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CHILD SEXUAL ABUSE IN INDIAN COUNTRY

A RESOURCE MANUAL FOR TRIBAL AND FEDERAL JUDGES

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TABLE OF CONTENTS:

CHILD ABUSE, CHILD SEXUAL ABUSE, AND CHILD NEGLECT CASE STATISTICAL REPORT

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National Statistics—Federal Level

The case statistics were collected as part of a federal level child abuse and neglect (CA/CN) mail survey administered to Indian Health Service (IHS) service unit directors and Bureau of Indian Affairs (BIA) agency superintendents nationwide. The IHS and BIA combined response rate for the mail questionnaire was 86.5% (IHS = 94%, BIA = 79%). There are several possible reasons for non-response: 1) The type of services an agency provides varies greatly. Agencies that did not respond and could not be contacted through follow-up activities, may have felt unable to respond if they do not provide CA/CN related services. Those who indicated they were not federally run or did not provide direct services were eliminated. 2) Some agencies refused to complete the survey noting personnel and time constraints in completing the survey. 3) CA/CN is a sensitive issue and intervention activities are under intense tribal scrutiny in some locations. Some employees felt their jobs would be threatened and thus declined to respond. 4) There was also an indication of denial from several who refused to participate because "these problems do not exist in my community." Despite the lower than expected response rate, the returns provided numbers large enough to make some statements about CA/CN in Indian communities and the role of the IHS in addressing this issue. Of all the responding agencies, a total of 37 agencies were able to return some or all of the information requested for our analysis of case statistics.

Sample sizes for individual questions varied, as some responding organizations did not collect or have access to certain types of data included on the questionnaire. However, the minimum sample size exceeded 900 incidents, so all of the analyses had sufficient power to detect small differences in the variables tested. Analyses were conducted to determine frequencies and to test associations between variables. The smallest unit of analysis in this data set is a reported incident, of which there was a total of 2037 during calendar years 1989 and 1990. These 2037 incidents involved 1800 child victims, some of whom were the victims of two or more abuse incidents in any given year. Unless otherwise indicated, columns headed "number" refer to numbers of reported incidents rather than numbers of children.

Geographic Location

The data were collected from 10 of the 12 IHS national Service Areas and 17 states within those areas. As indicated in Table 2a, the Navajo, Aberdeen, Albuquerque, and Oklahoma Service Areas had the most reported incidents during the two years surveyed.

Table 2a. Reports of child abuse and neglect incidents, by Area

Service area	number	percent
Albuquerque	305	15.0%
Navajo	501	24.6%
Portland	155	7.6%
Aberdeen	332	16.3%
Phoenix	144	7.1%
Bemidji	73	3.6%
Nashville	61	3.0%
Alaska	49	2.4%
Oklahoma	263	13.0%
Billings	152	7.5%

When examined by state (Table 2b), New Mexico, Arizona, and North Dakota reported the most incidents. However, it is important to emphasize that, due to the varying populations of American Indian and Alaska Natives in responding areas, combined with the low response rate, it is not possible to compare

rates of child abuse and neglect between various geographic areas. Such analyses require population-based data, which are not available to us at this time.

Table 2b. Reports of child abuse and neglect incidents, by state

State	number	percent	State	number	percent
New Mexico	513	25.2%	Oregon	87	4.3%
North Dakota	215	10.6%	Utah	144	7.1%
Michigan	24	1.2%	New York	52	2.6%
Alaska	49	2.4%	Wisconsin	45	2.2%
Arizona	293	14.4%	Oklahoma	129	6.3%
Idaho	68	3.3%	South Dakota	103	5.1%
Louisiana	9	.4%	Minnesota	4	.2%
Kansas	134	6.6%	Nebraska	14	.7%
Montana	152	7.5%			

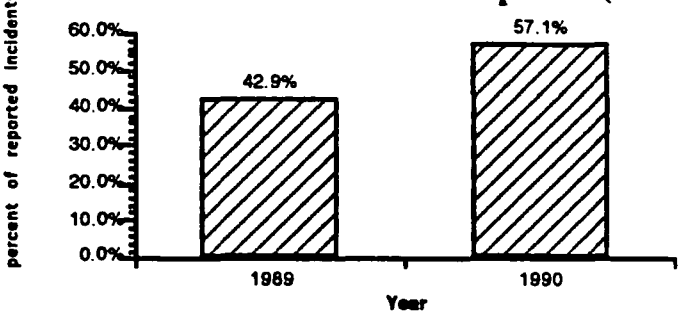
Agency

Of the incidents included in our data set, 57.5% were from BIA agencies and 42.5% were from IHS service providers. Such information needs to be interpreted cautiously, because of the different roles of IHS and BIA agencies in cases of child maltreatment. Further, direct comparison of reported incidents by the two agencies is complicated by the differences in absolute numbers of potential responding organizations as well as different response rates for our mailed surveys. A more useful approach is to examine the relative proportion of incidents of physical abuse, sexual abuse, and neglect reported by IHS and BIA respondents.

Year

Approximately half (54.0%) of the case reports included information concerning the year in which the incident occurred, either 1989 or 1990 (Figure 1). Of those, over half (57.1%) were 1990 cases, suggesting an increase in reported cases over time. However, the large proportion of cases missing this information combined with the low response rate make such an interpretation tentative at best. The apparent increase may be the result of an increase in incidents of maltreatment, but it may also result from improved recognition and reporting of such incidences. Current research suggests that while the incidence of child abuse may be on the rise, training and improved data management systems have contributed to an increase in agencies' ability to detect, diagnose, report, and track cases of child maltreatment.

Figure 1. Year in Which Incident Was Reported (n=1101)

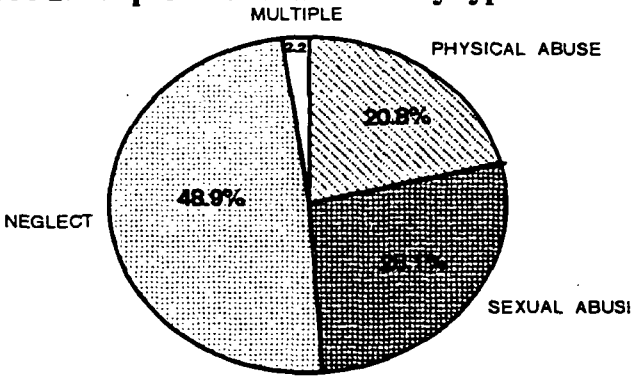


Abuse Type

As indicated by Figure 2, the greatest proportion of reported cases were of neglect (48.9%). Sexual abuse (28.1%) and physical abuse (20.8%) cases comprised most of the remainder of the reports. A few (2.3%) cases involved more than one type of abuse, e.g. physical abuse and neglect, in the same report.

Data collection formats within many agencies provide for only one type of abuse per incident report, and there were some questions initially regarding the few reports of multiple abuse type incidences. In addressing these questions it is felt that while multiplicity may be under-recorded, it is not as frequent as originally suspected. This may imply different motivations and different circumstances surrounding different types of maltreatment and warrants further study.

Figure 2. Proportion of incidents by type of abuse



IHS respondents reported higher proportions of physical abuse (23.2%) than BIA respondents (19.8%), though these differences were not statistically significant (Table 3). However, IHS incidents involved a significantly higher proportion of sexual abuse than BIA incidents (IHS = 31.5%; BIA = 26.7%), while BIA respondents reported relatively more incidents of neglect (BIA = 53.5%; IHS = 45.3%; $\chi^2 = 13.1$; $p < .002$). These inter-agency differences clearly have implications regarding the types of services provided by each agency to child victims of abuse and neglect.

Table 3. Proportions of physical abuse, sexual abuse, and neglect incidents, by Agency (n = 1975)

Abuse type	IHS	BIA
Physical abuse	23.2%	19.8%
Sexual abuse	31.5%	26.7%
Neglect	45.3%	53.5%

As noted earlier, the number of incidents reported varies considerably between states and service units. Thus, the total number of incident reports for that area biases the contribution of each area to the total sample of incidents reported. So, it is not surprising that the Navajo Service Area reported the greatest number of incidents of physical abuse and of neglect, and that the Aberdeen Service Area reported the greatest number of incidents of sexual abuse. These two service areas submitted over 40% of the reported incidents in our data set. An χ^2 analysis of the association between location and abuse type allows a more critical evaluation of the relative proportions of physical abuse, sexual abuse, and neglect in each service area.

As indicated in Table 4, the Phoenix Service Area was the only to have significantly higher proportion of incidents of physical abuse than expected; the Aberdeen, Nashville, and Oklahoma service areas all had significantly fewer incidents than expected. Sexual abuse was higher than expected in the Portland, Aberdeen, and Phoenix Service Areas, and lower than expected in the Albuquerque, Bemidji, and Nashville Service areas. Finally, there were more incidents of neglect than expected in the Bemidji, Nashville, and Oklahoma service areas, and a lower than expected proportion in the Portland and Phoenix Service Areas.

Table 4. Proportions of physical abuse, sexual abuse, and neglect incidents, by Service Area (n = 1973)

Abuse type	Higher than Expected	Lower than Expected
Physical abuse **Average = 21.2%**	Phoenix (36.6%)	Aberdeen (9.1%) Nashville (8.5%) Oklahoma (16.0%)
Sexual abuse **Average = 28.7%**	Portland (40.4%) Aberdeen (44.1%) Phoenix (40.1%)	Albuquerque (21.2%) Bemidji (9.0%) Nashville (8.5%)
Neglect **Average = 50.1%**	Bemidji (68.7%) Nashville (83.0%) Oklahoma (67.2%)	Portland (31.4%) Phoenix (23.2%)

Number of Incidents

Respondents were asked to indicate whether each report represented the first incident for a child, or whether it represented one of multiple incidents associated with the same victim in a given year. Surprisingly, this was the most frequently misunderstood question of any included in the questionnaire. Several respondents included more than one incident for the "same victim," when in fact the cases included victims of more than one age, sex, etc. Also, it should be noted that the incident number refers only to a particular year, and the same children may have been victims in reports of previous years not included in our survey.

With these qualifications in mind, analysis of the incident field showed the following (Table 5). For the years 1989 and 1990, there were, as far as could be determined from the data, 1800 child victims of at least one incident of neglect, physical abuse, or sexual abuse. Of these, 1626 (90.3%) victims had one report only, 127 (7.0%) had two reports, 37 (2.0%) had three reported incidents, 7 (.4%) had four, and three (.2%) were the victims of five or more reported incidents.

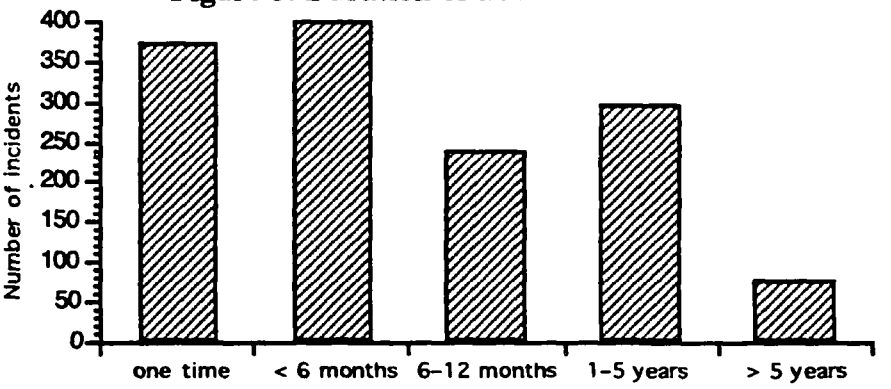
Table 5. Number of incidents reported for each child victim in any one year (n = 2037)

Number of Incidents	number of cases	percent
One incident only	1626	90.3%
Two incidents	127	7.0%
Three incidents	37	2.0%
Four or more incidents	10	.7%
Total	**1800**	**100.0%**

Duration

The duration of abuse for reported cases was fairly evenly distributed among the given options (Figure 3), i.e.: one time only (27.1%), duration of less than 6 months (28.8%), 6–12 months (17.2%), and 1–5 years (21.4%); few reported cases (5.6%) exceeded five years in duration. It is noteworthy that victim age is not uniformly distributed (as will be discussed below), and is instead skewed toward younger ages, particularly ages <5 years old. Thus, for a substantial proportion of the sample (≈ 40%), duration of abuse exceeding five years would not be possible (as they are not yet five years old).

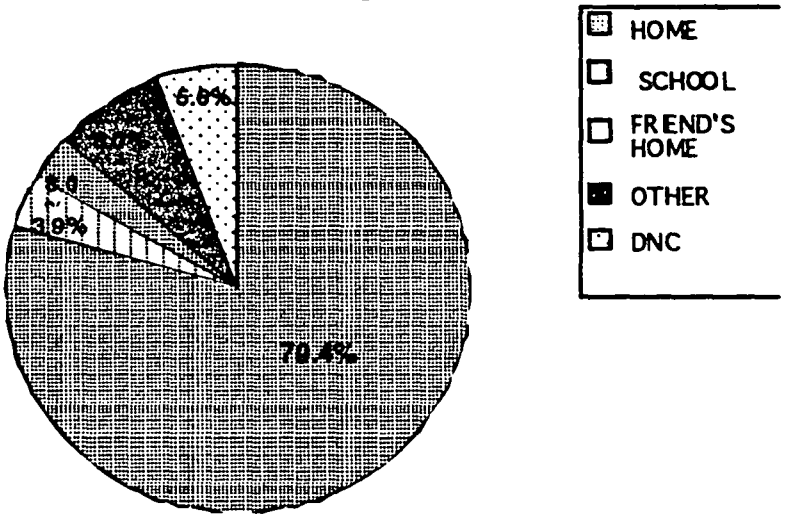
Figure 3. Duration of abuse



Location

By far the greatest proportion of reported cases (79.4%) occurred in the victims' homes (Figure 4). Less frequently, incidents of abuse and neglect occurred at school (3.9%), a friend's home (3.0%), or other locations (8.0%). This type of data was not collected by 5.6% of respondents.

Figure 4. Location at Which Reported Incident Occurred

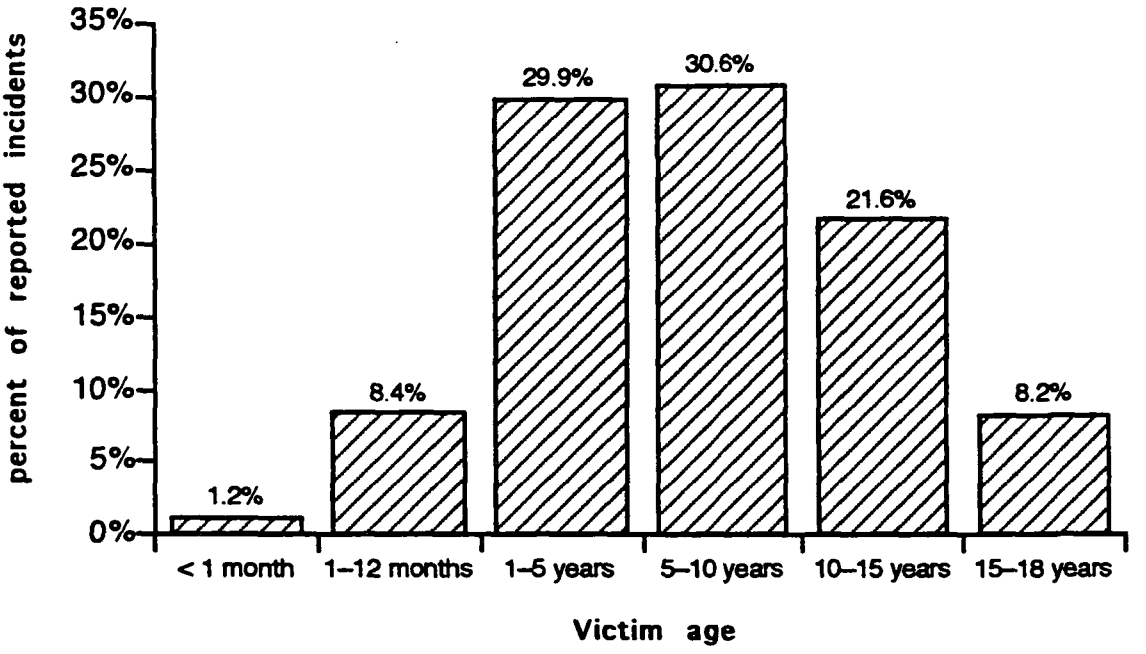


Victim Age

Within the given age ranges, the reported victim ages appear to be approximately normally distributed (Figure 5), with the mode at 5–10 years (30.6% of cases). When examined more closely, it is clear that a disproportionate number of victims are under one year old (9.6% vs. 5.6% if the distribution was uniform), with a particular concentration of victims under one month old (1.2% vs. .46% if distribution was uniform). When victim age is examined by type of abuse, it is clear that sexual abuse victims were older than victims of neglect or physical abuse were. Sexual abuse generally increases as a proportion of total cases with increasing victim age, and is most common in the 10–15 year victim age category, comprising over 40% of

incidents in that age range (41.6%). Conversely, neglect was most common in the youngest victim age group, and decreased as a proportion of total incidents with increasing victim age; over 80% (82.6%) of incidents with victims < 1 month old reported neglect, contrasted with 32.3% of incidents with victims aged 10–15 years. Physical abuse varied little with victim age, consistently accounting for 17–26% of cases in all victim age groups.

Figure 5. Distribution of Victim Ages for all Reported Incidents



Victim Sex

Table 6 shows the proportion of male and female victims in all reports, by abuse type. As indicated in this table, over half (57.1%) of victims were female. Male and female victims were approximately equally represented in cases of physical abuse (52.8% male) and neglect (51.1% male), while sexual abuse cases had primarily female victims (79.8%). These differences were statistically significant ($\chi^2 = 162$; $p < .0001$).

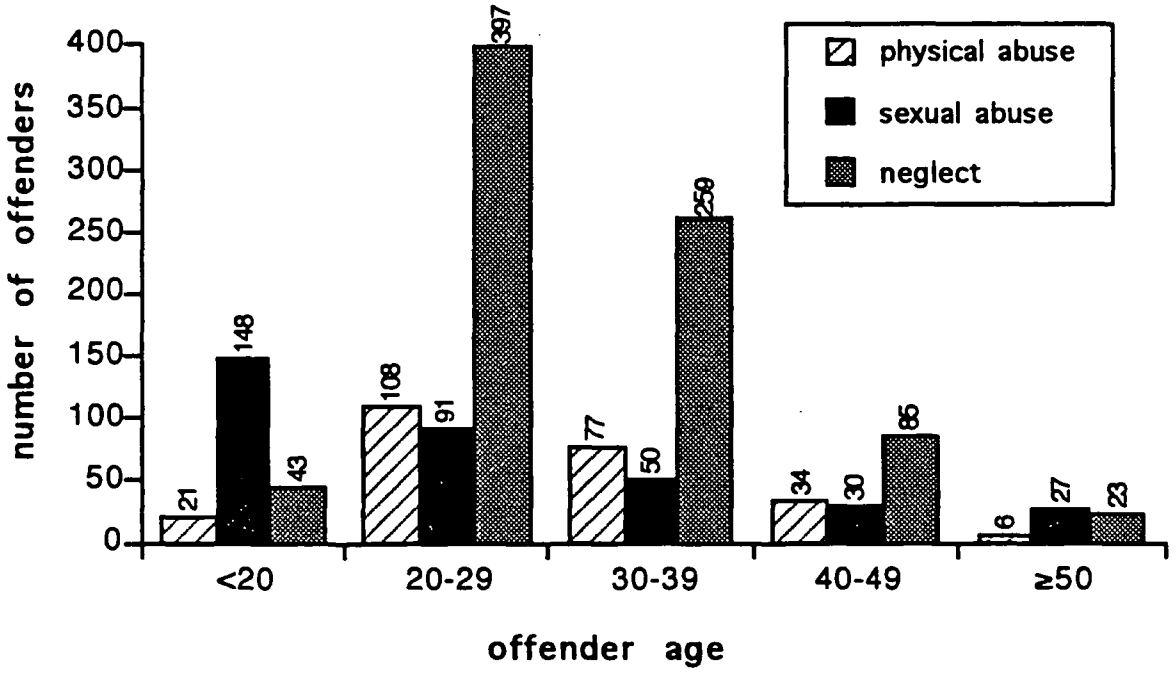
Table 6. Proportion of male and female victims in all reports and by abuse type (n = 2022)

	Victim sex			
	Male		Female	
	number	percent	number	percent
Total	867	42.9%	1155	57.1%
Physical abuse	220	52.8%	197	47.2%
Sexual abuse	114	20.2%	450	79.8%
Neglect	502	51.1%	481	48.9%

Offender Age

The greatest proportion of offenders fell into two age categories: 20–29 (42.5% of cases) and 30–39 (37.7%). When examined by abuse type, physical abuse cases were fairly evenly distributed over all age groups (Figure 6). Offenders in sexual abuse cases were significantly more likely to be younger (<20) or older (>50) than average, while offenders in neglect cases were more likely to be in age categories 20–30 and 30–40 years old. These differences are statistically significant ($\chi^2 = 352$; $p < .0001$).

Figure 6. Offender Age by Abuse Type



Offender Sex

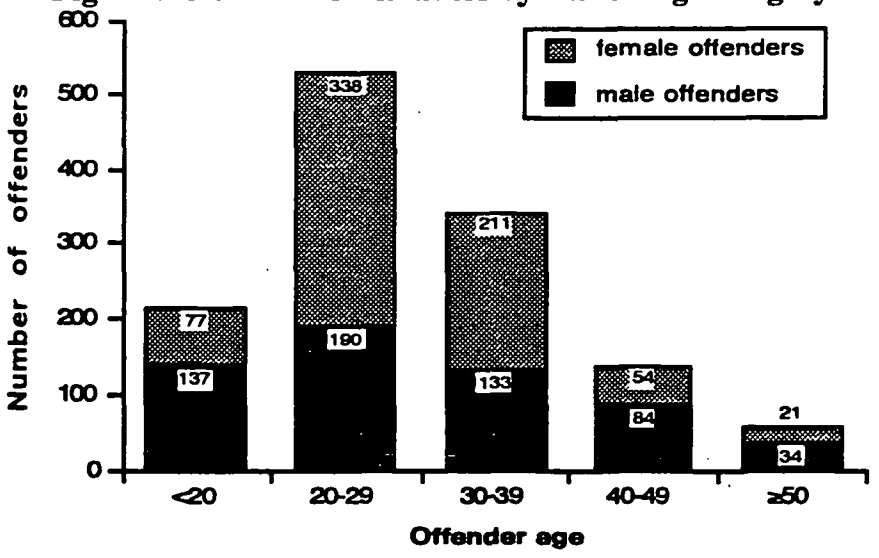
While it appeared that offenders were approximately equally likely to be male or female (48.9% male, 51.1% female), a sex bias was evident when cases were further distinguished by type of abuse (Table 7). Offenders were significantly more likely to be male in cases of sexual abuse (90.2% male) and physical abuse (59.3% male), and most often female (74.7% female) in cases of neglect ($\chi^2 = 566$; $p < .0001$).

Table 7. Proportion of male and female offenders in all reports and by abuse type (n = 1553)

	Offender sex			
	Male		Female	
	number	percent	number	percent
Total all	757	48.9%	796	51.1%
Physical abuse	191	60.4%	125	39.6%
Sexual abuse	390	90.3%	42	9.7%
Neglect	150	20.2%	613	79.8%

As indicated by Figure 7, male offenders were over-represented in both the youngest (< 20 years old) and oldest (> 40 years old) age groups, while the interim categories had significantly more female than male offenders did ($\chi^2 = 82.0$; $p < .0001$).

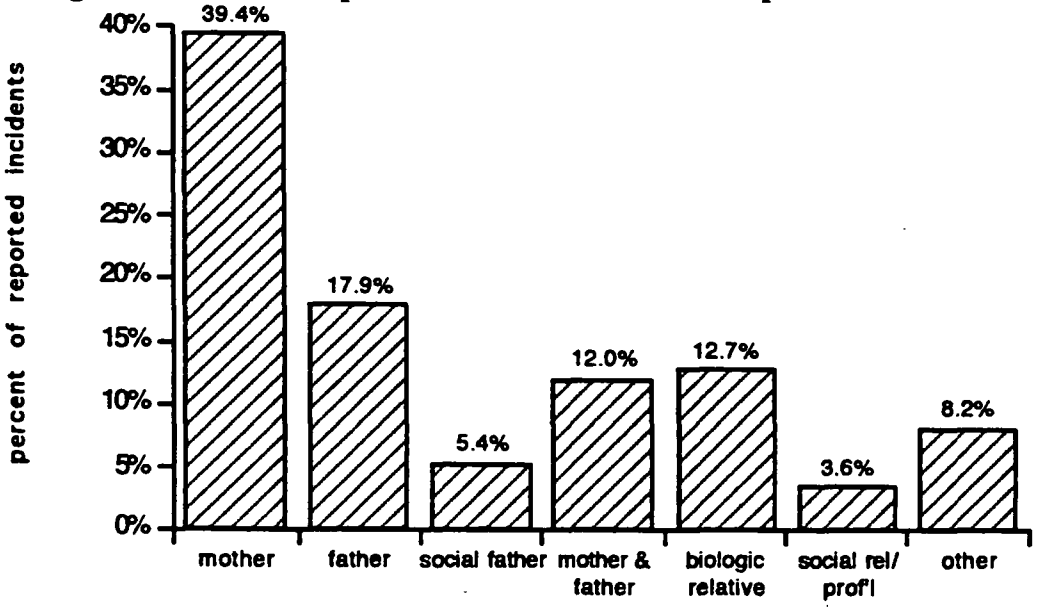
Figure 7. Number of Offenders by sex and age category



Victim-Offender Relationship

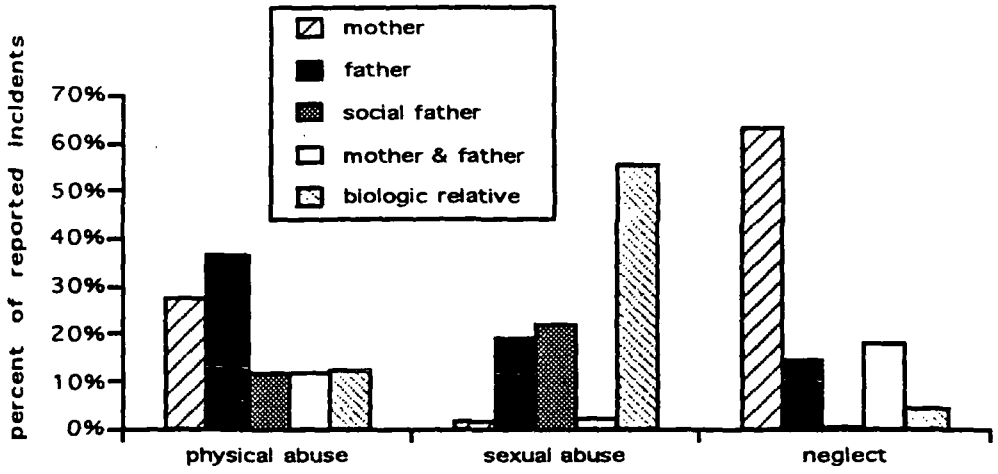
The most frequently reported offenders in our data set (Figure 8) were victims' mothers (39.4%), fathers (17.8%), mothers and fathers together (12.0%), and other biological relatives (12.7%). Stepfathers, mothers' boyfriends, and other "social fathers" comprised a small percentage of the total (5.4%).

Figure 8. Relationship of Offender to Victim in Reported Incidents



When examined by specific type of abuse (Figure 9), significant differences exist in associations between various offender categories and the three abuse types ($\chi^2 = 791$; $p < 0001$).

Figure 9. Relationship between Offender and Victim, by Abuse Type



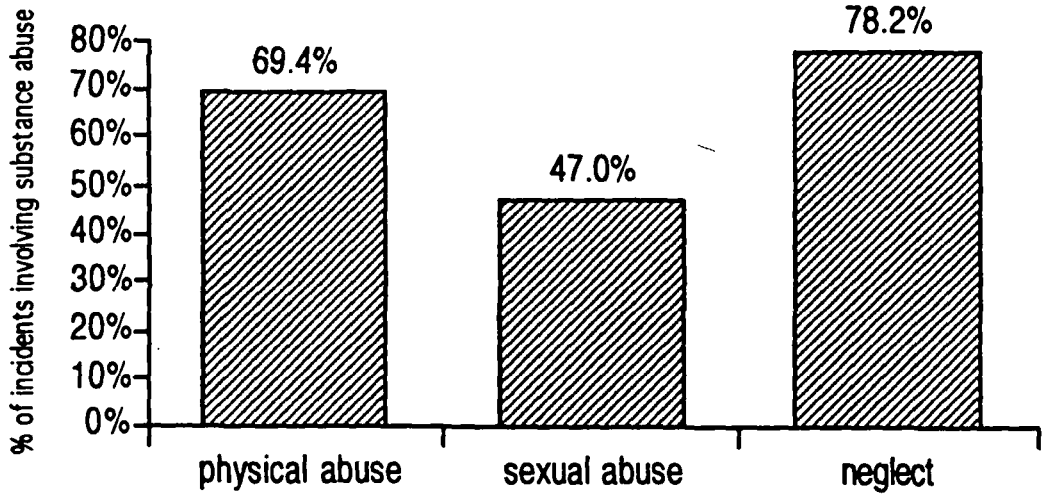
Mothers were the primary perpetrators in cases of neglect (62.9% of neglect cases). Fathers were the primary offenders in cases of physical abuse (36.3% of cases). Stepfathers and other social fathers were over-represented in cases of both physical (11.8%) and sexual abuse (22.0%), and other biological relatives were the primary perpetrators of sexual abuse (55.3% of cases).

Substance Abuse

Substance abuse was a factor in nearly three-quarters (70.3%) of cases in which such data were collected (Figure 10). The prevalence of substance abuse varied with offender sex, offender relationship to victim, offender age, and type of abuse.

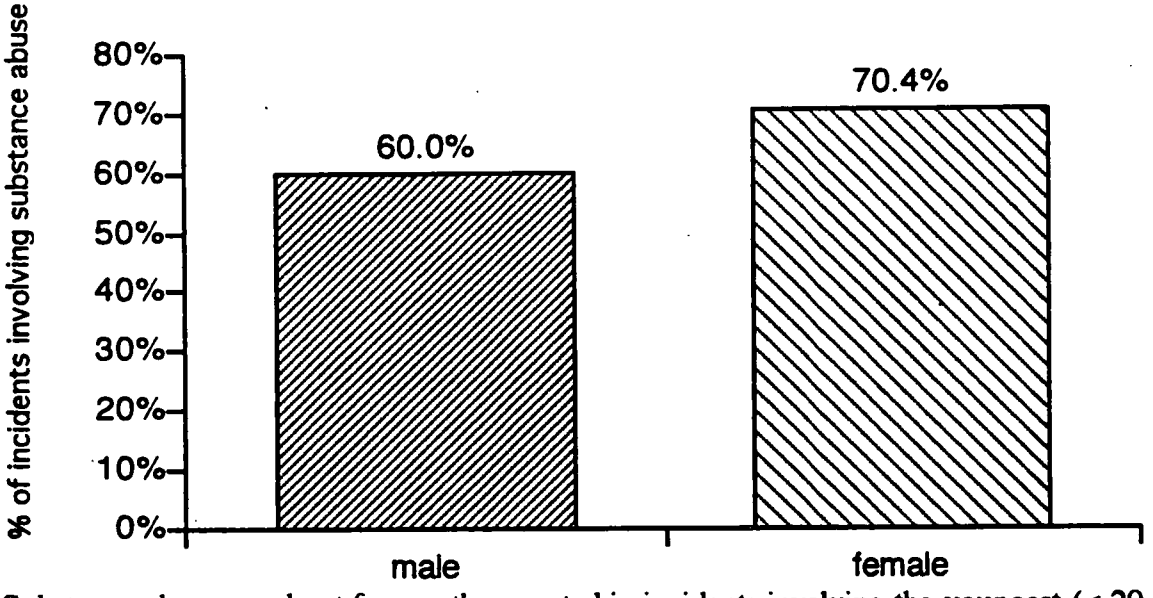
The association of substance abuse and abuse type was examined. Analyses showed that incidents of sexual abuse were significantly less likely to be associated with substance abuse (47.0%) than either incidents of physical abuse (69.4%) or neglect (78.2%).

Figure 10. Percent of incidents involving substance abuse by abuse type



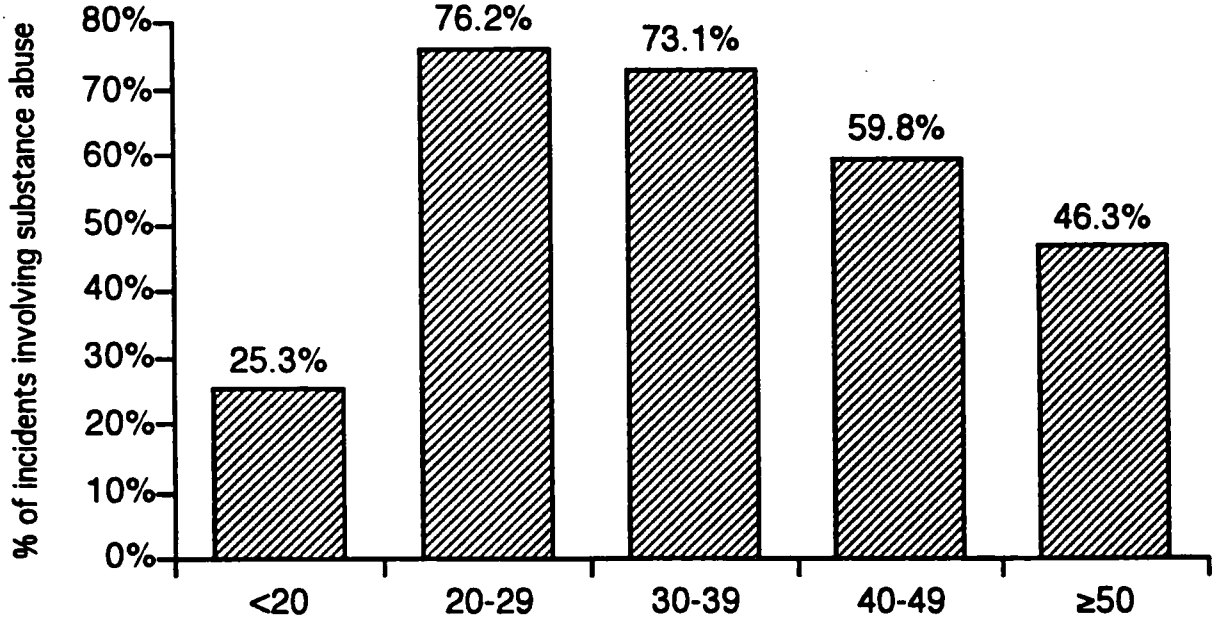
When substance abuse was examined within each offender sex (Figure 11), significant differences became apparent. Incidents with male offenders were less likely to involve substance abuse (60% of incidents) than incidents with female offenders (70.4% of incidents; $\chi^2 = 13.8$; $p < .0002$).

