A Community Prosecution Approach to Statutory Rape: Wisconsin's Pilot Policy Project

Sandy Nowack
A COMMUNITY PROSECUTION APPROACH TO STATUTORY RAPE: WISCONSIN'S PILOT POLICY PROJECT

Sandy Nowack*

INTRODUCTION

Three defendants stood in separate courtrooms in Dane County, Wisconsin, each charged with first degree sexual assault of a child. Each defendant faced the same consequences: a felony conviction carrying a potential term of imprisonment up to forty years. For each man, a conviction would bring life-altering collateral consequences including public humiliation, sex offender registration, and limitations on how the offender could earn a living.

A. Defendant Number One: The Pedophile

In the first courtroom, the defendant was a thirty-seven year-old white male with a considerable criminal history, including two prior convictions related to sexual assaults of eight year-old children. After police investigated allegations that he had impregnated his fourteen year-old stepdaughter, they learned of another earlier victim, an eight year-old neighbor whom the defendant had anally raped. The defendant was eventually convicted, though he continued to deny assaulting the eight year-old.

At sentencing, the defendant’s common-law wife sat next to her daughter and grandchild. As the proceedings commenced, the teen held her baby toward the defendant, enabling him to steal a glance at his child. Throughout the investigation, the teen told prosecutors she did not want the defendant punished. What happened between them, she said, was as much her choice as his. However, at sentencing the teen elected not to address the court.

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The teen’s mother remained loyal to the defendant and asked the court for leniency so the defendant could support his child. In a letter before sentencing, the defendant told the judge, “I made a big mistake by falling in love with someone to [sic] young for me and not realizing what the consequences are.”

B. Defendant Number Two: Straight Out of the Movies - A Dirty Old Man, But He Really Loves Her

In the second courtroom, several teenage girls sobbed as the judge sentenced their stepfather for a number of offenses, including having sexual contact with the girls’ thirteen year-old friend. The thirty-one year-old married male had no criminal record until he was charged with having sexual contact with the teenager, two months after her thirteenth birthday. When confronted by police, defendant number two said he understood that his “relationship” with the girl was illegal, but, he said, he loved her.

After defendant number two’s initial appearance, he was released on bail with the condition that he have absolutely no contact with the child. Within three months, police executed a search warrant at the defendant’s home, confronting him as he fled a second-floor bedroom. Inside, police found the thirteen year-old sitting on a large mattress. A dozen candles illuminated the darkened room. Two crystal flutes stood near a chilled bottle of champagne. Like a scene from a popular American film, rose petals were scattered atop the bed and a single red rose lay on the floor. A boom box played music by the Backstreet Boys.

At a bail hearing following the defendant’s second arrest, the thirteen year-old referred to the defendant as her fiancé, and identified an engagement ring he had given her. She told the court about the defendant’s plans to take her with him to Mexico, where they could start a life together.

C. Defendant Number Three: The Young Lover

Defendant number three was a nineteen year-old man who had intercourse with his fifteen year-old girlfriend. In spite of explicit warnings about the consequences of teenage pregnancy from the girl’s father, the girl conceived a child. She now begged to have the charges dropped, and hysterically insisted that she needed to see the defendant.

1. Letter from Defendant number two to trial judge (on file with author). Parties and case number are not identified to protect the identities of the victims.
Both of the girl’s parents communicated with the prosecution team as the case unfolded. They were both disappointed and concerned, but the mother was open to a continued relationship between her daughter and the defendant. The girl’s father was furious, and though he did not want the young man’s life ruined, he did want the defendant to be held accountable.

Defendant number three was a high school graduate with one non-assault misdemeanor conviction. He had never been in jail. He argued relentlessly that he loved his girlfriend, and that he ought to be permitted to parent his child. He would have his own family’s support in doing so.

The accounts presented above are not vignettes from a provocative new movie, a prime-time soap opera, or a “reality” cop show. These scenarios closely resemble actual cases encountered by the Dane County, Wisconsin, Prosecution Pilot Project on Statutory Rape. Each of the defendants committed the same crime under the law; each faced the same penalty for his offense. Clearly, equal sentences would not have served the interests of justice.

Perhaps more than any other type of crime, statutory rape cases, sexual assaults that are criminal because of the victim’s age, do not lend themselves to a simplistic application of the law. These cases become magnifying glasses, exposing with particular clarity any lack of harmony that exists in a community’s cultural values, beliefs about parenting and teens, and attitudes about female sexuality. They also identify inadequacies within criminal justice systems that are not equipped to deal appropriately with adolescent victims.

In Wisconsin, like many other jurisdictions, the law charges prosecutors with the duty to respond to these cases, with little guidance on how to harmonize a community’s differences, and no clear analytic process with which to discern “the right thing to do” under the law. The Wisconsin Legislature created the Prosecution Pilot Project on Statutory Rape to help Wisconsin prosecutors in that regard. Though awarded to the Dane County District Attorney’s Office, the grant project was intended to develop a model policy, which would ultimately be made available to prosecutors throughout Wisconsin.

This piece is intended to give an overview of the Dane County’s Pilot Prosecution Project on Statutory Rape. This article speaks with the voice of a prosecutor, not an academician. The article first introduces general principles of Wisconsin law and the background of the prosecution project. The article then summarizes the project’s

2. See infra Part II.
accomplishments over the fifteen months it was funded, and shares some highlights of what was learned through the Dane County experience.³

II. THE LAW IN WISCONSIN: A FRAMEWORK

A. Statutory Rape and Sexual Assaults

Legal researchers will not find any specific reference to the crime of "statutory rape" in the Wisconsin statutes. Quite simply, Wisconsin statutes defining sexual assaults do not recognize the crime of statutory rape as distinct from other sexual assaults of children. Crimes against children are codified in Chapter 948 of the Wisconsin statutes. Anyone, regardless of age, who has sexual intercourse or sexual contact with a child under the age of sixteen, violates section 948.02 of the Wisconsin Statutory Code, a felony offense, with maximum penalties ranging from imprisonment of twenty to forty years.⁴ This chapter does not allow for a misdemeanor offense if a sexual assault victim is under the age of sixteen.

Sexual assaults of children are strict liability offenses.⁵ The state does not have to prove that the child did not consent to the sexual

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³ See infra Part III.
⁴ Section 948.02 of the Wisconsin Statutes (1999-2000) provides:
   
   Sexual assault of a child.
   
   (1) First degree sexual assault. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.
   (2) Second degree sexual assault. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class BC felony.
   (3) Failure to act. A person responsible for the welfare of a child who has not attained the age of 16 years is guilty of a Class C felony if that person has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child, is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.
   (3m) Penalty enhancement; sexual assault by certain persons. If a person violates sub. (1) or (2) and the person is responsible for the welfare of the child who is the victim of the violation, the maximum term of imprisonment may be increased by not more than 5 years.
   (4) Marriage not a bar to prosecution. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.
   (5) Death of victim. This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

⁵ But cf. State v. Olson, 616 N.W.2d 144 (Wis. Ct. App. 2000). This case held that the trial court erred in rejecting proposed jury instruction requiring that the jury find the defendant committed some volitional act or affirmative instruction to the underage boys with whom she had sexual intercourse. The trial court's instruction that the state need only prove that intercourse
behaviors; a child is legally barred from giving consent. Wisconsin law specifically denies an offender a defense if he was mistaken about the age of the child, even if the child lied to the adult about her age.\(^6\) The statutes implicitly repeat one consistent theme: in Wisconsin, a child lacks the legal capacity to consent to sexual intercourse.\(^7\)

Under Wisconsin law, sixteen and seventeen year-olds may legally consent to sexual contact, but not to intercourse.\(^8\) A person who has sexual intercourse with a child over the age of sixteen commits a misdemeanor offense.\(^9\) Convictions of the misdemeanor crime created by this section are generally exempt from the significant collateral consequences that accompany convictions in which the victims were under the age of sixteen. Adults who have sexual intercourse with teens over the age of sixteen are not required to register as sex offenders, regardless of the difference in age between the offender and the teen.\(^10\) These offenses are not predicate offenses underlying civil

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6. Although Wisconsin Statute § 939.43 (1999-2000) creates a defense if an error in fact or law negates a \textit{mens rea} element of a crime, the statute expressly excepts "mistake of age" defenses in sexual assaults of children. Section 939.43 provides:

Mistake. (1) An honest error, whether of fact or of law other than criminal law, is a defense if it negates the existence of a state of mind essential to the crime. (2) A mistake as to the age of a minor or as to the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section is not a defense.


