table One, the most serious offense in most states applies when the child victim is under thirteen or fourteen years old. Only one state applies the most serious penalties to children up to age seventeen, and only two states follow the Model Penal Code's recommendation of applying this offense only to children under ten. The disparity among the states is striking: a person commits first degree rape in Idaho if the victim is seventeen years old, while the same conduct constitutes first degree rape in South Dakota only if the child is under ten years old.[236]

It is also useful to note that the age for sexual contact offenses substantially mirrors the age for penetration offenses.[237]

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[236] *See supra* note 173.

[237] UNDER 11: N.Y. PENAL LAW § 130.65 (McKinney 1987). UNDER 12: ALA. CODE § 13A-6-66 (1994); KY. REV. STAT. ANN. § 510.110 (Banks-Baldwin 1995); LA. REV. STAT. ANN. § 14:43.4 (West 1986 & Supp. 1997); MO. REV. STAT. § 566.067 (Supp. 1996); WASH. REV. CODE § 9A.44.083 (Supp. 1997); W. VA. CODE § 61-8B-7 (1992). UNDER 13: ALASKA STAT. § 11.41.436 (Michie 1996); 720 ILL. COMP. STAT. § 5/12-16 (West Supp. 1997); MICH. COMP. LAWS ANN. § 750.520c (West 1991); MINN. STAT. § 609.343 (Supp. 1997); N.H. REV. STAT. ANN. §§ 632-A:2(II) & 632-A:3(III) (1996); N.J. STAT. ANN. § 2C:14-2 (West 1996); N.M. STAT. ANN. § 30-9-13 (Michie Supp. 1996); OHIO REV. STAT. ANN. § 2907.05 (Anderson 1996); 18 PA. CONS. STAT. ANN. § 3126 (Supp. 1997); TENN. CODE ANN. § 39-13-504 (Supp. 1996); VA. CODE ANN. § 18.2-67.3 (Michie Supp. 1996); WIS. STAT. ANN. § 948.02 (West 1996). UNDER 14: ARK. CODE ANN. § 5-14-108 (Michie 1993); CAL. PENAL CODE § 288(a) (West Supp. 1997); HAW. REV. STAT. ANN. § 707-732 (Michie 1994); IND. CODE § 35-42-4-3 (Supp. 1996); IOWA CODE § 709.8 (West Supp. 1997); KAN. STAT. ANN. § 21-3504 (1995); ME. REV. STAT. ANN. tit. 17-A, § 255 (West Supp. 1996); MD. ANN. CODE art. 27, § 464B (1996); MASS. GEN. LAWS ANN. ch. 265, § 13B (West 1990); MISS. CODE ANN. § 97-5-23 (1994); NEV. REV. STAT. § 201.230 (1995); OR. REV. STAT. § 163.427 (1995); UTAH CODE ANN. § 76-5-404.1 (Supp. 1996); WYO. STAT. ANN. § 6-2-304 (Michie Supp. 1997). UNDER 15: ARIZ. REV. STAT. ANN. § 13-1410 (West Supp. 1996) COLO. REV. STAT. § 18-3-405 (1990 & Supp. 1996); CONN. GEN. STAT. ANN. § 53a-73a (West 1994); NEB. REV. STAT. § 28-320.01 (Supp. 1996); N.D. CENT. CODE § 12.1-20-03 (Supp. 1995); R.I. GEN. LAWS § 11-37-8.3 (1994). UNDER 16: DEL. CODE ANN. tit. 11, § 768 (1995); FLA. STAT. ANN. § 800.04 (West Supp. 1997); GA. CODE ANN. § 16-6-4 (Supp. 1997); IDAHO CODE § 18-1506 (Supp. 1996); MONT. CODE ANN. § 45-5-502 (1995); N.C. GEN. STAT. § 14-202.1 (1993); OKLA. STAT. ANN. tit. 21, § 1123 (West Supp. 1997); S.C. CODE ANN. § 16-15-140 (Law. Co-op. Supp. 1996); S.D. CODIFIED LAWS § 22-22-7 (Michie Supp. 1996); VT. STAT. ANN. tit. 13, § 2602 (Supp. 1996). UNDER 17: TEX. PENAL CODE ANN. § 21.11 (West 1994).

The most common age cut-off selected by the states for the most serious sexual contact offense to apply is under fourteen. The next most common age cut-off is under thirteen. In six states the most serious sexual contact offense applies if the victim is under fifteen; another ten states apply this offense to victims under sixteen, and one state applies its most serious sexual contact offense if the victim is under seventeen. In seven states the most serious sexual contact offense is not applicable when the child victim is twelve or older, and in one state the offense is not applicable to any child eleven or older.

Table One: Most serious sexual penetration and contact offenses: Age below which a child must be for the statute to apply

Age of Child	Most serious penetration offense: number of states	Most serious contact offense: number of states
Under 10	2	0
Under 11	2	1
Under 12	9	6
Under 13	14	12
Under 14	14	14
Under 15	4	6
Under 16	4	10
Under 17	0	1
Under 18	1	0

b. Intermediate Level Offenses

Several states create a mid-level offense applicable to younger adolescents. In Virginia, for example, non-forcible sexual intercourse with a child under the age of thirteen is rape, intercourse with a child aged thirteen or fourteen is carnal knowledge, and intercourse with a child who is fifteen, sixteen, or seventeen is "causing or encouraging acts rendering

children delinquent."[238] The older the age, the less serious the offense, with offenses involving children above the age of fourteen classified as misdemeanors.[239] The Virginia approach of lowering the level of offense with the increased age of the victim is consistent with most other states.[240]

c. Least Serious Offenses

Most states create a category of offenses applicable to consensual sexual activity between an adult and an older child. Analysis of these statutes, in combination with those few states retaining only one applicable offense, identifies the age of consent in each state.

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[238] VA. CODE ANN. §§ 18.2-67.3, 18.2-63, & 18.2-371 (Michie Supp. 1996).

[239] *See id.* § 18.2-371.

[240] *See, e.g.,* ALASKA STAT. §§ 11.41.434, 11.41.436, and 11.41.438 (Michie 1996) (penetration offenses against victims aged under 13, 13-15, and 16-17); CAL. PENAL CODE § 288(c)(1) (West Supp. 1997) (lewd and lascivious acts against children aged under 14, 14-15, and under 18); IOWA CODE §§ 709.3 & 709.4. (West 1993 & Supp. 1997) (penetration offense against victim aged under 12, 12-13, and 14-15); KY. REV. STAT. ANN. §§ 510.040 t0 .090 (Banks-Baldwin 1995) (different penetration offenses for victims under age 12, 14, and 16); N.Y. PENAL LAW §§ 130.25 to .50 (McKinney 1987 & Supp. 1997) (different penetration offenses for victims under age 11, 14, and 17); OKLA. STAT. ANN. tit. 10, §§ 7101 and 7115 (West Supp. 1997); tit. 21, §§ 888, 1111 and 1114 (penetration offenses for victims under age 14, 16, and 18); OR. REV. STAT. §§ 163.355 to .411 (1995) (penetration offenses for victim under age 12, 14, 16, and 18); S.C. CODE ANN. § 16-3-655 (Law. Co-op. 1985) (penetration offenses for victims aged under 11, 11-14 and 14-15); VA. CODE ANN. §§ 18.2-61, 18.2-63 and 18.2-371 (Michie Supp. 1996) (penetration offense against victims aged under 13, 13-14, and under 18); WASH. REV. CODE §§ 9A.44.073 to .089 (Supp. 1997) (penetration and contact offenses against victim aged under 12, 12-13, and 14-15); WIS. STAT. ANN. §§ 948.02 and 948.09 (West 1996) (penetration offenses against victim aged under 13, under 16, and 16-17); WYO. STAT. ANN. §§ 6-2-303 and 14-3-105 (Michie Supp. 1996) (penetration offenses against victim aged under 12, under 16, and under 18).

Table Two: Least serious sexual penetration and contact offenses: Age below which a child must be for the statute to apply

Age of Child	Oldest age for penetration offense: number of states	Oldest age for contact offense: number of states
Under 13	0	4
Under 14	1	9
Under 15	1	4
Under 16	30	22
Under 17	6	4
Under 18	12	7

Table Two[241] presents the ages at which a child can consent to sexual penetration with an adult in the fifty states.[242] This Ta-

[241] The table gives only the oldest age for which the offense can be prosecuted. This statute does not include those statutes which create a separate offense for abuse by one in a position of authority, which is often a higher age, nor does it identify states such as Virginia that have a third category of offenses applicable to younger adolescents.

[242] UNDER 14: HAW. REV. STAT. ANN. § 707-730 (Michie 1994). UNDER 15: COLO. REV. STAT. § 18-3-403 (1990 & Supp. 1996). UNDER 16: ALA. CODE § 13A-6-62 (1994); ALASKA STAT. § 11.41.436 (Michie 1996); ARK. CODE ANN. § 5-14-106 (Michie Supp. 1995); CONN. GEN. STAT. ANN. § 53a-71 (West 1994 & Supp. 1997); DEL. CODE ANN. tit. 11, § 773 (Supp. 1996); GA. CODE ANN. § 16-6-3 (Supp. 1997); IND. CODE § 35-42-4-9 (Supp. 1996); IOWA CODE § 709.4 (West Supp. 1997); KAN. STAT. ANN. § 21-3504 (1995); KY. REV. STAT. ANN. § 510.060 (Banks-Baldwin 1995); ME. REV. STAT. ANN. tit. 17-A, § 254 (West Supp. 1996); MD. ANN. CODE art. 27, § 464B (1996); MASS. GEN. LAWS ANN. ch. 265, § 23 (West 1990); MICH. COMP. LAWS ANN. § 750.520d (West 1991); MINN. STAT. § 609.344 (Supp. 1997); MONT. CODE ANN. § 45-5-503 (1995); NEB. REV. STAT. § 28-319 (1995); NEV. REV. STAT. §§ 200.364 and 200.368 (Supp. 1997); N.H. REV. STAT. ANN. § 632-A:3(II) (1996); N.J. STAT. ANN. § 2C:14-2 (West 1996); N.C. GEN. STAT. § 14-27.7A (Supp. 1996); OHIO REV. CODE ANN. § 2907.04 (Anderson 1996); OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 1997); 18 PA. CONS. STAT. ANN. §§ 3122.1 & 3125 (Supp. 1997); R.I. GEN. LAWS § 11-37-6 (1994); S.C. CODE ANN. § 16-3-655(3) (Law. Co-op. 1985); S.D. CODIFIED LAWS § 22-22-1 (Michie Supp. 1996); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1996); WASH. REV. CODE § 9A.44.079 (Supp. 1997); W. VA. CODE § 61-8B-5 (1992). UNDER 17: 720 ILL. COMP. STAT. § 5/12-16 (West Supp. 1997); LA. REV. STAT. ANN. § 14:80 (West Supp. 1997); MO. REV. STAT. § 566.034 (Supp. 1996); N.M. STAT. ANN. § 30-9-11 (Michie Supp. 1996); N.Y. PENAL LAWS § 130.25 (McKinney Supp. 1997); TEX. PENAL CODE ANN. § 22.011 (West 1994 & Supp. 1997). UNDER 18: ARIZ. REV. STAT. ANN. § 13-1405 (West

ble shows that while the most common age of consent is sixteen (i.e., the consent of victims up to the age of fifteen is irrelevant), nineteen states define offenses for intercourse involving sixteen or seventeen-year-old victims. Perhaps most surprising is that in one state children as young as fourteen years old are deemed capable of consenting to sexual penetration with an adult, and in another state fifteen-year-old children can consent to such conduct with no criminal consequences to the adult.[243]

Table Two also presents the age at which children can consent to sexual contact with an adult.[244] The Table demonstrates

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Supp. 1996); CAL. PENAL CODE § 261.5 (West Supp. 1997); FLA. STAT. ANN. § 794.05; IDAHO CODE § 18-6101 (Supp. 1996); MISS. CODE ANN. § 97-3-67 (1994); N.D. CENT. CODE § 12.1-20-05 (1985); OR. REV. STAT. § 163.435 (1995); TENN. CODE ANN. § 39-13-506 (Supp. 1996); UTAH CODE ANN. §§ 76-5-402 & 76-5-406(11) (1995 & Supp. 1996); VA. CODE ANN. § 18.2-371 (Michie Supp. 1996); WIS. STAT. ANN. § 948.09 (West 1996); WYO. STAT. ANN. § 14-3-105 (Michie Supp. 1996).

[243] There is no offense in Hawaii for sexual activity with children 14 and older when force is not alleged; Colorado provides no offense for such conduct with children 15 and older. It should be noted, however, that Colorado has a broadly written statute addressing abuse of a position of authority that is applicable to most adult-child sexual activity with a child under the age of 18. *See* COLO. REV. STAT. § 18-3-405.3 (1990 & Supp. 1996).

[244] UNDER 13: N.H. REV. STAT. ANN. § 632-A:3 (1996); N.M. STAT. ANN. § 30-9-13 (Michie Supp. 1996); TENN. CODE ANN. § 39-13-504 (Supp. 1996); VA. CODE ANN. § 18.2-67.3 (Michie Supp. 1996). UNDER 14: ARK. CODE ANN. § 5-14-108 (Michie 1993); HAW. REV. STAT. ANN. § 707-732 (Michie 1994); IOWA CODE § 709.8 (West Supp. 1997); ME. REV. STAT. ANN. tit. 17-A, § 255 (West Supp. 1996); MD. ANN. CODE tit. 27, § 464B (1996); MASS. GEN. LAWS ANN. ch. 265, § 13B (West 1990) (16 for the offense of assault with intent to rape, MASS. GEN. LAWS ANN. ch. 265, § 24B (West 1990)); MISS. CODE ANN. § 97-5-23 (1994); MO. REV. STAT. § 566.068 (Supp. 1996); NEV. REV. STAT. § 201.230 (1995). UNDER 15: COLO. REV. STAT. § 18-3-405 (1990 & Supp. 1996); CONN. GEN. STAT. ANN. § 53a-73a (West 1994); NEB. REV. STAT. § 28-320.01 (Supp. 1996); R.I. GEN. LAWS § 11-37-8.3 (1994). UNDER 16: ALA. CODE § 13A-6-67 (1994); ALASKA STAT. § 11.41.438 (Michie 1996); DEL. CODE ANN. tit. 11, § 768 (1995); FLA. STAT. ANN. § 800.04 (West Supp. 1997); GA. CODE ANN. § 16-6-4 (Supp. 1997); IND. CODE § 35-42-4-9 (Supp. 1996); KAN. STAT. ANN. § 21-3503 (1995); KY. REV. STAT. ANN. § 510.130 (Banks-Baldwin 1995); MICH. COMP. LAWS ANN. § 750.520e (West 1991); MINN. STAT. § 609.345 (Supp. 1997); MONT. CODE ANN. § 45-5-502 (1995); N.J. STAT. ANN. § 2C:24-4 (West 1996); N.C. GEN. STAT. § 14-202.1 (1993); OHIO REV. CODE ANN. § 2907.06 (Anderson 1996); OKLA. STAT. ANN. tit. 21, § 1123 (West Supp. 1997); 18 PA. CONS. STAT. ANN. § 3126 (Supp. 1997); S.C. CODE ANN. § 16-15-140 (Law. Co-op. Supp. 1996); S.D. CODIFIED LAWS § 22-22-7 (Michie Supp. 1996); VT. STAT. ANN. tit. 13, § 2602 (Supp. 1996); WASH. REV. CODE § 9A.44.089 (Supp. 1997); W. VA. CODE § 61-8B-9 (1992); WIS. STAT. ANN. § 948.02 (West 1996). UNDER 17: 720 ILL. COMP. STAT. § 5/12-16 (West Supp. 1997); LA. REV. STAT. ANN. § 14:81 (West 1986 & Supp. 1997); N.Y. PENAL LAW § 130.55 (McKinney Supp. 1997) (without consent defined as under 17 in § 130.00); TEX. PENAL CODE ANN. § 21.11 (West 1994). UNDER 18: ARIZ. REV. STAT. ANN. § 13-1405 (West Supp. 1996); CAL. PENAL § 288a

that this age is uniformly lower than the age at which they can consent to penetration. While the age is sixteen or above in over half of the states, nearly one-half of the states place the age at fifteen or below.

Table Three (see appendix) provides a state-by-state breakdown of the age under which sexual penetration of a child by an adult is a crime. This age is what is most commonly referred to as the "age of consent," and the table reflects that this age is uniformly higher than the common law ages of ten or twelve. In all but two states[245] the age of consent is at least sixteen, with the age being eighteen in twelve states.

B. *Variable Elements*

1. Age Difference Between Victim and Defendant

An element present in most states is an age difference between the parties. The Model Penal Code commentators consider it "harsh and unreasonable" to punish a person for engaging in sexual activity with a willing partner "whom society regards as a fit associate in a common educational and social endeavor."[246] Apparently, many states agree with this reasoning, as a substantial number of states follow the Model Penal Code pattern of including a requirement of an age difference between the actors.[247] There is no simple way to categorize the structure among the states due not only to the variation among the states, but also to the combination of approaches used within a state. However, the following general observations can be made.

One method of constructing an offense is to create as an element of the offense a minimum age the offender must have attained. In Alaska, for example, a non-family offender who has sexual intercourse with a child under thirteen must be sixteen

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(West Supp. 1997); IDAHO CODE § 18-1508A (Supp. 1996); N.D. CENT. CODE § 12.1-20-07 (1985); OR. REV. STAT. § 163.415 (1995); UTAH CODE ANN. § 76-5-404 (1995); WYO. STAT. ANN. § 14-3-105 (Michie Supp. 1996).

[245] The age of consent for offenses not involving family members is 15 in Colorado and 14 in Hawaii. *See supra* note 243.

[246] MODEL PENAL CODE § 213.3 cmt. 2 at 386.

[247] *See id.* § 213.3 cmt. 2 at 386. The drafters of the Model Code selected a four year age difference "to reflect the prevailing pattern of secondary education." *Id.*

years of age or older to commit the offense of first degree sexual abuse.[248] However, to be charged as a person in a position of authority in relation to the victim, the offender must be eighteen or older.[249] Likewise, if the victim is sixteen or seventeen years old, the offender must be eighteen years or older.[250] A minimum age for offenders is set for at least some offenses in more than half the states.[251]

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[248] *See* ALASKA STAT. § 11.41.434(a)(1) (Michie 1996).

[249] *See id.* § 11.41.434(a)(3).

[250] *See id.* § 11.41.438(a)(2).

[251] *See* ALA. CODE §§ 13A-6-61 to -67 (1994) (16 or older for most offenses; 19 or older for sexual contact offense with 13 to 15-year-old victim); ALASKA STAT. §§ 11.41.434 to .440 (Michie 1996) (either 16 or 18, depending on the offense); ARK. CODE ANN. §§ 5-14-106 and 5-14-108(a)(3) (Michie 1993 & Supp. 1995) (20 or older for penetration with a victim under 16; 18 or older for contact offense with victim under 14); CAL. PENAL CODE §§ 261.5 to 289 (West Supp. 1997) (over 21 for certain offenses); FLA. STAT. ANN. §§ 794.011(2)(a) & 794.05 (West Supp. 1997) (18 or older for penetration offense against child under 12; 24 or older for penetration offense against a person 16 or 17); GA. CODE ANN. § 16-6-3(a) (Supp. 1997) (21 or older for intercourse with child under 16); IDAHO CODE § 18-1506 (Supp. 1996) (18 or older for sexual contact with a child under 16); 720 ILL. COMP. STAT. §§ 5-12-13 to -16 (West 1993 & Supp. 1997) (17 or older for various offenses); IND. CODE §§ 35-42-4-3 to -9 (Supp. 1996) (either 18 or 21, depending on the offense); IOWA CODE §§ 709.8 & 709.12(1) (West 1993 & Supp. 1997) (18 or older for sexual contact offenses with victims under 14); KY. REV. STAT. ANN. §§ 510.040 to .090 (Banks-Baldwin 1995) (18 or 21 depending on the offense); LA. REV. STAT. ANN. §§ 14:80 and 14:81.2 (West 1986 & Supp. 1997) (over 17 and more than two years older for various offenses); ME. REV. STAT. ANN. tit. 17-A, § 254 (West Supp. 1996) (over 19 and more than five years older for penetration offense of 14 or 15-year old; 21 or older for penetration offense by teacher or other official against 16 or 17-year-old); MD. ANN. CODE art. 27, § 464B (1996) (21 or older for penetration and contact offenses against 14 or 15-year old); MISS. CODE ANN. §§ 97-3-65 & 97-5-21, -23, & -41 (1994) (18 or older for various offenses); MO. REV. STAT. §§ 566.034 and 566.064 (Supp. 1996) (21 or older for penetration offenses of child under 17); NEB. REV. STAT. §§ 28-319 and 28-320.01 (1995 & Supp. 1996) (19 or older for penetration of child under 16 and contact of child 14 or under); N.M. STAT. ANN. § 30-9-11(F) (Michie Supp. 1996) (18 or older and four years older for penetration offense of 13 to 16-year old); N.Y. PENAL LAW §§ 130.20 to .55 (McKinney 1987 & Supp. 1997) (18 or 21 years old for various offenses); N.C. GEN. STAT. §§ 14-27.2, 14-27.4, and 14-202.1 (1993 & Supp. 1996) (12 or older and four years older than victim for penetration of child under 13; 16 or older and five years older for indecent liberties with child under 16); N.D. CENT. CODE § 12.1-20-07(1)(f) (1985) (18 or older for sexual contact offense with 15 to 17-year-old); OHIO REV. CODE ANN. §§ 2907.04 and 2907.06 (Anderson 1996) (18 or older for penetration and contact offenses against 13 to 15-year-old); OKLA. STAT. ANN. tit. 21, §§ 888 and 1114 (West Supp. 1997) (over 18 for sodomy of a child under 16 and rape of a child under 14); OR. REV. STAT. § 163.435 (1995) (18 or older for intercourse with a victim under 18); R.I. GEN. LAWS § 11-37-6 (1994) (over 18 for penetration of 15-year-old); S.D. CODIFIED LAWS § 22-22-7 (Michie Supp. 1996) (16

Other states do not specify an age an offender must have attained, but require proof of a minimum age difference between the parties for some sex offenses.[252] Connecticut law, for example, states that a person who has intercourse with a child under thirteen years old and is more than two years older than the victim commits the offense of first degree sexual assault.[253]

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or older for contact offense against victim under 16); VT. STAT. ANN. tit. 13 §§ 3252 and 3253 (Supp. 1996) (18 or older for penetration offense of victim under 16 by parent and for contact offense against child under 10); VA. CODE ANN. §§ 180.2-370.1 and 18.2-371 (Michie Supp. 1996) (18 or older for contact offense by one in custodial relationship against child under 18; 18 or older for penetration offense of 15 to 17-year-old); W. VA. CODE §§ 61-8B-3 to -9 (1992) (14 or 16 depending on the offense).

[252] *See* CAL. PENAL CODE § 288 (West Supp. 1997) (10 years older than 14 or 15-year-old victim); COLO. REV. STAT. §§ 18-3-403 and 18-3-405 (1990 & Supp. 1996) (four years older than victim for penetration or contact with victim under 15); CONN. GEN. STAT. ANN. §§ 53a-70 and 53a-71 (West 1994 & Supp. 1997) (more than two years older for penetration offense of victim under 15); IDAHO CODE § 18-0508A (Supp. 1996) (five years older for penetration or contact offense with 16 or 17-year-old); 720 ILL. COMP. STAT. § 5/12-16(d) (West Supp. 1997) (five years older for penetration or contact offenses with 13- to 16-year-old); KY. REV. STAT. ANN. § 510.130 (Banks-Baldwin 1995) (five years older for contact offense with 14 or 15-year-old); LA. REV. STAT. ANN. § 14:89.1 (West 1986) (three years older for crime against nature with victim under 17); ME. REV. STAT. ANN. tit. 17-A, § 255(1)(C) (West Supp. 1996) (three years older for contact offense with victim under 14); MD. ANN. CODE art. 27, §§ 463-464C (1996) (four years older for various offenses against children under 14 or aged 14 to 15); MICH. COMP. LAWS ANN. § 750.520e (West 1991) (five years older for contact offense with victim aged 13 to 15); MINN. STAT. §§ 609.342 .345 (Supp. 1997) (more than 24, 36, or 48 months older than the victim for various offenses at various ages); MISS. CODE ANN. § 97-3-67 (1994) (offender must be older than victim); MONT. CODE ANN. §§ 45-5-502 to -507 (1995) (three years older for penetration or contact offense with victim under 16); N.J. STAT. ANN. § 2C:14-2 (West 1996) (four years older for contact offense with victim under 13 and penetration offense with victim aged 13 to 15); N.C. GEN. STAT. § 14-27.7A (Supp. 1996) (six years older for penetration offense with victim aged 13 to 15); 18 PA. CONS. STAT. ANN. §§ 3122.1 to 3126 (Supp. 1997) (four years older for penetration or contact offense with victim under 16); S.D. CODIFIED LAWS § 22-22-1(5) (Michie Supp. 1996) (three years older for penetration offense with victim aged 10 to 15); TENN. CODE ANN. § 39-13-506 (Supp. 1996) (four years older for penetration offense with victim aged 13 to 17); TEXAS PENAL CODE §§ 21.11 and 22.011 (West 1994 & Supp. 1997) (affirmative defense for contact or penetration offense if actor not more than three years older than victim under 17); WASH. REV. CODE §§ 9A.44.073 to .096 (Supp. 1997) (24, 36, 48, or 60 months older depending on age of victim and offense); W. VA. CODE § 61-8D-5 (Supp. 1996) (parent or guardian for penetration or contact offense four years older than victim under 18); WYO. STAT. ANN. §§ 6-2-303 and 14-3-105(b)(i) (Michie Supp. 1996) (four years older for penetration or contact offense than victim under 12; four years older than victim under 16 for indecent liberties).

