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COMMENTS

CHILD SEXUAL ABUSE IN CALIFORNIA: LEGISLATIVE AND JUDICIAL RESPONSES

A tremendous surge in the reporting of child sexual abuse cases is occurring in the United States today.¹ As a result of this increase, many state legislatures are beginning to adapt their criminal justice systems to the unique problems that child victims experience when confronting that system. The California Legislature is on the forefront of such change, spurred on in part by organized group pressure from Californians who have been affected by the problem of child sexual abuse.²

This Comment focuses on recent and proposed changes in California law that have occurred as a result of our "discovering"³ that thousands of children in this state are sexually abused each year. The majority of laws enacted will undoubtedly benefit

1. L.A. Times, Feb. 17, 1985, at 2, col. 1. The *Times* cited a study by the National Committee for the Prevention of Child Abuse which stated that reports of child sexual abuse were up 35% nationwide in 1984. The greatest increase in reported sexual abuse cases was in Mississippi, at 126%. Other states with increases of more than 50% were Nebraska, 121%; Missouri, 100%; Oregon, 83%; and Wisconsin, 82%. *Id.*

2. One such organization is Stronger Legislation Against Child Molesters (S.L.A.M.), a group that has regularly lobbied the state legislature and attended committee hearings that have been conducted throughout the state. See, e.g., *Child Molestation: Hearing Before the California Assembly Committee on Criminal Justice*, 31-52 (Nov. 12, 1980) [hereinafter cited as *Assembly Hearings*] (testimony of five members of S.L.A.M.). As their name suggests, S.L.A.M. takes the approach of locking up all molesters and throwing the key away. While such action might be justified in some cases, S.L.A.M.'s tendency to sensationalize the most gruesome of child molestations adds little reasoned thought to the complex problems that child molestation presents to society. See *id.* at 35-36 (coordinator of S.L.A.M. in Bakersfield, California, recalls incident where a priest was discovered orally copulating a 12-year-old paralyzed girl in a hospital). See also *id.* at 43 (organizer of S.L.A.M. tells of 8-year-old boy who had a cigarette lighter held under his penis by a child molester).

3. While reports of child sexual abuse are up dramatically, experts are divided on whether more children are being abused today than in the past or whether the increase in reporting is due to more children mustering up the nerve to confront their molester. San Francisco Examiner, Oct. 18, 1984, at 20, col. 1. See also *infra* note 91, which discusses the possibility that some reports of sexual abuse are fabricated.

the children who come in contact with the courts. However, a well-developed body of legislative and common law has been forged over the past century in California and should not be improvidently discarded. Many of the evidentiary issues relating to child molestation cases have been addressed by both the legislature and the courts over the years. Perhaps the true test of our criminal justice system is not the change made to adapt the system to current demands, but to what extent the system remains consistent in applying laws that have evolved over many years.

The scope of this Comment is purposefully broad, intended to give the reader an overview of the varied legal problems that surround child sexual abuse cases in California.⁴ The Comment is divided into three sections. The first section defines the problem of child sexual abuse, surveys its far-reaching societal effects, and discusses how the California Legislature has responded to the problem. The second section comments on the pivotal factors that should be properly weighed when a decision is made to prosecute a suspected child molester. The third and main section discusses the evidentiary problems that permeate many aspects of child molestation cases. Numerous credibility and corroboration issues are analyzed, with emphasis on relevant recent and proposed changes in both the penal and evidentiary law.

I. BACKGROUND

A. *Defining Sexual Abuse*

The sexual abuse of children is distinct from what is commonly known as "child abuse"—the physical beating of children.⁵ As defined under California law, an act of child sexual abuse occurs when

[a]ny person . . . willfully and lewdly commit(s)
any lewd or lascivious act . . . upon or with the
body, or any part or member thereof, of a child

4. By focusing on the law in California, it is hoped that not only will the California legal community be enlightened as to some of the complex issues in child sexual abuse cases, but that other states can learn from many of the progressive steps that California has taken in the area.

5. As prevalent as the sexual abuse of our nation's children appears to be, it is estimated that twice as many children are physically abused each year. CRIME PREVENTION CENTER, OFFICE OF THE CALIFORNIA ATTORNEY GENERAL, CHILD ABUSE PREVENTION HANDBOOK 4 (1983) [hereinafter cited as CHILD ABUSE PREVENTION HANDBOOK].

under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child⁶

A "lewd or lascivious" act between an adult and a child most often involves some kind of genital fondling,⁷ but may consist of more severe conduct such as oral copulation or vaginal and/or anal intercourse. When vaginal intercourse, anal intercourse, or oral copulation do occur, the offender may be tried under the separate statutes that prohibit such activity.⁸ Furthermore, if intercourse occurs and the offender is a parent, the parent may be prosecuted for incest.⁹

B. *Prevalence*

Statistics on the number of sexually abused children in this country vary greatly.¹⁰ One study estimates that 19.2% of the

6. CAL. PENAL CODE § 288(a) (West Supp. 1985). In addition to this felony child molestation section, there is a misdemeanor Penal Code section which details the offense of "annoying or molesting children" and is often charged when the sexual conduct between the defendant and victim is less severe, such as a grab at a shirt or pants. CAL. PENAL CODE § 647a (West Supp. 1985).

7. In one study of successfully prosecuted cases done by the Kinsey Institute, the average sexual abuse victim was a girl of age eight, and the sexual activities usually consisted of fondling, heavy petting, exposure, masturbation and some mouth-genital contacts. D. MACNAMARA & E. SAGARIN, *SEX, CRIME, AND THE LAW* 72 (1977). In California cases published at the appellate level, most section 288 charges involved genital fondling that led to more serious sexual contact (e.g. oral copulation or intercourse), conduct for which the defendant is charged separately.

8. CAL. PENAL CODE § 261.5 (West Supp. 1985) (unlawful sexual intercourse with a minor); CAL. PENAL CODE § 286 (West Supp. 1985) (sodomy); CAL. PENAL CODE § 288a (West Supp. 1985) (oral copulation). Rape may be charged if the abusive incident involves forcible intercourse, although the defense of consent could then be raised. CAL. PENAL CODE § 261 (West Supp. 1985). The statutes forbidding lewd or lascivious conduct, sodomy, and oral copulation also contain provisions to charge a defendant who uses force, violence, duress, or menace towards a victim while committing the charged lewd act. See CAL. PENAL CODE § 288(b) (West Supp. 1985); CAL. PENAL CODE § 286(c) (West Supp. 1985); CAL. PENAL CODE § 288a(c) (West Supp. 1985). See also *People v. Hagerman*, 164 Cal. App. 3d 967, 970, 210 Cal. Rptr. 504, 505 (1985) (defendant charged with one count of forcible rape, three counts of forcible oral copulation, one count of a forcible lewd and lascivious act, and one count of sodomy by force with a child under 14). While the victim's consent is not a defense to a section 288(a) charge (*People v. Toliver*, 270 Cal. App. 2d 492, 496, 75 Cal. Rptr. 819, 821 (1969)), knowing consent by a minor who is, in fact, capable of such consent is an affirmative defense to an alleged violation of section 288(b) "by use of force." *People v. Cicero*, 157 Cal. App. 3d 465, 484, 204 Cal. Rptr. 582, 595 (1984).

9. CAL. PENAL CODE § 285 (West Supp. 1985).

10. One national magazine reported that researchers' estimates on the number of sexually abused children in the United States range from 100,000 to 500,000 annually.

women and 8.6% of the men in this country have been sexually abused as children.¹¹ Intrafamilial abuse¹² is the most prevalent form of child sexual abuse; it is estimated that between two and five million American women have been sexually abused through incestuous relationships.¹³ While females are by no means the only victims of such abuse,¹⁴ the overwhelming reported number of sexually abused children are female.¹⁵ Whatever prevalence the statistics indicate, child sexual abuse is believed to be among the least reported crimes in this country,¹⁶ leaving to speculation the actual number of sexually abused children.

The number of reported sexual abuse cases has increased dramatically over the past decade. While the federal government has not compiled national statistics,¹⁷ the California Bureau of Criminal Statistics reports that sexual assaults on minors in Cal-

Watson, Lubenow, Greenberg, King & Junkin, *A Hidden Epidemic*, NEWSWEEK, May 14, 1984, at 30 [hereinafter cited as NEWSWEEK].

11. D. FINKELHOR, *SEXUALLY VICTIMIZED CHILDREN* 53 (1979). The author bases his estimates on data taken from 796 college students, 530 females and 266 males. This student sample probably excluded some crucial segments of the relevant population, but likely presented a more representative group than previous studies, which focuses on court cases, therapy clients, and volunteers in studying the problem of child molestation. *Id.* at 40, 42.

12. In discussing sexual abuse, "incest" means sexual activity between persons who are blood related; "intrafamilial" abuse refers to sexual activity between family members not related by blood (stepparents, a mother's boyfriend, etc.). *CHILD ABUSE PREVENTION HANDBOOK*, *supra* note 5, at 10. For the purposes of this Comment, the definition of "intrafamilial" will be broadened to include the child's natural parents.

13. NEWSWEEK, *supra* note 10, at 31, col. 1 (interview with David Finkelhor, Family Violence Research Project).

14. See Swift, *Sexual Victimization of Children: An Urban Mental Health Center Survey*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 18, 20 (L. Schultz ed. 1980). The author cites several studies which provide evidence that the sexual assault rate on male children may approach (or surpass) the rate on females. *Id.*

15. Herman & Hirschman, *Father-Daughter Incest*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 97, 98 (L. Schultz ed. 1980). The authors find an overwhelming predominance of father-daughter incest in all existing surveys, but question whether these data reflect a difference in the number of complaints. *Id.* at 98-99.

16. NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, *CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES* 2 (rev. ed. 1981) (Josephine Bulkley, Director, Child Sexual Abuse Project) [hereinafter cited as *CHILD SEXUAL ABUSE*]. Until recently, child sexual abuse was not even specifically covered by many of the state mandatory child abuse reporting statutes, although most states have corrected this oversight. Law enforcement agencies have also been lax in reporting sexual abuse to other agencies who keep such statistics. *Id.* at 2-3.

17. The F.B.I. has not kept national statistics on incidents of child sexual abuse. These figures are subsumed into the larger category of "sex crimes." However, independent groups have attempted recently to estimate reports of child sexual abuse across the nation. See *supra* note 1.

ifornia increased nearly fivefold between 1977 and 1983.¹⁸ The number of child sexual abuse cases in 1984 in California could quadruple the number of incidents investigated in 1981.¹⁹ Experts in the area of child sexual abuse offer various explanations for this increase in reporting,²⁰ but it is unclear whether this "silent" crime is more prevalent today than in the past. Society, however, appears more willing to confront this taboo now than it has in the past, as it is discovering that not only are many children physically abused nationwide,²¹ but that a substantial portion of these incidents involve sexual conduct as well.²²

C. *Effects*

The child victim potentially suffers many consequences as a result of sexual abuse: extreme feelings of guilt, self-hate, intense fear, anxiety, confusion, increased susceptibility to sexual exploitation, delinquent or criminal behavior, and possibly a fear of all sexual conduct.²³ Since the abuser is often a father,²⁴ step-

18. San Francisco Examiner, Oct. 18, 1984, at 1, col. 5.

19. *Id.* at 1, col. 5; *Id.* at 20, col. 1.

20. Dr. Roland Summit, a Southern California specialist in the sexual exploitation of children, believes that the sexual abuse of children was considered in the past to be a relatively rare phenomena because society has long had a denial syndrome when it comes to such disclosures: "Some of the disclosures we were hearing from children were so fantastic no one wanted to believe it." *Id.* at 20, col. 2. In the same article, a spokeswoman for the California Department of Social Services said: "I don't think there's any question that all of the recent publicity has increased the reporting [of sexual abuse incidents]." *Id.* at 20, col. 3. Confirming the role that publicity has played in the dramatic increase of disclosures, reported incidents in Santa Clara County, California, increased from 30 cases in 1972 to over 1,000 cases in 1984. See INSTITUTE FOR THE COMMUNITY AS EXTENDED FAMILY, CHILD SEXUAL ABUSE TREATMENT/TRAINING PROGRAM FACT SHEET (1984). Much of this increase is undoubtedly from the intensive public education effort in Santa Clara County, which encourages both victims and their parents to report abusive situations. See Cobey & Minzer, *Santa Clara County Sexual Abuse Treatment Program*, in INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES 24-32 (J. Bulkley ed. 1981) (a report of the Legal Resource Center for Child Advocacy and Protection).

21. CHILD ABUSE PREVENTION HANDBOOK, *supra* note 5, at 13. On the basis of existing information, over one million children in the United States are abused or neglected and the number has been steadily increasing over the past few years. *Id.*

22. *Id.* (Thirty percent of the child abuse cases reported to the California Department of Justice in 1982 involved sexual abuse.)

23. CHILD SEXUAL ABUSE, *supra* note 16, at 3-4. Besides the above effects, these authors note the following: incredible anguish, shame, and humiliation; regressive behavior or a variety of personality and physical disorders; mistrust of adults; and long term dormant aftereffects which make the victim a "psychological time bomb" (often leading to depression, promiscuity or prostitution). *Id.* Seemingly confirming this last observation was a report finding that an estimated 67% of the prostitutes in San Francisco were sexually abused as children. James & Meyerding, *Early Sexual Experience and Prosti-*

father,²⁵ or other trusted figure,²⁶ the child has relatively few people to whom to report the abuse.²⁷ Even if the child musters up the courage to tell someone about this "secret,"²⁸ there is a chance that whomever he or she tells will either overreact hysterically²⁹ or not believe the child's word over an adult's denials of sexual impropriety.³⁰

If a molestation is reported to the police, the sexually vic-

tution 134 AM. J. PSYCHIATRY 1381, 1383 (1977).

24. See, e.g., *People v. Younghanz*, 156 Cal. App. 3d 811, 814, 202 Cal. Rptr. 907, 909 (1984) (defendant had intercourse periodically with daughter for approximately eight years).

25. See, e.g., *People v. Battaglia*, 156 Cal. App. 3d 1058, 1060, 203 Cal. Rptr. 370, 371 (1984) (defendant sexually molested his stepdaughter on two occasions).

26. See, e.g., *People v. Gordon*, 165 Cal. App. 3d 839, 846-47, 212 Cal. Rptr. 174, 178-79 (1985) (defendant sodomized and committed lewd acts upon bodies of two children whom he was babysitting); *People v. Hetherington*, 154 Cal. App. 3d 1132, 1136, 201 Cal. Rptr. 756, 757 (1984) (defendant molested children for three years while operating a licensed day care center).

27. FINKELHOR, *supra* note 11, at 106:

[S]ome people harbor their experience all their lives, unable to reveal it, and it leaves a permanent scar. Never able to be reassured about the experience, never able to find out what others think, they feel an ineradicable sense of differentness and stigma. Only by sharing the experience can the scar be healed.

Id.

28. See S. BUTLER, *CONSPIRACY OF SILENCE* 32-33 (1978). In many cases of father-daughter incest, the father enjoins the child to secrecy in order to ensure her availability to him. This is most often accomplished with threats of dire consequences should she disclose her behavior to her mother or anyone else. *Id.*

29. Schultz, *The Child as a Sex Victim: Socio-Legal Perspectives*, in *RAPE VICTIMOLOGY* 257, 264 (L. Schultz ed. 1975). "Parents may overreact, become hysterical or physically attack the offender in front of the child . . . Parents will need help in accepting the offense in such a way that horror, panic and fright are not communicated to the child so as to create a trauma where perhaps none existed before." *Id.*

30. See Stevens & Berliner, *Special Techniques for Child Witnesses*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 246, 252 (1980). "Adults are extremely reluctant to believe a child or an adult . . . Popular mythology dictates that children often fabricate tales of sexual assault despite a lack of any research to substantiate this belief." *Id.* See also *People v. Gordon*, 165 Cal. App. 3d 839, 848, 212 Cal. Rptr. 174, 179-80 (1985) (victim's mother informed of abuse but did not call police because it was "really hard to believe" and she thought "it would be better for her just to forget about it"). Even if a child is believed, other factors may lead to the sexual abuse continuing. See J. Herman, *FATHER-DAUGHTER INCEST* 89 (1981), stating that some intrafamilial cases, mothers may make no effort to stop a father's abuse in order to protect their own failing marriages. Cf. *Gordon*, 165 Cal. App. 3d at 847, 212 Cal. Rptr. at 179, where one of the victims' mother had married the defendant's son. Upon learning of the sexual abuse from her daughter, the mother delayed in reporting the abuse to anyone for 15 months because her husband told her that if she put his father in jail she had better file for divorce as well. *Id.*

timized child can suffer extreme trauma as a result of his or her experiences in the criminal justice system.³¹ One law enforcement official estimates that a child sexual abuse victim may be required to repeat her story as many as fourteen to sixteen times before going to court.³² Furthermore, the methods by which law enforcement personnel and prosecutors interview child victims are often insensitive and not adapted to the child's level of understanding.³³

D. *Legislative Response*

Numerous recently enacted statutes indicate that the California Legislature recognizes the serious problem of child sexual abuse. In an effort to discover which children are abused, stricter child abuse reporting laws expand the number of persons who must report suspected sexual abuse to a child protection agency.³⁴ Underscoring the importance of these laws, the

31. CHILD SEXUAL ABUSE, *supra* note 16, at 4. The anticipation of testifying in court, not to mention the actual experience of doing so, can be agonizing to the child. Furthermore, the child may be coerced by other family members not to "fink on dad" or to recant earlier statements. *Id.* Some children will not wish to testify against their father because if the testimony is believed, the father could go to prison and the family would lose its breadwinner.

32. CHILD SEXUAL ABUSE, *supra* note 16, at 10 (citing a presentation by Sgt. Carol Painter, Los Angeles County Sheriff's Dept., at Judicial System Personnel Workshop, sponsored by Guardian Ad Litem/Dependency Court Improvement Project, in Los Angeles, California (June 27, 1980)).