7. See, e.g., \textit{Wis. Stat. Ann.} § 939.43(2) (West 1996) (mistake of age is not a defense). Other crimes of sexual assault committed against adults and/or requiring proof of lack of consent are enumerated in Chapter 940, Crimes Against Life and Bodily Security. See, e.g., \textit{Wis. Stat. Ann.} § 940.225(2) (West 1996) Second Degree Sexual Assault. "Whoever does any of the following is guilty of a Class BC felony: (a) has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence."


9. Wisconsin Statute 948.09 is a Class A misdemeanor and punishable by a fine of not more than $10,000, imprisonment for not more than nine months, or both. \textit{Wis. Stat. Ann.} § 939.51(3)(a) (West 1996).

10. Violations of Wisconsin Statute 948.09 are not even defined as sex offenses in the sex offender registration statute. According to Wisconsin Statute 301.45(1d)(b) (West 1996):

"Sex offense" means a violation, or the solicitation, conspiracy or attempt to commit a violation, of s. 940.22(2), 940.225(1), (2) or (3), 944.06, 948.02(1) or (2), 948.025, 948.05, 948.055, 948.06, 948.07, 948.08, 948.095, 948.11(2)(a) or (am), 948.12, 948.13 or 948.30, or of s. 940.30 or 940.31 if the victim was a minor and the person who committed the violation was not the victim's parent.

commitments for sexually violent offenders, nor are they considered serious sex offenses for criminal penalty enhancers.\textsuperscript{11}

\textbf{B. Increasing Liability for Sex Offenders in Wisconsin}

Sex offenders who give advance consideration to the legal consequences of their crimes may choose to commit their crimes somewhere other than Wisconsin. In the past decade, the Wisconsin Legislature has dramatically increased the consequences sex offenders face upon conviction. These dramatic consequences raise the stakes for statutory rapists, as well as for prosecutors responsible for securing just results in the cases they prosecute.

In 1995, criminal penalties for sexual assaults of children were increased to as much as forty years for a single offense, and sixty years for repeated acts of assault against the same child.\textsuperscript{12} Rather than a three strikes law, "persistent sex offenders," for example, who commit two serious sex offenses against children may be imprisoned for life.\textsuperscript{13} Because of these measures, sex offenders who commit their crimes in Wisconsin will quite often face life imprisonment or lifetime supervision if they are classified as repeat offenders.

Arguably the most notable of the collateral consequences of sexual assault convictions is Wisconsin's law permitting civil commitment for sexually violent persons.\textsuperscript{14} Under Chapter 980, sex offenders who are "substantially probable" to re-offend at the end of their prison term

\begin{itemize}
  \item \textsuperscript{11} Unlike other strict liability sex offenses involving minors, sexual intercourse with a child over age sixteen, without force, is not considered a sexually violent offense under Wisconsin's mental health commitment statute for sexually violent persons. \textit{Wis. Stat. Ann.} § 980.01(6) (West 1996).
  \item \textsuperscript{12} \textit{Wis. Stat. Ann.} § 948.02(2) (West 1996).
  \item \textsuperscript{13} \textit{Wis. Stat. Ann.} § 939.62(2m)(c) (West 1996). This discretionary section makes no provisions for offenders who may be close in age to the children they assault. "If the actor is a persistent repeater, the term of imprisonment for the felony for which the persistent repeater presently is being sentenced ... is life imprisonment without the possibility of parole or extended supervision."
  \item \textsuperscript{14} A sexually violent person is:
    \begin{itemize}
      \item a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect or illness, and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.
    \end{itemize}
    \textit{Wis. Stat. Ann.} § 980.01(7) (West 1996). Petitions for commitments as sexually violent persons are filed within ninety days of the prisoner's release from the correction facility. \textit{Id.} A complex statutory structure assures that the offender's constitutional rights are protected, while assuring protection of the public. \textit{Id.}
may be institutionalized or supervised in the community for treatment purposes, until such time as they are no longer dangerous.\textsuperscript{15}

Another separate statutory provision allows for lifetime supervision of serious sex offenders, without the mental health commitments required under Chapter 980.\textsuperscript{16} Additional tools for deterring sexual violence are found within the penalty enhancements for repeat serious sex offenders, and offenders who commit an offense while knowingly in possession of a sexually transmitted disease.\textsuperscript{17}

Wisconsin law attempts to protect its citizens from further assaults perpetrated by sex offenders through sex offender registration,\textsuperscript{18} the


\textsuperscript{16} Wis. Stat. Ann. § 939.615 (West 1996). The definition “lifetime supervision of serious sex offenders” specifies that “serious sex offenses” include felony sex offenses against children, including incest and sexual contact, and felony sexual assaults of adults, but these do not include incest or misdemeanor offenses. Section 939.615(b) provides: “‘Serious sex offense’ means any of the following: 1. A violation, or the solicitation, conspiracy or attempt to commit a violation, of s. 940.22(2), 940.225(1), (2) or (3), 948.02(1) or (2), 948.025(1), 948.05(1) or (1m), 948.055(1), 948.06, 948.07, 948.08, 948.11(2)(a), 948.12 or 948.13.” The statute allows for consideration of other crimes, including solicitation, conspiracy and attempt if the court determines that one of the purposes for the conduct was the offender’s desire for sexual arousal or gratification. The statute further provides that lifetime supervision may be ordered as follows:

(b), if a person is convicted of a serious sex offense or found not guilty of a serious sex offense by reason of mental disease or defect, the court may, in addition to sentencing the person, placing the person on probation or, if applicable, committing the person under s. 971.17, place the person on lifetime supervision by the department if notice concerning lifetime supervision was given to the person under s. 973.125 and if the court determines that lifetime supervision of the person is necessary to protect the public.

\textit{Id.}

\textsuperscript{17} Wis. Stat. § 939.622 (West 1996). Committing a serious sex crime while infected with acquired immune deficiency syndrome, HIV or a sexually transmitted disease, allows that the maximum term of imprisonment for serious sex offenses may be increased by not more than 5 years if all of the following apply:

(a) At the time that he or she commits the serious sex crime, the person convicted of committing the serious sex crime has a sexually transmitted disease or acquired immune deficiency syndrome or has had a positive test for the presence of HIV, antigen or nonantigenic products of HIV or an antibody to HIV.

(b) At the time that he or she commits the serious sex crime, the person convicted of committing the serious sex crime knows that he or she has a sexually transmitted disease or acquired immune deficiency syndrome or that he or she has had a positive test for the presence of HIV, antigen or nonantigenic products of HIV or an antibody to HIV.

(c) The victim of the serious sex crime was significantly exposed to HIV or to the sexually transmitted disease, whichever is applicable, by the acts constituting the serious sex crime.

(3) This section provides for the enhancement of the maximum term of imprisonment provided for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (2).

creation of a deoxyribonucleic acid (DNA) databank,\(^{*}^{19}\) and community notification.\(^{*}^{20}\)

In addition to increased consequences for offenders, the Wisconsin Legislature recently took a bold move in amending the state constitution to provide for the rights of persons who become the victims of crime. The law now provides that the rights of victims are to be “honored and protected . . . in a manner no less vigorous than the protections afforded defendants.”\(^{*}^{21}\) Among the basic bill of rights extended to victims are requirements that prosecutors inform victims of their rights under the law, consult with victims prior to disposing of cases if requested by the victims, and dispose of cases as expeditiously as possible to “minimize the length of time they must endure the stress of their responsibilities in connection with the matter.”\(^{*}^{22}\) As will be discussed below, these rights apply to children and their parents in statutory rape cases, even if the child does not want the prosecution to proceed.

