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NATIONAL INSTITUTE OF JUSTICE
Issues and Practices

When the Victim Is a Child

Second Edition

136080

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ACQUISITIONS

by

Debra Whitcomb

March 1992

Issues and Practices in Criminal Justice is a publication series of the National Institute of Justice. Designed for the criminal justice professional, each *Issues and Practices* report presents the program options and management issues in a topic area, based on a review of research and evaluation findings, operational experience, and expert opinion on the subject. The intent is to provide criminal justice managers and administrators with the information to make informed choices in planning, implementing and improving programs and practice.

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National Institute of Justice
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Foreword

The National Institute of Justice published the first edition of *When the Victim Is a Child* in 1985. Since then, the investigation and prosecution of child sexual abuse have advanced in many areas. To share important new information as widely as possible, NIJ commissioned this report, which incorporates these advances and discusses recent and emerging issues in this sensitive field. This Second Edition of *When the Victim Is a Child* reviews new research on the consequences of child sexual abuse, the capabilities of children as witnesses, and the impact of the court process on child victims. The report also analyzes pertinent statutes and case law, including two 1990 U.S. Supreme Court opinions with particular relevance to child sexual abuse prosecutions.

The report is intended primarily for judges. NIJ believes, however, that it will prove useful to a wide range of professionals who work with child victims in the pursuit of justice.

Charles B. DeWitt
Director
National Institute of Justice

Preface

In 1985, when the first edition of *When the Victim Is a Child* was published, child abuse—and particularly sexual abuse—was a subject much in the news. Prevention programs were introduced in schools and pre-schools. Television movies exposed the realities of incest. A U.S. Senator revealed her own sexual abuse as a child. An incredulous public was horrified by allegations of bizarre sexual activities involving small children in the context of satanic rituals. And children were testifying in court.

The Attorney General's Task Force on Family Violence had just published a report urging legislators, judges, and prosecutors to adopt new procedures for dealing with incidents of family violence, including child abuse. Several states had begun to adopt laws that permitted alternative (and controversial) techniques for prosecuting cases involving child victims. Enlightened prosecutors and victim advocates were already experimenting with innovative procedures such as videotaping children's statements, assigning individual advocates, and convening multidisciplinary teams to coordinate interventions on behalf of individual children.

The first edition of *When the Victim Is a Child* attempted to capture the state-of-the-art in the investigation and adjudication of child sexual abuse cases. Based on a review of published literature, telephone surveys with prosecutors around the country, and visits to four innovative communities, the report summarized research findings on child sexual abuse and children as witnesses. It contained a detailed review of existing statutes that authorized various reform measures on behalf of child victims. It also analyzed those innovations, both from a legal perspective and a practical perspective. And it concluded that the most highly touted courtroom innovations were *not* the panaceas that so many had sought. Far greater benefits would accrue to more children by attending to their special needs long before they reach the courtroom.

In the intervening years since the first edition was published, there has been an explosion of information about child sexual abuse and experience in taking these cases to court.

The federal government—particularly, the National Institute of Justice, National Center on Child Abuse and Neglect, and National Institute of Mental Health—has sponsored a great deal of basic and applied research on child sexual abuse and its aftermath. This research has taught us much about children's memories, their ability to withstand suggestive questioning, their credibility as witnesses, and their emotional reactions to the adjudication process. We have also gained a greater understanding of the immediate and long-term consequences of childhood sexual abuse.

Also in this brief period of time, legislatures in every state have passed a raft of laws intended to benefit child victims. Many of these laws have been challenged in the appellate courts, and there is now guidance from the U.S. Supreme Court on a few of the most critical issues pertaining to child victims as witnesses. At the federal level, a comprehensive package of rights and protections for child victims and witnesses was incorporated in the Victims of Child Abuse Act of 1990.

Finally, we have the benefit of several years' experience implementing a range of proposed reforms. Since the first edition was published, the Children's Justice Act was passed by the U.S. Congress to provide aid to states in their efforts to implement reforms on behalf of child victims and witnesses. The National Center for the Prosecution of Child Abuse was created under a grant from the Office of Juvenile Justice and Delinquency Prevention to provide technical assistance to prosecutors throughout the country. Opposing factions have emerged, most notably Victims of Child Abuse Legislation (VOCAL), which has active chapters nationwide.

Recognizing that the state-of-the-art in this area has advanced tremendously in a very short time while child-serving professionals nationwide continue to struggle with thorny issues and difficult cases, NIJ requested this follow-up study. Chapters 1 and 2 update statistics on the incidence of child sexual abuse and incorporate new research findings on child victims as witnesses. Chapter 3 is new to this edition; it explores the pros and cons of certain interviewing techniques. Chapters 4 through 10 contain updated reviews of state legislation and, in Chapters 5 and 6, analyses of two recent U.S. Supreme Court decisions with important implications for children in court.

Still, despite all that is new since the first edition was published, certain observations remain unchanged:

- courtroom innovations are *not* a panacea
- emphasis may be more wisely focused on improving the initial investigation when abuse is disclosed
- coordination and cooperation across agencies, courts, and professional disciplines are absolutely essential to an effective response to child sexual abuse
- reforms intended for child victims of sexual abuse may be equally beneficial to any child who is a victim of, or witness to, a crime.

The concluding chapter summarizes important lessons learned from research and practice and identifies several areas in which additional research is needed. As with any social issue, the challenges that beset the professional response to child victimization tend to assume different forms with increased knowledge and experience. Even as one set of questions appears to be resolved, a new set emerges. It is my sincere hope that this short report can help child-serving professionals in every discipline keep abreast of the impressive advances that have been made and better prepare them for new challenges on the horizon.

Acknowledgements

There are many people to thank for their assistance and support in carrying out this project to update the state-of-the-art in investigating and prosecuting child sexual abuse cases.

I am particularly indebted to Beth Wanger, formerly with the National Center for the Prosecution of Child Abuse, for her tireless work in researching the pertinent statutes and case law, and to Eva Klain, now with the National Center, for completing this review and ensuring its accuracy as we go to print.

I am grateful to all my advisors, who were unusually responsive in reviewing the draft report and providing helpful comments and suggestions. Special thanks go to Professor Michael Graham and Josephine Bulkley for lending their expertise to the discussion of legal issues.

At the National Institute of Justice, I thank Carol Petrie and Cheri Crawford for recognizing the need for this report and for their insightful reviews as the work progressed.

Last, but certainly not least, I extend my deep appreciation to my colleagues here at EDC: to Marc Posner and Mary Antes for their assistance in compiling the research literature; to Michelle Stober, Bill Kuhlman, Margie Saez, and Sandy Belk for their patience in shepherding this document through its various iterations from early drafts through final masterpiece; and to Nancy Ames for her unflagging support of all the work that I do.

Debra Whitcomb
Senior Research Associate
Education Development Center, Inc.
Newton, Massachusetts

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PART I

INTRODUCTION AND OVERVIEW

Chapter 1
An Introduction to the Problem

It is a sad commentary on modern society that children, like adults, become victims of crime. Any crime that can be committed against an adult can be perpetrated as easily (if not more so) upon a child. What is perhaps even more appalling is the fact that so little is known about the incidence and types of crimes committed against children. We do not even know the true magnitude of the problem.

How Many Children are Victimized?

There is no single data source to consult for statistics on crimes committed against children. Although several sources provide partial information, attempts to develop a composite are confounded by variations in definitions and reporting practices. For example, sources define the end of childhood at different ages, varying from 12 to 16 and 18 to 21. Some sources provide only "snapshot" views of crimes occurring during a brief time period and have not been routinely updated. Existing sources are also limited in the types of crimes for which they collect data on child victims. Admittedly, the available data are sketchy, but they do suggest that children become victims of crime more often than some may care to believe.

One type of data relies on incidents that are reported to public authorities. The FBI's Uniform Crime Reports (UCR), for example, publishes crime statistics reported by nearly 16,000 law enforcement agencies covering 97 percent of the American population. While the UCR offers the most comprehensive picture of reported crime in the United States, it provides almost no information on crimes against children. With the exception of murder, UCR statistics are not reported by victim age. Still, for that crime alone, the FBI reported that in 1988, 1,698 children under the age of 15 were victims, about 9 percent of the total.[1] The National Committee for Prevention of Child Abuse estimates that in 1988, there were 1,225 reported child abuse fatalities in this country.[2]

The National Center on Child Abuse and Neglect (NCCAN), a division of the U.S. Department of Health and Human Services, has commissioned two studies designed to provide a national estimate of the incidence of child maltreatment. These data, too, are incomplete, for they consider only cases of abuse or neglect inflicted by a parent or caretaker and known to community professionals (defined to include staff of child protection agencies, schools, hospitals, police departments, juvenile probation authorities, and other child-serving agencies). Even so,

the statistics are alarming: according to the National Incidence Study (NIS), more than 1.5 million children were endangered by abuse or neglect in 1986.[3]

It is widely known that reported crimes represent only the tip of the iceberg. The Bureau of Justice Statistics estimates that only 37 percent of all crimes, and 48 percent of all violent crimes, are reported to police.[4] Moreover, young victims (age 12 to 19) are far less likely than older victims to report crimes to police, particularly when the offender is not a stranger.[5]

Perhaps a more realistic estimate of crimes committed against children emerges from victimization studies, which solicit information directly from the general population, typically via telephone or household surveys. The National Crime Survey (NCS), for example, compiles offense data from household surveys. NCS does not collect data for children under age 12, but data for 1987 show that respondents in the 12-to-15 age group suffered a rate of victimization exceeded only by that of the 16-to-19 and 20-to-24 age groups. This was true for both crimes of violence and theft.[6]

Another large-scale victimization survey was designed to provide a national estimate of violent acts occurring within families. According to the second National Family Violence Survey, conducted in 1985, 1.5 million children suffer "very severe" violence (defined as kicking, biting, punching, beating, burning or scalding, threatening with or using a knife or gun) by their parents each year. When the definition is expanded to include hitting with an object (such as a stick or belt), the number of child victims of family violence rises to 6.9 million per year.[7]

A number of studies have focused specifically on the incidence of child sexual abuse. The National Incidence Study, for example, reports that 155,300 children were endangered by sexual abuse committed by parents or caretakers in 1986.[8] Research suggests, however, that perhaps 10 to 50 percent of reported sexual abuse is committed outside the family.[9] Victimization studies suggest that anywhere from 12 to 38 percent of all women, and from 3 to 16 percent of men, are subjected to some form of sexual abuse in their childhood. (See Exhibit 1.)

Using a somewhat different approach, researchers have asked paraphiliacs (persons with a preference for unusual sexual practices) to report on their own sexual behaviors with children. This study relied on voluntary self-reports by acknowledged, non-incarcerated paraphiliacs referred for treatment by health, mental health, and criminal justice professionals, and some who were self-referred through responses to media advertisements. About 22 percent of the deviant acts reported by the 561 study participants involved child molestation.

The researchers classified participants who reported child molestation as either "incest pedophiles" or "non-incest pedophiles" (depending on the relationship to the child) and gathered information both on the number of acts committed and the number of children involved. The results reveal that these individuals pose an

Exhibit 1

ESTIMATED INCIDENCE OF CHILD SEXUAL ABUSE BASED ON RETROSPECTIVE SELF-REPORTS

AUTHOR	ESTIMATE	VICTIM Age Range	STUDY CHARACTERISTICS	CAVEATS
Kinsey [1] (1953)	24% of women	"Pre-adolescent"	Personal interviews, 4,441 volunteer subjects	Excludes peer experiences; more than half the offenses were exhibitionism
Finkelhor [2] (1979)	19% of women 9% of men	through age 16	Self-administered questionnaire; 796 college students	Excludes peer experiences; 20% of offenses were exhibitionism
Karcher [3] (1980)	12% of women 3% of men	"Child"	Mail survey, 2,000 Texas drivers	Sexual abuse undefined
Finkelhor [4] (1984)	15% of women 5% of men	through age 16	Household survey; 521 Boston area parents	Excludes peer experiences
Russell [5] (1983)	38% of women	through age 18	Personal interviews; random sample of 933 adult women in San Francisco	Includes peer experiences; excludes exhibitionism; questions very detailed
Committee on Sexual Offenses Against Children and Youth [6] Canada (1984)	27% of women 15% of men	before age 16	National Population Survey 2,008 respondents	Includes peer experiences; 28% of offenses were exhibitionism; questions very detailed
Finkelhor and Hotaling, et al [7] (1989)	27% of women 16% of men	through age 18	National telephone survey by Los Angeles Times Poll; 2,626 respondents	Includes peer experiences and exhibitionism; four comprehensive screening questions

[1] Alfred Kinsey, et al., *Sexual Behavior in the Human Female* (Philadelphia: Saunders, 1953)

[2] David Finkelhor, *Sexually Victimized Children* (New York: Free Press, 1979)

[3] Glenn Karcher, *Responding to Child Sexual Abuse. A Report to the 67th Session of the Texas Legislature* (Huntsville, TX: Sam Houston State University, 1980)

[4] David Finkelhor, "How widespread is child sexual abuse?" *Children Today*, Vol. 13 (July-August 1984): 18-20.

[5] Diana Russell, "The incidence and prevalence of intrafamilial and extrafamilial sexual abuse of female children," *Child Abuse and Neglect*, Vol. 7 (1983).

[6] The Committee on Sexual Offenses Against Children and Youth, *Sexual Offenses Against Children* (Ottawa, Canada: Minister of Supply and Services, 1984), pp. 179-193.

[7] David Finkelhor and Gerald Hotaling, et al., "Sexual abuse in a national survey of adult men and women: Prevalence, characteristics, and risk factors," unpublished paper prepared under Grant No. 90CA1215 from the National Center on Child Abuse and Neglect to the University of New Hampshire, April 1989.

enormous threat to children. On average, each incest pedophile commits from 35 to 45 acts against one or two children. Non-incest pedophiles commit one or two acts against each of an astonishingly large number of children: about 20 female victims or 150 male victims per pedophile.[10]

What Are the Barriers to Reporting?

No one knows what proportion of crimes against children are reported to law enforcement or child protection authorities. Indeed, even the child's most trusted confidante may be unaware that something has happened. Very young children may simply lack the verbal skills to report or the knowledge that an incident is inappropriate or criminal. Older children may be embarrassed. Many child victims are threatened into silence. When they do confide in trusted adults, their reports may be dismissed as fantasy or outright lies.

Even if a child's report is believed by a parent or trusted adult, it may never come to the attention of authorities. One survey of Boston parents found that, of the 48 families in which a child had been sexually abused, 56 percent of the parents had reported the crime to authorities.[11] In another Boston study, only 38 percent of 156 families of child sexual abuse victims reported the incident to police.[12] When the non-reporters in these studies were asked their reasons for not reporting, they said that they preferred to handle the situation themselves, and that it was no one else's business. They felt sorry for the abuser, did not want to get him "into trouble," and simply wanted to forget the incident.[13] Other commonly reported reasons were not wanting to get involved with law enforcement officials (fearing disruption of the family) and doubt that sexual abuse actually occurred.[14] These responses probably reflect the fact that most of the non-reported cases in both studies involved perpetrators within the family.

Studies have also found that child-serving professionals, such as doctors, psychologists, school principals, and social workers often fail to file official reports when they suspect child abuse.[15] In fact, the National Incidence Study (NIS) revealed that only 40 percent of all children recognized by community professionals as abused or neglected were reported to, and investigated by, child protection agencies.[16] Such professionals often prefer to enroll troubled families in counseling, substance abuse treatment, or other social services.

Even so, the number of child sexual abuse allegations known to child protection agencies has been rising steadily since 1976, the year in which NCCAN began collecting data on these crimes. That year, child protection agencies reported 1,975 cases of child sexual abuse nationwide.[17] As noted above, ten years later, well over 100,000 cases were known to community professionals nationwide. The NIS authors observed that the rate of child sexual abuse cases tripled from 1980 to 1986, a finding they attributed largely to increases in reporting as the result of widespread media coverage and prevention campaigns.[18]

How Are Child Abuse Reports Investigated?

Reports and allegations cannot be equated with actual cases. The National Incidence Study states that 53 percent of all reports of suspected child maltreatment are found to be "substantiated" by child protection agencies.[19] There is no corresponding national figure for sexual abuse specifically, although studies of central registry data for New York State, Denver, and one county in Indiana found substantiation rates of 40, 53, and 57 percent respectively.[20] In order to place the apparently high rate of *un*substantiated reports in an appropriate context, it is instructive to understand the substantiation process.

Essentially, there are two "gatekeepers" in the child protection system. First is the intake worker who receives the initial report, typically on a telephone hotline, and determines whether the report deserves further investigation. Second is the investigative caseworker, who follows up on reports that survive the first level of screening to determine whether the reported child is at risk. Many reports are screened out at each gate.

Nonetheless, occasional accounts of children abruptly removed from their homes by social workers after minimal investigation and without notifying the parents have stimulated intense debate over the mandate to report suspected child abuse and the child protection agencies' ability to respond appropriately. Acting on the premise that these agencies are overwhelmed by inappropriate reports, to the extent that resources are seriously depleted and unavailable for true cases of maltreatment,[21] some commentators argue strongly that reportable "child abuse and neglect" should be redefined.[22]

And, in fact, in recent years the majority of states have adopted guidelines intended to narrow the types of reports that are accepted for formal investigation[23] (i.e., to stop the process at the first gate). The most common criteria for screening out reports include the following:

- The reporter is involved in a custody dispute.
- The reporter has made repeated unfounded allegations.
- The child is reported for truancy or educational neglect.
- The reporter provided incomplete information.
- There is no indication of harm or risk of harm.
- The reporter failed to mention a specific incident or pattern of incidents.
- The case involved maltreatment by a non-caretaker.[24]

More reports are screened out after investigation, often because there is insufficient information to determine whether abuse occurred or to identify the perpetrator. Other reasons include findings that the perpetrator is not within the agency's sphere of jurisdiction, or that the allegation was false.

The practical effect of narrowing the scope of child protection agencies' responsibilities was borne out in the National Incidence Study. Comparing the findings from 1980 and 1986, the authors inferred "that there is now greater selectivity of cases into children's protective services, which is most likely due to the use of more stringent screening standards." They also observed "an increasing tendency to exclude cases which in the past would have received intervention and services."[25] In other words, a large number of children remain at risk of maltreatment, unknown to or unserved by child protection agencies.

The Risk of False Allegations

A recent spate of highly publicized sexual abuse allegations has caused the public to recoil and question the limits of credulity. These allegations tend to fall into two categories: sexual abuse of preschool children in day care facilities, sometimes including bizarre and ritualistic elements; and sexual abuse allegations arising in the context of divorce, custody, or visitation disputes. Such cases have caused many observers to question the veracity of child sexual abuse reports.

Researchers have attempted to determine the fraction of unsubstantiated cases that can actually be attributed to false reports. The most comprehensive of these studies analyzed all reports of suspected sexual abuse filed with the Denver Department of Social Services (DSS) during 1983. All 576 reports had been investigated by the DSS Sexual Abuse Team and designated either "founded" (53 percent) or "unfounded" (47 percent). With the assistance of DSS caseworkers, the researchers applied clinical judgments to the case files and re-classified these reports, using the following categories.

Founded cases:

- reliable accounts
- recantations of reliable accounts

Unfounded cases:

- unsubstantiated suspicions
- insufficient information
- fictitious reports by adults
- fictitious reports by children

The latter two categories, "fictitious reports by adults" and "fictitious reports by children," included deliberate falsifications, misperceptions, confused interpretations of nonsexual events, and children who had been coached by adults. Upon re-classification by the researchers, 6 percent of the total cases (34 allegations) were found to be fictitious. Of those, only eight allegations had been made by five children, four of whom had been substantiated victims of abuse in the past.[26]

In a second phase of this study, the researchers examined 21 fictitious cases that had been referred to a sexual abuse clinic for evaluation between 1983 and 1985. Of these allegations, five had been initiated by the child, nine by an adult, and in seven cases the researchers could not determine who had initiated the charge. Custody/visitation disputes were ongoing in 15 of these cases: in one child-initiated case, in seven adult-initiated cases, and in all of the "mixed" cases.[27]

Another study examined 162 consecutive sexual abuse cases seen at a children's hospital over a ten-month period. Twenty-five of those cases involved allegations against a parent, and seven of those (28 percent) involved a custody or visitation dispute. The disputed cases were less likely to be substantiated than cases without such conflict, but were nevertheless substantiated more than half of the time.[28]

Other studies have approached the relationship between custody disputes and false allegations from a different perspective, beginning with cases that are referred to clinicians for custody evaluations (rather than sexual abuse diagnosis). These studies have found that a relatively high proportion of custody disputes involve false sexual abuse allegations.[29] It is important to note, however, that these studies depend upon clinical populations (i.e., troublesome cases that had been referred to a specialist for evaluation or diagnosis). Findings are based on a small number of cases, and, furthermore, the decision to label a report "fictitious" is based on clinical judgment: there is no objective, definitive measure of "truth." Due to these limitations, such studies cannot generalize to a conclusion that sexual abuse allegations associated with custody disputes are necessarily false.[30]

In fact, sexual abuse allegations arising from divorce and custody disputes appear to be quite rare. One study that attempted to quantify this phenomenon found that in most courts, about 2 to 10 percent of all family court cases involving custody and/or visitation disputes also involved a charge of sexual abuse. As an alternative way of framing the magnitude of this problem, sexual abuse allegations occurred in the range of approximately 2 to 15 per 1,000 divorce filings among the courts that were studied. Based on data from seven jurisdictions, 105 of 6,100 cases (or less than 2 percent) of custody or visitation disputes involved sexual abuse allegations.[31]

Research also suggests that sexual abuse in day care is no more common than it is within families. Extrapolating from 270 substantiated cases in 35 states over the three years from January 1983 through December 1985, researchers estimate that 500 to 550 actual cases occurred in that period, involving more than 2,500 children. Based on the total of seven million children attending day care facilities nationwide, the researchers calculate that 5.5 of every 10,000 children enrolled in day care are sexually abused. This compares to an estimated 8.9 of every 10,000 children who are sexually abused in their homes. The conclusion: The apparently large number of sexual abuse cases reported in day care "is simply a reflection of the large number of children in day care and the relatively high risk of sexual abuse to children everywhere."[32]

What is the Criminal Justice Response to Child Abuse?

The Child Abuse and Neglect Prevention Act of 1974 required that every state designate an agency to receive reports of alleged abuse of children (including sexual abuse) by parents or caretakers. Most states designated their departments of social services, but there has been great variation and controversy as to whether and when reports must also be made to police.

The findings of a study by the American Bar Association (ABA) suggest that law enforcement agencies may be more likely than child welfare agencies to take action on founded cases.[33] Such findings, coupled with growing concerns about the ability of child protection agencies to cope effectively with soaring caseloads, have prompted a number of proposals to accord greater responsibility to law enforcement agencies.

For example, 34 states now require child protection agencies to automatically notify law enforcement agencies about certain, more serious types of abuse; eight of those states specifically include sexual abuse.[34] Furthermore, all states but one (South Dakota) have legislation expressly intended to promote cooperation and coordination among agencies—including law enforcement—that serve maltreated children.[35] (Further discussion of multidisciplinary teams and other forms of joint investigations appears in Chapter 10.) The effectiveness of these laws has not yet been documented, although studies suggest that in some jurisdictions, some form of cross-reporting or joint investigation occurs in a large percentage of cases.[36]

Few criminal justice agencies routinely keep data to track the progress of child sexual abuse cases. Where statistics have been reported, they are quite variable. Nonetheless, several recent studies help to shed light on case processing in law enforcement agencies, prosecutors' offices, and the courts. (A nationwide survey of prosecutorial practices in child maltreatment cases is being conducted by the American Bar Association's Center on Children and the Law.)

According to 52 law enforcement agencies responding to a Police Foundation survey, 39 percent of child sexual abuse cases result in arrest. Forty-two percent are closed "exceptionally," meaning that the report has merit but cannot be pursued due to insufficient evidence, noncooperation of the victim, or other reasons.[37] (The remaining cases were either unfounded or still open at the time of the survey.) The ABA study documented slightly higher arrest rates in two counties, at 45 and 57 percent.[38]

Prosecution rates (i.e., the proportion of cases referred for prosecution that are subsequently accepted) appear to be extremely variable. Among five prosecutors' offices participating in a demonstration project for the Bureau of Justice Assistance (BJA), prosecution rates ranged from 38 percent to 100 percent.[39] In the

ABA study, the combined prosecution rate for two jurisdictions was 63 percent. Much of the observed variation in prosecution rates stems from differences in the definition of "referrals." Some prosecutors count referrals from the time they are first aware of a case; others only count when a file is opened. In some communities a large number of cases are "referred" because prosecutors are alerted to new cases early in the investigation, but only a small proportion are later filed for prosecution. Elsewhere, cases may not be "referred" until there is a joint decision among investigators to pursue prosecution, and hence there is a high prosecution rate.

Another statistic of interest is the proportion of cases that are accepted for prosecution but later dismissed. The BJA study observed dismissal rates ranging from 7 percent to 33 percent; the ABA study documented rates of 7 and 16 percent. According to the ABA study, the most common reasons for declining or dismissing cases are noncooperation by the victim and/or the victim's family, resolution by the child protection agency, and inability to locate the suspect. Less often, the child is perceived to be too young or otherwise incompetent to testify, or the victim has recanted.[40] A study of prosecutors' case files in eight jurisdictions, conducted by the National Council of Jewish Women (NCJW), Center for the Child, revealed lack of corroborating evidence, inconsistency in the victims' stories, and noncooperative families as the most common reasons for declining to prosecute.[41]

The outcomes of prosecution, in terms of case disposition, seem to reflect the policy of the prosecutor's office. As case acceptance criteria become more liberal, for example, conviction rates may decline because prosecutors are trying more difficult cases. Not surprisingly, prosecutors who accept only cases where there is a confession tend to enjoy remarkably high conviction rates. Among the five jurisdictions that participated in the BJA study, conviction rates ranged from 50 to 93 percent of cases accepted for prosecution. The ABA study found conviction rates of 72 and 77 percent, and the NCJW study documented an overall conviction rate of 75 percent. These figures are somewhat lower than reported conviction rates for felonies in general, which ranged from 79 percent to 94 percent among nine jurisdictions contributing data to the Bureau of Justice Statistics (BJS).[42]

As with other criminal cases, child sexual abuse cases are more often settled by guilty plea than by adjudication at trial. Looking again at the BJA study, the proportion of prosecuted cases that were disposed by guilty plea ranged from 33 percent to 87 percent. The ABA study observed plea rates of 66 and 74 percent, and the NCJW study found plea rates of 65 percent in jurisdictions with diversion programs and 73 percent where there are no diversion programs. For comparison, the BJS study reported plea rates ranging from 72 to 90 percent among felonies overall. There are many reasons for the variation in plea rates. In jurisdictions where prosecutors maintain a hard line against plea bargaining, for

example, trial rates tend to be high. In contrast, guilty pleas may be more common where sentences are perceived to be lenient, or where prosecutors are generally reluctant to take these cases to trial. Indeed, many sexual abuse cases are reportedly handled with pleas to lesser offenses that are not sex related.

Sentencing outcomes are also reflective of local conditions. In the BJA study, between 38 and 78 percent of convicted offenders were sentenced to some form of incarceration; the ABA study reported a 64 percent incarceration rate (aggregating results for the two counties). In fact, the ABA researchers found that individuals convicted of sex crimes against children are more likely to be sentenced to probation than are sex offenders who commit comparable crimes against adults.[43]

According to the ABA and BJA studies, as many as 50 percent of convicted child molesters are also required to participate in some form of treatment program, whether residential or community-based. Through experience and research, therapists are gaining confidence in their ability to identify those offenders who are most amenable to treatment that enables offenders to control their behavior. Interestingly, they do not distinguish between so-called "incest offenders" and "predatory pedophiles." Rather, they seek evidence that sexual attraction to children is not firmly entrenched in the offender's personality profile, and further, that the offender is sincerely motivated to change his behavior.[44] Many child-serving professionals, whether their orientation is therapeutic or legalistic, now believe that the leverage of the criminal justice system is crucial to the effective treatment of child abusers.[45]

Provided the sentence will be appropriate, guilty pleas are generally preferred in child abuse cases, since the child is saved from testifying at trial. However, even a guilty plea depends, to some extent, on input from the child. The child's initial statement to police and subsequent testimony at a deposition, preliminary hearing, or grand jury (depending on local law and custom) are all critical junctures in which the child plays a major role. Because children's participation can be so vital to the adjudication process, it is imperative that investigators, prosecutors, and judges take steps to accommodate their special needs.

* * * * *

Do child sexual abuse cases, many of which involve intrafamilial offenders, belong in the criminal justice system? Opponents of criminal justice intervention point to the system's insensitivity to family needs and particularly those of the child victim; supporters speak of the need to take sexual abuse allegations seriously, not only to exact retribution on behalf of society, but also to validate the victim's position and to shift the blame where it belongs: with the perpetrator.[46]

What happens to the child victims when their cases are not prosecuted? Victims of stranger abuse may feel that no one believed them, and they may fear being victimized again. These children are sometimes at an advantage, because with

counseling and a supportive family, they may overcome some of the long-range effects of victimization. Victims of intrafamilial abuse, however, must hope for a favorable outcome of juvenile court intervention. Perhaps the offender will obey a no-contact order. Perhaps he will be amenable to treatment. But in many cases, removing child victims from their homes and placing them in foster care is necessary as a last resort of the juvenile courts. This may feel like punishment to the child and leaves habitual offenders free to molest others. In the words of one victim:

> Why should I have been taken out of the home? I was the victim. I had nothing. I did nothing wrong. My father should have been taken out, not me.[47]

In recent years, a grassroots network has emerged to assist parents and children who believe the justice system has served them poorly. This "underground railroad" attempts to protect children from the accused by giving them and their sheltering parents new names and new homes. Such efforts to circumvent the system raise a number of thorny issues, many of which are new to the courts and, in fact, to society at large. Additional legal complications arise when children are taken across state or national borders, and when the abducting parent does not have legal custody of the child. Furthermore, little is known about the psychological effect on children who become "fugitives" in this way.

There will always be cases in which the veracity of allegations cannot be documented conclusively. Under such conditions, the needs of the child should be paramount. Cases should not be screened out solely because the parents are involved in a custody dispute, or because the child has recanted. Concerted efforts should be made to ascertain the child's story independent of the parents' influence, and to seek other evidence before allegations are confirmed or refuted. Children and their families should at least feel that "the system" has treated them competently and fairly.

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Chapter 2
Why Child Victims Are Different

Common sense and formal research would agree that children are not merely miniature adults. We know, for example, that children develop in stages during which they acquire capacities for new functions and understanding. We do not, generally speaking, read Shakespeare to a two year old, nor do we expect adult commentary on political issues. Adults, for the most part, attempt to speak to and treat children in accordance with their capabilities. We do not ordinarily expect children to understand or function on a par with adults.

When children become victims or witnesses of violence or sexual abuse, however, they are thrust into an adult system that traditionally does not differentiate between children and adults. As one attorney has said:

> Child victims of crime are specially handicapped. First, the criminal justice system distrusts them and puts special barriers in the path of prosecuting their claims to justice. Second, the criminal justice system seems indifferent to the legitimate special needs that arise from their participation.[1]

What are some of the reasons for problems that arise when children are called to participate in criminal proceedings? First is the child's immaturity with regard to physical, cognitive, and emotional development. Second are unique attributes of the offense of child sexual abuse, particularly when the perpetrator is a parent, parent substitute, or other adult having a trusting or loving relationship with the child. Third is our limited understanding of children's capabilities as witnesses. This chapter explains how these distinguishing factors affect children's ability to comply with the expectations of our judicial system.

Needs Related to Immaturity

Waterman has identified three types of developmental issues that are important when allegations of sexual abuse arise:[2]

First is the child's developmental level relative to other children in his or her age group. Knowing this information will dictate the nature of questioning to which the child can reasonably be expected to respond. It will also help to place the child's observable reactions to victimization in an appropriate context.

Second is the child's developmental level with regard to sexuality. Normal preschoolers, for example, express curiosity about the origin of babies and mild

interest in physical differences between the sexes. While it is not unusual for young children to engage in self-stimulatory behavior or exhibitionism, intercourse or other adult sexual behaviors are quite rare.[3]

Third is the child's ability to respond adequately to interviews and to testify in court. Those who work with young children should be aware of the following:

- Children think in concrete terms. An excerpt from a child's testimony, shown in Exhibit 2, is instructive.
- Children do not organize their thoughts logically. They often include extraneous information, and they have trouble generalizing to new situations.
- Children have limited understanding of space, distance, and time. A child may not be able to say at "what time" or "what month" something occurred, but may be able to say whether it was before or after school, what was on television, or whether there was snow on the ground.
- Children have a complex understanding of truth and lying.
- Children see the world egocentrically. Because they believe that adults are omniscient, they may expect to be understood even when they have only answered questions partially.[4]
- Children have a limited attention span.
- Children may have varying degrees of comfort with strangers.

These kinds of cognitive limitations are common among young children.

Older children tend to exhibit different, yet equally challenging, developmental patterns.[5] For example, although pre-adolescents have fairly sophisticated language capabilities, they may use words or phrases they do not fully understand. The growth of sexuality and concern with sexual identities during pre-adolescence makes these youngsters particularly vulnerable to disruption when they are sexually abused. As they enter adolescence, they tend to become very self-centered and have strong needs for privacy and secrecy. It is common for preteens and teenagers to express their feelings through the arts or physical activity, or by acting out in inappropriate or socially unacceptable ways.

Some researchers have specifically explored developmental aspects of children's understanding of the legal system.[6] Not surprisingly, they have found that older children have more accurate and complete knowledge of legal terminology (i.e., court, lawyer, jury, judge, and witness) as well as a better grasp of certain basic concepts of American justice. The researchers caution that children's understanding of the legal system is not only limited but sometimes faulty, so that child

Exhibit 2

EXCERPT FROM A CHILD'S TESTIMONY*

Defense Attorney:	And then you said you put your mouth on his penis?
Five-Year-Old Child:	No.
Defense Attorney:	You didn't say that?
Child:	No.
Defense Attorney:	Did you ever put your mouth on his penis?
Child:	No.
Defense Attorney:	Well, why did you tell your mother that your dad put his penis in your mouth?
Child:	My brother told me to.

At this point, it looked as if the child had completely recanted her earlier testimony about the sexual abuse and had only fabricated the story because her brother told her to. However, the experienced prosecutor recognized the problem and clarified the situation:

Prosecuting Attorney:	Jennie, you said that you didn't put your mouth on daddy's penis. Is that right?
Child:	Yes.
Prosecuting Attorney:	Did daddy put his penis in your mouth?
Child:	Yes.
Prosecuting Attorney:	Did you tell your mom?
Child:	Yes.
Prosecuting Attorney:	What made you decide to tell?
Child:	My brother and I talked about it, and he said I better tell or dad would just keep doing it.

* L. Berliner and M.K. Barbieri, "Testimony of the child victim of sexual assault," *Journal of Social Issues*, Vol. 40 (1984): 132.

witnesses may behave in ways that appear counterintuitive or inappropriate to the context.

For example, an interview with a child may begin by requesting identifying information: name, age, school, grade, home address. But young children may misinterpret these initial questions to mean they are under suspicion or arrest.[7] Also, because they do not understand the different roles and obligations of all the people who interview them, children do not understand why they must tell their stories for police, social workers, doctors, prosecutors, and, ultimately, the court. While this repetition may be simply exasperating for some children, others may relive the traumatic event each time; still others may assume the story is already known and proceed to omit important details in subsequent interviews. Similarly, some children may feel protected by the presence of the judge, but others may be intimidated by the big stranger in the dark, scary robe who yells at people in the courtroom and sits towering above the witness stand. One therapist tells of a child witness who was afraid that the judge would hit her with the gavel, which she referred to as a hammer. Children perceive the judge's power to punish and may not understand that they are not the object of that punishment.

To correct these problems, researchers recommend that attorneys, judges, and investigators choose their words with care when questioning child witnesses.[8] Some believe that targeted instruction for children who may serve as witnesses, possibly in the form of a "court school," would be helpful as well.[9] (Techniques for interviewing children are discussed in Chapter 3; court schools are discussed in Chapter 9.) Many prosecutors and victim advocates take children for a tour of the courtroom and introduce them to some of the key players before their scheduled court date. Critics contend, however, that such precautions may induce unnecessary apprehension for children who ultimately are not called to testify. At a minimum, interviewers would be wise to explain thoroughly the nature and purpose of each interview or court appearance before the child is questioned.

Children's Reactions to Victimization

There are few in our society who would argue that child sexual abuse does not cause serious problems for its victims. The burgeoning research on this subject suggests that the effects of victimization on children can be far-reaching, negative, and complex. In their review of the literature, Lusk and Waterman found seven "clusters" of effects on children.[10]

1. *Affective problems:* guilt, shame, anxiety, fear, depression, anger.
2. *Physical effects:* genital injuries, pregnancy, sexually-transmitted diseases, somatic complaints (e.g., headaches, stomachaches, bedwetting, hypochondria), changes in appetite or sleep patterns.
3. *Cognitive effects:* concentration problems, short attention spans.

4. *Behavioral symptoms*: "acting out" (hostile-aggressive behaviors, antisocial behaviors, delinquency, stealing, tantrums, substance abuse), withdrawal, repetition of the abusive relationship.
5. *Self-destructive behaviors:* self-mutilation, suicidal thoughts and attempts.
6. *Psychopathology:* neurosis, character disorders, multiple personalities, psychotic features.
7. *Sexualized behaviors:* excessive masturbation, repetition of sexual acts with others, atypical sexual knowledge.