33. See Pirro, *The Prosecution and Defense of Child Sexual Assault*, in THE PROSECUTION AND DEFENSE OF SEX CRIMES 9-1, 9-40 (B. Morosco ed. 1984), stating that special time and care should be taken to understand the psychological and neurological development of the child. In interviewing a child, law enforcement officials should be used at a minimum. No more than two persons should handle the case from beginning to end and the interviews should take place in an atmosphere in which the child is comfortable. *Id.* at 9-41. If pre-verbal children are involved, the use of anatomically correct dolls may facilitate the child's explanation of exactly what occurred. These dolls can be crucial to both the prosecution and defense because they readily distinguish between the various sex acts (intercourse, oral copulation, sodomy) that may have occurred. *Id.*

34. Act of Sept. 25, 1980, ch. 1071, § 4, 1980 Cal. Stat. 3420 (codified at CAL. PENAL CODE §§ 11165-11172) (West Supp. 1985). In California, the following persons must report suspected cases of child abuse: any teacher, administrative officer, supervisor of child welfare and attendance, or certified pupil personnel employees of any public or private school; public or private day camp administrators; community care facility administrators; headstart teachers; licensing workers or evaluators; social workers, public assistance workers, and probation officers; residential care facilities personnel; physicians, surgeons, psychologists, dentists, nurses, chiropractors, and dental hygienists; county health employees, coroners, and paramedics; marriage, family, or child counselors; and all police, sheriffs, county probation personnel, and county welfare personnel. CAL. PENAL CODE §§ 11165-11166 (West Supp. 1985). It is interesting to note that in 1984 a bill was proposed which would have made all persons in the state subject to mandatory

California Supreme Court has held that these reporting obligations take precedence over any physician-patient or psychotherapist-patient privilege.³⁵ The reporting statutes have also survived constitutional challenges.³⁶ Persons who are required to make disclosures of suspected abuse are statutorily immune from both civil and criminal prosecution unless it is proven that a false report was made and the person knew it was false.³⁷ If the disclosing person is sued and subsequently prevails, he or she can collect reasonable attorney's fees from the state.³⁸

The belief that child sexual abuse victims are further traumatized by the criminal justice system is evidenced by recent legislation authorizing the preparation of standard investigative procedures to be used by local police agencies when investigating a suspected case of child sexual abuse.³⁹ Funding for local assistance centers for victims and witnesses of child sexual abuse has been codified,⁴⁰ as have strict procedures to guide district attor-

reporting. Cal. A.B. 2704 (1983-84). Bills such as this may portend an even greater expansion of child abuse reporting laws in this country.

35. *People v. Stritzinger*, 34 Cal. 3d 505, 512, 668 P.2d 738, 743, 194 Cal. Rptr. 431, 436 (1983) (legislature intended to provide specific exception to general privilege between physician or psychotherapist and patient). However, such exception will apply "only when the patient's case falls squarely within its ambit." *Id.* at 513, 668 P.2d at 743, 194 Cal. Rptr. at 436.

36. *See People v. Battaglia*, 156 Cal. App. 3d 1058, 1062-65, 203 Cal. Rptr. 370, 372-75 (1984) (dismissing both a "right to privacy" challenge and a fifth amendment *Miranda* challenge); *People v. Younghanz*, 156 Cal. App. 3d 811, 815-18, 202 Cal. Rptr. 907, 909-11 (1984) (dismissing a "fundamental right to seek a cure for one's illnesses" challenge and a fifth amendment challenge on "self-incrimination" grounds).

37. CAL. PENAL CODE § 11172(a) (West Supp. 1985).

38. *Id.* at subd. (c).

39. Act of Sept. 30, 1981, ch. 1062, § 1, 1981 Cal. Stat. 4090 (codified at CAL. PENAL CODE § 13516) (West Supp. 1985). This Penal Code section provides in pertinent part:

The commission shall prepare guidelines establishing standard procedures which may be followed by police agencies in the investigation of sexual assault cases, and cases involving sexual exploitation or sexual abuse of children, including, police response to, and treatment of, victims of such crimes

The commission shall prepare and implement a course for the training of specialists in the investigation of . . . child sexual abuse cases

Id. at subd. (a) & (c).

40. Act of Sept. 30, 1983, ch. 1312, § 2, 1983 Cal. Stat. _____ (codified at CAL. PENAL CODE § 13835) (West Supp. 1985). The intent of the legislation is stated in the statute as follows:

That there is a need to develop methods to reduce the trauma and insensitive treatment that victims and witnesses may experience in the wake of a crime, since all too often citizens

neys in deciding whether or not to prosecute a suspected child molester, with the needs of the child victim receiving priority in this decision making process.⁴¹ Other legislation has established a State Children's Trust Fund to help address the needs of child victims and witnesses.⁴²

Perhaps most important of all legislation in this area is the establishment of the Child Sexual Abuse Prevention Training Centers, which recognize the "need to develop programs to provide the kinds of innovative strategies and services which will ameliorate, reduce, and ultimately eliminate the trauma of child sexual abuse."⁴³ These are lofty goals indeed, but new programs such as this must be funded if a serious attempt is to be made to make children equal participants in the criminal justice system.

One area of prevention that receives surprisingly little attention is the need to educate children about their right to sexual privacy. In 1984, one bill died in the California Legislature

who become involved with the criminal justice system, either as victims or witnesses to crime, are further victimized by that system.

Id. at subd. (a).

41. Act of Sept. 14, 1983, ch. 804, § 2, 1983 Cal. Stat. _____ (codified at CAL. PENAL CODE §§ 1000.12-.18) (West Supp. 1985). Although section 1000.12(a) states the intent that "nothing in this chapter is intended to deprive a prosecuting attorney of the ability to prosecute persons suspected . . . of an act of abuse . . . to the fullest extent of the law," section 1000.12(b) proceeds to declare that "the prosecuting attorney *may* refer that person to the county department in charge of public social services or the probation department for counseling and other such services The prosecuting attorney *shall* seek the advice of the county department in charge of public social services or the probation department in determining whether or not to make the referral." CAL. PENAL CODE § 1000.12 (a) & (b) (West Supp. 1985) (emphasis added). The decision on whether to prosecute the offender turns on the particular facts of the case at hand and will be discussed in section II of this Comment.

42. Act of Sept. 24, 1982, ch. 1399, § 2, 1982 Cal. Stat. 5334 (codified at CAL. WELF. & INST. CODE §§ 18965-18970) (West Supp. 1985). The Children's Trust Fund consists of revenue from county surcharges on birth certificates, grants, gifts, bequests, and money appropriated for the fund from the state legislature or local government agencies. CAL. WELF. & INST. CODE § 18966 (West Supp. 1985). Furthermore, money from tax returns may be earmarked for the fund by individual taxpayers, supplementing the revenue received from the aforementioned sources. Act of Sept. 26, 1983, ch. 1082, § 2, 1983 Cal. Stat. _____ (codified at CAL. REV. & TAX. CODE §§ 18500-18504) (West Supp. 1985). Hopefully, the mere mentioning of the Trust Fund on Tax return forms will help to publicize the plight of the many sexually and physically abused children in California.

43. Act of Sept. 30, 1984, ch. 1664, § 3, 1984 Cal. Stat. _____ (codified at CAL. WELF. & INST. CODE §§ 18275-18279.5) (West Supp. 1985). This statute provides for the selection of two child sexual abuse prevention training centers, one in Northern California and one in Southern California). *Id.*

that would have funded the development and dissemination of instructional materials to schools on child abuse and neglect.⁴⁴ There is a strong need for such programs because until the inherent sexual vulnerability of children is recognized, the sexual exploitation of our nation's youth will continue unabated.

II. THE DECISION TO PROSECUTE

In deciding whether to prosecute a suspected child molester, there is a tendency to favor prosecution whenever sufficient evidence exists for a conviction. However, this overlooks a crucial element of the prosecutorial equation: what is best for the child victim?⁴⁵ To help answer this question, it is necessary to determine first whether the abuser is a pedophile and second whether the abuser is a close relative of the child.

A. Pedophilic Sexual Abuse

A pedophile is a person who engages in sexual activity with prepuberal children as a repeatedly preferred or exclusive method of achieving sexual satisfaction.⁴⁶ The pedophile seeks out children for sexual purposes in much the same manner as one adult would seek out another.⁴⁷ The number of pedophiles in the United States is unknown, but if the thriving child pornography business is any indication, the number is substantial.⁴⁸ Whatever the actual number of pedophiles is, the number un-

44. Cal. A.B. 2699 (1983-84).

45. See CHILD SEXUAL ABUSE, *supra* note 16, at 7. Some criminal proceedings lead to the father's incarceration, splitting up the family and potentially leading to the child's intense guilt and blame for what has occurred to the family. Furthermore, if acquittal occurs, the child may well ask himself whether anything can be done. *Id.* at 8.

46. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271-72 (3d ed. 1980).

47. *Child Molestation: Hearings before the California Joint Committee for Revision of the Penal Code* (April 10, 1981) [hereinafter cited as *Revision Hearings*] (testimony of a pedophile):

Your pedophilic world, if you would, is a literal microcosm of the world we all know. You can take any of the adult heterosexual types . . . and you will find exactly the same operating in the pedophilic world. You will find the type of man who is an opportunist, who wants a one time sexual encounter with somebody. You will find ones who literally, emotionally settle down and get married to a child.

Id. at 77.

48. Increased arrests of pedophiles in California has led to the confiscation of thousands of magazines, films, and photographs depicting children in various stages of sexual activity. CHILD ABUSE PREVENTION HANDBOOK, *supra* note 5, at 12.

derestimates the extent of their danger to children because each pedophile tends to have numerous victims.⁴⁹

When a pedophile sexually abuses a child, little can be done outside of the criminal justice system.⁵⁰ There is no known "cure" for pedophilia,⁵¹ just as there is no known "cure" for hetero- or homosexuality. Hence, prosecuting pedophiles is necessary because they will molest a child the next time they desire sex with another person. A recent bill proposed in the California Legislature would establish the Repeat Child Abuser Prosecution Program, with state funding for counties participating in the program.⁵² Through this program, the prosecution of child abusers will be enhanced by vertical prosecutorial representation,⁵³ the assignment of highly qualified investigators and prosecutors,⁵⁴ and a significant reduction of caseloads for prosecutors assigned to repeat child abuse cases.⁵⁵

To help keep pedophiles in prison and off the streets, Cali-

49. One pedophile estimated that he has victimized around 14 children. *Revision Hearings, supra* note 47, at 74. This person testified that he knew a scoutmaster who had molested some 300 victims. *Id.*

50. *Assembly Hearings, supra* note 2, at 107 (testimony of Dr. Captane Thompson of the California Psychiatric Association). Doctor Thompson, in speaking of repeat offender pedophiles, testified:

I don't know of a specific treatment for a sexual psychopath If he's depressed, we can treat that. But if his propensity to offend children or others is based on some personality quirk or disturbance, we don't have a specific treatment. And I think it would be more appropriate to treat him as you would any other offender.

Id. at 107-08.

51. *Assembly Hearings, supra* note 2, at 82 (testimony of Roland Summit, Los Angeles County Dept. of Mental Health).

52. Cal. A.B. 33 (1985-86). Existing law in California provides for a program of enhanced prosecution efforts for sexual offenders in general. See CAL. PENAL CODE §§ 999i-999p (West Supp. 1985). Assembly Bill 33 is legislation aimed particularly at child abusers (both physical and sexual).

53. Vertical prosecutorial representation occurs when one prosecutor makes the initial filing or appearance in a case and subsequently makes all court appearances on that particular case through its conclusion, including the sentencing phase. Cal. A.B. 33, at 3 (1985-86).

54. A highly qualified investigator or prosecutor is defined in the bill as (1) individuals with one year of experience in the investigation and prosecution of sexual felonies, or (2) individuals who have received the special training set forth in Penal Code § 13836 (training of sexual assault investigators), or (3) individuals who have attended a program providing equivalent training as approved by the Office of Criminal Justice Planning. Cal. A.B. 33, at 3 (1985-86).

55. Cal. A.B. 33, at 3 (1985-86).

ifornia has stiffened sentences for child molestation convictions.⁵⁶ Several consecutive sentence enhancement provisions are also contained in the Penal Code directed to repeat offenders.⁵⁷ The paradox of the pedophile, however, is that unless society is ready to incarcerate all child sexual abusers for life, the pedophile will return to society and seduce more children after his prison term has expired.⁵⁸ With this in mind, California law requires that all convicted sex offenders (specifically including child molesters) register with the police upon entering a local jurisdiction with the intent to reside.⁵⁹ Moreover, all relevant California Department of Justice records concerning convicted sex offenders will be forwarded to requesting employers when such person "applies for employment or volunteers for a position in which he or she would have supervisory or disciplinary power over a minor."⁶⁰

56. With the enactment of determinate sentencing in California in 1976, the sentence for a section 288 violation was set at three, four, or five years. Act of Sept. 20, 1976, ch. 1139, § 177, 1976 Cal. Stat. 5110. This punishment was increased to three, five, or seven years in 1978. Act of Sept. 5, 1978, ch. 579, § 17, 1978 Cal. Stat. 1984. Finally the legislature increased the punishment to three, six, or eight years in 1981. Act of Sept. 30, 1981, ch. 1064, § 1, 1981 Cal. Stat. 4093.

57. Act of Sept. 30, 1981, ch. 1064, § 2, 1981 Cal. Stat. 4093 (codified at CAL. PENAL CODE § 667.51) (West Supp. 1985), provides for a five year enhancement for each prior conviction of specified sex offenses, including lewd and lascivious conduct on the body of a minor. *Id.* at subd. (a). The statute further provides that a conviction for child molestation of a person who has served two or more prison terms for previous sex offenses is punishable by imprisonment in the state prison for 15 years to life. *Id.* at subd. (c). A three year enhancement is also available if the perpetrator used a weapon against his victim (CAL. PENAL CODE § 12022.3 (West Supp. 1985)) or inflicted great bodily harm upon the victim (CAL. PENAL CODE § 12022.7 (West Supp. 1985)). See also *People v. Lopez*, 90 Cal. App. 3d 711, 721, 153 Cal. Rptr. 541, 546 (1979) (holding that multiple sex crimes against the same victim during the same incident may be separately punished). Although *Lopez* does not apply only to pedophiles, the punishment in appropriate cases can obviously be significantly increased if multiple sex crimes are committed. See, e.g., *People v. Bestelmeyer*, 166 Cal. App. 3d 520, 532, 212 Cal. Rptr. 605, 611-12 (1985) (consecutive prison terms totaling 129 years as punishment for the commission of 25 separate serious sex offenses is not cruel and unusual punishment).

58. The pedophile will seduce more children because this is his sexual preference, for which there is no "cure." See *supra* notes 50-51 and accompanying text. The realization that the pedophile might return to the streets spurred the legislature into establishing an experimental treatment program for persons convicted of sex offenses against children. Act of Sept. 29, 1982, ch. 1529, § 1, 1982 Cal. Stat. 5951 (codified at CAL. PENAL CODE § 1364) (West Supp. 1985). The Department of Mental Health is scheduled to submit an evaluation of this treatment program to the legislature in July, 1985.

59. CAL. PENAL CODE § 290(a) (West Supp. 1985).

60. Act of Sept. 23, 1981, ch. 681, § 2, 1981 Cal. Stat. 2481 (codified at CAL. PENAL CODE § 11105.3) (West Supp. 1985). Since it is known that pedophiles tend to seek out employment or volunteer positions where they will be in contact with children, this statute provides such organizations as the Boy Scouts and the Big Brothers the opportunity to screen convicted child sexual abusers out of their hiring process. See also CAL. PENAL

B. *Intrafamilial Sexual Abuse*

While mythology warns children about "the stranger with candy down the block," one expert estimates that upwards to eighty per cent of child sexual abuse victims know their adult abuser.⁶¹ Most of these cases involve "intrafamilial" abuse,⁶² commonly sexual conduct between father and daughter.⁶³ In contrast to a pedophile, a person without a prior history of sexual problems can be tempted to sexually abuse a child in the intimacy of family life, especially at times of stress or poor adult relationships.⁶⁴ However, there are social programs in California that deal particularly with intrafamilial sexual abuse cases.⁶⁵ In contrast to a pedophile, an intrafamilial abuser (if he is not a pedophile by nature) can receive effective psychiatric treatment and cease to sexually abuse children.⁶⁶

CODE § 291 (West Supp. 1985), providing for the notification of a school district if one of its teachers is arrested for certain sex offenses.

61. *Child Molestation: Hearing before the California Joint Committee for Revision of the Penal Code* (Dec. 16, 1980) (testimony of Dr. Carolyn Swift, Director of Prevention Services at Southwest Community Mental Health Center, Columbus, Ohio).

62. *See supra* note 12.

63. *See supra* note 15.

64. *See* Groth, *Patterns of Sexual Assault against Children and Adolescents*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 3, 8 (A. Burgess, A. Groth, L. Holstrom, and S. Sgroi eds. 1978). Groth writes of the intrafamilial abuser as a "regressed pedophile." *Id.* at 8-9. "A regressed child offender is a person who originally preferred peers or adult partners for sexual gratification . . . Typically this offender is married and a situation develops that threatens this relationship. Feeling overwhelmed by the resulting stress, this man becomes involved sexually with a child." *Id.* at 9 (emphasis omitted).

65. *See* Cobey & Minzer, *supra* note 20, at 24-32, for a detailed description of one such comprehensive innovative program in California—the Santa Clara County Child Sexual Abuse Treatment Program (CSATP). The ideal treatment program under CSATP is applied in this order:

- a) individual counseling, particularly for the child and mother, and later, the father;
- b) mother-child counseling;
- c) marital counseling, which becomes key treatment if the family wishes to be reunited;
- d) father-child counseling;
- e) family counseling; and
- f) group counseling.

Id. at 30. "Participation in the program is not an alternative to the criminal or juvenile justice processes . . . Counseling and self-help are not enough. Simply stated, the internal changes that the parent must make are too painful and too frightening to be undergone voluntarily." *Id.* at 28.

66. *See generally* INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES 123-34 (J. Bulkley ed. 1981) for detailed descriptions of treatment programs that have been formed throughout the country. One such program, the Santa Clara County Child

Assuming that a treatment program is established in a particular county, the prosecution of an intrafamilial sexual abuse case may be undesirable. This is true not only because the abuser can receive effective therapy, but also because prosecution may prove counterproductive to the welfare of the child, who would have to testify against her father and witness the breaking up of her family.⁶⁷ California statutory law recognizes the potential difference between the pedophile and the intrafamilial abuser. This is readily seen in the statute that forbids probation for virtually all sex offenses committed against a minor, but permits probation if the following three requirements are met: (1) the defendant is the victim's parent, (2) imprisonment of the defendant is not in the best interests of the child, and (3) rehabilitation of the defendant is feasible in a recognized treatment program.⁶⁸

III. EVIDENTIARY PROBLEMS IN CHILD SEXUAL ABUSE CASES

Once a prosecutor decides to proceed with the charges against an alleged child molester, he or she faces a myriad problems before obtaining a conviction. This section provides an overview of the difficulties facing both the prosecution and the defense, focusing on the evidentiary problems inherent in sexual abuse cases.

