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Sexual Abuse of Children: Recent Developments in the Law of Evidence

by D. Kelly Weisberg

Sexual abuse of children is currently the focus of considerable public attention. Such victimization includes extrafamilial abuse perpetrated by strangers or acquaintances, and also intrafamilial abuse perpetrated by family members. It also includes the use of children in pornography and in prostitution. In each case against the alleged perpetrator. When a child victim of a sexual offense is involved in the prosecution of an offender, typically the child is treated in the same manner as an adult victim. Although procedures vary from jurisdiction to jurisdiction, most states require several separate interviews, usually conducted by police and the district attorney among others. The victim must answer numerous questions concerning the incident, such as information on dates, time, sequence, description of the suspect and of the offense location. The victim may be obliged to identify the offender by picture or line-up. A preliminary hearing may occur, during which the victim must again recount details of the offense. If the suspect fails to plead guilty, a trial ensues in which the victim again testifies and is subject to cross-examination while facing the accused. Such testimony, if given in an adult criminal proceeding, takes place in a public courtroom. This process may last from several months to several years.

Although empirical evidence is scarce assessing the effect of the child’s interaction with the criminal justice system, many experts claim that child victims of sexual offenses are traumatized by the criminal proceedings.1 Testifying in court is a frightening experience to most children, including young victims of sexual offenses. Several commentators suggest that testifying is especially traumatic for the incest victim who must relate embarrassing details of sexual encounters with her father, and must do so in the presence of parents who are often angry and resentful.2 The price for the child victim’s interaction with the criminal justice system is long-term emotional distress,3 confusion,4 and feelings of guilt.5 Some scholars have argued that the court process, for the
child and the family, can constitute an equal or greater crisis than the sexual assault itself.⁸

A. Innovations Abroad

In the past few decades a number of foreign countries have adopted programs to protect the child victims of sexual offenses. In Copenhagen and Stockholm, the interviewing of child victims of sexual offenses is entrusted to special policewomen. In Stockholm these policewomen are qualified nurses with backgrounds in psychology and psychiatry as well as in police investigation. In both the Danish and Swedish systems, the child’s evidence is tape recorded. By this procedure, the victim is spared from continual repetition of the offense account. The tape recording may be introduced in evidence, accompanied by the sworn statement of the interviewer. The victim, thus, need make only one pretrial statement concerning the offense and is able to interact with only one specially trained child interviewer.⁹

As early as 1955 Israel also instituted special procedures to address the problems of child victims of sexual offenses. These procedures consist, first, of the vesting of pretrial investigation powers in impartial experts who are not members of the police, but rather are clinical psychologists, psychiatric social workers, psychiatrists, probation officers, child care workers and others trained in interviewing techniques. The child is interviewed in the home rather than the police station. The child’s written statement is taken by the interviewer and is made available to the police and prosecutor, along with copies of the interviewer’s report. The special child interrogator, rather than the police, controls the child’s investigation, medical examination, presence and participation in the identification of the offender and her appearance at judicial hearings.⁸

B. Innovations in America

A number of jurisdictions in the United States recently began to institute reforms in the handling of child sexual abuse victims. Several states have followed the example of Scandinavia and Israel and now employ specially trained child protective services personnel who are involved in the investigative process.⁹ These persons are trained in techniques of interviewing children, with specific attention to the dynamics of sexual abuse. Also, many jurisdictions have adopted procedures for reducing the number of interviews of the child through the adoption of joint interviews using personnel from child protective services, prosecutors offices, and treatment programs.¹⁰

One salient trend is the effort to minimize the trauma of children’s in-court testimony by means of liberalization of the rules of evidence. This trend takes several forms; (1) abolishing statutorily-set ages below which children are presumed to be incompetent as witnesses; (2) abandoning corroboration requirements which dictate that a defendant may not be found guilty of sexual abuse solely on the word of the child; (3) allowing children’s out-of-court statements to be introduced under exceptions to the hearsay rule; (4) videotaping victims’ interviews and admitting the videotape into evidence in subsequent judicial proceedings; and (5) introducing closed-circuit television in courtrooms which allows the victim to testify without being physically present in the same room as the accused.

