Approved: April 27, 1994
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael O'Neal at 3:30 p.m. on February 1, 1994 in Room 313-S of the Capitol.

All members were present except:
Representative Denise Everhart - Excused
Representative Joan Wagnon - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
Representative Rocky Nichols
Kyle Smith, Kansas Bureau of Investigations
Rich Hayse, Palmer Company
Ron Smith, Kansas Bar Association
Jim Clark, Kansas County & District Attorneys Association
Marian Raab, Representative Joan Wagnon's Intern
Becky Altman, Topeka
Sara Pattie, Topeka
Ruth Driver, Topeka
Jim McHenry, Kansas Children's Service League

Others attending: See attached list

Kyle Smith, Kansas Bureau of Investigations, appeared before the Committee with several bill requests. The first would amend K.S.A. 22-3801 to clearly designate that the expense of rape kits be either charged to court costs or paid for by the defendant. Currently some hospitals are billing rape victims for this examination kit. This would also make the kits that are used standardized as approved by the KBI, (see attachment 1).

Representative Heinemann made a motion to have this bill request introduced as a committee bill. Representative Macy seconded the motion. The motion carried.

The second bill request would amend K.S.A. 60-436 so records of Crime Stoppers Chapters would meet the statutory requirement of informant privilege, (see attachment 2).

Representative Heinemann made a motion to have this bill request introduced as a committee bill. Representative Mayans seconded the motion. The motion carried.

Hearings on **HB 2671** - Organized criminal activity act & **HB 2673** - Voiding leases on property that is a common nuisance, were opened.

Representative Rocky Nichols appeared before the Committee as a co-sponsor of both the proposed bills. He represents the Shawnee County Legislative Delegation which suggested that **HB 2671** be sent to the Kansas Sentencing Commission because of recent a Supreme Court ruling. **HB 2673** seeks to change a problem regarding the "party shack" law. Many officers have pointed out that they have had difficulty implementing the current "party shack" law because of a loophole written in for landlords and their tenants. This would allow for easier enforcement of the law and would empower law enforcement officials to close down drug houses, (see attachment 3).

Chairman O'Neal asked what the Delegation wants the Sentencing Commission to do with **HB 2671.** Representative Nichols responded that there are problems in the way the bill would be enforced. Under this act peaceful protestors could be considered a gang. There are some concerns as to how this would affect the prison population.

Kyle Smith, Kansas Bureau of Investigation, appeared before the Committee as a proponent of **HB 2671**. RICO is an effective and powerful tool that is used in a number of places. This is why there are concerns of how it could be and is used. A number of other states have RICO statutes, which when narrowly drafted could be a very helpful tool in fighting crime.

Representative Garner asked if he thought that circumstances like the abortion protestors in Wichita would be subject to the provisions in this bill. Mr. Smith replied that they probably would. If there is an organization, who's primary purpose is to organize illegal activity, that's an organization committing crime. However, under that situation enforcing the proposed bill should be a last resort.

Rich Hayse, Palmer Company, appeared before the Committee as an opponent to **HB 2671**. He was concerned about the unintended effects of the legislation. This bill is extremely broad and there is a number of problems with this bill, (see attachment 4).

Ron Smith, Kansas Bar Association, appeared before the Committee as an opponent of the bill. He stated that this proposed bill would overlap federal criminal jurisdiction and that it encompasses more than just organized criminal activity, (see attachment 5).

Jim Clark, Kansas County & District Attorneys Association, appeared before the Committee as an opponent to **HB 2673**. There are some problems with the bill stating that an arrest for drugs triggers a mandatory action on the part of the prosecution to file a criminal nuisance action and requires the courts to hold a hearing within 30 days, (see attachment 6).

Representative Mays asked if mandatory prosecution wasn't included in the bill would he support it. Mr. Clark responded that he doesn't see what the benefit of the bill would be. Representative Mays then asked if he was familiar with the "party shack" law and should it be repealed. Mr. Clark responded that he was familiar with the law. This is an old law and has been used by a lot of counties and districts. He stated that he doesn't understand what this bill is aimed at.

Representative Mays explained that this bill is aimed at drug houses. The law enforcement officials are having a great deal of trouble closing these down. The purpose of this bill was to extend the same provisions of the "party shack" law to drug houses.

The Chairman stated that the "party shack" law lists activities, the a violation of which would be declared a common nuisance; one of which is any violation of controlled substances. He asked why drug violations aren't covered in the "party shack" law. Representative Carmody responded that this bill adds an expedited procedure to get tenants out. Representative Mays commented that this was meant to be a tool for law enforcement officials not landlords.

Representative Scott commented that he had heard from several landlords in his district who favor this bill because it helps move the tenants out after an arrest has been made. They not only lose rent but they also have property that has been destroyed.

Representative Rock stated that he was a little bit concerned about moving someone out of their home before they are convicted of a crime.

Hearings on **HB 2671 & HB 2673** were closed.

Hearings on **HB 2690** - Statute of limitations on criminal prosecution of childhood sexual abuse, were opened.

Marian Rabb appeared on behalf of Representative Joan Wagnon. In the U.S. childhood sexual abuse has reached major proportions. An estimated 200,000 - 400,000 children are sexually abused each year. One study suggests that 1/3 of the female population experienced some form of sexual abuse as a child. Incest is the most common form of sexual abuse but is not reported. An estimated 90% of cases, for those females under the age of twelve, are not reported to the police. The current statute of limitations does not work for the victim of childhood sexual abuse. One should not expect a five year old to know that they have five years to file charges against the adult who molested them. Children probably don't even comprehend what has happened and will probably repress the events in order to save their sanity.

The U.S. Attorney General has recommended that states extend their statute of limitations to commence as of the date of the victims disclosure. **HB 2690** would extend the statute of limitations to two years from the date that the victim discovers or reasonably should have discovered that the crime occurred; or five years after the commission if the individual is under the age of sixteen. This allows the victim to mature to an age where they would be able to face the memories of childhood sexual abuse and begin criminal proceedings. Many other states have extended or eliminated their statutes of limitations for criminal prosecutions of childhood sexual abuse. Nine states have eliminated their statutes of limitations for felony sex offenses. Eleven other states have extended the statutes of limitations from two years to fifteen years after the alleged crime. It is time that Kansas protects its most valuable citizens, (see attachment 7).

Representative Adkins commented that by extending the statute of limitations there would be instances where long after the sexual abuse had happened and charges had been brought the defendant might lose their right to provide witnesses or other evidence. Ms. Reab stated that childhood sexual abuse is a very unique crime, because there are only two witnessness, the alleged victim and alleged perpetrator. She stated that the current law in Kansas is very harsh towards victims. It gives them only five years after the crime occurred to bring charges against the perpetrator.

Chairman O'Neal commented that this bill benefits the child of tender years who cannot appreciate the criminality and would give them time to mature and have the reality of what happened to them sink in so they could discover the criminality and not have lost their opportunity to prosecute. His suggestions were that there be an age that would be targeted to avoid the possibility that on someone's 90th birthday someone may accuse them of something that allegedly happened long ago. He questioned if they are addressing those age eleven and under, or those older individuals, who because the statute of limitations does not apply, cannot prosecute the perpetrator. Ms. Reab replied that this will come to the aid of children under the age of ten. Children over the age of ten shouldn't be expected to immediately report sexual abuse. Most children don't have the emotional capacity to face childhood sexual abuse and the demands of the court. However, this bill was not specifically geared toward young children.

The Chairman commented that below the age of sixteen there is a need to extend the statute for five years and over the age of sixteen the need is not there. It is assumed that at age sixteen there is the level of maturity and understanding of the criminality of the act. He stated that he doesn't understand the need to extend it beyond the age of sixteen. He understood that this bill was being proposed because a person of tender years, when the abuse did happen, was not capable of comprehending what had happened to them was a crime.

Representative Mays questioned how the defendant would prove that the statute of limitations has run. The Chairman responded that the burden would be on the victim to show that it hasn't. Jim Clark, Kansas County and District Attorneys Association, stated that there have been cases going both ways, where the burden is on the victim and on the defendant. The Chairman replied that the burden of discovery would be on the victim because charges are filed stating that a crime occurred, when the crime occurred and the justification for bringing the case to the court. Representative Rock commented that an amendment could be added to the bill which would state that the statute doesn't run until the victim reaches a certain age.

Becky Altman, Topeka, appeared before the Committee as a proponent of the bill. She stated she was sexually abused between the ages of four and ten. She was repeatedly told that she could never tell anyone and that adults do not believe children and because of this she repressed all memories of the abuse. At age 25 she began to have flashbacks and finally was able to recall what had happened to her as a child. This type of crime effects every aspect of one's life for their entire lifetime. This is a small step in bettering the legal services for those that have been sexually abused.

Chairman O'Neal stated that he admired her courage to come before the Committee. He questioned that at age 10, when the abuse stopped, did she know what had happened was wrong on the part of the perpetrator, and if she felt powerless to do anything about it. Ms. Altman responded that she did not know that it was a crime. She had always felt uncomfortable and did not like it. At age ten the abuse had gone on long enough that she thought it was normal. The Chairman asked that at age 18 did she know what had happened at age ten was wrong. Ms. Altman responded that she did not. Chairman O'Neal questioned when was the first time she realized that incest was criminal. Ms. Altman replied at about the age of 26 or 27. The Chairman then questioned if being able to prosecute was what she needed as a victim for closure to put her life back together. Ms. Altman answered that these people need to be held legally accountable for what they have done.

Representative Pauls questioned if there had been anyone else trying to prosecute the perpetrator. Ms. Altman responded that there had not been anyone else. She had contacted others that had been sexually abused by this perpetrator and they don't fall within the statute of limitations.

Ruth Driver, Topeka, appeared before the Committee as a proponent of the bill. She commented she was abused from a young age until age 14. She did not fully understand what had happened to her until she was 36 years old. She suffered severe depression and then found help. The sexual abuse had been going on for three generations in her family and she believes it still continues today. It is not the child's choice to repress the memories of the abuse but it is instead something that the mind does to protect the victim from the trauma until the person is able to deal with those painful memories. Most victims do not address the fact that they were sexually abused until they reach their late 20's and early 30's.

Chairman O'Neal questioned that by age 14 did she know that the abuse was wrong. Ms. Driver responded that she didn't know that it was wrong. All she knew was that she just didn't like it. The abuse felt like it was normal and was happening everywhere.

Representative Carmody commented that today the message is getting out that sexual abuse is wrong. Children are getting information that we didn't receive when we were their age. He asked if she felt that twenty years from now there would there be less likelihood of children repressing these types of memories because of the education that is happening in society. Ms. Driver replied that it would still be a normal response.

