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A Primer on Criminal Child Abuse and Neglect Law

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ABSTRACT

This article surveys major aspects of criminal child abuse and neglect law encountered by judges, prosecutors and defense lawyers, child advocates, and child care professionals. The author, whose casebook, *Children and the Law: Doctrine, Policy and Practice* (West 4th ed. 2010) (with Sarah H. Ramsey), is required reading in law schools throughout the United States, analyzes both constitutional and statutory law.

THE NATURE OF CRIMINAL ENFORCEMENT

The Roles of Constitutional and Statutory Enforcement

In 2010, the *Juvenile and Family Court Journal* published my article, *A Primer on Child Abuse and Neglect Law.*[1] Civil and criminal maltreatment law are intimately related because much conduct that would support a civil abuse or neglect petition would also support a criminal prosecution. Child maltreatment cases may be referred to law enforcement authorities by child protective agencies, families, victims, physicians, schools, and other persons. State abuse and neglect reporting acts typically require child protective agencies to share reports with law enforcement.

"One of the principal tasks of law-enforcement personnel is the investigation of reports of child abuse. Most departments have specially assigned investigators for child abuse cases and these persons are either on duty or on call twenty-four hours a day."[2] The

1 61 JUV. AND FAM. CT. J. 1 (Winter 2010) (with Sarah H. Ramsey).

2 WILLIAM G. BAILEY, THE ENCYCLOPEDIA OF POLICE SCIENCE 66 (1995).

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task is no small matter because acts of child abuse committed by parents and other caretakers comprise about one-fifth of violent crimes against all children, and more than one-half of crimes against children two or younger, that are reported to police.[3]

In child maltreatment cases, the goals of civil and criminal intervention are related yet distinct. Civil intervention seeks to protect the child by treating the child and family and, when necessary, removing temporary or permanent custody. Criminal enforcement seeks to protect the child by prosecuting offenders. Civil proceedings focus primarily on the condition of the child and family; criminal prosecutions focus primarily on the defendant's guilt or innocence.

Ideally child protective agencies and law enforcement cooperate to fashion a coordinated response about whether to move against particular acts of maltreatment civilly, criminally or both.[4] The decision may balance several factors, including these:

> *The seriousness of the alleged conduct.* Serious injury to the child may be prosecuted, but one slapping incident might not be.
> *The perpetrator's evident state of mind.* Prosecution may be more likely if the perpetrator acted wantonly, than if the maltreatment smacked of immaturity or frustration, or of not knowing how to raise a child.
> *The perpetrator's amenability to treatment.* Prosecution may be more likely if the perpetrator resists treatment or if civil authorities have previously tried treatment to no avail, but less likely if the perpetrator appears willing and perhaps able to respond to treatment.
> *The strength of the proof.* The criminal burden of proof is beyond a reasonable doubt; the civil burden is lower, either a preponderance of the evidence or clear and convincing evidence. The burden may be particularly important in sexual abuse cases, where the child victim (often the only eyewitness other than the perpetrator) may be unwilling or unable to testify, or may be ineffective on the stand.
> *Community outrage.* If the abuse or neglect is publicized and outrages the community, prosecution is more likely, perhaps partly for deterrent effect. Publicized acts are also likely to be relatively serious, thus relating to the first factor listed above.
> *The remedy's likely effect on the child and family.* Would branding a parent with a criminal record further hurt the family? If the parent has other children, should the parent be incarcerated? If authorities do not seek incarceration or termination of parental rights, would the child and family be better off if the parent is treated civilly? Would civil remedies (such as temporary loss of custody or termination of parental rights) better protect the child, and impose greater punishment on the parent, than a prison sentence?
> *Predictions of future abuse or neglect.* Even if the abuse or neglect does not appear particularly serious now, authorities may invoke the criminal process to deter the perpetrator before the conduct escalates and threatens death or serious injury to the child.

Parallel Proceedings

Child protective agencies and the prosecutor may employ both the civil system's protective function and the criminal justice system's punitive function arising from the same incident of maltreatment. In *People v. Moreno*, for example, the Illinois juvenile court dismissed the civil abuse petition because the state had not shown that the child's injuries

3 David Finkelhor & Richard Ormrod, *Child Abuse Reported to the Police* (OJJDP 2001).

4 *E.g.*, Douglas J. Besharov, *Combatting Child Abuse: Guidelines for Cooperation Between Law Enforcement and Child Protective Agencies*, 24 FAM. L.Q. 209 (1990).

were other than accidental.[5] Because civil and criminal child abuse proceedings have different purposes, however, the court then denied the defendant's motion to dismiss the criminal prosecution for aggravated battery of a child. "In the juvenile proceeding, the ultimate litigated issue was whether the minor children of defendant were abused . .; in the subsequent criminal proceeding, the ultimate litigated issue will be whether the defendant is criminally culpable for the injuries to [the child]."[6]

Because a juvenile court abuse or neglect proceeding is civil, a later criminal prosecution charging the underlying acts also does not constitute double jeopardy in violation of the Fifth Amendment, which applies only in cases of two or more criminal prosecutions.[7]

ABUSE, NEGLECT, AND CHILD ENDANGERMENT

Overview

A number of criminal statutes may be invoked against persons who inflict physical, sexual, or emotional maltreatment on children. Some of these statutes (such as ones proscribing murder, manslaughter, or assault) apply when the victim is "any person" or "another person," and thus permit prosecution when the victim happens to be a child.

Complementing these general-application crimes are crimes applicable only when the victim is a child. These child-specific crimes carry a variety of names, such as endangering the welfare of a child, child abuse, criminal neglect, or cruelty to children. The typical endangerment statute permits conviction for a wide range of conduct harmful to children.[8] Pennsylvania's child endangerment statute, for example, operates against "[a] parent, guardian, or other person supervising the welfare of a child" who "knowingly endangers the welfare of the child by violating a duty of care, protection, or support."[9] With somewhat greater specificity, Florida's criminal child abuse statute operates against "[a] person who knowingly or willfully abuses a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child."[10]

As the Pennsylvania and Florida statutes indicate, the child-specific statutes typically extend beyond defendants who have legal custody or control of the child, sometimes to persons such as teachers or day care workers.[11] The defendant class, however is not

5 744 N.E.2d 906 (Ill. App. Ct. 2001).

6 *Id.* at 912.

7 People v. Roselle, 643 N.E.2d 72 (N.Y. 1994); U.S. Const. amend. V ("nor shall any person be subject for the same offence to to be twice put in jeopardy of life or limb").

8 *E.g.*, Hughes v. State, 910 P.2d 254 (Nev. 1996) (transporting a child in a stolen vehicle); People v. Suquisupa, 637 N.Y.S.2d 302 (Sup. Ct. 1996) (selling fireworks to unsupervised 13-year-old who suffered a serious hand injury from a premature explosion); State v. Marschat, 1991 WL 12812 (Ohio Ct. App. 1991) (leaving 6-year-old son in the car for approximately two hours in August with all the windows rolled up; son died from the heat).

9 18 Pa. Cons. Stat. § 4304.

