

A Prosecutor's Perspective on Compliant Child Victims

Paul Stern

Deputy Prosecuting Attorney,
Snohomish Co., Washington

Ken Lanning has thoughtfully challenged child abuse professionals to address certain uncomfortable truths about a specific class of sexual assault victims. He urges more discussion about how we respond and react to these individuals. To the extent that we, as professionals, need to confront the reality of what he terms compliant victims, I agree completely. However, when it involves the reaction of the criminal justice system, the issues become very much more complicated.

Most child abuse professionals come to their work with a view to protect children. We seek to support, insulate, understand, and when needed, treat maltreated children. Our cause is just; our hearts are pure.

In his discussion, Lanning gently reminds us of a vulnerability these attributes create. One of the lessons we need to have learned from the 1980s is how we gave birth to a backlash movement. In our zeal to get attention, to be heard above the roar of apathy, child abuse professionals on occasion engaged in overstatements and dogmatic pronouncements: "Believe the children"; "Children never lie", and the too frequent unveiling of the best new therapy or treatment that would allow maltreated children to heal. Some professionals announced conclusions before the data had been developed to support their views (only to determine later that, perhaps contrary to what seemed so intuitively logical, the data did not support the announced conclusions). We have too often made public policy based upon public outrage from isolated horrific events, and we have sometimes engaged in careless labeling of all sex offenders as identical due to community fear or media hype.

These actions have come around to hurt us and hurt our credibility. In certain cases, they have come back to hurt the very people we have sought to help. But the actions of the child abuse community—to help, to empathize, to fix, to do something—are heartfelt and a part of who we are.

These same qualities are what, in Lanning's words, confuse us when we "see victims in child pornography giggling or laughing." Child abuse professionals see the victimization, understand the ramifications (which may not become apparent to the victim for years), and react in their protective mode. Lanning suggests we confront this dichotomy at the outset and recognize the willing compliance of the victim.

In a global sense, I agree with him completely. What to me becomes even more confusing is the double standard the criminal justice system has taken with adolescents. Indeed, child abuse professionals might want to protect adolescent victims, even compliant victims, until they have reached the age of lawful consent. They are, after all, minors and our legislatures have deemed them incapable of adequately consenting because of their perceived inability to maturely and insightfully understand the consequences of their actions. Those views might be correct. Yet, these same legislatures are demanding that adolescents of the same age who commit crimes be held to the

standard of adults. In many states, 16- to 17-year-olds who commit certain crimes are automatically to be treated as adults. In certain circumstances, children from 13 years of age can be treated as adults when it comes to crimes they have committed.

Lanning would likely argue that if we can treat a 14-year-old who commits a sexual assault as an adult, then the same 14-year-old, who purposely and knowingly engages in conduct that makes him or her a statutory victim, should be treated differently than an "innocent" victim. And, as a matter of social philosophy, he might be right. Unfortunately, the fair administration of the law sometimes requires bold lines of demarcation. Such bold lines, virtually by definition, result in non-individualizing justice.

One of the goals of a fair criminal justice system is to treat all individuals similarly. Thus, different offenders who commit the same specific crime should be sanctioned identically, without regard to their differences in age, race, income, station in life, marital status, and so on. In the name of equity, the rich and the poor should be treated alike; the doctor and the doorman; the banker and the barista should be treated equally. Only by that equal application of law can we truly strive for a system "of rules, not men."

Sometimes the broad lines of demarcation are indeed somewhat arbitrary. In many states, statements by children recounting abuse against them to another may be admitted at trial under the child hearsay exception. Generally, the law limits these statements to children who are younger than 10 or 12 years of age. There is not necessarily anything magical about the age of 10, however. That certain states have picked age 10, others 12, still others 13, 14, and 16 suggests this line is somewhat arbitrary. Yet a definitive standard must be set.

In a state where the rule is age 10, controversy can exist when a particularly immature, perhaps developmentally delayed 12-year-old makes a statement about being abused that is inadmissible because she was chronologically over age 10. That this individual had a "mental age" or "maturity age" of less than 10 is irrelevant. For if we begin to litigate maturity or developmental ages, we raise the potential of excluding statements of a particularly mature and advanced 8-year-old who has the mental or maturity age of a 12-year-old. The rules are set. Certain injustices will occur. Individualized justice is not possible in a system demanding that one size must fit all.

