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The Child Witness: The Progress and Emerging Limitations

LUCY BERLINER*

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I. INTRODUCTION

In the late 1970's it became apparent that many sexual assault victims were children.¹ Rape crisis programs found that an increasing number of the reported cases involved child victims.² Consequently, efforts to make the criminal justice system more responsive to rape victims were extended to child victims of sexual abuse. Children face many of the same problems encountered by adult victims. In particular, child victims encounter the same erroneous belief that victims lie about rape or provoke their own victimization.³ Children also run into the societal misperceptions that they frequently fantasize sexual assault experiences and are unable to distinguish innocent behavior from deviant sexual contact.⁴

The usual way that offenders sexually assault children is different from the way adults usually experience sexual assault. The nature of the assault is generally a function of the developmental differences between children and adults.⁵ Unlike adult rape victims, children are not usually overpowered by a sudden or violent

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1. Attorney General's Task Force on Family Violence, Final Report, Sept. 1984.

2. Radbill, *A History of Child Abuse and Infanticide*, in *THE BATTERED CHILD* (R. Helfer & C. Kempe eds. 1974).

3. *Id.*

4. *Id.*

5. Children have less knowledge, less experience, different cognitive and social skills and are very dependent on adults. A. GESELL & F. ILG, *THE CHILD FROM FIVE TO TEN* (1946); A. GESELL, H. HALVERSTON, H. THOMPSON, F. ILG, B. CASTNER, L. AMES & C. AMATRUDA, *THE FIRST FIVE YEARS OF LIFE* (1940); A. GESELL, F. ILG, & L. AMES, *YOUTH: THE YEARS FROM TEN TO SIXTEEN* (1956); J. STONE & J. CHURCH, *CHILDHOOD AND ADOLESCENCE: A PSYCHOLOGY OF THE GROWING PERSON* (1973).

attack. They are usually persuaded and tricked by known, and often trusted, adults into repeated sexual activity over extended periods of time.⁶ Although this behavior is defined as criminal conduct, it bears little resemblance to the usual criminal activity encountered by the justice system. The uniqueness of these cases creates victim witness complications and problems of proof.

In the early part of this century, scholars were interested in whether the developmental differences between children and adults affected the former's competency as witnesses.⁷ Yet only recently have large numbers of child witnesses entered the criminal justice system. The influx of child witnesses into the system has led to a resurgence of academic interest in the subject of competency.⁸ Currently, scholars are conducting studies that will allow them to more systematically understand the issues relating to the capability of child witnesses to testify at trial.⁹

II. THE CHILD AS A WITNESS

Several social trends have prompted interest in child victims of sexual assault. The women's movement of the early 1970's directed public awareness to the crime of rape and its effect on victims. It also provoked the establishment of rape crisis centers.¹⁰ These centers saw an increase in the number of child victims. Although the child abuse field has been well established since the early 1960's,¹¹ after the identification of the "battered child syndrome", only recently has sexual abuse been recognized as a major form of child abuse.

During the late 1970's, there was a shift toward balancing the rights of victim/witnesses with those of defendants.¹² Today, the general victim/witness movement receives national attention and support.¹³ In 1977, the federal government formally recognized the special concerns of the child witness by funding two programs devoted specifically to children as victim/witnesses: The Sexual As-

6. Conte & Berliner, *Sexual Abuse of Children: Implications for Practice*, J. CONTEMP. SOC. WORK 601 (1981).

7. Radbill, *supra* note 2, at 18.

8. See, e.g., Comment, *infra* p. 245 (*The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245 (1985)).

9. Goodman, *Children's Testimony in Historical Perspective*, 40:2 J. SOC. ISSUES, 9 (1984).

10. See D. RUSSELL, *THE POLITICS OF RAPE: THE VICTIMS' PERSPECTIVE* (1975).

11. See Radbill, *supra* note 2, at 18-19.

12. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *FINAL REPORT* (1982).

13. *Id.*

sault Center at Harborview Medical Center in Seattle, Washington, and The Children's National Hospital and Medical Center in Washington, D.C. The goal of the programs at these institutions was to develop social, medical and legal responses to child victims which recognized and accommodated the children's special needs and encouraged their successful participation in the criminal justice process. The programs were identified as national models and were awarded exemplary status in 1981.¹⁴ Since that time, interest in learning about and addressing the needs of children as victim/witnesses has increased tremendously.

