

CHILD SEXUAL ASSAULT PROSECUTION:

WHAT I KNOW AS A PROSECUTOR AND WHAT I WOULD CHANGE



Robin Sax

There is no greater concern in society than the concern people have for children. And with good reason for children are powerless to take on the perils of our world on their own. Child sexual assault needs our attention, because child

sexual assault is not only a social epidemic; it's affecting children in their own homes every day in huge numbers.

According to the Department of Justice's crime statistics, 67% of victims of sexual assault are juveniles. Combined statistics show that every two minutes, someone in the United States is sexually assaulted. While the numbers can vary depending on who is reporting and what methodology is used, the fact is that child sexual assault happens every day in homes, schools, cars, beaches, parks, and alleys across the country. I know this because as a sex crimes prosecuting attorney, I every day personally review the cases, meet with the victims, and hear kids disclose abuse.

While my job is challenging, I consider it an honor and privilege to give young victims a voice, a place to regain trust, and a place to heal. But today, I'd like to tackle a different question: "What would I do to change the legal system?"

So, if I were judge, jury, and lawmaker, here's my answer. And by the way, I'll be brutally honest, even if I think you won't like what I have to say.

1. I believe there should be mandatory sentencing schemes in all jurisdictions that should not require specific additional factors that a jury would have to prove beyond a reasonable doubt. Under many current statutes, a case involving two victims would make a case eligible for a mandatory life sentence. If, however, the jury convicted on one victim and not the other (which happens very often because jurors like to throw a "bone" to the defendant), then the case may no longer hold a mandatory life sentence. The existence of the multiple-victim factor alone should qualify a case for an enhanced penalty.

2. The Supreme Court should overturn the Crawford decision. Under current law, if a victim dies or is legally unavailable for a court appearance, the victim's prior statements made to the police or hospital is inadmissible, due to the defendant's right to confront and cross-examine the witness. I am in favor of the law prior to the recent Crawford decision that allows for admitting victims' or unavailable persons' previous statements made under certain conditions that ensure reliability. A defendant should not benefit from the death or legal unavailability of his or her victim.

3. Our jury system sounds wonderful in theory. Under the Constitution, each person charged with a crime is entitled to have the case heard by a jury of one's peers, people selected from our community, who listen to the evidence and determine what the facts are in the case, while the judge decides on the legal issues.

"A jury of one's peers" is based on the supposed impartiality of a random sample of the population. It assumes that the average accused will share more similarities than differences with a random sample of the population, and there-

(Continued on Next Page)

fore will be judged by people who are likely to give the accused a fair shake.

However, those of us who are not “average” will have a much smaller likelihood of having a jury that comprises our peers. Also, the mechanisms of the “voir dire” process, or jury selection, increases the problem by creating juries composed of a greater percentage of poor, uneducated, unintelligent people, with very little experience with the justice system, than is naturally prevalent in society.

The solution is a professional jury system. Professional jurors would be laypersons educated for the task. They would be taught to understand the rules of evidence, the trial process and instruction, and would be tested thoroughly on their objectivity. Most important, a professional jury would have no motivation other than ensuring that due process was followed. The complexities, nuances, and intricacies involved in a child sexual assault warrant a professional jury both because of the difficulty of the case and the great danger of releasing a predator back into society if a jury makes the wrong decision.

4. We need better supervision of registered sex offenders, including requiring registered sex offenders to register their computer Internet accounts, IP addresses, and telephone numbers—not just their physical address. They should be required to inform authorities of international travel and there should be an integrated international registration system (like that for known terrorists) to monitor their movements. Registered sex offenders should also be subject to lifetime counseling and therapy, not just as a condition of parole or probation.

5. Money and time should be available to train the professionals in this field, including law enforcement, prosecutors, advocates, therapists,

judges, probation, and parole officers. It’s important, of course, to stay current on the latest advances and laws in this area. Additionally, studies show that training and resources alleviate burnout and serve to inspire and motivate people in this line of work.

6. Right now, it’s standard procedure to assign prosecutors and law enforcement to handle sex crimes for a limited time before rotating them to another area of crime. The benefit of being in a vertical unit (handling all aspects of a case from beginning to end) is that there is a high degree of specialization and high accountability for those involved.

The theory behind vertical prosecution is to have a group of specialists trained in this highly difficult area. However, all too often, once a prosecutor or detective reaches a year or so in the unit, they are transferred. The bureaucratic thinking is that prosecutors and detectives should be cross-trained in all areas of criminal law, and that specializing narrows a prosecutor’s or detective’s skills. In the sex crimes area, where cases are so sensitive and the victims have their own special needs, I believe that lawyers and detectives should be assigned for a minimum of five years. Also, lawyers and law enforcers should be assigned to these units on a voluntary basis. This is not the type of unit for someone who doesn’t have the requisite passion or a tough enough stomach to handle these cases.

7. Specific courtrooms should be designed for child sexual assault and abuse cases, so they are 100% devoted to the needs and realities of kids who testify. For example, courtrooms can be painted in “kid friendly” colors like pastels, so they look more like a classroom. The chairs on the witness stand should be appropriately “kid sized” and adjustable so that a child’s feet can reach the floor. Further, the judges should be especially trained to handle these cases, and be

(Continued on Next Page)

very familiar with the laws pertaining to child testimony. They would thus be able to use their discretion to protect the child and assist the child when giving testimony. This system can be modeled after the drug courts that are devoted to drug addicts and focus on treatment, as opposed to punishment. These courts work with the defendants to address their issues and are sensitive to the needs of addicts.

