Adjudication of Child Sexual Abuse Cases

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Abstract

This article discusses issues in the adjudication of child sexual abuse allegations. Such allegations may be tried in criminal court and/or civil court (in child abuse or divorce proceedings), and these forums are discussed. Often central to any of these proceedings is the necessity for a child to testify. The article reviews research about the believability of child witnesses and discusses accommodations for the child that could assist the child witness and encourage accurate testimony, as well as continue to protect the rights of the accused.

The American legal system plays an important role in responding to child sexual abuse. The system is immensely complex, consisting of federal and state courts, trial and appellate courts, innumerable investigative agencies, and thousands of attorneys, probation officers, and related professionals. Moreover, the legal system varies from place to place. The particular complexities involved in responding to child sexual abuse only complicate further an already labyrinthine legal system.

This chapter provides an overview of child sexual abuse litigation. The article begins with a discussion of children as witnesses. Next, child sexual abuse litigation is discussed as it occurs in three different types of proceedings: criminal, juvenile court, and divorce. The article concludes by discussing the need for enhanced coordination of these proceedings of the legal system.

Children as Witnesses

As mentioned above, children testify in different types of legal proceedings. Child sexual abuse is a serious crime in all states, and many children testify in criminal trials. Children also testify in several types of civil proceedings. When a parent sexually abuses a child, proceedings may be initiated in juvenile court. The juvenile court has authority to protect the child by placing the youngster in foster care or leaving the child at home under supervision from an appropriate agency. The juvenile court also has authority to order abusive parents to participate in treatment to reduce the likelihood of future abuse.

Finally, sexual abuse allegations can be heard in civil divorce proceedings. When parents divorce, the custody of their children can become an issue. Most separating parents agree on a custodial arrangement. In a small number of cases, however, one parent accuses the other of sexually abusing their child, and the stage is set for acrimonious litigation in family court. Here too the child may have to testify.

Regardless of the type of litigation—criminal or civil—child sexual abuse is often exceedingly difficult to prove. The
U.S. Supreme Court has observed that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." In many cases, the child's testimony is the most important evidence. It is ironic that children are victimized because they are weak, and yet children's strength on the witness stand is often their best hope for protection.

**Children's Competence to Testify and Take the Oath**

Before a child may testify in court, the judge must be convinced that the child is competent to testify. Testimonial competence requires basic cognitive and moral capacities. The child must be able to observe and remember events, must understand the difference between truth and falsehood, and must appreciate the duty to tell the truth in court. The vast majority of children as young as three and four possess these capacities. In addition to the cognitive and moral capacity to testify, children must take a religious oath or a secular affirmation to testify truthfully.

There was a time in American law when children below specified ages—typically 10 or 12—were presumed to lack testimonial competence. When a young child was brought to court, the judge asked questions to assess the youngster's cognitive and moral capacities and ability to take an oath. If the child possessed sufficient understanding, the child testified. During the era when children were presumed incompetent, most youngsters passed this preliminary test.

As time passed, states abandoned the presumption that children were incompetent to testify, and today the presumption in most states is that children are competent. Although judges still question young children to make sure that they understand the proceedings, most children are allowed to testify.

**Believability of Children's Testimony**

While most children have the cognitive and moral capacity to be competent witnesses, competence is not the same as believability. A witness may be competent to testify but unworthy of belief. Thus the crucial question is, can children be believed?

At the outset, it is worth asking whether children deliberately lie about sexual abuse. By age three, children learn to bend the truth. There is no evidence, however, that children are any more or less prone to lie than adults. Although children—particularly adolescents—sometimes deliberately fabricate allegations of sexual abuse, research reveals that deliberate fabrication is uncommon, particularly among young children. Moreover, young children are not very good at maintaining a lie. Of greater concern than deliberate lying is the possibility that young children who are not abused may be coached or led into believing that they are. Some harsh and unbalanced critics envision an army of corrupt and malevolent professionals on a witch-hunt of false allegations. There is no evidence of such a witch-hunt. There is evidence, however, that some well-intentioned but misguided therapists, police, social workers, and attorneys use interview techniques that could distort children's memories. In rare instances, improper interviewing may actually create a "memory" of abuse that never happened. In these instances, children describe nonexistent abuse, all the while believing what they say. Although wholesale creation of abuse "memories" appears to be rare, the possibility cannot be ignored.

The possibility that flawed interviewing distorts children's memories is one of the most important issues facing professionals working to protect children. Unless the professional community comes to grips with this issue, two decades of progress for abused children could be jeopardized. The media contain numerous stories of improper interviewing, and public skepticism appears to be on the rise. Moreover, incredulity is not limited to the "man on the street." Judges too are worried, and if judges lose confidence in children, children will have lost a powerful ally.
Primary concern about interviewing focuses on young children’s suggestibility and memory. Although memory skills increase with age, young children, including preschoolers, have good memories. Fivush writes that “the single most important finding to emerge from the research on children’s autobiographical memory is that children’s recall can be quite accurate. Moreover, preschoolers seem to be as accurate as older children and accuracy does not appear to diminish over a period of years.” Baker-Ward and her colleagues add that “young children’s reports of personally experienced events can be extensive and accurate.” Concern about interviews should not focus on children’s memory ability, which is good. Rather, the focus should be on suggestibility.

By age 10 or 11, children appear to be no more suggestible than adults. This is not to say, of course, that children approaching adolescence are not suggestible. Psychologists have long documented suggestibility in adults. The important point is that concern about suggestibility does not have to be greater in older children than in adults.