C. Statutory Recognition that Young Lovers Are Not Necessarily Predatory Sex Offenders

Each of the measures previously discussed serve victims directly or indirectly. The issue of statutory rape, however, raises the question of who is a victim. Wisconsin’s victims’ rights legislation determines that a teen who has intercourse with an adult is a victim, even if she refuses to see herself as a victim, and even if she attempts to obstruct the prosecution.\(^{*}^{23}\) Under Chapter 950, Rights of Victims and Witnesses of Crime, the term victim includes a person against whom a crime has been committed.\(^{*}^{24}\) If the victim is a child, i.e., a person under the age of eighteen, the child’s parents are also victims.\(^{*}^{25}\) It is not uncommon in statutory rape cases for the “victims,” the parents and their child, to have polarized views on what is an appropriate outcome in a case.

Even with this clear statement that teens who have been victimized by statutory rapists are victims, the Wisconsin Legislature also appears to have recognized that some offenders are less culpable than others. In many of the measures intended to protect children against sex of-
fenders, the Wisconsin Legislature distinguished true predatory sex offenders from young lovers who just happened to be teens.

Over time sex offender registration laws have been amended to create judicial discretion for offenders whose "victims" are peers. In addition, in actions for the termination of parental rights, judges have discretion to exempt statutory rapists from provisions which deny standing to offenders who impregnate their victims.

Even as the legislature worked to communicate its recognition that sex offenders, under the law, are not always predators, one offender took the issue of statutory rape in Wisconsin to the national media.

In 1997, Kevin Gillson was ultimately convicted of repeated acts of sexual assault, a felony, as a result of sexual acts he engaged in with a fifteen year-old girl who became pregnant. As headlines chastised the prosecutor for criminalizing young love, the debate about statutory rape raged on. District Attorney Sandy Williams, from Ozaukee County, contends that the case was more about the problem of trying a case in the media than it was about statutory rape. Since Sandy Williams is ethically prohibited from discussing the details, the public will never know what, if any, plea offers had been extended to Mr. Gillson before he took his case to the media. Nevertheless, the Gillson case undoubtedly contributed to the climate that prompted the Wisconsin Legislature to fund the statutory rape prosecution project.

III. PROSECUTORIAL DISCRETION: RELEVANT STATUTES AND CHARGING DECISIONS

As a practical matter, the law prohibiting sexual contact or intercourse with children under the age of sixteen provides prosecutors with significant discretion. Technically, a fifteen year-old could be charged with having sexual intercourse with her fourteen year-old boyfriend. In reality, non-coerced sexual contact between two adoles-

27. See Wis. Stat Ann. § 48.42(2m) (West 1996); 1995 Wisconsin Act 108.
29. See generally State v. Gillson, Ozaukee County Case #969-CF-191.
30. Jeff Cole, DAs vary greatly on underage sex cases, Milwaukee Journal Sentinel, April 30, 1997, at 7A.
31. Telephone interview with Sandy Williams, Madison, Wisconsin, October 1999.
   (a) A lawyer . . . shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
cents is not typically charged without some aggravating factor. The question of whether a particular factor is sufficiently aggravating to warrant criminal culpability is decided by local prosecutors, and the answer may vary among and within local jurisdictions.

From a prosecutor's perspective, this broad discretion is a basic and essential tool in protecting victims. Even with corroborating evidence, sexual assault cases involving child victims are tough to prosecute. Though most people feel strongly that adults should not engage in sexual behaviors with children, juries are also concerned that a child's testimony could be wrong. Defense attorneys routinely demand that juries question whether a teen's testimony might have been tainted by a vindictive adult, by the teen's desire to harm the accused, or simply because the child lacks the capacity to know or remember what happened.

The fact that prosecutors need not prove a lack of consent in sex offenses against children assists prosecutors to carry out the legislature's intent, that an adult may not engage in sexual activity with a child, even if the child does not object to the sexual contact. Because the statute does not require proof of actual consent, Wisconsin's statutory structure empowers prosecutors to more easily convict offenders when they assault children with violence as well. For example, if an offender rapes a teen who is cognitively impaired, intoxicated, or who delayed reporting, the prosecutor need only prove that the contact occurred. An adult or juvenile rapist who assaults an adolescent may be held accountable under Chapter 948, while the victim is spared the experience of being cross-examined about any of the age-appropriate behaviors which may have caused her to be more vulnerable to the rapist.

With such a broad grant of authority, it is particularly important that prosecutors develop charging criteria that can be applied evenly and fairly. This grant of discretion comports with the legislature's direction: individuals who choose to have sexual contact with children carry an overwhelming responsibility for their actions, regardless of the child's state of mind.

Statutory rape cases often carry the same difficult proof issues that are presented by other sexual assaults, such as a lack of corroborating evidence, inconsistent statements, and the victim's reluctance to participate in the prosecution. In statutory rape cases, the evidentiary concerns are magnified because a child may purposefully obstruct the prosecution in an effort to protect the defendant. Potential jurors may have strong feelings about adults who assault "children," when an obviously "innocent" six year-old testifies. The jurors may be much
more ambivalent when a teenager angrily insists that she is responsible for what occurred. Consequently, a broad grant of discretion is necessary to allow prosecutors to address a crime after a realistic assessment of the evidence.

Prosecutorial discretion also helps insure that the criminal justice system treats offenders fairly. As previously noted, Chapter 948 does not create a specific misdemeanor offense for statutory rapists. When the circumstances warrant, many Wisconsin prosecutors rely on the section of Wisconsin's statutes establishing the misdemeanor offense of "sexual contact without the person’s consent." This section allows for a misdemeanor conviction with potential penalties including two years probation, not more than nine months imprisonment, and/or a fine of not more than $10,000. Although this approach has not yet been tested in the appellate courts, the prosecutors' theory is based on the legal premise that a child under the age of sixteen is legally incapable of giving consent, and therefore, the act was without a person's consent. Using the statutes in such a manner enables prosecutors to offer some legal consequence for offenders under appropriate circumstances, without blindly requiring a felony conviction and its collateral consequences.

The Wisconsin Legislature’s broad grant of prosecutorial discretion reflects the state's commitment to local government. This legacy is clearly expressed in the administration of criminal justice. With one exception, seventy-two Wisconsin district attorneys are elected to serve individual counties for two-year terms. Through the election process, local communities can readily express approval or displeasure with the way their prosecutors enforce the law.

IV. THE GRANT

A. Background and general objectives

The Wisconsin Legislature recognized prosecutors’ challenges in addressing statutory rapes. In 1997, Joan Wade Spillner, a Republican state representative from Columbia County, sponsored a bill to help resolve some of the difficulties. Initially intended as a welfare reform effort, 1997 Act 280 created a one-time, $183,000 grant, to fund spe-

34. The prosecutor's office in each of Wisconsin's seventy-two counties is headed by an elected district attorney and, in most counties depending on population, assistant district attorneys. The prosecutors' offices work independent of one another and, although administrative assistance and training is offered on a statewide basis, each office maintains its own prosecution policies. Shawano and Menominee Counties, which border the Menominee Reservation, share an elected district attorney.
cialized prosecutor and investigator positions in one Wisconsin county. Governor Tommy Thompson, known for his efforts in welfare reform, applauded the legislation as a measure to help reduce teen pregnancies.\textsuperscript{35}

The legislature envisioned that the grant recipient would increase prosecution of statutory rape cases, develop specialized knowledge and experience in prosecuting statutory rape cases, and ultimately create a model prosecution policy which would be made available to prosecutors statewide.