Other commonly cited effects were low self-esteem and problems with interpersonal relationships.

Many of the early studies in this area were flawed because they relied on populations of clinical samples of sexually abused children or on retrospective findings from adults who were sexually abused as children. Neither approach allows comparisons to "normal" populations. But in one study that compared 369 sexually abused children to 318 nonabused children, eight factors emerged to distinguish the two groups.[11] The sexually abused children were significantly more likely to demonstrate the following:

1. poor self-esteem
2. aggressive behaviors
3. fearfulness
4. conscientiousness
5. concentration problems
6. withdrawal
7. acting out
8. need to please others

Another study compared sexually abused children to two groups of nonabused children: one from a psychiatric outpatient clinic and the other from a well-child clinic. The researchers found that the sexually abused children were more similar to the psychiatric outpatients than to the normal children.[12] Sexually abused children displayed significantly more behavior problems (and particularly sexual behaviors) and fewer social competencies than did normal children.

Research psychologists, sociologists, and clinicians have developed several ways of conceptualizing the effects of sexual abuse on children. These models are briefly summarized below.

Sexually Abused Child Syndrome

Early attempts to describe a "sexually abused child syndrome" were quickly discarded as lacking foundation in empirical research. Today, however, some of the leading researchers and clinicians in this field are moving toward consensus on behavioral indicators of child sexual abuse. The results of a nationwide survey of professionals experienced in evaluating suspected child sexual abuse revealed high levels of agreement around the following factors:[13]

- age-inappropriate sexual knowledge
- sexualized play
- precocious behavior
- excessive masturbation
- preoccupation with genitals
- indications of pressure or coercion exerted on the child
- the child's story remains consistent over time
- the child's report indicates an escalating progression of sexual abuse over time
- the child describes idiosyncratic details of the abuse
- physical evidence of abuse

It is important to recognize, however, that these indicators represent a broad constellation of behaviors that are frequently seen among sexually abused children as a group. Because sexual abuse takes many forms (e.g., a long-term incestuous relationship or a single event), each child will exhibit a different set of behaviors. Thus, a child who experienced a single abusive incident may well be consistent with her story over time. Conversely, a child who experienced several years of abuse by a close relative may seem to contradict her story over time depending on the attitudes expressed by family members or the manner in which she is questioned. In other words, *there is no single array of behavioral indicators that will definitively identify a sexually abused child.*

Also, the last four factors listed are not, literally, "behavioral indicators." Rather, from a legal perspective, they may be considered "corroborating evidence" of abuse. This distinction has become increasingly important in light of the recent U.S. Supreme Court decision in *Idaho v. Wright*, 110 S.Ct. 3139 (1990), discussed further in Chapter 6 below.

Post-Traumatic Stress Disorder

A number of clinicians and researchers maintain that many of the symptoms demonstrated by victims of child sexual abuse can be attributed to post-traumatic stress disorder.[14] Post-traumatic stress disorder (PTSD) is an accepted psychiatric diagnosis comprising the following components:[15]

- experience or event that would be markedly distressing to almost anyone
- reexperiencing the traumatic event (e.g., through recurrent memories, dreams, and in children, expressing the trauma through repetitive play)
- avoiding stimuli associated with the trauma (e.g., through memory loss or repression of thoughts and feelings and, in young children, loss of recently acquired developmental skills)
- at least two of the following symptoms: hyperalertness, sleep problems, irritability, problems with memory or concentration, intensification of symptoms when exposed to stimuli related to the traumatic event

While a cursory comparison of these elements with the list of effects commonly associated with child sexual abuse reveals certain similarities, it is also true that many sexually abused children and adult survivors of childhood sexual abuse do not exhibit PTSD. Conversely, many sexually abused children and adult survivors exhibit additional symptoms that are not encompassed within the diagnosis of PTSD. Studies suggest that PTSD is difficult to diagnose among children[16] and that it is more often found among victims of father-daughter incest[17] and more severe forms of abuse.[18] Thus, PTSD may in fact describe a certain cluster of short- and long-term effects observed in some sexually abused children and adults who were sexually abused as children, but it does not explain the full range of effects that have been documented.[19]

Traumagenic Dynamics Model

Another methodological problem with the research on short-term consequences of child sexual abuse is the difficulty of disentangling the effects of abuse from the effects of the fallout from disclosing sexual abuse. Indeed, there are many who believe that the aftermath of disclosing child sexual abuse may be just as damaging to the victim as the abuse itself. Finkelhor and Browne offer an alternative conceptual scheme that takes into account events and interactions that occur after abuse is revealed.[20] Under this model there are four dynamics that

attempt to explain most, if not all, of the short-term effects that clinicians and researchers have observed among child sexual abuse victims:

1. *Traumatic sexualization* results from the inappropriate sexual contacts and relationships that typify abusive incidents.
2. *Betrayal* results when the child realizes that a loved or trusted individual has in fact harmed him or her. Another context for betrayal occurs when nonoffending family members or others to whom the child discloses fail to believe the child's allegations.
3. *Stigmatization* results when the child realizes that the abusive behavior is morally and socially unacceptable and is made to feel guilty or responsible.
4. *Powerlessness* results not only from the child's inability to prevent or terminate the abuse, but also from the "snowball" nature of society's interventions to protect the child.

This conceptualization suggests that although some of the adverse effects of child sexual abuse are intrinsic to the abusive behavior itself, others may be attributed to external factors that may be receptive to change. There is some evidence, for example, that having emotional support from nonoffending parents can help to ameliorate the negative effects of sexual abuse.[21] If this is so, human service professionals can work with parents to help them cope with conflicting emotions and be more supportive of their children. As will be described in subsequent chapters, efforts to restrict public access to child sexual abuse trials address the stigmatization inherent in public knowledge. Similarly, efforts to give the child a voice in the adjudication process are directed at overcoming his or her sense of powerlessness.

The Child Sexual Abuse Accommodation Syndrome

Another construct that is helpful in understanding children's reactions to sexual abuse is the "child sexual abuse accommodation syndrome," conceptualized by psychiatrist Roland Summit. This syndrome is not a means of diagnosing sexual abuse. Rather, it proceeds from a determination that a child was in fact sexually abused, and attempts to explain certain behaviors that might otherwise seem contradictory or inconsistent. The syndrome includes five categories.[22]

1. *Secrecy.* With few exceptions, child sexual abuse occurs when the child is alone with the perpetrator. Even when other children are present, the need for secrecy is made quite clear. As numerous studies of adult survivors reveal, and Dr. Summit summarizes, "The average child never asks and never tells."[23]

2. *Helplessness.* To quote Dr. Summit again, "Men who seek children as sexual partners discover quickly something that remains incredible to less impulsive adults: dependent children are helpless to resist or to complain."[24]

3. *Entrapment and accommodation.* For many child victims, the secrecy and helplessness of the abusive situation leaves them, literally, no way out. The healthy response, then, is to find some means of accommodating continuing abuse. Some of the more extreme accommodation techniques include multiple personalities, prostitution, juvenile sex offenses, and substance abuse. These behaviors may be viewed as pathological among the children or adults who exhibit them, but they are actually skills that abused children use to survive.

4. *Delayed, conflicted, and unconvincing disclosure.* Disclosure often occurs after the abuse has been ongoing for some time, and children frequently "test the waters" by disclosing only "chapters" before they reveal the whole story. If the immediate reaction to the initial disclosure is disbelief, the rest of the story may never be divulged. Children who display any of the accommodation behaviors described above are even less likely to be believed.

5. *Retraction.* It has become a maxim among professionals in this field that, "Whatever a child says about sexual abuse, she is likely to reverse it."[25] As Dr. Summit explains, "In the chaotic aftermath of disclosure, the child discovers that the bedrock fears and threats underlying the secrecy are true. Her father abandons her and calls her a liar. Her mother does not believe her or decompensates into hysteria and rage. The family is fragmented and all the children are placed in custody. The father is threatened with disgrace and imprisonment. The girl is blamed for causing the whole mess, and everyone seems to treat her like a freak."[26] Given this scenario, there is little wonder that clinicians report retraction to be such a common phenomenon, particularly among incest victims.

It is important to recognize that the preceding discussion of the effects of victimization on children is meant to be descriptive, not definitive. Neither child sexual abuse, nor the "sexually abused child syndrome," nor the "traumagenic dynamics model," nor the "child sexual abuse accommodation syndrome" is an accepted psychiatric diagnosis. Nonetheless, these "syndromes," and the observations of sexually victimized children that underlie them, often serve as the basis for expert testimony in attempts to explain certain aspects of a child's behavior. For a review of the limitations of this type of expert testimony, readers are referred to Chapter 8.

Children As Witnesses

A tremendous amount of research in recent years has focused on the attributes children bring to the role of key witness to a criminal prosecution of sexual abuse. As a result, psychologists and other researchers are gaining greater insights into the potential strengths and weaknesses that children possess as witnesses. These findings, in turn, have important implications for the ways in which investigators, prosecutors, and judges evaluate the testimony provided by child sexual abuse victims. In this section we summarize three distinct areas of research: children's memory, jurors' perceptions of child witnesses, and the impact of court processes on child victims.

Children's Memory

Research on children's memory has addressed three basic questions: (1) Can children recall events accurately? (2) Can children separate fact from fantasy? (3) To what extent can children maintain their memories independently, without being influenced by others? While the findings to date are far from conclusive, they do shed light on these important questions.

Can children recall events accurately? Laboratory research reveals the following:

- Children are, indeed, less skillful than adults in reproducing events using free recall[27] (i.e., in responding to open-ended questions like, "What did you do in school today?").
- Children do not provide more incorrect information in response to open-ended questions, simply less information.[28]
- When there are errors in children's memories, they are more likely to be errors of omission (i.e., forgetting) than commission (i.e., adding new or inaccurate information).[29] Even after a one-year delay, children do not make false reports of sexual abuse, although they may mistakenly report certain facts about the incident in question.[30]
- Like adults, children have stronger memories for central events than for peripheral details.[31]
- School-age children generally perform as well as adults in identifying persons from pictures or live lineups.[32] If the "culprit" is not pictured in the lineup, however, the children are more likely than adults to identify an "innocent" person.[33]

Differences in recall ability are more pronounced among younger children. Studies of three year olds, for example, consistently find that they recall less information, answer fewer objective questions correctly, and are less able to identify a person they have seen.[34]

Can children separate fact from fantasy? Research suggests that they can. Children as young as six years old have been shown to be on a par with adults in distinguishing between memories originating from an actual experience and those that come from an imagined experience.[35]

To what extent can children maintain their memories independently, without being influenced by others? (i.e., How suggestible are children?) In recent years, researchers have been exploring children's vulnerability to suggestion in a highly systematic and controlled way, often comparing samples of children to samples of adults. In general, these studies have shown that younger children are less resistant to suggestion than older children or adults, but that the age differences narrow when

- the event in question is understandable and interesting[36]
- memories have not been weakened by delay[37]
- the questioning concerns the central action or information rather than peripheral detail[38]
- the interviewer is supportive rather than hostile or cold[39]

Research in this area also suggests that repeated interviews may improve the accuracy of children's reports and increase their resistance to suggestion.[40] On the other hand, one factor that has been found to *heighten* children's suggestibility is their perception of the authoritative role of the interviewer.[41]

When interpreting these findings, Gail Goodman, a leading researcher in this field, cautions that the studies, of necessity, lack "ecological validity."[42] That is, the scenarios they create for experimental purposes differ from the actual experiences of child victims and witnesses in ways that may have important ramifications for their findings. For example, the time frame of questioning is often quite brief. In reality, cases may not go to trial until a year or more following disclosure, which in turn may occur months or even years after the abusive incident. Most studies are limited to one or two interviews with the subject children, and so cannot examine the effects on children's memories of multiple interviews over time, which commonly occurs over the course of an investigation. Also, although Goodman and her colleagues have attempted to examine children's memory and suggestibility under stressful or "abusive" conditions (e.g., when having blood drawn, getting a shot, or having a gynecological examination), it is impossible and unethical to induce the protracted trauma and emotional assaults that typify many child sexual abuse cases. Conversely, in order to examine whether children can be led to report abuse where none occurred, it is important to begin with a benign situation and frame the questions in a suggestive manner. Both types of experiments are important to increase our understanding of children's vulnerability to suggestion.

In sum, what we have learned about children's memory, ability to separate fact from fantasy, and suggestibility indicates that the manner in which children are questioned has important implications for the accuracy and completeness of their memories for specific events. Additional research on children's suggestibility, and specific recommendations emerging from this literature, are discussed in Chapter 3.

Jurors' Perceptions of Children's Credibility

Another fertile area for research has been children's credibility as witnesses. As with the research on children's memory, these laboratory studies have attempted to simulate trial testimony under controlled experimental conditions. To summarize briefly, these studies have shown the following:

- As a rule, children are perceived as less credible witnesses than adults.[43]
- Prior beliefs about children's testimony are influential in determining verdicts as well as jurors' perceptions of child witnesses and their testimony.[44]
- There are circumstances under which child witnesses are perceived as *more* credible than adults: when the scenario involves a trial for sexual assault,[45] and when the victims are perceived to be confident in their testimony.[46]

Interestingly, a mail survey of 74 defense attorneys and 47 prosecutors in the state of Florida revealed that trial attorneys are well aware of jurors' stereotypes of child witnesses, and further, that they incorporate these stereotypes into their trial tactics when questioning children and when addressing the jury.[47] The researchers expressed particular concern about the attorneys' endorsement of cross-examination tactics that focus on children's unique vulnerabilities: their inarticulateness, fear, and suggestibility. Because the weight of the psychological research evidence reported in the literature (and summarized in this chapter) strongly suggests that such tactics "reduce the likelihood of obtaining the completeness and accuracy of which a child is otherwise capable," the researchers questioned the wisdom of applying the adversarial process to cases that depended heavily on the testimony of children. In other words, if the purpose of a trial is to ascertain the truth, perhaps the means should be altered to achieve that end.

The Impact of Criminal Prosecution on Child Victims

Some observers of the justice system assert that participation in judicial proceedings can cause deleterious effects and psychological harm to sexually abused children. Others, however, maintain that testifying can serve as a catharsis for

child victims and contribute to their recovery by restoring a sense of power and control. There has been some research addressing the fundamental question of whether the adjudication process is in fact harmful to children.

In the only study reported to date that administered psychological tests directly to child victims whose cases were being adjudicated in juvenile and/or criminal courts, Runyan et al. found that testifying *in juvenile court* may actually be beneficial. (Too few children testified in criminal court to allow meaningful analysis.) Children whose cases were still pending criminal court disposition, however, did *not* improve on the psychological measures, and the researchers hypothesized that the delays and continuances that characterize criminal prosecution can cause additional stress for child victims.[48]

This hypothesis was challenged, however, by the findings of a subsequent study by Goodman and her colleagues.[49] Based on measures of behavioral adjustment provided by nonoffending parents of sexually abused children, Goodman et al. found that children tended to show greater improvement with time. Further, parents of children who testified were significantly more likely than parents of a matched control group of child victims who did not testify to say their children had been adversely affected by criminal prosecution; some specifically targeted the length of the adjudication process as a source of stress. At the final follow-up, 11 months after the children first testified, differences between the "testifiers" and the controls had diminished, although a subset of children still showed negative effects: some of these children had testified, others had not.

Overall, factors that appeared to be related to improvement were

- fewer times required to testify
- maternal support
- presence of corroborative evidence
- passage of time
- positive parental attitudes about the legal system

Factors *not* related to improvement were psychological counseling, case outcome, and the number of interviews.

What exactly is it about the criminal justice system that may be difficult or troublesome? Several researchers have explored this question. The children questioned by Goodman and her colleagues reported negative feelings about talking to the defense attorney and facing the defendant. They had mixed feelings about the judge, felt positively about the prosecutor, and wanted their (nonoffending) parents with them.[50] Courtroom observations of the children in Runyan et al.'s study revealed that the children lacked effective advocacy and support figures, and further, that attorneys often failed to prepare children and their families adequately prior to testifying. Inappropriate and ineffective trial tech-

niques on the part of both prosecuting and defense attorneys also contributed to the children's discomfort.[51]

Tedesco and Schnell queried child sexual abuse victims directly about their experiences with the criminal justice system.[52] Based on self-administered questionnaires completed by 48 children and/or adults on the children's behalf, the researchers found that a greater percentage of victims rated the legal process as helpful rather than harmful. Children were most likely to object to multiple interviewers and testifying in court.

Research in this vein continues. The Office of Juvenile Justice and Delinquency Prevention (OJJDP), for example, has funded a large-scale study to examine the effects of innovative techniques on the trauma experienced by child victims.[53] But the results of studies reported to date suggest the following:

- *Most child victims never experience trial.* For example, the study conducted by Goodman et al. was based on a sample of 218 cases that were referred for prosecution in three jurisdictions in the Denver area between September 1985 and June 1987. (The total number of cases referred for prosecution in that interval was 359.) Of 169 cases that were closed during the course of the study, only 21 went to trial; 19 children testified.

- *A somewhat larger proportion of child victims testify at other proceedings* (e.g., preliminary hearings, competency hearings, or hearings to settle pretrial motions). A total of 60 children in the Goodman study actually testified at some court proceeding (including trial).

- *While testifying may be a negative experience for children (as reported by parents, therapists, and the children themselves), the negative effects appear to be short-lived.* Nonetheless, some children who testified in the Goodman study did exhibit negative effects after their cases were closed. But it is also true that some children suffered emotional consequences even though they never testified.

In sum, the available research indicates that testifying is not a traumatic experience for most child sexual abuse victims. This finding, while perhaps counterintuitive, does *not* recommend complacency on the part of criminal justice and child protection personnel. Rather, it suggests that children, like adults, are individuals, harboring unique strengths, weaknesses, and fears. Those who work with child victims must be sensitive to each child's individual concerns, and take whatever steps appear to be necessary to address those concerns.

* * * * *

The testimony of a child victim or witness can be critical to the adjudication process. If children are treated insensitively in the pretrial period, the quality of their participation in the criminal justice system is likely to suffer, thereby jeopardizing the search for truth. To the extent possible, those elements of the judicial process that create undue stress should be minimized, because serving the child's best interests will, in the long run, benefit the justice system as well.

As we will see, victim advocates and prosecutors across the country have experimented with a variety of measures intended to alleviate the stress on child witnesses and thereby elicit more effective testimony. Different children may require different techniques; many can testify successfully without dramatic interventions. Even in the absence of explicit statutory authority or controlling case law, there is much that can be done to assist child victims in their pursuit of justice.

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Chapter 3
Interviewing Children

Children's ability to be heard when they attempt to disclose and describe sexual abuse has been seriously hampered by their own developmental limitations, as discussed in Chapter 2, and by the parallel limitations of the adults who question them. All too often, neither the child nor the adult fully understands the other. Over the years, professionals who work with troubled children have relied on several techniques as aids to communication. In this chapter, we review three techniques that have recently come under fire in the context of child sexual abuse: using anatomical dolls, asking leading questions, and videotaping interviews.

Using Anatomical Dolls

When anatomically detailed dolls were first introduced in the late 1970s,[1] they were widely hailed and almost universally adopted by child-serving professionals as an important advance in techniques for communicating with troubled children. The U.S. Congress (in the Victims of Child Abuse Act of 1990) and eight states[2] have enacted legislation expressly permitting children to use anatomical dolls as demonstrative aids when they testify in court (see Appendix A, Table 1), and many appellate courts have upheld this use of anatomical dolls.[3] The actual use of dolls at trial appears limited, however: courtroom observations of child sexual abuse trials in eight jurisdictions revealed only one use of dolls per jurisdiction over the course of a year, with one exception where dolls were used in three of four cases observed.[4]

Yet, even as the dolls' value as demonstrative aids in court has gained widespread acceptance, their use in investigative interviews to arrive at a finding, or "diagnosis," of sexual abuse that is later presented in court as expert opinion, has been sharply criticized. At the core of the controversy is the extent to which anatomical dolls may suggest sexual behaviors even among children with no history of abuse. Improper use of the dolls, and unsupported inferences about children's behavior with them, can imperil the search for truth.

Benefits and Drawbacks of Using Anatomical Dolls

Proponents of anatomical dolls maintain that, when properly used, the dolls can facilitate and enhance interviews with children.[5] Dolls can help with the following:

- *Establish rapport and reduce stress.* Most children relate well to dolls. They can have a calming effect and make the interview room appear less formal and more child-oriented.
- *Reduce vocabulary problems.* Interviewers can use the dolls to learn a child's sexual vocabulary before questioning the child about the alleged abuse.
- *Show what may be difficult or embarrassing to say.* Anatomical dolls can be an invaluable aid to children who are unable or unwilling to verbalize what happened to them.
- *Enhance the quality of information.* Dolls may help interviewers gather information without resorting to leading or protracted questioning to overcome children's reluctance to describe sexual acts.
- *Establish competency.* Interviewers can use the dolls in a general way to demonstrate the child's mental capacity and ability to communicate.

Many critics fear, however, that anatomically detailed dolls could have adverse effects, whether by provoking horror or alarm at the sight of genitalia or by eliciting apparently sexualized responses, even among children who have not been sexually abused. Even some appellate courts have raised the issue that interviewing children with anatomical dolls may contaminate their memory.[6] Research offers little support for these contentions, however. For example, one study of "non-referred" children (i.e., children with no history or current allegation of sexual abuse) found that they did play more with undressed dolls than with dressed dolls; the children's primary activity was, in fact, dressing the dolls.[7] Others report that non-referred children do examine the genitalia and orifices of anatomically detailed dolls, but only rarely do they enact sexual behaviors.[8] (It should be recognized, of course, that some proportion of non-referred children may have experienced some form of undetected sexual abuse.)

Goodman and Aman[9] compared the responses of non-referred three- and five-year-old children in interviews in which no dolls, regular dolls, and anatomical dolls were present. Dolls, with or without anatomical parts, were more helpful to five year olds than to three year olds in increasing the amount of correct information that was verbally recalled. Dolls made no difference when children of either age were asked incorrect, misleading questions designed to elicit responses suggestive of abuse. False positives (i.e., answers suggesting that

abuse occurred when in fact it did not) occurred rarely—only twice among 120 opportunities for the older children, and 24 times out of 120 among the younger children. More importantly, these errors occurred no more often when anatomical dolls were present than when regular dolls or no dolls were employed. The researchers conclude that although this study does not address the value of anatomically detailed dolls in assisting alleged sexual assault victims to tell their stories, it does indicate that the use of these dolls "in and of itself does not lead children to make false reports of abuse even under conditions of suggestive questioning."[10]

Scientific Support for Dolls as Diagnostic Tools

In some courts, clinicians' interpretations of children's use of anatomical dolls have been challenged as unscientific and lacking in empirical support. Such challenges most often arise in states that rely on the *Frye* rule which requires a showing of general acceptance among the scientific community before novel scientific evidence can be admitted. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The California courts, for example, have disallowed expert testimony relying on children's use of anatomical dolls to arrive at a finding of abuse. *In Re Amber B.*, 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1987). But at least two studies now have shown that children who have been referred for sexual abuse evaluations do in fact demonstrate more sexualized behavior with anatomical dolls than do control groups of children who are not suspected to be sexual abuse victims.[11]

Apart from the need for additional research is the absence of standards and training for using dolls properly. According to one survey of child-serving professionals,[12] only one-third of the social workers, therapists, investigators, and psychologists interviewed had used dolls for more than one year. With the exception of mental health practitioners, less than 50 percent of those surveyed indicated that they had received any training on doll use; "training" ranged from formal workshops to discussions with colleagues or supervisors. In fact, 13 percent of doll users said there was no training available. Guidelines for using dolls were available to only about 20 percent of protective service workers and mental health professionals, 8 percent of physicians, and none of the law enforcement officers surveyed.

How Should Dolls Be Used?

Related to the issue of limited training is the fact that professionals in this field have yet to reach consensus on "proper" use of anatomical dolls. A number of questions remain unanswered:[13]

- How "correct" in their appearance must the dolls be? Some respondents to Boat and Everson's survey[14] (reported in 1988) revealed using Barbie dolls, Cabbage Patch dolls, and homemade

stuffed dolls with varying degrees of accuracy in their representation of genitalia. Does the presence or absence of certain details influence children's behavior with the dolls? Must the dolls also be matched by age and racial features to the child and alleged perpetrator?

- When and how should the dolls be used to assist an investigation? Should the dolls be available to children at the start of the interview, or should they be introduced only after the child falters in responding to traditional questioning? Who should undress the dolls, and how should this activity be incorporated into the interview?
- How many sessions with a child are necessary before drawing conclusions about the child's behavior with the dolls?
- Should other adults be present during the interview?
- How many dolls should be available?

The answers to these questions vary with the professional orientations of the people who are asked. Clinicians' responses are more likely to reflect concerns for the children's well-being; legal professionals, on the other hand, express concern for the potential effects of certain practices when revealed in court. From the courts' perspective, it is probably least objectionable to

- introduce the dolls only after the child has verbally disclosed, or as a last resort to assist reluctant children[15]
- allow children to choose from a variety of dolls (rather than present only two to represent child and perpetrator)[16]
- offer the child minimal or no instruction in use of the dolls
- incorporate information gathered from doll interviews with other data to provide a complete assessment[17]

Similar recommendations would apply to use of other props, such as puppets or artwork.

Asking Leading Questions

Professionals who interview children who are suspected of having been sexually abused are caught in a perilous dilemma. In the words of two leading clinicians:

> In the best of all possible worlds, it would be advisable not to ask children leading questions.... But in the best of all possible worlds, children are not sexually assaulted in secrecy, and then bribed, threatened, or intimidated not to talk about it. In the real world, where

such things do happen, leading questions may sometimes be necessary. . . .[18]

As with the anatomical dolls, leading questions are widely used as a courtroom technique to assist child witnesses,[19] but they are seriously challenged when used in investigative interviews. There is, however, a grain of truth to the argument that children can be led, coached, or even "brainwashed" by the interview process, and interviewers would be wise to re-examine their methods in light of our growing experience in the courts.

Briefly, the defense argument rests on the social psychological theory of social influence. In essence, as it applies to child sexual abuse cases, this theory holds that children's responses to questioning are heavily influenced by the perceived authority or power of the adult interviewers. When they are praised or otherwise "rewarded" for disclosing elements of abuse, children learn what the interviewers want to hear. In other words, children answer to please adults.[20]

Furthermore, to continue this argument, the effect of social influence is magnified in child sexual abuse cases because the children are typically interviewed repeatedly by several different adults, each of whom contributes to the child's expanding story by infusing—and reinforcing—new information. Ultimately, according to one of the leading defense experts,

> In situations where a child will eventually testify, the memory will consist of a combination of recall and reconstruction influenced by all of the interrogations, conversations, and sexual abuse therapy that have occurred during the delay. The longer the delay, the greater the possibility of social influence and the more the memory may consist of reconstruction rather than recall.[21]

Challenges based on this theory have successfully undermined prosecution of several highly publicized cases, including the well-known Jordan, Minnesota case and the McMartin Preschool case.

In addition to the research that was reviewed in Chapter 2, there are studies that have specifically looked at children's responses to leading questions. Many of these studies, of necessity, involve children as bystanders or participants in emotionally neutral situations and therefore are not readily generalizable to the unique circumstances of a child who has allegedly been sexually abused. However, a few innovative psychologists have designed experimental conditions that contain some components of abusive situations.

In one study, for example, 72 children age five to seven underwent physical examinations. Half received external examinations of their genital and anal areas; the other half were examined for scoliosis (curvature of the spine). Within one month of the exam, the children were interviewed about the event using open-ended questions, anatomically detailed dolls, and specific and misleading

questions. The results of this study were both illuminating and provocative. Specifically:

- The majority of children who experienced genital and anal touching did not report it, either in response to open-ended questions or when asked to demonstrate with the dolls.
- All but five (of 36) disclosed touching in response to specific questions (e.g., "Did the doctor touch you here?").
- Only three (of 36) girls who received scoliosis examinations incorrectly reported genital/anal touching; only one of those provided additional (incorrect) details.

In sum, based on the total number of questions asked, "When all of the chances to reveal genital/anal contact were considered, children failed to disclose it 64 percent of the time, whereas the chance of obtaining a false report of genital/anal touching was only 1 percent, even when leading questions were asked."[22]

In another study, 88 five- and six-year-old children observed a "janitor" either "cleaning" or "playing with" dolls. In both scenarios, the janitor looked under the dolls' clothing, explaining either that he needed to "clean" them or that he liked to play with them that way. The janitor asked some of the children not to tell what he had done.

The children were then interrogated by the janitor's "boss," who adopted one of three perspectives: (1) neutral; (2) incriminating (accusing the janitor of playing when he should have been working); and (3) exculpating (maintaining that the janitor was in fact cleaning). All the children were asked 17 factual questions, including some meant to suggest sexual behaviors (e.g., "Did he kiss the doll?"), and six interpretive questions (e.g., "Was the janitor cleaning the toys or playing with them?" "Was he doing his job or was he being bad?"). A second interviewer then questioned the children, either in line with the first perspective or opposed to it. A third interview was conducted by the parent. The parents re-interviewed their children again one week later.

Although this study, like the others reviewed here, suffers from small samples, the findings suggest that children's susceptibility to interviewing styles is quite complex.

- Consistent with other research, children answered both factual and interpretive questions accurately when the interviews contained no leading suggestions, no persuasive interrogation, and when the perspective of the interrogation was consistent with what they saw. The children's answers did not change when questioned one week later.

- When the perspective of the interrogation was *inconsistent* with what they observed, however, 90 percent of the children answered the interpretive questions to conform to the interviewer's perspective. The children did not change their answers when questioned by the second interviewer or their parents, nor did they change after a one-week time lapse.
- Regardless of whether the children were interviewed in a neutral or biased fashion, they responded accurately to the 17 factual questions.[23]

In their review of these and other studies of children's susceptibility to leading questions, Goodman and Clarke-Stewart conclude as follows:

> Children may not make up facts, it seems, but they can be led to change their interpretations of what they have seen or what has been done if the event is ambiguous to start with. They are more likely to accept the interviewer's suggestions . . . when
>
> — they are younger
>
> — they are interrogated after a long delay
>
> — they feel intimidated by the interviewer
>
> — the interviewer's suggestions are strongly stated and frequently repeated
>
> — more than one interviewer makes the same suggestions

Even so, children's reports of specific acts generally remain accurate.[24]

In efforts to overcome children's apparent deficiencies as subjects of forensic interviews, some researchers are searching for interviewing techniques that are specially tailored for children. For example, researchers from the University of California at Los Angeles have tested an approach that involves three steps:

1. Building a rapport with the child
2. Instructing the child that it's okay to say "I don't know," "I don't want to answer that question," or "I don't understand," and to repeat their answers if asked the same question more than once.
3. Applying cognitive techniques of memory recall: reconstructing the circumstances surrounding the event, being as complete as possible, recalling events in reverse order, and changing perspectives.

These techniques were found to increase the amount of information recalled by 7- to 12-year-old children without a concomitant increase in erroneous information.[25]

These same researchers are also testing ways to teach children how to recognize questions that are confusing or misleading, and to answer appropriately.[26] Coupled with our growing awareness of children's capabilities and limitations as witnesses, improved interviewing techniques could strengthen the investigation of child sexual abuse cases in a dramatic way.

Videotaping Interviews

Videotaping technology, like anatomical dolls, has endured a rocky history since its introduction into the arena of child sexual abuse investigations. Widely accepted among the therapeutic community, videotaping was quickly embraced by investigators from law enforcement and child protection agencies, only to be quickly abandoned when the "flip" side of the innovative practice was exposed during preliminary hearings in the McMartin Preschool case. In the ensuing years, many child-serving professionals have returned to videotaping their interviews with alleged child sexual abuse victims, albeit with a more sober and cautious approach.

Proponents of videotaping as an investigative device cite the following benefits:[27]

- Unlike written notes or audiotape, videotape captures children's body language and facial expressions.
- It can reduce the number of interviews: agency representatives can satisfy their informational needs by viewing the videotape rather than questioning the child.
- It can enhance the therapeutic relationship by allowing the therapist and child to watch together.
- It can deter retractions by "converting" disbelieving parents to supportive parents.
- Compelling videotapes reportedly encourage defendants to enter guilty pleas.

Also, videotaped interviews can be immensely valuable as an educational device for training child-serving professionals in techniques that are both effective in eliciting the child's story and able to withstand scrutiny.

Videotaped interviews with child victims have been used successfully in court by both the prosecution and the defense. (Chapter 6 examines the case law surrounding the use of videotaped interviews or statements as a hearsay exception.) Prosecutors, for example, have introduced videotaped interviews to corroborate expert testimony based on interviews with the child,[28] to support motions for special courtroom precautions, as prior consistent statements to rebut defense charges of fabrication or coaching, even as prior *inconsistent* statements to

rehabilitate a child's recantation on the witness stand. Videotaped interviews may have equally great value for the defense, as the McMartin case so vividly revealed. There, videotapes taken by a diagnostic clinician were used by the defense to confront child witnesses with apparent inconsistencies in their stories, and to discredit the interviewing techniques that were used. However, in at least one well-documented case, the defendant's introduction of videotaped interviews to discredit the interviewers' techniques actually backfired, lending greater support to the children's stories.[29]

Armed with this experience, along with the knowledge gained from research on interviewing techniques and the wisdom shared among professionals in child-serving disciplines, many therapists and investigators have renewed their faith in videotaping. There are some precautions, however.

- Interviewers should be skilled in effective techniques of questioning children, recognizing that leading techniques may be necessary in certain cases. Furthermore, they must be able (and willing) to withstand challenges to their techniques in court.
- Certain technical considerations must be resolved: location and appearance of the interview environment; quality of the equipment; location and role of the camera operator.[30]
- Certain legal and ethical considerations must be resolved: Can and should a child give informed consent to be videotaped, and further, to release the videotape to the defense? To what extent can the videotape be protected from release to the media?[31]

Another issue that should be resolved is *when* to take the videotape. In many communities, only one interview with the child is videotaped. Typically, this is the first "statement" taken from the child, usually by a child protection worker, law enforcement officer, or specially-trained interviewer associated with a "children's center" or specialized medical clinic. However, it is reportedly rare for a young child to divulge a complete story in a single interview,[32] and many evaluators recommend several sessions before arriving at a finding.[33] To avoid the appearance of selectively videotaping "good" interviews or coaching during interviews that were not videotaped, several authors have recommended videotaping *all* investigative interviews with the child.[34]

* * * * *

A great deal has been learned in recent years about effective ways to interview children. We have learned, for example, that anyone who questions children about the possibility of having been sexually abused is a potential witness in a court case; this knowledge, gained largely through experience, has encouraged many mental health practitioners, in particular, to acquaint themselves with investigative techniques that are acceptable to the criminal justice system.

Likewise, criminal justice professionals have learned that traditional investigative styles of questioning are not always effective with children; this knowledge has encouraged greater cooperation across disciplines as communities strive to improve the quality of interviews with children.

There are many avenues for learning more about interviewing techniques. Cross-disciplinary training has been widely sponsored by various organizations with federal and state funding. Videotapes by recognized experts are available for rental or purchase. Readers also may wish to consult the following publications (as well as others that are cited in the references to this chapter):

- *Interviewing Child Victims of Sexual Exploitation*, by Lt. William Spaulding, available from the National Center for Missing and Exploited Children.
- *Investigation and Prosecution of Child Abuse*, by P.A. Toth and M. Whalen, available from the National Center for the Prosecution of Child Abuse.
- *Using Anatomical Dolls: Guidelines for Interviewing Young Children in Sexual Abuse Investigations*, by B.W. Boat and M.D. Everson, available from the University of North Carolina, Chapel Hill, Department of Psychiatry.
- *Sexual Abuse Allegations in Custody and Visitation Cases*, Part II: Investigation and Assessment, available from the American Bar Association, Center on Children and the Law.
- *Interviewing the Sexually Abused Child*, by D.P.H. Jones and M. McQuiston, available from the C. Henry Kempe National Center for the Prevention and Treatment of Child Abuse and Neglect.
- *Guidelines for Psychosocial Evaluation of Suspected Sexual Abuse in Young Children*, available from the American Professional Society on the Abuse of Children.

Endnotes

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2. Alabama, Connecticut, Michigan, New Jersey, New York, Pennsylvania, West Virginia, and Wyoming.
3. See for example, *Cleaveland v. State*, 490 N.E. 2d 1140 (Ind. App. 1986); *People v. Garvie*, 148 Mich. App. 444, 384 N.W. 2d 796 (1986); *State v. Jenkins*, 326 N.W. 2d 67 (N.D. 1982).
4. E. Gray, "Children as Witnesses in Child Sexual Abuse Cases Study," Final Report submitted to the National Center on Child Abuse and Neglect under Grant No. 90-CA-1273, by the National

Council of Jewish Women, New York, New York, 1990, p. 51. (Henceforth referred to as NCJW study.)