Turning to young children, most studies find that young children, particularly preschoolers, can be more suggestible than older children and adults. Research also discloses, however, that young children are better at resisting suggestive and misleading questions than many adults believe. Thus, concern about young children’s suggestibility is well founded, but should not be exaggerated.

Academic psychologists continue their research on young children’s suggestibility. All the researchers share the goal of greater understanding, although they approach children’s suggestibility from different perspectives. One group of researchers emphasizes children’s suggestibility. Stephen Ceci of Cornell University typifies this approach. Ceci structures some of his experiments to make extreme attempts to influence the child and to demonstrate children’s suggestibility. Not surprisingly, experiments designed to demonstrate suggestibility do just that—given the right circumstances, young children can be quite suggestible. Thus, when preschoolers are interviewed over and over again with highly misleading questions, many of them eventually make inaccurate statements.

A second group of researchers take a different approach, acknowledging and demonstrating that, in some instances, children can be suggestible but also demonstrating that, in less extreme situations, children often are able to resist misleading questions. Gail Goodman of the University of California at Davis is prominent in the second group, and her experiments highlight children’s strengths as well as their weaknesses.

The two approaches described above are not at loggerheads. Researchers like Ceci, who concentrate on children’s suggestibility, remind us of the critical need to improve the interviewing skills of the thousands of police officers, social workers, and other professionals talking to children and to avoid extreme situations in which children are barraged with leading questions from a number of professionals over a considerable period of time. At the same time, researchers like Goodman highlight children’s strengths and give us confidence that, when children are interviewed by competent professionals, it is appropriate to have reasonable confidence in what children say.

How then should interviews of young children proceed? Most experts agree that suggestive questions should be avoided when possible. But given the developmental constraints of young children, it is often impossible to avoid suggestive questions. This need for suggestive questions is the central dilemma facing interviewers. Although young children are most at risk of suggestibility, young children often require suggestive questions to unlock memory. This is so for two reasons, one having to do with the psychological dynamics of sexual abuse, the other with normal child development.

The first reason for suggestive questions during interviews relates to the nature of child sexual abuse. Many sexually abused children hesitate to disclose their abuse. Abused children often are threat-
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entered into silence, many are ambivalent about disclosing, and some are embarrassed.22 Sorensen and Snow examined interviews of 116 sexually abused children and found that nearly 80% of the children initially denied the abuse or hesitated to disclose.23 Thus, the very nature of child sexual abuse inhibits disclosure, and professionals sometimes have little choice but to help children along by asking suggestive questions.

The second reason for cautious use of suggestive questions is youth itself. Although young children have excellent memories, they often need suggestive questions to trigger their memories. Young children usually do not provide much information in response to non-specific, open-ended questions like “Do you know why I’m talking to you?” or “Why are we here today?” Pipe and her colleagues observe that such open-ended questions are “seldom likely to be a satisfactory basis for obtaining children’s testimony,”24 and Fivush adds that young children often need many specific questions to trigger memory.25

To anyone with young children, a simple example illustrates the need to “pry” information out of young children. Ask your four- or five-year-old, “What happened at preschool today?” and the answer is predictable, “I played.” It is not that the child cannot remember. Rather, the youngster needs specific questions to bring the memory to the surface. Thus, during interviews of young children, it is often necessary—for developmental reasons—to ask specific questions, some of which are suggestive.

In this author’s view, interviewers are often justified in asking suggestive questions after less worrisome techniques prove unsuccessful in getting the child to provide information about what he or she remembers. An increasing number of judges recognize the necessity of such questions.26 Of course, as the number of suggestive questions goes up, confidence in the child’s statements goes down. It must be remembered, however, that answers to suggestive questions are often true. The challenge is to reduce the need for such questions while, at the same time, respecting the need to ask them. Gail Goodman and others, notably Karen Saywitz of the University of California at Los Angeles and Amy Warren of the University of Tennessee, are producing valuable research on practical ways to lower children’s suggestibility.14,27

In the final analysis there is no single, “correct” way to interview young children, although professionals increasingly agree on basic “dos” and “don’ts.”28 Interviewers usually begin by making children feel comfortable. Young children are better at resisting misleading questions when they are put at ease.29 Children should be told in language they understand that it is okay to say, “I don’t know” or “I don’t remember,” and that they should feel free to correct and disagree with the interviewer. Initial questioning should be as open-ended and nonsuggestive as possible. If the child does not respond to such questions—and many young children do not—then the interviewer asks specific questions that focus the child’s attention on particular topics. When specific questions are asked, the interviewer proceeds along a continuum, usually beginning with questions that simply focus the child’s attention on a particular subject and, when necessary, moving gradually to more specific questions, some of which are suggestive.30

Interviewing young children is a delicate and difficult task. Done poorly, interviews undermine the ability to protect children and raise the specter of false allegations. Done well, interviews help children reveal their memories.

Courtroom Accommodations for Young Witnesses

After children are interviewed, some of them must take that long walk from the courtroom door to the witness stand. Children are particularly vulnerable witnesses. Imagine the emotions that grip young children required to speak publicly in the forbidding and foreign environment of a courtroom. The courtroom itself, however, is seldom the greatest impediment to testimony. Many children are required to describe on the witness stand the unspeak-
able acts of an adult sitting a few feet away. In many cases, the child testifies against a loved one, even a parent. Finally, once the child tells what happened, defense counsel may cross-examine with an eye toward destroying the child’s credibility.