Figure 11. Percent of Incidents involving substance abuse, by offender sex



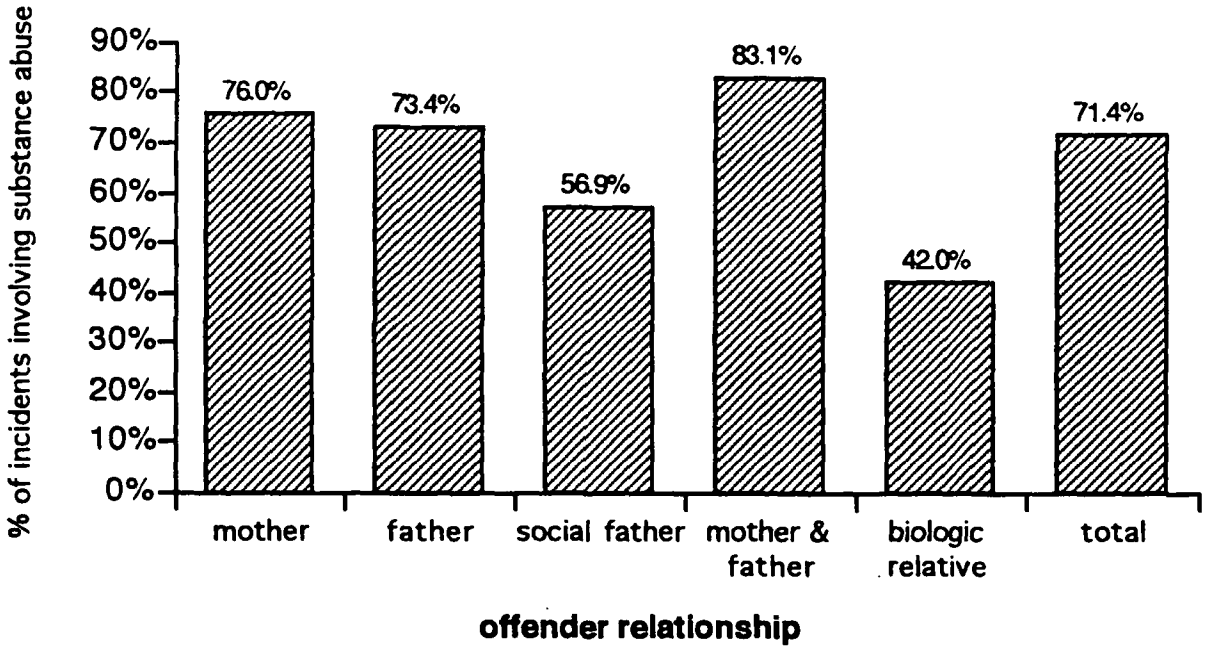
Substance abuse was least frequently reported in incidents involving the youngest (< 20 years old) and oldest (> 40 years old) offenders (Figure 12). In the interim age categories, ages 20–40, substance abuse was a factor in approximately three-quarters of reported incidents. The differences in substance use among different age groups were statistically significant ($\chi^2 = 171$; $p < .0001$).

Figure 12. Percent of incidents involving substance abuse, by offender age



When examined by offender relationship (Figure 13), incidents with offenders who were mothers or fathers were approximately equally likely to involve substance abuse (76.0% and 73.4%, respectively).

Figure 13. Percent of Incidents Involving Substance Abuse, by Offender Relationship



Cases in which both parents were involved had the highest proportion of substance abuse (83.1%). Other offenders had lower rates of substance abuse; approximately half of cases involving social fathers (56.9%) or other biologic relatives (42.0%) included substance abuse as a factor in the incidents (χ^2 = 87.5; $p < .0001$).

Few multivariate statistics were used in the analyses of the case statistics due to the categorical nature of the data. The one exception was an analysis of the association between substance abuse and duration of abuse, controlling for victim age, offender age, abuse type, and offender relationship (Figure 14). To utilize multiple regression, a dummy variable was substituted for the dichotomous substance abuse variable. The resulting multiple regression indicated that substance abuse was positively correlated to the duration of abuse; this relationship persisted when victim age, offender age, abuse type, and offender relationship were controlled ($\beta = .2$; $p < .0001$).

Figure 14. Substance abuse as a predictor of abuse duration in incidents of abuse and neglect (n = 970)

Control variable	Regression statistics
victim age	$\beta = .20$
offender age	$r^2 = .084$
victim-offender relationship	$p < .0001$

The substance abuse variable, however, explained only 4% of the variance in duration of abuse, and the addition of the other four controlling variables increased this to only 8%. Thus, many other factors influence the duration of abuse observed in this sample.

It should be emphasized that the association between substance abuse and duration of abuse is not necessarily causal; a plausible explanation would be that certain environmental factors (e.g. family history, unemployment, and lack of family support) might influence duration of abuse and substance abuse.

Unfortunately, information such as this was not available for offenders in this data set. However, such associations may suggest the type of information, which would be usefully included in child abuse and neglect records collected in the future.

CHILD SEXUAL ABUSE

This research illuminated the misconceptions and misinformation associated with the issue of child sexual abuse (CSA), partly the result of the dearth of information available on this topic. While this research cannot provide a detailed report on the issues for victims, offenders, families, and service providers, it can serve to clarify the primary issues and provide a base of information. Child sexual abuse is included in the range of child maltreatment issues discussed above, but the dynamics involved in sexual abuse warrant a separate analysis and a specialized focus for prevention and intervention. The data collection facilitated the development of a profile of sexual abuse cases within the context of Indian child maltreatment. By understanding specific risk factors and possible outcomes, appropriate and effective prevention and intervention can be developed. The following sections are included to provide detailed information about the extent of CSA in Indian communities, and an overview of some of the current perspectives on definition and treatment issues.

Definitions of sexual abuse

Sexual abuse is defined as the exploitation of a child for the sexual gratification of an adult, and includes non-contact, manipulative contact, and forced aggressive contact. Non-contact sexual abuse does not involve touching and may include calls, sexual jokes, propositions, and in showing pornography. Manipulative contact involves touching which appears non-hostile and has been psychologically rather than forcefully imposed. It may include unwanted hugs, kisses, and pinching, tickling, photographs, handling genitals, masturbation, oral genital contact. Forced aggressive contact is sexual activity that is forced, and it may include: rape; oral, vaginal, or anal sexual contact; sexual bondage; or maiming. The memory of victimization compounds the trauma and can be manifested verbally and/or physiologically. Depending on when the abuse occurred, it might be possible to treat memories of sexual abuse through physical therapy, role playing, and in other forms of therapy. It is also critical that service providers be aware that children who have been victimized are more likely to be victimized again and/or re-abused.

Rates and Reporting Trends

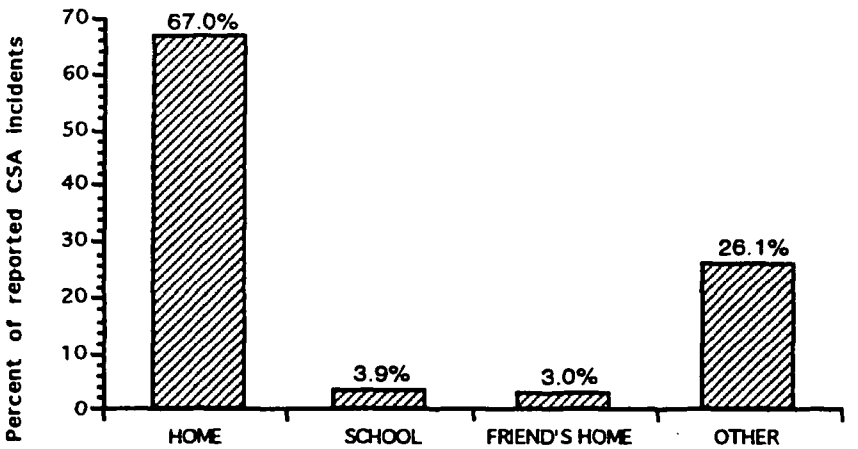
The national data indicate that child sexual abuse represents a significant proportion (28.1%) of child maltreatment cases in Indian country, and the number of reported cases is increasing. While rates appear to vary considerably, CSA is an issue in every community. Some of the differences in rates may be due to reporting, the availability and input of other agencies, denial, or the epidemic nature of CSA in some communities.

A greater percentage of IHS cases are CSA, probably due to the medical implications of cases. In some locations tribal agencies are equipped to deal with CSA cases, but often they do so without the assistance and collaboration of federal agencies. The lack of interagency communication and coordination of services may hinder service provision, and serve to obstruct the acquisition of sufficient statistical information for program expansion and development.

Location

By far the greatest proportion of reported cases (67%) occurred in the victims' homes (Figure 15). Less frequently, incidents of CSA occurred at school (3.9%), a friend's home (3.0%), or other locations (26.1%). Sexual abuse was more frequent than physical abuse or neglect among incidents occurring at friends' homes, with sexual abuse comprising 78.2% of those incidents. Additionally, sexual abuse incidents were more likely than physical abuse or neglect to occur at "other" locations such as relatives' homes, public buildings, vehicles, out of doors, etc.

Figure 15. Location at which reported CSA incident occurred

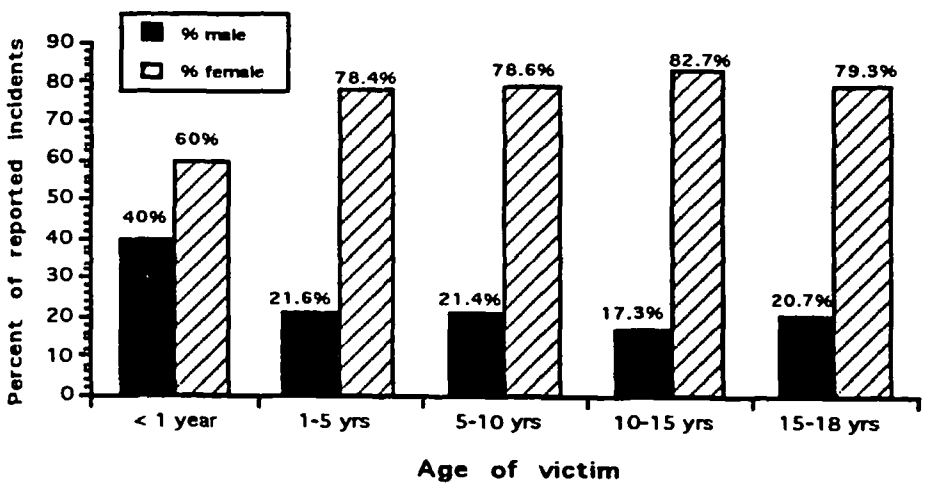


Victim Profile

More than three fourths (79.8%) of the sexual abuse victims in this sample were female. It should be noted that there is some controversy over the preponderance of females in sexual abuse reports. Some clinicians suggest that male victims may be as frequent as female victims, but that boys and their families may be far less likely to report sexual abuse and/or seek help. It is of importance to note that in the very youngest age category there is more equity in victim sex (40% male, 60% female).

In general, sexual abuse victims were older than victims of neglect or physical abuse. Sexual abuse generally increases as a proportion of total cases with increasing victim age, and is most common in the 10–15 year victim age category, comprising over 40% of incidents in that age range (41.6%). Although CSA victims are generally older than other abuse victims, CSA is not confined to adolescence (Figure 16). In this sample 58.79% of CSA victims were pre-adolescent (<10 years old), with about 1% of victims under one year of age.

Figure 16. Distribution of CSA victim ages, by sex

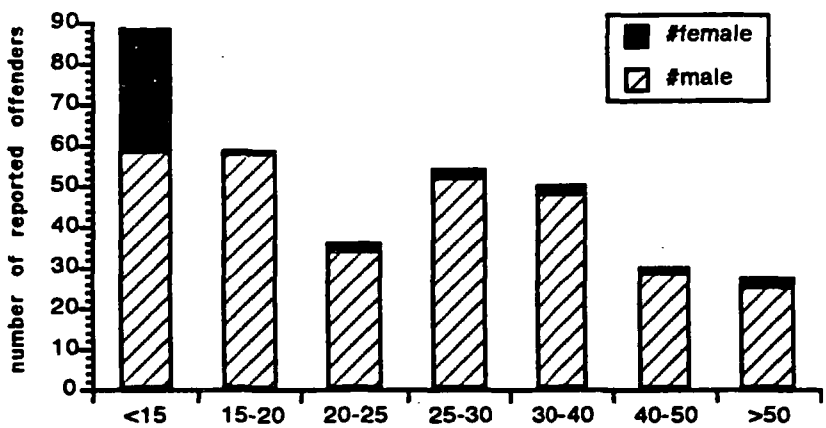


Offender Profile

Offenders are significantly more likely to be male in cases of sexual abuse (90.2% male). Offenders in sexual abuse cases were also significantly more likely to be younger (<20) or older (>50) than average. It is of interest to note that in the youngest age category, female offenders nearly equaled male offenders (30 female, 59 male) and account for the majority of female sex offenders in this data set (75%). In every other

age category male offenders predominated. The preponderance of young female offenders does not coincide with an increase in male victims however. The victims of the youngest offenders were primarily the same sex as the perpetrator. There are important implications for treatment and for understanding the some of the variance in sexual abuse with youthful offenders.

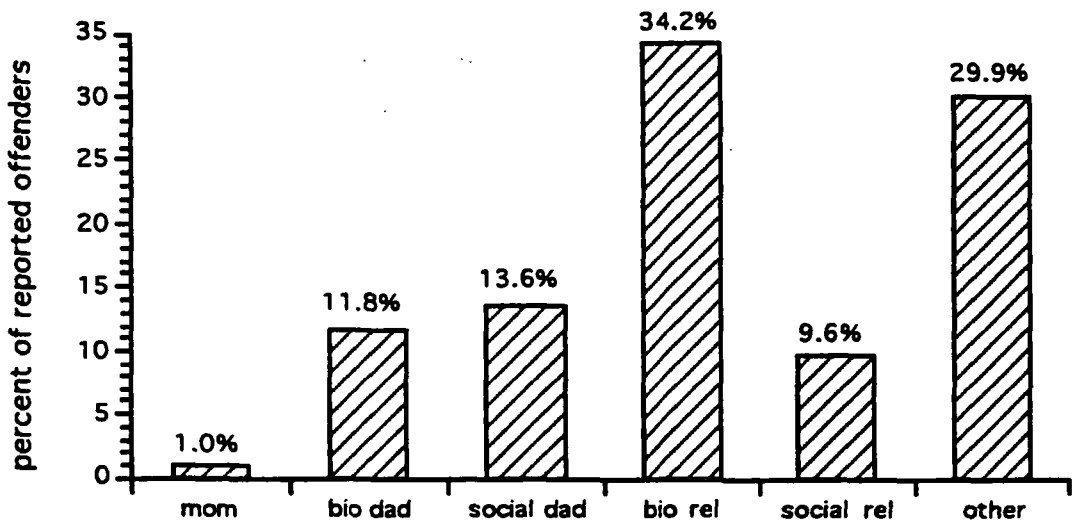
Figure 17. Number of offenders by sex and age category



Victim-Offender Relationship

Non-parental biological relatives were the primary perpetrators of sexual abuse (55.3% of CSA cases), and stepfathers and other social fathers were also over-represented as perpetrators of CSA (22.0% of cases). Thirty percent of offenders were listed as "other" and primarily included friends, neighbors, and individuals known to the victim.

Figure 18. Relationship between CSA victim and offender

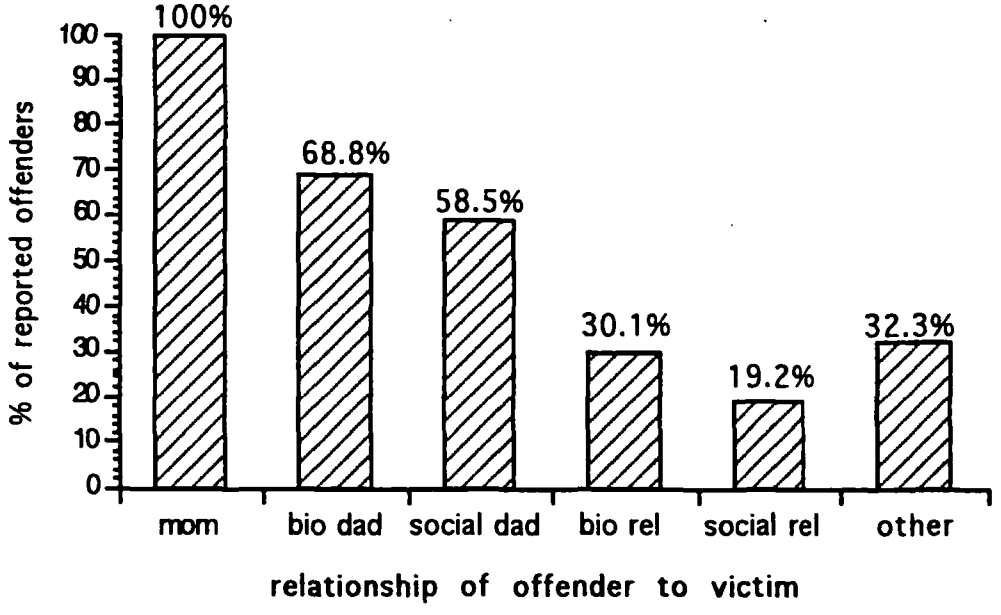


It is not known whether the perpetrators were caretakers, such as babysitters, at the time of the incident, The fact that the majority of offenders fall into the category of extended family provokes some questions regarding perpetrator access to children and the cycle of abuse within families.

Child Sexual Abuse and Substance Abuse

The association of substance abuse and abuse type was examined. Analyses showed that incidents of sexual abuse were significantly less likely to be associated with substance abuse (47.0%) than either incidents of physical abuse (69.4%) or neglect (78.2%). This trend differs somewhat in other data sets. Data analyzed for several specific service units showed higher proportions of substance abuse in cases of CSA, compared to other abuse types. However, it is unclear whether the difference lies in the substance abuse/abuse type association, or whether other differences in the data sets confound the comparison (e.g. differences in the primary perpetrators of CSA).. It will be important to understand how substance abuse increases risk of CSA and other abuse types, and what combination of interventions and services can best mitigate this risk.

Figure 19. Percent of CSA offenders reported using alcohol or drugs at the time of the incident



Current Perspectives for An Approach to Treatment

In attempting to formulate a model of how the experience of sexual abuse affects individuals, researchers have put together seemingly endless lists of categorical behaviors designed to aid in diagnosing victims of CSA. However, these lists often serve to confuse, more than assist, those who must identify and treat child sexual abuse. A more useful approach has been outlined by Finklehor and Browne (1988). They propose that the trauma of sexual abuse can be broken down into four generalized traumatizing phenomena, which in combination, make the experience of child abuse a unique experience sexual, abuse a unique experience.

These components include 1) traumatic sexualization, 2) stigmatization, 3) powerlessness, and 4) betrayal. Finklehor and Browne suggest that these factors alter the cognitive and emotional orientation of the child, thus distorting the child's self-concept, worldview, and affective capacities. When children attempt to cope with the world through these distortions, it may result in many of the behavioral problems noted to be in association with child abuse victims. With these components as a conceptual framework, a categorical listing of specific behaviors becomes more appropriate. In this section we will outline Finklehor and Browne's approach, as well as provide a useful description of specific behavioral manifestations of abusive experiences, family dynamics, developmental characteristics of sexually abused children, and assessment criteria for treating offenders.

These lists do not attempt to suggest any one-to-one correspondence between CSA and certain behaviors or thoughts. Such lists cannot be expected to be either comprehensive (some victims will manifest behaviors not included on any list of CSA-associated behaviors) or exclusive (not all victims will have all, or even any, of the characteristics noted as "typical"). What these concepts are useful for is a framework for future research aimed at understanding of child sexual abuse, the development of assessment instruments, in making clinical assessments of sexual abuse victims, and guiding planned interventions.

Traumatic Sexualization

Traumatic sexualization is the process by which a child's sexuality is shaped in developmentally inappropriate and interpersonally dysfunctional ways. This can occur when a child is repeatedly rewarded, by an offender e.g. through the exchange of gifts, affection, attention, or privileges, for sexual behavior that is inappropriate to the child's level of development. The child learns to use sexual behavior as strategies to manipulate others to meet his or her own emotional and developmental needs. Traumatic sexualization can also occur when certain parts of a child's anatomy become fetishized and given distorted importance and meaning, and through the misconceptions and confusions about sexual behavior communicated to the child from the offender. It can also be the result of very frightening or painful memories that become associated with sexual activities. Sexual abuse experiences can vary greatly in the degree of traumatic sexualization that occurs. Children who have been traumatically sexualized, to whatever degree, often have inappropriate repertories of sexual behavior, with confusions and misconceptions about their sexual self-concepts and unusual emotional associations to sexual activities.

Dynamics

Child rewarded for sexual behavior inappropriate to developmental level
Offender exchanges attention and affection for sex
Sexual parts of child fetishized
Offender transmits misconceptions about sexual behavior and sexual morality
Conditioning of sexual activity with negative emotions and memories

Psychological Impact

Increased salience of sexual issues
Confusion about sexual identity
Confusion about sexual norms
Confusion of sex with love and care-getting/caregiving
Negative associations with sexual activities and arousal sensations
Aversion to sex and intimacy

Behavioral Manifestations

Sexual preoccupations and compulsive sexual behaviors
Precocious sexual activity
Aggressive sexual behaviors
Promiscuity
Prostitution
Sexual dysfunction: flashbacks, difficulty in arousal and/or orgasm
Avoidance of or phobic reactions to sexual relations and/or intimacy
Inappropriate sexualization of parenting

Stigmatization

Stigmatization refers to the negative connotations (e.g. guilt, shame) that are communicated to the child surrounding the experiences. These eventually become incorporated into the child's self image. These negative communications can come from the offender, who may blame or denigrate the victim, or from the family and community, who may blame the child either directly (i.e. loose morals) or indirectly (i.e. damaged goods). Very often boys are blamed for victimization more than girls are, and thus male victims may receive less family or community support. Increased stigmatization has been shown to be a good predictor of the victim becoming a future abuser.

Dynamics

Offender blames, denigrates victim
Offender and others pressure child for secrecy
Child infers attitudes of shame about activities
Others have shocked reaction to disclosure
Others blame child for events
Victim is stereotyped and treated as damaged goods

Psychological Impact

Guilt, shame
Lowered self-esteem
Sense of being different than others

Behavioral Manifestations

Isolation
Drug or alcohol abuse
Criminal involvement
Self-mutilation
Suicide

Betrayal

Betrayal refers to the dynamic in which children discover that someone on whom they were dependent has caused them harm. Children can experience betrayal not only from the offender but also from family members who may be unwilling or unable to protect them, or who may change their attitude towards the child after disclosure. The extent to which the sense of trust was betrayed often depends on the closeness of the relationship between the victim and the offender. Within this dynamic is the lack of protection the child may feel. The child is "on this/her own," and critical developmental energy is put towards self-protection rather than on necessary developmental tasks. Victims are always monitoring others, and never really learn how to take care of themselves or their own children.

Dynamics

Naïve trust and vulnerability to being manipulated
Violation of expectation that others will provide care and protection
Child's well being disregarded
Lack of support and protection from parent(s)

Psychological Impact

Grief, depression
Extreme dependency
Impaired ability to judge trustworthiness of others
Mistrust, particularly of men

Anger, hostility

Behavioral Manifestations

Clinging
Vulnerability to subsequent abuse and exploitation
Allowing own children to be victimized
Isolation
Discomfort in intimate relationships
Marital problems
Aggressive behavior
Delinquency

Powerlessness

Powerlessness refers to the process in which the child's will, desires, and sense of efficacy are continually contravened. It is theorized that this occurs any time the child's territory and body space is repeatedly invaded against the child's will. Powerlessness is reinforced when the child's attempts to stop the abuse are frustrated; powerlessness is increased when the child feels trapped, fearful, or unable to make adults understand or believe what is happening. These dynamics are analogous to post-traumatic stress syndrome where the message is that there is no safety and no recourse but compliance. This creates passive, dependent people who feel they cannot do anything with their lives.

Dynamics

Body territory invaded against the child's wishes
Vulnerability to invasion continues over time
Offender uses force or trickery to involve child
Child feels unable to protect self and halt abuse
Repeated experience of fear
Child is unable to make others believe

Psychological Impact

Anxiety, fear
Lowered sense of efficacy
Perception of self as victim
Need to control
Identification with the aggressor

Behavioral Manifestations

Nightmares
Phobias
Somatic complaints; eating and sleeping disorders
Depression
Dissociation
Running away
School problems, truancy
Employment problems
Vulnerability to subsequent victimization
Aggressive behavior, bullying
Delinquency
Becoming an abuser

Assessment Criteria For Treatment Of Sexual Abuse Offenders

Assessment factors for the treatment of child sexual abuse offenders should include some of the following assessment criteria. The type of treatment appropriate to the situation may differ according to the extent and combination of various factors and characteristics.

Offense factors

1. nature of the offense
2. degree of aggressiveness used
3. extent of harm to victim
4. frequency of offenses
5. duration of sexually aberrant behavior
6. progressiveness of offenses
7. victim selection characteristics
8. substance use in conjunction with offense

Offender characteristics

1. age and sophistication
2. honesty and openness
3. degree of acceptance of responsibility for behavior
4. level of empathy for victim
5. motivation to participate in treatment
6. prior offense history
7. prior treatment history
8. substance abuse problems
9. psychosis, intellectual incapacity or significant neurological impairment
10. school, social and/or employment adjustment
11. sexual and sexual fantasy compulsivity
12. history of own victimization

Situational factors

1. family system pathology
2. family denial versus acceptance of offense
3. family support and cooperation in treatment
4. access of offender to potential victims
5. extrafamilial support system
6. stressors

Family Dynamics

There are four conditions consistent with sexual abuse:

The offender needs motivation to abuse—the other three listed below mitigates motivation

a. emotional congruence
b. sexual arousal
c. blockage—the offender represses normal feelings and social norms

The offender has to overcome internal inhibitors

a. Individual—alcohol (substance abuse can overcome internal inhibitors and serve to rationalize behavior), psychosis, failure of incest inhibitors

b. sociocultural—social toleration of sexual interest in children, no minimal sanctions, social tolerance for deviance committed while intoxicated, contempt for the victim and/or for Indian people.

The offender has to overcome external impediments, i.e., and opportunity

a. mother absent, ill, distanced, intoxicated, non-protective, victimized
b. social isolation and erosion of social networks—isolated communities and isolated children are very vulnerable
c. lack of supervision
d. unusual opportunities to be alone with the children, e.g. shift work
e. unusual sleeping conditions
f. lack of social support for the mother
g. barriers to female equality
   - patriarchal prerogatives
   - The higher the status of the offender, the lower the probability of disclosure due to the increased chance that the victim will be severely stigmatized by increased protection of the offender
h. ideology of family sanctity
i. child pornography
j. minimization of unresolved abuse by victimized mother
   - women who have been victimized often seek mates who seem to understand children but who are instead deceptive, manipulating individuals
k. financial constraints
   - Poorer people are more willing to trade their children's safety for a pedophile's resources
   - the neediest of people are the ones most likely to become victimized

The offender has to overcome/subvert the child's resistance

a. small children cannot resist - pedophiles use slow, calculated seduction to overcome resistance
b. resistance can also be overcome by the use of physical force, threats, etc. sexual abuse may be combined with physical violence in a family where there is a cycle of aggression, power, and violence
c. child is emotionally insecure, deprived, naïve, trusting
d. social powerlessness of children, lack of sex education for children

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Criminal Jurisdiction in Indian Country
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CRIMINAL JURISDICTION IN INDIAN COUNTRY

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OVERVIEW: Criminal jurisdiction in Indian country involves a mixture of federal, state and tribal law with jurisdiction dependent upon such factors as the race of the perpetrator and victim, as well as the situs of the crime. This outline reviews some of the pertinent issues relative to the question of who possesses jurisdiction over a perpetrator of a crime in Indian country.

I. Definition of Indian country - 18 U.S.C. 1151

Indian country is legislatively defined by the United States Congress at 18 U.S.C. 1151 as:

A. all lands within the limits of any Indian reservation notwithstanding the issuance of any patent, and including rights-of way running through Indian allotments This definition encompasses all lands within the exterior boundaries of a reservation even if the land is held in fee simple by a non-Indian entity or person. See Solem v. Bartlett, 465 U.S. 463(1984). Thus, if an Indian commits an offense within the exterior boundaries of the reservation tribal and federal jurisdiction would lie even if the crime occurred on fee land.

B. all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof. A dependent Indian community is defined in the case law based upon four inquiries. See United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981); United States v Driver, 945 F.2d 1410 (8th Cir. 1991)

1. Whether U.S. retains title to land and the authority to regulate in area. Those communities located on trust land outside the reservation boundaries are considered dependent communities.

2. The nature of the area and the relationship of the inhabitants to an Indian tribe or to the federal government. A majority population of a particular Tribe residing in Indian Housing authority housing would be considered a dependent Indian community.

3. Cohesiveness of the community and its reliance upon federal services.

4. Whether the area has been set aside for the use of Indians. For example, the Sisseton Tribal Court has ruled that a county road that connects the town of Sisseton with the seat of tribal government is a dependent Indian community.

C. Rights of way running through Indian allotments - this includes state, county and unmaintained roads that run through

Indian allotments even if the highway runs outside the exterior boundaries of the reservation.

II. Definition of Indian

A In General - In most cases, in order for either a tribal or federal court to exercise jurisdiction over a person in a criminal matter two conditions have to be met.

1. Possess some Indian blood;

2. Be regarded as Indian by his or her community.

B. Other Tests

1. Enrolled in federally-recognized tribe or other indicia of membership. See United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979)(enrollment not required for Indian to be considered member of Tribe.)

2. Adoption into Tribe is generally not sufficient to create Indian status. See United States v. Rogers, 45 U.S. (4How.) 567 (1846); but see Matter of Dependency and Neglect of A.L., 442 N.W.2d 233 (S.D. 1989)(Tribe's enrollment of white child sufficient to trigger application of Indian Child Welfare Act).

C. St. Cloud Test
Under this test, adopted by the United States Court of Appeals for the Eighth Circuit in U.S. v. Lawrence, 51 F.3d 150 (8th Cir. 1995), the Court adopted the standard set out in St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988) for a determination of who is an Indian (perpetrator and victim).

1.Tribal enrollment - generally is dispositive of issue.

2. Government recognition through receipt of benefits (IHS, BIA GA, commodities, etc.).

3. Enjoyment of the benefits of tribal affiliation.

4. Special recognition as Indian through residence on reservation and participation in social life.

These criteria should be examined in the totality to make the determination of whether a perpetrator or victim is Indian. However, even if the perpetrator meets the definition of Indian under these criteria, if he is a member of a terminated tribe, he is generally not considered "Indian" for purposes of federal jurisdiction. See St. Cloud; US v. Heath, 509 F.2d 16 (9th Cir. 1974).

D. Duro v. Reina, 495 U.S. 676(1990) - Duro had held that tribal courts do not have the inherent authority to exercise

criminal jurisdiction over non-member Indians. Congress legislatively repealed Duro in 1991 vesting tribal courts with the authority to prosecute *non*-member Indians to the same extent the federal courts exercise jurisdiction over Indians under the Major Crimes Act.

III. TYPES OF CRIMES

In general, federal courts exercise jurisdiction over offenses committed in Indian country by Indians and against Indians under several federal statutes, including the Major Crimes Act, 18 U.S.C. 1153, the Indian Country Crimes Act, 18 U.S.C. 1152, and the Assimilative Crimes Act, 18 U.S.C. 13, which the Supreme Court has held applies to crimes that occur in Indian country. Williams v. United States, 327 U.S. 711 (1946). Tribal courts exercise concurrent jurisdiction over crimes prosecuted by the United States, except those crimes where the perpetrator is non-Indian, and other crimes defined by tribal code or the Code of Indian Offenses. State Courts can only exercise jurisdiction over crimes committed by one non-Indian against another in Indian country or a victimless crime committed by a non-Indian, except in Public Law 280 reservations where states exercise jurisdiction over violations of prohibitory statutes, not regulatory ones. See 18 U.S.C. 1162; 25 U.S.C. 1322.

A. Federal Court Jurisdiction

1. Major Crimes Act - 18 U.S.C. 1153 - As the result of Ex parte Crow Dog, 109 US 556 (1883), the United States enacted the Major Crimes Act to criminalize federally certain major crimes. Those crimes now include: murder, manslaughter, kidnapping, maiming, kidnapping, rape, involuntary sodomy, carnal knowledge of any female who has not attained age of 16, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burgarly and robbery.

2. Concurrent jurisdiction of tribal courts - Tribal courts retain concurrent criminal jurisdiction over offenses covered by Major Crimes Act and double jeopardy does not apply to bar prosecution by federal court after tribal court prosecution. US v. Wheeler, 453 U.S. 313 (1978). The same rule also may apply to a subseqent federal prosecution after a CFR court prosecution, but no case law on this. Nor does the United States' Attorney's internal Petite policy, directing the United States not to prosecute a person already prosecuted by another sovereign, bar the prosecution of an Indian in federal court for the same offense prosecuted in tribal court. See United States v. Lester, 992 F.2d 124 (8th Cir. 1993).

a. Uncounselled guilty plea in tribal court generally cannot be used as admission against interest in federal court prosecution, but counselled ones can. United States v. Ant, 882 F.2d 13 (9th Cir. 1991).

b. Time served on tribal court sentence not necessarily credited on federal sentence, but discretionary with Attorney General.

c. Tribal Court convictions not used under federal sentencing guidelines to determine category of offender, but can be used to enhance sentence. See US v. Gallaher, 29 F.3d 635 (9th Cir. 1994).

3. Assimilative Crimes Act, 18 U.S.C. 13 - permits federal prosecutions by assimilating state substantive law. See United States v. Norquay, 905 F.2d 1157 (8th Cir. 1990)(although burglary is to be punished under state law, federal courts are still permitted to apply the federal sentencing guidelines to determine appropriate sentence).

4. Indian Country Crimes Act, 18 U.S.C. 1152 - general laws of the United States applicable to federal enclaves apply in Indian country. This includes the Assimilative Crimes Act. Williams v. United States , 327 U.S. 711 (1946).

5. Death Penalty - Death penalty inapplicable to Indians committing criminal offense subject to death penalty in Indian country unless Tribe opts in to death penalty. 18 U.S.C. 3598. Indians, however, are subject to the death penalty for other federal offenses that carry the death penalty (assasination, espionage, etc.) Nor are recent legislative enactments expanding federal penalties for federal offenses applicable to Indian country unless Tribes opt in. See 18 U.S.C. 3559(c)(6) (three strikes law); 18 U.S.C. 5032 (juveniles under 13 tried as adults.)

6. Special federal criminal statutes - Some statutes, for example, 18 U.S.C. 1165(illegal for non-Indian to enter on Indian land for unauthorized hunting and fishing); 18 U.S.C. 1164 (destruction of reservation boundary); 25 U.S.C. 171(enter into land transaction without federal authority) apply specifically to non-Indians who enter Indian country.

B. State Court Jurisdiction - turns on question of whether state has been vested with criminal jurisdiction under federal law, such as Pub. L. 280, or other special criminal federal statute, and on race of perpetrator and victim.

1. General - Absent some act of Congress, states have no jurisdiction to prosecute Indians for criminal offenses committed within Indian country or to prosecute non-Indians for criminal offenses committed against Indian victim in Indian country. Washington v. Confederated Bands of Yakima Nation, 439 U.S. 463 (1979); State v. Kuntz, 66 N.W.2d 531 (N.D. 1954); State v. Greenwalt, 663 P.2d 1178 (Mont. 1983); State v. Larson, 455 N.W.2d 600 (S.D. 1990).

2. Liquor offenses - one court has held that because Congress gave states and tribes the concurrent authority to regulate the introduction of liquor into Indian country, states can exercise criminal jurisdiction over criminal "liquor violations." Fort Belknap Indian Community v. Mazurek, 43 F.3d 428 (9th Cir. 1994). Tribes have civil authority to regulate liquor sales throughout Indian country, but no criminal jurisdiction to prosecute non-Indian violators. See City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993). Luke v. Mellette County, 508 N.W.2d 6 (S.D. 1993).

3. Non-Indian v. Non-Indian - State courts have jurisdiction to prosecute this crime that occurs in Indian country or non-Indian victimless crime.

4. Pub. L. 280- 18 U.S.C. 1162; as amended, 25 U.S.C. 1322 et seq.- gave certain states mandatory criminal jurisdiction over crimes occuring in Indian country and gave other states option to exercise jurisdiction.

a. Mandatory states - California, Oregon, Nebraska(except Winnebagos and Omahas have been retroceded jurisdiction), Minnesota(with exception of Red lake),Wisconsisn, and Alaska.

b. Optional states must comply with Pub. L. 280 and amend their state constitutions to accept jurisdiction. After enactment of Indian Civil Rights Act, 25 U.S.C. 1301 et seq., Tribes must affirmatively accept jurisdiction by tribal election. See Kennerly v. District Court, 400 U.S. 423 (1971). State cannot overrule prior state court precedent if effect is to vest state with jurisdiction after 1968 without tribal consent. See Rosebud Sioux Tribe v. State of South Dakota, 900 F.2d 1164 (8th Cir. 1990).

c. Tribal courts retain concurrent jurisdiction over criminal offenses with state courts.

d. States only obtained authority to enforce prohibitory laws in Indian country, not regulatory laws, such as gaming laws. See California v. Cabazon Band of Indians, 480 U.S. 202(1987); Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1991)(states have no authority to impose state regulatory traffic laws upon reservation-domiciled Indians). States cannot enforce mandatory insurance laws, et al, upon reservation Indians even in Pub. L. 280 states. Nor can states impose hunting and fishing regulatory laws upon reservation Indians.

e. Retrocession - Under Pub. L. 280, as amended, there is a provision found at 25 U.S.C. 1323 allowing a state to petition the United States to retrocede, or restore, tribal criminal or civil jurisdiction.

f. Special statutes - Congress has enacted special statutes, applicable to only certain tribes, vesting state courts with criminal jurisdiction over Indian country. See State v. Hook, 476 N.W.2d 565 (N.D. 1991)(North Dakota vested with criminal misdemeanor jurisdiction over Fort Totten Indian reservation).