Counties were invited to apply for the grant based upon the number of statutory rape cases reported to law enforcement within a particular county during 1997. Sixteen of the seventy-two Wisconsin counties had at least twenty-five cases of reported statutory rape and were therefore eligible to compete for the grant.\textsuperscript{36}

In its grant application, the Dane County District Attorney's Office summarized the challenges prosecutors face in addressing statutory rape:

Sexual relationships between teenage girls and adult men create social costs beyond the most obvious and serious one of teenage pregnancy... [However], there is limited understanding of the seriousness of these consequences to the child and to the community as a whole. As a result, the community lacks consensus about whether and how to intervene in these relationships. Investigation and prosecution standards reflect this lack of knowledge and consensus in the variability of standards and results. Historically, such crimes have been undervalued in terms of the resources allocated to their investigation, prosecution, and services to victims. The seriousness of the offense is similarly not adequately reflected in the disposition of criminal cases.\textsuperscript{37}

\textsuperscript{35} A June 12, 1998, press release from Governor Tommy Thompson's office stated:

"This new law will give Wisconsin more ammunition to reduce teen pregnancies and help young people get a better start on life for a brighter future," Gov. Thompson said... The initiative was a key recommendation of the governor's Committee on Adolescent Pregnancy Prevention, chaired by two cabinet secretaries.

Saying, "there is no surer prescription for poverty than teen births," the governor noted that adolescent mothers are more likely to give birth to low-birth weight babies. As they grow up, those children are more likely to be physically abused, abandoned or neglected, more likely to drop out of school and wind up in prison. In Wisconsin, the average age of a sexual assault offender in 1996 was 25; the average age of a sexual assault victim was 15."

Press Release, Governor Adds Resources to Fight Teen Pregnancy (June 12, 1998) (on file with author).

\textsuperscript{36} Statutory Rape Prosecution Pilot Project Grant Announcement, Wisconsin Department of Health and Family Services, 1997, Madison, Wisconsin.

\textsuperscript{37} Statutory Rape Prosecution Pilot Project, Grant Application submitted to the Wisconsin Department of Health and Family Services by the Dane County District Attorney's Office, (Oct. 1, 1998) [hereinafter "Grant Application"].
Statistics supported prosecutors' beliefs that statutory rape cases are under-reported. In 1996, Dane County's population was 398,233. In that same year, Dane County prosecuted thirty-two cases of statutory rape. In contrast, a local sexual assault advocacy group reported that in 1997, the agency served 187 clients between thirteen and eighteen years of age. While all 187 teens were not victims of statutory rape, the numbers offered additional support for the proposition that teen victimization is under-reported. It stands to reason that if violent assaults remain unreported, statutory rapes, in which the victim does not see herself as having been assaulted, are equally so.

In addition to the issue of under-reporting, Dane County's grant application confronted another issue of considerable concern to prosecutors: whether and how cultural differences impact the dynamics of statutory rape. “Unlike more rural counties, Dane County's population is diverse, somewhat transient and increasing at a considerable rate.” Although Dane County's current population is mainly Caucasian, African-American, South East Asian, and Latino people are increasingly part of the Dane County community, and the numbers of immigrants are rising steadily.

The impact of these challenges are made more significant due to the ever increasing prosecution caseloads, without significant increase in the number of prosecutors and other prosecution resources. In 1996, Dane County prosecutors carried an average of 331 cases per attorney, compared to an average of 312 cases per attorney statewide. Quite simply, as prosecutors scurry between Dane County's eight criminal circuit court branches, they lack the luxury of time in which to meet with their constituency in order to explore creative approaches to significant community issues.

38. Id. at 1 (citing the Wisconsin Department of Administration, Demographic Services).
41. Grant Application, supra note 37, at 1.
43. Despite ever-increasing caseloads, Wisconsin prosecutors have been unsuccessful in their continuing efforts to increase their numbers. See, e.g., A.B. 615, 1999-2000 Leg., 94th Sess. (Wis. 1999). Without increased resources, prosecutors' attempts to address statutory rape cases will continue to be unduly challenged.
B. It Takes a Village: Dane County's Philosophical Approach to the Grant and the Issues it Presented

Wisconsin's system of county government ensures that prosecutors will remain true to the values of the citizens they represent. The grant team felt it important to involve the Dane County community in solving the problem of "what to do about statutory rape." The grant team had confidence in the community's ability to significantly influence how its prosecutors resolved the gray areas in statutory rape cases. Rather than proposing one simplistic and rigid solution, the grant staff expended its energy exploring the community's values relating to statutory rape. The obligation to other counties in the state would be carried out through two methods. First, the Dane County policy could be offered as a model. Second, tools used to assess Dane County's community values would be offered to prosecutors in other counties throughout the state, who could then use the tools to assess the will of their own constituencies.

One of the grant's objectives was increased prosecution. The grant team recognized this responsibility as important, however, it agreed that the most important method to increase prosecutions required more than simply beating the bushes for more cases. Rather, the team felt that cases should be improved through providing consistent guidance to investigative agencies, and most importantly, through increased quality of service to victims. The team hypothesized that victims who felt respected would be more likely to cooperate with the investigation, and less likely to obstruct the case prosecution. Moreover, victims treated with respect would be more likely to encourage their peers to avoid sexual contact with men who are over the age of eighteen.

In support of this philosophy, then Dane County District Attorney Diane Nicks joined the grant team in identifying the issue of statutory rape not only as an issue of criminal law, but also as a matter of public health. Children who have sex with adults run the risk of social disease and pregnancy, as well as a failure to fulfill their ultimate potential, to establish appropriate peer relationships, and to follow an appropriate developmental path. In short, children lose their opportunity to experience adolescence if they are playing grown-up and having sex with people who are significantly older. In line with a public health perspective, Nicks encouraged the grant team to design a method to prosecute these cases, not at the whim of the child, rather

44. The grantor asked that Dane County prosecute more cases than the thirty-two cases identified in 1997.
through a process that respected and recognized the victim’s personal integrity. Nicks drew parallels with domestic violence cases she prosecuted in a rural Wisconsin county twenty years earlier. Her charge to the grant team was, “[e]ven if she disagrees with the prosecution today, let’s find a way to do these cases so that the child will look back ten years from now and say, ‘I’m glad they did that.’”

C. Community Guided Policy Development and Programatic Changes

The grant team sought to increase the number of cases through a process which paralleled the community’s view of which cases ought to be criminalized, and most importantly, through a process which did not re-victimize the child. This grant became an adventure in community-oriented prosecution and problem solving.

The American Prosecutor’s Research Institute has explained that in community-oriented prosecution, “the authority of the prosecutor’s office is used to solve problems, improve public safety and enhance the quality of life in the community.” While the grant was not originally intended to be an exercise in community-oriented prosecution, it turned out to be one of the most useful aspects of the project. The project focused on an issue, rather than on a geographic area. In other regards, the grant incorporated many principles from the framework of community-oriented prosecution. The team formed a partnership with the community, utilizing a proactive approach to problem solving, which included both public safety and quality of life issues, and specifically brought guidance from the community into the courtroom.

Grant activities aimed at assessment of the community’s values can be discussed in three categories of constituents: 1) teens and their neighborhoods; 2) the professional community; and 3) a specially appointed Community Advisory Group.

1. The Teens and Their Neighbors

The grant’s first objective, learning what the community thought about statutory rape, provided the grant team with an opportunity that is not afforded to many local prosecutors. In the early days of the grant, the prosecutor and investigator left the cramped quarters of the district attorney’s office, got in a car, and drove to many of Dane

45. Interview/Discussion with Diane M. Nicks, Madison, Wisconsin, April 1999.
47. Id. at 2.
County's neighborhoods. While visiting the neighborhoods, the prosecutor and investigator simply talked to people. The team approached the discussions on a very pragmatic level and asked: "This is the law. This is the kind of case that crosses the prosecutors' desks. What advice would you give them? What would you want them to do?"

The grant team worked with existing community coalitions and interdisciplinary groups. Some neighborhood groups were selected particularly because of socio-economic or cultural factors. Other neighborhoods were targeted as a result of particular cases.