10 Fla. Stat. Ann. § 827.03.

11 *E.g.*, State v. Pasteur, 9 S.W.3d 689 (Mo. Ct. App. 1999) (teacher); People v. Simmons, 699 N.E.2d 417 (N.Y. 1998) (day care worker).

unlimited. In *State v. Leckington*, for example, the Iowa Supreme Court reversed the endangerment conviction of an adult who was merely a passenger in a car that transported an intoxicated 13-year-old.[12]

Where the child-specific statute operates against "any person," or against "whoever" engaged in the proscribed conduct, the defendant class may even include a child, including a child younger than the victim. In *K.B.S. v. State*, for example, the Florida appellate court affirmed the delinquency adjudication against a 14-year-old for abusing a nine-year-old by burning him with a cigarette; the court noted that the statute would also operate against a 9-year-old who abused a 14-year-old.[13]

Children Who Witness Domestic Violence

Children who witness domestic violence inflicted on a parent may suffer profound adverse effects, including post-traumatic stress disorder and other severe emotional and behavioral damage. Female child witnesses are more likely later to be abused as adults, and male child witnesses are more likely later to become abusers as adults.[14]

In *People v. Johnson*, the court held that a defendant who committed vicious acts of domestic violence against his former girlfriend in her children's presence could be convicted under the state's endangerment statute, which criminalizes "knowingly act[ing] in a manner likely to be injurious to the physical, mental, or moral welfare of a child less than seventeen years old."[15] Some states now specifically criminalize "domestic violence in the presence of a child,"[16] or provide enhanced sentencing where children witness the attack.[17]

Parental Privilege

As public debate continues concerning the efficacy and propriety of corporal punishment of children, the criminal law continues to recognize a parental privilege for reasonable discipline. Section 3.08 of the Model Penal Code, for example, provides that "[t]he use of force upon or toward the person of another is justifiable if:

(1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian, or other responsible person and:

12 713 N.W.2d 218 (Iowa 2006).

13 725 So.2d 448 (Fla. Dist. Ct. App. 1999).

14 *E.g.*, Naomi Cahn, *Child Witnessing of Domestic Violence*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 3 (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006); Lois A. Weithorn, *Protecting Children From Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1 (2001).

15 740 N.E.2d 1075, 1076 (N.Y. 2000).

16 *E.g.*, Idaho Code § 18–918(7)(b).

17 *E.g.*, Or. Rev. Stat. § 163.160(3) (class A misdemeanor to class A felony).

(a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the preventing or punishment of his misconduct; and
(b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain, or mental distress or gross degradation."

The privilege seeks to balance parents' rights to direct their children's upbringing with the state's *parens patriae* interest in punishing child maltreatment. As the Model Penal Code formulation indicates, the privilege extends beyond parents to other caretakers, though the extension is not boundless. In *State v. Dodd*, for example, the live-in boyfriend of the child's mother not privileged because the court found that he was not a "person responsible for the child's welfare."[18]

Abusive Discipline

Criminal charges frequently arise from serious physical or emotional injury inflicted by parents or other caregivers on children they are seeking to discipline. The precise number of prosecutions arising from abusive discipline cannot be determined, but the number is likely significant because studies demonstrate that most of American parents use physical force to punish their children, and that most abuse is perpetrated by caregivers. Whatever the relationship, reported decisions include children who are burned, beaten with belts and bats, locked in closets and deprived of food, and force-fed. Abusive discipline leads to the child's death with disturbing frequency.[19]

The parental tort immunity doctrine prohibits unemancipated children from suing their parents for intentional or negligent torts. At one time, the doctrine sought to preserve family harmony, prevent fraud and collusion between parent and child, encourage support for parental authority, and protect family assets. Almost all states now allow children to sue their parents for intentional personal injuries, however, and some states now also permit suits for negligent supervision. In jurisdictions that have abrogated or restricted parental tort immunity, a child injured by unprivileged corporal punishment or other physical abuse may maintain a damage action against the parent who inflicted the abuse.[20]

Abandonment

Where child endangerment rises to the level of total neglect, a parent or guardian may face prosecution for abandonment. More than a million children each year run away from home and live on the streets; many of these children are more aptly labeled

18 518 N.W.2d 300, 301 (Wis. Ct. App. 1994).

19 *E.g.*, Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 481-82.

20 *E.g.*, Herzfeld v. Herzfeld, 781 So.2d 1070 (Fla. 2001) (intentional sexual abuse); Murray v. Murray, 623 N.E.2d 1236 (Ohio Ct. App. 1993) (abusive discipline).

"throwaways" because they are directly told to leave the household, or because no household member cares whether they return.[21] At least with respect to older children, however, authorities rarely invoke criminal abandonment statutes against throwaways' parents.[22]

Contributing to the Delinquency of a Minor

Most states have statutes criminalizing conduct that might lead a juvenile to commit delinquent acts. Massachusetts, for example, punishes "[a]ny person who shall be found to have caused, induced, abetted, or encouraged or contributed toward the delinquency of a child, or to have acted in any way tending to cause or induce such delinquency."[23]

As in Massachusetts, a contributing-to-delinquency statute's defendant class typically includes "any person" who commits the proscribed conduct, a class considerably broader than the parents and other caregivers reached by the typical endangerment statute.[24] Contributing-to-delinquency statutes are commonly used to punish adults for providing alcohol or tobacco or engaging in sexual activity.[25] These statutes, however, may even reach juvenile defendants who contribute to the delinquency of other juveniles.[26]

In most states, a defendant may be convicted of contributing to the delinquency of a minor even if the minor did not commit a delinquent act, or was never charged or adjudicated a delinquent. "The defendant is punished for his own acts, not those of the juvenile."[27]

"Safe Haven" Statutes

The media periodically reports tragic stories of newborns abandoned to die in dumpsters, trash bins, and similar places.[28] The mother is typically a frightened teenager or young woman who has concealed the pregnancy from family and friends, and who may even be in clinical denial that she is pregnant. Because many of these frightened mothers fear identification if they go to hospitals (particularly public hospitals), they may choose infanticide where the law provides no confidential alternative for surrendering the baby safely.

21 *E.g.*, DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 960-63 (4th ed. 2010).

22 Gregory A. Loken, *"Throwaway" Children and Throwaway Parenthood*, 68 TEMP. L. REV. 1715 (1995).

23 Mass. Gen. Laws ch. 119, § 63.

24 *E.g.*, State v. Groce–Hopson, 2004 WL 1252696 (Ohio Ct. App. 2004) (defendant helped her friend's child remove items from store without paying for them and load them in her car).

25 *E.g.*, State v. Gilbert, 969 A.2d 125 (Vt. 2009) (defendant approximately 50 years old purchased alcohol and cigarettes for a minor, attended an underage party with other minors at which there was drinking and drug use, and then engaged in sexual intercourse with a 14-year-old girl at the party.

26 *E.g.*, In re Lomeli, 665 N.E.2d 765 (Ohio Ct. App. 1995).

27 State v. Trevino, 865 P.2d 1172 (N.M. 1993).

28 *E.g.*, Christopher Placek & Josh Stockinger, *Preemie Found in Trash Bin*, CHI. DAILY HERALD, Dec. 19, 2012, at 5.

Nearly all states now have "safe haven" laws, which permit a parent to deliver a newborn safely to such persons as law enforcement personnel, firefighters, emergency medical technicians, clergy, or hospital personnel. Depending on the state, the laws permit safe delivery within a few hours after birth, or within a month or year. The legislation provides the parent freedom from conviction for child endangerment, abandonment, or similar crimes.

These laws have saved some newborns, but so far have generally proved less effective than their proponents had hoped. Reasons for diminished effectiveness may include inadequate publicity, practical difficulties inherent in safe haven relinquishment, mothers' lingering doubts about the completeness of promised legal protection, and the inability of such legislation to reach the frightened targets.[29]

"Void-For-Vagueness" Challenges

Criminal endangerment statutes typically carry broad language designed to enable authorities to prosecute a wide range of physical and emotional mistreatment of children. Some questionable conduct, however, cannot fit under even broad statutory mandates. Where the fit seems difficult to make, constitutional challenge remains available under the Fourteenth Amendment due process void-for-vagueness doctrine.

The doctrine requires that a penal statute "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[30] Where the conduct at issue appears particularly harmful to children and is arguably within the endangerment statute's proscriptions, courts normally reject vagueness challenges. In *Commonwealth v. Hendricks*, for example, the court rejected the vagueness defense of a father who, with his three-year-old child in the car, deliberately embarked on a high-speed nighttime chase to elude the police; reached speeds exceeding twice the speed limit; traveled over roadways that were narrow, scarred with pot holes, and contained sharp turns; and drove over an embankment and several hundred yards into woods, where he fled on foot from pursuing police while he held the child.[31]

Vagueness challenges to endangerment statutes sometimes succeed, however, where the seriousness of the defendant's conduct seems open to fair question. In *City of Las Vegas v. Eighth Judicial District Court*, the court sustained the vagueness defense of a man who "willfully and unlawfully annoy[ed] a minor . by following [her] from her residence to another residence, thereafter asking for her ten to fifteen times."[32] The defendant might have been prosecuted for a crime with more definite elements such as harassment, but not for endangerment.