C. Tribal Court Jurisdiction - Tribal Courts have criminal jurisdiction over all Indians who commit criminal offenses within Indian country. This jurisdiction is concurrent with federal courts in non-Pub. L. 280 states and with state courts in Pub. L. 280 states. Tribal courts have exclusive criminal jurisdiction to prosecute violations of regulatory statutes in Pub. L. 280 states.

1. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)(Tribal courts have been necessarily divested of criminal jurisdiction over non-Indians). Note that Oliphant does not divest tribal court of authority over quasi-criminal actions such as protection order proceedings or mental commitments.

2. Indian Civil Rights Act - 25 U.S.C. 1301 et seq.- governs the rights of criminal defendants in tribal courts.

a. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)(exclusive remedy for violation of Indian Civil Rights Act in federal court is writ of habeas corpus challenging detention).

b. Several Tribal Courts have held that ICRA waives immunity of tribal officials for suits in tribal court alleging violations of ICRA.

c. Federal Tort Claims remedy available for person aggrieved by tribal entity operating under 638 contract who violates ICRA.

d. No right to court-appointed counsel, but right to counsel of Defendant's choice if he pays. Tribe can require counsel to be member of tribal bar.

e. Punishment under ICRA now limited to one year and $5,000.00 fine for each offense. 25 U.S.C. 1302 (7).

OVERVIEW OF FEDERAL STATUTES REGARDING CHILD SEXUAL ABUSE

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SEXUAL OFFENSES UNDER CHAPTER 109A, AND INCEST

All the felony sexual abuse offenses under Chapter 109A are major felonies that can be used in prosecutions under either § 1153 or § 1152, regardless of the tribal affiliation of the offender or victim. There are four substantive statutes: aggravated sexual abuse (§ 2241), sexual abuse (§ 2242), sexual abuse of a minor (§ 2243), and abusive sexual contact (§ 2244). Until September 13, 1994, § 2245 contained the pertinent definitions. With passage of the Violent Crime Control and Law Enforcement Act of 1994, a new potentially capital offense, sexual abuse resulting in death, was added as § 2245[1], and the definitions were moved to § 2246. New sections were also added relating to punishments for repeat offenders (§ 2247)[2] and restitution to victims (§ 2248).

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[1] The death penalty is only applicable if the tribe has opted in under § 3598. Thus, if the tribe has not opted in, the punishment is life in prison for any type of sexual abuse in Chapter 109A that results in death. If the tribe has opted in, the offense is capital.

[2] The maximum penalties stated in the discussions below are for first-time offenders in cases not resulting in death. Pursuant to § 2247, recidivists face a maximum penalty of up to twice what would be otherwise authorized. A recidivist for these purposes is a person who commits at Chapter 109A offense after he has a final conviction for a Chapter 109A offense or similar state offense.

Incest is also a § 1153 major felony. It is not defined in federal law and must be assimilated from state statutes.

A. DEFINITIONS

1. Critical Terms in Definitions

To understand the differences between the Chapter 109A offenses, it is important to know the difference between a sexual act and a sexual contact. Conduct that includes a sexual act is treated much more seriously than conduct that includes only sexual contact.

The common misconception is that "penetration" involves an actual intrusion, however slight, into the interior of the vagina or the rectum. As will be discussed more fully below, that is not required.

2. Sexual Acts -- § 2246(2)

a. Penis to vulva or anus

Section 2246(2)(A) defines one form of sexual act: "contact between the penis and the vulva or the penis and the anus. " It specifically states that "contact involving the penis occurs upon penetration, however slight." So, if the penis "penetrates" either the vulva or the anus, the defendant has engaged in a sexual act.

Note that the anatomical terms used are "vulva" and "anus," not "vagina " and "rectum." The "vulva" is commonly held to mean the external genital organs of the female, including specifically the labia majora, or outer labia. It includes the area immediately outside the

vaginal opening, between the labia minora and the labia majora. Similarly, the "anus" is the tissue that constitutes the opening of the rectum, which includes the outer surface of that tissue.

b. Oral sexual acts

Section 2246(2)(B) defines the second type of sexual act: contact between the mouth and the penis, vulva, or anus. Unlike with § 2246(2)(A), discussed above, "contact" is not defined and there is no requirement of "penetration." Note also that the terms used are again "vulva" and "anus," such that oral contact with the external surfaces would fall within the definition of a sexual act.

c. Digital penetration

Section 2246(2)(C) defines the third type of sexual act: "penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

First, this type of sexual act always requires the specified unlawful intent. Second, it need not be the defendant whose sexual desires are intended to be aroused or gratified. Third, the anatomical terms change from "vulva" and "anus" to "genital opening" and "anal opening." Penetration through clothing is sufficient to support a prosecution under this statute.

d. Direct touching of child's genitalia

The Violent Crime Control and Law Enforcement Act of 1994 added a new type of sexual act in § 2246(2)(D). It consists of "the intentional touching, not through the clothing, of the genitalia of another person who has not reached the age of 16." It requires the same unlawful intent as § 2246(2)(C). The touching is not restricted to touching with the defendant's hands or fingers, and the victim's full "genitalia" are included. However, since "genitalia" commonly means one's reproductive organs, it probably does not include the victim's anus, buttocks, groin, inner thighs, or breasts.

3. Sexual Contact -- § 2246(3)

Sexual contact is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

The requisite intent is the same as that required under § 2246(2)(C) and (D) for digital penetration and direct genital touching. The term "clothing" is not limited to wearing apparel. A touching through a blanket may qualify.

B. AGGRAVATED SEXUAL ABUSE -- 18 U.S.C. § 2241

Aggravated sexual abuse is the most serious of the four substantive sexual abuse statutes. It always involves a sexual act, rather than sexual contact, and attempts to commit aggravated sexual abuse also constitute in themselves aggravated sexual abuse. There is no spousal immunity, so committing these acts upon one's

spouse is criminal.

There are several ways to commit aggravated sexual abuse. The maximum penalty in each case is life imprisonment, unless the offense causes death, in which case the penalty is death where the tribe has opted for the death penalty, and life in prison if the tribe has not. In addition, for violations of § 2241(c), Aggravated Sexual Abuse with Children, the penalty for second offenders is a mandatory term of life in prison, if the death penalty is inapplicable.

1. By Force or Threat -- § 2241(a)

One type of aggravated sexual abuse occurs when the defendant knowingly causes another person to engage in a sexual act by either using force against the victim, or threatening or placing the victim in fear that someone will be killed, kidnapped, or subjected to serious bodily injury.

The force requirement may be satisfied by showing the use or threatened use of a weapon; sufficient force to overcome, restrain, or injure a person, or the use of a threat of harm sufficient to coerce or compel submission by the victim. A victim's will can be overcome by threats to harm a third person, usually the victim's child.

2. By Rendering the Victim Incapable of Refusing -- § 2241(b)

Section 2241(b) provides that it is also aggravated sexual abuse when, essentially, the defendant knowingly makes the victim incapable of refusing to engage in a sexual act and "thereby" engages in the sexual act with the victim.

The theory is that deliberately causing a person to be unable to assert his or her will is as reprehensible as overcoming the victim's will with force or threats.

There are two ways of causing the victim to be incapable of refusing consent:

a. Rendering victim unconscious

The defendant commits aggravated sexual abuse if he knowingly renders the victim unconscious and "thereby" engages in a sexual act with the unconscious victim.

b. Administering intoxicants

The defendant also commits aggravated sexual abuse if he knowingly administers a drug, intoxicant, or other similar substance to the victim by force or threat of force, or without the victim's knowledge or permission, and "thereby" "substantially impairs the ability of [the victim] to appraise or control conduct" and engages in a sexual act with the impaired victim.

So, if the defendant spikes the victim's drinks without her knowledge and gets her so drunk that she cannot understand what is going on well enough to refuse him sex, he has committed forcible rape as if he had held a gun to her head.[3]

3. With Children Under 12 -- § 2241(c)

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[3] The sentencing guidelines also equate force or threats with the forcible or surreptitious administration of intoxicants. See U.S.S.G. § 2A3.1(b)(1).

It is aggravated sexual abuse for the defendant to engage--or, as noted above, attempt to engage--in a sexual act with a child under 12. Period. There is no requirement of threats, force, unconsciousness, or impairment. It is also a strict liability offense with respect to the age of the child. 18 U.S.C. § 2241(d).

Unlike the case with statutory rape of a child between 12 and 16, which is contained in § 2243(a) and discussed below, in a prosecution for aggravated sexual abuse with a child under 12, the age of the defendant does not matter. So long as the victim is under 12, there is no minimum age requirement for the defendant. Theoretically, a seven-year-old boy could be proceeded against as a juvenile offender for engaging in a sexual act with a girl aged 11 years and 11 months. Of course, the girl would be equally liable for engaging in the sexual act with the boy.

On September 23, 1996, Congress added a new crime to § 2241(c), making it a separate federal offense to cross a state line with the intent to engage in a sexual act with a child under 12. This new crime is not specific to Indian Country, and does not include crossing into or out of Indian Country with the required intent. It could be used in an Indian Country prosecution, if, for example, it could be proven that the suspect crossed from one state to another with the intent to sexually abuse a child under 12 in Indian Country, even if the suspect was stopped before he was able to complete, or even initiate, the act.[4]

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[4] The amendment to § 2241(c) was part of the Amber Hagerman Child Protection Act of 1996, which was incorporated in an appropriations act in the waning days of the Congressional session. The Amber Hagerman Child Protection Act also adds to § 2241(c) the

C. SEXUAL ABUSE -- 18 U.S.C. § 2242

Sexual abuse is the second most serious of the four substantive sexual abuse statutes. It, too, always involves a sexual act rather than sexual contact, and attempts to commit sexual abuse also constitute sexual abuse in themselves. Again, there is no spousal immunity, so committing these acts upon one's spouse is criminal.

There are two types of sexual abuse. Neither is a lesser included offense of aggravated sexual abuse by use of force or aggravated sexual abuse of a person incapable of consenting.

The maximum penalty for sexual abuse is 20 years imprisonment, unless the crime results in death.

1. Sexual Abuse by Threats -- § 2242(1)

One type of sexual abuse occurs when the defendant knowingly causes another person to engage in a sexual act by threatening or placing the victim in fear, other than the high degree of fear specified in § 2241(a)(2) that someone will be killed, kidnapped, or subjected to serious bodily injury.

Under this statute, the requirement of threats or placing the victim in fear may be satisfied by showing that the threat or intimidation created in the victim's mind in apprehension of fear of harm to herself or to others. See United States

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new crime of committing sexual abuse "under the circumstances described in subsections (a) and (b)" with victims between the ages of 12 and 16. This "new crime" is not really new, as aggravated sexual abuse through the use of force or with a person rendered incapable of refusing consent was already a serious crime under § 2241(a) or (b), regardless of the age of the victim. However, as noted above, the penalty for this crime is greatly enhanced for second offenders, who now face a mandatory term of life imprisonment for non-consensual sexual abuse of children age 16 or under.

v. Johns, 15 F.3d 740 (8th Cir. 1994) (fear victim would be rejected by religious spirits).

2. Sexual Abuse of Person Unable to Consent -- § 2242(2)

Section 2242(2) makes it sexual abuse to engage in a sexual act with another person if the victim is either: (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act."

Although, as stated above, sexual abuse is not a lesser included offense of aggravated sexual abuse of a person incapable of consenting, the type of conduct in this instance is similar. If the defendant takes advantage of the victim by deliberately causing her to be unable to resist, the crime is aggravated sexual abuse. On the other hand, if the defendant happens across a victim who is already impaired in her ability to refuse and simply takes advantage of the fortuitous circumstance, the crime is sexual abuse.

Common applications of § 2242(2) include sexual acts with developmentally handicapped adults or with drunken or stoned victims who knowingly and voluntarily got drunk or stoned. See e.g., United States v. Barrett, 937 F.2d 1346 (8th Cir.), cert. denied, 502 U.S. 916 (1991).

D. SEXUAL ABUSE OF A MINOR OR WARD -- 18 U.S.C. 2243

The third type of sexual abuse that also requires proof of a sexual act is sexual abuse of a minor or ward. As with aggravated sexual abuse and sexual abuse, attempts are included within the definition of the crime. However, sexual abuse of a

minor or ward is not a lesser included offense of either aggravated sexual abuse or sexual abuse. United States v. Amos, 952 F.2d 992 (8th Cir. 1991).

1. Sexual Abuse of a Minor -- § 2243(a)

This is the federal statutory rape law. It consists of engaging in a sexual act with a person between the ages of 12 and 16, or crossing a state line with the intent to do so. Consent is not a defense, but either (a) a reasonable belief that the victim was at least 16, or (b) being married to the victim at the time of the offense is a valid defense. Also, the defendant must be at least four years older than the victim. The government does not have to prove, however, that the defendant knew how old the victim was, nor that he knew there was a four-year age difference between them.

The maximum penalty for sexual abuse of a minor that does not result in death is fifteen years in prison. However, if the sexual abuse was perpetrated by force or against a person rendered incapable of refusing consent, as defined in § 2241(a) or (b), and if the perpetrator has a prior state or federal conviction for aggravated sexual abuse, then the mandatory penalty is life in prison.

2. Sexual Abuse of a Ward -- § 2243(b)

This crime consists of engaging in a sexual act with a person who is in "official detention" and "under the custodial, supervisory, or disciplinary authority" of the defendant at the time of the act. There is no age requirement,

but marriage, oddly enough, is a defense.[5]

"Official detention" is defined at § 2246(5). It includes, among other things, being detained by, or at the direction of, a federal officer or employee after charge, arrest, conviction, or adjudication of juvenile delinquency; or being in the custody of, or in someone else's custody at the direction of, a federal officer or employee for purposes incident to the detention, such as transportation, medical services, court appearances, work, and recreation. It specifically does not include persons released on bail, probation, or parole.

The maximum penalty for sexual abuse of a ward that does not result in death is one year in prison.

E. ABUSIVE SEXUAL CONTACT -- 18 U.S.C. § 2244

Abusive sexual contact is the fourth and least serious type of sexual offense in Chapter 109A. It is contained in § 2244, and the various types parallel the elements of aggravated sexual abuse, sexual abuse, and sexual abuse of a minor or ward, except that they involve sexual contact instead of sexual acts. However, abusive sexual contact is not a lesser included offense of aggravated sexual abuse, sexual abuse or sexual abuse of a minor, to the extent that these do not require proof of the specific intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desires. United States v. Demarrias, 876 F.2d 674 (8th Cir. 1989).

Sexual contact engaged in under circumstances that would constitute

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[5] It seems fairly unlikely that a federal officer or employee would be entrusted, in his or her official capacity, with the detention of his or her spouse.

aggravated sexual abuse if the contact had been a sexual act carries a maximum penalty of ten years, unless death results. If the circumstances would have constituted sexual abuse, sexual abuse of a minor, or sexual abuse of a ward, the maximum penalties are three years, two years, and six months, respectively. Under "other circumstances" that would not fit any of §§ 2241, 2242, or 2243, knowingly engaging in sexual contact punishable by six months in prison. The misdemeanor offenses, of course, cannot be prosecuted federally if both the offender and victim are Indian.

CHILDREN AS VICTIMS AND WITNESSES

18 U.S.C. 3509

The Crime Control Act of 1990 (18 U.S.C. § 3509 provides the following special alternatives for child victims:

1. Establishment of a multi-disciplinary team, including representatives from health social service, law enforcement, and legal service agencies to coordinate the assistance needed to help child victims.

2. Alternatives to live, in-court testimony, if the child is unable to testify out of fear or if it would traumatize him. Any videotaped deposition shall be destroyed five years after the judgment of the trial court, but not before a final judgment by the Supreme Court.

3. Competence exam, if there is a compelling reason to suspect that the child is not competent.

4. Privacy protection. All documents which disclose the name of the child in an abuse case shall be filed under seal and a protective order may be issued.

5. Closed courtroom, if necessary to prevent substantial psychological harm or if an open courtroom would render him unable to communicate.

6. Victim Impact Statements prepared by the multi-disciplinary team to express the crime's personal consequences on the child.

7. Guardian ad litem to protect the best interests of the child and to attend all depositions, hearings, and trial proceedings.

8. Adult attendant for emotional support.

9. Speedy trial. The court may designate the case as being of special public importance and may give it precedence over other cases.

10. Extension of child statute of limitations so that prosecution may not be precluded before the child reaches the age of 25 years.

11. Testimonial aids. The child may use anatomical dolls, drawings, etc. to assist in testifying.

FEDERAL RULES OF EVIDENCE 413, 414 and 415

I. Enactment of Fed. R. Evid. 413, 414 and 415

A. Congress enacted these rules to establish a general rule of admissibility for similar crimes evidence in sexual assault cases. Congress recognized and intended that this would make the admission of similar crimes evidence in sexual assault cases the norm, and its exclusion exceptional. These rules were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994.

B. Rule 413 applies to sexual assault prosecutions generally. Rule 414 applies specifically to child molestation prosecutions, and Rule 415 applies in civil suits premised on sexual offenses. Rule 413 is generally broader in scope than Rule 414 because it incorporates no limitation based on the age of the victims. However, Rule 414 is broader in one respect because it includes among its predicate offenses child pornography crimes.

By way of illustration, if a defendant is charged with molesting a child, evidence that a search of his apartment showed him to be in possession of a large trove of child pornography would be relevant since it would tend to establish that he has an abnormal sexual interest in children. In contrast, if a defendant were charged with raping an adult victim, knowledge that he possessed child pornography would have relatively little relevance. Rule 414 accordingly includes child pornography offenses as predicates, while Rule 413 does not.

C. The trial court must engage in Rule 403 balancing in relation to the evidence offered under these rules. Rule 403 provides a limited basis for excluding evidence, though relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. Exclusion of evidence under Rule 403 is an extraordinary remedy. United States v. LeCompte, 1997 W.L. 781217.

II. Fed. R. Evid. 413-414 supersede Fed. R. Evid. 404(b).

A. Rules 413-414 supersede in sex offense cases the restrictive aspects of Fed. R. Evid. 404(b). In contrast to Rule 404(b)'s general prohibition of evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing "on any matter to which it is relevant." This includes the defendant's propensity to commit sexual assault or child molestation offenses, and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.

140 Cong. Rec. H8991 (1994) (remarks of principal House sponsor, Rep. Molinari); see 137 Cong. Rec. S3238-40 (1991)(statement of Senate sponsors); David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and

Other Cases, 70 Chi.-Kent L.Rev. 15, 18-21-33-34 (1994).

B. Evidence of offenses for which the defendant has not previously been prosecuted or convicted is admissible, as well as prior convictions. No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding very substantial lapses of time in relation to the charged offense or offenses.

140 Cong. Rec. H8992 (1994)(remarks of Rep. Molinari); see 137 Cong. Rec. S3240, 4342 (1991)d(similar points in Senate sponsors' statement); Karp, 70 Chi.-Kent L. Rev. at 19.

III. Appellate Decisions

A. The decisions of the Eighth Circuit and other circuits confirm that evidence of other sexual offenses offered under Rules 413-15 is normally to be admitted. The Eighth Circuit has held that "Rule 414 and its companion rules...Rule 413...and Rule 415...are general rules of admissibility in sexual assault and child molestation cases for evidence that the defendant has committed offenses of the same type on other occasions," and that the "'new rules...supersede in sex offense cases the restrictive aspects of Federal Rules of Evidence 404(b).'" United States v. LeCompte, 1997 W.L. 781217 (1997). In United States v. Sumner, 119 F.3d 658 (8th Cir. 1997), the Eighth Circuit noted the legislative "presumption favoring admissibility" under Rule 414. The court further noted the legislative intent that Rules 413-415 put "evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission." 119 F.3d at 662 (quoting and citing the legislative sponsor).

B. United States v. Mound is a pending Eighth Circuit case involving admission of evidence of a prior child molestation crime under Rule 413. The constitutionality of Rule 413 is at issue. The district court engaged in Rule 403 balancing and allowed admission of the defendant's prior conviction for assaulting another 12-year-old girl. The district court found the prior conviction was relevant and probative for purposes allowed under Rule 413. On appeal the defendant challenges the constitutionality of Rule 413.

C. In United States v. Sumner, 119 F.3d 658 (8th Cir. 1977), the court noted the legislative "presumption favoring admissibility" under Rule 414. The court further noted that Rules 413-415 put "evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission." Id. At 662.

D. Other appellate decisions have directly upheld the constitutionality of propensity evidence. In United States v. Enjady, 1998 W.L. 17344 (10th Cir. 1998), the Court held that admission of a prior sexual assault to show propensity under Rule 413 did not violate the defendant's constitutional right to due process. Following Enjady, in United States v. Castillo, 1998 W.L. 156558 (10th Cir. 1998), the Court noted the broad historical support for allowing propensity evidence in sexual offense cases.

E. United States v. Guardia, 135 F.3d 1326 (10th Cir. 1998), set forth the following:

> Evidence must pass several hurdles before it can be admitted under Rule 413. First, the defendant must be on trial for "an offense of sexual assault." Second, the proffered evidence must be of "another offense of ... sexual assault." Third, the trial court must find the evidence relevant--that is, the evidence must show both that the defendant had a particular propensity, and that the propensity it demonstrates has a bearing on the charged crime. Fourth and finally, the trial court must make a reasoned, recorded finding that the prejudicial value of the evidence does not substantially outweigh its probative value.
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> Id. At 1332.

The Court concluded that the exclusion of evidence that a physician charged with sexual abuse had improperly touched women other than the victims was not an abuse of discretion.

F. Twenty-nine states allow propensity evidence in some category or categories of sex offense cases. See Reed, 21 Am. J. Crim. L. At 188. In People v. Fitch, 63 Cal. Rptr. 2d 753 (1997), the California Court of Appeals upheld the validity of sexual offenses to show propensity and rejected constitutional objections.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II--CRIMINAL PROCEDURE
CHAPTER 223--WITNESSES AND EVIDENCE

Current through P.L. 104-333, approved 11-12-96

§ 3509. Child victims' and child witnesses' rights

(a) Definitions.--For purposes of this section--

(1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

(2) the term "child" means a person who is under the age of 18, who is or is alleged to be--

(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

(B) a witness to a crime committed against another person;

(3) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(4) the term "physical injury" includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(5) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

(6) the term "exploitation" means child pornography or child prostitution;

(7) the term "multidisciplinary child abuse team" means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

(8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term "sexually explicit conduct" means actual or simulated--

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(iii) A judicial officer, appointed by the court; and

(iv) Other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(2) Videotaped deposition of child.—(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(B)(i) Upon timely receipt of an application described in subparagraph (A), the court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

(I) The child will be unable to testify because of fear.

(II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.

(III) The child suffers a mental or other infirmity.

(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.

(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are—

(I) the attorney for the Government;

(II) the attorney for the defendant;

(III) the child's attorney or guardian ad litem appointed under subsection (h);

(IV) persons necessary to operate the videotape equipment;

(V) subject to clause (iv), the defendant; and

(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to

(E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

(6) Not before jury.--A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

(7) Direct examination of child.--Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

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

(9) Psychological and psychiatric examinations.--Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need.

(d) Privacy protection.--

(1) Confidentiality of information.--(A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding shall--

(i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and

(ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

(B) Subparagraph (A) applies to--

(i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;

(ii) employees of the court;

(iii) the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding; and

(iv) members of the jury.

(2) Filing under seal.--All papers to be filed in court that disclose the name of or any other information concerning a child shall be filed under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court--

(A) the complete paper to be kept under seal; and

(B) the paper with the portions of it that disclose the name of or other information concerning a child redacted, to be placed in the public record.

(3) Protective orders.--(A) On motion by any person the court may issue an order protecting a child from

(E) expert medical, psychological, and related professional testimony;

(F) case service coordination and assistance, including the location of services available from public and private agencies in the community; and

(G) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

(h) Guardian ad litem.–

(1) In general.–The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

(2) Duties of guardian ad litem.–A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

(3) Immunities.–A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in paragraph (2).

(i) Adult attendant.–A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.

(j) Speedy trial.–In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.

(k) Stay of civil action.–If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

(l) Testimonial aids.–The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or

(a) serving a warrant of arrest; or

(b) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

(c) making a search at the request or invitation or with the consent of the occupant of the premises.

(June 25, 1948, c. 645, 62 Stat. 803; Oct. 11, 1996, Pub.L. 104–294, Title VI, § 601(a)(8), 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Reviser's Note

Based on Title 18, U.S.C., 1940 ed., § 53a (Aug. 27, 1935, c. 740, § 201, 49 Stat. 877).

Words "or any department or agency thereof" were inserted to avoid ambiguity as to scope of section. (See definitive section 6 of this title.)

The exception in the case of an invitation or the consent of the occupant, was inserted to make the section complete and remove any doubt as to the application of this section to searches which have uniformly been upheld.

Reference to misdemeanor was omitted in view of definitive section 1 of this title. (See reviser's note under section 212 of this title.)

Words "upon conviction thereof shall be" were omitted as surplusage, since punishment cannot be imposed until conviction is secured.

Minor changes were made in phraseology.

Legislative History

For legislative history and purpose of Pub.L. 104–294, see 1996 U.S. Code Cong. and Adm. News, p. ____.

CHAPTER 109A—SEXUAL ABUSE

Sec.
2241. Aggravated sexual abuse.
2242. Sexual abuse.
2243. Sexual abuse of a minor or ward.
2244. Abusive sexual contact.
2245. Sexual abuse resulting in death.
2246. Definitions for chapter.
2247. Repeat offenders.
2248. Mandatory restitution.

§ 2241. Aggravated sexual abuse

(a) By force or threat.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act—

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By other means.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly—

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children.—Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than that person), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of mind proof requirement.—In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3620, and amended Pub.L. 103–322, Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 2150; Pub.L. 104–208, Div. A, Title I, § 101(a) [Title I, § 121, subsection 7(b)], Sept. 30, 1996, 110 Stat. 3009–31.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3660.

Effective Date

Pub.L. 99–646, § 87(e), Nov. 10, 1986, provided that: "This section and the amendments made by this section [enacting this chapter; amending sections 113(a), (b), 1111(a), 1153, and 3185(12) of this title, sections 300w–3(a)(1)(G), 300w–4(c)(6), and 9511 of Title 42, The Public Health and Welfare, and section 1472(k)(1) of Title 49, Transportation]; and repealing chapter 99 (sections 2031 and 2032) of this title] shall take effect 30 days after the date of the enactment of this Act [Nov. 10, 1986]."

[Effective Date provision similar to Pub.L. 99–646, § 87(e), was enacted by Pub.L. 99–654, § 4, Nov. 14, 1986, 100 Stat. 3664.]

Short Title of 1996 Amendments

Pub.L. 104–208, Div. A, Title I, § 101(a) [Title I, § 121, subsec. 7(a)], Sept. 30, 1996, 110 Stat. 3009–31, provided that: "This section [probably should be this subsection, which amended this section and section 2243 of this title] may be cited as the 'Amber Hagerman Child Protection Act of 1996'."

Short Title

Pub.L. 99–646, § 87(a), Nov. 10, 1986, provided that: "This section [enacting this chapter; amending sections 113(a), (b), 1111(a), 1153, and 3185(12) of this title, sections 300w–3(a)(1)(G), 300w–4(c)(6), and 9511 of Title 42, The Public Health and Welfare, and section 1472(k)(1) of Title 49, Transportation; repealing chapter 99 (sections 2031 and 2032) of this title; and enacting note provision under this section] may be cited as the 'Sexual Abuse Act of 1986'."

[Short Title provision similar to Pub.L. 99–646, § 87(a), was enacted by Pub.L. 99–654, § 1, Nov. 14, 1986, 100 Stat. 3660.]

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2242. Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is—

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3621, and amended Pub.L. 103–322, Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 2150.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 2241 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2243. Sexual abuse of a minor or ward

(a) **Of a minor.**—Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) **Of a ward.**—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is—

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

(c) **Defenses.**—(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of mind proof requirement.—In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew—

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3621, and amended Pub.L. 101–647, Title III, § 322, Nov. 29, 1990, 104 Stat. 4818; Pub.L. 104–208, Div. A, Title I, § 101(a) [Title I, § 121, subsection 7(c)], Sept. 30, 1996, 110 Stat. 3009–31.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 2241 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 101–647, 1990 U.S.Code Cong. and Adm.News, p. 6472.

§ 2244. Abusive sexual contact

(a) Sexual conduct in circumstances where sexual acts are punished by this chapter.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if so to do would violate—

(1) section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than six months, or both.

(b) In other circumstances.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than six months, or both.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3622, and amended Pub.L. 100–690, Title VII, § 7058(a), Nov. 18, 1988, 102 Stat. 4403; Pub.L. 103–322, Title XXXIII, § 330016(1)(K), Sept. 13, 1994, 108 Stat. 2147.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 2241 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 100–690, 1988 U.S. Code Cong. and Adm. News, p. 5937; Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2245. Sexual abuse resulting in death

A person who, in the course of an offense under this chapter, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

(Added Pub.L. 103–322, Title VI, § 60010(a)(2), Sept. 13, 1994, 108 Stat. 1972.)

HISTORICAL AND STATUTORY NOTES

Prior Provisions

A prior section 2245 was renumbered section 2246 by Pub.L. 103–322, Title VI, § 60010(a)(1), Sept. 13, 1994, 108 Stat. 1972.

Legislative History

For legislative history and purpose of Pub.L. 103–322, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2246. Definitions for chapter

As used in this chapter—

(1) the term "prison" means a correctional, detention, or penal facility;

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term "official detention" means—

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3622, § 2245, renumbered § 2246 and amended Pub.L. 103–322, Title IV, § 40502, Title VI, § 60010(a)(1), Sept. 13, 1994, 108 Stat. 1945, 1972.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3662.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 2241 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646, see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2247. Repeat offenders

Any person who violates a provision of this chapter, after one or more prior convictions for an offense punishable under this chapter, or after one or more prior convictions under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual contact have become final, is punishable by a term of imprisonment up to twice that otherwise authorized.

(Added Pub.L. 103–322, Title IV, § 40111(a), Sept. 13, 1994, 108 Stat. 1903.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 103–322, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2248. Mandatory restitution

(a) **In general.**—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) **Scope and nature of order.**—

(1) **Directions.**—The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) **Enforcement.**—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) **Definition.**—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) **Order mandatory.**—(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

[(C) and (D) Repealed. Pub.L. 104–132, Title II, § 205(b)(2)(C), Apr. 24, 1996, 110 Stat. 1231]

[(5) to (10) Repealed. Pub.L. 104–132, Title II, § 205(b)(2)(D), Apr. 24, 1996, 110 Stat. 1231]

(c) **Definition.**—For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

[(d) and (e) Repealed. Pub.L. 104–132, Title II, § 205(b)(3), Apr. 24, 1996, 110 Stat. 1231]

[(f) Redesignated (c)]

(Added Pub.L. 103–322, Title IV, § 40113(a)(1), Sept. 13, 1994, 108 Stat. 1904, and amended Pub.L. 104–132, Title II, § 205(b), Apr. 24, 1996, 110 Stat. 1231.)

HISTORICAL AND STATUTORY NOTES

Effective Date of 1996 Amendments

Section 211 of Pub.L. 104–132 provided that: "The amendments made by this subtitle [enacting sections 3613A and 3663A of this title, amending this section and sections 2259, 2264, 2327, 3013, 3556, 3563, 3572, 3611, 3612, 3613, 3614, 3663, and 3664 of this title and Rule 32 of the Federal Rules of Criminal Procedure, and enacting provisions set out as notes under this section, section 3551 of this title, and section 994 of Title 28, Judiciary and Judicial Procedure] shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act [Apr. 24, 1996]."

Legislative History

For legislative history and purpose of Pub.L. 103–322, see 1994 U.S. Code Cong. and Adm. News, p. 1801. See, also, Pub.L. 104–132, 1996 U.S. Code Cong. and Adm. News, p. 924.

CHAPTER 110—SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct:

shall be punished as provided under subsection (d).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transport-

identical to those otherwise provided for assaults involving an official victim; when no assault is involved, the offense level is 6.

Historical Note: Effective October 15, 1988 (see Appendix C, amendment 64). Amended effective November 1, 1989 (see Appendix C, amendments 89 and 90); November 1, 1992 (see Appendix C, amendment 443); November 1, 1997 (see Appendix C, amendment 550).

* * * * *

3. CRIMINAL SEXUAL ABUSE

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

(a) Base Offense Level: 27

(b) Specific Offense Characteristics

(1) If the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b) (including, but not limited to, the use or display of any dangerous weapon), increase by 4 levels.

(2) (A) If the victim had not attained the age of twelve years, increase by 4 levels; or (B) if the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by 2 levels.

(3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by 2 levels.

(4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(5) If the victim was abducted, increase by 4 levels.

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

(d) Special Instruction

(1) If the offense occurred in a correctional facility and the victim was a corrections employee, the offense shall be deemed to have an official victim for purposes of subsection (a) of §3A1.2 (Official Victim).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *For purposes of this guideline—*

   "Permanent or life-threatening bodily injury," "serious bodily injury," and "abducted" are defined in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

   "The means set forth in 18 U.S.C. § 2241(a) or (b)" are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim.

2. *Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.*

5. *If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).*

6. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The maximum term of imprisonment authorized by statute is life imprisonment. The base offense level represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon.

An enhancement is provided when the victim is less than sixteen years of age. An additional enhancement is provided where the victim is less than twelve years of age. Any criminal sexual abuse with a child less than twelve years of age, regardless of "consent," is governed by §2A3.1 (Criminal Sexual Abuse).

An enhancement for a custodial relationship between defendant and victim is also provided. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This represents the potential for greater and prolonged psychological damage. Also, an enhancement is provided where the victim was an inmate of, or a person employed in, a correctional facility. Finally, enhancements are provided for permanent, life-threatening, or serious bodily injury and abduction.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 91 and 92); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1993 (see Appendix C, amendment 477); November 1, 1995 (see Appendix C, amendment 511); November 1, 1997 (see Appendix C, amendment 545).

§2A3.2. Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

(a) Base Offense Level: **15**

(b) Specific Offense Characteristic

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

2. *Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section applies to sexual acts that would be lawful but for the age of the victim. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. § 2243(a). An enhancement is provided for a defendant who victimizes a minor under his supervision or care.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 93); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

(a) Base Offense Level: 9

Commentary

Statutory Provision: 18 U.S.C. § 2243(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *A ward is a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.*

2. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 94); November 1, 1995 (see Appendix C, amendment 511).