Assuming that the child has reported the abuse within the applicable statute of limitations,⁶⁹ the primary problem in prose-

Sexual Abuse Program (CSATP) reports an astoundingly low one percent recidivism rate among those offenders who finish the program. Cobey & Minzer, *supra* note 20, at 32.

67. See *supra* note 31.

68. Act of Sept. 30, 1981, ch. 1064, § 4, 1981 Cal. Stat. 4095 (codified at CAL. PENAL CODE § 1203.066) (West Supp. 1985).

69. See CAL. PENAL CODE § 800 (West Supp. 1985), establishing a six year statute of limitations for crimes that are potentially punishable by eight years or more in the state prison. This brings the following sex crimes within its ambit: lewd or lascivious conduct (CAL. PENAL CODE §§ 288(a)(b) (West Supp. 1985)); rape (CAL. PENAL CODE § 261 (West Supp. 1985)); penetration by any foreign object (CAL. PENAL CODE § 289 (West Supp. 1985)); oral copulation with a child 14 or under and more than 10 years younger than perpetrator (CAL. PENAL CODE § 288a(c) (West Supp. 1985)); and sodomy with a child 14 or under and more than 10 years younger than perpetrator (CAL. PENAL CODE § 286(c) (West Supp. 1985)). Prosecution for less serious felonies (such as incest or unlawful sexual intercourse) must be commenced within three years of the commission of the crime. CAL. PENAL CODE § 801 (West Supp. 1985). Misdemeanor sex offense prosecutions must be commenced within a year after the crime allegedly occurred. CAL. PENAL CODE § 802

cuting a sexual abuse case is establishing the competency of the complaining witness, who is usually the only witness to the molestation.⁷⁰ Although California competency law is relatively liberal,⁷¹ some jurors may not believe the child complainant's word when compared to the defendant's denials.⁷² Hence, the issue of victim credibility is extremely important in child sexual abuse cases. Furthermore, corroboration of a victim's testimony is often necessary to convince a jury beyond a reasonable doubt that the alleged incident actually took place.⁷³ This corrobora-

(West Supp. 1985). Because delays are likely to occur before a molestation is reported (see *supra* notes 27-30 and accompanying text), some prosecutions will inevitably be prevented. See, e.g., *People v. Gordon*, 165 Cal. App. 3d 839, 852, 212 Cal. Rptr. 174, 182-83 (1985) (prosecution for sodomy barred by statute after both victim and mother delayed in reporting abuse). Currently under consideration in the legislature are several bills which would toll the statute of limitations in child sexual abuse cases to the date when the victim "comes of age." See Cal. A.B. 2477 (1985-86) (tolling the statute of limitations on crimes committed on persons who are less than eighteen years old to that date when they turn eighteen); Cal. A.B. 1981 (1985-86) (tolling the statute until victim turns twenty one); Cal. S.B. 1304 (1985-86) (permitting prosecution to be commenced anytime up until the victim's twenty-fourth birthday if the victim was twelve or younger when the crime was committed).

70. As is true with any sex crime, an act of child molestation is likely to be committed in private surroundings. If anyone does witness a molestation, it is often another child who herself is probably a victim of child sexual abuse. See, e.g., *People v. Butler*, 249 Cal. App. 2d 799, 803, 57 Cal. Rptr. 798, 801 (1967) (five-year-old witnessed adult "playing nasties" with other children); *People v. Crume*, 61 Cal. App. 3d 803, 812, 132 Cal. Rptr. 577, 582 (1976) (testimony of two sexual abuse victims uncorroborated except for one instance when one victim observed the defendant and other victim in an act of oral copulation).

71. Under California law, "every person is qualified" to be a witness. CAL. EVID. CODE § 700 (West 1966). Thus, no child is refused the opportunity to testify merely because of age. Most states designate an age (usually 10 or 14) and presume that any person above that age is competent to testify. Persons below this age must meet certain requirements before they may be declared competent. See Melton, Bulkley & Wulkan, *Competency of Children as Witnesses*, in *CHILD SEXUAL ABUSE AND THE LAW* 125, 126 (J. Bulkley ed. 1982). The authors proceed to detail the variations on the age requirement for competency in the several states. *Id.* at 126-27.

72. Some data indicate that the commonly held belief that a fact finder would be biased toward a complainant in a child molestation case may not be true. See Lloyd, *The Corroboration of Sexual Victimization of Children*, in *CHILD SEXUAL ABUSE AND THE LAW* 103, 104 (J. Bulkley ed. 1982). The author cites data which indicate that the conviction rate for sex offenses, including child molestation, is lower than the conviction rate for other offenses. *Id.*

73. *Id.* at 105. In addition to helping meet this strong burden of proof, corroboration of any criminal act, including an act of child sexual abuse, is necessary in California before a defendant's extrajudicial statements can be allowed into evidence. *People v. Ramirez*, 91 Cal. App. 3d 132, 137, 153 Cal. Rptr. 789, 791 (1979). Moreover, corroboration of an act of sexual molestation may prevent an appellate court from overturning a jury's verdict because of insufficient evidence. See, e.g., *People v. Williamson*, 161 Cal. App. 3d 336, 340-41, 207 Cal. Rptr. 503, 505-06 (1984), where a total lack of corroborat-

tion may take the form of medical evidence, expert testimony, out of court statements by the complainant, or evidence of prior sexual misconduct by the defendant.

A. *The Competency and Credibility of Child Witnesses*

1. Competency

The threshold problem in prosecuting a child sexual abuse case is establishing the competency of the complaining witness.⁷⁴ Without the testimony of the complainant, it is difficult to prove beyond a reasonable doubt the corpus delicti⁷⁵ of child molestation because there are seldom witnesses to the abusive act.⁷⁶

While the general rule in California is that "every person is qualified to be a witness"⁷⁷ concerning matters within their realm of personal knowledge,⁷⁸ a witness must demonstrate before testifying that he or she can (1) express herself or himself

ing evidence, coupled with the victim's inconsistent statements, led the appellate court to hold that no rational trier of fact could have convicted defendant.

74. Pirro, *supra* note 33, at 9-9.

75. The corpus delicti of a child sexual abuse case in California consists of: (1) a lewd and lascivious act being committed, (2) with the intent of arousing the sexual desires of the child or adult. See CAL. PENAL CODE § 288 (West Supp. 1985). The identity of the molester must also be proved beyond a reasonable doubt. See *People v. Houser*, 85 Cal. App. 2d 686, 694, 193 P.2d 937, 941 (1948) (question of strength or weakness of complainant's testimony as to identification was for jury to decide). The touching necessary to constitute a lewd act upon a person may be done by the child victim on his or her own person, if such touching was done at the instigation of the accused. *People v. Austin*, 111 Cal. App. 3d 110, 114, 168 Cal. Rptr. 401, 403 (1980). Whatever form it takes, some "touching" is necessary to commit the crime of child molestation; acts that are solicitous in nature constitute preparation only. *Cf. People v. LaFontaine*, 79 Cal. App. 3d 176, 181-83, 144 Cal. Rptr. 729, 732-33 (1978) (acts of solicitation were not even sufficient to prove the crime of attempted lewd and lascivious conduct).

76. See *supra* note 70.

77. CAL. EVID. CODE § 700 (West 1966). The statute provides in whole: "Except as otherwise provided by statute, every person is qualified to be a witness and no person is disqualified to testify to any matter." *Id.*

78. CAL. EVID. CODE § 702 (West 1966). This statute provides:

(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.

Id.

and (2) understand the duty to tell the truth.⁷⁹ Because all witnesses are presumed competent,⁸⁰ the defendant must request a voir dire examination to challenge the competency of a prospective witness.⁸¹

Upon voir dire examination, the child's ability (or lack thereof) to communicate is usually apparent.⁸² Pre-verbal children obviously cannot meet this preliminary requirement, which leads to the irony that society's most helpless victims are also helpless in the courtroom because they cannot accuse their molester.⁸³ Without any convincing corroborating evidence of the sexual assault or identification of the perpetrator, suspected sexual abuse cases involving pre-verbal children will likely go unprosecuted.⁸⁴

79. CAL. EVID. CODE § 701 (West 1966). This statute disqualifies a person to be witness if he is either "incapable of expressing himself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him" or "incapable of understanding the duty of a witness to tell the truth." *Id.* See MCCORMICK ON EVIDENCE § 62 (E. Cleary 3d ed. 1984) [hereinafter cited as MCCORMICK]. Decisions concerning competency are left to the judge's good discretion and will be overturned on appeal only if there was an abuse of discretion. *Id.* See, e.g., *People v. Berry*, 260 Cal. App. 2d 649, 652, 67 Cal. Rptr. 312, 314-15 (1968) (no abuse of discretion occurred when judge found that each witness understood that she was under compulsion to tell the truth); *People v. Bronson*, 263 Cal. App. 2d 831, 838, 70 Cal. Rptr. 162, 166 (1968) (no abuse of discretion occurred when judge declared nine- and twelve-year-old witnesses competent to testify).

80. CAL. EVID. CODE § 700 (West 1966).

81. *People v. Berry*, 260 Cal. App. 2d 649, 652, 67 Cal. Rptr. 312, 314 (1968) (it was not incumbent upon judge to conduct a voir dire of a prospective six-year-old witness). However, if a request for a voir dire is made by either party and is denied by the trial judge, an abuse of discretion may have been committed. See, e.g., *Bradburn v. Peacock*, 135 Cal. App. 2d 161, 163-64, 286 P.2d 972, 973 (1955) (reversible error to preclude a child from testifying without conducting a voir dire examination to determine his competency when counsel offered to prove such).

82. A child who clearly has no verbal skills would not even reach the voir dire stage of the examination because the prosecutor would have realized that the child was "incapable of expressing himself . . . so as to be understood . . ." CAL. EVID. CODE § 701 (West 1966).

83. The use of "anatomically correct dolls" could prove to be of value in cases involving victims who are pre-verbal. This has already occurred at a child dependency hearing, where the court held that a child's conduct during "play therapy" with anatomically correct dolls was nonassertive and therefore, not hearsay. *In re Cheryl H. v. L.A. County Dep't of Pub. Social Services*, 153 Cal. App. 3d 1098, 1126-27, 200 Cal. Rptr. 789, 807-08 (1984) (non-hearsay evidence of a child's play with anatomically correct dolls admissible because relevant (1) to prove allegation in petition that child was molested, and (2) as supplying part of the basis for doctor's opinion to the same effect). *Id.* at 1127-28, 200 Cal. Rptr. at 808.

84. Fortunately, the prevalence of sexual abuse is lowest in the under four age group, where the child is more likely to be pre-verbal (compared to the 5-8, 9-12, and 13-

A child's ability to differentiate truth from falsehood is among the most litigated of witness competency issues in California.⁸⁵ California courts do not require children to have any detailed knowledge of the nature of an oath.⁸⁶ The statutory truthfulness test is satisfied when a child fears that some earthly evil will result from a lie being told in court.⁸⁷ For example, it was sufficient for one child to state on voir dire examination that he would be sent to reform school if he did not tell the truth;⁸⁸ in another case, anticipation of a mother's spanking was sufficient to convince a judge that a child would tell the truth while testifying.⁸⁹

2. Credibility

Even if a child sexual abuse complainant⁹⁰ satisfies the legal competency requirements, the prosecution must still convince the trier of fact that the child is telling the truth while testifying. The issue of credibility decides many close cases where there is no medical or eyewitness evidence to corroborate the victim's claim that he or she was sexually abused.⁹¹

The general rule on credibility in California is that a trier of

15 age groups). CHILD ABUSE PREVENTION HANDBOOK, *supra* note 5, at 13. While the highest incidence of *physical* abuse occurs in the under four group, evidence establishing the corpus delicti of child abuse is usually more readily available (e.g. bruises, welts, broken bones) than in the typical sexual abuse prosecution, where there are more likely to be no physical manifestations of the assault. *See infra* note 132 and accompanying text.

85. *See, e.g.*, *People v. Lamb*, 121 Cal. App. 2d 838, 841, 264 P.2d 126, 128 (1953) (petitioner challenged competency of three children ages nine, six, and five); *People v. Elroy*, 94 Cal. App. 355, 355, 271 P. 346, 346 (1928) (appellant challenged competency of nine-year-old victim); *People v. Reeves*, 128 Cal. App. 2d 410, 412, 275 P.2d 158, 159 (1954) (defendant claimed court abused discretion in permitting six-year-old girl to testify); *People v. Farley*, 90 Cal. App. 3d 851, 868, 153 Cal. Rptr. 695, 704 (1979) (defendant contended that ten-year-old witness incompetent to testify).

86. *People v. Lamb*, 121 Cal. App. 2d 838, 845, 264 P.2d 126, 130 (1953). Furthermore, a religious belief or conviction was not required for a child under ten years of age to qualify as a witness. *Id.*

87. *Id.*

88. *People v. Elroy*, 94 Cal. App. 355, 356, 271 P. 346, 346 (1928) (nine-year-old child found competent to testify).

89. *People v. Reeves*, 128 Cal. App. 2d 410, 412-13, 275 P.2d 158, 159 (1954) (no abuse of discretion in trial court's permitting six-year-old child to testify).

90. The same rules that apply to complainants in sexual abuse cases apply to all children who witness acts of abuse, as well. As noted above, it is not uncommon for the only witnesses to a molestation to be children. *See supra* note 70.

91. Issues concerning the defendant's credibility, often tied into the commission of past offenses, are discussed below. *See infra* notes 244-75 and accompanying text.

fact⁹² may consider "any matter that has any tendency in reason to prove or disprove the truthfulness of [a witness'] testimony at the hearing."⁹³ Among the credibility factors that a trier of fact may consider are the witness' character for honesty, the witness' demeanor, the existence of a bias or motive that may influence a witness' testimony, the extent of the witness' capacity to recollect, and any inconsistent statement made previously by a witness.⁹⁴

All of these factors take on an even greater significance when the witness is a child. California courts have long believed that children have "impressionable and plastic minds"⁹⁵ and a common defense to child molestation charges is that the child is fabricating a tale of sexual abuse.⁹⁶ Even advocates of liberalizing the requirements of child competency concede that young children are vulnerable to adult influence,⁹⁷ raising the possibility that a sexual abuse charge could result from a divorce or child custody proceeding involving combatting parents.⁹⁸ In ad-

92. While the judge decides competency issues, the trier of fact decides all issues of credibility. See McCORMICK, *supra* note 79, at §§ 33-50, detailing the lines of attack on the credibility of a witness. If a witness decides credibility issues for the jury (whether or not a certain person is telling the truth), then an abuse of the judge's discretion may have occurred in permitting the witness to testify to the same. See, e.g., *People v. Alva*, 90 Cal. App. 3d 418, 426, 427, 153 Cal. Rptr. 644, 649 (1979) (evidence supported the conclusion of the court that the effect of expert testimony in question would be to usurp the jury's function of determining credibility).

93. CAL. EVID. CODE § 780 (West 1966).

94. *Id.* In addition to these factors, section 780 also mentions the following as relevant to a witness' credibility: the extent of the witness' opportunity to perceive any matter about which he testifies, the character of his testimony, a statement previously made by him that is consistent with his testimony at the hearing, and the existence or nonexistence of any fact testified to by him. *Id.*

95. *People v. Delaney*, 52 Cal. App. 765, 774, 199 P. 896, 900 (1921) (trial court's denial of appellant's counsel opportunity to voir dire child witness constituted abuse of discretion). *Id.* at 775-76, 199 P. at 901.

96. See, e.g., *People v. Deletto*, 147 Cal. App. 3d 458, 463, 195 Cal. Rptr. 233, 235 (1983) (part of defense was that the minor's foster mothers had participated in fabricating the minor's testimony in order to gain custody of her); *People v. Belasco*, 125 Cal. App. 3d 974, 979, 178 Cal. Rptr. 461, 463 (1981) (defendant implied theory of fabrication by complainant through testimony concerning disagreements with stepdaughter over her boyfriend, a large dog, and her report card).

97. Melton, Bulkley & Wulkan, *supra* note 71, at 138. "[T]here is some confirmation of the cognitive-developmental prediction of high vulnerability to adult influence among young children." *Id.*

98. See, e.g., *People v. Fritts*, 72 Cal. App. 3d 319, 326, 140 Cal. Rptr. 94, 97-99 (1977) (defendant attempted to introduce evidence that mother offered to drop charges if defendant would waive all custody rights and relinquish all community property).

The fact that children are capable of fabricating a story about sexual abuse, whether

dition to this "suggestibility" factor, courts (and jurors) often perceive children as capable of fantasizing about sexual encounters,⁹⁹ although recent research indicates that the opposite is likely to be true.¹⁰⁰

These considerations, coupled with the limited availability of evidence sufficient to convict a defendant,¹⁰¹ have led the California Supreme Court to unanimously hold that the "broadest latitude in cross-examination and production of rebuttal evidence is required" in prosecutions for child molestation.¹⁰² The

under parental influence or not, came to light recently in Jordan, Minnesota. Twenty-four adults were charged in 1983-84 with sexually abusing children in that city. L.A. Times, Dec. 29, 1984, at 1, col. 4. The first two defendants to come to trial were acquitted and the charges against the other defendants were subsequently dropped. *Id.* One of the therapists who worked with the children in Jordan (and believed their accusations) has stated:

I've been getting hoax type cases recently My colleagues are all saying the same. Lots are connected to custody cases where an ex-husband or new boyfriend gets accused. I think people are learning its a very effective weapon. We have four cases right now in our clinic that I think are false.

Id. at 26, col. 1.

Douglas J. Besharov, a former prosecutor in New York and current visiting scholar at the American Enterprise Institute in Washington, said the following:

When I started in this field 15 years ago, there was no one reporting even the most grievous cases. As a prosecutor in New York, I was part of a small group pushing to have fuller reporting. Now the world has changed discernibly and it's fair to say it's gone too far the other way. The tremendous attention paid by the news media is one reason. From spending hours on state hot lines, I can tell you, there's a lot of junk coming in. My wife, who is a social worker, knows an 11-year-old girl who made abuse reports in three foster homes. The girl told my wife, 'I got three now. I can do what I want.'

Id.

99. Lloyd, *supra* note 72, at 105.

100. *Id.* at 105-06. In discussing the likelihood of a child fantasizing about a sexual encounter, Lloyd states:

Since knowledge through observation or hearing is the basis for fantasy, children are unlikely to fantasize about sexual activity using adult terms because sexual matters are not generally discussed between parents and their children in an informative way. The child who can describe an adult's erect penis and ejaculation has had direct experience with them.

Id. at 105 (citation omitted).

