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The experience of the child witness: Legal and psychological issues

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ABSTRACT

The increasing presence of child witnesses in the courtroom has brought with it a host of challenges and dilemmas. Related concerns include whether children may be deemed incompetent solely because of their age, whether their testimony is reliable and accurate in light of their allegedly suggestible nature, and whether the experience of testifying may re-traumatize witnesses who are also victims. A growing body of multidisciplinary research continues to address the legal and clinical implications of permitting children to testify in open court. Numerous guidelines have been promulgated that contain recommendations for protecting children's best interests as they journey through the criminal justice system. Related courtroom procedures vary greatly among American jurisdictions, and innovations in other countries—for example, the United Kingdom's Youth Justice and Criminal Evidence Act of 1999, and similar legislation in Israel and in Norway—have introduced a range of alternative measures that can be employed with young witnesses, depending primarily on whether the child witness is ultimately deemed either "vulnerable" or "intimidated." This article incorporates legal and psychological studies—from geographically diverse perspectives—that focus upon the courtroom experiences of child witnesses in criminal proceedings, including determinations of testimonial capacity and other matters unique to this population.

1. Introduction

The notorious, hysteria-inducing preschool molestation scandals of the 1980s and 1990s[1] gave the 'child as witness' both a front-page spotlight and increased attention as the subject of empirical and intervention research (Raeder, 2010). Unfortunately, several of these headline cases (*Buckey v. County of Los Angeles*; *State v. Michaels*) became textbook examples of how leading questions and persuasive interview techniques can lead children to produce inaccurate and even fabricated accounts. The increasing presence of young witnesses in the courtroom has brought with it a host of challenges and dilemmas that are not typical of most adult witnesses. Concerns include whether children are incompetent solely because of their age, whether their testimony is reliable and accurate because of their highly suggestible nature, and whether the experience of testifying will re-traumatize child witnesses who are also victims.

There is a growing body of multidisciplinary research that continues to address the legal and clinical implications of permitting children to testify in open court, particularly with respect to the possibility of exacerbating the trauma and psychological harm the child may have already incurred (Goodman et al., 1992; Martin, 1992; Whitcomb, 2003). The majority of research indicates that testifying[2] usually does not significantly harm or revictimize children—particularly with the increasing use of several modern innovations or alternative witness procedures that can lower the child's anxiety and ensure better witness competency (Cashmore, 2002; Goodman et al., 1992; Myers, 1992; Raeder, 2010).

Numerous guidelines have been promulgated—from organizations and government bodies such as the ABA (ABA, 2002), the National Conference of Commissioners on Uniform State Laws, in the form of the Uniform Child Witness Testimony by Alternative Method Act or UCWTBAMA (Uniform Child, 2002), and the Administration for Children and Families, within the U.S. Department of Health and Human Services (Jones,

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[1] For example, the McMartin Preschool case (*Buckey v. County of Los Angeles*, Cal. 1992)) in California (1983–1990) was one of the longest trials (thirty months) in U.S. criminal history and involved nearly 400 children, 7 initial defendants, and 321 indictments alleging sexual abuse, satanic rituals, and animal and human sacrifice. After dropping charges against five defendants, the case against Raymond and Peggy Buckey proceeded to trial. The jury returned a verdict of not guilty on 52 counts, but deadlocked on 13; several jurors asserted that this was primarily due to the way in which the children were coaxed into making incriminating statements (Reinhold, 1990). The case of Margaret Kelly Michaels (*State v. Michaels*, 1994) involved a young New Jersey teacher who was convicted of 115 counts of sexual abuse against 20 children and sentenced to 47 years in prison (Nieves, 1994). However, after spending five years in jail, Michaels' case was overturned on appeal due to "major" prosecutorial errors, including "improper questioning by State investigators [which] had irremediably compromised the reliability of [the children's] testimonial evidence" (*State v. Michaels*, p. 303).

[2] It is important to note that while most researchers agree that testifying once is not likely to be permanently scarring, children who testified multiple times were much more likely to experience emotional problems later. The Goodman et al. (1992) study found a clear difference between children who had testified once (or not testified at all) and children who had testified on several occasions. Quas et al. (2005) conducted a follow-up to the Goodman et al. (1992) study and found that testifying multiple times predicted negative long-term problems.

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2006)—which contain recommendations for protecting children's best interests as they journey through the legal system and face their abusers. However, related courtroom procedures vary greatly among American jurisdictions, as individual judges are often given much discretion regarding the use (or non-use) of alternative witness procedures (such as the use of closed-circuit TV or physical barrier between the child and the defendant) and the establishment of a child's competency (Feller, Davidson, Hardin, & Horowitz, 1992; Stefanuca, 2005).

Innovations in other countries have introduced a range of measures that have been employed with young witnesses to crime. The Youth Justice and Criminal Evidence Act of 1999 sets forth criteria for witness competence in England and Wales, asserting that competence relies upon whether the child is deemed "vulnerable" and "intimidated" (Crown Prosecution Service, 2014). Other countries, such as Israel, have instituted the use of intermediaries, or specialists in child interrogation, who conduct the interviews and determine how or if the child may participate in proceedings (Henderson, 2010). In Norway, a child provides evidence on only one occasion during a pre-trial deposition which ideally occurs within two weeks of the crime. These depositions are overseen by a judge, but are conducted by specialists in child interviewing (Henderson, 2010).