[253] *See* CONN. GEN. STAT. ANN. § 53a-70(a)(2) (West Supp. 1997).

The age of the defendant per se is inconsequential so long as the specified age difference between defendant and victim is met. Some states combine the two approaches for certain offenses, requiring both a minimum age and minimum age difference.[254] Yet another method is to increase the severity of the offense for older defendants.[255] A few states specify no age requirements for defendants.[256]

Many states also create separate offenses or exceptions for crimes committed by juveniles. Thus, if a perpetrator must be eighteen or older to commit rape, a fifteen-year-old juvenile who has non-forcible intercourse with an eight-year-old usually can be adjudicated for a lower level offense.[257] Such statutes

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[254] *See* ALA. CODE § 13A-6-62 (1994) (person having sexual intercourse with 13, 14, or 15-year-old must be 16 or older and two years older than victim in order to commit second degree rape); DEL. CODE ANN. tit. 11, § 773 (Supp. 1996) (person who has sexual intercourse with a victim under 16 commits a felony; person who is 19 or older who has sexual intercourse with a victim under 14 years old commits a felony); LA. REV. STAT. ANN. §§ 14:80 and 14:81.2 (West 1986 & Supp. 1997) (defendant must be over 17 with an age difference of greater than two years for offenses of carnal knowledge, indecent behavior and molestation); ME. REV. STAT. ANN. tit. 17-A, § 254(1)(A) (West Supp. 1996) (defendant must be 19 or older and more than five years older than 14 or 15-year-old victim for sexual penetration offense); N.M. STAT. ANN. § 30-9-11(F) (Michie Supp. 1996) (defendant must be 18 or older and at least four years older than 13 to 16-year-old victim for penetration offense); N.C. GEN. STAT. §§ 14-27.1 and 14-27.2 (Supp. 1996) (defendant must be at least 12 and at least four years older than victim for sexual penetration of child under 13); OHIO REV. CODE ANN. § 2907.06 (Anderson 1996) (defendant must be 18 or older and four or more years older than victim for sexual contact offense with 13 to 15-year-old).

[255] *See* GA. CODE ANN. § 16-6-3(b) (Supp. 1997).

> A person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years; provided, however, that if the person so convicted is 21 years of age or older, such person shall be punished by imprisonment for not less than ten nor more than 20 years; provided, further, that if the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim, such person shall be guilty of a misdemeanor.

Id. See also IND. CODE §§ 35-42-4-3 and 35-42-4-9 (Supp. 1996) (increasing the grading if the offender is at least 21 years of age).

[256] These states are Arizona, Delaware, Hawaii, Kansas, Massachusetts, Nevada, New Hampshire, South Carolina, Utah, and Wisconsin.

[257] *See, e.g.* ALASKA STAT. § 11.41.440(a)(1) (Michie 1996) (penetration or contact offense for actor under 16 and victim under 13 and at least three years younger than actor); ARK. CODE ANN. §§ 5-14-104 and 5-14-109 (Michie Supp. 1995) (penetration and contact offenses for actor under 18 and more than two years older than victim under 14); FLA. STAT. ANN. § 794.011(2)(b) (West Supp. 1997) (penetration offense for actor under 18 and victim under 12); 720 ILL. COMP. STAT. §§ 5/12-14 to -16

typically require the juvenile perpetrator to be a specified number of years older than the victim. In Minnesota, for example, a person who is more than thirty-six months older than a victim who is under thirteen years old can be charged with first degree sexual conduct; a perpetrator who is less than thirty-six months older than the victim can be charged with third degree sexual conduct.[258] In Arkansas, the offense of first degree carnal abuse applies if a juvenile under the age of eighteen has intercourse with a victim under fourteen; the same conduct would be rape if committed by a defendant eighteen or older.[259]

The constitutionality of statutes allowing the prosecution of one minor for sexual activity with another minor has been the subject of substantial litigation.[260] Most states uphold the constitutionality of these statutes, while a few have found them to violate a juvenile's rights to equal protection, privacy, or due process.[261]

2. Relationship of Victim to Defendant (including abuse of position of authority)

More than thirty states specifically enhance penalties or

(West 1993 & Supp. 1997) (various offenses for actor under 17 and victims under 9; 9-12; and 9-16); IOWA CODE § 709.12 (West 1993) (contact offense for actor 16 or 17 and victim five years younger than actor); N.C. GEN. STAT. § 14-202.2 (Supp. 1996) (lewd or lascivious act for actor under 16 and victim at least three years younger); VA. CODE ANN. § 18.2-63 (Michie Supp. 1996) (intercourse for actor who is a minor and victim three or more years younger than actor).

[258] *See* MINN. STAT. § 609.344(1)(a) (Supp. 1997).

[259] *See* ARK. CODE ANN. §§ 5-14-103 and 5-14-104 (Michie 1993 & Supp. 1995).

[260] *See* Susan M. Kole, *Statute Protecting Minors in a Specified Age Range from Rape or Other Sexual Activity as Applicable to Defendant Minor Within Protected Age Group*, 18 A.L.R.5TH 856 (1994).

[261] *See* B.B. v. State, 659 So. 2d 256 (Fla. 1995) (holding Florida Statutes section 794.05 an unconstitutional violation of minor's right to privacy). The court's decision in *B.B.* prompted numerous additional challenges to Florida's laws. *See* State v. A.R.S., 684 So. 2d 1383 (Fla. Dist. Ct. App. 1996) (upholding constitutionality of child pornography statute applied to 15-years-old who videotaped himself and a younger female engaging in sexual activity); State v. J.A.S., 686 So. 2d 1366 (Fla. Ct. App. 1997) (refusing to hold unconstitutional a statute prohibiting lewd or lascivious assault when offenders and victims are minors); State v. Raleigh, 686 So. 2d 621 (Fla. Ct. App. 1996) (upholding constitutionality of lewd or lascivious assault statute when offender and victim are minors). The statute at issue in *B.B.*, FLA. STAT. ANN. § 794.05, was rewritten in 1996 and no longer applies to juvenile offenders. However, other statutes applying to juvenile offenders remain in place. *See* FLA. STAT. ANN. §§ 800.04 and 794.011 (West Supp. 1997).

create a separate offense when abuse is committed by a family member or another person who is in a position of authority over the victim,[262] although there is wide variation as to what constitutes a person in a position of authority. For example, some states identify school employees as persons to whom enhanced penalties should apply, such as when the actor is a

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[262] *See* ALASKA STAT. §§ 11.41.434 and 11.41.438 (Michie 1996) (penetration offenses); ALASKA STAT. §§ 11.41.436 and 11.41.440 (contact offenses); ARIZ. REV. STAT. ANN. § 13-1405 (West Supp. 1997) (penetration and oral contact offenses); ARK. CODE ANN. § 5-14-120 (Michie 1993) (penetration offense); ARK. CODE ANN. § 5-14-121 (Michie 1993) (contact offense); COLO. REV. STAT. § 18-3-405.3 (1990 & Supp. 1996) (contact offense); CONN. GEN. STAT. ANN. § 53a-71 (West 1994 & Supp. 1997) (penetration offenses); CONN. GEN. STAT. ANN. § 53a-73a (West 1994) (contact offense); FLA. STAT. ANN. § 794.011 (West Supp. 1997) (penetration offenses); 720 ILL. COMP. STAT. § 5/12-13 (West 1993) (penetration offenses); 720 ILL. COMP. STAT. § 5/12-16 (West Supp. 1997) (contact offenses); IND. CODE § 35-42-4-7 (Supp. 1996) (penetration offense); IOWA CODE § 709.4 (West Supp. 1997) (penetration offense); KAN. STAT. ANN. § 21-3603 (1995) (penetration and contact offenses); LA. REV. STAT. ANN. § 14:78.1 (West Supp. 1997) (penetration and contact offenses); LA. REV. STAT. ANN. § 14:81.2 (West 1986 & Supp. 1997) (contact offenses); ME. REV. STAT. ANN. tit. 17A, §§ 253 and 254 (West 1983 & Supp. 1996) (penetration or contact offenses); ME. REV. STAT. ANN. tit. 17A, § 255 (West Supp. 1996) (contact offense); MD. ANN. CODE art. 27, § 35C (1996) (penetration and contact offenses); MICH. COMP. LAWS ANN. § 750.520b (West 1991) (penetration offenses); MICH. COMP. LAWS ANN. § 750.520c (West 1991) (contact offenses); MINN. STAT. §§ 609.342 and 609.344 (Supp. 1997) (penetration offenses); MINN. STAT. §§ 609.343 and 609.345 (Supp. 1997) (contact offenses); MISS. CODE ANN. §§ 97-3-95 and 97-5-41 (1994) (penetration offense); MISS. CODE ANN. § 97-5-23 (1994) (contact offenses); MISS. CODE ANN. § 97-29-3 (1994) (penetration offense between teacher and pupil); MONT. CODE ANN. § 45-5-507 (1995) (penetration offense); N.H. REV. STAT. ANN. § 632-A:2(I) (1996) (penetration offenses) and N.H. REV. STAT. ANN. § 632-A:4 (1996) (contact offenses); N.J. STAT. ANN. § 2C:14-2 (West 1996) (penetration offenses) and N.J. STAT. ANN. § 2C:24-4 (West 1996) (sexual conduct generally); N.M. STAT. ANN. § 30-9-11 (Michie Supp. 1996) (penetration offense); N.M. STAT. ANN. § 30-9-13 (Michie Supp. 1996) (contact offense); N.C. GEN. STAT. § 14-27.7 (1993) (penetration or contact offenses); N.D. CENT. CODE § 12.1-20-07 (1985) (contact offense); OHIO REV. CODE ANN. § 2907.03 (Anderson 1996) (penetration offenses); OR. REV. STAT. §§ 163.375 and 163.405 (1995) (penetration offenses); S.C. CODE ANN. § 16-3-655 (Law. Co-op. 1985) (penetration offense); S.D. CODIFIED LAWS § 22-22-19.1 (Michie Supp. 1996) (incest offense that applies to persons under 21); TENN. CODE ANN. § 39-13.527 (Supp. 1997) (sexual contact offenses); UTAH CODE ANN. § 76-5-406 (Supp. 1996) (defines "without consent" as child under 18 and actor is parental figure); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1996) (penetration offenses); VA. CODE ANN. §§ 18.2-361 and 18.2-366 (Michie Supp. 1996) (penetration offenses); VA. CODE ANN. § 18.2-370.1 (Michie Supp. 1996) (contact offense); WASH. REV. CODE § 9A.44.093 (Supp. 1997) (penetration offense); WASH. REV. CODE § 9A.44.096 (Supp. 1997) (contact offense); W. VA. CODE § 61-8D-5 (Supp. 1996) (penetration offense); WIS. STAT. ANN. § 648.06 (West 1996) (penetration and contact offenses).

"teacher, employee or other official having instructional, supervisory or disciplinary authority over the student."[263] Other states use broader language that encompasses conduct committed by school employees as well as many other individuals.[264] The language often is so broad that courts are left to determine what type of person is in a position of authority or in a supervisory relationship.[265] A few states have created specific offenses applica-

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[263] ME. REV. STAT. ANN. tit. 17-A § 253(2)(F) (West 1983 & Supp. 1996). *See also* ARK. CODE ANN. §§ 5-14-120 and 5-14-121 (Michie 1993) (actor is "an employee in the minor's school or school district"); CONN. GEN. STAT. ANN. § 53a-71(a)(8) (West 1994 & Supp. 1997) ("actor is a school employee and [victim] is a student enrolled in a school in which the actor works"); MISS. CODE ANN. § 97-3-95(2) (1994) (actor is in a position of trust or authority, including a teacher); OHIO REV. CODE ANN. § 2907.03(7) (Anderson 1996) ("teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education provides minimum standards"); UTAH CODE ANN. § 76-5-404.1(3)(h) (Supp. 1996) (sexual contact offense in which actor was in a position of trust, which includes teachers, counselors and coaches).

[264] *See* ALASKA STAT. § 11.41.434(a)(3) (Michie 1996) (offender "occupies a position of authority in relation to the victim"); COLO. REV. STAT. § 18-3-450.3 (1990 & Supp. 1996) (sexual contact offense in which actor is in a "position of trust" with respect to victim); FLA. STAT. ANN. § 794.011(8) (West Supp. 1997) (actor in a position of familial or custodial authority); 720 ILL. COMP. STAT. § 5/12-13(a)(4) (West 1993) (actor in a position of "trust, authority or supervision" in relation to victim); IOWA CODE § 709.4(2)(c)(3) (West Supp. 1997) (the person is "in a position of authority over the other participant and uses that authority to coerce the other participant to submit"); LA. REV. STAT. ANN. § 14:81.2 (West 1986 & Supp. 1997) (sexual contact offense accomplished by "the use of influence by virtue of a position of control or supervision over the juvenile"); MICH. COMP. LAWS ANN. § 750.520b(1)(b)(iii) (West 1991) (the actor is in a "position of authority over the victim and used this authority to coerce the victim to submit"); N.H. REV. STAT. ANN. § 532-A:2(I)(k) (1996) (actor is "in a position of authority over the victim and uses this authority to coerce the victim to submit"); N.J. STAT. ANN. § 2C:14-2(a)(2)(b) (West 1996) (actor has "supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status"); N.M. STAT. ANN. § 30-9-11(D) (Michie Supp. 1996) (actor "is in a position of authority over the child and uses this authority to coerce the child to submit"); S.C. CODE ANN. § 16-3-655(3) (Law. Co-op. 1985) (actor is "in a position of familial, custodial, or official authority to coerce the victim to submit"); TENN. CODE ANN. § 39-13-502 (Supp. 1996) (actor uses coercion, which is defined as "the use of parental, custodial, or official authority over a child" in TENN. CODE ANN. § 39-13-501 (Supp. 1996)); VA. CODE ANN. § 18.2-370.1 (Michie Supp. 1996) (sexual contact offense committed by one who "maintains a custodial or supervisory relationship" over the child); WYO. STAT. ANN. § 6-2-303(a)(vi) (Michie Supp. 1996) (actor "in a position of authority over the victim and uses this position of authority to cause the victim to submit").

[265] *See* Hallberg v. State, 649 So. 2d 1355 (Fla. 1994) (teacher who did not have teaching or extracurricular responsibility over a child during summer recess held not to be in a position of authority); State v. Collins, 529 A.2d 945 (N.H. 1987) (a

ble only to family members in a custodial relationship with the victim,[266] but the language of most statutes includes family members and non-family members.[267] Most states differentiate contact and penetration offenses, proportionately increasing the penalty for both offenses when the crime is committed by one in a position of authority.

Grading of the offense is accomplished in one of two ways. In most states, an older age group of children is brought under a more serious offense if the actor is in a position of authority to the victim. In Minnesota, for example, eight different factors can exist to constitute the offense of first degree criminal sexual conduct, one of which is sexual penetration with a child under thirteen. However, if a child is thirteen to fifteen-years-old and one in a position of authority uses that authority to cause the victim to submit to sexual penetration, the first degree criminal sexual conduct statute applies.[268] Policy makers in Minnesota clearly consider abuse by one in a position of authority to be a serious aggravating factor, and its statutes reflect this policy.[269] In a few states, abuse by one in a position of authority creates an offense applicable to an age group of children who otherwise are deemed capable of consenting to sexual activity.[270] In these states, the relationship is not an aggravating factor, but an additional element to an entirely different offense.[271]

"psychometrist" who worked regularly with sixth and seventh grade students found to be in a position of authority); Scadden v. State, 732 P.2d 1036 (Wyo. 1987) (high school teacher and coach held to be in a position of authority).

[266] *See* ARIZ. REV. STAT. ANN. § 13-1405 (West Supp. 1997) (sexual conduct with a minor); KAN. STAT. ANN. § 21-3603 (1995) (aggravated incest); LA. REV. STAT. ANN. § 14:78.1 (West Supp. 1997) (aggravated incest); MO. REV. STAT. ANN. § 45-5-507 (incest); OR. REV. STAT. §§ 163.375(1)(c) and 163.405(1)(c) (1995); S.D. CODIFIED LAWS § 22-22-19.1 (Michie Supp. 1996) (incest); WIS. STAT. ANN. § 948.06 (West 1996) (incest). Incest statutes that do not discriminate based on age are not included in this collection.

[267] *See* S.C. CODE ANN. § 16-3-655(3) (Law. Co-op. 1985) (actor is "in a position of familial, custodial, or official authority to coerce the victim to submit").

[268] *See* MINN. STAT. § 609.342 (1996) for the full text of the statute.

[269] *See also* ALASKA STAT. §§ 11.41.434 to .440 (1994); MINN. STAT. §§ 609.343, 609.344 & 609.345 (1996); N.H. REV. STAT. ANN. §§ 632-A:2(I) & 632-A:4 (1996); S.C. CODE ANN. § 16-3-655 (Law. Co-op 1985).

[270] *See, e.g.*, ARK. CODE ANN. §§ 5-14-120 &5-14-121 (Michie 1993); COLO. REV. STAT. § 18-3-405.3 (Supp. 1996); CONN. GEN. STAT. ANN. §§ 53a-71(a)(4) & (8) (West 1994 & Supp. 1997).

[271] In some of these states, the applicable offense is actually an incest statute that

3. Use of Force

Force is not an element of offenses discussed in this article, though use of force may enhance a penalty or be an element of a more serious offense.[272] For example, in North Dakota sexual contact with a child ages fifteen to seventeen is a misdemeanor; when the offender causes the victim to submit by using force, the offense becomes a felony.[273] In a few states, sexual contact with older children is an offense only if it is forcible.[274] Of course, in any state the regular forcible rape or sexual battery statute could be charged for forcible conduct if there is no statute specific to children.

C. *Uncommon Elements*

A few states retain as an element of sexual offenses that the victim be of "chaste" character.[275] "Chastity" is generally under-

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applies to sexual activity with a relative of the offender under a certain age. *See, e.g.*, KAN. STAT. ANN. § 21-3603 (1995); MONT. CODE ANN. § 45-5-507 (1995); S.D. CODIFIED LAWS § 22-22-19.1 (Michie Supp. 1996).

[272] *See* ALA. CODE § 13A-6-65.1 (1994) (sexual torture); 720 ILL. COMP. STAT. § 5/12-16(c)(1)(i) (West Supp. 1997) (aggravated sexual abuse); IND. CODE §§ 35-42-4-3 and 35-42-4-9 (Supp. 1996) (increasing penalties for offenses committed with deadly force or armed with a deadly weapon); LA. REV. STAT. ANN. § 14:81.2 (West 1986 & Supp. 1997) (separate offense for conduct involving "use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm"); MASS. GEN. LAWS ANN. ch. 265, § 22A (West 1990) (separate offense if defendant compels a child "to submit by force and against his will or compels said child to submit by threat of bodily injury"); MO. REV. STAT. § 566.100 (Supp. 1996) (separate offense created for conduct involving use of "forcible compulsion" with a child); N.D. CENT. CODE § 12.1-20-04 (1985) (separate offense created for sexual contact offense against a child when defendant uses "any threat that would render a person of reasonable firmness incapable of resisting"); TENN. CODE ANN. §§ 39-13-502 and 39-13-504 (Supp. 1996) (aggravated offenses when defendant armed with a weapon).

[273] *See* N.D. CENT. CODE §§ 12.1-20-07(1)(f) and 12.1-20-04 (1985).

[274] *See, e.g.* KY. REV. STAT. ANN. § 510.130 (Banks-Baldwin 1995) (it is a defense to sexual contact with a 14 or 15-year-old that the lack of consent was due solely to child being under age 16); N.M. STAT. ANN. § 30-9-13 (Michie Supp. 1996) (offender either must use authority or force to coerce 13 to 18-year-olds in order to commit sexual contact offense); VA. CODE ANN. § 18.2-67.3(2) (Michie Supp. 1996) (sexual contact with 13 or 14-year-old an offense only "if committed against the will of the complaining witness by force, threat or intimidation").

[275] *See* MASS. GEN. LAWS ANN. ch. 272, § 4 (West 1990) (inducing a person under 18 "of chaste life" to have unlawful sexual intercourse); MISS. CODE ANN. § 97-3-67 (1994) (carnal knowledge of unmarried persons over 14 and under 18 who are of "previously chaste character"); MISS. CODE ANN. § 97-5-21 (1994) (seduction of child under 18 who is of "previously chaste character").

stood to mean virginity.[276] These statutes – applicable only to older adolescents – were enacted in an era when the goal of such statutes was to protect a girl's virginity. Once the girl lost her virginity, the purpose for the statute was no longer relevant and therefore no longer applied. Most jurisdictions consider this requirement obsolete and have long since abolished it.[277] One state supreme court that declined to abolish this requirement evoked a scathing criticism from a concurring judge:

> I am utterly at a loss to explain how the state can justify a statute such as this one, that seems to regard unchaste minors as being somehow less deserving of the state's protection than those who are otherwise. This view is a painfully short-sighted relic of a bygone era that was willing to punish nonmarital sexual acts severely, even to the point of regarding the innocent offspring of those unions as "children of no one" not even entitled to an inheritance.[278]

More common is a requirement that a child victim of certain sexual offenses be unmarried.[279] Few cases discuss this issue

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In fact, most states expressly forbid introduction of evidence of a victim's prior sexual activity under Rape Shield Statutes. *See* FED. R. EVID. 412 and accompanying commentary.

[276] *See* B.B. v. State, 659 So. 2d 256, 260 (Fla. 1995) (Kogan, J., concurring).

[277] *See id.* at 260-61 (Fla. 1995) (Kogan, J., concurring). In 1996 Florida rewrote a statute requiring chastity and omitted any reference to chastity of the victim. FLA. STAT. ANN. § 794.05 (West Supp. 1997). *Cf.* PERKINS & BOYCE, *supra* note 3, at 207-08 (finding a "very salutary legislative trend" statutes requiring proof of chastity of older adolescents). *See* Kristine Cordier Karnezis, Annotation, *Modern Status of Admissibility, in Statutory Rape Prosecution, of Complainant's Prior Sexual Acts or General Reputation for Unchastity*, 90 A.L.R.3D 1300, para. 6 (1996).

[278] B.B. v. State, 659 So. 2d 256, 260-61 (Kogan, J., concurring). The concurring judge argued that because the statute protected only "chaste" children, the state did not have the compelling interest necessary under a violation of privacy analysis for the law to be valid. The majority of the court refused to base its opinion on this ground, instead finding the statute unconstitutional as applied to a juvenile defendant because the state failed to prove a compelling interest in preventing sexual activity between teenagers since the statute was originally enacted to protect minors from sexual activities with adults. *See id.* at 259.

[279] *See* ARK. CODE ANN. § 5-14-103 (Michie 1993 & Supp. 1995); CAL. PENAL CODE § 261.5 (West Supp. 1997) (West Supp. 1997); COLO. REV. STAT. § 18-3-403 (1990 & Supp. 1996); GA. CODE ANN. § 16-6-3 (Supp. 1997); IND. CODE § 35-42-4-9 (Supp. 1996); IOWA CODE § 709.12 (West 1993); LA. REV. STAT. ANN. §§ 14:80 and 14:43.1 (West 1986 & Supp. 1997); ME. REV. STAT. ANN. tit. 17-A, § 253 (West 1983 & Supp. 1996); MISS. CODE ANN. §§ 97-3-67 and 97-5-23 (1994); N.H. REV. STAT. ANN. § 632-A:2 (1996); N.M. STAT. ANN. § 30-9-11 (Michie Supp. 1996); N.Y. PENAL LAWS § 130.25 (McKinney Supp. 1997); OHIO REV. CODE ANN. § 2907.02 (Anderson 1996);

beyond noting that the element of non-marriage must be proven by the prosecution beyond a reasonable doubt.[280]

D. *Punishment*

As with the elements of the offenses, punishment for sexual contact and sexual penetration offenses varies greatly around the country.[281] Sexual contact offenses committed against the youngest victims are often – but not always – felonies,[282] while

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OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 1997); OR. REV. STAT. § 163.445 (1995); 18 PA. CONS. STAT. ANN. § 3122.1 (Supp. 1997); S.D. CODIFIED LAWS § 22-22-7 (Michie Supp. 1996); TEX. PENAL CODE ANN. § 21.11 (West 1994); UTAH CODE ANN. § 76-5-401 (1995); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1996); VA. CODE ANN. § 18.2-61 (Michie Supp. 1996); WIS. STAT. ANN. § 948.09 (West 1996); WASH. REV. CODE § 9A.44.073 (Supp. 1997); W. VA. CODE § 61-8D-1 (1992).

[280] *See* State v. DePlonty, 749 P.2d 621 (Utah 1987) (non-spouse element is an objective element not dependent on defendant's state of mind and can be proven by circumstantial evidence). *See also* Annotation, *Statutory Rape of Female Who Is or Has Been Married*, 32 A.L.R.3D 1030 (1970).

[281] For purposes of the following analysis, if the state does not label the offense as a felony or misdemeanor, I classify that state's offenses as felonies if they provide a penalty of death or more than one year in prison for an offense. All other offenses I classify as misdemeanors. *See* 1 LAFAVE & SCOTT, *supra* note 80, §1.6(a), at 41. I do not attempt to dissect state sentencing schemes in any more detail than broad felony/misdemeanor distinctions.