101. The complainant's testimony by itself is legally sufficient for conviction in California. *People v. Scott*, 21 Cal. 3d 284, 296, 578 P.2d 123, 129, 145 Cal. Rptr. 876, 882 (1978) (uncorroborated testimony of a single witness was sufficient to sustain a conviction, unless the testimony was physically impossible or inherently improbable).

102. *People v. Clark*, 63 Cal. 2d 503, 504-05, 407 P.2d 294, 295, 47 Cal. Rptr. 382,

court also held that while the general rule in California forbids admission of specific wrongful acts to attack a witness' character,¹⁰³ this rule is inapplicable when a basic fact is in issue, such as a defense based on a motive to fabricate.¹⁰⁴ Buttressing this common law is a provision of the California Evidence Code which permits a defendant to offer into evidence specific instances of a victim's conduct to prove that the victim acted in conformity with such conduct at the time in question.¹⁰⁵ In interpreting this statute, one California appellate court found error in a trial court's refusal to admit testimony that a complainant had twice falsely complained of being a crime victim.¹⁰⁶

383 (1965). *See also* *People v. Blagg*, 267 Cal. App. 2d 598, 608-09, 73 Cal. Rptr. 93, 100 (1968) (impeachment methods in sex cases were much more liberal, and broad cross-examination of the prosecuting witness or prior sexual experience, fabrication, and sexual fantasy should be allowed). While the holding in *Blagg*, as far as fabrication, is probably still good law, the holding with regards to the witness' sex life has been modified (for certain sex crimes) by subsequent statutory law. *See infra* notes 110-11 and accompanying text.

103. CAL. EVID. CODE § 787 (West 1966) (stating that subject to the statute that permits impeachment by evidence of past conviction, "evidence of specific instances of this conduct relevant *only* as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness." *Id.* (emphasis added).

104. *People v. Clark*, 63 Cal. 2d 503, 505, 407 P.2d 294, 295, 47 Cal. Rptr. 382, 383 (1965). The following facts in *Clark* raised the distinct possibility that the complainant was fabricating the accusation against her stepfather in order to be permitted to live with her natural father: (1) an older sister had five years previously filed charges against defendant, who was later acquitted; (2) the complainant revealed accusations only after a long talk with her older sister at her natural father's home; (3) the complainant had a reputation for lying; and (4) no medical evidence, such as bleeding, was discovered despite the fact that complainant testified that defendant had "fully penetrated her" on three occasions. With all of the above evidence in mind, the court considered the evidence which rebutted complainant's claim that she never had any past sexual experiences as relevant. *Id.* at 506-07, 407 P.2d at 295-96, 47 Cal. Rptr. at 383-84.

105. CAL. EVID. CODE § 1103(a)(1) (West Supp. 1985). However, character evidence indicating conforming conduct is not admissible on the issue of "consent," which may arise if the accused molester is charged with rape. *Id.* at subd.(b)(1). If the defendant does offer character evidence to show that the victim acted in conformity on a relevant occasion, the prosecution may rebut this evidence. *Id.* at subd.(a)(2).

106. *People v. Randle*, 130 Cal. App. 3d 286, 295-96, 181 Cal. Rptr. 745, 750 (1982) (trial court erred in not allowing evidence that the victim had falsely complained of being a victim of a purse snatching and of having been kidnapped). *See also* *People v. Wall*, 95 Cal. App. 3d 978, 989, 157 Cal. Rptr. 587, 594 (1979) (in prosecution for rape, trial court erred in excluding testimony of boyfriend that complainant had threatened to make a false accusation of rape against him). The *Wall* court's reliance on Evidence Code section 1103(a) has met with criticism. *See* *People v. Jones*, 155 Cal. App. 3d 153, 183, 202 Cal. Rptr. 162, 179 (1984), where the court cited the Law Revision Commission's comment that Evidence Code section 1101 was not intended to refer to character-trait evidence offered to prove a fact relating to the credibility of a witness. *Id.* Rather, the admissibility of character-trait evidence is determined by Evidence Code section 787, which forbids specific instances of conduct when offered only to attack a witness' charac-

Although a defendant generally has freedom to inquire into the possibility of a motive to fabricate, the trial courts possess broad discretion to limit cross-examination of a complainant.¹⁰⁷ In essence, trial courts must determine whether there are facts indicating that complainant might be fabricating: "fishing expeditions" will not suffice.¹⁰⁸ For example, one court refused to allow testimony regarding a divorce proceeding between complainant's parents because such evidence was "far afield from the issue of appellant's guilt on the criminal charges."¹⁰⁹ The California Legislature has also codified strict procedures to follow whenever evidence of a sexual assault victim's past sex life is offered by the defense on the issue of the complainant's credibility.¹¹⁰ While these procedures apply only to certain sex crimes,¹¹¹ they apply to both adults and children and effectively limit po-

ter. *Id.* The *Jones* court did approve of the admission of evidence concerning the victim's reputation for dishonesty (*Id.* at 184, 202 Cal. Rptr. at 179), but the holding failed to address the fact that the defendant's defense was based on a theory of victim fabrication. The defendant's right to put on a full defense could be hampered if courts use the ban against the admission of specific instances of conduct (to prove credibility) in section 787 as a ban against specific instances offered to prove facts crucial to the defense. Many child sexual abuse cases hinge on the credibility of the complaining witness and the defendant must be offered a full and fair opportunity to attack a victim's credibility if the situation warrants.

107. *People v. Fritts*, 72 Cal. App. 3d 319, 326, 140 Cal. Rptr. 94, 97-98 (1977) (trial judge has broad discretion to keep cross-examination of a complainant in a sex offense case within reasonable bounds).

108. *See, e.g., People v. Pacheco*, 220 Cal. App. 2d 320, 323, 33 Cal. Rptr. 737, 737 (1963) (defendant unsuccessful in attempt to impeach eight-year-old complainant by showing that complainant had previously undressed a little girl). "The incident . . . did not come within the rule permitting interrogation with respect to prior false reports." *Id.*

109. *People v. Fritts*, 72 Cal. App. 3d 319, 326, 140 Cal. Rptr. 94, 98 (1977). The court in *Fritts* also forbade defense counsel to inquire into victim's sexual relations with her boyfriend, stating: "In incest and child molestation the victim's sexual experience has no direct relevance to the issue, and the court correctly protected the victim from exploratory questions in that area." *Id.* at 327, 140 Cal. Rptr. at 98.

110. Act of Sept. 24, 1981, ch. 726, § 1, 1981 Cal. Stat. 2876 (codified at CAL. EVID. CODE § 782(a)), expanded the former statute to include the crimes of sodomy, lewd or lascivious conduct, and penetration with a foreign object. The procedures in section 782 call for (1) a written motion from the defense that it has an offer of proof of the relevancy of the evidence, accompanied by affidavit stating the offer of proof, (2) a hearing outside the presence of the jury, where complainant is to be questioned about the offer of proof, (3) the court's finding that the evidence is relevant pursuant to Evidence Code section 780 (*see supra* notes 93-94 and accompanying text) and is not inadmissible pursuant to Evidence Code section 352 (*see infra* note 260), and (4) the court's issuing an order stating what evidence may be introduced and the nature of the questions to be permitted. *Id.*

111. CAL. EVID. CODE § 782(a) (West Supp. 1985). The crimes specifically mentioned in this section are rape, sodomy, oral copulation, penetration with a foreign object, and aiding or abetting rape or penetration with a foreign object. *Id.*

tentially traumatic testimony for the child.¹¹²

The flipside of attacking a victim's credibility through evidence of his or her sexual experiences is to offer evidence of a defendant's past sexual activities to support the credibility of the complaining witness. Prior to 1978, several California courts suggested that evidence of prior sex offenses was always admissible to corroborate a complainant's testimony.¹¹³ In 1978 in *People v. Thomas*, the California Supreme Court disapproved of these cases and established the rule that evidence of prior sexual acts by a defendant is admissible as corroborating a victim's testimony only when such evidence is independently admissible to prove a fact in controversy such as intent, identity, or common scheme.¹¹⁴

The *Thomas* rule makes much sense in that an absolute "support of the witness" rule of admissibility would emasculate the long established rule against the admissibility of character evidence.¹¹⁵ To prejudice a defendant with such evidence would virtually assure that a jury would convict a defendant regardless of the evidence concerning the act in controversy. Child molestation cases are highly inflammatory by nature and efforts to add to this volatility must be avoided if we are to maintain an equitable system of criminal justice.

The area of expert testimony has long been a controversial focal point on issues relating to a person's credibility in sex offense cases. In a widely quoted passage, Professor Wigmore stated that "[n]o judge should ever let a sex offense charge go to

112. See *supra* note 109.

113. See, e.g., *People v. Creighton*, 57 Cal. App. 3d 314, 325, 129 Cal. Rptr. 249, 255 (1976) (testimony by victim's sister of uncharged sex offenses admissible as supporting victim's credibility only); *People v. Covert*, 249 Cal. App. 2d 81, 88, 57 Cal. Rptr. 220, 225 (1967) (the implicit challenge to the credibility of complainant created relevance for evidence of similar sex acts upon other persons).

114. *People v. Thomas*, 20 Cal. 3d 457, 468-69, 573 P.2d 433, 439, 143 Cal. Rptr. 215, 221 (1978) (testimony by defendant's daughter of abusive episodes ten to eighteen years in the past held inadmissible as evidence of a "common scheme," hence, evidence was not admissible to support credibility of complainants). Accord *People v. Thompson*, 98 Cal. App. 3d 467, 481, 159 Cal. Rptr. 615, 624 (1979) (prosecution presented no "tenable theory" to prove that past conduct independently admissible to prove "common scheme or plan," therefore, witness corroboration theory did not attach).

115. *People v. Thomas*, 20 Cal. 3d 457, 468-69, 573 P.2d 433, 439, 143 Cal. Rptr. 215, 221 (1978).

a jury unless the female complainant's social history and medical makeup have been examined and testified to by a qualified physician."¹¹⁶ Following the archaic thinking of men like Wigmore, the common law rule in California prior to 1981 was that a judge could compel a complainant in a sex related case to submit to psychiatric examination.¹¹⁷ In order to admit the results of such an examination, the evidence had to establish that the complainant was suffering from a particular mental or emotional condition that affected her ability to tell the truth concerning the incident in question.¹¹⁸ Only then would the testimony be of any aid to the jury, which must ultimately decide if the complainant was telling the truth concerning the incident in question.¹¹⁹

Overruling prior common law, the California Legislature in 1981 passed a statute whereby a trial court "[s]hall not order any prosecuting witness, or a victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility."¹²⁰ This stat-

116. 3A WIGMORE, EVIDENCE § 924(a), at 737 (Chadbourn rev. 1970).

117. See, e.g., *Ballard v. Superior Court*, 64 Cal. 2d 159, 176-77, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966) (trial judge authorized to order psychiatric examination if circumstances indicate necessity); *People v. Russell*, 69 Cal. 2d 187, 194, 443 P.2d 794, 800, 70 Cal. Rptr. 210, 215-16 (1968) (court must decide if psychiatric testimony will aid trier of fact in assessing witness credibility). The judge's sound discretion decided (1) whether the complaining witness must submit to psychiatric examination, and (2) whether the examining psychiatrist's testimony was admissible. *Ballard*, 64 Cal. 2d at 176-77, 410 P.2d at 849, 49 Cal. Rptr. at 313. Subsequent cases narrowly interpreted the power a court had to force a complainant to submit to the exam. See, e.g., *People v. Mills*, 87 Cal. App. 3d 302, 308, 151 Cal. Rptr. 71, 74 (1978), which limited the appropriate sanctions for a complainant's refusal to submit to an examination to: (1) a comment to the jury on the refusal to cooperate, or perhaps (2) disallowance of the complainant's testimony. *Id.* The *Mills* court went on to hold that the trial judge abused his discretion when he dismissed the case because of complainant's refusal to submit to the examination. *Id.* at 309, 151 Cal. Rptr. at 75.

118. *People v. Russel*, 69 Cal. 2d 187, 196, 443 P.2d 794, 801, 70 Cal. Rptr. 210, 216-17. See, e.g., *People v. Alva*, 90 Cal. App. 3d 418, 427, 153 Cal. Rptr. 644, 649 (1979) (because examination revealed no particular mental or emotional condition, trial court properly refused to admit testimony from examining psychiatrist).

119. *People v. Russell*, 69 Cal. 2d 187, 196, 443 P.2d 794, 801, 70 Cal. Rptr. 210, 217 (1968). In addition to the "mental condition" requirement and the "preserving the integrity of the jury" requirement, the *Russell* court mentioned two factors that a judge must consider in deciding whether or not to admit the expert testimony of the examining psychiatrist: (1) whether the knowledge which the testimony represents can be effectively communicated to a jury, and (2) whether the examination utilized techniques of general scientific acceptance. *Id.*

120. Act of Feb. 25, 1980, ch. 16, § 1, 1980 Cal. Stat. 63 (codified at CAL. PENAL CODE

ute has been interpreted as banning only the power of the judge to order a psychiatric examination and does not affect the relevancy or admissibility of such evidence.¹²¹

Did the legislature act properly to deny trial courts the power to order a psychiatric examination? California courts have consistently rejected attempts to impeach prosecution witnesses with expert testimony in non-sex cases¹²² and there is no reason to believe that a sex offense complainant is more likely to be a liar than a non-sex offense complainant.¹²³ Furthermore, any witness, young or old, is subject to impeachment through prior inconsistent statements, reputation evidence for truthfulness, and cross-examination. Forbidding the trial judge from ordering a complainant to undergo a psychiatric examination supports the policy that "the victim of a sex crime should not unnecessarily be subjected to further harassment or distress in criminal proceedings against her alleged violator."¹²⁴

3. Conclusion

The competency laws in California are justifiably liberal in permitting children to testify, although it could be argued that

§ 1112 (West Supp. 1985)).

121. See *People v. Hagerman*, 164 Cal. App. 3d 967, 973, 210 Cal. Rptr. 504, 507 (1985). In this recent case, the issue arose whether Penal Code section 1112 survived the subsequently enacted state initiative Proposition 8, which altered the state constitution to read that subject to specific exceptions "relevant evidence shall not be excluded in any criminal proceeding . . ." CAL. CONST. art. I, § 28, subd. (d). The court in *Hagerman* held that a close reading of *Ballard* supported the distinction between the court's power to order a psychiatric examination and the court's power to admit or exclude psychiatric testimony. *Hagerman*, 164 Cal. App. 3d at 973, 210 Cal. Rptr. at 507. "In passing Penal Code section 1112 in 1980 the Legislature overruled the holding in *Ballard* only with regard to the first step [citation] but did not purport to act with regard to the second step concerning the admissibility of psychiatric testimony . . ." *Id.* at 974, 210 Cal. Rptr. at 507.

122. See, e.g., *People v. Guzman*, 47 Cal. App. 3d 380, 385-86, 121 Cal. Rptr. 69, 71-72 (1975) (in prosecution for murder, no abuse of discretion occurred when trial judge refused to admit into evidence defense's expert testimony concerning misidentification issue). See also *People v. Johnson*, 38 Cal. App. 3d 1, 7, 112 Cal. Rptr. 834, 837 (1974) (in prosecution for robbery, assault, and murder, trial court's ruling that psychologist's expert testimony would take over jury's task of determining weight of evidence was well within the court's range of discretion).

123. The California Supreme Court appears to have accepted this statement as fact. See, e.g., *People v. Rincon-Pineda*, 14 Cal. 3d 864, 883, 538 P.2d 247, 260, 123 Cal. Rptr. 119, 132 (1975) (those who made accusations of sexual misconduct were no less credible than any other class of complainants).

124. *People v. Mills*, 87 Cal. App. 3d 302, 307, 151 Cal. Rptr. 71, 74 (1978).

the requirement of understanding the difference between a lie and telling the truth is too restrictive. Even if competent to testify, however, a child still faces credibility problems when he or she testifies about an incident of sexual abuse. The possibility of fabrication undoubtedly exists in molestation cases, just as it does in non-sexual criminal complaints, but a proper offer of proof can lead to admission of evidence on this issue. Recent legislation will help children to overcome some of their inherent credibility problems. For example, criminal cases involving minors as material witnesses are given priority on criminal court calendars so that the memory of the child will be relatively fresh when he or she testifies.¹²⁵ Leading questions on direct examination is now statutorily permitted in some sexual abuse cases in the hope that the judicious use of such questions can help the child fully describe the molestation.¹²⁶ These changes rightfully focus on child sexual abuse victims and reflect an effort to remove some of the inherent handicaps which burden child witnesses. Such laws are also in direct contrast to the pre-*Thomas* line of cases, which reflected an effort to convict child molesters by admitting prejudicial evidence to support the credibility of the complainant.

B. Corroborating Evidence

Until the 1960's, the common law required the corroboration of any sex crime, regardless of the victim's age.¹²⁷ In response to lobbying efforts, most states have since repealed statutes requiring corroboration for rape complaints as well as for complaints of child sexual abuse.¹²⁸ Today, California does not require corroboration of an act of sexual molestation; the com-

125. Act of Sept. 25, 1984, ch. 1423, § 6, 1984 Cal. Stat. ____ (codified at CAL. PENAL CODE § 1048(b)) (West Supp. 1985). This statute provides in pertinent part: "[A]ll criminal actions in which a minor is detained as a material witness, or in which the minor is the victim of the alleged offense . . . shall be given precedent over all other criminal actions in the order of trial." *Id.*

126. Act of Sept. 25, 1984, ch. 1423, § 1, 1984 Stat. ____ (codified at CAL. EVID. CODE § 767(b)) (West Supp. 1985): "The court may in the interests of justice permit a leading question to be asked of a child under 10 years of age in a case involving a prosecution of child abuse or child molestation." *Id.*

127. Pirro, *supra* note 33, at 9-21. The author notes that only in the wake of Sigmund Freud's theories were women and children viewed as hysterical persons who made charges of rape based on their fantasies. This belief was responsible for the enactment of corroboration statutes in most states. *Id.*

128. *Id.*

plainant's testimony is sufficient to establish the corpus delicti of the crime.¹²⁹

Although legally it is no longer necessary to corroborate a child's testimony, compelling reasons remain for the continued use of corroborating evidence: (1) to overcome societal myths surrounding the sexual victimization of children, and (2) to avoid appellate reversal of a conviction based on insufficient evidence.¹³⁰ Ideally, the most successful corroboration comes from an eyewitness or the defendant, but these sources of corroboration are often not available.¹³¹ The prosecution must then rely on medical evidence, expert testimony, hearsay evidence, or evidence of past sexual misconduct by a defendant to ensure that guilt is proven beyond a reasonable doubt.