29 *E.g.*, Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753 (2006).

30 Kolender v. Lawson, 461 U.S. 352, 357 (1983).

31 891 N.E.2d 209 (Mass. 2008).

32 59 P.3d 477, 479 (Nev. 2002).

The "Cultural Defense"

Where a person commits acts or omissions that would support prosecution for endangering the welfare of a child or a similar offense involving abuse or neglect, should the law excuse guilt or mitigate punishment on the ground that the acts or omissions reflect the defendant's cultural background that differs from mainstream American culture? (Similarly, should juvenile courts weigh cultural differences in determining whether to find a child abused or neglected in civil proceedings?)

The "cultural defense" sometimes arises as the American population grows more diverse through immigration from nations with a variety of cultural traditions. The defense raises the question whether a pluralistic society tolerant of individual differences can (or should) have a culturally relative, rather than an absolute, child protective standard. Several cultural practices potentially clash with mainstream American views of child protection, including shaming and unreasonable corporal punishment, sexual relations with a child below the age of consent, and female circumcision.

American criminal law has refused to recognize a formal cultural defense. Civil authorities are also wary of the defense, but a few states require child protective authorities to examine cultural differences when determining whether abuse or neglect has occurred.

SEXUAL ABUSE

What Is Child Sexual Abuse?

According to the American Academy of Pediatrics, "[s]exual abuse occurs when a child is engaged in sexual activities that he or she cannot comprehend, for which he or she is developmentally unprepared and cannot give consent, and/or that violate the law or social taboos of society. The sexual activities may include all forms of oral-genital, genital, or anal contact by or to the child or abuse that does not involve contact, such as exhibitionism, voyeurism, or using the child in the production of pornography. Sexual abuse includes a spectrum of activities ranging from rape to physically less intrusive sexual abuse."[33]

Because of the attendant shame and embarrassment, sexual abuse is an underreported crime among victims of all ages. Data nonetheless indicate that "[u]nwanted sexual experiences during adolescence are common, with a large survey of middle- and high-school students indicating that 18% of females and 12% of males have had an unwanted experience."[34] "[T]wo thirds to three quarters of all adolescent sexual assaults are perpetrated by an acquaintance or relative of the adolescent. Older adolescents are most commonly the victims during social encounters with the assailants (e.g., a date). With

33 Am. Academy of Pediatrics, *The Evaluation of Sexual Abuse in Children*, 116 PEDIATRICS 506 (2005).

34 Miriam Kaufman et al., *Care of the Adolescent Sexual Assault Victim*, 122 PEDIATRICS 462, 464 (2008).

younger adolescent victims, the assailant is more likely to be a member of the adolescent's extended family."[35] "Children and adolescents with disabilities are at significantly increased risk of sexual assault: 1.5 to 2 times higher than the general population."[36]

Representative Statutes

Endangerment, criminal child abuse, and general criminal sexual abuse statutes often include sexual exploitation of children. Child sexual abuse statutes, however, operate specifically against such exploitation and ordinarily carry greater penalties.

"Forcible" and "Statutory" Rape

"Forcible rape" statutes depend on proof that the victim submitted to sexual activity because of the defendant's threat or use of physical compulsion. Forcible rape statutes generally criminalize conduct against "any person," and thus reach physical compulsion against children and adults alike.

To be distinguished from forcible rape, "statutory rape" is an offense sometimes called by such names as indecent liberties with a child, lewd and lascivious activities with a child, or carnal knowledge of a child. Statutory rape does not include force as an element. The key element is the victim's age, and the prosecutor may prevail by proving that the proscribed sexual conduct took place between the defendant and the underage victim. As a matter of law, the victim is deemed incapable of consent if he or she is below the statute's specified age (the so-called "age of consent"), or if more than the specified minimum age differential exists between the victim and the defendant. Purported consent would not be a defense, regardless of anything the young victim might have said or indicated to the perpetrator.

Where two competent adults engage in private, consensual sexual activity, their conduct is an exercise of liberty protected by Fourteenth Amendment substantive due process that statutes thus may not proscribe.[37] Privacy or other right offers no protection under the federal or state constitutions, however, when one or both participants in sexual activity is a child.[38]

The 1996 Welfare Reform Act urged states and local jurisdictions to "aggressively enforce statutory rape laws."[39] Congress acted on the assumption that prosecution would create a climate of deterrence and help control the rate of teenage out-of-wedlock pregnancies, which has risen dramatically in the past two decades. In 2011, 40.7% of U.S. births were to unwed mothers, a substantial number of whom were teenagers.[40] Most

35 *Id.* at 462-63.

36 *Id.* at 463.

37 Lawrence v. Texas, 539 U.S. 558 (2003).

38 *E.g.*, Ferris v. Santa Clara County, 891 F.2d 715 (9th Cir. 1989) (federal Constitution); In re C.P., 555 S.E.2d 426 (Ga. 2001) (state constitution).

39 42 U.S.C. § 14016.

40 Brady E. Hamilton et al., *Annual Summary of Vital Statistics: 2010-2011*, 131 PEDIATRICS 548 (2013).

out-of-wedlock teenage pregnancies result from conduct of older men that is chargeable as statutory rape or another sex crime.[41]

Incest

Where a person engages in sexual activity with a son, daughter, sibling, or other family member, the person may face prosecution for incest. Incest statutes reach blood relationships, but are not uniform in their treatment of non-blood relationships (such as step or adoptive relationships). Section 230.2 of the Model Penal Code, for example, would criminalize sexual relations between adoptive parents and their adoptive children, but not between other family members related by adoption or between step relations. Where the step or adoptive relationship between defendant and victim is outside the incest statute, the defendant would remain subject to prosecution for other sex crimes if the victim is under the age of consent. Incest perpetrated by children on siblings appears to be quite prevalent, though it is often under-reported, largely because parents may resist reporting that one of their children has sexually abused another in the home.[42]

Sexual Enticement of Children on the Internet

"Today's teenagers spend an average of 11.6 hours a week using the Internet—more time than they spend watching television (9.8 hours per week) . and doing homework (8.9 hours per week)."[43] Widespread Internet use raises serious child protection issues. "[M]olesters, who were once ostracized and limited in their ability to nurture relationships with minors due to the lack of opportunities to communicate freely with them in unsupervised settings, now develop relationships based on daily contact with children over the Internet. Within months, sometimes even weeks, these molesters are able to nurture the relationship to a point where the molester can travel to see the minor or arrange for the minor to travel to the molester."[44]

In a nationally representative survey of regular 10-17-year-old Internet users in 2005, researchers found (1) that about 13% of youth Internet users had received a sexual solicitation or approach over the Internet in the past year; (2) that about 4% of youth Internet users had received an "aggressive" sexual solicitation (a solicitor who asked to meet them somewhere; called them on the telephone; or sent them regular mail, money or gifts); (3) that 4% of youth Internet users were asked by online solicitors for nude or sexually explicit photographs of themselves; (4) that 34% of youth Internet users had had unwanted exposure in the past year to pictures of naked

41 *E.g.*, HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS; 2006 REPORT 37 (OJJDP 2006).

42 *Juveniles Who Have Sexually Offended* 14–15 (OJJDP Mar. 2001).

43 HORATIO ALGER ASS'N, THE STATE OF OUR NATION'S YOUTH 2008-2009, at 18 (2008 national survey by Peter D. Hart Research Assocs.).

