ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 8672

3903 SHES SB 3

79

SB 427 HISTORY

The bill was amended in Senate HESS. Wording changed from "preliminary examination" to "grand jury" because preliminary examinations are rarely used in Alaska. The change in Rule 6(r) was added.

The fiscal note is zero.

Senate HESS: 4 DP (Halford, V. Fischer, P. Moss, Josephson)
Senate JUD: 3 DP (Ray, Pettijohn, Eliason)
1 NR (Ziegler)

Passed Senate 5/8/84 16-0-4

Correspondence & Testimony

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Municipality of Anchorage; Division of Behavioral Health;
Department of Health; Frances Purdy, Dir.
264-4111
Council on Domestic Violence and Sexual Assault; Jana Varrati

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CSSB 472 was read across on May 10th and referred to Judiciary. It was not priority legislation to them and apparently they felt it was too late in the session.

THE NATIONAL LAW JOURNAL

VOL. 6—NO. 42 PRICE $2.00 *The Weekly Newspaper for the Profession* MONDAY, JUNE 25, 1984

New War on Child Abuse

Reforms Are Making Prosecutions Easier

By Mary Ann Galante
National Law Journal Staff Reporter

THE WITNESS BOX was empty. Instead, the packed Los Angeles courtroom audience watched a 5-year-old girl testify on a large TV screen placed before a podium from which lawyers asked her questions.

The tiny witness could have been at home, or even in another state. She was in the next room.

Washed in the glare of floodlights, the child was demure until questioning turned to details of her alleged molestation by an elementary school principal, Hugh Greenup, 57, of Northridge, Calif., charged with sexually assaulting seven students. The little girl, seated beside her mother, stared into space, then froze. "Your honor, we'll need a little time," came the voice of the bailiff as the sound of sobbing rose.

The testimony by two-way, closed-circuit TV was used in California for the first time last month. *People v. Greenup*, A752-34. It is one of several innovations being tried across the country to spare children who allegedly have been molested yet another assault by the legal system.

Sexual abuse of children brings out strong emotions. Dramatic reforms are being adopted nationwide to change courtroom procedures, sentencing laws and rules of evidence to facilitate prosecution of accused child molesters. But some question whether the trend is an overreaction at the expense of constitutional rights.

State laws vary widely, but the more common reforms include:

- Abolishing statutorily set ages below which children are presumed to be incompetent as witnesses.
- Abandoning corroboration requirements. Only two jurisdictions — Nebraska and the District of Columbia — still retain blanket prohibitions against finding someone guilty of sexual abuse solely on the word of a child.
- Changing hearsay rules to allow into evidence both out-of-court statements from children and videotaped interviews. A related technique — used in the

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Growing Disillusion

Is Partnership Worth It All?

By David A. Kaplan
National Law Journal Staff Reporter

"Probably every new and eagerly expected garment ever put on since clothes came in, fell a trifle short of the wearer's expectation."

— Charles Dickens in "Great Expectations"

FOR JUNIOR partners in the nation's major law firms, was the catch worth the chase?

The chance at partnership — what essentially amounts to lifetime job tenure, financial security and social status — is the brass ring that spurs those fresh out of law school to toil as overworked associates for as long as 10 years in hundreds of firms across the country.

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HIGHLIGHTS

Child-Abuse Prosecutions Are Increasing

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Greenup case — allows live testimony via closed-circuit television to shield very young witnesses from exposure to grand juries, spectators the press or even defendants.

Growing Awareness

The trend toward innovation can be traced to growing public awareness about a previously hidden issue that suddenly has burst out of the deepest corner of the American closet. In California alone, more than 40 bills aimed at easing young victims' trauma have been introduced in the Legislature.

Because prosecutors' offices tally cases differently, there are no reliable statistics to gauge the success of these efforts. But there's little doubt that more cases are being filed," notes Josephine A. Bulkley of Washington, D.C., former project director of the American Bar Association's two-year national study on how legal systems cope with child sex abuse.

Change has been slow. For years, prosecuting cases involving preschoolers was the exception rather than the rule because such cases, relying heavily on the testimony of the young witnesses, are difficult to prove.

