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**Review: Law & Order: SVU Episode, 1518, Downloaded Child**

By Joan Akalaonu

True to its reputation for storylines ripped from the headlines, the show Law & Order: Special Victims Unit’s episode *Downloaded Child* was largely based on the story of a young woman known as “Amy.” A victim of one of the “most widely distributed child pornography series in the world” as well as the victim in *Paroline v. United States*, a recently decided Supreme Court case on criminal restitution for victims of child pornography. Aired right before the Supreme Court gave its decision on the case, *Downloaded Child* brought further public attention to the devastating impact of child pornography on its victims and highlighted the benefits of the Mandatory Victims Restitution Statute, while also showcasing its limitations as it currently stands, particularly after the Paroline decision, in helping victims of child pornography.

The episode begins with Sergeant Bensen and her team of detectives rescuing a six-year-old girl, Maddie, who has been left alone in the apartment by her mother, Jenny. When questioning Jenny, the detectives quickly begin to suspect that Jenny is a victim of domestic violence and sexual exploitation. Bensen takes Jenny to be evaluated by her psychologist who says he thinks Jenny may have been sexually victimized as a child and shows signs of repressed trauma. To jog Jenny’s memory about her childhood, the detectives track down her mother, Tammy, and obtain photos from her. These photos were taken by Jenny’s stepfather and contain images of her around the age of six, dressed in a bikini and striking sexualized poses.

Disturbed by the content of the photos, the detectives reach out to a Federal Bureau of Investigation (“F.B.I.”) special agent who works for the National Center for Missing and Exploited Children. The agent recognizes the photos of Jenny immediately and states that these images have been named “Lacey Unknown” and that there are thousands of photos and videos of Jenny, as a child, being tied up, raped, and sodomized by her stepfather. The agent informs them that despite the fact that there are hundreds of men in prison for downloading her images, there are even more still out there worldwide, who continue every day to download, distribute, and collect her images on the internet.

District Attorney (“DA”) Raban suggests that there may be a possibility of restitution for Jenny if she is able to first identify herself as “Lacey Unknown.” Once satisfied that Jenny has identified herself as Lacey Unknown, the DA later explains to the detectives how he plans to use Mandatory Victims Restitution Statute in the Violence Against Women Act to go after men who have been convicted for possessing images of Jenny’s abuse. He explains that the statute mandates convicted sexual abusers to pay restitution to their victims and that those who possessed Jenny’s images are also guilty of her abuse. He also explains that legally, Jenny could receive restitution for medical costs, therapy, lost wages, and even foregone future earnings.

The detectives meet with Jenny to inform her of the DA’s plan to seek restitution. After hearing that her stepfather shared the videos and photos of her abuse online, Jenny becomes so visibly upset and paranoid that she must be hospitalized. A week later, when the detectives check in on Jenny, they tell her of an upcoming sentencing hearing for a
defendant convicted of possessing child pornography, including images of Jenny. Jenny insists on attending the hearing, and afterwards, the detectives inform her that because of her appearance and powerful statement, the defendant apologized and agreed to give her twenty thousand dollars in restitution. While glad for this victory, Jenny becomes distressed and discouraged when she learns that she will have to pursue each defendant for restitution for all her losses.

Soon thereafter, the DA meets with the detectives to inform them that he has identified another defendant who possessed Jenny’s images and that this defendant is a Chief Executive Officer worth twenty million dollars. The DA states that the statute is written in such a way that an offender could be mandated to pay the victim for all her losses. A forensic team has estimated Jenny’s losses to be around four million dollars; the DA argues that he will go after this wealthy defendant for it all through joint and several liability, leaving it then on the defendant, rather than Jenny, to go after the rest of Jenny’s online abusers for the rest of the money. The DA meets with this defendant and his attorney and convinces him to pay the full restitution amount for a lesser charge and less prison time. The episode concludes with the detectives talking with Jenny, who is astonished and grateful to have gotten all the money from one man and happy to now be reunited with Maddie who has been placed back in her care.

The conclusion of Downloaded Child incorporated the legal theory that Amy’s counsel actually put forth in Paroline: (1) that every defendant convicted of child pornography should be held jointly and severally liable for the full amount of the victim’s losses, and (2) that the burden of collection should be shifted from the innocent victim to the guilty defendants by allowing defendants to seek contribution from other defendants. In reality, the Supreme Court, in a split decision, held the opposite, rejecting Amy’s legal theory and instead holding that a criminal defendant must pay restitution only in the amount that coincides with the “the defendant’s relative role in the causal process that underlies the victim’s general losses.”

Throughout the episode, Downloaded Child highlighted the often life-long, damaging psycho-social and emotional effects that child pornography can have on the lives of its victims. When being questioned by the police, Jenny demonstrates hypervigilance and distorted thinking about social and sexual interactions, normalizing the abuse she received from her stepfather; she discloses engaging in high-risk behaviors as a teenager—drugs, alcohol, and forced sexual experiences with an older “boyfriend.” Throughout the episode, Jenny has flashbacks, dissociates, or attempts to block out memories of her abuse. The detectives at one point say that Jenny shows symptoms of Post-traumatic Stress Disorder (“PTSD”). These symptoms are only compounded when Jenny learns that her abuse has been recorded, shared, and viewed repeatedly online. Jenny displays shock and shame as she exclaims, “everywhere I go, men on the bus, on the street, they’ve all seen me like Lacey.”

Jenny’s history and symptoms not only mirror those of Amy, who herself was diagnosed with depression and PTSD, dropped out of college, and became involved in a domestic violence relationship, but also those of many victims of child pornography. Victims of child pornography tend to experience a higher risk for depression, guilt, anger, withdrawal, hypervigilance, delinquency, substance abuse, PTSD, and other
psychological disorders than even child sex abuse victims whose abuse was not recorded and shared. They also tend to have a greater difficulty forming healthy relationships with others. The psycho-social and emotional harm suffered by victims of child pornography is exacerbated by the powerlessness that they experience from knowing that images of their abuse continue to be viewed online. Their abuse is ongoing. The Supreme Court in Paroline even recognized these undeniable harms when they noted that “every viewing of child pornography is a repetition of the victim’s abuse.”