44 Virginia Kendall, *The Lost Child: Congress's Inability to Protect Our Teenagers*, 92 NW. U. L. REV. 1307, 1307 (1998).

people or people having sex; and (5) that 9% of youth Internet users had been threatened or harassed. Many youth Internet users do not tell their parents or authorities when they are victimized.[45] Among youths targeted in 2007, "solicitations were more commonly reported via instant messaging (43%) and in chat rooms (32%), and harassment was more commonly reported in instant messaging (55%) than through social networking sites (27% and 28%, respectively)," such as Facebook and MySpace.[46]

To catch and prosecute persons who use the Internet to entice children into sexual encounters, undercover police officers often pose as children in communications with adults. Courts have upheld convictions for attempted child enticement and similar sex crimes, even where the defendant sought to entice a non-existent "child" because the target actually was a posing law enforcement officer.[47] Some states have amended their criminal statutes to proscribe, not luring "a minor" by computer into a sexual encounter, but luring "a person the adult believes to be a minor."[48] In the usual circumstance in which the defendant initiates the contact and later pursues the conversation and perhaps seeks to meet the child, courts also reject defendants' efforts to establish a defense of entrapment, which occurs only when the government "implant[s] in an innocent person's mind the disposition to commit a criminal act, and then induce[s] commission of the crime so that the Government may prosecute."[49]

Federal Legislation

Most prosecutions of sex crimes against children (like most prosecutions generally) occur in state courts, but Congress has also legislated to reach molesters who prey on children face-to-face or through the Internet or other means of communication. For example, 18 U.S.C. § 2423 makes it a crime to travel in interstate or foreign commerce to engage in any of a wide range of sexual acts with a person under eighteen. The section has been upheld against challenges that it exceeds Congress' commerce clause authority or impermissibly burdens the fundamental right to interstate travel.[50] The defendant similarly holds no First Amendment right to engage in speech that entices children to engage in sexual activity.[51]

45 Janis Wolak et al., *Online Victimization of Youth: Five Years Later* 1–2, 57 (OJJDP 2006).

46 Michele L. Ybarra & Kimberly J. Mitchell, *How Risky Are Social Networking Sites?*, 121 PEDIATRICS 350 (2008).

47 *E.g.*, United States v. Helder, 452 F.3d 751 (8th Cir. 2006); Kirwan v. State, 96 S.W.3d 724 (Ark. 2003).

48 *E.g.*, N.D. Cent. Code § 12.1–20–05.1.

49 Jacobson v. United States, 503 U.S. 540, 548 (1992); *see also, e.g.*, State v. Pischel, 762 N.W.2d 595 (Neb. 2009) (rejecting enticer's entrapment defense).

50 *E.g.*, United States v. Hawkins, 513 F.3d 59 (2d Cir. 2008) (commerce clause); United States v. Bredimus, 352 F.3d 200 (5th Cir. 2003) (right to travel).

51 *E.g.*, United States v. Dhingra, 371 F.3d 557 (9th Cir. 2004).

The Contours of Criminal Liability

Gender Neutrality

Statutory rape laws typically now carry gender-neutral language, though most statutory rape prosecutions still involve a male offender and an underage female victim.[52] Prosecution is also possible where the perpetrator and underage victim are of the same gender.[53]

Mistake of Age

Most statutory rape and other sex crimes statutes establish strict liability offenses (that is, offenses not requiring proof of a culpable mental state), even though strict liability crimes are the exception in American law. Mistake of age is no defense, regardless of the victim's appearance, sexual sophistication, or verbal misrepresentations about age, and regardless of the defendant's efforts to learn the victim's age. Legislatures restrict or eliminate the mistake-of-age defense to protect victims and punish wrongdoers, and to limit or eliminate the need for testimony by or concerning the victim.

Only about a third of the states have statutes permitting a mistake-of-age defense in some sex crime prosecutions. Some of these statutes permit the defense to crimes charging sexual relations with older underage victims but not with younger victims. Other states permit the defense for less serious sex crimes but not more serious ones. Where a mistake-of-age defense is available, the defendant must prove the reasonableness of his belief concerning the victim's age.

Emancipation or Marriage

If the victim unmarried to the defendant is below the age of consent, the sex crime defendant may not avoid liability by establishing that the victim was emancipated. Marriage, however, remains a defense for a spouse to most statutory rape and other non-forcible sex crimes that impose liability based on the victim's age. The rationale is that the law should not intrude on the marital relationship unless the defendant spouse has resorted to force. The marital defense is unlikely to affect non-forcible sexual relations with particularly young minors because such minors normally do not marry, even under statutes permitting marriage with parental consent or court approval.

Child Perpetrators

"[J]uveniles continue to constitute a substantial proportion—more than one-third [35.6%]—of those who commit sexual offenses against minors."[54] The number of such

52 Snyder & Sickmund, *supra* note 41, at 37.

53 *E.g.*, State v. Buch, 926 P.2d 599 (Haw. 1996) (third-degree sexual assault).

54 David Finkelhor et al., *Juveniles Who Commit Sex Offenses Against Minors* 1-2, 7 (OJJDP 2009).

victimizations may be even higher, not only because of the general reluctance to report sexual victimization, but also because many cases may be resolved by child protection authorities or the schools without police involvement.[55] This population of juvenile offenders "includes older and younger youth, males and females, those who offend against much younger children, those who offend against peers, those who offend alone, and those who offend in groups."[56]

Most sex crime laws subject a defendant of any age, including a minor, to prosecution because they operate broadly against "any person," or against "whoever" engages in the conduct. Virtually all courts have upheld prosecutions of a minor perpetrator, or of both minor participants on the grounds that "each is the victim of the other" and each needs the law's protection.[57] Some statutory rape laws, however, permit prosecution of a minor, but only where the difference in the ages of the perpetrator and the underage victim is at least a specified minimum.[58]

When the alleged perpetrator is a particularly young child, prosecutorial discretion may raise delicate threshold concerns. The American Academy of Pediatrics, for example, urges authorities to distinguish between "sexual abuse" and "sexual play," based on whether the sexual activity is marked by "a developmental asymmetry among the participants" and by whether the behavior is coercive. "[W]hen young children at the same developmental stage are looking at or touching each other's genitalia because of mutual interest, without coercion or intrusion of the body, this is considered normal (i.e., nonabusive) behavior. However, a 6-year-old who tries to coerce a 3-year-old to engage in anal intercourse is displaying abnormal behavior, and appropriate referrals should be made to assess the origin of such behavior and to establish appropriate safety parameters for all children involved."[59] "Children or adolescents who exhibit inappropriate or excessive sexual behavior may be reacting to their own victimization or may live in environments with stressors, boundary problems, or family sexuality or nudity."[60]

Proving the Case

General Difficulties of Proof

The Supreme Court acknowledges that child sexual abuse is "one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."[61] Prosecutors may face obstacles to bringing charges in the first place, and then to proving guilt beyond a reasonable doubt consistent with the presumption of innocence and other constitutional guarantees. Most sex crimes against children leave no

55 *Id.* at 5.

56 *Id.* at 8.

57 In re T.W., 685 N.E.2d 631 (Ill. App. Ct. 1997).

58 *E.g.*, N.C. Gen. Stat. § 14–27.2(a)(1) (first-degree rape) (victim under thirteen and defendant at least twelve and at least four years older than the victim).

59 Am. Academy of Pediatrics, *The Evaluation of Sexual Abuse in Children*, 116 PEDIATRICS 506 (2005).

60 *Id.*

61 Pennsylvania v. Ritchie, 480 U.S. 39 (198⁻) (plurality opinion).

physical or medical evidence to corroborate the charge. As *Ritchie* intimates, many sex crimes are committed in private, leaving the child victim the only eyewitness. The frightened or ashamed child may have delayed reporting the abuse, inviting suggestion that he fabricated the charge or that the child's memory has dimmed with the passage of time. The child may be an ineffective witness because she is scared, intimidated, less than fully communicative, or perhaps reluctant or unwilling to help convict a family member or other trusted person. The child may be unable to recall key events or may recant. The family may not want the child to suffer further trauma of public testimony.