5. K.R. Freeman and T. Estrada-Mullaney, "Using dolls to interview child victims: Legal concerns and interview procedures," *Research in Action*, National Institute of Justice (January/February 1988), p. 2.
6. White, supra, note 1, at p. 472-3.
7. S. White and G. Santilli, "A review of clinical practices and research data on anatomical dolls," *Journal of Interpersonal Violence*, Vol. 3 (December 1988): 437-9.
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9. G.S. Goodman and C. Aman, "Children's use of anatomically detailed dolls to recount an event," *Child Development*, Vol. 61 (1990): 1859-1871.
10. Ibid, p. 1869.
11. L. Jampole and M.K. Weber, "An assessment of the behavior of sexually abused and nonsexually abused children with anatomically correct dolls," *Child Abuse and Neglect*, Vol. 11 (1987): 187-192; and S. White, et al., "Interviewing young sexual abuse victims with anatomically correct dolls," *Child Abuse and Neglect*, Vol. 10 (1986): 519-529.
12. White and Santilli, supra, note 7 at p. 431.
13. Ibid.
14. B. Boat and M. Everson, "Use of anatomical dolls amoung professionals in sexual abuse evaluations," *Child Abuse and Neglect*, Vol. 12 (1988): 171-179.
15. K. MacFarlane and S. Krebs, "Techniques for interviewing and evidence gathering," in K. MacFarlane and J. Waterman, et al., *Sexual Abuse of Young Children* (New York: The Guilford Press, 1986), pp. 74-75.
16. Ibid.
17. White and Santilli, supra, note 7 at p. 439-40.
18. MacFarlane and Krebs, supra, note 15 at p. 87.
19. NCJW Study, supra, note 4 at p. 52.
20. S.J. Ceci, D. Ross, and M. Toglia, "Age differences in suggestibility: Narrowing the uncertainties," in S.J. Ceci, M.P. Toglia, and D.F. Ross (eds.), *Children's Eyewitness Memory* (New York: Springer-Verlag, 1987), pp. 79-91.
21. H. Wakefield and R. Underwager, "Techniques for interviewing children in sexual abuse cases," *VOCAL Perspective* (Summer 1989): 7-15.
22. K. Saywitz, et al., "Children's memories of genital examinations: Implications for cases of child sexual assault," in G.S. Goodman (Chair), *Can children provide accurate eyewitness testimony?* Symposium presented at the Society for Research in Child Development Meetings, Kansas City, Missouri, 1989.
23. A. Clarke Stewart, L. Thompson, and S. Lepore, "Manipulating children's testimony through interrogation," in G.S. Goodman (Chair), ibid.
24. G.S. Goodman and A. Clarke-Stewart, "Suggestibility in children's testimony: Implications for sexual abuse investigations," in J. Doris (Ed.), *The Suggestibility of Children's Recollections: Implications for Eyewitness Testimony* (Washington, D.C.: American Psychological Association, 1991), pp. 92-105.

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26. K. Saywitz, "Preparing children for the investigative and judicial process: Improving communication, memory, and emotional resiliency," Grant No. 90CA1369-01 from the National Center on Child Abuse and Neglect to Harbor-UCLA Medical Center, Torrance, California.

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28. D. Lorenzen, "Admissibility of expert psychological testimony in cases involving the sexual misuse of a child," *University of Miami Law Review*, Vol. 42 (1988): 1033-1073.

29. J. Hollingsworth, *Unspeakable Acts* (New York: Congdon & Weed, 1986).

30. MacFarlane and Krebs, supra, note 27 at pp. 181-186.

31. Ibid., at pp. 187-191.

32. MacFarlane and Krebs, supra, note 15 at p. 83.

33. A.K. Lampel, "Models for assessing suspected sexual abuse: The role of the forensic psychologist," paper presented at the American Psychological Association Convention, Atlanta, Georgia, August 1988.

34. E.F. Loftus and G.M. Davies, "Distortions in the memory of children," *Journal of Social Issues*, Vol. 40 (1984): 51-67; H. Wakefield and R. Underwager, *Accusations of Child Sexual Abuse* (Springfield, IL: Charles C. Thomas, 1988), p. 199.

PART II

INNOVATIVE PRACTICES: LEGAL ISSUES AND PRACTICAL CONCERNS

Statutory and Procedural Reforms

Public outrage and intense media coverage of child sexual abuse have prompted a flurry of proposals for reform in the way child protection and criminal justice systems handle these cases. Over the last five years, at least three national panels have promulgated recommendations or guidelines for improved management of child sexual abuse cases, as depicted in Exhibit 3 on the following page.

Of these three panels, only the American Bar Association[1] explicitly limited its purview to the needs of child witnesses in cases involving allegations of child abuse. The other two considered these issues as part of a broader mandate. The Attorney General's Advisory Board on Missing and Exploited Children,[2] for example, published a host of recommendations pertaining to the problems of runaway or abducted youth; the President's Child Safety Partnership[3] focused on public and private sector initiatives aimed at a variety of social problems afflicting America's youth—alcohol and drug abuse, physical and sexual abuse, parental neglect, exploitation, abduction, and violence.

Despite the differences in focus, there is a surprisingly high degree of congruence among these three groups in their recommendations for justice system reforms, as the table shows. For example, all three groups endorsed the following four ideas:

- obtaining children's testimony via closed-circuit television or videotape
- using anatomically correct dolls to help children communicate
- employing a team approach to investigation and prosecution
- using specialized victim assistance or advocacy programs

And, in fact, only three of the 14 reform measures listed on the table were mentioned by only one group.

Several states have convened their own special task forces, analogous to the national groups, to examine issues surrounding child victims and witnesses.[4] Many of their recommendations parallel those enunciated by the national groups mentioned above. Many of these recommendations have been the subject of bills introduced in state legislatures, and, increasingly, alternative procedures for child victims are being given the force of statutory authority. State legislatures have responded to the perceived plight of the child victim witness with unusual speed. Exhibit 4 below shows the number of states that had enacted selected evidentiary and procedural innovations as of December 1984 and, again, as of December 1988.

Exhibit 3

ENDORSEMENTS OF SELECTED REFORM MEASURES BY THREE NATIONAL ORGANIZATIONS

Selected Reform Measures	ABA[1]	AG's Board[2]	Child Safety Partnership[3]
Abolishing arbitrary age limitations for competency determinations	√		√
Use of leading questions	√	√	
Use of reliable hearsay	√	√	
Presence of support persons during child's testimony	√		
Testimony via closed circuit television or videotape	√	√	√
Excluding spectators during child's testimony	√		
Use of anatomically correct dolls and drawings	√	√	√
Team approach to investigation and prosecution	√	√	√
Speedy trials/reduced continuances	√		√
Extended statutes of limitations	√	√	
Specialized victim assistance or advocacy programs	√	√	√
Media responsibility	√		√
Coordinating actions in multiple courts		√	√
"Child-friendly" interviews: fewer, shorter, age-appropriate, conducted in suitable location by trained interviewer			√

[1] American Bar Association, 1985
[2] Attorney General's Advisory Board on Missing and Exploited Children, 1986
[3] President's Child Safety Partnership, 1987

Exhibit 4

Number of States Enacting Selected Reforms, 1984 and 1988

Statutory Reform	December 1984	December 1988
Special hearsay	9	26
Videotaped testimony	15	36
Closed circuit testimony	4	29
Presumption of competency	20	33*

*Includes six states with special provisions exempting child sexual abuse victims from competency examinations.

Several states have enacted a "child victims' bill of rights" that articulates the legislature's recognition that children require special consideration in the justice system. Utah's statute, excerpted in Exhibit 5, is illustrative.

And, at the federal level, the Victims of Child Abuse Act of 1990 (S.3266) amended Chapter 223 of title 18, U.S. Code, to add a new section in the Federal Rules of Criminal Procedure. The new procedures codify specific "rights" for children, never before legally recognized in federal court, and allow other important accommodations, including

- alternatives to live in-court testimony, whether by two-way closed circuit television at trial or by videotaped depositions taken prior to the trial
- presumption of children's competency as witnesses, with specific guidance for the conduct of competency examinations
- privacy and protection from public identification
- closing the courtroom during children's testimony
- victim impact statements from children, with assistance as needed from court-appointed guardians ad litem
- use of multidisciplinary teams to provide medical and mental health services to child victims, expert testimony, case management, and training for judges and court personnel
- appointment of guardians ad litem to protect the best interests of child victims
- appointment of a child's attendant to provide emotional support for children during judicial proceedings

- speedy trial
- extension of the statute of limitations for commencing prosecution of child sexual or physical abuse allegations until the child reaches the age of 25
- testimonial aids, such as dolls, puppets, or drawings

These provisions are discussed in greater detail in subsequent chapters of this report. Other subtitles of the Act authorize grant programs to

- improve investigation and prosecution of child abuse cases through the establishment of multidisciplinary teams and specialized "counseling centers"
- expand the Court-Appointed Special Advocate program
- provide training and technical assistance for prosecutors, judges, and court personnel
- provide equipment and specialized training for taking children's testimony via closed-circuit television or videotape
- establish treatment programs for juvenile offenders who are victims of child abuse or neglect.

Finally, the Victims of Child Abuse Act articulates reporting requirements for suspected child abuse on federal land or in federally operated (or contracted) facilities, and it mandates criminal background checks for child care workers employed by agencies or contractors of the federal government. In August 1991, the U.S. Attorney General's Office issued guidelines to assist federal law enforcement officers, investigators, and prosecutors in implementing the provisions of the Victims of Child Abuse Act.

To assist states in making the transition from recommendations to legislation to actual practice, the Children's Justice Act, S. 140, was passed in 1986. This Act provides a mechanism for allocating funds to the states for Children's Justice Grants. These grants are meant to support programs that improve (1) the handling of child abuse cases by reducing trauma to the victims and (2) the investigation and prosecution of child abuse cases. In order to qualify for Children's Justice Grants, multidisciplinary task forces established by the states must set forth recommendations that include

- reforms to reduce the trauma to the child victim and ensure procedural fairness to the accused
- programs for testing innovative approaches to improving judicial action in child abuse cases
- reform of state laws and procedures for providing protection for children

Exhibit 5

UTAH'S BILL OF RIGHTS FOR CHILDREN

Utah Code Criminal Procedure 77-37-4. In addition to all rights afforded to victims and witnesses under this chapter, child victims and witnesses shall be afforded these rights:

(1) Children have the right to protection from physical and emotional abuse during their involvement with the criminal justice process.

(2) Children are not responsible for inappropriate behavior adults commit against them and have the right not to be questioned, in any manner, nor to have allegations made, implying this responsibility. Those who interview children have the responsibility to consider the interests of the child in this regard.

(3) Child victims and witnesses have the right to have interviews relating to a criminal prosecution kept to a minimum. All agencies shall coordinate interviews and ensure that they are conducted by persons sensitive to the needs of children.

(4) Child victims have the right to be informed of available community resources that might assist them and how to gain access to those resources. Law enforcement and prosecutors have the duty to ensure that child victims are informed of community resources, including counseling prior to the court proceedings, and have those services available throughout the criminal justice process.

As of this writing, some 37 states, the District of Columbia, and five territories have been funded under the Children's Justice Act. Most of the recipients have used their grants to support professional training programs or conferences. At least four states (Hawaii, Maryland, New Mexico, and North Carolina) are supporting children's centers (see Chapter 10) to consolidate and streamline the investigation process. Other states purchased equipment: hand-held microrecorders and transcribers in Kansas; video equipment, one-way mirrors, and listening devices for use in the children's centers in Maryland; dolls and dollhouses in Tennessee; and one-way mirrors, videotape equipment, and recorders in Vermont. Other popular uses of Children's Justice Grants include development of interagency protocols or multidisciplinary teams, direct funding of programs or services, legislative advocacy activities, and program and policy research.

The federal government has also underwritten at least two sources of professional technical assistance to jurisdictions in their efforts to implement reform. The National Resource Center on Child Sexual Abuse[5] is funded by the National Center on Child Abuse and Neglect (Department of Health and Human Services), and the National Center for the Prosecution of Child Abuse[6] (a program of the American Prosecutors Research Institute, itself a division of the National District Attorneys Association), was initiated with grants from the Office of Juvenile Justice and Delinquency Prevention (Department of Justice). *Investigation and Prosecution of Child Abuse*, a detailed reference manual developed by the National Center for the Prosecution of Child Abuse, served as an invaluable resource for this report.

Judges, too, have expressed great interest in finding ways to assist child victims in the courtroom. The National Council of Juvenile and Family Court Judges has sponsored conferences and seminars on this topic, and the State Justice Institute, an agency funded by the U.S. Congress to support the state courts, lists procedures to assist victims and witnesses—and particularly children—among its special priorities.

In sum, there has been a tremendous amount of activity targeted at the perceived needs of child sexual abuse victims in the context of criminal proceedings. Yet many of the proposed innovations and reforms remain controversial. The legal issues and practical concerns that beset certain interventions on behalf of child victims are explored in the chapters that follow. To assist readers with special interest in statutory reforms, several of the chapters include charts that delineate and compare specific provisions of pertinent state legislation. Appendix A contains complete lists of the statutory citations.

Endnotes

1. American Bar Association, Criminal Justice Section, Report to the House of Delegates, *Recommendation:* BE IT RESOLVED, that the American Bar Association approves the "Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged" dated May 1985, approved by the American Bar Association, July 1985.
2. *America's Missing and Exploited Children: Their Safety and Their Future,* Report and Recommendations of the United States Attorney General's Advisory Board on Missing Children (Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, March 1986).
3. President's Child Safety Partnership, *Final Report* (Washington, D.C.: Office for Victims of Crime, 1987).
4. See, for example, *Protecting Our Children: Not Without Changes in the Legal System,* The Report of the Governor's Working Group on Child Abuse and Neglect Legal Proceedings (Augusta, ME: Department of Human Services, undated); *Report of the Governor's/Massachusetts Bar Association's Commission on the Unmet Legal Needs of Children,* undated; California Child Victim Witness Judicial Advisory Committee, *Final Report* (Sacramento: California Attorney General's Office, October 1988).
5. National Resource Center on Child Sexual Abuse, 106 Lincoln St., Huntsville, AL 35801, (205) 534-6868.
6. National Center for the Prosecution of Child Abuse, 1033 N. Fairfax Street, Suite 200, Alexandria, VA 22314, (703) 739-0321.

Chapter 4
Competency of Child Witnesses

Historically, competency hurdles were widely recognized as "the No. 1 legal rule preventing successful prosecution of child molestation cases."[1] Individuals could be considered incompetent to testify for reasons ranging from age to religious beliefs and marital relation to the offender.[2] Since 1975, with the enactment of the Federal Rules of Evidence and the subsequent adoption of the Uniform Rules of Evidence in many states, there has been a trend away from competency criteria and, in particular, the common law rule establishing a presumption of competency only for children over the age of 14 years. The more liberal Federal and Uniform Rules allow children to testify and permit the trier of fact to determine the weight and credibility of the testimony. Widespread adoption of these rules has been recommended by several prestigious groups, including the American Bar Association's Center on Children and the Law, and the President's Child Safety Partnership.[3]

Under federal law (Victims of Child Abuse Act of 1990), children are presumed to be competent witnesses. State competency standards may be found in state laws, court rules of evidence, or codified rules of evidence. An analysis of each state's competency provisions as of December 31, 1990, revealed the following:

- Fifteen states dictate that every person is competent, with no specific requirements.
- Fourteen states assert that anyone is competent, regardless of age, providing certain minimum requirements are met. These requirements commonly include capability of expression (directly or through an interpreter) and an understanding of the duty to tell the truth.
- Twenty states provide specifically for child witnesses.
  - — In four states, children are required to demonstrate their competency before they are allowed to testify. Two additional states require children to have the capacity to remember and communicate the facts in question, although there is no direct mention of a qualifying examination.
  - — Nine states specifically exempt child sexual abuse victims from the competency requirements.
  - — Four states essentially waive the need for children to understand the nature of an oath.

— One state merely asserts that age cannot be the sole reason for precluding a child from testifying.

- The state of Virginia lacks a specific statute or court rule regarding competency. Here, case law offers the only guidance on children's competency.

See Table 1 for additional detail and Appendix A, Table 2, for a list of statutory citations.

Regardless of a state's written provisions for children's competency as witnesses, however, it is common practice for trial courts to require young children to demonstrate their competency as witnesses before permitting them to testify.[4] Rarely is the trial court found to have abused its discretion in ruling on a child witness's competency.

The test of a child's competency derives from the landmark U.S. Supreme Court decision in *Wheeler v. United States*, 159 U.S. 523 (1895), in which the question of a child's competency was found to:

> . . . depend on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.

In the ensuing years, the courts have set forth four dimensions that are used to measure a child's competency to testify.

1. *Capacity for truthfulness*: A child must understand the difference between truth and fantasy and appreciate the obligation or responsibility to speak the truth.
2. *Mental capacity:* He or she must have sufficient mental capacity at the time of the occurrence in question to observe or receive and record accurate impressions of the occurrence.
3. *Memory:* A child must have memory sufficient to retain an independent recollection of the observations.
4. *Communication:* A child must have the capacity to communicate or translate truly into words the memory of such observation and the capacity to understand simple questions about the occurrence.[5]

The remainder of this chapter discusses these dimensions in further detail and reviews some of the current empirical research and courtroom procedure pertaining to the evaluation of a child's ability to testify.

Table 1
SUMMARY OF PROVISIONS RELATING TO CHILDREN'S COMPETENCY

PROVISION \ STATE	AL	AK	AZ	AR	CA	CO	CT	DE	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WV	WI	WY	FED
STATUTES WITH SPECIFIC PROVISIONS FOR CHILDREN																																																			
Child sexual abuse victims are exempt from competency requirements	√				√	√		√																√															√		√		√		√					
Children must demonstrate competency before they can testify											√	√									√																					√									
Other:				[1]√			[1]√	[1]√												[2]√		[3]√									[1]√				[3]√															[4]√
STATUTES THAT DO NOT DIFFERENTIATE CHILDREN																																																		
Every person is competent, with nothing further			√	√										√	√			√					√			√			√				√		√		√	[5]√	√	√						√	√		
Every person is competent, with minimum requirements		√								√					√	√	√			√						√		√	√	√	√		√				√							√	√					

[1] Children may testify even if they do not understand the nature of the oath.
[2] Age may not be the sole reason to preclude a child from testifying.
[3] Children must have the capacity to remember and relate truly the facts in question.
[4] Children are presumed competent.
[5] Pennsylvania case law holds that when a witness is under 14 years of age, there must be a searching judicial inquiry to make an ultimate decision as to the competency of the child. *Commonwealth v. Shorts*, 420 A.2d 694 (1980); *Roche v. McCoy*, 156 A.2d 307 (1959).

Capacity for Truthfulness

The first dimension—understanding the difference between truth and fantasy and the obligation to tell the truth—is perhaps the most emphasized in today's courts. Even states that have adopted liberal competency standards still require a minimal understanding of what it means to tell the truth. Historically, children were asked questions about church attendance and their belief in God to determine their knowledge of the difference between truth and a lie. The current trend, however, recognizes that these types of questions may be irrelevant due to changes in attitudes and cultural emphasis on religion and church attendance.

For adults, the taking of the oath is considered adequate evidence that the witness knows the difference between truth and falsehood and is obligated to tell the truth. A child, on the other hand, may not understand the wording of the oath or the import of its recitation. Not understanding the language of the oath does not disqualify child witnesses, as there are many other ways to determine their capacity to testify truthfully. The National Center for the Prosecution of Child Abuse recommends, for example, the following line of questioning:[6]

1. Do you know the difference between right and wrong?
2. Do you know what it is to tell a lie?
3. If I said it was Christmas today, would that be the truth or would it be a lie?
4. Is it right or wrong to tell a lie?
5. If you were to tell these people a lie, or something that wasn't true, what would happen to you?
6. Do you promise only to say things that are true today?
7. Do you promise not to tell any lies?

Such lines of questioning are fairly common and generally accepted as giving adequate evidence of the child's understanding of truth.[7]

To date, there is only one published study that examines the relationship between the questions asked during competency examinations and children's accuracy in testifying. Goodman, et al., conducted an experiment with children ages three to six who had just received inoculations to test their memory for this stressful event. After the children completed the memory test, they were asked the following questions:

1. Do you know the difference between the truth and a lie?
2. If you said the nurse kissed you, would that be the truth or a lie?
3. What happens if you tell a lie?
4. Is everything you told me today the truth?

The researchers found only limited support for the belief that correct answers to questions like these will predict accuracy on memory tests. This relationship held true only when five- and six-year-old children correctly answered the third question, "What happens if you tell a lie?" No correlation was found for answers to any of the other competency questions, nor was there any correlation for answers provided by the younger children.[8]

While these findings are provocative, it should be noted that the children studied were asked the competency questions *after* they had answered the questions designed to test their memory. In a courtroom situation, of course, the competency examination precedes the child's testimony. It would be interesting to replicate this experiment reversing the order of the two sets of questions.

Finally, other research suggests that there may be little reason to differentiate children from adults in terms of their propensity to lie on the witness stand. Studies have shown that moral behavior or telling the truth does not necessarily follow from an understanding of the difference between truth and falsehood. In children as well as adults, comprehending the oath and the repercussions of telling a lie does not guarantee honesty.[9]

Mental Capacity

Little is known about children's ability to receive accurate impressions of criminal events. This may be because mental capacity is difficult to evaluate without considering whether the child has sufficient memory and the communicative capacity to relate events, the third and fourth dimensions. Questioning that leads to an assessment of the other three dimensions will likely answer the court's questions concerning the child's mental capacity. It is recommended, however, that questioning in this regard be geared to the age of the child and remain centered around simple questions such as the child's age and where he or she goes to school.[10]

Memory

The third dimension of competency is memory sufficient to retain independent recollection. Research on children's memory was summarized in Chapter 2 and will be recapitulated briefly here.

- Children find it difficult to describe events using free recall.
- When answering specific open-ended questions, children do provide less information than adults, but what they say is generally accurate.
- All but the youngest children (roughly pre-school years) generally perform on a par with adults when (1) identifying persons from

pictures or live lineups and (2) responding to suggestive questioning about central events that are understandable or interesting to them (provided there has not been a lengthy delay since the event occurred).

- The errors children make are more likely to be errors of omission rather than commission, that is, children are more likely to omit factual information than to provide new, false information.

The trial courts have employed a range of techniques to test children's memory. Some courts interpret the memory "prong" of the competency test to require specific memories of the incident being litigated. Sometimes such a test is mandated by statute, as in Idaho, where the relevant language directs the judge to examine children under ten *in camera*, in the presence of the parties,

> . . . posing any reasonable questions previously requested by the parties, to determine if the child is capable of receiving just impressions of the facts in question and relating them truly. **IDAHO CODE 9-202 (1985)**

Under such circumstances, the competency examination approximates a "mini-trial," subjecting the child to special scrutiny in close proximity to the defendant. Elsewhere, in contrast, children are asked simple questions about recent events at school, Christmas, or their birthdays—simple questions that serve not only to test their ability to recall and describe pertinent events in their lives, but also to set them somewhat at ease with the judge and their role as witnesses. As directed in the Victims of Child Abuse Act of 1990,

> The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, *shall not be related to the issues at trial*, and shall focus on determining the child's ability to understand and answer simple questions. (Emphasis added)

When this approach is used to assess competency, the defendant need not be present because there is no substantive questioning about the facts of the case. *Kentucky v. Stincer*, 107 S. Ct. 2658 (1987).

Communication

The final dimension is whether the child can communicate the facts of a case. This problem is clearly more pertinent to younger children. It has been recognized that young children can communicate adequately if certain minor accommodations are made. The most obvious is tailoring the questions to the child's level of language development—especially in sexual abuse cases, where children generally use nontechnical language to describe parts of the body. A second technique that has been helpful in this regard is the use of anatomically detailed

dolls, with which child witnesses reenact the abusive incident. As was discussed in Chapter 3, the courts have generally upheld the use of dolls as a demonstrative aid for young children. A third technique, less commonly employed, is the use of an interpreter. Many of the states' competency provisions explicitly acknowledge the possibility of communicating through an interpreter, but only Florida (to date) has enacted a statute expressly enabling child witnesses to use these services:

> Children who cannot be reasonably understood or who cannot understand questioning may be aided by an interpreter. **FLA. STAT. ANN. 90.606(1) (West 1985)**

The recommendations for interviewing children presented in Chapter 3 can be instructive for assessing competency as well. If the child is interviewed appropriately during the competency exam, the benefits will likely be twofold: the trier of fact will have a clear and accurate picture of the child's developmental level (and therefore competency), and the child may be more likely to give accurate testimony. If a child appears incompetent on the stand, chances are that it is anxiety about the trial situation or the inappropriate nature of the competency exam that is rendering the child incompetent.

In recent years, there has been a trend among defense attorneys to request psychological or psychiatric examinations for the purpose of assessing the child's competency as a witness.[11] Appellate courts have usually upheld the trial courts' denials of these motions, generally on grounds that such assessments encroach on the jury's rightful role in evaluating the credibility of witnesses. In *State v. Hall*, 1988 WL 79298 (Ohio App.), the court explicitly reminded the appellant not to confuse competency (an issue for the court to decide) with credibility (an issue for the jury to decide). But in at least one case, the court ruled that the defendant is entitled to have children examined by a court-appointed mental health practitioner to determine competency *and to aid the defense in evaluating their credibility. Anderson v. State*, 749 P.2d 369 (Alaska App. 1988).

In general, it appears that courts are circumspect in granting defense requests for mental health examinations. Such exams tend to be permitted when (1) existing mental illness or serious disability indicates there is reason to question the child's competence, or (2) the prosecution has opened the door by offering its own expert assessments of the child's competence/credibility.[12] This reasoning was adopted in the Victims of Child Abuse Act of 1990, which precludes psychological and psychiatric examinations to assess the competency of child witnesses "without a showing of compelling need." (Additional discussion of the use of mental health experts to assess children's credibility appears in Chapter 8.)

* * * * *

As we have seen, studies suggest that on most tasks inherent in testifying, children have sufficient skills to testify. A relationship between age and honesty has never been shown, and it may be fair to say that young children cannot independently fabricate truly credible descriptions of events outside of their experience. There seems to be no line of questioning that will determine definitively that a child (or adult, for that matter) is competent to testify.

Since adults are at least as likely to lie or to report incorrect facts during testimony, it seems only logical that children be allowed to testify to the best of their ability, just as adults do. Juries should be instructed to use the same standards for assessing children's testimony as they do for adults' testimony or, alternatively, to consider the child's age, knowledge, and experience.[13] As the Attorney General's Task Force on Family Violence recommended

> Because the victim is often the only witness to the crime, a child's testimony may be critical to the prosecution of the case. Children, regardless of their age, should be presumed to be competent to testify in court. A child's testimony should be allowed into evidence with credibility being determined by the jury.[14]

The bottom line in the competency question appears to be the common sense axiom that people—including children—are different. From this standpoint, age is a somewhat arbitrary discriminator of legal competency to testify in court. Adoption of the more liberal Federal and Uniform Rules of Evidence, which allow children to testify and permit the trier of fact to determine the weight and credibility of the testimony, would facilitate justice in cases involving children.

Endnotes

1. M.A. Galante, "New war on child abuse," *National Law Journal*, June 25, 1984, p. 26, quoting Law Professor Irving Prager.
2. G.S. Goodman, "Children's testimony in historical perspective," *Journal of Social Issues*, Vol. 40 (1984): 12.
3. National Legal Resource Center for Child Advocacy and Protection, *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases* (Washington, D.C.: American Bar Association, 1982); President's Child Safety Partnership, *Final Report* (Washington, D.C.: Office for Victims of Crime, 1987).
4. E. Gray, "Children as Witnesses in Child Sexual Abuse Cases Study," Final Report submitted to the National Center on Child Abuse and Neglect under Grant No. 90-CA-1273, by the National Council of Jewish Women, New York, New York, 1990, p. 65.
5. G. Melton, J. Bulkley, and D. Wulkan, "Competency of children as witnesses," in National Legal Resource Center for Child Advocacy and Protection, *Child Sexual Abuse and the Law*, ed. J. Bulkley (Washington, D.C.: American Bar Association, 1981), p. 127.
6. P.A. Toth and M.P. Whalen, *Investigation and Prosecution of Child Abuse* (Alexandria, VA: American Prosecutors Research Institute, 1986): p. V-22.

7. Gray, supra, note 4 at p. 65.
8. Goodman, et al., "Children's memory for stressful events," *Merrill-Palmer Quarterly,* in press.
9. Goodman, supra, note 2 at p. 13.
10. Toth and Whalen, supra, note 6.
11. ARIZ. REV. STAT. ANN. 13-4065 (1985); CAL. PENAL CODE 1112 (West 1984); ILL. ANN. STAT. Chapter 38, 115-7.1 (1984); N.M. STAT. ANN. 30-9-18 (1987).
12. J.A. Bulkley, "Major legal issues in child sexual abuse cases," forthcoming in *The Sexual Abuse of Children: Theory, Research and Therapy* (W. O'Donahue and J. Geer, eds. in preparation, Lawrence Erlbaum Assoc., Inc., publishers).
13. R. Eatman and J. Bulkley, *Protecting Child Victim/Witnesses: Sample Laws and Materials* (Washington, D.C.: American Bar Association, February 1986), p. 39.
14. Attorney General's Task Force on Family Violence, *Final Report,* September 1984, pp. 38-39.

Chapter 5
Alternatives to the Traditional Courtroom

As early as 1969, David Libai called for the development of "children's courtrooms," in which defendants and spectators would observe the child's testimony from behind a one-way mirror. Defendants could communicate with their attorneys via headphones.[1] This recommendation was resurrected in 1982 by Jacqueline Parker,[2] and echoed in 1983 by the National Conference of the Judiciary on the Rights of Victims of Crime: "Judges . . . may consider . . . encouraging specially designed or equipped courtrooms to protect sensitive victims, provided that the right of confrontation is not abridged."[3]

Over the last decade, the advent of video technology has made these recommendations possible. There are two primary means by which a child's testimony can be taken outside the traditional courtroom and without the physical presence of the defendant, jury, and others in the courtroom audience. Closed-circuit television (CCTV) allows for simultaneous transmission of the child's live testimony to the courtroom from a nearby location. Alternatively, the child's testimony may be videotaped at a hearing or proceeding apart from the trial itself, and the resulting videotape substituted for the child's live testimony at trial.

Use of videotape or closed-circuit television to substitute for children's live, in-court testimony was recommended by all three organizations shown in Exhibit 3 above. And, in fact, by 1985, four states had enacted laws to authorize closed-circuit television in child abuse cases (Kentucky, Louisiana, Oklahoma, and Texas), and several state courts had used, or sought to use, CCTV even in states lacking such statutes.[4] By the end of 1989, only four states (Maine, North Carolina, North Dakota, and West Virginia) had not provided statutorily for either CCTV or videotaped testimony as alternatives to direct, in-court testimony for child witnesses.

Although some prosecutors and child advocates, and certainly the popular press, seized upon these techniques as certain remedies for the perceived trauma experienced by child witnesses in open court, videotape and CCTV have rarely been used. Most prosecutors prefer to offer a live witness wherever possible, of course, but the more compelling reason for limited application was uncertainty regarding the constitutionality of these alternatives to direct confrontation. With the recent U.S. Supreme Court decision in *Maryland v. Craig*, 110 S.Ct. 3157 (1990), prosecutors and the courts are likely to be more accepting of closed-circuit television and videotaped testimony, although some questions still remain.

Legal Issues

The Sixth Amendment to the U.S. Constitution guarantees all criminal defendants the right to confront their accusers. At the same time, fear of seeing the defendant is frequently mentioned as one of the most traumatic aspects of the criminal justice system for children. Theoretically, looking the defendant in the eye as one accuses him or her of a crime provides an acid test of the truth. But when the accuser is a child, the right of confrontation may offer a convenient means of intimidating the witness, resulting in serious, damaging effects on the child's testimony.

Enterprising prosecutors have sought ways to shield child victims from direct eye contact with defendants for many years. Some prosecutors report using their own bodies to block victims' view of defendants during the direct examination. Others simply instruct children to look elsewhere while they testify, especially to look for a supportive family member or victim advocate in the courtroom audience. Some encourage children to tell the judge if the defendant is "making faces." Such instructions to a child may not completely eradicate the fear of seeing the defendant in court, but at least they impart a small sense of control in an otherwise overpowering situation.

For nearly a century, trial courts have experimented with improvised measures designed to protect sensitive victims from the direct gaze of the defendant during their testimony. These test cases met with mixed results at the appellate level. For example, in *State v. Mannion*, 57 P. 542 (Utah Sup. Ct. 1899), the witness had been seated with her back to the defendant, who was seated in a corner of the courtroom and could not see or hear the witness's testimony. This arrangement was found to abridge the defendant's right of confrontation. In contrast, the court in *State v. Strable*, 313 N.W.2d 497 (Iowa 1981), held that the fact that the witness testified behind a blackboard was, at most, a harmless error under the circumstances of that case.

Interestingly, the first child witness case to reach the U.S. Supreme Court on the issue of alternatives to in-court testimony did not involve video technology. Rather, a screen with "one-way" glass had been erected in the courtroom between the child witnesses and the defense table during the children's testimony. Without deciding whether face-to-face confrontation could be abrogated, the Court ruled that Iowa's statute, which created a generalized presumption of trauma to child witnesses, was insufficient to justify an exception to the Confrontation Clause. Instead, the Court would require "individualized findings that these particular witnesses needed special protection." Nevertheless, the Court cited Roman law, Shakespeare, and President Eisenhower in demonstrating the deep-seated belief in the value of such confrontation as the ultimate test of truthfulness. *Coy v. Iowa*, 487 U.S. 1012 (1988).

At the same time, however, the Supreme Court acknowledged that the right of confrontation is not absolute, and may give way to "other important interests." In her concurring opinion, Justice O'Connor articulated her position on the nature of those "other important interests."

> The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, (citing statutes) our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses.

Justice O'Connor explicitly discussed statutes authorizing one-way and two-way closed-circuit television, as well as provisions for videotaped testimony, as protective measures that were not "necessarily doom[ed]" by the *Coy* decision.

In a number of subsequent cases, state appellate courts applied Justice O'Connor's reasoning when ruling on the use of CCTV or videotape in lieu of live, in-court testimony by child witnesses. For example, in *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (1988), *cert. denied*, 109 S. Ct. 1572, a case that was remanded by the U.S. Supreme Court to the New Mexico Court of Appeals for reconsideration in light of *Coy*, the state's use of one-way videotaped testimony for five child witnesses was upheld. The court found that the necessity prong had been satisfied by testimony from three experts and the children's parents that testifying in court would cause these children "unreasonable and unnecessary harm." In *People v. Henderson*, 156 A.D. 2d 92, 554 N.Y.S. 924 (1990), the New York Supreme Court reversed a babysitter's conviction because the trial court's finding of the children's "vulnerability," necessitating the use of two-way CCTV to obtain their testimony, was based solely on an expert's testimony that *all* sexually abused children would benefit from this procedure. The state appellate court relied on *Coy* in holding that the finding of vulnerability must be specific for the children involved. Appellate courts in other states reached similar conclusions.[5]

But some state courts remained reluctant to dispense with the right of confrontation. Most notably, the Maryland Court of Appeals reversed the conviction of a day care operator charged with sexually abusing a six-year-old child, on grounds that the state's showing of necessity was insufficient to permit the child to testify via one-way CCTV. Experts had testified that the child victim, and several other child witnesses, would suffer serious emotional distress, interfering with their ability to communicate, if required to testify in the courtroom. The Court of Appeals ruled that, in order to satisfy the "high threshold" of necessity required by *Coy*, children must be questioned first in the presence of the defendant (to assess whether they would be traumatized), and secondarily by way of two-way

CCTV, before the more restrictive one-way procedure can be used. *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989).

The U.S. Supreme Court disagreed. *Maryland v. Craig*, 110 S.Ct. 3157 (1990). In the majority opinion, written by Justice O'Connor, the Court found that "the Maryland statute, which requires a determination that the child will suffer serious emotional distress such that the child cannot reasonably communicate, clearly suffices to meet constitutional standards." The Court further stated that before an alternative to direct confrontation can be permitted, there must be a showing that the child would be traumatized, *not by the courtroom generally, but by the defendant's presence*, and further, that the child's emotional distress would be "more than de minimus."

In its discussion, the Court delineated four elements of confrontation: physical presence of the witness, testifying under oath, cross-examination, and observation of the witness's demeanor by the trier of fact. According to the Court, closed-circuit television incorporates all these elements, thereby serving as the "functional equivalent" of live, in-court testimony. In fact, the Court observed, the assurances provided by one-way CCTV "are far greater than those required for the admission of hearsay statements."

Because *Maryland v. Craig* was decided on a 5-4 vote, it is instructive to consider the dissenting opinion. The dissenting Justices took issue with the Court's holding that the needs of child witnesses can be a sufficiently compelling interest to outweigh the protections afforded by the Confrontation Clause. They asserted that the Constitution does not permit the Court to balance interests in this way. Citing research demonstrating children's heightened suggestibility to leading questions and the disastrous case in Scott County, Minnesota (in which inappropriate interviewing techniques thoroughly confounded the investigation), the dissent expressed its concern that use of alternative techniques might permit innocent people to be convicted by children who had been coached by malevolent adults. The dissent repeatedly emphasized the literal meaning of confrontation to require a face-to-face meeting, concluding that the Sixth Amendment applies to *all* criminal prosecutions and that exceptions cannot be carved for child witnesses in the interests of public policy.

There are some additional legal questions that were not addressed in *Craig*. For example, critics have argued that videotaping the child's testimony at a proceeding apart from trial threatens the defendant's rights to a public trial and a jury trial because the jury and public are not physically present when the videotape is made.[6] At this writing, there appear to be no published opinions on these issues.

Statutes Permitting Use of Closed Circuit or Videotaped Testimony

By December 31, 1989, 32 states statutorily authorized judges to allow certain child witnesses to testify via closed circuit television to the court and jury (see Tables 2 and 3). And, as of the end of 1989, 36 states provided for the introduction at trial of videotaped testimony taken either at the preliminary hearing or at a formal deposition. Twenty-two states authorized both forms of alternative testimony, 14 states authorized videotaped testimony only, and ten states allowed only testimony via closed circuit television.[7] (Full statutory citations are contained in Appendix A, Tables 3 and 4.) And, in the Victims of Child Abuse Act of 1990, the U.S. Congress authorized the use of two-way closed-circuit television and videotaped depositions as alternatives to live in-court testimony by child witnesses.

