

12-15-1985

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Recommended Citation

Dominic J. Fote *Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 Pepp. L. Rev. Iss. 1 (1985)

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Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform

I. INTRODUCTION

Now more than ever before, shocking stories of child degradation are being revealed all over the country. In recent months the number of criminal prosecutions for child sexual abuse has risen dramatically. As a result of increased judicial activity in this area, recognition of past inadequacies in the handling of child witnesses in such cases has become inescapable. Traditional notions regarding children as unreliable witnesses have proven to be unfounded in modern empirical studies. Conclusive data indicates that children witnesses are as reliable as adults. Legal requirements, which once prevented children from qualifying as witnesses, have modernly been changed to reflect those findings of reliability, and the policy favoring admission of all relevant evidence has facilitated the use of child witnesses in the courtroom.

However, with the increased use of child witnesses in sexual abuse cases a common dilemma has become apparent: though the child-victim's evidence is usually the most important, the process for extracting that evidence often traumatizes young witnesses. The victims are made victims once again.

In recognition of this revictimization, various reforms have been proposed to alleviate the judicial burden placed on child-victim witnesses. These reforms include expanded hearsay exceptions for children, the use of expert testimony, videotapes, specially constructed courtrooms, and closed-circuit television in lieu of live, in-court child testimony. A common threat to each of the proposed reforms is the right to confrontation of the sixth amendment. However, policy considerations and artful construction of the reforms may combine to defeat any constitutional challenge.

II. THE RELIABILITY OF CHILD WITNESSES

Though traditional notions of child witness reliability have largely been abandoned, it is necessary to consider those notions to set them apart from the modern legal requirements for child victim witnesses

and the responses to their unique predicament. The presumptions of old should not be allowed to taint the evaluation of modern rules and proposals concerning child witnesses.

Traditional assumptions concerning the reliability of children as witnesses are generally negative. Concern has been expressed over the truthfulness of child witnesses,¹ their susceptibility to leading or suggestive questions,² their ability to accurately recall events,³ and their need for special questioning techniques.⁴ The dubious reputation children have acquired as witnesses is represented in even the most respected legal treatises.⁵

Empirical studies have produced results indicating that most of these traditional assumptions are completely unfounded. According to established statistics, there is in fact little correlation between age and honesty.⁶ An experiment regarding the potential of children as eyewitnesses conducted by Barbara Marin and others in 1979, dispels traditional notions about the reliability and suggestibility of children performing eyewitness tasks.⁷

In the Marin experiment, children and adults ranging in age from 5 to 22 watched the experimenter and a confederate engage in a heated conversation. At varying intervals, those viewing the argument were asked to narrate exactly what they had seen, to answer objective questions about the incident, including a leading question,

1. Melton, *Children's Competency To Testify*, 5 LAW & HUM. BEHAV. 73, 79 (1981).

2. Studies have shown that leading questions often distort the memories of adults, but the question raised is whether the memories of children are any more susceptible. Marin, Holmes, Guth & Kovac, *The Potential of Children as Eyewitnesses*, 3 LAW & HUM. BEHAV. 295, 297-304 (1979) [hereinafter cited as Marin].

3. *Id.*

4. *Id.*

5. American Jurisprudence offers these comments on witness credibility:

In determining the credibility of a witness and the weight to be accorded his testimony, regard may be had to his age and his mental or physical condition, such as where the witness is a child, is intoxicated, is a narcotics addict, or is insane, or of unsound or feeble mind.

81 AM. JUR. 2D *Witnesses* § 667 (1976) (footnotes omitted). The classification of children along with drug addicts and mental incompetents aptly reflects the suspect view of children as witnesses.

Leading commentators on the subject share this lack of trust: "There is the danger that a child will intermingle imagination with memory and thus have incorrect statements irretrievably engraved on the record by a guileless witness with no conception that they are incorrect or that the words should not have been spoken." Stafford, *The Child as a Witness*, 37 WASH. L. REV. 303, 309 (1962) (footnotes omitted). It hardly seems possible that children three to five years old could "imagine" detailed sexual activity which is not normally openly discussed, even among adults.

6. From 1969 to 1974, Michigan police referred 147 children to a polygraph examiner to test the truthfulness of their allegations of sexual abuse. Of the 147 children tested, only one was judged to be lying. Melton, *supra* note 1, at 79.

7. Marin, *supra* note 2, at 303-04.

and to identify the confederate from a photo array.⁸ Results indicated that very young children were as capable as adults in answering direct questions about the incident.⁹ Also, young children scored as well as adults in identifying from a photo array.¹⁰ Perhaps most surprising was the data indicating that children were no more easily swayed to answer incorrectly by the use of leading questions than were adults.¹¹ One finding did indicate that children were not as capable as adults to freely articulate their version of what occurred. Nonetheless, while the youngest children tended to say little, what they did say was three times more likely to be accurate than what the adults said.¹²

The Marin study concluded that the main problem with young witnesses is not their ability to accurately perceive events, but their ability to accurately and meaningfully report their perceptions. Given certain external prompts and cues, however, "the young witness would be expected to perform quite adequately."¹³ In the final analysis, "it would seem, then, that children as young as five years of age are no less competent or credible as eyewitnesses than are adults when responding to direct objective questions."¹⁴

Other studies have come up with results contradicting the findings

8. Ninety-six subjects were tested in four groups consisting of twenty-four per group. The four groups were comprised of the following subjects, respectively: kindergarten and first graders, third and fourth graders, seventh and eighth graders, and college students. They were tested individually in a small room where the confederate stormed in, argued with the experimenter over the use of the room, then stormed out. The duration of a subject's exposure to the confederate was fifteen seconds, from a distance of approximately seven feet. At intervals of ten or thirty minutes, the subjects were evaluated on free recall, direct questions including one leading question, and photo identification. Two weeks later, the subjects returned and were reassessed, this time using a non-leading question. *Id.* at 297-98.

9. The results of the objective questions concerning this incident indicated no significant difference of the percentage of questions correctly answered between the different age groups. *Id.* at 301.

10. *Id.* at 302.

11. *Id.* at 303. But see Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 LAW & HUM. BEHAV. 201 (1980).

12. The youngest children averaged only 1.42 descriptive statements on free recall, while the three older groups averaged 3.75, 6.5, and 8.25 descriptive statements, respectively. However, the youngsters gave incorrect statements only 3% of the time, while the older groups did so at the rate of 12%, 8%, and 10%, respectively. Marin, *supra* note 2, at 304. In fact, free narration skills have shown marked improvement with age in other studies. *Id.* at 296-97.

13. *Id.* at 297. "It appears that children are no more likely than are adults to fabricate incorrect responses, and that when their testimony is elicited through the use of appropriate cues, it is no less credible than that of adults." *Id.* at 304.

14. *Id.*

of Marin. One such study, published in 1980, produced data indicating that third grade subjects were inferior to older subjects in memory capacity, and in their ability to resist suggestion.¹⁵ However, this test did not create a true live eyewitness task, as did the Marin test.¹⁶ Furthermore, a second round of testing produced conflicting results, leading the experimenters to conclude that children "are still potentially good sources of eyewitness information."¹⁷

Other commentators have criticized the Marin study as lacking. Gary Melton, of the University of Virginia Institute of Law, Psychiatry and Public Policy, states that the question whether child witnesses are particularly suggestible needs further research. Melton notes that only one leading question was used in the Marin study and that the interviewer probably had less authority in the eyes of a child than would an attorney in a courtroom.¹⁸ Melton also observed that young children's need for cues to stimulate recollection may compound the problem of suggestibility.¹⁹ However, Melton included no empirical data to support his conclusions, and even he admits that to date, the Marin experiment is the only one involving "a courtroom-like task."²⁰

Now that the misconceptions about the reliability of children eyewitnesses have been cleared away, courts and legislatures are beginning to change the legal requirements children must meet to qualify as witnesses.

III. LEGAL REQUIREMENTS FOR CHILD WITNESSES: COMPETENCE

A. Oaths

At common law, the main hurdle children had to overcome in order to be allowed to testify was swearing the oath. The common law required that all witnesses believe in a deity in order to be properly sworn,²¹ and children of "tender years" were considered incapable of giving evidence under oath.²² However, a child of "tender years" was

15. Cohen & Harnick, *supra* note 11, at 201.

16. *Id.* at 204-05. This test involved the viewing of a movie by the subjects with subsequent questioning about events in the movie. The Marin scenario, created with the help of a confederate, much more closely approximated a true eyewitness situation. *Id.*

17. *Id.* at 209.