For many children, facing the defendant is the most difficult aspect of testifying.

With testifying so difficult for many children, why not close the courtroom to spectators and reporters? Why not allow children to testify in less intimidating surroundings like the judge’s chambers? Why make children endure face-to-face confrontation with the defendant? And why require children to submit to cross-examination? The answers to these questions change with the type of litigation.

Closing the Courtroom
In criminal cases, the U.S. Constitution guarantees the defendant a public trial. Additionally, the Constitution guarantees the press and public a right to attend criminal trials. Although these constitutional rights are important, they are not absolute, and, in appropriate cases, the judge may close the courtroom to the public and the press. Closing the courtroom is particularly appropriate when children must describe degrading and embarrassing acts. Nevertheless, the need to protect children does not justify closure in every case. Indeed, the U.S. Supreme Court ruled unconstitutional a law that closed courtrooms for all children. In deciding whether to close the courtroom for a particular child, the judge considers the child’s age, the nature of the sexual abuse, and the psychological strength and stability of the child.

In contrast to criminal litigation, civil litigation involving children is often conducted behind closed doors. In most states, proceedings in juvenile court are closed to the public and the press. Although litigation in family court is usually open, judges have authority to close the proceedings when children testify.

Face-to-Face Confrontation with the Defendant
In criminal cases, the U.S. Constitution guarantees persons accused of crime the right to face-to-face confrontation with the witnesses against them, including children. For many children, however, facing the defendant is the most difficult aspect of testifying. Moreover, psychological research discloses that face-to-face confrontation undermines some children’s ability to testify. Goodman and her colleagues observed children testifying in criminal court and discovered that young-
sters who were most frightened of the defendant experienced the greatest difficulty answering questions.36

Although the defendant’s constitutional right to face-to-face confrontation is important, it is not absolute. With its 1990 decision in *Maryland v. Craig*, the U.S. Supreme Court ruled that, in selected cases, children may be spared the ordeal of face-to-face confrontation. Before confrontation may be curtailed, however, the judge must determine that a face-to-face encounter would cause the child serious emotional distress that interferes with the ability to communicate. Mere nervousness or reluctance to testify is not sufficient to curtail the defendant’s confrontation right.

During the 1980s, many states enacted laws authorizing video testimony by children in criminal cases.38 Although video testimony laws vary from state to state, a common scenario allows the child to testify in the judge’s chambers rather than the courtroom. The judge, jury, defendant, and spectators remain in court where they watch the child’s testimony on a television monitor. The primary goal of video testimony is to reduce children’s stress. The Supreme Court’s decision in *Maryland v. Craig* cleared away obstacles under the U.S. Constitution to allowing selected children to testify outside the physical presence of the defendant. It should be noted, however, that state constitutions contain confrontation clauses. Although most state courts have ruled that state constitutions permit video testimony for certain children, the supreme courts of Pennsylvania and Illinois have struck down laws allowing video testimony.39

In England, where there is no constitutional right of confrontation, the Criminal Justice Acts of 1988 and 1991 authorize routine use of video testimony with children. Davies and Noon report that video testimony “has been demonstrated to have positive and facilitating effects on the courtroom testimony of children and to have widespread acceptance among the various professional groups involved in the processes of justice;”40 including judges and barristers for the prosecution and defense.

Although video testimony is a promising alternative to face-to-face confrontation in criminal court, *Maryland v. Craig* made clear that the U.S. Constitution precludes widespread use of this technique. Moreover, in states where video testimony laws are on the books, prosecutors seldom use the technique, preferring instead to present children’s testimony in open court.

The right to face-to-face confrontation is strongest in criminal trials. A more limited confrontation right applies in juvenile and family court cases, which are civil rather than criminal.41 When parents are accused in juvenile court of abuse, judges have considerable latitude to spare children the ordeal of face-to-face confrontation. The same is true in family court, where it is common for children to testify in the judge’s chambers, away from parents.

**Cross-Examination**

The right in criminal cases to confront witnesses includes the right to cross-examine them.32 Although cross-examination is important, the Supreme Court has ruled that “judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’s safety, or interrogation that is repetitive or only marginally relevant.”43 Thus, judges have authority to protect children from harassment and intimidation, and this authority applies in criminal and civil litigation.

Attorneys often ask questions that are beyond the ken of children. For example, one four-year-old was asked, “On the evening of January third, you did, didn’t you, visit your grandmother’s sister’s house and didn’t you see the defendant leave the house at 7:30, after which you stayed the night?”44 It is doubtful that the adults in the courtroom understood this question, let alone the preschooler. Judges need to take a more active role in requiring lawyers to ask questions children understand. In California a statute allows judges to “forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age of the witness.”45 Similar laws are needed elsewhere.

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Reducing Children's Stress and Improving Their Testimony

Although testifying is difficult for most children, the difficulty should not be exaggerated. Children are strong and resilient, and most of them cope with testifying and move on with their lives. Indeed, with proper preparation and support, some children are empowered by testifying. Runyan and his colleagues found that, for many children, “the opportunity to testify in juvenile court may exert a protective effect on the child.”