Chairman O'Neal stated that there is the assumption that an individual is presumed to know the law. The fact that an individual does not know the law is not the defense. With the passage of this bill an act against a victim who knows that the sexual abuse is a crime has a two year statute of limitation and if they don't know that it was a crime they have an extended statute of limitations until they discover that what they knew was happening was against the law. He was concerned that if the offender and the victim were both juveniles at the time the abuse happened, and the victim remembers at age 25 that this abuse happened, would the perpetrator be charged in juvenile court because he was a juvenile when the act occurred or would he be charged in the adult court because he is now an adult. Ms. Driver stated that she couldn't address this concern.

Sara Pattie, Topeka, appeared before the Committee as a proponent of the bill. She stated that she was sexually abused by a neighborhood man at age eleven. She started having flashbacks when she had her own daughter several years ago. She did file a report but because the statute of limitations had run there was nothing that could be done. The man has a 20 year history of sexually abusing children. The police department has a record of at least 50 cases in which this man had allegedly abused children. Out of those, there are two victims that have attempted to bring charges.

Chairman O'Neal asked when she truly feel that what had happened to her was criminal. Ms. Pattie responded that she was not sure. She stated that in the back of her mind she probably always knew, however, one tends to tuck those memories aside and later in life recall the memories. It's been about two years since she has had full disclosure of these memories. The Chairman stated that the concern he had was that guilt or innocence in these cases hinges on the last question she had just answered. If the victim has known it all along the offender goes free, because the two years started as soon as they knew it was wrong. However, if the victim never really knew or appreciated that the act was criminal, then the statute helps the victim would have two years after they discovered it to bring charges. Everything revolves around the victims memory.

Ron Smith, Kansas Bar Association, appeared before the Committee as an opponent to the bill. He stated that extending the statute of limitations beyond five years would not result in quality prosecutions. The purpose of the statute of limitations is to give some type of finality to crimes and their prosecutions, (see attachment 8).

Representative Macy questioned if the Bar's main concern was that the bill would not result in quality prosecutions. Mr. Smith replied that the longer the time period from when the crime occurred to when the prosecution happens there is extreme deterioration in the case. Representative Macy commented that the testimony and questions have been geared toward protecting the perpetrator. These are very unique crimes that have happened to children.

Jim McHenry, Kansas Children's Service League, appeared before the Committee and stated that the League has been watching the issue of childhood sexual abuse over the past several years. The majority of cases dealing with children deal with sexual abuse.

Hearings on **HB 2690** were held open.

The Committee meeting adjourned at 6:15 p.m. The next meeting is scheduled for February 2, 1994.

GUEST LIST

HOUSE JUDICIARY COMMITTEE

DATE February 1, 1994

NAME	ADDRESS	ORGANIZATION
Ken Smith	Topeka	KS Bar
[illegible]	Topeka	KSCPA
Zach Hayse	Topeka	Palmer Cos
Marian Mabs	Lawrence	Joan Wagnon
Ruth Baisner	Topeka	Joan Wagnon
Sara Pattie	Topeka	Joan Wagnon
Becki Altman	Silver Lake	Joan Wagnon
Scott Alisoglu	Topeka	Budget
Stefanie Bosch	Topeka	Washburn student
Cindy Rodriguez	Topeka	Washburn Student
Katrina Wesch	Topeka	Washburn U. Student
Douglas Johnston	Wichita	Planned Parenthood
Rocky Nichols	Topeka	St. Rep
Ben Coates	Topeka	KPA
Terri Robbins	Topeka	Kansas State Nurses Assn.

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
TOPEKA, KANSAS 66612
(913) 296-8200
FAX: 296-6781

ROBERT B. DAVENPORT
DIRECTOR

ROBERT T. STEPHAN
ATTORNEY GENERAL

KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE JUDICIARY COMMITTEE
BILL REQUEST
JANUARY 31, 1994

Mr. Chairman and Members of the Committee:

I am Kyle Smith, Assistant Attorney General, and on behalf of Attorney General Robert T. Stephan, the Kansas Bureau of Investigation, request an amendment to the statute dealing with court costs, K.S.A. 22-3801, which clearly designates the expense of the rape kits as well as the rape examinations as court costs. We have had cases where hospitals have actually charged the rape victims for the kits. We feel that these more properly should be viewed as court costs and paid by either the county or the defendant. We are also asking for these kits to be standardized to ensure quality investigations.

Thank you for your consideration.

#127

House Judiciary
Attachment 1
2-1-94

65-448. Physicians at medical care facilities to examine victims of sexual offenses; when; remedy for refusal; costs. Upon the request of any law enforcement officer and with the written consent of the reported victim, any physician on call or on duty at a medical care facility of this state, as defined by subsection (h) of K.S.A. 65-425, shall examine persons who may be victims of sexual offenses cognizable as violations of K.S.A. 21-3502, 21-3503, 21-3504, 21-3505, 21-3506, 21-3602 or 21-3603 for the purposes of gathering evidence of any such crime. If the physician refuses to perform such physical examination the prosecuting attorney is hereby empowered to seek a mandatory injunction against such physician to enforce the provisions of this act. Any refusal by a physician to perform an examination which has been requested pursuant to this section shall be reported by the county or district attorney to the state board of healing arts for appropriate disciplinary action. The department of health and environment, in cooperation with the Kansas bureau of investigation, shall establish procedures for gathering evidence pursuant to this section. A minor may consent to examination under this section. Such consent is not subject to disaffirmance because of minority, and consent of parent or guardian of the minor is not required for such examination. The hospital or medical facility shall give written notice to the parent or guardian of a minor that such an examination has taken place.

using Kansas Bureau of Investigation sexual assault evidence collection kits or similar kits approved by the KBI,

Costs of conducting an examination of a victim as herein provided shall be charged to and paid by the county where the alleged offense was committed.

including the costs of the sexual assault evidence collection kits,

History: L. 1977, ch. 210, § 1; July 1.

Attorney General's Opinions:

Doctors of chiropractic cannot use the term "chiropractic physician." 87-42.

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
TOPEKA, KANSAS 66612
(913) 296-8200
FAX: 296-6781

ROBERT B. DAVENPORT
DIRECTOR

ROBERT T. STEPHAN
ATTORNEY GENERAL

KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE JUDICIARY COMMITTEE
BILL REQUEST
JANUARY 31, 1994

Mr. Chairman and Members of the Committee:

I am Kyle Smith, Assistant Attorney General, Kansas Bureau of Investigation. I am here today to request on behalf of the Kansas State Crime Stoppers Association legislation amending the informant privilege statute, K.S.A. 60-436, so that it would apply not only to testimonial statements, but any records revealing the identity of informants. This is being done on behalf of Crime Stoppers Chapters throughout the State of Kansas, as records are kept by Crime Stoppers and there have been attempts to subpoena those records as a way of getting around the statute, and thus obtaining the identity of informants without meeting the statutory requirements. There is also a question about the status of Crime Stoppers under this statute and that is clarified.

Thank you for your consideration.

#125

House Judiciary
Attachment 2
2-1-94

60-436. Identity of informer. A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this state or of the United States to a representative of the state or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his or her identity is essential to assure a fair determination of the issues.

History: L. 1963, ch. 303, 60-436; Jan. 1, 1964.

or to a Crime Stoppers chapter

Said privilege extends to documenting records as well as testimony.

2-2

STATE OF KANSAS

ROCKY NICHOLS
STATE REPRESENTATIVE
58TH DISTRICT
SHAWNEE COUNTY

HOME:
2329 S.E. VIRGINIA
TOPEKA, KANSAS 66605
(913) 357-6262

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: LABOR & INDUSTRY
PUBLIC HEALTH & WELFARE
ECONOMIC DEVELOPMENT

OFFICE:
STATEHOUSE—284-W
TOPEKA, KANSAS 66612-1504
(913) 296-7675

February 1, 1994

Chairman O'Neal and members of the House Judiciary Committee:

Thank you for this opportunity to testify on House Bills 2673 and 2671 concerning amendments to the common nuisance law and organized criminal activity. The members of the Shawnee County Legislative Delegation appreciates this committee's response to these facets of bi-partisan juvenile crime package.

Regarding the criminal activity bill, I have spoken with members of the Shawnee County Legislative Delegation and we would respectively request that House Bill 2671 be sent to the Kansas Sentencing Commission. Given the recent Supreme Court rulings, we believe that this bill should be sent to the Sentencing Commission for serious review. Although the intent of the bill is sound, we believe that we need to see some data about the effect before we move forward.

House Bill 2673 relates to the common nuisance law and seeks to change a problem that law enforcement has run into involving the old "party shack" law. Last summer I took the opportunity to speak with several local Shawnee County law enforcement officials. I talked to law enforcement officers involved in the narcotics department, the detective division as well as patrol officers. Many officers pointed out their difficulty in working with the current party shack law, due to a loophole written for landlords and their tenants. This bill would set up a formal hearing process before the court in order to find out whether illegal drugs are being dealt out of the property. This bill allows for easier enforcement and empowers local law enforcement officials to close down drug houses. In addition, The Topeka Chamber of Commerce supports this bill and the rest of the delegation crime package.

Thank you for this opportunity to testify on these bills. I will stand for any questions.

House Judiciary
Attachment 3
2-1-94

OPPOSITION TO HB 2671
on behalf of
PALMER COMPANIES, INC.

Kansas House Judiciary Committee
February 1, 1994

We are concerned about possible unintended effects on legitimate organizations of bills such as HB 2671. These concerns have led us to oppose previous similar bills. While this bill is an amalgam of previous bills, many of the definitions and procedures are improved.

However, many of the provisions in HB 2671 are confusing, circular or redundant. This leads to great uncertainty about the actual impact of the bill.

- The bill states as one of its purposes to provide new civil sanctions and remedies, but then states that nothing in the act is intended to create a civil cause of action or liability.

- The bill defines "Attorney General," "Criminal Activity Lien," "Innocent Party," "Pecuniary Value," and "Personal Property," but apparently does not use the definitions.

- The definition of "Enterprise" includes individuals: it is unclear how an individual can be an enterprise.

- The definition of "Entity" overlaps the definition of "Enterprise" and becomes circular.

- "Proceeds" is defined, but in application is apparently sometimes confused with "Profits."

- The bill is <u>extremely</u> broad in scope, including every crime in Chapters 21 and 65 of the statutes, or any other felony fraud.

