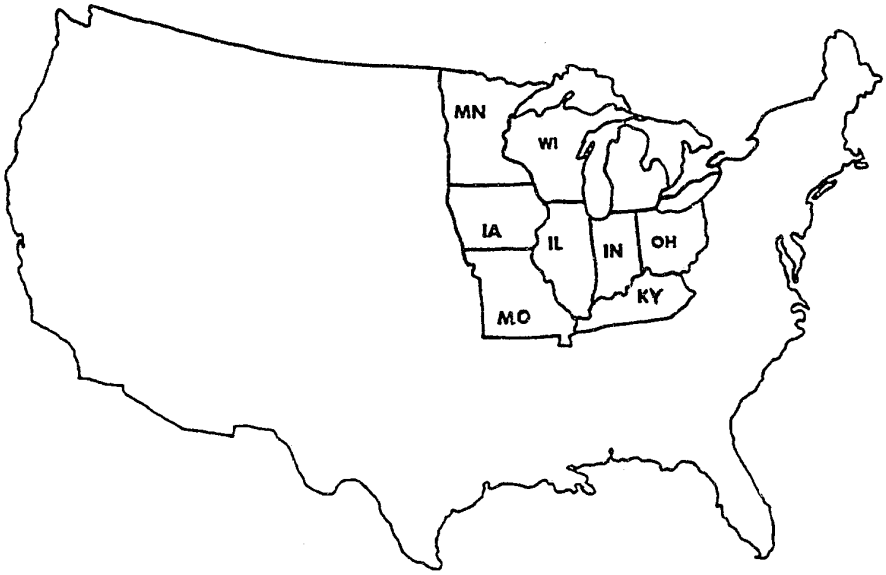

Criminal Child Sexual Abuse & Exploitation Laws in Eight Mid-Western States: Recommendations for Legislative Change

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INTRODUCTION: Analysis of statutes with the aim of developing recommendations for legislative reform is based in part on the 1986 recommendations of the U.S. Attorney General's Commission on Pornography, Davidson and Loken's *Child Pornography and Prostitution: Background and Legal Analysis* (Arlington, VA: NCMEC 1987), and Howell, Schretter, and Aspell's *Selected State Legislation: A Guide for Effective State Laws to Protect Children* (Arlington, VA: NCMEC 1993). References to most case law discussed herein have been obtained from Davis, *Program to Increase Understanding of Child Sexual Exploitation: Legal Analysis* (ABA Center on Children and the Law: To be published.) For comprehensive statutory summaries, see *"An Interstate Approach: Criminal Child Sexual Abuse and Exploitation Laws in Eight Mid-Western States"* completed in conjunction with this document.

LAW REFORM: CHILD PORNOGRAPHY AND RELATED OFFENSES

I AGE OF PROTECTION

With the exception of Indiana, all states prohibit the use of performers under the age of eighteen. Although Indiana's children are protected from exposure to obscene or harmful material until age eighteen, Indiana's child pornography statute only provides that performers cannot be under sixteen. Children between the ages of sixteen and eighteen who perform are not protected.

Kentucky's statute provides for enhanced penalties if a child is under sixteen.

Missouri's child pornography statutes generally protect children under eighteen; however, the age limit is seventeen if a sexual performance is involved, Mo. Rev. Stat. § 568.080, or if an individual is prosecuted for photographing or filming a child pursuant to "Abuse of Child," Mo. Rev. Stat. § 568.060(1). In addition, film and photographic print processors in Missouri only have a duty to report materials depicting children under seventeen engaged in acts of sexual conduct.

Ohio extends the age of protection to twenty-one for individuals with physical or mental handicapping conditions. Illinois also expands its statutes' coverage to institutionalized individuals who have been diagnosed as having severe or profound mental retardation.

Recommendations:

A) Make the age of protection 0 to 18 years for all prohibited child pornography activities and mandatory reporting. Note recommendation #38 of the U.S. Attorney General's Commission on Pornography (hereinafter the "Commission")(1986) which

requests that Congress enact legislation to prohibit use of performers under 21 in the production of certain sexually explicit visual depictions.

B) Consider the imposition of enhanced penalties if younger children participate in child pornography production (i.e., under 16 or 13).

C) Require producers, retailers, or distributors of sexually explicit visual depictions to maintain records containing consent forms and proof of performers' ages. (Commission Recommendation #37); consider implementing legislation similar to 18 U.S.C. § 2257.

II PROHIBITED CHILD PORNOGRAPHY ACTIVITIES

All statutes prohibit the creation or production of child pornography. The terms "creation" or "production" may not be utilized in all instances; statutes do specify activities which can be construed to mean "creation" or "production," such as filming, videotaping, photographing, depicting or portraying by means of similar medium.

Regarding the employment or solicitation of minors to perform in pornography production, seven of the eight states outlaw such activity. Indiana law does not specifically address employment or solicitation. Iowa, Ohio, and Wisconsin statutes broadly delineate other activities related to solicitation, including using, encouraging, persuading, inducing, enticing, and coercing. Missouri and Kentucky statutes include inducing as an element of the crime. In addition to Iowa and Wisconsin, Ohio expressly prohibits compelling a child to participate in child pornography production. A Minnesota provision prohibits using a minor to assist another in a sexual performance and Kentucky law forbids the employment of a minor to assist another in distributing child pornography.

All state statutes prohibit some type of child pornography dissemination. Iowa has one of the more detailed definitions of promoting which encompasses "procuring, manufacturing, issuing, selling, giving, providing, lending, mailing, delivering, transferring, transmuting, transmitting, publishing, distributing, circulating, disseminating, presenting, exhibiting, advertising, offering, or agreeing to any of the aforementioned acts." Iowa Code § 728.12(2). Likewise, other states forbid advertising. Indiana does not ban advertising outright, but does prohibit "offering to disseminate."

The majority of statutes clarify that dissemination means to transfer possession with or without consideration. Provisions in Ohio and Wisconsin do not specify a profit requirement, but also do not state distribution for free. (Commentary to Wisconsin's provisions refers to *State v. Bruckner,* 447 N.W.2d 376 (Wis. Ct. App. 1989) for the proposition that the term "import" means "bringing in from external source and does not require commercial element or exempt personal use.") Minnesota has two statutory provisions prohibiting dissemination of child pornography. The provision making

dissemination a felony states "dissemination" is "for profit," Minn. Stat. § 617.246(4); the provision making it a misdemeanor is silent as to consideration, but the implication is that dissemination can be without consideration. Minn. Stat. § 217.247(3). One should note that Minnesota's law dealing with the exposure of minors to sexually explicit materials and exhibits provides that dissemination is "without monetary consideration." Minn. Stat. § 617.291(2).

Illinois and Kentucky appear to be the only states to create a rebuttable presumption that an individual intends to distribute child pornography if he or she possesses more than one item of it. Wisconsin and Missouri prohibit possession with the intent to furnish child pornography to others, but do not specify the number of items necessary to prove intent. In contrast, Ohio's provision states that an individual must possess five or more items to create a presumption that an individual intends to promote or pander obscenity. It is important to be aware, however, that Ohio law related to pandering obscenity or possessing nudity-oriented materials or performances involving minors is silent on the issue.

Mere possession of child pornography for in-home use is forbidden in all eight states. Kentucky's statute may have a limited purpose in that it proscribes possession of "matter which visually depicts an actual sexual performance by minor," Ky. Rev. Stat. Ann. § 531.335(1), rather than all potential pornographic matter of a simulated, animated, or computerized nature. Similarly, though Indiana's definition of child pornography in relation to possession appears to be restrictive, the material is defined as depicting "sexual conduct by a child who is, or appears to be, less than sixteen years of age and that lacks serious literary, artistic, political or scientific value...." Ind. Code § 35-42-4-4(c).

Ohio makes criminal the possession or viewing of "any material or performance that shows a minor who is not the person's child or ward in a state of nudity." Ohio Rev. Code Ann. § 2907.323(A)(3). The United States Supreme Court upheld the constitutionality of Ohio's statute in *Ohio v. Osborne*, 495 U.S. 103 (1990) balancing the State's vital interest in protecting children from the harmful effects of child pornography production against the infringement of individuals' constitutional rights under the First and Fourth Amendments. Ohio also makes it unlawful for an individual to possess "obscene material that has a minor as one of its participants," Ohio Rev. Code Ann. § 2907.321(A)(5), and "any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality," Ohio Rev. Code Ann. § 2907.322(A)(5).