Local community groups helped the grant team to view the statutory rape issue from their perspective. While the team certainly witnessed a diversity of opinion, it also began to see patterns and similarities in people's opinions. For example, in a meeting with a Spanish-speaking mother's group, comprised largely of immigrants from Mexico and Central America, some women told the grant team that in their countries of origin, relationships between men over the age of eighteen and girls under the age of eighteen had been historically tolerated. However, the women made it clear that they did not approve of the phenomenon back home, and they did not want their daughters to have those experiences in the United States. Other mothers pointed out that the relationships were more difficult to condemn when the men involved might be their own sons. These women wanted reasonable results, and mostly, they wanted to avoid the occurrence of statutory rapes in their children's lives.

Two African-American mothers in one Madison neighborhood group became particularly animated as they argued about whether young girls who repeatedly become involved with adult men should be held criminally responsible. Both women agreed that the number of African-American men in prison is a tragedy, but one of the women was particularly concerned that African-American girls should be protected from the problems that come with early sexual activity with older partners. The other woman viewed the girls as contributing to the delinquency of young African-American men who were already at a disadvantage in the criminal justice system. This commentator believed that a girl who sought out a sexual relationship with a man should be prosecuted to an extent equal to that of the young man.

Elders from a south-east Asian community explained their view that there are good reasons to support relationships between teens and men who are as much as ten or more years older. These commentators explained that the adult would be in a position financially and emotionally to support the child, where a peer could not provide such support. Some of the citizens expressed the opinion that they would
prefer the District Attorney to intervene in sexual relationships among teens because in the peer relationships, neither person was properly equipped to be a responsible parent. Other members of the group, however, suggested that the traditional view of these relationships supported sexual violence or coercion. If a teen girl from within this community was found in a compromising position with a man, the community would expect her to marry the man, whether or not marriage would have been her choice.

The grant team had the unusual opportunity to visit teen victims in their own environments of home and school. The victims' friends, who often act as potential witnesses in the prosecution's cases, spoke with the grant staff. As will be discussed below, teens contributed their views in a more formal way as an important part of the community advisory group.

2. The Professional Community

The grant team also consulted with Dane County's professional community. In 1998, when the grant was awarded, the written policy in effect asked that investigative agencies refer all cases in which the age difference between the teen and the person with whom he or she had engaged in sexual activity was three or more years. The prosecution team spoke with Dane County professionals affected by the policy, including child protection workers, police, probation and parole officers, public health nurses, sexual assault nurse examiners, school social workers, sex offender treatment providers, teachers, and judges. The team learned that professionals were sometimes frustrated by the lack of a consistent response to statutory rape cases from prosecutors. The professionals commented that the work of "public servants" often requires triage. They wanted a better sense from prosecutors as to which cases justified the expenditure of overextended resources. These professionals occasionally felt uncomfortable advising their clients about what might happen in a particular statutory rape case because the results often varied depending on the police agency, prosecutor, and court involved in the case.

A second area of concern to community professionals was the difficulty and frustration they often experienced in working with the teens and their families. Given a choice, some professionals would choose simply not to work with both adolescents and their families. When pushed to be candid, some generalists, that is professionals whose con-

48. Letter from Michael Walsh, Deputy District Attorney, to All Dane County Police Agencies (August 29, 1992) (on file with the author).
stiuants were not primarily teens, sometimes described teenagers generally as dishonest, erratic, and “overly emotional.”

The grant team acknowledged that these professionals and some investigators would be more motivated to deal with statutory rape cases if they had a clear idea of the good that was accomplished through the investment of their energies in these cases. The grant team hypothesized that part of the challenge which faced law enforcement in dealing with teens was an inability to communicate confidently and effectively. When investigators experienced failure and frustration, they may have identified the teens as “problems,” rather than viewing the children as expressing developmentally appropriate issues in developmentally appropriate ways.

Additionally, the grant team realized that most of its beliefs about the negative aspects of adult and teen sexual relationships were based merely on intuition and experience. Consequently, one of the team’s tasks was to accumulate a sound knowledge base on the issues. In the interest of distinguishing beliefs supported by research from those that are intuitive, the grant contracted with a clinical psychologist, Erica Serlin, Ph.D., to provide technical assistance on the psycho-social sexual development of adolescents and the impact of adult and teen relationships on normative development. After conducting a literature review, Dr. Serlin developed a curriculum for Dane County law enforcement and social service investigators, probation agents, prosecutors, and other professionals who might be in a position to report statutory rapes. The training was intended to teach investigators about how adolescents think and communicate, what adolescents gain from sexual relationships with adults, and what those relationships ultimately cost the teens. For two days in November of 1999, multidisciplinary groups of more than 180 professionals from throughout Dane County came together to learn about adolescent victims of sexual assault. Dr. Serlin’s curriculum was one anchor for the training. During the training, prosecutors discussed existing policies with law enforcement and child protection investigators. These professionals, in turn, had an opportunity to clarify their own policies and discussed the appropriate exchange of information between agencies.

The grant team recognized the importance of joining the grant with existing community institutions. The most important of these institutions was Dane County’s new child advocacy center, Safe Harbor. The advocacy center made use of the Cognitive Graphic Interview

49. Dr. Erica Serlin is a clinical psychologist with the Family Therapy Center, Madison, Wisconsin.
Technique created by Ann Ahlquist, a professor at the University of Minnesota’s School of Social Work. Building on training already conducted locally for advocacy center purposes, the grant asked Professor Ahlquist to provide specialized training using the Cognitive Graphic Interview Technique with adolescent victims.

Participants responded positively to the local training. Most had never received training on interview techniques appropriate for adolescents. Using the Cognitive Graphic Interview Technique had an unanticipated benefit. Since the investigators had been trained to use the technique with children, the training highlighted adolescent developmental levels introduced by Dr. Serlin. The interview training consequently reinforced the training on adolescent developmental issues, and Professor Ahlquist’s expertise added to the legitimacy of defining statutory rapes as crimes against children.

3. The Tools

To facilitate discussion and policy development, the grant team used written case scenarios intended to target particularly challenging issues with professional and nonprofessional groups. One issue of general concern as evidenced by the existing Dane County policy, as well as by the Kevin Gillson case, was the question of a particular age difference between a child and the person who engages in sexual acts with her. One of the earliest tools developed was a simple numeric exercise. The exercise listed a couple by name, along with a series of ages. “Erin is 13, Devon is 15,” and “Erin is 13, Devon is 19,” and so on.50 The grant team then asked discussion participants individually.

50. The following is reproduction of the exercise which asked at what age should it be legally permissible for a child to have sex:

Erin and Devon are in love and have had intercourse. If asked, each would say that he/she wanted to have intercourse at the time. In which of the following scenarios do you think criminal prosecution is appropriate? Based upon the information you have regarding Erin and Devon’s ages, please place a check mark next to the cases in which the sexual intercourse should be illegal.

____ Erin and Devon are both 13.
____ Erin is 13; Devon is 14.
____ Erin is 13; Devon is 15.
____ Erin is 13; Devon is 16.
____ Erin is 13; Devon is 17.
____ Erin is 13; Devon is 18.
____ Erin is 13; Devon is 19.
____ Erin is 13; Devon is 14.
____ Erin is 14; Devon is 17.
____ Erin is 14; Devon is 18.
____ Erin is 14; Devon is 19.
____ Erin is 14; Devon is 20.
____ Erin is 14; Devon is 21.
____ Erin is 14; Devon is 30.
to identify the ages at which a sexual relationship should be permissible under the law, as well as those which they felt should be prosecuted.

Following this general discussion of the fictional characters and their ages, the grant team provided case scenarios that fleshed out alternative circumstances from the characters' lives. The scenarios were designed to confront troubling factors actually witnessed in the district attorneys' offices. One scenario described a Southeast Asian couple, with significant age differences. The child was proud to be in the relationship, and the couple's cultural community fully supported the relationship. A second scenario involves a twenty-two year old Mexican immigrant who falls in love with his fourteen year-old neighbor.

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**Scenario A**

Youa is a 14 year-old girl whose family and community recently celebrated her marriage to 25 year-old Cha. Though the marriage is not legal, Youa is committed to Cha. Youa is a sophomore at the local high school and suspected sexual abuse is reported when a teacher discovers that Youa is pregnant.