Downloaded Child also showcased some of the benefits of utilizing the Mandatory Victims Restitution Statute for victims of child pornography. One of the prime benefits has been in helping victims, who often struggle to pay for services, access the resources they need to recover and try to live a regular life. In this episode, Jenny is hospitalized after learning that her images of her abuse are being viewed online. She tells the police how her Medicaid will not let her stay in the treatment facility for much longer, and she has no means to pay rent to support herself and Maddie who still remains in foster care. The detectives inform her that seeking restitution from those convicted of possessing her images could help her to pay for treatment, housing, and childcare, and indeed by the end of the episode, after receiving restitution, Jenny is able to get Maddie back and pay for their care and for continued counseling and medication. Much like Jenny, over the last several years, many victims of child pornography have increasingly sought to utilize this federal statute to obtain restitution to help “put their lives back together” and as one victim put it to receive “the help we desperately need to heal.” Amy, whom Jenny’s character is based on, has used restitution to pay for therapy, transportation, bills, and “just to try to create some kind of normal life” in the midst of the ongoing abuse she suffers from images of her abuse continually being viewed and shared online.

Another benefit to using the Mandatory Victims Restitution Statute, illustrated in Downloaded Child, is that it confronts the misconception that possession of child pornography is a victimless crime. In the episode, rather than writing a victim impact statement, Jenny insists on attending and making a statement at the sentencing hearing of a defendant who possessed her images. At the hearing, she looks the defendant in the eye as she states, “Look at me. I want you to see how what you enjoyed watching has ruined my life. . . . You told the judge that what you did didn’t hurt anyone, I want you to know that it did. I want you to see that I am a person.” This powerful portrayal of Jenny confronting this defendant is on point with what actually took place when Amy appeared at the sentencing hearing of Alan Hesketh, a prominent defendant found with one of her images. Amy also wanted to face her fear and make a point to Hesketh, who, through his attorney, argued that he had a committed a victimless crime. This is a common defense put forth by those convicted of possessing child pornography and one that the courts have emphatically rejected. In United States v. Norris, the Court reasoned that a child’s victimization does not end when the pornographer’s camera is put away, that consumers of child pornography contribute to the victimization of the child, invading the child’s privacy, and also promoting the continued creation and distribution of child pornography. And in Paroline, the Court noted that one of the reasons necessitating mandatory
restitution for possession of child pornography was to “impress upon offenders that their conduct produces concrete and devastating harms for real, identifiable victims.”

Despite these benefits, the episode also points out the limitations of the Mandatory Victims Restitution Statute to meaningfully and effectively help those victimized by child pornography recover and heal. In the episode, Sergeant Bensen points out that one of the drawbacks is that in pursuing restitution, Jenny would have to keep finding out about the men who are watching her get raped and abused online. When the detectives explain to Jenny that the F.B.I. are required to notify her of each individual arrest of those found with her images, Jenny asks incredulously how many there are and is taken into a room filled with over seven hundred notification letters. After the police tell her that she will have to pursue each defendant for restitution for her losses, Jenny with a look of distress, sobs “every time . . . so I’m gonna be dealing with this for the rest of my life. . . . I can’t. I just can’t do it. I just can’t.”

This portrayal of the restitution process, as it currently stands, and Jenny’s reaction to it, highlights a major limitation and drawback to the Mandatory Victims Restitution Statute. With victims being held responsible for pursuing each defendant to obtain the full amount of their losses, they are often, as Chief Justice Roberts, Scalia, and Thomas note in their dissent in Paroline, “stuck litigating for years to come” obtaining at best “piecemeal restitution” and “trivial restitution orders.” Most restitution amounts are small, Amy herself at times received amounts of just a hundred dollars and sometimes nothing at all. With the burden, post-Paroline, remaining on victims to collect restitution from each defendant, victims must continue to go through the “immense amount of time and work investment . . . without any promise of closure” including receiving notifications, often “multiple court notifications each week informing them that their images have been recovered from child pornography offenders.”

Years of litigation and notifications are triggering physical reminders to victims that their victimization is ongoing as their images continue to be viewed online. While the notification system was designed to help victims track and pursue offenders, it can also have the unintended effect of re-victimizing the victim by reminding them of the continual circulation of the images of their abuse and so compound the psycho-social and emotional harms that the victims are already suffering through. A young woman, “Vicky,” who like Amy, was also a victim of child pornography, put it best when she stated,

With each case in which the victim seeks restitution . . . there is an emotional cost just for being involved in the case. It brings up the painful reality of the victim’s situation of never-ending humiliation and puts it right in the victim’s face one again. . . . It leaves victims with the choice between not pursuing restitution to pay for the help we need or continuing to have this painful part of our lives in our face on a regular basis for several more years, if not decades. . . . I worry that the emotional toll may not be adequately compensated for in the end.
Ultimately, *Downloaded Child*, in its accurate portrayal of this issue involving child pornography, emphasizes the need to continue to develop more meaningful remedies for child pornography victims to access resources and receive services in a manner that does not contribute to their ongoing trauma. Two weeks after the Supreme Court’s decision in *Paroline*, The Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014 was introduced to Congress. Taking on board Justice Sotomayor’s advisement in her dissent in *Paroline*, the Act incorporates an aggregate causation standard that would allow a victim of child pornography to hold defendant possessors jointly and severally liable for the full amount of the victim’s losses or at least for significant amounts (in the thousands) based on charges for production, distribution, or possession. The Act would furthermore shift the burden from innocent victims onto the guilty defendants to identify and pursue other defendants to seek contribution. Hopefully, if this bill is made law, the ending Jenny experienced in *Downloaded Child* might actually become a reality for real life victims like Amy.

**Sources**


*Prepared Statement of Dr. Sharon Cooper, Adjunct Professor, Pediatrics, Univ. of N.C.-Chapel Hill Sch. of Med., to the Comm’n*, at 7 (Feb. 15, 2012).