As communities become more aware of the massive extent of the problem, there have been consistent jumps in the number of reported instances of child abuse.¹⁵ The communities have put pressure on the criminal justice system to prosecute more cases, and as a result, larger numbers of child witnesses are being thrust into the judicial process. Although, originally, most of the child abuse cases involved sexual abuse, more and more cases of the witnessing of violence and physical abuse are coming into the system. In addition, the domestic violence movement lends support to the involvement of children in the criminal justice system by promoting the view that family violence should be seen as criminal behavior. This trend has gained widespread support.¹⁶ Today, most people feel that children are victimized and that something ought to be done about it. They expect the criminal justice system to handle these cases as serious crimes and to make it possible for children to cooperate successfully within the criminal justice process.

III. SYSTEM RESPONSE TO CHILD VICTIMS

There are two major concerns about children as witnesses: (1) additional psychological trauma may accompany participation by the children in the criminal justice system and, (2) it is questionable whether children can be effective and competent witnesses. A number of writers have observed that the criminal justice process may be inappropriate or harmful to child witnesses.¹⁷ In addition,

14. D. Whitcomb, *Assisting Child Victims of Sexual Abuse* (1982) (printed by the National Institute of Justice, U.S. Dep't of Justice).

15. Sarafino, *An Estimate of Nationwide Incidence of Sexual Offenses Against Children*, 58 J. CHILD WELFARE LEAGUE AM. 127 (1979).

16. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT (1984).

17. Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969); Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643 (1982).

reserchers have shown that that jurors hold biases against child witnesses.¹⁸

Communities have organized and worked to improve the experience that children have in the judicial process.¹⁹ They have been able to accomplish substantial changes in the processing of cases.²⁰ They have primarily emphasized reducing those aspects of the process which appear to be most associated with trauma to the child. In general, this has meant that the agencies involved in prosecuting child abuse cases have agreed to certain protocols or procedures and have created an atmosphere of cooperation and coordination in order to facilitate child participation.²¹

Some of the goals of these communities are: that the personnel working these cases should be specially trained and committed to the importance of the work, that children should be interviewed as few times as possible by the fewest number of people by eliminating unnecessary interviews or combining them, that the same personnel should be assigned all the way through the process and that every effort should be made to streamline the process.²² The use of special devices designed to assist children is common. The devices include providing special interviewing or waiting rooms, employing anatomically correct dolls both for interviewing and courtroom use, and making advocates available to prepare the children for the courtroom experience. These common sense procedural reforms have reduced some of the most obvious and completely unnecessary forms of system induced-trauma.²³

Due to more sensitive and supportive handling of cases, children seem to perform better as witnesses. When they are well prepared and comfortable with the personnel and process, their testimony is more convincing. As a result, the impression of witness competence increases. Younger and younger children have proved

18. Goodman, Golding & Haith, *Juror's Reactions to Child Witnesses*, 40:2 J. Soc. Issues 139 (1984).

19. For an interesting narrative by a District Attorney who developed a community approach that attained model status, see Cramer, *infra* p. 209 (*The District Attorney as a Mobilizer in a Community Approach to Child Sexual Abuse*, 40 U. MIAMI L. REV. 209 (1985)).

20. D. Whitcomb, *supra* note 14.

21. NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, AMERICAN BAR ASSOCIATION, *INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES* (J. Bulkeley ed. 1981).

22. See MacFarlane, *supra* p. 135 (*Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985)).

23. Stevens & Berliner, *Special Techniques for Child Witnesses*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* (L. Schultz ed. 1980).

to be capable of participating in the criminal justice system.²⁴

There have also been changes in how the lawyers handle these cases. Prosecutors have devised ways of showing in court that children are qualified to be witnesses, and as a result, much younger children are routinely declared competent to testify.²⁵ Recent research on child memory and identification demonstrates that children can recall experiences accurately and describe them effectively in court.²⁶ Researchers have developed data on the ways in which children understand and communicate and on the changes in their capabilities as they grow.²⁷ This information has given rise to an accepted form of questioning of child witnesses. Courts often allow leading questions when child witnesses are examined. They permit greater latitude in the phrasing and language used by the children than than permitted of adults.²⁸ Children in general, especially young children, are probably not subjected to the same kind of intimidation, or deliberately misleading cross examination that adult witnesses experience.