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level:

(1) **16**, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);

(2) **12**, if the offense was committed by the means set forth in 18 U.S.C. § 2242;

(3) **10**, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than **16**, increase to level **16**.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(c) Cross References

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2244(a)(1),(2),(3). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"The means set forth in 18 U.S.C. § 2241(a) or (b)" are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.*

2. *"The means set forth in 18 U.S.C. § 2242" are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.*

3. *Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

4. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

5. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 95); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

* * * * *

UNITED STATES COURT OF APPEALS DECISIONS REGARDING CHILD SEXUAL ABUSE

1. ***United States of America v. Lonnie Horse Looking***, 1998 U.S. App. LEXIS 2185, September 9, 1998 (In a case off the Rosebud reservation involving despicably severe sexual and physical abuse of a six month child, Court rejects Defendant's argument that the admission of statements made to law enforcement was in error on ground that Defendant had been properly Mirandized and that the Defendant failed to properly allege involuntariness of statements even after being given second chance by magistrate. Court also rejects argument that trial court committed error by permitting government to interview defense witness before trial on ground issue not preserved for appeal and witness' testimony not exculpatory. Trial court did not err in denying admission of a calendar prepared by defendant and his family on ground that calendar was hearsay and was not a contemporaneous recitation of facts but prepared later. Lastly, sufficient evidence existed to sustain convictions on all counts)

2. ***United States of America v. Weaselhead,*** 1998 U.S. App. LEXIS 21880, September 9, 1998 (Court holds that the federal prosecution of a Blackfeet Indian for sexual abuse of a minor barred by double jeopardy because Defendant had already been prosecuted for same conduct underlying federal prosecution in the Winnebago Tribal Court. Court holds that in light of Duro v. Reina's holding that Indian tribes lack the inherent sovereign authority to prosecute non-member Indians, the Winnebago Tribal Court was exercising authority under a federal delegation and thus the subsequent federal prosecution was barred. Decision may cause some problems with initial tribal prosecution when federal prosecution is sought later. Entire court later splits en banc thus affirming the lower court's decision that federal prosecution not barred)

3. ***United States v. Rouse***, 111 F.3d 561 (8th Cir. 1997), reconsidering 100 F.3d 560 (8th Cir. 1996) (In case off the Yankton Sioux reservation involving several defendants and victims the Court reverses its earlier panel decision reversing several convictions of sexual abuse of minors on grounds that the district court erred in excluding certain expert opinion testimony and in denying defendants' motion for independent pretrial psychological examinations of the abused children. Court holds that defendants failed to preserve argument that State DSS denied defense

counsel adequate access to children for investigation and that government did not contribute to such denial. Court reverses itself on whether the Defendants displayed a need for further physical and psychological examination of the children by holding that the physical examinations conducted were adequate and that psychological evaluations on competency of children were not requested to the district court and that thus the children were presumed competent to testify. Court also strongly endorses the notion that children should be not further traumatized by court proceedings by holding that: *Of course, the court must protect a criminal defendant's right to a fair trial, but it must also protect the State's paramount interest in the welfare of the child. Making court-ordered adversarial examinations routinely available would raise a barrier to the prosecution of this kind of crime by maximizing the trauma that its victims must endure. At a minimum, therefore, the court should heed a custodial agency's opinion that pretrial access to the child for investigative or adversarial purposes is unnecessary or unwise. Given the difficulty of balancing these important interests, we conclude that, if the custodian of a child witness opposes access as not in the child's best interest, defendant must show that denial of access would likely result in an absence of "fundamental fairness essential to the very concept of justice" before the trial court need reach the question whether some type of access may appropriately be ordered.*
Court also denies the Defendants' claims that permitting three of the victims to testify via closed circuit television violated the confrontation rights of the Defendants on ground that: *Accordingly,"where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure" which preserves "the essence of effective confrontation" -- testimony by a competent witness, under oath, subject to contemporaneous cross-examination, and observable by the judge, jury,and defendant. Before invoking such a procedure, the district court must find that the child "would be traumatized, not by the courtroom generally,but by the presence of the defendant.*

Court also affirms trial court's denial of testimony regarding sexual activity of child victims on ground that defendants failed to timely notify government of intent to use as required by Rule 412.

Court rejects Defendants' argument that admission of statements made by

children at initial interview with FBI was hearsay on ground that the statements met the requirements of the residual hearsay exception, Fed. R. Evid. 803(24), because they had indicia of reliability and the children were also available for cross-examination.

Court affirms the lower court's decision rejecting the testimony of defendants' psychological expert who intended to testify that children's testimony was unreliable because it had been implanted in them by multiple inappropriate interrogations because such testimony invaded the province of the jury and did not satisfy the Daubert standard for expert testimony. Court also, in a closer call, upheld the Court's rejection of an offer of proof made by the expert on the ground that it was harmless error because the jury heard substantial evidence from the expert on the suggestibility of the methods of interrogation used.

Lastly, the Court upheld the denial of a new trial motion based on juror misconduct finding that a challenged juror was not a racist and affirmed the trial court's decision to allow the government to reopen its case after resting to better establish crimes occurred in Indian country.

4. ***United States v. LeCompte***, 99 F.3d 274 (8th Cir. 1996) Court reverses conviction for sexual contact with minor on ground that trial court committed error in permitting in other incidents of sexual contact between defendant and other children on theory that it demonstrated modus operandi of the defendant with children he allegedly molested. In dicta Court also cautions the trial court about deviating upward in sentence calculation on ground not listed in the sentencing guidelines.

5. ***United States v. Butler***, 56 F.3d 941 (8th Cir. 1995) Court affirms conviction for aggravated sexual abuse and one count of engaging in sexual contact in Indian country. Court rejects argument that child witness was subjected to leading direct examination on ground that there was only one leading question objected to and that leeway can be given in the direct examination of child victims. Court also upholds trial court's decision to permit in prior uncharged sexual act committed by the Defendant on same victim on ground that count of sexual contact is an intent crime and that the prior bad act shows intent and also it shows identity of the Defendant. Court also rejects a challenge to a witness credibility jury instruction which allegedly gave more credence to the testimony of child witnesses on ground it substantially advised the jury of its obligation to weigh all

witness testimony adequately.

4. ***United States v. Lawrence,*** 51 F.3d 150 (8th Cir. 1995) Court upholds a dismissal of an indictment charging the Defendant, a non-Indian, with sexual contact of a minor on ground that the victim in question, although meeting the requirement of having some degree of Indian blood, was not considered Indian by her community under the test laid out in St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988). Those factors, which the Court considered in declining order of importance, are: 1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life. Id. at 1461.

5. ***United States v. Whitted,*** 11 F.3d 782 (8th Cir. 1993) Court reverses the conviction of the Defendant who was convicted of several counts of aggravated sexual abuse and contact on ground that the trial court erred in permitting the doctor who performed medical evaluations on the child victim to testify: *My final diagnosis was that [L.] had suffered repeated child sexual abuse. "Dr. Likness testified he recommended that L. not be exposed to her father in the near future.* The Court held that: *Because jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse, however, a doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury nor admissible.* Court also holds that issue could be raised on appeal even though Whitted did not make timely objection because the error was manifest and prejudiced the Defendant.

7. ***United States v. Knife***, 9 F.3d 705 (8th Cir.1993) Court upholds trial court's determination for sentencing purposes that crime of aggravated sexual contact had been committed by force because Defendant had laid on victim and threatened her if she told anyone. See also United States v. Shoulders, 1993 U.S. App. LEXIS 21660.

8. ***United States v. Eagle Thunder***, 893 F.2d 250 (8th Cir. 1990) Court affirms conviction of Defendant for aggravated sexual abuse denying his claim that he was prejudiced by the Court's failure to severe trial from

co-defendant's who was convicted of kidnapping child victim and that Court erred in denying admissibility of prior sexual activity testimony regarding child victim on ground that the Defendant failed to properly offer it.

9. ***United States v. St. Pierre***, 812 F.2d 417 (8th Cir. 1987)Court affirms conviction of unlawful carnal knowledge of Defendant's stepdaughter and rejects argument that Court's refusal to permit testimony regarding the minor child's maintenance of pornographic material and other statements regarding her alleged sexual promiscuity was in error, that the Defendant's right to due process was denied by Court's refusal to appoint another expert to evaluate the child and him to determine whether he met the profile of a sex offender. Court also upheld the government's use of prior sexual acts committed by the Defendant upon the child victim on ground that it tended to show motive, opportunity and intent.

10. ***United States v. Denoyer***, 811 F.2d 436 (8th Cir. 1987) Court upholds conviction under Assimilative Crimes Act for involuntary sodomy of Defendant's son and rejects argument that statements made by the son to a doctor were inadmissible hearsay. Court also upholds trial court's refusal to suppress statements made by the Defendant to a law enforcement officer to the effect that the Defendant suspected that child was victim of sexual abuse. Court also rejects the Defendant's argument that he should have been permitted to demonstrate to the jury that the community he lived in was replete with sexual abuse and that others could have committed the crime.

11. ***United States v. Azure***, 801 F.2d 336 (8th Cir. 1996)Court reverses conviction of Indian for carnal knowledge of a female under 16 on ground that the Court erred in allowing pediatrician to vouch for credibility of child sexual abuse victim, holding that the Court erred in allowing the pediatrician to testify that she saw no reason why the child's testimony would be untrue.

12. ***United States v. Renville,*** 779 F.2d 430 (8th Cir. 1984) Court upholds trial court's finding that court had jurisdiction under Assimilitative Crimes Act to prosecute Indian for forcible rape against daughter in Indian country because incest under Major Crimes Act referred to state law which did not define incest as including forcible rape. Court

also upholds statements made by minor to medical professionals as statements made to assist diagnosis.

13. ***United States v. Clark,*** 1998 U.S. App. LEXIS 22373 Court upholds conviction of person for committing aggravated sexual abuse on Red Lake Indian reservation and rejects argument that Red Lake reservation is not Indian country because Tribe had never ceded land to United States for allotment on ground that the reservation need not be ceded to US for Indian country status to apply.

14. ***United States v. Crow***, 148 F.3d 1048 (8th Cir. 1998) Court reverses the Defendant's sentence and remands on ground that base offense level was improperly determined because there was insufficient evidence to demonstrate force in conviction for aggravated sexual contact when only force was the removal of victim's clothing and threat made after the crime.

15. ***United States v. A.W.***L., 1997 U.S. App. LEXIS 17916 Court upholds adjudication of juvenile as sexual offender finding that he was an Indian under the commonly-accepted definition of Indian laid out in United States v. Lawrence.

16. ***United States v. Jones,*** 104 F.3d 193 (8th Cir. 1997) Court holds that a tribal law enforcement officer need not notify a Defendant of possible federal charges when interrogating for tribal crime.

17. ***United States v. Gregor***, 98 F.3d 1080 (8th Cir. 1996) Court upholds conviction of resident of Wagner for statutory rape on ground that Wagner is within Indian country. (Note that this case may or may not be good law dependent upon the fate of federal court decisions regarding what exactly is the Yankton Sioux Indian reservation)

18. ***United States v. Cavanaugh***, 1996 U.S. App. LEXIS 10923 Court vacates sentence on conviction of aggravated sexual contact on ground that trial court did not adequately find that threats or force had been used by the Defendant in the commission of offense and that base offense level had not been established.

19. ***Nazarenus v. United States,*** 69 F.3d 1391 (8th Cir. 1995) Court affirms denial of habeas corpus application of defendant convicted of

aggravated sexual abuse claiming ineffective assistance of counsel because counsel had not objected to government continuance requests that permitted DNA exams which showed that he was a liar when he denied having sex with victim.

20. ***United States v. R.E.J.***, 29 F.3d 375 (8th Cir. 1994)Court affirms trial court's adjudication of juvenile as delinquent for committing two counts of sexual abuse of minor.

21. ***Shaw v. United States,*** 24 F.3d 1040 (8th Cir. 1996) Court reverses denial of evidentiary hearing on habeas corpus of Defendant convicted of several counts of aggravated sexual abuse on ground that Defendant was entitled to hearing on claim that trial counsel was ineffective by not offering evidence of prior sexual activity of minor victim to demonstrate source of venereal disease as well as alternative theory on torn hymen.

22. ***United States v. Yellow***, 18 F.3d 1438 (8th Cir. 1994) Court upholds conviction of Defendant for raping his disabled brother and minor sister on Red Lake reservation finding that the trial court did not err in admitting evidence of prior acts of sexual abuse against the victims on ground that it tended to show identity, motive and intent. Court also finds that the other acts were demonstrated by a preponderance of the evidence. Court also upholds the admission of statements made to a psychologist as statements made to assist in diagnosis under Fed. R. Evid. 803(4), rejecting the argument that such statements cannot be made to a psychologist. Court also upholds departure upward in sentence on ground that the victims suffered severe psychological harm based upon judge's observations and expert records.

23. ***United States v. Clown***, 925 F.2d 270 (8th Cir. 1991) Court affirms sentence for incest under ACA finding that sexual abuse was most analogous federal crime for application of federal sentencing guidelines.

24. ***United States v. Demarrias***, 876 F.2d 674 (8th Cir. 1989) Court upholds conviction of abusive sexual contact on ground that it is a lesser included offense of aggravated sexual abuse and sexual abuse of a minor. Court also upholds federal jurisdiction over offenses under Major Crimes Act finding that the Sexual Abuse Act amended Major Crimes Act. Court finally holds that the act of the presiding district court judge leaving

town and allowing the magistrate to accept the verdict did not violate the federal magistrate law.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
DECISIONS ON CHILD SEXUAL ABUSE

1. United States v. TSINHNAHIJINNIE, 112 F.3d 998 (9th Cir. 1997)(Conviction for child sexual abuse reversed because of fatal variance between date alleged in indictment and date proven by the United States because date proven may have been off reservation.)

2.United States v. Bighead, 128F.3d 1329 (9th Cir. 1997)(Court upholds the admissibility of the testimony of a forensic director of a Children's Advocacy Center regarding the characterstics of child sexual abuse victims, specifically with regard to the timing of the reporting and recollection of the abuse. Bighead argued that the district court erred in admitting Boychuk's expert testimony about certain characteristics of child sexual abuse victims, because it lacked foundation under Fed. R. Evid. 702 and under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). He faults Boychuk's opinion as it went beyond her own observations, cf. United States v. Hadley, 918 F.2d 848 (9th Cir. 1990), but lacked the bases required by Fed. R. Crim. P. 16; and he contends that the district court should have determined whether her theories could be tested, were subjected to peer review and publication, had the potential for error, and were generally accepted in the field.

Boychuk was called as a rebuttal witness after the victim's ability to recall and to recount the incidents of sexual abuse vigorously had been challenged on cross-examination. Boychuk did not testify about the facts of this case, or about the particular victim, whom she had never examined. Rather, she testified about "delayed [**4] disclosure" and "script memory," which are typical characteristics she has observed among the more than 1300 persons she has interviewed who say they are victims of child abuse. As such, her testimony falls within Hadley. It holds that where an expert testifies to "general behavioral characteristics" based upon the expert's "professional experience" and does not rely on "novel scientific technique" or employ "any special techniques or models," Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923) is not implicated. 918 F.2d at 853. Daubert has supplanted the Frye test that had previously beenfollowed uniformly. However, we have already indicated that Daubert's tests for the admissibility of expert scientific testimony

do not require exclusion of expert testimony that involves specialized knowledge rather than scientific theory. United States v. Cordoba, 104 F.3d 225 (9th Cir. 1996). Boychuk's testimony consisted of her observations of typical characteristics drawn from many years experience interviewing many, many persons, interviewed because they were purported victims of child abuse.

3. United States v. Rivera, 43 F.3d 1291 (9th Cir. 1995)Court upholds aggravated sexual abuse conviction and concludes that the statements made by a fifteen year old victim to her mother that the Defendant had just raped here were excited utterances and thus exceptions to hearsay. Court also upholds testimony of doctor that the victim's story was consistent with medical examination as not being violative of the rule that a witness cannot bolster another's testimony).

4. United States v. Hadley, 918 F.2d 848 (9th Cir. 1990)(In notorious case involving former BIA teacher on the Navajo reservation, the Court upholds convictions for aggravated sexual abuse and abusive sexual contact. Court upholds the use of other instances of sexual abuse committed by the Defendant on ground that it demonstrated modus operandi and intent. Court also upholds the use of expert testimony regarding the characteristics of child sexual abuse victims.)

5. United States v. LOMAYAOMA, 86 F3d 142 (9th Cir. 1996)(Court holds that the amendments to the Major Crimes Act to include child sexual abuse does not violate the Constitution because Congress has plenary authority to address Indian affairs).

6, United States v. Frederick, 78 F.3d 1370 (9th Cir. 1996)Court reverses conviction for aggravated sexual abuse because of cumulative impact of numerous errors involving the admission of testimony regarding prior bad acts by Defendant and inadmissible hearsay.)

7.United States v. Chatlin, 51 F.3d 869 (9th Cir. 1996)(Court vacates sentence under Federal Sentencing Guidelines because of upward departure based upon use of acts that were dismissed in plea agreement).

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EXPERT TESTIMONY IN CHILD SEXUAL ABUSE PROSECUTIONS

I. Presentation: Expert Testimony in Child Sexual Abuse Prosecutions

A. Scientific or Technical?

B. What Constitutes "Expertise"

C. Various Categories of Expert Testimony

1. CSAAS

2. Behavior of Sexually Abused Children

3. Diagnosis of Sexual Abuse

4. Suggestibility of Children

5. Use of Anatomical Dolls

6. Credibility of Children

D. Special Considerations in Native American cases

E. The Proposed Amendment to Federal Rule of Evidence 702

F. The Dangers of Expert Testimony in Child Sexual Abuse Prosecutions

II. Materials

Moriarty, "Psychological and Scientific Evidence in Criminal Trials," (1996)

U.S. v. Bighead, 128 F.3d 1329 (9th Cir. 1997)

State v. Scheffelman, 250 Mont. 334, 820 P.2d 1293 (1992)

U.S. v. Chiquito, 106 F.3d 311 (10th Cir. 1997)

U.S. v. Whitted, 11 F.3d 782 (8th Cir. 1993)

State v. Michaels, 136 N.Y. 299, 642 A.2d 1372 (1994)

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Psychological and Scientific Evidence in Criminal Trials

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Chapter 8

Child Sexual Abuse Syndrome

I. INTRODUCTION

II. EXPERT TESTIMONY

I. INTRODUCTION

§ 8:1 Overview

By most accounts, reports of child sexual abuse in this country have grown exponentially over the past few decades. Whether the incidence of the crime is actually growing or the reporting of the crime is finally occurring is not clearly understood. What engenders no debate is that the abuse of children—whether physical, sexual, or emotional—is pernicious and damages their physical and mental well-being, often scarring them well into adulthood. Some children, sadly, do not survive the abuse.

Among the more discussed aspects of child abuse is child sexual abuse. Long believed by many simply to be fantastic childhood tales, the vast majority of Americans now believe sexual abuse of children occurs and occurs fairly frequently. Some people, however, believe that a witch hunt for sexual abuse has developed in this country, and

that the "experts" and courts have totally lost touch with reality.[1]

> In a recent publication, one group of commentators provided the following statistics: In 1991, an estimated 2,694,000 children were reported to Child Protective Services agencies as victims of . . . abuse or neglect. Of these, approximately 15 percent, or 404,100 were sex abuse cases. . . . The numbers for 1992 are even higher with an estimated 2,936,000 reported cases of . . . abuse and 17 percent, or 499,120 being sex abuse cases. There is also growing evidence that a substantial portion of the allegations are either unsubstantiated . . . or false. . . . Of the 2.7 million reported cases for 1991, an average of only 39 percent were substantiated following investigation.[2]

The prosecution of adults who physically batter children is a generally simpler process than the prosecution of sexual abusers. In physical abuse cases, there is usually ample physical evidence to support the claim of abuse. Additionally, physicians' testimony about the battered child syndrome has uniformly been admitted in courts and is accepted in the medical profession.[3] In sexual abuse cases, however, there is often no physical evidence and reliance on psychological evidence has therefore become more pronounced.

As with most societal issues being played out in the criminal courts, however, the road to prosecuting sexual abuse crimes has been difficult. There has been substantial conflict in these cases about what evidence should be admissible—most prominently in the area of admission of expert testimony. The prosecution has claimed that difficulties encountered inherent in proving sexual abuse has made the introduction of expert testimony a necessity. The defense

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[Section 8:1]

[1] The McMartin sexual abuse case in California and the Kelly Michaels case in New Jersey both underscore the growing belief among many that the allegations of sexual abuse are reaching hysterical proportions. In both cases, preschool teachers were accused by several children of sexual abuse—after numerous suggestive interrogations amid an atmosphere of hysteria. For an account of the McMartin case, see Coleman, Learning from the McMartin Hoax, 1(2) Issues in Child Abuse Accusations 68 (1989); Carlson, Six Years of Trial By Torture, Time Mag, Jan. 29, 1990. Some of the details of the interrogation in the *Michaels* case are contained in the appendix to the New Jersey Supreme Court's opinion. State v. Michaels, 642 A.2d 1372 (N.J. 1994).

[2] Jenkins & Howell, Child Sexual Abuse Examinations: Proposed Guidelines for A Standard of Care, 22 Bull Am Acad Psychiatry & L 5, 6 (1994).

[3] The battered child syndrome is a diagnostic tool used by physicians determining the cause of children's repeated physical injuries.

has claimed that much of the expert testimony results in unfair trials in which innocent people are convicted of crimes they did not commit.

The purpose of this chapter is to provide an overview for the practicing lawyer dealing with the child sexual abuse case. Its primary focus will be to provide an in-depth review of the psychological evidence aspects of the child sexual abuse case.

Specifically addressed will be the various concepts that have become integral to the prosecution and defense of child sexual abuse cases. These concepts include the so-called "child sexual abuse accommodation syndrome," the psychological underpinnings for the claims that "children do not lie about sexual abuse," the behavioral profiles often introduced at trial of sexually abused children, and the growing concern about suggestive interview techniques and anatomical dolls.

Additionally included in this chapter are a review of the various positions taken by the courts on the admission of psychological evidence, a discussion of the problems that arise in the uncovering of alleged abuse, and a step-by-step approach to trying the child sexual abuse case. Furthermore, the special problems of mass declarations of child abuse (where several children allege abuse at the hands of the same person) are reviewed. As in most of the chapters in this book, there are prosecution and defense checklists at the end of the chapter.

§ 8:2 Special problems of child sexual abuse cases

It is hard to imagine a category of criminal cases that presents more problems for both sides (and for the court) than child sexual abuse cases. The whole concept of child sexual abuse is such an affront to our sensibilities and so difficult to comprehend. With the growing awareness of child sexual abuse, many parents have been worried about leaving their child in day care, and many professionals in the day care business are terrified of the possibility of a child making a claim of sexual abuse.

In addition to the difficulties presented in the case of one (or a few) children alleging abuse, there are special difficulties faced by both the prosecution and the defense in cases of mass declarations. The *McMartin* case in California and the *Michaels* case in New Jersey

are perfect examples of the dangers and difficulties in the cases.[1]

§ 8:3 — Prosecution difficulties in child sexual abuse cases

Among the problems faced by prosecutors in these cases are the following:

- There are usually no witnesses to the crime, other than the child victim.
- The vast majority of cases occur where the adult in question has a relationship of trust with the child and the parties are often loathe to bring suit. There is often a great deal of disbelief by one parent when the other parent is accused of the acts, and the child is often pressured to recant the allegation.
- Sexual abuse often leaves no physical evidence as it may consist of improper touching or other acts.
- Children are often unbelievable witnesses and are hampered by an inability to verbalize and explain all the events.
- Children often react in unexpected ways to the abuse, evidencing behaviors that are difficult for jurors to understand.
- The tales of abuse are often too bizarre to be believed and jurors assume that the child must be fabricating the tale.
- Adults who abuse children often lead very respectable, upright lives in society, making it difficult for jurors to believe that the defendant could have committed such a pernicious act.
- Abused children have often been threatened or warned about not telling anyone about the abuse and they are therefore terribly afraid to reveal the abuse for fear that they or their family will be harmed.
- Children are often unable to state when or where the abuse occurred or specifically how many times it occurred, rendering their testimony less than believable.
- Children are often traumatized by testifying in court—both as a result of the public aspect of the proceeding and by the presence

[Section 8:2]

[1] Both of the cases referred to, State v. McMartin, and State v. Michaels, 642 A.2d 1372 (N.J. 1994), involved child sexual abuse claims made by children who were in day care programs run by the defendants. In the *McMartin* case, the jury returned a verdict of not guilty after a year-long trial. In the *Michaels* case, the Superior Court and Supreme Court of New Jersey reversed the conviction (on different issues), with the likely result that the case will not be able to be retried. The subject of mass declarations of child abuse is addressed in this chapter.

of the abusive individual of whom they are afraid and/or whom they still love.

As difficult a job as prosecutors have in these cases, defense counsel (and the courts) are faced with equally difficult challenges in the defense of child sexual abuse cases.

§ 8:4 — Defense difficulties in child sexual abuse cases

Among the difficulties presented in the defense of child sexual abuse cases are the following:

- Children are naturally sympathetic witnesses, whom jurors want to protect when they listen to them. Individuals accused of child sexual abuse crimes, on the other hand, are often not accorded the presumption of innocence by jurors, but are clearly viewed with distrust and suspicion.
- The flood of information on television, newspapers, magazines, and in other areas of the media about child sexual abuse has made the subject much more accessible and believable to the population at large. Many individuals are now convinced that there is an epidemic of child sexual abuse cases.
- It is almost impossible to find witnesses to corroborate the adult's denial of the act(s). How does a defendant prove that the touching did not occur?
- Stepfathers are often defendants and they have a historically "evil" reputation, deservedly or not.
- Most courts have permitted children to testify without reference to specific places, dates, or times, further complicating the availability of alibi and other defenses.
- There is often a lack of witnesses and physical or circumstantial evidence—the defendant has limited tools to construct a defense.
- Courts have become increasingly more lenient with prosecutorial attempts to introduce expert evidence to explain any discrepancies, bolster the child's testimony, and to explain the child's behavior.
- Some courts are not requiring that the child actually testify in court, but are permitting videotape testimony, thus depriving the jury of the right to evaluate the child's testimony in person.

There has recently been a growing awareness of the problems with inaccurate uncovering of child abuse by counselors, police, and pros-

ecutors. Specifically, the use of dolls and certain types of interrogation techniques have become more suspect.

§ 8:5 — Dilemma of courts handling sexual abuse cases

Courts handling these cases must deal with the dynamic of balancing their natural sympathy for the victims of crime with their need to assure the fairness of the proceedings to individuals accused of crimes. Additionally, courts must balance the need for expert testimony against the danger of unfair prejudice it poses.

Another major problem for the courts is in evaluating the science behind the testimony. Many courts are confused in the area of psychological testimony and are unsure of who is or who should be an authority. Additionally, many of the experts are not familiar with the literature and are not aware of the psychologically controversial nature of the testimony they are providing to the court.[1]

II. EXPERT TESTIMONY

§ 8:6 Advent of expert testimony

As the prosecution of sexual abuse cases became more prevalent in the 1980s, prosecutors began to push the courts to permit the introduction of expert testimony to explain why children were changing their stories, recanting tales of abuse, and acting in bizarre and inexplicable fashions. Additionally, prosecutors sought to buttress their cases by introducing expert testimony to explain to the jury that sexually abused children often exhibited certain behavior patterns (profiles) and that these patterns were exhibited by the child in question. Finally, some prosecutors attempted to introduce expert evidence to suggest that victims of child sexual abuse never or very rarely lie about such abuse.

The prosecutors in child sexual abuse cases have argued the following: that the rules of evidence should permit expert psychological testimony; that any difficulties with the expert's testimony went towards its weight and not its admissibility; that the jury's inherent bias against believing such testimony from children required such testimony; and that defendants were not unfairly prejudiced by the introduction of such testimony.

[Section 8:5]

[1] Chapter 2 contains a more complete discussion concerning the credentials of expert witnesses.

Not surprisingly, defense lawyers began seriously challenging this expert evidence on a variety of fronts, including challenges to the relevancy, reliability, and prejudicial effect of such evidence, the invasion of the jury's province to determine credibility, the qualifications of the experts, and the basic unfairness of the testimony.

The result of these arguments for and against expert testimony in child sexual abuse cases has been to create once again a wide divergence among the courts as to whether expert testimony should be admissible and, if so, what specific testimony should be considered by the jury.

To understand the courts' respective positions, it is necessary to understand fully the psychological concepts to which the court and litigants are referring in these cases. To that end, the following sections will contain an explanation of the psychology behind the testimony, along with a review of the current literature and the various difficulties, as understood by the experts.

§ 8:7 — Psychological aspects of child sexual abuse

There are several psychological aspects to child sexual abuse. There are the psychological aspects to why children do not tell people immediately about the abuse. There are the behaviors sexually abused children exhibit, sometimes referred to as behavior profiles. Additionally, there are the psychological issues regarding recantation, secrecy, and changes or discrepancies in the retelling of the abuse. This latter category is most frequently referred to as the child sexual abuse accommodation syndrome (CSAAS). Finally, there is the question of children's memory of and truthfulness about the abuse as well as children's suggestibility.

§ 8:8 — Confusion of the courts

Often, the courts (and litigants) confuse or misapprehend the psychological issues. Unfortunately, experts (or those who purport to be experts) also sometimes confuse these issues themselves, owing to the substantial and complex problems associated with expert testimony concerning child sexual abuse.

Among the areas of dispute are whether children lie about sexual abuse, whether there is an identifiable set of behaviors indicated by victims of sexual abuse, whether psychologists have any special way of discerning whether children are telling the truth, and whether

there is any validity to the child sexual abuse accommodation syndrome.

Further complicating the problem is the courts' leniency with regard to expert credentials. Often, the "experts" who testify do not have sufficient expertise and education to render the opinions they are giving in court. Because there has been a great deal of latitude by the courts with regard to expert witnesses, individuals who are not licensed psychologists or psychiatrists regularly render opinions that are far beyond their ken. The result of this procedure has been to create confusion in the courts.

One of the more pronounced misunderstandings has been the confusion of CSAAS evidence with behavioral profiles and the erroneous belief that CSAAS is a diagnostic syndrome. The following sections clearly explain the differences among the three types of evidence.

§ 8:9 Three possible types of psychological testimony

Generally, there are three different types of testimony that prosecutors have sought to introduce into evidence: behavior profiles of sexually abused children; child sexual abuse accommodation syndrome testimony; and testimony concerning whether children are telling the truth about sexual abuse.

§ 8:10 — Child sexual abuse accommodation syndrome

Psychiatrist Roland C. Summit first introduced a theory to explain how children adjusted, or accommodated to sexual abuse.[1] Termed the child sexual abuse accommodation syndrome (CSAAS), it quickly found its way into the courtroom. CSAAS consists of some or all of five elements often seen in sexually abused children: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed or (5) conflicted disclosure and retraction.

Although the purpose of defining these characteristics as a syndrome was to provide a common language for those working with abused children,[2] the courts began to admit such evidence in sexual abuse prosecutions, often to buttress claims of abuse.

According to Dr. Summit and other professionals, CSAAS is not a diagnostic syndrome. "The syndrome does not detect sexual abuse.

[Section 8:10]

[1] Summit, M.D., The Child Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177 (1983).

[2] Id. at 191. See also Myers, Expert Testimony in Child Sexual Abuse Litigation, 68 Neb L Rev 1, 67 (1989)(hereinafter Myers, Expert Testimony).

Rather it *assumes* the presence of abuse, and explains the child's reactions to it."[3] In a criminal case, any evidence that *assumes* the existence of a material fact in issue (namely, whether the child was abused) is potentially dangerous testimony.

The method of using CSAAS in courts has often been erroneous, as many courts have admitted such syndrome evidence as if it were a diagnostic syndrome. However, there have been other misuses of the syndrome. One influential commentator has stated:

> If the first error was erroneously equating child sexual abuse accommodation syndrome with a diagnostic device, the second mistake was hardly less serious. Some professionals conflated the reactions described by Summit, which are not probative of abuse, with behaviors that are probative of abuse. This combination of behaviors was then denominated a syndrome, the presence of which was supposedly probative of abuse.[4]

Although Myers refers to "behaviors probative of abuse," the truth is that many experts also testify about behaviors that are not necessarily probative of abuse.[5] In any event, the purpose of CSAAS has often been lost in the courts and inappropriately admitted.

If CSAAS testimony should be admitted (and that is subject to some disagreement), the only appropriate way would appear to be as rebuttal testimony to the issue of delayed or inconsistent reporting and recantation. Some courts have allowed this testimony in for such purpose.[6] The purpose of admitting such testimony is to help rehabilitate the child's testimony after it has been attacked on the grounds of inconsistency, delay, or recantation.

Those who support the admission of such testimony claim that the jury should be educated about the typical method of explaining such methods of reporting to contradict the inference that the child is lying. That is, many people believe that individuals (including children) who recant or delay reporting, or who relate inconsistent stories or stories that change are not being honest. Since such delaying, reporting and recanting behavior is typical of abused children, juries should be advised of this.

Those who oppose the admission of such testimony argue that such evidence invades the province of the jury to determine credibil-

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[3] Myers, Expert Testimony at 67.

[4] Id.

[5] Behavioral profiles are addressed in the next section.

[6] See, e.g., Hosford v. State, 560 So. 2d 163 (Miss. 1990).

ity and that it impermissibly suggests that all child victims are telling the truth when, in fact, some are not. Additionally, arguments have been made that juries are readily able to understand why children are afraid to tell about sexual abuse or why they get confused or recant—namely, that they are children and not adults. Since these issue are within the range of common understanding, they do not need to be explained by expert witnesses. There are jurisdictions that have declined to admit such testimony on these various grounds.

While CSAAS testimony clearly is helpful in proving actual cases of child sexual abuse, it is exceedingly dangerous in cases in which the allegations are not true. In the cases where abuse by the defendant has not occurred, CSAAS testimony often eliminates the only defense the defendant can present. Again, the problem in sexual abuse cases is that in the courts' concern for the welfare of the child, they often lose sight of the fact that in all criminal proceedings defendants enjoy the constitutional presumption of innocence and entitlement to present a defense.

The Supreme Court of Arizona highlighted the problem of appropriate focus in *State v. Moran*,[7] noting that "[g]iven the egregious nature of child molestation, we are tempted to stretch the rules of evidence to their utmost. . . ."[8] That court also noted that child sexual abuse cases are "an evolving area of the law that calls for creative, cautious, and reliable approaches to issues of proof that endeavor *to protect blameless children and give their alleged abusers sufficient due process safeguards.*"[9]

§ 8:11 — Behavioral profiles of sexually abused children

According to many psychologists who specialize in the area of child sexual abuse, there are several observable behaviors that are exhibited by the abused child. The admissibility of this evidence, sometimes referred to as a "profile" of the sexually abused child, has generated a lot of disagreement in the courts. Among the behaviors

[7] State v. Moran, 728 P.2d 248 (Ariz. 1986).

[8] Id. at 251 n.2.

[9] Id. Again, the court here seems to have lost sight of the purpose of a criminal trial: for a jury to determine beyond a reasonable doubt whether an individual, presumed to be innocent, has committed the acts with which he is charged. No more and no less is to be accomplished in a criminal case. It is not the appropriate forum to focus on the rights of the child nor is it the place to protect blameless children. The job of protecting children is for the family courts and the department of social services in these cases.

described by experts *in the case law*[1] on sexual abuse are the following characteristics: pre-mature sexual knowledge, anger, depression, low self-esteem, fear of abuse stimuli, sexualized play, aggression, fear, clingyness, withdrawal, overly compliant and eager-to-please behavior, bed wetting, nightmares, excessive masturbation, and drawing figures with exaggerated or missing limbs.

These behaviors do not account for the full range of exhibited behaviors by children who have been abused. In addition, many of these behaviors are exhibited by children who have been exposed to or endured other trauma (divorcing parents, psychologically or physically abusive parents, or death of a parent, among others).[2] Even more significantly, some of these behaviors are exhibited by children without significant traumatic situations.[3]

In the past few years, however, there has been a growing consensus among professionals about the existence of specific, unique behaviors exhibited by children who have either "personal or vicarious sexual experience."[4] Specifically, these behaviors include "age-inappropriate knowledge of sexual acts or anatomy, sexualization of play and behavior in young children, the appearance of genitalia in young children's drawings, and sexually explicit play with anatomically detailed dolls."[5]

Another study that collected the results of various professional dealings with sexually abused children found a high level of agreement that the following factors indicated sexual abuse:

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

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[Section 8:11]

[1] There is a distinction between what the experts are writing about in scientific publications and what testimony has been admitted in the courtroom. The former is far more specific and exact than the latter.

[2] See, for example, studies collected in Cappy & Moriarty, Child Sexual Abuse Syndrome: Exploring the Limits of Relevant Evidence, 1 Crim Proc L Rev 1 (1991); Myers, Expert Testimony at 62.

[3] Gardner, Sex Abuse Hysteria, Salem Witch Trials Revisited, 60–65 (1991).

[4] Myers, Expert Testimony at 62.

[5] Id.

abuse.[6]

However, these results are by no means conclusive that the abuse has occurred. They simply are probative that abuse may have occurred. What the studies have failed yet to do, however, is to determine the application of these findings, or to ascertain how scientifically controlled these various survey findings were and whether enough children who were not abused are not exhibiting such behaviors. Whether an accurate diagnosis of child sexual abuse can be made by these observations has not yet reached the level of necessary consensus among professionals, however, to be readily admitted by all courts.

For example, numerous important questions have not yet been sufficiently addressed:

- Do children who have watched pornographic movies exhibit these same behaviors?
- Do children exhibit these behaviors if they saw their parents (or babysitter, for example) having sex?
- What is the effect of sexually explicit lyrics in music on children?
- Do children who learn about sexuality at an early age from other children exhibit these behaviors?
- Do children who have looked at pornographic pictures or books exhibit such behaviors?
- Is there any difference exhibited in groups of children from different socio-economic backgrounds and cultures?
- Have the changing mores of our society in the last several years resulted in children learning about sexuality at increasingly younger ages? What has been the effect of the media and television access to sexual information on children's early sexual knowledge?[7]

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[6] Conte, Evaluating Children's Reports of Sexual Abuse: Results From a Survey of Professionals (unpublished), cited in Myers, Expert Testimony at 75.