Circumstances may leave the prosecutor with little practical alternative but to try to prove the case through expert testimony of physicians, psychiatrists, social workers or psychologists. Where obstacles appear particularly imposing, the prosecutor may drop charges altogether or accept a plea bargain that sharply reduces the sentence imposed on a dangerous perpetrator.

In recent years, the law has fashioned evidentiary devices designed to elicit statements from child victims in sex abuse prosecutions. The innovations, which are discussed in the next three sections, stem from the sense that children's reports of sexual abuse are generally reliable because children would not persistently lie about sensitive matters, and would not know details of sexual behavior necessary to sustain a lie for very long. Some observers, however, maintain that an adult questioner (such as a physician, child welfare agency employee, or police officer) can sometimes lead a child to give answers the questioner wants to hear. Much scholarship and empirical research discuss the suggestibility of child interviewees and reveal sharp disagreements about the circumstances under which young sex abuse victims can or should be believed.[62]

The evidentiary innovations designed to elicit the child victim's statements are more available in civil maltreatment cases than in criminal prosecutions, which are subject to the Supreme Court's new Sixth Amendment Confrontation Clause restrictions on the admission of hearsay testimony. The new restrictions, which the Supreme Court announced in *Crawford v. Washington* in 2004, are discussed below.[63]

The "General Child Hearsay" Exception

Children's out-of-court statements may be admissible under recognized hearsay exceptions such as the ones for excited utterances or statements for medical diagnosis or treatment.

Many states have also enacted "general child hearsay" exceptions, which permit admission of a child sexual abuse victim's out-of-court statements that the court deems trustworthy. In Missouri, for example, an otherwise inadmissible statement concerning a sex crime made by a victim under twelve is admissible in a criminal proceeding as substantive evidence to prove the truth of the matter asserted if: "(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circum-

62 *E.g.*, Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004 (1999), which discusses much of the literature.

63 541 U.S. 36 (2004).

stances of the statement provide sufficient indicia of reliability; and (2)(a) The child testifies at the proceedings; or (b) The child is unavailable as a witness; or (c) The child is otherwise physically available as a witness but the court finds that the significant emotional or psychological trauma which would result from testifying in the personal presence of the defendant makes the child unavailable as a witness at the time of the criminal proceeding."[64]

Normally a declarant's mere absence from the trial does not establish the declarant's unavailability. The party seeking to invoke a hearsay exception must also establish that the declarant could not be present or testify because of death or then-existing physical or mental illness or infirmity, or that the party could not procure the declarant's attendance by process or other reasonable means. The Missouri statute quoted above, however, illustrates the relaxed approach taken by the "general child hearsay" exception statutes. The child's significant emotional or psychological trauma can render the child "unavailable" even if the child is sitting at home a mile away. The child's trustworthy hearsay statement would be admissible, and the defendant would not have an opportunity to cross-examine the child who could otherwise be produced.

The Victim's Ex Parte Videotaped Statement

A few states have enacted statutes permitting admission of a videotaped interview of particularly young child sex abuse victims, without a showing that the child presently suffers from significant emotional trauma and without contemporaneous cross-examination. Kansas, for example, permits admission where the court finds that the interview offers sufficient indicia of reliability, the person conducting the interview is available to testify, the interview has not resulted from leading or suggestive questioning, the recording equipment accurately recorded the interview, and the videotape has not been altered or edited. Any later testimony by the child may be in person, or it may be by videotape or closed-circuit television in accordance with the child witness protection statute.[65]

State Child Witness Protection Statutes

The child victim's testimony may be more forceful than introduction of his or her out-of-court statements. To protect child sex abuse victims from the trauma of testifying in the physical presence of the defendant, most states have enacted statutes permitting introduction of video monitor testimony of sexually abused children; about half of these states authorize use of one-way closed-circuit video monitor testimony. A few states authorize use of a two-way system that permits the child witness to see the courtroom and the defendant on a video monitor and permits the jury and judge to view the child during the testimony.

64 Mo. Rev. Stat. § 491.075.

65 Kan. Stat. § 22–3433(a).

In *Maryland v. Craig*, the Supreme Court rejected a Sixth Amendment Confrontation Clause challenge to child witness protection statutes.[66] *Craig* concluded that the Clause ("In all criminal prosecutions, the accused shall enjoy the right . . to be confronted with the witnesses against him")[67] normally requires an actual face-to-face meeting between the defendant and the witness appearing before the trier of fact, but that the Clause's "preference" for face-to-face confrontation may yield where denial of such confrontation is necessary to further an important public policy and where the testimony's reliability is otherwise assured.[68] One such policy, according to *Craig*, is the need to protect the physical and psychological well-being of child sex abuse victims from trauma that would be caused by testifying in the physical presence of the defendant. The Sixth Amendment thus does not bar child witness protection statutes that, like the Maryland statute under review, assure reliability by preserving three essential elements of confrontation: "The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies."[69]

Craig held that even with these three essential elements preserved, the Sixth Amendment permits an exception to face-to-face confrontation only where the trial court also hears evidence and makes a case-specific finding (1) that the particular child witness "would be traumatized, not by the courtroom generally, but by the presence of the defendant," and (2) that "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.' "[70]

Most state child witness protection statutes apply not only to child victims who testify in criminal sexual abuse proceedings, but also to child victims who testify in civil abuse and neglect proceedings. In civil proceedings, the Sixth Amendment Confrontation Clause does not apply but procedure must satisfy due process.

Federal Child Witness Protection

The Child Victims' and Child Witness' Protection Act of 1990 governs federal court testimony of children under eighteen who are victims of physical, emotional, or sexual abuse; children who are victims of child exploitation (child pornography or child prostitution); or children who witness a crime against another person.[71] The Act authorizes the court to permit these children to testify by two-way closed-circuit television where expert testimony provides basis for a case-specific determination that the prospective witness would suffer substantial fear or trauma and be unable to testify or

66 497 U.S. 836 (1990).
67 U.S. Const. amend. VI.
68 497 U.S. at 849 (italics deleted).
69 *Id.* at 851.
70 *Id.* at 856.
71 18 U.S.C. § 3509.

communicate reasonably because of the defendant's physical presence, and not merely because of a general fear of the courtroom.

The Sixth Amendment Confrontation Clause: The Crawford *Standard*

In civil child maltreatment cases in the juvenile or family court, the evidentiary and trial process devices discussed above remain applicable in accordance with due process and the rules of evidence. In criminal child maltreatment prosecutions, however, admission of out-of-court statements (including those by the child victim) must comport with the Sixth Amendment Confrontation Clause, which is quoted above.

In *Crawford v. Washington* in 2004, the Supreme Court established a new standard for determining whether admission of hearsay testimony comports with the Confrontation Clause.[72] Before *Crawford*, admissibility of hearsay statements in criminal prosecutions depended on whether the statement was "reliable"; under *Crawford*, admissibility now depends on whether the proffered hearsay is "testimonial" or "non-testimonial." Where an absent witness' statement is testimonial, the Confrontation Clause permits admission only where two requirements—"unavailability and prior opportunity for cross-examination"—are met.[73] In a child maltreatment prosecution, the defendant's prior opportunity need not necessarily come when the declarant made the statement, but may come when the declarant testifies at a videotaped deposition or under another substituted procedure.[74] The defendant has had the requisite prior opportunity to cross-examination even where the young witness is unresponsive or answers most questions with "I don't know" or "I don't recall."[75]

Crawford provided no "comprehensive definition of 'testimonial,' " but did say that "at a minimum," the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[76] In 2006, the Court explained that out-of-court statements (1) are non-testimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,"[77] but (2) are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[78] The Court left open the question of "whether and when statements made to someone other than law enforcement personnel are 'testimonial.' "[79]

Lower courts have applied *Crawford* in several decisions reviewing convictions for maltreating children who gave out-of-court statements. Child victims' statements to a