Most cases involve only the child and the offender, without the traditional corroborative evidence such as medical or physical findings, or witnesses to the crime.²⁹ Other supportive testimony, however, can be introduced to corroborate the testimony of child witnesses. For example, hearsay can be employed if it falls under established hearsay exceptions such as statements to a physician or excited utterances.³⁰ Prosecutors have argued for liberal extensions of the exceptions, in particular, in the length of time which may elapse between the event and the child's report.³¹ Further, experts

24. Researchers recruited three hundred and sixty-nine child victims between four and seventeen years old for a study on the "Impact of Sexual Abuse on Children" funded by the National Institute of Mental Health. The project directors were Jon Conte, from the University of Chicago School of Social Service Administration, and Lucy Berliner, from the Sexual Assault Center in Seattle, Washington. Fifty percent of the children were under the age of eight years and ninety-three percent of the cases were involved in the criminal justice system.

25. In King County, Washington, the courts have found children as young as three years old competent to testify.

26. Marin, Holmes, Guth & Kovac, *The Potential of Children As Eyewitnesses*, 3 LAW & HUM. BEHAV. 295 (1979). See generally Goodman & Helgeson, *infra* p. 181 (*Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181 (1985)).

27. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40:2 J. SOC. ISSUES 125 (1984).

28. 81 AM. JUR. 2d *Witnesses* § 91 (1976)

29. Radbill, *supra* note 1.

30. M. GRAHAM, *EVIDENCE TEXT, RULES, ILLUSTRATIONS AND PROBLEMS* 171-85 (1983).

31. Bulkley, *Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial*, in *CHILD SEXUAL ABUSE AND THE LAW* 153 (J. Bulkley ed. 1984).

have been allowed to testify about the characteristics and dynamics of child sexual abuse because, generally, it will not be known to the jurors and might legitimately assist them in making informed decisions about the weight to be given to the child's testimony.³²

Institution of these reforms requires nothing more than a trained and knowledgeable prosecutor who is willing to develop a prosecutorial approach which takes into account children's limitations and special needs and creatively uses what little available corroboration there may be. None of these changes really poses any fundamental challenge to existing constitutionally protected rights.

IV. LEGAL REFORMS

Recently, there has been a surge of legislative proposals designed to provide protection for child witnesses. Such legislation usually entails limiting some of the rights to which defendants are currently entitled.³³ The primary goal of most of the statutes is to develop alternatives to a child's live testimony in an open courtroom, to alleviate the trauma of having to face the defendant and being subjected to cross-examination. Some of the suggested approaches are: in camera testimony, barring spectators and/or the press from the courtroom, videotaped testimony, using closed circuit television, and having a physical barrier in the courtroom between the victim and the defendant.³⁴ The laws provide for varying conditions and circumstances under which these alternatives might be used. These procedures threaten rights guaranteed to defendants by the first and sixth amendments, such as the right to a public trial, and the right to confront one's accuser. They also may threaten the freedom of the press.³⁵

These laws are relatively new and most that have been challenged are still being appealed. Thus, the courts have not clearly

32. Berliner, Canfield-Blick & Bulkley, *Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development*, in *CHILD SEXUAL ABUSE AND THE LAW* 166 (J. Bulkley ed. 1984).

33. D. Whitcomb, E. Shapiro & L. Stellwagen, *When the Victim is a Child: Issues for Judges and Prosecutors* (Government Printing Office, 1985).

34. *But see* Mylniec & Dally, *supra* p. 115 (*See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115 (1985)).

35. Paper presented by J. Bulkley, *Evidentiary and Procedural Trends In State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES (National Legal Resource Center for Child Advocacy and Protection, American Bar Association, Washington, D.C.-April 1985).

established the acceptable boundaries of the legislation. The Supreme Court of the United States, however, ruled on one aspect of the reform legislation in *Globe Newspaper Co. v. Superior Court*.³⁶ The Court found unconstitutional a Massachusetts law that required the press to be excluded from the courtrooms during child-victim testimony.³⁷ The decision apparently did not rule out the possibility that, under certain limited circumstances, the press could be excluded. Decisions like *Globe* cause states to redraft their legislation so as to withstand a similar constitutional challenge. In an effort to avoid reversal on appeal, the videotaping statutes usually provide for the defendant to be present at videotaped depositions and cross-examination, or require that the child be available for cross-examination.³⁸ The protection of the child witness from confronting the accuser may then be lost.

Hearsay exceptions can make it possible to proceed without the child's direct testimony.³⁹ Ten states have special hearsay exceptions for sexual abuse cases.⁴⁰ Although these exceptions are most often used when the child testifies, some statutes allow the prosecution to move forward based on hearsay statements alone, when the statements meet standards of reliability.⁴¹ The statutes often require independent corroboration when the child is unavailable to testify.⁴² One of the critical legal issues is defining unavailability in a way which is consistent with legal precedents. A child may be unavailable due to incompetence or psychological trauma which prevents the giving of testimony. How the courts will resolve

36. 457 U.S. 596 (1982).