Because children’s testimony in court is so often indispensable to their protection, the wiser course is not to seek ways to keep them off the witness stand, but to help children testify more effectively. The first step toward improving children’s testimony and reducing their stress is familiarizing them with the courtroom and what goes on there. Saywitz and Snyder point out that “[p]reparation of children for painful medical procedures has proven successful in lowering children’s perceptions of pain and raising their level of cooperation. Children facing similarly stressful forensic procedures deserve no less.” Prosecutors often give children a tour of the courtroom, pointing out various aspects of the room, allowing the child to sit in the witness chair, and introducing the child to court personnel such as the bailiff and clerk. Although preparation of this kind is laudable, Saywitz and Snyder point out that a brief tour of the courtroom “is only the beginning” of effective preparation. In ground-breaking research on preparing children to testify, Saywitz and her colleagues describe techniques for improving the completeness of children’s reports and enhancing children’s ability to resist misleading questions.

A number of communities have “court schools” for children who are scheduled to testify. Children attend “classes” where they learn about court. Role playing is used to allow children to practice testifying about innocuous events unrelated to their abuse. These worthwhile programs reduce the fear of the unknown and boost children’s confidence.

One obvious way to reduce children’s stress is to allow a parent or other trusted adult to remain in the courtroom while the child testifies. In appropriate cases, the judge allows the support person to sit near the child. In some instances, however, courts will preclude this if the adult is also to be a witness in the case. Research by Goodman and her colleagues reveals that the presence of a supportive adult enhances children’s ability to answer questions. Moreover, when a supportive adult is present, children are less likely to give inconsistent answers to questions or to recant. The search for truth is advanced by the simple step of providing emotional support for child witnesses. Providing such support violates none of the defendant’s rights.

Children pose many challenges for interviewers, judges, and attorneys. The law makes reasonable accommodations for children, although more can be done for children without sacrificing defendant’s rights.

The Criminal Justice System

Prosecution of child sexual abuse has been part of the legal armamentarium since the beginning of organized child protection in the nineteenth century. It was the 1970s and 1980s, however, that witnessed substantial growth in prosecution. Increased prosecution is one result of greater societal awareness of the prevalence and seriousness of child sexual abuse.

Unfortunately, there are no national statistics on the number of prosecutions for child sexual abuse. (See the article by Finkelhor regarding criminal justice-statistics in this journal issue.) It is clear, however, that thousands of criminal cases are filed each year.

Virtually all experts agree that prosecution is often necessary. The U.S. Supreme Court recognized the importance of prosecution, writing that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” In a similar vein,
the Florida Supreme Court wrote that society has a "strong interest in eliminating the sexual abuse of children through vigorous enforcement of child-abuse laws."

Debate persists over the extent to which the criminal justice system should play a leading role in responding to child sexual abuse. Critics of increased prosecution point out that the law is a blunt and adversarial system that is poorly equipped to cope with the social and psychological dimensions of child sexual abuse. Critics of prosecution suggest that the best way to reduce child sexual abuse is prevention and therapy, not heavy reliance on litigation. Critics also worry that the threat of prosecution causes abusive adults to hide their deviance rather than seek desperately needed professional help. Offenders realize that, if they seek counseling, the therapist will file a report with child protective services (CPS) or the police.

Proponents of prosecution do not underestimate the value of prevention and treatment for sex offenders. Proponents point out, however, that prevention often fails. Moreover, although the threat of prosecution undoubtedly keeps some offenders away from therapists' offices, it is unlikely that an appreciable number of sex offenders would voluntarily seek counseling in a system where therapists were not required to report suspected child abuse. Most important, proponents of prosecution assert that anyone who sexually abuses a child commits a serious crime and should be held accountable. Peters and his colleagues make the case for prosecution: "(1) criminal intervention clearly establishes that the children are innocent victims and that the perpetrators are solely responsible for their wrongful behavior; (2) punishment validates the victims' and society's sense of fairness that an older person has no right to violate or exploit the relative weakness of children; (3) successful prosecutions and public identification of offenders educate the community regarding child abuse and underscore its unacceptability, thereby having a deterrent effect on others tempted to commit similar crimes; (4) the court can order offenders into treatment programs in an attempt to modify deviant sexual interests or other abusive behavior and reduce the likelihood of recidivism; and (5) criminal prosecution gives an offender a criminal record that will follow him from state to state."}

Debate will continue over the proper role for prosecution. It is unlikely, however, that prosecution will recede appreciably from its present level.

**The Criminal Justice System in Operation**

When citizens think of prosecution, they imagine a trial. The public is generally unaware that trials are the exception rather than the rule. Only a small fraction of the cases that come to official attention end in trials.

**Investigation**

Reports of child sexual abuse are received by child protective services agencies and the police. As discussed above, however, CPS typically investigates only when the suspected abuse involves the actions or omissions of a parent. When this is the situation, cross-reporting between CPS and the police is required in some states and is increasingly common even when not required. Thus, it is not unusual in intrafamilial abuse cases to find parallel investigations, one by the police and one by CPS. Unfortunately, as Finkelhor discusses in his article in this journal issue, statistics on sex crimes are aggregated, and we do not have information about the numbers of separate sex crimes against children or to what extent criminal cases are also cross-referred to CPS.

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Many reports are screened out with little or no investigation. Reports warranting criminal investigation are pursued by the police. When the criminal investigation leads to the conclusion that abuse occurred, the suspect is arrested. If the investigation leads nowhere, the criminal case is closed.