The tables reveal that specific provisions contained in statutes authorizing the use of videotape and closed-circuit television are quite similar. Chief among the issues they address are

- the nature of preliminary findings that may be required prior to introducing alternative testimony
- the extent to which various elements of confrontation are preserved
- whether the child witnesses remain available for live, in-court testimony despite the use of videotape or closed-circuit technology

Necessary Findings

As noted above, although the Supreme Court offered little guidance for determining a minimum level of emotional trauma before alternatives to confrontation may be used, the *Craig* opinion did require a finding that the child will be traumatized specifically by face-to-face confrontation with the defendant, not by the courtroom generally. A review of existing videotape and CCTV statutes reveals that they vary with regard to their view of the source of the children's trauma. In fact, these statutes are widely divergent in their efforts to balance defendants' constitutional rights against the states' interest in protecting child victims.

At one end of the continuum are those statutes in which there is a presumption that child witnesses will be traumatized by testifying in open court, and alternative means of obtaining testimony from children under a certain age are preferred. In New Hampshire, for example, the testimony of witnesses under 12 is taken by videotaped deposition unless the court finds, after a hearing, that it is in the

Table 2
SUMMARY OF STATUTES PROVIDING FOR TESTIMONY VIA CLOSED-CIRCUIT TELEVISION
(Current as of December 31, 1989)

PROVISION \ STATE	AL	AK	AZ	CA	CT	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	MD[1]	MA	MI	MN	MS	NJ	NY	OH	OK	OR	PA	RI	TX	UT	VT	VA[1]	WA	FED
CASE CHARACTERISTICS																																	
Age of child is less than:	16	13	15	11	13	16	15	16	17	13	10	14	13	13	14	18	15	15[2]	10	16	17	13	11	13	10	17[2]	18[2]	13	14	13	13	10	18
Nature of offense:																																	
Sexual abuse	√	√		√	√	√		√	√	√					√	√		√	√	√	√				√		√	√	√	√	√	√	√
Physical abuse					√			√		√					√	√			√		√							√	√			√	√
Criminal (unspecified)			√										√									√		√									
Other [3]							√				√			√			√						√								√		√
CIRCUMSTANCES OF TESTIMONY																																	
Persons present with child:																																	
Judge					√	√	√			√		√			√		√		√				√		√	√	√	√	√				
Defendant	√				√[4]	√[4]	√			√		√[4]			√[4]		√[4]			√[4]		√[4]						√			√[4]	
Prosecutor & defense attorney	√	√	√		√	√	√	√		√		√	√	√	√	√	√		√				√	√	√	√	√	√	√		√	√	√
Support person		√	√	√	√	√	√		√	√	√	√	√	√	√	√			√				√	√	√	√	√	√	√	√	√	√	√
Equipment operator	√[5]	√	√[5]		√	√		√[5]		√[5]	√	√	√[5]	√[5]	√[5]	√			√			√[5]	√[5]	√[5]	√	√	√[5]		√	√	√		√
In court's discretion	√							√									√				√[6]												
Other [7]				√		√	√		√	√	√							√					√			√							√

Table 2 (Continued)

SUMMARY OF STATUTES PROVIDING FOR TESTIMONY VIA CLOSED-CIRCUIT TELEVISION
(Current as of December 31, 1989)

PROVISION \ STATE	AL	AK	AZ	CA	CT	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	MD[1]	MA	MI	MN	MS	NJ	NY	OH	OK	OR	PA	RI	TX	UT	VT	VA[1]	WA	FED
LEGAL CONDITIONS																																	
Showing required:																																	
Inability to communicate		√														√															√	
Fear of defendant					√												√					√									√	√
Trauma to victim						√	√				√						√			√	√	√			√						√	√
Medical, other unavailability				√[8]		√			√[8]		√					√			√				√			√	√		√	√		
Factors specified [9]		√		√					√									√				√	√								√	
Other [10]										√					√											√			√				
Nature of confrontation:																																	
Two-way only				√				√[11]	√													√	√							√		√
One-way permissible		√	√		√	√						√	√	√	√[12]		√	√	√	√	√			√		√	√	√	√	√		√	
Child not to be called			√	√[13]	√			√	√[13]				√	√		√[13]								√		√	√	√[14]	√	√[14]		√[13]	
Oath required				√					√													√					√					√	
SPECIAL PROVISIONS																																	
Resulting video subject to protective order				√					√	√																							

FOOTNOTES TO TABLE 2

1. Not applicable if the defendant is an attorney pro se (unless, in Washington, the defendant has a court-appointed attorney assisting in the defense).

2. Michigan: provisions also apply to persons 15 or older with a developmental disability.
Pennsylvania: for a child 14-15 years old, there shall be a rebuttable presumption that the child will benefit from CCTV testimony; for a child 16-17 years old, there shall be a rebuttable presumption that the child will not benefit from CCTV testimony.
Rhode Island: for a child 13 or younger, there shall be a rebuttable presumption that the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm.

3. Virginia's statute includes kidnapping and other family offenses; the other state statutes list specific sections of the penal code; the Victims of Child Abuse Act applies to child witnesses.

4. Defendant may be excluded under certain specified conditions.

5. Equipment operators are hidden from the child's view.

6. The court's order shall specify whether the child will testify outside the presence of spectators, the defendant, the jury, or all of them, and shall be based on specific findings relating to the impact of the presence of each.

7. "Other" may include interpreters for the child, bailiffs, court-appointed representatives, security personnel, court reporters, persons chosen by the child.
Georgia: the child's testimony is taken in the courtroom, with all parties present, and televised to the jury in the jury room.
Michigan: all persons not necessary to the proceeding shall be excluded.

8. The child's refusal to testify shall not alone constitute sufficient evidence that CCTV is necessary.

9. Such factors typically include age and maturity of the child, nature of the offense, nature of the expected testimony, possible effects of in-court testimony on the child, whether the child's testimony is relevant and material, desire of the child or family or guardian to have testimony taken in a room closed to the public. [See text for additional provisions in the California, Idaho, and New York statutes.]

10. Illinois: upon a finding that CCTV is in the child's best interest.
Louisiana: when justice so requires.
Pennsylvania and Utah: for good cause shown.

11. Defendant's presence is not unduly emphasized to the child.

12. Except for purposes of identification.

13. The court is not prohibited from ordering the child into the courtroom for a limited purpose, such as identifying the defendant.

14. Unless the court finds there is good cause. [See text for additional provisions in the Texas statute.]

Table 3

SUMMARY OF STATUTES PROVIDING FOR TESTIMONY VIA VIDEOTAPE

(Current as of December 31, 1989)

PROVISION \ STATE	AL	AZ	AR	CA	CO	CT	DE	FL	IL	IN	IA	KS	KY	MA	MI	MN	MS	MO	MT	NE	NV	NH	NM	NY	OH	OK	PA	RI	SC*	SD	TN	TX	UT	VT	WI	WY	FED
CASE CHARACTERISTICS																																					
Age of child is less than:	16	15	17	15	15	13	12	16		10		13	12	15	15	10	16	17	16	12	14	17[1]	16[2]	12[1]	11	13	16	17[1]		16	13	13	14	13	16[1]	12	18
Nature of offense:																																					
Sexual abuse	√		√	√	√	√		√				√	√	√	√	√		√		√		√		√	√			√		√	√	√	√	√	√	√	√
Physical abuse				√	√	√		√					√	√	√	√																	√				√
Criminal (unspecified)		√					√		√		√	√						√				√				√	√										
Other						√				√										√				√	√						√			√			
LEGAL CONDITIONS																																					
Showing required:																																					
Fear of defendant														√		√	√	√															√	√		√	√
Trauma to victim				√				√		√				√	√		√					√		√	√			√		√			√			√
Medical, other unavailability				√	√			√		√							√													√		√				
Factors specified [3]	√																	√		√												√			√	√	
Good cause	√		√															√			√		√				√						√				
Admissibility:																																					
As former testimony				√	√																				√					√						
In lieu of court testimony	√		√[4]					√[5]						√			√	√		√	√[6]	√		√[7]											√	√
Child not to be called		√				√	√					√	√									√			√	√	√	√			√	√	√	√	√	√	

* South Carolina's statute mandates sensitive treatment of child victims and lists taped sessions as one way to accomplish this mandate.

Table 3 (Continued)

SUMMARY OF STATUTES PROVIDING FOR TESTIMONY VIA VIDEOTAPE

(Current as of December 31, 1989)

PROVISION \ STATE	AL	AZ	AR	CA	CO	CT	DE	FL	IL	IN	IA	KS	KY	MA	MI	MN	MS	MO	MT	NE	NV	NH	NM	NY	OH	OK	PA	RI	SC*	SD	TN	TX	UT	VT	WI	WY	FED
LEGAL CONDITIONS																																					
Nature of confrontation:																																					
Two-way only	√		√						√										√	√		√	√							√						
One-way permissible		√				√	√[8]	√		√[8]	√[9]	√	√	√	√	√	√	√[8]						√		√	√	√			√	√	√		√	
Cross-examination required	√		√		√				√[10]					√	√			√[11]	√	√		√	√		√		√	√		√				√	√	√
Oath required																		√					√				√				√			√		
CIRCUMSTANCES OF TESTIMONY																																					
Location:																																					
At preliminary hearing			√																					√												
In judge's chambers	√		√															√	√[12]			√				√										
Outside the courtroom														√											√		√			√	√	√	√			
Child-friendly location																										√								√		
Persons present with child:																																					
Judge	√		√			√		√[13]	√	√	√			√		√	√[13]	√	√	√		√	√				√	√		√	√	√	√	√	√	√
Defendant	√		√					√	√		√			√		√	√		√	√		√	√							√		√	√		√	√
Prosecutor & defense attorney	√	√	√			√	√	√[14]	√	√	√	√	√	√		√	√	√	√	√		√	√	√[15]		√	√	√		√	√	√	√		√	√
Support person		√				√	√		√	√	√	√	√			√				√		√		√		√	√	√		√	√	√	√		√	√
Equipment operator		√[16]				√	√		√	√	√	√[16]	√[16]			√			√					√		√[16]	√	√[16]		√[16]	√[16]	√	√[16]		√	√
Other[17]								√	√								√							√		√	√									
SPECIAL PROVISIONS																																					
Video subject to protective order	√		√	√			√		√								√		√				√	√										√	√	√

FOOTNOTES TO TABLE 3

1. These states have special provisions pertaining to the child's age:
   New Hampshire: For witnesses < 12, a videotaped deposition is taken unless the court finds that it is in the best interest of justice to allow testimony in open court.
   New York: A showing of trauma is required for victims > 12.
   Rhode Island: For children 13 or under, mental or emotional harm resulting from testifying is a rebuttable presumption.
   Wisconsin: Videotaping is available for children 12-16 if the court finds it warranted by the interests of justice.

2. New Mexico STAT. ANN. 30-9-17 (1978) specifies children < 16; R. CRIM. PROC. 29.1 (1980) specifies children < 13.

3. Such factors include age and maturity of the child, nature of the offense, nature of the expected testimony, possible effects of in-court testimony on the child, whether the child's testimony is relevant and material. Nebraska's statute requires a showing of compelling need, based on particularized findings as specified.

4. The prosecutor may call the child to testify.

5. Except if the child testifies at trial via CCTV.

6. Videotaped testimony may also be used in addition to direct testimony or, for impeachment purposes, to contradict trial testimony; also permits videotaping of grand jury or preliminary hearing testimony; does not preclude the child from testifying without videotape; any party may offer any part at trial.

7. In lieu of live grand jury testimony only.

8. Exception for pro se defendants, who are permitted to question the child.

9. Child must be told that defendant can see and hear him or her.

10. Defendant may not question the child at the videotaped proceeding, but must have an opportunity to cross-examine at trial.

11. Defendant must have opportunities for cross-examination before the preliminary hearing and at least once before trial.

12. Or the courtroom.

13. Unless the child is represented by counsel or a guardian ad litem and court finds at a hearing that a judge is not necessary to protect the child.

14. Does not specify presence of the prosecutor.

15. Defense attorney is not present.

16. Hidden from the child's view.

17. Includes security personnel, court reporter or clerk, interpreter or attorney for the child, medical assistant.

interest of justice to allow testimony in open court. Similarly, in Rhode Island, mental or emotional harm resulting from testifying is a rebuttable presumption for children 13 or under; Pennsylvania's legislation contains similar language. New York's videotaping statute requires a showing of trauma only for victims over 12.

Other statutes are very general in their requirements for preliminary findings prior to taking a child's testimony by alternative means. In Nebraska, for example, the court may order (upon defendant's motion) an independent examination of the child by a psychologist or psychiatrist to assist in determining whether "compelling need" exists to videotape the child's testimony. In Wisconsin, videotaping is an option available to children between the ages of 12 and 16 if the court finds it is warranted "by the interests of justice." In Illinois, CCTV is allowed upon a finding that it is in the best interest of the child; courts in Louisiana may order CCTV "when justice so requires." Five videotape statutes and two CCTV statutes require only a showing of "good cause," with nothing further. Finally, 12 videotape statutes and six CCTV statutes contain no language to suggest that any type of particularized findings are necessary. All of these statutes are likely to be unacceptable in light of the ruling in *Craig* (and, indeed, earlier in *Coy*) that particularized findings of need are required before videotaping and/or CCTV may be used.

At the other extreme are statutes that limit the use of videotape and/or CCTV to those cases in which children were actually harmed or violently threatened by the defendant. California's CCTV statute, for example, requires a finding that

> the impact on the minor of one or more of the factors enumerated (below) is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless (two-way) closed-circuit television is used.
>
> (A) Threats of serious bodily injury to be inflicted on the minor or a family member, of incarceration or deportation of the minor or a family member, or of removal of the minor from the family or dissolution of the family, ...
>
> (B) Use of a firearm or any other deadly weapon during the commission of the crime.
>
> (C) Infliction of great bodily injury upon the victim during the commission of the crime.
>
> (D) Conduct on the part of the defendant or defense counsel during the hearing or trial which causes the minor to be unable to continue his or her testimony. **CAL. PENAL CODE 1347(b)(2) (West 1987)**

CCTV statutes in Idaho and New York contain similar language.

Seven videotape statutes and 11 CCTV statutes require a finding of medical or other unavailability; in fact, CCTV statutes in California and Idaho stipulate that a child's refusal to testify is not enough to warrant use of the procedure. This language suggests that the framers of the legislation are considering videotape and CCTV as forms of hearsay rather than the "functional equivalent" of live testimony.

Twelve videotape statutes and nine CCTV statutes require a finding that the child will suffer emotional trauma (variously defined) if made to testify in open court. Six videotape statutes and seven CCTV statutes specify factors which the judge must consider before allowing alternative testimony, including the possible effect of in-court testimony on the child. In fact, concern for children's fear of the courtroom may be inferred from *all* the CCTV statutes, since the child is removed from the court during his or her testimony, and from those videotape statutes that provide for taking the videotape in a location apart from the courtroom. (One notable exception is Georgia's CCTV statute, which provides for the child's testimony to be taken in the courtroom, with all parties present, and televised for the jury, which is removed to the jury room.) Similarly, it may be surmised that New York's videotape statute, which applies only to testimony for the grand jury, proceeds from a concern for children's discomfort in court, since defendants are rarely present at grand jury. There, the one-way procedure presumably shields the child from trauma induced by appearing before the jurors. Likewise, Indiana's videotape/CCTV statute, which applies to trial testimony, requires a showing that

> . . . the child is one who should be permitted to testify outside the courtroom because a psychiatrist certified that testifying in the courtroom would be a traumatic experience for the child, a physician certified that the child cannot be present in the courtroom for medical reasons, or evidence has been introduced regarding the effect of the child's testifying in the courtroom and the court finds it is more likely than not that this would be a traumatic experience for him/her.

Although many of these statutes may be implicitly incorporating fear of confrontation with the defendant among the elements contributing to the child's generalized fear of in-court testimony, the language may need to be clarified in order to comport with the directive in *Craig*.

In fact, the Victims of Child Abuse Act of 1990, videotape statutes in only seven states, and CCTV statutes in only four states have language that is consistent with the Supreme Court's requirement tying the child's trauma to confrontation with the defendant. It may also be safe to infer that other statutes permitting one-way videotape or CCTV (see discussion in the following section) are implicitly assuming confrontation with the defendant to be the source of the child's fears, even where there is no required showing of such.

Videotaping provisions in the Colorado statute and the Victims of Child Abuse Act of 1990 differ from those in other jurisdictions because they provide for

testimony via deposition *before trial commences*. In doing so, they create an avenue for child witnesses to exit early from the adjudication process. Both statutes require two findings. First, before videotaping a child's testimony, there must be a preliminary finding that the child is likely to be unable to testify at trial, due to medical unavailability, emotional trauma, or other specified reasons. Then, before admitting the videotaped testimony into evidence at trial, the court must again find that the child is unable to testify.

Although these statutes may achieve the goal of obtaining children's testimony at an earlier point in the process, they raise the dilemma of showing at trial that a child who was able to testify on videotape is, nonetheless, unable to testify at trial.[8] This may pose a particular problem if the child has already successfully testified for the taping, and especially if the defendant was present. A second problem may occur when new information arising between the videotaped proceeding and the actual trial necessitates calling the child for further cross-examination. (These same problems may arise in California and Ohio, where videotape statutes provide only for videotaping the child's testimony at preliminary hearings for later use at trial.) The Victims of Child Abuse Act of 1990 addresses these problems by (1) providing for defendants to observe the child's deposition via two-way closed-circuit television, and (2) allowing for a second videotaped deposition in the event that new evidence is discovered subsequent to the child's initial testimony.

Elements of Confrontation

A number of statutes appear to have been crafted with the primary intent of protecting children from the physical environment of the courtroom. Many of these statutes preserve full confrontation between the child and the defendant.

A majority of videotape statutes and 12 CCTV statutes specifically require the defendant to be in the room with the child during the child's testimony, although several of those statutes do permit one-way confrontation, whereby the defendant is physically separated from the child, under certain circumstances. Three videotape statutes and two CCTV statutes even make explicit exceptions for *pro se* defendants, allowing them to question child witnesses themselves.

A few statutes presume that the defendant is in the room with the child unless the court finds that the defendant's presence will cause trauma to the child. In Massachusetts and Washington, and under the Victims of Child Abuse Act of 1990, the court must make specific findings as to whether the child is likely to suffer trauma from testifying in open court or from testifying in the presence of the defendant (or both). Unless the court's order specifies that the defendant's presence will cause trauma to the child, the defendant must be present during the child's testimony. Similarly, New Jersey's CCTV statute requires the court to specify whether the child will testify outside the presence of spectators, the

defendant, the jury, or all of them, and shall be based on specific findings relating to the impact of the presence of each.

Although the holding in *Craig* did not adopt procedural prerequisites for one-way or two-way confrontation, most of the states have addressed this issue explicitly. Eight videotape statutes, six CCTV statutes, and the Victims of Child Abuse Act of 1990 require two-way confrontation between child and defendant when the child's testimony is taken. Twenty-one videotape statutes and ten CCTV statutes provide for one-way confrontation, whereby the defendant can observe the child but the child cannot see or hear the defendant.

Seventeen videotape statutes require the child to undergo cross-examination on videotape "as if at trial." Conversely, Illinois' statute *prohibits* defendants from questioning child witnesses during the videotaped proceeding, although they are required to be present. Instead, the child must be available for cross-examination at trial—a provision that appears to contradict the philosophy underlying the need for videotape. In another unusual provision, Missouri's statute stipulates that defendants must have opportunities for cross-examination before the preliminary hearing and at least once before trial.

Roughly half of the videotape and CCTV statutes explicitly exempt the child from live, in-court testimony once their testimony has been taken via alternative means, although many allow for a limited in-court appearance for the purpose of identifying the defendant. The Texas CCTV statute prohibits courts from requiring child witnesses to testify in court at the proceeding for which CCTV testimony was taken, "unless the court finds there is good cause." In making the determination of "good cause," the court must consider the following:

- the rights of the defendant
- the interests of the child
- the relationship of the defendant to the child
- the duration of the alleged offense
- any court finding related to the availability of the child to testify
- the age, maturity and emotional stability of the child
- the time elapsed since the alleged offense
- other relevant factors

The statute goes on to enumerate factors contributing to a determination of the child's availability.

1. relationship of the defendant to the child
2. character and duration of the alleged offense

3. age, maturity and emotional stability of the child

4. time elapsed since the alleged offense

5. whether the child is more likely than not to be unavailable to testify because

   (A) of emotional or physical causes

   (B) the child would suffer undue psychological or physical harm.

TEX. CODE CRIM. PROC. ANN. art. 38.071 (7) and (8) (1987)

Given the Supreme Court's view of videotaped and closed-circuit testimony as the "functional equivalent" of live, in-court testimony, the level of precautions contained in this statute and many others may be unnecessary. (Of course, the states can always be more restrictive than the Supreme Court.)

Finally, although the Supreme Court recognized the importance of the oath as one of the key elements of confrontation, only five videotape statutes and five CCTV statutes require the child to be under oath, or to attest to a reasonable "child-friendly" modification, such as promising to tell the truth. Interestingly, New York's videotape statute specifically does *not* require children to take an oath before testifying.

Other Provisions of Interest

Statutes vary with regard to who is permitted (or required) to be present with child witnesses when they testify. Twenty videotape statutes, virtually all the CCTV statutes, and the Victims of Child Abuse Act of 1990 provide explicitly for the presence of a support person for the child. Many statutes also include equipment operators among those who are present with the child, although several stipulate that they are to be hidden from the child's view.

A few of the videotaping statutes contain some unusual provisions. For example, the Illinois statute directs that videotapes may not be admissible at trial if leading questions were used; recall from the preceding discussion that only the prosecutor and judge are allowed to interview child witnesses on videotape. In Wyoming, children may use anatomically correct dolls to assist with their testimony, and their demonstrations with the dolls must be part of the videotape. These statutes give little guidance regarding the location of the videotaping. Seven statutes merely state that the videotape shall be taken outside the courtroom; six provide for videotaping in the judge's chambers; two specify a "child-friendly" location.

Finally, to protect the child's identity from publication, 11 statutes make the child's videotaped testimony subject to a protective order. Three CCTV statutes provide similarly for recordings made of the child's live testimony.

Practical Questions

Although the Supreme Court appears to have addressed the confrontation concerns with its decision in *Maryland v. Craig*, it is probable that closed-circuit television and videotaped testimony will still be invoked only as a last resort. Several commentators have argued that inherent properties of a televised (or videotaped) trial—its limited perspective, distortion of images, and similarity to television as an entertainment medium—detract seriously from the viewer's ability to grasp a complete and accurate picture of the witness' demeanor, thereby threatening the defendant's right to a fair trial.[9]

To test these claims, researchers conducted a series of studies—some in a laboratory setting, others using actual jurors who viewed live versus videotaped, reenacted trials—and found "no evidence to indicate that the introduction of videotaped materials has any marked negative effect on courtroom communication between trial participation and jurors."[10] Indeed, jurors who watched videotaped trials retained more trial-related information than did jurors who saw live presentations. Color videotape, however, tended to enhance witness credibility, particularly for witnesses with strong presentational skills.[11] Other researchers have compared mock jurors' reactions to the testimony of children and adults via videotape against identical testimony in a written transcript. They, too, found increased witness credibility with the videotape medium, regardless of witness age.[12] Additional research on the effect of televised testimony on witness credibility is now underway.

It is interesting to note, though, that in some cases, the courts themselves have expressly acknowledged the superiority of videotape technology over other methods of reproducing a witness' testimony when the witness is unavailable for trial (such as an audio or written recording of the preliminary hearing or having someone relate the witness' testimony).[13] And, in fact, the new technology is reportedly gaining popularity within the courts as an effective and cost-efficient means of conducting certain proceedings, such as arraignments.[14]

* * * * *

The Supreme Court's ruling in *Maryland v. Craig* offers hope for prosecuting cases in which child victims are threatened or intimidated by the defendant's presence. In striking a balance between protecting children and preserving the right of confrontation, the Court recognized that unless alternative means of testifying can be accommodated under certain circumstances, many young children will be effectively precluded from testifying, some cases will never be prosecuted, others will be dismissed, and justice will not be served.

Nonetheless, it remains likely that prosecutors will continue to view videotape and closed-circuit television as "last resort" measures when all other efforts to obtain children's testimony have failed. Although there should be less concern for

the constitutional challenges on confrontation issues, most prosecutors still prefer a live witness whenever possible. Furthermore, the need to demonstrate that a child will suffer emotional distress, "more than de minimus," in the defendant's presence, may be interpreted to require expert psychological testimony, which in turn opens the door to adversarial expert testimony on behalf of the defense. How the courts choose to define the minimum degree of emotional distress remains to be seen.

It is important to recognize, too, that trial may not be the only proceeding in which a child may be required to face a defendant. In states where it is customary to depose child witnesses as part of the discovery process, or where children must testify in the defendant's presence at preliminary hearings, policymakers may wish to consider instituting videotaping as a routine precautionary measure. Not only does the videotape guard against subsequent recantations or loss of memory, but the very process of videotaping can substitute for the jury's role in overseeing the actions of overzealous and insensitive attorneys.

Endnotes

1. D. Libai, "The protection of the child victim of a sexual offense in the criminal justice system," *Wayne Law Review*, Vol. 15 (1969): 977-1032.
2. J.Y. Parker, "Rights of child witnesses: Is the court a protector or perpetrator?" *New England Law Review* (1981-82): 643-717.
3. U.S. Department of Justice, National Institute of Justice, *Statement of Recommended Judicial Practices*, Adopted by the National Conference of the Judiciary on the Rights of Victims of Crime, Reno, Nevada, December 2, 1983.
4. See, for example, *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984) (permitting the use of one-way CCTV under conditions specified by the court); *Hochheiser v. Superior Court*, 161 Cal. App. 777, 208 Cal. Rptr. 273 (1984) (refecting the use of CCTV without prior statutory authorization).
5. See also, *Glendening v. State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, 109 S. Ct. 3219 (1989), and *State v. Davis*, 550 A.2d 1241 (N.J. Super. 1988) (upholding CCTV and videotaped testimony where there was a specific finding of a substantial likelihood that the child witness would suffer emotional or mental harm if forced to testify at trial); *State v. Eastham*, 39 Ohio St.3d 307, 530 N.E.2d 409 (1988), *State v. Vincent*, 159 Ariz. 418, 768 P.2d 150 (1989), and *State v. Eaton*, 244 Kan. 370, 769 P.2d 1157 (1989) (reversing convictions where CCTV or videotape was used without particularized findings of need).
6. J.J. Armstrong, "The criminal videotape trial: Serious constitutional questions," *Oregon Law Review*, Vol. 55 (1976): 567-585.
7. South Carolina's pertinent statute mandates sensitive treatment of child victims and lists videotaped sessions as one way of accomplishing this without further specification. New York's videotape statute provides only for the use of videotape as an alternative to live *grand jury* testimony; it does not apply to trial.
8. Note, "The testimony of child victims in sex abuse prosecutions: Two legislative innovations," *Harvard Law Review*, Vol. 98 (1985): 806-27.

9. Armstrong, supra, note 6; S. Brakel, "Videotape in trial proceedings: A technological obsession," *American Bar Association Journal,* Vol. 61 (Aug. 1975).

10. G.R. Miller, "The effects of videotaped trial materials on juror responses," *Psychology and the Law,* ed. G. Bermant, C. Nemeth, and N. Vidmar (Lexington, MA: Lexington Books, 1976).

11. A similar phenomenon was noted by the court in *Hochheiser v. Superior Court,* 161 Cal.App. 777, 208 Cal. Rptr. 273 (1984), citing Miller and Fontes, "Real versus reel: What's the verdict? The effects of videotaped court materials on juror response," Final Report, NSF-RANN Grant APR75-15815, Michigan State University, pp. 74-75.

12. D.F. Ross, et al., "Age stereotypes, communication modality, and mock jurors' perceptions of the child witness," in S.J. Ceci, D.F. Ross, and M.P. Toglia (eds.), *Perspectives on Children's Testimony* (New York: Springer-Verlag, 1989): 37-56.

13. See, for example, *State v. Hewitt,* 86 Wash. 2d 487, 545 P.2d 1201 (1976), and *Hutchins v.State,* 286 So.2d 244 (D. Ct. App. Fla. 1973).

14. "TV arraignment breaks new ground to streamline courts," *Government Technology,* Vol. 2 (July 1989).

Chapter 6
Statutory Exceptions to Hearsay

The rationale for the rule against admitting hearsay is that, with respect to most out-of-court statements, it is impossible to determine whether or not they are trustworthy. The statements are not made under oath, the trier of fact is not able to observe the demeanor of the declarant, and the defense has no opportunity to cross-examine the declarant. To be entered as evidence, hearsay must fall into one of the narrow exception categories. If it does, then under most categories of exceptions, whether the declarant actually testifies, is available but does not testify, or is unavailable is irrelevant.

In cases of child sexual abuse, the child's out-of-court statements may be the most compelling evidence available. Indeed, hearsay may be the only evidence, since child sexual abuse frequently occurs in the absence of other witnesses or physical trauma to the child, and the child may be found incompetent or otherwise unavailable as a witness. Moreover, very young, immature sexual abuse victims often make casual, innocent remarks that are alarmingly accurate in their portrayal of sexual activities that should be unknown to a child. Such statements are usually inadmissible, however, because they cannot fit into an available exception category. In the interests of justice, many states have created a new hearsay exception that recognizes the inherent reliability of certain out-of-court statements that are unique to young victims of sexual abuse.

Limitations of Available Exceptions to Hearsay

Traditional hearsay exceptions that are most commonly applicable to sexual assault cases are complaints of rape, statements for the purpose of medical diagnosis or treatment, and excited utterances. But these exceptions have limited value when the victim is a child, because of the unique characteristics of the offense and the way children react to it.

Complaint of Rape

The doctrine of complaint of rape allows rape complaints to be admitted as evidence to corroborate the victim's testimony in order to rebut an inference of silence inconsistent with the victim's story. There are three reasons why this doctrine is of limited value in child sexual abuse cases. First, the theory generally applies to forcible rape cases, where a victim's failure to complain may be construed as "consent." In statutory rape cases (i.e., where the victim is a child), however, consent is not an issue, leading some courts to hold that the complaint of rape is immaterial and therefore inadmissible.

Also, a child victim may never make a complaint of rape. As was discussed in Chapter 2, child sexual abuse victims frequently endure ongoing abuse for long periods of time—even years—before their victimization is revealed. To fit the doctrine, of course, the complaint must be prompt. And, even when child sexual abuse is disclosed, the revelation may occur fortuitously or inadvertently, not because the child complained.

Finally, complaints of rape are only admissible to corroborate the in-court testimony of the victim. In child sexual abuse cases, the victim may not, in fact, testify.

Statements Made for the Purpose of Medical Diagnosis or Treatment

The exception for statements made for the purpose of medical diagnosis or treatment suffers similar limitations when applied to child sexual abuse cases. Under this exception, statements made relating to bodily feelings or conditions are admissible to prove their truth. The underlying assumption is that people do not fabricate such information because they believe the effectiveness of treatment will rely in large part on the accuracy of the information they provide. A child's out-of-court statement may be admitted under this exception only if the statement is pertinent to medical diagnosis or treatment.

This exception has been stretched to accommodate the special conditions that commonly arise in child sexual abuse cases. For example, courts have frequently allowed in statements identifying the perpetrator under this exception, reasoning that the perpetrator's identity is important to the child's treatment, particularly if the child is diagnosed with a sexually transmitted disease, or if the perpetrator shares the child's household.[1] Some courts have also extended the exception to apply to statements made by children to nonmedical personnel, such as psychologists or social workers, so as to prevent repeated incidents of abuse that would have an obvious negative effect on treatment. In *State v. Nelson*, 138 Wis. 2d 418, 406 N.W.2d 385 (1987), *cert. denied*, 110 S. Ct. 835 (1990), for example, the court permitted a psychologist to testify about a three-year-old child's statements because the child understood the psychologist to be an authority figure and was aware that she was being observed toward a goal of treatment.

These interpretations of the hearsay exception for statements made for the purpose of medical diagnosis or treatment have been the subject of intense debate. Some critics argue that children may not know whether the person to whom they disclose can diagnose or treat their problem, and further, that the nature of psychological diagnosis and treatment, in particular, can be so expansive as to embrace virtually any statement made by a child as potentially useful.[2]

To remedy these problems, some commentators suggest adopting a more literal interpretation of the exception for statements made for purposes of medical

diagnosis and treatment. Statements made to psychologists or social workers might be more appropriately considered under the "residual" hearsay exception or special exceptions for sexually abused children (see discussion below).[3] An alternative approach recommends that the courts pay closer attention to the theory under which they are considering admitting a particular statement, that is, whether it is a statement made because the individual has a "selfish interest" in obtaining treatment, and whether the statement was used by a medical expert to form a basis for diagnosis or treatment.[4] Under this argument, when a statement is considered solely under the latter theory, the expert should be required to testify as to his or her opinion before the hearsay statement can be admitted in order to demonstrate how the child's statement contributed to that opinion. However, if the child is unavailable to testify, proponents of this approach would admit only statements made under the "selfish interest" theory, and even then would require some showing that the statement implicated the perceived well-being of the child. Both of these recommendations would have the effect of limiting the availability of this hearsay exception in child sexual abuse cases.

Excited Utterances

The excited utterances ("spontaneous exclamation," or *res gestae*) exception to hearsay is the one most often applicable to child sexual abuse cases. The three essential requirements of an excited utterance are (1) a sufficiently startling experience suspending reflective thought, (2) a spontaneous reaction, not one resulting from reflection or fabrication, and (3) a statement relating to the startling experience. The requirement of spontaneity is heavily influenced by the time lapse between the startling event and the statement. Traditionally, the statement must have been made *contemporaneously* with the event, but the modern trend is to consider whether the delay provided an opportunity to fabricate the statement.

Some courts have relaxed the excited utterances exception to allow in spontaneous statements made by child victims days, weeks, or even months after the abusive incident, provided there is a plausible explanation for the delay. Reasons for a child's reticence to disclose may include threats made by the defendant, fears of not being believed, feelings of confusion and guilt, and efforts to forget.

Many courts have even allowed in, as excited utterances, statements made in response to limited questioning. In *Commonwealth v. Fuller*, 22 Mass. App. Ct. 152, 491 N.E. 2d 1083 (1986), statements made by a child to her mother in response to questions on the way to the doctor's office were found admissible. In *State v. Mateer*, 383 N.W. 2d 533 (Iowa 1986), statements made in response to questioning by a police officer were admitted because they were "impulsive" rather than "reflective." And, in *State v. Wagner*, 30 Ohio App.3d 261, 508 N.E.2d 164 (1986), the court allowed in a child's demonstration with anatomically detailed dolls, conducted for an investigator.

Many critics have argued that cases like those cited above only stretch the excited utterances hearsay exception beyond reasonable limits. Unless the courts are willing to be extremely liberal in applying the excited utterance exception to children's out-of-court statements, there are still many cases in which the exception will not apply. Depending on the nature of the abuse, for example, children may be unaware that it is "wrong," and so their remarks about it may appear unconcerned or even casual. Alternatively, children may appear worried or frightened, but until they are directly questioned, they do not volunteer the source of their fears. In either circumstance, the children's statements will lack the necessary element of spontaneity. Also, a child's delay in making the statement may far exceed even the most liberal interpretation of the excited utterance exception.

The Residual Hearsay Exception

Another hearsay exception that has been applied to some out-of-court statements made by child victims is the "residual" hearsay exception, as exemplified in Fed.R.Evid.R. 803.

> Rule 803. *Hearsay Exceptions: Availability of Declarant Immaterial*
>
> *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement of evidence.

The residual hearsay exception could be applied in child sexual abuse cases when the children's out-of-court statements are found to have "equivalent circumstantial guarantees of trustworthiness." When, for example, a seven-year-old girl asks her father, "Daddy, does milk come out of your wiener? It comes out of Uncle Bob's and it tastes yukky,"[5] there can be little doubt that the child has been sexually abused. Under the residual hearsay exception, the court could admit this statement by considering indicia of reliability other than its temporal proximity to the event or its reflection of a "startled" reaction.

Yet even this residual exception has its limitations in child sexual abuse cases. Many states have not adopted this rule because they fear it is too broad and because it lacks specific guidelines, and therefore could be applied inappropriately.[6] These concerns were addressed by the U.S. Supreme Court in a recent opinion discussed later in this chapter.

Hearsay Exception for Sexually Abused Children

Rather than "torture" or "stretch" the available exceptions to the point where they lose sight of their original intent, by December 31, 1989, 28 states had statutorily created a special hearsay exception explicitly limited to child sexual abuse victims. Washington's statute, reproduced in Exhibit 6, served as the model for many states. By and large, these statutes were fashioned to comport with the legal requirements set forth by the U.S. Supreme Court in *Ohio v. Roberts*, 448 U.S. 56 (1980). In that seminal case, the Court established a two-part test for determining whether an adequate showing has been made as to the trustworthiness of an out-of-court statement made by a witness who does not testify at trial. First, the statement must either fall into a firmly rooted hearsay exception or have "adequate 'indicia of reliability'." (448 U.S. 56, at 66.) In addition, *Roberts* held that it is "normally" required to establish that the witness is unavailable.