**Scenario A Responses**

- 20% Cha should be charged with a felony, but should not be incarcerated.
- 6% Cha should be convicted of a misdemeanor offense.
- 33% First offender programming is appropriate.
- 40% Cha should be brought in and confronted, but not charged.
- 6% Cha should register as a sex offender.
- 27% Cha should not be permitted to have further contact with Youa.

The age difference between Cha and Youa was the most commonly cited aggravating factor (73%).

Most common mitigating factors were:

- (67%) the victim and adult's cultural beliefs
- (20%) viewed this as an aggravating factor
- (67%) the adult's education and employment
- (6%) saw this is an aggravating factor
- (33%) the impact of the relationship on the victim and her family
- (27%) considered this an aggravating factor
- (33%) apparent lack of coercion
- (6%) saw this is an aggravating factor

**Scenario B**

Jose is a 22 year-old immigrant from central Mexico. He cannot read or write, and speaks no English. He works two jobs here in Madison and sends much of the money he earns back to his parents in Mexico. Jose lives with four other young men in an apartment. Each day Jose sees Lucia, a 14 year-old neighbor girl, who goes out of her way to smile and wave at him. Before long, Jose spends much of his little free time with
Although the two claim to be in love, the girls' parents object to the relationship. A third scenario introduced a very intelligent and seemingly mature fifteen year-old, who became involved with a twenty-three year-old manager of a fast-food restaurant with whom the child worked. The immature adult manager had a history of developing relationships with the teens he employed.

Lucia whose own parents are often at work. Jose and Lucia say they are in love, and begin a sexual relationship. One day, Lucia's older sister discovers them in a compromising situation and tells Lucia's father. Lucia's parents are very upset about the relationship and they want Jose kept away from their daughter. Although Lucia wants to be with Jose, she is afraid to disobey her parents.

Scenario B Responses
40% Jose should be charged with a felony.
20% Jose should be incarcerated.
73% Jose should be referred to a first offender program.
47% Jose should be convicted of a misdemeanor.
6% Jose should be brought in and confronted, but not charged.
93% Jose should not be allowed to have further contact with Lucia.
20% Jose should register as a sex offender.
33% Jose should not register as a sex offender.
The victim's age and the adult's awareness of her age were the most common aggravating factors (87-100%).
80% said the victim's parents' attitude about the relationship as an aggravating factor.
20% viewed the victim's attitude toward prosecution as an aggravating factor; 13% viewed her attitude as a mitigating factor.
33% identified the victim and adult's cultural beliefs as mitigating factors; 20% viewed the cultural factors as aggravating.

Scenario C
Denise is 15, Aaron is 20. They met at the fast-food restaurant where they work. Denise is a high school sophomore, Aaron is at the University. They are both honor students, competitive swimmers and they do volunteer work for the same literacy organization. Denise and Aaron believe they are soul-mates and take every opportunity they can to be together. They have had sex several times but are careful to use birth control. "We have definite plans for our future," says Aaron. Denise and Aaron know that the sexual contact is illegal, but they don't expect anything to happen to them unless their parents find out. Denise and Aaron are an interracial couple and their parents will not allow them to date because the parents disapprove of interracial relationships.

Scenario C Responses
13% Aaron should be charged with a felony.
67% Aaron should be referred to a first offender program.
6% Aaron should be incarcerated.
20% Aaron should be convicted of a misdemeanor offense.
27% Aaron should be brought in and confronted, but not charged.
40% Aaron should have no further contact with Denise.
6% Aaron should register as a sex offender.
47% Aaron should not register as a sex offender.
Between 73 and 87% considered the parties' ages and/or the difference in ages as aggravating factors.
40% indicated the victim's attitude toward prosecution was a mitigating factor, as was an apparent lack of coercion.
Discussion participants were asked to make charging decisions and design dispositions they deemed appropriate for each case. The scenarios were not intended to provide empirically tested data. They provided an opportunity for participants to formulate their own beliefs about the statutory rape question, while providing input for ultimate policy development.

5. The Community Advisory Group

Ultimately, the district attorney created a twenty-five member community advisory group to speak on the community’s behalf. The group’s composition was intended to reflect the community at large, and particularly those with an investment in the issue. Group members included six teens, a student newspaper editor, teenage parents, and statutory rape victims. Other members included the professionals identified above, as well as parents, journalists, sex offender treatment providers, and urban planners.

The grant team explained up-front that the group’s purpose was outcome specific, and the time commitment would be limited to four professionally facilitated meetings held over the course of approximately nine months. Prosecutors informed the group that its recommendations, whatever they might be, would be considered along with other factors that are always present in prosecutor’s decision making, such as, harm to the victim, the offender’s prior criminal history, treatment needed by the offender, and the extent to which the offender took responsibility for his behaviors. Prosecutors assured the group that none of its recommendations would be applicable to cases involving force or threats of violence.

Ultimately, the advisory group arrived at a consensus on some very difficult policy issues related to charging and disposition in statutory rape cases. The advisory group strongly encouraged prosecutors to evaluate cases individually, and recognized the distinction between

13% viewed the victim's parents' attitude toward the relationship as a mitigating factor; 33% viewed the parental attitude as an aggravating factor.
33% indicated that the effect of the relationship on the victim's relationship with her parents was an aggravating factor; 13% viewed this as a mitigating factor.
54. The following reflects the recommendations of the advisory group:

CHARGING/DISPOSITION
CONCEPTUAL DRAFT

PLEASE NOTE: These are conceptual guidelines only. The phrase “objective disposition” is used to identify the desired outcome in cases without significant aggravating or mitigating factors, and without evidentiary concerns.
1) Cases in which child is under 13 years are not contemplated within the statutory rape scheme. (i.e., the act is a first degree sexual assault of a child without regard for the perpetrator’s age, or the child's wishes)
the charging and disposition phases of the prosecution. It became clear that variables in individual cases could often overwhelm all but the most flexible of policies. Therefore, the advisory group was asked

2) With victims who are at least 13, but under age 16, charge all cases in which the age difference is more than 4 years. Charge as second degree sexual Assault of a Child, 948.02(2), a felony.

3) With victims who are sixteen or over, charge all cases in which the age difference is more than 5 years. Charge as a violation of 948.09, a misdemeanor.

4) The objective disposition in cases involving adults age 21 or over who perpetrate against children under age sixteen is a felony conviction. (In some circumstances First Offender Program (FOP) may still be appropriate)

5) With perpetrators under age 21, objective disposition is FOP.

With Responsible Sexuality Course

6) With perpetrators under age 21, if prior criminal record makes the perpetrator inappropriate for FOP, objective disposition is misdemeanor conviction; 4th Degree Sexual Assault, 940.225(3m); With Responsible Sexuality Course

7) Disposition of all cases is to be determined on a case by case basis. Deviation from objective dispositions warranted by presence of aggravating or mitigating factors.

FACTORS

8) FOP/Misdemeanor disposition not appropriate where adult ultimately denies the behavior (some level of denial may be expected) OR where this is not the adult’s first sex offense.

9) **Primary consideration: Age difference.**

**Other primary factors which evidence coercion:**

10) Disability/limitation of either party

11) Adult provides child with drugs or alcohol

12) Adult interferes significantly with parental relationship (e.g., causes child to runaway)

13) Adult in caretaker role/position of trust

14) Adult causes child to engage in illegal/delinquent behaviors

15) Consideration of recommendation of child’s parents is appropriate to some degree.

16) Prosecutors and investigators need to be vigilant in training and awareness of cultural differences. Such differences may involve mitigating or aggravating factors that can be properly assessed only with an understanding of the cultures involved.

17) Pregnancy is a consideration only insofar as probation period might be required to ensure financial/parental responsibility, along with a requirement of acknowledgment of paternity.

18) Incarceration is at the discretion of the prosecutor based on usual factors.

19) Prior criminal history/corrections experience, treatment motivation, evidence of coercion and lack thereof, likelihood that perpetrator will comply with no contact provisions, punishment.