- HB 2671 increases criminal penalties for, among other things, acquiring an interest in real property or an enterprise through a "pattern of criminal activity," but the bill does not affect the interest thus acquired.

We respectfully urge that the bill not be reported favorably in its present form.

--- Richard F. Hayse

House Judiciary
Attachment 4
2-1-94

KANSAS BAR ASSOCIATION

Legislative Information for the Kansas Legislature

TO: *House Judiciary Committee*

FROM: *Ron Smith, KBA General Counsel*

SUBJ: *HB 2671, organized criminal activity act*

February 1, 1994

POSITION

The Kansas Bar Association is opposed to new crimes being enacted in broadly called "organized criminal activity" if they overlap federal criminal jurisdiction and while state funding of judicial, prosecutorial and public defense systems remains inadequate.

BACKGROUND:

This legislation makes it a mid-level felony crime out of what might be conspiracy to commit two misdemeanors. It is aimed at organized criminal activity, presumably organized crime, but it can be used in a much broader way.

There is language in this bill that makes the taking of a fee for services rendered as not being part of the criminal enterprise. We support this language.

The problem with HB 2671, however, is that it creates another set of crimes, with more impact on prisons, prosecutors, judges, the Board of indigent defense services, and law enforcement. Yet there is no assurance that new funds will be available in those budgets at the end of April to implement this law. Asking the judicial budget and BIDS, especially, to take on these new crimes -- difficult crimes and conspiracies to prove -- will denigrate the programs and projects already ongoing in those budgets.

The history of recent legislatures is to enact new law enforcement requirements then funding the program, but them at the end of the session to put into place across the board budget cuts which then affect the entire agency.

Let me illustrate.

I was speaking with Judge Mershon in Manhattan last week on another topic. We discussed judicial budgeting of past years. He pointed out that in the last five years, the number of clerks in his court had decreased, the prosecutor's office had quadrupled its size. This meant that the Riley County had spent the money necessary to prosecute the crime problem in

This legislative analysis is provided in a format easily inserted into bill books. We hope you find this convenient.

Manhattan. But the state was spending less in the courthouse in Manhattan than it did five years ago.

There will be a fiscal note on this bill from a variety of agencies. We suggest if you want to enact this law that you debate ALL of the issues this bill raises. To do that you must include the fiscal notes in aggregate form as the final section of this bill. Lawmakers have a right to vote on *all* parts of this topic, and its cost is a legitimate issue for you to consider before enacting this law.

Duplication

Section 2 states the purpose of the law is to lessen the "social, economic and political" impact of criminal activities in the state. The law is aimed at enterprises. These are defined as legal or illegal entities and activities.

In short, this law is aimed at organized crime and its fringe elements. That is fine. But federal prosecutors already have jurisdiction in this area and generally are better equipped with FBI help to undertake such activities. This bill allows duplication of effort.

The pending federal crime bill is going to make new and demanding costs on the state system if we want our share of that $20 billion bill. Many of these types of crimes can be prosecuted under existing federal organized crime laws if the United States Attorney for Kansas so desires. Federal judicial, prosecutorial and defense funding is historically better than in state courts. Creating duplicate crimes for Kansas prosecutions without funding the consequences is contrary to good notions of a well designed judicial system, and will eventually degrade other parts of the state system.

PARTICULARS

Some of the inconsistent parts of the bill are:

1. Line 17 indicates prosecutors and victims of crime are given new civil remedies under this act. Yet Section 7 indicates no civil remedies are created under this act.

2. On page 2, line 6, is the definition of criminal activity lien. Nowhere else is the term used in the act.

3. Page 2, line 22, defines a pattern of criminal activity. This is so broad that two different episodes of trespassing by two people would result in level 5 nonperson felonies. This may not be aimed directly at abortion picketing, but it sure lends itself to that type of activity.

Last week the U.S. Supreme Court held in *National Organization for Women Inc. v. Joseph Scheidler,* (#92-780, ___ U.S. ___) that private individuals can use federal civil RICO laws against protesters who break the law. If the purpose of HB 2671 is to give the state a similar law, it is unnecessary.

Practical Problems

This past summer in *State v. Schlien* the Kansas Supreme Court held that our gambling statute was written so that a "gambling place" was any place where a bet was offered or made, and did not require that the facility be used two or more times for such gaming purposes. Illegal but noncommercial gambling is a misdemeanor. Under HB 2671, the act of forming a poker game by asking two or more people to come to your house to play a nickel-dime-quarter game, plus the people showing up to play poker, would constitute the two separate occasions to constitute criminal activity and result in a level 5 felony prosecution against everyone in the game.

That may not be the intent of this bill, but the only thing preventing such prosecutions is prosecutorial discretion.

CONCLUSION.

It is possible for this legislature to make this law. The real question is whether you should.

Unless there is new money to fund the new impact on the criminal justice system, you should resist the impulse to enact such laws.

If you feel you must send this bill to the floor, we suggest you put the fiscal note in the last section of the bill.

5-2

Kansas County & District Attorneys Association

827 S. Topeka Blvd., 2nd Floor • Topeka, Kansas 66612
(913) 357-6351 • FAX (913) 357-6352
EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE • CLE ADMINISTRATOR, DIANA C. STAFFORD

Testimony in Opposition to

HOUSE BILL NO. 2673

The Kansas County and District Attorneys Association opposes adoption of HB 2673, allowing landlords to require prosecution of a nuisance action. While the concerns of landlords regarding criminal activity by their tenants is laudable, there are other methods of dealing with those concerns than outlined in the bill. The bill gives the landlord the power to compel prosecutors to file a criminal nuisance action, mandates the courts to hold a hearing within 30 days, for the sole purpose of revoking any lease agreement that may exist. There are better, and more efficient uses of the prosecution's time and resources than protecting the private interests of landlords. More importantly, there are better ways for landlords to protect their own interest, such as including language in the lease agreement that voids the lease upon arrests for the violations listed in the bill.

Besides the requirement of prosecutors to become private enforcers in landlord-tenant disputes, the bill is capable of subversion by unscrupulous landlords. For example, if a landlord employs tenants to run a drug operation, upon the arrest of one of them, he may require the prosecution to initiate an action. Presumably the rules of civil discovery apply, and the prospect of disclosure of an ongoing drug investigation becomes a real possibility.

Perhaps the purpose of the bill can be better effected by allowing landlords the power to intervene once a criminal nuisance actions has been filed, and then allowing the court a remedy to restore the property to the landlord upon a showing that a nuisance exists on the property.

STATE OF KANSAS

JOAN WAGNON
REPRESENTATIVE, FIFTY-FIFTH DISTRICT
1606 BOSWELL
TOPEKA, KANSAS 66604
(913) 235-5881
OFFICE:
STATE CAPITOL, 272-W
TOPEKA, KANSAS 66612-1504
(913) 296-7647

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
CHAIRMAN: BOARD OF DIRECTORS, CORPORATION FOR CHANGE
RANKING MINORITY MEMBER: TAXATION
MEMBER: JUDICIARY

Testimony Before the House Judiciary Committee
Rep. Michael O'Neal, Chair
House Bill 2690
February 1, 1994

By Marian Raab
Legislative Intern for Rep. Joan Wagnon
and Law Student at the University of Kansas

I. The traditional arguments supporting statutes of limitations do not apply in criminal childhood sexual abuse cases.

- Statutes of limitations are usually imposed to assist the courts in their pursuit of the truth by barring stale claims.
- Statutes of limitations are usually imposed to protect potential defendants from the protracted fear of litigation.

II. However, victims of childhood sexual abuse are frequently incapable of reporting sexual abuse.

- Children are not psychologically able to handle the emotions that arise from childhood sexual abuse.
- The majority of children will repress their memories of childhood sexual abuse to protect their fragile psyches.

House Judiciary
Attachment 7
2-1-94

III. The current law as it stands, K.S.A. 21-3106(2), allows no recourse for these victims.

- Currently, the statute of limitations provides that criminal prosecutions of childhood sexual abuse must be commenced within five years after the commission of the crime if the victim is under sixteen years of age.
- House Bill 2690 would amend the current law to give victims the opportunity to commence criminal prosecutions within two years from the date the victim discovers or reasonably should have discovered that the crime occurred.

IV. Many states have extended or eliminated their statutes of limitations for criminal prosecutions of childhood sexual abuse.

- Wyoming and South Carolina have no statutes of limitations for childhood sexual abuse.
- Alabama, Kentucky, Maryland, North Carolina, Rhode Island, Vermont, and West Virginia impose no statutes of limitations for felony sex offenses committed against children.

V. Personal testimony from Becky Altman, Ruth Driver, and Sara Pattie, constituents of Rep. Joan Wagnon, regarding House Bill 2690.

VI. Comment: "Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform," Washington Law Review, Volume 65, Number 1, January 1990, by Jessica E. Mindlin.

WASHINGTON LAW REVIEW

VOLUME 65, NUMBER 1, JANUARY 1990

Published by Students of the
University of Washington School of Law

CONTENTS

7-3

Vol. 65:171, 1990

provision for inquiry at hospital admis-
sion assume a public resistance that has

ingly valuable commodities. As such,
claims of the individual, the family, and
nt. The task of mediating among these
The 1987 UAGA offers a viable model
enge.

he provision prohibiting commerce in
ill then reinforce federal law, reaffirm-
iting the option to sell organs intrudes
Public policy supports the conclusion
t carry a price tag.

acilitate organ donation enhance indi-
while reducing family opportunity to
dopted to increase the number of val-
increase physician confidence in the
Family consent may remain pivotal in
due more to traditional cultural atti-
mily. However, cultural changes can
v is clear. The 1987 UAGA provides

ectly confronts larger numbers of per-
ion. This creates individual opportu-
to object. The severity of the organ
sk of increased refusal. The lessons
987 UAGA will guide future attempts
ersonal resource.

Ann McIntosh

CHILD SEXUAL ABUSE AND CRIMINAL STATUTES OF LIMITATION: A MODEL FOR REFORM

Abstract: Many states permit courts to toll criminal statutes of limitation in a child sexual abuse case if the victim is under a minimum age, or if the offender prevents the victim from reporting the abuse. Twenty-four states have no such tolling provision, however, and their state courts have not devised a common law solution to avoid the problem of time-barred prosecutions. This Comment examines child sexual abuse in the context of state criminal law. It concludes that statutes of limitation present a formidable obstacle to the successful prosecution of perpetrators of child sexual abuse, and proposes a model legislative amendment to toll states' criminal statutes of limitation.