As shown in Table 4, however, there are some variations among the statutes that create these special hearsay exceptions. (See Appendix A, Table 5 for a list of statutory citations.) For example, while 27 statutes require a finding of trustworthiness before the child's statement can be admitted, only ten list specific factors the court may consider in making that determination. Furthermore, 15 statutes require corroboration *of the act* before the hearsay statement of an unavailable child can be admitted; Arizona's statute requires corroboration *of the statement*. There is one important distinction, however: corroboration is not the equivalent of reliability, and further is not necessary under *Ohio v. Roberts*. Statutes that require corroboration, in addition to "sufficient indicia of reliability," are responding not to the requirements of the Confrontation Clause, but rather to the widespread concern that defendants might otherwise be convicted solely on the hearsay statement of a child witness who is unavailable for cross-examination.[7] Issues of reliability and corroboration are considered more fully below.

Legal Issues

Since the Supreme Court's 1980 opinion in *Ohio v. Roberts*, which served as the basis for much of the legislation creating special hearsay exceptions for out-of-court statements made by sexually abused children, there have been additional cases that address both the availability and reliability prongs of the test that the *Roberts* decision introduced. These opinions may have important implications for the admissibility of children's out-of-court statements.[8]

Availability of the Child Witness

In *Ohio v. Roberts*, the Supreme Court also ruled that before an out-of-court statement may be admitted into evidence, the Confrontation Clause requires the state either to produce the declarant or demonstrate the declarant's unavailability to testify. In that case, the state sought to introduce a witness's preliminary

Exhibit 6

WASHINGTON'S STATUTORY HEARSAY EXCEPTION FOR SEXUALLY ABUSED CHILDREN

9A.44.120 Admissibility of child's statement—Conditions.
A statement made by a child when under the age of ten describing any act of sexual conduct performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings by the courts of the state of Washington if:

1) The court finds, in a hearing, conduct outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of realibility; and

2) The child either:

   (a) Testifies at the proceedings; or

   (b) Is unavailable as a witness; Provided, That when the child is unavailable as a witness, such treatment may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

Table 4

SUMMARY OF STATUTORY HEARSAY EXCEPTIONS FOR CRIMINAL CHILD ABUSE CASES

(Current as of December 31, 1989)

PROVISIONS \ STATE	AL	AK	AZ	AR	CA	CO	FL	GA	ID	IL	IN	KS	KY[5]	ME	MD	MN	MS	MO	NV	NJ	OK	OR	PA	SD	TX	UT	VT	WA
NATURE OF STATEMENTS																												
Concerns physical abuse			√			√	√	√	√		√	√	√		√	√	√	√										
Concerns sexual abuse	√		√	√		√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
Includes non-verbal conduct		√													√													
Limited to statements made to specified persons															√		√								√			
Age of child making statement is less than:	12	10	10	10	12		12	14	10	13	10			16	12	10	12	12	10	12	12	10	12	10	13	14	10	10
AVAILABILITY OF CHILD WITNESS																												
Child must testify		√[1]												√[6]														
Child must be available to testify								√					√												√		√	
Child must testify or be unavailable	√		√[4]			√[2]	√[2]		√[2]	√[2]	√[2]				√[2]	√[2]	√[2]	√	√	√[2]	√[2]	√[2]	√[2]	√[2]		√[2]		√[2]
Child must be unavailable					√							√		√														
SPECIAL REQUIREMENTS																												
Court finding of reliability/trustworthiness	√[3]	√	√	√[3]	√	√[3]	√[3]	√		√[3]	√	√	√[3]		√[3]	√	√[3]	√	√	√	√	√[3]	√	√	√	√[3]	√	√
Notice to opposing party	√		√	√		√	√		√	√	√				√	√	√	√	√	√	√	√	√	√	√	√	√	√
Special jury instruction concerning use of child's statement	√			√						√		√																

[1] Alaska's statute applies *only* to grand jury proceedings. [2] If child unavailable, corroboration of act required. [3] Statute lists factors court may consider in determining reliability.
[4] If child unavailable, corroboration of statement required. [5] This statute was declared unconstitutional in *Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky.1990).
[6] The statement must be made under oath and recorded in the presence of a judge or justice.

hearing testimony in lieu of live testimony at trial. In *United States v. Inadi*, 475 U.S. 387 (1986), however, the Supreme Court distinguished the hearsay exception for prior testimony, as applied in *Roberts*, from another exception that permits out-of-court statements made by co-conspirators. After considering the reliability of such a statement, the necessity to introduce it, the benefit of admitting it into testimony, and the burden of demonstrating unavailability of the declarant, the Court held that the Confrontation Clause does *not* mandate an initial showing of unavailability under these circumstances.

As is evident from the statutory reviews in this chapter and in Chapter 5, many state statutes require a showing of unavailability before a child's out-of-court statements may be admitted or the child's testimony may be taken via closed-circuit television or videotape. There remains some ambiguity, however, about what constitutes an "unavailable" witness for these purposes. According to Federal Rule of Evidence 804(a),

> "Unavailability as a witness" includes situations in which the declarant—
>
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of his statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means.

Additional grounds for unavailability, which frequently apply in child sexual abuse prosecutions, include incompetence of the witness, the danger of severe psychological injury to the child from testifying, and unwillingness or inability to testify.[9]

Several of the statutes that allow certain alternatives to confrontation or create special hearsay exceptions include one or more of these latter conditions among their required findings before a child is declared unavailable as a witness. However, the definition of anticipated psychological injury, in particular, varies widely, from "moderate emotional or mental distress" to "unreasonable and unnecessary mental or emotional harm" and "severe emotional or mental harm." This lack of consensus in defining the parameters of "psychological injury" may be the subject of future litigation as the courts struggle to interpret the statutory language.

The Supreme Court has not yet directly considered the issue of defining psychological unavailability. In *Warren v. United States*, 436 A.2d 821 (D.C. Ct. App. 1981), the District of Columbia Court of Appeals suggested four factors that contribute to a finding of psychological unavailability:

1. probability of psychological injury as a result of testifying
2. degree of anticipated injury
3. expected duration of the injury
4. whether the expected psychological injury is substantially greater than the reaction of the average victim of rape, kidnapping, or terrorist act

In practice, however, these factors are extremely difficult, if not impossible, to quantify. Certainly, the assessment of children's psychological unavailability as witnesses is one area in which the testimony of mental health experts is likely to have an important and controversial impact in child sexual abuse cases.

Reliability of the Child's Out-of-Court Statement

The second prong of the test set forth in *Ohio v. Roberts* requires that an out-of-court statement must either fall into a firmly rooted hearsay exception or have adequate indicia of reliability. More recent opinions have clarified this point. In *Bourjaily v. United States*, 483 U.S. 171 (1987), the Court confirmed that indicia of reliability may be assumed where the out-of-court statement falls into a firmly rooted hearsay exception. This particular case applied to the co-conspirator hearsay exception, as did the *Inadi* case discussed above.

In *Idaho v. Wright*, 110 S.Ct. 3139 (1990), the Supreme Court considered a case involving a child witness in which the state had invoked a "residual" hearsay exception to introduce statements made by the child to an examining physician. The child had been found incapable of communicating with the jury, and therefore did not testify. Instead, the doctor was permitted to testify as to statements the child had made in response to his questions.

In finding that it was error for the trial court to admit the child's hearsay statements under the residual hearsay exception, the Supreme Court first reasoned that because the express purpose of the residual exception is to accommodate statements "not otherwise falling within a recognized hearsay exception," the residual hearsay exception cannot be classified as a "firmly rooted hearsay exception." The Court then considered whether the child's statement to the doctor possessed sufficient guarantees of trustworthiness to satisfy the reliability requirement. In this case, the Court concluded it did not. Among the factors contributing to the lower court's decision to admit the child's statement, the Supreme Court accepted only two as relevant to the reliability of the statement: (1) whether the child had a motive to fabricate the allegations, and (2) whether the

child's description of the alleged abuse was consistent with the cognitive abilities and sexual awareness of so young a child. Corroborating evidence in the form of physical evidence of the abuse, statements from another witness, and opportunity for the defendant to commit the abuse—all were rejected as not pertinent to the making of the statement itself and therefore inappropriate in weighing its reliability.

In a decision that preceded *Idaho v. Wright* by six years, the Supreme Court of the state of Washington set forth nine factors to guide trial courts in determining whether a child's hearsay statement possesses sufficient indicia of reliability. *State v. Ryan*, 103 Wash.2d 165, 691 P.2d 197 (1984). Those factors are as follows:

1. whether there is a motive to lie
2. the general character of the declarant/child
3. whether more than one person heard the statement
4. whether the statement was spontaneous
5. the timing of the statement and the relationship between the declarant/child and witness
6. the statement contains no express assertions about past fact
7. cross-examination could not show the declarant/child's lack of knowledge
8. the possibility of the declarant/child's faulty recollection is remote
9. the circumstances surrounding the statement are such that there is no reason to suppose the declarant/child misrepresented the defendant's involvement. 103 Wash.2d at 175-76.

Given the opinion in *Idaho v. Wright*, these factors will become increasingly salient when evaluating the admissibility of a child's out-of-court statements concerning sexual abuse. All pertain to aspects of the statement itself, independent of any extrinsic evidence that may be available in a case.

It is important to be aware, however, that *Idaho v. Wright* was narrowly decided, by a 5-4 vote. Justice Kennedy, writing for the dissent, argued that excluding corroborating evidence apart from the statement itself flies in the face of common sense, legal precedent, and "the considered wisdom of virtually the entire legal community that corroborating evidence is relevant to reliability and trustworthiness." Furthermore, he observed, it is preferable to consider other corroborating evidence since that evidence can at least be examined by the defendant and the trial court "in an objective and critical way."

Videotaped Interviews or Statements

As of December 31, 1989, 15 states[10] had enacted legislation making videotaped statements or interviews with child witnesses admissible at trial under certain circumstances. (See Appendix A, Table 6.)Two of these statutes (Indiana and Minnesota) simply include videotaped interviews as a specific form of out-of-court statement that may be admissible under the special statutory hearsay exception described in the preceding section. Both require a preliminary finding that the time, content, and circumstances of the videotaped statement provide "sufficient indicia of reliability." Further, the child must either testify or be found unavailable, and where the child is unavailable, there must be corroboration of the act before the videotape may be introduced into evidence. Under Iowa's statute, the court must determine that the videotaped statement substantially meets the requirements of either of two already existing residual hearsay exceptions, Iowa rules of evidence 803(24) or 804(5).

Other statutes, however, are less explicit in their assurances that the elements of confrontation will be met when videotaped statements are introduced. Hawaii's statute, excerpted in Exhibit 7, is illustrative; eight additional statutes contain similar, if not identical, language.[11] Salient features of these laws include

- questioning of the child by a non-attorney
- availability of the interviewer for direct and cross-examination at trial
- availability of the child to testify at trial

Unlike the videotaping statutes that were described in Chapter 5, these statutes do not contemplate videotape as an alternative to in-court testimony, since the child must be available for trial. Rather, protecting the child from the presumed trauma of trial testimony appears to be an implicit agenda. The state is not required to produce the child during its case-in-chief and, in practice, it is often left to the defense to call the child for cross-examination. However, many defense attorneys choose *not* to call the child for fear of angering a jury that may be sympathetic to the child's plight. As a result, the unchallenged videotape of a child's statement given to a law enforcement officer, social worker, or mental health professional may stand as the only evidence provided by the child.

Legal Concerns with Videotaping Interviews or Statements

The prototype for these statutes was struck down by the Texas Court of Appeals in *Long v. State*, 694 S.W.2d 185 (Tex. Ct. App. 1985), *cert denied*, 485 U.S. 993 (1988).[12] The Texas statute had attempted to resolve potential confrontation problems by requiring the child to be available to testify at trial. The appellate court found this law unconstitutional largely because it distorts the compulsory

Exhibit 7

HAWAII'S PROVISIONS FOR VIDEOTAPING CHILDREN'S STATEMENTS

Rule 616. Videotaping the testimony of a child who is a victim of an abuse offense or a sexual offense. (a) This rule applies only to a proceeding in the prosecution of an abuse offense or sexual offense alleged to have been committed against a child less than sixteen years of age at the time of the offense, and applies only to the statements or testimony of that child.

(b) The recording of an oral statement of the child made before the proceedings begins is admissible into evidence if:

1) No attorney of either party was present when the statement was made;
2) The recording is both visual and aural and recorded on film or videotape or by other electronic means;
3) The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and unaltered;
4) The statement was not made in response to questioning calculated to lead the child to make a particular statement;
5) Every voice on the recording and every person present at the interview is identified;
6) The person conducting the interview of the child in the recording is present at the proceeding and available to testify for or to be cross-examined by either party and every other person present at the interview is available to testify;
7) The defendant or the attorney for the defendant is afforded discovery of the recording before it is offered into evidence; and
8) The child is present to testify.

(c) If the electronic recording of the statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

process clause of the Sixth Amendment, which gives defendants the right to present evidence *in their favor*. Instead, the Texas statute requires defendants to call witnesses against them.[13] Interestingly, in the *Inadi* opinion discussed above, the U.S. Supreme Court appears to contradict this position. There, the Court ruled that making the declarant of an out-of-court statement available for cross-examination by the defense, even without having been called by the prosecution, satisfies the compulsory process clause. Other state appellate decisions, considering "Texas-like" videotaping statutes, have adopted the *Inadi* position.[14]

Three of the statutes modeled after the Hawaii/Texas statute (Kansas, Oklahoma, and Tennessee) depart from that example by requiring a finding that the time, content, and circumstances of the videotaped statement provide sufficient indicia of reliability before the videotape is admitted into evidence. Statutes in Oklahoma and Utah further provide that videotaped statements may be admitted upon a finding that the child is unavailable as a witness, although Oklahoma's statute additionally requires corroborative evidence of the act. These statutes appear to be "hybrids" in that they incorporate elements of the statutory hearsay exceptions that were described earlier, perhaps in an attempt to circumvent the constitutional problems that arose in Texas.

The Texas legislature has likewise attempted to overcome the defects in its original law by revising its statute pertaining to videotaped interviews. The new law applies *only when the child is found to be unavailable to testify at trial*; such unavailability may be grounded in "emotional or physical causes, including the confrontation with the defendant or the ordinary involvement as complainant in the courtroom trial," or "undue psychological or physical harm through his involvement at trial."

Under the new Texas statute,[15] a child's statement to a neutral individual prior to an indictment or complaint may be recorded and admitted into evidence under certain conditions. In one scenario, both prosecutor and defense counsel have an opportunity to submit interrogatories for a subsequent interview to be conducted and videotaped in a manner parallel to the first interview. The first videotaped interview cannot be admitted into evidence without the second interview (if a second interview is conducted). In an alternative scenario, the defendant may request to cross-examine the child under oath prior to trial in a deposition-like proceeding that is videotaped. There is one-way confrontation only; the child cannot see or hear the defendant although the defendant can observe the proceeding and communicate with counsel. Under either scenario, the first videotaped interview appears to be admissible without the second interview or deposition if the defendant fails to take advantage of these opportunities. Furthermore, the child may not be required to testify in court unless the court finds "good cause."

Given the recent opinion in *Idaho v. Wright*, discussed above, it appears as though most videotaped interviews and statements will be ruled inadmissible *unless the child testifies and is cross-examined.* Despite language in many videotape

statutes that explicitly discourages the use of leading questions (see Exhibit 7), it cannot be denied that these videotapes are made for investigative purposes, and that the children's statements are not the spontaneous disclosures that are frequently admitted under the special hearsay exceptions. As Professor Graham explains,

> It is . . . extremely doubtful that a child's statement to a police officer, social worker, or someone specially trained to interview children will be found to possess equivalent circumstantial guarantees of trustworthiness, whether or not the statement was videotaped or otherwise recorded. The normal timing of such an interview, its investigative function, the frequent use of suggestive questions by a person in authority, and the fact that the child will usually have made several earlier statements relating to the alleged sexual contact all militate against admissibility.[16]

Furthermore, in another aspect of the *Wright* opinion, the Supreme Court rejected an attempt by the Idaho Supreme Court to establish "procedural safeguards" for professionals who interview children, including a requirement that all such interviews be videotaped. The state court had further recommended that interviewers have no prior knowledge of the child's allegations and ask no leading questions. Describing this approach as a "preconceived and artificial litmus test," the Court acknowledged that, while such procedures may enhance the reliability of a child's statements, they are nowhere contemplated within the Sixth Amendment's protections. (However, the Court did express concern that the child's statements to the physician had been made in response to leading questions, which, in the Court's view, placed their trustworthiness in doubt.)

Practical Concerns

From the standpoint of admissibility, then, videotaping a child's out-of-court statement offers the government, at best, a chance to shore up a weak case where the child performs poorly on the stand, whether because of pressures to retract, over-preparation, or inability to withstand cross-examination. By and large, these videotapes are far more useful to prosecutors as aids to decision making and sometimes, as a means to reduce the need for repetitive interviews with the child. From the defense perspective, videotapes of children's early statements or interviews can contribute to effective cross-examination. For example, it should be recognized that children's interviews are seldom straightforward. During a videotaped interview, a child may refuse to talk, deny or contradict any previous allegations, or provide only partial or inconsistent information. The videotaped statement may even contradict the child's testimony at trial. Such inconsistencies naturally raise questions about the child's credibility and truthfulness.

Furthermore, as was discussed in earlier chapters, it is often difficult to obtain a clear story from a child without some degree of prompting. Moreover, if the child

has been pressured or threatened into silence, the interviewer may feel compelled to reinforce the child as the story unfolds. These questioning techniques, though perfectly reasonable and even beneficial in a therapeutic milieu, are dangerous in a court of law. If the interview process is sufficiently flawed, the videotapes may help to support an argument that the child was coached.

Finally, the existence of videotapes may pose a threat to children's privacy. Excerpts have reportedly appeared on media broadcasts, prompting a number of mental health professionals to abandon the use of videotape, even for therapeutic purposes. Only Louisiana statutorily places these videotapes under protective orders. Even there, however, and in other jurisdictions where videotapes are not explicitly protected, interviewers should make special efforts to ensure that children and their parents or guardians understand that the confidentiality of videotapes cannot be guaranteed.

* * * * *

The states have shown great interest in special statutory hearsay exceptions to accommodate casual, unprovoked disclosures that are sometimes made by child sexual abuse victims. It appears, however, that the Supreme Court's opinion in *Idaho v. Wright* may have the effect of restricting prosecutors' use of out-of-court statements made by child victims who do not testify. The existence of corroborating evidence may no longer be considered in determining whether the child's statement possesses particularized guarantees of trustworthiness; rather, the courts must search for indicators surrounding the making of the statement itself.

Some have observed that, in situations where the child testifies, it may not be necessary to introduce a hearsay statement at all[17] (although it may be needed to counter a defendant's efforts to impeach the child). If the hearsay statement is introduced, the statement's reliability is assured by the very fact of cross-examination. *California v. Green*, 399 U.S. 149 (1970). From this perspective, legislation authorizing special hearsay exceptions for sexually abused children should require indicia of a statement's reliability *only* in cases where the child is unavailable or does not testify.

Also in *Idaho v. Wright*, the Supreme Court rejected efforts to require that witnesses who testify as to children's out-of-court statements have no prior knowledge of the allegations at the time of their interviews, use no leading questions, and videotape their interviews. The Court recognized that such circumstances are not inherent indicators of the reliability of a child's statements. Nonetheless, the *Wright* opinion also appears to threaten the state's ability to introduce videotaped interviews with child victims. Because the child's statements are not made spontaneously, but rather in response to questioning as part of an investigation, it is unlikely that the required findings of indicia of reliability can be satisfied. (It may, however, still be possible to introduce a videotaped statement as a prior consistent or inconsistent statement *after* a child has testified.)

Even if they are not admissible as evidence, these videotapes may be valuable to prosecutors as aids to the charging decision, as a "shared" interview that may obviate the need for subsequent questioning by other agency representatives, or as leverage to encourage guilty pleas.[18] Similarly, a good videotaped interview might be useful to defendants and their attorneys in determining how to proceed with their cross-examination. In view of the very real potential for unintended consequences when interviewing children, special precautions should be taken to assess the skill of the individuals who interview child victims and to guard against unchecked publication or disclosure of the videotapes.

Endnotes

1. See, for example, *State v. Robinson,* 153 Ariz. 191, 735 P.2d 801 (1987); and *State v. Olesen,* 443 N.W.2d 8 (S.D. 1989).
2. M.H. Graham, "The confrontation clause, the hearsay rule, and child sexual abuse prosecutions: The state of the relationship," *Minnesota Law Review,* Vol. 72 (February 1988): 523-601. See also, *State v. Gokey,* 574 A.2d 766 (Vt. 1990).
3. Ibid.
4. R.P. Mosteller, "Child sexual abuse and statements for the purpose of medical diagnosis or treatment," *North Carolina Law Review,* Vol. 67 (January 1989): 257-294.
5. Excerpted from L. Berliner and M.K. Barbieri, "The testimony of the child victim of sexual assault," *Journal of Social Issues,* Vol. 40 (1984): 133.
6. See, for example, *W.C.L. v. People,* 685 P.2d 176 (1984), *superseded by statute as stated in People v. District Court In and For Summit Country,* 791 P.2d 682 (Colo. 1990), in which the Supreme Court of Colorado observed that the residual hearsay exception had been intentionally omitted from the Colorado Rules of Evidence due to "vagueness and lack of standards."
7. See, for example, F.M. Tuerkheimer, "Convictions through hearsay in child sexual abuse cases: A logical progression back to square one," *Marquette Law Review,* Vol. 72 (1988): 47-62.
8. I am indebted to law professor Michael H. Graham and legal commentator Josephine A. Bulkley for their guidance in analyzing the relevant case law and exploring its implications for child sexual abuse cases. For a more scholarly interpretation of these issues, readers are referred to Graham, supra, note 2, and infra, note 16; see also, J.A. Bulkley, "Major legal issues in child sexual abuse cases," forthcoming in *The Sexual Abuse of Children: Theory, Research and Therapy* (W. O'Donahue and J. Geer, eds. in preparation, Lawrence Erlbaum Assoc., Inc., publishers); see also, J. Bulkley, "Legal proceedings, reforms, and emerging issues in child sexual abuse cases," *Behavioral Sciences and the Law,* Vol. 6 (1988): 153-180.
9. Ibid., at p. 554.
10. Arizona, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Oklahoma, Tennessee, Texas, Utah, and Wisconsin.
11. Arizona, Kansas, Kentucky, Louisiana, Missouri, Oklahoma, Tennessee, and Utah.
12. See also, *People v. Bastien,* 129 Ill. App. 64, 541 N.E.2d 670 (1989), striking down a similar statute in Illinois.
13. See discussion in Graham, supra, note 2 at pp. 580-586. See also, W.J. Mlyniec and M. Dally, "See no evil? Can insulation of child sexual abuse victims be accomplished without endangering the defendant's constitutional rights? *University of Miami Law Review,* Vol. 40 (November 1985): 115-134.

14. See, e.g., *State* v. *Feazell* 486 So.2d 327 (La. App. 1986) *writ denied*, 491 So.2d 20 (La. 1986).

15. TEX. CODE CRIM. PROC. ANN. art. 38.071(1)(2), and (5) to (13) (Vernon 1987).

16. M.H. Graham, "Indicia of reliability and face to face confrontation: Emerging issues in child sexual abuse prosecutions," *University of Miami Law Review*, Vol. 40 (1985): 57.

17. Graham, supra, note 2 at p. 533.

18. See, for example, R. Krause, "Videotape, CCTV help child abuse victims tell their story but legal problems remain," *Law Enforcement Technology* (November 1984): 16-18; and S. Chaney, "Videotaped interviews with child abuse victims: The search for truth under a Texas procedure," in National Legal Resource Center for Child Advocacy and Protection, *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases* (Washington, D.C.: American Bar Association, 1985).

Chapter 7
Restrictions on Public Access

Open trials are a mainstay of the American justice system. Historically, their main purpose is to prevent judicial misconduct and use of the legal system as an instrument of persecution. Yet, in certain cases, and particularly sexual abuse cases, victim advocates have advanced several arguments for restricting public access to the courtroom. The strongest argument emphasizes the trauma potentially suffered by the victim when relating the details of a particularly sensitive crime before the public. In addition, victim advocates sometimes argue that public exposure, whether in the courtroom or by the media, may have a chilling effect on the willingness of future victims to report such offenses and cooperate with prosecution.

Despite the paucity of empirical findings to support these claims, many states have enacted statutes with the intent of limiting public access in two ways: (1) by excluding the public from the courtroom during the victim's testimony, and (2) by restricting publication of information that may identify the victim.

Limiting the Courtroom Audience

At least 14 states[1] and the U.S. Congress have acknowledged an interest in barring some portion of the audience from the courtroom during the testimony of a sexual abuse victim. (See Table 5 and Appendix A, Table 7.) Closure statutes in Michigan, Virginia, and Wisconsin apply only to the preliminary hearing. Some states specify certain exceptions to the excluded audience, typically persons "with direct interest in the case," court officers, family members, or supportive persons. At least four states (Florida, Georgia, Illinois, and South Dakota) permit representatives of the media to remain in the courtroom. In an unusual variation, New Hampshire's statute provides that

> Victims under 16 testify *in camera* unless defendant shows good cause for not doing so. The rest of the proceeding is open to the public. **N.H. REV. STAT. ANN. 632-A:8 (1979)**

Closing the courtroom to the general public threatens the defendant's Sixth Amendment right to a public trial. Nonetheless, case law in this area reveals that, under certain circumstances, the right to a public trial may be subordinate to other compelling interests, including the need to protect a child victim from public scrutiny. The U.S. Supreme Court has addressed the issue of court closure several times, both in cases dealing with trial testimony and in those involving closure of other court proceedings.

Table 5
ELEMENTS OF COURTROOM CLOSURE LAWS
(Current as of December 31, 1989)

PROVISION \ STATE	CA	FL	GA	IL	LA	MA[1]	MA	MI	MN	NH	NC	SC	SD	VA	WI	FED
APPLICABILITY OF STATUTE																
Applies to sexual offenses	√	√	√		√		√	√	√	√	√		√	√		√
Applies to any criminal offense				√								√				
Age of victim is less than:	M	16	16	7	16	M	M	15	M	16			child			18
Applies *only* to preliminary hearings/examinations								√						√	√	
Applies *only* during minor's testimony	√	√	√					√		√	√		√			√
PERMISSIVE vs. MANDATORY																
Closure permitted									√[2]		√		√			√[2]
Closure mandated	√[2]	√				√	√	√[2]								
EXEMPTIONS																
Supportive person for victim														√	√	
Media		√	√	√		√	√									
SPECIAL PROVISIONS																
Public transcript available	√							√								

[1] This state has two statutes pertaining to courtroom closure.
[2] Only upon showing of necessity

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Court considered whether a trial court could exclude the public and the press during a criminal trial. The trial court in this case had closed the trial under a Virginia statute permitting trial closures at the sole discretion of the judge. The Supreme Court found the trial court's action to be unconstitutional, as it violated the right of the public to open trials. In finding a violation of that right, the Court cited the fact that the trial judge made no findings to support closure, no inquiry into alternative solutions, no recognition of the constitutional right for the public and press to attend, and no suggestion that sequestration would not have protected the jurors from misinformation. Under these circumstances, the Court did not consider what countervailing interests might be sufficient to reverse the presumption of an open trial.

In 1982, the U.S. Supreme Court examined a Massachusetts statute, construed by the Massachusetts Supreme Judicial Court to require judges to exclude the press and general public from the courtroom during the testimony of certain sex offense victims under the age of 18. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). The Supreme Court found the mandatory closure interpretation unconstitutional, despite the fact that it was narrowly applied.

In this case, the state argued that closure was necessary to protect minor victims of sex crimes from further trauma. The Supreme Court found that, although this interest is compelling, it could be served by making the determination on a case-by-case basis. A mandatory rule is not justified, as not all victims will be traumatized by the spectators and press. The test is the incremental injury suffered by testifying in the presence of the press and the general public. To apply this test, the court must take into consideration the victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relations.[2]

The state also argued that closure is justified to encourage victims of sex offenses to come forward and testify. The Supreme Court found this justification to be speculative and open to serious question as a matter of logic and common sense.[3]

The Supreme Court has also ruled on the propriety of closing the courtroom during preliminary hearings,[4] voir dire,[5] and pretrial suppression hearings.[6] In all three opinions, the Court found a right of access. In *Waller v. Georgia*, 467 U.S. 39 (1984), the Court further specified that, in order to close the courtroom,

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. 467 U.S. at 48.

The need to consider alternatives to closure and make findings on the record has been echoed in several state appellate decisions.[7] State courts have accepted as

sufficient justification for closure such reasons as eliminating excess noise and sparing witnesses from embarrassment,[8] and protecting the dignity of the complaining witness.[9]

Another question that arises when the courtroom is closed is whether representatives of the media can substitute for the general public. While some courts have permitted such a substitution as an appropriate use of the trial court's discretion,[10] others have held that this practice violates the Sixth Amendment right to a public trial.[11]

Many prosecutors and victim advocates observe that the courtroom audience is not a major concern for most child victims. They also note that there rarely is a general audience; when disinterested spectators are present, they can often be persuaded to leave voluntarily by simple request of the prosecutor. In one study involving courtroom observations of child sexual abuse trials, public access to the courtroom was limited during the child's testimony in only two of 25 cases observed.[12]

Even when a closure statute is invoked, it may not accomplish its intent of alleviating stress on the victim, simply because so many people still have legitimate rights to be present. In one criminal trial, for example, although the courtroom was cleared,

> the family and all attorneys, the defendant and defense witnesses, and court personnel, many of whom were male, all remained. Only a female friend of the victim and [the researcher] were made to leave.[13]

The teenage victim testified poorly and the defendant was acquitted. This particular child might have been better served if her friend had been permitted to stay. Unfortunately, the closure statute in this state does not specifically exempt support persons for the child.

In sum, statutes permitting courtroom closure may only be needed under certain extenuating circumstances, for example, when the defendant purposely fills the audience with individuals who may intimidate the child victim, or when a high school civics class happens to choose a sexual abuse trial as a field trip destination. The National Center for the Prosecution of Child Abuse suggests that clearing the courtroom of hostile defense witnesses might, in fact, be more easily achieved through a motion to exclude witnesses.[14]

Restrictions on Publication of Identifying Information

The Attorney General's Task Force on Family Violence has advocated "carefully managed press coverage" of trials involving child victims:

> Court proceedings involving a child victim or witness must not become a media event. When a youngster is a juvenile offender, his

> name is withheld and the court proceedings are closed to the public. At a minimum, the same considerations should be given to the child victim.[15]

As of December 31, 1989, 26 states and the U.S. Congress had enacted legislation limiting the release of identifying information about child sexual abuse victims[16] (see Table 6, and Appendix A, Table 8). Nine of the state laws apply to all victims of sex offenses and six apply to all victims of crime. Most of these statutes, including the Victims of Child Abuse Act of 1990, direct that identifying information *shall* be kept confidential, while others allow privacy upon motion of the prosecutor. Violations may be treated as contempt (Iowa, Rhode Island, Wyoming) or as misdemeanor offenses (Florida, Georgia, Pennsylvania, South Carolina, Texas); in Massachusetts, it is punishable by a fine ranging from $2,500 to $10,000. In Kentucky, where there is no law addressing this issue, the Attorney General's Office and Kentucky Press Association signed a formal agreement to prohibit the press from releasing identifying biographical information about child sexual abuse victims.[17]

These statutes have seldom been challenged. One exception is the Michigan statute, which provides as follows:

> Upon the request of the counsel or the victim or actor in a prosecution under sections 520b to 520g the magistrate before whom any person is brought on a charge of having committed an offense under sections 520b to 520g shall order that the names of the victim and actor and details of the alleged offense be suppressed until such time as the actor is arraigned on the information, the charge is dismissed, or the case is otherwise concluded, whichever occurs first. **MICH. COMP. LAWS ANN. 750.520K (West 1974)**

In *WXYZ, Inc. v. Hand*, 658 F.2d 420 (Mich. 1981), and again in *Booth Newspapers v. Twelfth Dist. Ct.*, 432 N.W.2d 400 (Mich. App. 1988), this statute was found to be unconstitutional on its face under the First Amendment since it mandates entry of a suppression order without requiring a prior hearing. These opinions are consistent with the opinion in *Globe*, discussed earlier. In other words, each case must be considered individually, a hearing must be held, and findings must be entered on the record before the courts can permit departures that threaten certain constitutional rights.

By and large, there is considerable court discretion as to whether, when, and how to release identifying information. Based on courtroom observations of child sexual abuse trials, one study reports that restrictions on media publication of the child's identity were imposed in only 9 of 27 cases.[18]

Victim advocates observe that, in practice, the media's cooperation with requests to suppress identifying information has been variable. There have been instances

Table 6
SUMMARY OF STATUTES LIMITING RELEASE OF IDENTIFYING INFORMATION
(Current as of December 31, 1989)

PROVISION \ STATE	AL	CA	CT	FL[1]	FL	GA	HI	ID	IL	IA	LA[3]	ME	MD	MA	MI	MN[1]	MN	NJ	NM	ND[1]	ND	OH	PA	RI	SC	TX[2]	WA	WI	WY	FED
APPLICABILITY OF STATUTE																														
Applies to sexual abuse victims	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
Applies to physical abuse victims			√		√		√	√			√		√				√	√	√	√	√		√				√	√	√	√
RESTRICTIONS ON CONTENT OF PUBLIC RECORDS																														
Identifying portions of police or court records or reports confidential					√				√					√		√							√	√						√
Identifying information not to appear in indictment or information or any public record										√								√		√										√
RESTRICTIONS ON TIMING OF RELEASE																														
Court not to require disclosure during pretrial or trial proceedings			√														√		√		√									√
Identifying information not to be released pre-filing or pre-arrest										√																		√		
Permits suppression of names of parties and details until arraignment, preliminary hearing, dismissal or conclusion, whichever comes first															√							√							
SPECIAL PROVISIONS																														
Criminal penalties attached				√		√								√				√					√		√	√				√

[1] These states have two statutes limiting release of identifying information.
[2] Texas statutes are not listed separately because they are really two provisions of the same law. One allows the victim to use a pseudonym in public files and records. The other punishes the knowing or intentional disclosure of that victim's name, address, or telephone number by a public servant to someone other than the defendant, defense counsel, a person assisting in the investigation and prosecution, or other court specified person.
[3] Applies to records contained in the central registry.

where the child's name was withheld but the parents were clearly identified, or where photographs or film clips were prominently featured. In other words, efforts to protect victims' privacy may be thwarted by artful or inadvertent press coverage.

* * * * *

There is, to date, no empirical support for contentions that children are traumatized by the presence of an audience during their testimony. Anecdotal evidence suggests that the courtroom audience is *not* a concern for many children. To be sure, some children will indeed be humiliated by public exposure of their victimization. In such cases, courtroom spectators generally comply if the prosecutor asks them to leave.

As a rule, however, when considering motions to limit the courtroom audience, judges should also consider exempting the child's primary support person. As will be discussed further in Chapter 9, courts generally permit support persons to remain in the courtroom during the child's testimony, even at grand jury, and even when the support person is a witness in the case.

Although courtroom closure can help to shield child victims from the presumed trauma of testifying in open court, it does little to protect them from public exposure by the media. Statutes limiting the release of identifying information can help to the extent that the courts support and enforce them. As a matter of policy, the media should respect the private dignity of these children by withholding *any* identifying information and by refraining from exploiting the potentially sensational nature of these crimes.

Endnotes

1. California, Florida, Georgia, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, New Hampshire, North Carolina, South Carolina, South Dakota, Virginia, Wisconsin.
2. *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982).
3. For an analysis of the *Globe* opinion and its ramifications for future research on the vulnerabilities of child witnesses, see G.B. Melton, "Child witnesses and the first amendment: A psycholegal dilemma," *Journal of Social Issues,* Vol. 40 (1984): 109-123.
4. *Press-Enterprise Co. v. Superior Court of California,* 478 U.S. 1 (1986).
5. *Press Enterprise Co. v. Superior Court of California,* 464 U.S. 501 (1984).
6. *Waller v. Georgia,* 467 U.S. 39 (1984), *on remand, Waller v. State,* 253 Ga. 146, 319 S.E.2d 11.
7. See, for example, *Ex rel. Stevens v. Circuit Court for Manitowoc County,* 141 Wis.2d 239, 407 N.W.2d 832 (1987); *Kearns-Tribune Corp. v. Lewis,* 685 P.2d 515 (Utah 1984); and *Eversole v. Superior Court,* 148 Cal. App. 3d 188, 195 Cal. Rptr. 816 (1983). All address the issue of courtroom closure during preliminary hearing. See also, *Miami Herald Pub. Co. v. Morphonios,* 467 So. 2d 1026 (Fla. App. 1985), applying the same reasoning to closure of pretrial depositions.
8. *State v. Workman,* 14 Ohio App. 3d 385, 471 N.E. 2d 853 (1984).

9. *State v. Workman,* 14 Ohio App. 3d 385, 471 N.E. 2d 853 (1984).

10. See, e.g., *United States ex rel. Orlando v. Fay,* 350 F.2d 967 (N.Y. 1965), *cert. denied sub nom. Orlando v. Follette,* 384 U.S. 1008 (1966); *Commonwealth v. Hobbs,* 385 Mass. 863, 434 N.E.2d 633 (1982); *State v. Smith,* 123 Ariz. 243, 599 P.2d 199 (1979).