[7] The highly sexualized rap songs of the last few years seem to emphasize change in sexual knowledge among younger people. Additionally, the proliferation of twelve and thirteen- year-old children having sex suggests that children are being exposed to much more sexual information than previously believed.

Children who are brought up by neglectful parents or substance addicted parents are often exposed to sexual issues at a very young age, as a result of a lack of parental supervision. That does not mean, however, that those children were sexually abused.

In addition to these questions, the courts have addressed the other questions concerning whether the behavior profiles sought to be introduced really are evidence of the type that should be admitted.

§ 8:12 — — Do sexual abuse victims react in an identifiable pattern?

One of the more difficult problems for many of the courts dealing with the question of whether to admit evidence of child sexual abuse is whether abused children react in an identifiable pattern. It appears, at this point, that sexually abused children do not exhibit a specific pattern of symptoms and that it is difficult to accurately diagnose children on the basis of such symptoms.[1] There are, however, individuals who claim to be able to diagnose sexual abuse from behavior patterns.[2]

According to most of the literature on the subject, the reactions to sexual abuse vary with the child, the nature and severity of the abuse, and the age of the child. Additionally, because of each individual's unique makeup, children exposed to the same abuse (for example, two children of an abusive father) may react in totally different fashions. As one commentator notes, there is "great variability in the type and severity of the children's reactions."[3]

In a National Institute of Mental Health study, written up by Lenore Walker,[4] over thirty-five different symptoms were noted in a study of 369 sexually abused children. Although roughly one-third of

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[Section 8:12]

[1] See, e.g., Haugaard & Reppucci, The Sexual Abuse of Children, A Comprehensive Guide to Current Knowledge and Intervention Strategies 177–78 (1988); Gardner, Sex Abuse Hysteria, Salem Witch Trials Revisited (1991); and studies collected in Note, The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims, 74 Geo LJ 429, 440-41 (1985).

[2] Many individuals who testified as experts in sexual abuse cases claim to be able to diagnose child sexual abuse by the behavior patterns of children. See, e.g., Allison v. State, 346 S.E.2d 380 (Ga. App. 1986), in which three expert witnesses testified about child sexual diagnoses based on behaviors exhibited by the child.

[3] Meyers, Expert Testimony in Child Sexual Abuse Litigation, 88 Neb L Rev 1, 55 (1988). This comprehensive article was published as part of a multi-disciplinary group composed of a law professor and several mental health practitioners. It has been widely cited by various courts around the country.

[4] Handbook on Sexual Abuse of Children, Assessment and Treatment Issues (1988).

the children suffered from low self-esteem, there were no symptoms that were exhibited by a majority of the children.[5]

§ 8:13 — — Do sexually abused children act like other children?

Another issue that has arisen in child sexual abuse prosecutions is that sexually abused children exhibit many behaviors that are similar to children who have been subjected to other forms of abuse, such as battering, emotionally abused and neglected. As one commentator has noted:

> [O]ne cannot reliably say that a child exhibiting a certain combination of behaviors has been sexually abused rather than, for instance, physically abused, neglected, or brought up by psychotic parents. Although future research may support identification of victims by their behaviors, such identification is currently not possible.[1]

The behaviors exhibited by sexually abused children are often the behaviors of a child who has been betrayed, treated cruelly, terrified and emotionally damaged. In that sense, those children really are not different from the children whose parents berate them or beat them, starve them, or neglect them. At the most fundamental level, the child is not thriving because of mistreatment. "The problems are not abuse-specific; . . . the common problems all can be tied to the lack of nurturance . . . all [caregivers] failed to provide sensitive, supportive care for their child."[2]

In the courtroom, however, the fact that the behaviors are not truly distinct from one another damages their ability to be relevant, probative evidence. The lack of discriminant ability is often fatal in evidentiary decisions. More than one court has remarked on this issue:

> Suffice it to say, then, that the literature in the area is disparate and contradictory and that the child abuse experts have been unable to agree on a universal symptomology of sexual abuse, especially the precise symptomology that is sufficiently reliable to be used

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[5] A chart containing the symptoms is contained in Cappy & Moriarty, The Child Sexual Abuse Syndrome: Exploring the Limits of Relevant Evidence in Criminal Trials, 1 Crim Prac L Rep 1, 2 (1993).

[Section 8:13]

[1] Haugaard & Reppucci, supra, at 178.

[2] Freidrich, Psychotherapy of Sexually Abused Children and Their Families 25 (1990).

confidently in a forensic setting as a determinant of abuse.[3]

Additionally complicating the issue is the fact that some experts in the field believe that certain of the behaviors ascribed to sexual abuse are actually normal childhood behaviors—such as temper tantrums, bedwetting, and nightmares.[4] Since these behaviors are often not indicative of abuse, there is a further dilution of their probative value.

Despite these problems inherent in the evidence, many courts (as will be fully discussed later in the chapter) have admitted evidence of behaviors exhibited by alleged abused children. In many jurisdictions, it would appear that the analysis performed by the Utah Supreme Court in *Rimmasch* was not undertaken. Rather, several courts have simply reviewed the expert testimony in a cursory fashion and decided to admit such testimony without benefit of much analysis.

§ 8:14 — Do sexually abused children lie about the abuse?

In case after case, prosecutors have introduced (or attempted to introduce) evidence through expert witnesses that victims of sexual abuse simply do not lie about their abuse. According to these experts who testify, children generally do not have sufficiently developed sexual knowledge to fabricate a tale of abuse, nor do they have the motivation to do so. These experts may also claim that children are reluctant to discuss the abuse and find it painfully difficult to relate such tales of abuse.

There are studies to support the claims that children do not lie about sexual abuse.[1] Empirical data would seem to support the claim that small children really would not know enough to fabricate

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[3] State v. Rimmasch, 775 P.2d 388, 401 (Utah 1989).

[4] Gardner, M.D., Sex Abuse Hysteria, Salem Witch Trials Revisited 60–65 (1991).

[Section 8:14]

[1] See, e.g., Berliner & Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. Soc. Issues 125, 127 (1984), stating:

> there is little or no evidence indicating that children's reports are unreliable, and none at all to support the fear that children often made false accusations of sexual assault or misunderstand innocent behavior by adults. . . . Not a single study has ever found false accusations of sexual assault a plausible interpretation of a substantial portion of cases. Goodman, Aman & Hirschman report that in their experiments, "children *never* made up false stories of abuse even when asked questions that might foster such reports." (emphasis supplied).

such tales. For example, how would a four-year-old child have any knowledge to create the suggestion that a male adult put his penis in her mouth? Nothing in her realm of experience enables her to make such a statement. And yet, there are other influences on children, such as exposure to sexually explicit material, suggestibility in the interview process and manipulation by a trusted adult, that could affect a child's statements.

In studies addressing when children lie, researchers have identified five motivations for children to be inclined to fabricate. These motivations are "(1) avoiding punishment; (2) sustaining a game; (3) keeping a promise (e.g., protect a loved one); (4) achieving personal gains (e.g. rewards, being accepted into a group); (5) and avoiding embarrassment."[2]

The authors discussed various studies in which children were given one of the above-listed motives to lie. One study involved parents kissing their child while giving them a bath. Another study involved children watching an adult spill ink and then being told by that adult that the adult would be in trouble if the child told anyone about spilling the ink. A sizable percentage (42 percent) of five-year-olds involved in the study claimed to have no knowledge when asked about the spilled ink. In the bathtub experiment, half the children did not tell the truth in response to questions asked of them.

In making the connection between children's willingness and ability to lie in these five scenarios, the authors state as follows:

> Until now, researchers who have claimed that children cannot be coached to distort their testimony appear to have tilted the odds toward finding truthfulness among preschoolers by implicitly using motives that favor a truthful outcome (e.g., Goodman et al., 1990; Saywitz et al., 1991). There were no motives for the child to make false disclosures in these earlier studies.
>
> In sum, the most recent research on lying has attempted to approximate real-life crime contexts by weaving effect and motive into studies of recollection and by using highly familiar contexts such as observing loved ones break toys or being kissed while in the bathtub. Young children will consciously distort their reports of what they witnessed, and they will do so more in response to some motives (e.g., fear of reprisal and avoidance of embarrassment) than others (e.g., to sustain a gain, gain rewards).[3]

[2] Ceci & Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psychol Bull 403, 426 (1993), referring to the results of numerous studies.

[3] Id. at 426.

Although these studies do not prove that children may lie about abuse, they certainly call into question the studies that claim unequivocally that children do not lie about abuse. For those attorneys who are in jurisdictions which permit testimony about credibility, it would be wise to review the Ceci and Bruck article in its entirety and find out if there are any follow-up articles that have been published subsequently.

§ 8:15 — — Effects of exposure to sexually explicit material

It is conceivable that a four-year-old has heard about sexual incidents or matters from an older sibling, a friend, or from watching the Geraldo show while the babysitter was on the phone. In short, there are many ways that a child could develop sexually precocious knowledge, although it may be difficult to pinpoint such acquisition of knowledge in a specific child.

We live in a world where sexual mores have loosened drastically in the last several years. What was once unheard of is now commonplace. Profanity and sexual messages are everywhere—from advertising to MTV to movies and magazines. This has had an effect on younger children, as mental health professionals will attest. [1]

Often, there are relatively harmless types of exposure to sexually explicit scatological knowledge—children playing doctor, or watching a movie such as Dennis the Menace where one child fools another into kissing a doll's bare bottom. Children are naturally curious, and "private parts" often generate a great deal of curiosity.

When children are eight or nine, it is now more likely that they have been exposed to a fair amount of sexually explicit information on the television, in the movies and in the lyrics of song. [2] Children permitted to "channel surf" at will on the television without supervision will find material to which they should not be exposed. Any child who goes to the movies cannot help but be exposed to sexually explicit material. Even clothing advertisements are sexually

[Section 8:15]

[1] See, e.g., Gardner, Sex Abuse Hysteria: Salem Witch Trials Revisited, 19-22 (1991).

[2] Lyrics, for instance, such as the one from popular Snoop Doggy Dog song, Gin and Juice — "I'm dialing 187 (murder) with my dick in your mouth."

suggestive.[3]

Clearly, by the time a child is thirteen or fourteen, the child has sufficient sexual knowledge to comprehend and report sexual abuse as well as sufficient knowledge to fabricate sexual abuse. The huge increase in pregnancies among young girls of twelve, thirteen, and fourteen clearly indicates a growing exposure to and engagement in sex at younger and younger ages.

In children of all ages, however, there is always the possibility that they inadvertently observed their parents or babysitters engaging in sexual behavior.

§ 8:16 — — Suggestibility and interrogation of children

In other circumstances, some believe that the nature of the questioning about the abuse can confirm what actually never occurred. Recently, the Supreme Court of New Jersey issued an explosive opinion detailing the suggestive methods by which the police interrogated children in a sexual abuse case. In *State v. Michaels*,[1] the prosecution alleged that Ms. Michaels abused an entire preschool class. Numerous children confirmed the abuse and there were experts to testify about the behavioral effects of the child abuse. The defendant was ultimately convicted of 114 counts of child sexual abuse and sentenced to forty-seven years in jail.

On appeal, the New Jersey Superior Court reversed the conviction on various grounds. The supreme court subsequently heard the case only on the issue of the method of interrogation of the children and affirmed the superior court. In discussing whether the interrogation of children was suggestive, the court stated that "an investigatory interview of a young child can be coercive or suggestive and thus shape the child's responses . . . . If a child's recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events."[2]

In the *Michaels* case, the court quoted pieces of the tape-recorded interviews and remarked that numerous children were told that the defendant was in jail because she had hurt children. They were also

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[3] The concern over sexually suggestive advertising, especially with the use of teenage models, became more vocal in the late summer of 1995. See, e.g., Carlson, Where Calvin Crossed the Line, TIME, Sept 11, 1995, at 64.

[Section 8:16]

[1] State v. Michaels, 642 A.2d 1372 (N.J. 1994).

[2] Id. at 1377.

told to keep her in jail and to be the "little detectives" for the police. Mock police badges were given to the children who cooperated. In addition, the children were subjected to mild threats, cajoling, and bribery.

In sum, the court found that "the interviews of the children were highly improper and employed coercive and unduly suggestive methods. As a result, a substantial likelihood exists that the children's recollection of past events was both stimulated and materially influenced by that course of questioning."[3]

The court relied on the various psychological studies to support its finding that there was a substantial likelihood that the children's recollections were tainted.[4]

The dangers of suggestibility were addressed at length in a recent article by researchers Stephen J. Ceci and Maggie Bruck.[5] In that article, the authors review the research and results of studies performed on children's memories and suggestibility over the past several decades. Among the interesting findings made by these researchers were that children have a fragile boundary between reality and fantasy and may be confused about the source of certain memories.[6] Additionally, children are susceptible to adult questioning and often act in a manner that shows that they desire to comply with a respected authority figure.[7]

Thus, when police, social workers, or parents question a child about sexual abuse, they may be unknowingly suggesting the answer to the child in their questions. Apparently, "children some-

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[3] Id. at 1380.

[4] Studies relied upon by the New Jersey Supreme Court include: Poole & White, Effects of Question Repetition on Eyewitness Testimony of Children and Adults, 27 Developmental Psychology, (Nov 1991); Goodman & Hegelson, Child Sexual Assault: Children's Memory and the Law, 40 U Miami L Rev 181 (1985); Younts, Evaluating and Admitting Expert Opinion Testimony In Child Sexual Abuse Prosecutions, 41 Duke LJ 691 (1991); King & Yuille, Suggestibility and the Child Witness, in Children's Eyewitness Memory (Ceci, et al eds 1987); Berger, The Deconstitutionalization of the Confrontation Clause; A Proposal for a Prosecutorial Restraint Model, 76 Minn L Rev 557 (1992); and Ceci, Age Differences in Suggestibility, in Children's Eyewitness Memory (Ceci, et al eds 1987).

[5] Ceci & Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psychol Bull 403 (1993)(hereinafter Ceci & Bruck).

[6] Id. at 417–18.

[7] Accord Gardner, Sex Abuse Hysteria: The Salem Witch Hunts Revisited 94–95 (1991).

times attempt to make their answers consistent with what they see as the intent of the questioner rather than with their knowledge of the event.[8]

§ 8:17 — — Importance of videotaping interrogation

The United States Supreme Court in *Idaho v. Wright*[1] noted that the failure to use a videotaped interview with children in sexual abuse cases created the potential for elicitation of unreliable information.

The guidelines referred to in this book that detail proper interview techniques, along with the commentators, uniformly support the use of videotaping to make certain there is no coerciveness to the initial allegation.[2]

If there has been no videotaping in your case, urge the court to provide you wide latitude pretrial, and if it gets that far, during trial to fully develop any theory of suggestive or coercive questioning. Make sure you have reviewed the literature of the effects of suggestibility before you proceed with an examination. You will need to know what constitutes inappropriate questioning before you start your case.

§ 8:18 — — Dangers of repetitive questioning

According to the experts, there is a substantial danger that when children are repeatedly questioned, they will begin to mold their answers to the desires of the interrogators. When such interrogators are the prosecution (or their agents), the child's testimony will begin to be molded according to the prosecution's vision. The Supreme Court of New Jersey remarked on this phenomenon in the case of *State v. Michaels,*:[1]

> The use of incessantly repeated questions also adds a manipulative element to an interview. When a child is asked a question and gives an answer, and the question is immediately asked again, the child's

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[8] Ceci & Bruck at 418–22.

[Section 8:17]

[1] Idaho v. Wright, 497 U.S. 805 (1990).

[2] See generally Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for Prosecutorial Restraint Model, 76 Minn L Rev 557, 608 (1992); Goodman & Hegelson, Child Sexual Assault: Children's Memory and the Law, 40 U Miami L Rev 181, 195, 198–99 (1985).

[Section 8:18]

[1] State v. Michaels, 642 A.2d 1372 (N.J. 1994).

> normal reaction is to assume that the first answer was wrong or displeasing to the adult questioner. . . . The insidious effects of repeated questioning are even more pronounced when the questions themselves over time suggest information to the children. [2]

In light of the results of these studies, there is a real need for prosecutors to be especially careful about how they conduct their interviews and a special motive for defense lawyers to carefully inquire about such interrogation.

§ 8:19 — — Appropriate interrogation techniques

As discussed earlier, it is critically important in child sexual abuse cases to ascertain that investigation was done properly—whether you are a defense lawyer or a prosecutor. There are guidelines promulgated for the proper interrogation of children, requiring that the interviewer remain "open, neutral and objective," and that the interviewer avoid asking leading questions, never threaten a child or try to force a reluctant child to talk. Additionally, the interviewer should never tell the child what other people have reported. [1]

To learn appropriate techniques for interviewing children, you may want to review the studies and guidelines studies and guidelines available on the subject. [2]

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[2] Id. at 1377 (citing Poole & White, Effects of Question Repetition on Eyewitness Testimony of Children and Adults, 27 Dev Psychol 975 (1991) and Goodman & Helgeson, Child Sexual Assault: Children's Memory and the Law, 40 U Miami L Rev 181, 195 (1985)).

[Section 8:19]

[1] *Michaels*, 642 A.2d at 1378, quoting American Prosecutors Research Institute, National Center for Prosecution of Child Abuse, Investigation and Prosecution of Child Abuse 7–9, 24 (1987).

[2] Those studies and guidelines include Myers, The Child Witness: Techniques for Direct Examination, Cross-Examination and Impeachment, 18 Pac LJ 801 (1987); American Academy of Child and Adolescent Psychiatry: Guidelines for the Clinical Evaluation of Child and Adolescent Sexual Abuse, 27 Am Acad Child Adolescent Psychiatry 655 (1988); Jenkins & Howell, Child Sexual Abuse Examinations: Proposed Guidelines for a Standard of Care, 22 Bull Am Acad Psychiatry & L 5 (1994).

§ 8:20 — — Anatomical doll debate

Anatomical dolls have been used for many years to help children who are believed to have been abused explain the abuse.[1] According to the experts, many professionals base their opinions on whether children were abused by watching them play with anatomical dolls.[2] There has developed, however, a growing debate about the use of these dolls among professionals.

Specifically, some professionals claim that the dolls are suggestive, simply because they are anatomically correct. For example, a "child may insert a finger into a doll's genitalia simply because of its novelty or 'affordance.'[3] The fact that a child will put two dolls together, simply because they fit together, needs to be considered in these cases.

The second problem alleged with anatomical dolls is that no control studies have been done. In other words, there are no standards for how nonabused children play with these dolls and there is no established protocol addressing the proper manner of how dolls should be used during the interview.

Dr. Richard Gardner, Clinical Professor of Child Psychiatry at the College of Physicians and Surgeons at Columbia University, claims that the exaggeration of the dolls' genitalia renders them overly suggestive:

> The child cannot but be startled and amazed by such a doll. The likelihood of the child's ignoring these unusual genital features is almost at the zero level. Accordingly, the dolls almost demand attention and predictably will bring about the child's talking about sexual issues. Again, the contamination here is so great that the likelihood of differentiating between bona fide and fabricated sex abuse has become reduced considerably by the utilization of these terrible contaminants.
>
> If one gives a child a peg and a hole, the child is going to put the peg in the hole unless the child is retarded or psychotic. . . . Give a child one of these female anatomical dolls with wide open mouth, anus, and vagina; the child will inevitably place one or more fingers in one of these conspicuous orifices. For many . . . , such an act is "proof"

[Section 8:20]

[1] See Boat & Everson, The Use of Anatomical Dolls Among Professionals in Sexual Abuse Evaluations, 12 Child Abuse & Neglect 171 (1988).

[2] Mason, A Judicial Dilemma: Expert Witness Testimony in Child Sex Abuse Trials, 19 J. Psych. & L. 185, 197–204 (1991).

[3] Ceci & Bruck at 423.

that the child has indeed been sexually abused. [4]

According to the review of studies considered by Ceci and Bruck, there are inconsistent results about whether anatomical dolls were probative of sexual abuse. Ceci and Bruck state the following:

> Our reading of the literature suggests that the techniques for using anatomical dolls have not been developed to the level that they allow for a clear differentiation between abused and nonabused children. It seems that for a small number of nonabused children, the dolls are suggestive in that these children engage them in sexual play. [5]

In the event you are handling a case in which anatomical dolls were used, it is important to review the research on these issues and discuss the matter fully with your expert.

[4] Gardner, M.D., Sex Abuse Hysteria: The Salem Witch Trials Revisited 52 (1991).

[5] Id. at 424–25. Among the anatomical doll studies reviewed in this article are August & Forman, A Comparison of Sexually Abused and Nonabused Children's Behavioral Responses to Anatomically Correct Dolls, 20 Child Psychiatry & Human Dev 39 (1989); White, Interviewing Young Sexual Abuse Victims with Anatomically Correct Dolls, 10 Child Abuse & Neglect 519 (1986); Realmuto, Specificity and Sensitivity of Sexually Anatomically Correct Dolls in Substantiating Abuse: A Pilot Study, 29 J Am Acad Child & Adol Psych 743 (1990); Cohn, Anatomical Doll Play of Preschoolers Referred for Sexual Abuse and Those Not Referred, 15 Child Abuse & Neglect 455 (1991).

Medico-legal Issues in the Evaluation of Child Sexual Abuse

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What constitutes an appropriate medical evaluation of an allegedly sexually abused child?

Guiding Principles

- Patient Centered
- Medically Oriented
- Evidence Based

Patient Centered

- Independent
- Humane

Medically Oriented

- Diagnosis and Treatment
  - Undiagnosed conditions
  - Signs of other maltreatment
  - S.T.D.'s
  - Psychotherapy
  - Safety-Protection

Evidence Based

- An Abuse Epistemology
  - Refereed Journals
  - Relevant Clinical Experience
  - Not Theories
  - Daubert

The Exam

- History/Interview
- Laboratory/x-ray

History/Interview

- Focal vs. Suggestive
- Dolls?
- The Healing Starts

Physical Exam

- Developmental Assessment
- Growth Parameters
- Complete Head To Toe
- Genital Exam/Colposcopy

Lab and X-ray

- GC
- Chlamydia
- HSV
- HPV
- PCR vs Culture
- Serology
- Skeletal Series

The Examiners

- The Interviewer
- The Practitioner

Diagnostic Formulation

- History
- Behavioral Changes
- Physical Findings
- Lab/X-ray

Documentation

- To Tape or Not to Tape

Ethical Medical Testimony

- Science and experience --not theory
- Don't take sides
- The truth will set you free

AMERICAN ACADEMY OF PEDIATRICS

Committee on Child Abuse and Neglect

Guidelines for the Evaluation of Sexual Abuse of Children

There are few areas of pediatrics that have so rapidly expanded in clinical importance in recent years as sexual abuse of children. What Kempe referred to in 1977 as a "hidden pediatric problem"[1] is certainly less hidden. Recent incidence studies, while imperfect, suggest approximately 1% of children will experience some form of sexual abuse each year.[2] Children may be sexually abused either in intrafamilial or extrafamilial settings and are more frequently abused by males. Boys may be victimized nearly as often as girls. Adolescents are perpetrators in at least 20% of reported cases,[2] and women may be perpetrators, especially in day-care settings.[3] Pediatricians will encounter these cases in their practices and will be asked by parents and other professionals for their opinions. These guidelines are prepared for use by the primary care pediatrician. Pediatricians who "specialize" in the area of child abuse or child sexual abuse have generally developed their own protocols for their referral practices. In addition, specific American Academy of Pediatrics guidelines for the evaluation of rape of the adolescent are published and should be used for this age-group.[4]

Because a pediatrician has unique skills and a trusted relationship with patients and families, he or she will often be in a position to provide essential support and gain information not readily available to others involved in the investigative, evaluative, or treatment processes. By the same token, the pediatrician may feel inadequately prepared to perform a medical examination of a sexually abused child. The pediatrician should think about these issues when determining how best to utilize his or her skills while avoiding actions that may obstruct the collection of essential evidence. The pediatrician should know what resources are available in the community and should identify these in advance, including a consultant with special expertise in evaluating sexually abused children.

DEFINITION

Sexual abuse can be defined as the engaging of a child in sexual activities that the child cannot comprehend, for which the child is developmentally unprepared and cannot give informed consent, and/or that violate the social and legal taboos of society. The sexual activities may include all forms of oral-genital, genital, or anal contact by or to the child, or nontouching abuses, such as exhibitionism, voyeurism, or using the child in the production of pornography.[1] Sexual abuse includes a spectrum of activities ranging from violent rape to a gentle seduction.

Criminal statutes define and classify sexual abuse as misdemeanors or felonies, depending on whether varying degrees of penetration of body orifices occurred or whether physical or psychological force was used.

Sexual abuse can be differentiated from "sexual play" by assessing the frequency and coercive nature of the behavior and by determining whether there is developmental asymmetry among the participants. Thus, when young children are mutually looking at or touching each other's genitalia, and they are at the same developmental stage, no coercion is used, and there is no intrusion of the body, this should be considered normal (ie, nonabusive) behavior. However, when a 6-year-old coercively tries to have anal intercourse with a 3-year-old, this is not normal behavior, and the health and child protective systems should respond to it whether or not is is legally considered an assault.

The recommendations in this statement do not indicate an exclusive course of treatment to be followed. Variations, taking into account individual circumstances, may be appropriate.

This statement has been approved by the Council on Child and Adolescent Health.

PRESENTATION

Sexually abused children will be seen by pediatricians in a variety of circumstances: (1) They may be brought in for a routine physical examination or for care of a medical illness, behavioral condition, or physical finding that would include child sexual abuse as part of the differential diagnosis. (2) They have been or are thought to have been sexually abused and are brought by a parent to the pediatrician for evaluation. (3) They are brought to the pediatrician by social service or law enforcement professionals for a "medical evaluation" as part of an investigation.

In the first instance, the diagnosis of sexual abuse and the protection of the child from further harm will depend on the pediatrician's willingness to consider abuse as a possibility. There are many ways sexual abuse can present,[5] and because children who are sexually abused are generally coerced into secrecy, a high index of suspicion is required to recognize the problem. On the other hand, the presenting symptoms are often so general in nature (eg, sleep disturbances, enuresis, encopresis, phobias) that caution must be exercised because these behaviors may be indicators of physical or emotional abuse or other nonabuse-related stressors. Among the more specific signs and symptoms of sexual abuse are rectal or genital pain, bleeding, or infection; sexually transmitted diseases; and developmentally precocious sexual behavior. Pediatricians evaluating children who have these signs and symptoms should at least consider the possibility of abuse and, therefore, should complete a report (see below).

Pediatricians who suspect sexual abuse as a possibility are urged to inform the parents of their concerns in a neutral and calm manner. It is critical to realize that the individual who brought the child to the pediatrician may have no knowledge of, or involvement in, the sexual abuse of the child. The physician may need to reinforce this point with office, clinic, or hospital staff. Children spend many hours in the care of people, other than the parents, who may be potential abusers. A complete history, including behavioral symptoms and associated signs of sexual abuse, should ensue. In some instances, the pediatrician may need to protect the child and, therefore, may delay informing the parent(s) until a report is made and an expedited interview with law enforcement and child protective services agencies can be conducted.

TAKING A HISTORY/INTERVIEWING THE CHILD

In many states, the suspicion of child sexual abuse as a possible diagnosis requires a report to the appropriate law enforcement or child protective services agency. All physicians should know what their state law requires and where and when to file a written report. The diagnosis of sexual abuse has both civil (protective) and criminal ramifications. Investigative interviews should be conducted by the designated agency or individual in the community to minimize repetitive questioning of the child. This does not preclude physicians asking relevant questions needed for a detailed pediatric history, including a review of systems. Occasionally children will spontaneously describe their abuse and indicate who it was who abused them. When asking 3- to 6-year-old children about abuse, the use of line drawings,[6] dolls,[7] or other aids[8] may be helpful. The American Academy of Child and Adolescent Psychiatry has guidelines for interviewing sexually abused children.[9] Children may also describe their abuse during the physical examination. It is desirable for those conducting the interview to use nonleading questions; avoid demonstrations of shock, disbelief, or other emotions; and maintain a "tell me more" or "and then what happened" approach. If possible, the child should be interviewed alone.

A behavioral review of systems may reveal events or behaviors relevant to sexual abuse, even in the absence of a clear history of abuse in the child.[5] The parent may be defensive or unwilling to accept the possibility of sexual abuse. This unwillingness is not of itself diagnostic, but it also does not negate the need for investigation.

In the second situation, where children are brought to physicians by parents who suspect abuse, the same behavioral history and approach is warranted.

In the third instance, when children are brought by protective personnel, little or no history may be available, other than that provided by the child. The pediatrician should try to obtain an appropriate history in all cases before performing a medical examination. The child may spontaneously give additional history during the physical examination as the mouth, genitalia, and anus are examined. When children are brought in by professionals, the history should focus on whether the symptoms are explained by sexual abuse, physical abuse to the genital area as a response to toileting accidents, or other medical conditions.

PHYSICAL EXAMINATION

The physical examination of sexually abused children should not lead to additional emotional trauma for the child. The examination should be explained to the child and conducted in the presence of a supportive adult not suspected of being party to the abuse. Many children are anxious about giving a history, being examined, or having proce-

dures performed. Enough time must be allotted to relieve a child's anxiety.

When the alleged sexual abuse has occurred within 72 hours, and the child provides a history of sexual abuse including ejaculation, the examination should be performed immediately. In this acute situation, rape kit protocols modified for child sexual assault victims should be followed to maintain a "chain of evidence." Adult rape kits have been adapted and standardized in some states (Florida, Indiana). These are available in emergency rooms, rape treatment centers, or law enforcement agencies. When more than 72 hours has elapsed, the examination usually is not an emergency, and therefore, the evaluation should be scheduled at the earliest convenient time for the child, physician, and investigative team.

The child should have a thorough pediatric examination, including assessments of developmental, behavioral, and emotional status. Special attention should be paid to the growth parameters and sexual development of the child. In the rare instance when the child is unable to cooperate and the examination must be performed because of the likelihood of trauma, infection, and/or the need to collect forensic samples, consideration should be given to performing the examination with the child under general anesthesia. Instruments that can magnify and illuminate the genital and rectal areas may be used if available, but they are not required. Any signs of trauma should be carefully documented. Specific attention should be given to the areas involved in sexual activity—the mouth, breasts, genitals, perineal region, buttocks, and anus. Any abnormalities should be noted.

In female children, the genital examination should include inspection of the medial aspects of the thighs, labia majora and minora, clitoris, urethra, periurethral tissue, hymen, hymenal opening, fossa navicularis, and posterior fourchette. Findings that are consistent with, but not diagnostic of, sexual abuse include (1) chafing, abrasions, or bruising of the inner thighs and genitalia; (2) scarring, tears, or distortion of the hymen; (3) a decreased amount of or absent hymenal tissue; (4) scarring of the fossa navicularis; (5) injury to or scarring of the posterior fourchette; (6) scarring or tears of the labia minora; and (7) enlargement of the hymenal opening. The volume of published literature is expanding quickly in this area.[10–15]

Various methods for visualizing the hymenal opening in prepubertal children have been described. Published studies are not uniform in their approach. The degree of relaxation of the child; the degree of separation, traction (gentle, moderate) on the labia majora, and the position of the child (supine, lateral, knee-chest); and the time taken will all influence the size of the orifice and the exposure of the hymen and the internal structures.[16] The technique used is less important than maximizing the view and recording the method and results (see below for discussion of significance of findings). Invasive procedures (eg, speculum or digital) are generally not necessary in the prepubertal child.

In male children, the thighs, penis, and scrotum should be examined for bruises, scars, chafing, bite marks, and discharge.

In both sexes, the anus can be examined in the supine, lateral, or knee-chest position. As with the vaginal examination, position may influence the anatomy. The presence of bruises around the anus, scars, anal tears (especially those that extend into the surrounding perianal skin), and anal dilation are important to note. Laxity of the sphincter, if present, should be noted, but digital examination is not always necessary. (See below for discussion of significance of findings.) Note the child's behavior and demeanor during the examination, and ask the child to demonstrate what, if anything, happened. Care should be taken not to suggest answers to questions.

LABORATORY DATA

In the examination occurring within 72 hours of acute sexual assault or sexual abuse with ejaculation, forensic studies should be performed. Routine cultures and screening of all sexually abused children for gonorrhea, syphilis, human immunodeficiency virus, or other sexually transmitted diseases are not recommended. The yield of positive cultures is very low in asymptomatic prepubertal children, especially those whose history indicates fondling only. When epidemiologically indicated, or when the history and/or physical findings suggest the possibility of oral, genital, or rectal contact, appropriate cultures and serologic tests should be obtained. The Centers for Disease Control and American Academy of Pediatrics Committee on Infectious Diseases also provide recommendations on laboratory evaluation.[17,18] The implications of the diagnosis of a sexually transmitted disease for the reporting of child sexual abuse are listed in Table 1.

Pregnancy prevention guidelines have been published by the Committee on Adolescence,[4] and the American Academy of Pediatrics Task Force on Pediatric AIDS has developed guidelines for human immunodeficiency virus testing for assailants.

DIAGNOSTIC CONSIDERATIONS

The diagnosis of child sexual abuse is made on the basis of a child's history. Physical examination

alone is infrequently diagnostic in the absence of a history and/or specific laboratory findings. The physician, the multidisciplinary team evaluating the child, and the courts must establish a level of certainty about whether a child has been sexually abused. Table 2 as prepared by the AAP Committee on Child Abuse and Neglect provides suggested guidelines for making the decision to report sexual abuse of children based on currently (November 1990) available information.

As indicated in Table 2, the presence of semen/sperm/acid phosphatase, a positive culture for gonorrhea, or a positive serologic test for syphilis makes the diagnosis of sexual abuse a medical certainty, even in the absence of a positive history (congenital forms of gonorrhea and syphilis excluded).

TABLE 1. Implications of Commonly Encountered Sexually Transmitted Diseases (STDs) for the Diagnosis and Reporting of Sexual Abuse of Prepubertal Infants and Children

STD Confirmed	Sexual Abuse	Suggested Action
Gonorrhea*	Certain	Report†
Syphilis*	Certain	Report
*Chlamydia**	Probable‡	Report
Condylomata acuminatum*	Probable	Report
Trichomonas vaginalis	Probable	Report
Herpes 1 (genital)	Possible	Report§
Herpes 2	Probable	Report
Bacterial vaginosis	Uncertain	Medical follow-up
Candida albicans	Unlikely	Medical follow-up

* If not perinatally acquired.
† To agency mandated in community to receive reports of suspected sexual abuse.
‡ Culture only reliable diagnostic method.
§ Unless there is a clear history of autoinoculation.
Prepared by the American Academy of Pediatrics Committee on Child Abuse and Neglect (November 1990).

78

TABLE 2. Guidelines for Making the Decision to Report Sexual Abuse of Children

Data Available			Response	
History	Physical	Laboratory	Level of Concern About Sexual Abuse	Action
None	Normal examination	None	None	None
Behavioral changes	Normal examination	None	Low (worry)	± Report*; follow closely (possible mental health referral)
None	Nonspecific findings	None	Low (worry)	± Report*; follow closely
Nonspecific history by child or history by parent only	Nonspecific findings	None	Possible (suspect)	± Report*; follow closely
None	Specific findings	None	Probable	Report
Clear statement	Normal examination	None	Probable	Report
Clear statement	Specific findings	None	Probable	Report
None	Normal examination, nonspecific or specific findings	Positive culture for gonorrhea; positive serologic test for syphilis; presence of semen, sperm, acid phosphatase	Definite	Report
Behavioral changes	Nonspecific changes	Other sexually transmitted diseases	Probable	Report

* A report may or may not be indicated. The decision to report should be based on discussion with local or regional experts and/or child protective services agencies.
Prepared by the American Academy of Pediatrics Committee on Child Abuse and Neglect (November 1990).

Other physical signs or laboratory findings may be "suggestive of" or "consistent with" a child's history of sexual abuse. In the absence of a positive history, these findings are, at the least, worrisome or suspicious and require a complete history. If the history is negative, the physician may wish to observe the child closely to monitor changes in behavior or physical findings. If the history is positive, sexual abuse is more than a worry, and a report should be made to the agency authorized to receive reports of sexual abuse.

The differential diagnosis of genital trauma also includes accidental injury and physical abuse. This differentiation may be difficult and may require a careful history and multidisciplinary approach. There are many congenital malformations and infectious or other causes of anal-genital abnormalities that may be confused with abuse. Familiarity with these is important.[19]

After the examination, the physician should provide appropriate feedback and reassurance to the child and family.