18. Melton, *supra* note 1, at 80-81.

19. *Id.* at 81.

20. *Id.* at 209.

21. Comment, *Evidence — Competency of Child Witness — Four-Year-Old Is Not Per Se Incompetent And Need Not Be Sworn By An An [sic] Adult Oath, Nor Have Independent Recollection In Order To Be Ajudged Competent*, 11 RUT.-CAM. L.J. 339, 342 n.16 (1980).

22. Jerrard, *The Evidence of a Child*, 134 NEW L.J. 109 (1984). At common law, a presumption of competency existed for a proposed witness over fourteen years of age,

not one of any particular age, and the court often determined a child's qualifications by his ability to give evidence under oath.²³

The leading case at common law, *R. v. Brasier*,²⁴ involved an assault on a seven-year-old child. The judges agreed that testimony could be legally admitted only upon oath, and that a child of seven years or younger may be properly sworn if the court determined that the child had sufficient understanding of the nature and consequences of the oath.²⁵ Finding insufficient understanding, the court ruled the child's testimony inadmissible.²⁶

The oath as an obstacle to child witness testimony waned with the passage of time. The traditional American view of child competency was set forth in *Wheeler v. United States*.²⁷ In that case, the U.S. Supreme Court stated:

While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath.²⁸

The *Wheeler* Court did not abandon the necessity of a child's understanding of the oath, but it stressed other factors which have since become the basis of modern child competency requirements: the

but proof of competency had to be made for witnesses under fourteen. Comment, *supra* note 21, at 343-44.

23. Jerrard, *supra* note 22, at 109.

24. 168 Eng. Rep. 202 (1779).

25. *Id.* at 202.

26. *Id.* at 202-03.

27. 159 U.S. 523 (1895). In England, the common law position was altered by section 38 of the Children and Young Persons Act of 1933, which states:

(1) [W]here, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of the oath, his evidence may be received though not given upon oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of telling the truth.

Jerrard, *supra* note 22, at 109.

28. *Wheeler*, 159 U.S. at 524-25. Interestingly, the *Wheeler* court, in dicta, did suggest a cut-off age of four, below which a child might be considered per se incompetent. Other American courts have suggested similar age limits for competency: "'Age, at least after four years are past, does not touch competency, and the question is one of intelligence'. . . ." *State v. Juneau*, 88 Wis. 180, 182, 59 N.W. 580, 580 (1894). However, as the problem of sexual abuse of very young children becomes more visible in modern times, and given that very young children are reliable witnesses, such judicial preconceptions are unwarranted.

child's capacity and intelligence, his appreciation of the difference between truth and falsehood, and his appreciation of the duty to tell the truth.

Modernly, states have abandoned the traditional oath as a strict requirement for child witness competency. This shift is well illustrated by the New Jersey case, *State ex. rel. R.R., Jr.*²⁹ In the case, a four-year-old child, Sean, had been sexually abused. The trial court refused to rule Sean incompetent per se, and administered an oath which had been adapted to account for his age and level of comprehension.³⁰ R.R., the accused minor, was adjudicated a juvenile delinquent by the lower court, but the decision was reversed on appeal.³¹ The appellate division ruled that Sean's oath was improper because it was not administered in the traditional form as mandated by Rule 18 of the New Jersey Rules of Evidence.³² The Supreme Court of New Jersey reversed the appellate division, and held that any oath which shows a special commitment on the part of the witness to tell the truth, upon pain of any type of future punishment, satisfies the requirements for an oath under Rule 18 of the New Jersey Rules of Evidence.³³ This ruling typifies the modern American interpretation of the oath requirement for child witness competency.³⁴

Thus, the oath requirement has waned as an impediment to child

29. 79 N.J. 97, 398 A.2d 76 (1979).

30. Sean's oath ran as follows:

The Clerk: Will you tell the truth to this Court?

The Witness: Yes.

The Clerk: Do you believe in God?

The Witness: Yes.

The Clerk: If you lie do you believe that God will punish you?

The Witness: No.

The Clerk: God will not punish you if you tell a lie? Or will He punish you?

The Witness: He will.

The Clerk: He will. The boy is sworn, Judge.

Id. at 104, 398 A.2d at 79.

31. The per curiam opinion of the appellate division was unpublished. *Id.* at 107, 398 A.2d at 79.

32. *Id.* at 107, 398 A.2d at 81. Rule 18 of the New Jersey Rules of Evidence states: "A witness before testifying shall be required to take an oath or make an affirmation or declaration to tell the truth under the penalty provided by the law. No witness may be barred from testifying because of religion or lack of it." N.J. R. EVID. 18.

33. *Ex. Rel. R.R.*, 79 N.J. at 107-11, 398 A.2d at 82-83. The court interpreted Rule 18 as requiring "an" oath, not "the" oath. *Id.* at 108, 398 A.2d at 81. The court also ruled that a four-year-old child is not per se incompetent as a witness. Any witness' competency should be judged by the trial court according to Rule 17 of the New Jersey Rules of Evidence. *Id.* at 111, 398 A.2d at 83.

34. The modern British view of child witness competency is much the same, and well represented in *R. v. Hayes*, [1977] 1 W.L.R. 234:

The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.

witness testimony. However, other obstacles still exist. A child's general mental capacity may still serve as a point of challenge for exclusion of his testimony.

B. General Capacity Requirements

The standards used to judge child witness competency have developed through case law, and have recently been codified into state evidence codes. Maine's experience is exemplary of this trend, and most states follow Maine's standards in determining child witness competency.³⁵

The 1978 Maine case, *State v. Samson*,³⁶ set out three criteria for determining child witness competency: (1) the child's ability to understand and answer questions intelligently, (2) the child's ability to accurately relate a true version of his sense impression, and (3) the child's ability to understand the difference between truth and falsehood.³⁷

The *Samson* criteria were replaced by Rule 601(b) of the Maine Rules of Evidence in the 1980 case of *State v. Pinkham*.³⁸ The defendant in that case sought to rely on the *Samson* criteria to challenge the admissibility of an eight-year-old's adverse testimony by challenging her competency. The court rejected the *Samson* criteria and, instead, looked to the recently enacted Rule 601(b) of the Maine Rules of Evidence.³⁹ Under Rule 601(b) the court found that the child need only to express herself so as to be understood by the judge and jury, and to know what telling the truth means.⁴⁰ The court held that the other *Samson* criteria went only to the weight and credibil-

Id. at 237. In Canada, the testimony of a child may be received without the child first taking an oath. CAN. REV. STAT. ch. E-10, § 16 (1970).

One aspect of the child oath requirement which has remained constant in all Anglo courts since the common law is the fact that whatever determination is made rests in the sound discretion of the trial court.

35. 4 AM. J. TRIAL ADVOC. 455, 468-69 (1980).

36. 388 A.2d 60 (Me. 1978).

37. *Id.* at 64.

38. 411 A.2d 1021 (Me. 1980).

39. *Id.* at 1023. Maine Rule of Evidence 601(b) states:

A person is disqualified to be a witness if the court finds that (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by a judge and jury. . . or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth. . . .

ME. R. EVID. 601(b).

Similar provisions exist in the evidence codes of many states. See, e.g., N.J. R. EVID. 17, the language of which is virtually identical to that of the Maine rule.

40. *Pinkham*, 411 A.2d at 1023.

ity to be accorded the child's testimony, not to her competency to testify.⁴¹

Maine's standard, that a child is competent to testify if he is able to express himself and is able to understand what it means to tell the truth, is followed in most American jurisdictions.⁴² It represents a trend away from the traditional distrust of children's testimony, and towards the widely accepted policy of admitting all relevant evidence wherever possible.

Though the courts have overcome the problems of child witness reliability and of the competency standards requisite to the admissibility of child testimony, they now face a new problem raised by the use of children as witnesses: the trauma children experience when testifying in court about painful events. State legislative and judicial branches have responded to that problem with proposals for reforming the way child testimony is taken in some cases.

IV. THE CHILD VICTIM REVICTIMIZED

Using young children as witnesses in the prosecution of sexual abuse cases involves the inherent danger of psychologically traumatizing the child. This danger has been widely recognized by commentators on the subject of child witnesses. Noted psychologist David Libai coined the phrase "legal process trauma," to represent the negative impact of criminal prosecutions against sex offenders on child victims.⁴³ Often the "legal process trauma" itself can be more devastating than the actual abuse. The prosecution of a child abuse case involves interviews and interrogation of the child by numerous agencies.⁴⁴ Repeated recollection of the abuse episode may aggravate the traumatization.⁴⁵ Finally, some believe the trauma of testifying to painful experiences in open court to be the most damaging.⁴⁶

This revictimization of child victims raises other problems which reach beyond the effect on the child's mind; they impact on the func-

41. *Id.*

42. See 4 AM. J. TRIAL ADVOC. 455, 468 n. 112, 469 n. 113 (1980).

43. Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 983 (1969).