Perpetrators of child sexual abuse escape prosecution for their acts when the abuser uses threats and coercion to prevent the victim from reporting the offense until after the statute of limitation has expired, or when the victim is too young to report the abuse within the statutory period. Consider the following facts:

> *The sexual contacts began when Susan was five years old and her brother Tom was seventeen. In the next three years, the abuse progressed from touching to oral sex to intercourse. Although Tom stopped having intercourse with Susan when she was ten, other acts of abuse and threats of harm continued until she was fourteen. Her brother often threatened to shoot her if she told anyone about the abuse. Frightened, Susan maintained her silence. Eventually she told her parents about the abuse, but they merely punished her for lying. When Susan was seventeen she learned that Tom also had abused her younger sisters. Distressed, she told a school counselor about her abuse and a complaint was filed with local police. Tom was prosecuted and convicted. His conviction was overturned, however, because the statute of limitation had expired.*[1]

If Susan lived in Oregon, Utah, or any one of another twenty-two states,[2] criminal charges could not be brought against Tom. In Oregon, for example, criminal charges would be barred by the state's three year statute of limitation for Rape of a Child.[3] Similarly, in Utah, charges would be barred by the state's four year statute of limitation for most felony offenses.[4] Although other acts of abuse continued

1. Adapted from State v. Shamp, 422 N.W.2d 736 (Minn. Ct. App.), *rev'd*, 427 N.W.2d 228 (Minn. 1988) (overturning conviction for sexual abuse because charges were brought after statute of limitation had expired).

2. *See infra* note 12.

3. OR. REV. STAT. § 131.125 (Supp. 1988).

4. UTAH CODE ANN. § 76-1-302(1)(a) (1978). A prosecution for murder, manslaughter, or a capital felony may be commenced at any time. *Id.* § 76-1-301.

7-4

until Susan was fourteen, prosecution for these offenses also would be barred.[5]

Susan's story is not unique.[6] Twenty-four states across the country have no provision for tolling the statute of limitation in cases where the victims are too young to report the sexual abuse within the statutory period. These states also have no provision for tolling the statute when child victims do not report the abuse because they were coerced into silence by their abusers.[7] Despite statutes criminalizing child sexual abuse in every state,[8] perpetrators of abuse continue to escape prosecution for their crimes.[9] Often, abusers shame and threaten child victims into silence.[10] When victims remain silent until after the statute of limitation has expired, criminal charges are barred and the sex offender escapes prosecution.[11]

Although the lack of tolling provisions in child sexual abuse cases is a problem nationwide,[12] a growing number of states in recent years have endeavored to address the statute of limitation problem. Two states impose no statutes of limitation for criminal offenses.[13] Another seven states impose no statutes of limitation for certain felonies, including felony sex offenses committed against children.[14] Legislatures in sixteen other states have taken a different approach, mandating that the limitation period does not begin to run until an offense is discovered, the victim reaches a minimum age, or the abuse is reported to law enforcement agencies.[15] Further, on occasion courts have acted

5. In Utah, a prosecution may be commenced for rape, sodomy or sexual abuse of a child within one year after the report to law enforcement officials so long as no more than eight years has elapsed since the commission of the offense. *Id.* § 76-1-303. Oregon has a two year statute of limitation for all misdemeanor offenses, including sexual misconduct and second degree sexual abuse. OR. REV. STAT. §§ 131.125, 163.445.

6. The American Psychological Institute estimates that 12 to 15 million living American women have experienced incestuous abuse. Brozan, *Helping to Heal the Scars Left by Incest*, N.Y. Times, Jan. 9, 1984, at B6, col. 2. The National Incidence Study of Child Abuse and Neglect estimated that 44,700 children were sexually abused between May 1979 and April 1980. D. FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE 17–18 (1986) [hereinafter SOURCEBOOK]. The American Humane Association estimates that in 1983 almost 72,000 cases of child sexual abuse were reported to child protective agencies nationwide. *Id.* at 17. An unidentified number of cases involved multiple victims. *Id.* The broad range of estimates is based, in part, upon the definition of "incest" and the methodology and sample size used. *See id.* at 22–27 (a comprehensive discussion of the definitions of "incest" on which studies have relied).

7. There are no statistics documenting how often criminal child sexual abuse cases are barred by statutes of limitation. In Seattle, Washington, an attorney in the King County Prosecutor's Office estimated that the office receives approximately four cases per month where charges are time-barred. This estimate does not include reports made to police officers who do not pursue cases barred by statutes of limitations. Telephone conversation with Jeff Baird, Co-director, Special Assault Unit, King County Prosecutor's Office, Seattle, Washington (Nov. 30, 1988) (notes on file with *Washington Law Review*).

8. *See* Note, *The Crime of Incest Against the Minor Child and the States' Statutory Responses*, 17 J. FAM. L. 93 (1978).

9. Child molestation is "perhaps the least understood and most poorly handled crime . . . . [The crime] is often not reported or discovered, let alone adequately investigated, prosecuted and sentenced." Assistant U.S. Attorney General Lois Haight Herrington, N.Y. Times, Oct. 4, 1984, at C3, col. 1.

10. One child sexual abuse specialist recounts the following:

> I have two little girls in my sex abuse group. They were both sexually abused by their father over a long period of time. The father has been prosecuted for abusing the younger girls, but not the older ones. Presently, he is living outside the home. He's not allowed to have contact with the kids, but he talks to them on the phone every day: he's trying to convince the older girls not to tell about the abuse. He tells them what happens to men like him if they have to go to prison . . . he says that without his income their mother won't be able to support them and that the girls will all end up in foster care. He knows the statute of limitations expires in six months. He's doing all he can to keep the girls from telling. . . . Unfortunately, he's succeeding.

Interview with Gabriella Donnell, Sex Abuse Treatment Specialist, Children Protective Services in Portland, Oregon (Jan. 2, 1989) (notes on file with *Washington Law Review*).

11. Statutes of limitation also pose a major procedural obstacle in civil suits brought by a victim against his or her abuser. Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 190 (1984) [hereinafter Note, *Preserving the Victim's Remedy*]; *see also* Note, *The Discovery Rule and Father-Daughter Incest: A Legislative Response*, 29 B.C.L. REV. 941 (1988) [hereinafter Note, *The Discovery Rule*]. For a summary of "Post-Incest Syndrome," see Rosenfeld, *The Statute of Limitations Barrier In Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 HARV. WOMEN'S L.J. 206 (1989) [hereinafter Rosenfeld, *The Equitable Estoppel Remedy*].

12. The following 24 states impose statutes of limitation for child sexual abuse and have no statutory or common law provisions for tolling the statute: California, CAL. PENAL CODE § 803 (West Supp. 1989); Connecticut, CONN. GEN. STAT. ANN. § 54-193 (West Supp. 1988); Delaware, DEL. CODE ANN. tit. 11, § 205 (1988); Georgia, GA. CODE ANN. § 17-3-1 (Supp. 1988); Hawaii, HAW. REV. STAT. § 701-108 (1987); Idaho, IDAHO CODE § 19-402 (1988); Indiana, IND. CODE ANN. § 35-41-4-2 (Burns Supp. 1988) (there is no statute of limitation if the offense is committed by using or by threatening the use of deadly force, or while armed with a deadly weapon (§ 35-42-4-3)); Iowa, IOWA CODE ANN. § 802.6 (West 1979); Kansas, KAN. CRIM. CODE ANN. § 21-3106 (Vernon Supp. 1986); Maine, ME. REV. STAT. ANN. tit. 17-A, § 8 (Supp. 1988); Michigan, MICH. STAT. ANN. § 28.964 (Callaghan 1988); Mississippi, MISS. CODE ANN. § 99-1-5 (1988); Missouri, MO. ANN. STAT. § 556.036 (Vernon Supp. 1989); Montana, MONT. CODE ANN. § 45-1-206 (1987); Nebraska, NEB. REV. STAT. § 29-110 (1985); New Hampshire, N.H. REV. STAT. ANN. § 625:8 (Supp. 1988); New York, N.Y. CRIM. PROC. LAW § 30.10 (McKinney Supp. 1989); Ohio, OHIO REV. CODE. ANN. § 2901.13(f) (Anderson 1987); Oregon, OR. REV. STAT. § 131.125 (1987); South Dakota, S.D. CODIFIED LAWS ANN. § 23A-27-1 (1988); Tennessee, TENN. CODE ANN. § 40-2-103 (Supp. 1988); Texas, TEX. CODE CRIM. PROC. ANN. art. 12.01 (Vernon 1965); Utah, UTAH CODE ANN. §§ 76-1-303-04 Supp. 1988); Vermont, VT. STAT. ANN. tit. 13, § 4501 (Supp. 1988).

13. Wyoming and South Carolina have no statutes of limitation for any criminal offenses.

14. Alabama, Kentucky, Maryland, North Carolina, Rhode Island, Virginia, and West Virginia have no limitation period for any felony offenses. (Alabama does not impose a statute of limitation for any sex offense involving a victim under the age of 16). ALA. CODE § 15-3-5(a)(4) (Supp. 1988); KY. REV. STAT. ANN. § 500.050 (Baldwin 1988); MD. CTS. & JUD. PROC. CODE ANN. § 5-106 (Supp. 1988); N.C. GEN. STAT. § 15-1 (Supp. 1988); R.I. GEN. LAWS § 12-21-2 (1981); VA. CODE ANN. § 19.2-8 (Supp. 1988); W. VA. CODE § 61-11-9 (1984).