RECORDS

Because the likelihood of civil or criminal court action is high, detailed records, drawings, and/or photographs should be kept. The submission of written reports to county agencies and law enforcement departments is encouraged. The more detailed the reports and the more explicit the physician's opinion, the less likely the physician may need to testify in civil (juvenile) court proceedings. Testimony will be likely, however, in criminal court where records alone are not a substitute for personal appearance. In general, the ability to protect a child may often depend on the quality of the physician's records.[20]

TREATMENT

All children who have been sexually abused should be evaluated by competent mental health providers to assess the need for treatment. Unfortunately, treatment services for sexually abused children are not universally available. The need for treatment will vary with the type of sexual molestation (intrafamilial vs extrafamilial), the length of time the molestation has gone on, and the age and symptoms of the child. In general, the more intrusive the abuse, the more violent the assault, the longer the sexual molestation has occurred, and the closer the relationship of the perpetrator to the victim, the worse the prognosis and the greater the need for long-term treatment. Whether or not the parents are directly involved, the parents may also need treatment and support in order to cope with the emotional trauma of the child's abuse (as in the instance when the child has been the victim of extrafamilial molestation).

LEGAL ISSUES

The legal issues confronting pediatricians in evaluating sexually abused children include mandatory reporting with penalties for failure to report; involvement in the civil, juvenile, or family court systems; involvement in divorce/custody proceedings in divorce courts; and involvement in criminal prosecution of defendants in criminal court. In addition, there are medical liability risks for pediatricians.

All pediatricians in the United States are required under the laws of each state to report suspected as well as known cases of child sexual abuse. These guidelines do not suggest that a pediatrician who sees a child with an isolated behavioral finding (nightmares, enuresis, phobias, etc) or an isolated physical finding (eg, a hymenal diameter of 5 mm) must feel obliged to report these cases as suspicious. If additional historical, physical, or laboratory findings suggestive of sexual abuse are present, the physician may have an increased level of suspicion and then should report. Pediatricians are encouraged to discuss cases with their local or regional child abuse consultants as well as with their local child protective services agency. In this way, agencies may be protected from being overburdened with large numbers of vague reports, and physicians may be protected from potential prosecution for failure to report.

Civil courts in most states will intervene protectively if it is more likely than not that child abuse or neglect has occurred. The court should be acting in the best interest of the child to try to determine the safety of the child's environment and should be less concerned with "who did it" than with how recurrence can be prevented. These courts should order evaluations and/or treatment, appoint a guardian ad litem and/or therapist for the child, and monitor the family during a treatment plan.

Pediatricians and children are faced with increasing numbers of cases in which parents who are in the process of separation or divorce are alleging that one or the other (or both) is sexually abusing the child during custodial visits. These cases are generally more difficult for the pediatrician, the child protective services system, and law enforcement agencies. They require more time and should not be unsubstantiated or dismissed simply because a custody dispute exists. Allegations of abuse that occur in the context of divorce proceedings should be reported to the child protective services agency.

A juvenile court proceeding may ensue to determine whether the child needs protection. The pediatrician should act as an advocate for the child in these situations and should encourage the appointment of a guardian ad litem by the court to represent the child's best interests. It should be noted that the American Bar Association indicates that the majority of divorces do not involve custody disputes, and relatively few custody disputes involve allegations of sexual abuse.[20]

In criminal proceedings, the standard of proof is the highest—"beyond a reasonable doubt" or "to a reasonable degree of medical certainty." For many physicians, this level of certainty may be a focus of concern because, in this setting, the pediatrician's testimony is part of the information used to ascertain the guilt or innocence of an alleged abuser. Physicians should be aware of the specificity of their findings and their diagnostic significance.[21]

Pediatricians may find themselves involved in civil malpractice litigation. The failure of a physician to recognize and diagnose sexual abuse in a timely manner may lead to liability suits if a child has been brought repeatedly to the physician and/or a flagrant case has been misdiagnosed. With approximately 50% of American children in some form of out-of-home care, the risk of sexual abuse outside the family is substantial (about half that of intrafamilial abuse)[3] and increases the importance of making the diagnosis in a timely manner. The possibility of a suit being filed for "false reports" by physicians exists. Statutes generally provide immunity as long as the report is done in good faith. We are unaware of any successful suits as of this writing.

Civil litigation suits may be filed by parents against institutions or individuals who may have sexually abused their children. The physician may be asked to testify in these cases. In the civil litigation cases, the standard of proof is "a preponderance of the evidence."

CONCLUSION

The evaluation of sexually abused children is increasingly a part of general pediatric practice. The pediatrician will be part of a multidisciplinary approach to the problem and will need to be competent in the basic skills of history taking, physical examination, selection of laboratory tests, and differential diagnosis. An expanding clinical consultation network is available to assist the primary care physician with the assessment of difficult cases.

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APSAC AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN

PRACTICE GUIDELINES

Psychosocial Evaluation of Suspected Sexual Abuse in Young Children

Statement of Purpose

These Guidelines for mental health professionals reflect current knowledge and consensus about the psychosocial evaluation of suspected sexual abuse in young children. They are not intended as a standard of practice to which practitioners are expected to adhere in all cases. Evaluators must have the flexibility to exercise clinical judgment in individual cases. Laws and local customs may also influence the accepted method in a given community. Practitioners should be knowledgeable about various constraints on practice, and prepared to justify their decisions about particular practices in specific cases. As experience and scientific knowledge expand, further refinement and revision of these Guidelines are expected.

These Guidelines are specific to psychosocial assessments. Sexual abuse is known to produce both acute and long-term negative psychological effects requiring therapeutic intervention. Psychosocial assessments are a systematic process of gathering information and forming professional opinions about the source of statements, behavior, and other evidence that form the basis of concern about possible sexual abuse. Psychosocial evaluations are broadly concerned with understanding developmental, familial, and historical factors and events that may be associated with psychological adjustment. The results of such evaluations may be used to assist in legal decision making and in directing treatment planning.

Interviews of children for possible sexual abuse are conducted by other professionals as well, including child protective service workers, law enforcement investigators, special "child interviewers," and medical practitioners. Such interviews are most often limited to a single, focused session which concentrates on eliciting reliable statements about possible sexual abuse; they are not designed to assess the child's general adjustment and functioning. Principles about interviewing contained in the Guidelines may be applied to investigatory or history-taking interviews. Some of the preferred practices, however (e.g., number of interviews), will not apply.

Psychosocial evaluators should first establish their role in the evaluation process. Evaluations performed at the request of a court may require a different stance and include additional components than those conducted for purely clinical reasons. The difference between the evaluation phase and a clinical phase must be clearly articulated if the same professional is to be involved. In all cases, evaluators should be aware that any interview with a child regarding possible sexual abuse may be subject to scrutiny and have significant implications for legal decision-making and the child's safety and well-being.

I. The Evaluator

A. Characteristics

1. The evaluator should possess an advanced mental health degree in a recognized discipline (e.g., MD, or Masters or Ph.D. in psychology, social work, counseling, or psychiatric nursing).
2. The evaluator should have experience evaluating and treating children and families. A minimum of two years of professional experience with children is expected, three to five years is preferred. The evaluator should also possess at least two years of professional experience with sexually abused children. If the evaluator does not possess such experience, supervision is essential.
3. It is essential that the evaluator have specialized training in child development and child sexual abuse. This should be documented in terms of formal course work, supervision, or attendance at conferences, seminars, and workshops.
4. The evaluator should be familiar with current professional literature on sexual abuse and be knowledgeable about the dynamics and the emotional and behavioral consequences of abuse experiences.
5. The evaluator should have experience in conducting forensic evaluations and providing court testimony. If the evaluator does not possess such experience, supervision is essential.
6. The evaluator should approach the evaluation with an open mind to all possible responses from the child and all possible explanations for the concern about possible sexual abuse.

II. Components of the Evaluation

A. Protocol

1. A written protocol is not necessary; however, evaluations should routinely involve reviewing all pertinent materials; conducting collateral interviews when necessary; establishing rapport; assessing the child's general functioning, developmental status, and memory capacity; and thoroughly evaluating the possibility of abuse. The evaluator may use discretion in the order of presentation and method of assessment.

B. Employer of the Evaluator

1. Evaluation of the child may be conducted at the request of a legal guardian prior to court involvement.
2. If a court proceeding is involved, the preferred practice is a court-appointed or mutually agreed upon evaluation of the child.
3. Discretion should be used in agreeing to conduct an evaluation of a child when the child has already been evaluated or when there is current court involvement. Minimizing the number of evaluations should be a consideration; additional evaluations should be

conducted only if they clearly further the best interests of the child. When a second opinion is required, a review of the records may eliminate the need for reinterviewing the child.

C. Number of Evaluators

1. It is acceptable to have a single evaluator. However, when the evaluation will include the accused or suspected individual, a team approach is the preferred practice, with information concerning the progress of the evaluation readily available among team members. Consent should be obtained from all participants prior to releasing information.

D. Collateral Information Gathered as Part of the Evaluation

1. Review of all relevant background material as part of the evaluation is the preferred practice.
2. The evaluation report should document all the materials used and demonstrate their objective review in the evaluation process.

E. Interviewing the Accused or Suspected Individual

1. It is not necessary to interview the accused or suspected individual in order to form an opinion about possible sexual abuse of the child. 85
2. An interview with or review of the statements from a suspected or accused individual (when available) may provide additional relevant information (e.g., alternative explanations, admissions, insight into relationship between child and accused individual).
3. If the accused or suspected individual is a parent, preferred practice is for the child evaluator to contact or interview that parent. If a full assessment of the accused or suspected parent is indicated, a team approach is the preferred practice.

F. Releasing Information

1. Suspected abuse should always be reported to authorities as dictated by state law.
2. Permission should be obtained from legal guardians for receipt of collateral materials and for release of information about the examination to relevant medical or mental health professionals, other professionals (e.g., schoolteachers), and involved legal systems (e.g., CPS, law enforcement). Discretion should be used in releasing sensitive individual and family history which does not directly relate to the purpose of the assessment.
3. When an evaluation is requested by the court, information should be released to all parties to the action after consent is obtained.

III. Interviewing

A. Recording of Interviews

1. Audio or video recording may be preferred practice in some communities. Professional preference, logistics, or clinical consideration may contraindicate recording of interviews. Professional discretion is permitted in recording policies and practices.
2. Detailed written documentation is the minimum requirement, with specific attention to questions and responses (verbal and nonverbal) regarding possible sexual abuse. Verbatim quotes of significant questions and answers are desirable.
3. When audio and video recording are used, the child must be informed. It is desirable to obtain written agreement from the child and legal guardian(s).

B. Observation of the Interview

1. Observation of interviews by involved professionals (CPS, law enforcement, etc.) may be indicated if it reduces the need for additional interviews.
2. Observation by non-accused and non-suspected primary caregiver(s) may be indicated for particular clinical reasons; however, great care should be taken that the observation is clinically appropriate, does not unduly distress the child, and does not affect the validity of the evaluation process.
3. If interviews are observed, the child must be informed and it is desirable to obtain written agreement from the child and legal guardian(s).

C. Number of Interviews

1. Preferred practice is two to six sessions for directed assessment. This does not imply that all sessions must include specific questioning about possible sexual abuse. The evaluator may decide based on the individual case circumstances to adopt a less direct approach and reserve questioning. Repeated direct questioning of the child regarding sexual abuse when the child is not reporting or is denying abuse is contraindicated.
2. If the child does not report abuse within the two to six sessions of directed evaluation, but the evaluator has continuing concerns about the possibility of abuse, the child should be referred for extended evaluation or therapy which is less directive but diagnostically focused, and the child's protection from possible abuse should be recommended.

D. Format of Interview

1. Preferred practice is, whenever possible, to interview first the primary caretaker to gather background information.
2. The child should be seen individually for initial interviews, except when the child refuses to separate. Discussion of possible abuse in the presence of the caretaker

during initial interviews should be avoided except when necessary to elicit information from the child. In such cases, the interview setting should be structured to reduce the possibility of improper influence by the caretaker upon the child's behavior.

3. Joint sessions with the child and the non-accused caretaker or accused or suspected individual may be helpful to obtain information regarding the overall quality of the relationships. The sessions should not be conducted for the purpose of determining whether abuse occurred based on the child's reactions to the accused or suspected individual. Nor should joint sessions be conducted if they may cause significant additional trauma to the child. A child should never be asked to confirm the abuse statements in front of an accused individual.

IV. Child Interview

A. General Principles

1. The evaluator should create an atmosphere that enables the child to talk freely, including providing physical surroundings and a climate that facilitates the child's comfort and communication.
2. Language and interviewing approach should be developmentally appropriate.
3. The evaluator should take the time necessary to perform a complete evaluation and should avoid any coercive quality to the interview.
4. Interview procedures may be modified in cases involving very young, preverbal, or minimally verbal children or children with special problems (e.g., developmentally delayed, electively mute).

B. Questioning

1. The child should be questioned directly about possible sexual abuse at some point in the evaluation.
2. Initial questioning should be as non-directive as possible to elicit spontaneous responses. If open-ended questions are not productive, more directive questioning should follow.
3. The evaluator may use the form of questioning deemed necessary to elicit information on which to base an opinion. Highly specific questioning should only be used when other methods of questioning have failed, when previous information warrants substantial concern, or when the child's developmental level precludes more non-directive approaches. However, responses to these questions should be carefully evaluated and weighed accordingly.

C. Use of Dolls and Other Devices

1. A variety of nonverbal tools should be available to assist the child in communication, including drawings, toys, doll-houses, dolls, puppets, etc.
2. Anatomically detailed dolls should be used with care and discretion. Preferred

practice is to have them available for identification of body parts, clarification of previous statements, or demonstration by non- or low-verbal children after there is indication of abuse activity.

3. The anatomically detailed dolls should not be considered a diagnostic test. Unusual behavior with the dolls may suggest further lines of inquiry and should be noted in the evaluation report, but is not generally considered conclusive of a history of sexual abuse.

D. Psychological Testing

1. Formal psychological testing of the child is not indicated for the purpose of proving or disproving a history of sexual abuse.
2. Testing is useful when the clinician is concerned about the child's intellectual or developmental level, or about the possible presence of a thought disorder. Psychological tests can also provide helpful information regarding a child's emotional status.
3. Evaluation of non-accused and accused individuals often involves complete psychological testing to assess for significant psychopathology or sexual deviance.

V. Conclusions/Report

A. General Principles

1. The evaluator should take care to communicate that mental health professionals have no special ability to detect whether an individual is telling the truth.
2. The evaluator may directly state that abuse did or did not occur, or may say that a child's behavior and words are consistent or inconsistent with abuse, or with a history or absence of history of abuse.
3. Opinions about whether abuse occurred or did not occur should include supporting information (e.g., the child's and/or the accused individual's statements, behavior, psychological symptoms). Possible alternative explanations should be addressed and ruled out.
4. The evaluation may be inconclusive. If so, the evaluator should cite the information that causes continuing concern but does not enable confirmation or disconfirmation of abuse. If inconclusiveness is due to such problems as missing information or an untimely or poorly-conducted investigation, these obstacles should be clearly noted in the report.
5. Recommendations should be made regarding therapeutic or environmental interventions to address the child's emotional and behavioral functioning and to ensure the child's safety.

Acknowledgments

These Guidelines are the product of APSAC's Task Force on the Psychosocial Evaluation of Suspected Sexual Abuse in Young Children, chaired by Lucy Berliner, MSW. A group of experts who responded to a lengthy, open-ended, mailed survey provided the content for the first draft. That draft was revised based on comments from a large number of practitioners who responded to mailed requests for input and who participated in the open Task Force meeting held at the Fourth Annual Health Science Response to Child Maltreatment conference, held in San Diego, California, in January, 1990. The next draft was published for comment in APSAC's newsletter, *The APSAC Advisor*, in Spring, 1990. Revised according to suggestions made by APSAC members and Board, this is the final result.

Appreciation goes to all the practitioner/experts who contributed much of their time and expertise to make these Guidelines valuable. Special thanks goes to Richard Stille, Ph.D., who helped synthesize the first draft.

The Guidelines will be updated periodically. Any comments or suggestions about them should be directed to Lucy Berliner through APSAC, 407 South Dearborn, Suite 1300, Chicago, Illinois, 60605.

Genital and Anal Conditions Confused With Child Sexual Abuse Trauma

Jan Bays, MD, Carole Jenny, MD

• **Examination of a child with genital or anal disease may give rise to suspicion of sexual abuse. Dermatologic, traumatic, infectious, and congenital disorders may be confused with sexual abuse. Seven children referred to us are representative of such confusion.**

(*AJDC*. 1990;144:1319-1322)

When genital or anal disease occurs, the health care provider must perform a careful examination and consider diagnoses other than sexual abuse, especially when the child volunteers no history of abuse. Ten percent to 25% of children are sexually abused before age 18 years.[1] With increasing awareness of this problem, physicians are being called on more frequently to examine children for signs of possible abuse. A diagnosis of sexual abuse may have serious consequences for the child, family, and suspected offender. We will review the existing literature on conditions mistaken for injuries due to child sexual abuse and present cases of seven children referred to us.

PATIENT REPORTS

PATIENT 1.—A 6-year-old girl was referred for a sexual abuse examination after her pediatrician noted fresh vaginal bleeding and genital bruising and made a report of suspected abuse. On the day of the examination, the child had returned to her divorced mother after a visit with her father.

She had subepidermal bleeding over the left side of the clitoris, the left labium minus, and the left wall of the introitus. There was a 2-cm ruptured bulla in the posterior fourchette to the right of the midline. The hymen was normal. There was a slight decrease in the pigmentation of the skin surrounding the genitalia. There were two superficial fissures of the anal verge. The child was questioned in private and denied sexual abuse. She was referred to a dermatologist, who diagnosed lichen sclerosus confirmed by biopsy (Fig 1). Treatment with topical corticosteroid decreased the friability of the skin around the vagina and anus.

PATIENT 2.—A 5-year-old girl was referred by her private pediatrician with a complaint of intermittent vaginal bleeding. Over a 15-month period, the child had had 11 episodes of small amounts of red or brown blood on her underwear or on toilet paper. She had occasional episodes of dysuria. A vaginal culture was positive for *Streptococcus pyogenes* on one occasion, but treatment with antibiotics did not stop the vaginal bleeding. Serum follicle-stimulating hormone, luteinizing hormone, and estradiol levels were normal on two occasions.

Genital examination revealed Tanner 1 female genitalia with a large, dilated, tortuous vein running from the top of the clitoris down through the right labium majus. The vaginal opening was completely hidden in hymen tissue, which was swollen and dark beefy red. There were a number of bright red, dilated blood vessels in the posterior fossa. The child was interviewed alone and denied sexual abuse. A magnetic resonance imaging scan of the pelvis was normal. Examination under anesthesia revealed a hemangioma of the entire vagina. There was no evidence of sarcoma botryoides or foreign body. No treatment will be undertaken unless significant bleeding occurs.

PATIENT 3.—A 7-month-old female infant was seen in an emergency department for high fever. The examining pediatrician found an area in the perineum that he thought might be due to an injury from sexual abuse. The child and her 2-year-old sister were placed into protective custody by the police. Three days later, the child was brought in for examination at a sexual abuse evaluation center. Genital examination revealed a vaginal opening hidden in light pink, redundant hymen tissue, which showed no evidence of trauma. Just below the rim of the posterior fourchette in the midline there was a deep red depression measuring 2 mm long and 1 mm deep. Under the colposcope, this depression appeared to be a congenital pit (Fig 2), which could be manipulated and stretched so that the increased vascularity in its depth blanched. The infant's sister had a normal genital examination, and both girls were returned to the custody of their parents.

PATIENT 4.—A 5-year-old girl was brought to the outpatient clinic for a genital injury. The child stated that she had been climbing on a stool at her grandmother's house and had fallen. A wooden leg of the stool had struck and injured her genitalia. She had experienced two episodes of dysuria and hematuria in the 4 hours since the injury occurred. Several clinic personnel expressed concern that the child might have been sexually abused.

Genital examination revealed a 2-cm laceration in the crease lateral to the right labium minus, with adjacent bruising (Fig 3). The hymen was normal. The child denied sexual abuse. No report of suspected abuse was made.

PATIENT 5.—A 2½-year-old boy told his mother that his "bottom hurt" on returning from day care. His physician diagnosed anal trauma, and a day-care worker was interviewed by the police after the child said, "Mark hurt me." After the child was examined at a child abuse center, the diagnosis of perianal streptococcal cellulitis was made (Fig 4). On further questioning, the child said the day-care worker had hurt him when he was wiped after toileting. The pain apparently occurred because of preexisting anal irritation from the infection.

PATIENT 6.—A 5-year-old girl was referred to a sexual abuse evaluation program because her pediatrician had noted that her clitoris was split. Examination revealed a complete cleft of the upper genital structures, including the clitoris, labia minora, and anterior urethral wall. The child denied trauma or sexual abuse. Normal uterus, ovaries, and kidneys were visualized on ultrasound examination. Voiding cystourethrogram was normal except for a 1.7-cm split in the pubic symphysis. The child was referred to a pediatric urologist with a diagnosis of

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Fig 1.—Patient 1. Lichen sclerosus.

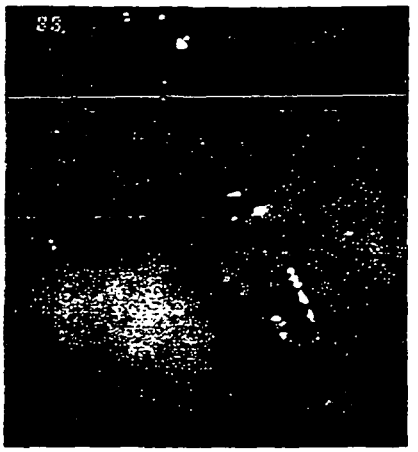

Fig 2.—Patient 3. Congenital pit of the perineal body.

Fig 3.—Patient 4. Straddle injury adjacent to the right labium.

Fig 4.—Patient 5. Perianal streptococcal cellulitis.

Fig 5.—Patient 6. Epispadius (incidental foreign body).

Fig 6.—Patient 7. Periurethral caruncle.

92

congenital epispadius (Fig 5).

PATIENT 7.—A 4-year-old girl was referred for possible sexual abuse when she complained of dysuria and had several episodes of hematuria after playing with older neighborhood children. The child and her playmates convincingly denied sexual abuse or sexual play when questioned by the patient's concerned mother and pediatrician. Genital examination revealed a hemorrhagic urethral caruncle (Fig 6). The child's symptoms resolved over 3 weeks with warm sitz baths and topical estrogen cream. A report of suspected abuse was not made.

COMMENT

Dermatologic Disorders

Erythema and excoriations of the genitalia are not signs specific to sexual abuse, as they may have many other common causes, including diaper dermatitis, poor hygiene, *Candida*, pinworms, and irritants such as bubble bath.[24] Increased pigmentation around the anus, although reported after chronic sexual abuse, is a common finding in nonabused children.[2] Bruises in the genital or anal area can raise suspicion of possible sexual abuse. Bruising confused with child abuse has been re-

ported in the Ehlers-Danlos syndrome,[4] hematologic disorders, hypersensitivity vasculitis, purpura fulminans, meningitis with disseminated intravascular coagulation, mongolian spots, and cases of coining or other folk medicine practices.[5] Phytodermatitis also has been mistaken for bruising or burns due to child abuse. This disorder occurs when plant psoralens, notably the juice of fig, lime, lemon, parsnip, or celery, contact the skin before sun exposure.[6,7]

Other dermatologic conditions that can cause pain, bleeding, fissures, and skin changes in the genital or anal regions that must be differentiated from signs of sexual abuse include lichen sclerosus, lichen planus, seborrheic dermatitis, atopic dermatitis, contact dermatitis, lichen simplex chronicus, and psoriasis.[8]

Lichen sclerosus manifests as alarming subepidermal hemorrhages and bullous and vesicular lesions that can occur after minor trauma such as wiping with toilet tissue, as occurred with patient 1. The clinician should be familiar with the atrophic skin and hourglass-shaped area of decreased pigmentation around the genitalia and/or anus that characterize this disease. A biopsy may be done to confirm the diagnosis.[9,10]

Labial fusion is a common condition in girls who are still in diapers. In older girls it may be more likely related to sexual abuse but is not diagnostic.[11,12]

Congenital Conditions

Congenital abnormalities of the genitalia can cause concern about possible sexual abuse. Patient 2 had a hemangioma of the hymen and vaginal wall that produced hypervascularity and swelling of the hymen tissues with intermittent bleeding. A vulvar hemangioma with ulcerative changes has been diagnosed and investigated as a perineal burn secondary to child abuse.[13] Another child was referred to protective services after she presented with a midline skin defect, thought to be a traumatic scar, extending from the fossa navicularis into the anus. Colposcopic examination at a child abuse center revealed no evidence of scarring. A diagnosis was made of congenital failure of midline fusion across the posterior fourchette.[14] A common congenital anomaly of the external anal sphincter may cause smooth, fan-shaped areas in the midline at the anal verge, which may be mistaken for anal scars. Although anal skin tags have been observed after trauma from anal sodomy,[3] a prominent medial raphe and anterior midline anal skin tags are also common in nonabused children.[2] Patient 3 had a congenital midline pit of the perineal body, which was confused with an injury due to abuse. Patient 6 had midline congenital cleft of the genital structures above the urethra, an anomaly that was undetected for 5 years despite regular pediatric care. Caution is advised in diagnosing midline lesions of the genitalia or anus.[2,12]

Injuries

Accidental injury to the genitalia may also be mistaken for sexual abuse.[15] Straddle injuries usually cause crushing of soft tissue over a solid structure such as the pubic symphysis, ischiopubic ramus, and adductor longus tendon. Compared with injuries due to sexual abuse, straddle injuries are more often anterior and unilateral, cause damage to the external rather than internal genital structures, and are associated with an acute and dramatic history. Patient 4 had characteristic historical and physical findings of a straddle injury. Severe genital injuries, including vaginal lacerations and rectovaginal fistula, have been described in girls falling astride sharp objects.[16]

Sudden, accidental violent abduction of the legs may cause splitting injuries of the midline genital structures.[3,17] However, in the only patient report of this type of injury, the cause was forced abduction of the thighs during sexual abuse.[18]

Motor vehicle accidents can cause injury to the genitalia.[16,19] A seat-belt injury causing referral for possible sexual abuse has been described. The injuries included abrasions to the labia, hematoma of the mons, and a perineal tear. The hymen was undamaged.[20] In patients of African or Middle Eastern origin, female circumcision in infancy or childhood can result in hemorrhage and unusual genital adhesions and scars.[16]

Genital strangulation by hairs or other objects can occur accidentally, as a result of sexual abuse, or as punishment for toilet accidents.[21] Masturbation is not reported to cause genital injuries except in severely developmentally delayed children or those who self-mutilate due to genetic diseases.[15,17,22] A review of 11 clinical and behavioral syndromes that can result in self-inflicted injury in children and adolescents includes one child with recurrent hematuria apparently caused by the child inserting a quartz crystal into his urethra. As the authors caution, however, self-destructive behavior is more common in abused and neglected children.[23] Tampon use is reported to cause slight stretching of the hymenal opening but not actual injuries to the hymen.[22,24,25]

Other Anal Conditions

Diseases that produce anal changes that might raise questions of abuse include Crohn's disease,[26] hemolytic uremic syndrome,[27] lichen sclerosus,[9,10] postmortem anal dilation,[5] rectal tumor, neurogenic patulous anus, and severe or chronic constipation and megacolon.[28,29] Eversion of the anal canal has been described as a result of sexual abuse.[28] However, Zempsky and Rosenstein[30] have listed 11 other medical conditions causing rectal prolapse in children. A causal relationship with anal abuse has not been established definitively.

Infections

Infections of the genitalia may lead to concerns about sexual abuse. Perianal streptococcal cellulitis, as in patient 5, can present as an erythematous perianal rash, painful defecation, anal fissures, and bleeding.[31] This case is an example of the importance of obtaining a careful history to distinguish innocent actions from sexual abuse. Vaginal varicella has been confused with genital herpes.[32] Genital warts in adults are considered sexually transmitted. In children, other possible routes include in utero transmission, inoculation during delivery, and autoinoculation.[33]

Urethral Conditions

In patient 7, bleeding from a urethral caruncle led to concerns about sexual abuse. Other urethral conditions causing bleeding or alarming changes in anatomy include urethral hemangioma,[34] urethral prolapse, urethral polyps, papilloma, urethral caruncle, sarcoma botryoides, and prolapsed ure-

terocele. Urethral prolapse occurs most commonly in prepubescent black girls. In one series, 67% (8/12) of girls with urethral prolapse had antecedent episodes of increased intra-abdominal pressure, which may have contributed to the condition. Sexual abuse was the cause of prolapse in one patient. Other causes were infection, seizures, respiratory and urinary tract infections, burns, straddle injury, and strangury.[35]

SUMMARY

Sexual abuse is included in the differential diagnosis of a variety of abnormal physical findings in the genital and anal area. It is prudent for clinicians who discover these abnormalities to be aware of other potential diagnoses, to take a complete medical history, and to become comfortable with questioning children and their parents about possible abuse. Parents can be told that sexual abuse is one of several possible explanations for their child's findings, and they can be asked if they have had any concerns about abuse. If appropriate, the clinician can interview the child alone and ask if anyone has touched or hurt them in their "private parts." If abuse is suspected, it may be necessary to refer the child for a second examination and an in-depth interview.[36]

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28

Child Sexual Abuse

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Estimates of the incidence of child sexual abuse vary enormously by the study methods employed (1a). In 1982, sexual abuse made up about 7% of all suspected reports of maltreatment made in the United States (1). Most authorities agree, however, that the true incidence greatly exceeds reported or disclosed cases. Sexual abuse may be more likely than other forms of abuse to remain hidden for years after its onset (2). Visible scars are rare, the victims often feel stigmatized (or suffer memory repression), and adults often react with anger and disbelief when children make disclosures. In population surveys, 5–20% of women report having had unwanted sexual experiences during childhood, and upwards of 50% give affirmative responses to more detailed probes about the occurrence of sexual maltreatment (3).

Although the figures may be biased to some extent by disclosure and referral patterns, studies have found that for many, if not the majority, of child victims, sexual abuse begins in the first few years of life (4,5). This early onset is one of the factors that contributes to delays in disclosure: young children are easily misled into believing that the activities are "special" and must be kept secret. Child sexual abuse is characterized by dynamics to which young, dependent children are particularly vulnerable. The perpetrator assures them that should they disclose, that dire consequences will ensue to themselves, other family members, or the perpetrator.

The legal definition of child sexual abuse includes both sexual contact (either intrusion into body orifices, fondling, or requiring the child to fondle or fellate the perpetrator) and noncontact acts (such as exhibitionism, involvement in child pornography, and deliberate exposure of children to sexually explicit materials). Sexual abuse of children generally begins with acts that may be confusing or frightening for

children but that do not involve physical harm. Contacts may slowly increase in intensity and intrusiveness, often over a period of years. Thus, physical findings in a child who has disclosed may be minimal if the disclosure is relatively early in the course of the abuse, or if the perpetrator has avoided or not yet begun intrusive activities.

APPROACH TO THE PHYSICAL EXAMINATION

Parents and children are often very anxious about examinations conducted in the course of evaluations for suspected maltreatment. After an initial disclosure, while the family is still in a state of crisis and unable to offer adequate support, the child may have undergone an *initial exam in an* emergency room, possibly conducted by a physician who was pressed for time or not comfortable with being involved in that type of case. If no previous exam has taken place, both parent and child may be worried that what has been arranged is the child's first "internal" exam, with the parent unable to conceal from the child his or her own distaste for such procedures. Thus, at the time the examination is scheduled, it is important to ask about such experiences and concerns and to outline what will be taking place. Families are usually greatly reassured to learn that the upcoming examination will not involve any instrumentation besides the use of a bright light and possibly some magnifying apparatus.

When the child's condition permits, it is preferable to speak to the child and parent before asking the child to disrobe. It is important to remember that the examination of a potentially abused child must be therapeutic as well as diagnostic. Both the child and the parent may feel or actually be victimized, or they may be feeling an acute lack of control and personal security, even if only from being required to follow through with evaluations because of the suspicion of abuse. Even more than with other medical encounters, it is vital that the clinician show respect for the family's concerns, privacy, and modesty.

In general, children suspected of being victims of maltreatment have or will be questioned closely by professionals who specialize in conducting forensically correct interviews. Such encounters must follow careful procedures to document questions and responses, avoid any appearance of leading the child or suggesting answers, and provide reassurance about the availability of support during the investigation. *The interviews accompanying medical* evaluations usually focus only on symptoms that may yield clues to infection or trauma. It is reasonable, however, for the clinician to tell the child that he or she would be happy to hear about what has *happened if the child is comfortable telling* the story. If the child says "no," the clinician can use information from the parents, police, or social service agencies to guide the evaluation. If the child is willing to provide some details, they should be noted carefully in the medical record. The clinician should try to make his or her questions and replies as open-ended and nonspecific as possible. Questions that ask whether a specific person performed a specific act (for example, "Did Mr. Smith ever put his penis in your mouth?") should be avoided at all costs. Better questions are, "Did anyone else do anything?" and "Did he do anything else?" It can also be important to reassure the child that the clinician is asking these questions to guide the exam and better help the child. Often, if the child has been questioned before, the child will think that the clinician is repeating the questions because he or she does not believe the previous statements.

The examination of a possibly abused child should extend from head to toe, regardless of the type of abuse suspected. Perhaps the most important reason for this is to help the child become accustomed to the clinician's touch, and to allow the clinician to demonstrate that he or she can be trusted to talk about the steps in the exam and respond to the child's signs of distress or discomfort. This period of adjustment is critical for the parent as well as for the child, since the parent's discomfort will be quickly transmitted to the child even if the child herself is not apprehensive. A second *reason for conducting a thorough exam* is that various forms of child abuse often occur together: signs of physical abuse or neglect may also be present. Finally, manifestations of sexual abuse are not confined to the genitalia and rectum. As discussed below, there may be injuries to the mouth or breasts, or physical findings suggestive of disseminated sexually transmitted diseases.

Depending upon the type of case and the extent of preparation for the visit, children may sometimes refuse all or part of the examination. Unless some serious injury or infection is suspected, it is preferable to defer the exam until another date (often after the child has had the opportunity to meet with a counselor or therapist) rather than use force or undue emotional pressure to obtain compliance. There is always some risk that the child's refusal represents an attempt to manipulate the parents or clinician, but this is far outweighed by the possibility that insisting will be revictimization of a child whose bodily integrity has already been violated. Refusals can often be avoided by careful preparation of the family prior to the visit, exploring the parent's reservations as well as the child's, and taking the exam slowly, giving the child ample opportunity to know what is happening and to take control to the extent possible.

Documentation plays a critical role in examinations of suspected abuse. Information in medical records may be admissible in court even though it could otherwise be kept out of discussion by rules about hearsay; for example, a child's identification of a perpetrator, made because the nature of the assault is important for the planning of diagnosis and treatment, may be admissible in court even if the child ultimately cannot testify herself or himself. As with other medical-legal cases, *records will* likely be scrutinized both by attorneys and by other clinicians, sometimes with the goal of discounting the findings or clouding their interpretation. It is thus crucial that clinicians clearly describe procedures and findings, *and then separately discuss their conclusions*. It is best to avoid words that may have specific legal meanings or emotional value (and that frequently lack any real medical significance) such as "intact" to describe a hymen or "marital" to describe the introitus. "Penetration," to a physician, may indicate insertion of an object into the anal canal or vagina; to an attorney, it may be legally defined as simple placement of a penis between the labia or buttocks; a child may report the sensation of "having something stuck inside me" after vulvar coitus or pressure on the perirectal skin. It is essential that the clinician give a description of the physical findings that can serve as primary data for other professionals to interpret independently along with the clinician.

EXTRAGENITAL LESIONS SUGGESTIVE OF SEXUAL ABUSE

Bites inflicted in the context of sexual abuse or assault may injure the breasts, stomach, or genitals themselves (6). Bite marks may also be found on the arms, nose, or earlobes; they may be inflicted in order to damage or hurt the victim, as well as for sexual gratification. Bites can provide important evidence in cases of suspected abuse because they may give some clue as to the identity of the abuser. Human bites cause a combination of crush injury with superficial laceration. Soon after the bite, only an elliptical or oval set of indentations may be visible in the skin, perhaps with a reddened area in the center from the force of sucking or folding the skin. Later, the outline of the bite may be visible as bruises

that correspond to the locations of the teeth. Although the skin does not provide good medium for making a perfect casting of the bite, it is often possible to assess the distance between the maxillary canine teeth: intercanine distances of greater than 3 cm most likely represent adult dentition (7). Fresh bites can also be swabbed for salivary residue and processed in the same manner as other forensic specimens.