44. This may include interviews by psychologists, social workers, court appointed guardians, police, attorneys, etc. See, e.g., Haas, *The Use of Videotape in Child Abuse Cases*, 8 NOVA L.J. 373, 373 (1984).

45. *Id.* Various reforms have been proposed to solve the problem of multiple interviews, one of which is a single collective investigatory interview. *Id.*

46. Comment, *Libai's Child Courtroom: Is It Constitutional?*, 7 J. JUV. L. 31, 32 (1983). A child's in-court testimony must still conform with rules of criminal procedure, "which may exacerbate their victimization. In particular, the defendant's right to confrontation and cross-examination and to a public trial and the public's right of access to trials may result in the child victim's exposure to prolonged stress, embarrassment, and recollection of the experience of abuse." Melton, *Psycholegal Issues in Child Victims' Interaction with the Legal System*, 5 VICTIMOLOGY 274, 274 (1980).

tioning of the judicial system. Some commentators believe that the trauma accompanying in-court testimony produces unreliable evidence.⁴⁷ This would inhibit the court's fact finding task and defeat the purpose of using the child as a witness in the first place. Imposing upon a child witness the rigors of the judicial process may also result in a popular perception of the court as perpetrator, rather than protector.⁴⁸ Given the bizarre, and often horrific details of many child sexual abuse cases, such a characterization may not be far from correct.⁴⁹

47. Note, *Parent-Child Incest: Proof At Trial Without Testimony In Court by The Victim*, 15 U. MICH. J.L. REFORM 131, 137 (1981). Child witnesses suffer certain inherent cognitive limitations, which, if aggravated, may produce unreliable testimony:

They have a subjective sense of time. . . especially with regard to experiences such as incest which are repeated over time — and a limited ability to communicate what they do understand and recall. These natural disabilities tend to intensify when the child is afraid or under emotional stress, as the child may regress to a less mature state or withdraw entirely.

Id. (footnotes omitted).

48. Parker, *The Rights of Child Witnesses: Is The Court A Protector Or Perpetrator?*, 17 NEW ENG. L. REV. 643, 643 (1982). "The child who is required to testify in court may experience severe psychological stress in re-living the witnessed event. The judicial system has not been sensitive to the victimization that a child may face in the courtroom. Courts, in effect, have become perpetrators, not protectors of the child's interests." *Id.*

A municipal court judge in Solano County, California, ordered that a twelve-year-old girl be held in juvenile hall for eight days for contempt of court when she refused to testify against her stepfather on felony child molestation charges. What ostensibly appeared to the press and public as an outrage of revictimization, however, was actually the judge's attempt to prevent witness intimidation and recurrence of the offense. L.A. Daily J., Jan. 31, 1984, at 4, col. 3.

49. "Certainly a five year old girl should be spared the necessity of testifying against her father in a rape case if at all possible. . . .

We do not agree . . . that five year old girls should be dragged in to court to testify and to re-live the horrifying experience of being raped." State v. Boodry, 96 Ariz. 259, 363-65, 394 P.2d 196, 199-200 (1964).

In Jordan, Minnesota, two child abuse rings were discovered in 1984, and subsequent criminal proceedings resulted in acquittal of the two defendants. The child witnesses involved were badgered about times, places, and dates; they were also accused of lying and of being preprogrammed due to their similar descriptions of sexual penetration. Several left the witness stand in tears. L.A. Daily J., Oct. 2, 1984, at 4, col. 3.

In Manhattan Beach, California, the highly publicized McMartin preschool case, which arose in the fall of 1983, has produced particularly bizarre child testimony at the preliminary hearing. The second child to testify at the hearing was a ten-year-old boy. On direct examination, he alleged that he was forced to perform sex acts with all seven defendants, including the seventy-seven-year-old matron of the preschool. He further testified to having been forced to watch two of the defendants, brother and sister, have sex. He described having been photographed in the nude, being tied up during "naked games," being shown animal slaughters, and having the lives of his parents threatened. On cross-examination, the boy vividly described the hacking to death of two ponies and of being forced to drink the blood of a slaughtered rabbit. L.A. Times, Feb. 25, 1985, § II, at 3, col. 5. Assuming for argument's sake that these allegations are

V. RESPONSE TO THE SPECIAL CIRCUMSTANCES OF CHILD WITNESSES

A. *The Hearsay Exceptions*

One response to the problems associated with child witness testimony has been liberality in the admission of hearsay statements of children. The hearsay rule, one of the oldest canons in the law of evidence, was designed to prohibit the introduction of oral or written evidence of statements made out of court, when that statement is being offered for the truth of the matter asserted.⁵⁰ Various exceptions to the rule arose at common law, many of which have been codified into the Federal Rules of Evidence.⁵¹

The chain of events in the typical child sexual abuse case emphasizes the special need for child hearsay evidence. Generally, the child is the only witness to the crime.⁵² Physical evidence of the crime is seldom available because the crimes are generally of a non-violent nature, and children rarely resist their molesters.⁵³ Also, children's memories fade rapidly over time, so statements made closer in time to the event are likely to be more accurate.⁵⁴

For these reasons, along with other considerations concerning the well-being of the child, many courts and state legislatures have adopted rules to facilitate the admissibility of child victim hearsay statements.⁵⁵

1. Expansion of the Res Gestae and Excited Utterance Exceptions

At common law, the rule banning all hearsay became unfeasible

true, it is easy to see how forced repetition in the judicial processes might place the courts in a position of revictimizing the child victims.

50. C. MCCORMICK, MCCORMICK ON EVIDENCE 584 (2d ed. 1972).

51. See, e.g., FED. R. EVID. 803-04.

52. Comment, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1749 (1983).

53. *Id.* "Most crimes consist of petting, exhibitionism, fondling, and oral copulation, activities that do not involve forceful physical contact." *Id.* at 1750 (footnote omitted).

54. *Id.* This is particularly important because long periods of time often pass between the criminal act and the trial. *Id.* at 1750-51.

55. For a sympathetic view toward expansion of child victim hearsay exceptions, see Comment, *supra* note 52. See also Note, *A Tender Years Doctrine for the Juvenile Courts: An Effective Way to Protect the Sexually Abused Child*, 61 U. DET. J. URB. L. 249 (1984) (discussion of expansion of various hearsay exceptions in Michigan, and proposal for "tender years" exception) [hereinafter cited as *A Tender Years Doctrine*]; Pierron, *The New Kansas Law Regarding Admissibility of Child-Victim Hearsay Statements*, 52 KAN. B.A. J. 88 (1983) (discussion of Kansas' recognized exceptions, its new exception, and the need for child hearsay); *Ohio Supreme Court Review, State v. Duncan: The Relationship Between Abusive Sexual Acts and the Admissibility of Spontaneous Exclamations*, 6 OHIO N.U.L. REV. 498 (1979) (casenote discusses liberalization of spontaneous utterance exception in Ohio) [hereinafter cited as *Ohio Supreme Court Review*].

because some hearsay statements were the most reliable form of evidence available and did not violate the purposes of the rule.⁵⁶ In response, a broad exception to the hearsay rule known as "res gestae" developed. "Res gestae" for evidentiary purposes is generally defined as a statement made at the time of an event, explaining that event or occurrence. Considering the totality of circumstances, sufficient time will not have passed to contrive or fabricate the statement so as to render it self-serving.⁵⁷ The res gestae exceptions were based on the notion that spontaneity made the hearsay statements especially trustworthy.⁵⁸

The res gestae exception to the hearsay rule fell into disfavor due to its ill-defined and ever-expanding characteristics.⁵⁹ Res gestae then evolved into specific exceptions, the foremost being the excited utterance exception which has been widely accepted. The excited utterance exception has two requirements: first, the occurrence or event must be sufficiently startling to render the normal reflective thought processes of an observer inoperative; and second, the statement must be a spontaneous reaction to the occurrence or event and not the result of reflective thought.⁶⁰ In a number of jurisdictions, courts have relaxed the traditional requirements of spontaneity and contemporaneity for statements by young children to create a "tender years" variation of the excited utterance exception.⁶¹