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**Spotlight On:** Chicago Resources Aimed at the Intervention of Youth Gang Activity and Alternatives to Juvenile Delinquency

*By Thomas Goodwyn*

Chicago has long been known for its rampant gang activity. From Al Capone during the Prohibition Era to gang-controlled Cabrini Green to the hundreds of different gangs in present-day Chicago. The gangs have affected everyone affiliated with Chicago, particularly those who live in the neighborhoods where their presence is most prevalent. Children and adolescents growing up around gang violence become accustomed to the violence and often have come to think that it is a normal part of life. While the number of juvenile arrests has decreased from 31,931 in 2000 to 22,877 in 2012, it is unclear how many of those individuals were gang-affiliated. However, these statistics can give hope to and are rewarding for all activists trying to better the lives of the underserved youth in Chicago. Although there has been improvement, their fight is not close to being over.

Chicago mayor Rahm Emanuel launched the Safer Chicago Plan, which addresses the risk factors and root causes of youth violence. The Mayor’s Commission for a Safer Chicago (the “Commission”) involves over 130 staff members ranging from youth and their parents to community and faith leaders to practitioners and subject-matter experts. Their research has led to recommendations in five areas: youth employment, health and healing, creating restorative school communities, safety and justice, and safe spaces and activities. This article will briefly introduce and discuss each area of the Commission’s plan. Although this plan is specific to Chicago, all can learn from the Commission’s extensive research and recommendations and adapt the plan for different cities and communities across the country.

Keeping youth active outside of school has long been proved as a major deterrent and goal of activists for preventing the spread of gang influence on adolescents. Providing jobs not only takes young people off the streets and limits the amount of exposure to antagonizing older gang members, it also puts money in their pockets and prepares them for future employment. One Summer Chicago is a collaborative effort among city, county, state, and business and foundation communities and has provided 22,500 summer jobs for disadvantaged youth since 2011, leading to a drop of forty-three percent in violent crime arrests for all participants. The organization also provides mentoring and social-emotional learning aimed at teaching youth to understand and manage cognitive behaviors that may affect their employability. The Commission wants to continue building on the success of One Summer Chicago by offering year-round, diverse opportunities for more participants to give them the proper skills for further education or unsubsidized, private-sector employment.

For those that are too young to be employed or when employment opportunities are limited, the Commission has developed afterschool programs and activities as well as built, maintained, and improved safe, recreational facilities for all ages. The Commission has built, refurbished, and will continue to build and improve parks and playgrounds around the city. The goal is for no child to live further than a ten-minute walk from the nearest park or playground. The Commission has also expanded numerous different
programs that provide learning experiences for Chicago youth. The main goal is to provide fun activities for children and teenagers and ensure safe travel.

The Commission has also developed techniques to keep children and adolescents in school so that they can earn their high school diplomas. Through its “Restorative Practices” approach to discipline, the numbers of suspensions, referrals for expulsion, and in-school arrests have each dropped an average of thirty-five percent in the past three school years by reforming the student code of conduct. Some schools still have zero-tolerance policies, but Chicago Public Schools has updated its disciplinary policy to encourage individual schools to engage all parties in a discussion to help determine the root of the problem and a collective solution. Local colleges, including the University of Chicago, have piloted tutor programs where participants who were once failing math are now excelling, leading to a drop of sixty-seven percent in their misconduct rate. Programs like Becoming a Man and Working on Womanhood are leaders in non-academic interventions that work to strengthen participants’ social and emotional behavioral issues. Youth Guidance hosts and develops these gender-specific, weekly sessions for troubled teens by focusing on developing a specific skill through recreational activities, stories, role-playing and group exercises. Youth Guidance has seen arrests reduced and future graduation rates increased among participants. For dropouts, Chicago has created re-engagement centers and non-traditional learning environments to get these students back in school. The Commission plans to build on these successful programs to reach and engage more students in 2015.

Not only is the Commission striving to prevent the influence gangs have over Chicago youth, it also develops programs and devices to rehabilitate those affected by violence. Exposure to violence can cause cognitive and emotional impairments. Numerous organizations including Illinois Accountable Care Entities Response Collaborative, Illinois Childhood Trauma Coalition, Illinois Department of Child and Family Services, and Strengthening Chicago’s Youth, among others, have come together to educate teachers, parents, and others interested in how to detect and what to do when an adolescent is dealing with social and emotional impairments. The Commission plans to have healthcare providers incorporate these same procedures with their standard evaluations of young patients. Chicago has also received a federal grant to form and maintain an immediate homicide response unit that supports victims’ families and friends and facilitates ongoing services.

Chicago has made major changes to its juvenile delinquency procedures within the past ten years. Studies have found that therapeutic intervention involving counseling and skills training, as opposed to harsher punitive punishments, reduces youth recidivism. Through programs like the Juvenile Intervention Support Center and Restoring Individuals Through Supportive Environments, Chicago has seen its youth crime rate drop especially among juvenile delinquents. The Commission hopes and expects those numbers to decrease even more as juvenile diversion programs continue to reach more and more adolescents. Just this past year, Mayor Emanuel worked with the Illinois Congress to pass a statute requiring the Illinois State Police to automatically expunge all juvenile arrest records that were never formally charged on an annual basis. Over 15,000 arrested juveniles will have their 2014 arrest records expunged because of this new law.
This will help thousands of Chicago youth have a more-successful adulthood by not having these specific blemishes on their records that could have serious consequences for housing, financial aid, and college admissions.

While some call for a bigger police force and harsher penalties, the Commission has taken a holistic approach. Arresting and jailing those accused of crimes may be an immediate solution, whereas the organizations working together as part of the Commission’s plan have shown some short-term success, the true rewards have yet to materialize. Through education and addressing the roots of the crime problem such as cognitive issues, the goal is to have long-lasting effects for generations to come. As disadvantaged children of today have more opportunities to succeed than their parents did, they will be in better positions to take care of and be positive role models for their children. The Mayor’s Commission for a Safer Chicago has seen some short-term successes, and there is hope and promise that one day Chicago will be able to remove the stigma of being a dangerous place, and other communities and cities can model their plans off of Chicago’s successes and failures.