One of the most promising innovations in the investigation of child sexual abuse is the interdisciplinary approach. (See also the discussion in the article by Pence and Wilson in this journal issue.) The goal of this approach is to coordinate
and streamline the investigative efforts of law enforcement, CPS, and related agencies. In particular, the interdisciplinary approach reduces the number of times the child is interviewed. In California, a committee of experts described the need for greater coordination, writing: “[C]hildren are interviewed numerous times by many individuals during the course of a child abuse investigation. In response to intrafamilial child abuse reports, children may be interviewed by law enforcement officers, social workers, physicians, nurses, mental health professionals, prosecutors, defense attorneys and probation officers. . . . Children frequently suffer emotional trauma from the frequent requests from numerous interviewers to re-tell their stories.”

In examining ways to meet the needs of child victim witnesses during the investigative process, the committee focused on the concept of creating a child-oriented environment for interviewing the child. The ideal approach would involve the establishment of child victim witness centers. With the multidisciplinary approach, the child is spared repetitive interviews by professionals from different agencies. Instead, the child is taken to a specialized, child-friendly interview center, where a highly trained and experienced professional interviews the child.

Wherever investigative interviews of children take place, the question arises: Should such interviews be videotaped? This question is hotly debated, and, although there are advantages and disadvantages to videotaping, in this author’s view, the argument in favor of videotaping is stronger (See also the discussion in the article by Pence and Wilson in this journal issue.) Moreover, recent research in California suggests that videotaping investigative interviews of children does not have deleterious effects on investigation or litigation of child abuse.

The Decision to File Criminal Charges

When a law enforcement investigation yields evidence of abuse, the next step is the prosecutor’s decision to file formal criminal charges. Prosecutors have broad discretion in deciding when to prosecute. Few national data are collected, however, about the percentage of investigated child sexual abuse cases that are prosecuted. In exercising their discretion, prosecutors consider many factors, including the strength of the evidence and the likelihood of conviction.

In many cases, the strength of the evidence depends on the child’s ability to testify. Children are usually the only eyewitnesses to sexual abuse, and prosecutors are more likely to file criminal charges when they believe children will be effective witnesses. Not surprisingly, age plays a role in prosecutorial decision making. Preschool-age children are sometimes ineffective witnesses, with the tragic consequence that the law is least able to protect the youngest and most vulnerable victims. Adolescents too have their difficulties. Although teenagers have the ability to testify, prosecutors worry that some jurors view teenagers as partly responsible for their sexual abuse. Tjaden and Thoennes found that “cases with victims ages 7-12 years were significantly more likely to result in prosecutions than cases with younger or older children.” Prosecution is more likely when the abuse is severe, when force is used, when the child’s story is consistent over time, and when the accused has a prior criminal record. Charges are also more likely when there is evidence to corroborate the child’s testimony. When medical evidence of abuse is available, it can be used to corroborate children’s testimony, increasing the likelihood of prosecution. Unfortunately, medical evidence exists in a relatively small percentage of cases. (See the article by Kerns, Terman, and Larson in this journal issue.)

Plea Bargaining

Once criminal charges are filed, prosecutors engage in plea bargaining with defense attorneys representing defendants. In many cases, the defendant pleads guilty to a less serious offense than originally charged, or agrees to plead guilty to the original charge in exchange for the prosecutor’s commitment to recommend
leniency when the judge pronounces sentence. Approximately 66% of child sexual abuse charges end in guilty pleas before trial, a proportion which is similar to that for other crimes.72

**Diversion from Prosecution**

In some jurisdictions, prosecutors have authority to divert selected defendants away from prosecution for child sexual abuse and into treatment. The American Bar Association describes diversion: “Based upon certain eligibility guidelines, offenders are diverted from the traditional criminal justice process, either before or after charges are filed, but prior to conviction or entry of judgment. Criminal proceedings are suspended conditioned upon the performance of specified obligations by the defendant, often including participation in counseling or treatment. Upon successful completion or compliance with the conditions of diversion, the case is dismissed.”72

As with the decision to file charges, data about the frequency of diversion are far from complete. Decision making about diversion turns on several factors, including the seriousness of the abuse, the defendant’s amenability to treatment, and the likelihood the defendant will reoffend. Not all communities use diversion, and, in those that do, most require the defendant to acknowledge that the abuse occurred before diversion becomes an option.

Critics of diversion point out that it allows acknowledged sex offenders to escape the “punishment they deserve.” Moreover, offenders who complete the conditions required for diversion do not have a conviction on their record, and their name may not find its way onto one of the sex offender registries described below. There are few data about the extent to which those who are diverted ever recommit child sexual abuse.

**Trial**

As a result of plea bargaining, diversion, and dismissal for other reasons, the number of cases that go all the way to trial is small. Approximately 10% of cases filed by prosecutors are tried.2,3 Most cases that go to trial end in conviction.

**Sentencing After a Plea of Guilty or a Conviction Following Trial**

Convicted child molesters often receive long prison terms. As with other crimes, however, some individuals convicted of child sexual abuse do not go to prison. Rather, their punishment consists of a suspended prison sentence and probation.36,74 Probation is “a sentence under which the court either suspends or substantially reduces the period of incarceration, but retains the authority to condition the defendant’s freedom on her agreement to abide by certain requirements and to revoke the grant of freedom should any of the conditions be violated.”75 Although there are no national statistics on probation in child sexual abuse cases, the federal government’s Bureau of Justice Statistics compiles probation data on all crimes. In 1990, “[a]bout a fourth of convicted defendants were sentenced to probation instead of incarceration, regardless of whether the conviction was for a felony or a misdemeanor.”76 The mean length of probation for felony convictions was three and one-half years.77

A person on probation lives in the community under the supervision of a probation or parole officer. Among the many conditions of probation, a sex offender may be ordered by the judge to participate in therapy to reduce the likelihood of future child sexual abuse. Failure to participate in treatment can lead to revocation of probation and incarceration.