[282] FELONIES: *See* ALA. CODE § 13A-6-66 (1994) (class C felony if child under 12); ALASKA STAT. § 11.41.436(a)(2) (Michie 1996) (class B felony if child under 13); ARIZ. REV. STAT. ANN. §§ 13-1404(A) & 13-1410 (West Supp. 1996) (class 3 felony if under 15 and contact with breast; class 2 felony if under 15 and sexual contact with other than breast); ARK. CODE ANN. § 5-14-108(a)(3) (Michie 1993) (class C felony if child under 14); CAL. PENAL CODE § 288(a) (West Supp. 1997) (felony if child under 14); COLO. REV. STAT. § 18-3-405(1) (1986 & Supp. 1996) (class 4 felony if child under 15); DEL. CODE ANN. tit. 11, § 768 (1995) (class G felony if child under 16); FLA. STAT. ANN. § 800.04(1) (West Supp. 1997) (2d degree felony if under 16); GA. CODE ANN. § 16-6-4 (Supp. 1997) (felony if child under 16); HAW. REV. STAT. ANN. § 707-732 (Michie 1994) (class C felony if child under 14); IDAHO CODE § 18-1506 (Supp. 1996) (felony if child under 16); 720 ILL. COMP. STAT. § 5/12-16(c)(1)(i) (West Supp. 1997) (class 2 felony if child under 13); IND. CODE § 35-42-4-3(b) (Supp. 1996) (class C felony if child under 14); IOWA CODE § 709.8(1) (1997) (class D felony to touch pubes or genitals of child under 14); KAN. STAT. ANN. § 21-3504(a)(3)(A) (1995) (severity 3 person felony if child under 14); KY. REV. STAT. ANN. § 510.110 (Banks-Baldwin 1995) (class D felony if child under 12); LA. REV. STAT. ANN. § 14:43.1 (West 1986 & Supp. 1997) (felony if child under 15); ME. REV. STAT. ANN. tit. 17-A, § 255(1)(C) (West Supp. 1996) (class C crime if child under 14); MD. ANN. CODE art. 27, § 464(B)(a)(3) (1996) (felony if child under 14); MASS. GEN. LAWS ANN. ch. 265, § 13B (West 1990) (felony if child under 14); MICH. COMP. LAWS ANN. § 750.520c(1)(a) (West 1991) (felony if child under 13); MINN. STAT. §§ 609.343(1)(a) & 609.345(1)(a) (Supp. 1997) (felony if under 13); MISS. CODE ANN. § 97-5-23(1) (1994) (felony if child under 14); MO. REV. STAT. § 566.067 (1994) (class

contact offenses against older children often are misdemeanors.[283] As noted above, however, the low age of consent to con-

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C felony if child under 12); MONT. CODE ANN. § 45-5-502 (1995) (felony if under 16); NEB. REV. STAT. § 28-320.01 (1995) (class IV felony if under 15); NEV. REV. STAT. § 201.230 (1995) (B felony if under 14); N.H. REV. STAT. ANN. §§ 632-A:2(II) & 632-A:3(III) (1996) (felony if child under 13); N.J. STAT. ANN. § 2C:14-2(b)(1) (West 1996) (2d degree crime if child under 13); N.M. STAT. ANN. § 30-9-13(A)(1) (Michie Supp. 1996) (3d degree felony if child under 13); N.Y. PENAL LAW § 130.65 (McKinney 1987) (class D felony if child under 11); N.C. GEN. STAT. § 14-202.1 (Supp. 1996) (class F felony if child under 16); N.D. CENT. CODE § 12.1-20-03(2) (Supp. 1995) (class B felony if child under 15); OHIO REV. CODE ANN. § 2907.05 (Anderson 1996) (3d degree felony if child under 13); OKLA. STAT. ANN. tit. 21, § 1123 (West Supp. 1997) (felony if child under 16); OR. REV. STAT. § 163.427 (1995) (class B felony if child under 14); R.I. GEN. LAWS § 11-37-8.3 (1994) (felony if child under 15); S.C. CODE ANN. § 16-15-140 (Law. Co-op. 1996) (felony if child under 16); S.D. CODIFIED LAWS § 22-22-7 (Michie Supp. 1996) (class 3 felony if child under 16); TENN. CODE ANN. § 39-13-504 (Supp. 1996) (class B felony if child under 13); TEX. PENAL CODE ANN. § 21.11 (2d degree felony if child under 17); UTAH CODE ANN. § 76-5-404.1(1) (2d degree felony if child under 14); VT. STAT. ANN. tit. 13, § 2602 (Supp. 1996) (felony if child under 16); VA. CODE ANN. § 18.2-67.3 (Michie Supp. 1996) (felony if child under 13); WASH. REV. CODE § 9A.44.083 (1996) (class A felony if child under 12); W. VA. CODE § 61-8B-7 (1992) (felony if child under 12); WIS. STAT. ANN. § 948.02(1) (West 1996) (class B felony if child under 13); WYO. STAT. ANN. § 6-2-304(a)(ii) (Michie Supp. 1997) (felony if child under 14). MISDEMEANORS: CONN. GEN. STAT. ANN. § 53a-73a(a)(1)(A) (West Supp. 1997) (class A misdemeanor if child under 15); IOWA CODE § 709.12(1) (1997) (aggravated misdemeanor to fondle inner thigh, groin, buttock, anus, or breast of child under 14); 18 PA. CONS. STAT. ANN. § 3126(a)(7) (West Supp. 1997) (1st degree misdemeanor if child under 13).

[283] If a state has only one age for a sexual contact offense, the penalty indicated in footnote 193 is repeated in this footnote to allow easier comparison of the states. FELONIES: ALASKA STAT. § 11.41.438(a)(1) (Michie 1996) (class C felony if child 13-15); ARIZ. REV. STAT. ANN. §§ 13-1404(A) & 13-1410 (West Supp. 1996) (class 3 felony if under 15 and contact with breast; class 2 felony if under 15 and sexual contact with other than breast); ARK. CODE ANN. § 5-14-121 (Michie 1993) (class D felony if child 14-17 and defendant in a position of trust); CAL. PENAL CODE § 288(c)(1) (West Supp. 1997) (misdemeanor or felony if child 14 or 15); COLO. REV. STAT. § 18-3-405.3 (1986 & Supp. 1996) (class 3 felony if child under 15, and class 4 felony if child is 15-17 and defendant in position of trust); DEL. CODE ANN. tit. 11, § 768 (1995) (class G felony if child under 16); FLA. STAT. ANN. § 800.04(1) (West Supp. 1997) (2d degree felony if under 16); GA. CODE ANN. § 16-6-4 (Supp. 1997) (felony if child under 16); HAW. REV. STAT. ANN. § 707-732 (Michie 1994) (class C felony if child under 14); IDAHO CODE § 18-1508A (Supp. 1996) (felony if child 16 or 17); 720 ILL. COMP. STAT. § 5/12-16(d) (West Supp. 1997) (class 2 felony if child 13-16); 720 ILL. COMP. STAT. § 5/12-16(f) (West Supp. 1997) (class 2 felony if child 13-17 and defendant in position of authority); IND. CODE § 35-42-4-9(b) (Supp. 1996) (class C or D felony if child 14-15); IOWA CODE § 709.8(1) (1997) (class D felony to touch pubes or genitals of child under 14); KAN. STAT. ANN. § 21-3503 (1995) (severity 5 person felony if child 14-15); KAN. STAT. ANN. § 21-3603(a)(2)(B) (1995) (severity 7 person felony if child 16-17 and defendant is parent); LA. REV. STAT. ANN. §§

14:43.1, 14:81 & 14:78.1 (West 1986 & Supp. 1997) (felony if child under 15 or under 17; felony if child under 18 and relative of defendant); ME. REV. STAT. ANN. tit. 17-A, § 255(1)(C) (West Supp. 1996) (class C crime if child under 14); ME. REV. STAT. ANN. tit. 17-A, § 255(1)(F) & (G) (West Supp. 1996) (class C or D crime if child under 18 and defendant parent or in position of authority); MD. ANN. CODE art. 27, § 464(B)(a)(3) (1996) (felony if child under 14); MASS. GEN. LAWS ANN. ch. 265, § 24B (West 1990) (felony if child under 16, but intent to rape is an element); MICH. COMP. LAWS ANN. § 750.520c (West 1991) (felony if child 13-15 and defendant related); MINN. STAT. §§ 609.343 & 609.345 (Supp. 1997) (various felonies if child under 16; various felonies if child 16-17 and defendant in position of authority); MISS. CODE ANN. § 97-5-23 (1994) (felony if child under 14; felony if child under 18 and defendant in position of authority); MONT. CODE ANN. § 45-5-502 (1995) (felony if under 16); NEB. REV. STAT. § 28-320.01 (1995) (class IV felony if under 15); NEV. REV. STAT. § 201.230 (1995) (B felony if under 14); N.H. REV. STAT. ANN. §§ 632-A:2(II) & 632-A:3(III) (1996) (felony if child under 13); N.J. STAT. ANN. § 2C:24-4 (West 1996) (3d degree crime if child under 16); N.M. STAT. ANN. § 30-9-13 (Michie Supp. 1996) (3d degree felony of child under 13; 3d or 4th degree felony if child 13-18 and defendant in position of authority or uses force); N.C. GEN. STAT. § 14-202.1 (Supp. 1996) (class F felony if child under 16); N.D. CENT. CODE § 12.1-20-07(1)(f) (Supp. 1995) (class C felony if defendant 22 or older and child 15-17); OKLA. STAT. ANN. tit. 21, § 1123 (West Supp. 1997) (felony if child under 16); S.C. CODE ANN. § 16-15-140 (Law. Co-op. 1996) (felony if child under 16); S.D. CODIFIED LAWS § 22-22-7 (Michie Supp. 1996) (class 3 felony if child under 16); TENN. CODE ANN. § 39-13-504 (Supp. 1996) (class B felony if child under 13); 1997 Tenn. Pub. Act 256 (class C felony if child 13-17 and defendant in position of authority); TEX. PENAL CODE ANN. § 21.11 (2d degree felony if child under 17); UTAH CODE ANN. § 76-5-404 (2d degree felony if child 14-17); VT. STAT. ANN. tit. 13, § 2602 (Supp. 1996) (felony if child under 16); VA. CODE ANN. §§ 18.2-67.3 & 18.2-370.1 (Michie Supp. 1996) (felony if child under 13, or if under 18 and defendant in custodial or supervisory relationship); WASH. REV. CODE §§ 9A.44.086, 9A.44.089 (1996) (class B felony if child 12-13; class C felony if child 14-15); W. VA. CODE § 61-8D-5 (1992) (felony if child under 18 and defendant a parent or guardian); WIS. STAT. ANN. §§ 948.02(2) & 948.06 (West 1996) (class BC felony if child under 16, or if under 18 and a relative); WYO. STAT. ANN. § 14-3-105 (Michie 1988) (felony if child under 18). MISDEMEANORS: *See* ALA. CODE § 13A-6-67 (1994) (class A misdemeanor if child 13-15); ALASKA STAT. § 11.41.440(a)(2) (Michie 1996) (class A misdemeanor if child 16-17 and defendant in a position of trust); CAL. PENAL CODE § 288(c)(1) (West Supp. 1997) (misdemeanor or felony if child 14 or 15); CONN. GEN. STAT. ANN. § 53a-73a(a)(1)(D) (West Supp. 1997) (class A misdemeanor if child under 18 and defendant in position of authority); IOWA CODE § 709.12(1) (1997) (aggravated misdemeanor to fondle inner thigh, groin, buttock, anus, or breast of child under 14); KY. REV. STAT. ANN. §§ 510.120 & 510.130 (Banks-Baldwin 1995) (class A misdemeanor if child under 14; class B misdemeanor if child 14-15); MICH. COMP. LAWS ANN. § 750.520e (West 1991) (misdemeanor if child 13-15); MO. REV. STAT. § 566.068 (1994) (class A misdemeanor if child 12-13); N.H. REV. STAT. ANN. § 632-A:4 (1996) (misdemeanor if child 13-15 and defendant related, or child 13-17 and defendant in position of authority); N.Y. PENAL LAW §§ 130.55 & 130.60 (McKinney 1987) (class B misdemeanor if child 15-16; class A misdemeanor if child under 14); OHIO REV. CODE ANN. § 2907.06 (Anderson 1996) (3d degree misdemeanor if child 13-15); OR. REV. STAT. § 163.415 (1995) (class A misdemeanor if child under 18); 18 PA. CONS. STAT. ANN. § 3126(a)(8) (West Supp. 1997) (2d degree misdemeanor if child under 16); R.I. GEN.

tact offenses in many states precludes prosecution altogether.

Penetration offenses committed against the youngest children are always felonies[284] and penetration offenses committed

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LAWS § 11-37-8.3 (1994) (felony if child under 15); WASH. REV. CODE § 9A.44.096 (1996) (gross misdemeanor if child 16-17 and defendant in significant relationship); W. VA. CODE § 61-8B-9 (1992) (misdemeanor if child under 16).

[284] *See e.g.*, ALA. CODE §§ 13A-6-61 & 13A-6-63 (1994) (class A felony if child under 12); ALASKA STAT. § 11.41.434(a)(1) (Michie 1996) (unclassified felony if child under 13); ARIZ. REV. STAT. ANN. § 13-1405 (West Supp. 1996) (class 2 felony if child under 15); ARK. CODE ANN. § 5-14-103(a)(3) (Michie 1993) (class Y felony if child under 14); CAL. PENAL CODE §§ 286(c), 288a and 289(j) (West Supp. 1997) (felonies for various penetration offenses if child under 14); COLO. REV. STAT. § 18-3-403(3) (1986 & Supp. 1996) (class 4 felony if child under 15); CONN. GEN. STAT. ANN. § 53a-70(a)(2) (West Supp. 1997) (class B felony if child under 13); DEL. CODE ANN. tit. 11, § 773(3) (1995) (class B felony if child under 14); FLA. STAT. ANN. § 794.011 (West Supp. 1997) (capital or life felony if under 12); GA. CODE ANN. § 16-6-3 (Supp. 1997) (felony if child under 16); HAW. REV. STAT. ANN. § 707-730 (Michie 1994) (class A felony if child under 14); IDAHO CODE § 18-1508 (Supp. 1996) (felony if child under 16); 720 ILL. COMP. STAT. § 5/12-14.1(a)(1) (West Supp. 1997) (class X felony if child under 13); IND. CODE § 35-42-4-3(a) (Supp. 1996) (class A or B felony if child under 14); IOWA CODE §§ 709.3(2) & 709.4(2)(b) (1997) (class B felony if child under 12; class C felony if child 12-13); KAN. STAT. ANN. § 21-3502 (1995) (severity 1 person felony if child under 14); KY. REV. STAT. ANN. §§ 510.040 & 510.070 (Banks-Baldwin 1995) (class A felony if child under 12); LA. REV. STAT. ANN. §§ 14:42 & 14:43.1 (West 1986 & Supp. 1997) (felony if child under 12); ME. REV. STAT. ANN. tit. 17-A, § 253(1)(B) (West Supp. 1996) (class A crime if child under 14); MD. ANN. CODE art. 27, §§ 463 & 464A (1996) (felony if child under 14); MASS. GEN. LAWS ANN. ch. 265, § 23 (West 1990) (felony if child under 16); MICH. COMP. LAWS ANN. § 750.520b (West 1991) (felony if child under 13); MINN. STAT. §§ 609.342(1)(a) & 609.343(1)(a) (Supp. 1997) (felony if under 13); MISS. CODE ANN. §§ 97-3-65(1) & 97-3-95(1) (1994) (capital offense or felony if child under 14); MO. REV. STAT. §§ 566.032 & 566.062 (1994) (felony if child under 14); MONT. CODE ANN. § 45-5-503 (1995) (felony if under 16); NEB. REV. STAT. § 28-319 (1995) (class II felony if under 16); NEV. REV. STAT. § 200.368 (1995) (C felony if under 16); N.H. REV. STAT. ANN. § 632-A:2(I)(l) (1996) (felony if child under 13); N.J. STAT. ANN. § 2C:14-2(a)(1) (West 1996) (1d degree crime if child under 13); N.M. STAT. ANN. § 30-9-11(C) (Michie Supp. 1996) (1st degree felony if child under 13); N.Y. PENAL LAW §§ 130.35 & 130.50 (McKinney 1987) (class B felony if child under 11); N.C. GEN. STAT. §§ 14-27.2 & 14-27.4 (Supp. 1996) (class B1 felony if child under 13); N.D. CENT. CODE § 12.1-20-03(1) (Supp. 1995) (class A felony if child under 15); OHIO REV. CODE ANN. §§ 2907.02 & 2907.12 (Anderson 1996) (1st degree felony if child under 13); OKLA. STAT. ANN. tit. 21, § 1114 (West Supp. 1997) (capital offense or felony if child under 14); OR. REV. STAT. §§ 163.375(1)(c), 163.405(1)(b) & 163.411 (1995) (class A felony if child under 12); 18 PA. CONS. STAT. ANN. §§ 3123(a)(6) & 3125(7) (West Supp. 1997) (1st or 2d degree felony if child under 13); R.I. GEN. LAWS § 11-37-8.1 (1994) (felony if child under 15); S.C. CODE ANN. § 16-3-655(1) (Law. Co-op. 1985) (felony if child under 11); S.D. CODIFIED LAWS §§ 22-22-1(1) & 22-22-30.1 (Michie Supp. 1996) (class 1 felony if child under 10 or under 13); TENN. CODE ANN. § 39-13-522 (Supp. 1996) (class A felony if child under 13); TEX. PENAL CODE ANN. § 22.021 (1st degree felony if child under 14); UTAH CODE ANN. §§ 76-5-402, 76-5-

against older children are almost always felonies, although some of these offenses may be misdemeanors.[285] Thus, sexual

402.2, 76-5-403, & 76-5-403.1 (1st degree felony if child under 14); VT. STAT. ANN. tit. 13, § 3253 (Supp. 1996) (felony if child under 10); VA. CODE ANN. §§ 18.2-61, 18.2-67.1 & 18.2-67.2 (Michie Supp. 1996) (felony if child under 13); WASH. REV. CODE § 9A.44.073 (1996) (class A felony if child under 12); W. VA. CODE § 61-8B-3 (1992) (felony if child under 12); WIS. STAT. ANN. § 948.02(1) (West 1996) (class B felony if child under 13); WYO. STAT. ANN. § 6-2-303(a)(v) (Michie 1988) (felony if child under 12).

[285] If a state has only one age for a sexual penetration offense, the penalty indicated in footnote 195 is repeated in this footnote to allow easier comparison of the states. FELONIES: ALA. CODE §§ 13A-6-62 & 13A-6-64 (1994) (class B felony if child 13-15); ALASKA STAT. § 11.41.436(a)(1) (Michie 1996) (class B felony if child 13-15); ARIZ. REV. STAT. ANN. § 13-1405 (West Supp. 1996) (class 6 felony if child 15-17); ARK. CODE ANN. §§ 5-14-106 & 5-14-120 (Michie 1993 & Supp. 1995) (class D felony if child under 16; class C felony if child 14-17 and defendant in position of authority); CAL. PENAL CODE §§ 261.5, 286, 288a, & 289 (West Supp. 1997) (misdemeanors and felonies for various penetration offenses if child under 18);); COLO. REV. STAT. § 18-3-403(3) (1986 & Supp. 1996) (class 4 felony if child under 15); CONN. GEN. STAT. ANN. § 53a-71 (West Supp. 1997) (class C felony if child 13-15, or under 18 and defendant in position of authority); DEL. CODE ANN. tit. 11, §§ 770 through 775 (1995) (class B, C, D, or E felonies for various penetration offenses if child under 16); FLA. STAT. ANN. § 794.05 (West Supp. 1997) (2d degree felony if child 16 or 17 and defendant 24 or older); FLA. STAT. ANN. § 794.011(8) (West Supp. 1997) (1d degree felony if child 12- 17 and defendant in position of authority); FLA. STAT. ANN. §§ 800.04(2) & (3) & 827.04(3) (West Supp. 1997) (2d degree felony if child under 16; 3d degree felony for impregnating child under 16); GA. CODE ANN. § 16-6-3 (Supp. 1997) (felony if child under 16); HAW. REV. STAT. ANN. § 707-730 (Michie 1994) (class A felony if child under 14); IDAHO CODE § 18-1508A (Supp. 1996) (felony if child 16 or 17); 720 ILL. COMP. STAT. § 5/12-16(d) (West Supp. 1997) (class 2 felony if child 13-16); IND. CODE § 35-42-4-9 (Supp. 1996) (class B or C felony if child 14-15); IOWA CODE § 709.4(2)(c) (1997) (class C felony if child 14-15); KAN. STAT. ANN. § 21-3504(a)(1) (1995) (severity 3 person felony if child 14-15); KAN. STAT. ANN. § 21-3603(a)(2)(A) (1995) (severity 5 person felony if child 16-17 and defendant is parent); KY. REV. STAT. ANN. §§ 510.060 & 510.090 (Banks-Baldwin 1995) (class D felony if child under 16); LA. REV. STAT. ANN. §§ 14:43.3, 14:80 & 14:78.1 (West 1986 & Supp. 1997) (felony if child under 15 or 12-16; felony if child under 18 and relative of defendant); ME. REV. STAT. ANN. tit. 17-A, § 254(1)(A) (West Supp. 1996) (class D crime if child 14 or 15); ME. REV. STAT. ANN. tit. 17-A, §§ 253 & 254 (West Supp. 1996) (class B, C, D, or E crime if child under 18 and defendant a relative or in position of authority); MD. ANN. CODE art. 27, § 464B (1996) (felony if child 14 or 15); MASS. GEN. LAWS ANN. ch. 265, § 23 (West 1990) (felony if child under 16); MICH. COMP. LAWS ANN. § 750.520d (West 1991) (felony if child 13-15); MINN. STAT. §§ 609.342 & 609.344 (Supp. 1997) (various felonies if child under 16; various felonies if child 16-17 and defendant in position of authority); MISS. CODE ANN. §§ 97-3-67, 97-3-95, 97-3-21, & 97-5-41 (1994) (various felonies if child under 18); MO. REV. STAT. §§ 566.034 & 566.064 (1994) (felony if child under 17); MONT. CODE ANN. § 45-5-503 (1995) (felony if under 16); NEB. REV. STAT. § 28-319 (1995) (class II felony if under 16); NEB. REV. STAT. § 28-319 (1995) (class II felony if under 16); NEV. REV. STAT. § 200.368 (1995) (C felony if under 16); N.H. REV. STAT. ANN. § 632-A:3(II)

penetration offenses are uniformly treated more seriously than sexual contact offenses by statute, although in practice, offenders committing penetration offenses do not necessarily receive significant sentences.

(1996) (felony if child 13-15); N.H. REV. STAT. ANN. § 632-A:2 (1996) (felony if child 13-15 and defendant related, or child 13-17 and defendant in position of authority); N.J. STAT. ANN. § 2C:14-2 (West 1996) (2d degree crime if child 13-15; 1st or 2d degree crime if child 13-17 and defendant related or in position of authority); N.M. STAT. ANN. § 30-9-13(F) (Michie Supp. 1996) (4th degree felony if child 13-16); N.Y. PENAL LAW §§ 130.20 & 130.40 (McKinney 1987) (class E felony if child under 17); N.C. GEN. STAT. §§ 14-27.7 & 14-27.7A (Supp. 1996) (class E felony if child a minor and defendant in position of authority; class B1 or C felony if child 13-15); N.D. CENT. CODE § 12.1-20-05 (Supp. 1995) (class C felony if defendant 22 or older and child 15-17); OHIO REV. CODE ANN. §§ 2907.04 & 2907.03 (Anderson 1996) (4th degree felony if child 13-15; 3d degree felony if child under 18 and defendant in position of authority); OKLA. STAT. ANN. tit. 10, § 7115 (West Supp. 1997) (felony if child under 18); OKLA. STAT. ANN. tit. 21, §§ 888 & 1111 (West Supp. 1997) (felony if child under 16); OR. REV. STAT. §§ 163.355, 163.385 & 163.405 (1995) (class C felony if child under 16; class A felony if child under 16 and defendant a relative); 18 PA. CONS. STAT. ANN. §§ 3122.1, 3123(a)(7) & 3125(8) (West Supp. 1997) (1st or 2d degree felony if child under 16); R.I. GEN. LAWS § 11-37-6 (1994) (felony if child 15); S.C. CODE ANN. § 16-3-655(2) & (3) (Law. Co-op. 1985) (felony if child 11-15); S.D. CODIFIED LAWS §§ 22-22-1(5) (Michie Supp. 1996) (class 3 felony if child 10-15); TENN. CODE ANN. § 39-13-506 (Supp. 1996) (class E felony if child under 13-17); TEX. PENAL CODE ANN. § 22.011 (2d degree felony if child under 17); UTAH CODE ANN. §§ 76-5-402, 76-5-402.2, 76-5-403, & 76-5-403.1 (1st degree felony if child 14-17); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1996) (felony if child under 16, or child under 18 and defendant in position of trust); VA. CODE ANN. §§ 18.2-63, 18.2-361 & 18.2-366 (Michie Supp. 1996) (felony if child 13-14; felony if child 13-17 and defendant is parent or grandparent); WASH. REV. CODE §§ 9A.44.076, 9A.44.079 (1996) (class A felony if child 12-13; class C felony if child 14-15); WASH. REV. CODE § 9A.44.093 (1996) (class C felony if child 16-17 and defendant in significant relationship); W. VA. CODE §§ 61-8B-5 & 61-8D-5 (1992) (felony if child under 16 or under 18 and defendant is parent or guardian); WIS. STAT. ANN. §§ 948.02(2) & 948.06 (West 1996) (class BC felony if child under 16, or if under 18 and a relative); WYO. STAT. ANN. §§ 6-2-304(a)(i) & 14-3-105 (Michie 1988) (felony if child under 16 or under 18). MISDEMEANORS: CAL. PENAL CODE §§ 261.5, 286, 288a, & 289 (West Supp. 1997) (misdemeanors and felonies for various penetration offenses if child under 18); MD. ANN. CODE art. 27, § 464C(a)(3) & (4) (1996) (misdemeanor if child 14-15 and defendant four or more years older); MISS. CODE ANN. § 97-3-67 (1994) (misdemeanor or felony penalties available if child 15-17); MISS. CODE ANN. § 97-29-3 (1994) (misdemeanor if child under 18 and defendant is teacher); OR. REV. STAT. § 163.435 (1995) (class A misdemeanor if child under 18); VA. CODE ANN. § 18.2-371 (Michie Supp. 1996) (class 1 misdemeanor if child 15-17); WIS. STAT. ANN. § 948.09 (West 1996) (class A misdemeanor if child 16-17).