11. *State v. Klem,* 438 N.W.2d 798 (N.D. 1989); *Ex rel. Stevens v. Circuit Court for Manitowoc County,* 141 Wis.2d 239, 407 N.W.2d 832 (1987).

12. E. Gray, "Children as Witnesses in Child Sexual Abuse Cases Study," Final Report submitted to the National Center on Child Abuse and Neglect under Grant No. 90-CA-1273, by the National Council of Jewish Women, New York, New York, 1990, p. 53.

13. N. King, W. Hunter, and D. Runyan, "Going to court: The experience of child victims of intrafamilial sexual abuse," *Journal of Health Politics, Policy and Law,* Vol. 13 (Winter 1988): 1-17.

14. P.A. Toth and M.P. Whalen, eds., *Investigation and Prosecution of Child Abuse* (Alexandria, VA: American Prosecutors Research Institute, 1987), p. IV-18.

15. Attorney General's Task Force on Family Violence, *Final Report,* September 1984, p. 40.

16. Alabama, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Washington, Wisconsin, and Wyoming.

17. Toth and Whalen, supra, note 14 at p. IV-1.

18. Gray, supra, note 12 at p. 54.

Chapter 8
Use of Expert Witnesses

Among the most disturbing trends in the prosecution of child sexual abuse cases is the increasing reliance on expert witnesses—particularly experts in the behavioral sciences—by both the prosecution and the defense. This trend is disturbing for several reasons:

- Child sexual abuse is a relatively new and inexact field of study.[1] Much remains unknown, and there are many areas of controversy.
- The majority of behavioral scientists who testify as experts in these cases are not certified as forensic specialists in their respective disciplines[2] (which include psychiatry, psychology, social work, counseling, and to a lesser extent, pediatrics). They may have little knowledge of the very circumscribed role expert testimony should play in most criminal cases.
- A small number of behavioral scientists have become, in effect, professional experts who "ride circuit" around the country to testify in well-financed cases. This practice is detrimental both to the legal profession and to the mental health professions.
- The absence of consensus among behavioral scientists about many of the issues surrounding child sexual abuse and children's testimony (see Chapters 2 and 3) paves the way for "battles of the experts" which tend to obscure, rather than clarify, the fact-finding process.

Some of these problems can have serious ramifications for the outcome of child sexual abuse cases. For example, child victims may be subjected to a series of psychological examinations by opposing experts. Not only is this practice intrusive and potentially stressful for the child, but it generally yields conflicting findings and escalates the cost of litigation. Also, research suggests that when the key witness is a child, jurors give more weight to the testimony of other witnesses.[3] Further, and more directly on point, when child witnesses appear shaky or uncertain on the stand, jurors tend to accord greater weight to the testimony of experts.[4] This finding underscores the critical need for caution and deliberation before experts enter the scene in child sexual abuse litigation.

This chapter does not presume to be an exhaustive review of the extensive case law that has accumulated as the courts struggle to define parameters for the appropriate use of expert testimony in child sexual abuse cases. Furthermore,

published case law deals almost exclusively with defense challenges to prosecutors' experts, so that less is documented about the issues emerging from experts testifying for the defense. For a more scholarly, legal analysis of the role of expert witnesses in child sexual abuse cases, readers may refer to articles by law professor John E.B. Myers, et al.,[5] legal scholar Josephine Bulkley,[6] the National Center for the Prosecution of Child Abuse,[7] psychologist Gary B. Melton,[8] prosecutor Rebecca Roe,[9] and law professor David McCord.[10]

Guidance from the Federal Rules of Evidence

Rule 702 of the Federal Rules of Evidence provides a foundation for expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Actual application of Rule 702 in a given situation raises a number of difficult questions. The most obvious are as follows:

- Is the knowledge to be conveyed scientific, technical, or otherwise specialized?
- Will the knowledge to be conveyed by the expert be helpful to the trier of fact?
- Is the proffered expert appropriately qualified?

To begin with the last question, case law suggests that the qualification of experts is rarely an issue on appeal. The Federal Rules of Evidence offer little guidance on this issue and, historically, the courts have been fairly lenient in qualifying experts based on academic credentials and pertinent professional experience.[11] In practice, challenges to a witness's expertise are more likely to occur during cross-examination at trial than upon introduction of the proffered witness.

A quick review of the preceding chapters in this book should suffice to demonstrate that researchers and clinicians have learned much about child sexual abuse—for example, the dynamics of the event, the effects on the child, children's ability to remember and to communicate—that is not common knowledge. Whether this information is helpful to the trier of fact is a matter of continuing debate. As this chapter will show, the courts are concerned that certain types of testimony, offered at certain stages of the trial, may be more prejudicial than helpful. And few would subscribe to the notion that a "battle of experts" has great value for anyone. Under what circumstances, then, can expert testimony contribute to the fair conduct of a criminal trial for child sexual abuse?

Pretrial Uses of Expert Testimony

It is not unusual for mental health experts to testify at certain pretrial proceedings. For example, experts may be called upon to assist in determining a child's competency as a witness. A New Mexico statute explicitly authorizes court-ordered examinations to determine competency of victims under the age of 13 (only after an evidentiary hearing and with procedural safeguards) **N.M. Stat. Ann. 30-9-18, 1987.** And, in *Anderson v. State*, 749 P.2d 369 (Alaska App. 1988), the court ruled that defendants were entitled to have a court-appointed mental health practitioner examine the child witnesses in order to determine their competency and to aid the defense in evaluating their credibility. (The use of experts to evaluate children's credibility is discussed later in this chapter.)

Another pretrial use of expert testimony is to support motions for alternatives to in-court testimony by assessing the likelihood that a child will be seriously traumatized by testifying in open court. In fact, the U.S. Supreme Court may have paved the way for greater use of mental health experts for this purpose by requiring case-by-case determinations of need in *Maryland v. Craig* (see Chapter 5) and in the earlier *Globe* and *Coy* decisions. Under most circumstances, the testimony of the child's therapist should be sufficient evidence of the likelihood of trauma, and there should be no need for an additional exam. But the Victims of Child Abuse Act of 1990 and at least one state (Oregon) require expert testimony to establish that a child will suffer severe emotional or psychological harm before closed-circuit television can be used.[12] It is also possible that defendants will challenge the recommendations of a child's therapist, or that the courts will order an independent examination to evaluate a child's competency or need for alternative techniques.[13] When this occurs, the child may be subjected to multiple evaluations and the stage may be set for a battle of the experts.

Trial Uses of Expert Testimony

Medical testimony is perhaps the most commonly used type of expert testimony seen in child sexual abuse trials. Mental health experts are frequently introduced (1) to challenge or support the child's credibility and (2) to ascribe the child's or defendant's characteristics to an accepted "syndrome" or "profile." Case law on these subjects, and particularly "syndrome" or "profile" testimony, is widely divergent.

Medical Testimony

Evidence provided by physicians can be especially helpful to the trier of fact. Where there are medical findings of sexual abuse, the physician can explain the nature of these findings and the degree of confidence in which they are attributable to sexual abuse. With the use of a colposcope (a device which lights and magnifies the genital area), physicians can detect scars or injuries that may not

have been visible otherwise. Many colposcopes are equipped with a powerful camera to take photographs of the affected area.

Despite the availability of this advanced technology, medical findings remain the exception rather than the rule in child sexual abuse cases. Because the absence of positive findings may seem counterintuitive, especially when more severe forms of abuse are alleged, it is helpful for the physician to explain how it is possible for a sexually abused child to have a normal exam. Sometimes, the type of abuse inflicted simply does not leave markers for the physician to find. Examples include oral-genital abuse, fondling, involvement in pornography, and other sexual activities that do not involve penetration or ejaculation. Alternatively, a child's injuries may have healed between the time of the incident, the disclosure, and the subsequent examination. Evidence that ejaculation occurred can vanish within 48 hours. Research in this area reveals that it is even possible for penetration to occur without leaving scars or marks.

Finally, the examining physician is often permitted to testify as to information learned in the course of taking the child's history. In fact, where there are no medical findings of abuse, the history plays a critical role in forming a diagnosis. According to Dr. Carolyn Levitt, a prominent pediatrician,

> if disclosure of the abuse is delayed, physical findings are present in only 10% to 20% of cases. The physican who limits the evaluation to physical evidence alone is, then, making decisions regarding whether or not abuse occurred with 80 to 90% of the data missing.[14]

Although physicians are generally permitted to testify as to the findings of the medical examination (or lack thereof) and their resulting diagnosis, admissibility becomes less certain when the physician relies on behavioral indicators of abuse, or on statements made by the child, in reaching a diagnosis. (This debate is discussed above in Chapter 6.)

A more detailed treatment of the nature of medical evidence and admissibility of physicians' expert testimony can be found in J.E.B. Myers, et al., "Expert testimony in child sexual abuse litigation," *Nebraska Law Review*, Vol. 68 (1989), Section IV.A.

Testimony Regarding Credibility

In one area, the courts are nearly in complete consensus. Prosecution experts are almost universally never permitted to express direct opinions about children's credibility as witnesses.[15] The predominant reasoning is that the assessment of credibility lies squarely within the province of the jury.[16]

Although it is seldom documented in the case law, the question of children's credibility offers fertile ground for the defense. It is not unusual for the defense to suggest, for example, that children's memories are contaminated by improper

interviewing techniques, or that children cannot differentiate between fantasy and reality or between truth and falsehood. Sometimes prosecutors counter these assertions by introducing experts in the area of child development. (Such testimony is rarely admitted before the challenge has been raised.) As was demonstrated in preceding chapters, research in this field has burgeoned tremendously in recent years; prosecutors and defense attorneys would be wise to test their experts' currency on the subject before exposing them to cross-examination.

Several commentators have suggested adopting an approach to evaluating children's testimony that has been used for many years in some countries.[17] These countries (e.g., Israel and West Germany) rely on specially trained or court-appointed experts to interview child witnesses prior to trial and to present their findings in court; the children are seldom required to testify. In West Germany, court-appointed psychologists use a structured questionnaire in their examinations of child witnesses, designed not only to elicit the child's story but also to assess credibility. This technique, called "statement validity analysis," has attracted the interest of several American psychologists who are now conducting controlled evaluations of this instrument in hopes of documenting its utility as a test for credibility.[18]

Conceptually, the notion of "statement validity analysis" closely resembles the polygraph, or "lie detector" test, although the latter is premised on physiological responses rather than psychological evaluations. And, like the polygraph, even if statement validity analysis or other quantitative device were found to be a reasonable litmus test of children's credibility, precedent suggests that the findings would be inadmissible in trial.[19] In fact, the courts in Florida have flatly rejected expert testimony based on the application of "scientific" techniques to evaluate children's credibility,[20] and at least four states have enacted legislation expressly prohibiting court-ordered psychological or psychiatric examinations of child sexual abuse victims for purposes of assessing credibility.[21]

Syndrome Testimony

Another category of expert testimony attempts to demonstrate that either the child or the defendant fits (or does not fit) the "profile" of a "typical" sexual abuse victim or sex offender. The courts are less consistent in their treatment of this category of testimony.

Testimony describing offender profiles or characteristics of child molesters is almost always found inadmissible because it relies on statistical probabilities that are meaningless in determining the facts of a particular case.[22] Statistics suggest, for example, that 60 to 80 percent of child molesters are known to their victims.[23] But it does not follow that the defendant *in a given case* either (a) committed the abuse because the child knows him, or (b) did *not* commit the abuse because the child does *not* know him. Such testimony is usually rejected on grounds that its prejudicial effects far outweigh its probative value.

Attempts to apply similar profiles (or "syndromes") to describe sexually abused children have met with similar opposition. (The various syndromes that have been developed to describe behaviors commonly observed among sexually abused children are summarized in Chapter 2.) Melton and Limber describe the arguments against "syndrome" testimony as follows:[24]

- First, a child may "feel" abused without actually having been abused *as defined by law.* Conversely, a child who was in fact abused (again, as defined by law) may not exhibit the expected reactions.
- Second, although a child may, in fact, have been abused at some point in time, this alone does not prove that the child was abused by the defendant at the particular point in question.
- Third, the extant syndromes are based on clinical intuition, not hard data. They lack a firm scientific foundation.
- Fourth, available statistical data are too easily misinterpreted. Although it is true, for example, that a high proportion of sexually abused children suffer symptoms of post-traumatic stress disorder (PTSD), it is equally true that PTSD could result from a variety of traumatic events, of which sexual abuse is but one.[25]

In short, syndrome testimony has serious limitations that should be recognized before such testimony is admitted into evidence.

Nonetheless, expert testimony about common indicators of child sexual abuse has been approved by some courts. The following framework may be helpful in understanding the conditions under which syndrome testimony offered by the prosecution has been considered:

- Some courts have permitted experts to testify describing a general profile of sexually abused children, or behavioral patterns of incest victims, *provided* there is no attempt to apply the description to the particular child victim.[26] Others have found such testimony inadmissible in the absence of specific questioning at trial.[27]
- Expert testimony is sometimes introduced in efforts to demonstrate that behaviors of a particular child victim are consistent with behavioral patterns observed among sexually abused children. The courts are divided as to whether such testimony is admissible. Several courts, for example, have allowed this kind of testimony on grounds that it assists the jury in evaluating the victim's credibility.[28] Other courts, however, have reasoned that such testimony is tantamount to an expert assessment of the child's truthfulness or credibility.[29]

- Some courts have explicitly permitted syndrome testimony *only* in rebuttal to defense attacks on the child's credibility. In *People v. Beckley*, 161 Mich. App. 120, 409 N.W.2d 759 (1987), *app. gr. in part*, 430 Mich. 858, 420 N.W.2d 827 (1988), *and aff'd in part*, 434 Mich. 691, 456 N.W.2d 391 (1990), for example, the Court permitted an expert to testify that delay in reporting is normal, explaining that such testimony was admissible because it was introduced after the defense raised the issue of the victim's apparently inconsistent behavior.[30]

- Other courts have likewise restricted syndrome testimony to rebut defense challenges, but for different reasons. These courts have recognized that the "child sexual abuse accommodation syndrome" and post-traumatic stress disorder (PTSD) were not developed as tools to diagnose child sexual abuse, but rather as aids to therapy for known victims, and therefore cannot be used as evidence that abuse occurred.[31]

It is important to recognize that, when offering testimony in rebuttal to defense challenges, experts need not, nor do they always rely on an identified "syndrome." Rather, they may focus specifically on the issue that was raised by the defense and draw on their own clinical experience or knowledge of the research literature to counter the defense assertions. For example, it is not at all uncommon for the courts to admit expert testimony to explain specific behaviors of an alleged sexual abuse victim, such as delay in reporting or recantations, once the defense has opened the door. There is no need for the expert to ascribe the child's behavior to any kind of syndrome. In fact, in states that apply the *Frye* rule[32] (which requires a demonstration of general acceptance of novel scientific evidence), this kind of expert testimony may be acceptable, but it is probably wise to avoid mention of a syndrome altogether.

Reasons for Caution in Use of Mental Health Expert Testimony

Professor John E.B. Myers has identified four common errors in the use of expert testimony in child sexual abuse cases:[33]

1. *Use of unqualified witnesses.* Because the courts have little guidance for the task of qualifying proffered experts, they tend to accept minimal credentials of academic degrees, publications, and/or prior expert witness experience. However, the subject of child sexual abuse is sufficiently complex to warrant more scrupulous attention to the qualifications of proffered experts. Otherwise, the trier of fact may base its findings on evidence that is unsupported by state-of-the-art research and clinical wisdom.

To remedy this problem, prosecutors and defense counsel should scrutinize the credentials of experts before engaging them as witnesses. In doing so, counsel must be very clear in their own minds about the nature of the desired testimony to be assured that the proposed expert will indeed "fill the bill." Someone who is in fact an expert on the child sexual abuse accommodation syndrome may not be equally qualified to testify about children's memories or propensity to fantasize sexual abuse. Counsel might also routinely challenge each other's experts to establish that they are qualified. Similarly, judges might require counsel to document the credentials of their proffered experts and to demonstrate the link between those credentials and the content of the anticipated testimony.

2. *Testimony that exceeds expertise.* As an example, a social worker from the child protection agency might be called to testify about the child's use of anatomically detailed dolls during investigative interviews. While the social worker may have a great deal of clinical experience observing children's behavior with dolls, he or she may be unfamiliar with the research literature and rely solely on observations of doll-play in reaching an opinion that a child was sexually abused. To summarize the discussion in Chapter 3, these dolls were designed to help children communicate. They are invaluable in assisting children who, due to their embarrassment or inadequate verbal skills, cannot verbalize what happened to them. The courts have almost unanimously recognized and accepted the value of these dolls as demonstrative aids to children's testimony. The confusion arises when people attempt to interpret the child's interaction with anatomically detailed dolls as diagnostic of sexual abuse. While the weight of the research in this area suggests that abused children do play with the dolls differently than nonabused children, the findings are far from conclusive. (See Chapter 3 for an overview.) Researchers repeatedly caution investigators against relying too heavily on doll-play when evaluating allegations of sexual abuse.

3. *Failure to articulate the theoretical justification for expert testimony.* Trial judges must be fully apprised in advance of the intended purpose of expert testimony so they can forestall inappropriate uses. Myers distinguishes between testimony intended to prove that abuse occurred and testimony intended to rehabilitate a child's credibility. Certain types of testimony may be admissible for one purpose but not the other, and the timing of the expert's

testimony may be critical. For example, testimony that many sexually abused children recant their stories at some point during the investigation and adjudication of the charges may be inadmissible during the state's case-in-chief because it bolsters the child's credibility. Yet identical testimony may be admissible if offered to rebut a defense charge of fabrication.

4. *Misunderstanding of relevant literature.* Perhaps the strongest example of this error is misapplication of the child sexual abuse accommodation syndrome. As was shown above, because that syndrome was designed to assist clinicians in their work with children for whom abuse has already been determined, testimony asserting that a child's behaviors comport with the child sexual abuse accommodation syndrome should not be introduced as proof that sexual abuse occurred. Such testimony is usually admissible only to counter defense assertions that a child's behaviors are inconsistent with the behaviors one would expect of a victim of sexual abuse. Prosecutors and defense attorneys must make the effort to understand the relevant literature so they can use expert testimony accurately and beneficially.

The National Center for Prosecution of Child Abuse cautions prosecutors about the use of mental health experts as witnesses, particularly in the case-in-chief, unless they are absolutely necessary to make the case.[34] Two situations in which expert testimony may be required are as follows:

- If the child is incompetent or otherwise unavailable to testify, and corroborative evidence is needed in order to introduce the child's out-of-court statement. (This situation only arises in those states with special child sexual abuse hearsay statutes requiring corroboration; see Chapter 6.)
- If the child victim's credibility will be seriously damaged by defense arguments. Even in this situation, the center recommends offering explanations through other witnesses or other evidence in the case before turning to expert testimony.

By limiting the use of mental health experts to these specific circumstances, prosecutors may be able to avoid being drawn into battles of the experts. Even more important, they can better assure that cases will be decided on the facts that are presented to the jury.

* * * * *

The burden of monitoring and limiting expert behavioral science testimony should be shared among the mental health and legal professions. Melton and Limber caution their colleagues in the field of psychology as follows:[35]

> Psychologists who answer questions about characteristics of abused children are not violating ethical principles, *provided* that they are cognizant of the limits of knowledge and take steps to ensure that the trier of fact is aware of such limits. . . .(Emphasis in original)

Similarly, Myers argues[36]

> It is time for attorneys and experts on child sexual abuse to stop and think seriously about the kind and quality of expert testimony offered in child sexual abuse litigation. . . . Unless professionals concerned about the uses and limits of expert testimony get their house in order, the courts may have little alternative but to condemn the property and close the shutters.

As a final observation, it is worth noting that placing appropriate controls on the use of expert witnesses is well within the discretion of the trial court. Careful consideration of the expert's credentials and the nature and timing of the anticipated testimony ensures a reasoned decisionmaking process that is likely to be upheld at the appellate level.

Endnotes

1. P.A. Toth and M.P. Whalen (Eds.), *Investigation and Prosecution of Child Abuse* (Alexandria, VA: American Prosecutors Research Institute, 1987), Chapter V. Section C.5, "Expert Psychological Testimony."
2. Grisso, "The economic and scientific nature of forensic psychological assessment," *American Psychologist*, Vol. 42 (September 1987): 831-39.
3. G.S. Goodman, et al., "When a child takes the stand: Jurors' perceptions of children's eyewitness testimony," *Law and Human Behavior*, Vol. 11 (1987): 27-40.
4. N.W. Perry, C. Doherty, and R. Kralik, "Expert testimony and child witness behavior: Effects on jurors' decisions," Paper presented at the annual meeting of the Southwestern Psychological Association, Tulsa, Oklahoma, April 21, 1988.
5. J.E.B. Myers, et al., "Expert testimony in child sexual abuse litigation," *Nebraska Law Review*, Vol. 68 (1989): 1-145.
6. J. Bulkley, "Psychological expert testimony in child sexual abuse cases," in E.B. Nicholson, ed., *Sexual Abuse Allegations in Custody and Visitation Cases* (Washington, D.C.: American Bar Association, 1988), pp. 191-213.
7. Toth and Whalen, supra, note 1.
8. G.B. Melton and R.A. Thompson, "Getting out of a rut: Detours to less traveled paths in child witness research," in S. Ceci, M. Toglia, and D. Ross (eds.), *Children's Eyewitness Memory* (New York: Springer-Verlag, 1987): 209-229.

9. R.J. Roe, "Expert testimony in child sexual abuse cases," *University of Miami Law Review*, Vol. 40 (November 1985): 97-114.

10. D. McCord, "Expert psychological testimony about child complainants in sexual abuse prosecutions: A foray into the admissibility of novel psychological evidence," *Journal of Criminal Law and Criminology*, Vol. 77 (1986): 1-68.

11. See, for example, *State v. St. Hilaire*, 97 Or. App. 108, 775 P.2d 876 (1989), permitting testimony on "sex abuse syndrome" from a detective with extensive experience investigating child abuse cases and interviewing alleged victims.

12. OR. REV. STAT. 40.460 (24) (1989).

13. See, for example, NEB. REV. STAT. 29-1925 and 1926 (1988), which provides that upon defendant's motion, the court may order an independent examination by a psychiatrist or psychologist to assist in determining "compelling need" for taking a child's testimony via videotape.

14. C. Levitt, "Sexual abuse in children," *Postgraduate Med.*, Vol. 80 (1986): 201-202.

15. Selected cases include *Commonwealth v. Davis*, 518 Pa. 77, 541 A.2d 315 (1988) (failure of trial counsel to object to expert testimony regarding credibility of sexually abused children was ineffective assistance of counsel); *Tingle v. State*, 536 So.2d 202, (Fla. App. 1988) (rejecting expert witness testimony on the issue of whether or not the child was telling the truth); *Commonwealth v. Seese*, 512 Pa. 439, 517 A.2d 920 (1986) (expert testimony as to credibility of children who claim to be victims of sexual abuse is inadmissible).

16. There have, however, been a few cases permitting experts to testify regarding their belief in the victim or their opinion that children "don't lie" about being abused. *State v. Feazell*, 486 So.2d 327 (La. App. 1986), *writ denied*, 491 So.2d 20 (La. 1986), *State v. DeJoinville*, 145 Vt. 603, 496 A.2d 173 (1985), *State v. Myers*, 359 N.W.2d 604 (Minn. 1984).

17. See, for example, D. Libai, "The protection of the child victim of a sexual offense in the criminal justice system," *Wayne Law Review*, Vol. 15 (1969): 977-1032; and J.Y. Parker, "Rights of child witnesses: Is the court a protector or perpetrator?" *New England Law Review* (1981-82): 643-717.

18. D.C. Raskin and J.C. Yuille, "Problems in evaluating interviews of children in sexual abuse cases," in S.J. Ceci, D.F. Ross, and M.P. Toglia (eds.), *Perspectives on Children's Testimony* (New York: Springer-Verlag, 1989): 184-207.

19. J.A. Bulkley, "Impact of new child witness research on sexual abuse prosecutions," in S.J. Ceci, D.F. Ross, and M.P. Toglia (eds.), *Perspectives on Children's Testimony* (New York: Springer-Verlag, 1989), pp. 222-223.

20. *Davis v. State*, 527 So.2d 962 (Fla. App. 1988), and *Norris v. State*, 525 So.2d 998 (Fla. App. 1988).

21. ARIZ. REV. STAT. ANN. 13-4065 (1985); CAL PENAL CODE 1112 (West 1984); ILL. ANN. STAT. Chapter 38, 115-7.1 (1984); N.M. STAT. ANN. 30-9-18 (1987).

22. But see *People v. Stoll*, 49 Cal.3d 1136, 783 P.2d 698 (1989), in which the California Supreme Court upheld the testimony of a defense psychologist who relied on standard psychological tests to assert that the defendant displayed "normal personality function" and no "indicators of deviancy." The Court found that such testimony was not "profile" testimony.

23. D. Finkelhor, et al., "Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors," unpublished paper, University of New Hampshire, Durham, New Hampshire, April 1989.

24. G.B. Melton and S. Limber, "Psychologists' involvement in cases of child maltreatment: Limits of role and expertise," *American Psychologist*, Vol. 44 (September 1989): 1225-1233.

25. But see Ill. Ann. Stat. ch. 38, 115-7.2:

    In a prosecution for an illegal sexual act perpetrated upon a victim, including but not limited to prosecutions for violations of Sections 12-13 through 12-16 of the Criminal Code of 1961, testimony by an expert, qualified by the court, relating to any recognized and accepted form of post-traumatic stress syndrome shall be admissible as evidence.

26. See, for example, *People v. Skinner,* 153 Mich. App. 815, 396 N.W.2d 548 (1986), and *State v. McCoy,* 400 N.W.2d 807 (Minn. App. 1987).

27. See, for example, *State v. McNeely,* 368 Pa. Super. 517, 534 A.2d 778 (1987), *appeal denied,* 520 Pa. 582, 549 A.2d 915 (1988).

28. See, for example, *State v. Carlson,* 360 N.W.2d 442 (Minn. App. 1985); and *State v. Garden,* 404 N.W.2d 912 (Minn. App. 1987); and *Kruse v. State,* 483 So.2d 1383 (Fla. App. 1986) (expert testimony that the child suffered from PTSD would be helpful to the jury by providing more facts on which to decide whether the child had been sexually abused).

29. See, for example, *State v. Lamb,* 145 Wis.2d 454, 427 N.W.2d 142 (1988), *affirmed* 87-0883-CR (9/21/89) unpublished opinion; and *Commonwealth v. Ferguson,* 377 Pa. Super. 246, 546 A.2d 1249 (1988).

30. See, for example, *People v. Koon,* 724 P.2d 1367 (Colo. App. 1986); *State v. Spigarolo,* 210 Conn. 359, 556 A.2d 112 (1989), *cert. denied,* 110 S. Ct. 322; and *People v. Matlock,* 153 Mich. App. 171, J95 N.W.2d 274, (1986).

31. See, for example, *In re Sara M.,* 194 Cal. App. 3d 585, 239 Cal. Rptr. 605 (1987), and *State v. Bowman,* 104 N.M. 19, 715 P.2d 467 (1986).

32. *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923).

33. J.E.B. Myers, "Expert testimony in child sexual abuse cases: Proceed with caution," *The Advisor,* Vol. 2 (January 1989): 6+.

34. Toth and Whalen, supra, note 1 at pp. V-35 - V-37.

35. Melton and Limber, supra, note 23 at p. 1230.

36. Myers, supra, note 32 at p. 11.

Chapter 9
The Victim Advocate

The American Bar Association's Center on Children and the Law,[1] National Conference of the Judiciary on the Rights of Victims of Crime,[2] and Attorney General's Task Force on Family Violence[3] all have recommended providing a support person for child witnesses in criminal proceedings. Research, too, suggests that preparing the child for the experience of testifying, and supporting the child during that experience, can make a noticeable difference in the child's performance on the witness stand.[4]

Recognizing the child's need for support in the courtroom, at least eight states had statutorily authorized presence of a support person during criminal proceedings as of December 31, 1989.[5] And, in the Victims of Child Abuse Act of 1990, the U.S. Congress followed suit. (See Table 7 on the following page and Appendix A, Table 9.) At a minimum, these statutes enable a parent, relative, or friend of the child to accompany the child during his or her testimony at preliminary hearing, grand jury, or trial. The federal legislation permits the "adult attendant" to hold the child's hand or hold the child on the adult's lap during the proceeding.

Perhaps anticipating that the support person's presence would be challenged, the Victims of Child Abuse Act of 1990 requires that "the image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape."[6] In general, however, the courts have allowed support persons to accompany child witnesses even without such precautions. At least one appellate court has explicitly permitted a support person to hold the child on her lap during the child's testimony.[7] The one exception occurs when the chosen support person is also a witness in the case. Recognizing this as a concern, legislators in California and Minnesota incorporated special procedures to accommodate this situation. But, appellate decisions are mixed on this issue: for some, the support person may accompany the child after completing his or her own testimony;[8] others are more restrictive and refuse to permit two witnesses in the courtroom simultaneously.[9] The role of the parent, relative, or friend as a support person for the child is just that: to provide emotional support during the ordeal of testifying. But these individuals, for the most part, are strangers to the criminal justice system themselves and cannot adequately prepare the child in advance. In fact, they may impart their own fears and anxieties to the child, whether knowingly or inadvertently, and seriously erode the child's strength and confidence as a witness. Recognizing these limitations, several statutes and recommendations suggest a trend toward enlarging the role of the child victim advocate. Legislation creating a "bill of rights" or enumerating rights and

Table 7
SUMMARY OF STATUTES PERMITTING THE PRESENCE OF SUPPORT PERSONS IN CRIMINAL CHILD ABUSE CASES
(Current as of December 31, 1989)

PROVISION \ STATE	AR	CA	HI	ID	MI	MN	RI	WA	FED
APPLICABILITY OF STATUTE									
Child victims in any criminal matter				√		√			
Sex offense victims	√	√							√
Child victims of felonies							√		
Age of child is less than:	minor		14			18	18	18	18
TYPE OF PROCEEDINGS									
Investigative proceedings							√		
Any hearings	√								
Preliminary hearings		√		√					
Grand jury proceedings			√						
Depositions	√								
Pre-trial hearings									
All judicial proceedings			√				√	√	√
Trial	√	√		√	√	√			
Omnibus hearing						√			
During victim's testimony	√				√			√ [1]	
SPECIAL PROVISIONS									
Number of people authorized	1	2	1	1	1	1	1	1	1
Notice to opposing counsel required	√				√				
Special procedure if person(s) selected as a prosecuting witness		√			√	√			

[1] Washington law also provides for an advocate or support person to wait with the child prior to and during court proceedings.

services for child victims, for example, often encourages judges, prosecutors, or law enforcement agencies to designate a "friend of the court" to assist child victims in a variety of ways. Assigning a "friend of the court" for child victims also obviates the problem of identifying an appropriate support person in intrafamilial cases, where family, relatives, and friends may be unable to provide even a minimum of emotional support for the child. Wisconsin's statute, excerpted in Exhibit 8, is a good example of this type of legislation.[10]

Regardless of whether such enabling legislation exists, child victims in many communities benefit from an array of support services, including but not limited to those listed above. This chapter discusses several common approaches to assisting child victims in the courts.

Victim Assistance Programs

In more than 7,000 communities throughout the United States, child victims are offered support from victim/witness assistance programs.[11] The overwhelming majority of these programs are not organizationally affiliated with any criminal justice agency. According to a recent national survey, more than 80 percent of community-based victim assistance programs reportedly serve children who have been abused or sexually assaulted.[12]

Victim assistance programs typically provide a broad range of services, in decreasing order of frequency:

- notification of court dates
- notification of case dispositions
- provision of printed information
- referrals to counseling or social services
- notification of investigation status
- court accompaniment
- assistance with transportation
- assistance with return of property held as evidence
- arrangement for secure court waiting areas
- "next day" or short-term counseling[13]

Other activities encompassed within the role of victim assistance include helping crime victims to complete applications for victim compensation or restitution programs, or to prepare their victim impact statements.

Exhibit 8

CHILD VICTIMS AND WITNESSES: RIGHTS AND SERVICES

Wis. Sta. 950.055(2)....counties are encouraged to provide the following additional services on behalf of children who are involved in criminal proceedings as victims or witnesses:

(a) Explanations, in language understood by the child, of all legal proceedings in which the child will be involved.

(b) Advice to the judge, when appropriate, and as a friend of the court, regarding the child's ability to understand proceedings and questions. The services may include providing assistance in determinations under §967.04(7) and the duty to expedite proceedings under §971.105.

(c) Advice to the district attorney concerning the ability of a child witness to cooperate with the prosecution and the potential effects of the proceedings on the child.

(d) Information about and referrals to appropriate social services programs to assist the child and the child's family in coping with the emotional impact of the crime and the subsequent proceedings in which the child is involved.

There are some additional services provided specifically for child victims. For example, program staff may provide training for judges and prosecutors on the dynamics of child sexual abuse or the capabilities of children as witnesses. Victim assistance programs are often represented on multidisciplinary review teams for child sexual abuse cases. Some programs also monitor concurrent family court proceedings or perpetrators' compliance with no-contact orders. In unusual circumstances, the advocate may be permitted to lead the questioning of the child for purposes of obtaining a statement while the police investigator and/or prosecutor look on.

Because of their interactions with child victims, and especially those activities that are designed to prepare them for testifying, victim assistants are sometimes suspected of "coaching" the children to say the "right things" in court. When such suspicions arise, victim assistants may be identified as witnesses in the case and excluded from the courtroom during the child's testimony. Victim assistants who are sensitive to this issue carefully avoid discussing details of the alleged incident with children and take minimal notes on their interviews, thereby giving the defense little pretext for calling them as witnesses.

In a few large jurisdictions, such as Los Angeles, San Diego, and Philadelphia, the volume of child sexual abuse cases that are prosecuted is sufficiently large to support a "court school." In Los Angeles, "Kids In Court" is sponsored by the Junior League and operated by Children's Institute International, a nonprofit social service agency. In San Diego, the court school is operated by the Center for Child Protection of Children's Hospital, and in Philadelphia the program is housed in the District Attorney's Office under a small grant from the U.S. Department of Health and Human Services. Regardless of the sponsoring or operating agency, however, these programs are similarly structured. Children attend a series of group sessions that incorporate discussions, tours of the courtroom, role play, and presentations by judges, prosecutors, defense attorneys, and other court personnel. Supportive parents may also participate in separate groups that run concurrently with the children's program. The goal is to familiarize children and their families with the physical environment of the courtroom, local procedures and practices, and what is expected of them as witnesses.

The Guardian Ad Litem

In the juvenile court, where most allegations of child abuse and neglect are adjudicated, child victims typically have a guardian ad litem (GAL) appointed by the court to represent their best interests. Appointment of a GAL is mandated under the Child Abuse Prevention and Treatment Act of 1974 for states wishing to receive federal funds.[14] The role of the GAL in juvenile court is akin to, but larger than, that of a victim/witness assistant. In addition to accompanying the

child to court proceedings and obtaining needed social, medical, or mental health services, the GAL can make recommendations directly to the court and, in some instances, may even call and question witnesses.

Although the language of the federal legislation refers generally to "judicial" proceedings, in most jurisdictions the appointment of a GAL occurs only in juvenile court. There is a growing recognition, however, that independent representation may be just as critical for child victims in criminal cases (as well as contested divorces and custody cases involving sexual abuse allegations). Ideally, in a criminal case, the victims' interests would coincide with those of the state, but where children are involved, and particularly in intrafamilial cases, the situation may be far from ideal. Prosecutors may be inexperienced in these cases and unaware of alternative measures they can use in court. Worse, prosecutors who are untrained or insensitive may place secondary importance on the child's wishes and feelings in their zeal to obtain a conviction and lengthy sentence. In fact, this latter reason contributes largely to the rationale behind appointment of a GAL in juvenile court.[15]

As of December 31, 1989, at least 15 states had passed laws providing for appointment of GALs in criminal proceedings.[16] The Victims of Child Abuse Act of 1990 added the U.S. Congress to this list. (See Table 8 on the following page and Appendix A, Table 10.) In New Hampshire, GALs may be appointed under the authority of a court rule. **N.H. Superior Ct., Rule 93-A (1986).** GALs have also been appointed in criminal courts on an "as needed" basis.[17] Sometimes, GALs who are appointed in juvenile court voluntarily extend their representation into criminal proceedings, even without benefit of a formal court appointment.

As shown in Table 8, nine states provide GALs in criminal proceedings for child victims of both physical and sexual abuse; Oklahoma specifies physical abuse victims only; four states (California, North Dakota, Tennessee, and Vermont) limit GAL representation to sexual abuse victims. Two states (Alaska and Iowa) and the federal statute extend GAL services to child witnesses. In 11 states, appointment of the GAL is mandatory.

Overall, the statutes offer little guidance for the GAL's role in criminal proceedings. For example, only three states (Florida, Iowa, and North Dakota) require that the GAL be notified of all proceedings. Five permit the GAL to make recommendations directly to the court or to the prosecutor. Only three states (Florida, Oklahoma, and Pennsylvania) explicitly permit the GAL to interview witnesses, but Oklahoma and Pennsylvania statutes also allow the GAL to examine witnesses in court. Under the Victims of Child Abuse Act of 1990, the role of the guardian ad litem may include

- attending all the depositions, hearings, and trial proceedings in which a child participates

- making recommendations to the court concerning the welfare of the child
- having access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child
- marshalling and coordinating the delivery of resources and special services to the child

It is also the GAL's responsibility to assist the child in preparing a victim impact statement.