15. In Arizona, criminal statutes of limitation do not begin to run until after actual discovery by the state, or from the time discovery should have occurred with the exercise of reasonable diligence. ARIZ. REV. STAT. ANN. § 13-107 (Supp. 1988). In Oklahoma, criminal prosecutions

independently of their legislatures to fashion their own tolling excep-
tions.[16] Unless legislative or judicial changes are made in the remain-
ing states, however, even the best-designed criminal laws will no
protect children and will impede the successful prosecution of perpe-
trators of child sexual abuse.[17]

Part I of this Comment examines the dynamics of sexually abusive
relationships and discusses the states' criminal statutes of limitation.
Part II identifies the primary approaches to the statute of limitation
problem and explains how tolling procedures have been implemented.
Part III evaluates these procedures as models for change in states'
criminal statutes of limitation. Part IV recommends that state legisla-
tures enact statutes directing state courts to toll statutes of limitation
in criminal cases of child sexual abuse when the victim is under seven-
teen years of age.

for sexual acts against children must begin within five years after the discovery of the crim
OKLA. STAT. ANN. tit. 22, § 152 (West Supp. 1989). In North Dakota, criminal statutes
limitation are tolled until the victim reaches age 15. N.D. CENT. CODE § 29-04-03.2 (Supp
1987). In Florida and Massachusetts the statutes are tolled until the victim reaches 16. FLA
STAT. ANN. § 775.15(b)(6) (West Supp. 1989); MASS ANN. LAWS ch. 277, § 63 (Law. Co-op
Supp. 1988). In Louisiana, the statute is tolled until the victim reaches 17. LA. CODE CRIM
PROC. ANN. art. 573(4) (West Supp. 1989). In Arkansas, Illinois, Nevada, New Jersey, New
Mexico, and Pennsylvania the statute may be tolled until the victim reaches 18. ARK. STAT
ANN. § 5-1-109(h) (Supp. 1987); ILL. ANN. STAT. ch. 38, para. 3-6(c) (Smith-Hurd Supp. 1988
NEV. REV. STAT. § 171.095 (Supp. 1987); N.J. REV. STAT. § 2C:1-6-b(4) (Supp. 1988); N.M
STAT. ANN. § 30-1-9.1 (Supp. 1988); PA. STAT. ANN. tit. 42, § 5554(3) (Purdon Supp. 1988).
Colorado, the limitation period is extended seven years if at the time of the offense the victim
under 15. COLO. REV. STAT. § 16-5-401 (1986). In Washington, prosecution must
commenced within three years of the victim's 18th birthday or seven years of the commission
the offense, whichever is later. 1989 Wash. Laws 1577 § 3 (to be codified at WASH. REV. COD
§ 9A.04.080). Alaska partially tolls the limitation period. In Alaska, a prosecution for
offense committed against a person under the age of 16 may be commenced within one year aft
the crime is reported or one year after the victim reaches sixteen, whichever occurs first. ALASK
STAT. § 12-10-020 (1985). In Wisconsin, prosecution may be commenced within the specifi
period or until the victim reaches age 21, whichever is later. WIS. STAT. ANN. § 939.74 (We
1988).

16. *See e.g.*, State v. Danielski, 348 N.W.2d 352, 356–57 (Minn. Ct. App. 1984) (where vict
and defendant reside in the same house and defendant's use of authority to coerce the victim i
submitting to the abuse is an element of the crime, the continued use of authority to silence
victim tolls the statute of limitation because the offense is not complete).

17. In Connecticut, for example, if the alleged victim of a sexual assault is less than sixte
years old at the time of the offense, a criminal action must be brought within one year after
parent or guardian learned of the assault, despite the general five-year limitation period. CO
GEN. STAT. ANN. § 53a-69 (West 1985). *See, e.g., State v. Whiteman*, 204 Conn. 98, 526 A.
869 (1987) (section 53a-69 does not toll general five-year limitation period, so that where
year-old victim did not report the assault until less than one month before the five-year per
expired and the State did not issue a timely warrant, prosecution was time-barred).

I. CHILD SEXUAL ABUSE: VICTIMS' SILENCE AND THE LAW

A. *The Abusive Relationship*

Most incidents of child sexual abuse are intrafamilial, falling within the definition of incest.[18] The majority of sex offenders are male,[19] while the majority of reported victims are female.[20] Most frequently, the abuse begins when the victim is between seven and twelve years old.[21] In the incestuous family, victims often remain silent about the abuse, fearing the results of disclosure and desperately hoping to keep the family intact.[22] Often, the incestuous father is the only adult employed outside the home. Thus, his wife and children depend on him for economic support.[23] Victims of incest frequently feel responsible for the welfare of other family members and maintain their silence

18. In his 1979 and 1984 studies, Dr. David Finkelhor defined incest and child sexual abuse include contact acts, such as intercourse and genital fondling, as well as noncontact acts, such intentional exhibition of genitals and solicitation. *See* SOURCEBOOK, *supra* note 6, at 23–24. ther studies define incest as any sexual contact "between a child and an adult in a position of aternal [sic] authority." J. HERMAN, FATHER-DAUGHTER INCEST 70 (1981). Approximately 5% of all incest occurs between father and daughter or stepfather and daughter. Kempe, *Incest nd Other Forms of Sexual Abuse*, in THE BATTERED CHILD, 204 (C. Kempe & R. Helfer 3d ed. 980).

19. "Molesters cut across economic, social, ethnic and educational lines. They may be rich or oor, well-educated or ignorant, blue collar or white, married or single." *The Child Molester: No Profile'*, L.A. Times, Apr. 25, 1984 at 1, col. 1.

20. Every study documenting child sexual abuse has found rates of abuse to be at least five mes higher for female victims than for males. Experts speculate that male victimization may be nderreported in part because males are more reluctant to admit to the abuse "because it clashes ith the expectations of masculinity." SOURCEBOOK, *supra* note 6, at 62. Estimates of the requency of male victimization range from 3% to 31% of all reported abuse. *Id.* at 19.

21. Child sexual abuse specialists previously believed abuse typically began when the child eached the age of 12. *Id.* at 64–66. More recent studies indicate that now children are requently victimized between the ages of six and seven. *Id.* at 64. Victims range in age, owever, from one or two months to 18 years or older. The American Humane Association eported 71,961 cases of child sexual abuse in 1983. Twenty-five percent of these cases involved ictims under the age of five. *Backlash Feared on Child Sex Cases*, Wash. Post, Mar. 23, 1985, at 13, col 1. With the abuse beginning at an earlier age, child sexual assault victims will spend ore years in the abusive environment. For the victim who waits to report the abuse until she or e is out of the home, the lower age increases the likelihood that the statute of limitation will pire before the abuse is reported.

22. Even after disclosing the abuse, victims may be reluctant to testify against their abusers. 1984, a Solano County, California, judge sentenced a nine-year-old girl to eight days of ilitary confinement for her refusal to testify against her stepfather, a local Air Force physician, o was charged with sexually abusing her. *Defiance; Solitary For a Twelve-year-old*, TIME, Jan. 1984, at 35; *see also* State v. DeLong, 456 A.2d 877, 883 (Me. 1983) (affirming contempt nviction and seven-day jail sentence of a 15-year old girl who refused to testify against her ther, accused of sexually abusing her).

23. J. HERMAN, *supra* note 18, at 72.

in exchange for the abuser's promise not to hurt them or another family member.[24]

Similarly, extrafamilial abuse typically is perpetrated by someone with a close personal relationship to the child victim.[25] The abuser usually is someone in a position of authority and trust.[26] The abuser typically uses that authority to coerce the victim into an abusive relationship.

Horror stories of child sexual abuse abound. Present in each is the perpetrator's desire to keep the abuse secret. Even where the child does not have an innate sense that the sexual activity is wrong, the abuser's demand that it be kept secret communicates to the child that the activity is wrong.[27] Victims soon come to realize that they are participating in an activity that is unacceptable, but one that they are powerless to stop.[28]

B. Child Sexual Abuse and Criminal Laws

1. State Child Sexual Abuse Laws

Child sexual abuse has been recognized as a crime in the United States since the early 1800's.[29] Since then, statutes defining child sexual abuse have been revised and refined to reflect society's increased understanding and intolerance of sexual abuse.[30] Today, incest is a

24. J. HAUGAARD & N. REPPUCCI, THE SEXUAL ABUSE OF CHILDREN 91 (1988). Sometimes both parents actively abuse the victim. *See, e.g., infra* notes 57–60; *see also* I NEVER TOLD ANYONE: WRITINGS BY WOMEN SURVIVORS OF CHILD SEXUAL ABUSE 108–11 (E. Bass & L. Thornton eds. 1983).

25. "Approximately three-fourths of the offenders are known to the victim, possibly as family friends, neighbors, baby sitters, or school or church personnel." Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives,* 52 CHILD WELFARE 148 (1973) [hereinafter Schultz] (cited in L. SANFORD, THE SILENT CHILDREN 84 (1980)).

26. Child victims of sexual assault "are usually persuaded and tricked by known, and often trusted, adults into repeated sexual activity over extended periods of time." Berliner, *The Child Witness: The Progress and Emerging Limitations,* 40 MIAMI L. REV. 167, 168 (1985) (citing Conte & Berliner, *Sexual Abuse of Children: Implications for Practice,* J. CONTEMP. SOC. WORK 601 (1981)); *see also,* J. CREWDSON, BY SILENCE BETRAYED 114 (1988) (FBI study of 40 convicted pedophiles found that half used their occupations as principal way of meeting victims).

27. J. HAUGAARD & N. REPPUCCI, *supra* note 24, at 91.

28. *Id.*

29. In Missouri, for example, the first rape statute was passed in 1808. Act of Nov. 4, 1808, 1 Terr.L. p. 211, § 8. Washington's first statute prohibiting sexual acts between a minor child and an adult was passed in 1854 by the first legislative assembly of the Washington Territory. 1854 Wash. Laws ch. 2, § 33. Minnesota's Code of 1848 included a prohibition against fornication between a male guardian and his female ward. Hutchinson's Code of 1848, ch. 64, art. 12, tit. 3(22).

30. For example, the 1989 Washington Legislature recently enacted legislation tolling statutes of limitation until the victim reaches 18 in all criminal child sexual abuse cases. *See supra* note 15; *see also infra* note 34 and accompanying text.

criminal offense in every state.[31] Moreover, every state prohibits adults from having intercourse with persons under a minimum age. States also continue to regulate the age at which minors may legally consent to marriage.[32]

Increasingly, state legislatures are expanding the definition of what constitutes sexually abusive behavior. This increase stems from legislatures' growing awareness of the power imbalance between offenders and child victims.[33] In recent years, some state legislatures have begun to criminalize the use of authority to coerce the child victim into the abusive relationship.[34] In other states, however, legislatures continue to expect abuse victims who are too young to consent to sexual relations to report an assault within the statutory period. This remains true even when the offense is committed by a member of the child's family or by an authority figure outside the family. Thus, despite statutes prohibiting incest and sexual abuse, criminal laws remain inadequate to protect young sex abuse victims if the state is time-barred from prosecuting sexual offenders.

2. Criminal Statutes of Limitation and Child Sexual Abuse

Twenty-four states do not toll their statutes of limitation in criminal child sexual abuse cases.[35] In these states, the statutes of limitation for

31. Wulkan and Bulkley, *Analysis of Incest Statutes,* in SEXUAL ABUSE AND THE LAW (1984).

32. Generally, the age of consent ranges from 14 to 18 years. Exemptions may be granted with parental or judicial authorization. THE BOOK OF THE STATES, Table 8.3, at 336 (1988-89 ed.).