The mouth should also be examined in cases of suspected sexual abuse or assault. Ulcers or exudates may be signs of sexually transmitted diseases. The frenula attaching the gums to the upper and lower lip or tongue may be lacerated from the application of gags or from forceful feedings. Erythema, petechiae, and bruising of the palate may occur after fellatio (8).

TECHNIQUES OF GENITAL EXAMINATION

Because of the scrutiny likely to follow any examination for suspected abuse, clinicians need to document not only their findings but how their examination was conducted. Recent work by McCann et al. (9,10) has demonstrated that differences in technique alter the types of observations that can be made about the prepubertal genitalia and the apparent size of the structures observed.

Three approaches are commonly used to examine prepubertal female genitalia. (a) The most common is the so-called supine separation technique. A child is asked to lie on her back, either on a parent's lap or examining table, with the hips fully abducted and the heels touching. The examiner applies lateral and slightly downward traction on the labia majora with the fingertips, exposing the hymen and vagina. (b) The supine traction variant of this technique is conducted in the same position, but instead the labia are held gently and pulled laterally, slightly forward, and slightly up. These supine positions are probably the most comfortable for the child, and they offer the best view of the labia, vestibule, and posterior fourchette. The separation technique, however, is least efficient in spreading out the hymen, and allowing its configuration and any opening to be seen. (c) A third possibility for an examination is the knee-chest position. The child is asked to kneel on an examining table with her back swayed, chest flat on the table, and knees slightly apart. The examiner then stands behind her, and gently spreads and pulls back the tissues adjacent to the introitus. Although it may be harder to prepare the child for this approach, it offers the greatest possibility of seeing up into the vagina and looking for foreign bodies or injury without the use of a speculum.

Regardless of the position used, good lighting and usually some magnification are important to the examination. Colposcopes are widely recommended for use in examinations for suspected maltreatment, but their benefits have also been debated (11). Major advantages of colposcopes are their excellent illumination, ability to take photographs, and distance that they afford between the examiner and child. Disadvantages include cost, lack of availability, and visualization of detail that, given the present state of knowledge, may be more suitable to research than clinical activities.

Time and patience are perhaps the most essential tools for examining small children's genitalia. Relaxation has a major impact on both how much visualization can be obtained and on the appearance of the structures visualized. The effort to avoid any direct instrumentation, even with only a moistened swab, means that traction often must be applied, relaxed, or reapplied to free up moist, adherent tissues, and then observations made in another position. This is only possible if the child is cooperative and the parent supportive.

EXAMINATION OF THE VULVA

The labia minora extend from the clitoris anteriorly to the area known as the posterior fourchette. The tissue that normally joins them posteriorly, known as the frenulum, is often stretched tightly when lateral traction is placed on the labia majora. Before puberty, the skin of the frenulum is very thin and superficial midline lacerations may often occur during examination. Vulvar irritation from either mechanical or infectious causes can also lead to increased friability. One study that was able to compare both probably abused with probably unabused girls found an increased prevalence of friability among both those with a history of sexual abuse and those who had been referred for vaginitis, vulvitis, and dysuria (12). Some unabused girls also have a midline, avascular appearing area in the posterior fourchette (10). These areas may be more pronounced with greater degrees of traction, and then seem to disappear as traction is relaxed. Of ongoing concern is how such areas might be distinguished from scars that could be attributed to prior trauma.

Friability in the posterior fourchette is often seen in conjunction with adhesions of the labia minora. Small adhesions are usually posterior, extending anteriorly from the fourchette. Because labial adhesions are thought to be caused by prior trauma or irritation, it would seem logical to expect them to be more common among children who have been sexually abused. Observations recorded in the literature, however, yield a confusing picture. Berkowitz et al. (13) reported finding labial adhesions in 10 of 375 girls younger than 5 years old referred for evaluation of possible sexual abuse (about 3%). This figure was higher than the "less than 1%" prevalence described in textbooks. In a comparative study that included older prepubertal girls, Emans et al. (12) found labial adhesions in nine of 127 "normals" (7%), four of 59 with vaginal problems (7%), and 21 of 118 with a history of sexual abuse (18%). When the results were analyzed separately by race, however, white girls had no difference in the prevalence of adhesions among the three study groups. There was a trend for abused black and Hispanic girls to have more adhesions, but the number of cases available for analysis was small. Finally, in the study of McCann et al. (10) of girls aged 1–10 years who had been screened to exclude likely cases of abuse, the prevalence of labial adhesions was nearly 40% among 90 girls examined in the supine position and 14% among 86 girls examined in the knee-chest position. These widely varying prevalence rates suggest major differences in the populations studied and the criteria used to make observations. Until more uniform data are developed, the association of adhesions with abuse is likely to remain a matter of conjecture.

A variety of conditions can cause changes in the vulvar tissue that can be mistaken for possible maltreatment (14). Perhaps the most problematic are the skin conditions such as lichen sclerosis and related disorders that can cause subepidermal bleeding, blisters, and superficial lacerations after minor trauma. Genital warts are a second very problematic finding. As discussed in the chapter by Tjaden and Rock (this volume), neither the natural history nor means of transmission of human papilloma virus (HPV) infection are well defined. Warts in toddlers and younger children may possibly be associated with perinatal infection, whereas it is more difficult to postulate nonsexual HPV infection in older children. When the concern for maltreatment arises because of a particular physical finding, and not because of a child's disclosure, it is important to carefully gather other medical information and to probe tactfully for evidence of behavioral or family problems before reaching a clinical conclusion. Once a concern for abuse is raised, it is very difficult to retract.

EXAMINATION OF THE HYMEN

Examination of the hymen has been the most intense focus of studies hoping to demonstrate findings diagnostic of sexual abuse in prepubertal girls. The normal hy-

men varies a great deal in appearance, although congenital absence apparently does not occur except in the case of major genitourinary malformations (15). Pokorny (16) has proposed the following classification:

- The fimbriated hymen has "redundant, gathered skirts" of tissues with a scalloped rim that attaches to all 360° of the rim of the hymenal ring.
- The circumferential hymen is composed of a "smooth, unfolded skirt" of tissue that also attaches to the full circumference of the hymenal ring.
- The *posterior rim hymen* appears as a crescent of tissue that runs generally from about 2 or 3 o'clock on the hymenal ring along the posterior edge to a symmetrical location on the opposite side. Partial openings in hymens are usually either central or anterior, probably reflecting how the urogenital sinus and the Mullerian structures join during embryogenesis. Anterior/posterior septae are also sometimes seen.
- The hymen may sometimes be imperforate. In that case, its appearance will differ from that of a large labial adhesion in that the urethra will not be covered. The fact that the membrane appears thin instead of thick helps to differentiate an imperforate hymen from agenesis of the vagina. Having the child cough should make the truly imperforate hymen bulge.

Before making a final determination of configuration, however, the clinician should check for relaxation and consider making observations in another examining position. In the study of McCann et al. (10), hymens that had appeared to be fimbriated using the supine separation method took on a smoother, crescentic appearance when traction was applied or the child was examined in the knee-chest position.

Early attempts to diagnose sexual abuse attempted to determine sizes of the hymenal opening that might be indicative of prior trauma. The landmark study in this area was reported by Cantwell (17), a comparison of findings among over 250 girls 12 and younger who had been admitted to a crisis care facility for treatment of various kinds of abuse. In this population, a hymenal opening of greater than 4 mm was strongly associated with a history of sexual abuse. A subsequent study by Emans et al. (12), however, offered some important methodologic improvements and questioned the utility of Cantwell's 4 mm cut-off point. Table 1 gives dimensions of the hymenal opening (measured supine) among children 3–6 years old, comparing asymptomatic children with those who gave a history of sexual abuse and those who had genital complaints. Although the asymptomatic children had, on the average, smaller openings, only four of the 55 children in the abused group had openings outside the range found in the asymptomatic girls. Based on these and other data, the authors concluded that the horizontal diameter of the hymenal opening was not a good indicator of previous vaginal or vulvar trauma, although girls with openings greater than 6 mm might be in a group at increased risk if they did not currently have some other vaginal complaint.

The study of McCann et al. (10) of apparently not abused girls provided further evidence against the 4 mm cut-off point, although it was not a comparison of abused

TABLE 1. *Horizontal diameter of the hymenal opening in girls 3–6 years of age*

Group	n	Mean (mm)	Range (mm)
History of sexual abuse	55	4.0	1–10
Asymptomatic	34	2.9	1–6
Vaginal complaints	19	4.1	2–10

Adapted from ref. 12

and nonabused children. The study also demonstrated the extent of difference in hymenal opening diameter that could be attributed to a child's age and to examination techniques. Table 2 shows mean horizontal diameters for three age groups of children and three examination techniques. Average diameter increases with age, and is generally larger in the supine traction and knee-chest positions, although this difference is most important in young children. An important caveat in comparing these figures to Emans' is that McCann and colleagues did not average in the opening size of zero for those girls whose hymens appeared redundant and without an opening. This represented about 20% of the girls examined with the supine separation technique and 8% of those examined with supine traction or in the knee-chest position. This would tend to make McCann's average measurements larger than those made by other investigators who might have included all cases. The ranges reported by McCann, however, are similar to those reported by Emans and support the idea that diameters substantially larger than 4 mm may be normal findings. It is also important to note that vertical diameters tend to be larger than horizontal, and that studies comparing which dimension is most affected by injury, or which might ultimately provide the most sensitive or specific indicator of maltreatment, have yet to be reported. There are also some data to suggest that after injury and stretching the hymenal diameter may decrease over time (18). How rapidly and to what extent this may occur are not known, however.

Despite questions about its utility, measurement of the hymenal diameter continue to be an expected part of examining a prepubertal girl for suspected sexual abuse. Once variation in relaxation and examination technique are accounted for, colposcopes offer the most precise method of measurement. The very narrow depth of field allows the examiner to focus on the hymen, take a photograph, and subsequently photograph a ruler or other measuring device at exactly the same focal length and magnification. If the two images are printed at the same size, the ruler can be used to measure distances on the photograph. This procedure is complicated and subject to some error if the plane of the hymenal opening is not parallel to the plane of the colposcope lens, but it is far superior to holding a measuring device on the perineum and squinting down the vaginal canal toward the hymenal ring. Some clinicians use a probe of known diameter and hold it in or near the hymenal orifice. This can be successful if the child does not become

TABLE 2. *Horizontal diameter of hymenal opening in nonabused girls: variation by age and examining position*[a]

Age group	Examination method	n	Mean diameter (mm)	Range
2–4 years	Separation	21	3.9	1.0–5.5
	Knee-chest	29	4.6	2.5–7.5
	Traction	24	5.2	2.0–8.0
5–7 years	Separation	39	4.2	1.0–8.0
	Knee-chest	41	5.6	2.5–8.5
	Traction	43	5.6	1.0–9.0
8 years to Tanner Stage II	Separation	19	5.7	3.0–8.5
	Knee-chest	21	7.3	4.0–11.0
	Traction	20	6.9	2.5–10.5

[a]The children examined were volunteers who had been screened to determine risk factors or history that might be suggestive of maltreatment. See text for descriptions of examination methods and cautions about comparing figures with other published data.

Adapted from ref. 10.

frightened or if the probe does not touch sensitive tissues.

Several other characteristics of hymens may serve to demonstrate that an individual has a higher likelihood of having been sexually abused. These are well illustrated in the color atlas of prepubertal genital and rectal findings developed by the California Medical Association (19). Perhaps the most significant is a cleft or tear in the hymen posteriorly, especially at about the 6 o'clock position. Anecdotal reports (20,21) suggest that this is the area most likely to be damaged in violent sexual assault or attempted penile penetration (Fig. 1). In the study by Emans et al (12), the presence of a cleft or healed tear in the hymen did not distinguish among abused, asymptomatic, and symptomatic girls. Only three girls, however, had a tear at 6 o'clock, and these were all individuals who had given a history of pain and penetration. Bumps on the hymen in the 3 o'clock to 9 o'clock region, adhesions of the hymen to the vaginal wall, attenuation of the hymen (narrowing of the rim), and increased vascularity of the hymen or surrounding tissue have all been found among children with a history of abuse, but Emans and colleagues found them in roughly equal or greater proportion among children with other vaginal complaints. These are all observations based on a relatively small number of studies and patients. Other studies reported to be in progress will certainly add to what is known.

FIG. 1. Colposcopic photograph of a prepubertal girl's genitalia. The hymen is attenuated, and there is a cleft or interruption at about 6 o'clock. (Courtesy of Dr. T. Doran, Sinai Hospital of Baltimore.) (© 1990, The Williams and Wilkins Co., Baltimore)

INTRAVAGINAL FINDINGS

Especially by examining a child in the knee-chest position, it is often possible to see through the opening of the hymen and into the vagina. Anterior/posterior ridges (columns) run lengthwise, with transverse rugae branching out from them laterally. The length of the vagina varies a great deal with age and among individuals. From birth to about 7 years of age it is about 4–5 cm long (22). Just before puberty it is about 6–7 cm deep along its anterior wall and about 8–11 cm deep posteriorly (23). Penetration with an object larger than a single adult finger is said, after only a few episodes, to cause the vagina to lengthen and its folds to flatten.

The possibility of sexual abuse is often raised when a vaginal foreign body is found. Young children sometimes do put small objects in convenient orifices, and this is probably not a sign of molestation or abnormal psychosexual development unless it happens repeatedly or seems to be associated with an excessive amount of self-stimulatory behavior. What is unusual is for children to insert objects that would mimic coitus, or to do anything to themselves that one might anticipate to be painful. Such episodes suggest inflicted injury or, if self-inflicted, exposure to explicit sexual material. If a foreign body is suspected under these circumstances, an evaluation under anesthesia may be preferable to instrumentation or even irrigation in the office setting. Noninvasive approaches such as ultrasound might be considered first.

PERIRECTAL LESIONS

The prevalence of rectal injury in child abuse may well be underestimated, if only because knowledge of normal variations and the manifestations of trauma is even more scanty than for the genitalia. Serious injury to the rectum seems to be relatively uncommon in prepubertal sexual abuse, possibly because many child sexual abusers go to great lengths not to inflict trauma that will be detected. In addition, the anus is very expansive: Many stools are larger than the adult penis and can be accommodated without injury; therefore, penile penetration of the rectum may go undetected. Healing also appears to be quite rapid, so that minor injuries may be virtually undetectable by 2–3 weeks after a sexual encounter. More serious injuries may take place when the assailant is another child (and not capable of preventing detectable abuse), in the setting of violent sexual assault (rape), or among adolescents who are abused by adults practicing rectal sexual practices with violence or without lubrication such as in the insertion of hands ("fisting") or foreign bodies. It seems likely that as more sexual abuse victims come forward that the true prevalence of anal injuries will be found to be relatively high.

The types of injuries found in children or adults correspond to various aspects of the anatomy of the perirectal area (8,23). When the buttocks are first parted, the hyperpigmented skin of the anal verge can be seen surrounding the anterior-posteriorly oriented slit of the anus itself. The anal verge is roughly circular, and its skin is loosely applied over a thin layer of involuntary muscle and an easily disrupted network of small blood vessels (the inferior hemorrhoidal plexus). The muscle layer normally keeps the skin folded into multiple shallow furrows that fan out from the anus more or less symmetrically in all directions. Penetration with a single finger or other small object, especially if it is relatively well lubricated, may leave no visible mark on the anal verge except possibly for a shallow abrasion, possibly from a fingernail (24). Larger objects, however, especially if no lubricant is used, will tend to draw the anal verge skin inward with them. The fragile blood vessels under the skin may break, causing either localized or circumferential bruising (25). The skin itself may tear, causing a shallow fissure that may bleed. More extensive tears extending beyond the skin of the anal verge, either onto the adjacent skin of the buttocks or down into the rectal mucosa, are clearly unusual and suggest some nonphysiologic (abusive) trauma. On the other hand, shallow fissures are indistinguishable from the injuries that can be caused by the passage of a large, hard stool, or from the friability and maceration encountered with wearing diapers or poor hygiene.

Anecdotal reports suggest that unless there is chronic abuse most minor lesions of the anal verge resolve within a period of weeks. Areas of blue discoloration or hematomas resolve in a period of days, sometimes leaving small skin tags that may persist for an additional 2–3 weeks (24). These can be confused with midline skin tags in or near the anal verge, which are often a normal finding. In those cases, the tag will be noted to have been present since birth. Some observers (25) feel that increased prominence of the venous markings under the skin of the anal verge, or more pronounced filling and emptying of these vessels, may be a sign of prior trauma. Hemorrhoids may also be found and potentially are signs of prior trauma since otherwise they are rare in childhood. Other causes of hemorrhoids include perirectal infections and inflammatory bowel disease. Shallow fissuring in the past may leave fine scars

that appear to be triangular, with the point of the triangle facing the anal opening, when the skin folds of the anal verge are spread during an examination. Although some authorities have felt that scars created by objects passing out of the rectum look different from those created by objects going in, others (23) feel that these two scenarios generally leave the same markings. The latter base their opinion on the fact that the configuration of the scar appears to be determined by the action of the underlying musculature rather than the mechanics of the injury. McCann et al. (26), in their study of children who were thought *not* to be victims of abuse, reported finding shinier, triangular-shaped "smooth" areas in the perirectal skin anteriorly and posteriorly (at the 6 and 12 o'clock positions), which they attributed to the distribution of the underlying musculature.

Chronic abuse does appear to alter the skin of the anal verge. It becomes thickened from repeated abrasion and flattened as the underlying muscle becomes stretched. In extreme cases, the perianal area may take on a "funnel-shaped" appearance, so that the apparent opening of the anus is within the perianal skin, above its normal location at the point that the rectal mucosa begins. Although this finding is said to be rare in children, one group of physicians has reported seeing it in six of 224 prepubertal children examined for suspicion of sexual abuse (27).

The anal canal is the passage that links the lower rectum to the exterior of the body at the anus. It ranges from about 1 cm long in children to 3 cm in adults. The external part of the canal is made up of skin similar to that of the anal verge: delicate and very sensitive to pain, because it is innervated by the somatic sensory system. The internal portion is lined with a mucous membrane that is relatively insensitive to pain, because it derives its innervation from the autonomic system. The internal and external portions meet near the so-called dentate line, which gets its name from the appearance of the puckered, longitudinal folds (known as Morgagni's, anal, or rectal columns) of the internal portion. The dentate line is at the level at which the anal canal passes through the levator ani musculature. At the ends of the anal columns are blind folds known as anal valves. The "crypt" within each valve contains glands that serve to lubricate the area and that can be involved with perirectal infections and ultimately in the development of perianal abscesses (28).

Both trauma and infection (with chlamydia, gonorrhea, or herpes virus, for example) may produce erythema and edema of the anal mucosa (proctitis). Symptoms include a burning sensation and pain on defecation. If the irritation is caused by a single episode of trauma and is not associated with infection, it will resolve spontaneously. The anal mucosa may also be lacerated (with or without involving the deeper muscle layers), causing pain and bleeding. Laceration may be caused by insertion of the penis, other body parts, or an object of some kind. Care must be taken to assure that the laceration has not perforated the wall of the anal canal or of the rectum. These are very distensible structures and perforation suggests either great force or the introduction of a relatively large or sharp object. Perforations may enter either the peritoneal cavity or the perineal tissues. The former type of perforation usually presents rapidly with signs of peritonitis and free air in the abdomen, but the latter may not be readily apparent until cellulitis develops. Initial evaluation can include checking the hemocrit and vital signs to determine the extent of bleeding, and an upright abdominal film to search for a foreign body or free air in the peritoneal cavity. Children suspected of having serious acute, rectal trauma should be hospitalized for observation, surgical consultation, and possibly proctoscopy.

The anal sphincter is composed of two sets of overlapping musculature, the internal and external sphincters. The internal

sphincter, which lies closest to the bowel, is an involuntary muscle innervated by the autonomic nervous system while the external sphincter, which wraps around the internal sphincter and extends the entire length of the anal canal, is striated, voluntary muscle. The external sphincter has no opposing muscles to force it to open; defecation is possible when the muscle relaxes from its usually contracted position.

Acute stretching of the sphincter may cause it to remain open for a period of hours. If the muscle fibers have not actually been ruptured (sometimes visible at the site of a laceration of the anal skin or mucosa) the injury will be followed by spasm. Injury to the anal area that does not stretch the sphincter may also result in spasm as the muscles attempt to "splint" sensitive tissues and reduce discomfort. Past the acute period, unless there has been repeated penetration or tearing, the sphincter will appear normal. Repeated penetration can result in stretching the sphincter so that it easily accommodates wide objects (several centimeters in diameter) and loses some of its strength (manifested as a decreased "grip" on an examiner's fingers). Scarring from an old laceration, or splinting because of an abscess or fissure, may produce increases in tone or asymmetry in the shape of the anus when closed.

One of the standard findings in routine physical examinations of children and adults is the so-called anal wink, a reflex tightening of the external sphincter in response to stimulation of the perirectal skin. The reflex is also sometimes triggered by simply spreading the buttocks. It can be abolished by lesions of the sacral segments of the spinal cord or of the pelvic nerves, and individuals can learn to inhibit it if they have experienced frequent stimulation in the perirectal area or in order to be cooperative with the examiner. Physicians who perform digital rectal examinations in adults, for example, know that with coaching and relaxation a patient can relax the sphincter to allow entry of a finger or an instrument. Children who have had repeated rectal examinations, or frequent enemas or other instrumentation, may also learn to inhibit contraction of the sphincter. It follows that failure to observe a strong wink, or the ability to relax the sphincter during observation or digital examination, is a nonspecific finding that may have many interpretations.

Some children tighten the anus when the buttocks are spread, and others relax it slightly, often allowing a small amount of flatus to escape. Both of these reactions are probably normal (23). If traction is applied to the perirectal skin to "test" the sphincter, the mucocutaneous junction of the anal canal can often easily be seen in normal individuals because it is actually just at or below the bottom edge of the sphincter muscles. McCann et al. (26) in their study of children thought not to be abused provide the only data regarding how far the anus should normally open when the buttocks are spread. In that study, more than half the children would gradually relax the sphincter if gentle traction was maintained for a sufficient time (average about 60 sec). The degree of relaxation frequently fluctuated during the exam. McCann's team observed rectal openings, when the examinations were conducted in the knee chest position, of up to 2 cm measured anterior-posteriorly (average 1 cm). Putting McCann's observations together with those of Paul (23), one could develop the following criteria for judging whether a child's rectum might be abnormally dilated:

- large diameter (> 2 cm) in the absence of stool in the rectal ampulla
- asymmetry of the anus when dilated
- apparently fixed opening—no gradual relaxation or fluctuation in diameter observed
- thickening and smoothing of the skin of the anal verge (although smoothing alone, during relaxation, is probably normal, reflecting only relaxation of the underlying muscles)

- decreased "grip" on digital exam (if one believes that digital exams are appropriate in cases of suspected sexual abuse).

If the child is willing or able to talk about what has happened, he or she should be asked in an open ended, nonleading way about discomfort or pain associated with the incident of abuse. Anal penetration is usually painful both initially and on withdrawal. This pain is often sharp, and children sometimes will report that the assailant "put a knife in my rear." This may sometimes actually be the case, but it is important to ask the child if a knife or other sharp object was actually seen. The discrepancy between this type of account and a finding of only minor or no lasting trauma often serve erroneously to discredit the child's statement. Clinicians can help by explaining the probable source of the child's perception. There is usually a dull aching sensation after anal penetration, or continued sharp pain if there has been more extensive trauma. Even with minimal trauma, there may be pain on defecation for 2 or 3 weeks, sometimes accompanied by a change in bowel habits.

If it is not appropriate to ask about the incident of abuse, or if one has not yet been disclosed, it is still important to enquire about other rectal symptoms such as burning or pain on defecation, passing blood, or problems with large, hard stools or chronic constipation. These questions can be asked as they would be normally, by asking about the frequency of defecation and medications or enemas that may have been administered. Changes in bowel habits are also of potential significance, as are episodes of encopresis after toilet training or apparent leakage of stool.

The perirectal exam must be more than a "quick look." Relaxation and good lighting are vital. The child should initially be assured that the exam will be totally external and not painful. He or she may be comfortable in a variety of positions including supine, bent over prone (standing or on a special proctoscopy table) or on the side. The knee-chest position also offers good visibility but may be the most embarrassing.

When the child is relaxed the buttocks can be spread gently and the configuration and reaction of the anus observed. As discussed above, either a reflex tightening or gentle relaxation is probably normal. If there is any doubt about the competency of the sphincter, the perirectal skin can be stimulated to provoke a wink, but a negative response in a relaxed child may not have great meaning. The anus itself should be a relatively uniform anterior-posterior slit, surrounded by a symmetrical area of hyperpigmented skin. The buttocks themselves should be examined for bruises and scars.

The perirectal skin should be examined for redness, scars, hemorrhoids, skin tags, fissures, ulcers, or warts. Irritation may be secondary to poor hygiene or pinworm infection. The folds of the anal verge can be gently spread tangentially to look for shallow fissures or scars that may not be immediately visible. Inspection and gentle palpation of the skin around the anal verge, especially anteriorly, may reveal bulging or tenderness suggestive of a perirectal abscess or fistula. Finally, traction on either side of the anal verge will allow inspection of the most distal portion of the anal canal, possibly revealing other hemorrhoids either external or internal (if they have prolapsed).

For most children with a normal examination, or with no findings suggestive of chronic abuse, no further inspection may be performed. A digital examination is not likely to yield any further information, except, perhaps, if there is reason to suspect a vaginal foreign body that might be felt through the anterior wall of the rectum. If there is reason to suspect serious acute or complicated chronic injury (perforation, fistula, foreign body), a specialist should be consulted for an examination with an appropriate instrument, probably under anesthesia.

When chronic abuse is suspected, but no acute injury is present, a digital exam may be the easiest way to determine the extent of stretching and decrease in strength, or alternatively the extent of scarring. The digital exam is best performed with a gloved, lubricated finger (29). Gentle pressure should be exerted with the ball of the finger, not the tip. Older children can be asked to bear down as if they were going to the bathroom. They should be warned that they may feel as if they are about to defecate but that this is not the case. As the sphincter relaxes, the finger can be rotated forward so that the tip enters first. If relaxation fails to occur, or there is tightening, waiting for a moment with the finger in place and reassuring the child may help. Once the finger is inserted, it can be rotated gently to assess first the uniformity of the superficial portion of the external sphincter and then the deep portion of the sphincter and the wall of the rectum.

FORENSIC PROCEDURES IN CASES OF SEXUAL ABUSE OR ASSAULT

When abuse or assault has taken place within 48 to 72 hours, it may be possible to detect materials from the abuser on the victim's body or clothing. This may provide important evidence to demonstrate that abuse has taken place and may sometimes help to identify the abuser. Procedures must be carefully followed to adequately collect and preserve available evidence.

Clothing

If the victim is still wearing the clothing worn at the time of the assault, he or she should stand on a large, clean cloth or paper sheet and remove all clothing. The clothing should be wrapped in the sheet, taking care not to spill any small objects that may have fallen onto it, and the bundle labelled and safely stored until it can be handed over to a police laboratory.

Examination for Traces of Semen

Finding traces of semen on a victim's body or clothing can be strong evidence that sexual contact of some kind took place. A first goal is to demonstrate that semen is present, and a second is to isolate genetic markers in the semen that may be linked with a particular perpetrator.

Examination for Semen on Skin

Victims may have semen from the abuser on their skin, often at sites adjacent to target areas for sexual contact. Ultraviolet (UV) light, which causes semen to fluoresce, can be used to aid detection. After a thorough explanation of the procedure, the room can be partially darkened. A few moments are required for the examiner's eyes to adapt to the dark. The UV light can be used to examine the thighs, buttocks, lower abdomen, chest, and lower face. Secretions may also be found in the hair, especially if the victim has tried to spit out ejaculate. If positive areas are found they can be swabbed with saline-moistened swabs that should be air-dried and put into empty, sterile blood collecting tubes or a clean paper envelope. If sealed tubes are used, the swabs must be totally dry to avoid overgrowth of contaminants. Alternatively, if preferred by the local forensic laboratory, the swabs can be immediately frozen instead of being dried. This may help preserve the activity of prostatic enzymes that can be used to identify the material as semen.

Semen is usually identified by looking microscopically for sperm and biochemically for enzymes and other proteins in the ejaculate. Both processes should be applied in all cases: as will be discussed below, the factors that influence retrieval of sperm and other seminal components act in a very variable manner. It is not unusual for sperm to be found in the absence of enzymes or vice versa. (Some abusers and rapists may

be impotent, so that even finding no evidence of semen does not rule out genital contact.)

Sperm

Although, normal male ejaculate can contain hundreds of millions of sperm, much smaller numbers are recovered from the vagina, even immediately after intercourse. In addition, the concentration of sperm in any individual's ejaculate may be decreased by elevated testicular temperature, chronic alcohol intake or procedures such as vasectomy.

Sperm recovered from the vagina shortly after sexual contact may still be observed to be moving when examined in wet preparations. The outer limit for finding motile sperm in adult vaginal secretions is often given as eight hours (30), although studies report a great deal of variation. Twelve hours appears to be the longest survival generally reported (31). Nonmotile sperm can be found for much longer periods, with reports ranging from 14 to 26 hours (30,32,33). These figures are all for sperm that, while nonmotile, are morphologically intact. Sperm without tails may be identified for considerably longer (33), but it may be harder to differentiate them from yeasts, debris, or other similar-size objects. Identification of intact sperm is more convincing forensic evidence (34).

Sperm may be found in other body sites besides the vagina. They can survive in the cervix for up to several days after sexual contact, or for a period of hours on the perineal skin. Survival in the anus and rectum is much shorter than the cervix or vagina: Whole sperm can usually be found for only a few hours, although pieces, if they can be properly identified, may be present for up to 2 days (33). In females, small numbers of sperm found in the anus or perirectal area may be contaminants from the vagina (34). Sperm may also be recovered from the oral cavity and surrounding skin. If the index of suspicion for oral sex is high, separate swabs should be taken from the perioral skin, the gums, the tongue, and the pharynx. The gums may be an especially good source. Their protected location in the mouth allows sperm to be retained there for several hours after contact, sometimes despite of the use of mouthwashes or toothbrushing.

A variety of techniques are described for obtaining specimens to examine for sperm. Some clinicians feel that wet preparations are generally not useful (32) because of the variable motility of sperm. Dried, stained smears may be more sensitive, and the have the advantage of creating a permanent record that other observers may examine. Swabs soaked with material to be examined can be immersed in 1 or 2 ml of saline or distilled water, or a portion of the swab can be cut off and dropped into the fluid so that the rest of the swab can be used for biochemical analysis (33). The fluid and swab are agitated to release sperm and then a drop of fluid can be air-dried on a slide and either stained (with Giemsa or hematoxylin and eosin) or processed as a cytopathology specimen.

Biochemical Markers

Semen contains several enzymes and other proteins that can be used to demonstrate its presence in vaginal fluids. The most commonly used biochemical marker for semen is the enzyme acid phosphatase (ACP) which is produced in the prostate. Small amounts of ACP are present in normal adult vaginal secretions, but at levels that are 100–1,000 times smaller than in semen. ACP is measured in international units (IU), with one IU equal to the amount of enzyme required to metabolize one micromole of substrate in 1 min. Several quantitative methods are available to measure ACP activity.

Given the excess of ACP in semen compared to vaginal secretions, it would seem

simple to use analysis of ACP in vaginal fluids to detect recent intercourse. Unfortunately, ACP activity diminishes rapidly in the vagina, although it is relatively stable on dry materials such as cloth if kept cool, dark, and relatively acid (35). In the vagina, activity related to prostatic ACP may not be distinguishable from normal vaginal enzyme after about 72 hr following intercourse.

Establishing cut-off values for inferring the presence of prostatic ACP, and determining the rate with which activity decays so that the time of coitus can be estimated, have been hampered by the fact that various collection and assay methods yield different dilutions of specimens and thus different values for "normal." In addition, normal adult vaginal ACP levels do not have a Gaussian (or "bell-shaped") distribution. The distribution of activity levels is log normal; that is, most women have relatively low levels of activity, but a small proportion of have relatively high levels. Pooling data from several studies, Sensabaugh (36) calculated that the 99% upper confidence limit for normal vaginal ACP activity is about 6.6 times a laboratory's average normal vaginal level using a consistent collection technique. For example, if the average ACP activity in adult females is 25 IU/L, a level of about 165 IU/L represents a 99% confidence upper limit of normal. ACP levels higher than this point would be presumed to be caused by the presence of prostatic enzyme. Sensabaugh also calculated multipliers to obtain 99% confidence intervals for estimated ACP activity for various time periods between coitus and when a sample is taken.

Other Tests Potentially Useful for Identifying Assailant

The following procedures may not be required in many cases and, with the exception of the first, can usually be postponed until after the initial examination. The clinician should consult with a police laboratory official or a designated sexual assault center to decide if collection is necessary.

Combings for Hair Samples

It may be useful to search for abuser's hair that has become adherent to the patient's body. If the patient has pubic hair it can be gently combed onto a piece of clean filter paper that is then carefully folded and placed in a labelled envelope for delivery to the police. If the patient struggled with and scratched the assailant, scrapings from under the fingernails may contain tissue useful in identifying the assailant or corroborating the history of struggle. Collection of blood or saliva from the patient may also be useful in differentiating his or her secretions from those of the assailant.

Identification of specific abusers from hair, blood, or semen samples has, until the present, been a difficult and often frustrating task. Most presently available testing has been based on a search for polymorphisms in blood group markers and serum proteins. Although several markers and proteins can be examined (fewer for semen than for blood or other tissues), patterns of variation cannot uniquely identify individuals. It can often be said that only one person in 100 or 1,000 would have a similar pattern of polymorphisms, but these odds are frequently not small enough to be the sole evidence linking a particular individual with a particular crime (37). This situation has been radically altered by the availability of genetic "fingerprinting" techniques based on detection of polymorphisms in human DNA (38).

"CHAIN OF EVIDENCE" FOR MEDICOLEGAL SPECIMENS

It is vital that a "chain of evidence" be maintained for sexually transmitted disease and other laboratory specimens associated with a case of suspected child abuse of any

kind. The "chain" is a written record assuring that the specimen which arrived in the laboratory for analysis was the same specimen taken from the patient. Although a medical facility's standard procedures are usually adequate for social service and juvenile court proceedings, they may be challenged and provide a handy defense for an abuser should a case be heard in a criminal court.

The chain may be carried out in many ways. A slip may accompany each specimen and contain spaces for the name and signature of each person handling the specimen (person collecting, transporting, evaluating) with the corresponding date and time handled. Alternatively, the clinician may describe the specimens collected in the medical record, carry them him or herself to the laboratory, and ask the technician to sign the record stating that the specimens were received and giving any laboratory number that may be assigned to them. Specimens collected for the police laboratory may be placed in a locked cabinet or "black box." When a police representative comes to collect the box, he or she should be asked to co-sign a slip describing the box's contents, and the date and time of transfer.

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Background: The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 94); November 1, 1995 (see Appendix C, amendment 511).

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level:

(1) **16**, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);

(2) **12**, if the offense was committed by the means set forth in 18 U.S.C. § 2242;

(3) **10**, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than **16**, increase to level **16**.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(c) Cross References

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2244(a)(1),(2),(3). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"The means set forth in 18 U.S.C. § 2241(a) or (b)" are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.*

2. *"The means set forth in 18 U.S.C. § 2242" are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.*

3. *Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

4. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

5. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 95); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

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identical to those otherwise provided for assaults involving an official victim; when no assault is involved, the offense level is 6.

Historical Note: Effective October 15, 1988 (see Appendix C, amendment 64). Amended effective November 1, 1989 (see Appendix C, amendments 89 and 90); November 1, 1992 (see Appendix C, amendment 443); November 1, 1997 (see Appendix C, amendment 550).

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3. CRIMINAL SEXUAL ABUSE

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

(a) Base Offense Level: **27**

(b) Specific Offense Characteristics

(1) If the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b) (including, but not limited to, the use or display of any dangerous weapon), increase by **4** levels.