Sources


In the Courts: Sentencing Juvenile Offenders

By Hsin-Hsin Lee

Society generally perceives juvenile gang activities as “bad choices” on the part of the youth, and the youth are often punished as such in the juvenile justice systems. In fact, anti-gang initiatives such as California’s Street Terrorism Enforcement and Prevention Act attaches significant sentence enhancements that are applied without consideration of the offender’s age. However, as the courts began to recognize cognitive differences in children and adults, there is a potential future trend for U.S. courts to perceive youth involvement in gangs as a form of labor trafficking as opposed to bad decision-making on the part of the youth that deserves to be punished. This change will drastically alter juvenile court sentencing as juvenile gang members are perceived as “victims” instead of “perpetrators.” This view follows the judicial trend to sentence juveniles differently than adults because they are not fully emotionally developed, and as evidenced by the holdings in Graham v. Florida, Miller v. Alabama, People v. Gutierrez, People v. Cabellero, and People v. Com, it is readily apparent that juveniles involved in gangs require a different approach to sentencing.

In 2010, the U.S. Supreme Court recognized that mandatorily sentencing juveniles to life without parole is a violation of the “cruel and unusual punishment” clause of the Eight Amendment. In Graham v. Florida, the Court stated that juveniles must be afforded a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” The Court reasoned that a life-without-parole sentence imposed on youth who have committed non-homicide crimes is unconstitutional because it “improperly denies the juvenile offender a chance to demonstrate growth and maturity.” This holding acknowledged that juvenile offenders differ from their adult counterparts as juveniles are more likely to be “rehabilitated”; and further placed a ban that prohibits the state from sentencing a juvenile non-homicide offender to life without parole. Nonetheless, the state retains the option to sentence juvenile offenders to life with a possibility of parole.

In 2012, the Supreme Court reinforced the Graham decision in Miller v. Alabama by holding that states cannot impose mandatory life without parole sentences on juveniles. The Miller decision is important because of its focus on physiological and developmental differences that set juvenile offenders apart from adults. The Miller court recognized that children lack the life experience necessary to properly balance risk and reward, and are therefore more likely than adults to engage in high-risk behavior for short-term gains. In Miller, the Court summarized the factors that make juvenile offenders less culpable than adults as: (1) they are less able to assess risk; (2) they are more susceptible to outside influences; and (3) they do not have a fully-developed character.

These three concerns opined in Miller are very apt when applied to gang settings. Author and gang expert Dan Korem states that the most common explanation for youths’ choices to join dangerous street gangs is the failure of family and similar support mechanisms, which he calls the “missing protector factor.” Societal changes like rising divorce rates, increasing numbers of mothers in the workforce, and the failure of public
schools to properly educate youths “have posed challenges particularly for poor families, and also for racial and ethnic minorities.” Given this background, the gang context magnifies juveniles’ inability to accurately assess the riskiness of their behavior because the promise of acceptance as a gang member may cause juveniles to lower their moral standards. Secondly, the gang context magnifies the effects of juveniles’ susceptibility to negative influences. The Miller court noted that juveniles are highly susceptible to negative influences from their peers and family, similar to how joining a gang brings juveniles into an environment in which peers are more likely to be engaging in delinquent behaviors. Lastly, the Miller court noted that juvenile acts are less likely to be predictive of the offender’s future conduct, which remains true in gang settings as juveniles are often willing to terminate their gang participation for other types of peer groups.

In People v. Caballero, a juvenile defendant was convicted of three counts of willful, deliberate, and premeditated attempt of murder and inflicted great bodily injury upon one victim for the benefit of a criminal street gang. The Supreme Court of California concluded that a one hundred-year-to-life sentence imposed on a juvenile who was not convicted of a homicide contravenes Graham’s mandate against cruel and unusual punishment under the Eighth Amendment. The Caballero court reiterated that the state is not required to “guarantee eventual freedom to a juvenile convicted of a non-homicide offense.” Additionally, the Caballero court observed that Miller had extended Graham’s reasoning that juvenile homicide offenders should be given the opportunity to be rehabilitated, but refrained from extending Graham’s categorical ban on life without parole from non-homicide offenders to homicide offenders.

In People v. Gutierrez, the California Supreme Court held that juveniles who have been convicted of special circumstance murder could each be sentenced to receive a life sentence. The Gutierrez court outlined five factors from the Miller decision for a sentencing court in juvenile homicide cases: (1) a juvenile offender’s chronological age and his or her hallmark features; (2) the family and home environment that surrounds the juvenile; (3) the circumstances of the homicide offense; (4) whether the offender might have been charged and convicted of a lesser offense if not for incapacities associated with youth; and (5) the possibility of rehabilitation. Nonetheless, the court shall still evaluate whether each of the juveniles can be determined, at the time of sentencing, to be “irreparably corrupt beyond redemption, and thus unfit ever to reenter society, notwithstanding the ‘diminished culpability and greater prospects for reform’ that ordinarily distinguish juveniles from adults.” In sum, the Gutierrez court once again confirms that environmental and circumstantial factors must be considered when the sentence involves a minor. Consequently, courts are required to consider underlying reasons, such as the “missing protector factor,” for a juvenile’s gang involvement in evaluating the juvenile offender’s culpability.

In Commonwealth v. Batts, the Supreme Court of Pennsylvania recognized Miller’s holding that the imposition of a mandatory life-without-parole sentence on a minor offender was unconstitutional. The defendant admitted that he was inducted into a gang and he shot the victims because he thought it was the instruction of senior gang members. He also admitted that he was promoted to a higher ranking within the gang after the murder. The Batts court acknowledged that the U.S. Supreme Court did not
entirely foreclose the imposition of a life-without-parole sentence on a juvenile offender but quoted the Miller majority in stating that the occasion for such punishment would be “uncommon,” accounting for “how children are different, and how those differences counsel against irrevocably sentencing them to a life in prison.” The Pennsylvania court ultimately decided that the remedy for a constitutional violation was to remand for a new sentencing hearing at which the trial court could consider the factors detailed in Miller v. Alabama. In weighing these factors, the trial court retains the discretion to impose a life sentence either with or without parole. Ultimately, the Batts decision is instructive in demonstrating that although the courts have not completely banned life without parole as a sentencing option from juvenile homicide cases, the courts are vigilant in ensuring that all environmental and circumstantial factors are considered before a minor is barred from ever reentering society.