33. *See, e.g.,* ARK. STAT. ANN. preamble § 5-1-109 (Supp. 1987) ("Whereas, in many instances, child victims are threatened or intimidated to prevent the prompt reporting of abuse or sexual offenses . . . it is in the best interest of the State to extend the statute of limitations for certain offenses involving child victims . . . ."); FLA. STAT. ANN. preamble § 794.011 (West Supp. 1989) ("through fear, guilt, or immaturity children of tender years may fail to report a sexual offense; this frequent and understandable failure to report sexual offenses before statutes of limitation expire bars prosecution of many offenders"); *see also Selected 1987 Georgia Legislation, Felonies Against Minors: Extend Statutes of Limitations,* 3 GA. ST. U.L. REV. 418, 419 (1987) [hereinafter *Georgia Legislation*] ("Due to the child's immaturity and the close relationship . . . between the abused child and the criminal offender, a child generally is reluctant to tell an adult about the criminal conduct.")

34. Washington, for example, recently established the crime of Sexual Misconduct With a Minor. In the first degree, the offense includes a perpetrator at least 60 months older than the victim, in a significant relationship to the victim, and who commits the offense by abusing a supervisory relationship. WASH. REV. CODE ANN. §§ 9A.44.093–.096 (Supp. 1989). In Minnesota, an offender commits Criminal Sexual Misconduct by using his or her position of authority to coerce the victim into the abusive relationship. MINN. STAT. ANN. § 609.342(b) (1990). For a more extensive discussion of Minnesota law, see *infra* notes 57–61 and accompanying text; *see also* COLO. REV. STAT. § 18-3-405 (1984) (increasing from four years to ten the maximum penalty for sexual assault on a child by a person in a position of trust).

35. *See supra* note 12.

crimes of sexual activity with a minor range from one year for Sexual Assault in the Third Degree[36] to ten years for Rape of a Child[37] or Sexual Assault.[38] In contrast, none of these states imposes a limitation period for murder or for arson resulting in death.[39] Each of these states permits tolling statutes of limitation for a felony committed by a public officer in breach of a public duty or in violation of an oath of office.[40]

South Dakota is typical in the structure of its criminal laws and accompanying statutes of limitation. South Dakota has no statutes of limitation for major felony crimes (a "major crime" is defined as any class A, B, or 1 felony).[41] Rape and incest are class 2 and 5 felonies, respectively.[42] Because neither rape nor incest is classified a major crime a prosecution must commence within seven years of the offense.[43] In contrast, a defendant charged with forgery or theft may be prosecuted up to seven years after the *discovery* of the offense.[44] Thus, relatively minor crimes may have a limitation period considerably longer than those for child sexual abuse.

Further, although criminal statutes of limitation should be liberally interpreted in favor of repose,[45] every state has well-recognized tolling exceptions. In each of the twenty-four states without a tolling provision in child sexual abuse cases, the state's legislature previously enacted a statute permitting courts to toll criminal statutes of limitation during the time a defendant was not "usually and publicly" a resident within the state.[46] Many state legislatures also toll the limitation period during the time an indictment, complaint, or information is set aside.[47] Even when law enforcement officials know the defendant's out-of-state address, absence from the state may be sufficient to toll the limitation period for any crime.[48] Thus, in each of the "non-

36. NEB. REV. STAT. §§ 28-30, 29-110 (1985).
37. MO. ANN. STAT. § 556.037 (Vernon Supp. 1989).
38. *Id.*
39. SHEPARD'S LAWYER'S REFERENCE MANUAL (Supp. 1988) at 479–487.
40. *Id.*
41. S.D. CODIFIED LAWS ANN. § 23A-42-1 (1988).
42. *Id.* §§ 22-22-1 & 22-22-19.1.
43. *Id.* § 23A-42-2.
44. *Id.* § 23A-42-3.
45. United States v. Scharton, 285 U.S. 518, 522 (1932).
46. *See* SHEPARD'S LAWYER'S REFERENCE MANUAL, *supra* note 39 at 479–487.
47. *Id.*
48. *See e.g.*, State v. Ansell, 36 Wash. App. 492, 496, 675 P.2d 614, 617–18 (1984); *see also* State v. Howard, 52 Wash. App. 12, 20, 756 P.2d 1324, 1328 (1988) (12 year lapse between victim's death and defendant's murder trial was not a prejudicial delay absent a showing that loss of evidence affected defendant's ability to raise a defense); State v. Newcomer, 48 Wash. App. 88, 90, 737 P.2d 1285, 1289 (1987) (defendant's ability to adequately prepare his defense not prejudiced although defendant's alibi witness died during the five-year period in which the State failed to transfer defendant to Washington to stand trial on robbery charges).

"tolling" states, legislatures already authorize courts to toll statutes of limitation in some circumstances.

II. STATES' APPROACHES TO THE PROBLEM OF TIME-BARRED PROSECUTIONS IN CRIMINAL CHILD SEXUAL ABUSE CASES

Expiring statutes of limitation in child sexual abuse cases are a problem nationwide. To remedy the problem, many state legislatures and courts have adopted a variety of curative procedures. This section outlines solutions to the problem of time-barred prosecutions adopted by legislatures and courts throughout the states.

A. *Legislative Approaches To Tolling*

Legislatures have enacted a variety of solutions to the problem of time-barred prosecutions. In nine states there are no statutes of limitation for felony child sexual abuse.[49] Legislatures in another sixteen states have fashioned statutory provisions for tolling statutes of limitation in criminal child sexual abuse cases.[50] Although the statutes vary from state to state, all but two states (Arizona and Oklahoma) permit courts to toll the statute of limitation at least until the victim reaches the age of fifteen.[51]

State legislatures have begun to realize that the power relationship between the adult offender and the child victim makes reporting abuse within the statutory period very unlikely.[52] They continue to revise state criminal laws to reflect recognition of the power dynamics in the sexually abusive relationship. Generally, these legislatures have two motives for permitting courts to toll child sexual abuse statutes of limitation. First, legislators believe that children under a certain age need additional time to disclose the abuse.[53] Second, legislatures recognize

49. *See supra* notes 13–14 and accompanying text.
50. *See supra* note 15 and accompanying text.
51. *Id.*
52. *See supra* note 33.
53. "The bill [extending the statute of limitations] was introduced because prosecutors were concerned that this increased time was necessary when sexual crimes were committed against children. . . . This additional time should enable the state to more effectively prosecute criminal defendants who commit a felony against children under fourteen years of age." *Georgia Legislation, supra* note 33. What legislatures fail to recognize, however, is that adults, too, need additional time to report the abuse. Age is a facile bright line test for determining when a victim will be deemed to have the requisite emotional stability to criminally prosecute his or her abuser. Child victims may become adults long before they have recovered from the abuse sufficiently to report their abuser. *See* Rosenfeld, *The Equitable Estoppel Remedy, supra* note 11.

that child sexual abuse is an offense serious enough to warrant law which facilitate prosecution of offenders.[54]

B. *Judicial Approaches To Tolling*

Courts in several states have fashioned judicial exceptions to stat utes of limitation in criminal cases of child sexual abuse. These court employ two approaches. Some state courts have applied the "continu ing crime" doctrine. Other state courts have extended existing "secre manner" or "concealment" statutes to cases of child sexual abuse.

1. *Continuing Crime Doctrine*

In common law, a crime continues, and therefore is not complete, so long as the defendant engages in the criminal conduct.[55] The statut of limitation does not begin to run until the crime is complete. Courts have employed the contin ing crime doctrine to toll the statute of limitation for the duration of e criminal activity.

The Minnesota Court of App als has used the continuing crime doctrine to extend the limitation riod in cases of criminal child sexual abuse. In *State v. Danielski*,[57] a case of first impression, the court held that where an element of a sexual offense is the perpetrator's exercise of authority over the victim, the exercise of that authority to prevent the victim from reporting the abuse is a continuing crime.[58] The victim in *Danielski* was abused by her stepfather over a seven-year period, beginning when she was nine years old. Although the victim told her mother about the abuse, the mother did nothing. On one occasion, she participated in the abuse.[59] Thus, the same parental authority that was used to accomplish the criminal acts also was used to prevent the victim from reporting the abuse.[60] The court reasoned

under these facts, the offense continued until the abuse of author- ceased. Applying the continuing crime doctrine, the court held because the ongoing abuse of authority prevented the crime from g complete, the statute of limitation did not begin to run until the im was no longer subject to her parents' authority.[61]

Secret Manner and Concealment Statutes

In many states, statutes of limitation may be tolled in a criminal e if the crime is committed in a secret manner,[62] or if the perpetra- concealed the fact that a crime occurred.[63] Courts have wide retion in determining the scope of secret manner and concealment visions. For example, the Nevada secret manner tolling statute[64] not specify in which criminal cases the statute of limitation may olled pursuant to these provisions. In *Walstrom v. State*,[65] the vada Supreme Court held that the secret manner statute could be lied to criminal cases of child sexual abuse even where the victim aware that an offense had been committed.[66] In *Walstrom*, the

54. *See supra* note 33.

55. *See generally* 21 AM. JUR. 2D *Criminal Law* §§ 154–57 (1965). "[T]here are crimes whi are continuous in character . . . . Generally, in crimes of this nature, the statute does not begin run from the occurrence of the initial act . . . but from the occurrence of the most recent act *Id.* § 157.

56. Pendergast v. United States, 317 U.S. 412, 418 (1943); United States v. Irvine, 98 U 450, 452 (1879).

57. 348 N.W.2d 352 (Minn. Ct. App. 1984).

58. *Id.* at 355–56.

59. The victim also sought assistance from friends and professionals. She eventually disclo the abuse to her natural father and stepmother, who immediately reported it to law enforcem authorities. The report was filed 26 days after the statute of limitation had expired. *Id.* at 3

60. The defendants in *Danielski* were charged with criminal sexual misconduct in the degree. *Id.* at 353. In Minnesota, criminal sexual misconduct in the first degree occurs whe adult feloniously and unlawfully engages in sexual penetration with a minor and the minor least 13 but less than 16 years old, the defendant is at least 48 months older than the victim,

ant is in a position of authority over the victim, and the defendant uses that authority to the victim to submit to the sexual acts. MINN. STAT. § 609.342(b) (1980).

If the victim and the defendant are not in frequent contact and do not reside together, the nt's control over the victim may be insufficient to justify tolling the statute of limitation. tate v. Shamp, 422 N.W.2d 736, 740 (Minn. Ct. App.) (where the victim and the defendant t live in the same house and the defendant does not control the victim's day-to-day ents, defendant's authority is insufficient to prevent the victim from reporting the crime), *on other grounds*, 427 N.W.2d 228 (1988); *see also* State v. French, 392 N.W.2d 596 (Minn. App. 1986) (no tolling statute of limitation where, although victim was abused by her uncle, ter in her church, her uncle did not control her day-to-day life, he did not engage in "active ion" to prevent her from reporting the abuse, and, prior to reporting the abuse to law cement officials, victim's church congregation attempted to resolve the matter privately).