56. The purposes behind the rule include insuring the trustworthiness and necessity of the evidence offered. 5 J. WIGMORE, WIGMORE ON EVIDENCE §§ 1420-22 (J. Chadbourn ed. 1974). When it was shown that the hearsay testimony did not offend the policy supporting the hearsay rule and the trustworthiness and necessity of the evidence could be established without cross-examination of the declarant, exclusion no longer made sense. *Id.*

57. See, *A Tender Years Doctrine*, *supra* note 55, at 253.

58. C. MCCORMICK, *supra* note 50, § 288, at 687.

59. McCormick expressed this sentiment: "[I]t seems clear that the law has now reached a stage at which this desirable policy of widening admissibility [through res gestae] will be best served by other means." *Id.*

60. C. MCCORMICK, *supra* note 50, § 297, at 704.

61. See, e.g., *A Tender Years Doctrine*, *supra* note 55, at 255-56. See also *Wheeler v. United States*, 211 F.2d 19 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 1019, *reh'g denied*, 348 U.S. 852 (1954); *Snowden v. United States*, 2 App. D.C. 89 (1893); *Soto v. Territory*, 12 Ariz. 36, 94 P. 1104 (1908); *State v. Duncan*, 53 Ohio St. 2d 215, 373 N.E.2d 1234 (1978); *State v. Lasecki*, 90 Ohio St. 10, 106 N.E. 660 (1914); *State v. Hutchison*, 222 Or. 533, 353 P.2d 1047 (1960).

Many commentators support the trend of liberalizing exceptions to the hearsay rule, using empirical evidence as justification:

This type of approach has been supported through recent findings in social research which indicates that the evidentiary problems in child abuse and neglect cases result in frequent failures to establish a *prima facie* case and often

2. The Michigan Experience

The expansion of the admissibility of hearsay evidence in child abuse cases through the excited utterance exception has not enjoyed unfettered development. A 1982 Michigan Supreme Court case exemplifies the continuing respect for the traditional policy against hearsay.⁶² In Michigan, evolution of the common law resulted in a "tender years" exception to the rule against hearsay. The exception allowed the otherwise excludable hearsay statements of a child of tender years, claiming to have been sexually abused, to be admitted as corroborative evidence through a third person's testimony.⁶³

The Michigan Supreme Court abolished the "tender years" exception in *People v. Kreiner*.⁶⁴ In *Kreiner*, the court held that the Michigan Rules of Evidence, promulgated in 1978, only adopted the hearsay exceptions specifically enumerated therein, which did not include the "tender years" exception.⁶⁵ The court's decision in *Kreiner* was criticized for failing to take into account the special circumstances of a sexual abuse case, and was followed by proposals for reform.⁶⁶

serve to protect the perpetrator of the crime and not the child who has been victimized.

Ohio Supreme Court Review, *supra* note 55, at 507. See also *id.* at 507 n.65.

62. *People v. Kreiner*, 415 Mich. 372, 329 N.W.2d 716 (1982).

63. *People v. Baker*, 251 Mich. 322, 232 N.W. 381 (1930).

The rule in this State is that where the victim is of tender years the testimony of the details of her complaint may be introduced in corroboration of her evidence, if her statement is shown to have been spontaneous and without indication of manufacture; . . . so far as it is caused by fear or other equally effective circumstance.

Id. at 326, 232 N.W. at 383.

64. 415 Mich. 372, 329 N.W.2d 716 (1982).

65. 415 Mich. 377-78, 329 N.W.2d at 719-20.

66. Factors that courts should take into account when considering child victim hearsay include:

a recognition of the trauma suffered by a sexually abused child as well as the child's inability to remember and articulate the circumstances of an offense; the fact that the child is often the only source of proof as to an offense; the need to act in the best interests of the child and the necessary protections that must follow therefrom; and other difficulties that are generally associated with the increased incidences of sexual abuse of children.

A Tender Years Doctrine, *supra* note 55, at 250-51.

One proposal for reform recommended an addition to the Michigan Juvenile Court Rules, which have jurisdiction over child abuse cases, as follows:

Any out-of-court statement made by a child under ten years of age shall be admissible as competent evidence in any juvenile court proceeding instituted on complaint of abuse/neglect, provided the court finds:

- 1) that the statement concerns sexual conduct perpetrated with or upon the child; and
- 2) that under the circumstances the statement possesses sufficient indicia of reliability; and
- 3) that some other evidence supports the child's allegation of illegal sexual conduct.

Id. at 272. The author of the proposal goes on to acknowledge that "[t]he circumstantial guarantees of truthworthiness recognized by the Michigan courts prior to *Kreiner*,

Such proposals for reform with regard to child victim testimony have arisen in other jurisdictions as well. Several states have codified different versions of the exception, while others are presently considering more innovative reform measures.

3. The Washington Experience

In 1982, the State of Washington codified its version of an exception to the hearsay rule, applicable in criminal prosecutions for child sexual abuse.⁶⁷ The exception is unique because it gives the trial court discretion in determining whether the statement is trustworthy.⁶⁸ The Washington exception is typical of others recently enacted in several states.⁶⁹

Pursuant to the exception, the hearsay statements of a child under age ten, describing a sexual act performed with or on the child, is admissible if certain requirements are met. First, the court must find,

however, did not simply vanish because the rules of evidence were codified." *Id.* The author also asserts that "[t]he proposed rule, or a comparable alternative, recognizes that children have experiences, capabilities, and vulnerabilities that are significantly different from those of adults." *Id.*

67. WASH. REV. CODE § 9A.44.120 (Supp. 1985) provides:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
 - (a) Testifies at the proceedings; or
 - (b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

Id.

68. With other Washington exceptions, the judge merely determines whether the statement falls under the specific circumstances set forth in the exception to indicate trustworthiness. See WASH. R. EVID. 803-04.

69. Colorado, Utah, and Kansas have recently enacted similar provisions in what appears to be a developing trend. For a discussion of Kansas' new legislation, see generally Pierron, *supra* note 55. For a discussion of the new laws in Colorado, Utah, and Washington, see Comment, *The Sexually Abused Infant Hearsay Exception: A Constitutional Analysis*, 8 J. JUV. L. 59 (1984). For a detailed discussion of the new Colorado law, see Garnett, *Children as Witnesses: Competency and Rules Favoring Their Testimony*, 12 COLO. LAW. 1982 (1983). For a discussion of California's proposed new legislation, see L.A. Daily J., Apr. 12, 1984, at 2, col. 2.

in a hearing outside the jury's presence, that the statement bears sufficient indicia of reliability. Next, the child must either testify at the proceeding or be considered as an unavailable witness. If the child is unavailable, there must be corroborative evidence of the act of sexual contact described. Also, the prosecution must notify the defendant of its intention to use the statement, giving the defendant enough time to prepare a defense.⁷⁰

Prior to the adoption of the new exception, Washington courts had followed the trend of expanding the excited utterance exception to admit child victim hearsay.⁷¹ However, the excited utterance exception was being construed to accommodate statements never intended to come under the exception as originally conceived. This expansive application could have two negative effects: (1) it could make discretionary what was originally meant to be a non-discretionary exception,⁷² and (2) expansion of the old exception to meet special needs in child sexual abuse cases might serve as a precursor to further expansive applications in other, less appropriate, types of cases.⁷³

The new exception solves these problems by codifying the discretion already being exercised in the liberal application of the excited utterance exception, thereby creating a discretionary exception.⁷⁴ The new exception now achieves its intended purpose as a discretionary mechanism. Furthermore, it will not create the precedential confusion generated by the old excited utterance applications.⁷⁵

The Washington statute has received its share of criticism. As to the Act's operation with an available declarant, it has been criticized for admitting, as substantive evidence, prior consistent statements of witnesses and prior inconsistent statements not made under oath.⁷⁶ As to its operation with an unavailable declarant, the Act has been criticized for allowing hearsay testimony from incompetent children.⁷⁷

70. See *supra* note 67.

71. Comment, *Sexual Abuse of Children - Washington's New Hearsay Exception*, 58 WASH. L. REV. 813, 818-19 (1983).

72. *Id.* at 819.

73. *Id.*

74. The factors of time, content, and circumstances required by the new exception are substantially the same as those considered under the old liberal application of the excited utterance exception. *Id.*

75. Under the new exception, appellate decisions will provide trial courts with guidance as to how to apply its elements. *Id.* at 820.

Another advantage of the new exception is that it provides the defendant with a greater ability to prepare a defense. In the past, the defendant had no warning as to whether such a statement would be proposed for admission, and no indication of how far the court would stretch the excited utterance exception. *Id.* at 819-20.