Since the U.S. Supreme Court’s recognition that youths and adults have physiological and developmental differences, an even greater emphasis is placed on the “possibility of rehabilitation” when the sentencing involves a minor. The repeatedly-outlined Miller sentencing factors is a primary example of how the courts would weigh the “missing protector factor” in evaluating a juvenile gang member’s culpability and possibility of redemption in a crime. Although recent cases have not made a statement on how juvenile gang membership affects sentencing, the courts have repeatedly emphasized sentencing factors that account for a juvenile offender’s environmental and circumstantial background. Nonetheless, Graham and Miller’s clarification that eventual freedom is not guaranteed for juvenile offenders illustrates that the court has not yet made the full shift to view the juvenile gang offenders as victims of labor trafficking. In spite of the state courts’ current stance, the fact that the Supreme Court has recognized that juvenile offenders are less culpable than adults is a hopeful sign that the courts will gradually perceive a minor’s involvement in gangs as labor trafficking rather than the minor’s bad decision-making skills.

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*By Mitchell Paglia*

The United Nations Convention on the Rights of the Child (“CRC”), adopted by the United Nations General Assembly on November 20, 1989, was created in order to better protect children from abuse and exploitation and to set out the measures each signing country must take in order to protect and promote the civil, political, economic, social, and cultural rights of all children. There is only one country that has not ratified the CRC: the United States. Even South Sudan, still in its infancy as it was founded on July 9, 2001, has ratified the CRC. So what excuse does the United States have? It is not as if there have not been plenty of opportunities to ratify the treaty. Indeed, the United States was a major contributing factor in the formation of the treaty under Presidents Ronald Reagan and George H.W. Bush. The United States even signed the CRC in 1995. However, neither Presidents Bill Clinton nor George W. Bush pushed for the CRC’s ratification. Nor did Barack Obama, who, during his 2008 presidential campaign, said of the CRC, “it is embarrassing that the [United States] is in the company of Somalia, a lawless land. If I became president, I will review this and other human rights treaties.” Somalia has since ratified the treaty, yet the United States still has not, and likely will not under the current congressional layout of a Republican-controlled House and Senate. There is a staunch domestic opposition to ratifying the treaty for a variety of reasons: it impedes states’ rights, it diverts resources from more important federal concerns, and it limits how parents can raise their own children. Ratification does not even appear to be a feasible option until we have a new president and most likely a new congressional layout as well, if that will even work.

Notwithstanding the reasoning as to why the CRC has not been ratified by the United States, as the CRC pertains to promoting the empowerment of children to testify in court along with the requisite protection to do so, it is not necessary that the United States ratify the CRC. There are various areas of American law that deal with children and the rights and responsibilities associated with them; subjects ranging from juvenile justice and the school-to-prison pipeline, maternity and paternity leave, education, poverty, and health are just a few that the CRC covers. Yet when it comes to the promotion of a child’s rights to communicate on behalf of their own interests, and protecting those rights after they have been the victim of or witness of a crime against them, the United States’ ratification of the CRC is not necessary. This article will very briefly recap the theoretical objectives that Articles 3 and 12 of the CRC’s aim at fulfilling. Then, this article will provide a brief overlay of the United States’ legal framework for protecting the rights of children to testify on behalf of their interests after they have witnessed or been victimized by a crime. This article will then compare the CRC to U.S. law and show that the United States has done much to fulfill the CRC and
that ratifying the CRC is not necessary to protect children’s rights to testify on their own behalf.

**The Interests Preserved Through the CRC**

The CRC “recognized the general disregard for the needs of child victims and witnesses and sought to remedy these shortcomings [by] addressing a child’s right to participation and the need for courts, administrative tribunals, and other . . . actors to take ‘the best interests of the child’ into consideration of their operations.” The CRC operates on the presumption that children should testify, whenever at all possible, according to the child’s individual capacities and ability to handle the situation, to the crimes they have experienced or witnessed. The CRC also recognizes the duty to protect the child from re-traumatization and other forms of physical or mental forms of harm.

Article 12 states that all countries who sign the CRC will allow a child who is capable of expressing their views freely on matters that affect the child to do so, and that the weight of the child’s expressions will be weighted in accordance with age and maturity. The child has the opportunity to be heard either directly or indirectly through a representative and to have their opinions taken into consideration when decision-makers pass judgment. These testimonies should occur whether the crime directly or indirectly affects the child. The reasons and methods behind promoting a child’s right to testify under the CRC are quite important. Permitting the child to testify recognizes the child’s humanity and ability to participate within society. Children can also come to terms with the crimes that they faced, presuming that they understand that they have that opportunity to do so and freely choose to do so without undue pressure or manipulation. Children should, therefore, be permitted to speak on their own behalf whenever possible or have a representative do so if it can be ensured that the representative is fully expressing the views and wishes of the child.

Article 3 of the CRC expresses the duty that countries have in protecting and promoting the “best interests of the child” and their well-being, while preventing the physical, mental, and emotional harms and trauma that may come from testifying in both direct and cross-examinations, facing the defendant and having a general lack of knowledge about the legal system. A “higher duty of care” is owed to children to make sure that they are afforded the same rights to testify as adults but also to ensure that they are protected from exposure to situations that are likely to be traumatic or harmful, while not providing so much protection as to inhibit opportunities to meaningfully testify. Conforming to this higher duty of care can include actions such as not interviewing children more than is necessary; ensuring that the condition that the child is testifying in will be one that makes the child feel respected, at ease and secure in a child-friendly environment and non-intimidating atmosphere; informing the child about the procedures and setting in which they will testify, including who will be participating; making sure that the child knows about the different health, psychological, and social services that are available; and, when possible, permitting the child to not be heard in open court, but rather under conditions of anonymity and informing the child to the conditions they will be testifying under. These measures taken in the interests of the child are critical regarding the child being able to make clear and informed decisions as to how they wish
to testify. All of these rights of the child must also be balanced by the right of the accused to receive a fair trial. The United States, while not having ratified the CRC, has nonetheless adopted the responsibilities that Articles 12 and 3 dictate and has preserved the balance between providing a defendant a fair trial and protecting the child victims.