But is it safe to put convicted child molesters on probation with the requirement that they get psychological treatment? Does treatment work? Judith Becker discusses the treatment literature elsewhere in this journal issue, and her analysis is not repeated here. Experts are far from unanimous on the efficacy of treatment. Becker and Hunter write that “probation and the supervision that it affords the perpetrator appear to be effective in the majority of cases in assisting them in not acting out on their atypical sexual urges during probation.”78 Marshall and his colleagues reviewed the literature and concluded that “some treatment programs have been effective with child molesters and exhibitionists but not, apparently, with rapists. In examining the

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value of the different approaches, we con-
cluded that comprehensive cognitive/be-
havioral programs (at least for child mo-
lesters, incest offenders, and exhibition-
ists) are most likely to be effective. . . .”79
On the other hand, Quinsey and his col-
leagues reviewed the literature and wrote
that “the effectiveness of treatment in re-
ducing sex offender recidivism has not yet
been demonstrated. . . .”80

Treatment is only as effective as the
professional providing it. Although na-
tional standards for offender treatment
are lacking, improvement is under way.
On the national level, the Association for
the Treatment of Sexual Abusers provides
leadership.81 On the state level, the most
impressive achievement to date comes
from the state of Washington, where the
Legislature enacted strict certification re-
quirements for professionals treating sex
offenders.82

Of course, some convicted sex offend-
ers do go to prison. Of these, many are
released on parole, and the remainder
return to the community when their term
of imprisonment expires. As discussed in
the article by Becker in this journal issue,
there are very few data about recidivism.

Because of the fear and belief that sex
offenders will reoffend, approximately half
the states require convicted sex offenders
to register with local law enforcement
agencies.

In 1990, the state of Washington, how-
ever, acknowledging that some sexual of-
fenders are likely to reoffend after they
are released, adopted a rational approach
to the danger posed by violent sexual
offenders. The Washington law permits
particularly dangerous offenders to be in-
stitutionalized for long-term treatment af-
after their prison term ends.83 In 1993, the
Washington Supreme Court upheld the
constitutionality of the law.84

Sex Offender Registration Laws
In large part because of the fear and belief
that sex offenders will reoffend, approxi-
mately half the states require convicted sex
offenders to register with local law en-
forcement agencies and to change their
registration when they move.85 In addition
to local registries, these states maintain
statewide registries of convicted sex of-
fenders. Registered information is confi-
dential and is accessible only to law en-
forcement personnel.

Registration laws are helpful to law en-
forcement. When a child is abused or ab-
ducted by an unknown assailant, or when
a child is murdered and the body reveals
evidence of sexual abuse, the police use
child abuse registries to generate a list of
possible suspects. Several states improve
the odds of identifying the perpetrator by
requiring registered sex offenders to sub-
mit specimens of body fluids that can be
genetically compared with specimens
taken from victims.86

In several cases, sex offenders have
challenged the constitutionality of registra-
tion laws, arguing that such laws con-
stitute cruel and unusual punishment.87
Courts reject such challenges,88 and in this
author’s view, states without registration
laws should enact them.

On December 20, 1993, President Clin-
ton signed the National Child Protection
Act of 1993.89 The purpose of the act “is
to require the States to report information
on arrests and convictions for child abuse
crimes to the national criminal history
record system maintained by the Federal
Bureau of Investigation. . . .”90 This impor-
tant law is a valuable step toward a national
child abuse registry.

The Juvenile Court System
As discussed above, when a parent is al-
leged to have sexually abused a child or to
have permitted such abuse, the juvenile
court and the child protective service sys-
tem investigate and may litigate the case
in a civil dependency proceeding. Finkel-
hor estimates in this journal issue that
child protective services agencies handle
approximately 150,000 substantiated
cases of child sexual abuse each year.
Some of these may also be prosecuted as
criminal cases, but no national data reveal
how many.

The juvenile court originated in 1899
as part of the social reform movement
known as the Progressive Era. The first
juvenile courts were in Chicago and Den-
ver. The concept of a special court for
children was immediately popular, and
the juvenile court spread quickly across
the United States. Today, every state has a
system of juvenile courts. In some states—for example, Hawaii, Nevada, and New York—the court is known as a family court.

The juvenile court has authority over two categories of children and adolescents: (1) delinquents, and (2) abused and neglected children. Child sexual abuse cases may be heard in either category. A minor who commits a crime is a juvenile delinquent and may be “prosecuted” in juvenile court. Indeed, one of the most disturbing trends in recent years is the increase in young sex offenders: children molesting children. (See the article by Becker in this journal issue.) These cases must be taken seriously and should not be brushed aside as “childish experimentation with sex.” Unfortunately, many juvenile courts are ill-equipped to handle the increase in young sex offenders, and few communities have adequate treatment resources. A recent report from the National Task Force on Juvenile Sexual Offending provides many recommendations for responding to this serious problem.