In practice, the GAL's role in criminal court may be broader than that of the victim assistant but more circumscribed than the GAL's role in juvenile court. It has been described as follows:

- counselor and interpreter for the child (e.g., by assisting in investigative interviews, preparing the child for competency examinations, or explaining court proceedings and outcomes)
- protector against system-induced trauma (e.g., by guarding against redundant interviews, arguing against requests for continuances, or recommending the use of alternative techniques to elicit the child's testimony)
- "linchpin" coordinating the actions of multiple agencies and court systems (e.g., by monitoring concurrent or parallel actions in dependency, divorce/custody, or other civil proceedings and bringing inconsistencies to the attention of court personnel; see additional discussion in Chapter 10)
- voice for the child (e.g., by representing the child's interests at plea negotiations, or by assisting the child with victim impact statements or allocution at the sentencing hearing)
- advocate for the child's legal rights (e.g., by blocking efforts to obtain the child's medical or school records)[18]

Guardians ad litem rarely intervene during trial, although there have been isolated instances where GALs have examined witnesses or raised objections.

Attorney vs. Lay Citizen?

Some authors recommend, and five states require, that child victims have independent legal counsel in criminal court proceedings.[19] The important advantage of having attorneys as advocates is their greater understanding of the legal process and, with experience or proper training, their knowledge of applicable

Table 8
SUMMARY OF STATUTES REGARDING THE APPOINTMENT OF GUARDIANS *AD LITEM* IN CRIMINAL CHILD ABUSE PROCEEDINGS
(Current as of December 31, 1989)

PROVISION \ STATE	AL	AK	CA	FL	IN	IA	MO	ND	OH	OK	PA	SD	TN	VT	WA	FED
APPLICABILITY OF STATUTE																
Covers child physical abuse victims	√	√		√		√	√		√	√	√	√			√	√
Covers child sexual abuse victims	√	√	√	√		√	√	√	√		√	√	√	√	√	√
Also applies to child witnesses		√				√										√
Age of child is less than:	18	13	11	minor			18	minor		18				minor		18
Specifies criminal proceedings		√		√		√		√		√			√	√		√
REQUIREMENTS OF GUARDIAN AD LITEM																
Mandatory appointment	√			√	√	√[1]	√		√	√	√	√		√	√	
Must be an attorney	√						√			√	√	√				
Training required			√[2]													
ROLE OF GUARDIAN AD LITEM																
Must be notified of all proceedings				√		√		√								√
May make recommendations to or advise the court				√		√				√	√				√	√
May interview witnesses				√						√	√					
May examine witnesses in court										√	√					
SPECIAL PROVISIONS																
Financial compensation permitted				√			√	√		√			√			
Provided civil and criminal immunity				√									√			√

1 Statute is written as an entitlement for the child witness.
2 Training to be provided under guidelines established by the National CASA Association.

statutory and case law. These advantages would carry considerable weight in criminal court, where child sexual abuse cases in particular can become exceedingly ugly and complex. On the other hand, appointing legal counsel for child victims can be costly. In North Dakota, the statute directs that the county or the state must pay (depending on whether the case is prosecuted in county or district court). In Tennessee, the court must order the perpetrator to pay for the cost of GAL services. In Iowa, the law is silent on the issue of who pays for GAL services; in at least one county, this issue has not yet been resolved (although the law mandating GAL appointments was passed more than four years ago), and so judges are disinclined to make routine appointments.

In many jurisdictions laypersons are appointed to serve as guardians ad litem for abused children. In fact, at this writing some 13,000 specially trained volunteers serve as Court-Appointed Special Advocates (CASA) in 375 programs in 46 states. CASA volunteers provide representation for abused and neglected children in dependency proceedings; seldom do they venture into criminal courts. Under California law, however, the court may appoint a "volunteer advisor" who has been trained under the National CASA Association guidelines to consult with the child and family to ascertain any special needs. Another exception is the Volunteer Guardian Ad Litem Program in the state of Florida, which operates in nearly every judicial circuit with a paid director and legal advisor. Volunteers are trained to ascertain the child's interests in pursuing criminal prosecution and to convey those interests to prosecutors, who rely on the volunteers' intimacy with the child to inform their charging decisions and their recommendations for plea negotiations or sentencing.

Despite their lack of formal legal training, lay advocates may be more effective than attorneys in representing the best interests of child victims. Volunteer laypersons typically carry very small caseloads and thus can devote more time and energy to each child. Their motivations for engaging in this line of endeavor are likely to be altruistic rather than professional (many attorneys seek GAL work as a means of acquiring courtroom experience). And many have academic or "life experience" credentials that better equip them for the unique challenges of working with abused children and their families. In fact, several CASA programs were initiated precisely because judges believed that attorneys were not performing adequately as GALs.[20]

Legal Issues Surrounding the Role of GALS in Criminal Cases

From a legal perspective, the propriety of a child victim having independent counsel in a criminal action is questionable. There are at least four issues:[21]

- Does the GAL have legal standing?

- To what extent does the GAL function as a "private prosecutor"?
- Does the presence of a GAL violate the defendant's right to a fair trial?
- Does the GAL enjoy privileged communications with the child?

None of these questions has been answered definitively. To some extent, the answers depend on the GAL's actual activities in a criminal case. For example, in one criminal case in which a GAL had been appointed for the child victim, defense counsel argued that the GAL's presence impermissibly bolstered the child's credibility as a witness. During trial, the GAL sat silently at the prosecution table, except for one incident. The child had asked for a recess to consult with the GAL, and the GAL said the following words in the presence of the jury: "Thank you. May we approach the bench?" The New Hampshire Supreme Court found no error:

> . . . given the young age of the victim, her stake in obtaining the full protection available to her under the rape shield statute, and the limited involvement of the guardian ad litem in this case. *State v. Walsh*, 126 N.H. 610, 495 A.2d 1256 (1985)

Using this language, the court implied that more visible actions of the GAL might not win approval.

In sum, the potential for a guardian ad litem or other victim advocate to participate actively in criminal proceedings has not yet been defined. The National Conference of the Judiciary on the Rights of Victims of Crime considered this question in 1983 and concluded it would permit an individual of the victim's choice to *accompany* the victim in closed juvenile or criminal proceedings, and in camera proceedings, and to remain with the victim in the courtroom. However, the National Conference clearly drew the line at *participating* in judicial proceedings.[22]

* * * * *

There is little doubt that a child victim needs a "friend" in court. It also seems clear that the child's advocate need not be an attorney, that is, that lay victim assistants can be just as effective in representing the children's interests. The controversy centers on the scope of the advocate's role. Should advocates seek to advise judges and prosecutors as to the victim's wishes, fears, needs for privacy, or protection from harassment? Can advocates press for certain interventions or alternative techniques to help the victims testify? Our answers to these questions are affirmative, and we would borrow from the GAL model in juvenile court to suggest an analogous role in criminal court.

Endnotes

1. National Legal Resource Center for Child Advocacy and Protection, *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases* (Washington, D.C.: American Bar Association, October 1982), p. 9.
2. U.S. Department of Justice, National Institute of Justice, *Statement of Recommended Judicial Practices,* Adopted by the National Conference of the Judiciary on the Rights of Victims of Crime (Rockville, MD: National Criminal Justice Reference Service, 1983).
3. Attorney General's Task Force on Family Violence, *Final Report,* September 1984, p. 37.
4. N.M.P. King, W.M. Hunter, and D.K. Runyan, "Going to court: The experience of child victims of intrafamilial sexual abuse," *Journal of Health Politics, Policy and Law*, Vol. 13 (Winter 1988): 1-17.
5. Arkansas, California, Hawaii, Idaho, Michigan, Minnesota, Rhode Island, Washington.
6. The 1991 Attorney General Guidelines for Victim and Witness Assistance, which implement the provisions of the Victims of Child Abuse Act of 1990, interpret this to mean that the adult attendant's image is to be recorded on videotape only when the child is testifying by closed-circuit television or videotaped deposition, since the jury would not be present at these times to view for themselves any prohibited actions by the adult attendant.
7. *State v. Johnson,* 38 Ohio App.3d 152, 528 N.E.2d 567 (1986), *cert.denied sub nom. Johnson v. Alexander,* 111 S.Ct. 81 (1990).
8. See, for example, *People v. Wilson,* 77 A.D.2d 713, 430 N.Y.S.2d 715 (1980).
9. See, for example, *Hall v. State,* 15 Ark. App. 309, 692 S.W.2d 769 (1985). Both this case and the case cited above in note 6 addressed the propriety of permitting the child's mother to remain with the child during grand jury proceedings.
10. Statutes in at least five other states have similar language. Those states are Colorado, Delaware, New York, North Dakota, and Pennsylvania.
11. Information supplied by the National Organization for Victim Assistance, Washington, D.C., September 19, 1989.
12. H. Nugent and J.T. McEwen, "Prosecutors' national assessment of needs," *Research in Action* (Washington, D.C.: National Institute of Justice, August 1988); B. Webster, "Victim assistance programs report increased workloads," *Research in Action* (Washington, D.C.: National Institute of Justice, August 1988).
13. H. Nugent and J.T. McEwen, "Prosecutors' national assessment of needs," ibid.
14. *Child Abuse Prevention and Treatment Act,* P.L. 93-247, 1974.
15. See, for example, James R. Redeker, "The right of an abused child to independent counsel and the role of the child advocate in child abuse cases," *Villanova Law Review*, Vol. 23 (1977-78): 527-530; Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards Project, *Standards Relating to Counsel for Private Parties* (New York: Ballinger Publishing Co., 1976), pp. 71-73.
16. Alabama, Alaska, California, Florida, Indiana, Iowa, Missouri, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Vermont, Washington.
17. See, for example, *State v. Freeman,* 203 N.J. Super. 351, 496 A.2d 114 (1985).
18. For an in-depth discussion of the potential role for guardians ad litem in criminal court, see D. Whitcomb, *Guardians Ad Litem in the Criminal Courts* (Washington, D.C.: National Institute of Justice, 1988).
19. See, for example, Jacqueline Y. Parker, "Rights of child witnesses: Is the court a protector or perpetrator?" *New England Law Review* (1981-82): 643-717.

20. Whitcomb, supra, note 18, p. 54.

21. Ibid, Chapter 3. For more thorough treatment of the legal issues, see M. Hardin, "Guardians ad litem for child victims in criminal proceedings," *Journal of Family Law*, Vol. 25 (October 1987): 687-728.

22. U.S. Department of Justice, National Institute of Justice, *Statement of Recommended Judicial Practices*, Adopted by the National Conference of the Judiciary on the Rights of Victims of Crime (Rockville, MD: National Criminal Justice Reference Service, 1983).

Chapter 10
Streamlining the Adjudication Process

Among the most frustrating aspects of our criminal justice system are (1) the need for witnesses to repeat their stories over and over again, and (2) the length of the adjudication process. The plight of an adult rape victim undergoing repeated questioning and experiencing innumerable continuances is well-known to criminal justice and mental health professionals. A child sexual assault victim shares this trauma, but it is vastly compounded when the perpetrator is a family member. Several jurisdictions have attempted to remedy these problems both legislatively and informally. This chapter describes these efforts.

Limiting the Number of Interviews

In a typical criminal case, a witness may be interviewed by police, prosecutors, the defense attorney, and probation officer several times each before the case reaches final disposition. Of course, there are also the formal interrogations at preliminary hearings, grand jury appearances, depositions, and trial.

In intrafamily abuse cases, additional agencies become involved and thus more interviews are needed. There will be physicians, social workers, and treatment specialists. There will be investigators and prosecutors handling the separate, but often concurrent, juvenile protection proceedings. There may be a guardian ad litem in juvenile court and a victim assistant in criminal court. If custody proceedings are instituted, there will be additional social workers and mental health professionals. Service providers who testified before the Attorney General's Task Force on Family Violence reported that child victims average at least a dozen investigative interviews throughout the course of child protection proceedings, criminal prosecution, and custody proceedings.[1]

Many individuals who work with child victims believe that having to retell the story so many times is among the most traumatic aspects of the justice system. Numerous professional organizations at the state and national levels have recommended limiting the number of interviews required of child victims, and as of December 31, 1989, eight states had enacted laws specifically directed at this goal.[2] More recently, in the Victims of Child Abuse Act of 1990, the U.S. Congress endorsed this concept by requiring "coordination of each step of the investigation process to minimize the number of interviews that a child victim must attend."

The interview process can be consolidated by

- conducting some form of "joint" interview among two or more of the agencies involved
- assigning specialists within each agency and coordinating their efforts in the form of a multidisciplinary case review team
- videotaping the child's first statement
- eliminating the need for the child to appear at one or more of the formal proceedings
- coordinating multiple court proceedings

As with many of the techniques discussed in preceding chapters, there are practical constraints associated with each. These are examined below.

The Joint Interview

Traditionally, child protection agencies have been the first to receive and respond to reports of child abuse. Whether and when to involve law enforcement was a matter left to the discretion of the agency or the individual worker. In many cases, law enforcement agencies were not contacted until after child protection workers had at least conducted an initial investigation and substantiated that abuse had occurred.

Due to the sheer volume of cases being reported, police sometimes prefer not to be involved in a case until it has been substantiated by the child protection agency. Having a social worker perform this preliminary "screening" precludes the need for a uniformed officer to respond to the scene. Instead, substantiated reports can be referred directly to the detective responsible for case investigation.

This practice of having social workers screen cases for the police has come under fire, however. Opponents offer at least three arguments: First, social workers may overlook the need to gather evidence; the mere fact of their visit to the home may suffice to warn perpetrators to destroy it before the police arrive. Second, social workers may be unwilling to invite police intervention and decline to refer cases. Third, when social workers and police officers interview the child sequentially, it adds to the child's burden and creates opportunities for inconsistencies and contradictions in the child's story.

These concerns have contributed to a growing trend to encourage more cooperative interventions. One recent statutory review found that, as of December 1987, six states required child protection agencies to inform police in all child abuse cases, while 18 states and the District of Columbia required notice to police only in designated types of cases. (In 12 of the latter states, notification of police

occurs after the social worker's investigation.)[3] Conversely, in 27 states police are required to report suspected child maltreatment to child protection agencies.[4] In practice, 93 percent of police agencies responding to a nationwide survey said that they routinely report all child maltreatment cases to the child protection agency. Conversely, 77 percent of the responding agencies received reports from child protection agencies on all sexual abuse cases; fewer departments are routinely notified of physical abuse and neglect cases.[5]

As of December 31, 1988, legislatures in at least 15 states had directed the establishment of joint investigation procedures for reported cases of child sexual abuse. Even without a legislative mandate, police and child protection agencies in jurisdictions throughout the country have developed protocols outlining procedures to be followed when one or the other agency receives a report of child abuse. Roughly half of the law enforcement agencies responding to the aforementioned survey had written agreements with child protection agencies to guide a cooperative response to child abuse reports.[6] In fact, as was noted earlier, development of investigation protocols is among the more common activities being supported under the Children's Justice Act.

Typically, these protocols direct the agencies to contact each other upon receiving a report of child abuse, and further, set forth procedures to coordinate their investigations in some way. Some protocols, for example, envision a joint interview of the child. In some jurisdictions this is accomplished by having either the police officer or the social worker lead the questioning while the other observes and takes notes, sometimes hidden from view behind a one-way mirror. Elsewhere, as in San Diego, the investigators share the questioning: the police officer may question the child while the social worker talks with the parent.

Although joint interviews may appear attractive on paper, in practice they tend to be unwieldy, for several reasons. First, police officers and protective services workers have very different missions when conducting their first interviews on a report of child abuse. Police are interested in determining whether a crime was committed, identifying the perpetrator, and ascertaining whether physical evidence is available. Protective services workers must determine whether an abuse has occurred and if the child should be taken into custody for his or her own protection. Individuals from both disciplines argue that their disparate missions cannot be satisfied simultaneously, and the distrust that sometimes exists between police and social services agencies cannot be ignored. "Frontline" workers in each agency must trust each other's motives and actions before they will defer to the other's judgment in handling the initial interview.

Second, an interview that attempts to serve multiple purposes can become quite lengthy and even counterproductive when working with a young child with a short attention span. One way to avoid this is for law enforcement and child protection agencies to agree on a minimum set of questions that must be addressed in the initial interview. Additional questions would be postponed for a

subsequent interview, to be conducted by one of the same individuals. Although each additional interview may increase the risk of inconsistency in the child's story, subsequent questioning *by the same individual* may help to build rapport and trust and thereby elicit a more complete description from the child.

A third drawback to this approach is the difficulty in scheduling a time convenient to several people, including the child. Some jurisdictions have overcome this problem by scheduling interviews to coincide with the regularly scheduled meetings of their multidisciplinary teams, as discussed below.

Multidisciplinary Teams

Police departments have long had vice squads and youth divisions. More recently, prosecutors have instituted sex crimes units and major offense bureaus. In some communities, even the child protection agency has a special sexual abuse unit. Specialized units have the dual advantages of highly trained and committed staff and the ability to pursue "vertical" techniques of case management. It is this latter benefit—having a single individual responsible for a case from initial assignment through final disposition—that contributes most to reducing the number of interviews a child victim must endure.

In the ideal situation, the assigned personnel from all the agencies would become, formally or informally, a "strike force" dedicated to managing its designated cases in a manner that maximizes the protection afforded to the child. Represented on these groups would be the prosecutor's office, major law enforcement agencies, the child protection agency, an examining physician, victim advocate, and perhaps the child's therapist. Throughout the country, communities are establishing such multidisciplinary teams to meet on a regular basis to discuss elements of new cases, progress of ongoing cases, and proposals for future improvements in case processing. And, as noted above, in some jurisdictions, interviews with child victims are scheduled to coincide with the team meetings to enable the various agency representatives to participate in, or contribute to, the questioning. As of December 1987, 18 states and the federal government (in the Victims of Child Abuse Act of 1990) had statutorily provided for the creation of multidisciplinary teams expressly to improve the management of child abuse cases.[7]

In Madison County (Huntsville), Alabama, the District Attorney's Office took a step beyond the multidisciplinary teams to establish the pioneering Children's Advocacy Center. Based in a residential building that was purchased expressly for this purpose, the Center houses specialists from each of the relevant agencies. Children are no longer "bounced" from one austere government building to the next as they make their rounds of investigative interviews; rather, they are brought to the center, which they come to recognize as a "home base" where virtually all interviews take place.

The Huntsville program, now known as the National Children's Advocacy Center, sparked a groundswell of enthusiasm. The Huntsville model has been replicated nationwide, with variations, in communities of all sizes. In Dade County (Miami), for example, the Children's Center is located in a county office building directly opposite the courthouse. The Sex Battery Unit of the State's Attorney's Office is located there, along with child interviewers and officers detailed from the Metro Dade Police Department. Housed within the center are two specially furnished child interviewing rooms, both equipped for televised monitoring (in a central control booth or in smaller, adjacent rooms), and for videotaping if desired. Some communities, such as Hennepin County (Minneapolis), Minnesota, have sought also to incorporate the medical examination within their children's centers. The National Children's Advocacy Center reports that at least 40 communities are operating, or developing, similar centers, and at least four states have used their Children's Justice Grants to support children's centers.[8] The Victims of Child Abuse Act of 1990 also encourages the development of "counseling centers" for "referring, interviewing, treating, and counseling child victims of sexual and serious physical abuse and neglect."

Of course, the arrangements described above rely on friendly relationships among personnel in the various agencies, a condition that simply does not exist in many communities. But some have reported that the very process of planning for a children's center tends to foster greater communication and coordination, because the involved professionals are working toward a common vision. Another potential barrier in some jurisdictions involves laws protecting the confidentiality of child abuse cases. Under most circumstances, however, a written waiver should enable agency representatives to institute a coordinated case review process.

The Videotaped Interview

Many jurisdictions are using videotape to record the child's first statement and thereby reduce the number of future interviews. The pros and cons of videotaping as an adjunct to interviews with child victims were discussed earlier in Chapter 3, and the validity of videotaped statements as an evidentiary device was debated in Chapter 6. Before instituting videotape to preserve a child's statement, readers are advised to consider the following questions:

- At what point in the investigation will the videotape be made? Given that children do not always disclose completely during their first interview, should subsequent interviews with the child be videotaped as well?
- Who will conduct the interview? Has this individual been trained in investigative interviewing techniques? Does he or she know how to avoid leading questions? Will he or she be able to withstand severe cross-examination?

- What is the quality of the videotaping equipment? How true-to-life is the result?
- What are the procedures for preserving the chain of custody? Who owns the videotape? Who may obtain copies? How can the videotape be shielded from the media?
- Legally, is it necessary to obtain the child's informed consent before videotaping an interview? Ethically, is it desirable for the child to know that his or her interview will be videotaped?

Investigators in some jurisdictions use videotape routinely, both to reduce the need for repetitive interviews and to preserve the child's statement. Prosecutors in these communities are confident in their interviewers' skills and in their own abilities to thwart defense challenges. Elsewhere, prosecutors are reluctant to permit videotaping, preferring to avoid the inevitable defense attacks. Clearly, the technique remains controversial.[9]

Eliminating Formal Appearances

Both the American Bar Association's Center on Children and the Law[10] and the Attorney General's Task Force on Family Violence[11] have urged that child victims not be required to testify in person at preliminary hearings. As the Task Force explained in its final report,

> The preliminary hearing is not a trial. It is the initial judicial examination of the facts and circumstances of the case where the court determines only whether the evidence is sufficient to continue with further prosecution. . . . Consistent with state procedures, a videotaped statement, testimony by the child to a law enforcement investigator, or other such presentations should be adequate. . . . Children should not be required to testify in person.[12]

The ABA's Center on Children and the Law extended this recommendation to grand jury proceedings as well.[13] And, in fact, prosecutors have reported that they do avoid putting the child on the stand for preliminary hearings and grand juries wherever possible.

In contrast, some prosecutors believe that preliminary hearing or grand jury can serve as a "testing" ground for children in an environment that is more sheltered than the criminal courtroom. In most states, these proceedings are not adversarial and so there is no cross-examination. Prosecutors believe that children who perform well at preliminary hearing or grand jury will be perceived by the defense as strong witnesses, thereby encouraging guilty pleas. (There is, to date, no empirical evidence to support or refute this claim.) The major drawback to having children testify at the preliminary hearing, in particular, is that this proceeding is typically scheduled very soon after an arrest is made, and there is very little time for the prosecutor to prepare the child or, indeed, the case.

Where prosecutors have a choice between initiating a case via preliminary hearing or grand jury, the latter is preferable by far. When children must testify at an adversarial pretrial proceeding, such as California's preliminary hearing or a deposition for purposes of discovery, some prosecutors elect to videotape the proceeding as a means of preserving the child's testimony for later use at trial, should the child become unavailable. Also, as a substitute for the eyes and ears of the general public at these pretrial proceedings, videotape tends to encourage better treatment of child witnesses by all the involved parties.

Coordinating Multiple Court Proceedings

Children who are the alleged victims of intrafamilial abuse may be the subjects of concurrent proceedings in several courts with different missions. While prosecutions in criminal court seek to punish (or coerce treatment for) the alleged offender, dependency proceedings may be initiated in juvenile court to protect the child from further abuse and, ultimately, to preserve the family. At the same time, family or probate courts may be working to resolve custody or visitation issues. These missions are not only separate but, in many cases of intrafamilial child abuse, they are incompatible, inefficient, and ineffective.

For example, a juvenile court may grant a dependency petition, thereby placing a child in shelter care, when the criminal court has already issued a no-contact order on the defendant. As another example, some defendants have effectively nullified no-contact orders issued by the criminal courts by obtaining visitation rights from the juvenile or family courts. Also, in some jurisdictions, dependency proceedings are suspended until the criminal case is resolved. As a result, the child and family may not receive needed social services, and because there is no mechanism to enforce no-contact orders, the perpetrator may re-enter the home to re-abuse the child or pressure the child to recant. Throughout this process, the child may be required to appear in multiple court proceedings and to submit to repetitive medical and psychological examinations and investigative interviews.

Several prestigious national and state organizations have recommended some form of court restructuring toward the goal of coordinating the multiple court proceedings that frequently attend a report of intrafamilial child abuse. For example, the Attorney General's Advisory Board on Missing and Exploited Children recommended combining the criminal case with the dependent/neglect case, possibly under the auspices of a consolidated family court.[14] Similarly, the California Child Victim Witness Judicial Advisory Committee recommended instituting mechanisms to allow cooperative case management and exchange of information between the criminal and juvenile dependency courts.[15] And, as a final example, a joint commission of the Governor's Office and the Massachusetts Bar Association recommended establishing mechanisms to identify all cases pertaining to a single family unit as well as procedures to coordinate and consolidate these cases.[16]

In May 1989, a National Invitational Symposium on Families and Improved Court Processes convened specifically to consider these and other recommendations. Co-sponsored by the State Justice Institute, the National Judicial College, the National Council of Juvenile and Family Court Judges, the National Center for State Courts and the American Bar Association's Center for Children and the Law, the symposium recognized the needs to

> . . . develop procedures and systems for assuring that courts receive all relevant and admissible information concerning other cases involving a family; and structure the processes within the court system to better coordinate and consolidate the multiple issues involving families and develop a "streamlined, user-friendly, integrated intake" for all family-related cases.[17]

In at least 14 states, it is theoretically possible for the juvenile court to have jurisdiction over crimes within a family. And in four states, the family court has original or concurrent jurisdiction over intrafamily crimes:[18]

- Delaware's Family Court has original civil and criminal jurisdiction, the latter including cases involving child abuse, neglect, and contributing to the delinquency of a child.
- The Rhode Island Family Court has concurrent jurisdiction over intrafamily crimes, domestic abuse, and criminal non-support.
- Hawaii's Family Court has concurrent jurisdiction with the criminal division, with discretion left to the judge of the family court whether to maintain jurisdiction over criminal matters.
- New York's Family Court has concurrent jurisdiction with the state supreme court over delinquent or dependent minors, custody of minors not incidental to divorce or separation, paternity, conciliation, guardianship, and intrafamily crime and offenses.

One advantage of adjudicating intrafamily crimes within the Family Courts is the greater availability of court-supervised services to distressed families. One disadvantage is the danger that the crime of child abuse will be perceived as less serious if it is not adjudicated by the criminal court.

Some jurisdictions are experimenting with other ways to coordinate multiple court actions in intrafamilial cases. For example, the state of Virginia recently implemented a pilot program providing for coordinated communications among the courts. In California, the legislature authorized a pilot program to create a new Family Relations Division within the Superior Court, co-equal with the Criminal and Civil Divisions, with jurisdiction over all *civil* actions arising within a family.[19] And in Utah, a court rule directs the county attorney, when commencing litigation in the district, circuit, or juvenile courts, to file written notice of any related matters pending in the other courts.[20]

Coordination of multiple court proceedings can also be accomplished in other, less formal ways. For example, a special prosecutorial unit could be assigned to handle both criminal and juvenile aspects of child abuse cases, as in Ramsey County (St. Paul), Minnesota. A protocol could be developed to ensure joint decision making by prosecutors from separate juvenile and criminal divisions. Or the guardian ad litem appointed in juvenile court could continue to assist the child in criminal court, as was described in Chapter 9. Such procedures not only alleviate the burden on the child, but also help to streamline and rationalize the criminal justice/child protection systems.

Expediting Cases

Often, and particularly in cases involving child witnesses, it is in the defendant's interest to prolong proceedings, wagering on the child's failing memory and desire to forget and move on. But the justice system does not forget, and although the court may allow numerous continuances, the child remains on call. Criminal proceedings can become quite prolonged, and child abuse cases are no exception. The National Council of Jewish Women (NCJW) found that among eight jurisdictions studied, the time from referral for prosecution to trial or other disposition in child abuse cases ranged from 71 to 297 days (or roughly two to ten months).[21] Another study of child abuse prosecutions in four counties reported that the time elapsed from referral for prosecution to guilty plea ranged from 96 to 171 days (or roughly three to six months). The time from referral to case dismissal ranged from 56 to 205 days.[22]

Continuances can sometimes benefit the prosecution, for example, when the child is recanting. But some critics believe that more often, the effect of repeated continuances and delays is devastating, both to child victims and to the quality of their testimony. Psychiatrists working with child witnesses to parental homicides assert that "each trial postponement can cause renewed anxiety until, perhaps, anxiety related to the original memories of the event is shifted to the court proceedings."[23] Research findings on the effect of delay on child victims are mixed, however. One study reports that protracted proceedings in criminal court may have an adverse effect on the mental health of child sexual abuse victims.[24] In contrast, another study found that the more times the case was continued, the more likely the child victim's behavioral adjustment was to improve.[25]

Our statutory review revealed that 21 states[26] and the federal government have enacted legislation intended to expedite cases involving child witnesses, whether by mandating speedy disposition of these cases or by establishing a policy against continuances. In requiring judges to "consider and give weight to any adverse impact the delay or continuance may have on the well-being of a child victim or witness," most of these statutes explicitly subscribe to the prevailing belief that delay is harmful to child victims.

In practice, however, these laws are rarely invoked. Prosecutors report that every case involves at least one continuance, for several reasons. For example, attempts to schedule an early trial may be thwarted if the defendant claims there is inadequate time to prepare an effective defense. Also, there are frequently competing cases on the court's calendar, other cases that likewise demand priority scheduling.

To avoid the problem of competing criminal cases, the Attorney General's Task Force on Family Violence suggested creating a special docket exclusively for family violence cases (which would include spouse and elder abuse as well as child abuse).[27] Nevertheless, despite the good intentions of legislatures and other policymakers, judges and prosecutors across the country have observed that, in the absence of resources to build new courtrooms and appoint more judges, these laws constitute little more than an attempt to encourage judicial and prosecutorial vigilance against unwarranted requests for continuances.

* * * * *

Given the nature of the American justice system, there is probably some minimum number of interviews to which every witness, including children, must submit. Similarly, there often are perfectly justifiable reasons for delay. These facts may seem intuitively obvious to an adult, but to a child they may be puzzling, at best, or even overwhelming. Though there are ways to streamline the adjudication process, all depend on some level of cooperation among the agencies involved—a quality that cannot be legislated or mandated. Instead, it must come about through the joint efforts of some very committed people.

Endnotes

1. Attorney General's Task Force on Family Violence, *Final Report,* September 1984, p. 15.
2. Alabama, Florida, Hawaii, Minnesota, New Hampshire, North Dakota, Utah, and West Virginia.
3. D.J. Besharov and H.M. Asamoah, "The statutory framework for police activities in cases of child abuse," Washington, D.C., American Enterprise Institute for Public Policy Research, April 22, 1988, pp. 14-15.
4. Ibid., p. 11.
5. S.E. Martin and E.E. Hamilton, "Law enforcement handling of child abuse cases: Policies, procedures, and issues," revised version of a paper presented at the annual meeting of the American Society of Criminology, Chicago, Illinois, August 21, 1989, p. 6.
6. Ibid., p. 12.
7. Alabama, Colorado, Florida, Indiana, Kansas, Maryland, Massachusetts, Minnesota, Montana, New York, North Dakota, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.
8. For information on multidisciplinary approaches to child abuse investigations, contact the National Children's Advocacy Center, 106 Lincoln Street, Huntsville, AL 35801, (205) 533-5437.

9. For technical assistance in weighing the pros and cons of videotaping children's statements, contact the National Center for the Prosecution of Child Abuse, 1033 N. Fairfax St., Suite 200, Alexandria, VA 22314, (703) 739-0321.
10. National Legal Resource Center for Child Advocacy and Protection, *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases* (Washington, D.C.: American Bar Association, 1982), p. 11.
11. Attorney General's Task Force, supra, note 1, at pp. 27, 33.
12. Ibid., pp. 32, 38.
13. National Legal Resource Center, supra, note 9 at p. 11.
14. U.S. Attorney General's Advisory Board on Missing Children, *Report on Missing and Exploited Children: Progress in the 80's* (Washington, D.C.: U.S. Department of Justice, December 1987), p. 29.
15. California Child Victim Witness Judicial Advisory Committee, *Final Report* (Sacramento, CA: California Attorney General's Office, 1988), pp. 38-52.
16. *Report of the Governor's/MBA Commission on the Unmet Legal Needs of Children,* Massachusetts Bar Association, undated.
17. *State Justice Institute News,* Vol. 1 (Summer 1989): p. 8.
18. Massachusetts Bar Association Report, supra, note 15.
19. S.B. No. 218, Chapter 1220, Title 7. California Child Victim Witness Pilot and Demonstration Programs, approved by Governor October 1, 1989.
20. Utah Code of Judicial Administration, Rule 4-901.
21. E. Gray, "Children as Witnesses in Child Sexual Abuse Cases Study," Final Report submitted to the National Center on Child Abuse and Neglect under Grant No. 90-CA-1273, by the National Council of Jewish Women, New York, New York, 1990, p. 27.
22. D. Whitcomb, "Evaluation of programs for the effective prosecution of child physical and sexual abuse," Final Report submitted to the Bureau of Justice Assistance under Cooperative Agreement No. 86-SD-CX-K005, with the Institute for Social Analysis, Washington, D.C., September 1988.
23. R.S. Pynoos and S. Eth, "The child as witness to homicide," *Journal of Social Issues,* Vol. 40 (1984): 103.
24. D. Runyan, et al., "Impact of legal intervention on sexually abused children," *Journal of Pediatrics,* Vol. 113 (1988): 647-53.
25. G.S. Goodman, et al., "Emotional effects of criminal court testimony on child sexual assault victims," Final Report submitted to the National Institute of Justice under Grant No. 85-IJ-CX-0020, 1989.
26. Those states are Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Rhode Island, and Wisconsin.
27. Attorney General's Task Force on Family Violence, supra, note 1 at p. 41.

PART III

CONCLUSIONS AND RECOMMENDATIONS

Chapter 11
Conclusions and Recommendations

What Have We Learned?

The last five years have witnessed an explosion of interest in child victims of sexual abuse. Public awareness has been aroused to unprecedented levels and with this heightened awareness has come political pressure to "do something." And, with astonishing speed, legislators have responded. At the federal level, sizable funds have been allocated to support research on the phenomenon of child sexual abuse and its effects on children; and to develop, implement and evaluate prevention programs, a variety of interventions, and treatment for victims and offenders alike. At the state level, many of the statutory innovations examined in this book have been adopted.

In short, there has been a tremendous amount of activity among researchers and practitioners. But what have we learned?

- Increased public awareness and stronger reporting laws do, in fact, motivate increased reporting.[1] Although many reports are ultimately "unfounded," largely for insufficient evidence, very few are false.[2]
- Increased reporting necessarily requires an enhanced capacity to respond.
- The states' resources to respond effectively to sexual abuse allegations are limited.
- There are serious shortages of trained child protection workers, quality foster care facilities, and slots in treatment programs.[3]
- Many troubled adolescents and adults—as reflected in their histories of physical health, mental health, and behavioral problems as well as criminal records—were sexually abused as children.[4]

In other words, we have learned that child sexual abuse is a serious problem with serious ramifications for society. While we have always known that prevention is the best treatment, we have also confronted the reality that where prevention fails, intervention is a necessity.

As was shown in the preceding chapters, we have also learned some lessons about the intervention process:

- Interagency cooperation and coordination are absolutely vital to alleviate the confusion and redundancy for child victims and to fashion the most effective interventions.
- The truth-seeking process can be imperiled by inappropriate and repetitive interviews of child victims. Videotaping interviews can be a double-edged sword.
- A very small percentage of child sexual abuse cases go to trial. Very few children actually testify. Nonetheless, each case must be handled as though it will ultimately go to court, and the child will ultimately have to testify.
- Children can be effective witnesses given adequate preparation and support.
- Testifying in criminal court may not always be traumatic for child sexual abuse victims.

We have also learned a great deal about the value of innovative techniques that are intended to ease the ordeal of testifying for child witnesses. After several years of cautious experimentation in the courts, a number of test cases have wound their way through the appellate process and we now have the benefit of U.S. Supreme Court opinions in certain areas.

- The trend toward abolishing special competency requirements for child witnesses continues. Much of the current controversy surrounding children's testimony centers less on their capacity to remember events and to relate them truthfully—the cornerstones of modern competency requirements—and more on their susceptibility to suggestion and credibility with the jury. Appellate courts are almost unanimous in their opinions that determinations of witness credibility fall squarely within the domain of the trier of fact.
- Although many states have adopted special hearsay exceptions to allow in certain out-of-court statements made by child sexual abuse victims, the U.S. Supreme Court's decision in *Idaho v. Wright* limits admissibility to those statements in which there are indicators of reliability surrounding the making of the statement itself; other evidence introduced in the case cannot be used. It is likely that videotaped statements or interviews with child victims will be excluded under this interpretation. At this writing, the Court is expected to rule on whether a child must be found

unavailable to testify before the hearsay statement may be introduced. *White v. Illinois.*

- In the wake of *Maryland v. Craig* and *Globe Newspaper Co. v. Superior Court,* it is now possible to introduce a child's testimony via closed circuit television or videotape, and to exclude spectators from the courtroom during the child's testimony—provided there is a prior finding that the child will be emotionally distressed if made to testify in the traditional courtroom setting. Despite these favorable rulings, alternative techniques for eliciting children's testimony are likely to remain measures of last resort.
- The proper use of expert testimony is among the most controversial issues in child sexual abuse cases. If the rulings in the *Craig* and *Globe* cases are interpreted to require expert testimony on the issue of trauma, the Supreme Court may in fact have fueled this debate.