76. Comment, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. PUGET SOUND L. REV. 387, 391-92 (1984).

77. *Id.* at 392. Failing to define unavailability, the Act admits into evidence statements of a child held incompetent to testify. *Id.* This undermines the traditional pref-

Perhaps the greatest challenge to the Act has come on constitutional grounds involving the defendant's sixth amendment right to confrontation.⁷⁸ Critics of the Washington Act speculate that the Act will be used primarily when the defendant is in the greatest need of his constitutional rights, thereby undermining his right to confrontation.⁷⁹

B. The Confrontation Clause Challenge to Child Hearsay Exceptions

Washington's hearsay exception and others like it are subject to attack on sixth amendment right of confrontation grounds. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"⁸⁰ The confrontation clause is designed to provide the trier of fact with a basis for evaluating statements offered into evidence.⁸¹ The United States Supreme Court has defined the right of confrontation as requiring first, the presence of the witness at trial,⁸² and second, an opportunity for the defendant to effectively cross-examine the witness.⁸³ These requirements are intended to allow the jury to evaluate the witness' testimony by observing his overall demeanor

erence for firsthand evidence. If a child would make a poor witness, the prosecutor will not want him to testify and may allege that he is incompetent. A judge, sympathetic to the plight of the child victim witness, may also find him incompetent to spare him the rigors of in-court testimony. In any case, the hearsay evidence is admissible regardless of availability. The end result is that both prosecutors and judges may relax their standards, relying instead on findings of incompetency and thus ignoring the well-established preference for firsthand evidence. *Id.* at 398. Furthermore, evidence that the sexual act took place is in no way related to whether or not the child is telling the truth, and thus does not properly corroborate the latter. *Id.* at 397-98.

78. *Id.* at 398-403.

79. In situations where the prosecution has strong corroborative evidence, admission of the child's hearsay statements will probably not be necessary. Given inconclusive evidence, however, the prosecutor may need those statements to prove his case. Thus, when the state's case is at its weakest, and the defendant is in the greatest need of his constitutional rights, the new hearsay exception is most likely to be used. The result is that the Act will be used most often where it tends to undermine a defendant's right to confrontation. *Id.* at 402. However, this argument can be refuted when one considers that most accepted hearsay exceptions operate in the same way, and have passed constitutional muster when attacked.

80. U.S. CONST. amend. VI.

81. The basis for evaluation is the demeanor and credibility of a witness. *California v. Green*, 399 U.S. 149, 160-61 (1970).

82. *Id.* at 158. See also *Barber v. Page*, 390 U.S. 719, 721, 725 (1968); *Mattox v. United States*, 156 U.S. 237, 244 (1895).

83. See *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418-19 (1965); *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965).

and to allow the defendant to challenge the witness' credibility through cross-examination.

If taken as an absolute, the confrontation clause would exclude all hearsay evidence. However, the right is not absolute,⁸⁴ and sometimes must be sacrificed for more important policy considerations.⁸⁵ The accepted hearsay exceptions allow the right to be sacrificed where the statements in question have strong indicia of trustworthiness and necessity. Hearsay exceptions themselves are not tested individually by the Supreme Court for their constitutionality. Rather, courts test the constitutionality of specific applications of the exceptions on an ad hoc basis.⁸⁶ Thus, in the final analysis, the question is not whether the Washington exception itself is unconstitutional, but whether specific applications are unconstitutional.⁸⁷ Modeled after the exceptions to the federal rules, Washington's sexually abused child hearsay exception and those similar to it seem able to withstand constitutional attack based on the confrontation clause.⁸⁸

The trend adopting codified child victim hearsay exceptions is only one response to the problems raised by the use of children as witnesses. Various other responses have arisen in different jurisdictions.⁸⁹ Aside from hearsay, the most pervasive responses have come in the areas of expert testimony and the use of audio visual aids as a substitute for child witness testimony.

84. See *Ohio v. Roberts*, 448 U.S. 56, 62-66 (1980).

85. *Mattox*, 156 U.S. at 243. In *Davis v. Alaska*, 415 U.S. 308 (1974), the Supreme Court ruled that the right to confrontation outweighed the statutory policy of protecting a juvenile's confidentiality in a juvenile court proceeding.

86. Comment, *supra* note 71, at 822.

87. *Id.* It is conceivable that if every possible application of the exception were deemed unconstitutional, the exception itself would for all intents and purposes be unconstitutional.

88. Comment, *supra* note 69, at 72-73.

89. For a discussion of the liberal trend in state courts' admitting evidence of various kinds in child sexual abuse cases, see Comment, *Liberalization In The Admissibility of Evidence In Child Abuse And Child Molestation Cases*, 7 J. JUV. L. 206 (1983). This comment discusses the following topics: trends in the admissibility of child testimony, *id.* at 205; the use of photographs as evidence in the absence of the victim's testimony, *id.* at 208 (see also *Torres v. State*, 442 N.E.2d 1021 (Ind. 1982) (Supreme Court of Indiana affirms conviction based on photographic evidence alone)); trends in the admissibility of evidence showing the defendant to have a history of child abuse/molestation, Comment, *supra* at 208 (for an in-depth discussion of the admissibility of similar evidence, see Note, *Evidence, Child Abuse*, 16 LAND & WATER L. REV. 769 (1981); Paisley, *Similar Facts And "Possible Conspiracy": Does Guay Veto The Voir Dire?*, 1 SUP. CT. REV. 375 (1980)); and trends in the use of expert witnesses to establish the credibility of the testimony of the child abuse/molestation victim, Comment, *supra* at 210. For a summary of recent California legislation designed to impose harsher criminal penalties on sex offenders, especially those victimizing children, see *Selected 1981 California Legislation*, 13 PAC. L.J. 633, 634 (1982).

C. Expert Testimony in Child Sexual Abuse Cases

Bearing in mind the trauma which commonly accompanies the sexually abused child's testimony, one alternative to in-court testimony has been suggested which involves the use of tape recorded pretrial examinations accompanied by expert testimony.⁹⁰ The proposal⁹¹ would not require in-court testimony by the child witness or subject the child to multiple pretrial interrogations.

The child's only interview would be conducted with an expert social worker. The expert would possess dual qualifications including experience in the psychology of child sexual abuse and familiarity with pertinent legal standards. Expert and victim could meet in an interviewing room, accompanied by all parties to the action. Adverse parties having questions for the victim could submit them to the expert at a recess, whereupon the expert could then submit them to the witness. The entire session could be recorded, preferably on videotape. Later, the court and parties could review the tapes and ask any additional questions of the expert, who would then relay them to the child. This process would end either when all the parties are satisfied or when the expert decides that further questioning would not be in the best interest of the child. At trial, the tapes would be substituted for the child's testimony. Either party could call the expert to testify as to his method of questioning and to discuss theories indicating whether the child's story is authentic.⁹²

The benefits espoused by the supporters of the proposal are several.⁹³ First, rather than traumatize the child, the interview would amount to therapy. Second, due to the low stress atmosphere, the evidence obtained would be more reliable than in-court testimony. Third, the parties would have an opportunity to question the child several times on any issue. Fourth, the defendant's due process rights would be better served by allowing him ample opportunity to review the evidence before trial. Finally, the interview would meet any hearsay or right to confrontation challenges. The unavailability requirement for admissible hearsay could be utilized, supported by the overriding policy against traumatizing the victim. Furthermore, the evidence can be acquired at a proceeding prior to the trial where the defendant has an opportunity to conduct a modified form of

90. Note, *supra* note 47, at 132.

91. *Id.* at 139-40.

92. *Id.*

93. *Id.* at 141-42.

cross-examination.⁹⁴

This proposal presents a viable alternative to the child's in-court testimony. However, it has not been implemented in any jurisdiction to date. The plan assumes the admissibility of both expert witness testimony on child abuse and of a videotaped interview. Admission of such evidence can be problematic, and unless precedent is set allowing these obstacles to be overcome, the proposal may never see its day in court.

As suggested earlier, attorneys, judges and juries often harbor misconceptions about child sexual abuse cases. Attorneys expect to find proof of violence and force upon examination of the victim.⁹⁵ However, most often the crimes do not involve forceful physical contact.⁹⁶ Attorneys will often look for signs of trauma in the child's behavior and, absent such signs, conclude that no assault occurred.⁹⁷ These misconceptions present a need for expert witness testimony in child sexual abuse cases.