V. Effects of Abuse on the Individual and Society

A. *Psychological Effects of Abuse on the Individual*

As with many other areas of psychology, much of the early research conducted on the effects of abuse was influenced by the thinking of Sigmund Freud.[286] Based on his extensive therapy with patients, Freud initially asserted that at the base of adult "hysteria" was childhood sexual trauma. However, Freud apparently was uncomfortable with the implication of this theory that many otherwise respectable men were sexually abusing children. As a result, Freud repudiated this theory and instead hypothesized that all the women who described incestuous experiences to him were describing fantasies based on their own incestuous desires. This later theory of Freud pervaded the psycho-analytic community for decades to come:

> The legacy of Freud's inquiry into the subject of incest was a tenacious prejudice, still shared by professionals and laymen alike, that children lie about sexual abuse. This belief is by now so deeply ingrained in the culture that children who dare to report sexual assaults are more than likely to have their complaints dismissed as fantasy.[287]

Social scientists conducting research studies continued to follow the tradition of Freud throughout much of the 20th Century. In 1953, Alfred Kinsey, in the first significant research study on human sexuality, gathered substantial data on child sexual abuse by adults.[288] However, instead of recognizing the extent of the abuse revealed by the data,[289] Kinsey dismissed it in much the same fashion as Freud. A primary aim of Kinsey's research was to demonstrate that American laws were out of touch with the reality of human sexuality, and thus many of his interpretations were influenced by his desire to convince

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[286] This is based on Judith Herman's interpretation of Freud's progression of thought. *See* JUDITH HERMAN, FATHER-DAUGHTER INCEST 9-10 (1981).

[287] HERMAN, *supra* note 286, at 11.

[288] ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 121 (1953).

[289] Kinsey notes that 24% of their sample of females reported being approached in their pre-adolescent years by adult males who appeared to be making sexual advances or who in fact sexually touched the girl. *See* KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE, *supra* note 288, at 117. Kinsey also states that about half the adult males were relatives and half were strangers. *See id.* at 118.

Americans to be more open-minded about human sexuality. To this end, he downplayed the seriousness of adult sexual activity with children:

> It is difficult to understand why a child, except for cultural conditioning, should be disturbed at having its genitalia touched, or disturbed at seeing the genitalia of other persons, or disturbed at even more specific sexual contacts. . . Some of the more experienced students of juvenile problems have come to believe that the emotional reactions of the parents, police officers, and other adults who discover that the child has had such a contact, may disturb the child more seriously than the sexual contacts themselves.[290]

The fallacy of this thinking is now plain to most professionals. As articulated by Herman:

> In their plea for greater tolerance, however, they failed to distinguish between essentially harmless acts committed by consenting adults . . . and frankly exploitative acts such as . . . the molesting of children. Ignoring issues of dominance and power, they took a position that amounted to little more than advocacy of greater license for men.[291]

It is impossible to measure the impact of the Kinsey studies on decision making, but Herman and others assert that Kinsey significantly affected legislative decisions during the 1960s and 1970s.[292] There is not much evidence that Kinsey affected the reasoning of appellate courts,[293] at least not to reference Kinsey's assertion that sexual contact had little impact on the welfare of children.[294]

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[290] KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE, *supra* note 289, at 121.

[291] HERMAN, *supra* note 286, at 16-17.

[292] HERMAN, *supra* note 286, at 162-76.

[293] It is impossible to measure the extent to which Freudian and Kinseyesque thinking affected trial judges, prosecutors, police officers, and others directly involved in the criminal justice system. Many professionals argue that the criminal justice system continues to be heavily prejudiced against children. *See* ELLEN GRAY, UNEQUAL JUSTICE (1993) (surveying child sexual abuse prosecutions in eight jurisdictions and concluding that child victims are not treated fairly).

[294] Sixty-eight cases cite the Kinsey studies to support any proposition. Search of LEXIS, Mega Library, Mega File (July 24, 1997) (<Kinsey w/10 sex! w/10 behavior or scale or research or report or stud!>). Many of these opinions are in the context of challenges to criminal convictions involving obscenity, pornography, adult consensual anal intercourse, cunnilingus or fellatio and are cited to show that certain sex acts are no longer deviate sexual behaviors. Several cases cite Kinsey for his asser-

In spite of the pervasive influence of Freud and Kinsey, a dramatic increase in scientific research examining the causes and effects of child abuse and neglect began in the early 1980s.[295] While the entire reaches of the effects of abuse are far from being fully understood, several psychological effects are by now well documented. These effects have been divided into two categories. First are those effects that show up during childhood as a result of abuse, which are referred to in the literature as short-term effects of abuse.[296] Second are those effects that cause problems during the adult life of the person abused as a child, which are referred to as long-term effects of abuse.[297]

Before discussing the merits of the research, however, its limitations need to be mentioned. The first limitation of existing research is that few researchers employ sampling tech-

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tions regarding homosexuality. One judge writing a concurring opinion overturning an adult rape conviction cites Kinsey to support the assertion that "[some women] will not consent and act as if they do." United States v. Steele, 43 C.M.R. 845, 849 (1971) (Finkelstein, J., concurring).

Only three cases cite Kinsey for a proposition related to sexual contact with children, and two of these cite Kinsey to support assertions that child sexual abuse is a serious societal problem, Wallace v. Der-Ohanian, 199 Cal. App. 2d 141 (1962) and Commonwealth v. Maduro, 13 Phila. 513 (Philadelphia Common Pleas Court 1985). In *State v. D.R.*, 518 A.2d 1122 (N.J. Super. Ct. App. Div. 1986), the court quotes Kinsey's assertion that children should not be disturbed at having their genitalia touched. *Id.* at 1129 (quoting Note, *A Comparative Approach to Child Hearsay in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1756 n.94 (1983), quoting DAVID FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 31 (1974), quoting KINSEY, *supra* note 288, at 121). However, this quotation is made in the context of a case examining whether a child's spontaneous declaration should be admitted as an exception to the hearsay rule. The court is citing Kinsey to support its position that children are naive and may not realize they are harmed by the abuse, and therefore may not make spontaneous outbursts immediately after the abuse. It is not quoted for the purpose of down-playing the seriousness of sexual contact with children. Thus, courts have not accepted Kinsey's assertion that sexual contact between adults and children is not harmful to children.

[295] The leading journal in the field, CHILD ABUSE AND NEGLECT: THE INTERNATIONAL JOURNAL, has now been in publication for more than 20 years. Newer journals, such as Child Maltreatment and the JOURNAL OF CHILD SEXUAL ABUSE also address issues solely related to abuse and neglect. Other journals, such as PEDIATRICS, the JOURNAL OF INTERPERSONAL VIOLENCE, and the JOURNAL OF FAMILY VIOLENCE publish numerous studies related to abuse and neglect of children, and countless other medical and psychological journals now regularly address issues related to child abuse.

[296] *See* A. Browne & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 PSYCHOL. BULLETIN 66 (1986).

[297] *See id.* at 69.

niques in which a random segment of society is selected to participate in a study.[298] Rather, most researchers use either clinical patients or college students as subjects of studies since these populations are readily available to the researchers who often are either practicing therapists or college teachers. Research based on such non-random samples is not representative of larger society, and thus generalizations that can be made about larger society based on this research are limited. For example, experiences of individuals receiving psychological treatment cannot be said to represent experiences of people not in treatment. Similarly, college students in a class on sexuality may have life experiences that give them the desire to take such a class and may not have comparable life experiences of the janitor who cleans the classroom. In contrast, random sampling increases the likelihood that all segments of society are represented in a study – provided a sufficient number of people are surveyed – and generalizations can more justifiably be made about broader society based on the experiences of those tested.[299] Of course, it is expensive to design and conduct random sample research in which strangers are asked to voluntarily disclose information about childhood sexual abuse and current sexual functioning; such studies will not, as a practical matter, be conducted often.

Another criticism is that much of the research does not make use of a control group against which to measure results. If, for example, a researcher determines that thirty-three percent of adults who were abused as children exhibit abnormal sexual functioning, the number is meaningful only if it is known that twenty percent of non-abused adults exhibit the same behavior. All other factors being equal, it can then be said that the difference of thirteen percent is attributable to the childhood sexual abuse. In other words, control groups are integral to studies attempting to show that the measured effect (e.g. abnormal sexual functioning) is attributable to the variable under examination (childhood sexual abuse). Just as with random sampling, use of a control group is an added expense

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[298] *See* Joseph H. Beitchman et al., *A Review of the Long-Term Effects of Child Sexual Abuse*, 16 CHILD ABUSE & NEGLECT 101, 102-03 (1992).

[299] *See* KENNETH D. BAILEY, METHODS OF SOCIAL RESEARCH 87-88 (3d ed. 1987).

and difficulty that many researchers cannot overcome.

These criticisms are most significant when the research is used to create a checklist to assist social workers, therapists, and others in the field of child protection in diagnosing abuse. While a single checklist absolutely identifying abuse does not exist, a variety have been developed over the years to assist professionals in determining whether a child has been abused. For example, the Structured Interview for Signs Associated with Sexual Abuse has been used to question parents about a child's behavior in order to help determine the likelihood of the child being sexually abused.[300] Similarly, the Child Behavior Checklist is used by some professionals in assisting with their determination of whether a child has been abused.[301] The utility of any type of checklist has been extensively criticized if it is used to make a determination as to whether a child has been abused,[302] and accepted practice limits over-reliance on behavioral indicators.[303]

In contrast to searching for causative relationships for individual children, the focus of this article is on the basic correla-

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[300] *See* Robert D. Wells, et al., *Emotional, Behavioral, and Physical Symptoms Reported by Parents of Sexually Abuse, Nonabused, and Allegedly Abused Prepubescent Females*, 19 CHILD ABUSE & NEGLECT 155, 156 (1995).

[301] *See* T.M. ACHENBACH & C. EDELBROCK, MANUAL FOR CHILD BEHAVIOR CHECKLIST (1983). Other instruments, such as the Child Sexual Behavior Inventory-3, further quantify changes in sexual behavior. The determination of whether the changes are indicative of abuse is made subsequently. *See* William N. Friedrich et al., *Child Sexual Behavior: An Update with the CSBI-3*, 9 APSAC ADVISOR 13 (Winter 1996).

[302] *See* Lucy Berliner & Jon R. Conte, *Sexual Abuse Evaluations: Conceptual and Empirical Obstacles*, 17 CHILD ABUSE & NEGLECT 111 (1993).

[303] *See* KATHLEEN COULBORN FALLER, EVALUATING CHILDREN SUSPECTED OF HAVING BEEN SEXUALLY ABUSED 29-30 (1996).

> Psychological tests are neither necessary nor sufficient for deciding whether a child has been sexually abused. . . . However, testing can be helpful as one piece of information to be used to determine whether a child has been sexually victimized and often provides a picture of a child's overall functioning.

Id. *See also* Kenneth V. Lanning & Bill Walsh, *Criminal Investigation of Suspected Child Abuse in* THE APSAC HANDBOOK ON CHILD MALTREATMENT, *supra* note 6, at 257. The use of behavioral indicators may be relevant in a child sexual abuse prosecution, though this issue is widely debated. *See* 1 MYERS, *supra* note 226, § 4.32, at 285-93 (2d ed. 1992); AMERICAN PROSECUTORS RESEARCH INSTITUTE, *supra* note 213, at 13. "Standing alone, behavioral indicators are insufficient to conclude that a child has been abused, but they have emerged on a regular enough basis to warrant your further investigation of a particular case." *Id.*

tion between childhood sexual abuse and harmful consequences. Consequently, the criticisms of certain reviewers, while still deserving attention, are more muted in this context. The research falls far short of exhaustive consideration of every possible cause and effect, but adequately identifies several harms clearly attributable to sexual molestation of children and other harms that are less concretely established but are nonetheless important to consider.

1. Effects of Abuse on Children

It has long been intuitively understood that sexual violation of children has devastating immediate psychological consequences.[304] Modern scientific researchers identify a long list of potential negative consequences of abuse, such as: "fears, anxiety, phobias, sleep and eating disturbances, poor self-esteem, depression, self-mutilation, suicide, anger, hostility, aggression, violence, running away, truancy, delinquency, increased vulnerability to revictimization, substance abuse, teenage prostitution, and early pregnancy."[305] Because this list is generic, and nearly half of abused children may display none of these symptoms,[306] researchers are justifiably hesitant to identify any behavior as diagnostic of abuse. Nonetheless, many outcomes are found to be consistently more prevalent in abused than non-

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[304] *See* People v. Gibson, 134 N.E. 531, 532 (N.Y. Ct. App. 1922). "The intention of the law [assault on a child] is to protect unmarried girls from carnal copulation, such intercourse being fraught with peril to the morals of the community and to the well-being of the individual." *Id.*

This assumption was not universal, however. Until very recently, some mainstream academics continued to assert that child sexual abuse had no harmful psychological consequences to children. *See* Larry L. Constantine, *The Effects of Early Sexual Experiences, in* CHILDREN AND SEX: NEW FINDINGS, NEW PERSPECTIVES 217, 242 (Larry L. Constantine & Floyd M. Martinson, eds., 1981)

> [L]egitimate sexual experiences are . . . ones (1) in which the child is sexually knowledgeable and fully comprehends the activity; (2) to which he or she freely consents on the basis of that comprehension; (3) that take place in a family and/or social setting that affirms such sexual experiences as appropriate; and (4) that (therefore) do not result in symptoms of dysfunction in the child or the family.

Id. See also James Henderson, *Is Incest Harmful?*, 28 CANADIAN J. PSYCHIATRY 34, 38 (1989). *See also infra* note 434-54.

[305] Frank W. Putnam & Penelope K. Trickett, *Child Sexual Abuse: A Model of Chronic Trauma*, 56 PSYCHIATRY 82, 84 (1993).

[306] *See id.*

abused children.

a. Psychological, Behavioral, and Social Effects

In a 1993 review of the literature, Kendall-Tackett lists the following symptoms found by every researcher who compared non-clinical, non-abused children to sexually abused children: "fear, nightmares, general posttraumatic stress disorder (PTSD), withdrawn behavior, neurotic mental illness, cruelty, delinquency, sexually inappropriate behavior, regressive behavior (including enuresis, encopresis, tantrums, and whining), running away, general behavior problems, self-injurious behavior, internalizing, and externalizing."[307]

Of these symptoms, Kendall-Tackett conclude that seven factors stand out when comparing abused and non-abused children: aggression, anxiety, depression, externalizing, internalizing, sexualized behavior, and withdrawal.[308] When further broken down by age group of the children, Kendall-Tackett concludes that pre-school children often exhibit anxiety, nightmares, post traumatic stress disorder, internalizing, externalizing, and inappropriate sexualized behaviors.[309] School-age children exhibit fear, neurotic and general mental illness, aggression, nightmares, school problems, hyperactivity, and re-

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[307] Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULLETIN 164, 165 (1993). Internalizing includes withdrawn behavior, depression, fearfulness, inhibition and overcontrol. Externalizing includes aggression and antisocial and undercontrolled behavior. *See id.* at n.3. *See also* Vicky V. Wolfe & Jo-Ann Birt, *The Psychological Sequelae of Child Sexual Abuse*, 17 ADVANCES IN CLINICAL CHILD PSYCHOLOGY 233 (1995).

[308] In young children this may result in masturbation and sexual play with other children, while older children may be outright promiscuous. *See* Joseph H. Beitchman, et al., *A Review of the Short-term Effects of Child Sexual Abuse*, 15 CHILD ABUSE & NEGLECT 537, 552 (1991).

Research also indicates that sexually abused adolescents are more likely to engage in risky health behaviors. Stephen Nagy et al., *A Comparison of Risky Health Behaviors of Sexually Active, Sexually Abused, and Abstaining Adolescents*, 93 PEDIATRICS 570 (1994). *See also* Clare E. Cosentino et al., *Sexual Behavior Problems and Psychopathology Symptoms in Sexually Abused Girls*, 34 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 1033 (1995); David M. Fergusson et al., *Childhood Sexual Abuse, Adolescent Sexual Behaviors and Sexual Revictimization*, 21 CHILD ABUSE & NEGLECT 789 (1997).

[309] Kendall-Tackett, *supra* note 307, at 167. *See also* Wolfe & Birt, *supra* note 307, at 255 (identifying PTSD and sexuality problems as the most common short and long term effect).

gressive behavior.[310] Adolescents often demonstrate depression, withdrawn, or self-injurious behaviors, somatic complaints, illegal acts, running away, and substance abuse.[311] More than one age group shows nightmares, depression, withdrawn behavior, neurotic mental illness, aggression, and regressive behavior.[312]

Research conducted after the Kendall-Tackett reviews confirms many of the conclusions drawn in comparisons of children not in a clinical setting. For example, in a 1995 study, three groups of sixty-eight children were examined. The first group was a control group (children "carefully selected for nonabuse"); the second group was composed of "confirmed" victims of abuse (only those cases in which there was a guilty plea); and the third group contained alleged abuse victims (girls seen in a clinic after CPS or law enforcement referral for abuse, but in which there was no guilty plea; "sexual victimization may have been likely but was unconfirmed").[313] The study found the following symptoms to be significantly more pronounced in the abused and alleged abused group (in decreasing order, beginning with the strongest statistical difference): emotional or behavioral changes, more knowledge about sex, fear of being left with a particular person, unusual interest/curiosity about sex matters, acting overly mature, difficulty getting to sleep, fearful of males, becoming withdrawn, unusually self-conscious about her body, change in school performance, and difficulty concentrating.[314]

Similarly, the findings of a 1996 study of very young girls were in general accord with the Kendall-Tackett categories.[315] Mian compared forty-two girls aged three to five years old who entered a Toronto hospital for minor problems with seventy girls of the same age who presented to the hospital with com-

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[310] *See* Kendall-Tackett, *supra* note 307, at 167.

[311] *See* Kendall-Tackett, *supra* note 307, at 167.

[312] *See* Kendall-Tackett, *supra* note 307, at 167.

[313] *See* Wells, *supra* note 300, at 156.

[314] *See* Wells, *supra* note 300, at 160. Interestingly, there was no significant difference between abused and non-abused groups on bedwetting, headaches, stomach aches, and constipation, which are frequently cited as behaviors commonly seen in abused children. *See* 1 MYERS, *supra* note 226, § 4.32, at 285.

[315] *See* Marcellina Mian et al., *The Effects of Sexual Abuse on 3- to 5-Year-Old Girls*, 20 CHILD ABUSE & NEGLECT 731 (1996).

plaints of sexual abuse during the same period of time. The researchers gathered information by interviewing the mothers and by interviewing and administering tests to the children. The researchers found that the abused children demonstrated greater depression, anxiety, social withdrawal and inappropriate sexual behavior than the controls.[316] Consistent with other studies, they also found that repeated abuse and abuse that involved greater physical intrusiveness were associated with more negative outcomes.[317] Additionally, those children abused by family members showed more adverse consequences in some areas.[318]

One question arising from these results is whether the symptoms reported in the research are exclusive to sexually abused children or if they are regularly found in all children who receive therapy. If the symptoms are common to all children in therapy, then they are not necessarily a direct result of the abuse. In fact, Beitchman concludes: "most of the symptoms found in child and adolescent victims of sexual abuse were characteristic of clinical samples in general."[319] When researchers have been able to compare clinical populations of sexually abused children and non-abused children, they have found only sexualized behavior and post traumatic stress disorder to be symptoms consistently occurring with more frequency among sexually abused children.[320]

Another issue researchers must address is the fact that some victims of child sexual abuse do not demonstrate any of the harmful behavioral or psychological effects. Researchers es-

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316 *See id.* at 737.

317 *See id.* at 741.

318 *See id.* at 742.

319 Beitchman, *supra* note 308, at 546.

320 *See* Kendall-Tackett, *supra* note 307, at 167. As stated by Dr. William Friedrich of the Mayo Clinic: "A growing body of increasingly sophisticated empirical research has demonstrated that sexual abuse is related to increased sexual behavior following the abuse. . . . In addition, sexually abused children differ not only from nonabused children but also from nonabused children with psychiatric diagnoses." William N. Friedrich, *Sexual Victimization and Sexual Behavior in Children: A Review of Recent Literature*, 17 CHILD ABUSE & NEGLECT 59, 64 (1993). *See also* William N. Friedrich et al., *Dissociative and Sexual Behaviors in Children and Adolescents with Sexual Abuse and Psychiatric Histories*, 12 J. INTERPERSONAL VIOLENCE 155, 166 (1997) (finding caregiver reports of sexual behaviors to differ significantly between psychiatric sexually abused and psychiatric non-abused children).

timate that approximately thirty to fifty percent of victims exhibit no negative effects of abuse.[321] One explanation is that imprecise instruments fail to measure symptoms actually present. Another possibility is that some children simply are more resilient and able to endure the hardship without exhibiting negative effects. It is also possible that demonstration of the harmful effects are delayed in some children. In fact, one study suggests that harmful behaviors may surface later and with greater severity in children who do not immediately exhibit harmful behaviors.[322] In any event, it is not necessary for every child to exhibit every negative symptom in order for researchers and policy makers to conclude that child sexual abuse results in harmful consequences to victims and to society at large. As articulated by Mullen in summarizing their research on the effects of abuse:

> The women in our study uniformly described their experience in negative terms varying from confusing and disturbing to disgusting and overwhelmingly distressing and, even if there were no long-term adverse effects, the immediate impact would be enough to support an unequivocal condemnation of sexual contact between adults and children.[323]

b. Physical Effects

An obvious physical effect upon children who are sexually penetrated by an adult is the immediate physical injury. While medical findings are not present in many cases of abuse, significant genital injuries can result from sexual penetration of a child by an adult.[324] In addition, children may be exposed to the devastating physical consequences of sexually transmitted dis-

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[321] *See* Kendall-Tackett, *supra* note 307, at 168. Briere and Elliott give the range as between 10 and 28 percent. John N. Briere & Diana M. Elliott, *Immediate and Long-Term Impacts of Child Sexual Abuse, in* 4 THE FUTURE OF CHILDREN 55 (1994).

[322] *See* B. Gomes-Schwartz, *The Aftermath of Child Sexual Abuse: 18 Months Later, in* CHILD SEXUAL ABUSE: THE INITIAL EFFECTS (J.M. Horowitz & A.P. Cardarelli, eds. 1990).

[323] Paul E. Mullen et al., *Childhood Sexual Abuse and Mental Health in Adult Life*, 163 BRITISH J. PSYCHIATRY 721, 730 (1993).

[324] *See* Allan R. De Jong, *Genital and Anal Trauma, in* CHILD ABUSE: A MEDICAL REFERENCE 231, 237-40 (Stephen Ludwig & Allan E. Kornberg, eds., 1992).

eases.[325] Particularly during an era in which the risk of HIV infection is ever present, the serious effects of sexually transmitted diseases cannot be overlooked.[326]

Another physical consequence is pregnancy resulting from abuse.[327] Approximately 23,000 girls under the age of fifteen years either gave birth to a baby or had an abortion in 1990.[328] While this number represents only three percent of all adolescent pregnancies and fewer than ten percent of sexually experienced females of this age,[329] it nonetheless is a significant number of very young children becoming pregnant. Moreover, this represents an increase of thirteen percent in pregnancies and thirty percent in birth rates between 1980 and 1990.[330] Because a significant amount of sexual activity with a girl under fifteen would be criminal conduct if the male partner is an adult, and because of the perception that most such partners are adults,[331] statistics such as these have generated substantial

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[325] *See* Margaret R. Hammerschlag & Sarah A. Rawstron, *Sexually Transmitted Diseases, in* CHILD ABUSE: A MEDICAL REFERENCE, *supra* note 324, at 249.

[326] *See* David Finkelhor & Jennifer Dziuba-Leatherman, *Victimization of Children*, 49 AM. PSYCHOLOGIST 173, 181 (1994) (stating that risk of HIV-related infection poses a greater risk to older children because they are more likely to suffer penetrative assault).

[327] *See* Alison M. Spitz et al., *Pregnancy, Abortion, and Birth Rates Among US Adolescents – 1980, 1985, and 1990*, 275 J. AMER. MEDICAL ASSOC. 989 (1996).

[328] *See id.* at 991. During this same year, there were more than 800,000 pregnancies among girls aged 15-19. This statistic is of limited usefulness for this article because the vast majority of these pregnancies were females aged 18 or 19 and, while consensual sexual conduct with females this age could be an offense in some states under certain circumstances (e.g. incest), nearly all sexual activity between an adult male and a female in this age range would not constitute criminal conduct.