(2) (A) If the victim had not attained the age of twelve years, increase by **4** levels; or (B) if the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by **2** levels.

(4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if the victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.

(5) If the victim was abducted, increase by **4** levels.

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

(d) Special Instruction

(1) If the offense occurred in a correctional facility and the victim was a corrections employee, the offense shall be deemed to have an official victim for purposes of subsection (a) of §3A1.2 (Official Victim).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *For purposes of this guideline—*

"Permanent or life-threatening bodily injury," "serious bodily injury," and "abducted" are defined in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

"The means set forth in 18 U.S.C. § 2241(a) or (b)" are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim.

2. *Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.*

5. *If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).*

6. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The maximum term of imprisonment authorized by statute is life imprisonment. The base offense level represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon.

An enhancement is provided when the victim is less than sixteen years of age. An additional enhancement is provided where the victim is less than twelve years of age. Any criminal sexual abuse with a child less than twelve years of age, regardless of "consent," is governed by §2A3.1 (Criminal Sexual Abuse).

An enhancement for a custodial relationship between defendant and victim is also provided. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This represents the potential for greater and prolonged psychological damage. Also, an enhancement is provided where the victim was an inmate of, or a person employed in, a correctional facility. Finally, enhancements are provided for permanent, life-threatening, or serious bodily injury and abduction.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 91 and 92); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1993 (see Appendix C, amendment 477); November 1, 1995 (see Appendix C, amendment 511); November 1, 1997 (see Appendix C, amendment 545).

§2A3.2. Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

(a) Base Offense Level: **15**

(b) Specific Offense Characteristic

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

2. *Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section applies to sexual acts that would be lawful but for the age of the victim. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. § 2243(a). An enhancement is provided for a defendant who victimizes a minor under his supervision or care.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 93); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

(a) Base Offense Level: 9

Commentary

Statutory Provision: 18 U.S.C. § 2243(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *A ward is a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.*

2. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 94); November 1, 1995 (see Appendix C, amendment 511).

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level:

(1) **16**, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);

(2) **12**, if the offense was committed by the means set forth in 18 U.S.C. § 2242;

(3) **10**, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than **16**, increase to level **16**.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(c) Cross References

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2244(a)(1),(2),(3). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"The means set forth in 18 U.S.C. § 2241(a) or (b)" are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.*

2. *"The means set forth in 18 U.S.C. § 2242" are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.*

3. *Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

4. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

5. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 95); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

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SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B							
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D							
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

REFERRALS FOR PHYSICAL AND SEXUAL ABUSE AGAINST CHILDREN

UNITED STATES ATTORNEY'S OFFICE
DISTRICT OF NORTH DAKOTA

Year	Physical Abuse	Sexual Abuse
1993	6	29
1994	7	27
1995	9	43
1996	10	45
1997	7	30
1998 (1/1 to 9/15)	11	30

Chart reflects matters, cases, and immediate declinations by victim

ATTACHMENT "C"

TABLE OF CONTENTS

INTRODUCTION

If you are a victim of or a witness to a crime, the Victim-Witness Assistance Program is designed to provide you with services while you are involved in the criminal justice system.

As a victim of a crime, you may be experiencing feelings of confusion, frustration, fear, and anger. Our staff can help you deal with these feelings. We also will explain your rights as a victim or witness, and help you better understand how the criminal justice system works.

One of the responsibilities of citizenship for those who have knowledge about the commission of a crime is to serve as witnesses at the criminal trial or one of the other hearings held in connection with the criminal prosecution. The federal criminal justice system cannot function without the participation of witnesses. The complete cooperation and truthful testimony of all witnesses are essential to the proper determination of guilt or innocence in a criminal case.

Our office is concerned that victims and witnesses of crime are treated fairly throughout their contact with the criminal justice system.

The United States Department of Justice and the United States Attorney's Office have taken several steps to make the participation by victims of crime and witnesses more effective and meaningful. One of these steps is the preparation of this handbook. We hope that it will provide the answers to many of your questions and will give you sufficient general information to understand your rights and responsibilities.

Thank you for your cooperation with our office and for your service as a witness. We appreciate the sacrifice of time that being a witness requires.

GENERAL INFORMATION FOR VICTIMS AND WITNESSES

The United States Attorney is the chief prosecutor of crimes against the laws of the United States. There is a United States Attorney's Office for each federal judicial district.

You are either a victim of a crime or are being asked to serve as a witness for the United States in a particular case.

This handbook is designed to help you understand the federal criminal justice system.

1. YOU ARE ENTITLED TO UNDERSTAND WHAT IS HAPPENING IN THE CASE IN WHICH YOU ARE INVOLVED

If you have questions about the case in which you are involved, you should feel free to call the Assistant United States Attorney who is handling the case and ask questions. Also, the Assistant United States Attorney may be contacting you throughout the case regarding various stages of the proceeding.

2. YOU ARE ENTITLED TO A WITNESS FEE FOR EVERY DAY THAT YOU APPEAR IN COURT IN CONNECTION WITH THE CASE

If you are not a federal government employee, you will receive a witness fee for each day that you are required to attend court in connection with the case, including time spent waiting to testify. Out-of-town witnesses receive reimbursement for certain travel expenses in addition to their daily witness fee.

At the conclusion of your testimony, you will be assisted in completing a witness voucher to make a claim for your fees. Generally, a check for all fees will be provided to you when the case is over.

If you are a federal government employee, the United States Attorney's Office will submit a "Certificate of Attendance" that will enable you to receive your regular salary, notwithstanding your absence from your job. You will not collect a witness fee in addition to that salary.

3. YOU HAVE THE RIGHT TO BE FREE FROM ANY THREATS

If anyone threatens you, or you feel that you're being harassed because of your contribution to the case being tried, you should immediately notify the United States Attorney's Office, the Federal Bureau of Investigation (FBI), or the law enforcement agency conducting the investigation. It is a federal offense to threaten, intimidate, harass, or mislead a witness in a criminal proceeding. Victims or witnesses have the right to be free of harassment or intimidation by the defendant or others.

The court may release the defendant while (s)he is awaiting trial under conditions that satisfy the court that the defendant will appear in court for all hearings and for trial. The court may require the defendant to post a money or property bond, or it may simply require the defendant to promise to appear. Since most federal criminal defendants are released on bond pending trial, you should not be surprised if you happen to see the defendant on release prior to trial. Nevertheless, if you have any concerns about the conditions of the defendant's release, please discuss them with the Assistant United States Attorney handling the case.

Of course, if you are threatened or harassed while you are attending court proceedings, you should report that fact immediately to the Assistant United States Attorney.

4. DISCUSSING THE CASE WITH OTHERS

United States Attorneys' Offices often receive calls from witnesses asking about their rights if a defense attorney or a defense investigator contacts them. Witnesses do not belong to either side of a criminal case. Thus, even though you may first be subpoenaed by the prosecution or by the defense, it is proper for the other side to try to talk to you. While it is the prosecution that is asking for your cooperation in this case, you may be contacted by the defense lawyer or an investigator for the defendant for an interview. While you may discuss the case with them if you wish to do so, you also have the right not to talk to them. The choice is entirely yours. If you do agree to an interview with a representative of the government or defense, here are some suggestions on how to deal with it:

First and foremost, you should always tell "the truth, the whole truth, and nothing but the truth."

If you give a statement to a lawyer or an investigator for the government or the defense, you do not have to sign the statement. However, any statement that you make during an interview, even if not signed, may be used to try to challenge or discredit your testimony in court if your testimony differs from that statement. This applies even to oral statements that are not reduced to writing at all.

If you decide to sign a statement, make sure you read it over very carefully beforehand and correct any mistakes.

Ask to have a copy of any statement that you make. Whether you sign the statement or not, you may tell the lawyer or investigator that you will refuse to give a statement unless you receive a copy of it.

When you have an interview with the defendant's lawyer or investigator, please let the United States Attorney's Office know about the interview. If you elect to have an interview with the defendant's lawyer or investigator, you may want to have present an additional person chosen by you to witness the interview.

You may discuss the case with anyone you wish. The choice is yours. Be sure you know to whom you are talking when you discuss the case. We encourage you not to discuss the case with members of the press, since you are a potential witness in a criminal case and the rights of the government and the defendant to a fair trial could be jeopardized by pre-trial publicity.

After a witness has testified in court, (s)he may not tell other witnesses what was said during the testimony until after the case is over. Thus, do not ask other witnesses about their testimony and do not volunteer information about your own.

The Assistant United States Attorney may discuss various aspects of the case with you to inform you and to prepare you for testimony if that is necessary. However, the Federal Rules for Criminal Procedure prevent an Assistant United States Attorney from disclosing to anyone, with limited exceptions, what has occurred in the grand jury. The purpose of this secrecy rule is to protect grand jurors and persons involved in the investigation and to make sure that no one tampers with the investigation or flees from the jurisdiction. For those reasons, an Assistant United States Attorney may be prevented from fully answering some of your questions about the results of the investigation or the decision of whether to file criminal charges.

5. SCHEDULING YOUR APPEARANCE IN COURT

There are several kinds of court hearings in a case in which you might be asked to testify. These include a preliminary hearing, a grand jury appearance, a motion hearing, and an appearance in court for trial or sentencing. It is difficult to schedule court hearings at a time convenient for everyone involved. Any court hearing requires the presence of witnesses, law enforcement officers, the defendant's lawyer, an Assistant United States Attorney, and the judge, as well as the defendant.

Therefore, WHEN THE COURT SETS A TIME AND PLACE FOR A HEARING IN THE CASE YOU ARE INVOLVED IN, YOU MUST BE THERE PROMPTLY, unless an emergency prevents it. And if you have been sent a subpoena -- a formal order to appear -- you should know that there are serious penalties for those who do not obey that order.

If you know in advance anything that might keep you from making a court appearance, let the United States Attorney's Office know immediately so that an attempt may be made to adjust the schedule. However, scheduling is at the discretion of the court.

Despite the best efforts of everyone concerned, court hearings do not always take place on schedule -- the hearing or trial is sometimes postponed or continued to a new date. When possible, the Assistant United States Attorney handling the case in which you are involved will discuss with you any proposed scheduling change. Also, the United States Attorney's Office will notify you of any postponements in advance of your appearance at court.

6. PLANNING YOUR TRIP TO COURT

As a victim or witness, you may have questions about transportation, the location of the courthouse, food service, or where to go and what time to appear. The United States Attorney's Office has assembled information on these subjects. You should feel free to ask either the case agent, the Assistant United States Attorney, or the Victim-Witness Coordinator about them.

7. HOW CASES TURN OUT

Many criminal cases are concluded without a trial being held. In many cases, the evidence of the defendant's guilt is so strong that (s)he pleads guilty to the crime. Guilty pleas and other ways the case may end without a trial are discussed below:

a. Guilty Plea

The defendant may choose to plead guilty. By pleading guilty, the defendant waives his or her right to a trial. Generally, the guilty plea constitutes a conviction.

b. Plea Agreement

The Assistant United States Attorney may enter into an agreement with the defendant whereby if the defendant pleads guilty to certain charges, the government will ask the court to dismiss other charges, or will take another position with respect to the sentence imposed or some other action. Sometimes, the defendant will agree to plead guilty to one or more of the charges or to a less serious or related offense. This process of obtaining a defendant's agreement to plead is recognized by the courts as a proper way of disposing of criminal cases. In fact, the United States Supreme Court held that agreed-upon pleas are to be encouraged.

The government usually benefits in several ways by entering into an agreement for a guilty plea to certain charges rather than going to trial against a defendant on all charges. One benefit is the guarantee of a conviction. Criminal cases always involve risks and uncertainties. Even a case that appears to be very strong may not result in a conviction if there is a trial. And in many cases, there is a possibility that certain evidence may not be admitted. The Assistant United States Attorney will consider this in deciding to agree to a plea to certain charges. Another benefit of plea agreements is the prompt and certain imposition of sentence, which is a major goal of the criminal justice system. A third benefit is that they help to obtain pleas and convictions of other defendants. Often, the Assistant United States Attorney will require, as a condition of a plea, cooperation of the defendant in further investigation or prosecutions of others. Also, since there is no trial and no witnesses are called to testify, the identity of informants and witnesses can remain undisclosed. This preserves an informant's usefulness in other investigations, and prevents inconvenience and emotional stress that witnesses might experience when they have to testify.

In deciding to accept certain pleas, the Assistant United States Attorney considers the effect of the criminal offense on the victims, the criminal history of the defendant, the seriousness of the offense, and the interest of society in seeing all crimes punished with certainty. The Assistant United States Attorney will also consider whether the proposed plea will expose the defendant to a maximum punishment that is appropriate even though the defendant may not plead guilty to all charges.

c. Declination and Dismissal

A case referred to the United States Attorney may not be acted upon, which is called a declination, or may be dismissed after it has been filed with the court. There are several reasons why cases may be declined or dismissed.

An Assistant United States Attorney has discretion to decline to prosecute a case based on several considerations. The Assistant United States Attorney must decline if the evidence is too weak. The Assistant United States Attorney is ethically bound not to bring criminal charges unless the admissible evidence will probably be sufficient to obtain a conviction. However, even when the evidence is sufficient, the Assistant United States Attorney may consider that there is not a sufficient federal interest served by prosecution, but that the defendant is subject to prosecution in another state or local court (including a state court for the prosecution of juvenile delinquents).

A dismissal may occur when the Assistant United States Attorney asks the court to do so. The Assistant United States Attorney may do so because the court has excluded critical evidence or witnesses have become unavailable. In other situations, evidence which weakens the case may come to light after the case has started. The court may dismiss a case over the objection of the Assistant United States Attorney when it determines that the evidence is insufficient to find the defendant guilty.

d. Pre-Trial Diversion

In selected cases, an Assistant United States Attorney may decide not to try a defendant right away or to bring charges immediately. Instead, the defendant is placed in a Pre-Trial Diversion Program. Under this program, the United States and the defendant enter into a contract in which the defendant agrees to comply with certain conditions and to be supervised by the United States Probation Office for a period of time, usually one year. One of the conditions may be to make restitution to the victims of a crime. If the defendant successfully complies with all of the conditions, no charges will be brought. If, however, the defendant fails to meet a condition, charges may be filed.

The Pre-Trial Diversion Program is designed for those defendants who do not appear likely to engage in further criminal conduct and who appear to be susceptible to rehabilitation. Overall, the objectives of the program are to prevent future criminal activity by certain defendants who would benefit by diversion from traditional punishment into community supervision and services. The program also helps to make criminal sanctions more appropriate to the individual offenders, and it saves judicial and prosecutive resources for concentration on major crimes.

Several factors may be considered in deciding upon diversion, including the criminal record of the defendant, the willingness of the defendant to make restitution, and the likelihood that the defendant may engage in further criminal conduct. Additionally, before a defendant may enter into a diversion program, the United States Probation Office must agree to supervise the defendant, and the defendant usually must admit that he or she committed the wrongdoing.

8. WHAT IF YOUR PROPERTY IS BEING HELD AS EVIDENCE?

Sometimes law enforcement officers take and store property belonging to witnesses as evidence in a trial. This might be property that was taken by law enforcement officers at the crime scene or that was stolen. If your property is being held as evidence by law enforcement officers and you would like to regain your property before the case is over, you should notify the law enforcement officer or Assistant United States Attorney who is handling the case in which you are involved. Many times arrangements can be made for early release of property. That is a determination to be made considering the value of the property as evidence at trial. In any event, at the conclusion of the case you should be able to have your property returned to you promptly. The prompt return of your property will always be sought. In those instances where this cannot be achieved, the Assistant United States Attorney will explain the reasons for retaining the property.

9. RECOVERING FINANCIAL LOSSES

Often, crime means a real financial loss for the victim. Perhaps you have had cash or valuable property stolen (and not recovered), have experienced damaged property, medical expenses, or a loss of income because you could not work, or the nature of the crime may be that you have been defrauded of money belonging to you. If any of these things have happened to you, please check to see if you have insurance which will cover the loss.

If you have no insurance or only partial coverage, there are three possible ways of trying to recover your losses. Unfortunately these three ways, discussed below, are not always effective in many cases.

a. Compensation

Crime victims' compensation programs, administered by the states, provide financial assistance to victims and survivors of victims of criminal violence. Payments are made for medical expenses, including expenses for mental health counseling and care; loss of wages attributable to a physical injury; and funeral expenses attributable to a death resulting from a compensable crime. Other compensable expenses include eyeglasses or other corrective lenses, dental services and devices, and prosthetic devices. Each state establishes its own instructions for applying for crime victims compensation, procedures to be used in processing applications, approval authority, and dollar limits for awards to victims.

b. Restitution

When an offender gives back the things (s)he stole from a victim, or otherwise makes good the losses (s)he has caused, (s)he has given restitution to the victim.

From the point of view of effective law enforcement, the time to seek restitution is when the defendant is found guilty or pleads guilty. If that is the final result of the case -- which is never a sure thing -- the trial judge must consider, by law, restitution as part of the offender's sentence. The decision, however, is the judge's. The judge might determine that the defendant does not have enough money to repay the debt to the victim, or the judge may decide to sentence the offender to jail or prison, in which case the defendant may not be able to earn money to pay back the victim.

You should discuss restitution with the Assistant United States Attorney. You should cooperate fully with the United States Attorney's Office and the United States Probation Office by giving them information regarding the impact that the crime had on you, as the victim. Without this information, the judge cannot make an informed decision on your need for restitution.

c. Civil Damages

A victim may try to recover his or her losses by a civil lawsuit against the defendant. Such a private lawsuit is completely separate from the criminal case. In fact, the jury in a civil case may find that the defendant owes the victim money, even though a different jury in the criminal case may find the defendant not guilty because the burden of proof is higher in a criminal case.

The difficulty in trying to obtain civil damages from the defendant is the same as in trying to get restitution; whatever money the defendant once had may now be gone. You may need a lawyer to bring such a suit. If you qualify, you may be able to get help free of charge from legal aid services. On the other hand, if your total losses are small, then you may not need a lawyer at all. You may be able to bring your own lawsuit without the assistance of a lawyer.

WHAT HAPPENS IN A FELONY CASE?

Any offense punishable by death or imprisonment exceeding one year is called a felony. Felonies are the most serious crimes. The prosecutors and the courts handle felony cases differently from misdemeanor cases (cases that have shorter possible sentences).

This part of the handbook is intended to explain the way a felony case moves through the court system. Each step is explained in the sections below. WITNESSES ARE NOT NEEDED AT EVERY STEP IN THE PROCESS. Most witnesses are asked to come to court only for a preliminary hearing, a grand jury hearing, a witness conference, or a trial.

Not every step is taken in every case. In fact, many cases end before they reach trial. Even so, you may wish to know all the steps that the case in which you are involved might go through.

1. INITIATING CHARGES BY COMPLAINTS

Some felony cases begin when the United States Attorney (or usually an Assistant United States Attorney), working with a law enforcement officer, files a criminal complaint before a United States Magistrate. This complaint is a statement, under oath, of facts sufficient to support probable cause to believe that an offense against the laws of the United States has been committed by a defendant. If the Magistrate accepts the complaint, a summons or arrest warrant will be issued for the defendant. In some cases, the defendant may have been arrested without a warrant, in which case the defendant is presented to the Magistrate at the time the complaint is filed.

Victims and witnesses of federal offenses may be interviewed by a law enforcement officer prior to the filing of a complaint. In those situations, the law enforcement officer will report the statements of the victim or witness to the Assistant United States Attorney assigned to the case. Sometimes the Assistant United States Attorney may wish to interview the witness in person.

2. THE INITIAL APPEARANCE

This is the defendant's first hearing after arrest. It takes place before a United States Magistrate, usually the same day the defendant is arrested. Witnesses are not needed for testimony at this hearing. The hearing has three purposes. First, the defendant is told his or her rights and the charges are explained. Second, the defendant is assisted in making arrangements for legal representation, by appointment of an attorney by the court, if necessary. Third, the court determines if the defendant can be safely released on bail.

Many defendants charged with a felony are released at the end of this hearing -- either they have posted money to guarantee their return for trial and other hearings, or they have been released on conditions which include their promise to return for future hearings or the trial. Those conditions may include the requirement that they not personally contact witnesses in the case. In some cases, the defendant will be detained without bail.

3. PRELIMINARY HEARING

The purpose of this hearing is to determine whether there is evidence to find probable cause to believe that the defendant has committed the offense charged. The burden is on the United States Attorney to produce sufficient evidence to support this finding. The United States Attorney does not have to prove at this hearing that the defendant is guilty, but must present evidence to show that there is good reason to proceed with the charges against the defendant. T[redacted] date for this hearing will be set at the init[redacted] appearance.

Usually the law enforcement officer alone can give sufficient evidence that there is probable cause that the defendant has committed the offense. Occasionally, witnesses may be subpoenaed to testify; if you receive such a subpoena, you should get in touch with the Assistant United States Attorney who is handling the case as soon as possible.

4. GRAND JURY HEARINGS

A grand jury is a group of twenty-three (23) citizens from the same judicial district who meet to examine the evidence against people who may be charged with a crime. The work is done in complete secrecy. Only an Assistant United States Attorney and a stenographer meet with them -- plus those witnesses that are subpoenaed to give evidence before a grand jury.

Although a grand jury is not a trial, it is a serious matter. Witnesses are put under oath. Their testimony is recorded and may later be used duri[redacted] the trial. It is important to review carefully what [redacted]

remember about the crime before you testify before the grand jury. You must tell the truth. Prior to testifying before the grand jury, you will probably meet with the case agent or the Assistant United States Attorney. This will help you get ready for your grand jury appearance.

After hearing the evidence presented by the Assistant United States Attorney, the grand jury will decide whether the case should be prosecuted. Grand jury charges against a defendant are called "indictments." If the grand jury finds that the case should not be prosecuted, they will return a "no true bill."

Not every witness in a serious crime is called to testify by the grand jury. Sometimes the grand jury will issue indictments on the basis of an officer's testimony alone. If you are called to testify, the Assistant United States Attorney should be able to give you an approximate time when your testimony will be heard.

Unfortunately, it is not always possible to schedule testimony to the minute. Your appearance may involve some waiting to be called before the grand jury itself, so we recommend that you bring some reading material along with you.

All witnesses who testify before the grand jury, except federal employees, are entitled to the same witness fee and expenses which are available for testifying in court at trial.

5. ARRAIGNMENT ON THE INDICTMENT

The defendant in this hearing is read the charges which are contained in an indictment, and his or her bail conditions are reviewed. Witnesses are usually not needed at this hearing. Usually at this hearing the date is set for the case to be heard at trial.

6. HEARINGS ON MOTIONS

Before the trial, the court may hear "motions" made by the defendant or the United States. These may include motions to suppress evidence, to compel discovery, or to resolve other legal questions. In most cases, witnesses are not needed at the motions hearing. If a witness is needed at this hearing, (s)he will receive a notice from the United States Attorney's Office.

7. THE WITNESS CONFERENCE

At some time before the trial date, the Assistant United States Attorney in charge of the case may contact you by letter or phone asking you to appear at a witness conference to prepare you for trial. The purpose of this witness conference is to review the evidence you will be testifying about with the Assistant United States Attorney who will be trying the case. You are entitled to a witness fee for attending this conference.

8. TRIAL

In many felony cases, the only contact witnesses have with the prosecutors comes at the witness conference and at the trial. Normally, when the trial date has been set, you will be notified by a subpoena -- a formal written order from the court to appear.

You should be aware that a subpoena is an order of the court, and you may face serious penalties for failing to appear as directed on that subpoena. Check your subpoena for the exact time at which you should appear. If for any reason you are unable to appear as the subpoena directs, you should immediately notify the Assistant United States Attorney who is working on the case.

Usually felony trials go on as scheduled; however, this is not always the case. Sometimes the defendant may plead guilty at the last minute, and the trial is therefore canceled. At other times, the defendant asks for and is granted a continuance. Sometimes the trial has to be postponed a day or more because earlier cases being heard by the court have taken longer than expected. When possible, the Assistant United States Attorney handling the case or the Victim-Witness Coordinator will discuss with you any proposed

scheduling change. Also, the United States Attorney's Office will do everything it can to notify you of any postponement in advance of your appearance at court.

Although all of the witnesses for trial appear early in the day, most must wait for some period of time to be called to the courtroom to give their testimony. For this reason, it is a good idea to bring some reading material or handwork to occupy your waiting time. If you are waiting in a courtroom, you should remember that it may be against the rules to read in court.

A felony trial follows the same pattern as the trial of any other criminal case before the court. The prosecution and the defense have an opportunity to make an opening statement, then the Assistant United States Attorney will present the case for the United States. Each witness that is called for the United States may be cross-examined by the defendant or the defendant's counsel. When the prosecution has rested its case, the defense then has an opportunity to present its side of the case. The United States may then cross-examine the defendant's witnesses. When both sides have rested, the prosecution and the defense have an opportunity to argue the merits of the case to the court or, in a case which is being heard by a jury, to the jury, in what is called a "closing argument." The court or the jury will then make its findings and deliver a verdict of guilty or not guilty of the offense charged.

After you have testified in court, you should not tell other witnesses what was said during the testimony until after the case is over. Thus, you should not ask other witnesses about their testimony, and you should not volunteer information about your own.

9. SENTENCING

In a criminal case, if the defendant is convicted, the judge will set a date for sentencing. The time between conviction and sentencing is most often used in the preparation of a pre-sentence investigation report. This report is prepared by the United States Probation Office. At the time of sentencing, the judge will consider both favorable and unfavorable facts about the defendant before determining the appropriate sentence to impose.

The function of imposing sentence is exclusively that of the judge. In some cases, (s)he has a wide range of alternatives to consider and may place the defendant on probation (in which the defendant is released in the community under supervision of the court for a period of years), or place the defendant in jail for a specific period of time, or impose a fine, or formulate a sentence involving a combination of these sanctions.

The court will also consider requiring the defendant to make restitution to victims who have suffered physical or financial damage as a result of the crime. If you are a victim, you should cooperate fully with the United States Attorney's Office and the United States Probation Office on preparing a Victim Impact Statement regarding the impact of the crime and the need for restitution. A Victim Impact Statement is a written description of your physical, psychological, emotional, and financial injuries that occurred as a direct result of the crime. A Victim Impact Statement is read by the judge who will be sentencing the defendant.

Victims and witnesses may attend the sentencing proceedings and also may have the opportunity to address the court at this time. The Assistant United States Attorney will tell you if such an opportunity exists for you and will talk to you about such a presentation.

WHAT HAPPENS IN A MISDEMEANOR CASE?

Any criminal offense punishable by imprisonment for a term not exceeding one year is a misdemeanor. Any misdemeanor that carries a penalty of imprisonment for not more than six months, a fine of not more than five hundred dollars ($500), or both, is a petty offense.

Misdemeanors include such offenses as minor assaults, simple possession of controlled substances, some tax law violations, and other offenses. Petty offenses include offenses against traffic laws as well as many regulations enacted by the agencies of the United States.

1. CRIMINAL INFORMATIONS OR COMPLAINTS

A misdemeanor case can be initiated in several ways. The United States Attorney may file a criminal information or a complaint with the court charging a misdemeanor. This is usually done after review of the evidence by an Assistant United States Attorney with a law enforcement officer's assistance. It is the United States Attorney's task to decide whether a case will be brought, and how that case will be charged. That review may involve the Assistant United States Attorney speaking to witnesses and victims, or it may be that the law enforcement officer will report the statements of victims and witnesses to the United States Attorney.

Once the complaint or information is filed, a date is set for the defendant to appear before the United States Magistrate for arraignment. In cases where an arrest has been made prior to the filing of a complaint or information, the arraignment takes place immediately.

2. ARRAIGNMENT

The arraignment before the United States Magistrate is a hearing during which the defendant is advised of his or her rights against self-incrimination and to the assistance of counsel, of his or her right to have the case heard before a United States District Court Judge or before a United States Magistrate, and of the dates for further proceedings in the case.

The Magistrate will review facts presented by the United States Attorney and by the defendant and set conditions of bail release. Those conditions may include a promise to appear on the date set for trial of the case, and/or the promise of a money bond to be forfeited if the defendant fails to appear, or other such conditions of release as seem fair and just to the Magistrate. The purpose of bond is to ensure that the defendant will be present when the case is heard for final disposition. It is not necessary for victims or witnesses to appear at this arraignment, unless they have been specifically instructed to do so by the case agent or the Assistant United States Attorney.

3. PETTY OFFENSES

Petty offenses are most often initiated by the issuance of a traffic violation notice (TVN). A TVN is issued to defendants by the law enforcement officer at the time of the offense. They command the defendant either to pay a collateral fine to dispose of the matter or to appear before the United States Magistrate on the date written on the ticket. Most often the case will be heard for trial before the United States Magistrate on that date, if the collateral is not paid. If you are a victim or a witness in one of these petty offense cases, the United States Attorney's Office may request that you attend a witness conference prior to trial.

4. TRIAL

A trial of a misdemeanor case follows the same pattern as the trial of any other criminal case before the court. The prosecution and the defense have an opportunity to make an opening statement, then the Assistant United States Attorney will present the case for the United States. Each witness called for the United States may be cross-examined by the defendant or the defendant's counsel. When the prosecution has rested its case, the defense then has an opportunity to present its side of the case. The United States may then cross-examine the defendant's witnesses. When both sides have rested, the prosecution and the defense have an opportunity to argue the merits of the case to the court or, in a case which is being heard by a jury, to the jury in what is called a "closing argument." (Some serious misdemeanor cases are heard with a jury, either before the Magistrate or before the United States District Court Judge.)

The court or the jury will then make its findings and deliver a verdict of guilty or not guilty of the offense charged.

5. SENTENCING

In petty offense cases, the court may proceed immediately after the verdict to sentencing. The defendant and the United States each has an opportunity to speak to the issue of sentencing. In misdemeanor cases, the court may request a pre-sentence investigation and report from the United States Probation Office. If such a report is ordered, sentencing will be suspended for a period of time to permit the report to be prepared. If the case before the court involves financial or physical injury to a victim of the crime, the court must consider restitution (repayment of damages to the victim as part of the sentence imposed).

A Victim Impact Statement, prepared by the victim, can be used to establish this element of damage. In cases in which damage has been suffered as a result of a misdemeanor offense, the victim should bring that damage to the attention of the Assistant United States Attorney handling the case, to ensure that the damage is set before the court. The victim should cooperate fully with the Assistant United States Attorney and the United States Probation Officer to determine the extent of the impact of the crime.

The function of imposing sentence is exclusively that of the judge, who has a wide range of alternatives to consider and, depending upon the case, may place the defendant on probation (the defendant is released into the community under the supervision of the court for a period of time), or place the defendant in jail for a specific period of time, or impose a fine. Victims and witnesses may attend the sentencing proceedings and also may have the opportunity to address the court at this time. The Assistant United States Attorney handling the case will tell you if such an opportunity exists for you and will talk to you about such a presentation.

CONCLUSION

We hope that this handbook has answered many of your questions as to how the federal criminal justice system operates and what is expected of you in your role as a potential witness. As explained in this handbook, witnesses have important responsibilities in this process, and their full cooperation is essential if the system is to operate effectively. Your contribution, in time and energy, is very much appreciated by everyone in the United States Attorney's Office.

If you have any other questions or problems related to the case, please contact the Victim-Witness Coordinator or the Assistant United States Attorney assigned to the case.

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NOTES

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U.S. Department of Justice
United States Attorney's Office
District of South Dakota

Preparing to Testify

INTRODUCTION

One of the responsibilities of citizenship for those who have knowledge about the commission of a crime is to serve as witnesses at the criminal trial, or at one of the other hearings held in connection with the criminal prosecution. The federal criminal justice system cannot function without the participation of witnesses. The complete cooperation and truthful testimony of all witnesses are essential to the proper determination of guilt or innocence in a criminal case.

The United States Department of Justice and the United States Attorney's Office have taken several steps to make the participation by witnesses more effective and meaningful. One of these steps is the preparation of this pamphlet. We hope that it will provide the answers to many of your questions and will give you sufficient general information to understand your rights and responsibilities.

Thank you for your cooperation with our office and for your service as a witness. We appreciate the sacrifice of time that being a witness requires.

TESTIFYING IN FEDERAL COURT

1. Before you testify, try to picture the crime scene — the objects there, the distances, and exactly what happened, so that you can recall the facts more accurately when you are asked. If the question is about distances or time, and if your answer is only an estimate, be sure you say it is only an estimate. Beware of suggestions by attorneys as to distances or times when you do not recall the actual time or distance. Do not agree with their estimate unless you independently arrive at the same estimate.

2. **SPEAK IN YOUR OWN WORDS.** Don't try to memorize what you are going to say. Be yourself. Prior to trial, go over in your own mind those matters about which you will be questioned.

3. There is no dress code in a courtroom; however, it is important to dress in a manner that shows respect for the courtroom proceedings.

4. Avoid distracting mannerisms such as chewing gum while testifying. Smoking is not allowed in federal courtrooms.

5. From the moment you enter the courtroom or courthouse, your behavior should be appropriate to the seriousness of the proceedings.

6. When you are called into court for any reason, be serious and avoid saying anything about the case until you are actually on the witness stand. Also, do not read in the courtroom unless asked to do so by the judge or the attorneys.

7. When you are called to testify, you will first be sworn in or affirmed. When you take the oath or affirmation say, "I do" clearly.

8. Most important of all, you are sworn to **TELL THE TRUTH.** Every true fact should be readily admitted. Do not stop to figure out whether your answer will help or hurt either side. Just answer the questions to the best of your memory. If you don't understand the question, say so. Don't make up an answer.

9. Do not exaggerate. Don't make overly broad statements that you may have to correct. Be particularly careful in responding to a question that begins, "Wouldn't you agree that...?" The explanation should be in your own words. Do not allow an attorney to put words in your mouth.

10. When a witness gives testimony, (s)he is first asked some questions by the lawyer who called the witness to the stand; in this case, it is an Assistant United States Attorney. This is called the "direct examination." The witness is then questioned by the defense lawyer in "cross-examination." Sometimes the process is repeated two or three times to help clear up any confusion. The basic purpose of direct examination is for you to tell the judge and jury what you know about the case. The basic purpose of cross-examination is to raise doubts about the accuracy of your testimony. If you feel you are being doubted in cross-examination, remember that to raise doubt is the defense counsel's job. Do not lose your temper. Always be courteous even if the lawyer questioning you appears discourteous.

11. Jurors are the ones who decide the facts of the case. Always speak clearly and loudly so that every juror can easily hear you.

12. DO NOT nod your head for a "yes" or "no" answer. Speak so that the court reporter (or recording device) can hear the answer.

13. If you don't understand the question asked by any of the attorneys, ask the attorney to repeat or rephrase the question so that you understand exactly what is being asked.

14. Give the answer in your own words, and if a question can't be truthfully answered with a simple "yes" or "no," ask to explain your answer.

15. Answer ONLY the question asked you. Do not volunteer information not actually asked for.

16. If your answer was not correctly stated, correct it immediately. If your answer was not clear, clarify it immediately. If you realize you have answered incorrectly, say, "May I correct something I said earlier?"

17. The judge and the jury are interested in the facts that you have observed or personally know about. Therefore, don't give your conclusions and opinions, and don't state what someone else told you, unless you are specifically asked.

18. Unless certain, don't say, "That's all of the conversation" or "Nothing else happened." Instead, you might say, "That's all I recall" or "That's all I remember happening." It may be that after more thought or another question, you will remember something important.

19. Sometimes, witnesses give inconsistent testimony — something they said before doesn't agree with something they said later. If this happens to you, don't get flustered. Just explain honestly why you were mistaken. The jury, like the rest of us, understands that people make honest mistakes.

20. Stop instantly when the judge interrupts you or when an attorney objects to a question. Wait for the judge to tell you to continue.

21. Give positive, definite answers when at all possible. Avoid saying, "I think," "I believe," or "In my opinion." If you do not remember certain details, it is best to say that you don't remember.

22. Sometimes an attorney may ask this question: "Have you talked to anyone about this case?" It is perfectly proper for you to have talked with the prosecutor, police, or family members before you testify, and you should respond truthfully to this question. Say very frankly that you have talked with whomever you have talked with — the Assistant United States Attorney, the victim, relatives, or anyone else. **ALL THAT WE WANT YOU TO DO IS TO TELL THE TRUTH.**

23. After a witness has testified in court, (s)he should not tell other witnesses what was said during the testimony until after the case is over. Thus, do not ask other witnesses about their testimony and do not volunteer information about your own.

If you have questions or problems related to the case, please contact the Victim-Witness Coordinator or the Assistant United States Attorney assigned to the case.

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