NO CONTACT PROVISIONS

20) No contact during pendency of criminal case or FOP

21) If the relationship results in a pregnancy, contact during pendency of criminal case or FOP may be permissible to make arrangements/transfer custody of child determined to be in the best interests of the child; if desired by victim; IF SUPERVISED BY THE MINOR’S PARENTS

22) Contact and conditions of probation supervision at discretion of the agent. Favor no contact provisions unless the best interests of the victim indicate otherwise.

23) Violations of no contact provisions as condition of bail will be prosecuted.
to address "objective outcomes" to cases in which there were no overwhelming, aggravating, or mitigating circumstances. While no such cases existed, this framework allowed the group to offer guidance on particular isolated issues. In the end, the document would be used to guide prosecutors in charging and disposing of cases by considering factors related to the victim, the acts, and the perpetrator.

Amazingly enough, given the complexity of the issues and the diverse composition of the advisory group, the group was eventually able to arrive at a consensus on a number of issues. The advisory group believed that the phrase "statutory rape" is not appropriate in those cases where the child is under the age of thirteen. Those cases, the group felt, were simply cases of child abuse and should be addressed accordingly.

The group recommended that the prosecutor's office amend its case review policy and enlarge the age difference which would normally be deemed criminally culpable. Rather than seeking out cases in which the age difference was more than three years, as directed in the existing policy, the advisory group recommended prosecution primarily in cases where the age difference was four or more years. The advisory group expressed the opinion that without some aggravating factor, an eighteen year-old high school senior, or even a nineteen year-old recent graduate, should not be a convicted felon for having sexual contact with his fifteen year-old girlfriend. The group advised that a victim's cognitive or other limitations should be viewed as aggravating factors in prosecution.

The advisory group also considered factors relating to the perpetrators. In cases where the offenders are under the age of twenty-one, the advisory group identified deferred prosecution or misdemeanor, rather than felony convictions as the "objective outcome," that is, the ideal outcome in cases without other aggravating and mitigating factors. Essentially, the advisory group wanted the focus in cases involving younger offenders to be on preventative education and rehabilitation, rather than long-term punishment. However, the group identified an exception for offenders who had multiple relationships with teens or who involved the teens in other illegal activities. Significantly, an age gap of five years, where the victim was under the age of sixteen, was viewed as an aggravating factor. Clearly, the group saw an inverse correlation between the victim's age and the significance of the age difference between the child and perpetrator.

Often, after a statutory rape case has been charged, court ordered bail conditions require that the offender have no contact with the victim. The advisory group felt the no contact provisions were most
often appropriate. However, the group commented that an exception may exist in cases where the adolescent is pregnant or has a child by the offender. In situations where the child, her parents, and the court deem it appropriate, the advisory group approved of the courts' considerations of requests for supervised contact to allow young offenders to assume appropriate parental responsibilities. The group suggested that prosecutors should generally and consistently prosecute violations of court ordered bail conditions.

Not surprisingly, the advisory group was quite concerned with issues of culture and their impact on an adolescent's victimization, as well as on a just outcome for the perpetrator. Some members were concerned that increased emphasis on statutory rape prosecutions would perhaps unintentionally target members of ethnic minorities. Other members viewed aggressive prosecution as a means of protecting victims, regardless of culture. Ultimately, the group was able to agree that differences in culture might frequently raise aggravating or mitigating factors which could go unrecognized if investigators, prosecutors, and judges were not attuned to cultural norms that differed from their own. The group urged prosecutors, law enforcement officers, and other professionals to educate themselves on the different cultures present in the Dane County community. The group commented that without a real understanding of culture, prosecutors might miss evidence of coercion, or lack thereof, in individual cases.

The advisory group was somewhat dissatisfied with then available disposition options for offenders and a lack of services for victims. During the course of the grant, the project team developed a nine-week “responsible sexuality” course and implemented it as a deferred prosecution option for young offenders.\(^{55}\) The course was made possible without cost, through the combined efforts of public agencies in Dane County: Dane County Public Health, the Wisconsin Department of Corrections, Division of Probation and Parole, the Madison Police Department, the Rape Crisis Center of Dane County, the Dane County Department of Family Services, and a sexual assault nurse examiner. Topics ranged from reproductive physiology and pregnancy prevention, to victims’ issues and parenting. The course was also made available to young people on probation for other crimes. To date, the district attorney’s office has run two cycles of the program, with more than sixteen young men having successfully completed the

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55. The program was closely modeled after a course first developed and implemented by Planned Parenthood and the Portage County District Attorney’s Office in Stevens Point, Wisconsin.
course. The current Dane County District Attorney, Brian Blanchard, intends to resume this program.

D. Investigation and Prosecution of Statutory Rape Cases

The grant team spent much of its time confronting difficult policy issues and exploring community values. These questions played out not only in philosophical discussions and policy recommendations, but in actual cases, as the team disposed of more than one hundred cases during the grant period.56

Due to the specific objectives of the grant, the project team devoted its time and energy almost exclusively to cases involving adolescent victims of sexual assault. With this specialization, the grant team adopted strict vertical prosecution of cases, with the prosecutor often meeting with the victim prior to charging. The grant, therefore, created a significant service to victims, unlike any other available. Although the Dane County District Attorney’s Office is known for significant leadership on victims issues in Wisconsin, the demands of a general prosecution caseload rarely allow prosecutors to meet victims prior to charging.57

The grant prosecutor and sensitive crimes investigator had years of experience in social work, law enforcement, and prosecution. In addition, throughout the grant period, the team consulted with sexual assault victim advocates and other professionals from across the country.58 The team felt strongly that in order to increase effective prosecution of statutory rape cases, it had to establish meaningful relationships with the victims.

As discussed above, the grant team focused on its obligation to the victims. Prosecutorial decisions were not abdicated to the children in

56. It is recognized that this number may not adequately quantify the work of the grant. This number includes bail jumping charges as a result of violations of no contract provisions. Because of the broad scope of statutes applicable to the crime of statutory rape, statistical analysis is difficult. The grant's limited funding did not adequately provide for this information.
57. Note that the question of whether prosecutors should meet with victims in advance of charging statutory rape may be controversial. In a domestic violence case, for example, best practice suggests that prosecutors do not meet with victims prior to charging, although victim advocates will meet with the victims in order to ascertain the victims' position on such issues as necessary bail conditions. The principle behind this policy emphasizes that the victim is not responsible for the abuser's behaviors, nor for the consequences of those behaviors. Interview with Assistant Dane County District Attorney Judy Munaker, Dane County Domestic Violence Prosecution Team, Madison, Wisconsin, December 2000.
these cases. However, under the circumstances, the grant team tried to allow the teens as much respect and integrity as possible. In most cases, the prosecution team referred teens almost immediately to a victim’s advocate from outside the prosecutor’s office. The significance of victims’ advocates in statutory rape cases cannot be understated. First, the effort establishes clear boundaries between the role of the prosecutor and the victim. Second, the referral recognizes the child’s stake in the case and the value of her opinion, even though it may be different from that of the prosecutor or the child’s parents. This simple act of insuring that the child has someone available to her, a person who is knowledgeable about the criminal justice system and who can speak solely to the child’s wishes, sends a message to the child. It tells her that she has a voice in the system, that she has a right to her feelings and beliefs, and that she is respected.

Adults who commit statutory rape almost always exercise coercive control over the child. It is important, to the extent possible, that the criminal justice system avoid repeating a similar pattern of interaction with the child. Dane County investigators, both child protection and law enforcement, were trained to listen to adolescent victims. A simple enough concept, however, the grant team initially observed a few investigators who took it upon themselves to convince the child that her “relationship” with the offender had no value. In training, the grant team focused on the need to allow the child to identify the value the offender had in her life. If the child was permitted to express herself, she was more likely to feel that she had been treated fairly throughout the justice and law enforcement process.

However, listening to teen victims is not purely an altruistic venture. As a child talks about the benefit she believes she found in having the perpetrator in her life, investigators can gain evidence necessary for a conviction and appropriate case disposition. When the defendant is a thirty-one year-old married man, his act in presenting flowers to a thirteen year-old married man, his act in presenting flowers to a thirteen year-old is not an act of seduction, rather, it is an act of predatory grooming.