As indeed it must. The law dictates that children under a specific age cannot consent to certain sexual activity with adults. Although Lanning urges us to recognize that, in some circumstances, children do consent, albeit rationally and maturely, we cannot allow the criminal justice system to individualize defined criminal conduct. We cannot look at each individual compliant victim and determine whether he or she is at a maturity level that should be treated as an adult. Such pre-trial litigation of the victim's maturity level would result in more injustices than it might seek to correct.

Additionally, two specific goals of prosecution are unrelated to victim-oriented thinking:

- 1) to properly label the offender's behavior; and
- 2) to hold the offender accountable for his or her actions.

Usually the goals of pursuing legally provable cases and properly holding offenders accountable with accurate offender labeling are compatible. However, the class of cases Lanning describes can cause

conflict with these goals.

What we, as child abuse professionals can do, as Lanning urges, is not turn a blind eye to the issue of compliant victims. In my community, as in many others, we have drafted community standards that govern when certain cases should be prosecuted. The issues of dealing with compliant victims might appropriately be dealt with in such a forum. The community might decide to treat a certain class of crimes in a specific way, pursuant to various guidelines. But once standards are endorsed, the rules need to be made reasonably inflexible so that all people similarly situated are treated equally.

Even though various jurisdictions have debated how best to deal with cases with consenting victims, the issues raised by Lanning are further complicated by two other trends within the criminal justice system: a) demands for more accountability of sex offenders by increasing sentencing ranges and sentencing consequences, such as registration requirements; and b) shrinking public resources.

Moreover, prosecutors are faced with ever-increasing caseloads and, in all forms of criminal actions, need to make decisions about which cases receive highest priorities. In certain jurisdictions, a decision may be made to give low priority to cases where the adolescent victim has "consented" to sexual activity. Further, the fact that the consequences for conviction of a sexual crime in some jurisdictions have increased so substantially may influence how prosecutors choose to label certain offenders. As states experiment with three-strike-type laws for sex offenses, demand lifetime parole for certain crimes, and embrace the civil commitment of sexually violent predators, the consequences of a sexual assault conviction could be deemed by some to be disproportionate, based upon an offender's conduct with a "consenting" adolescent victim.

These considerations may influence prosecutors to examine compliant victim cases in a different light. Various jurisdictions have reviewed their policies and standards of how to best respond to these cases. The author does not necessarily advocate any particular approach here. However, various jurisdictions have chosen to consider at least one of the following:

- Exempting from prosecution a certain class of cases
- Treating compliant victim cases as misdemeanors not felonies
- Creating pre-trial diversion programs for specific types of sex offenders
- Adopting forms of restorative justice programs

Even when formal alternatives have not been adopted, certainly some prosecutorial charging decisions are likely to be influenced by the compliant victim. As a practical matter, the victim's behavior might get factored in such a manner as to lead a prosecutor to not file criminal charges. In certain circumstances, using the rubrics of "lack of victim cooperation," "limited jury appeal," or "proof problems," these cases might be judged to be not suitable for prosecution under a proof by a reasonable doubt standard.

If communities do elect to adopt standards on how best to deal with compliant victim cases, a variety of issues might appropriately be addressed. The first, of course, is definitional. Lanning begins his article with an admission that the term compliant is a bit troublesome. He noted, "The term compliant is being used because at this time I cannot think of a better one." Obviously this word will mean different things to different people. The fact that Lanning himself

has a hard time defining it for his own use illustrates the problem a community might have in determining just who should be covered under this characterization.

Here are other issues to consider:

- What age limits should be used for the compliant victim? Are we limiting this discussion to cases involving 14- to 15-year-olds...12-year-olds? What about the sexually promiscuous 5-year-old Lanning described?

- What age limits should be used for the offender? Are there differences if the 14-year-old is involved with a 20-year-old versus a 35-year-old versus a 50-year-old? Where is that line to be drawn?