72 541 U.S. 36 (2004).
73 *Id.* at 68.
74 State v. Griffin, 202 S.W.3d 670 (Mo. Ct. App. 2006).
75 *E.g.*, Pantano v. State, 138 P.3d 477 (Nev. 2006).
76 *Crawford*, 541 U.S at 68.
77 Davis v. Washington, 547 U.S. 813, 822 (2006).
78 *Id.* at 822.
79 *Id.* at 823.

friend, co-worker, or non-government employee, without police involvement, have been held non-testimonial and thus admissible.[80] Courts are likely to find child victims' statements to their parents non-testimonial because of the intimate nature of the parent-child relationship.[81] In *Pantano v. State*, the Nevada Supreme Court explained the policy considerations: "A parent questioning his or her child regarding possible sexual abuse is inquiring into the health, safety, and well-being of the child. To characterize such parental questioning as the gathering of evidence for purposes of litigation would unnecessarily and undesirably militate against a parent's ability to support and nurture a child at a time when the child most needs that support."[82]

Where a physician or other medical personnel interview the child strictly for medical treatment purposes and not in anticipation of criminal proceedings, courts have similarly held the child's out-of-court statements non-testimonial.[83] Where a child makes a statement as part of an investigation by government officials, however, courts generally hold the statement testimonial because *Crawford* stated that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse."[84] The government officials' involvement, the Court added, would often "lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[85] In particular, statements made by child victims at children's shelters with police involvement have been held testimonial.[86]

Craig's approval of child witness protection statutes has survived *Crawford* because the earlier decision did not concern children's hearsay testimony, but rather children who testified subject to cross-examination, though under a substituted procedure.[87]

The remainder of this section discusses other trial practice devices and accommodations designed to facilitate child sexual abuse testimony in civil and criminal cases alike.

Children's Competency to Testify

In recent years, concern about child sexual abuse has led states to relax rules concerning child victims' competency to testify. Children under a particular age are generally competent unless they are shown to lack capacity to recall facts correctly or to testify truthfully. In many states, however, child sexual abuse victims of any age are competent as a matter of law to testify about the abuse. Victims as young as three have testified.

80 *E.g.*, People v. Griffin, 93 P.3d 344 (Cal. 2004) (12-year-old murder victim's statement to a friend at school that the defendant stepfather had been fondling her for some time and she intended to confront him); People v. Geno, 683 N.W.2d 687 (Mich. Ct. App. 2004) (two-year-old girl's statement to a non-government employee of Children's Assessment Center about sexual assault by the defendant).

81 *E.g.*, Herrera-Vega v. State, 888 So.2d 66 (Fla. Dist. Ct. App. 2004) (three-year-old child's statements to her mother and father reporting a touching).

82 138 P.3d 477, 483 (Nev. 2006).

83 *E.g.*, State v. Vaught, 682 N.W.2d 284 (Neb. 2004) (physician); State v. Scacchetti, 690 N.W.2d 393 (Minn. Ct. App. 2005) (nurse practitioner).

84 *Crawford*, 541 U.S. at 56.

85 *Id.* at 52 (citation omitted).

86 *E.g.*, State v. Snowden, 867 A.2d 314 (Md. 2005) (child sexual abuse victim's statement to child protective services investigator).

87 *E.g.*, State v. Henriod, 131 P.3d 232, 237 (Utah 2006).

The Oath

Prospective witnesses, including children, must be sworn or affirmed before testifying. With a young child witness, however, the oath need not take any particular form. The New Jersey Supreme Court explains that "[a]ny ceremony which obtains from [a child] a commitment to comply with [the] obligation [to speak the truth in court] on pain of future punishment of any kind constitutes an acceptable . . oath. It is not necessary that an infant mouth the traditional litany nor comprehend its legal significance."[88]

Manner of Examination

The child may hold an absolute right to have a parent present during testimony, even if the parent would otherwise be subject to exclusion from the courtroom as a potential future witness.[89] Trial courts otherwise have considerable discretion to regulate the manner in which child witnesses are examined.

For example, courts ordinarily permit young sex abuse victims to be accompanied during testimony by parents, relatives, friends, guardians ad litem, clergy, or other adults. In *State v. Alidani*, for example, the trial court permitted the victim-assistant to sit beside the eight-year-old victim and hold her hand during her testimony.[90] The South Dakota Supreme Court affirmed the conviction because the record showed no indication that the assistant spoke or acted in any way to influence the child's testimony.

The trial court may permit counsel, on direct examination, to ask leading questions of a child sex abuse victim.[91] Despite the trial court's leeway in regulating the child witness' testimony, however, the court commits reversible error where the judge's behavior amounts to vouching for the witness. In *People v. Rogers*, for example, the trial judge committed reversible error by personally escorting the six-year-old sexual abuse victim to and from the witness stand in front of the jury.[92] In *In re J.G.*, however, the trial judge did not commit fundamental error by thanking the six-year-old sex abuse witness for her testimony as she left the witness stand: "You answered the questions just right. Thank you. You can go."[93]

Closing the Courtroom

The Sixth Amendment provides that a criminal defendant "shall enjoy the right to a . public trial."[94] The right is not absolute, however, and courts have long held

88 State v. G.C., 902 A.2d 1174, 1181 (N.J. 2006).

89 *E.g.*, State v Uriarte, 981 P.2d 575 (Ariz. Ct. App. 1999).

90 609 N.W.2d 152 (S.D. 2000).

91 *E.g.*, United States v. Rojas, 520 F.3d 876 (8th Cir. 2008) (10-year-old victim); Bell v. State, 670 S.E.2d 476 (Ga. Ct. App. 2008) (14-year-old victim).

92 800 P.2d 1327 (Colo. Ct. App. 1990).

93 195 S.W.3d 161 (Tex. Ct. App. 2006).

94 U.S. Const. amend. VI.

authority to exclude the public from sexual assault trials, particularly ones involving child victims.[95]

The public also holds a constitutional right to open criminal trials. Where the objection to a closure order comes from the media or other members of the public rather than from the defendant, however, the objection implicates the First Amendment rather than the Sixth Amendment. In *Globe Newspaper Co. v. Superior Court*, the Supreme Court struck down a state statute that mandated exclusion of the press and the general public during testimony of minor victims of specified sexual offenses.[96] *Globe Newspaper Co.* found a compelling state interest in protecting child sex crime victims, but nonetheless held that mandatory exclusion violated the media plaintiffs' First Amendment rights. The Court held that "[i]n individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims."[97] The trial court, however, must determine on a case-by-case basis whether closure is necessary to protect the victim. Among the factors to be weighed are the victim's age, psychological maturity and understanding; the nature of the crime; the victim's desires; and the interests of parents and relatives.[98]

The Child Sexual Abuse Accommodation Syndrome

Through shame or fear, children frequently delay reporting sexual abuse, even to members of their immediate family. Delay invites the defendant to claim that the child fabricated the story or suffers from memory lapse. The Child Abuse Accommodation Syndrome offers explanations about why a sexually abused child would accept the abuse or delay reporting it, behavior some adults might find unusual or even inconceivable.[99] The Syndrome includes five behaviors most commonly observed in child sex abuse victims:

> *Secrecy*. Because much sexual abuse happens only when the child is alone with the offending adult who often threatens her with injury to herself or her family if she discloses, the child gets the impression of danger and fearful outcome.
> *Helplessness*. Because the child is in a subordinate role, totally dependent on the adult, her normal reaction is to "play possum."
> *Entrapment and accommodation*. Because of the child's helplessness, the only healthy option is to survive by accepting the situation.
> *Delayed, conflicted, and unconvincing disclosure*. Most child victims never disclose the sexual abuse, at least not outside the immediate family. Disclosure may occur only after some years have passed and accommodation mechanisms break down.
> *Retraction*. "Whatever a child says about sexual abuse, she is likely to reverse it."[100]

95 Reagan v. United States, 202 F. 488, 490 (9th Cir. 1913).
96 457 U.S. 596 (1982).
97 *Id.* at 611 n.27.
98 *Id.* at 608.
99 *E.g.*, State v. J.Q., 617 A.2d 1196 (N.J. 1993).
100 *Id.* at 1204-05.