Ohio is the only state to address the transportation of child pornography across state or county lines. In Ohio, it is unlawful to bring or to cause to be brought into the state child pornography or to transport a child into or across Ohio with the intent that the child engage in pornography production. Ohio Rev. Code Ann. §§ 2907.321(A)(6), 2907.322(A)(6).

Recommendations:

A) Ensure all child pornography production activities are prohibited by including terms "creation" and "production" in delineation of illegal activities.

B) Specify that employment or solicitation of minors for production of child pornography is illegal; statutes should include the language "using, encouraging, persuading, inducing, enticing, or coercing" to clarify the proscribed conduct; consideration should be given to expanding illegal conduct to having minor assist another in production or distribution of child pornography.

C) Make the act of child selling or child purchasing for the production of sexually explicit visual depictions a felony (Commission Recommendation #43 and #49).

D) Adopt Iowa's detailed definition of promotion to guarantee the coverage of all potential illegal conduct; make it a felony to advertise, sell, purchase, barter, exchange, give, or receive information as to where sexually explicit materials depicting children can be found (Commission Recommendation #47).

E) Clarify that dissemination of child pornography is with or without consideration (commercial distribution not necessary).

F) Incorporate into statute a rebuttable presumption that an individual intends to distribute child pornography, if he or she has possession of more than one item of child pornography.

G) Enact statutes prohibiting possession of child pornography, even if one does not have intent to distribute.

H) Adopt Ohio's provisions making it unlawful to transport a minor across state or county lines for purposes of child pornography production or to bring or cause to be brought into a state child pornography materials.

III CHILD PORNOGRAPHY DEFINED

Obscenity:

In accordance with *New York v. Ferber,* 458 U.S. 747 (1982), there is no constitutional requirement that child pornography be determined to be "obscene" before a defendant can be convicted for violating child pornography laws. Delivering the Court's opinion, Justice White stated that "whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." 458 U.S. at 761.

The state statutes examined do not generally condition a conviction on proof of obscenity. However, statutes in Indiana, Kentucky, and Ohio lack clarity and could be interpreted to require a finding of obscenity for certain performances or portrayals prior to conviction.

Indiana's child exploitation statute, Ind. Code § 35-42-4-4, does not state that the sexual conduct depicted be obscene. Yet, this statute does appear to conflict with two Indiana statutes related to the sale or distribution of obscene matter, Ind. Code § 35-49-3-1, and obscene performances, Ind. Code § 35-49-3-2, which are applicable to the use of performers under the age of sixteen in pornography production.

Likewise, in Kentucky, the law prohibits the production or promotion of any performance which includes sexual conduct by a minor. "Sexual conduct of a minor" is defined to include "exposure in obscene manner (predominate appeal of matter taken as whole is to a prurient interest in sexual conduct) of the unclothed or apparently unclothed human male or female genitals, pubic area or buttocks, or female breast, whether or not subsequently obscured by mark placed thereon...." Ky. Penal Code § 531.300(d). See *Bach v. Commonwealth*, 703 S.W.2d 489 (Ky. 1986) (held that photographs and videotape of thirteen year old, produced in mother's presence, were not obscene as girl did not appear nude and materials produced were not "hard core" pornography or reflective of patently offensive conduct).

Ohio's statutes delineate three categories of child pornography: obscenity involving a minor; sexually oriented matter involving a minor; and nudity-oriented material. Unlike the statutes cited above, Ohio's categorization of child pornography would appear to ensure that the production, promotion, and possession of non-obscene child pornography is criminal. (Penalties are enhanced for possession and the commission of subsequent offenses if child pornography is obscene.)

Sexual Conduct:

All states attempt to delineate sexual activities which would constitute child pornography if portrayed. (See Child Pornography Overview (Section V) of "Criminal Sexual Abuse & Exploitation Laws in Eight Mid-Western States" (hereinafter "The Guide") for definitions.) An important consideration as to whether a law can withstand constitutional challenge based on due process and First Amendment claims is whether the proscribed conduct is defined with specificity and not vague or overbroad. Issues which have arisen during the course of litigation include the following: whether the state can proscribe nudity without qualifying that a child's nude portrayal is lewd, lascivious, or designed to arouse sexual interest; and whether the portrayal of a child in a clothed state with his or her genital area highlighted or posed in a sexually provocative fashion constitutes child pornography.

The recent case of *United States v. Knox,* 977 F.2d 815 (3d Cir. 1992), *cert. granted,* 113 S.Ct. 2926 (1993) exemplifies the latter issue. In *Knox,* the United States Court of Appeals for the Third Circuit reviewed the issue of whether or not a defendant had violated federal child pornography laws, 18 U.S.C. § 2252(a)(2),(4) (Supp. 1990); 18 U.S.C. § 2256 (2)(E) (1988), by possessing and receiving videotapes which depicted children exhibiting clothed genitals or pubic areas. In affirming the defendant's conviction, the court held: "Although our interpretation of an exhibition is expansive, the limiting principle in the statute is the requirement of lasciviousness. A visual depiction of a child, whether the child is clothed or naked must be lascivious to be proscribed." 977 F.2d at 823. (In November 1993, the United States Supreme Court remanded the case to the United States Court of Appeals for the Third Circuit for further review of the conviction. With the support of President Clinton, the United States Justice Department has proposed legislation to amend the challenged law to ensure that federal child pornography laws have broad applicability.)

The state laws examined vary on whether nudity is a prerequisite to violation of child pornography laws. For example, Illinois defines sexual conduct as including the "lewd exhibition of the unclothed genitals, pubic area, buttocks, or fully or partially developed breast of a female child or other person." Ill Comp. Stat. ch. 720, § 5/11-20.1(a)(i)-(vii). Indiana's provision refers to the "exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person...." Ind. Code § 35-42-4-4(a). Iowa Code § 728.1(5),(8) is similar to Indiana's provision. Moreover, its mandatory reporting statute for commercial film processors does include in its definition of prohibited sexual act the requirement of nudity. Iowa Code § 728.14(1).

The remaining statutory provisions either clarify that genital areas can be clothed or do not specifically address the issue implying that certain exhibitions could be violative of child pornography laws even if a child were clothed. As stated earlier, although Kentucky's law appears to require a finding of obscenity, it does incorporate into its definition the phrases "apparently unclothed" and "whether or not subsequently obscured by mark placed thereon." Ky. Rev. Stat. Ann. § 531.300(d). In referring to sadomasochistic abuse, Minnesota's law provides that the individual portrayed can be "clad in undergarments or in a revealing costume." Its sexual contact definition also alludes to the "lewd exhibition of genitals" (silent as to nudity) and "physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of male or female humans, or breasts of female.... Minn. Stat. § 617.246(e). *See, State v. Fan,* 445 N.W.2d 243 (Minn.App. 1989)(citing *Mankato v. Fetchenhier,* 363 N.W.2d 76 (Minn.Ct.App. 1985); *People v. Walcher,* 55 N.E.2d 319 (Ill.App. 1987)(child pornography laws surviving constitutional overbreadth challenges).

Ohio, Missouri, and Wisconsin provisions are somewhat comparable. In Ohio, distinct crimes are created to prohibit depictions involving nude minors, as well as other types of sexually oriented matter. Ohio Rev. Code §§ 2907.321, 2907.322, 2907.323. Missouri includes in its sexual conduct definition "physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in a act of apparent

stimulation or gratification." Mo. Rev. Stat. § 556.061(29). Also applicable is Missouri's sexual act definition which proscribes "nudity, if such nudity is to be depicted for purposes of sexual stimulation or gratification of the individual who may view such depiction." Mo. Rev. Stat. § 568.060(2). Wisconsin's statutes refers to the "lewd exhibition of genitals or the pubic area," Wis. Stat. § 948.01(4),(7), and makes no reference to nudity.