37. In invalidating the Massachusetts law, the Court suggested that the question of whether a courtroom should be closed in this type of case should be left to the discretion of the presiding judge. Instead of having a mandatory closure rule, the judge would be able to conduct a hearing with all affected parties and determine whether the facts of a particular case indicate a need for closing the courtroom. *Id.* at 608-09.

38. D. Whitcomb, E. Shapiro & L. Stellwagen, *supra* note 33.

39. Professor Michael Graham has recently formulated a hearsay exception making out-of-court statements of child sexual assault victims admissible under certain prescribed circumstances. The prescribed circumstances assure that defendants' constitutional rights will not be violated. See Graham, *supra* p. 19 (*Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecution*, 40 U. MIAMI L. REV. 19 (1985)), see also Comment, *infra* p. 217 (*Other Crimes Evidence to Prove the Corpus Delicti of a Child Sexual Offense*, 40 U. MIAMI L. REV. 217 (1985) (recommending admission of evidence of defendant's prior sexual offenses where *corpus delicti* is at issue and certain prescribed circumstances are met)).

40. Bulkley, *supra* note 35.

41. *Id.*

42. Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MAR. 1 (1984).

this issue remains to be seen.⁴³

Although much of the legislation is new and awaits appellate rulings, the trend seems apparent. It will be difficult to find legally acceptable means of excusing children from giving direct testimony and from being cross-examined in court like other witnesses. There is likely to be strenuous legal opposition—even from prosecutors—concerning the removal of constitutional protections in any wholesale fashion, no matter how just the cause.

There are some possibly negative consequences in using the recommended approaches. Thus, even where videotaping is allowed, many prosecutors will be reluctant to use it because others will have found its use detrimental to their cases.⁴⁴ One major concern is that a videotaped statement is a visual verbatim record which can be used to attack the child's credibility when subsequent renditions of the assault experience differ. Taped interviewing by mental health professionals, although often legitimate by mental health standards, frequently appears to be leading or suggestive and might be used to discredit the child.⁴⁵ Some prosecutors have expressed that the presence of a live child witness, albeit a nervous or hesitant one, offers the jury an opportunity to identify with the child—a benefit which they say outweighs the actual content which can be elicited in the courtroom.

There are other issues raised by attempts to legislate these kinds of exceptions for child witnesses. The concern about providing special protections for children originates from the occasional reported instances when children had horrible experiences in the criminal justice system. The children were viciously cross-examined and became so frightened by seeing the defendant, or by their own presence in courtroom, that their testimony became confused, or they were unable to proceed.⁴⁶ There is no reliable evidence to conclude that children in general cannot testify effectively in court or that they are universally traumatized by the experience. In fact the opposite seems to be true. There has been a dramatic increase in prosecutions resulting in convictions.⁴⁷ Counselors have

43. For a discussion of the competency of a child witness, see Bulkley, *supra* note 35.

44. D. Whitcomb, E. Shapiro & L. Stellwagen, *supra* note 33.

45. MacFarlane, *infra* p. 135 (*Diagnostic Evaluations and the Uses of Videotape in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985)).

46. Burgess & Holmstrom, *The Child's Family during the Court Process*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* (A. Burgess, A.N. Groth, L. Holmstrom, S. Sgroi eds. 1978); J. DeFrancis, *Protecting the Child Victim of Sex Crimes Committed by Adults* (Children's Division, The American Human Association, Denver, Colo.).

47. Conte & Berliner, *Prosecution of the Offender in Cases of Sexual Assault Against*

found that children sometimes psychologically benefit by participating in the criminal justice system. It is therefore possible that a movement to keep children out of the courtrooms could serve to perpetuate the incorrect perception of children as incompetent witnesses.