1. Medical/Behavioral Evidence

If medical and/or scientific evidence is available in a child molestation prosecution, it is much easier to convince a jury that a molestation has occurred. Although physical trauma is often not apparent on the person of a child sexual abuse victim,¹³² when present, evidence such as abrasions, bruising, or swelling do provide corroboration of a child's testimony concerning a lewd act. California requires only marginal relevancy of such physical evidence. The possibility that the physical trauma originated from a source other than the defendant will merely affect the weight of the evidence.¹³³ Proof of a victim's preg-

129. See *supra* note 101.

130. Lloyd, *supra* note 72, at 103. See also *People v. Williamson*, 161 Cal. App. 3d 336, 340-41, 207 Cal. Rptr. 503, 505-06 (1984), which overturned a rape conviction because of the lack of medical corroboration and the seventeen-year-old complainant's inconsistent statements.

131. See *supra* note 70.

132. Lloyd, *supra* note 72, at 108. There may be no trauma "if the child alleges that only fondling . . . occurred or if the perpetrator induced the child to participate by threat of force, bribery, misrepresentation of moral standards, seductive flattery, or by intoxication of the child." *Id.* (footnote omitted). See also Burgess & Holmstrom, *Sexual Trauma of Children and Adolescents: Pressure, Sex, And Secrecy*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 67, 72-73 (L. Schultz ed. 1980) (suggesting several reasons why a child may delay in reporting a sexual abuse incident: fear of punishment, fear of repercussions from telling, fear of rejection, and communication barriers that children sometimes have). It is obviously more difficult to obtain any medical or physical evidence if a substantial time period has passed between the incident and the examination.

133. See, e.g., *People v. Worthington*, 38 Cal. App. 3d 359, 366, 113 Cal. Rptr. 322, 326 (1974) (possibility that swelling of anus was caused by attempted anal intercourse was a matter for the jury to determine).

nancy is generally admissible since it is relevant in establishing the corpus delicti of any sexual abuse charge involving sexual intercourse.¹³⁴

Physical trauma aside, the presence of spermatozoa or seminal fluid on the body¹³⁵ or clothing¹³⁶ of a child provides evidence of recent sexual activity. However, the *absence* of such fluid generally has no evidentiary value.¹³⁷ Seminal fluid in the vaginal tract of the victim establishes penetration,¹³⁸ which is a crucial element to the corpus delicti of rape, incest, or unlawful sexual intercourse.

Both saliva and semen produce minute portions of blood that can be "typed."¹³⁹ The admissibility of blood type evidence is a controversial issue in criminal cases because such evidence only narrows the pool of potential suspects down to a large segment of the population.¹⁴⁰ Accordingly, a few states do not permit evidence that the blood type from semen found on a child's

134. *People v. Stoll*, 84 Cal. App. 99, 101, 257 P. 583, 583-84 (1927). While evidence of a victim's pregnancy is generally admissible, this is not necessarily true in all instances. In *Stoll*, for example, the evidence of pregnancy did not tend to prove the corpus delicti of incest because the time that the doctor said that conception occurred and the time that the alleged incident took place were not the same. *Id.* at 101, 257 P. at 584.

135. *People v. Orduno*, 80 Cal. App. 3d 738, 742, 145 Cal. Rptr. 806, 808 (1978), *cert. denied*, 439 U.S. 1074 (1978) (spermatozoa found on the child's skin in the vaginal area).

136. *People v. Clark*, 104 Cal. App. 2d 634, 638, 232 P.2d 290, 292 (1951) (victim's and defendant's stained clothing admissible).

137. Pirro, *supra* note 33, at 9-45-46. The author explains:

Many sex offenders are sexually dysfunctional during the act, and are thus unable to ejaculate. In some cases there may be very little sperm to ejaculate or in others the penis may be withdrawn prior to ejaculation. Seminal fluid, however, can be blood typed, since some people secrete minute portions of blood in other fluids."

Id. at 9-46.

138. *Id.*

139. Moenssens, Moses & Inbau, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* 255 (1973).

140. See, e.g., *People v. Vallez*, 80 Cal. App. 3d 46, 56, 143 Cal. Rptr. 914, 920 (1978) (evidence that semen stains on victim's nightgown were from a man with type A blood was both relevant and admissible in prosecution of defendant with type A blood even though 40% of the world's population had the same blood type). Less controversial than blood typing is the typing of pubic hairs that may be found on a sexual abuse victim, as such evidence potentially links the defendant directly to the victim. See, e.g., *People v. Hagerman*, 164 Cal. App. 3d 967, 971, 210 Cal. Rptr. 504, 506 (1985) (laboratory expert noted positive microscopic comparison between pubic hairs found on the victims and those on the defendant).

person or clothes is the same as that of the defendant,¹⁴¹ although such evidence is generally admissible if the blood type does *not* match that of the defendant.¹⁴² However, in California and most states, evidence matching the blood type of defendant with the blood type found in the semen is relevant and admissible.¹⁴³ As with physical trauma evidence, the weight given to blood type evidence is a matter for the jury to decide in light of all the facts.¹⁴⁴ California courts do require that blood typing be used only as corroborating evidence to support "some additional, independent evidence tending to show either (1) that the man who committed the crime did lose blood in the process, or (2) that the defendant was present at the scene."¹⁴⁵

The presence of a sexually transmitted disease also corroborates sexual activity.¹⁴⁶ However, if a physician examines a sexually abused child shortly after a molestation and identifies a venereal disease, this does not necessarily corroborate the particular sexual act in question because most venereal diseases have incubation periods of at least several days.¹⁴⁷ The presence of the venereal disease only indicates that the victim had been involved in prior sexual activity, and such evidence may not be

141. Iowa and New York are two such states. *See, e.g., State v. Peterson*, 219 N.W.2d 665, 671-72 (1974); *People v. Robinson*, 27 N.Y.2d 864, 865, 265 N.E.2d 543, 543, 317 N.Y.S.2d 19, 19-20 (1970).

142. Evidence that blood taken from a molestation does not match the blood type of defendant is relevant in any defense of misidentification. Although criminal case law on this issue is non-existent, in the paternity area blood type evidence is only admissible when its effect is to exclude the defendant as the possible father of the child. *Hodge v. Gould*, 274 Cal. App. 2d 806, 808, 79 Cal. Rptr. 245, 246 (1969). "Blood tests may be used to exclude a defendant as the possible father of a child, but no inference or presumption of paternity arise from the mere fact that such tests fail to exclude him." *Id.*

143. *People v. Lindsey*, 84 Cal. App. 3d 851, 866, 149 Cal. Rptr. 47, 56 (1978) (citing overwhelming number of jurisdictions in accord). *Id.* at 863-64, 149 Cal. Rptr. at 54-55.

144. *See id.* at 864, 149 Cal. Rptr. at 55 (citing *Shanks v. State*, 185 Md. 437, 446-47, 45 A.2d 85, 89 (1945)) (comparing evidence that defendant had the same blood type as that found at the crime scene to evidence that a defendant was near the crime scene when the crime occurred).

145. *People Lindsey*, 84 Cal. App. 3d at 866, 149 Cal. Rptr. at 56 (citing *Commonwealth v. Mussoline*, 429 Pa. 464, 468, 240 A.2d 549, 551 (1968)) (blood type evidence can only be used to corroborate other evidence at the time in question).

146. *See People v. Scott*, 21 Cal. 3d 284, 296, 578 P.2d 123, 129, 145 Cal. Rptr. 876, 882, (1978) (evidence of venereal infection trichomoniasis strongly suggests that victim had sexual relations with someone at some time). *See also Lloyd, supra* note 72, at 108 (citing several authorities supporting proposition that presence of a sexually transmitted disease corroborates sexual activity).

147. *Lloyd, supra* note 72, at 108.

admissible at a trial for the particular incident charged.¹⁴⁸

Evidence of the child's unusual or emotional behavior after an abusive episode can also corroborate the child's testimony.¹⁴⁹ Such behavior may occur shortly after a molestation,¹⁵⁰ or may occur as part of the "acting out" behavior that sexually abused children often exhibit, such as frequent masturbation and/or pseudo-seductive behavior.¹⁵¹ Psychological examinations may reveal disturbances, such as frequent and obvious sexual references in a child's drawings.¹⁵² The person to whom the sexual abuse is reported will likely to be the best witness to a child's unusual behavior following a molestation. However, when investigating for such corroborative evidence the prosecution should not overlook parents, teachers, or siblings who have frequent opportunities to observe a child's behavior.

There is a great need for medical or behavioral corroborative evidence in child sexual abuse prosecutions. This fact is evidenced by a California statute which requires that all convicted sex offenders give samples of their blood and saliva to the state government, evidence that can be used against them in future prosecutions.¹⁵³ There are limits, however, as to how far the government can go to obtain medical evidence from an accused sex offender.

148. *Id.*

149. *See, e.g.*, *People v. Dunnahoo*, 152 Cal. App. 3d 561, 575, 199 Cal. Rptr. 796, 803 (1984) (adults who witnessed abnormal reactions and conduct of allegedly abused children can share observations with jury); *People v. Meacham*, 152 Cal. App. 3d 142, 156, 199 Cal. Rptr. 586, 595 (1984) (children's unusual behavior while attending nursery school highly probative of the intent with which defendant conducted private photography sessions).

150. *See, e.g.*, *People v. Rodriguez*, 68 Cal. App. 3d 874, 879, 137 Cal. Rptr. 594, 596 (1977) (teacher witnesses child crying on playground and climbing fence, acting hysterically).

151. Lloyd, *supra* note 72, at 109-10. *See, e.g.*, *People v. Meacham*, 152 Cal. App. 3d 142, 154-55, 199 Cal. Rptr. 586, 594 (parents testify to children's unusual behavior, including masturbation, bedwetting, nightmares, sex play with other children, unruly behavior, and complaints of vaginal rashes).

152. Lloyd, *supra* note 72, at 109 (citing Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool for Families*, in *LEGAL REPRESENTATION OF THE MALTREATED CHILD* 70, 78 (1979)).

153. Act of Sept. 9, 1983, ch. 700, § 1, 1983 Cal. Stat. ____ (codified at CAL. PENAL CODE § 290.2) (West supp. 1985). Under this statute, the withdrawal of blood must be performed in a "medically approved manner" and blood grouping analysis shall be released only to law enforcement agencies and district attorneys' offices. *Id.* at subd. (a)(b).

In *People v. Scott*,¹⁵⁴ the California Supreme Court held that the attempt to obtain medical evidence from a defendant violated his fourth amendment right against unreasonable searches. The particular facts of *Scott* were most compelling. In an effort to determine whether the defendant had the same venereal disease as a child molestation victim,¹⁵⁵ the accused was subjected to a prolonged massage of his prostate gland, necessarily through his rectum, to induce involuntary ejaculation.¹⁵⁶ After articulating a balancing test to justify "bodily intrusions"¹⁵⁷ and finding that this intrusion violated both the California and the United States Constitutions, the court rejected the People's argument that the requirements for bodily intrusions be relaxed in sex cases because of the difficulty in obtaining corroborating evidence. "[I]t is precisely the general paucity of independent evidence which renders the criminal defendant in a sex case particularly vulnerable to questionable efforts at obtaining corroboration."¹⁵⁸

2. Expert Testimony

As is true in many areas of the law, the use of expert witnesses is expanding in child sexual abuse prosecutions. The testimony of those who are professionally familiar with the complex subject of child sexual abuse can potentially help educate juries on the intricacies of their specialty.¹⁵⁹

154. *People v. Scott*, 21 Cal. 3d 284, 295, 578 P.2d 123, 128, 145 Cal. Rptr. 876, 881 (1978). While accepting appellant's fourth amendment arguments, the court rejected a fifth amendment self-incrimination argument and held that the privilege against self-incrimination is limited to the involuntary giving of testimonial or communicative evidence. *Id.* at 291, 578 P.2d at 126, 145 Cal. Rptr. at 879.

155. The venereal disease was trichomoniasis. If a test on defendant's semen was conducted, there would be a 70% chance of showing whether or not defendant had this disease. The test proved negative, although it did reveal a chronic prostate inflammation, of which trichomoniasis was one of three possible causes. These results were introduced by the People at trial. *Id.* at 289, 578 P.2d at 125, 145 Cal. Rptr. at 878.

156. *Id.*

157. This test consists of balancing the severity of the imposed intrusion against such factors as the reliability of the method employed, the seriousness of the underlying criminal offense and society's consequent interest in obtaining a conviction, the strength of law enforcement suspicions that evidence of crime will be revealed, and the possibility that the evidence could have been obtained in a less burdensome manner. *Scott*, 21 Cal. 3d at 293, 578 P.2d at 127, 145 Cal. Rptr. at 880.

158. *Id.* at 295, 578 P.2d at 128-29, 145 Cal. Rptr. at 881.

159. California courts frown upon "advocacy testimony" and any opinions given by "experts" that appear too absolute may be discounted by the judge. *See, e.g., People v. Worthington*, 38 Cal. App. 3d 359, 366, 113 Cal. Rptr. 322, 326 (1974) (affirming testi-

To warrant the use of expert testimony as corroborating evidence of an act of child sexual abuse, the prosecution must show that an expert is needed to draw inferences from the facts which a jury would not be competent to draw.¹⁶⁰ If such "specialized knowledge"¹⁶¹ is required and an expert is shown to have sufficient skill, knowledge, or experience in the pertinent field, the expert's testimony may be considered by the jury in its deliberations.¹⁶² The trial judge has broad discretion to decide whether to permit expert testimony and reversals on appeal for an abuse of discretion are rare.¹⁶³

Testimony from examining physicians is the most widely recognized use of expert testimony in child sexual abuse cases.¹⁶⁴ An examining physician can testify about any blood or sperm

mony of doctor who was extremely cautious and guarded in expressing any opinions).

160. CAL. EVID. CODE § 801 (West 1966). This statute provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Id. See generally McCORMICK, *supra* note 79, at § 13.

161. This "specialized knowledge" of sexual abuse cases is admittedly in its early stages of development, but great progress has been made since California and other states began funding programs to attempt to deal with child sexual abuse. See *supra* notes 40, 65 & 66.

162. See CAL. EVID. CODE § 720(a) (West 1966). Where an expert medical witness discloses sufficient knowledge of subject to entitle his opinion to go to jury, any question of the degree of his knowledge goes more towards the weight of the evidence than its admissibility. *Evans v. Ohanesian*, 39 Cal. App. 3d 121, 128, 112 Cal. Rptr. 236, 240 (1974).

163. *Cooper v. Bd. of Medical Examiners*, 49 Cal. App. 3d 931, 947, 123 Cal. Rptr. 563, 573 (1975) (an abuse of discretion occurs only if the witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to trier of fact); *People v. Kelly*, 17 Cal. 3d 24, 39, 549 P.2d 1240, 1250, 130 Cal. Rptr. 144, 154 (1976) (trial court's ruling on qualification of expert will not be disturbed on appeal unless a manifest abuse of discretion is shown).

164. See, e.g., *People v. Creighton*, 57 Cal. App. 3d 314, 317, 129 Cal. Rptr. 249, 250 (1976) (expert testified that the complainant did not engage in act of sexual intercourse on the date in question); *People v. Belasco*, 125 Cal. App. 3d 974, 979, 178 Cal. Rptr. 461, 463 (1981) (doctor testified that two abrasions indicated forced penile entry).

specimens found on the child's body or clothing, and can diagnose any bruising or swelling that may have been caused by sexual activity.¹⁶⁵ If the alleged crime involves sexual intercourse, a doctor may offer his expert opinion on whether the child had engaged in recent acts of sexual intercourse.¹⁶⁶ While the California Supreme Court has commented that "[s]cientific evidence has for decades been a recognized if under-utilized resource for the proof of rape,"¹⁶⁷ a more frequent problem than "under-utilization" in many child molestation prosecutions is the unavailability of medical evidence either because no intercourse occurred or because of a significant delay between the sexual act(s) and the disclosure.¹⁶⁸

The use of mental health professionals as expert witnesses in child sexual abuse cases is a growing practice both nationally and in California.¹⁶⁹ The expert's testimony is only one piece of evidence in a prosecution and does not establish a prima facie case of child sexual abuse.¹⁷⁰ A mental health professional can

165. See, e.g., *People v. Worthington*, 38 Cal. App. 3d 359, 366, 113 Cal. Rptr. 322, 326 (1974) (expert physician's diagnosis that swelling may have been caused by anal intercourse was admissible).

166. See *supra* note 164.

167. *People v. Rincon-Pineda*, 14 Cal. 3d 864, 882, 538 P.2d 247, 259, 124 Cal. Rptr. 119, 131 (1975). For proper procedures in gathering medical evidence in sex cases, see generally Enos, Beyer & Mann, *The Medical Examination of Cases of Rape*, in *RAPE VICTIMOLOGY* 221 (L. Schultz ed. 1975).

168. See *supra* note 132 and accompanying text.

169. J. BULKLEY, *RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES* 34 (1982). See, e.g., *People v. Dunnahoo*, 152 Cal. App. 3d 561, 577, 199 Cal. Rptr. 796, 804 (1984) (testimony by child sexual abuse expert that a sexually molested child finds it difficult to talk about sexual indiscretions with an adult). It should be noted that many of the "experts" in the field of child molestation are non-mental health professionals. The qualified experts in *Dunnahoo* were police officers who had extensive experience in dealing with child molestation victims. *Id.*

170. Berliner, Blick & Bulkley, *Expert Testimony on the Dynamics on Intra-Family Sexual Abuse and Principles of Child Development*, in *CHILD SEXUAL ABUSE AND THE LAW* 166, 169 (J. Bulkley ed. 1982). See, e.g., *People v. Meacham*, 152 Cal. App. 3d 142, 148, 199 Cal. Rptr. 586, 590 (1984) (expert in child development testifies that nude poses by children on photographs were instigated by others, either physically or by demonstration). A prima facie case may be established by expert testimony where physical abuse is involved. See *People v. Jackson*, 18 Cal. App. 3d 504, 507, 95 Cal. Rptr. 919, 921 (1971) (the "battered child syndrome" indicated that the child had not suffered his injury by accidental means). "This conclusion is based upon an extensive study of the subject by medical science. The additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason." *Id.* If enough "extensive study" is done on child sexual abuse cases, the possibility exists for development of a "child sexual abuse syndrome." See *infra* notes 188-204 and accompanying text.

help a jury understand why there was no physical injury to a child, why the child delayed in reporting the abuse, and why a child might retract a previous statement.¹⁷¹ By so testifying, an expert can help rebut an inference that a child is fabricating a story. However, the expert witness cannot decide credibility issues; these are for the jury to decide.¹⁷²

a. *California Penal Code Section 1346 / Evidence Code Section 240(c)*

An increase in the use of child molestation mental health experts can be expected to follow from three recent legislative enactments. Through the first two enactments, the California Legislature has liberalized the evidence rules concerning the admissibility of former testimony at trial.¹⁷³ In 1983, the legislature enacted a law which authorizes the videotaping of certain child sexual abuse victims' testimony at the preliminary examination.¹⁷⁴ The videotape of the child's testimony would be admissible as evidence at trial under Evidence Code section 1291¹⁷⁵ "[i]f at the time of trial the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of Section 240 of the Evidence Code"¹⁷⁶

Subsequent to the passage of Penal Code section 1346, the legislature amended Evidence Code section 240 to state in pertinent part that

171. Berliner, Blick & Bulkley, *supra* note 170, at 171-73. See also *People v. Dunahoo*, 152 Cal. App. 3d 561, 577, 199 Cal. Rptr. 796, 804 (1984) (expert testimony relevant as to why child did not report abuse immediately).