Researchers believe that child sexual molestation cases occur, more often than not, in a repeating pattern.⁹⁸ This pattern has been recognized by psychologists as the "sexually abused child syndrome."⁹⁹ However, until recently, courts have refused to recognize this syndrome as a scientifically established basis appropriate for expert testimony.¹⁰⁰

94. *Id.*

95. Wells, *Expert Testimony on the Child Sexual Abuse Syndrome: To Admit or Not To Admit*, 57 FLA. B.J. 672, 673 (1983).

96. See *supra* note 53 and accompanying text. See also Wells, *supra* note 95, at 674.

97. Wells, *supra* note 95, at 673.

98. "It is suspected that an indepth study of such incidents would demonstrate that the actions of the aggressor constitute a pattern of conduct rather than an isolated incident." *Id.* at 676.

99. *Id.* at 676 n.5 (citing S. Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool for Families*, in NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, *LEGAL REPRESENTATION OF THE MALTREATED CHILD* 70 (1979)).

100. "The respective ages of the victim and the accused, as well as their relationship, juxtaposed against the nature of the crime, encourage courts to conclude that there are no reasonable opinions that can be asserted by an expert in this area." Wells, *supra* note 95, at 675.

The Florida courts, exemplary of most jurisdictions, have refused to allow experts to testify on the sexually abused child syndrome. The rationale is that "the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert." *Id.* at 675 (quoting *People v. Anderson*, 406 Ill. 585, 592, 94 N.E.2d 429, 432 (1950)).

Generally, the most effective type of evidence available to a prosecutor in a child abuse case is the child's own in-court testimony. However, eliciting such can be a delicate matter and may require much pre-trial preparation. For a discussion of pre-trial preparation, questioning techniques, and child victim testimony, see generally Bernstein, *Out Of The Mouths of Babes: When Children Take The Witness Stand*, 4 CHILDREN'S LEGAL RTS. J. 11 (1982); Bauer, *Preparation of the Sexually Abused Child for Court Testimony*, 11 BULL. AM. ACAD. PSYCHIATRY L. 287 (1983); Croteau, *Child Victims of Sexual Abuse*, 16 PROSECUTOR 16 (1981).

Although it is too early to tell, a new trend may be emerging regarding the admissibility of expert testimony in child sexual abuse cases. Expert testimony on the child sexual abuse syndrome was admitted by a Florida judge in mid-1982.¹⁰¹ The expert's testimony was the only evidence, other than the child's testimony, available to the state's attorney, who was attempting to permanently commit a fourteen-year-old girl to foster care.¹⁰²

Although not directly addressing the child sexual abuse syndrome, an expert's testimony characterizing a small child's behavior as typical of molested children was admitted by a California court of appeal in *In re Cheryl H.*¹⁰³ The court affirmed a lower court decision to admit the expert's testimony. Decisions such as these may be precipitant of a new breakthrough for admission of expert testimony in child sexual abuse cases.

D. Videotaping

One of the most innovative responses to the problems associated with child victim testimony has been the use of videotape. Although only a few states have actually authorized substitution of the child's in-court testimony with a videotaped version, proposals abound for use of videotaped interviews, both in and out of court.

One proposal suggests a collective investigatory interview involving all agencies which might later seek to question the child.¹⁰⁴ The collective interview would reduce the necessity of repeated individual

101. This expert testimony was admitted in the case of *In re D.B.*, an unreported Florida tenth judicial circuit court case. See Wells, *supra* note 95, at 675, 676 n.23.

102. Wells, *supra* note 95, at 676. The girl was first committed to foster care at the age of thirteen after claiming to have been molested by her father. After she expressed her desire not to return home a year later, a permanent commitment hearing was held. *Id.* at 675-76.

103. 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984). In this case, a psychiatrist observed an allegedly abused three-year-old playing with anatomically correct dolls and concluded that the child's behavior was typical of molested children. The court held that the psychiatrist's testimony "was not inadmissible hearsay because the child was not attempting to communicate anything by her behavior." *Id.* at 117-18, 200 Cal. Rptr. at 800-01. See Low, *Court Allows Use of Dolls to Show Evidence of Abuse*, L.A. Daily J., Apr. 4, 1984, at 1, col. 4.

The use of experts in such situations has received its share of criticism. Gerald Uelmen, a professor of criminal law at Loyola University (Los Angeles), claims that "[i]t's causing a lot of problems. . . . There's a question as to whether there's a scientific basis for what they say or whether just [sic] supposed to be human lie detectors." L.A. Daily J., Apr. 4, 1984, at 1, col. 4. See Comment, *supra* note 89, at 210.

104. See generally Haas, *supra* note 44. In Florida, for example, when an incident of child abuse is reported, a child protection team is appointed, consisting of pediatricians, psychologists, psychiatrists, lawyers, and case coordinators. *Id.* at 374. A sepa-

interviews, thus reducing the traumatic effect of such repetition on the child.¹⁰⁵ The recommended scenario for such an interview would include a neutral setting, anatomically correct dolls, hidden cameras and microphones, a one-way mirror, and a neutral interviewer asking prepared questions with an opportunity for follow-up questions transmitted to the interviewer by a listening device.¹⁰⁶ The interview would be observed by representatives of all agencies concerned and would be videotaped to preserve it for later use by those agencies and by the court, if possible.¹⁰⁷

Without at least some means of confronting and cross-examining the child witness in the course of the videotaped interview, however, the defendant could effectively challenge the child's admissions on hearsay grounds in a criminal proceeding.¹⁰⁸ Still, early in the adversarial process the non-confrontational videotaped interview could be effectively used. By showing it to the defendant and his attorney, plea negotiations could be motivated.¹⁰⁹ On the other hand, the tapes may also serve as a two-edged sword: once made, the tapes would be subject to discovery by the defendant, who might then be able to capitalize on their weak points.¹¹⁰

rate interview by each agency involved would compound the child victim's traumatization. *Id.* at 373.

105. *Id.*

106. *Id.* at 376-77.

107. *Id.* Potential uses for the videotape include orientating the attorneys, guardians ad litem, and other case workers to the facts and circumstances involved. *Id.* at 374. This can be especially helpful where caseloads are heavy, or where a case is transferred to new lawyers who need to be briefed in a short period of time. *Id.* at 374-75. Another use for the videotaped interview would be to aid prosecutors in making decisions about whether to press charges. *Id.* at 375. Psychologists and psychiatrists could also use the videotape to assist in therapy and diagnosis. *Id.*

108. *Id.* at 377.

109. *Id.* at 373.

Minneapolis police have had a program of videotaping alleged victims of child abuse for over two years. They claim to have never lost a case and to have never had a child called by the defense to testify. In 1983, videotapes were used in 75 cases, resulting in approximately sixty defendants pleading guilty as soon as they viewed the tapes. *Videotaping—Device for Fighting Child Abuse*, 70 A.B.A. J. 36, 36 (Apr. 1984) [hereinafter cited as *Videotaping*].

110. Such use of the tapes could facilitate impeachment of the child witness. Haas, *supra* note 44, at 374.

Videotaping has been routinely used in drunk driving cases. But because drunk people on videotape often seem perfectly sober to juries, some California police departments have stopped the taping. *Videotaping*, *supra* note 109, at 36.

In fact, the two-edged sword may already have had an effect in the McMartin preschool case. At the preliminary hearing, a defense attorney requested that a videotape of an initial interview therapy session be shown in court to prove that suggestive methods were used by therapists. The tape did show damaging, leading, and suggestive questioning on the part of the therapist. The defense maintains that the taped interview proves that the children were "brainwashed." Timmick, *Court Sees Videotape of a Therapy Session For McMartin Witness*, L.A. Times, Mar. 6, 1985, § II, at 6, col. 4.

Care should be taken in arranging videotaped interviews of sexually abused children. Faulty decision-making about initial interviews and videotaping could result

The Florida Legislature has led the way in enacting legislation allowing videotaped interviews of child victims to be admitted in court. A Florida statute¹¹¹ allows the admission of a child's videotaped testimony in a sexual assault case if the court makes certain findings. Upon a motion for an order admitting the videotape, the court must find that the child is under sixteen years of age and that there is substantial likelihood that the child will suffer severe emotional or mental strain if required to testify in court.¹¹² The motion may be made at any time once reasonable notice has been given to each party, and the videotaping may occur at any time after such motion is granted.¹¹³ Unless certain conditions are met, the trial judge must preside at the videotaping and rule on all questions as if at trial.¹¹⁴

The Florida videotape statute may still be subject to a constitutional challenge on confrontation grounds. However, this hurdle

either in the impairment of a case against a guilty defendant, or in the bolstering of a case against an innocent defendant.