There are a number of legal reforms which could be instituted. Several years ago, the American Bar Association's Legal Resource Center for Child Advocacy made a series of recommendations about legal reforms which have been adopted in various parts of the country.⁴⁸ The recommendations call for abolishing the requirement of corroboration of the child's testimony. Only Nebraska and the District of Columbia retain this requirement. Another recommendation is that children should not be required to prove that they are competent before being permitted to testify.⁴⁹ Developmental research does not support the position that children are necessarily less reliable witnesses than adults.⁵⁰ In the absence of empirical evidence, children should not be subjected to a special requirement which clearly implies that they are less reliable witnesses whose testimony should be viewed with suspicion. The Federal Rules of Evidence no longer require a competency hearing. In the states which have adopted the Federal Rules of Evidence, the fact finder decides how much weight to give the testimony based on direct evaluation of the witness' testimony.⁵¹

Where constitutionally possible, it is desirable to eliminate unnecessary courtroom appearances. Not all jurisdictions demand a grand jury indictment for the filing of criminal charges; nor are preliminary hearings always required.⁵² Sometimes the testimony in these jurisdictions can be taken by deposition or affidavit; and hearsay can also be introduced.⁵³ In the actual criminal trial, creative but legally proper use of hearsay as supportive testimony can be helpful.

Children, VICTIMOLOGY: INT'L J. (1983).

48. RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN CHILD SEXUAL ABUSE CASES NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, AMERICAN BAR ASSOCIATION (J. Bulkeley, ed. 1982).

49. See Comment, *infra* p. 245 (*The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245 (1985)).

50. Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40:2 J. Soc. Issues 33-50 (1984).

51. See NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, *supra* note 35.

52. In the State of Washington, charges may be brought when an information is filed in the Superior Court and is accompanied by a certification of probable cause.

53. *Id.*

Some courts permit expert witnesses to testify as long as the attorney lays a foundation for the credentials of the expert and the testimony remains within certain prescribed limits.⁵⁴ Some courts also permit expert testimony about the characteristics and dynamics of child sexual abuse if they are unusual or unknown to the general public.⁵⁵ Lawyers must use this type of testimony carefully because appellate courts have reversed decisions where professionals offered an opinion about whether the person had been victimized based on the presence of certain symptoms.⁵⁶ This kind of testimony invades the province of the judge or jury as fact finders.⁵⁷ Testimony about child sexual abuse syndrome may lead to reversal because there is no empirical evidence that the syndrome is always present in child victims.

V. LIMITATIONS OF CRIMINAL JUSTICE SYSTEM

Although substantial success has been achieved in reporting and obtaining convictions in these cases, major limitations of the criminal justice system have begun to emerge. With heightened community education and awareness, many more cases are being brought to the attention of the criminal justice system. Law enforcement agencies are inundated with reports of cases which previously would not have come to the attention of the prosecutors.⁵⁸

Many child molesters condition children to accept inappropriate physical contact in a gradual manner which then progresses to actual sexual acts.⁵⁹ Children may report molestation at earlier stages if they are taught to report "uncomfortable touches" in preventative education programs.⁶⁰ With very young victims, there is a problem in ascertaining the motivation of the contact. Parents and caretakers permissibly touch children's genital areas to change diapers and clothing, clean, check for injury and infection, apply

54. M. GRAHAM, *supra* note 30.

55. *State v. Petrich*, 101 Wash. 2d 566, 683 P.2d 173 (Wash. 1984).

56. *See Roe*, *supra* p. 97 (*Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985)).

57. *Id.*

58. In the State of Washington, the Department of Social and Health Services refers all cases of reported child abuse when the prosecuting attorney believes that a crime has been committed. Cases may involve children as young as two or three years old. The statute of limitations has been extended to seven years for certain sexual crimes against children.

59. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE AND NEGLECT: INT'L J. 177-93 (1983).

60. *See, e.g.*, Committee For Children, *Prevention of Child Sexual Abuse: Trainer's Manual* (1984) (available from the Committee for Children, P.O. Box 15190, Seattle, WA 98115).

lotion or ointment, take rectal temperature and even to touch affectionately, such as to rub the bottom of a young child. If anyone else were to engage in such activities with a child, a high index of suspicion would be warranted. While these behaviors seem innocent, they can be used to disguise sexually motivated contact.

Educational programs teach parents and professionals to inquire into the possibility of sexual abuse when a child exhibits certain out of the ordinary or unusual behavior.⁶¹ This is necessary, in part, because the literature and clinical experience show that children are afraid to tell about the abuse but may show signs of distress or hint about the abuse through other behavior.⁶² According to data collected at the Sexual Assault Center, one third of the cases come to light because an adult elicits the report from the child.⁶³ In a legal forum, this may suggest that an adult has placed words or thoughts into the child's mind. Although there is no reason to think this is a serious problem, it is probably true that in some situations, adults have misinterpreted the children and the children have been unwittingly encouraged to exaggerate their stories.