[329] *See* Spitz, *supra* note 327, at 991.

[330] *See* Spitz, *supra* note 327, at 992.

[331] *See* 141 CONG. REC. S8419 (July 22, 1996) (statement of Sen. Lieberman), discussed *supra* notes 166-68 and accompanying text. Several public interest organizations dispute the accuracy of this perception and have conducted research to test the perception. *See, e.g.* Patricia Donovan, *Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?*, 29 FAMILY PLANNING PERSPECTIVES 30 (1997) (concluding that stricter enforcement of statutory rape laws will not substantially lower birthrates and consequent public assistance expenses); Laura Duberstein Lindberg et al., *Age Differences Between Minors Who Give Birth and Their Adult Partners*, 29 FAMILY PLANNING PERSPECTIVES 61 (1997) (concluding that only eight percent of births to girls aged 15-19 are to unmarried minors with a partner five or more years older).

public attention in recent years.[332]

An emerging subset of studies on physical effects on children attempts to find evidence of physiological effects of severe sexual abuse. While the field is too new to draw definitive conclusions, early research suggests effects such as reduction in the size of portions of the brain,[333] changes in types and amounts of chemicals released in the body,[334] and overall poorer physical health.[335]

c. Causes of the Effects

If studying the effects of abuse is difficult, determining the causes of the effects is fraught with even more difficulties. Nonetheless, Kendall-Tackett is able to conclude from their review of the literature that the following factors appear to result in more severe symptoms among abused children: abuse perpetrated by someone in a close relationship to the victim, such as a father or step-father; abuse that occurs frequently; abuse that occurs over a long period of time; the use of force; and sexual

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[332] *See, e.g.*, Ellen Goodman, *Bringing Back a 1921 Idaho Law on Sex*, DES MOINES REGISTER, July 18, 1996, at 13 (editorial critical of prosecution of pregnant teenager for fornication after she applied for public assistance to pay for her medical care); Judith Havemann, *Statutory Rape-Pregnancy Link Reassessed*, WASH. POST, April 16, 1997, at A3; Debra J. Saunders, *Finding the Magic Bullet*, S.F. CHRON., April 22, 1997, at A17 (editorial alleging political bias in Lindberg study, *supra* note 331, and arguing sex education is no more effective than stricter enforcement of statutory rape laws at preventing teenage pregnancies); *Stop Predators: Statutory-rape Laws Can Be Used to Reduce Rising Teen Pregnancies*, CINCINNATI ENQUIRER, June 19, 1996, at A18; Eric Zorn, *Statutory Rape Crackdown Isn't Answer to Problem*, CHICAGO TRIBUNE, May 26, 1996, § Metro Chicago, at 1.

[333] *See* Madhuswee Mukerjee, *Hidden Scars: Sexual and Other Abuse May Alter a Brain Region*, SCIENTIFIC AMERICAN 10 (October 1995); Bruce D. Perry, *Neurodevelopment and the Neurophysiology of Trauma I: Conceptual Considerations for Clinical Work with Children*, APSAC ADVISOR (American Professional Society on the Abuse of Children, Chicago, IL), Spring 1993, at 1.

[334] *See* Michael D. De Bellis, et al., *Hypothalamic-Pituitary-Adrenal Axis Dysregulation in Sexually Abused Girls*, 78 J. CLINICAL ENDOCRINOLOGY & METABOLISM 249 (1994); Michael D. De Bellis et al., *Urinary Catecholamine Excretion in Sexually Abused Girls*, 33 J. AMER. ACAD. CHILD ADOLESCENT PSYCHIATRY 320 (1994).

[335] *See* Tamerra P. Moeller, et al., *The Combined Effects of Physical, Sexual, and Emotional Abuse During Childhood: Long-Term Health Consequences for Women*, 17 CHILD ABUSE & NEGLECT 623, 631-34 (1993); *see also* Putnam & Trickett, *supra* note 305, at 89-91.

acts that involve penetration.[336] Beitchman concludes that only penetrative abuse, use of force, and a close relationship to the offender have been shown to be associated with greater trauma.[337] Of course, many of these variables are related and it is difficult to distinguish the exact impact each has in the process.

Other factors are partially supported by the literature, though these factors have not been adequately researched for conclusions to be drawn. These factors include children who are older at the time of onset of abuse, a large number of perpetrators, and a large lapse of time between the abuse and assessment.[338]

2. Effects of Abuse on Adults Victimized as Children

a. Psychological Effects

While the studies examining long-term effects of abuse are criticized as suffering from the same weaknesses as studies of short-term effects – the infrequent use of control groups and random sampling[339] – consistent results found throughout the studies allow researchers to draw some firm conclusions.[340]

(1) Sexual dysfunction

The most thoroughly corroborated long-term effect is that adults who are sexually abused as children are more likely than non-abused adults to exhibit sexual dysfunctioning.[341] A sexual dysfunction may take the form of fear of sex, low sexual inter-

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336 Kendall-Tackett, *supra* note 307, at 171.

337 Beitchman, *supra* note 308, at 549.

338 *See* Kendall-Tackett, *supra* note 307, at 171.

339 *See* Beitchman, *supra* note 298, at 102-03. The following categories are drawn directly from Beitchman's review and the accompanying discussion of long-term effects draws heavily on this article.

340 *See* Briere & Elliott, *supra* note 321, at 55; *see also* Debra A. Neumann et al., *The Long-Term Sequelae of Childhood Sexual Abuse in Women: A Meta-Analytic Review*, 1 CHILD MALTREATMENT 6, 10-11 (1996) (finding a significant relationship between child sexual abuse and adult psychological distress and dysfunction).

341 *See* Beitchman, *supra* note 298, at 103-05; Paul E. Mullen et al., *The Long-Term Impact of the Physical, Emotional, and Sexual Abuse of Children: A Community Study*, 20 CHILD ABUSE & NEGLECT 7, 12 (1996).

est, or low satisfaction with sex.[342] While the most comprehensive study indicates that approximately thirty percent of women sexually abused as children report sexual dysfunction,[343] some studies have found even higher percentages.[344]

(2) Anxiety, fear and depression

Numerous studies have identified consistently higher levels of general anxiety among adults abused as children than among controls.[345] For example, Stein found twenty-nine percent of sexually abused adults to have anxiety disorders, compared with eleven percent of non-sexually abused adults.[346] Similarly, women abused as children have been found to suffer from major depression in significantly higher numbers.[347]

(3) Suicide

Researchers have consistently found that adults abused as children have suicidal thoughts or attempt suicide in much larger numbers than the general population. In a study conducted with clients already in counseling, researchers found that fifty-six percent of those who were victims of child sexual abuse had attempted suicide, compared with twenty-three percent of the non-abused clients. In studies of non-clinical samples of adults abused as children, researchers have found lower rates of suicide attempts (five percent of the sexually abused), though the number of attempts by those not abused remains even lower (zero percent).[348] Similarly, Silverman found that twenty-one percent of twenty-one-year-old women sexually

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[342] *See* Beitchman, *supra* note 298, at 103.

[343] *See* Judith A. Stein et al., *Long-Term Psychological Sequelae of Child Sexual Abuse, in* LASTING EFFECTS OF CHILD SEXUAL ABUSE 141 (Gail Elizabeth Wyatt & Gloria Johnson Powell, eds., 1988).

[344] *See* KARIN C. MEISELMAN, INCEST: A PSYCHOLOGICAL STUDY OF CAUSES AND EFFECTS WITH TREATMENT RECOMMENDATIONS 221 (1978) (finding that 20 of 23 incest victims – 87 percent – had serious problems with sexual adjustment).

[345] *See* Beitchman, *supra* note 298, at 105-06.

[346] *See* Judith A. Stein et al., *Long-Term Psychological Sequelae of Child Sexual Abuse, in* LASTING EFFECTS OF CHILD SEXUAL ABUSE 144 (Gail Elizabeth Wyatt & Gloria Johnson Powell, eds., 1988).

[347] *See* Beitchman, *supra* note 298, at 106.

[348] *See* Beitchman, *supra* note 298, at 107.

abused as children thought about committing suicide within the past twelve months, compared with seven percent of the non-abused sample.[349] Further, twenty-six percent of the women had actually attempted suicide, compared with two percent of the non-abused sample.[350]

(4) Revictimization

Women who are sexually abused as children are at a greater risk of being raped or beaten as adults. Studies have found rates ranging from thirty-seven percent to sixty-five percent of victims reporting being revictimized as adults.[351]

(5) Personality Disorders

While several studies report a high incidence of multiple personality disorder among women sexually abused as children,[352] Beitchman concludes that the studies are flawed, primarily because there have been no studies in which independent raters determine whether the subject suffers from multiple personality disorder and because the studies have not differentiated whether the multiple personality disorder stems from physical abuse or sexual abuse. Consequently, Beitchman is not willing to draw firm conclusions about the relationship.

Briere and Elliott discuss the broader concept of "dissociative phenomena," which includes, but is not limited to, multiple personality disorder.[353] They define dissociation as "a disruption in the normally occurring linkages between subjective awareness, feelings, thoughts, behavior, and memories," and conclude that the research supports the conclusion that such symptoms are more commonly seen in child sexual abuse survivors. Some researchers believe dissociation acts as a defen-

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[349] *See* Amy B. Silverman et al., *The Long-Term Sequelae of Child and Adolescent Abuse: A Longitudinal Community Study*, 20 CHILD ABUSE & NEGLECT 709 (1996).

[350] *See id.* at 719. Mullen et al. found suicidal behavior to be 20 to 70 times greater in their sample of abused women compared to controls. *See* Mullen, *supra* note 323, at 727-28.

[351] *See* Beitchman, *supra* note 298, at 108.

[352] *See* Beitchman, *supra* note 298, at 109. Beitchman cites studies reporting that as many as 80% of women with multiple personality disorder were sexually abused as children.

[353] Briere & Elliott, *supra* note 321, at 59-60.

sive mechanism to help reduce the emotional pain by avoiding the experience.[354] Thus, some believe multiple personality disorder, as well as other dissociative phenomena, are common occurrences among abuse victims.[355]

(6) Multiple Psychiatric Disorders

Some researchers suggest that sexually abused children are four times more likely than non-abused to develop psychiatric disorders, and that eight percent of all psychiatric cases in the United States are attributable to childhood sexual abuse.[356] For example, in a 1996 article, Silverman discusses a study of 375 randomly selected females who participated in an ongoing study over a seventeen year period.[357] The women in this study who reported being sexually abused as children[358] demonstrated many of the symptoms commonly seen in adults sexually abused as children, such as major depression, post-traumatic stress disorder, antisocial behavior, and alcohol abuse and dependence.[359] The researchers were most concerned, however, with their finding that women who were sexually abused as children were significantly more likely than non-abused women to demonstrate multiple "co-occurring" psychiatric disorders:

> These sexually abused females were nearly three times more likely than nonsexually abused females to have at least one active psychiatric disorder, were more than six times more likely than nonsexually abused females to have at least two active disorders and were more than 11 times as likely to have at least three psychiatric disorders relative to their nonsexually abused counterparts.[360]

In addition, due to the longitudinal nature of the study, the researchers were able to determine that effects of abuse apparent when the women were fifteen years old were still present

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354 *See* Briere & Elliott, *supra* note 321, at 59.

355 *See* Putnam & Trickett, *supra* note 305, at 86-89.

356 *See* Finkelhor & Dziuba-Leatherman, *supra* note 326, at 181.

357 *See* Silverman, *supra* note 349, at 709.

358 *See* Silverman, *supra* note 349, at 714. Twenty-three of the 187 women (12.3%) reported being sexually abused. *See id.*

359 *See* Silverman, *supra* note 349, at 718.

360 Silverman, *supra* note 349, at 718 (statistics omitted).

at age twenty-one.[361] Thus, the impact on these women is severe and prolonged.[362]

A study of randomly selected women in New Zealand confirmed many of the findings listed above.[363] When women who identified themselves as sexually abused as children were compared with women who identified themselves as not abused, the researchers found, among other things, the following significant differences: histories of eating disorders, greater chance of excessive drinking, greater risk of attempted suicide, and greater likelihood of having spent time in a psychiatric hospital.[364] Women abused as children also were more likely to have sexual problems as adults.

b. Physical Effects

Research indicates that women who are sexually abused as children suffer a variety of adverse physical consequences as adults. The most consistent findings are that such women have a higher incidence of irritable bowel syndrome, pelvic pain, and headaches than non-abused women.[365] In addition, women who are sexually abused as children are 2.5 times more likely to visit a physician or be hospitalized than are non-abused women,[366]

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[361] *See* Silverman, *supra* note 349, at 720.

[362] *See also* Shan A. Jumper, *A Meta-Analysis of the Relationship of Child Sexual Abuse to Adult Psychological Adjustment*, 19 CHILD ABUSE & NEGLECT 715 (1995) (reporting that the studies find statistically significant relationships between childhood sexual abuse and psychological symptomology, depression and low self-esteem as adults); Leora N. Rosen & Lee Martin, *Impact of Childhood Abuse History on Psychological Symptoms Among Male and Female Soldiers in the U.S. Army*, 20 CHILD ABUSE & NEGLECT 1149, 1158 (1996) (finding a relationship between childhood sexual abuse and adult psychological adjustment).

[363] *See* Paul E. Mullen et al., *The Long-term Impact of the Physical, Emotional, and Sexual Abuse of Children: A Community Study*, 20 CHILD ABUSE & NEGLECT 7, 12 (1996); *see also* Mullen, *supra* note 323 (discussing this study in additional detail).

[364] *See* Mullen, *Long-Term Impact*, *supra* note 363, at 12.

[365] *See* Jane Leserman et al., *Medical Consequences of Sexual and Physical Abuse in Women*, 11 HUMANE MEDICINE 23, 26 (1995).

[366] *See* Tamerra P. Moeller et al., *The Combined Effects of Physical, Sexual, and Emotional Abuse During Childhood: Long-Term Health Consequences for Women*, 17 CHILD ABUSE & NEGLECT 623, 626 (1993) (citing M.A. Sedney & B. Brooks, *Factors Associated with a History of Childhood Sexual Experience in a Nonclinical Female Population*, 23 J. AMER. ACAD. OF CHILD PSYCHIATRY 465 (1984)).

and also are more likely to have general health problems.[367]

c. Causes of the Effects

Studies examining specific factors related to childhood sexual abuse that bring about the adverse results in adults, while not absolutely conclusive, provide solid information about which acts are most harmful.[368]

(1) Penetration

Studies examining penetration offenses have found consistently higher degrees of lasting harm.[369] Mullen found a consistent and strong relationship between intercourse and negative outcomes: "Those who suffered abuse involving intercourse consistently have a worse outcome than the abused group as a whole and, in every instance, except anxiety disorders, have a worse outcome than those whose abuse involved genital contact."[370]

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[367] *See* Jane Leserman et al., *Medical Consequences of Sexual and Physical Abuse in Women*, 11 HUMANE MEDICINE 23, 24 (1995). Moeller found that children who are victims of any type of childhood abuse are more likely to suffer general health problems as adults. *See* Moeller, *supra* note 366, at 631-34.

[368] *See* Beitchman, *supra* note 298, at 110-11; Berliner & Elliott, *supra* note 321, at 60-62 (identifying penetration, violence, close relationship, multiple offenders, long duration and frequent contact as related to more negative impact in both child and adult survivors).

[369] *See* Beitchman, *supra* note 298, at 114; *see also* Lynne Briggs & Peter R. Joyce, *What Determines Post-traumatic Stress Disorder Symptomatology for Survivors of Childhood Sexual Abuse?*, 21 CHILD ABUSE & NEGLECT 575 (1997) (likelihood of post-traumatic stress disorder significantly increased in women who report multiple childhood abusive episodes involving sexual intercourse). Beitchman is more reserved in his conclusions than some authors, stating that the concepts of "harm" and "adjustment" are not the same:

> Trauma or harm are personal and subjective, whereas adjustment or symptomology are usually tied to some external anchor and tend to be objective. In those studies where abuse involving penetration was adequately frequent, the results support an association between invasive sexual abuse and trauma or harm. Where the outcome measure was adjustment, mental health status, or other psychiatric symptoms, the results are suggestive but not certain.

Beitchman, *supra* note 298, at 114.

[370] Mullen, *supra* note 323, at 728.

(2) Force

One of the few factors which clearly causes long-term serious harm is the use of force. Although identifying the exact negative outcomes that are caused by use of force remains difficult, repeated research has found serious trauma to consistently correlate with the use of force.[371]

(3) Relationship to the Offender

Abuse by a family member or another in a position of authority over the victim also may affect the degree of trauma to the child. In particular, studies have found that abuse by a father or step-father creates longer lasting effects for a child. Herman compared a community sample of incest victims against a sample of outpatients from incest survivor therapy groups.[372] The researchers found first, that victims from the community sample who had been abused by a father or step-father reported experiencing longer-lasting harm from the abuse. They also found that a much higher proportion of the outpatient sample reported being abused by their father.[373] In comparison to the lasting harm of abuse by a father figure, abuse by other relatives has not been consistently found to have the same degree of traumatic effect.[374]

While little empirical research identifies the specific effects caused when abuse is inflicted by one in a position of authority, researchers are confident that adverse effects occur: "[I]t can be assumed that an incestuous trauma is often found in connection with particular mental disorders, and that specific and/or nonspecific links exist between incest and mental or psychosomatic disorders, such as eating disorders, substance abuse and self-mutilation, psychosis, dissociative disorders and borderline personality disorders."[375] Interestingly, Kinzl & Biebl

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[371] *See* Beitchman, *supra* note 298, at 113.

[372] *See* Judith Herman et al., *Long-Term Effects of Incestuous Abuse in Childhood*, 143 AMER. J. PSYCHIATRY 1293 (1986).

[373] *See id.* at 1295.

[374] *See* Beitchman, *supra* note 298, at 111.

[375] Johannes Kinzl & Wilfried Biebl, *Long-Term Effects of Incest: Life Events Triggering Mental Disorders in Female Patients with Sexual Abuse in Childhood*, 16 CHILD ABUSE & NEGLECT 567, 570-71 (1996) (citations omitted).

found that patients in their clinic who suffered non-violent sexual abuse experienced greater trauma than those who experienced physical violence in conjunction with the abuse.[376]

(4) Gender of the victim

Although most studies focus on the effects of abuse on women, the few studies examining effects on male victims indicate that males suffer at least as seriously from abuse.[377] Importantly, studies of male victims report sexual dysfunction and other adverse consequences in much the same manner as is found with female victims.[378]

(5) Age at onset of abuse

No studies to date clearly delineate the harm associated solely with the age of the victim when abuse begins. The existing studies either demonstrate barely significant effects, no effects at all, or effects that cannot be identified as relating strictly to age.[379] Consequently, while intuition and the construction of statutes would lead one to believe that abuse beginning at a younger age is more harmful than abuse beginning in adoles-

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[376] *Id.* at 571.

[377] *See* Bill Watkins & Arnon Bentovim, *Male Children and Adolescents as Victims: A Review of Current Knowledge, in* MALE VICTIMS OF SEXUAL ASSAULT 27, 40-47 (Gillian C. Mezey & Michael B. King, eds., 1992); Steven J. Collings, *The Long-Term Effects of Contact and Noncontact Forms of Child Sexual Abuse in a Sample of University Men*, 19 CHILD ABUSE & NEGLECT 1, 4 (1995) (finding that child sexual abuse of boys involving physical contact resulted in later problems with psychological adjustment). *See also* Pamela Cermak & Christian Molidor, *Male Victims of Child Sexual Abuse*, 13 CHILD AND ADOLESCENT SOCIAL WORK J. 385 (1996) (discussing under-reporting of abuse of males).

[378] *See* Beitchman, *supra* note 298, at 111. Studies of male victims are too few to draw firm conclusions about many specific effects known about female victims. *See id.*; *See also* Kendall-Tackett, *supra* note 307, at 170. Although not as emphatic in their conclusions because of limited studies in this area, researchers conclude that sexual abuse of boys by females has definite negative consequences to the victim. Emanuel Peluso & Nicholas Putnam, *Case Study: Sexual Abuse of Boys by Females*, 35 J. AMER. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY 51, 53 (1996) (stating that "there is no credible evidence to support a notion that [boys abused by women] are less traumatized than boys or girls abused by men"). *See also* Suzanne M. Sgroi & Norah M. Sargent, *Impact and Treatment Issues for Victims of Childhood Sexual Abuse by Female Perpetrators, in* FEMALE SEXUAL ABUSE OF CHILDREN 14 (Michele Elliott, ed., 1994).

[379] *See* Beitchman, *supra* note 298, at 110.

cence, the research does not conclusively bear this out. In fact, Beitchman argues to the contrary that there is "somewhat better evidence of a greater effect of postpubertal abuse than prepubertal abuse."[380]

(6) Duration and Frequency of Abuse

Studies examining the effect of continuous abuse produce surprisingly conflicting results. Some studies have determined that solitary episodes have longer lasting effects[381] while others show that repeated abuse generates longer lasting harm.[382] Beitchman concludes that on the whole, the studies suggest that abuse occurring over a long period of time is associated with greater trauma and long-term harm.[383]

3. Summary of the Research

Briere and Elliott attempt to provide a cohesive theory explaining the literature on both short-term and long-term effects by dividing the effects into six broad categories. First, adults abused as children are more likely than non-abused adults to be diagnosed with post-traumatic stress disorder.[384] Post-traumatic stress disorder symptoms surfacing in adulthood often include abuse-related flashbacks, frequent bad memories of the abuse, and nightmares. Second, adults abused as children exhibit "cognitive distortions," in which a person misperceives the world around him or her, such as the level of danger in the world and others' negative perceptions of the person. Such persons often have low self-esteem and feel helpless to change their situation in life.[385] Third, adults abused as children frequently have more serious emotional problems such as depres-

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[380] Beitchman, *supra* note 298, at 110.

[381] *See* Mullen, *Impact of Sexual and Physical Abuse on Women's Mental Health*, 1 LANCET 841, 843 (1988).

[382] *See* Beitchman, *supra* note 298, at 113.

[383] Beitchman, *supra* note 298, at 113.

[384] *See* Briere & Elliott, *supra* note 321, at 55. *See also* Lynne Briggs & Peter R. Joyce, *What Determines Post-traumatic Stress Disorder Symptomatology for Survivors of Childhood Sexual Abuse?*, 21 CHILD ABUSE & NEGLECT 575 (1997).

[385] *See* Briere & Elliott, *supra* note 321, at 56. *See also* Ruth Gallop et al., *The Impact of Childhood Sexual Abuse on the Psychological Well-Being and Practice of Nurses*, 9 ARCHIVES OF PSYCHIATRIC NURSING 137 (1995).

sion, anxiety, and anger than do the non-abused population.[386] Fourth, abused persons have an "impaired sense of self," which may result in higher gullibility and revictimization.[387] Fifth, individuals who have been abused tend to exhibit avoidant behavior, which may result in dissociation, substance abuse, suicide, and compulsive behavior (bingeing/purging, sexual promiscuity, self-mutilation).[388] Sixth, child sexual abuse can result in serious interpersonal difficulties such as decreased intimacy or increased aggressiveness.[389]

On a more general level, Mullen argues that abuse disrupts a child's normal development and that many other factors affect how serious long-term effects will be on adults:

> Abuse is not destiny, but it does make progress toward successful social, interpersonal, and intrapsychic functioning in adult life more difficult. The mental health difficulties in adult life associated with [child sexual abuse] are largely the second order effects of developmental disruptions rather than the direct result of the abuse trauma. Again, however, a caveat: Those most severely abused will be the most likely to suffer continuing direct effects from the trauma and may well suffer the double disadvantage of [post-traumatic stress disorder] and the unfolding of the developmental damage inflicted at the time.[390]

B. *Effects of Abuse on Society*

1. Occurrence of Child Sexual Abuse

Accurate national statistics identifying the numbers of child sexual abuse victims annually are notoriously elusive, in part because there is no mechanism in place for systematically collecting child abuse information from state and local agencies.[391]

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[386] *See* Briere & Elliott, *supra* note 321, at 57-58. *See also* Arne Cornelius Boudewyn & Joan Huser Liem, *Childhood Sexual Abuse as a Precursor to Depression and Self-Destructive Behavior in Adulthood*, 8 J. TRAUMATIC STRESS 445 (1995).

[387] *See* Briere & Elliott, *supra* note 321, at 58-59.

[388] *See* Briere & Elliott, *supra* note 321, at 60-61.

[389] *See* Briere & Elliott, *supra* note 321, at 60-61.

[390] Paul E. Mullen, *Child Sexual Abuse and Adult Mental Health: The Development of Disorder*, 8 J. INTERPERSONAL VIOLENCE 429, 431 (1993). *See also* Lucy Berliner, *Sexual Abuse Effects or Not?*, 8 J. INTERPERSONAL VIOLENCE 428 (1993).

[391] *See infra* notes 414-18 and accompanying text.

In the absence of a comprehensive national database of information, researchers attempt to estimate sexual abuse rates through two methods: examining incidence and examining prevalence of child sexual abuse. Incidence refers to the number of cases that are officially reported to professionals each year. Since these numbers are incomplete due to the absence of a uniform method for collecting official agency reports from all fifty states, researchers extrapolate national statistics based on the available information. Prevalence refers to the total percentage of the national adult population who report having been abused at some point in their childhood.[392] This data is not limited to those cases making it through official governmental channels, but instead is based on retrospective studies of adults who indicate whether they were abused as children. While the numbers reported by incidence versus prevalence studies vary greatly, all studies confirm that child sexual abuse occurs on a large scale in the United States.

a. Incidence

A primary source of incidence information is a periodic survey of randomly selected child protective service (CPS) agencies and non-CPS professionals around the country.[393] Commonly referred to as the National Incidence Study, it has been conducted three times, with results published in 1981 (NIS-1), 1988 (NIS-2) and 1996 (NIS-3). Abuse is defined in this project either as acts resulting in demonstrable harm (the harm standard) or acts not yet resulting in harm but endangering the child (endangerment standard).[394] The most recent sur-

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[392] *See* David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse, in* 4 THE FUTURE OF CHILDREN 31, 36 (1994).