When expert testimony is based on interviews with the child, most authorities consider the Syndrome's underlying theory and science valid as diagnostic tools to explain the child's seemingly unusual reactions to sexual abuse. But these authorities also recognize that behaviors characteristic of the Syndrome may also characterize children's reactions to disorders that have nothing to do with sexual abuse, such as poverty or psychological abuse.

Syndrome testimony has divided the courts that have ruled on its admissibility. Most decisions hold that the prosecutor may not use expert testimony concerning the Syndrome in the case-in-chief as substantive evidence that abuse occurred, and that the Syndrome may be introduced only to rehabilitate the child's credibility by explaining his or her coping mechanisms. A few decisions hold Syndrome testimony inadmissible either as substantive evidence or to rehabilitate.[101]

Prospective Restraints on the Offender

Civil Commitment

Prosecutors concerned with forcing the child sexual abuse victim to relive the trauma at trial may decide not to charge the alleged perpetrator, or else may decide to accept a plea bargain. Following a plea bargain, a dangerous defendant may return to the streets considerably sooner than if sentencing had followed trial and conviction. On the other hand, many sex offenders are not recidivists. In an effort to protect future victims while enabling non-dangerous offenders to reintegrate themselves peaceably into the community after serving their sentences, states have enacted civil commitment statutes. These statutes authorize the court, after a hearing, to order commitment or other mandatory treatment of sexual offenders determined to be mentally abnormal and sexually dangerous when their criminal sentences expire.

In *Kansas v. Hendricks*, the Supreme Court upheld that state's Sexually Violent Predator Act, which established procedures for civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," the court finds likely to engage in future "predatory acts of sexual violence."[102] The Act applied to persons presently confined and scheduled for release, persons charged with a "sexually violent offense" but found incompetent to stand trial, and persons found not guilty by reason of insanity or because of a mental disease or defect.

Registration and Community Notification

On July 29, 1994, seven-year-old Megan Kanka was abducted, raped, and murdered by a neighbor who lived across the street from her family in suburban New Jersey. The confessed murderer had enticed the child into his home with a promise to see his new puppy, then strangled her with a belt, covered her head with plastic bags, raped her as she

101 Abrams & Ramsey, *supra* note 21, at 587-88.
102 521 U.S. 346, 350 (1997).

lay unconscious, and left her body in a nearby park. Megan, her parents, local police, and other members of the community were unaware that the murderer had twice been convicted of sex offenses against young girls, and that he shared his house with two other men also previously convicted of sex crimes.

New Jersey responded swiftly to intense public reaction to Megan's murder by enacting the Registration and Community Notification Laws, collectively called "Megan's Law," within three months. The laws (1) required persons who had committed designated crimes involving sexual assault to register their addresses with local law enforcement authorities, and (2) provided for dissemination to the community of information about registrants deemed to pose continuing danger to public safety.

Within a year, most other states enacted their own versions of Megan's Law, plus a variety of related child-protective measures. Many states, for example, prohibit released sex offenders from living near or visiting schools, playgrounds, and other places where children typically gather.[103] Some courts have imposed such prohibitions as conditions of probation or community supervision.[104]

In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which required a state to create a sex offender registration program as a condition for receiving a percentage of federal crime prevention and interdiction funds.[105] The Act mandated registration for ten years of persons convicted of sex crimes against minors or violent sex crimes. The Act permitted, but did not mandate, community notification provisions. When it became apparent that only a few states would mandate notification, Congress amended the Wetterling Act in 1996 to mandate that states also enact community notification provisions as a condition for receiving their full share of federal funds.[106]

The 1996 legislation also established a national sex offender registry, maintained by the Federal Bureau of Investigation.[107] The Adam Walsh Child Protection and Safety Act of 2006 instructs the U.S. Justice Department to maintain an integrated national Internet sex offender registry available to the public and searchable by ZIP Code and provides minimum nationwide federal standards for sex offender registration and notification.[108] A convicted sex offender who fails to register in person with local authorities, provide DNA samples, and then regularly update information commits a federal felony. The 2006 legislation requires states to list all sex offenders and provide their photographs, descriptions, employment, and other specified information. Most states have resisted implementing the national federal registry because of opposition to lifetime registration for juvenile sex offenders, concerns for burdens imposed on existing state criminal codes, and the costs of compliance.[109]

103 *E.g.*, State v. Seering, 701 N.W.2d 655 (Iowa 2005).

104 *E.g.*, Belt v. State, 127 S.W.3d 277 (Tex. Ct. App. 2004).

105 42 U.S.C. § 14071.

106 *Id.* § 14071(d).

107 *Id.* § 14071.

108 P.L. 109–248.

109 Maggie Clark, *States Still Resisting National Sex Offender Law Requirements*, http://www.pewstates.org/projects/stateline/headlines/states-still-resisting-national-sex-offender-law-85899420374 (Oct. 1, 2012).

Where registration or public notification turns on whether the sex offender poses a continuing threat to children or other persons in the community, the offender has a constitutional right to an opportunity for a pre-notification hearing to determine that fact.[110] In *Connecticut Dep't of Public Safety v. Doe*, however, the Supreme Court held that due process does not require a hearing concerning the offender's current dangerousness where the state act bases the registration requirement only on the prior conviction, and not on current dangerousness.[111]

Megan's Laws vary considerably in their application to juvenile perpetrators. Most states permit or require registration by adjudicated juveniles, and a few states specifically exclude juvenile perpetrators. In the states that permit or require juvenile registration, most limit registration to juvenile perpetrators who were above a minimum age at the time of the offense, ranging from seven in Massachusetts to fifteen in South Dakota.[112] Most of these states also impose the possibility of lifetime registration, though some states set a maximum age or time limit after which a court may lift the requirement.[113]

Covered juvenile perpetrators may range from ones who commit forcible rape to B.G., a 12-year-old delinquent adjudicated for reportedly groping his eight-year-old stepbrother while they were in the bathtub.[114] Megan's Laws thus may impose a wholesale "one size fits all" standard designed for predatory adults, an outcome that has caused some courts considerable discomfort.[115]

Child Pornography

New York v. Ferber (1982)

Production and dissemination of child pornography—"depictions of sexual activity involving children"[116]—are forms of child sexual abuse. The seminal Supreme Court decision is *New York v. Ferber*, which upheld the conviction of the owner of an "adult" bookstore who sold an undercover police officer two films devoted almost exclusively to depicting young boys masturbating. The New York statute prohibited persons from knowingly promoting sexual performances of children under sixteen by distributing material that depicted such performances. The statute operated even where the sexual performance was not legally obscene.

Ferber held that child pornography, like obscenity, is unprotected by the First Amendment. The Court acknowledged that the Amendment protects depictions of

110 *E.g.*, Doe v. Poritz, 662 A.2d 367 (N.J. 1995).

111 538 U.S. 1 (2003).

112 Linda A. Szymanski, *Megan's Law: Juvenile Sex Offender Lower Age Limits* (2009 Update), at 1 (Nat'l Center for Juv. Just. 2009).

113 Linda A. Szymanski, *Megan's Law: Termination of Registration Requirement* (2009 Update), at 1 (Nat'l Center for Juv. Just. 2009).

114 In re B.G., 674 A.2d 178 (N.J. Super. Ct. App. Div. 1996).

115 *E.g.*, In re J.R.Z., 648 N.W.2d 241 (Minn. Ct. App. 2002) (upholding statutory requirement that 11-year-old offender register for lifetime, but urging the legislature to "review the prudence of requiring all juveniles adjudicated for criminal sexual conduct to register as predatory sexual offenders").