Professionals who deal with cases involving the sexual abuse of children are frequently accused of conspiring to brainwash children, or of deliberately implicating the innocent. This allegation has recently received widespread media attention.⁶⁴ While there may be occasional instances of overzealousness or sloppiness in investigation, there is no real support for this contention. It is not clear that it is even possible to induce children to describe an experience they never had.

Along with increased training and awareness has come the recognition that very young children, even infants, are sexually assaulted. Confessions from admitted child molesters disclose that no child is too young to be the object of sexual or aggressive interest. Children under the age of about four, although they have memories and some ability to communicate, will rarely meet the

61. L. SANDFORD, *THE SILENT CHILDREN: A BOOK FOR PARENTS ABOUT THE PREVENTION OF CHILD SEXUAL ABUSE* (1980).

62. Sgroi, Porter, & Canfield-Blick, *Validation of Child Sexual Abuse*, in *HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE* (1982).

63. J. Conte & L. Berliner, *Impact of Sexual Abuse on Children*, (study in progress) National Institute of Mental Health.

64. A Minnesota case received widespread media coverage. Two adults were tried and acquitted. Several children recanted their earlier statements. On both the Phil Donohue Show and Sixty Minutes, individuals claimed that there had been professional misconduct in the investigation. See *Chicago Tribune*, Dec. 16, 1984.

legal criteria for competence.⁶⁵ Cases involving very young children seem the most egregious and evoke the most horror. The lack of prosecution seems even worse in those cases, but there is no readily apparent way to pursue them in the criminal justice system as long as the children are too young to testify and there is no corroboration of their experiences.⁶⁶

Additionally, through increased awareness and training programs, many types of previously unknown sexual abuse have been discovered. There are groups of individuals who sexually abuse groups of children in an organized fashion. Scores of young children are not banding together to fabricate elaborate accusations of sexual misconduct by groups of adults. The prosecutor faces significant problems in this situation because discrepancies in children's statements will occur when each has been abused over a period of time by many offenders. It is extremely difficult for the children to recall which adults committed which acts at what time on which children. The decision of whether to prosecute all of the accused offenders together or whether to sever the cases is also present. There is great hardship on the children in either case—whether they go through the process several times or are confronted in court by numerous defendants, and are cross-examined by numerous attorneys. All of this compounds the trauma.

It has also become increasingly apparent that not all child sexual abuse is non-violent. Some offenders will use any means no matter how sadistic or shocking to insure submission and silence from their child victims. Threatening children's parents with death, torturing or killing animals, destroying favorite toys, and giving them drugs have all been reported.⁶⁷ It may simply be asking too much of children to directly confront individuals who are so inhumane. Many adults would choose not to prosecute under similar circumstances.

VI. CONCLUSIONS

Over the past ten years, great strides have been made in recognizing the victimization of children, acknowledging the truth of their stories, and improving society's response to the children. It has been incontrovertibly established that large numbers of chil-

65. Berliner & Barbieri, *supra* note 27.

66. One possibility is to keep cases open throughout the period of the statute of limitations and then reassess the child's capabilities at a later time.

67. Strasser & Bailey, *A Sordid Preschool Game*, Newsweek, Apr. 9, 1984 (Los Angeles and Bureau Reports).

dren are victims of very serious crimes. A criminal justice system which does not accommodate a whole class of victims, especially those who are the most vulnerable, helpless, and deserving of protection, does not serve society well. It is intolerable that the opportunity for justice so unevenly depends on the state where the child is victimized. The basic procedural changes should be immediately extended to all jurisdictions. Outdated misconceptions about children's competence should no longer influence decision making.⁶⁸ Adequate resources must be made available to properly staff the systems.

The current public attention which is focused on the plight of children who enter the criminal justice system, is positive. Rushing, however, to untried, possibly unnecessary solutions which are politically appealing may do more harm than good. Reliable studies about children's experiences in the criminal justice system are needed to identify the sources of system trauma and to formulate possible solutions. Further research into children's capabilities would better inform the legal system as well. Special legal reforms need to be well thought out and used sparingly. It may be that some cases will not be best resolved by the criminal justice system or that in the balance of competing interests, the protections guaranteed to accused individuals may prevail. The solution to the problem of sexual abuse does not rest solely with changes in the criminal justice system. Some of the goals can be accomplished by a community that educates itself, protects the children, and does not allow known offenders to be in a situation where they can inflict their greatest harm.

68. See Comment, *infra* p. 245, (*The Competency Requirement For the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245 (1985)).