[393] *See* ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (1996) [hereinafter NIS-3]. The researchers examined all reports of abuse and neglect made to CPS during a three-month period in 42 randomly selected counties. In addition, non-CPS professionals such as school teachers, police departments, and public health providers in each participating county were selected to notify the researchers of abused children with whom they came into contact during the data collection period. *See id.* at 2-4.

[394] *See id.* at 2:9. Endangered children included those whose maltreatment was substantiated by a CPS investigation, although it would not qualify as "harm" under the NIS-3 definition. Endangerment also was identified by the non-CPS professionals

vey, based on data collected in 1993 and 1994, estimated that each year 217,700 children were sexually abused under the harm standard[395] and 300,200 children were sexually abused under an endangerment standard.[396] The NIS-3 demonstrated an eighty-three percent increase in sexually abused children under the harm standard[397] and a 125 percent increase under the endangerment standard,[398] leading the researchers to conclude that there had been a substantial increase in child sexual abuse between 1986 (NIS-2 collection year) and 1993 (NIS-3 collection year).[399]

A second source of data is a yearly survey by the U.S. Department of Health and Human Services. In the 1995 survey, forty-nine states and the District of Columbia reported that 126,095 cases of sexual abuse were substantiated.[400] One limitation of the study is its purely descriptive nature; there is no discussion of the significance of the data in comparison to other studies. Further, incidence data based on child protective service assessments has the inherent drawback of underestimating abuse. Because protective service agencies have jurisdiction only over abuse that occurs within the family and because many cases are never reported to protective service agencies in the first place, data based on these statistics underestimates actual occurrence of abuse.

A final source of incidence data based on governmental data is the National Committee to Prevent Child Abuse's annual fifty state survey.[401] The Committee surveys state child pro-

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who judged children to be in danger. *See id.* at 2-9.

[395] *See id.* at 3-3.

[396] *See id.* at 3-18.

[397] *See id.* at 3-7.

[398] *See* NIS-3, *supra* note 393, at 3-21.

[399] *See* NIS-3, *supra* note 393, at 3-30 –3-31. The researchers were confident in their conclusion that actual abuse increased since the methodology and definitions of the NIS had not changed between NIS-2 and NIS-3. The researchers concluded that only actual increase could account for the dramatic increase in all categories of their data between 1986 and 1993. *See id.* In addition to increases in sexual abuse, physical neglect increased 102%, emotional neglect increased 333%, and seriously injured children increased 299% under the harm standard. *See id.* at 3-10 -3-14.

[400] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 1995: REPORTS FROM THE STATES TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT 2-6 (1997).

[401] *See* CHING-TUNG LUNG & DEBORAH DARO, NATIONAL COMMITTEE TO PREVENT

tection administrators for child abuse reporting information and extrapolates national estimates based on the information provided. The data is limited because not every state provides the requested data, and because there are no uniform definitions and collection procedures among the states to ensure that the information provided to the Committee is consistent among the states. In spite of these limitations, the Committee's annual data provide another useful source for estimating incidence. The researchers conducting the 1996 survey estimated that 109,230 new cases of child sexual abuse were accepted by child protection authorities nationwide in 1995. This represents a drop of nine percent from the Committee's 1995 survey.

b. Prevalence

Dozens of studies have been conducted in the past two decades attempting to identify the number of adults who report being abused as children.[402] Because of the large numbers of research studies, the best estimates are made by other researchers who review the body of original studies. Most reviewers conclude that approximately twenty percent of adult females in the United States report being sexually abused as a child.[403] Similarly, reviewers estimate that five to ten percent of American males have been sexually abused as children.[404]

A 1995 Gallup poll provides even more dramatic numbers about child sexual abuse. Gallup asked 1,000 randomly selected parents whether their child had been forced to touch an adult or older child in a sexual way within the past year.[405] Based on the percentage of parental responses, Gallup estimated that more than 1.2 million children were sexually abused in 1995. These numbers are approximately four times higher than the NIS-3 number of just over 300,000.[406] The same poll also re-

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CHILD ABUSE, CURRENT TRENDS IN CHILD ABUSE REPORTING AND FATALITIES: THE RESULTS OF THE 1995 ANNUAL FIFTY STATE SURVEY (1996).

402 *See* Finkelhor, *supra* note 392, at 34-42 (summarizing these studies).

403 *See* Finkelhor, *supra* note 392, at 37.

404 *See* Finkelhor, *supra* note 392, at 34.

405 *See* THE GALLUP ORGANIZATION, DISCIPLINING CHILDREN IN AMERICA: SURVEY OF ATTITUDE AND BEHAVIORS OF PARENTS (1995).

406 The confidence interval of a study identifies the statistical accuracy of the results. In the Gallup survey, the confidence interval was 95% (i.e. the results can be

ported that twenty-three percent of parents responded that they were sexually abused as children themselves.

A 1994 study asked children directly – with their parents' permission – about their sexual victimization.[407] The study consisted of 2,000 children aged ten to sixteen years randomly selected from around the country who were questioned about whether they had experienced several forms of abuse within the past year. Of the children surveyed, 3.2% of girls and .6% of boys indicated they had been sexually abused within the past year. Extrapolating from U.S. Census data,[408] this would mean that more than 770,000 girls and 145,000 boys in this age range were sexually abused that year.

In sum, the statistics vary greatly: 109,230 substantiated cases of child sexual abuse in 1995 as reported by the National Committee, versus more than one million cases in the same year reported by Gallup. Why is there such a dramatic difference among the studies? First, the incidence studies identify only those cases reported to government agencies. These numbers are certainly low, as not every case of child sexual abuse is reported. Second, some of the studies rely on substantiated cases of abuse; many cases reported to child protective services are not substantiated for reasons unrelated to whether the abuse in fact happened. For example, if the abuser is not a caretaker, CPS may not have authority to investigate and the case will not be substantiated; if the abuser moves from the jurisdiction CPS may not have time to complete an investigation; or, because children may be hesitant to talk or there is no physical evidence, CPS may not have sufficient evidence to make a finding of substantiation in many cases when abuse is in fact present.[409]

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assumed to be statistically accurate within five percentage points). Thus, Finkelhor states that even calculating using the low end of the 95 percent confidence interval, the Gallup survey reveals more than 600,000 children who were reported by their parents to be abused. *See* David Finkelhor et al., *Sexually Abused Children in a National Survey of Parents: Methodological Issues*, 21 CHILD ABUSE & NEGLECT 1, 7 (1997).

[407] *See* Finkelhor & Dziuba-Leatherman, *supra* note 326.

[408] *See* Finkelhor & Dziuba-Leatherman, *supra* note 326, at 418. Finkelhor & Dziuba-Leatherman cite U.S. Census data as indicating there were 24,327,000 children between the ages of 10 and 16 at the time of their research. *See id.*

[409] For a more complete discussion of the differences between incidence and prevalence studies, *see* Finkelhor, *supra* note 392; Gail L. Zellman & Kathleen Coul-

Based on all available information, Finkelhor estimates that 500,000 new cases of child sexual abuse occur each year.[410] He further notes that, if this number is accurate and if the rates of substantiated cases are accurate, then a significant number of actual cases each year are never reported to authorities.[411]

c. Data on Criminal Prosecution

Whereas a relatively large body of literature examines incidence and prevalence of child abuse generally, virtually no information is available on how often sexual crimes against children are prosecuted in the United States.[412] While a few studies have examined the processing of child sexual abuse cases in selected jurisdictions,[413] no studies report rates of prosecution across the country.

In 1993, the federal government set the framework for establishing a national criminal records database of child abuse convictions and created a financial incentive for states to maintain records on child abusers and forward these records to the FBI.[414] A major component of the law encourages states to forward child abuse crime information to the FBI.[415] Each state de-

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born Faller, *Reporting of Child Maltreatment*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT, *supra* note 6, at 374-76.

[410] *See* Finkelhor, *supra* note 392, at 34.

[411] *See* Finkelhor, *supra* note 392, at 43. Using the rate of 150,000 substantiated cases from the 1994 National Committee study, Finkelhor concludes that fewer than one-third of all cases are reported to authorities. *See id.* This number of unreported cases would be even higher using the Committee's 1996 figure of 109, 230.

[412] There are many reasons for the lack of statistics. A primary source of crime statistics, the Uniform Crime Report published by the FBI, does not break down crimes by age of the victim. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: 1996 PRELIMINARY ANNUAL RELEASE (1997). A national survey of crime victims identifies crime victims only down to the age of 12 and is widely criticized for interviewing children in front of their parents and other methodological problems. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION (1996) (NCJ-158022); *see also* Finkelhor, *supra* note 392 (discussing the problems in determining incidence of child abuse and neglect in the United States).

[413] *See* Mary Martone et al., *Criminal Prosecution of Child Sexual Abuse Cases*, 20 CHILD ABUSE & NEGLECT 457 (1996); Theodore P. Cross et al., *Prosecution of Child Sexual Abuse: Which Cases Are Accepted?*, 18 CHILD ABUSE & NEGLECT 663 (1994); GRAY, *supra* note 293.

[414] *See* National Child Protection Act of 1993, 42 U.S.C. §§ 5119 – 5119c (1994).

[415] *See* 42 U.S.C. § 5119(a).

termines the effect of the individual's conviction on his or her suitability for contact with children and identifies those convictions in the records regarded as child abuse crimes. While the Act sets a time frame for achieving full reporting from the states,[416] the FBI's computer system is not expected to be completed until 1999 at the earliest.[417] Once this database is fully operational, however, a structure should exist to enable more complete collection of national data on child sexual abuse convictions.[418]

2. Economic Effects

Although the monetary costs of crime victimization are difficult to specify with precision, studies of crime victimization consistently indicate that the cost of crime in the United States is extremely high. For example, in 1992 federal, state and local governments in the United States spent a combined $93.7 billion on criminal justice.[419] Of this amount, approximately $41.3 billion was spent on police protection; $21 billion on courts and prosecutors; and $31.4 billion on corrections.[420] Approximately five million adults were under some form of correctional supervision in 1994 and the percentage of U.S. population under correctional care more than doubled between 1980 and 1994.[421] The cost of incarcerating these prisoners is estimated to be around $12,500 per year, per prisoner.[422]

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[416] *See* 42 U.S.C. § 5119(b).

[417] *See* UNITED STATES GENERAL ACCOUNTING OFFICE, FINGERPRINT-BASED BACKGROUND CHECKS: IMPLEMENTATION OF THE NATIONAL CHILD PROTECTION ACT OF 1993 12 (1997) (GAO/GGD-97-32); *see also* Jim McGee & Roberto Suro, *FBI's Credibility with Hill Slumps after Missteps: Computer Systems Improvements Far Behind Schedule, Over Cost*, WASH. POST, Mar. 16, 1997, at A1 (reporting on the various problems plaguing implementation of new FBI computer systems).

[418] One of the requirements of the act is for the Justice Department to publish an annual statistical summary of child abuse crimes. *See* 42 U.S.C. § 5119(d).

[419] *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1994, at 2 (Kathleen Maguire, ed., 1995).

[420] *See id.* at 3.

[421] *See* JODI BROWN ET AL., U.S. DEP'T JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1994 iii (1996). Approximately three-quarters of these individuals were on probation or parole; the remainder were in jails or prisons. *See id.* In 1980 1.1% of American adults were under correctional care; by 1994 the number had risen to 2.7%. *See id.*

[422] *See* Mark A. Cohen et al., *The Costs and Consequences of Violent Behavior in the*

Studies estimating the costs directly attributable to child sexual abuse are rare and face two large hurdles. First is the problem discussed above of specifying the extent of child sexual abuse. If it is not known how often abuse occurs it is difficult to estimate how much the abuse costs society. Second is the problem of estimating the costs themselves. Determining how much is spent on child abuse in the thousands of counties and cities in the United States is a daunting task.

One of the first efforts to systematically quantify the cost of child sexual abuse is a study published by the National Institute of Justice in 1996.[423] While the focus of the NIJ study is on the costs to the victims – in contrast with the cost to society – it nonetheless provides some enlightening numbers on both issues. For purposes of their calculations, Miller uses an estimate of 185,000 sexual assaults against children – a very conservative estimate of incidence of child sexual abuse.[424] The researchers identify the tangible costs to the victim, such as medical and mental health care, and the intangible costs associated with a lower quality of life.[425]

Based on this data and on an extensive review of other research, Miller estimates that a child sexual abuse victim suffers $9,500 in tangible losses and $89,800 in intangible losses, for a total loss of $99,000 for each victim. Extrapolating from these

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United States, *in* 4 UNDERSTANDING AND PREVENTING VIOLENCE 133 (Albert J. Reiss, Jr., & Jeffrey A. Roth, eds., 1994).

[423] *See* TED R. MILLER ET AL., U.S. DEP'T OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996). The conclusions as to the costs of child sexual abuse were only a part of the overall study, which examined the cost of crime generally. The crimes examined were fatal crimes, child abuse, adult rape, other assaults, robbery, drunk driving, arson, larceny, burglary, motor vehicle theft. The researchers concluded that these crimes have an annual tangible cost of $105 billion and an annual intangible cost of $450 billion. *See id.* at 11; *see also* Mark A. Cohen et al., *The Costs and Consequences of Violent Behavior in the United States*, *in* 4 UNDERSTANDING AND PREVENTING VIOLENCE 67 (Albert J. Reiss, Jr., & Jeffrey A. Roth, eds., 1994 (discussing economic costs,).

[424] Miller estimated incidence by analyzing data gathered in the NIS-2. *See* MILLER, *supra* note 423, at 3; A.J. SEDLAK, NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988 (1991). The researchers acknowledge that their estimates are conservative. *See id.* Because of the dramatic increase in numbers between the NIS-2 – the study used by Miller – and the NIS-3, this number is made even more conservative. *See supra* notes 393-99 and accompanying text.

[425] Clearly, the dollar figure associated with intangible losses is difficult to calculate. The authors of this study based their calculation primarily on money damages awarded in civil suits stemming from crimes. *See* MILLER, *supra* note 423, at 15.

numbers, the researchers conclude that child sexual abuse costs American victims and society $23 billion each year.[426] Breaking down the costs further, the researchers estimate that $56 is spent on police and fire services per victimization and $1,100 is spent on victim services such as child protective services, foster home care, and other victim services.[427]

The authors recognize that their figures are rough estimates based on little data. Significantly, however, the estimates do not include general costs to society such as the cost of prosecuting crime and the cost of incarcerating offenders; moreover they are based on extremely conservative estimates of how much abuse occurs. In spite of its limitations, this initial attempt to quantify the cost of child sexual abuse makes it clear that the cost to both the victim and to society at large is enormous.[428]

3. Sociological Effects

A significant concern relating to the effects of abuse is whether sexually abused children will grow up to become the next generation of abusers. While there is no support for the proposition that abused children will unavoidably become abusers,[429] research demonstrates that sexually abused children are nonetheless at greatly increased risk of becoming offenders. As stated by one pair of researchers:

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[426] *See* MILLER, *supra* note 423, at 17. Of this, approximately $2 billion is attributed to tangible losses and $21 billion to intangible losses. *See id.*

[427] *See* MILLER, *supra* note 423, at 17.

[428] Other costs such as foster care placement constitute another significant expenditure. *See* Victor I. Vieth, *The Mutilation of a Child's Spirit: A Call for a New Approach to Termination of Parental Rights in Cases of Child Abuse*, 20 WM. MITCHELL L. REV. 727, 731 (1994) (citing a Minnesota study identifying out-of-home placement as "the single largest expenditure of community social service money").

[429] *See* William D. Murphy & Timothy A. Smith, *Sex Offenders Against Children: Empirical and Clinical Issues*, *in* THE APSAC HANDBOOK ON CHILD MALTREATMENT, *supra* note 6, at 181; *see also* Cathy Spatz Widom & M. Ashley Ames, *Criminal Consequences of Childhood Sexual Victimization*, 18 CHILD ABUSE & NEGLECT 303 (1994) (stating that their research shows that while victims of all forms of child abuse and neglect are at increased risk of being arrested as adults when compared to non-abused people, sexually abused children are not at greater risk when compared to other abused children); UNITED STATES GENERAL ACCOUNTING OFFICE, CYCLE OF SEXUAL ABUSE: RESEARCH INCONCLUSIVE ABOUT WHETHER CHILD VICTIMS BECOME ADULT ABUSERS (1996).

> [A] history of [child abuse] victimization increases the likelihood that someone will become a perpetrator of crime, violence, or abuse. . . . An important qualification is that victims are not necessarily prone to repeat their own form of victimization. But the proposition that childhood victims are more likely to grow up to victimize others is firmly established.[430]

Murphy and Smith conservatively estimate that thirty percent of all child molesters were sexually abused as children, a proportion significantly higher than the ten percent rate most commonly cited as the general incidence rate for sexual victimization of boys.[431] By perpetuating future abuse and other crimes, childhood sexual abuse has a significant negative societal impact.

VI. RECOMMENDATIONS

A. *Lessons Learned*

Legislatures often have drafted statutory sexual offenses protecting children without systematic consideration of the specific conduct to be prohibited or the rationale underlying the prohibitions.[432] Several guidelines emerge when considering

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[430] Finkelhor & Dziuba-Leatherman, *supra* note 326, at 181.

[431] *See* Murphy & Smith, *supra* note 429, at 181; *see also* Thomas W. Haywood et al., *Cycle of Abuse and Psychopathology in Cleric and Noncleric Molesters of Children and Adolescents*, 20 CHILD ABUSE & NEGLECT 1233, 1236-37 (1996) (finding that adults surveyed who were molested as children were five to six times more likely than non-abused adults to become molesters themselves).

Surveys of prisoners reveal similar statistics. *See* LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS iv (1996) (finding one in five incarcerated offenders reporting being sexually abused as children). One issue with prison research is the reliability of information obtained by simple surveys of prisoners. *See* J.P. Fedoroff et al., *Simulated Paraphilias: A Preliminary Study of Patients Who Imitate or Exaggerate Paraphilic Symptoms and Behaviors*, 37 J. FORENSIC SCIENCES 902 (1992).

[432] Apart from the Model Penal Code, few studies have systematically analyzed sexual crimes against children. A series published in the 1970s in the Women's Rights Law Reporter proposed a model rape statute, but did not thoroughly discuss issues relevant to children since the focus of the article was the rape of adult women. *See* Leigh Bienen, *Rape II*, 3 WOMENS RIGHTS LAW REPORTER 90 (1977); *see also* HERMAN, *supra* note 286, at 221-59 (discussing a variation of this collection comparing incest with other sex crimes). The American Bar Association published a report in 1981 that compared sexual crimes against children from around the country. However, this report is almost entirely descriptive and provides little critical analysis

lessons learned from the historical treatment of sexual offenses against children.[433]

1. Adult Sexual Activity With Children Should be Criminally Prosecuted

In spite of the near universal recognition that sexual conduct between adults and children should be criminal, societal commitment to prosecuting child sexual abuse wavers occasionally. The Model Penal Code illustrates such uncertainty in its treatment of sexual contact offenses.[434] For example, under the Model Code, a person who induces a four-year-old child to disrobe and then kisses and touches a child's genitals commits a misdemeanor offense[435] no more serious than indecent exposure,[436] issuing a bad check,[437] or disrupting a lawful meeting.[438] The 1980 commentary considers many such contacts of "ambiguous import"[439] and does not contemplate the possibility that sexual touching of a child can indeed cause harm beyond an "invasion of individual dignity."[440] If the child is an adolescent female, the Model Penal Code effectively blames her for instigating sexual activity. The drafters of the 1980 commentary reason:

> [T]hose who engage in intercourse with adolescents are neither as dangerous nor as morally reprehensible as those who

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of statutory schemes. *See* Lynne Kocen & Josephine Bulkley, *Analysis of Criminal Child Sex Offense Statutes, in* CHILD SEXUAL ABUSE AND THE LAW (photo. reprint 1985) (1981). *See also* Maryanne Lyons, Comment, *Adolescents in Jeopardy: An Analysis of Texas' Promiscuity Defense for Sexual Assault*, 29 HOUS. L. REV. 583, 608 (1992) (discussing an earlier attempt at compiling age of consent statutes).

Due to the difficulty of uncovering legislative history in most states, an extensive effort to uncover representative legislative histories was not attempted for this article. This is not to say that state legislatures have not contemplated policy issues, only that a clear history of these policy debates often is not recorded.

433 Because the Model Penal Code presents one of the few commentaries on sexual offenses against children, many of my comments are directed at it. My views are more of a reflection of changing societal views toward children and are not intended as a criticism of the commentators and drafters of the Model Penal Code.

434 *See supra* notes 111-13 and accompanying text.

435 MODEL PENAL CODE § 213.4.

436 *Id.* § 213.5.

437 *Id.* § 224.5.

438 *Id.* § 250.8.

439 *See supra* note 112 and accompanying text.

440 MODEL PENAL CODE § 213.4 cmt. 1 at 399.

> engage in such conduct with very young children. In part this is true because the post-pubescent child is a more plausible, though certainly not an acceptable, target of sexual desire. More importantly, the sexually mature though underage adolescent may play such an active role in encouraging sexual relations that the conduct of the older participant in yielding to temptation must be viewed as evidencing a less grievous moral default than exhibited by the exploiter of a very young child.[441]

Even more resistant than the Model Penal Code are those few individuals who outright object to the prosecution of child sexual abuse.[442] While these objections need not be exhaustively discussed here as they have been repeatedly answered elsewhere,[443] a brief retort is appropriate.

One objection to prosecution is that prosecuting further harms the child victims. Although it is well founded that children find the trial process stressful – as does any crime victim – there is no evidence that child witnesses are routinely traumatized by the process.[444] To the contrary, research demonstrates that the vast majority of child victims who testify return to normal functioning and that children whose offenders are brought to justice benefit from the process.[445]

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[441] *Id.* § 213.3 cmt. 2 at 379.

[442] *See* Roger J.R. Levesque, *Prosecuting Sex Crimes Against Children: Time for "Outrageous" Proposals?*, 19 LAW & PSYCHOL. REV. 59 (1995) (expressing these views).

[443] *See, e.g.*, GRAY, *supra* note 293, at 14-20; Scott Harshbarger, *Prosecution is an Appropriate Response in Child Sexual Abuse Cases*, 2 J. INTERPERSONAL VIOLENCE 108 (1987); James M. Peters et al., *Why Prosecute Child Abuse?*, 34 S.D. L. REV. 649 (1989); Inger J. Sagatun & Leonard P. Edwards, CHILD ABUSE AND THE LEGAL SYSTEM 116-18 (1995).

[444] Of course, it is possible for individual victims to be traumatized by an unscrupulous defense attorney, incompetent prosecutor, insensitive judge, or other individuals involved in the criminal justice system. However, such harm could happen with adult or child victims and is, in itself, insufficient justification for decriminalizing all offenses that would affect that class of victims. A more appropriate response is for society to reiterate its commitment to prosecuting such offenses by training professionals to appropriately handle such cases. *See* AMERICAN PROSECUTORS RESEARCH INSTITUTE, *supra* note 213, at xxxiii – xxxiv.

[445] *See* Lucy Berliner & Jon R. Conte, *The Effects of Disclosure and Intervention on Sexually Abused Children*, 19 CHILD ABUSE & NEGLECT 371, 383 (1995). "It is of note that only one child regretted telling because of the negative consequences to her family. All of the other children who commented would have liked more, not less, criminal justice intervention." *Id. See also* Jim Henry, *System Intervention Trauma to Child Sexual Abuse Victims Following Disclosure*, 12 J. INTERPERSONAL VIOLENCE 499, 510 (1997). "The children overwhelmingly viewed the system as positive . . . This finding indicates that most system interventions do serve to support sexually abused chil-

A second objection is that the goal of child protection should be treating rather than incarcerating offenders.[446] The focus on treatment rather than criminal sanctions is repeatedly raised not only in the context of child abuse crimes, but in the context of criminal justice generally.[447] Two responses to this argument are sufficient. First, rehabilitation is not inherently antithetical to prosecution. In fact, supervision provided by the criminal system and the threat of incarceration provided by the criminal process often are integral to treatment.[448] Moreover, in the context of sexual crimes against children, arguments that offenders should be treated rather than imprisoned have been made and followed for years – often with devastating consequences. Empirical research on recidivism demonstrates an un-

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dren. This is especially important to reform-minded professionals who must not cast aside present methods of intervention but, rather, build on existing systems." *Id.* *See also* Julie Lipovsky, *The Impact of Court on Children*, 9 J. INTERPERSONAL VIOLENCE 238, 245 (1994).

> The studies reviewed consistently demonstrate that many (but not all) children find the court process distressing. Effects do not appear to be long lasting and children's functioning tends to improve over time regardless of their court-related experience, although children who testify may improve at a slower pace than those who do not.

Id. *See also* Julie Lipovsky & Paul Stern, *Preparing Children for Court: An Interdisciplinary View*, 2 CHILD MALTREATMENT 150 (1997). "A number of recent empirical studies indicate that although court involvement can be stressful, children typically are not emotionally scarred by their participation as witnesses in criminal or dependency court." *Id.* (citations omitted). *See also* James M. Peters et al., *Why Prosecute Child Abuse?*, 34 S.D. L. REV. 649 (1989).