Today, however, prosecutors and child therapists alike bristle at the widespread view that sexually abused youngsters cannot separate fact from fantasy. They counter that toddlers as young as 2 or 3 are incapable of describing sex acts unless they have actually experienced them.

Special Units

Although they are still rare, special prosecuting units have been set up in a few major cities. Two years ago, Jean Matusinka, who heads the Los Angeles District Attorney's Child Sex Abuse Unit, won funding from the Los Angeles County Board of Supervisors for her section. Her pitch was easy: The county had 750 incest cases, and half were being ignored for lack of lawyers.

Last year, her team of five trial lawyers and two investigators filed about 130 cases involving sexual abuse. They won convictions in all but two.

A major plus of the special units is that they usually allow for vertical prosecution — in which one lawyer follows a case through all phases, rather than the assembly-line approach used in most felonies.

> The younger the victim, the more likely he'll 'babble, wander, twirl in the chair, then look at you and freeze.'

That approach, which minimizes a child's contact with the legal system, was started in the mid-1970s by what became the King County Special Assault Unit in Seattle, long a leader in innovative prosecution of child sex-abuse cases. Lawyers there prosecute 275 to 300 cases involving child molestation a year — an unusually high figure even in larger cities.

Another way prosecutors minimize the trauma of eliciting testimony from young victims is by using anatomically accurate dolls. They are helpful "for kids who can only verbalize with names like 'peanut' and 'koochie' to show what happened [to them]," explains Laurie Boerma, chief of Philadelphia's Child Abuse Unit.

Seattle offenders who are found to be suitable candidates for treatment often receive light jail time of perhaps 90 days, and then are allowed into a therapy program — provided they admit the crime.

The approach results in guilty pleas in 80 percent of the filed cases. Its success has led to plans in Florida's Dade County to launch soon a similar program to treat entire families of pedophiles who admit intrafamily abuse.

It's when cases go to trial, lawyers on both sides agree, that child sexual-abuse cases are the toughest.

Prosecutor often have no more than the story of a terrified toddler. And the younger the victim, the more likely he or she is "to babble, wander, twirl in the chair, then look at you and freeze," notes Robert H. Lynn, assistant county attorney in Minneapolis.

Moreover, the cases' sensitive nature results in an exhausting emotional drain for both sides, observes Seattle defense lawyer Michael A. Frost. "After three days of trial, everybody feels like it's lasted two weeks. You don't want to get up and go to court."

The defense burden is doubly difficult because jurors resent a lawyer who bullies children. "With adults, you can be tough to get at the truth. But how do you deal with a 4-year-old" who may be lying? asks Deputy District Defender Susan Alkema of Albuquerque, N.M.

Nonetheless, the odds still favor the attacker because most cases continue to go unreported and untried. But as many states amend their rules of evidence, prosecutors are gaining an edge.

Competency Rules

A major trend has been toward dropping competency criteria. At one time, legal scholars note, children were in the same class as felons and athlests — jurors were told their testimony was suspect. The shift started in 1974, when the Federal Rules of Evidence were enacted, eliminating the competency requirement for children.

Nonetheless, about half the states today still presume witnesses younger than 10 are incompetent. A substantial number of states have no presumption, leaving it up to the judge to decide whether children in specific cases meet competency standards.

> The cases are exhausting, says one defense lawyer. 'After three days of trial, everybody feels like it's lasted two weeks.'

The competency hurdles have been "the No.-1 legal rule preventing successful prosecution of child-molestation cases," says Irving Prager, a professor at California's University of La Verne College of Law.

But competency standards clearly are being eroded. Several states — including Colorado and Utah — have gone at least as far as the federal rules, and similar reforms have been proposed in California and Ohio.

An even greater barrier to prosecution has fallen with the elimination of requirements that all cases of sexual abuse be corroborated independently.

'Substantial Impact'

In New York, which just amended its law to drop the corroboration requirement in sex abuse cases, the Brooklyn

Continued on following page

Some prosecutors use anatomically correct dolls to elicit testimony from victims. Those help kids who can only verbalize with names like 'peanut' and 'koochie,' says one prosecutor.