116 New York v. Ferber, 458 U.S. 747, 753 (1982).

non-obscene sexual activity between adults, but granted states "greater leeway" in regulating child pornography because of its effect on the child performers themselves, without regard for its effect on viewers.[117]

Ferber concluded (1) that "the exploitative use of children in the production of pornography has become a serious national problem,"[118] (2) that states have a compelling interest in "safeguarding the physical and psychological well-being of a minor"[119] and in "[t]he prevention of sexual exploitation and abuse of children,"[120] and (3) that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child"[121] because "the materials produced are a permanent record of the children's participation."[122]

Ferber *in the Computer Age*

Ferber, decided before the age of computer-generated images, defined child pornography to concern "the exploitative use of children."[123] The decision removed child pornography from First Amendment protection because of its present and future harmful effects on actual child performers, without discussing any effect that child pornography might have on viewers. Without deciding the question, *Ferber* said in passing that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[124]

By the last decade of the twentieth century, "virtual" child pornography had become a pressing issue. Computers can now manipulate, or "morph," an innocent picture of an actual child to create a picture showing the child engaged in sexual activity. An obscene or non-obscene picture of an adult can be transformed into the image of a nonexistent child. Computer graphics can even generate the realistic image of a nonexistent child.

In the Child Pornography Prevention Act of 1996, Congress responded to technological advances by criminalizing non-obscene virtual child pornography.[125] The lawmakers based the Act squarely on virtual child pornography's effect on viewers. The lawmakers found that pedophiles might use virtual images to encourage children to participate in sexual activity, and that pedophiles might also whet their own sexual appetites with the pornographic images. Congress also found that the existence of computer-generated images can complicate prosecutions of pornographers who do use real children by making it more difficult to prove that a particular picture was produced using actual children.

117 *Id.* at 756.
118 *Id.* at 749.
119 *Id.* at 756-57 (citation omitted).
120 *Id.* at 757.
121 *Id.* at 758.
122 *Id.* at 759.
123 *Id.* at 749.
124 *Id.* at 764-65.
125 18 U.S.C. § 2256.

In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down provisions of the 1996 Act relating to materials that appear to depict minors but are produced without using real children.[126] The plaintiffs did not challenge the provision criminalizing morphing, which (like the materials at issue in *Ferber*) implicates the interests of real children. *Ashcroft* also left undisturbed the provision criminalizing child pornography using actual children, *Ferber's* target. But *Ashcroft* held that the provisions relating to nonexistent children violated the First Amendment for prohibiting speech that "records no crime and creates no victims by its production."[127] The Court found any causal link between virtual images and actual incidents of child abuse only "contingent and indirect."[128]

Ashcroft's conferral of First Amendment protection carried substantial risks as virtual child pornography became more brutal, more graphic, and more available on the Internet than ever before. The greater availability threatened children's safety because, according to one former FBI agent, "All virtual porn does is satisfy [pedophiles] until they can find their next victim. It feeds their addiction."[129] Most important, *Ashcroft* indeed seriously impeded child pornography prosecutions because, as Congress predicted in the 1996 legislation, "[t]he emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children."[130]

With the genuine prospect that child pornography prosecutions would grind to a halt, the Court strengthened prosecutors' hands in 2008. In *United States v. Williams*, the Court upheld the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003.[131] The Act's "pandering and solicitation" provision prohibits advertisement, distribution, and solicitation of child pornography where the speaker believes, or intends the listener to believe, that the subject of the proposed transaction depicts real children. The prohibition applies even where the materials do not exist or do not portray actual children. By holding that "offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment,"[132] *Williams* permits effective regulation of transactions in the underlying materials without regard to their content.

Child Nudity

Ferber concerned a statute that prohibited distribution of photographs and films depicting "sexual activity" by juveniles. In recent years, a number of commercial photographers have used nude and partially nude children in photo essays displayed in public exhibitions or published in books.

126 535 U.S. 234 (2002).

127 *Id.* at 250.

128 *Id.*

129 Chris Francescani & Christel Kucharz, *Virtual Child Porn Riles Law Enforcement*, http://abcnews.go.com/print?id=3159871 (May 10, 2007).

130 United States v. Williams, 553 U.S. 285 (2008).

131 Id.; 117 Stat. 650.

132 *Williams*, 553 U.S. at 299.

The Supreme Court has not decided whether photographs and films of nude or partially nude children, without sexual activity, constitute punishable child pornography or First Amendment-protected expression. In a footnote, *Ferber* stated that "nudity, without more is protected expression," but the Court was not reviewing a statute that presented the nudity issue.[133] In the absence of Supreme Court resolution, most lower courts have regarded photographs and films of nude children, without more, as First Amendment-protected expression, but have upheld convictions under statutes that prohibit such depictions made for sexual gratification. As thus limited, the depictions become child pornography proscribable under *Ferber*.

Private Possession and Viewing of Child Pornography

In *Osborne v. Ohio*, the Court upheld a statute that prohibited private possession and viewing of non-obscene child pornography (including private possession and viewing in one's own home), even without proof that the possessor intended to distribute the material.[134] The Court found that because "much of the child pornography market has been driven underground" since *Ferber*, "it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution."[135]

Federal Legislation

Neither Congress nor the states legislated against child pornography until the 1970s. Based on findings that the "highly organized, multi-million dollar" underground child pornography industry was interstate and international in scope,[136] the Protection of Children Against Sexual Exploitation Act of 1977 added two substantive sections to the federal criminal code. The first section, now 18 U.S.C. § 2251, prohibits the use of children in "sexually explicit" productions, and prohibits parents and guardians from allowing such use of their children. The second section, now 18 U.S.C. § 2252, makes it a federal crime to transport, ship or receive in interstate commerce for the purpose of selling, any "obscene visual or print medium" if its production involved the use of a minor engaging in sexually explicit conduct.

Because the 1977 Act required proof that the materials were obscene and that the defendant had a profit motive, the Act yielded only a handful of prosecutions in its first five years of operation. Relying on *Ferber*, the Child Protection Act of 1984 prohibited distribution of non-obscene material depicting sexual activity by children and eliminated the "pecuniary profit" element. The 1984 Act also legislated against possession by criminalizing the receipt in interstate or foreign commerce of materials showing minors engaged in sexually explicit conduct.

Congressional legislation has continued. In 1986, for example, the lawmakers prohibited production and use of advertisements for child pornography and created a

133 *Ferber*, 458 U.S. at 765 n.10.
134 495 U.S. 103 (1990).
135 *Id.* at 110.
136 S. Rep. 95–438 (1977).

private civil remedy in favor of persons who suffer personal injury resulting from the production of child pornography.[137] The Child Pornography Prevention Act of 1996 is discussed above ("*Ferber* in the Computer Age").

"Sexting"

Growing numbers of teens are taking nude, semi-nude, or other sexually explicit photos of themselves and then sending the photos to friends electronically. About 20% of teens acknowledge participating in this so-called "sexting." Most of the participating teens (69%) send the photos to their boyfriends or girlfriends, or someone they would like to date (30%).[138] Once sent, the photos may be distributed widely by cell phones, the Internet, and other electronic means.

Some prosecutors have moved against sexting under laws criminalizing production, distribution, or possession of child pornography. A delinquency adjudication or criminal conviction arising from sexting might obligate a teen to register as a sex offender, perhaps for life. When a 14-year-old girl was arrested for posting nude photos of herself online, however, Maureen Kanka (the mother of Megan, whose 1994 murder spurred registration and notification statutes) said that "This shouldn't fall under Megan's Law in any way, shape or form. She should have an intervention and counseling, because the only person she exploited was herself."[139]

137 18 U.S.C. §§ 2251(c), 2255.

138 *Sex and Tech: Results from a Survey of Teens and Young Adults* (June 20, 2009).

139 Assoc. Press, *Girl Posts Nude Pics. Is Charged With Kid Porn* (Mar. 27, 2009), http://www.msnbc.msn.com/id/29912729/ (May 3, 2010).