(1) Competency Requirements

Many states follow the common law rule which establishes an age above which a child is presumed to be a competent witness. At common law a child 14 years or older was presumed to be competent as a witness. If the child
was under 14 years old, the court had to inquire into the child's maturity or mental capacity, as well as the child's appreciation of the duty to tell the truth. This view is still followed by a number of jurisdictions.\textsuperscript{11}

In 1974 the General Rule of Competency, Rule 601 of the Federal Rules of Evidence, was promulgated. Rule 601 states that "every person is competent to be a witness except as otherwise provided in these rules."\textsuperscript{12} Recently, thirteen states have adopted the statute.\textsuperscript{13} The new legislation has the effect of abolishing all grounds of incompetency, including age. These thirteen jurisdictions typify a liberal trend in allowing children to testify without the necessity of qualifying them before-hand, and enable the trier of fact to determine the weight and credibility of the child's testimony.

\begin{quote}
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\end{quote}

(2) Corroboration Requirements

In judicial proceedings involving sexual victimization of children, there is usually a need for evidence in addition to the child's testimony. This supplemental evidence must corroborate the child's account — to add to the credibility of the child. Since sexual abuse of children normally takes place in private settings (in the child's home or the offender's), corroborating evidence in the form of eyewitness testimony is frequently unavailable. And, since children often fail to report the abuse until days, months or years afterwards, medica
cal evidence of the molestation, similarly, is absent. The effect of this, in jurisdictions requiring corroboration, is to permit the defendant to avoid liability. In response to considerable criticism of the corroboration requirement in sexual child abuse cases,\textsuperscript{14} numerous jurisdictions have abandoned or liberalized these requirements. Only three jurisdictions (Washington, D.C., Nebraska, and New York) currently require corroboration in all child sexual offense cases.\textsuperscript{15}

(3) Introduction of Children's Out-of-Court Statements

A number of states have liberalized their requirements regarding the admission of hearsay. Under traditional rules of evidence, a child's out-of-court statement about the abuse or the abuser is inadmissible as hearsay if it is offered to prove the truth of the statement. Hearsay exceptions would allow such persons as mothers, teachers, and counselors to relate to the court those statements made by the child about the abuse or the abuser. This would spare the child the necessity of testifying. Josephine Bulkey, former project director of the American Bar Association's national study on child sexual abuse, points out that several jurisdictions have relaxed the requirement of spontaneity (in the excited utterance exception to the hearsay rule) to allow the introduction of statements made some time after the sexual assault of very young children.\textsuperscript{16} This is especially important since younger children are more likely to delay in reporting the offense than are older victims.\textsuperscript{17}

(4) Use and Introduction of Videotapes

A number of other jurisdictions have established procedures to videotape interviews with child victims and to provide for the admission of the videotape into evidence. Specifically, Arizona, Colorado, Florida, Minnesota, Montana, New Mexico and Texas recently enacted provisions to this effect.\textsuperscript{18} The procedures in each jurisdiction concerning videotaping vary. Some states allow the videotaping to take place in an informal interview between the child and a social worker. Other jurisdictions, such as
New Mexico, require videotaping to constitute a formal deposition with full cross-examination, attended by a judge.\textsuperscript{19}

The use of videotapes has been praised as sparing the child the necessity of undergoing several interviews and testifying in public judicial proceedings.\textsuperscript{20} However, it presents a serious problem. Specifically, it treads on the defendant’s constitutional rights by infringing his right to confrontation. If the victim has been videotaped previously and is unavailable during subsequent judicial proceedings, the defendant is unable to cross-examine the child to challenge the child’s testimony. The ability of the defendant to challenge damaging testimony is fundamental to his due process rights.

(5) Closed-Circuit Television

One very recent innovation is the use of closed-circuit television. By this method, the child testifies in court through the use of a closed-circuit television. In a typical transmission, the child’s testimony is viewed simultaneously by the defendant. However, the child testifies without being physically present in the same courtroom as the defendant. The young victim is thus spared the intimidation of relating her account in the presence of the accused.\textsuperscript{21} This last reform is now the subject of a draft of federal legislation.

Currently under consideration is legislation drafted by Senator Arlen Specter (D.-PA.), Chairperson of the Senate Subcommittee on Juvenile Delinquency of the Senate Committee on the Judiciary. This legislation would facilitate the testimony of child victims by providing for the closed-circuit televising of the testimony of a child who is the victim of a sexual offense. Specifically, the legislation would provide:

“The testimony of a child under the age of sixteen who is the complaining victim of a criminal offense involving sexual assault or sexual exploitation may, upon motion of the Government, the child, the parent of the child, or guardian or guardian ad litem of the child, be taken outside the courtroom and contemporaneous communicated to the courtroom by two-way closed circuit television if testimony in the courtroom is likely to cause significant psychological harm to the child.”\textsuperscript{22}

This innovation addresses the significant constitutional obstacle to videotaped testimony. That obstacle concerns the defendant’s right to confrontation which is guaranteed by the sixth amendment to the Constitution, made applicable to the states through the fourteenth amendment.\textsuperscript{23} The sixth amendment provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”\textsuperscript{24} It is generally thought that the right of confrontation includes the right to cross-examine witnesses who testify against the defendant.\textsuperscript{25} Videotaped testimony prevents the defendant from cross-examining the child victim because she is not present in the courtroom.