Continued from preceding page

district attorney's office alone in the past two years dropped 56 cases involving child sexual abuse for lack of corrobation, claims District Attorney Elizabeth Holtzman. The prosecutor said she expects the state's newly amended law will have "a substantial impact on our ability to prosecute child-molestation cases."

That seems to be proven in those states that no longer require more than a child's word to convict sexual offenders. The Sacramento, Calif., district attorney's office, for example, won a conviction in a case within the past year using the uncorroborated testimony of a 4-year-old. The tiny victim, notes Deputy DA Robin Shakely, "testified beautifully . . . She was a really sharp little girl."

But defense lawyers are concerned that removing corroboration requirements will wipe out needed constitutional safeguards. "Juries tend to believe victims," notes Linda Jacobson, an attorney with Washington, D.C.'s Public Defender Service, which opposes changing the district's rule. "A lot of times there are unsubstantiated allegations, and not a tremendous amount of proof."

Even more controversial are those reforms that create exceptions to the hearsay rule. Throughout the country, these have taken two forms: exceptions that allow admission of youngsters' out-of-court statements, and those that involve videotaped interviews with child victims.

Washington state took the lead by adopting a hearsay exception in 1982 to admit children's statements when the victims are under 10 and allege sexual abuse. To be admissible, the court must find the time, content and circumstances of the child's statement provide enough "indicia of reliability." Corroboration is needed if the child is unavailable. Wash. Rev. Code 9A.44.120.

Similar exceptions have since been adopted in Colorado, Kansas, Minnesota and Utah. Legislators in four other states — California, Ohio, Virginia and Wisconsin — are looking at adopting hearsay bills.

Hearsay exceptions allow mothers, teachers, counselors and others having the child's trust to tell a court what a child too young to testify for himself privately confides about sexual abuse. A vivid example occurred recently in Colorado, when prosecutor Yvette Kane used hearsay testimony against a man who eventually admitted fondling his 2½-year-old grandchild.

Such cases show that the exceptions clearly are a prosecutor's tool. But

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Reforms Aim to Minimize Child's Trauma

Reforms Aim to Minimize Child's Trauma

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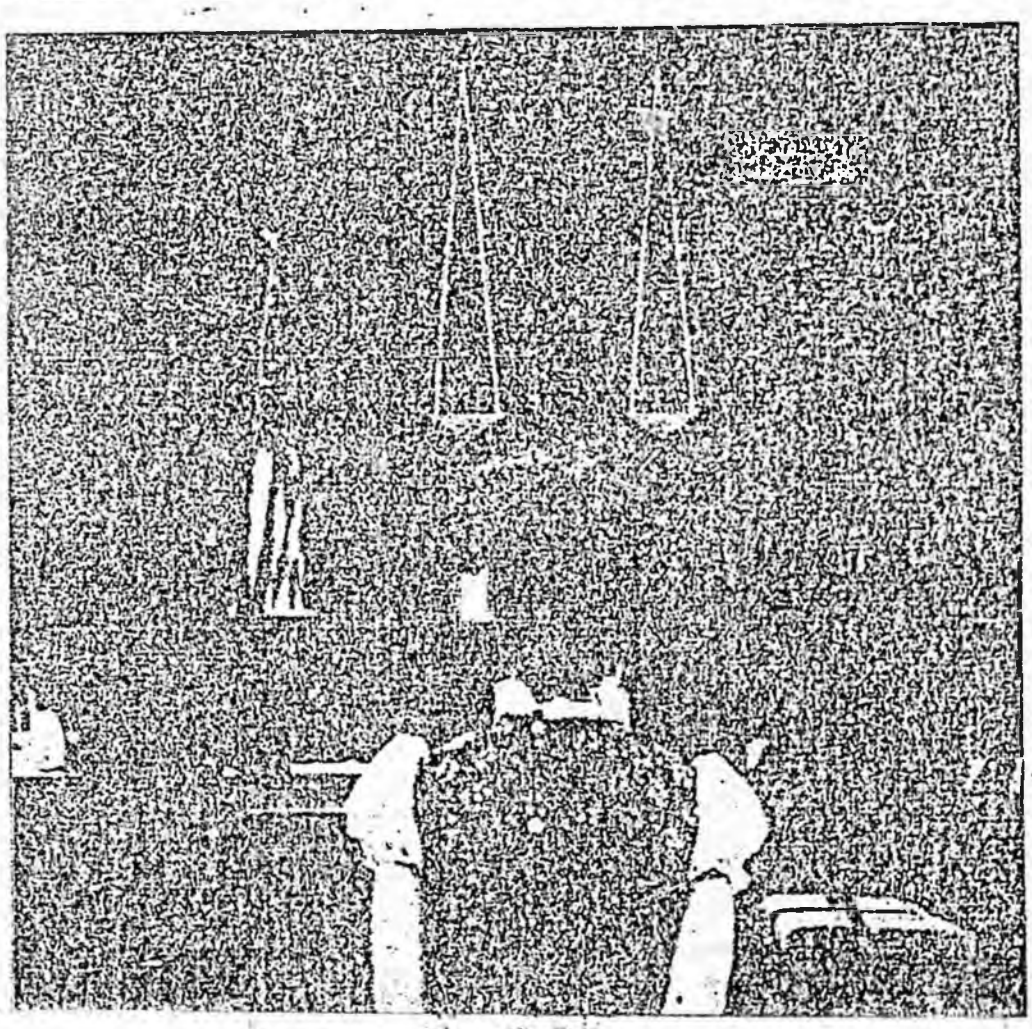
there are pragmatic limits. Because live testimony of child victims has a far greater impact on juries, prosecutors say they only resort to hearsay evidence when cases can be prosecuted no other way.