172. See, e.g., *People v. Sergill*, 138 Cal. App. 3d 34, 39, 187 Cal. Rptr. 497, 500 (1982) (court found no authority to support the proposition that the veracity of those who report crimes to the police is a matter sufficiently beyond common experience to require testimony of an expert).

173. General rules governing the admission of past testimony are codified in California under CAL. EVID. CODE § 1291 (West 1966). These rules are: (1) the witness must be "unavailable", and (2) either the former testimony is offered against the person who offered it earlier or it is offered by the same party that offered it earlier, provided that the opposing party had the opportunity and motive to cross-examine the witness. *Id.* at subd.(a)(1)(2).

174. Act of March 6, 1982, ch. 98, § 1, 1982 Cal. Stat. 313 (codified at CAL. PENAL CODE § 1346 (West Supp. 1985)). The child witness must be fifteen years of age or younger to qualify for videotaping under this statute. *Id.* at subd. (a).

175. See *supra* note 173.

176. CAL. PENAL CODE § 1346(d) (West Supp. 1985).

[e]xpert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a).¹⁷⁷

The "expert" who finds the witness "unavailable" may be a physician, psychiatrist, psychologist, licensed clinical social worker, or a marriage, family, or child counselor.¹⁷⁸

Because the mental trauma experienced by a child while testifying to acts of sexual abuse are potentially significant,¹⁷⁹ any child who experiences such trauma at the preliminary hearing may be spared going through the trauma a second time,¹⁸⁰ assuming that the defendant had the opportunity to cross-examine the witness at the preliminary examination.¹⁸¹ While minimizing the trauma of court appearances on sexual abuse victims should be a priority of the legislature, there are several ways of doing this that are less prejudicial to the defendant,¹⁸² who pos-

177. Act of July 11, 1984, ch. 401, § 1, 1984 Cal. Stat. ____ (codified at CAL. EVID. CODE § 240(c) (West Supp. 1985)).

178. *Id.* See also CAL. EVID. CODE § 1010 (b)(c)(e) (West Supp. 1985) for statutory definitions of psychologist, licensed clinical social worker, and marriage, family and child counselor.

179. This especially true if the witness accuses a parent or close relative of the molestation. See *supra* note 31.

180. This assumes that the trial judge exercises his discretion and finds the witness "unavailable" under CAL. EVID. CODE § 240(c) (West Supp. 1985).

181. CAL. EVID. CODE § 1291(a)(2) (West Supp. 1985).

182. See, e.g., Act of Sept. 28, 1978, ch. 1310, § 1, 1978 Cal. Stat. 4298 (codified at CAL. PENAL CODE § 868.5) (West Supp. 1985), which entitles a sex offense prosecuting witness under seventeen years of age to the presence of a support person (parent, sibling, relative, or friend) at the preliminary hearing and trial. The closing of the preliminary examination to the public is also statutorily authorized in California. See *infra* notes 185-87 and accompanying text. Hopefully the increased state support for programs concerning child sexual abuse victims will help to sensitize the criminal justice system to the needs of such victims and better equip them to face the accused in open court. See *supra* notes 39-43 and accompanying text. A bill recently proposed in the California Legislature would provide for the following as means to help consider the special needs of child witnesses who are ten years of age or under:

(a) Forego the wearing of judicial robes.

(b) Relocate the placement of the judge, parties, witnesses, support persons, or court personnel to facilitate a more comfortable and personal environment for a child witness who is ten years of age or under.

sesses a constitutional right to confront those who accuse him.¹⁸³ Since the testimony of the complaining witness is so vital in sex offense cases, it must be questioned whether a preliminary hear-

(c) Order more frequent recesses to accommodate the special physical, mental, and emotional needs of a child witness who is ten years of age or under.

(d) Appoint a volunteer to advise the court during the testimony of a child witness who is ten years of age or under, as to the special physical, mental, and emotional needs of the child witness.

(e) Allow a support person to have physical contact with a child witness who is ten years of age or under.

Cal. A.B. 295, at 3 (1985-86).

183. See U.S. CONST. amend. IV; CAL. CONST. art. I, § 15. See also CAL. PENAL CODE § 686(3) (West Supp. 1985). The California Legislature recently passed a bill which raises several confrontation issues. Cal. S.B. 46 (1985-86) (codified at PENAL CODE § 1347). This bill permits a court to order that the testimony of a child sexual abuse victim ten years or younger be taken by contemporaneous examination (and cross-examination) in another place, out of the presence of the judge, jury, defendant and attorneys. Cal. S.B. 46, at 3 (1985-86). The child's testimony will be communicated to the court room by means of two way closed-circuit television. *Id.* This method of testifying can only be used if it is shown by clear and convincing evidence that the child is "unavailable" as a witness for one or more of the following reasons: 1) the child or a family member was threatened with serious bodily injury or the child was removed from the family in order to prevent or dissuade the minor from reporting the alleged sexual abuse, 2) a deadly weapon was used in the commission of the charged offense, 3) great bodily injury was inflicted upon the child during the commission of the crime, or 4) the conduct of defense counsel or the defendant during the hearing causes the minor to be unable to continue testifying. *Id.* at 3-4.

Under this enactment, the defendant's right to confront the witnesses who accuse him will be affected in several ways. First, physical confrontation will not be possible under the above arrangement. See *Herbert v. Superior Court*, 117 Cal. App. 3d 661, 667, 172 Cal. Rptr. 850, 852 (1981), which appears upon close reading to include physical confrontation as an element of sixth amendment guarantees. Second, the defense attorney's cross-examination may be hampered because of the use of the two-way television system. Moreover, "there are serious questions about the effects on the jury of using closed-circuit television to present the testimony of an absent witness since the camera becomes the juror's eyes, selecting and commenting upon what is seen." *Hochheiser v. Superior*, 161 Cal. App. 3d 777, 786, 208 Cal. Rptr. 273, 278 (1984). For example, "the lens or camera angle chosen can make a witness look small and weak or large and strong." Note, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. REV. 567, 575 (1976). Closed circuit television may also "affect the presumption of innocence by creating prejudice in the minds of the jurors towards the defendant similar to that created by the use of physical restraints on a defendant in the jury's presence." *Hochheiser*, 161 Cal. App. 3d at 787, 298 Cal. Rptr. at 279. Finally, the jury may have difficulty in assessing the victim's credibility via closed-circuit television. The demeanor of the witness is one of the factors that a juror may consider in assessing credibility (see CAL. EVID. CODE § 780(a) (West 1966)), and the ability of the jury to assess demeanor may be impinged upon through the use of closed circuit television. It may be preferable for the legislature to concentrate on finding ways to help a child confront the accused (see *supra* note 182), rather than passing drastic measures which raise constitutional questions.

ing cross-examination¹⁸⁴ adequately ensures a defendant of his right to confront those who testify against him.

b. *California Penal Code Section 868.7*

A second legislative enactment that portends a greater role for expert witnesses in child sexual abuse prosecutions involves closing the courtroom while a complaining witness testifies during a preliminary hearing.¹⁸⁵ Before a courtroom may be closed, the prosecution must show that testifying before the general public "would be likely to cause serious psychological harm to the witness."¹⁸⁶ Although no appellate case has yet defined "serious psychological harm," it would appear that objective expert testimony could substantially support a victim's subjective claim that he or she does not wish to testify in public.¹⁸⁷

c. *Child Sexual Abuse Syndrome*

A final area where expert testimony can potentially aid a jury is still in its developmental stages. The phrase "child sexual abuse syndrome" has been coined to describe this area.¹⁸⁸ To establish a prima facie case of sexual abuse using evidence of this

184. Preliminary hearings in California must be conducted within 10 days of defendant's arraignment. CAL. PENAL CODE § 859b (West Supp. 1985). While a continuance can be granted, it would still be difficult to conduct a complete and adequate cross-examination at the preliminary hearing, especially since defense counsel is often forced to "discover" the People's case at the preliminary hearing.

185. Act of March 1, 1982, ch. 83, § 4, 1982 Cal. Stat. 245 (codified at CAL. PENAL CODE § 868.7 (West Supp. 1985)).

186. CAL. PENAL CODE § 868.7(a)(1) (West Supp. 1985). For a judge to approve closing a courtroom, there must not be any alternative procedures available that would spare the victim the trauma of testifying in public. Procedures specifically mentioned are the videotaping of a child's deposition and the contemporaneous examination in another place communicated to the courtroom via closed-circuit television. *Id.*

187. This situation is clearly analogous to the above discussion concerning expert testimony and the "unavailability" of the witness. *See supra* notes 176-80 and accompanying text. Constitutional questions concerning the right of the press to have access to criminal trials and the right of the defendant to a public trial are raised whenever a courtroom is closed to the public. However, the United States Supreme Court has stated that the "compelling state interest" in safeguarding the physical and psychological well-being of the minor is sufficient to justify closing a courtroom if the particular facts of the case justify such action. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-08 (1982), where the Court held that a Massachusetts closure law was unconstitutional because it forbade the press from being present during the testimony of *all* minor victims of sex offenses, regardless of the facts in a given case. *Id.* at 607-08.

188. Lloyd, *supra* note 72, at 109-10 (citing Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool for Families*, in LEGAL REPRESENTATION OF THE MALTREATED CHILD 70, 80-81 (1979)).

syndrome, medical testimony or a statement of abuse by the child which constitutes an "excited utterance"¹⁸⁹ is combined with other circumstantial evidence such as behavioral indicators and family dynamics.¹⁹⁰

Study of this syndrome is in its developmental stages and thus likely to be inadmissible at a criminal trial.¹⁹¹ However, the groundwork for admitting evidence of the syndrome is being laid in parallel areas of the law. California courts have recognized the "battered child syndrome" by permitting (in criminal cases) expert medical opinion that a child has been battered.¹⁹² Although this medical diagnosis is based on probability, this lack of scientific certainty does not deprive the medical opinion of its evidentiary value.¹⁹³ However, the expert witness can only testify as to whether or not the child was battered and cannot venture an opinion on whether the defendant inflicted the injuries.¹⁹⁴

In another related area, the California Supreme Court recently approved of the admissibility of evidence concerning "rape trauma syndrome."¹⁹⁵ The court distinguished past cases that had seemingly sounded the death knell for such evidence,¹⁹⁶

189. See *infra* notes 214-20 and accompanying text.

190. "Behavioral indicators" of the sexually abused child may include clinical depression, runaway or truant tendencies, involvement with drugs, pseudo-mature seductive behavior, and promiscuity. See Berliner, Blick & Bulkley, *supra* note 170, at 172-73. "Family dynamics" of the sexual abuse case may include a child who endures the abuse for several years, a passive parent who unconsciously denies that the abuse has occurred, and a child who makes inconsistent statements concerning the sexual abuse. *Id.* at 171-72.

191. J. BULKLEY, *supra* note 169, at 41. Because the study of "child sexual abuse syndrome" is in the developmental stages, it is not study "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates" CAL. EVID. CODE § 801(b) (West Supp. 1985).

192. *People v. Jackson*, 18 Cal. App. 3d 504, 508, 95 Cal. Rptr. 919, 922 (1971) (in prosecution for child beating, admission into evidence of a doctor's diagnosis of a "battered child syndrome" was not an improper invasion of the province of the jury). *Accord* *People v. Phillips*, 122 Cal. App. 3d 69, 87, 175 Cal. Rptr. 703, 714 (1981) (the intentional poisoning of a child, being merely another form of child abuse, warranted the admission of expert testimony under *Jackson*).

193. *People v. Jackson*, 18 Cal. App. 3d 504, 507, 95 Cal. Rptr. 919, 921 (1971).

194. *Id.* The *Jackson* court went on to state that the doctor's conclusions as to what caused the abuse were based upon extensive study of the subject by medical science. "The additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon reason and logic." *Id.*

195. *People v. Bledsoe*, 36 Cal. 3d 236, 247-48, 681 P.2d 291, 298, 203 Cal. Rptr. 450, 457 (1984).

196. See, e.g., *People v. Guthreau*, 102 Cal. App. 3d 436, 162 Cal. Rptr. 376 (1980);

stating that "there is nothing in those decisions to suggest that *all* expert testimony by rape counselors is inadmissible."¹⁹⁷ The court approved of the evidentiary value of the syndrome in helping to rebut false inferences which a jury may draw because of a victim's inconsistent statements, delay in reporting the rape, or unusual behavior following the rape.¹⁹⁸ However, the court rejected admission of "rape syndrome" evidence to prove that a rape had, in fact, occurred, reasoning that the general scientific community had not developed the syndrome for that purpose.¹⁹⁹ The court was careful to point out that the "rape syndrome" was distinguishable from the "battered child syndrome," which was developed for the express purpose of helping society to discover which of its youth are being physically abused.²⁰⁰ In this regard the "child sexual abuse syndrome" may be closer to the "battered child syndrome" than to the "rape trauma syndrome," assuming that child sexual abuse experts use evidence of the syndrome to help discover which children are being sexually abused, and not develop it solely for therapeutic reasons.

Outside of the criminal law, one California court approved of testimony concerning child sexual abuse syndrome as it applied to civil dependency hearings.²⁰¹ After noting that expert

People v. Clark, 109 Cal. App. 3d 88, 167 Cal. Rptr. 51 (1980). *Bledsoe* distinguished both of these cases:

In both of these cases, the expert witnesses—rape counselors employed by police departments—testified that under the circumstances in which the alleged victim found herself, the degree of resistance displayed by the victim was entirely reasonable [However] [e]vidence that an expert was of the opinion the prosecutrix's resistance was reasonable under the circumstances is irrelevant to the issue of [*the defendant's*] *bona fide belief*. [Citation]

Id. at 246, 681 P.2d at 297, 203 Cal. Rptr. at 456 (emphasis in original).

197. People v. Bledsoe, 36 Cal. 3d 236, 246, 681 P.2d 291, 298, 203 Cal. Rptr. 450, 457 (1984).

198. *Id.* at 247-48, 681 P.2d at 298, 203 Cal. Rptr. at 457.

199. *Id.* at 248-51, 681 P.2d at 299-301, 203 Cal. Rptr. at 458-60. The scientific community developed the rape trauma syndrome "as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselors' clients or patients [R]ape counselors are taught to make a conscious effort to avoid judging the credibility of their clients." *Id.* at 249-50, 681 P.2d at 300, 203 Cal. Rptr. at 459.

200. *Id.* at 249-50, 681 P.2d at 299-301, 203 Cal. Rptr. at 458-60. "Unlike fingerprints, blood tests, lie detectors, voice prints or the battered child syndrome, rape trauma syndrome was not devised to determine the 'truth' or 'accuracy' of a particular past event" *Id.* at 249, 681 P.2d at 300, 203 Cal. Rptr. at 459.

201. *In re Cheryl H. v. L.A. County Dep't of Public Social Services*, 153 Cal. App.

testimony was admissible in child beating cases, the court stated:

[H]ere, of course, it is not medical testimony about the physical characteristics of the injury which supports the diagnosis. Rather it is psychiatric testimony about the victim's post-injury behavior which leads to the conclusion she was sexually abused. But that behavior appears to be unique to children subjected to child abuse and as valid indicia of such abuse as the physical characteristics used to diagnose "battered child syndrome."²⁰²

The court also held, however, that the expert's opinion that the father was the sexual abuser was inadmissible.²⁰³

Expert testimony on child sexual abuse syndrome is potentially a valuable and legitimate part of a sexual abuse prosecution, but further study in this area needs to be done. State legislatures can facilitate this study by increasing the funding for child sexual abuse research. Through such funding, the legal system's involvement in these cases could concentrate "less on a frantic search for admissible evidence, and more on obtaining protection of the child and treatment for the child and family."²⁰⁴

3. Hearsay Evidence

Hearsay evidence is testimony in court of a statement made out of court, offered to prove the truth of the matter asserted.²⁰⁵ Although hearsay evidence is generally inadmissible at trial,²⁰⁶ numerous exceptions to this hearsay rule have developed over

3d 1098, 1116-18, 200 Cal. Rptr. 789, 800-01 (1984).

202. *Id.* at 1117, 200 Cal. Rptr. at 800-01.

203. *Id.* at 1121, 200 Cal. Rptr. at 803. The court held that the expert did what the expert in *Jackson* did not do: express an opinion that a certain individual committed the acts of abuse. *Id.*

204. J. Bulkley, *supra* note 169, at 41.

205. CAL EVID. CODE § 1200(b) (West 1966). *See also* McCORMICK, *supra* note 79, at § 246.

206. CAL EVID. CODE § 1200(b) (West 1966). *See also* McCORMICK, *supra* note 79, at § 245. The rule against hearsay is designed to ensure compliance with three ideal conditions under which witnesses ordinarily will be required to testify: oath, personal presence at trial, and cross-examination. *Id.*

the years.²⁰⁷ Commentators posit two main reasons for the proliferation of hearsay exceptions: first, the reliability and trustworthiness of certain out of court statements justifies their admission into evidence²⁰⁸ and, secondly, there is a high necessity in certain cases for such hearsay evidence.²⁰⁹

These two factors of "reliability" and "necessity" are often present when a child sexual abuse victim makes the out of court statement. On the "reliability" side, the courts seem to believe that a child's statement of sexual abuse is very trustworthy, pointing out on occasion that children are not adept at reasoned reflection or at concocting false stories under such circumstances.²¹⁰ On the "necessity" side, a scarcity of evidence in child sexual abuse prosecutions is inherent in the crime.²¹¹ Hence, it is not surprising that child molestation prosecutors have increasingly relied upon exceptions to the hearsay rule to either (1) corroborate the child's testimony,²¹² or (2) help establish the corpus delicti of the crime.²¹³

The hearsay exception most often utilized in sexual abuse

207. California has some fifty specific exceptions to the hearsay rule. See CAL. EVID. CODE § 1220-1340 (West 1966).

208. McCORMICK, *supra* note 79, at § 253. The availability or unavailability of the witness is not controlling for hearsay statements grounded in the belief that there is good "reliability" and "trustworthiness." *Id.* See also 5 WIGMORE, EVIDENCE, §§ 1420-1422, at 252-54 (Chadbourn rev. 1974).