Investigator training similarly focused on the need to observe evidence of a child’s developmental level and genuine ability to consent to sexual contact. Conversation with the child provides important information about the power imbalance in the “relationship.” One teen told investigators that she and an adult male had had oral sex. When asked her definition of “oral sex,” she explained that they

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talked dirty on the telephone. The child’s statements became evidence of her lack of sophistication, her vulnerability, and the defendant’s criminal culpability for his behaviors. The statement provided considerable information about this child and evidence of her inability to give informed consent to the sexual contact that eventually took place.

Investigators need to understand the teen culture on a very basic level. Today’s teens communicate through a technological swamp of pagers, emails, and cellular telephones. Nevertheless, handwritten love notes and diaries seem to be a timeless part of the teen culture. Each means of communication is an important source of evidence in statutory rape cases. In many cases, teens ultimately provided this type of information voluntarily to investigators who had worked to establish a rapport with them. In some cases, however, investigators and prosecutors are faced with the difficult decision of whether to obtain intrusive search warrants to access potential evidence. It is an ugly task, and the professionals who must use these investigative tactics probably never feel good about the intrusions. One victim’s mother became concerned about her thirteen year-old, searched the child’s room and read her diary. The diary contained evidence of the child’s plan to have sexual contact with a man who was more than twice the child’s age. The mother was guilt-ridden, but nevertheless turned the diary over to authorities. The situation in which police were forced to obtain a search warrant based on a teen’s diary illustrates why communities need well thought-out, community-driven policies on statutory rape. An officer can more comfortably act, or elect not to take action, if the community has offered direction on how it wants its children to be protected.

Another evidentiary concern affecting statutory rape prosecutions is the victim’s unique ability to squelch a prosecution. For example, Wisconsin’s victims’ rights provisions limit the circumstances in which a victim may be sequestered at trial. A defendant has the right to demand sequestration when it is a necessary action in order to assure he receives a fair trial. There is no similar provision for the state’s benefit. If a victim elects to alter her testimony on a defendant’s behalf, she is in a better position to do so after having heard other testimony. Similarly, a victim can at times undercut the prosecution’s case if she refuses to turn over psychological records. Under State v. Shiffera and its progeny, a witness can be prohibited from testifying if they
refuse to make material records of psychological treatment available to the defense.  

The point is not that these concerns justify reducing a victim’s right in the criminal justice process or require the state to “pull its punches” where the case requires aggressive prosecution. Prosecutors must be continually aware, however, that these cases present unusual challenges and require that situations be evaluated with an open mind, and in many cases, creativity. As is true in many other types of criminal cases, alternate dispositions may present the best outcomes in statutory rape cases.

Cases prosecuted under the pilot project did not typically go to trial. Defendants often admitted to their behaviors. Some offenders did not realize the legal consequences, some did not care, and others knew the prosecution had obtained significant corroborative evidence. Nevertheless, prosecutors may be challenged to gain recognition of the potentially serious impact of these crimes. This fact may be particularly true where the victim is male or appears to be streetwise. The use of expert witnesses at sentencing can assist in this process. One of the grant’s last projects was co-sponsorship of a training seminar for mental health professionals statewide. The training was intended to create a pool of expert witnesses who were familiar with the specialized issues of adolescent victimization and statutory rape offenders. Instructors provided scientific findings about sex offender assessment and work with victims of statutory rape. A prosecutor then spoke with the group about legal principles involved in testifying as an expert witness, and offered suggestions on how to testify effectively. The prosecutor then conducted a mock witness-prep session with one of the psychologists.

A significant challenge faced by the prosecution team was locating sound information about statutory rape offenders. Even repeat statutory rapists may score relatively low on tools that are typically used by evaluators who assess on offenders’ risk of recidivism. Does such a finding imply that statutory rapists are not likely to re-offend once they are apprehended? The grant team was unable to discern a clear answer to this question. In addition, contacts with mental health professionals establish that this question remains largely unresolved.

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60. State v. Shiffra, 499 N.W.2d 719 (Wis. Ct. App. 1993) (holding that victim’s testimony can be barred if victim refuses to authorize release of confidential records that are material to the defendant’s case).
V. Conclusion

In the introduction of this piece, the reader was introduced to three statutory rape offenders who came to the criminal justice system under vastly different circumstances. Defendant number one, the pedophile, was sentenced to eighty years in the Wisconsin prison system. The victim wept when sentence was pronounced.

Defendant number two, the dirty old man, who may also be a pedophile, was sentenced to five years in prison, on sexual assault and bail jumping charges, followed by eleven years of probation. At sentencing, the court relied in part on the victim’s age. By the time the defendant has served his sentence, the child will be an adult, and hopefully, equipped to make important decisions for herself. His victim attended sentencing with her parents and told the court that she now realized how the defendant had manipulated her.

Defendant number three, the young lover, completed a nine-week Responsible Sexuality Course. His charges were reduced to two misdemeanor offenses for having sexual contact with a person without her consent, which may ultimately be expunged from his record. He was placed on probation for a period of three years, with the condition that he maintain financial responsibility for his child and complete parenting classes. As a result of a contact with the teen in violation of court-ordered bail conditions, Defendant number three was required to serve thirty days in jail, with work release privileges. To this writer’s knowledge, he continues to be involved with his child.

Was the statutory rape prosecution pilot project a success? The range of outcomes in those cases suggests, in part, that it was. Defendant number two’s victim, the thirteen year-old, had substantial support from a Rape Crisis Advocate and a well-trained police detective. That officer, in particular, recognized that the victim had suffered a loss when her relationship with the defendant ended. The prosecutor and detective often met with the victim as the case proceeded. The continued contact, made possible by the specialized prosecutor position, established a relationship with the victim and her family; a relationship which would not have been otherwise possible. We can never know if the grant’s work made the difference in this particular case. I can only tell you that it appeared to have an effect, and I believe the victims would have the same response.

In Defendant number three’s case, however, the prosecution project undoubtedly impacted the case resolution. First, by allowing Dane County to develop its own Responsible Sexuality Course. Second, and perhaps most importantly, was the opportunity the prosecu-
tor had to learn about the defendant and the circumstances of this particular case. The first session of the Responsible Sexuality Course presented legal issues and was taught by the grant’s prosecutor and investigator. At that initial meeting, Defendant number three was angry, volatile, and verbally aggressive. As the class proceeded, he began to express himself until, by the end of the nine-week class, he was asking questions about how to interact with his child.

Clearly, we accomplished the initial objective of prosecuting more cases. Public and professional training went a long way toward improving the understanding of adolescents as victims of sexual assault. Tools were created to allow other communities to develop their own responses to statutory rape. Certainly, Dane County began to think and talk about statutory rape and the many related issues in a way which would not have been possible without grant funds.

One concern with the use of a community advisory group’s recommendations is that the district attorney has a dual and potentially conflicting role as both a representative of the public’s views as well as a law enforcement official charged with enforcing statutes. Any advisory group’s recommendations must be critically evaluated to insure that they represent fully informed recommendations that sufficiently protect public safety. For example, relying once again on the domestic violence model, if the community were surveyed on its views twenty years ago, many might have said, “what happens in the home, stays in the home.” Now after years of public education efforts, one would hope the response might be different.

The project can fairly be classified as a short-term success for Dane County. A great deal was accomplished in an incredibly short period of time, with very little money.61

The success of the project continues as Dane County shares the project results, and the tools used in obtaining those results, with prosecutors throughout Wisconsin. Early in the grant period, the project sponsored a one-day strategic planning session for prosecutors statewide. It was clear that most prosecutors, regardless of a jurisdiction’s unique characteristics, struggle with the issue of statutory rape. The grant will now have even more impact as other counties undertake their own community oriented decision making process.

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61. The grant’s strength was its community focus. A proposal to renew the grant project to allow the team to assist prosecutors in expanding its accomplishments statewide was not accepted. It is clear that prosecutors need more resources if they are to adequately serve victims and their communities on this complex issue.