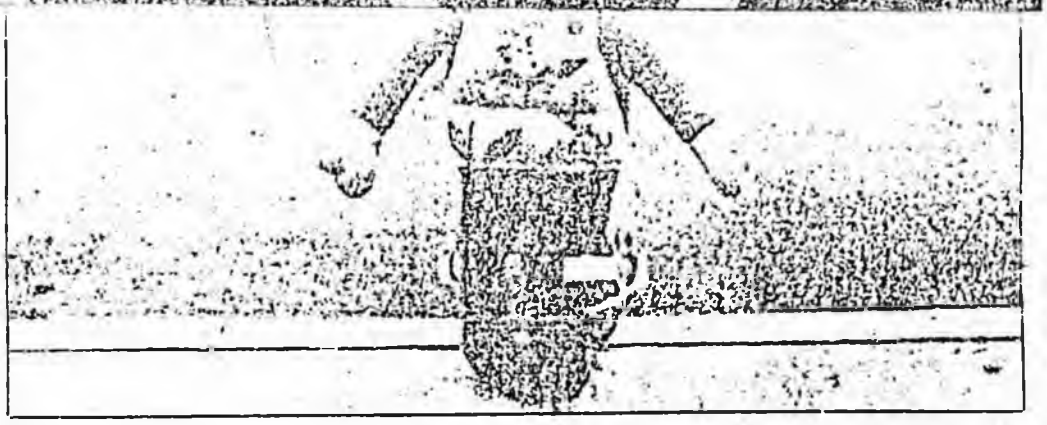
In the two years since the Washington law was enacted, for instance, prosecutors in King County have used it in only 15 cases. "Frankly, if a victim *can* testify and is competent, I want the jury to see and hear the child," says Rebecca Roe, supervising attorney of the Special Assault Unit in Seattle. "It's usually much more convincing."

Washington's law already has been appealed to the state Supreme Court in a case from Okanogan County. *State v. Ryan*, 50216-1. And legal experts predict that more appeals on laws that create new hearsay exceptions are certain. Colorado lawyers, for instance, point to the fact that that state's law has no definition for what constitutes witness "unavailability," or what kind of corrobation is needed if a witness does not testify.

Controversy Over Tapes

Defense lawyers have raised equally strong arguments about videotaping of victims' interviews and depositions, the second method of admitting abused children's out-of-court statements.





AP/Wide World Photos

In the past several years, a number of states have enacted provisions allowing videotaping in child sex abuse cases. The list includes Arizona, Colorado, Florida, Minnesota, Montana, New Mexico and Texas.