The second category of children under the authority of the juvenile court are abused or neglected. Juvenile court proceedings to protect abused children are usually initiated by government attorneys at the behest of CPS social workers. In some communities, the attorney is the local prosecutor. In other communities, the attorney works for CPS. The parties to the litigation are the state and the child’s parents. In some states the child is also a party. The state is represented by a government lawyer. Parents may retain their own counsel, and in most states poor parents are represented by the public defender. Increasingly, the child is also represented by an attorney, often called a guardian ad litem. There is a critical need for well-trained attorneys to represent children in juvenile court.

When the juvenile court becomes involved, a form of “plea bargaining” occurs. As in criminal litigation, most juvenile court cases do not proceed all the way to trial. Government attorneys hammer out agreements with attorneys representing parents and children. Under these agreements, parents often agree to services designed to reduce the likelihood of future abuse.

When cases proceed to trial, the proceedings in juvenile court are civil rather than criminal. A finding that abuse occurred does not result in a criminal conviction or punishment of the parent. Rather, a determination of abuse gives the juvenile court authority—usually called jurisdiction—over the abused child. The court’s jurisdiction lasts as long as the child needs protection. In these proceedings, juvenile courts are mandated by federal and state law to make reasonable efforts to provide whatever supervision or services are necessary to the family to allow it to stay together. If it is impossible to protect the child adequately without removing the child from the home, the court is mandated to ensure that the child protective agencies make reasonable efforts to help the parents and child to reunify.

There are very few data about the effect that these requirements have on the handling of sexual abuse cases. Are reports of sexual abuse more likely to result in an investigation and opening of a case than reports of other kinds of abuse? Is emergency removal of the child from the family more likely in these cases? What services are typically provided either to keep the family intact or to reunify the family? Is reunification more or less likely in sexual abuse cases? When reunification occurs, is it likely to be successful? More formal data about what currently happens are essential to understand what needs to be done in these difficult cases.

Sexual Abuse Allegations in Child Custody Litigation

Disputes over child custody and visitation in the context of divorce are resolved in family court, often a court separate and distinct from a juvenile court or a court that handles criminal or nonfamily civil matters. Unfortunately, contested custody litigation can be acrimonious, bitter, and destructive. In a gradually increasing number of custody cases, one parent accuses the other of sexually abusing the couple’s child. Some portion of these allegations...
is fabricated to gain an advantage in the litigation. There is uncertainty, however, about how often such allegations are fabricated.

The body of research on fabricated allegations of child sexual abuse is small. Most of this research focuses on fabrication in the general universe of child sexual abuse reports including, but not limited to, custody cases. Jones and McGraw evaluated all reports of suspected sexual abuse received by Denver CPS during 1983 and found a fabrication rate of 8%. Jones and McGraw’s important research is presently being replicated. Other studies disclose rates of fabricated allegations ranging from two to ten percent.

There is no doubt that an increasing number of parents embroiled in custody litigation broach the subject of sexual abuse. There is no systematic evidence, however, that the number of allegations has reached flood stage. Nor is there convincing evidence that a significant portion of the allegations is fabricated. In every case, it is vital to search out the truth unshackled by preconceptions and biases.

The Importance of Coordination Among Courts

As the above discussion highlights, child sexual abuse cases are handled by a number of different courts. In fact, allegations of child sexual abuse can be litigated in as many as ten separate legal proceedings. Criminal litigation is, of course, the most highly visible and emotionally charged. The media spotlight focuses on the drama and symbolism of criminal trials, pushing other types of litigation into relative obscurity. Yet, noncriminal litigation, although less often in the public eye, is equally important to sexually abused children.

It sometimes happens that child sexual abuse litigation is under way in two or more courts simultaneously. Suppose, for example, that five-year-old Sally is sexually abused by her father. When Sally’s mother learns of the abuse, mother’s attorney begins a divorce action seeking child custody. At the same time, child protective services believes Sally is unsafe in the family home; therefore, the attorney for CPS files a petition in juvenile court. A week later, the local prosecutor files criminal charges against Sally’s father. In some metropolitan areas, each of these legal proceedings is initiated by a different attorney, in a different court, and before a different judge. Sally may have to testify in each proceeding, perhaps multiple times.

Coordination among courts is essential when multiple proceedings are under way concerning the same child. Coordination eliminates courts working at cross-purposes and avoids the awkward spectacle of judges entering conflicting orders. In one case, for example, the father of a young child was accused of sexual abuse. A judge in criminal court ordered the child’s mother to allow the father supervised visits with the child. Meanwhile, a judge in family court ordered the father to have no contact with the child. These
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irreconcilable orders put the mother in the position of violating a court order regardless of what she did. Coordination among courts eliminates such unfortunate episodes. Moreover, cooperation among courts sometimes reduces the number of court appearances for the child.

One of the most exciting legal innovations for children is the “family court,” where all proceedings concerning a child and family are consolidated before one judge.107 Family courts exist in a small but growing number of states, including Hawaii, Nevada, and New York. The unified family court holds real promise for improving services for troubled families and for protecting abused children.

Conclusion

Sexual abuse robs children of childhood. Clearly, society must do everything in its power to prevent child sexual abuse and, when prevention fails, to rescue children from further abuse. Although the legal system cannot solve the tragedy of child abuse, the law plays a central role in ongoing efforts to protect children.

1. There are, however, no national statistics on how many children testify in criminal trials each year.
3. The same requirements of testimonial competence and oath or affirmation are imposed on adult witnesses.
10. See note no. 8, Myers, for a review of media coverage of child sexual abuse.
12. See note no. 11, Fivush, p. 18.