This paper examines current research on the child's experience in the criminal courtroom,[3] focusing on competence and other obstacles unique to children and the alternative procedures that have been implemented in attempts to overcome the limitations of the child witness. It explores how landmark U.S. Supreme Court decisions involving the Sixth Amendment's Confrontation Clause have changed the child witness experience in the U.S. It compares U.S. practices to the different methods implemented in other countries, and identifies the most effective measures.

It then proposes that, in spite of possible complications of abused children testifying, it is vital that they continue to do so—not only for the administration of justice, but because it has the potential to right some of the wrongs done to their development. It incorporates a discussion of moral development—the process by which children acquire notions of right and wrong in their environment. It also reviews prominent research demonstrating the damage that maltreatment can have on a child's development of moral reasoning skills. In so doing, I propose that children should be encouraged to testify if they are able, as it affords them the opportunity to regain control, offers a sense of empowerment, and provides a feeling of retribution against the abuser. If the child's experience from allegation to adjudication is handled properly and sensitively, the child can benefit from testifying.

2. Concerns about child testimony

2.1. Statistics, or lack thereof

Despite the mounting interest in the child's experience as a testifying witness, there seems to be only a rough estimate regarding the number of children who actually serve as witnesses each year. Child testimony expert Stephen Ceci used data from New York state to approximate that nearly 100,000 children testify every year in some type of court proceeding, though this estimate was generated in 1993 (Ceci & de Bruyn, 1993). The National Office of the Court Appointed Special Advocates (CASA) asserted that this estimate remained about the same in 2012 (CASA, 2012).

The majority of children become involved with the legal system—in both the U.S. and other countries—because they have been victims of some form of maltreatment (McWilliams et al., 2014). In 2010, nearly 6 million children were referred to child protective agencies across the U.S. due to alleged maltreatment (Children's Bureau, 2011[4]). However, 78% of maltreatment cases involved neglected children, and these cases typically do not require children to testify in court.

2.2. Child witnesses in an adult criminal justice system

While all involved undoubtedly wish to prevent additional harm to child victim–witnesses, it is important to bear in mind that the primary goal and function of the criminal justice system is to determine whether a defendant is guilty. In seeking to achieve that goal, the central purpose of witnesses is to obtain the accurate, relevant information needed to reach the truth of the matter. The safeguarding of child witnesses' welfare must play a secondary—though not entirely insignificant—role.

However, the goals—seeking justice and protecting witnesses—are interrelated: studies have shown that anxiety caused by face-to-face confrontation with an alleged abuser and the adversarial nature of cross-examination can significantly interfere with the child's memory and capability to accurately and effectively testify (Goodman et al., 1992; Saywitz & Nathanson, 1993; Zajac & Hayne, 2003). Therefore, protecting the welfare of these child witnesses is fundamental, because without due concern for the child, he or she will be less able to testify competently. This overlaps with the primary function of the criminal justice system—determining the guilt or innocence of the accused. If a child's well-being is taken into account and precautionary measures are used to prevent (or considerably mitigate) retraumatization, the child's testimony is likely to be more accurate and reliable. Put another way, if traditional methods of testifying—such as sitting in the witness box alone in an adult-sized chair, directly facing the defendant in open court, having a courtroom filled with observers or press—hamper the objective and purpose of the criminal justice system (i.e., seeking truth to achieve a just outcome), then some of these conventional methods should be modified to keep the ultimate goal attainable. It is critical to accommodate the needs and limitations of witnesses (in this case, victimized children) while at the same time, protecting the rights of the accused. The fairness to and rights of both defendant and witness need not be mutually exclusive.

The criminal justice system wrestles with maintaining a balance between protecting the interests and welfare of victim–witnesses with the defendant's Sixth Amendment rights (Etter, 2008; Hall & Sales, 2008; Ljungdahl, 2003). In protecting the child, this typically involves somehow physically shielding the child from his or her alleged abuser, but in the process, possibly infringes on the defendant's constitutional rights. The question at issue is whether the defendant's Sixth Amendment rights to face-to-face confrontation and to cross-examination of witnesses outweigh the possible trauma to the child (again, trauma that is theoretically caused by the child having to testify in front of his abuser). There has been much debate about this balance—as the growing knowledge base about the consequences of testifying attempts to identify and clarify what these possible dangers and traumas might be (Etter, 2008; Goodhue, 1991).

The act of testifying in court has been analyzed predominantly for its short-term effects on the children. The body of research analyzing the short-term consequences has generated mixed results, as some studies have found that testifying generates adverse outcomes (Feller et al., 1992; Tedesco & Schnell, 1987), while others have demonstrated the benefits (or lack of significant negative impact) of participation in the court process (Goodman et al., 1992).

Quas et al. (2005) conducted one of the few existing long-term studies exploring the impact of children testifying against their abusers. Doing a follow-up to the Goodman et al. (1992), study, Quas et al. interviewed the same subjects 12 years later. Results indicated that

[3] This paper will primarily focus on children who are not only testifying witnesses, but are also victims of abuse and/or neglect or first-hand witnesses of domestic violence or other violent crimes. Though children do testify in civil courts (for divorce and custody hearings, termination of parental rights proceedings, and foster care placement hearings), this paper will concentrate on the children's experiences with the criminal justice system and its associated proceedings.

[4] The Children's Bureau estimate is generated from the National Child Abuse and Neglect Data System (NCANDS), which annually collects and analyzes national data on child maltreatment.