Medium of communication:

In order to ensure that all child pornography activities are illegal, statutes must address all potential media utilized to portray and communicate child pornography. For the most part, the state statutes examined are quite comprehensive. They delineate specific methods by which child pornography can be communicated, usually incorporating a "catch-all" phrase, such as "other visual portrayal."

All states, except Iowa and Wisconsin, provide that both the medium documenting the sexual activity and live performances are covered by child pornography laws. Two of seven states, Illinois and Missouri, specifically forbid the production of live performances involving minors. Kentucky, Minnesota, and Ohio's statutes imply the prohibition of such performances as they ban a minor's engagement in any sexual performance. In Wisconsin, although its statute addresses the medium recording sexual conduct, it does not appear to specifically prohibit live performances. In Iowa, despite a detailed definition of "material," child pornography is limited to a "visual reproduction of a live event."

Furthermore, states, such as Illinois and Wisconsin, make it clear that almost all acts of sexual conduct portrayed can be actual or simulated. Indiana and Ohio are the only states in which sexual conduct is not clarified as being actual or simulated.

Even though many state statutes defining pornography medium could be interpreted to include the use of computer technology, incorporation of language specifically addressing the issue would eliminate legal challenges in prosecutions of individuals utilizing computers in child pornography activities. Law enforcement officials and others are witnessing an increasing number of cases involving the utilization of computers to produce and promote child pornography, including the transmission of visual images, and to further other types of child sexual exploitation. See Chock, P. "The Use of Computers in the Sexual Exploitation of Children and Child Pornography." *Computer Law Journal* 7:3, 383-407 (1987, Summer). Federal law addressing child pornography specifically prohibits its dissemination "by any means, including computer." 18 U.S.C. §§2251, 2252 (West Supp. 1993)

Recommendations:

A) Delete language establishing an obscenity standard in statutes related to child pornography.

B) Define all depicted sexual conduct involving children to include actual and simulated acts, and with specificity.

C) Ensure that child pornography prohibitions include the "lascivious exhibition of the genital, breast, or buttock area" with such exhibition to include genital, breast, and buttock areas which are clothed.

D) Include in sections addressing production of child pornography, a provision prohibiting production of live performances of a pornographic nature involving minors.

E) Adopt Nebraska Criminal Code § 28-1463.03 which prohibits the depiction of sexual explicit conduct with a child as a "portrayed observer."

F) Do not limit definitions of pornographic materials to visual reproductions of live events; describe medium as being "pictured, computer-generated, animated, or live."

G) Include a general catch-all phrase, such as "other similar visual reproduction or portrayal" to guarantee that all modes of communication are covered.

H) Ensure that potential pornography medium include "undeveloped film" (Commission Recommendation #41).

I) Incorporate provisions that make criminal the utilization of computer technology in the production and promotion of sexual conduct involving children (Commission Recommendation #39).

IV PARENTAL AND GUARDIAN COMPLICITY

Illinois, Missouri, and Wisconsin statutes expressly prohibit parents or legal guardians from permitting or inducing their children to engage in activities related to child pornography production and promotion. In addition, Wisconsin law is more expansive and lists others, including foster parents, persons responsible for children in residential settings, and persons employed by individuals legally responsible for children who exercise temporary control or care for children.

Iowa, Kentucky, Minnesota, and Ohio statutes more generally state that individuals must not permit, induce, or engage minors to participate in the above-stated conduct. Indiana law does not incorporate this language.

Ohio statutes also prohibit a parent, guardian, or custodian from consenting to his or her minor child being photographed or participating in any performance in a state of nudity, unless the material or performance has a bona fide artistic, medical, scientific,

educational, religious, governmental, judicial or other proper purpose.

Recommendation:

A) In addition to all other individuals, amend statutes to specifically prohibit parents, legal guardians, and others responsible for a child's welfare from permitting, engaging, or inducing child to participate in the production and promotion of child pornography.

V DEFENSES AND EVIDENTIARY CONSIDERATIONS IN CHILD PORNOGRAPHY PROSECUTIONS (Discussion does not include case law analysis)

Minnesota and Ohio appear to be the only states in which the mistake of age defense is not permitted by statute. In addition, Minnesota law prohibits the consent defense. Ohio statutes allow the trier of fact to infer that a person in pornographic material or performance is a minor, if the material or performance, through title, text, visual representation, or otherwise, represents or depicts the person as a minor.

Illinois, Missouri and Wisconsin statutes do permit a defendant to raise the defense that he or she reasonably believed that a child involved in child pornography activities was 18 or older, as long as he or she made an affirmative effort to ascertain the child's age. Kentucky law creates a presumption as to minority based on a minor's appearance, but allows a defendant to prove by competent evidence that he or she in good faith reasonably believed that the person involved in the performance was not a minor.

Indiana and Iowa do not have statutory provisions addressing mistake of age or consent defenses.

Illinois, Iowa and Minnesota expressly exempt law enforcement and other professionals from prohibitions related to the possession of child pornography, as long as possession occurs within the scope of their employment.

Recommendations:

A) Enact statutory provisions which expressly prohibit the use of mistake of age and consent defenses in prosecutions for violations of child pornography laws.

B) Eliminate requirement that the prosecutor identify or produce testimony from the child who is depicted if proof of age can otherwise be established (Commission Recommendation #51); adopt Ohio provision that the trier of fact can infer that person in material or performance is minor if material or performance, through title, text, visual representation, or otherwise, represents or depicts person as minor; permit expert testimony as to age.

C) Require producers of pornography to maintain documentation as to age of performers used in pornographic materials or performances.

D) Ensure that law enforcement and appropriate professionals are exempted from prohibitions related to the possession of child pornography, as long as possession occurs within the scope of their employment.

VI FORFEITURE OF PROCEEDS EARNED IN CHILD PORNOGRAPHY ACTIVITIES

Illinois is the only state which has enacted legislation addressing the forfeiture of proceeds earned or property maintained as a result of child pornography and juvenile prostitution activities. Its law provides that after sentencing and upon the petition of the Attorney General or State's Attorney, the court must hold a hearing to assess whether any property or property interest is subject to forfeiture. The petitioner must prove by the preponderance of the evidence that the property or property interest at issue is subject to forfeiture to the State. Pursuant to Illinois law, should the court order a forfeiture of proceeds or property to the State, the proceeds are divided equally between units of local government who conducted the investigation resulting in the forfeiture and the Violent Crime Victims Assistance Fund. Ill. Comp. Stat. ch. 720, § 5/11-20.1.

For examples of forfeiture statutes, one should examine laws enacted in Alabama, Georgia, Nevada, Oregon, and Virginia, as well as federal child pornography civil and criminal forfeiture statutes, 18 U.S.C.A. §§ 2253, 2254, set forth in Appendix V of "The Guide." *See also, Austin v. U.S.*, ____U.S.____, 113 S.Ct. 2801 (1993)(Eight Amendment's prohibition against "excessive fines" applicable to forfeiture proceedings); *U.S. v. Good*, ___U.S.___, No. 92-1180 (December 13, 1993)(government seizure of convicted drug dealer's real estate without notice or opportunity to be heard violative of Fifth Amendment).

Recommendations:

A) Enact statutes, similar to the Illinois statute, which allow for the criminal and civil forfeiture of proceeds earned as a result of child pornography production and promotion or any property used or intended for use in such production or promotion (law should also encompass juvenile prostitution activities).

B) State in statute that all forfeiture proceeds will be utilized to treat and provide for the special needs of children who are victims of sexual abuse or exploitation.

C) Create a civil remedy for victims who are minors, similar to 18 U.S.C. § 2255, which allows a minor to recover actual damages sustained, with sustained damages of no less than $50,000 in value, and the costs of litigating a lawsuit, including reasonable attorney's fees.

VII MANDATORY REPORTING FOR COMMERCIAL FILM PROCESSORS

In Illinois, Iowa, and Missouri, commercial film processors must immediately report to their local law enforcement authorities their suspicions that a child has participated in the production of child pornography. The Iowa statute also provides that a processor is not required to review all matter delivered to the processor within his or her professional capacity. In Missouri, the commercial film processor only has a duty to report materials depicting children under 17, as opposed to 18.