20. See note no. 17, Goodman and Bottoms.


22. See note no. 17, Saywitz, Goodman, Nicholas, and Moan.


25. See note no. 11, Fivush, p. 6.


33. See note no. 32, Globe Newspaper Co. v. Superior Court.

34. United States ex rel. Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), cert. denied, 434 U.S. 1076 (1978); also, see note no. 32, Globe Newspaper Co. v. Superior Court.


37. See note no. 35, Maryland v. Craig.

38. See note no. 4, Myers, 1992.


41. In re Mary S., 230 Cal. Rptr. 726 (Ct App 1986).


43. See note no. 42, Delaware v. Van Arsdall, at p. 679.

44. See note no. 14, Saywitz and Snyder, pp. 117-46.

45. California Evidence Code Section 765(b).

47. See note no. 14, Saywitz and Snyder, p. 119.

48. See note no. 14, Saywitz and Snyder, p. 123.

49. See note no. 27, Saywitz, Nathanson, Snyder, and Lamphear.

50. Videotapes are available describing court schools. See Maleng, N. *King County prosecutor: A day at King County kid's court*. Hosted by Harry Anderson. Seattle: Office of the Prosecuting Attorney, 1992; Children's Hospital and Health Center, Center for Child Protection. *Kids in court*. San Diego: Children's Hospital and Health Center, 1989.


52. Although national statistics are lacking, a growing body of research focused on particular communities provides insight into the way child abuse cases are handled. For a brief review of these studies see Myers, J.E.B. Commentary: A call for forensically relevant research. *Child Abuse & Neglect* (1993) 17,5:573-79.


58. See note no. 57, Peters, Dinsmore, and Toth, pp. 654, 659.

59. For an example of a reporting statute that requires cross-reporting, see California Penal Code Section 11166(g).


61. See note no. 30, Myers, for a more detailed description of the criminal justice system's handling of child abuse cases.

62. For information regarding the multidisciplinary approach, contact the National Children's Advocacy Center, 106 Lincoln St., Huntsville, AL 35801, or call (205) 533-KIDS; or write to the Crime and Violence Prevention Center, Department of Justice, 1515 K St., Ste. 100, Sacramento, CA 95814, or call (916) 322-2900.


64. Congress recognized the promise of the multidisciplinary approach. See 42 United States Code Section 13001 et seq.


70. See note no. 69, Tjaden and Thoennes, p. 816.


72. See note no. 52, Myers.


74. See note no. 69, Tjaden and Thoennes.


77. See note no. 76, U.S. Department of Justice, p. 4.


81. The address for the Association for the Treatment of Sexual Abusers is P.O. Box 866, Lake Oswego, OR 97034.

82. See Revised Code of Washington, Title 18, Section 18.155.010 et seq.

83. Revised Code of Washington, Title 17, Section 71.09.020 et seq.

84. *In re Young*, 857 P.2d 989 (Wash. 1993).

85. States that have registration laws include Alabama, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Illinois, Louisiana, Maine, Missouri, Montana, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, and Washington; see National Center for Prosecution of Child Abuse. *Legislation requiring sex offenders to register with a government agency*. Alexandria, VA: NCPCA, 1993. For information about this publication call (703) 739-0321 or write to the National Center for Prosecution of Child Abuse, 99 Canal Center Plaza, Suite 510, Alexandria, VA 22314.

86. States that require registered sex offenders to provide samples of body fluids include Florida, Hawaii, Louisiana, Missouri, South Dakota, and Tennessee.

87. Registration laws have typically been challenged as a violation of the Eighth Amendment to the U.S. Constitution, which prohibits “cruel and unusual punishment,” or of state constitutions which contain similar provisions.

88. Although certain applications of registration laws are unconstitutional, the basic framework of the laws has withstood constitutional challenge.

89. National Child Protection Act, 42 United States Code Section 5119.


91. In addition to its jurisdiction over delinquents and abused and neglected children, the juvenile court has authority over children called status offenders. A minor commits a status offense by violating a curfew law, skipping school, running away from home, or by driving, drinking, or smoking under age. A status offense is not a crime; thus status offenders are not delinquents.


94. For a breakdown of postreferral dispositions in sexual abuse cases in three California counties during 1991, see Barth, R.P., Berrick, J.D., Courtney, M., and Albert, V. *Pathways*
In a study of 625 children ages 0 to 12 who were reunited with their families after a stay of 72 hours to 12 months in foster care, researchers found that physical and sexual abuse were not associated with the reunification outcome, that is, whether there was rereferral or reentry into foster care. Davis, I.P., English, D.J., and Landsverk, J.A. *Going home—and returning to care: A study of foster care reunification*. Summary report. San Diego, CA: San Diego State University College of Health and Human Sciences, 1993, p. 8.


See note no. 4, Myers, 1992, for a description of the research.


In addition to criminal cases, juvenile court litigation to protect children, and child custody cases, allegations of child sexual abuse are litigated in administrative proceedings to revoke licenses of day care centers where sexual abuse occurs, guardianship proceedings, civil litigation by victims seeking monetary damages from perpetrators, civil actions by victims against institutions where abuse occurs, civil actions by victims against child protective services agencies for failing to protect children from sexual abuse, and civil litigation by the state to terminate the parental rights of abusive adults.