The United States

In the United States, children are not “among the principal victims of war . . . are [not] brutally targeted [in war, and are not] killed, tortured, raped and abducted into armed groups to fight in adult wars where they may be forced to commit atrocities against their own families and friends.” Nonetheless, children within the United States still face maltreatment in the form of neglect, threats, being victims of or witnessing physical or sexual abuse, or witness parental drug or alcohol abuse. 18 U.S.C. § 3509 establishes child victims’ and child witnesses’ rights within the United States. The United States defines a child as any person who is under the age of eighteen and provides for the protection of children who are either the victims of or witness of a crime involving physical or sexual abuse or exploitation or was a witness to a crime committed against another person.

A child is presumed to be competent to testify, and only upon overwhelming evidence, age alone not being sufficient, will questions pertaining to the child’s competency to testify be accepted. Only the judge can ask those questions unless the judge is satisfied that the child will not experience emotional trauma. The types of questions permitted “shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child’s ability to understand and answer simple questions.” When the child does testify, the United States provides for a child to testify live by a two-way closed circuit television or videotaped deposition of the child, if it can be shown that the child is unable to testify because of fear; if there is a substantial likelihood, established through expert testimony, that the child would suffer emotional trauma; if the child suffers from some form of mental condition; or the defendant or his counsel causes the child to be unable to continue testifying. The judge of that child’s case also has the discretion to be able to question the child either within his chambers or “some other comfortable place other than the courtroom with the child’s attorney and other individuals who may help the child feel more comfortable in testifying. This video testimony will then be transmitted to the courtroom for the defendant and the jury to listen to along with an opportunity for the defendant to be able to communicate with his attorney throughout the taking of the testimony for Sixth Amendment purposes.

The United States has also provided means to ensure that the personnel present within the courtroom can help facilitate the testimony of the child. A court has discretion to exclude from the courtroom all people, including members of the press, who do not have a direct interest in the case. This order may be made if the court determines that testifying in open court would cause substantial psychological harm to the child or result in the child’s inability to communicate effectively. Such a finding must be made only after taking into account the victim’s age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.
Children are to have available to them multidisciplinary child abuse teams, members of a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to help coordinate the assistance needed to handle cases of child abuse. These teams will provide medical diagnoses and evaluations and related expert testimony, in-person and telephone consultations, psychological and psychiatric diagnoses, and training services for judges, litigators, court officers, and others who are involved in child victim and child witness cases so they may better handle these children. To represent the child’s best interests, guardian ad litems may be appointed whose purpose is to attend depositions, hearings, and trial proceedings in which the child participates in order to best make recommendations to the court concerning the welfare of the child and is also responsible for marshaling and directing the services and resources that the child may need.

Finally, a child is permitted to have an adult attendant who may accompany the child to provide emotional support. As long as the child is not being directed to answer the questions by the attendant, the attendant may hold the child’s hand or have the child sit in the attendant’s lap. The child may also use “anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.”

**Conclusion**

The preceding comparisons between Articles 3 and 12 of the CRC and the United States’ law, 18 U.S.C. § 3509, show striking similarities, and even the most dedicated and sincere proponents of the United States adopting the CRC must admit that for purposes of protecting child witnesses, the United States would not have many more legal remedies to provide in order to follow the obligations set forth within the CRC.

The presumed competency of a child to testify reflects the desirability of allowing in all relevant evidence within trials. Presuming that a child is competent to testify also reflects the recognition that the CRC makes that children are to be valued members of society and are sought after to contribute to the functioning of that society. Presuming competence also facilitates the child’s coming to terms with what happened to him or her and allows them to feel a sense of control in the outcome of the trial that either directly affects them as victims or indirectly as witnesses to a crime, all things that the CRC strongly promotes within Article 12. When a child is deemed competent to testify, then the child’s testimony as to what the child saw and experienced is deemed just as equal and as important as any adults. Furthermore, Article 12 encourages the use of representatives to speak on the behalf of the children and to articulate the child’s interests. This role of dedicated advocacy is precisely what the guardian ad litem role outlined in 18 U.S.C. § 3509 is designed to do. It is the guardian ad litem who helps push for the court to make a judgment at trial that is within the best interests of the child, and the best interests of the child are determined by the guardian ad litem who has built a rapport with the child through ascertaining and understanding the child’s needs and desires. The guardian ad litem helps the court understand what it was that the child either saw or experienced.

Permitting a child to testify against an individual who has hurt him or her and having that child feel comfortable in being able to do so are two separate, albeit related,
matters. The United States has demonstrated in § 3509 the type of protective measures that Article 3 promotes. Article 3 ensures that the child will feel physically, mentally, and emotionally safe and secure, and that he or she will feel enabled to testify against the defendant. The ability for children to be able to meet with the judge either within his or her chambers or elsewhere in an environment that is comfortable for a child echoes the encouragement from the CRC that a child feel respected, at ease, and secure in a non-intimidating atmosphere. This approach to the child feeling safe is also reflected in the widely-available use of two-way video testimony and video depositions. It is a well-recognized pattern within psychological literature that a child is often muted with fear and anxiety when presented with an abuser who has either personally hurt the child, or who is someone the child loves. Placing the child away from the defendant is another way in which the United States promotes the child victim’s mental wellbeing. The CRC also encourages letting the child be aware of and able to utilize the resources of psychological and health services that may help the child testify, a sentiment that reverberates within § 3509. A child in abuse cases is provided with state-sponsored multidisciplinary child abuse teams that guide the child step by step through the entire process of the litigation and act on the child’s behalf to navigate a world the child would be utterly helpless to navigate solo.

For purposes of empowering and protecting child witnesses, ratifying the CRC may be a symbolic statement, but one that is highly superficial, for if one goes beyond skimming the surface of the United States’ rejection of ratifying the CRC, they will find that in essence, we already have.