Recommendation:

A) Require commercial film processors to report immediately to their local law enforcement authorities their suspicions that a child is or has participated in the production of child pornography.

VIII MANDATORY REPORTING UNDER CHILD ABUSE LAWS OF SUSPECTED CHILD PORNOGRAPHY ACTIVITIES

[See Criminal Sex Offense Overview of "An Interstate Approach: Criminal Child Sexual Abuse & Exploitation Laws In Eight Mid-Western States" (hereinafter "An Interstate Approach"); for analysis and recommendations, refer to "Law Reform: Criminal Sex Offenses" below]

IX PENALTIES FOR VIOLATION OF CHILD PORNOGRAPHY STATUTES

All state statutes make it a felony offense for individuals to engage in the production and promotion of child pornography. However, penalties vary for possession of pornographic materials for in-home use depicting children. In Illinois, Minnesota, Ohio, and Wisconsin, an individual is guilty of a felony for possessing child pornography. In Indiana Kentucky, and Missouri, an individual convicted of possession is guilty of a misdemeanor for a first offense, but for a second offense is guilty of a felony. Ohio law provides for enhanced penalties for subsequent offenses. The Minnesota statute specifies that the offense constitutes a misdemeanor with subsequent offenses warranting a court-ordered mental examination as to the necessity for treatment.

Recommendations:

A) Make all child pornography activities, including possession, felony offenses.

B) Adopt Minnesota's provision with some modification to require a court-ordered mental examination as to the necessity for treatment at the time of the first offense

and ensure that the court has authority to order such treatment.

X MISCELLANEOUS:

Recommendations:

A) Enact statute, similar to Ky. Rev. Stat. Ann. § 531.350(1) or Ohio Rev. Code Ann. § 2907.34, which prohibits the following: as a condition to sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication, or other merchandize, person requires purchaser or consignee to receive matter portraying sexual performance by a minor, or denies, or threatens to deny a franchise, or revokes or threatens to revoke, or imposes a penalty, financial or otherwise, by reason of the return of such matter.

B) Definitions of relevant terms should be stated at onset of chapter on subject or incorporated into statute; all significant terms should be defined (i.e. "child" in Iowa sex offenses); statutory provisions should not be cross-referenced, if at all possible, as cross-referencing makes it difficult for reader to quickly determine prohibited conduct.

C) Statutes should be gender-neutral or ensure applicability to both sexes; reading of majority of statutes implies males are sole perpetrators.

LAW REFORM: JUVENILE PROSTITUTION

I COMPREHENSIVE STATUTES ADDRESSING JUVENILE PROSTITUTION

All states have comprehensive laws designed to combat prostitution. However, whether or not they adequately deal with the problem of prostitution involving minors is debatable. Of the eight state laws examined, Illinois, Minnesota, Ohio and Wisconsin appear to have the only statutes which specifically deter the use of minors in almost all prostitution activities. (Illinois and Minnesota vary the age of protection depending on the prostitution activities; issue will be discussed below.)

Illinois statutes expressly prohibit soliciting for juvenile prostitutes, keeping a place of juvenile prostitution, patronizing juvenile prostitutes, juvenile pimping, and exploiting juvenile prostitutes. *See Illinois v. Anderson*, 493 N.E.2d 410 (Ill.App.Ct. 1986)(affirmed dismissal of solicitation for juvenile prostitution charge as statute applies to persons who direct prospective patrons, but not prostitutes to place for prostitution); *Cf. Illinois v. Blair*, 114 Ill. App. 3d 655, 449 N.E.2d 172 (1983)(held that statute prohibited both soliciting a prostitute and soliciting another on behalf of a prostitute). (Statutory cites from Davis, *Program to Increase Understanding of Child Sexual Exploitation: Legal Analysis* (ABA Center on Children and the Law: To be published))

Minnesota and Ohio's provisions address solicitation, inducement, and promotion of juvenile prostitutes. Although tersely stated, Wisconsin's law forbids soliciting and patronizing child prostitutes, as well as establishing any child in a place of prostitution.

In Indiana, Iowa, Kentucky, and Missouri, laws address juvenile prostitution in a more limited manner. Their laws do not make criminal patronizing or soliciting juvenile prostitutes. Indiana's statute does provide for an enhanced penalty for promoting prostitution if a prostitute is under 18 years of age. ("Child Solicitation," Ind. Code § 35-42-4-6 does not specifically deal with juvenile prostitution, but is a criminal sex offense making illegal the solicitation of a child under 12.) Kentucky and Iowa's statutes specify enhanced penalties if minors are involved in the pandering or promotion of prostitution. Missouri law prohibits promoting the prostitution of an individual under sixteen.

With the exception of Minnesota (Minn. Stat. §§ 609.322(1a) & (2)), the state laws examined do not specifically address parental or guardian complicity in a minor's involvement in prostitution activities. For statutory models addressing the issue, one should refer to statutes in Louisiana, Maine, Maryland, Nevada, New Mexico, and Wyoming which provide for enhanced penalties for parents, guardians, or custodians who authorize, permit, or promote a child's involvement in prostitution. Davis, *supra*.

Recommendations:

A) Enact statutes specifically addressing each type of prostitution-related activity and make that conduct illegal as it relates to children under 18 years of age; ensure that provisions deal with individuals who patronize and solicit juvenile prostitutes, promote juvenile prostitution, encourage, entice or compel individuals to become prostitutes, confine minors for such purposes, and keep or support places of juvenile prostitution.

B) Include statutory provision which forbids parent, guardians, or others responsible for child's welfare from permitting, inducing, or promoting a child's involvement in prostitution; enhance penalty for violation.

C) Adopt Ohio's law which prohibits the transporting of another, or causing another to be transported across the boundaries of the state or any county in the state, for the purpose of facilitating such other person engaging in prostitution.

II AGE OF PROTECTION/JUVENILE PROSTITUTE AS CRIMINAL

The statutes are not uniform in terms of the age of protecting children against juvenile prostitution. Regarding those statutes which expressly address juvenile prostitution, Iowa, Kentucky, Minnesota, Ohio, and Wisconsin have the only statutes that make the age of protection zero through eighteen. For certain prostitution activities, Ohio's "Endangering Children" statute, Ohio Rev. Code Ann. § 2919.22, extends the age of protection to twenty-one if the individual has a physical or mental handicapping condition. Illinois' provisions related to juvenile pimping and child exploitation also apply to institutionalized severely or profoundly mentally retarded individuals without age limitations.

Despite Illinois' comprehensive statutory framework discussed above, the age of protection varies depending on the conduct at issue. The age of protection extends to children under seventeen if patronizing is involved, but is only under sixteen if solicitation, keeping a place of prostitution, pimping, and child exploitation is the focus. Similarly, Indiana protects children under twelve from solicitation, but not children between the ages of twelve and eighteen (as noted above, the solicitation provision is not specific to juvenile prostitution); however, children under eighteen are covered under promotion provisions. Missouri's age of protection is under sixteen for promoting prostitution.

In Kentucky and Minnesota, offenders are subject to enhanced penalties if children younger than eighteen are involved in prostitution activities.

Because of the lack of uniformity among states regarding the age of protection, children in some states are viewed as victims and in others, as delinquents or adult offenders if they are involved in juvenile prostitution. In *Child Pornography and Prostitution:*

Background and Legal Analysis (Arlington, VA: NCMEC 1987), Gregory Loken advocates for the decriminalization of the act of prostitution by the minor. He believes that children engaged in prostitution activities are victims and as such, should not be treated punitively. He asserts:

> Contact with police would not be so negative an event for young prostitutes if it led them to special, long-term projects to help them--and if it did not create for them an indelible, deeply injurious criminal record. Treatment of prostitution as a "status offense" rather than a crime--even for young people beyond the normal age of juvenile court-would seem a useful area for legislative experimentation.

Id. at 76. In addition to supporting decriminalization, he supports raising the age of protection to above eighteen believing that individuals in the eighteen through twenty-one years of age population are still vulnerable to exploitation. *Id. at* 74-5.

Recommendations:

A) Make the ages of protection 18 and under for all types of prostitution-related activities; consider enhanced penalties if conduct involves younger children, but ensure that penalties for offender involvement with older children are severe or constitute felonies.