See, e.g., NEV. REV. STAT. § 171.095(1) (Supp. 1987) ("If a felony . . . is committed in a manner [a complaint must be] filed [within three or four years] after the discovery of the . . . .").

See, e.g., KAN. CRIM. CODE ANN. § 21-3106(4)(c) (Vernon Supp. 1986) ("The period which a prosecution must be commenced shall not include any period in which . . . the the crime is concealed . . . ."). Georgia's concealment statute provides that the period which the prosecution must be commenced does not include the period in which the committing the crime or the crime is unknown. GA. CODE ANN. § 17-3-2 (1982).

In Nevada, a crime is committed in a secret manner "when it is committed in a ately surreptitious manner that is intended to and does keep all but those committing the aware that an offense has been committed." Walstrom v. State, 752 P.2d 225, 228 (Nev. In addition to tolling statutes of limitation under the secret manner statute, Nevada has a statute tolling the limitation period in cases of child sexual abuse. The statute provides inal charges may be filed at any time until the victim of the sexual abuse is 18 years old ictim did not report the offense to any person who had a duty to report, and no other was made to a law enforcement or protective service agency. NEV. REV. STAT. 95(2) (Supp. 1987).

752 P.2d 225 (Nev. 1988).

Id. at 228.

defendant's wife revealed the abuse to law enforcement officials after she discovered pornographic slides of her husband committing lewd acts with a minor.[67] The court concluded that because the defendant committed the crime in a secret manner, the statute of limitation was tolled until the discovery of the offense.[68]

In Kansas and Georgia, courts have relied on the concealment statute to toll statutes of limitation in embezzlement or theft cases. The same courts, however, have refused to extend the concealment statute to criminal cases alleging child sexual abuse.[69] In *State v. Bentley*[70] the Kansas Supreme Court held that "[c]rimes against persons, by their very nature, cannot be concealed,"[71] and declined to "equate a threat made to a child victim with concealment . . . ."[72] Similarly, in *Sears v. State*,[73] the Georgia Court of Appeals refused to toll the statute in a criminal case of child sexual abuse. The Court held that where the victim knew that an offense had been committed, the victim's knowledge was imputed to the state. The court reasoned that if the state is aware of the offense, then the crime has not been concealed and the statute of limitation cannot be tolled.[74]

67. The pictures at issue had been taken at least eight years before their discovery. The defendant concealed the film in a locked footlocker inside his private vehicle. *Id.* at 226.

68. *Id.* at 229. The Nevada court rejected the assertion of the Kansas Supreme Court that, by their very nature, crimes against persons cannot be concealed. The Nevada court stated that the Kansas courts' interpretation of the statute was overbroad and failed to take into account the special vulnerability of children. *Id.* at 228.

69. The Kansas statute states that the statute of limitation does not include any period in which a crime has been concealed. KAN. CRIM. PROC. CODE ANN. § 21-3106(4)(c) (Vernon Supp. 1986). To constitute concealment under Kansas law, the defendant's acts must be calculated or designed to prevent discovery of the crime. State v. Bentley, 239 Kan. 334, 721 P.2d 227, 229 (1986).

70. 239 Kan. 334, 721 P.2d 227 (1986).

71. 721 P.2d at 230.

72. *Id.* The court cautioned that the "practical effect of construing a threat to a sexually abused child as concealment would be to extend the statute of limitations . . . in nearly every [child sexual abuse] case." It also noted that because statutes of limitation are measures of public policy, revising them is a task which should be left to the legislature. *Id.*

73. 182 Ga. App. 480, 356 S.E.2d 72 (1987).

74. 356 S.E.2d at 74. *But see Bentley*, 721 P.2d at 231 (Herd, J. dissenting) ("A nine-year-old victim does *not* 'necessarily know' that the acts of a trusted uncle constitute a crime.").

SOLUTIONS TO STATUTE OF LIMITATION PROBLEMS IN CRIMINAL CHILD SEXUAL ABUSE CASES

Although state legislatures continue to revise the statutes of limitation for child sexual abuse,[75] the current laws are inadequate to protect victims. Courts and legislatures must act to ensure that offenders cannot escape prosecution by coercing their victims into silence. The following section evaluates various mechanisms for effecting the necessary change.

Legislative Solutions

Eliminating or Increasing Statutes of Limitation

State legislatures could greatly increase—or even eliminate—the criminal statutes of limitation for child sexual abuse, and thereby ensure that prosecution of offenders would not be time-barred. This approach would permit the state to delay pursuing criminal charges against an alleged offender for an indefinite period of time or until the victim was no longer legally a minor. Greatly increasing or eliminating a statute of limitation effectively ameliorates the harsh effects of statutes of limitation.

There are, however, several drawbacks to this approach. The problem of time-barred prosecutions is not related to the *length* of the statute of limitation per se. Instead, the problem arises when child victims are unable to report because they are too young to know how or what to report, because they are too traumatized to report the crime, or because they are prevented from reporting the crime within the statutory period. Greatly increasing or eliminating the limitation periods may unnecessarily extend the reporting period for *all* child sexual abuse cases, including cases where the offender has not prevented the victim from reporting the abuse.

This approach also neglects the important judicial interests served by statutes of limitation. Statutes of limitation are designed to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories

75. In 1989, the Washington Legislature enacted a statute tolling the limitation period in all criminal cases of child sexual abuse until the victim reaches the age of 18. 1989 Wash. Laws ch. 3, § 3. In 1987, the Massachusetts Legislature extended from six years to ten the criminal statute of limitation for sexual offenses committed upon a child under 14 years of age. The limitation period does not begin to run until the victim reaches age 16 or until the offense is reported to law enforcement officials, whichever occurs first. MASS. ANN. LAWS ch. 277, § 63 (Law. Co-op. Supp. 1988); *see also* Note, *The Discovery Rule, supra* note 11, at 959–60.

have faded, and witnesses have disappeared."[76] Statutes of limitation provide predictability for both the defendant and the prosecution by prescribing the time period beyond which "there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."[77] Finally, it is argued that statutes of limitation provide defendants with repose, by limiting defendants' exposure to criminal prosecution to a fixed period of time.[78] For all these reasons, extensions of statutes of limitation should be closely tailored to address specific needs. Thus, eliminating or greatly increasing the limitation period for all sexual offenses involving a minor is not the best solution to the problem of time-barred prosecutions.

2. *Statutes Tolling The Limitation Period*

A statute permitting courts to toll the limitation period in criminal cases of child sexual abuse could ameliorate the harsh effects of statutes of limitation. Applying a tolling statute to child sexual abuse cases also is consistent with state laws criminalizing child sexual abuse, with public policy reasons for tolling *civil* statutes of limitation in child sexual abuse cases, and with existing state tolling provisions.

Many states have already enacted appropriate tolling statutes. Sixteen states have enacted statutes specifically permitting courts to toll statutes of limitation in criminal cases of child sexual abuse.[79] Although the statutes vary their requirements for tolling, each state's provision reflects an awareness that criminal statutes of limitation must accommodate child victims who are less able than adults to disclose incidents of sexual abuse.[80]

Legislatures (and courts) remain willing to toll the limitation period for a variety of offenses, despite evidentiary concerns and defendants' claims of prejudice.[81] Because courts recognize that the passage of

76. Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 348–49 (1944); *accord* United States v. Kubrick, 444 U.S. 111, 117 (1979); Tyson v. Tyson, 107 Wash. 2d 72, 75–76, 727 P.2d 226, 228 (1986).

77. United States v. Marion, 404 U.S. 307, 322 (1971).

78. *See, e.g.*, HAW. REV. STAT. § 701-108 (1985) (Commentary) ("Even a person who has committed a penal act is entitled, after the passage of some time, to conduct his affairs on the assumption that they will not be disrupted by a prosecution."). Despite this position, however, many states impose no limitation period for murder nor for a variety of other crimes. *See supra* notes 39–40 and accompanying text.

79. *See supra* note 15.

80. *See supra* note 33.

81. For example, in State v. Ansell, 36 Wash. App. 492, 675 P.2d 614 (1984), the Washington Court of Appeals held that the defendant's absence from the state justified tolling the statute of limitation, although law enforcement officials were continually aware of his residence outside the state. The defendant argued that rape charges against him should be dismissed. Relying on

...does not necessarily prejudice a criminal defendant, prosecutors ...uld be permitted to pursue criminal charges against sex offenders ...o effectively discourage their victims from reporting the abuse, or ...o violate children too young to disclose that they have been abused. ...egislatures previously have enacted measures to permit tolling the ...tute of limitation in other circumstances.[82] They also should pass ...gislation tolling the limitation period in cases of criminal child sexual ...use.

... *Judicial Solutions*

...The concealment doctrine in Minnesota and the secret manner statute in Nevada enabled these courts to toll the statutes of limitation. ...er, neither of these approaches is an ideal solution to the statutes of ...itation problem.

... *Continuing Crime Doctrine*

...Adopting the concealment doctrine to establish a continuing crime ...ers several benefits. Adoption of the doctrine would require no ...anges in state law. This approach therefore would permit courts to ...l the statutes of limitation in child sexual abuse cases even if the ...te's legislature fails to enact a specific tolling provision. The con...alment approach also grants courts broad discretion in determining ...ether an abuser's conduct falls within the scope of the exception. It ...us permits courts to focus on the very factor which prevented the ...use from being reported within the statutory period: the use of ...thority to coerce the child victim into an abusive relationship.[83]

...Despite these benefits, however, adopting the continuing crime ...proach would be a limited solution. The Supreme Court has stated ...t a criminal offense should not be construed as a continuing crime ...less either the explicit language of the statute compels such a con...sion, or the framers of the law intended that the offense be treated

...d States v. Marion, 404 U.S. 307 (1971), the Court held that the possibilities that memories ...d dim, witnesses would become inaccessible, and evidence would be lost were not in ...selves enough to demonstrate prejudice, or to justify dismissal of the indictment. *Ansell*, 36 ... App. at 498–99, 675 P.2d at 618–19. Similarly, Washington courts have permitted *civil* ... to proceed years after the statute of limitation had expired. *See e.g.*, Ruth v. Dight, 75 ... 2d 660, 667–68, 453 P.2d 631, 636 (1969). *But see* Tyson v. Tyson, 107 Wash. 2d 72, ...727 P.2d 226, 229 (1986) (statute of limitation not tolled where there was no independent ...ce to verify the victim's allegations of multiple sexual assaults committed against her by ...ther).