Depending on the jurisdiction, the videotaping can be of a formal deposition with full cross-examination and a judge in attendance, as in New Mexico. Or it can be as informal as a playroom interview between the child and a social worker, videotaped only to preserve testimony.

Either way, videotaping is intended to prevent trauma to a child who is spared having to retell his or her ordeal before a grand jury or, in some states, at trial. New Mexico's law, for instance, has allowed prosecutors for the past several years to record depositions of witnesses under 13 who have been proven unable to testify in court without physical or mental harm.

Some experts — including prosecutors — dispute the value of videotaping children's testimony in sexual-abuse cases at all. Instead, they argue, young victims benefit from being able to tell their stories.

"It's important for kids to realize they're going to be listened to and believed," insists Ms. Shakely. She feels the procedure often is suggested by "people who don't know what they're doing. Having the power back and the ability to control their own lives makes kids feel good."

Two-Way Solution?

Some of the objections to videotape — constitutional as well as practical — may be resolved by allowing children to testify via closed-circuit television. When the transmission is two-way, as in the Greenup preliminary hearing in Los Angeles last month, constitutional problems are avoided, advocates suggest. Meanwhile, child victims can testify in person, while still being insulated from the courtroom, spectators and the alleged attacker.

Because closed-circuit testimony is live and allows witnesses to respond to questions from both the prosecution and defense, the issue becomes whether the accused has the right to "eyeball-to-eyeball" confrontation.

In a leading related case, *U.S. v. Benfield*, 593 F.2d 815, the 8th U.S. Circuit Court of Appeals in 1979 found videotaping was unconstitutional when a woman with a "psychiatric infirmity" was deposed while her alleged kidnapper sat in another room and viewed her testimony. But because the victim was unaware of the defendant's presence, the court found the right to face-to-face confrontation was not met.

A California appellate court used a similar rationale in a 1981 ruling, *Herbert v. Superior Court*, 117 Cal.App.3d 661. Confrontation rights were denied in that child sex-abuse case, the court said, when the victim was allowed to testify with her back to the defendant.

But attorneys in *Greenup* believe the confrontation issue is resolved because the video monitors are two-way. The seven alleged victims viewed the accused molester, as well as the questioning attorney at the same time those in the courtroom watch the children testify.

A 'Real' Confrontation?

Los Angeles Municipal Court Judge Candace Cooper, who presided over the preliminary hearing of the case, believes the simultaneous nature of the two-way closed-circuit transmission meets constitutional muster. "The issue is: Is this 'real' confrontation or not? I believe there's no constitutional problem because all parties are aware and viewing everyone at the same time," the judge said.

Potential challenges aside, both lawyers and the judge found the closed-circuit technique seemed to result in the child-witnesses being more relaxed in a comparatively isolated setting.

Part of that ease may be due to the pains taken by prosecutors beforehand. Los Angeles Deputy District Attorney Kenneth R. Freeman walked each of the children through in the courtroom in dry runs before they actually testified, showing them monitors and explaining procedures.

He said the 5-year-old who broke down did so because a bright light was shining in her eyes. "Once we found out what was bothering her and removed the light, she did fine," Mr. Freeman noted. In fact, he continued, for that terrified youngster, the closed-circuit cameras "made the difference in getting and not getting testimony."

Despite initial reservations, defense lawyer Edward Masry of Los Angeles says he, too, is pleased with the results of the two-way video-camera experiment. He agreed to the experiment, he says, because *Greenup* "involves an innocent man in a high-profile case." The closed-circuit testimony, he explains, eliminated the highly charged emotional state that a small child will display to a jury.

So Mr. Greenup, the defendant, agreed to the procedure at the preliminary hearing with the understanding it will be used again at trial, his lawyer claims. The ultimate decision will be left with the superior court judge who hears the case, based upon a showing that further testimony will cause emotional trauma to the victims.

Even if the judge agrees, there may be other hurdles to the procedure in Los Angeles, as well as elsewhere. The closed-circuit camera in *Greenup* cost roughly $1,000 per day — a figure that could place the technique well out of smaller counties' economic range.