111. FLA. STAT. ANN. § 90.90 (West Supp. 1985) provides:

(1) On motion and hearing in camera and a finding that there is a substantial likelihood that a victim or witness who is under the age of 16 would suffer severe emotional or mental distress if he were required to testify in open court, the trial court may order the videotaping of the testimony of the victim or witness in a sexual abuse case or child abuse case, whether civil or criminal in nature, which videotaped testimony is to be utilized at trial in lieu of trial testimony in open court.

(2) The motion may be filed by:

(a) The victim or witness, or the victim's or witness' attorney, parent, legal guardian, or guardian ad litem;

(b) A trial judge on his own motion;

(c) Any party in a civil proceeding; or

(d) The prosecuting attorney or the defendant, or the defendant's counsel.

(3) The judge shall preside, or shall appoint a special master to preside, at the videotaping unless the following conditions are met:

(a) The child is represented by a guardian ad litem or counsel;

(b) The representative of the victim or witness and the counsel for each party stipulate that the requirement for the presence of the judge or special master may be waived; and

(c) The court finds at a hearing on the motion that the presence of a judge or special master is not necessary to protect the victim or witness.

(4) The defendant and the defendant's counsel shall be present at the videotaping, unless the defendant has waived this right.

(5) The motion referred to in subsection (1) may be made at any time with reasonable notice to each party to the cause, and videotaping of testimony may be made at any time after the court grants the motion. The videotaped testimony shall be admissible as evidence in the trial of the cause.

(6) The Supreme Court may, by rule, provide procedures to implement this section.

Id.

112. *Id.* § 90.90 (1).

113. *Id.* § 90.90 (5).

114. *Id.* § 90.90 (3).

could be overcome by allowing confrontation and the opportunity for cross-examination by the defendant at the videotaped proceeding.¹¹⁵

It remains to be seen whether the Florida videotape statute will survive all challenges and serve its intended purpose in alleviating the burden placed on child abuse victims. However, other equally innovative measures are presently being considered involving the use of audiovisual aids.

E. The Libai "Child Courtroom"

The problems associated with child abuse victim testimony have not gone unnoticed in the past. However, with the development of new technologies, lawmakers are much better equipped to deal with the problems today than they were a decade ago.

In 1969, David Libai proposed a solution for the problem he called "legal process trauma."¹¹⁶ His solution involved the construction of a special "child courtroom"¹¹⁷ consisting of an inner chamber surrounded by a larger room. The inner room would be furnished so as to be less threatening to a child and would house the child, both attorneys, and the judge. The accused, the jury, and the public would sit in the outer room and observe the child's testimony through one-way glass. The accused and his attorney would each have a microphone and earphones in order to communicate with each other. The jury would observe both the accused and his accuser, and the defendant would observe the child testifying.¹¹⁸ The only aspect of traditional confrontation lacking from the scenario is that the child would not be able to see the defendant.

The rationale behind the child courtroom is that given a less stressful atmosphere, a child could express himself better.¹¹⁹ The design of the courtroom with its neutral inner room and the lack of eye-to-eye contact from child to defendant would tend to reduce stress. Such an environment might also encourage more guilty defendants to plead guilty as charged, instead of advancing with a defense based upon de-

115. Statutory and case law support the notion that, in criminal cases, depositions of child abuse victims must afford the defendant face-to-face contact and the right to cross-examine. *United States v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979); *FLA. R. CRIM. P.* 3.180. Further consideration of the constitutional challenge to *FLA. STAT. ANN.* § 90.90 (West Supp. 1985) will be given later. See *infra* notes 137-45 and accompanying text.

116. Libai, *supra* note 43, at 983. Libai actually coined the phrase "legal process trauma" in this oft-cited article.

117. *Id.* at 1014-25.

118. *Id.* at 1017. Libai based his child courtroom proposal on similar practices in Israel. *Id.* at 1017 n.136. This proposal allows for a special hearing to be held in the child courtroom, which would be taped for use later at trial as a substitute for live testimony by the child. *Id.* at 1028.

119. Comment, *supra* note 46, at 34.

stroying the child's credibility in open court.¹²⁰

Libai's child courtroom has received its share of criticism even from those advocating other reform measures for child witnesses. The child courtroom has been criticized for "[overburdening] judicial resources, for failing to protect the child from the traumatic experience of adversarial cross-examination, and for failing to add expertise to the analysis of the child's [testimony]."¹²¹ An even stronger challenge comes from those who assert that, in attempting to spare the child,¹²² the Libai proposal goes too far in abridging the defendant's right to confrontation.¹²³

Suggestions on how to modify the Libai courtroom in order to bring it more in accord with the sixth amendment have centered on bringing the child into some form of visual contact with the defendant. One suggestion involves the use of a closed circuit television monitor in the inner area, which at the start of the hearing would project the face of the defendant to the child.¹²⁴ At this point, the child would be told that the defendant is watching and listening to his testimony. The monitor would then be switched off and the hearing would proceed.¹²⁵

The Libai child courtroom was innovative in its approach, but it was restricted by the limited technological developments of its time. Advancements in audio and video technologies now offer more feasi-

120. *Id.*

121. Note, *supra* note 47, at 139 n.39. Interestingly, these criticisms come from an advocate of reform whose own proposals involve the increased use of expert testimony. See *supra* notes 95-102 and accompanying text.

122. A common practice among defense attorneys is to stand next to the defendant while questioning the child witness. This forces the child to look at the defendant while testifying, and is designed to induce stress and inhibit testimony. Comment, *supra* note 46, at 34. The Libai proposal avoids this problem altogether by providing for no child-to-defendant confrontation.

123. *Id.* at 34-39. The eighth circuit ruled in *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979), that face-to-face confrontation was essential, and that electronic intervention through videotaping impaired the defendant's rights and was "constitutionally infirm." *Id.* at 821. This ruling places the child courtroom in constitutional jeopardy. See *infra* notes 137-45 and accompanying text.

124. Comment, *supra* note 46, at 37.

125. *Id.* This modification might solve the confrontation problem by providing momentary, electronically transmitted face-to-face confrontation. However, it would still be subject to attack on grounds that the confrontation is not continuous throughout the testimony, and what little confrontation there is could be skewed by the eye of the cameraman. Perhaps a continuous closed-circuit confrontation would suffice, but the problem of the cameraman perspective would remain. See *infra* notes 126-36 and accompanying text.

ble means for meeting the constitutional challenge while still providing needed protections for the child.

F. Closed-Circuit Televised Child Testimony

With the development of cheaper and more sophisticated closed-circuit television systems, the Libai child courtroom proposal has become obsolete. A one-way or two-way closed-circuit system provides virtually all of the advantages of the child courtroom at considerably less cost and inconvenience. In fact, proposals for the use of closed-circuit television are at the forefront of the movement for reform in child witness testimony conditions.

California is currently the focal point of the controversy over closed-circuit child witness testimony. The *McMartin* preschool case¹²⁶ has triggered a rapid movement toward legislative acceptance of child witness closed-circuit testimony in California. However, weighty constitutional considerations and contrary precedent must first be overcome before any such innovations can occur.

Persuasive authority dictating against the admissibility and constitutionality of closed-circuit child testimony was laid down by a California appellate court in *Hochheiser v. Superior Court*.¹²⁷ In *Hochheiser*, the court stated that "the camera becomes the juror's eyes, selecting and commenting upon what is seen."¹²⁸ The *Hochheiser* court claimed that a camera can distort perception and lead jurors astray; however, the court did not rule that closed-circuit testimony would be unconstitutional. Instead, it ruled that a judge has no legal authority to allow it.¹²⁹

Scarcely a month after the *Hochheiser* decision, prosecutors in the *McMartin* preschool case moved for admission of closed-circuit child testimony. The Los Angeles Municipal Court judge presiding over the preliminary hearing cited *Hochheiser* in ruling that closed-circuit televised testimony would not be allowed.¹³⁰ This ruling sparked frenetic activity by the proponents of closed-circuit testimony in Califor-

126. See *supra* note 49. See also *Video Testimony in McMartin Case Is Barred by Judge*, L.A. Daily J., Dec. 11, 1984, at 1, col. 4; *Senate OKs Court Use of TV in Child Sex-Abuse Cases*, L.A. Times, Feb. 5, 1985, § II, at 3, col. 5; *State High Court Bars Children's Testimony by TV*, L.A. Times, Feb. 15, 1985, § II, at 1, col. 5.