[446] Some critics argue that the child protection system casts too broad a net and expends limited resources investigating too wide a range of cases. However, these arguments are directed more at child protective service investigations and federal child protective policies rather than on the criminalization of child abuse. *See* Douglas J. Besharov, *Responding to Child Sexual Abuse: The Need for a Balanced Approach*, 4 THE FUTURE OF CHILDREN 135 (1994); David Finkelhor, *Is Child Abuse Overreported?*, PUBLIC WELFARE, Winter 1990, at 23 (stating an excellent rebuttal to many of Besharov's arguments).

[447] *See* 1 LAFAVE & SCOTT, § 1.5, at 32-33.

[448] *See* AMERICAN PROSECUTORS RESEARCH INSTITUTE, *supra* note 213, at 229; Lucy Berliner et al., *A Sentencing Alternative for Sex Offenders*, 10 J. INTERPERSONAL VIOLENCE 487, 488-89 (1995); William D. Murphy & Timothy A. Smith, *Sex Offenders Against Children: Empirical and Clinical Issues*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT, *supra* note 6, at 185 ("Optimal treatment requires close monitoring in the community by probation or parole personnel and/or significant others who are aware of risk factors and who are willing to coordinate their monitoring with the treatment provider.").

acceptably high risk of reoffense for many perpetrators,[449] while research on treatment indicates no reliable method exists for "curing" sex offenders to the point that the treatment provider can ensure the person will not reoffend.[450] As a result, arguments that offenders should be treated without the intervention of the criminal justice system[451] belie both the history of the treatment of sex offenders in the United States[452] and research on recidivism.

A third criticism, expressed by only a few individuals, is that children are not harmed by sexual abuse.[453] Given the over-

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[449] Gene Abel and his colleagues found that among the 561 sex offenders they studied, men who targeted boys had an average of 150 victims, while men who targeted girls had an average of 19 victims. *See* Gene G. Abel, et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE 3, 17 (1987).

[450] *See* Judith V. Becker, *Offenders: Characteristics and Treatment, in* 4 THE FUTURE OF CHILDREN 176, 188 (1994). "Numerous serious methodological issues limit the scientific validity of existing studies and preclude firm statements about the efficacy of treatment of sex offenders in general." *Id. See also* Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULLETIN 3 (1989) (discussing methodological problems and resulting uncertainty of recidivism research); R. Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. CONSULTING AND CLINICAL PSYCHOLOGY 646, 651 (1993).

> Our findings of substantial long-term recidivism suggest that any short-term treatment, no matter how well conceived and well delivered, is unlikely to effectively control many child molesters. Sexual offense recidivism is most likely to be prevented when interventions attempt to address the life-long potential for reoffenses and do not expect child molesters to be permanently 'cured' following a single set of treatment sessions.

Id. See also William D. Murphy & Timothy A. Smith, *Sex Offenders Against Children: Empirical and Clinical Issues*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT, *supra* note 6, at 175; Peters, *Why Prosecute Child Abuse?*, *supra*; UNITED STATES GENERAL ACCOUNTING OFFICE, SEX OFFENDER TREATMENT: RESEARCH RESULTS INCONCLUSIVE ABOUT WHAT WORKS TO REDUCE RECIDIVISM (June 1996).

[451] *See* Levesque, *supra* note 442, at 71.

[452] One of the primary reasons for the recent societal focus on commitment of sexually violent predators and community notification of the release of sex offenders is that many offenders were imprisoned during a time when rehabilitation was the focus. As a result of ineffective treatment and short prison terms, these offenders are being released and society is responding to the danger they pose. *See* In re Linehan, 518 N.W.2d 609 (Minn. 1994) (discussing involuntary civil commitment law passed in response to the release of an extremely violent offender from prison).

[453] *See* Levesque, *supra* note 442, at 59. Levesque claims: "Public reaction to sexual abuse is strong because of incorrect perceptions about the effects of the experience; contrary to media and popular accounts, most victims do not experience long-term impairment." *Id.* at 67, n.27. Levesque fails to cite any literature to support his claim, nor does he discuss the scientific literature that overwhelmingly demonstrates that child sexual abuse has very serious long-term consequences for individuals and soci-

whelming consensus demonstrated in the voluminous scientific literature that sexual abuse causes serious harm to children, this objection to prosecution is entirely without foundation.[454]

2. Statutory Sexual Offenses Against Children Should Not be Gender Exclusive

The 1980 commentary to the Model Penal Code identifies public outcry, the frequency of the offense, and severity of harm to the victim as influencing the gender-exclusivity of the Model Penal Code.[455] The drafters consider public outcry to be negligible and any coercive sexual activity involving female perpetrators to be highly unlikely.[456] Likewise, the drafters perceive the severity of harm to male victims to be minimal. In the context of female perpetrators and male victims, the drafters of the 1980 commentary state:

> [T]he potential consequences of coercive intimacy [with a female offender and male victim] do not seem so grave. For one thing there is no prospect of unwanted pregnancy. And however devalued virginity has become for the modern woman, it is difficult to believe that its loss constitutes a comparable injury to the male.[457]

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ety. *See supra* Part V. For an older article arguing along the same lines as Levesque – that the societal response to abuse is more likely to harm children than the act itself – see *Sexual Offences Against Children*, 1 BRITISH MED. J. 626 (1966).

[454] *See supra* Part V.

[455] MODEL PENAL CODE § 213.1 cmt. 8(a) at 338. In the words of the 1980 commentary:

> Economy in the use of the most severe sanctions of the criminal law suggests that perhaps the punishment of rape as a first-degree felony should be limited to those cases where public outcry is likely to be the greatest, where the harm to the victim is likely to be perceived as the most severe, both by the victim and by society, and where the frequency of the offense has caused the greatest public apprehension. It can be expected, in other words, that very few cases will arise under a gender-neutral statute where the sentences authorized by Section 213.2 or 213.3 will be perceived as inadequate or where assault penalties will not suffice.

Id. Again, the drafters primarily have in mind adult coercive activity against other adults. However, the language also makes clear that intercourse with children was contemplated but the risk posed by female perpetrators and harm to male victims was considered minimal. *See* MODEL PENAL CODE § 213.1 cmt. 8(a) at 338, n.173.

[456] *See id.* § 213.1 cmt. 8(a) at 336-37.

[457] *Id.* § 213.1 cmt. 8(a) at 338. *See also supra* notes 184-85 (discussing retaining a gender-exclusive structure).

Similarly, in the context of male perpetrators and male victims, the drafters do not consider serious harm to be a likely result of sexually penetrative conduct. A footnote to the 1980 commentary gives a hypothetical situation in which an attack by a group of men upon a boy less than ten-years-old could "easily be regarded as of the same level of seriousness as an attack on a girl of the same age."[458] The footnote goes on to state that "there are few reported instances of such attacks that would justify the extreme penalties of a first-degree felony and the fact remains that it is the frequency and violence of male attacks upon females that has led to the greatest public concern over rape."[459]

In contrast to the information available to the drafters of the 1980 Model Penal Code commentary, current knowledge about the prevalence and impact of abuse makes it clear that all three concerns raised by the commentary are present today. First, public outcry about sexual offenses committed against both male and female children is significant. For example, by 1996 every state had passed laws requiring convicted sex offenders to register with state law enforcement agencies and the vast majority of states allowed some type of public access to sex offender registries in order to help protect against sexual predators who prey on children.[460] Other laws enacted in many states permit the involuntary civil commitment of sexually violent predators.[461] The major impetus behind this legislation was public outcry over sexual molestation of young children – boys and girls – by repeat, and often extremely violent, sex offend-

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458 *Id.* § 213.1 cmt. 8(a) at 338, n.173.

459 *Id.* § 213.1 cmt. 8(a) at 338, n.173.

460 *See* DEP'T OF HEALTH AND HUMAN SERVICES, CHILD ABUSE AND NEGLECT STATE STATUTE SERIES: SEX OFFENDER REGISTRATION (1997) (compiling all sex offender registration laws through December 31, 1996); DEP'T OF HEALTH AND HUMAN SERVICES, CHILD ABUSE AND NEGLECT STATE STATUTE SERIES: PUBLIC NOTIFICATION OF THE RELEASE OF SEX OFFENDERS (1997) (compiling all public notification laws through December 31, 1996). *See also* E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997) (upholding New Jersey's sex offender registration and public notification laws); Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997) (upholding New York's sex offender registration and public notification laws).

461 *See* Kansas v. Hendricks, 65 U.S.L.W. 4564 (U.S. June 23, 1997) (holding Kansas sexually violent predator statute constitutional).

ers.[462]

Second, the frequency of offenses committed against male victims and by female perpetrators is much better known. While sexual crimes against children continue to be committed overwhelmingly by male offenders, the fact that offenses are committed by females is now recognized in the scientific literature.[463] Research also demonstrates that significant numbers of boys are victimized by males each year and that such offenders are among the most dangerous sex offenders.[464] These offenses should be clearly stigmatized in recognition of their prevalence and harm.

Third, there is no question that sexual conduct between

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[462] *See* In re Young, 857 P.2d 989, 992 (Wash. 1993) (stating that the impetus behind Washington's sexually violent predator civil commitment law – one of the first of its kind in the country – was a violent sexual attack against a boy). *See supra* note 2 (citing high profile cases). Public outrage has not been limited to these sexually violent sadists. The pedophile who repeatedly befriends and seduces children also has been the target of legislation. *See* Kansas v. Hendricks, 65 U.S.L.W. 4564 (U.S. June 23, 1997) (listing several boy and girl victims of a pedophile who spent half of his adult life imprisoned for sexual offenses).

[463] *See generally* FEMALE SEXUAL ABUSE OF CHILDREN (Michele Elliott, ed., 1994); MIC HUNTER, ABUSED BOYS: THE NEGLECTED VICTIMS OF SEXUAL ABUSE (1990); Ruth Mathews et al., Female Sexual Offenders, in 1 THE SEXUALLY ABUSED MALE 275 (Mic Hunter, ed., 1990); Margaret M. Rudin, et al., *Characteristics of Child Sexual Abuse Victims According to Perpetrator Gender*, 19 CHILD ABUSE & NEGLECT 963 (1995); Barbara K. Schwartz, *Characteristics and Typologies of Sex Offenders*, *in* THE SEX OFFENDER: CORRECTIONS, TREATMENT AND LEGAL PRACTICE 3-1, 3-4 (Barbara K. Schwartz & Henry R. Cellini, eds., 1995) (stating that "[a]lthough most convicted sex offenders are male, there is growing evidence that females commit a significant proportion of sexual assaults"); Barbara K. Schwartz, *Female Sex Offenders*, *in* THE SEX OFFENDER, *supra* at 5-1; Bill Watkins & Arnon Bentovim, *Male Children and Adolescents as Victims: A Review of Current Knowledge*, *in* MALE VICTIMS OF SEXUAL ASSAULT 27, 28-39 (Gillian C. Mezey & Michael B. King, eds., 1992). Sexual abuse committed by women against boys also is reported in the popular press. *See Va. Woman Sentenced in Rape of Her Son at 9*, WASH. POST, May 2, 1997, at B3.

[464] *See* Abel, *supra* note 449; *see also supra* notes 377-78 and accompanying text. Media reports also demonstrate increased awareness of such offenses. For example, on April 30, 1997, the Washington Post reported that a man from the Washington, D.C. metropolitan area was accused of sexually abusing several boys while working as a nanny. *See* Scott Bowles, *Nanny Sought in Molestation of Youth*, WASH. POST, Apr. 30, 1997, at B3. On the same day the Post reported the sentencing of a convicted child molester from the Washington, D.C. area – a Nobel Laureate who sexually abused numerous boys he brought to the United States from islands in the Pacific. *See* Justin Gillis, *Nobel Laureate Is Sent to Jail; Tape Helped Decide Fate in Sex Abuse Case*, WASH. POST, Apr. 30, 1997, at A1. These are not isolated events. They occur often and are regularly reported by the media.

maturity would involve "subjective impressions and poorly definable terminology" that would inevitably lead to successful constitutional challenges as to the statute's vagueness.[473] The method traditionally chosen to eliminate vagueness problems is to create a clear age of consent at a reasonable age, based on reasons other than the average age of onset of puberty.

Finally, the scientific data demonstrates a significant disparity in the age at which different children mature physically,[474] emotionally, and psychologically,[475] and provides no precise age at which children mature. As a result, decisions about age of consent are driven more from larger policy perspectives than from scientific data.

4. Pregnancy Prevention Should be Secondary to the Objective of Protecting Children

Courts and legislators occasionally assert pregnancy prevention as a reason to prohibit sexual intercourse between adult males and adolescent females.[476] A recent variation of the pregnancy prevention rationale adds lowering public assistance as a goal.[477] Apart from whether these goals are attainable through enforcing criminal statutes,[478] legislators considering

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[473] *See* State v. Jones, 640 So. 2d 1084 (Fla. 1994) (Kogan, J., concurring).

[474] In the Herman-Giddens study, for example, 62 percent of African-American girls and 35 percent of white girls had begun menses by age 12. *Id.* at 510. A substantial number of girls, therefore, begin menses at an older age.

[475] *See infra* notes 483-85 and accompanying text. *See* Francoise D. Alsaker, *Timing of Puberty and Reactions to Pubertal Changes, in* PSYCHOSOCIAL DISTURBANCES IN YOUNG PEOPLE 37, 44 (Michael Rutter, ed., 1995).

[476] *See supra* notes 158-65 and accompanying text. The related rationale of protecting female virginity is now considered antiquated by nearly all policy makers. *See supra* notes 152-55 and accompanying text. The Model Penal Code commentary identifies "the psychological damage that may result from loss of female virginity" as a reason to classify sexual offenses against females as more serious offenses than comparable conduct with male victims. MODEL PENAL CODE § 213.2 cmt. 3 at 375-76. The 1980 Commentary recognizes that the Model Penal Code "does not implement this judgment with exactitude." First, some acts of oral or anal intercourse with a female would be first degree felonies under section 213.1. Pregnancy or loss of female virginity is not involved in these acts. Similarly, anal penetration of a girl under 10 is a first degree felony under section 213.1 while the same conduct with a boy of the same age can only be a second degree felony under section 213.2. Only the gender of the victim distinguishes the two acts.

[477] *See supra* notes 166-68 and accompanying text.

[478] *See supra* note 331.

such a course need to carefully articulate their goals. If pregnancy is viewed as one of many potential physical harms to children, and if a belief exists that children are not psychologically prepared to raise children, then the rationale has some force. If, on the other hand, pregnancy prevention is detached from the goal of protecting children, the rationale loses its force. A societal message that an adult male will be prosecuted only if he gets a girl pregnant[479] risks overlooking the harm caused to the many children who do not become pregnant, as well as overlooking all harm to boys and pre-pubescent girls. While harm to society generally – including economic harm – is one factor to consider in making conduct criminal, the harm to the child always should be society's first concern.

B. *Rationale for Punishing Crimes Against Children*

While both theory[480] and practice[481] support criminalization of sexual activity with children "just because it's wrong,"[482] such acts can just as easily be prohibited on the basis of utilitarian justifications: the public good is promoted when those who choose to engage in sexual activity with children are punished. Regardless of the philosophical perspective, there is overwhelming support for the criminalization of sexual activity between children and adults.

1. Children Cannot Give Meaningful Consent

David Finkelhor, a noted expert on the causes and effects of family violence, argues persuasively that society's justification for prohibiting sexual conduct between adults and children should be rooted in the concept of consent.[483] Consent is only possible if a person knows what he or she is consenting to and has the freedom to say yes or no. With children, neither of these conditions can be fulfilled.

Several factors demonstrate why children cannot have ade-

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[479] *See* Goodman, *supra* note 332.

[480] *See supra* notes 117-23 and accompanying text.

[481] *See supra* notes 145-47 and accompanying text.

[482] While this expression overstates the retributivist perspective, it does reflect public sentiment.

[483] FINKELHOR, *supra* note 116, at 17.

quate knowledge of sexual activity to understand the nature of their consent. Finkelhor emphasizes that children lack the vital information about sex, sexual relationships, and the biology of reproduction necessary to make informed decisions on sexual matters. Beyond simply being ignorant of facts related to sex, children do not know the rules and meanings of sexuality and what they signify. Children do not have experience distinguishing platonic from sexual relationships, or friendship from sexual advances. Finally, children cannot be aware of the physical, psychological and emotional consequences of sexual activity.[484] All of this information is slowly learned from late childhood through adulthood, and children cannot (and should not) have the information about sexuality to make informed decisions related to sexual activity.

Neither do children have freedom to voluntarily consent to sexual activity. Adults control all of a child's resources (food, shelter, money, clothing), children are taught to obey adults, adults exercise extensive physical control over children, and adults are authority figures who punish children. The enormous power disparity between adults and children removes any legitimate ability on the part of children to consent to activities encouraged by an adult. Moreover, when an adult is in a special relationship to a child, such as a parent or guardian, this adult has even more control over the child. Children cannot freely consent to sex with an adult because they are not truly free to say no.[485]

Reliance on consent as the underlying rationale in criminalizing sexual activity between adults and children raises three additional issues that must be explored. First is the difficulty of defining the age at which children can consent. Since the crea-

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[484] *See* FINKELHOR, *supra* note 116, at 17-18; *see also* Collins v. State, 691 So. 2d 918, 924 (Miss. 1997) (stating that "[a]t the heart of [capital rape and statutory rape statutes] is the core concern that children should not be exploited for sexual purposes regardless of their 'consent.' They simply cannot appreciate the significance or the consequences of their actions"); 3 FEINBERG, *supra* note 176, at 325-32 (providing a lucid description of a child's legal capacity to consent to sexual activity); Gerald P. Koocher, *Children under Law: The Paradigm of Consent, in* REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH (Gary B. Melton, ed., 1987) (discussing children's ability to make life-impacting decisions in areas other than sexual conduct with adults).

[485] *See* FINKELHOR, *supra* note 116, at 18.

tion of statutory sexual offenses against children, the age of consent has vacillated,[486] and the states continue to differ in their policies on when children are capable of consenting to sexual activity with adults.[487] Recognizing that setting an age of consent is difficult, the problem of determining this age in each state should not overshadow the validity of the principle that children, however defined by the state, should be deemed legally incapable of consenting to sexual activity with adults.

A second issue is the rationale for criminalizing sexual activity when both parties are minors. If neither party has the legal capacity to consent to the activity, it is inconsistent to punish one of the parties for his or her conduct when no psychological or physical coercion is present. While the coercive behavior of one minor against another minor should be penalized,[488] a different rationale than that presented herein is needed for criminalizing conduct when two minors willingly participate in sexual activity with each other.[489]

A third issue, related to the previous two, is raised by cases in which a defendant who is "barely" an adult is prosecuted for engaging in sexual activity with his girlfriend, who is a minor.[490] While issues raised by cases involving two minors may be cause for public consternation, especially if no publicly supported rationale is articulated for criminalizing such behavior, once the premise of children's capacity to consent is accepted and legislatures define the applicable ages, the "borderline" cases must be accepted as within the appropriate range of behavior governed. Legal distinctions based on age that have significant

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[486] *See supra* notes 26-39 & 49-50 and accompanying text.

[487] *See supra* notes 232-45 and accompanying text.

[488] The need to protect children from violent and coercive conduct of other minors is certainly an adequate rationale for criminalizing certain sexual activity between minors.

[489] *See e.g.*, Kitrosser, *supra* note 177 (discussing one proposal). Regulating purely consensual, non-coercive activity between minors (the complexity of defining "consensual" notwithstanding) raises numerous additional issues that are not addressed in this article. *See* Kole, *supra* note 260.

[490] Such cases are routinely prosecuted in many jurisdictions. *See* Edmonds, *supra* note 3, at A2 (citing Syracuse, New York, District Attorney's Office statistic that 100-150 such cases are prosecuted in that office each year). *See also* Jones v. State, 640 So. 2d 1084 (Fla. 1994). An occasional case will receive extensive publicity. Suro, *supra* note 4, at A1 (discussing community reaction to prosecution for sexual assault of an 18 year old who impregnated his 15-year-old girlfriend).

consequences are commonplace and are enforced daily.[491] These lines are accepted as valid in all other contexts; sexual activity between an adult and a child should not be the exception.

A fourth issue is the incongruity created when the age of consent for sexual contact crimes differs from the age of consent for penetration crimes. Currently many states allow children to consent to sexual contact at a much lower age than they can consent to sexual penetration with an adult. If consent is the rationale for making the behavior criminal, there is no basis for distinguishing a child's ability to consent to these various forms of sexual activity. Policies reflecting the perceived seriousness (or lack thereof) of these acts should be reflected in the grading of sexual contact offenses involving older children, not the elimination of such offenses.

Some of the more difficult issues related to consent were faced by the Florida Supreme Court in *Jones v. State*.[492] In *Jones* two fourteen-year-old females had intercourse with nineteen and twenty-year-old males. The defendants challenged the constitutionality of a statute prohibiting sexual conduct between adults with children under the age of sixteen. The fourteen-year-olds indicated that the intercourse was entirely voluntary and they did not want to prosecute the defendants. In fact, one of the girls expressed a desire to become pregnant. The trial judge found that the statute unconstitutionally infringed upon the privacy rights of children by not allowing them to have voluntary sexual intercourse and become pregnant.

The state supreme court rejected the trial court's decision and upheld the constitutionality of the statute, finding that the state has a compelling interest in protecting children from sexual exploitation which is not outweighed by a minor's privacy rights. A concurring judge, Justice Kogan, strongly challenged the idea that adolescents can consent to sex. First, Justice Kogan emphasized the dangers of changing the legal concept

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[491] For example, the day before his birthday a child cannot serve in the military, the next day he is eligible to be involuntarily drafted into military service with potential responsibility for making life and death decisions. The day before her birthday a child cannot be tried as an adult for violent criminal activity, the next day she could serve significant prison time. *See* Oberman, *supra* note 177, at 42-53 (discussing children's legal capacity to consent in other contexts).

[492] 640 So. 2d 1084 (Fla. 1994).

of consent to mean that children have a right to engage in sexual activity with adults if they so choose:

> Such a loose reading of [prior case law] potentially would mean that children of a young age could enter into contracts even if they lack the experience or means to do so; could marry at a very young age without parental or judicial consent; could purchase and consume tobacco and alcoholic beverages; could attend adult movies and purchase pornography; and much else. Nothing in [prior case law] supports these troubling scenarios.[493]

Second, Justice Kogan argued that no reasonable person would argue that children of any age should be able to consent to sexual activity:

> I cannot believe, for example, that any responsible adult seriously thinks a six-year-old legally could consent to sex. Children of that age *always* lack the experience and mental capacity to understand the harm that may flow from decisions of this type. They may unwittingly 'consent' to something that can ruin their lives, jeopardize their health, or cause emotional scars that will never leave them. I think most concerned adults and experts in the field would agree that this lack of prudent foresight continues in youths well into the teen years.[494]

Consequently, it is entirely reasonable for the state to set an age below which a child is deemed legally incapable of consenting to sexual activity with an adult:

> [T]he legislature has acted pursuant to its authority to protect children and young adolescents when it set the age of consent for present purposes at sixteen. The legislature, I believe, can choose any age within a range that bears a clear relationship to the objectives the legislature is advancing. Some reasonable age of consent must be established because of the obvious vulnerabilities of most youngsters and the impossibility of legally defining 'maturity' for allegedly precocious teens in this context. Because an age of consent is necessary, there is no good reason why the legislature cannot set it at sixteen for present purposes, which clearly is reasonable in light of the available psychological and medical literature.[495]

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[493] *Id.* at 1089.

[494] *Id.* (emphasis in original).

[495] *Id.* at 1089-90.

Other courts addressing the same issue have had no difficulty determining that the state's interest in protecting children overrides any privacy interest on the part of the child or the defendant.[496] Children are incapable of consenting to sexual activity with adults and states have the obligation to protect children and society from harm produced by such activity.

2. Sexual Activity Between Adults and Children Harms Children and Society

Psychological research makes it clear beyond any doubt that sexual activity between adults and children has serious negative repercussions for children[497] and causes additional harm to society.[498] As articulated by a federal district court: "It is now a generally accepted conception that harm is inherent in the act of sexually abusing a child."[499] The government's interest in protecting children and society from these harms is not seriously in dispute.

3. Assumptions About Certain Harms Need to be Reconsidered

Difficulties arise when attempting to specifically identify particular harms and fashion statutes which respond to those harms. While the scientific literature confirms some of the assumptions implicit in state statutory schemes about specific activities that cause the more serious effects, the literature fails to confirm other widely held beliefs.

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[496] *See, e.g.*, Anderson v. State, 562 P.2d 351 (Alaska 1977) (finding that the state's interest in protecting children justifies a state statute forbidding an adult committing fellatio with a child under 16 regardless of the child's consent); State v. Munz, 355 N.W.2d 576 (Iowa 1984); Goodrow v. Perrin, 403 A.2d 864 (N.H. 1979); State v. Barlow, 630 A.2d 1299 (Vt. 1993).

[497] *See supra* notes 304-90 and accompanying text.

[498] *See supra* notes 393-431 and accompanying text. As with other offenses, imposing criminal sanctions is an appropriate response to societal costs. *See* 1 LAFAVE & SCOTT, *supra* note 80, § 1.5, at 30.