In jurisdictions across the country, child-serving professionals have recognized that although courtroom reforms may hold great potential for the small minority of child victims who ultimately testify in court, much can be done to support the growing numbers of children whose lives are touched by the child protection and criminal justice systems. Among the more promising indicators of progress in this vein have been the following:

- the number and intensity of specialized training programs targeted at various subspecialties within many professions whose members serve child sexual abuse victims
- the development of protocols that clearly define each agency's role in child abuse investigations as well as procedures for cooperation and coordination
- the ubiquitous adoption of multidisciplinary teams that share information and jointly consider available and appropriate interventions for new and ongoing cases
- widespread implementation of "children's centers" in various shapes and forms, all dedicated to streamlining and simplifying the investigation process
- the proliferation and creativity of efforts to prepare children for the courtroom experience, whether through tours of the courtroom, videotapes of trial proceedings, doll-sized courthouses, or structured "court school" programs
- the popular use of victim/witness assistants (and less commonly, guardians ad litem) to support children throughout the adjudication process

In fact, in some communities, investigation and prosecution of "routine" child sexual abuse cases approaches the metaphor of a "well-oiled machine." In these communities, high-ranking agency officials *share a common goal* and give their staffs the authority and responsibility to carry out that goal. There may be a Child Sexual Abuse Task Force or similar policy-level group of community leaders who meet regularly to reaffirm the consensus and plan for (or react to) new developments. Often there is a *specialized child sexual abuse unit within each agency*, and the members of these units typically comprise an *effective multidisciplinary team* that engages not only in case planning but also in negotiating and mediating the inevitable conflicts or disagreements that arise. Frequently there are *written protocols* to ensure that the hard-won advances in the community's response to child sexual abuse will survive the relatively brief tenures of those who fill the roles of investigators, counselors, physicians, advocates, and prosecutors at any given time.

Current Challenges and Directions for Future Research

The focus of concern has changed in recent years. No longer do incest accusations make headlines; these cases, for the most part, are viewed as "routine" or "normal" sexual abuse cases. Today, the media center on accusations arising from custody or visitation disputes, from situations involving multiple children and multiple suspects, or in conjunction with allegations of ritualism or satanism. Furthermore, these cases tend to involve the youngest children, those least likely to speak for themselves or even to begin to comprehend the complexity and severity of their plight. Fortunately for all, these cases are far less common than the media coverage might suggest. The bad news is that when they happen, these cases pose extraordinary challenges. For example, interviewers should know how to probe, with sensitivity, a child's motivation for disclosing abuse: Is he or she seeking help in extricating him- or herself from an intolerable situation, or is the child being used as a pawn in a bitter divorce/custody dispute? Or, has a well-meaning parent unintentionally misconstrued the child's innocent remark? Additional research is needed to better understand the dynamics of these allegations and to guide critical case management decisions.

Perhaps less newsworthy, but certainly more common in the caseloads of child protection workers, investigators, and prosecutors are cases involving certain "subpopulations" of children: very young (sometimes preverbal) children, children with disabilities, and teenagers. Each category presents its own set of difficulties for investigators and prosecutors. Research on the subject of interviewing techniques continues, as was discussed in Chapter 3, but little has been done to address the unique credibility problems surrounding adolescent victims. At a minimum, jurors need to understand the effects of sexual abuse on teens and why their coping behaviors (e.g., running away or substance abuse) seem to

contradict adult expectations. Expert testimony on the child sexual abuse accommodation syndrome has been helpful in some cases (see discussion of "syndrome testimony" in Chapter 8), but a more widespread public information effort would help to raise general awareness of the fact that childhood sexual abuse is so often found in the histories of runaways and substance-abusing youth.

Additional research is needed to evaluate the various types of treatment that are presently available to child victims. Given that a connection between childhood sexual abuse and problems in adolescence and adulthood has been documented, it is imperative that we learn how to interrupt this pattern for victims. Why are some victims more successful than others in overcoming their childhood trauma? Recent research suggests, for example, that raising the level of maternal support for abused children may be among the most effective ways to improve the children's well-being, regardless of whether their cases are prosecuted. How, then, can child-serving professionals identify and strengthen mothers' own emotional reserves so they can, in turn, support their children? What resources are available to assist mothers when their families are shattered by a disclosure of abuse?

We also need to know more about the value of various treatment and punishment alternatives for offenders. Quality recidivism studies are desperately needed (but are exceedingly difficult to do). For example, although diversion programs are currently out of favor, this approach may in fact be more effective, both in reducing recidivism and in strengthening the child and family, than more traditional sentencing options. Empirical research would certainly inform decision making by judges and prosecutors as they struggle to achieve the best possible outcome for perpetrator and victim.

Given the clear trend in the Supreme Court's decisions regarding alternative techniques, specifically, requiring individualized findings of need, judges have a pressing need for guidance in assessing children's ability to withstand the ordeal of testifying. Are there any behavioral or situational clues that are in fact correlated with a child's later performance on the witness stand? Can these clues be ascertained by judges, prosecutors, or parents, or do they require the expert assistance of mental health professionals? Judges, in particular, would benefit tremendously from greater consensus from within the mental health disciplines regarding the knowledge base they possess and how it can best inform the adjudication process. Additional guidance from the legal community regarding parameters of the mental health expert's role in child sexual abuse cases would be especially helpful.

In general, continuing efforts to educate the judiciary must be supported. Judges should be alert to children's unique situation in the criminal court setting. They have considerable discretion to modify the courtroom environment and procedure in ways that benefit child witnesses without abridging defendants' rights. For example, before a child takes the stand, the judge can set certain "ground

rules" for the attorneys' behavior, such as drawing an invisible line around the witness chair, within which the attorneys may not approach the child, or cautioning the attorneys against raising their voices. During direct and cross-examination of a child witness, judges can learn to recognize lines or forms of questioning that confuse or intimidate the child, or signs of discomfort or embarrassment that may cloud or distort the child's testimony. In these circumstances, judges may wish to intervene, for example, to call a recess in order to identify and remedy the source of the child's distress, or to direct attorneys to rephrase their questions. In sum, judges should consider accepting a more active role in overseeing the child's participation at trial.

It is important to recognize, too, that much of what has been learned through experience and research on sexually abused children should be applied to every child who is a victim of, or witness to, a crime. Certainly, any of the courtroom reforms can be just as beneficial to child witnesses of parental homicide, for example, or to child victims of kidnapping or other traumatic crimes, as they are to child victims of sexual abuse. Similarly, improvements in investigation and intervention, particularly in the area of case management and coordination, can be equally helpful to child victims of any form of parental maltreatment. Likewise, counseling or therapy should be an essential element of case planning for *every* abused or neglected child, since research suggests that *all* forms of childhood victimization can have serious repercussions in later life.

Perhaps most important, from a prevention standpoint, emerging research has revealed that child sexual abuse is not an isolated social problem. Families in which child abuse has occurred are often wracked by serious substance abuse problems, and recent studies have underscored the connections between child abuse and other forms of family violence. When responding to suspected child abuse cases, investigators, medical personnel, and mental health personnel should routinely inquire about abuse of other family members, both siblings and parents. At the same time, they should be alert to signs of alcohol or drug abuse in the household. Conversely, battered women's shelters and victim assistance centers should inquire about the children's victimization, and substance abuse treatment specialists would do well to explore the well-being of children who share households with their clients. Efforts must be made, for example, to treat battered women and their children both individually and as a family unit to strengthen their respective coping abilities. This, in turn, may help avoid removing abused children from mothers who otherwise may be unable to protect them. Substance abuse problems must be attended to, not only for obvious health reasons, but also as a preventive measure to reduce the risk of child abuse.

Judges can do their part by recognizing the existence of multiple problems among sex offenders and fashioning sentences that incorporate treatment for substance abuse or violence as well as the sexual abuse. Judges on the criminal bench can consult with their colleagues in the juvenile or family courts to ensure that

children and nonoffending family members are receiving necessary counseling and ancillary services. Where treatment programs are lacking or inadequate, judges can take a leadership role in their communities by encouraging mental health providers to develop new programs or expand their services. With the enormity of social problems that may occur within a single family, treating a single symptom without recognizing, and responding to, additional symptoms that may occur simultaneously is only a partial solution.

Endnotes

1. National Center on Child Abuse and Neglect, *Study Findings: Study of National Incidence and Prevalence of Child Abuse and Neglect* (Washington, D.C.: U.S. Department of Health and Human Services, 1988).
2. D. Jones and J. McGraw, "Reliable and fictitious accounts of sexual abuse to children," *Journal of Interpersonal Violence*, Vol. 2 (March 1987): 27-45.
3. For an excellent review of the research on short- and long-term effects of child sexual abuse, see A. Browne and D. Finkelhor, "Initial and long-term effects: A review of the research," in D. Finkelhor and Associates, *A Sourcebook on Child Sexual Abuse* (Beverly Hills: Sage Publications, Inc., 1986): 143-152.
4. U.S. House of Representatives, Select Committee on Children, Youth and Families, *Abused Children in America: Victims of Official Neglect* (Washington, D.C.: U.S. Government Printing Office, 1987).

Appendix A
Tables of Statutory Citations

TABLES OF STATUTORY CITATIONS

Table 1

LEGISLATION PERMITTING THE USE OF ANATOMICAL DOLLS IN CHILD ABUSE PROSECUTIONS

(Current through 12-31-89)

ALABAMA	ALA. CODE 15-25-5 (1985)
CONNECTICUT	CONN. GEN. STAT. 54-86g (1989)
MICHIGAN	MICH. COMP. LAWS ANN. 600.2163a(1) to (3) and 712.A.17b (1) to (3) (West 1987)
NEW JERSEY	N.J. REV. STAT. 2A:84A-16.1 (1985)
NEW YORK	N.Y. CRIM. PROC. LAW 60.44 and N.Y. EXEC. LAW 642-a(7) (McKinney 1986)
PENNSYLVANIA	PA. STAT. ANN. tit. 42, 5987 (Purdon 1986)
WEST VIRGINIA	W. VA. CODE 61-8-13(b), 61-8B-11(d) and 61-8C-5 (1986)
WYOMING	WYO. STAT. 7-11-408(f) (1987) (for use during child's videotaped deposition)

SOURCE: Statutory compilations were provided by the National Center for Prosecution of Child Abuse, American Prosecutors Research Institute.

Table 2

COMPETENCY AND RELATED LAWS
(Current through 12-31-90)

ALABAMA	ALA. CODE 12-21-165 (a) (1940) ALA. CODE 15-25-3(c) (1985)
ALASKA	ALASKA R. EVID. 601
ARIZONA	ARIZ. REV. STAT. ANN. 13-4061 (1985)
ARKANSAS	ARK. R. EVID. 601
CALIFORNIA	CAL. EVID. CODE 700 (West 1985) CAL. EVID. CODE 701 (West 1985) CAL. EVID. CODE 710 (West 1988)
COLORADO	COLO. REV. STAT. 13-90-106 (1989)
CONNECTICUT	CONN. GEN. STAT. ANN. 54-86(h) (West 1985)
DELAWARE	DEL. CODE ANN. tit. 10, 4302 (1985)
FLORIDA	FLA. EVID. CODE 90.605(2) (West 1985) FLA. EVID. CODE 90.606(1) (West 1985)
GEORGIA	GA. CODE ANN. 24-9-5 (1990)
HAWAII	HAW. R. EVID. 601 HAW. R. EVID. 603.1
IDAHO	IDAHO CODE 9-202 (1985)
ILLINOIS	ILL. CODE OF CRIM. PROC. 106A-5 (Smith-Hurd 1989) ILL. CODE OF CRIM. PROC. 115-14 (Smith-Hurd 1988)
INDIANA	IND. CODE ANN. 35-37-4-1 (Burns 1981) IND. CIVIL CODE ANN. 34-1-14-5 (Burns 1990)
IOWA	IOWA R. EVID. 601 (West 1990)
KANSAS	KAN. STAT. ANN. 60-417 (1963)
KENTUCKY	KY. REV. STAT. ANN. 421.200 (Baldwin 1952)
LOUISIANA	LA. REV. STAT. ANN. art. 601 (West 1988)
MAINE	ME. R. EVID. 601
MARYLAND	MD. CTS. & JUD. PROC. CODE ANN. 9-103 (1985)
MASSACHUSETTS	MASS. GEN. LAWS ANN. ch. 233, 20 (West 1986)

Table 2 (continued)
COMPETENCY AND RELATED LAWS
(Current through 12-31-90)

MICHIGAN	MICH. RULES OF EVID. 601 MICH. COMP. LAWS ANN. 600.2163 (West 1915)
MINNESOTA	MINN. STAT. ANN. 595.02(1) (West 1987)
MISSISSIPPI	MISS. CODE ANN. 13-1-3 (1942)
MISSOURI	MO. REV. STAT. 491.060(2) (1985)
MONTANA	MONT. R. EVID. 601 (1976)
NEBRASKA	NEB. REV. STAT. 27-601 (1975)
NEVADA	NEV. REV. STAT. 50.051 and 50.035 (1971)
NEW HAMPSHIRE	N.H. R. EVID. 601
NEW JERSEY	N.J. R. EVID. 17 (1967)
NEW MEXICO	N.M. R. EVID. 601
NEW YORK	N.Y. R. EVID. 60.20 (1975)
NORTH CAROLINA	N.C. R. EVID. 601
NORTH DAKOTA	N.D. R. EVID. 601
OHIO	OHIO REV. CODE ANN. 2317.01 (Baldwin 1953)
OKLAHOMA	OKLA. STAT. ANN. tit. 22, 702 (West 1957) and tit. 12, 2601 (West 1978)
OREGON	OR. REV. STAT. 40.310, R. 601 (1981)
PENNSYLVANIA	PA. STAT. ANN. tit. 42, 5911 (Purdon 1978)
RHODE ISLAND	R.I. R. EVID. 601
SOUTH CAROLINA	S.C. CODE ANN. 19-11-25 (1988)
SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. 19-14-1, R. 601
TENNESSEE	TENN. CODE ANN. 24-1-101 (1985)
TEXAS	TEX. R. EVID. 601 (Vernon 1989)
UTAH	UTAH CODE ANN. 76-5-410 (1985)
VERMONT	VT. R. EVID. 601
WASHINGTON	WASH. REV. CODE ANN. 5.20.020 and 5.60.050 (1986)

Table 2 (continued)
COMPETENCY AND RELATED LAWS
(Current through 12-31-90)

WEST VIRGINIA	W. VA. CODE 61-8-13(e) (1986), 61-8B-11(c) (1986) W. VA. R. EVID. 601
WISCONSIN	WIS. STAT. ANN. 906.01 (West 1974)
WYOMING	WYO. R. EVID. 601

SOURCE: Statutory compilations were provided by the National Center for Prosecution of Child Abuse, American Prosecutors Research Institute.

Table 3

STATE LEGISLATION REGARDING THE USE OF CLOSED-CIRCUIT TELEVISION TESTIMONY IN CRIMINAL CHILD ABUSE CASES
(Current through 12-31-89)

ALABAMA	ALA. CODE 15-25-1, 15-25-2, 15-25-3 (1985)
ALASKA	ALASKA STAT. 12.45.046 (1988)
ARIZONA	ARIZ. REV. STAT. ANN. 13-4251 & 13-4253(A), (C) (1987)
CALIFORNIA	CAL. PENAL CODE 1347 (West 1987)
CONNECTICUT	CONN. GEN. STAT. ANN. 54-86g (1989)
FLORIDA	FLA. STAT. ANN. 92.54 (West 1987)
GEORGIA	GA. CODE ANN. 17-8-55 (1985)
HAWAII	HAW. R. EVID. 616(a), (d), and (e) (1985)
IDAHO	IDAHO CODE 19-302A (1989)
ILLINOIS	ILL. ANN. STAT. ch. 38, 106A-1, 106A-3, and 106A-4 (1988)
INDIANA	IND. CODE ANN. 35-37-4-8 (Burns 1986)
IOWA	IOWA CODE ANN. 702.5 and 910A.14(1) (West 1986)
KANSAS	KAN. STAT. ANN. 22-3434 (1986)
KENTUCKY	KY. REV. STAT. ANN. 421.350(1), (3), & (5) (Baldwin 1986)
LOUISIANA	LA. REV. STAT. ANN. 15:283 (1984)
MARYLAND	MD. CTS. & JUD. PROC. CODE ANN. 9-102 and Article 27, § 35A (1988)
MASSACHUSETTS	MASS. GEN. LAWS ANN. ch.278, 16D (West 1988)
MICHIGAN	MICH. COMP. LAWS. ANN. 600.2163a(1), (2), (11), & (12)(a) (West 1987)
MINNESOTA	MINN. STAT. ANN. 595.02(4) (West 1987)

Table 3 (continued)
STATE LEGISLATION REGARDING THE USE OF CLOSED-CIRCUIT TELEVISION TESTIMONY IN CRIMINAL CHILD ABUSE CASES
(Current through 12-31-89)

MISSISSIPPI	MISS. CODE ANN. 13-1-401, 405, & 411 (1986)
NEW JERSEY	N.J. REV. STAT. 2A:84A-32.4 (1985)
NEW YORK	N.Y. CRIM. PROC. LAW 65.00 to 65.30 & 642-a (McKinney 1985) (expires 11/1/91)
OHIO	OHIO REV. CODE ANN. 2907.41 and 2937.11(B) (Baldwin 1986)
OKLAHOMA	OKLA. STAT. ANN. title 22, § 753 (West 1984)
OREGON	OR. REV. STAT. 40.460(24) (1989)
PENNSYLVANIA	PA. STAT. ANN. title 42, § 5985 (Purdon 1986)
RHODE ISLAND	R.I. GEN. LAWS 11-37-13.2 (1985)
TEXAS	TEX. CODE CRIM. PROC. ANN. art. 38.071(1), (3), & (6) to (13) (Vernon 1987)
UTAH	UTAH CODE ANN. 77-35-15.5 (1988)
VERMONT	VT. R. EVID. 807 (1985)
VIRGINIA	VA. CODE ANN. 18.2-67.9 (1988)
WASHINGTON	R.C. WASH ch. 9A.44 (1990)
UNIFORM RULES	UNIF. RULES Rule 807(d)

SOURCE: Statutory compilations were provided by the National Center for Prosecution of Child Abuse, American Prosecutors Research Institute.

Table 4

LEGISLATION PERMITTING THE USE OF VIDEOTAPED TESTIMONY IN CHILD ABUSE PROSECUTIONS

(Current through 12-31-89)

ALABAMA	ALA. CODE 15-25-2 (1985)
ARIZONA	ARIZ. REV. STAT. ANN. 13-4251 and 4253(B), (C) (1987)
ARKANSAS	ARK. STAT. ANN. 16-44-203 (1987)
CALIFORNIA	CAL. PENAL CODE 1346 (West 1986)
COLORADO	COLO. REV. STAT. 18-3-413 (1983), 18-6-401.3 (1985)
CONNECTICUT	CONN. GEN. STAT. ANN. 54-86g (West 1985)
DELAWARE	DEL. CODE ANN. tit. 11, 3511 (1985)
FLORIDA	FLA. STAT. ANN. 92.53 (West 1985)
ILLINOIS	ILL. ANN. STAT. ch. 38, 106A-1, -2, and -4 (Smith-Hurd 1987)
INDIANA	IND. CODE ANN. 35-37-4-8(a), (c), (d), (f) and (g) (Burns 1986)
IOWA	IOWA R. CRIM. PROC. 12(2)(b) (West 1986)
KANSAS	KAN. STAT. ANN. 22-3434 (1986)
KENTUCKY	KY. REV. STAT. ANN. 421.350(1), (4), and (5) (Baldwin 1986)
MASSACHUSETTS	MASS. GEN. LAWS ANN. ch. 278, 16D (West 1985)
MICHIGAN	MICH. COMP. LAWS ANN. 600.2163a (1), (2), (13), (14) and 712.A.17b(12) and (13) (West 1987)
MINNESOTA	MINN. STAT. ANN. 595.02(4) (West 1987)
MISSISSIPPI	MISS. CODE ANN. 13-1-407 (1986)
MISSOURI	MO. REV. STAT. 491.675 to .705 (1987)

Table 4 (continued)

LEGISTLATION PERMTTING THE USE OF VIDEOTAPED TESTIMONY IN CHILD ABUSE PROSECUTIONS
(Current through 12-31-89)

MONTANA	MONT. CODE ANN. 46-15-401 to 403 (1983)
NEBRASKA	NEB. REV. STAT. 29-1925 and 1926 (1988)
NEVADA	NEV. REV. STAT. 174.227, .229 (preliminary hearing and grand jury testimony) and .231 (1985)
NEW HAMPSHIRE	N.H. REV. STAT. ANN. 517:13-a (1985)
NEW MEXICO	N.M. STAT. ANN. 30-9-17 (1978), R. CRIM. PRO. 29.1 (1980)
NEW YORK	N.Y. CRIM. PROC. LAW 190.30 and 190.32 (McKinney 1984)
OHIO	OHIO REV. CODE ANN. 2151.3511(A), (B), (D) to (F); 2937.11(C) and 2945.49(B) (preliminary hearing testimony) (Baldwin 1986)
OKLAHOMA	OKLA. STAT. ANN. tit. 22, 753(A), (C) and (D) (West 1984)
PENNSYLVANIA	PA. STAT. ANN. tit. 42, 5984 (Purdon 1986)
RHODE ISLAND	R.I. GEN. LAWS 11-37-13.2 (1985)
SOUTH CAROLINA	S.C. CODE ANN. 16-3-1530(G) (Law. Co-op. 1984)
SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. 23A-12-9 (1986)
TENNESSEE	TENN. CODE ANN. 24-7-116(a), (d) to (f) (1985)
TEXAS	TEX. CODE CRIM. PROC. ANN. art. 38.071(1), (4), (5) (b), and (6) to (13) (Vernon 1987)
UTAH	UTAH CODE ANN. 77-35-15.5 (3), (4) (1988)
VERMONT	VT. R. EVID. 807(a) to (d), (f) and (g) (1985)
WISCONSIN	WIS. STAT. ANN. 967.04(7) to (10) (West 1985)
WYOMING	WYO. STAT. 7-11-408 (1987)

SOURCE: Statutory compilations were provided by the National Center for Prosecution of Child Abuse, American Prosecutors Research Institute.

Table 5

SPECIAL STATUTORY HEARSAY EXCEPTIONS FOR CHILDREN'S OUT-OF-COURT STATEMENTS
(Current through 12-31-89)

ALABAMA	ALA. CODE 15-25-31 to 15-25-37 (1989)
ALASKA	ALASKA STAT. 12.40.110 (1985) (specifically pertains to admissibility before the grand jury)
ARIZONA	ARIZ. REV. STAT. ANN. 13-1416 (1989)
ARKANSAS	ARK. R. EVID. 803(25) (A) (1985)
CALIFORNIA	CAL. EVID. CODE 1228 (West 1985)
COLORADO	COLO. REV. STAT. 13-25-129 (1987), and 18-3-411(3) (1985)
FLORIDA	FLA. STAT. ANN. 90.803(23) (West 1985)
GEORGIA	GA. CODE ANN. 24-3-16 (1986)
IDAHO	IDAHO CODE 19-809A and 19-3024 (1986)
ILLINOIS	ILL. ANN. STAT. ch. 38, 115-10 (Smith-Hurd 1987); related provision ILL. ANN. STAT. ch. 38, 115-13 (Smith-Hurd 1987)--creates medical diagnosis and treatment hearsay exception specifically for use in the prosecution of sexual assault or abuse cases
INDIANA	IND. CODE ANN. 35-37-4-6 (Burns 1985)
KANSAS	KAN. STAT. ANN. 60-460(dd) (1986)
KENTUCKY	KY. REV. STAT. ANN. 421.355 (Baldwin 1986)
MAINE	ME. REV. STAT. ANN. tit. 15, 1205 (1985)
MARYLAND	MD. CTS. & JUD. PROC. CODE ANN. 9-103.1 (1988)
MINNESOTA	MINN. STAT. ANN. 595.02(3) (West 1986)
MISSISSIPPI	MISS. CODE ANN. 13-1-403 (1986)
MISSOURI	MO. REV. STAT. 491.075 (1985)
NEVADA	NEV. REV. STAT. 51.385 (1985)
NEW JERSEY	N.J. STAT. ANN. 2A:84A - Rule 63(33) (1989)
OKLAHOMA	OKLA. STAT. ANN. tit. 12, 2803.1 (West 1986)

Table 5 (continued)
SPECIAL STATUTORY HEARSAY EXCEPTIONS FOR CHILDREN'S OUT-OF-COURT STATEMENTS
(Current through 12-31-89)

OREGON	OR. REV. STAT. 40.460, Rule 803(18a & b) (1989)
PENNSYLVANIA	PA. LAWS 5985.1 (1989)
SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. 19-16-38 (1987)
TEXAS	TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon 1985)
UTAH	UTAH CODE ANN. 76-5-411 (1988)
VERMONT	VT. R. EVID. 804a (1986)
WASHINGTON	WASH. REV. CODE ANN. 9A.44.120 (1985)

Note: Excludes provisions applicable only to civil proceedings.

SOURCE: Statutory compilations were provided by the National Center for Prosecution of Child Abuse, American Prosecutors Research Institute.

Table 6

LEGISLATION PROVIDING FOR ADMISSIBILITY OF VIDEOTAPED INTERVIEWS OR STATEMENTS IN CRIMINAL PROCEEDINGS

(Current through 12-31-89)

ARIZONA	ARIZ. REV. STAT. ANN. 13-4251, 4252 (1987)
HAWAII	HAW. REV. STAT. 626-1, Rule 616(a) to (c) (1985)
INDIANA	IND. CODE ANN. 35-37-4-6 (Burns 1985)
IOWA	IOWA CODE ANN. 910A.14(3) (West 1989)
KANSAS	KAN. STAT. ANN. 22-3433 (1986)
KENTUCKY	KY. REV. STAT. ANN. 421.350(2) (Baldwin 1986)
LOUISIANA	LA. REV. STAT. ANN. 15:440.1 to .6 (West 1986)
MICHIGAN	MICH. COMP. LAWS ANN. 600.2163a(1), (2), (5) to (8), and 712.A.17b(5) to (7) (West 1987)
MINNESOTA	MINN. STAT. ANN. 595.02(3) (West 1986)
MISSOURI	MO. REV. STAT. 492.304 (1985)
OKLAHOMA	OKLA. STAT. ANN. tit. 22, 752 (West 1986)
TENNESSEE	TENN. CODE ANN. 24-7-116(a) to (c) (1985)
TEXAS	TEX. CODE CRIM. PROC. ANN. art. 38.071(1), (2) and (5) to (13) (Vernon 1987)
UTAH	UTAH CODE ANN. 77-35-15.5(1) (1988)
WISCONSIN	WIS. STAT. ANN. 908.08 and 971.24(3) (West 1985)

SOURCE: Statutory compilations were provided by the National Center for Prosecution of Child Abuse, American Prosecutors Research Institute.

Table 7

LEGISLATION PERMITTING THE COURTROOM TO BE CLOSED DURING CHILD TESTIMONY IN CRIMINAL CHILD ABUSE CASES

(Current through 12-31-89)

CALIFORNIA	CAL. PENAL CODE 868.7 (West 1983)
FLORIDA	FLA. STAT. ANN. 918.16 (West 1977)*
GEORGIA	GA. CODE ANN. 17-8-54 (1985)*
ILLINOIS	ILL. ANN. STAT. ch. 38, 115-11(Smith-Hurd 1987)*
LOUISIANA	LA. REV. STAT. ANN. 15:469.1 (West 1980)
MASSACHUSETTS	MASS. GEN. LAWS ANN. ch. 278, 16A (West 1931) and ch. 278, 16C (West 1979)
MICHIGAN	MICH. COMP. LAWS ANN. 600.2163a(1),(2),(9) and (10)(a) (West 1987) (only applies to preliminary examination proceedings)
MINNESOTA	MINN. STAT. ANN. 631.045 (West 1985)
NEW HAMPSHIRE	N.H. REV. STAT. ANN. 632-A:8 (1979)
NORTH CAROLINA	N.C. GEN. STAT. 15-166 (1981)
SOUTH CAROLINA	S.C. CODE ANN. 16-3-1530(G) (Law. Co-op. 1984).
SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. 23A-24-6 (1983).
VIRGINIA	VA. CODE ANN. 19.2-266 (1987).
WISCONSIN	WIS. STAT. ANN. 970.03(4) (West 1987).

*Statute specifically permits media to remain in courtroom.

SOURCE: Statutory compilations were provided by the National Center for Prosecution of Child Abuse, American Prosecutors Research Institute.

Table 8

LEGISLATION LIMITING THE RELEASE OF IDENTIFYING INFORMATION CONCERNING CHILD ABUSE VICTIMS IN CRIMINAL CASES

(Current through 12-31-89)

ALABAMA	ALA. CODE 15-1-2(b) (1985)
CALIFORNIA	CAL. EVID. CODE 352.1 (West 1985)*
CONNECTICUT	CONN. GEN. STAT. ANN. 54-86d (West 1982)*
FLORIDA	FLA. STAT. ANN. 794.03 (West 1975)* and 119.07 (h) (West 1986)
GEORGIA	GA. CODE ANN. 16-6-23 (1968)* and 49-5-2 (1990) (providing privacy protection for child abuse records)
HAWAII	1986 Haw. Sess. Laws H.R. 53 (urging utmost discretion in disclosing the identity of child victims and witnesses)
IDAHO	IDAHO CODE 19-5306(2) to (4) (1985)**
ILLINOIS	ILL. ANN. STAT. ch. 38, 1451 to 53 (Smith-Hurd 1986)
IOWA	IOWA CODE ANN. 910A.13 (West 1986)
LOUISIANA	LA. REV. STAT. ANN. R.S. 14:403 (1989)
MAINE	ME. REV. STAT. ANN. tit. 30, 508 (1979)
MARYLAND	MD. CTS. & JUD. PROC. CODE ANN. 9-501 (1985)**
MASSACHUSETTS	MASS. GEN. LAWS ANN. ch. 265, 24C (West 1987)*
MICHIGAN	MICH. COMP. LAWS ANN. 750.520K (West 1974)*
MINNESOTA	MINN. STAT. ANN. 609.3471 (West 1987) and 611A.035 (West 1986)**
NEW JERSEY	N.J. STAT. ANN. 2A:82-46 (1990)
NEW MEXICO	N.M. STAT. ANN. 31-24-5(B)(1) (1987)**
NORTH DAKOTA	N.D. CENT. CODE 12.1-35-03 (1987), 12.1-34-02(10) (1987),** and 50-25.1-11 (1989)
OHIO	OHIO REV. CODE ANN. 2907.11 (Baldwin 1975) (only suppressed until preliminary hearing, arraignment, dismissal or case conclusion)

Table 8 (continued)

LEGISLATION LIMITING THE RELEASE OF IDENTIFYING INFORMATION CONCERNING CHILD ABUSE VICTIMS IN CRIMINAL CASES

(Current through 12-31-89)

PENNSYLVANIA	PA. STAT. ANN. tit. 42, 5988 (Purdon 1986)
RHODE ISLAND	R.I. GEN. LAWS 11-37-8.5 (1985)
SOUTH CAROLINA	S.C. CODE ANN. 16-3-730 (Law. Co-op. 1979)*
TEXAS	TEX. CODE CRIM. PROC. ANN. art. 57.01 to .03 (Vernon 1987)*
WASHINGTON	WASH. REV. CODE ANN. 7.69A.020 (1985) and 7.69A.030 (3) (1985)
WISCONSIN	WIS. STAT. ANN. 904.13 (West 1985)**
WYOMING	WYO. STAT. 6-2-310 (1985)*, 6-4-403(f) to (k) (1985) and 14-3-106 (1983)*

* Also applies to adult victims of specified sexual offenses.
** Applies to victims generally.

SOURCE: Statutory compilations were provided by the National Center for Prosecution of Child Abuse, American Prosecutors Research Institute.

Table 9

LEGISLATION PERMITTING THE PRESENCE OF SUPPORT PERSONS IN CRIMINAL CHILD ABUSE CASES

(Current through 12-31-89)

ARKANSAS	ARK. STAT. ANN. 16-42-102 (1987)
CALIFORNIA	CAL. PENAL CODE 868.5 (West 1989)
HAWAII	HAW. REV. STAT. 621-28 (1985)
IDAHO	IDAHO CODE 19-3023 (1989) and IDAHO R. EVID. 615(c) (1985)
MICHIGAN	MICH. COMP. LAWS ANN. 27A.2163 (West 1987)
MINNESOTA	MINN STAT. ANN. 631.046 (West 1986)
RHODE ISLAND	R.I. GEN. LAWS 12-28-9(2) (1985)
WASHINGTON	WASH. REV. CODE ANN. 7.69A.030(2), (7), and (8) (1985)

SOURCE: Statutory compilations were provided by the National Center for Prosecution of Child Abuse, American Prosecutors Research Institute.

Table 10

LEGISLATION REGARDING THE APPOINTMENT OF GUARDIANS *AD LITEM* IN CRIMINAL CHILD ABUSE CASES

(Current through 12-31-89)

ALABAMA	ALA. CODE 26-14-11 (1975)
ALASKA	ALASKA STAT. 12.45.046(a)(1) (1988)
CALIFORNIA	CAL. PENAL CODE 868.8 (1988)
FLORIDA	FLA. STAT. ANN. 415.508 (West 1984) and 914.17 Laws 381 (West 1988)
INDIANA	IND. CODE 31-6-11-9 (1989)
IOWA	IOWA CODE ANN. 910A.15 (West 1987)
MISSOURI	MO. REV. STAT. 210.160 (1985)
NORTH DAKOTA	N.D. CENT. CODE 12.1-20-16 (1987)
OHIO	OHIO REV. CODE ANN. 2151.281 (1988)
OKLAHOMA	OKLA. STAT. tit. 21, 846(B) (1987)
PENNSYLVANIA	PA. STAT. ANN. tit. 11, 2223 (1982)
SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. 26-10-12.1 (1985) and 26-10-17 (1984)
TENNESSEE	TENN. Session Laws ch. 478, sec. 11 (1985)
VERMONT	VT. R. CRIM. PROC. 44.1 (1985)
WASHINGTON	WASH. REV. CODE ANN. 26.44.053 (1987)

SOURCE: Statutory compilations were provided by the National Center for Prosecution of Child Abuse, American Prosecutors Research Institute.

Appendix B
Selected Legal Readings

Competency

G. Melton, J. Bulkley, and D. Wulkan, "Competency of children as witnesses," in National Legal Resource Center for Child Advocacy and Protection, *Child Sexual Abuse and the Law*, ed. J. Bulkley (Washington, D.C.: American Bar Association, 1981), pp. 125-145.

R. W. Morey, "The competency requirement for the child victim of sexual abuse: Must we abandon it?" *University of Miami Law Review*, Vol. 40 (November 1985): 245-286.

Alternatives to Confrontation

J.J. Armstrong, "The criminal videotape trial: Serious constitutional questions," *Oregon Law Review*, Vol.55 (1976): 567-585.

S. Brakel, "Videotape in trial proceedings: A technological obsession," *American Bar Association Journal*, Vol. 61 (Aug. 1975).

D. Libai, "The protection of the child victim of a sexual offense in the criminal justice system," *Wayne Law Review*, Vol. 15 (1969): 977-1032.

W.J. Mlyniec and M. Dally, "See no evil? Can insulation of child sexual abuse victims be accomplished without endangering the defendant's constitutional rights?" *University of Miami Law Review*, Vol. 40 (1985): 115-134.

J.Y. Parker, "Rights of child witnesses: Is the court a protector or perpetrator?" *New England Law Review* (1981-82): 643-717.

"The testimony of child victims in sex abuse prosecutions: Two legislative innovations," *Harvard Law Review*, Vol. 98 (1985): 806-27.

Exceptions to Hearsay

J.A. Bulkley, "Major legal issues in child sexual abuse cases," forthcoming in *The Sexual Abuse of Children: Theory, Research and Therapy* (W. O'Donahue and J. Geer, eds. in preparation, Lawrence Erlbaum Assoc., Inc., publishers).

M.H. Graham, "The confrontation clause, the hearsay rule, and child sexual abuse prosecutions: The state of the relationship," *Minnesota Law Review*, Vol. 72 (February 1988): 523-601.

M.H. Graham, "Indicia of reliability and face to face confrontation: Emerging issues in child sexual abuse prosecutions," *University of Miami Law Review, Vol.* 40 (1985): 57.

R.P. Mosteller, "Child sexual abuse and statements for the purpose of medical diagnosis or treatment," *North Carolina Law Review,* Vol. 67 (January 1989): 257-294.

F.M. Tuerkheimer, "Convictions through hearsay in child sexual abuse cases: A logical progression back to square one," *Marquette Law Review,* Vol. 72 (1988) 47-62.

Restrictions on Public Access

G.B. Melton, "Child witnesses and the first amendment: A psycholegal dilemma," *Journal of Social Issues,* Vol. 40 (1984): 109-123.

Expert Witnesses

J. Bulkley, "Psychological expert testimony in child sexual abuse cases," in E.B. Nicholson, ed., *Sexual Abuse Allegations in Custody and Visitation Cases* (Washington, D.C.: American Bar Association, 1988), pp. 191-213.

D. McCord, "Expert psychological testimony about child complainants in sexual abuse prosecutions: A foray into the admissibility of novel psychological evidence," *Journal of Criminal Law and Criminology,* Vol. 77 (1986): 1-68.

J.E.B. Meyers, et al., "Expert testimony in child sexual abuse litigation," Nebraska Law Review, Vol. 68 (1989): 1-145.

R.J. Roe, "Expert testimony in child sexual abuse cases," *University of Miami Law Review,* Vol. 40 (November 1985): 97-114.

Victim Advocates

M. Hardin, "Guardians ad litem for child victims in criminal proceedings," *Journal of Family Law,* Vol. 25 (October 1987): 687-728.