127. 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984). In *Hochheiser*, the prosecutors sought to have closed-circuit testimony of the child witness admitted at trial. See *Video Testimony In McMartin Case is Barred by Judge*, *supra* note 126.

128. 161 Cal. App. 3d at 786, 208 Cal. Rptr. at 278. See also *State High Court Bars Children's Testimony by TV*, *supra* note 126, at 3, col. 1.

129. 161 Cal. App. 3d at 786-87, 208 Cal. Rptr. at 278-79. The court characterized closed-circuit television as constitutionally questionable and unauthorized by law. *Id.*

130. Judge Aviva Bobb stated, "[i]t's my view that *Hochheiser* cannot allow closed circuit television in a preliminary hearing or trial . . ." *Video Testimony In McMartin Case Is Barred by Judge*, *supra* note 126. Bobb ruled that the children must testify live in open court. *Id.*

nia. A bill was immediately drawn up for the State Legislature and rushed through the State Senate, where it received approval by a narrow margin.¹³¹ The bill was passed by the California Assembly and was approved by the Governor on May 18, 1985.¹³² The new statute allows child molestation victims under the age of ten to testify outside the courtroom by closed-circuit television.¹³³ Before such testimony will be allowed, the new law requires the court to determine first, whether the child's testimony would involve "a sexual offense committed on or with the minor." Second, four factors are delineated, the satisfaction of any or all of which could make the child "unavailable as a witness unless closed-circuit television is used."¹³⁴

Unfortunately, the movement toward acceptance of closed-circuit testimony in California may have been significantly impeded by a recent decision of the California Supreme Court. The supreme court refused to grant a hearing on the prosecution's appeal in the

131. Senate Bill No. 46 was submitted as an urgency bill requiring two-thirds approval (27 votes) by the California Senate. The Senate passed the bill on February 4, 1985, by a vote of 28 to 8. *Senate OKs Court Use of TV in Child Sex-Abuse Cases*, *supra* note 126.

132. 1985 Cal. Legis. Serv. § 46, Ch. 43 (West).

A spirited debate followed the bill through the California Legislature. California State Senator Art Torres, an avid supporter of the bill, stated that it was as "constitutionally pure as possible", and that it was a "contemporary" legal tool. *Senate OKs Court Use of TV in Child Sex-Abuse Cases*, *supra* note 126. However, California State Senator Barry Keene, former chairman of the Senate Judiciary Committee, claimed that the bill would "hinder and distort the truth gathering process." *Id.*

The bill has been codified into law as California Penal Code section 1347.

133. While the bill was still in the legislature as urgency legislation, proponents, including many McMartin preschooler's parents, were hoping it would be passed in time to spare at least some of the 41 children from the ordeal of live, in-court testimony. *Id.*

The law places the matter in the court's discretion, and, although passed in time, ironically, Judge Aviva Bobb chose not to utilize the new law until the last child was called to testify. On October 1, 1985, an 8-year-old boy, the last of the prosecution's child witnesses, took the stand at the McMartin preliminary hearing. *L.A. Times*, Oct. 2, 1985, § II, at 2, col. 3.

The child, accompanied by a parent, a bailiff, and an independent monitor, testified from a small room behind the courtroom. He watched the attorney questioning him, and occasionally the judge, on a 19-inch color T.V. monitor. He watched the seven defendants, their lawyers and the public on two 25-inch monitors. His testimony was transmitted to the courtroom via three 19-inch monitors; two showing a close-up of the child, and one focused on the accompanying parent. *Id.*

However, the delay in utilization of the bill was costly. Of the original 41 child witnesses planned to testify, only 14 ended up actually taking the stand. The others either declined or were dropped by the prosecution for various reasons, most notably the then-present inability to testify via closed-circuit T.V. *Id.*

134. 1985 Cal. Legis. Serv. § 46, Ch. 43 (West) (to be codified at CAL. PENAL CODE § 1347).

Hochheiser case, thereby affirming the decision.¹³⁵ This ruling throws the constitutionality of the new statute into question. The ruling may also have a state-wide effect by influencing court decisions.¹³⁶

The future development of closed-circuit testimony in child abuse cases is hard to predict. The California Legislature seems to be moving in the opposite direction of the California courts. The California experience will undoubtedly have a profound impact throughout the country. Therefore, keeping a close watch on developments in California should prove fruitful to those researching the subject.

A common obstacle confronting all of the proposals for reform has been the sixth amendment constitutional challenge. In order to accurately determine whether such proposals will be successful, consideration of how the reforms will overcome the constitutional obstacle is in order.

VI. THE CONSTITUTIONAL CHALLENGE TO REFORMS IN CHILD VICTIM TESTIMONY

Inherent in any proposed solution to the problems surrounding child victim testimony is the notion that the children must be accorded special protections. However, these protections come in direct conflict with well-established principles protecting defendants' rights in criminal proceedings.

As discussed earlier,¹³⁷ the sixth amendment provides criminal defendants with the right to confront their accusers. This right has consistently been interpreted to require "face-to-face" confrontation.¹³⁸ That interpretation was recently followed by the Supreme Court in *United States v. Benfield*.¹³⁹ Unfortunately, face-to-face confrontation is one of the trauma-causing factors the child victim

135. *State High Court Bars Children's Testimony by TV*, *supra* note 126, at 3, col. 1-2.

136. *Id.* at 3, col. 2. The *Hochheiser* decision is actually binding authority only in the second district of California, which includes Los Angeles County. However, as the first decision of its kind, it will probably provide a lead for other California districts. *Id.* In the end, the ruling may turn out to be more significant than first imagined. As California is the groundbreaking state with regard to closed-circuit testimony, a severe setback in California could have rippling effects which would retard development throughout the country.

137. See *supra* notes 80-89 and accompanying text.

138. For cases interpreting the right of confrontation to mean "face-to-face," see *Lewis v. United States*, 146 U.S. 370 (1892); *Mattox v. United States*, 156 U.S. 237 (1895); *Kirby v. United States*, 174 U.S. 47 (1899); *Dowdell v. United States*, 221 U.S. 325 (1911). Courts have rarely departed from such a strict construction of the confrontation clause. See *Illinois v. Allen*, 397 U.S. 337 (1970) (defendant waived his right through misconduct); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (defendant waived right when he intimidated witness before trial).

139. 593 F.2d 815 (8th Cir. 1979). The court in *Benfield* stated, "[m]ost believe that

testimony reforms seek to minimize.¹⁴⁰ However, despite the apparent obstacle the sixth amendment presents to those reforms, there is still hope that they can survive a constitutional attack. The *Benfield* court stressed that its ruling should not discourage the development of new technologies that closely approximate the traditional courtroom setting which the court might accept under appropriate circumstances.¹⁴¹

Jurisdictions around the country have varied determinations concerning the necessity of face-to-face confrontation. In 1981, a California court of appeal ruled that face-to-face confrontation was absolutely necessary.¹⁴² However, in 1975, the Missouri Supreme Court allowed admission of closed-circuit testimony by an expert where the defendant could watch the expert, but the expert only saw the defendant's attorney.¹⁴³

Whether the confrontation clause will result in the defeat of child witness reform measures in the future is unknown. The trend from coast to coast through legislation, such as that in California,¹⁴⁴ and through adopted laws, such as that in Florida,¹⁴⁵ is for concern over the psychological harm that accompanies child victim testimony. Although it is too early to tell, given this trend and the new reforms dealing with the problem, it is probable that some of the proposals will pass constitutional muster.

VII. CONCLUSION

The increased use of child witnesses in sexual abuse cases necessitates reforms to protect those witnesses from traumatization. Proposed reforms often conflict with established principles of law. But hopefully, through the ingenuity of drafters and the flexibility of

in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge." *Id.* at 821.

140. Proposals for expansion of hearsay exceptions for the use of expert testimony, videotapes, special courtrooms, and closed-circuit testimony in lieu of live in-court testimony all involve the avoidance of a face-to-face confrontation between the child and defendant.

Although the sixth amendment also gives the defendant the right to cross-examine his accusers, the United States Supreme Court has stated that it does not mandate cross-examination in every case. *California v. Green*, 399 U.S. 149, 156-58 (1970).

141. *Id.*

142. *Herbert v. Superior Court*, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981).

143. *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975).

144. See *supra* notes 126-36 and accompanying text.

145. See *supra* notes 111-15 and accompanying text.

courts, the policy of protecting our children will continue to be pursued.

DOMINIC J. FOTÉ