B) Enact legislation decriminalizing the act of prostitution by individuals under 18 or 21; treat juvenile prostitutes as children who have been abused or as status offenders; appropriate funding for services to assist them in escaping poverty and the prostitute's lifestyle, or in reuniting them with their families.

III PROSTITUTION DEFINED: CONSIDERATION FOR ACT

As many child prostitutes are concerned with obtaining food, shelter, and other basic necessities, the definition of prostitution should be amended to include the exchange of sexual services for items other than money. Missouri and Wisconsin both have statutes which state that prostitution means the exchange of sexual favors for "something of value" or "any thing of value." Missouri goes on to interpret "something of value" as meaning "any money or property, or any token, object or article exchangeable for money or property."

Other state provisions are less clear as to consideration. Iowa's provision refers to "selling or offering for sale the person's services as partner in a sex act." Kentucky's statute states consideration is "a fee." Minnesota and Ohio's law alludes to engaging someone "for hire." Indiana speaks of consideration as "money or other property." No terms are defined.

Illinois law appears to create an unnecessary distinction in that the consideration for sexual penetration is "money" and for the touching or fondling of sex organs, it is "money or anything of value." Consideration also varies depending on the conduct being prohibited. For example, the Illinois pandering statute forbids an individual from compelling a person to become a prostitute "for money." Whereas, the state's pimping, juvenile pimping, and exploitation of a child statutes define consideration as being "money or other property."

Recommendations:

A) Modify statutory references to consideration to clarify that consideration means any money, property, token, object, article, or any thing of value.

B) Ensure that same definition of consideration is made applicable to all prostitution-related conduct.

V PROSTITUTION DEFINED: SEXUAL CONDUCT

Although the prohibited conduct related to the act of prostitution itself is similar in each state, the level of specificity related to definitions of sexual conduct is not consistent. Indiana and Wisconsin do not have statutory definitions of sexual conduct. In contrast, Illinois, Minnesota, Missouri and Ohio statutes have comprehensive descriptions; they reflect that sexual penetration can be "however slight," and possible without semen emission. Iowa has a relatively thorough definition of sex activity, but does not include the above-stated language regarding penetration or semen emission. Kentucky law defines sexual conduct in a more limited manner as being "sexual intercourse or any act of sexual gratification involving sex organs." (See "An Interstate Approach", Juvenile Prostitution Overview for definitions of sexual conduct.)

Recommendations:

A) Ensure that sexual conduct is defined in all statutes related to prostitution.

B) Define sexual conduct with specificity and include statements that sexual penetration can be "however slight" and possible without semen emission.

VI DEFENSES AND EVIDENTIARY CONSIDERATIONS IN PROSECUTIONS FOR VIOLATIONS OF JUVENILE PROSTITUTION STATUTES (Discussion does not include case law analysis)

There are relatively few statutory provisions related to defenses and evidentiary considerations in prosecutions for violations of juvenile prostitution statutes. If defenses or

evidentiary considerations are delineated, they are applicable primarily to prosecutions under prostitution law involving adult conduct.

Minnesota and Ohio appear to have the only statutory provisions which expressly state that the mistake of age defense is not a defense in prosecutions for violations of its juvenile prostitution laws.

Illinois law provides that an individual charged with soliciting a juvenile prostitute, keeping a place of prostitution, or patronizing a juvenile prostitute may raise the defense of mistake of age. However, the defense is not permitted in prosecutions for indecent solicitation involving children under 13.

The statutes reviewed do not include the requirement that victim be of "previous chaste character." Minnesota prohibits the use of the defense that the individual had previously practiced prostitution.

Minnesota also forbids the defense of consent.

Recommendations:

A) Abolish the defense of "mistake of age" by enacting legislation which expressly prohibits its use in prosecutions for violations of juvenile prostitution laws.

B) Ensure that statutes do not require that child be of "previous chaste character" for offense to occur.

C) Adopt Minnesota's provision, Minn. Stat. 609.325(2), which prohibits the defense of consent.

D) Adopt Minnesota's provision, Minn. Stat. 609.325(3), which states that it is not a defense that the victim had engaged in prostitution prior to the act in question.

VII PENALTIES FOR VIOLATION OF JUVENILE PROSTITUTION STATUTES

As discussed earlier, Illinois, Minnesota, Ohio and Wisconsin have the most comprehensive statutes combatting juvenile prostitution. A defendant found to be guilty of any of these provisions will have committed a felony and be subject to hefty prison terms and fines. In the remaining states, prostitution statutes provide for enhanced penalties if juveniles are involved, but usually only for promotion activities. Prohibited conduct such as patronizing or soliciting prostitutes are generally misdemeanor offenses.

A) Enact statutes, similar to the Illinois statute, which allow for the criminal and civil forfeiture of proceeds earned as a result of prostitution activities and property

utilized in the promotion and actual performance of such activities.

B) State in forfeiture statute that proceeds will be utilized to provide support services, including shelter, mental health and medical care, educational programs, and job training, to juvenile prostitutes and runaways to assist them in escaping poverty and if they so desire, to be reunited with their families.

C) Make the patronizing or soliciting of juvenile prostitutes (under 18) a felony with significant prison time and fines; enhance felony penalties for promoting or operating a place of juvenile prostitution; enhance felony penalties for subsequent offenses.

D) Adopt Missouri's law which deems prostitution houses to be public nuisances subject to suits in equity to enjoin their operation.

VIII MISCELLANEOUS:

Recommendations:

A) Adopt Minnesota's provision, Minn. Stat. § 609.324(5), which allows the court to determine whether or not individual's car was utilized during commission of prostitution offense, and if so, to forward its findings to motor vehicle bureau so that findings can be recorded on offender's driving record.

B) Incorporate provisions making criminal the utilization of computer technology in the promotion of juvenile prostitution.

C) Adopt Minnesota's statute, Minn. Stat. § 609.3232, which allows a parent or guardian to seek a juvenile court order enjoining an individual from engaging his or her child in prostitution activities (for statute summary, refer to "An Interstate Approach," Section X of Prostitution Overview).

D) Review legislation being considered in Germany, France, and Scandinavia making it illegal for individuals in those nations to patronize foreign child prostitutes while abroad; examine law enforcement practices in Australia targeting travel agencies which cater to pedophiles (Time, No. 25, 6/21/93, p. 45); consider a mandatory reporting requirement for travel agency personnel who suspect that they are being asked to facilitate international or interstate travel involving the sexual exploitation or abuse of minors; evaluate constitutional concerns or infringement on civil liberties.

LAW REFORM: CRIMINAL SEX OFFENSES AFFECTING CHILDREN

The following is a general discussion of the criminal sex offense statutes as they relate to children. There are innumerable differences between the statutes, especially as to the age of protection, not addressed in this section. The reader should refer to "An Interstate Approach," Appendix III for greater specificity. In addition, this section only focuses on sex offenses that expressly govern children. The tables in Appendix III delineate criminal sex offenses, silent as to the ages of victim and offender, which are applicable to prosecutions for sexual assault of both children and adults.

I PROHIBITED SEXUAL CONDUCT: AGE OF PROTECTION

There is a lack of uniformity as to the age at which children are protected under state statutory rape and sexual assault laws where the issue of a child's consent is immaterial to the prosecution of the sex offense. The inconsistency is primarily due to efforts by legislators to address consensual sex between teenagers and assumptions, possibly culturally based, about the age at which children can be expected to engage in sexual activities. For the most part, the age of protection is dependent on the type of sexual activity perpetrated, the age of the perpetrator, or whether the perpetrator is a family member or holds a position of trust or authority in relation to the victim. Also, penalties are usually enhanced if younger children are assaulted or molested.

In contrast to other states, Wisconsin's sexual assault laws appear to have board applicability as they protect children as old as eighteen and generally do not set limits on the offender's age. (The offender's age is usually defined so as to avoid the prosecution of teenagers participating in consensual sexual activities.) In Wisconsin, "First Degree Sexual Assault with a Child" is having sexual contact or intercourse with a person under the age of thirteen; "Second Degree Sexual Assault with a Child" is having sexual contact or intercourse with a person under sixteen; and "Sexual Intercourse with a Child 16 or Older" is having sexual intercourse with a child (defined as under 18), not one's spouse, who has attained sixteen years of age. Likewise, the law protects children under eighteen from having to expose their genitals or pubic area or being exposed to an offender's genital or pubic area. In addition, Wisconsin's incest law prohibiting sexual intercourse between family members does safeguard children under eighteen years of age, as the statute does not state age limitations.