However, the use of closed-circuit television surmounts this obstacle. Closed-circuit televising permits a two-way transmission of the proceeding. The child’s testimony is televised to the defendant. The child can testify in person and is available for cross-examination. Because she is in a different courtroom, she is insulated from the alleged perpetrator. Closed-circuit testimony, in distinction to videotaped testimony, is live and simultaneous. Signifi-
cantly, it permits the child witness to be subject to questioning by both the prosecution and the defense, thus preserving the defendant’s right to cross-examination.

The only constitutional issue remaining is whether the defendant’s rights include the right to “eyeball to eyeball” confrontation. That is, does the Constitution require the witness to be in the immediate visual presence of the defendant? Although this issue has yet to be tested by a court, some commentators believe that closed-circuit television does pass constitutional muster. Last summer this type of transmission was utilized for the first time in California in a preliminary hearing in a case involving the alleged molestation of a five-year-old by an elementary school principal.

Even if introduced and passed by Congress, the federal legislation would have limited impact. The new procedure would be applicable only to prosecutions in the District of Columbia, and prosecutions brought by the United States Attorney. The latter would include prosecutions of pornographers under the Protection of Children Against Sexual Exploitation Act and prosecutions of the pimps of minors brought under the Mann Act. The legislation would not apply to the logical trauma to the child. A showing of such harm would be a prerequisite to the use of the closed-circuit transmission.

**Summary**

The aforementioned reforms serve to facilitate the prosecution of accused sex offenders. These innovations, which are gradually being adopted nationwide, have one important consequence for child victims of sexual offenses. The reforms spare children who have already once been victimized yet another assault by the criminal justice system.

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**Footnotes**


3. D. Walters, supra note 1, at 113; Libai, supra note 1, at 983-84; Schultz, supra note 1, at 451.

4. Giaretto, supra note 1, at 146; Meyers, supra note 1, at 52.

5. Kempe, supra note 1, at 209; Meyers, supra note 1, at 52, 54; Reifen, supra note 1, at 116-17, 119.

6. Burgess and Holmstrom, The Child and Family During the Court Process, in Sexual Assault of Children and Adolescents 205 (A. Burgess, A. Groth, L. Holm-
strom, S. Sgroi eds. 1978); S. Katz & M. Mazur, supra note 1, at 200.
(7) Libai, supra note 1, at 990-91.
(8) Id. at 206. See also Reifen, supra note 1, at 224-25.
(9) For an account of one pioneering program, see Berl egy, King County’s Approach to Child Sexual Abuse, Seattle, Washington, in American Bar Association, National Legal Resource Center for Child Advocacy and Protection, Innovations in the Prosecution of Child Sexual Abuse Cases 112-18 (November 1981).
(10) In the ABA national study, one-third of the jurisdictions surveyed reported having such procedures. Id. at 7.
(12) FED. R. EVID. 601.
(13) These states include Arkansas, Florida, Maine, Michigan, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Pennsylvania, South Dakota, Wisconsin and Wyoming. Melton, Bulkey & Wulkan, supra note 11, at 141 n.20.
(15) ABA, Innovations, supra note 9, at 18 n.3.
(16) ABA, Child Sexual Abuse, supra note 11, at 155-57.
(19) Id., at 28; see also Parker, supra note 1, at 653.
(20) ABA, Child Sexual Abuse, supra note 11, at 155-57.
(21) This reform was strongly advocated in cases of incest in Comment, Parent-Child Incest, supra note 2.
(22) The bill is presently under consideration and has not yet been introduced; hence, it has not been assigned a Senate bill number.
(24) U.S. CONST. amend. VI.
(25) However, the Supreme Court has never said that the confrontation clause mandates cross-examination in every case. See California v. Green, 399 U.S. 149, 172-73 (1970); see also Comment, Parent-Child Incest, supra note 2, at 146-51.
(26) See Galante, supra note 18, at 28.
(27) People v. Greenup, A752-34, discussed in id. at 1, 28.