Financial considerations aside, the closed-circuit procedure — as well as other innovations — are not likely to be readily embraced, at least by the defense bar. The current public outcry is seen by many as bordering on hysteria. "It's gotten so that I'm afraid to get into an elevator with a little girl," observes defense lawyer Masry wryly.

While readily acknowledging a sexual abuse epidemic, some see the potential for reforms going too far.

In Los Angeles, where the McMartin Pre-School case, *People v. Buckey*, A 750900, has public sentiment at a fever-pitch, the ACLU already has come down against such suggested reforms as allowing hearsay exceptions in child sexual-abuse cases. "Any court proceeding is traumatic" for every victim, notes Marjorie Swartz, an ACLU legislative advocate. "We're going to be convicting innocent people if we don't preserve cross-examination and confrontation to the greatest degree."

A similar view was echoed by Mr. Lynn in Minneapolis, who is prosecuting a sexual-abuse case against the artistic director of the famed Children's Theatre Co. and School in Minneapolis.

Reflecting on recent changes in Minnesota — notably to that state's hearsay rules — Mr. Lynn talked about his "gut reaction, even as a prosecutor . . . The more afield we get, the more nervous I am that some poor innocent guy will go down the tubes" he notes.

"I've got to sleep at night and look at myself as I shave in the morning," he adds. "Constitutional rules serve a purpose — making sure that we convict only the guilty. Schmaltzy as it sounds, it's true."

Molestation Cases Spur Suits, Novel Theories

AS THE STIGMA once connected with molestation has eased, more children and their parents are using civil lawsuits to strike back.

Angry plaintiffs across the nation are testing out novel legal theories in sex-abuse cases that range from failure to protect and warn to asking courts to recognize a new tort of incest.

At the same time, the list of potential defendants has swelled, as plaintiffs look for new sources of funds. The result has been more third parties being hauled into court in sex-abuse cases — including doctors, lawyers, police officers and insurers.

There's little doubt that civil suits over child abuse — all but unheard of five years ago — "have just taken off like crazy," says Judith Musick, a psychologist with San Francisco's Institute for the Study of Sexual Assault.

One new source of some of the suits are the criminal reporting laws in most states that require public officials and health professionals to report suspected child abuse. The theory is that doctors, hospitals and police should be held accountable civilly if they are called in to help molested children but don't inform authorities.

Lawyer Named In Suit

A Los Angeles Superior Court case now in litigation goes one step further by naming a mother's former divorce lawyer as a defendant, in addition to physicians, a detective and the city of Inglewood, Calif., which employs the officer. *Henderson v. City of Inglewood*, C 468673.

The $20 million negligence suit was brought after a 3-year-old girl twice was found to have serious vaginal injuries after weekend visits with her father. Faye Henderson, the child's mother, claims she repeatedly warned the defendants that her ex-husband was raping the toddler.

Detectives allegedly did not pursue the matter, and her lawyer allegedly did not tell the mother she would have to share custody with her ex-husband, according to filings in the case. Los Angeles lawyer Linda Pate, who now represents the plaintiff, claims the mother's divorce attorney breached a duty to the child by agreeing to the father's joint custody.

The cases also have not been limited to the alleged victim. In Los Angeles, for example, at least 20 cases stemming from the McMartin Pre-School prosecution — a widely publicized case in which seven former teachers in a Manhattan Beach, Calif., preschool have been charged with 207 child-molestation counts — have alleged injury to the children's parents. *People v. Buckey*, A 750900.

According to the complaints, the parents' emotional distress was a foreseeable result of their children's alleged sexual abuse. So far, trial courts have not been receptive to the parents' emotional-distress claims. They have had more success in alleging the nursery school's breach of contract and fraud.

> One new source of suits are the criminal reporting laws requiring officials and health professionals to report suspected child abuse.

'Adult Survivor' Suits

In addition to cases brought on behalf of minors, a flurry of so-called "adult survivor" suits are being filed.