Sources

¹ The Sixth Amendment of the U.S. Constitution provides for all defendants to be able to face their accuser. The constitutional framework within the United States will not permit for a defendant’s Sixth Amendment right of confrontation to be abbreviated or circumscribed per se solely because of the discomfort of a child.
victim. Congress’s method of balancing the rights of the defendant and the sensitivities of the child is reflected in § 3509. Although there is some variation within the various jurisdictions of the fifty state legislatures, ninety-four federal judicial districts, and twelve federal judicial circuits within the United States, any nuances that are established within those respective jurisdictions are all based off of preceding rulings from the U.S. Supreme Court on the subject of children’s testimony and a defendant’s Sixth Amendment right to confrontation. The case that is the backbone for many of these discussions is *Maryland v. Craig*, 497 U.S. 836 (1990). For a more in-depth discussion of the interplay between these competing interests, the Gershman and Richard’s articles are strongly recommended, along with the CJS and Kletter legal encyclopedia entries.
Statistically Speaking: Questioning the Child Witness: What is the Best Way to Get Information from Victims of Sexual Abuse?

By Lauren Rygg

Each year, thousands of children are called upon to testify in the United States. They are called to testify as witnesses and victims. For children involved in litigation, the most stressful part of the process is the questioning, either in the courtroom or in the proceedings prior to the trial. Although there is the opportunity for both parties to stipulate to the child’s testimony, when children are the subject of the litigation, particularly in child abuse cases, children must testify in order to provide credibility to the prosecution’s case and fulfill the Sixth Amendment due process right of the defendant to face his accuser. Juries often need to see a complaining witness and hear their story. Further, in child abuse cases, sometimes the strongest evidence is the testimony of the child. This also means that children are subjected to the same level of questioning as adult witnesses. Litigation is often stressful and emotionally trying for adult witnesses, who are ostensibly better-equipped mentally and developmentally to handle the lines of questioning. The same cannot always be said for a child witness.

There have been numerous studies over the past twenty years that explore the benefits and the detriments to questioning children involved in litigation. Much of this surfaced as a result of an increase in reports of child abuse and neglect in the late eighties and early nineties. What concerned judges and attorneys at that time was the believability of a child’s testimony. Studies at that time had shown that the age of a child witness had an adverse effect on the jury, leading the jury to find the testimony of younger children less believable than that of their older counterparts. This result was disturbing because pre-school and early elementary-aged children were more likely to be abused.

Unfortunately, not much has changed in today’s courtrooms. Jurors still rely on visual cues from child witnesses, such as eye contact, facial expressions, and demeanor, in order to ascertain the believability of the child’s testimony. Depending on the perceptions of the jurors, this could be outcome-determinative for a case.

What becomes crucial at this point, in order to persuade the jury and present the case in its entirety, is the line of questioning. A recent study from California completed by Stacia N. Stolzenberg and Thomas D. Lyon explored the effect that questioning had on the testimony of child witnesses. Specifically, this study focused on the best way to obtain information from a child witness in a sexual abuse case. This study examined how attorneys question child witnesses in sexual abuse cases about their prior conversations with suspects and the disclosure recipient, or to whom the child reported the abuse.

For a child sexual abuse prosecution, the child’s testimony is normally the most important evidence. Very little research, however, has conducted in-depth analysis of the testimony in child sexual abuse cases. Typically, the research examines the types of questions used, with the results often concluding that the defense line of questioning is more confusing and more leading than the prosecutor’s line of questioning. From an experienced trial attorney’s perspective, these results would not be surprising because this is the norm for trial procedure and strategy: the prosecution asks open-ended questions of
their witness and the defense asks close-ended, leading questions meant to create doubt for the jury with respect to the credibility of the witness. The problem with this strategy is that children are more prone to suggestion and thus want to tell the questioner what the child believes the questioner wants to hear. Other countries, such as Australia and the United Kingdom, have done studies and created initiatives to bring awareness to and in hopes of avoiding this problem in order to protect and better utilize children as witnesses.

With respect to the efforts in the United States, the California study is the first to determine the veracity of sexual abuse allegations by examining how attorneys discuss children’s prior conversations about sexual abuse at trial. What this could mean for child witnesses is a way to achieve credibility beyond that of the jury’s perception of demeanor. Essentially, if the right questions are asked, a child would be able to better describe the events that occurred.

The goal of the prosecution’s questioning is to help the jury to envision how abuse occurred. It is also often to combat the misperception that force is necessary in all sexual abuse cases. Additionally, prosecutors focus on why the abuse was kept secret, as a jury can perceive the abuse as being fabricated due to the delay in disclosure. Child victims may be more reluctant to disclose because of the complex nature of child abuse, and how it is achieved. The process of grooming by the perpetrator, typically by gradual build-up to abuse through conversations and time spent with the child, also accounts for delays in disclosure. The research from the California study suggests that a prosecutor can illicit more information by asking the child witness what the suspect had said rather than what the suspect did. By inquiring into the nature of the conversations, the prosecutor will be better prepared to explain to the jury why the child delayed in disclosing, making the child witness’s testimony more credible and more effective.

Just as the prosecution has incentive to better question child witnesses, so does the defense. The defense’s goal is to demonstrate that the child has been coached or influenced to give a false report. This coaching can be achieved by caregivers who are suspicious that the child is being abused and in their suspicions, they ask suggestive questions. There is also concern when the suspect is an ex-spouse or ex-partner of a concerned adult that the concerned adult may be the true source of the child’s disclosure. Jurors may be aware that children are susceptible to suggestive questioning, but just how susceptible the child is may not be common knowledge.

The California study examined (1) the attorney question type and children’s response type, (2) the suspect’s conversations with children, specifically their commands during alleged abuse, seductive comments before alleged abuse, inducements to silence, threats to enforce secrecy, and children’s resistance, and (3) the children’s prior disclosure conversations, including questions about specific conversational partners, as well as attempts to coach children’s reports.

The results showed that the defense attorneys asked more leading questions in court than prosecutors, which was consistent with other studies and trial practice in general. However, both the defense and prosecuting attorneys asked questions that simply asked for a yes or no answer. By doing this, the attorneys were responsible for creating the details of the interactions. The study also showed that when prosecutors did ask open-ended questions, questions that began with, who, what, where, and how, the child witness
was more likely to elaborate and provide details. Prosecutors were more likely to ask about suspect statements than defense attorneys were, however, prosecutors asked more questions about commands rather than seductive statements, which are statements made by the abuser meant to encourage the child to engage in the abuse. Most literature about the dynamics of sexual abuse focuses more on the seductive statements as being the coercive element in the abuse rather than the commands. However, in the cases involved in the study, the command aspect was explored more in questioning. With respect to the child’s disclosure, both defense and prosecuting attorneys asked questions about disclosing, but the defense attorneys were more likely to ask about the details of specific disclosure events. In most of the cases examined, children were never directly asked if they had told the truth or lied. But prosecutors were more likely than defense to ask the child witnesses about why they disclosed or failed to disclose. In most cases though, neither attorney asked the child witnesses about their motives for disclosing or lack thereof.