... *See supra* notes 39–40 & 46–48 and accompanying text.

... *See supra* notes 33–34 and accompanying text.

as a continuing crime.[84] Minnesota's criminal sexual misconduct stat
ute, for example, requires that the defendant occupy a position of
authority over the victim and that the defendant use that authority to
coerce the victim to submit to the abuse.[85] Thus, the defendant's con-
duct in *State v. Danielski*[86] was uniquely suited to fall within the con-
tinuing crime exception. Other states' child sexual abuse laws do not
dovetail so neatly with the continuing crime exception. In Washing-
ton, for example, only criminal sexual misconduct requires as an ele-
ment of the offense that a significant and supervisory relationship be
abused.[87] Far more serious crimes, such as incest, do not explicitly
require that the offender abuse a position of authority to engage in the
sexual contacts.[88] Thus, the concealment doctrine would be but a par-
tial solution to the statute of limitation problem.

2. Secret Manner and Concealment Statutes

State legislatures could enact secret manner or concealment statute
to permit courts, in their discretion, to toll the limitation period i
certain cases of child sexual abuse. Enacting a secret manner statut
has several benefits. First, this approach preserves judicial flexibilit
by permitting courts to decide case by case when the facts warrant
tolling the statute of limitation. Second, the secret manner and con
cealment statutes appear to address the very element of the crim
(secrecy and concealment) that prevents reporting and prosecutin
within the statutory period. Legislatures, however, would have t
resolve critical issues before implementing a secret manner or conceal
ment statute. For example, they would have to decide whether t
limit the statute to cases of child sexual abuse or to extend it to othe
concealed crimes. They would also have to carefully define what co
stitutes concealment.

The *Walstrom*,[89] *Bentley*,[90] and *Sears*[91] cases illustrate that suc
statutes can be ambiguous, depending upon whether concealment
narrowly or broadly construed. The *Walstrom* court, for examp
held that a sexual offense committed with a minor could be committe

84. Toussie v. United States, 397 U.S. 112, 115 (1970).
85. MINN. STAT. ANN. § 609.342(1)(b) (West Supp. 1989).
86. 348 N.W.2d 352 (Minn. Ct. App. 1984); *see supra* notes 57–60 and accompanying
87. *See supra* note 34.
88. Amending states' criminal laws to include "abuse of authority" as an element of
crime is not an appropriate solution. This would only increase the state's burden of proo
adding another element to be proven.
89. 752 P.2d 225 (Nev. 1988).
90. 239 Kan. 334, 721 P.2d 227 (1986).
91. 182 Ga. App. 480, 356 S.E.2d 72 (1987).

"secret manner."[92] On the other hand, *Bentley* and *Sears* held
threats to prevent victims from reporting the offense did not con-
ute concealment.[93] If a victim knew an offense had been commit-
that victim's knowledge was imputed to the state.[94] Accordingly,
fore a state could adopt a secret manner or concealment statute, the
islature would have to resolve the conflicts demonstrated by the
law.[95]

ecret manner and concealment statutes also are inefficient solutions
statute of limitation problems in criminal cases of child sexual
e, despite the flexibility and broad discretion they give the courts.
e statutes do not encompass the child sexual abuse cases where the
er does not actively coerce the victim but the child is too young or
ntened to report the crime within the statutory period. The stat-
also would unduly burden the courts by setting a standard that
ires individual application to each abusive incident in every case.

A CALL FOR LEGISLATIVE ACTION

e legislatures should enact statutes permitting courts to toll stat-
limitation in criminal cases until the victim reaches eighteen, if
ctim is under seventeen at the time of the offense. This statute
permit the state to delay pursuing criminal charges in cases
the victim was too young to report the abuse, and legally still
parental authority. Not tolling in cases where the victim is sev-
at the time of the offense is appropriate because even with a
ar statute of limitation the victim would reach majority before
iod for filing charges expired.

age of majority means that a person will be treated as an adult
legal system. It does not automatically make a child victim
ble to confront his or her experience as a sex abuse victim.
ictims may be living with their abuser at the time they reach
y, or after. Nevertheless, the age of majority provides legisla-
courts with a bright line test for determining when the limi-
period commences. It may allay legislatures' fears that criminal

752 P.2d at 228; *see supra* notes 65–68 and accompanying text.
721 P.2d at 230; Sears, 356 S.E.2d at 74; *see supra* notes 70–74 and ac-
ext.
notes 70–74 and accompanying text.
ley and *Sears* holdings and analyses should be rejected because they do not
pecial vulnerability of children. The courts' decisions fail to consider fully the
sexually abusive household, and the reasons why sexual crimes against a child,
estuous abuse, easily may be concealed. Further, the courts erroneously impute
the maturity and wisdom of adults, although in some instances victims may
are that a crime has occurred.

defendants' rights are being compromised.[96] Also, it spares courts and prosecutors the administrative overload which could result from a test requiring a case by case determination of when a victim could have reported the abuse. Legislatures should therefore amend existing tolling statutes[97] to read:

> . . . *And further provided,* That if the victim of a crime set forth in [statute(s) defining applicable offense(s)] is under the age of seventeen at the time the offense is committed, the period of limitation does not begin to run until the victim reaches the age of majority or until the offense is reported to a law enforcement agency, whichever occurs first.[98]

Until a state's legislature amends or enacts a tolling statute, state courts could extend existing secret manner or concealment statutes to toll the limitation period if a defendant engages in coercive behavior to prevent the victim from reporting the abuse.[99] When a perpetrator of child sexual abuse engages in coercion or threatens the victim in order to conceal the acts of abuse, courts should hold such conduct to be a continuing crime.[100]

V. CONCLUSION

Many victims of child sexual abuse are too young or too frightened to disclose their abuse while they are under the control or authority of the person who abused them. Unless state legislatures and the courts remedy the problem of time-barred prosecutions, offenders will continue to escape prosecution because the criminal statutes of limitation have expired.

There are several possible approaches to the statute of limitation problem, some of which have been successfully adopted in other states. The best solution is for state legislatures to extend the scope of existing

96. *See supra* notes 76–77 and accompanying text.

97. Every state already has a statute tolling the limitation period during the time a defendant is absent from the state. *See* state statutes of limitation referenced in SHEPARD'S LAWYER REFERENCE MANUAL, *supra* note 39 at 479–487.

98. The proposed statute closely parallels the tolling provisions in Florida, Massachusetts and Washington. *See* FLA. STAT. ANN. § 775.15(7) (West Supp. 1988); MASS. ANN. LAWS ch. 27 § 63 (Law. Co-op. Supp. 1988); 1989 Wash. Laws 1577 § 3.

99. Another useful approach would be to follow California's lead in criminalizing the conduct of a person who "attempts to prevent or dissuade another person who has been the victim of a crime [from] . . . [m]aking any report of such victimization to any peace officer or [state or local law enforcement officer]." CAL. PENAL CODE § 136.1(b)(1) (West Supp. 1988). Then, even if the limitation period for the sexual offense had expired, offenders could be prosecuted for preventing the report of the crime.

100. Criminal acts such as indecent liberties, rape, and child molestation probably would not fall within the scope of the continuing crime exception because abuse of authority is not usually a defined element of any of these offenses.

olling statutes. This would permit courts to toll the statutory period until the victim reaches the age of majority, or until the abuse is reported to law enforcement authorities.

State legislatures must act to protect child victims and to break the cycle of abuse. If the legislatures fail to act, child victims of sexual abuse will continue to suffer, neglected by a system unable to help them and unable to prosecute their abusers.

Jessica E. Mindlin

1-13

KANSAS BAR ASSOCIATION

Legislative Information for the Kansas Legislature

TO: *House Judiciary Committee*

FROM: *Ron Smith, KBA General Counsel*

SUBJ: *HB 2690; Statutes of Limitation*

February 1, 1994

POSITION

KBA did support the increase in statutes of limitation for sex crimes against children from two to five years. However, to extend that concept beyond five years to an indeterminate period of time based on a "discovery rule" is imprudent and will not result in quality prosecutions.

BACKGROUND:

Federal law generally has five year statutes of limitation while most state crimes have a two year statute of limitation. Certain sex crimes against children in Kansas carry the longer limitation. KBA supported this policy.

This lengthened statute was created in prat because of better evidence recovery techniques, such as DNA fingerprinting.

However, we have not supported general broad-based lengthening of statutes of limitation without having some singular purpose in mind.

Current five year statutes of limitation on certain sex crimes involving children raises many procedural problems for prosecutors, defense counsel and judges. Lengthening that time even further we do not believe enhances the criminal justice system.

Sex crime charges involving children are difficult to prove as it is. In the actions contemplated in HB 2690, physical evidence is usually nonexistent and often it is the word of one person against another. The accuser has usually "discovered" the crime because they've repressed it for years. When policy allows prosecutions to prosecute based on facts of a crime that are ten or fifteen years old, then it makes prosecution more difficult and the defense more expensive.

In many instances, the defense of these crimes will fall on the state through its indigent defense fund.

Most of the time a crime is cleared with an arrest by law enforcement officers well within the five year statute of limitation.

This legislative analysis is provided in a format easily inserted into bill books. We hope you find this convenient.

Further, if the facts of the crime or a series of ongoing crimes is hidden from authorities because of the actions of the defendant, the statute of limitation already stops running. (See page 2, line 3).

The proposed amendment is designed to allow the emerging issue of remembering repressed crime. *Such prosecutions are examples of a judicial system being wholly dependent on expert witnesses. Without experts to guide the person into remembering their repressed childhood incidences, such prosecutions fail. These procutions are wholly dependent on the experts.*

The legal profession is ofen criticized because of our dependence on expert witnesses to present the major viewpoints in litigaiton. The concept of an insanity defense is under continuing attack by members of this House. Those cases become battles of experts. This legislation is heavily dependent on experts. It would appear that the more one gets away from fact witnesses and into the realm of opinion testimony, the more skeptical the public becomes.

Further, by extending the statute of limitations possibly a decade or more creates satellite issues in these criminal cases. A major issue in every such case will be whether the child "discovered or reasonably should have discovered" the existence of the crime and when that happened.

The purpose of a statute of limitation is to give some finality to crimes and their prosecutions. While it would be possible to create a statute of limitation for all crimes, that is unlimited like the murder statute, it would not be practical.