- Should there be an on-going relationship between the parties, such that some sense of feelings and affection were developed? Are first night date rapes to be treated the same as acts committed in the course of a months-long relationship?

- What are the implications when the offender used various degrees of force? What if alcohol or drugs were used to lower a victim's inhibitions? ... to impact her judgment? ...to incapacitate her?

- What if the sexual acts led to a pregnancy? What if the parties now have a child in common? Does that aggravate the offense or mitigate it?

- What about the criminal history of the offender? What if the offender has prior criminal history? ...prior sexual offenses? ...misdemeanors?

- What if the offender was in a supervisory role toward the victim?

- What if the offender denies the extent of the victim's allegations? Should a full confession to the alleged act be required, or can an offender be permitted alternative prosecution avenues for crimes he denies committing?

- What efforts should be taken to distinguish consenting acts between two people and those of an offender who has acted in a predatory manner, targeting underage females? Should a psychosexual evaluation and an agreement to follow-through with recommended treatment be a requirement of any program?

- Although these policies are to account for cases where the victim "consented" to the sexual acts, does the victim also have to consent to the case being handled in an alternative manner? Does consent to the sexual relationship also mean consent to the less harsh way the case is handed in the criminal justice system?

These are various considerations that might be factored into a community decision to treat compliant victim cases in a specific manner. However, even without the adoption of a formal, alternative approach, in some situations exceptional circumstances may dictate the altering of traditional charging decisions and modify the goal of proper offender labeling. Without formal standards in place, care must be taken to prevent the tail from wagging the dog.

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Thus, we should not define a specific offender's conduct by the specific victim's reaction to it.

As Lanning urges us to be aware of the reality of compliant victims, the criminal justice system must be equally vigilant to not overreact to such seemingly unsympathetic victims. We need to stay reminded of the reasons for the statutory rules in the first place. We recognize that a completely consensual act of sexual contact between two people is nevertheless criminal when there is an imbalance in the relationship, which impacts one person's ability to consent. That factor can be the age difference or the power imbalance, for example, a patient having a sexual relationship with his or her mental health care provider or an inmate having "consensual" sex with a jail guard. So victim consent alone is not always enough to decriminalize behaviors by the offender.

In another context, the current movement is to practically ignore adult victims' wishes when they have also become crime victims. Prosecutors have been urged to adopt blanket "no drop" policies in domestic violence cases, effectively determining that adult women are incapable of deciding for themselves how they want to interact with their domestic partners. Are we adopting here a standard that sexually active 14-year-old girls are more competent decision makers than adult women in a long-term, albeit at times violent, relationship?


Lanning properly asks in what way the wishes of the compliant victim should best be considered. Victims' wishes should always be solicited, considered, and respected. However, they should not be

determinative. Once the offender has been properly labeled and held accountable, victims' input on sanctions to be imposed should be heard.

Sentencing allows the opportunity to consider factors that go outside the strict elements of the offense. In respond to Lanning's question, I would endorse completely the view that the opinions of a child victim of sexual abuse be considered by the criminal justice system at sentencing. Just as we want the sentencing authority to be aware of the damage done, the terrific harm and trauma sustained by some victims, we must also be vigilant to permit victims in compliant cases to articulate their feelings regarding punishment. When those victims articulate feelings of affection and compassion for their "abusers," we need to be strong to avoid our own conflicts. At times our roles as protectors need to move aside and allow the "victims" the respect to offer whatever words and emotions they choose to express.

As a result, we might look at each other as wrong or misguided. After all, our cause is just, our hearts are pure; then again, sometimes the best we can do is to just sit down and listen. Our conflict in these cases may also serve as a reminder that child abuse professionals are there to provide services victims need. These cases can serve as a reminder of the importance to provide support to victims for their sake, not our own; that we provide services because they make the victim feel better, not because it makes us feel better.

The opinions expressed in this section are exclusively those of the author. They do not necessarily represent the views or policies of Mr. Stern's office or employers, nor do they represent the views or policies of APSAC. This article is meant merely to encourage thought and discussion of these issues.




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