The remaining state laws generally provide that if an individual engages in sexual penetration or conduct with a child under the age of twelve, thirteen, or fourteen, the individual is guilty of a felony and subject to a term of imprisonment. The majority of statutes prohibit sexual conduct with teenagers, at least twelve or thirteen, but under sixteen or seventeen, if the perpetrator is more than three, four or five years older than the victim. The age of protection, as well as the age of the offender, varies depending on the sexual

activity outlawed. In cases in which a family member or individual in a position of trust or authority engages a child in sexual intercourse, the age of protection is usually eighteen. (For further discussion of incest laws, see Parent/Guardian Complicity, Section III below.)

Recommendations:

A) Consider the recommendation stated in Selected State Legislation that a state law should make the consent of a minor irrelevant in criminal prosecutions for sexual contacts and sexual acts with minors younger than the age of 12 and for sexual contacts and sexual acts with minors who are between the ages of 12 and 16 if the offender is at least four years older. Id. at 64.

B) Consider legislation similar to Illinois, Minnesota, and Ohio law which sets the age of protection at 13 for most sex offenses, with some variation for older children as stated above in Recommendation A.

C) Ensure that the age of the child is stated in the statutory sections dealing with the proscribed sexual conduct to enhance clarity.

II PROHIBITED SEXUAL CONDUCT: DEFINITIONS

The majority of states have detailed statutory definitions of criminal sexual conduct, sexual penetration, or deviate sexual intercourse. (Definitions are provided in Section III of the "An Interstate Approach", Criminal Sex Offense Overview, Section II.) Illinois, Kentucky, Minnesota, Missouri, and Wisconsin provisions also ensure that sexual penetration can be "however slight," and possible "without semen emission." Ohio's definition does refer to penetration as being "however slight," but does not include the phrase "without semen emission."

Although Indiana's law prohibits sexual intercourse, deviate sexual conduct, fondling and touching as they relate to children of specified ages, these terms are not statutorily defined. Also, Iowa's statutory definition of sex act or activity does not include inappropriate touching or fondling, though these activities are addressed in "Lascivious Act with Child," Iowa Code § 709.8.

Recommendations:

A) Ensure that all references to sexual conduct, including sexual penetration, are defined in all statutes relevant to criminal sexual assault.

B) Define sexual conduct with specificity and include statements that sexual penetration can be "however slight," and "possible without semen emission"; ensure that all terminology subject to varying interpretation, such as intimate parts

(Minnesota), is defined.

C) Define terms in separate statutory section to enhance clarity.

III PROHIBITED SEXUAL CONDUCT: INCEST/PARENTAL-GUARDIAN COMPLICITY.

All states have statutes outlawing certain sexual activities between family members. In Illinois, Indiana, Iowa, Kentucky, and Minnesota, there are prohibitions against family members and other custodians engaging in sexual activities with children in accordance with both "incest" laws and criminal sex offense statutes. Missouri, Ohio and Wisconsin appear to be the only three states which address the issue of criminal familial abuse in one statute. It is notable that with the exception of Iowa, and possibly Indiana (deviate sexual conduct not defined), "incest" statutes are typically limited to prohibiting certain family members from engaging in sexual intercourse and are inapplicable to other forms of sexual activities.

Even though "incest" laws are limited, only Illinois and Minnesota have criminal familial sexual abuse statutes broader in scope. In Illinois, the state's "Sexual Relations Within Families" law only pertains to sexual penetration, whereas its more general sex offense statutes govern both sexual penetration and other forms of sexual contact if the victim is under eighteen and a family member is involved. Similarly, in Minnesota, although its "incest" law does not cover all forms of sexual conduct, the state has laws expressly forbidding individuals having a "significant relationship" (defined to include family members) from engaging in sexual penetration and other types of sexual contact with victims under the ages of sixteen or eighteen.

Regarding the problem of a parent or guardian failing to prevent a child's sexual abuse or assault, Wisconsin and Illinois appear to have the only statutes addressing the issue. Wisconsin's law specifies that any person responsible for the welfare of a child under sixteen (includes parent, guardian, foster parent, public or private residential home employee, other who is responsible in a residential setting, and person employed by one legally responsible for the child's welfare who exercises temporary control or care of the child) who fails to prevent the sexual assault of a child is guilty of a felony. Though somewhat narrower in scope, Illinois' statute penalizes any parent or stepparent who knowingly allows or permits an act of criminal sexual abuse to be perpetrated against his or her child.

Recommendations:

A) Amend incest statutes to outlaw <u>all</u> types of sexual conduct perpetrated against children under 18 by family members; incorporate provisions related to incest with other state statutes addressing familial criminal sex offenses to ensure uniformity within a state's statutory scheme.

B) Modify criminal sex offense laws to penalize individuals who sexually assault children under 18 who have a "significant relationship" or are in "positions of trust, authority or supervision" in relation to child victims; define "individuals having a significant relationship as including the following: "parents, stepparents, guardians; family members related by blood, marriage, or adoption, brothers, sisters, stepbrothers, stepsisters, first cousins, aunts, uncles, nephews, nieces, grandparents, great-grandparents, great-uncles, great-aunts; and any adults who jointly reside intermittently or regularly in the same dwelling as the victim and is not victim's spouse (Minn. Stat. § 609.341(15)); define "position of authority" as including, but being limited to any person who is a parent or acting in place of a parent and charged with any of a parent's rights, duties or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of the act" (Minn. Stat. § 609.341(10).

C) Adopt Wisconsin and Illinois' laws which make criminal the failure of a parent, guardian, or other custodian to prevent the sexual assault of a child in his or her custody.

D) Provide for enhanced coordination between juvenile and criminal courts which have jurisdiction over cases involving familial abuse or exploitation to ensure case dispositions in the child's best interest.

IV STATUTORY DEFENSES AND EVIDENTIARY CONSIDERATIONS IN PROSECUTIONS FOR VIOLATIONS OF CRIMINAL SEX OFFENSES INVOLVING CHILDREN (Discussion does not include case law analysis)

Minnesota and Ohio are the only states to expressly prohibit the mistake of age defense in almost all sexual assault prosecutions involving children. In Minnesota, the exceptions to the rule are offenses involving criminal sexual conduct in the third and fourth degrees when the victim is at least 13, but under 16 and the offender is more than two years older than the victim. In these limited circumstances, the mistake of age defense is allowed, Similarly, in Ohio, statutory law provides that for the offenses of rape, gross sexual imposition, sexual imposition, felonious sexual penetration, and criminal child enticement, there is no mistake of age defense. Ohio law is silent on the mistake of age issue for its remaining sex offense statutes.

Missouri and Illinois generally permit mistake of age defenses in prosecutions for criminal sexual assault with some exceptions dependent on the seriousness of the offense and the child's age. For example, Missouri does not allow the mistake of age defense in cases of rape, sodomy, and second degree sexual abuse, but does permit its use for first degree sexual assault, first degree deviate sexual assault, and sexual misconduct. For other sex offenses involving children, Missouri's statutes on second degree sexual assault, second

degree deviate sexual conduct, and first degree sexual abuse, are silent as to the defense. Likewise, Illinois law does not address the defense for all statutory provisions related to child sexual assault, such as criminal sexual assault and aggravated sexual assault. In Illinois, the mistake of age defense is specifically permitted for criminal sexual abuse and aggravated criminal sexual abuse offenses.

Kentucky and Indiana appear to be the only two states to permit mistake of age defenses in almost all criminal child sex offense prosecutions. Wisconsin and Iowa do not address mistake of age in its statutes.

In regard to the defense of consent, the majority of states do not deal with the issue by statute. Minnesota and Kentucky prohibit the defense of consent in most prosecutions for criminal sex offenses involving children. To a more limited degree, Iowa law forbids the defense in prosecutions for "Lascivious Acts With A Child or Minor" and "Indecent Contact With A Child." Illinois allows the defense in cases in which force or threat of force is an element of the sex offense crime.