209. This occurs most often when a witness is unavailable for trial. While live testimony is preferred, if the declarant is unavailable, the out of court statement will be accepted. McCORMICK, *supra* note 79, at § 253. See also 5 WIGMORE, *supra* note 208, § 1420, at 253.

210. J. BULKLEY, *supra* note 169, at 35. See also *supra* notes 98-100 and accompanying text.

211. See *supra* note 70 and accompanying text. Furthermore, a child may be too young to qualify as a competent witness, hence, he or she is "unavailable" for trial and an exception to the hearsay rule is needed. See, e.g., *People v. Orduno*, 80 Cal. App. 3d 738, 742, 145 Cal. Rptr. 806, 808 (1978), *cert. denied*, 439 U.S. 1074 (1978) (hearsay statement of child too young to testify admissible under exception to hearsay rule).

212. This is usually done through admission of a child sexual abuse victim's "complaint of rape." See, e.g., *People v. Crume*, 61 Cal. App. 3d 803, 813-14, 132 Cal. Rptr. 577, 583 (1976) (evidence of complaint by victim of sex offense corroborates child's testimony). See *infra* notes 221-24 and accompanying text.

213. This often occurs when a child does not testify at trial, but made a "spontaneous declaration" shortly after the molestation. See, e.g., *People v. Butler*, 249 Cal. App. 2d 799, 806-07, 57 Cal. Rptr. 798, 803 (1967) (child witness' "spontaneous declaration" admissible as exception to hearsay rule, therefore admissible to prove truth of matter asserted). See *infra* notes 214-20 and accompanying text.

cases is the "spontaneous statement" exception.²¹⁴ To render a child's statement admissible under this exception, three requirements must be met: (1) there must be some occurrence startling enough to produce nervous excitement and the corresponding unreflective statements, (2) the nervous excitement must still be present when the statements are made, and (3) the statement must relate to the circumstances of the occurrence preceding it.²¹⁵ If these three requirements are met to the judge's satisfaction,²¹⁶ the evidence is admissible as tending to prove the truth of the matter stated. Furthermore, California courts have consistently held that admitting a spontaneous declaration into evidence does not violate the defendant's constitutional right to confront witnesses.²¹⁷

Despite the great need for a sexual abuse victim's out of court statements and the apparently broad discretion given to the trial judges' interpretation of the three requirements, California courts have generally construed the "contemporaneous time factor" narrowly.²¹⁸ This has led to the inadmissibility of most statements not made immediately after a sexual abuse incident. In contrast, other jurisdictions have developed a specific "tender years" offshoot of the spontaneous statement exception.²¹⁹ This "tender years" doctrine has considerably length-

214. J. BULKLEY, *supra* note 169, at 34. *See, e.g.*, *People v. Butler*, 249 Cal. App. 2d 799, 804-06, 57 Cal. Rptr. 798, 802-03 (1967) (spontaneous statements from two children after abusive episode admissible at trial); *People v. Orduno*, 80 Cal. App. 3d 738, 742, 145 Cal. Rptr. 806, 808 (1978), *cert. denied*, 439 U.S. 1074 (1978) (child's statement that "the man wet my pants" admissible as spontaneous declaration). Of course, an adult's spontaneous declarations are also admissible at trial. *See, e.g.*, *People v. Worthington*, 38 Cal. App. 3d 359, 366, 113 Cal. Rptr. 322, 326 (1974) (mother's spontaneous statement that "he's trying to go down on my daughter" admissible at trial).

215. *People v. Orduno*, 80 Cal. App. 3d 738, 746, 145 Cal. Rptr. 806, 810 (1978), *cert. denied*, 439 U.S. 1074 (1978). *See also* McCORMICK, *supra* note 79, at § 297.

216. *See* *People v. Ferguson*, 99 Cal. App. 3d 356, 365, 160 Cal. Rptr. 263, 268 (1979) (application of spontaneous declaration exception is confided to the sound discretion of the trial judge).

217. *People v. Orduno*, 80 Cal. App. 3d 738, 748, 145 Cal. Rptr. 806, 811-12 (1978), *cert. denied*, 439 U.S. 1074 (1978) (citing abundant authority in other jurisdictions that have held that admission of spontaneous declarations did not violate the confrontation clause). *See also* *In re Damon H.*, 165 Cal. App. 3d 471, 479, 211 Cal. Rptr. 623, 628 (1985) (admission of hearsay evidence comports with the substance of the right to confront witnesses).

218. *See, e.g.*, *In re Cheryl H. v. L.A. County Dep't of Public Social Services*, 153 Cal. App. 3d 1098, 1130, 200 Cal. Rptr. 789, 810 (1984) (nothing in case law suggested that the necessary level of psychological stress could be sustained for even a few hours).

219. *See, e.g.*, *State v. Duncan*, 53 Ohio St. 2d 215, 222, 373 N.E.2d 1234, 1238

ened the legally allowable time lapse between a molestation and the statement being offered under the exception,²²⁰ ostensibly on the belief that statements of a child abuse victim are reliable despite the fact that the victim had time to reflect after the incident.

In California, when a child does not report a molestation immediately, his or her extrajudicial statements may still be admissible under the court created "complaint of rape" exception to the hearsay rule.²²¹ Under this exception, evidence that a victim made a "fresh complaint" after a molestation is admissible to rebut an inference of fabrication.²²² Even if a complaint is not made immediately after the abusive episode, this fact only affects the weight of the evidence.²²³ While the time limit requirements are less restrictive under the complaint of rape theory than the spontaneous statement theory, the former is restricted in scope to include only the reporting of the crime itself. No details of the molestation are admissible.²²⁴ Hence, the spontaneous statement exception is preferable to the complaint of rape exception if the prosecution is attempting to establish the corpus delicti of the crime.

(1978) (two hour time period elapsed between abusive incident and child's reporting); *State v. McFall*, 75 S.D. 630, 634-35, 71 N.W.2d 299, 301-02 (1955) (six-year-old related details of molestation two weeks after incidents occurred).

220. One case in Michigan upheld a three month time period between a molestation and the subsequent statements of the victim. *People v. Gage*, 62 Mich. 271, 275, 28 N.W. 835, 836 (1886). However, in 1982, the Michigan Supreme Court eliminated this "tender years" exception in Michigan through its interpretation of the modern Michigan Code of Evidence. *See People v. Kreiner*, 415 Mich. 372, 377-78, 329 N.W.2d 716, 719-20 (1982).

221. *See, e.g., People v. Meacham*, 152 Cal. App. 3d 142, 159, 199 Cal. Rptr. 586, 597 (1984); *People v. Orduno*, 80 Cal. App. 3d 738, 745, 145 Cal. Rptr. 806, 810 (1978), *cert. denied*, 439 U.S. 1074 (1978). In *Meacham*, the court held that a recent complaint by a minor victim was admissible as *non-hearsay* evidence because it was admitted to show a complaint was made not to show the truth of the statement made. *Id.* at 158, 199 Cal. Rptr. at 596.

222. *People v. Burton*, 55 Cal. 2d 328, 351, 359 P.2d 433, 443-44, 11 Cal. Rptr. 65, 75-76 (1961) (seven-year-old told mother that defendant twice "made me play with his peter"). *Id.* at 337, 359 P.2d at 435, 11 Cal. Rptr. at 67. *See also People v. Brown*, 35 Cal. App. 3d 317, 323-24, 110 Cal. Rptr. 854, 858 (1973) (fifteen-year-old told officer that defendant committed an act of sodomy upon her body).

223. *People v. Meacham*, 152 Cal. App. 3d 142, 158-59, 199 Cal. Rptr. 586, 597 (1984) (possible one month period between the molestation and complaints sufficiently "fresh" to be admissible).

224. *Id.* (citing *People v. Burton*, 55 Cal. 2d 328, 351-52, 359 P.2d 433, 444, 11 Cal. Rptr. 65, 76 (1961)) (although details of the incident were not admissible, the victim's statement of the nature of the offense and the identity of the alleged offender were admissible).

Although the excited utterance and complaint of rape exceptions to the hearsay rule are the most commonly used exceptions in sexual abuse cases, other exceptions may also apply. The "bodily feelings" exception²²⁵ arises occasionally, most often when the victim describes a molestation to an attending physician.²²⁶ The physician uses the child's statements in making his diagnosis and may testify to their content. This exception generally excludes the description of past pain or symptoms,²²⁷ although they may be admissible if a physician considers them in making his diagnosis. Furthermore, the proposed testimony cannot include the identity of the person who caused the condition or bodily feelings because such information is not necessary to the diagnosis.²²⁸

In conjunction with the hearsay testimony of the examining physician, hospital or medical records in sexual molestation cases provide corroborating evidence under the "regularly kept records" exception to the hearsay rule.²²⁹ The importance of care

225. CAL. EVID. CODE § 1250 (West 1966) states in pertinent part:

(a) [E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

- (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
- (2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory of belief

Id. See also McCORMICK, *supra* note 79, at § 291 (statements of the declarant's present bodily condition and symptoms, including pain and other feelings, are generally admissible to prove the truth of the matter asserted).

226. See McCORMICK, *supra* note 79, at §§ 292-93.

227. CAL. EVID. CODE § 1250(b) (West 1966). See also McCORMICK, *supra* note 79, at § 291. See, e.g., *Benwell v. Dean*, 249 Cal. App. 2d 345, 350, 57 Cal. Rptr. 394, 399 (1967).

228. See *In re Cheryl H. v. L.A. County Dep't of Public Social Services*, 153 Cal. App. 3d 1098, 1119, 200 Cal. Rptr. 789, 802 (1984) (California's "state of mind" exception excluded statements about declarant's state of mind as evidence of a *third person's* conduct). See also CAL. EVID. CODE § 1250(b) (West 1966).

229. CAL. EVID. CODE §§ 1270-1272 (West 1966). Section 1270 defines a "business;" section 1271 states what is necessary for evidence of a writing made as a record to be admitted into evidence:

- (a) The writing was made in the regular course of business;
- (b) The writing was made at or near the time of the act, condition or event;
- (c) The custodian or other qualified witness testifies to its

and precision in compiling these records should be obvious from the frequency such testimony is offered by both the prosecution and the defense.²³⁰ Unfortunately, “[m]edical records haven’t always been taken properly. The symptoms of trauma have not been indicated, and if evidence is not gathered quickly and completely, prosecution is difficult.”²³¹ As is true with declarations of present bodily feelings, the hospital records must relate to diagnosis and treatment if they are to be used for corroborating purposes.

In addition to the well established exceptions to the hearsay rule, some states have created a new hearsay exception that specifically addresses out of court statements by child sexual abuse victims.²³² While these statutes vary in some regards, such as the age of the qualifying child, all require the trial judge to find “sufficient indicia of reliability” involving the circumstances surrounding the statement.²³³ This trustworthiness examination is conducted outside the presence of the jury. These statutes also provide that if a child does not testify at the hearing, there must be some corroborative evidence that the act in question actually occurred.²³⁴ Adequate notice to the defendant is also required by the statute.²³⁵

identity and the mode of its preparation; and
(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

CAL. EVID. CODE § 1271 (West 1966). See also *Springer v. Reimers*, 4 Cal. App. 3d 325, 338, 84 Cal. Rptr. 486, 493 (1970) (properly authenticated hospital records were admissible in so far as they recorded personal observations of attending physician or pertinent statements of patient’s history which physician had made use of in reaching his professional opinions).

230. Burgess & Laszlo, *Courtroom Use of Hospital Records in Sexual Assault Cases*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 257 (L. Schultz ed. 1980).

231. *Id.* at 258.

232. See WASH. REV. CODE ANN. § 9A.44.120 (West Supp. 1985); COLO. REV. STAT. § 13-25-129 (Supp. 1974); UTAH CODE ANNOTATED § 76-5-411 (Supp. 1983).

233. See, e.g., WASH. REV. CODE ANN. § 9A.44.120(1) (West Supp. 1985). The court must find that “the time, content, and circumstances of the statement provide sufficient indicia of reliability . . .” *Id.*

234. See, e.g., COLO. REV. STAT. § 13-25-129(b)(I)(II) (Supp. 1984). If sufficient reliability permits evidence to be heard by the jury, the child must either testify at the hearing or be “unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.” *Id.*

235. See, e.g., UTAH CODE ANN. § 76-5-411(2) (Supp. 1983): “A statement may be admitted under this exception only if the proponent of it makes known to the adverse party with an opportunity to prepare to meet it, his intention in offering the statement, and the particulars of it.” *Id.*

The California Legislature has rejected passing a similar statute²³⁶ because of the constitutional problems that such a statute could present.²³⁷ However, the federal constitution appears to pose no obstacles to a carefully worded hearsay exception. In fact, it has been argued that the child sexual abuse hearsay exceptions written to date go further in protecting a defendant's right to confrontation than has the United States Supreme Court.²³⁸

The legislature has passed a more limited hearsay exception that provides for admitting a child's out of court statement only when a defendant has made a confession.²³⁹ While this limited exception will be quite helpful to those prosecutions where it applies,²⁴⁰ there are obviously many reliable statements that will be inadmissible because the defendant has not made a confession or the statement does not qualify under one of the other hearsay exceptions.

In sum, an exception to the hearsay rule for out of court statements made by child sexual abuse victims is justified when a trial court is convinced that the circumstances surrounding the statement indicate that it is reliable and trustworthy. This exception can be specifically tailored to sexual abuse cases or can be written along the lines of the various "residual exceptions" that have been enacted in other states and under the Federal

236. Cal. S.B. 621 (1983-84).

237. See Note, *The Sexually Abused Infant Hearsay Exception: A Constitutional Analysis*, 8 J. Juv. L. 59, 61 (1984). This author argues that sexually abused child exceptions do pass constitutional muster. *Id.* at 68-73.

238. See Comment, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1766 (1983).

239. Act of Sept. 25, 1984, ch. 1421, § 1, 1984 Cal. Stat. ____ (codified at CAL. EVID. CODE § 1228) (West Supp. 1985), providing for the admission of out-of-court statements concerning sexual abuse if (1) the child is under the age of 12, (2) the statement was included in a law enforcement or county welfare department report, (3) the statement was made prior to the defendant's confession, (4) circumstances indicate the reliability of the statements, (5) the minor child is found to be unavailable or *refuses to testify*, and (6) notice is given to the defendant. *Id.* (emphasis added) Furthermore, if the statement is found admissible it can only be used to corroborate the defendant's confession. *Id.* It appears that this statute does not require a literal finding of "unavailability"—the child's refusal to testify apparently is sufficient to invoke this statute.

240. Before a defendant's confession will be found admissible at trial in California, there must be some independent corroboration that the act charged occurred. *People v. Ramirez*, 91 Cal. App. 3d 132, 137, 153 Cal. Rptr. 789, 791 (1979) (the corpus delicti of a crime must be established independently of extrajudicial statements of defendant).

Rules of Evidence.²⁴¹ The need for a hearsay exception is great, especially when a child is found incompetent to testify. The most helpless victim of sexual abuse—those under five years of age—should have some means to accuse their molester in court; a hearsay exception could provide that means. A carefully worded statute can adequately provide for a defendant's right to confront his accuser.²⁴²

The prosecution, however, should not rely too heavily on hearsay statements from child witnesses when preparing sexual abuse cases for trial. A live witness is not only potentially more credible, but the hearsay statement is still only admissible as corroboration of the testimony. Thus, we must give priority to finding ways that adapt the courtroom process to the realities of a child's existence so that more children can testify credibly in court. Such oral testimony can potentially aid not only the prosecution, but also the defendant, who would have the opportunity to cross-examine his accuser.

4. Prior Sexual Acts

It is common in child molestation prosecutions to attempt to introduce evidence of a defendant's prior sexual acts. The main impetus behind these efforts is, once again, the lack of evidence available in many sexual abuse cases. This raises to new heights (1) efforts to find admissible corroborative evidence, and (2) efforts to cast shadows on the credibility of both the complainant and defendant. While testimony concerning prior sexual acts by a defendant is potentially admissible in California as either corroborative evidence or credibility evidence,²⁴³ courts in recent years have begun to limit the admissibility of such prejudicial evidence.

The California Evidence Code codifies the general rule in

241. See FED. R. EVID. 803(24); WIS. R. EVID. § 908.03(24) (1975). The Federal Rules permit the admission of hearsay evidence that does not fit under one of the regular exceptions if such statement (1) has circumstantial guarantees of trustworthiness, (2) is offered as evidence of a material fact, (3) is not cumulative, and (4) should be admissible "in the interest of justice." FED. R. EVID. 803(24).

242. See *supra* notes 237-38 and accompanying text.

243. See *People v. Thomas*, 20 Cal. 3d 457, 468, 573 P.2d 433, 439, 143 Cal. Rptr. 215, 221 (1978) (if evidence of similar, non-remote offenses were independently admissible as showing a common plan or scheme, then such evidence would also be admissible to support the witness' version of facts).

California that "evidence of a person's character or a trait of his character . . . is inadmissible when offered to prove his conduct on a specified occasion."²⁴⁴ The purposes of this exclusionary rule are threefold:

- (1) to avoid placing the accused in a position in which he must defend against uncharged offenses,
- (2) to guard against the probability that evidence of such uncharged acts would prejudice defendant in the minds of the jurors, and
- (3) to promote judicial efficiency by restricting proof of extraneous crimes.²⁴⁵

In short, a defendant should not be convicted because the prosecution can prove that he is a bad person.²⁴⁶ Hence, evidence of past sexual acts by a defendant is inadmissible if offered *solely* to prove a defendant's criminal disposition.²⁴⁷

However, evidence made inadmissible by Evidence Code section 1101(a) is potentially admissible under section 1101(b). This latter section provides that evidence of past wrongs may be admissible "when relevant to prove some fact . . . other than his disposition to commit such acts."²⁴⁸ Specifically mentioned as admissible are facts that indicate a motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident on the part of the defendant.²⁴⁹ The prosecution in child molestations and other sex crimes is often successful in admitting evidence that appears at first blush to be inadmissible as material to prove one of the above factors.²⁵⁰

244. CAL. EVID. CODE § 1101(a) (West 1966).

245. *People v. Thomas*, 20 Cal. 3d 457, 464, 573 P.2d 433, 436, 143 Cal. Rptr. 215, 218 (1978); *People v. Cramer*, 67 Cal. 2d 126, 129, 429 P.2d 582, 585, 60 Cal. Rptr. 230, 233 (1967). See also *McCORMICK*, *supra* note 79, at 188 (character evidence "laden with the dangerous baggage of prejudice, distraction, time consumption, and surprise").