[499] Troy v. Allstate Ins. Co., 789 F. Supp. 1134 (D. Kan. 1992) (civil suit of insurance company excluding defendant – alleged perpetrator – from coverage of a civil suit for harm arising from sexual molestation).

a. Offenses Committed Against Older Children Can be as Harmful as Offenses Committed Against Younger Children

Scientific literature does not confirm the common assumption that adolescents are less severely harmed by abuse than younger children. The research in fact is inconclusive, with some studies indicating that betrayal and violation of trust has a more detrimental impact on older children.[500] Although the research does not provide justification for altering the current status of penalizing crimes against younger children more severely than crimes against older children, it does provide relevant information for the numerous states that treat sexual crimes against older children quite leniently.[501] Older children are harmed by sexual abuse and such acts should be treated seriously.

b. Offenses Committed by Relatives or Acquaintances Can be More Serious Tthan Offenses Committed by Strangers

Scientific literature demonstrates that the violation of trust accompanying abuse by a non-stranger may make the offense committed by a known and trusted individual more serious rather than less serious,[502] yet statutes do not consistently punish more severely abuse by one in a position of authority.[503] Offenses committed by strangers often are perceived as more heinous, perhaps in part because many high-profile cases involving strangers also involve abduction and brutalization of children.[504] In such cases the other aggravating factors may actually account for the public outrage and justifiably increased punishment,

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500 *See supra* notes 379-80 and accompanying text.

501 *See supra* notes 283, 285.

502 *See supra* notes 372-76 and accompanying text. Another factor influencing societal views on the seriousness of intra-familial abuse is the perception that such abuse is a family matter not appropriate for government intervention. This view is rejected by most professionals, but persists among some in American society. *See* RICHARD J. GELLES, THE BOOK OF DAVID 132-43 (1996) (citing objections to a policy of family preservation).

503 *See supra* notes 262-67 and accompanying text and statutes cited in note 283.

504 *See supra* note 1.

but the perception remains that the "stranger" factor is the most serious. States reconsidering rationale behind their statutes should examine whether harm to children caused by a violation of trust deserves heightened punishment.[505]

c. Penetration Offenses and Offenses Involving Physically Violent Force are Likely to Cause More Serious Harm Than Contact Offenses

One widely held belief consistently demonstrated by the literature is that penetration offenses are more harmful than contact offenses. These offenses also carry a risk of pregnancy, sexually transmitted diseases, and physical injuries not associated with contact offenses. Policies of the states to punish penetration offenses more severely are thus in line with the research. Similarly, offenses involving physically violent force consistently cause more serious harm to children and should be punished severely.[506]

d. Offenses Committed Repeatedly or for a Long Duration Cause Serious Harm to Children

Although a few studies conclude that single instances of abuse cause more harm than repeated instances, the bulk of the literature supports the assumption implicit in many statutes that repeated and prolonged abuse causes serious harm to children.[507] As such, the trend in many states to significantly increase punishment for second and subsequent convictions is supported by scientific data. In addition, statutes providing increased punishment for continuous abuse of a child also are justified, unless the continuous abuse offense does not provide greater punishment than the individual charges (and individual

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[505] A counterbalancing factor is the amount of damage caused by one stranger pedophile who may abuse dozens of children, compared to the abuse of family members that may not extend outside the family. One way to reconcile these competing interests is to increase punishment for abuse by one in a position of authority, but also significantly increase punishment for repeat offenders. Thus, both the multiple victim pedophile and the intra-familial abuser receive appropriate punishment for the harm they cause. *See, e.g.*, GA. CODE ANN. § 16-6-4 (Supp. 1997) (increasing penalties for second and subsequent acts of child molestation).

[506] *See supra* notes 272-74 and accompanying text.

[507] *See supra* notes 381-83 and accompanying text.

incidents are provable).[508]

C. *Recommended Statutory Provisions*

Just as the Model Penal Code attempted to provide legislators with "a reasoned, integrated body of material" discussing criminal law generally,[509] this article attempts to present a systematic and reasoned approach to the narrow category of sexual crimes against children. Because the individual states demonstrate significant differences in basic policy toward sexual offenses, this article refrains from recommending specific statutory language and instead offers general guidelines to inform legislative discussions. Consequently, the following section suggests basic principles that theory, experience, and research indicate should be followed when crafting legislation covering sexual offenses against children. The organization of this section follows the basic elements of a criminal offense – mental state, the act, and dangerousness.

1. Mental State: Maintaining Strict Liability

While a few commentators have proposed[510] and a few courts have decided[511] that strict liability for sexual crimes against children should be eliminated, this view has not prevailed in the United States.[512] Continuing with strict liability in these cases is appropriate for several reasons.

The first reason is the degree of harm caused by sexual offenses against children. Courts have consistently viewed the minimal danger of convicting one who reasonably believes a child is of the age to consent to be outweighed by the monumental harm caused by sexual activity between adults and children.[513] Unlike many other strict liability offenses,[514] sexual

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508 *See supra* notes 205-13 and accompanying text.

509 *See* 1 LAFAVE & SCOTT, *supra* note 80, § 1.1(b) at 5 (citing Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code*, 42 A.B.A.J. 321 (1956)).

510 *See supra* notes 217 & 219.

511 *See* Collins v. State, 691 So. 2d 918, 923 (Miss. 1997) (rejecting a mistake of fact defense for capital rape of a child under 14).

512 *See* Collins v. State, 691 So. 2d 918, 923 (Miss. 1997).

513 *See* Loewy, *supra* note 134, at 285-86 (discussing the balance of culpability and harm in the creation of criminal offenses).

514 *See* Levenson, *supra* note 219, at 453 n.266 (listing strict liability crimes).

crimes against children present a significant and pervasive societal problem. Strict liability expresses society's recognition of the harms and represents a reasonable effort to extend the greatest protection to children.

Second, children need confirmation that responsibility and blame belongs with the offender. A potential phenomenon in cases of child sexual abuse is self-blame by the victim.[515] Without a criminal justice system to place blame upon the adult, children may be made to feel responsible for the adult's conduct. A rule of strict liability places the responsibility entirely on the shoulders of adults. Adults must be aware of the laws and, when engaging in sexual activity, adults bear the full responsibility of ensuring that their partner is an adult. Elimination of strict liability would shift this responsibility to children, especially when the child is an adolescent.

Third, it is inconsistent to assert that a child becomes capable of consenting solely because an adult thinks that the child is old enough. If children are legally incapable of consenting to sexual activity with adults, the sexual activity is nonconsensual regardless of the adult's knowledge (or perception) of the child's age. Even critics of strict liability do not seriously question this theory when the victim is young;[516] it is only with older adolescents that the rule is questioned.[517] The result of this reasoning is to place upon children the responsibility of not looking or acting old and lessen the responsibility of the adult to ensure that he or she is entering into a sexual relationship with another adult.

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[515] *See* Curtis McMillen & Susan Zuravin, *Attributions of Blame and Responsibility for Child Sexual Abuse and Adult Adjustment*, 12 J. INTERPERSONAL VIOLENCE 30, 31-32 (1997). The research makes clear that self-blame is a response of some sexually abused children, but the research presents conflicting results about the prevalence of blame. Clinicians indicate that children often blame themselves; researchers find it to be an uncommon phenomenon. However, whether children whose abuse is successfully prosecuted engage in less self-blame is unanswered by the empirical literature.

[516] *See* People v. Olsen, 685 P.2d 52 (Cal. 1984). Few, if any, courts would be concerned with proof of mental state when an adult is convicted of sexual intercourse with an 8-year-old because it is presumed that such a person must know he or she is engaging in wrongful conduct. *See also* Loewy, *supra* note 134, at 286 (discussing culpability inherent in certain conduct).

[517] *See* Cavallaro, *supra* note 217, at 819 n.21; Levenson, *supra* note 219; Singer, *supra* note 219, at 79 n.200; MODEL PENAL CODE § 213.6(a).

Most protests as to mistake of age have more to do with age of consent than with the doctrine of strict liability. And setting an age of consent is a legitimate ground for debate. If members of society believe that the age of consent is too high, then rather than altering the doctrine of strict liability for all victims, the age of consent should be lowered.[518] But so long as society believes children are not capable of consenting to sexual acts with adults, the burden should not be shifted to those children to look or act their age.

2. Prohibited Harmful Acts

Particular acts are prohibited because of the harm caused by those acts.[519] The following elements should be considered and addressed in some form by statutes prohibiting sexual penetration and sexual contact between adults and children.

a. The Sexual Act

• Statutes defining penetration and contact offenses should specify the targeted conduct with appropriate language that is not hindered by concerns as to delicacy.[520] This requires sexual organs to be identified by name and sexual acts to be precisely described.

• Gender-neutral language should make all penetration and contact offenses applicable to male and female defendants as well as male and female victims.[521]

• Penetration or contact of or by a third party at the direction of the defendant should be identified as an offense.[522]

• Statutes should make clear that any act committed upon the actor by the child constitutes the offense.[523]

• Language should clarify that penetration, however slight,

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[518] Another alternative, though still inconsistent with a child's legal incapacity to consent, is to create a limited mistake of age defense with a high burden of proof placed on the defendant. *See* Levenson, *supra* note 219.

[519] *See supra* notes 137-39 and accompanying text.

[520] *See* MINN. STAT. §§ 609.341(11) & (12) (Supp. 1997); N.H. REV. STAT. ANN. §§ 632-A:1(IV) & (V) (1996); N.J. STAT. ANN. §§ 2C:14-1(c) & (d) (West 1996).

[521] *See supra* note 186 (citing statutes).

[522] *See supra* notes 188 & 192 (citing statutes).

[523] *See supra* note 189 (citing statutes).

of the vagina, anus, or mouth is sufficient and proof of emission is not required.[524]

• Language should specifically identify penetrative conduct: (a) penile penetration of the anus, vagina or mouth; (b) oral penetration of the anus or vagina; (c) penetration of the anus or vagina of another by an animate or inanimate object; (d) penetration of the anus or vagina of another by any body part of the defendant; (e) penetration of one's own body by a finger or a foreign object at the direction of an adult.[525]

• Statutes should specify whether sexual intent must be proven in cases of oral, penile, digital, or object penetration.[526]

• Statutes should create an exception for object or digital penetration accomplished for a bona fide medical reason. An exception for conduct involving penetration of an intimate part by the mouth or penile penetration of any body orifice is not necessary.[527]

• Sexual contact statutes should clearly define the sexual (or other) intent required to be proven.[528]

• Sexual contact statutes should define those parts of the body the touching of which constitutes the offense.[529]

• Sexual contact statutes should define touching through clothing as sexual contact.[530]

• Legislators drafting sexual contact offenses should determine whether to include a catch-all indecent liberties or lewd and lascivious conduct offense present in a few states.[531]

b. The Age of the Child

State statutes should clearly affirm that children are unable to consent and that these laws are written to protect children

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[524] *See* Rigelhaupt, *supra* note 58.

[525] *See supra* note 182 (citing statutes).

[526] *See supra* note 222 (citing statutes).

[527] *See supra* note 222 (citing statutes).

[528] *See supra* note 190.

[529] *See* MINN. STAT. § 609.341(5) (Supp. 1997) ("'Intimate parts' includes the primary genital area, groin, inner thigh, buttocks, or breast of a human being."). *See also supra* note 190 (citing statutes).

[530] *See supra* note 190 (citing statutes).

[531] *See supra* notes 196, 198, 200 (citing statutes).

who do not yet have the capacity to protect themselves. A two tier system provides a structure that reinforces society's commitment to protecting all children (not just those of "tender" years) while recognizing a public policy decision to more seriously punish offenses committed against very young children. Such a system also helps avoid some confusion of issues surrounding mistake of age in demonstrating uniform agreement that those issues are not relevant to younger children.[532]

The ages to be set within these tiers will depend upon the state's policy debate. However, it is instructive for policy makers to know the current status:

- In fourteen states, the most serious penetration offense applies to children as old as thirteen years of age. In another fourteen states, the most serious penetration offense applies to children as old as twelve years of age.
- In fourteen states, the most serious contact offense applies to children as old as thirteen years of age. In another twelve states, the most serious contact offense applies to children as old as twelve years of age.
- All but two states set the age of consent for penetration offenses at sixteen or older (the age of consent is seventeen in six states and eighteen in twelve states).
- The majority of states set the age of consent for contact offenses at sixteen or older.[533]

While decisions become more difficult as the age of the victim increases and the age of the defendant decreases, the fundamental decision that sexual conduct between adults and children is criminal should be unwavering.

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[532] Feinberg objects to a grading system of sexual offenses against children on the ground that consent is either valid or not valid: "Expressions of assent may vary in degree of voluntariness, but short of that degree required for validity, a miss is as good as a mile. . . . This must be one of the rare places in the law where voluntariness that is insufficient to make consent valid nevertheless has other legal effects, in this case mitigating ones." 3 FEINBERG, *supra* note 176, at 330. While Feinberg is certainly correct in stating that a distinction in grading should not be made on the basis of a child's relative ability to consent (it is an all or nothing proposition), a distinction in grading is validly made on the basis of the harm to the child and societal outrage about the conduct. Feinberg recognizes that such grading is likely "based on assumed differences in the amount of harm done the victim." *Id.*

[533] *See supra* Table One and Table Two.

c. The Relationship of the Offender to the Victim

Research indicates that parental figures are the abusers in six to sixteen percent of cases, and that a relative is the abuser in approximately one quarter of all cases.[534] Research also makes clear that the relationship of the offender to the victim accounts for significant harm to the victim.[535] Given the prevalence and seriousness of these offenses, abuse by one in a position of authority is an important consideration in sexual offense charging statutes.

Of the two approaches most prevalent in the United States,[536] statutes which make the relationship of offender to victim an aggravating factor provide the most tailored response to the harm. The relationship of an offender to a child does not alter the child's capacity to consent, but rather demonstrates additional betrayal and more serious manipulation of a child. As stated by the 1980 commentary to the Model Penal Code in contrasting this act to the offense of incest, abuse by one in a position of authority "punishes such conduct for what it is – not incest, but aggravated illicit intercourse achieved by misuse of a position of authority and control."[537] As such, abuse of a position of authority is correctly treated as an aggravating factor that results in increased punishment of the offender.

It is important when drafting an abuse of position of authority provision to clearly define persons to whom it applies. In some states the provision applies only to parental figures. In others it extends to permanent or temporary caregivers, such as school teachers and youth leaders. In some states broad language covers many additional people in a position to exert authority over the child. While the breadth of such language is a policy issue for each state to determine, careful drafting of language is important to avoid uncertainty as to application of

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534 *See* Berliner & Elliott, *supra* note 321, at 52.

535 *See supra* notes 372-76 and accompanying text.

536 *See supra* notes 268-71 and accompanying text.

537 MODEL PENAL CODE § 213.3 cmt. 3 at 387. The alternative approach is reasonable in that a child may be old enough to be able to freely consent to most activities, yet be unable to freely consent in the context of a close relationship, such as a parent or guardian. Thus, the child is incapable of freely consenting when the actor is a parent, but is otherwise able to consent. *See supra* notes 483-85 and accompanying text.

the law.[538]

d. Age Difference Between the Adult and the Child

An important element in many state schemes is an age difference between the adult and the child. Such age categories are necessary in targeting the harmful conduct at issue: sexual activity between an adult and a child. Some states choose to make a simple adult-child distinction, requiring only that the defendant be eighteen or older and the child be under that age (or, more likely, under sixteen). Other states build in a somewhat larger age difference for certain offenses, usually for offenses involving older adolescents. For example, in Indiana identical conduct with a fourteen or fifteen-year-old child is a lesser felony for an 18-year-old defendant than for a twenty-one-year-old defendant.[539] Those states creating a minimum age of the defendant most accurately reflect a policy based on the concept of consent by clearly differentiating adult-child conduct from child-child conduct.

In addition to specifying who is an adult and who is a child, age difference provisions address the issue of criminalization of sexual activity involving only minors. States specifying an age difference without setting a minimum age of the offender demonstrate one attempt at addressing juvenile offenders by indicating that an age difference of three or four years is enough to create culpability for the older child.[540] Statutes such as Minnesota's may in fact provide a good resolution, but these issues need to be analyzed separately from adult-child debates because they involve a different set of societal concerns.[541]

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[538] *See e.g., supra* notes 262-64 (citing statutes).

[539] *See* IND. CODE § 35-42-4-9. A related issue is whether the child is married to the adult. If the state allows the child to be married at the age to which an offense would otherwise apply, then non-marriage at the time of the conduct is an appropriate element of the offense.

[540] *See* MINN. STAT. §§ 609.342 -.345. An age difference requirement creates a presumption that conduct is inherently coercive when a large age disparity exists between children.

[541] *See supra* notes 488-89 and accompanying text.

e. Duration of the Assaultive Relationship

A factor clearly associated with increased harm to children is duration of abuse.[542] States have attempted to address this factor either by enacting continuous abuse statutes or by dramatically increasing penalties for subsequent offenses.[543] While continuous abuse statutes may be a useful tool for cases in which dates cannot be specified, increased penalties for multiple offenses more precisely target the harm of multiple acts.[544]

3. Aggravating Factors

A number of aggravating factors are listed by various statutes, such as causing physical harm to the child, using physically violent force in the commission of the act, and using or displaying a weapon.[545] The presence of one of these factors takes the conduct outside the scope of consensual sexual activity as discussed in this article, and often statutes other than the ones discussed herein would apply to such conduct. In some cases, the statutes addressing adult-child sexual crimes will cover the conduct, and in such cases these acts should be considered for inclusion within these offenses as aggravating factors.[546]

4. Punishment

The purpose of this article has not been to recommend a comprehensive sentencing scheme. However, material discussed herein raises several issues related to sentencing that should be considered by legislatures amending child sexual offense statutes.

• Although penetrative offenses should continue to be graded more seriously than contact offenses, the leniency with which many sexual contact offenses are dealt should be remedied.

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[542] *See supra* note 383 and accompanying text.

[543] *See supra* notes 205-13 and accompanying text.

[544] *See* GA. CODE ANN. § 16-6-4 (Supp. 1997); 720 ILL. COMP. STAT. § 5-12-13 (West 1993); MASS. GEN. LAWS ANN. ch. 265, §§ 22A, 23, & 24B (West 1990); VT. STAT. ANN. tit. 13, § 2602 (Supp. 1996).

[545] *See supra* notes 272-74 and accompanying text.

[546] *See* CAL. PENAL CODE § 288(b)(1) (West Supp. 1997); IND. CODE § 35-42-4-3(b) (Supp. 1996).

• The assumption that older children are not seriously harmed by sexual activity with an adult should be reconsidered.

• Policy makers should consider making an offender's abuse of a position of authority over a victim an aggravating factor or a separate offense carrying additional penalties.

D. *Conclusion*

Protection of children in our society requires a reasoned system of punishment for sexual activity between adults and children with statutes that clearly define the prohibited conduct. When statutes are drafted with adults rather than children in mind,[547] or in response to high profile cases,[548] they may not adequately respond to the harms they are intended to prevent. This article represents an attempt to more precisely define criminal conduct by recommending a more complete statutory foundation as one part in the complex process of protecting children in our society. If adults in society work to improve the laws and the implementation of these laws, our efforts to substantially reduce sexual victimization of children may someday be realized.

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[547] *See supra* note 455.

[548] *See supra* note 1.

Appendix

Table Three: Age of consent by state (age under which consensual sexual penetration is a crime)

State	Age	Cite
Alabama	16	ALA. CODE § 13A-6-62 (1994)
Alaska	16	ALASKA STAT. § 11.41.436 (Michie 1996) (18 if parent or person in position of authority, ALASKA STAT. § 11.41.434; 1.41.436 (Michie 1996))
Arizona	18	ARIZ. REV. STAT. ANN. § 13-1405 (West Supp. 1997)
Arkansas	16	ARK. CODE ANN. § 5-14-106 (Michie Supp. 1995) (18 if guardian, ARK. CODE ANN. § 5-14-120 (Michie 1993))
California	18	CAL. PENAL CODE § 261.5 (West Supp. 1997)
Colorado	15	COLO. REV. STAT. § 18-3-403 (1990 & Supp. 1996) (18 if actor in a position of trust subjects child to sexual contact, COLO. REV. STAT. § 18-3-405.3 (1990 & Supp. 1996))

Connecticut	16	CONN. GEN. STAT. ANN. § 53a-71 (West 1994 & Supp. 1997) (18 if guardian, CONN. GEN. STAT. ANN. § 53a-71 (West 1994 & Supp. 1997))
Delaware	16	DEL. CODE ANN. tit. 11, § 773 (Supp. 1996)
Florida	18	FLA. STAT. ANN. § 794.05 (West Supp. 1997)
Georgia	16	GA. CODE ANN. § 16-6-3 (Supp. 1997)
Hawaii	14	HAW. REV. STAT. § 707-730 (Michie 1994)
Idaho	18	IDAHO CODE § 18-6101 (Supp. 1996)
Illinois	17	720 ILL. COMP. STAT. § 5/12-16 (West Supp. 1997) (18 if family member or person in a position of trust, 720 ILL. COMP. STAT. § 5/12-13 (West 1993))
Indiana	16	IND. CODE § 35-42-4-9 (Supp. 1996) (18 if parent, IND. CODE § 35-42-4-7 (Supp. 1996))
Iowa	16	IOWA CODE ANN. § 709.4 (West Supp. 1997)

Kansas	16	KAN. STAT. ANN. § 21-3504 (1995) (18 if a parent KAN. STAT. ANN. § 21-3603 (1995))
Kentucky	16	KY. REV. STAT. ANN. § 510.060 (Banks-Baldwin 1995)
Louisiana	17	LA. REV. STAT. ANN. § 14:80 (West Supp. 1997) (18 if parent, LA. REV. STAT. ANN. § 14:78.1 (West Supp. 1997))
Maine	16	ME. REV. STAT. ANN. tit. 17A, § 254 (West Supp. 1996) (18 if parent or teacher ME. REV. STAT. ANN. tit. 17A, § 253 (West 1983 & Supp. 1996)
Maryland	16	MD. CODE ANN. art. 27, § 464B (1996) (18 if parent, MD. CODE ANN. art. 27, § 35C (1996))
Massachusetts	16	MASS. GEN. LAWS ch. 265 § 23 (West 1990)
Michigan	16	MICH. COMP. LAWS § 750.520d (West 1991)
Minnesota	16	MINN. STAT. § 609.344 (Supp. 1997) (18 if parent, teacher, MINN. STAT. § 609.344 (Supp. 1997))

Mississippi	18	MISS. CODE ANN. § 97-3-67 (1994)
Missouri	17	MO. REV. STAT. § 566.034 (Supp. 1996)
Montana	16	MONT. CODE ANN. § 45-5-503 (1995) (18 if relative, MONT. CODE ANN. § 45-5-507 (1995))
Nebraska	16	NEB. REV. STAT. § 28-319 (1995)
Nevada	16	NEV. REV. STAT. §§ 200.364 and 200.368 (Supp. 1997) (defines age of consent as 16)
New Hampshire	16	N.H. REV. STAT. ANN. § 632-A:3(II) (1996) (18 if position of authority, N.H. REV. STAT. ANN. § 632-A:2(I) (1996))
New Jersey	16	N.J. STAT. ANN. § 2C:14-2 (West 1996) (18 if related or supervisory, N.J. STAT. ANN. § 2C:14-2 (West 1996))
New Mexico	17	N.M. STAT. ANN. § 30-9-11 (Michie Supp. 1996)
New York	17	N.Y. PENAL LAW § 130.25 (McKinney Supp. 1997)

North Carolina	16	N.C. GEN. STAT. § 14-27.7A (Supp. 1996) (18 if parent, N.C. GEN. STAT. § 14-27.7 (Supp. 1996))
North Dakota	18	N.D. CENT. CODE § 12.1-20-05 (1985)
Ohio	16	OHIO REV. CODE ANN. § 2907.04 (Anderson 1996) (18 if teacher, OHIO REV. CODE ANN. § 2907.03 (Anderson 1996))
Oklahoma	16	OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 1997)
Oregon	18	OR. REV. STAT. § 163.435 (1995)
Pennsylvania	16	18 PA. CONS. STAT. §§ 3122.1 and 3125 (Supp. 1997)
Rhode Island	16	R.I. GEN. LAWS § 11-37-6 (1994)
South Carolina	16	S.C. CODE ANN. § 16-3-655 (Law. Co-op. 1985)
South Dakota	16	S.D. CODIFIED LAWS § 22-22-1 (Michie Supp. 1996) (21 if relative, S.D. CODIFIED LAWS § 22-22-19.1 (Michie Supp. 1996))
Tennessee	18	TENN. CODE ANN. § 39-13-506 (Supp. 1996)

Texas	17	TEX. PENAL CODE § 22.011 (West 1994)
Utah	18	UTAH CODE ANN. §§ 76-5-402 & 76-5-406(11) (1995 & Supp. 1996)
Vermont	16	VT. STAT. ANN. tit. 13, § 3252 (Supp. 1996) (18 if in care of defendant 13, VT. STAT. ANN. tit. 13, § 3252 (Supp. 1996))
Virginia	18	VA. CODE ANN. § 18.2-371 (Michie Supp. 1996)
Washington	16	WASH. REV. CODE § 9A.44.079 (Supp. 1997) (18 if supervisory WASH. REV. CODE § 9A.44.093 (Supp. 1997))
West Virginia	16	W. VA. CODE § 61-8B-5 (1992) (18 if parent, W. VA. CODE § 61-8D-5 (Supp. 1996))
Wisconsin	18	WIS. STAT. ANN. § 948.09 (West 1996)
Wyoming	18	WYO. STAT. ANN. § 14-3-105 (Michie Supp. 1996)