In the majority of states, the admissibility of evidence on a victim's previous sexual behavior or reputation is most likely governed by case law or evidentiary rule, as opposed to statute. Kentucky, Ohio, and Wisconsin statutes do provide limitations for the admissibility of such evidence in their statutes for specified sex crimes. However, these statutory provisions do not specifically address limitations as they relate to child victims.

For an outline of other defenses and evidentiary considerations, one should refer to "An Interstate Approach," Sex Offense Overview, Section VI.

Recommendations:

A) Adopt Minnesota's legislation and prohibit the mistake of age defense in prosecutions of criminal sex offenses involving minors.

B) Consent defenses should be specifically prohibited in prosecutions for violations of criminal sex offenses involving minors under the age of 12 or minors between the ages of 12 or and 16 if the offender is more than four years older (Selected State Legislation, p. 64).

C) Ban the admission of any evidence of the minor's previous sexual experiences and abolish any requirements that the prosecution prove that the minor was chaste prior to the sexual activity at issue (Selected State Legislation, p. 64)

V PROHIBITED SEXUAL CONDUCT: MANDATORY REPORTING

The statutes discussed in this section are delineated in "An Interstate Approach," Overview of Child Pornography, Section X and Appendix IV.

All states require specified individuals to report to law enforcement or child protection agencies any suspicions of child abuse and neglect. State law varies, however, in regard to the scope of the abuse or neglect to be reported. The majority of statutes only require that suspected abuse and neglect perpetrated by parents, guardians, and others having custody or in positions of authority be reported to authorities. In addition, the nature of the abuse or neglect reported may not include all types of sexual abuse or exploitation, such as prostitution and child pornography activities. They do not require the reporting of abuse and neglect in which the perpetrator does not have the child's legal or authorized custody.

All states do have definitions of "abuse" and "neglect" for reporting purposes which are relatively broad. Indiana, Iowa, Kentucky, Minnesota, Ohio, and Wisconsin's description of "abuse" does enumerate offenses related to sexual assault, prostitution, and pornography. Illinois' provisions appear to be limited to "any criminal sex offense against a child under 18." Missouri's law refers to "sexual abuse."

Indiana and Wisconsin do not limit their reporting mandates to familial abuse or neglect. Although Iowa's statute defines abuse as being perpetrated by family or specified non-relatives, another provision allows any one with knowledge of an alleged offense involving sexual abuse, including use of individuals under eighteen in pornography activities, to file a child in need of assistance petition; this provision does not expressly limit the sexual abuse to perpetrators who are family or specified non-relatives.

Recommendations:

A) Broaden mandatory reporting laws to cover extra-familial abuse and neglect and all offenses involving child sexual assault, abuse, and exploitation, including illegal activities related to child pornography and juvenile prostitution.

B) Mandate that broad categories of persons be required to report suspected child maltreatment (Selected State Legislation, p. 60).

C) Ensure that definitions of neglect include knowing failure to take reasonable steps to prevent another person from committing physical abuse, sexual abuse, sexual exploitation, or other harm to a child (Selected State Legislation, p. 60).

D) Laws should require that appropriate law enforcement authorities be notified in cases of extra- and familial sexual abuse and exploitation in addition to child welfare agencies, to enable law enforcement authorities to quickly initiate their investigations of child maltreatment. (Selected State Legislation, p. 61).

VI REGISTRATION OF SEX OFFENDERS

In drafting or amending legislation dealing with the registration of sex offenders, one has to evaluate the following: the crimes for which a convicted offender must register (pleading to lesser offenses or crimes not titled sex offenses); the length of the mandated registration period; the retroactive application of the law to individuals convicted of sex offenses prior to the enactment of a sex offender registration act; and whether the act governs offenders convicted in other states. For comprehensive recommendations for legislation, one should refer to those of the National Center For Missing and Exploited Children stated below.

Although Illinois, Minnesota, Missouri, and Ohio have laws which require sex offenders to register with local law enforcement authorities upon their release from prison or placement on probation, their laws could be strengthened to ensure that a greater number of convicted sex offenders are governed by their registration laws. For instance, Illinois and Ohio law define sex offenses narrowly and does not include offenses related to child pornography or prostitution. In addition, Illinois registration law does not govern at least two of its laws specifically addressing child sexual abuse, "Sexual Relations Within Families," and "Permitting Sexual Abuse of A Child." In both Illinois and Ohio, the law does not cover out-of-state sex offense convictions and is limited to a ten year period of registration.

Minnesota also does not include conviction for prostitution or child pornography offenses under its sex offender registration law (see Chapter No. 326, H.F. No. 1585; statute appears to have been amended to exclude these crimes in the 1993 legislative session), but it does includes the reporting of other crimes, such as murder and kidnapping involving a minor victim. Like Illinois and Ohio's statutes, Minnesota's law has a ten year period of mandated registration. In addition, Minnesota does have a provision that when Minnesota accepts a prisoner under a reciprocal interstate compact agreement, the prisoner must agree to comply with Minnesota's registration laws upon his or her release if the prisoner decides to live in Minnesota (Chapter No. 326, H.F. No. 1585).

Of the four state laws examined, Missouri has the least comprehensive in that its law merely requires reporting to the Federal Interstate Identification Index System. Its law does not establish a comprehensive statutory framework for the registration and supervision of convicted sex offenders.

Judith Drazen Schretter, Esq. of the National Center For Missing and Exploited Children has researched case law in the fifty states addressing the constitutionality of sex offender registration laws. She concluded that the "consensus of the cases examined...upholding mandatory registration of sex offenders is that registration is not a form of punishment and therefore is not subject to the Eighth Amendment prohibition against cruel and unusual punishment." She adds that due process and equal protection claims have not been successful in challenging the laws as courts have determined that "neither a defendant's right to privacy nor his right to travel has been unreasonably infringed by the requirement to register."

For Illinois appellate decisions on sex offender registration, see *Illinois v. Taylor,* 561 N.E.2d 393 (Ill. App.4 Dist. 1990) (continuing jurisdiction of trial court to certify defendant as habitual child sex offender); *Illinois v. Adams,* 555 N.E.2d 761 (Ill. App.2 Dist. 1990)(registration not violative of Eight Amendment, due process, or equal protection); *Illinois v. Rogers,* 555 N.E.2d 53 (Ill. App.2 Dist. 1990)(defendant's prior conviction for having had sexual intercourse with fifteen year old when he was seventeen not governed by registration act as the law violated no longer existed and was a misdemeanor offense)(Case law provided by National Center For Missing and Exploited Children.)

Recommendations (the following is a verbatim excerpt from Selected State Legislation, p. 41):

A) Require lifetime registration.

B) Make the requirement to register pertain to adult sex offenders only, both under supervision and nonsupervised.

C) Require the offender to appear in person to register with local law enforcement.

D) Require local law enforcement to relay information to the state agency that maintains criminal history information.

E) Require offenders be notified of mandatory registration process either by courts for those offenders receiving probation or by the appropriate state agency responsible for corrections for offenders leaving custodial supervision.

F) Require registration within ten (10) days of assuming residence in a new community.

G) Require written notification of change of address within ten (10) days of move.

H) Prohibit public inspection of registry information which should be accessible only by law enforcement personnel or other persons authorized by law.

I) Require persons moving into the state who have been convicted of sexual offenses in any other state to register within ten (10) days of entering the state.

J) Require registration for offenders convicted of offenses, both felony and misdemeanor, including, but not limited to, any attempt or actual act of rape, sodomy, indecent exposure, solicitation of children to engage in sexual conduct, use of minors in sexual performance, solicitation of a minor for prostitution, incest, promoting or distributing matter portraying a minor in a sexual performance, or any attempt or act defined as a sexual offense under the laws of the state.

K) Require regular verification of offender's address within the state, at least annually.

L) Establish penalties for failure to comply with the provisions of the registry (misdemeanor for first offense, higher penalties for subsequent failures to register).