8. There should be limits to an attorney's ability to cross-examine and badger kids. One of the basic tenets of our Constitution is that criminal defendants have the right to confront and cross-examine the witnesses against them. It often seems that our criminal justice system offers greater protection to the accused than to the child victim involved in a sexual abuse prosecution.

9. In recent years, legislators have been concerned about defendants who escape punishment for sexually molesting young children because the children are afraid to testify in the defendant's presence. To address this problem, many states have enacted special rules that authorize judges—in certain situations—to allow children to testify via closed-circuit television. The defendant can see the child on a television monitor, but the child cannot see the defendant. The defense attorney can be present where the child is testifying and can cross-examine the child. Closed-circuit TV should be allowed more readily than its current use.

10. Currently, admissibility of expert testimony is problematic. And even when admitted, the admissibility tends to be for extremely limited purposes. Expert testimony should be welcomed and encouraged (from both sides) in order to assist jurors in understanding the unique issues when it comes to child sexual assault. Factors that the defense uses to discredit a child including delayed disclosure, recantation, minimization, self blame, lying first in order to protect the abuser or fearing they are in trouble, and understanding why "smart"

kids engage in risk-taking behavior, can make a disclosure credible if put into perspective by an expert.

11. Defense attorneys should be as sensitive and compassionate about victims as they are about their own clients. There must be legislation to stop re-victimizing the victim through the court process and to cease casting blame on the victim for being a crime victim.

12. Cases involving children should go to trial no later than six months from the filing. Currently, the most expeditious cases are tried in roughly a year from the date it was filed (not necessarily reported). Unlike fine wine, an aging case never gets better for the prosecution as time goes by.

13. As an alternative to jail and/or prison there should be live-in/lock-down facilities that are meant to work with, treat, and study sex offenders. Like drug rehabilitation, there should be facilities where we can take a low-level sex offender off the streets to ensure the safety of the public and treat them (if possible) or at least learn from the offender.

14. There should be amendments to the rule against double jeopardy (which means you can't be tried twice for the same offense) to enable the re-opening of proceedings against acquitted defendants where there is compelling new evidence. This will apply to a range of grave offenses, including those involving serious sexual offenses.

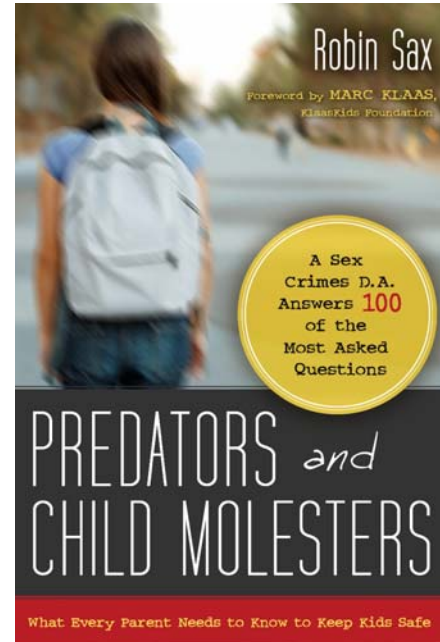
15. There should be a total ban, or at least limitations, on what a child sexual assault defendant should be allowed to do in the criminal process. For example, a defendant representing himself should not be able to personally direct or cross-examine children who are witnessing against him. He should not be able to access all the discovery information that a defense attorney (an officer of the court) would normally receive, such as the victim's school records, rape exam photos, and other confidential records.

(Continued on Next Page)

16. If a case is successfully appealed after a conviction, it may take two or three years before a court determines whether or not the defendant is entitled to a new trial. The prosecution would then need to bring the victim in to testify again. The new or old testimony could then be presented as “inconsistencies” from the first testimony, thus casting doubt on the victim’s credibility. If the cause for appeal has nothing to do with the victim’s testimony, the victim should not be made to return to court and the entire prior testimony should be stipulated as accurate and complete.

There is no greater concern in society than the concern people have for children. Whether it is providing a better earth, protecting kids from wars, terrorism, criminals, or abuse, our society prides itself on shielding our young. And with good reason—children are powerless to take on the perils of our world on their own. We can give children the voice that they so desperately

deserve if our leaders, lawmakers, and voters spoke up on and acted to protect the children we brought into this world.■



Book will be available September 2009

A MESSAGE FROM MARC

(Continued from Page 1)

children. Law enforcement has adopted a multi-disciplinary approach toward investigating these crimes that minimizes trauma to the victim and better preserves evidence. Media, particularly the cable news outlets, often lead their newscasts with the latest high-profile crime involving a child. Finally, policy makers have responded to sex crimes against children by passing laws that sentence perpetrators to much harsher prison terms, force them to register prior to being released into society, and notify the community whenever a registered sex offender moves into a neighborhood.

However, this sea change in knowledge and information is understandably accompanied by confusion, myth, and misinformation. The days of simply telling your children not to talk to

strangers are long gone. We now know that the problem is not stranger-centric. The predator’s playground has extended beyond the school yard. We know that it exists in cyberspace, at church, on the playground and even at home. In fact, statistics suggest that 70-80% of children who are molested are victimized by a family member or somebody that they know.

If we are going to protect our children against victimization, recognize it when it exists and ensure that it can be properly dealt with when it has been established, society must take advantage of every viable tool that is provided to us: whether it be legal, legislative or the deep-seated knowledge based on personal experience.■