246. *People v. Adamson*, 225 Cal. App. 2d 74, 79, 36 Cal. Rptr. 894, 898 (1964). See also 1 WIGMORE, EVIDENCE, § 194 (3d ed. 1940): "It may almost be said that it is because of this indubitable [r]elevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much." *Id.*, § 194, at 646.

247. *People v. Thompson*, 27 Cal. 3d 303, 317, 611 P.2d 883, 889, 165 Cal. Rptr. 289, 295 (1980) (inference of a criminal disposition may not be used to establish any link in the chain of logic connecting the uncharged offense with a material fact).

248. CAL. EVID. CODE § 1101(b) (West 1966).

249. *Id.*

250. See, e.g., *People v. Dunnahoo*, 152 Cal. App. 3d 561, 574, 199 Cal. Rptr. 796, 802 (1984) (evidence of uncharged offenses may constitute evidence of a lewd disposition or "intent" of the defendant towards particular individuals and therefore be admissible).

California courts have had great difficulty determining whether evidence of past wrongs is impermissible character evidence or permissible evidence relating to a material issue: "[t]he decided cases cannot be justified, distinguished, or rationalized with any degree of reason, consistency, or symmetry."²⁵¹ The California Supreme Court has in recent years attempted to end this confusion with several important decisions concerning the issue of admitting "other offense" evidence.

In *People v. Thomas*,²⁵² the court detailed four requirements that must be met before evidence of uncharged offenses can be admitted under section 1101(b). The prior offenses (1) must not be too remote in time, (2) must be similar to the offense(s) charged, (3) must have been committed on persons similar to the prosecuting witness, and (4) must possess a sufficiently high degree of common features with the charged offense(s).²⁵³ Although *Thomas* specifically involved the issue of a "plan," a similar analysis is appropriate when related issues such as "modus operandi,"²⁵⁴ "identity,"²⁵⁵ or "common scheme,"²⁵⁶ are

The list of potentially relevant fact issues in CAL. EVID. CODE § 1101(b) (West 1966) is not considered to be exclusive. See, e.g., *People v. Crume*, 61 Cal. App. 3d 803, 812, 132 Cal. Rptr. 577, 583 (1976) (evidence of past offenses admissible to show conduct inconsistent with the defendant's testimony on direct examination). See generally McCORMICK, *supra* note 79, at § 190.

251. JEFFERSON, CALIFORNIA EVIDENCE HANDBOOK, § 21.4, at 267 (1972). The California Supreme Court has admitted that their pronouncements in the area of "other crimes" has not been entirely consistent. See *People v. Tassel*, 36 Cal. 3d 77, 83, 679 P.2d 1, 4, 201 Cal. Rptr. 567, 570 (1984).

252. 20 Cal. 3d 457, 573 P.2d 433, 143 Cal. Rptr. 215 (1978).

253. *Id.* at 465, 573 P.2d at 437, 143 Cal. Rptr. at 219. The *Thomas* court rejected evidence that defendant had committed similar acts of molestation with another daughter because the incidents occurred 10-18 years in the past. "The fact that the defendant had molested one daughter a decade or more ago would not establish the fact that he had a continuing common plan or scheme to molest all of his daughters." *Id.* at 466, 573 P.2d at 437, 143 Cal. Rptr. at 219.

254. See, e.g., *People v. Barney*, 143 Cal. App. 3d 490, 496, 192 Cal. Rptr. 172, 176 (1983) (court found modus operandi when eight distinctive similarities between defendant's charged sexual conduct and his conduct on other occasions with complainant and other daughters).

255. See, e.g., *People v. Thornton*, 11 Cal. 3d 738, 758, 523 P.2d 267, 280, 114 Cal. Rptr. 467, 480 (1974), where evidence of past uncharged sex offenses were properly admitted to establish identity of defendant. The court held that the strength of the inference is evaluated by consideration of "the degree of distinctiveness of individual shared marks." *Id.* at 756, 523 P.2d at 279, 114 Cal. Rptr. at 479 (emphasis in original).

256. See, e.g., *People v. Haslouer*, 79 Cal. App. 3d 818, 826-27, 145 Cal. Rptr. 234, 238 (1978), where defendant's routine had become as distinctive as his signature. The defendant used his daughter as a procurer of young girls. When the girls arrived, they

involved.

In the years since the *Thomas* decision, the court has held that even if evidence of other crimes is relevant under an identity, intent, or common scheme theory, such evidence may still be excluded because of its inflammatory impact.²⁵⁷ Specifically, the court has required (1) that an issue must be *expressly in dispute* before evidence of past offenses may be heard by a jury,²⁵⁸ (2) that evidence not be cumulative with respect to other evidence,²⁵⁹ and (3) that the prejudicial effect of the evidence be weighed against the probative value, in light of all the circumstances.²⁶⁰

were undressed and placed in T-shirts while defendant put on a bath robe. Pornographic playing cards were then used as initiation to sexual activity. *Id.*

257. *People v. Alcala*, 36 Cal. 3d 604, 631, 685 P.2d 1126, 1141, 205 Cal. Rptr. 775, 790 (1984) (holding that all doubts concerning the connection between charged and uncharged offenses must be resolved in the accused's favor).

258. *People v. Thompson*, 27 Cal. 3d 303, 315, 611 P.2d 883, 888, 165 Cal. Rptr. 289, 294 (1980) (the fact that an accused had pleaded not guilty was not sufficient to place the elements of the crimes charged against him "in issue"). The "expressly in dispute" requirement was upheld in *People v. Tassel*, 36 Cal. 3d 77, 89, 679 P.2d 1, 8, 201 Cal. Rptr. 567, 574 (1984). The court held in *Tassel* that absent an issue of identity, "it is immaterial whether the modus operandi of the charged crime was similar to that of the uncharged offenses. While the People rely on the 'common plan or scheme' rationale for admissibility, under the circumstances that is merely a euphemism for 'disposition.'" *Id.* After *Tassel*, it must be questioned whether cases such as *People v. Haslouer*, 79 Cal. App. 3d 818, 145 Cal. Rptr. 234 (1978) are still good law because there doesn't appear to be a true "identity" issue involved in the latter case—the evidence was merely admitted under a "common scheme" analysis. *Id.* at 827-28, 145 Cal. Rptr. at 239-40. The "expressly in dispute" requirement also applies to cases involving the issue of intent. *See, e.g., People v. Willoughby*, 164 Cal. App. 3d 1054, 1063, 210 Cal. Rptr. 880, 886 (1985) (defendant categorically denied any sexual involvement with victim; therefore, intent was not an issue in case and evidence of prior wrongs with another child was inadmissible). In dicta, the *Willoughby* court went on to say that the proffered evidence may be admissible under an "identity" theory because the defendant had implied that he was not the molester through his denials of any lewd touching and the prosecution had the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator. *Id.* at 1064-65, 210 Cal. Rptr. at 887. The court went on to state that (1) the evidence of the prior offenses could not be deemed "cumulative" to the victim's testimony, and (2) that the charged and uncharged offenses contained "highly distinctive marks of similarity." *Id.* at 1065, 210 Cal. Rptr. at 887-88.

259. *People v. Guerrero*, 16 Cal. 3d 719, 724, 548 P.2d 366, 369, 129 Cal. Rptr. 166, 169 (1976).

260. *People v. Thompson*, 27 Cal. 3d 303, 318, 611 P.2d 883, 890, 165 Cal. Rptr. 289, 296 (1980). This requirement of weighing the prejudicial effect of relevant evidence is codified at CAL. EVID. CODE § 352 (West 1966). This statute states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the

As result of these rules, admitting past offense evidence as corroboration in child sexual abuse cases is quite difficult in California. This is particularly true where the prior incident(s) involved different children than the victim of the offense with which defendant is charged. In these situations, a pattern must be established that separates the defendant "from the substantial portion of the population of child molesters."²⁶¹ In essence, the defendant must use his "signature" when he commits acts of molestation before non-charged offenses will be admitted.

California courts have been more lax in allowing past offense evidence under a "lewd disposition" theory of intent.²⁶² These cases involve prior sex acts committed upon the complainant by the defendant, usually in the intimacy of family life.²⁶³ Such evidence tends to prove that the defendant acted to realize his own desires on the occasion of the charged offense "and is not dependent upon defendant's bad character or his disposition to do wrongful acts."²⁶⁴ As of this writing, there is no explicit requirement that the defendant's intent explicitly be in issue before evidence of past sex offenses *against the complainant* are admissible.²⁶⁵ However, use of the "lewd disposition"

jury." *Id.*

261. *People v. Alcala*, 36 Cal. 3d 604, 633, 685 P.2d 1126, 1142, 205 Cal. Rptr. 775, 791 (1984). The court's holding in *Alcala* that the evidence of the prior offenses must separate the defendant "from the substantial portion of the population of child molesters" portends much difficulty for the prosecution in getting before the jury the evidence of prior acts. This is because child molesters, as a group, tend to operate in a similar manner: inducing children to submit to sexual advances under circumstances where detection is unlikely. Clearly establishing one molester's "modus operandi" as being separate from that of other child molesters will not be easy, even assuming that a material issue such as identity or intent is actually in dispute at trial.

262. The use of the term "lewd disposition" is common but unfortunate in that it implies that the evidence is being admitted solely to show defendant's bad character, which is expressly prohibited under CAL. EVID. CODE § 1101(a) (West 1966). In reality, "lewd disposition" represents the issue of "intent," which must be proved under a prosecution for "lewd or lascivious" conduct. See CAL. PENAL CODE § 288 (West Supp. 1985). See also *infra* note 263 and accompanying text.

263. See, e.g., *People v. Sylvia*, 54 Cal. 2d 115, 119-20, 351 P.2d 781, 785, 4 Cal. Rptr. 509, 513 (1960) (evidence that defendant had committed previous sex act with twelve-year-old complainant was admissible); *People v. Dunnahoo*, 152 Cal. App. 3d 561, 574, 199 Cal. Rptr. 796, 802-03 (1984) (evidence of a lewd disposition or the intent of defendant towards children with whom he lived was admissible); *People v. Barney*, 143 Cal. App. 3d 490, 494, 192 Cal. Rptr. 172, 175 (1983) (when uncharged offenses indicate the emotion of sexual passion towards daughter and granddaughter, usual exclusion of past offenses was inapplicable).

264. *Id.* at 494, 192 Cal. Rptr. at 175.

265. See *People v. Moon*, 165 Cal. App. 3d 1074, 212 Cal. Rptr. 101 (1985). The

theory of relevancy is limited by the requirement that a complainant's testimony concerning prior sexual activity be corroborated before it is admitted.²⁶⁶ While corroboration of recent sex offenses is difficult enough, corroborating past sexual acts to show a lustful disposition towards a complainant will often be impossible.

While the issues enumerated in section 1101(b) are not considered to be exclusive,²⁶⁷ it has been held that the issue of a complainant's credibility does not, in itself, warrant the admission of past offenses by the defendant.²⁶⁸ Rather, evidence of past offenses corroborates credibility *only if* one of the issues listed in section 1101(b) is material to the case.²⁶⁹ Many other states are more lax in admitting evidence of past acts to corroborate a complainant,²⁷⁰ but California courts have taken the position that to permit the introduction of all prior sex offenses on the issue of credibility "would absorb the general rule of exclusion in its entirety."²⁷¹

California common law recognizes two other situations where evidence of past sexual acts by the defendant may be admissible at trial. First, if the defendant testifies and denies any sexual contact with children, case authority permits the introduction of evidence detailing defendant's past sexual activity

Moon court cited favorably to *Sylvia*, *Barney* and *Dunnahoo*, (*see supra* note 263), while approving of the trial court's decision to allow testimony by the complainants of past sexual acts committed by defendant to be admitted notwithstanding the fact that the defendant's intent was not in issue. *Moon*, 165 Cal. App. 3d at 1079, 212 Cal. Rptr. at 103-04. The court distinguished past cases that require that an issue such as intent must be expressly in dispute before evidence of past wrongs will be admitted, (*see supra* note 258 and accompanying text), by stating that these cases pertained only to prior offenses committed against other individuals—not against the same victim. *Id.* at 1081, 212 Cal. Rptr. at 105. The court concluded that "absent express guidance from the Supreme Court, we cannot conclude that it has impliedly overruled *People v. Sylvia* and its progeny." *Moon*, 165 Cal. App. 3d at 1081, 212 Cal. Rptr. at 105 (citation omitted).

266. *See People v. Stanley*, 67 Cal. 2d 812, 817, 433 P.2d 913, 916, 63 Cal. Rptr. 825, 828 (1967). The uncorroborated testimony of complainant regarding past acts "add[s] nothing to the prosecution's case . . . [and] involves a substantial danger of prejudice to defendant." *Id.* at 819, 433 P.2d at 917, 63 Cal. Rptr. at 829.

267. *See supra* note 250.

268. *See supra* notes 114-15 and accompanying text.

269. *People v. Thomas*, 20 Cal. 3d 457, 468-69, 573 P.2d 433, 439, 143 Cal. Rptr. 215, 221 (1978).

270. *See generally* 1A WIGMORE, EVIDENCE, § 62.2 (Tillers rev. 1983).

271. *People v. Thomas*, 20 Cal. 3d 457, 468-69, 573 P.2d 433, 439, 143 Cal. Rptr. 215, 221 (1978).

with children.²⁷² This evidence shows conduct inconsistent with the defendant's testimony on direct examination.²⁷³

A second instance in which evidence of prior acts may be admissible involves rehabilitating the complainant after impeachment by inconsistent statements. One court held²⁷⁴ that because the People should be allowed to explain such inconsistent statements, if the explanation concerns prior sex acts between complainant and defendant, evidence concerning the prior sex acts should be heard by the jury.²⁷⁵ Although the application of this section is obviously limited, it does illustrate the potential pitfalls that defense counsel faces when she attempts to impeach complaining witnesses in child molestation prosecutions.

Proposals have been made to liberalize the rules concerning the admission of evidence of past sexual misconduct by a defendant charged with child molestation.²⁷⁶ This would undoubtedly increase the conviction rate in sexual abuse prosecutions, but at what price? The rules in California concerning evidence of past offenses have developed over many years and do afford the prosecution the opportunity to use such evidence when it is relevant to an issue in dispute. Granted, finding evidence to support con-

272. *People v. Crume*, 61 Cal. App. 3d 803, 812-13, 132 Cal. Rptr. 577, 582-83 (1976). Furthermore, the *Crume* court held that evidence of past offenses admitted to impeach the credibility of the *defendant* need not be corroborated even if given by complainant because the rule requiring corroboration of past offenses (*see supra* note 266 and accompanying text) is applicable only to instances where the evidence is offered to support the credibility of the *complainant*. *Id.* at 813, 132 Cal. Rptr. at 583.

273. *Id.*

274. *People v. Belasco*, 125 Cal. App. 3d 974, 178 Cal. Rptr. 461 (1981).

275. *Id.* at 981-82, 178 Cal. Rptr. at 464. The reported opinion does not detail exactly how the inconsistent statements were "inextricably wound up" with the previous sex act, but it is not uncommon for victims of sexual abuse to make inconsistent statements because of a fear of reprisal or a fear of breaking up the family. This assumes that a child overcomes any initial fear to report the incident in the first place. *See supra* note 132 for discussion on why child may delay reporting an incident of abuse.

276. *See, e.g., J. BULKLEY, supra* note 161, at 5-6. This study proposes that:

Courts should have the discretion to admit evidence of prior sexual acts between the offending parent and child to show either: (1) a depraved or lustful disposition of the parent; or (2) a plan, scheme, motive, or modus operandi. Evidence of sexual acts by the offending parent with other children also should be admissible to show plan, scheme, design, motive, or modus operandi.

Id. This proposal would liberalize considerably current California common law, which requires that a material issue such as intent or identity must be present before evidence of a scheme or plan would gain relevancy. *See supra* note 258.

victions is difficult in child sexual prosecutions, but defending against such charges is equally as difficult, especially with the current increase in media coverage of child sexual abuse cases. With the tremendous increase in reported child sexual abuse cases, prosecutions for child molesting will undoubtedly go up as well. It may prove to be deceptively easy to round up people with past records of sex offenses and obtain convictions based on these records. Innocent men (and women) could be convicted in the hysteria unless such prejudicial evidence is excluded.

IV. CONCLUSION

It is a physiological and psychological fact that children are susceptible people and may be exploited sexually. It is also a fact that there are tens of thousands of adults in this country who act upon their desires to have sex with children. With these facts in mind, it is not that difficult to comprehend why this country faces a problem of epidemic proportions—the sexual victimization of its youth.

As detailed in this Comment, California courts and the state legislature have begun to address the numerous problems that a child faces when he or she becomes entwined in the web of the criminal justice system. While testifying in a court proceeding enervates most adult victims of crime, the effects on a child victim are undoubtedly more severe, especially when their testimony details sexual activity with an adult. The proper focus in the years to come should be on considering the needs of the child sexual abuse victim and adapting the criminal justice system to these needs. Studies need to be funded in the area of child development to help courts and juries more fully understand how children react to both the sexual abuse and the criminal justice process. Potentially, such studies will lead to a greater development in the use of expert testimony at child molestation trials.

In addition, a hearsay exception specifically covering statements made by sexual abuse victims appears to be justified. The reliability and trustworthiness of such statements is at least as high as in the numerous other hearsay exceptions that have been developed over the years, and a judge may still refuse to admit such statements if the particular facts surrounding their disclosure are suspicious. Through a carefully worded hearsay excep-

tion, a child could still “accuse” her molester even if she were found incompetent to testify.

Finally, while the true extent of child sexual abuse in this country is just becoming apparent, child sexual abuse cases have been tried in California and other states for over one hundred years. The law that has developed over these years should not be discarded wholesale in an attempt to convict child molesters. This is especially true in the area of “past offense” evidence which if introduced before a jury virtually assures the conviction of a defendant. Prosecutors should direct their attention to obtaining evidence concerning the sexual abuse incident with which the defendant is currently charged. In this regard, the medical profession needs to standardize procedures for obtaining evidence of sexual abuse. Reliance on this type of evidence is preferable to the highly prejudicial evidence of past offenses. With sexual abuse cases likely filling up future court dockets (and newspaper headlines), it could prove fatally simple to convict defendants because of their reputation—and not on the evidence.

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