There is still much to learn about the dynamics of child sexual abuse. But given these results, the study recommends that the best approach attorneys could take would be to use more of the “how” type questions to elicit information. In doing so, the child witness would provide elaborative responses that are not yes or no responses to the attorneys’ questions and thus provide more credibility in their testimony.

This could be the first step in making the testifying process easier and more reliable for child witnesses. Though there is still a sensitivity aspect that attorneys need to take into consideration in child sexual abuse cases, following this line of questioning could be more beneficial overall to each side.

Sources


U.S. CONST. amend. VI, § 2.

Around the World: Protecting Victims of Child Pornography in Japan

By Lauren P. Schroeder

The rise of the Internet and the digital age in the last few decades has significantly multiplied the growth of the child pornography market. Such advances have made the child pornography market one of the fastest growing businesses on the Internet. Further, the global nature of the Internet has made child pornography an international problem. For instance, a recent investigation into a child pornography ring led to the arrest of 350 persons across six continents and involved over fifty countries. The worldwide scope of child pornography and vast number of laws and legal systems involved can make the prosecution of offenders and recovery for victims difficult.

By 1990, it was illegal to possess child pornography throughout a large portion of the United States. In contrast, the possession of such material in Japan was legal until 2014. Across cultures, child pornography victims face severe psychological damage. This damage is intensified by the knowledge that images of their sexual abuse can be accessed online and possessed across the world indefinitely. Japan’s recent child pornography law is a welcome step, as Japan has long been criticized as a major production center of child pornography circulating around the world. Studies have shown that between 2011 and 2012, the number of child abuse victims in Japan jumped almost twenty percent. This indicates a need for tougher laws addressing child abuse, including the abuse of children through child pornography. Unfortunately, Japan’s new law fails to prohibit the possession of manga and anime, two popular forms of Japanese animated media, which can depict violent sexual abuse of children. Tolerating such images of child sexual abuse can harm children and lead to further psychological damage to victims of child pornography. This failure is not unique to Japan and will contribute to a significant problem in protecting victims of child pornography worldwide.

In Ashcroft v. Free Speech Coalition, the Supreme Court of the United States gave First Amendment protection to “virtual child pornography.” This child pornography was created through computer technology, without the use of real children, but still has the potential for devastating effects on victims of child pornography. The Supreme Court noted that pedophiles might use the materials to encourage or “groom” children to engage in sexual activity or might be encouraged by the virtual media to engage in the creation, distribution, and possession of child pornography involving real children. The Court reasoned that it is impossible to ban the idea of minors engaging in sexual activity, because doing so would ban materials beyond those imitating real child pornography, such as prominent films and famous books like Romeo & Juliet. Fortunately, the U.S. government followed the Ashcroft decision with legislation banning “obscene” virtual child pornography. This allows for courts to distinguish “hardcore” pornography that involves real or apparent minors from depictions of sexual activity with artistic value, such as Romeo & Juliet. Japan has made no such distinction and continues to protect animated child pornography.

Virtual child pornography, however, like that at issue in Ashcroft or in Japanese animation, still has the potential to severely harm children. Not only can it be used to
engage children in sexual activity, but it can be created by virtually editing images or likenesses of real children to make it look like they are engaging in sexual activity. This has the potential to create severe psychological damage to children who, even if not forced to engage in sexual activity for the purposes of producing child pornography, have to live with the knowledge that images of them doing so are accessible online and possessed across the world.

Further, Japan’s laws are criticized for not creating long-term care to assist children who have experienced sexual abuse. This assistance would help victims overcome the abuse and address the intensified suffering due to the presence of the abuse material on the Internet. The ability to access long-term care is essential for child pornography victims because healing is a lifelong process, amplified by the re-victimization faced by victims when their images are shared. Japan needs to further acknowledge the harm faced by victims by the continued possession of their images through instituting laws that provide victims with financial assistance and long-term care programs. While not perfect, the United States has created a legal framework to assist victims of child pornography in recovery. Through a mandatory restitution statute, civil remedies, crime victim funds, and other government benefits, child pornography victims in the United States have some recourse to obtain resources to support their recovery. However, in Japan, a major producer of child pornography, victims have no such recourse.

This failure puts Japan in violation of two major international conventions it has ratified, the United Nations Convention on the Rights of the Child (“CRC”) and the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography (“Optional Protocol”). The CRC requires that countries take appropriate measures to protect children from abuse and the Optional Protocol explicitly requires that signors provide restorative services to victims and allow victims to receive restitution from their offenders. Specifically, the Optional Protocol mandates that countries take all “feasible measures with the aim of ensuring all appropriate assistance to victims of [child pornography], including their full social reintegration and their full physical and psychological recovery.” Further, it requires signors to give victims access to seek compensation from those legally responsible. By not providing victims with recovery options, Japan fails in its obligations to protect children.

Until Japan passed its possession law in 2014, it was blatantly in violation of the Optional Protocol, as the Protocol requires all parties to take “appropriate measures aimed at effectively prohibiting the production and dissemination of [child pornography].” Legally banning the possession of child pornography was an essential step to moving towards compliance with its international obligations. Japan must now take further steps to clarify and affirm its commitment to protecting children. Specifically, Japan should enact laws that distinguish between appropriate Japanese anime and manga and that used to depict and perpetrate child pornography. The existence of such child pornography is harmful to victims in and of itself, but can also be used to induce children to engage in sexual activity. This allows for further production of child pornography. Additionally, as a world center for the production and distribution of child pornography, Japan must recognize the needs of victims and ensure they have access to
the services needed for recovery. By establishing crime victim funds and enacting laws that make it easy for victims to obtain restitution, Japan will begin to be seen by the world as a partner in the fight against child pornography and not a villain.

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