VII HIV TESTING AND SEX OFFENDERS

With the exception of Iowa, all Council member states have laws governing the testing of offenders for the human immunodeficiency virus (HIV). In Indiana, Kentucky, Minnesota, and Missouri, the defendant must be convicted of a specified sex offense prior to undergoing any mandatory HIV testing. Kentucky law also permits the court to inform an individual charged with a sex offense of the availability of the HIV test at the time of the initial hearing, but does not mandate the performance of the test before conviction.

Ohio and Wisconsin laws allow the test if the individual is charged with a sex offense. Illinois appears to have two statutes addressing the topic. One requires that the test be administered, upon the victim's request, if there is probable cause to believe a specified sex offense has occurred or if an indictment has been returned charging the accused with a violation of a sex offense. 720 ILCS § 5/12-18(e). The other which governs additional sex related offenses requires a conviction before testing. 730 ILCS § 5/5-5-3(g).

The majority of the statutes subject an offender to mandatory HIV testing for sexual assault and abuse, usually involving sexual intercourse or contact as an element of the crime. Illinois and Indiana extend testing requirements to crimes involving prostitution.

For the most part, statutes minimally address confidentiality of test results. Minnesota appears to have the strictest confidentiality provisions as "no reference to the test, the motion requesting the test, the test order, or the test results may appear in the criminal record or be maintained in any record of the court or court services." Minn. Stat. § 611A.19(b). Its law also limits access to test results to the victim, the minor victim's parent or guardian, and the commissioner of health. The test results are not available to any other person for any purpose. In addition, upon the victim receiving test results, the

data must be removed form medical data or health records maintained in accordance with Minnesota law and be destroyed. Minn. Stat. 611A.19(2). In Illinois, the two HIV testing statutes provide that "such test shall be kept strictly confidential by all medical personnel involved in the testing and must be personally delivered in a sealed envelope to the judge of the court in which the conviction was entered for the judge's inspection in camera." Upon review, the judge has the discretion to disclose the results if to do so is in the interest of the victim and public. 730 ILCS § 5/5-5-3(g), 720 ILCS § 5/12-18(e).

Ohio law also prohibits the admission of any evidence related to HIV testing of the defendant, over the objection of the defendant, in the prosecution of the charges or "a different offense arising out of the same circumstances as the offense charged." Ohio Rev. Stat. § 2907.27(B). In Wisconsin, the court has the discretion not to order the test "if the court finds substantial reason relating to the health or life of the defendant not to do so and states the reason on the record." Wis. Stat. § 968.38.

At least one state, Kentucky addresses the treatment of HIV-infected offender in that its law requires that as a condition of release from probation, community control, or incarceration, the individual must accept treatment and counseling. Ky. Rev. Stat. Ann. § 529.090(1). The provision's implication is that the State must provide an HIV-infected individual with appropriate medical care and counseling services.

Mandatory HIV testing, for whatever purpose, is controversial. Individuals opposed to mandatory HIV testing of sex offenders argue that the underlying purpose of such laws, to apprise the victim of the offender's HIV status for treatment purposes, is not satisfied given the potential unreliability of HIV test results. The issue arises as to whether the victim is obtaining accurate information as to whether the offender is actually infected with HIV. Health professionals have reported that negative HIV test results do not automatically mean that the individual is not infected with the virus. They indicate that an individual infected with HIV might not test positive for the virus for several months after being infected with it. Furthermore, even if an offender does test positive for the virus, the individual may not have been infected at the time of commission of the sex offense.

Advocates who object to mandatory HIV drug testing assert that any individual who is the victim of a sexual offense must be vigilant and undergo testing for HIV on a regular basis. Having mandatory HIV testing does not change that requirement. They also state that mandatory HIV testing is not cost-effective given the test's drawbacks. They advocate that limited government funds are better spent on educating the public on HIV transmission and encouraging voluntary HIV testing.

As stated in the disclaimer, the commentary presented are those of the author. In the development of its action plan to implement reform of their state laws, the I-SEARCH Advisory Council may issue alternative proposals. It should also be noted that the above discussion of mandatory HIV-testing is a limited one and not designed to address all legal issues or arguments related to such testing. For the American Bar Association Policy and

Report on AIDS, refer to Toledo Law Review 21:1, 9-130 (1989, Fall)(hereinafter ABA Policy on AIDS).

Recommendations (Selected Verbatim Excerpts from ABA Policy on AIDS):

A) Because existing civil and criminal remedies are available to prosecute the instances in which specific criminal sanctions might apply, HIV-specific criminal sanctions should play a limited role in combatting the HIV epidemic. Accordingly, a program of aggressive public education about the Human Immunodeficiency Virus (HIV) should be implemented as the most effective method of deterring behavior which poses a high risk of transmitting HIV (Recommendation A Concerning Criminal Sanctions).

B) Criminal justice personnel must be educated about the medical and legal issues arising from the HIV epidemic (Recommendation B(1) Concerning Criminal Procedure and Courtroom Procedure).

C) Public agencies should make available victim counseling and testing programs which assist crime victims who have reason to believe they have been exposed to the virus. These programs should be offered at no cost to victims. Where appropriate, offenders should bear or share the cost for these programs (Recommendation B(2) Concerning Criminal Procedure and Courtroom Procedure).

D) Where the Court has determined that a defendant's HIV status is relevant in a criminal case, the court must be provided with the most current, accurate and objective medical information about a defendant's condition. Unless the defendant's HIV status is at issue in the prosecution, only those with a demonstrable need or right to know should receive medical information about a defendant's HIV status. Criminal justice personnel who receive such information must safeguard its confidentiality. (Recommendation B(5) Concerning Criminal Procedure and Courtroom Procedure).

E) Appropriately funded training and educational programs regarding HIV should be instituted in all correctional facilities (Recommendation C(1) Concerning Correctional Facilities).

F) Inmates in correctional facilities should be afforded appropriate medical care for the full range of HIV infections and should be afforded appropriate counseling services (Recommendation C(2) Concerning Correctional Facilities).

G) States should provide for accessible anonymous or confidential testing and counseling sites, coupled with confidentiality and non-discrimination protections, in order to promote voluntary testing for HIV (Section E.1, HIV Testing and Counseling, ABA Policy On AIDS).

H) A voluntary HIV test should be conducted only after informed consent, specific to the HIV test, has been obtained and documented (Section E.2, HIV Testing and Counseling, ABA Policy on AIDS).

VIII PENALTIES FOR VIOLATION OF CRIMINAL SEX OFFENSE STATUTES

All states designate serious sexual offenses impacting on children as felonies. Ohio has one of the harshest penalties in that convictions either for forcible rape or felonious sexual penetration involving a child under thirteen mandates life imprisonment.

Illinois law provides that the court has the discretion to order an offender to pay for the costs of a victim's treatment. Minnesota provisions allow the court to stay the imposition of sentence for specified offenses, if the court finds that it is in the best interest of the family or complainant for an offender to be referred to treatment, and a professional assessment team indicates that the offender can respond to treatment.

Recommendations:

A) Ensure that penalties for serious criminal sex offenses constitute felonies.

B) Enact provisions similar to those in Illinois, 720 ILCS § 5/12-18(d), which give the court the authority to order the offender to pay the costs of a victim's treatment, including, but not limited to, medical, psychiatric, rehabilitative or psychological treatment.

C) Consider enactment of a provision which allows the court to stay a sentence and refer an offender for treatment if it is in the victim or family's interest and a professional team states that the offender is amenable to treatment.

IX UNIQUE PROVISIONS AND MISCELLANEOUS:

Recommendations:

A) Consider enacting forfeiture statutes to prevent offender from profiting from his/her illegal activity (i.e. movie, book contracts).

B) Adopt "Forced Viewing of Sexual Activity," Wis. Stat. § 940.227 which prohibits causing a child under 18, but above 13 to view sexually explicit conduct, by use or threat of force or violence (enhanced penalty if child under 13).

C) Adopt "Criminal Child Enticement," Ohio Rev. Code Ann. § 2905.05, which forbids knowingly soliciting, coaxing, enticing, or luring child under 14 to enter any vehicle whether or not the offender knows the child's age, without parental or guardian permission.

D) In conjunction with sex offense registration laws, enact law to provide for notice to victim of offender's pending release from prison, if victim so desires.