The adult actions typically are by women who allege they did not realize they were traumatized by childhood sexual abuse until years later. As a result, the suits can have a major hurdle: often the statute of limitations has lapsed by the time the plaintiff discovers she wants to sue.

In a case now before the Third Appellate District of the California Court of Appeal, American Civil Liberties Union attorney Susan McGreivy is urging the creation of a new tort of incest. *Newlander v. Newlander*, C-319315. Plaintiffs' lawyers believe a special tort is needed to sidestep barriers that could crop up in battery suits — such as statutes of limitations and intrafamilial immunity.

'Manifestation-of-Injury Theory'

The argument could be a strong one. Robert L. Rabin, a Stanford law professor, believes courts might eliminate statute-of-limitations problems by "a manifestation-of-injury theory . . . that an injury occurs when the plaintiff becomes conscious of it," comparing the cases with toxic torts suits. He cautions, however, that while it is "possible to draw an administratively feasible line," such a policy also could allow plaintiffs to delay filing a suit, perhaps, until a defendant dies.

Once civil molestation cases resist attacks on the pleadings, many apparently have a good chance of success. The Institute for the Study of Sexual Assault — which tries to keep score of the filings — has tallied at least four cases that ended in judgments or settlements ranging from $30,000 to $908,000 within the past few years.

That arguably is so because, from a defense standpoint, the cases are far from child's play. Most involve a sympathetic plaintiff — typically a young, blameless child. Along the way, plaintiff can get what amounts to a legal free ride if the defendant is found guilty in a related criminal case.

And if the alleged sexual abuse occurred in the defendant's home, plaintiffs' lawyers say, there's a good chance that insurance companies will offer settlements under homeowner policies.

"They're potentially dangerous cases because juries get angry, which might lead to runaway verdicts," says one Los Angeles insurance defense lawyer who asked not to be named.

— *Mary Ann Galant*

Anchorage Chamber of Commerce
Crime Commission

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100 SURVEYS

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1. STATE NEEDS A CONSPIRACY LAW AGREE 83 DISAGREE 8
AT PRESENT, FEDERAL LAW HAS TO BE USED TO CHARGE MANY PERSONS INVOLVED WITH SOPHISTICATED CRIMES INVOLVING DRUGS, ETC. NO OPINION - 9

2. HEARSAY EVIDENCE RULE NEEDED. AGREE 86 DISAGREE 11
GRAND JURIES WOULD BE ALLOWED TO HEAR EVIDENCE FROM EXPERT WITNESSES AND WOULD REDUCE THE PUBLIC COST WITHOUT ADVERSELY AFFECTING AN ACCUSED'S RIGHTS.
NO OPINION - 3

3. JUVENILE WAIVER AGREE 97 DISAGREE 2
16 AND 17 YEAR OLDS CHARGED WITH SERIOUS CRIMES; I.E., MURDER, SHOULD BE TRIED AS ADULTS.
NO OPINION - 1

4. RECRIMINALIZATION OF MARIJUANA AGREE 70 DISAGREE 26
POSSESSION IS ILLEGAL ACCORDING TO U.S. LAW BUT ALLOWED IN ALASKA EVEN THOUGH ALASKA LAW STATES YOU CANNOT PURCHASE NOR SELL MARIJUANA.
NO OPINION - 4

* OVER *

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36	COURTS/JUDGES	7	VANDALISM	10	PAROLE
34	DRUNK DRIVING	20	ALCOHOL ABUSE	___	OTHER - LIST BELOW
8	PRESUMPTIVE SENTENCING				

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wash State upheld hearsay

Mr. Harris has not demonstrated that the federal government did not consent to his transfer to the state for the purposes of prosecution on the rape charge. In addition, prior to the date of the judgment and sentence in this case, the federal government had paroled Mr. Harris. He has failed to demonstrate prejudice on any of the issues raised with respect to the conviction.

In challenging the minimum term set by the Board of Prison Terms and Paroles, Mr. Harris contends the board improperly enhanced his minimum term by adding various periods of time after finding the offense involved violence, forethought, physical force, major or permanent injury and "additional fondle". Mr. Harris admits receiving notice of the adverse information to be considered by the board and that he refused to comment on it. Nonetheless, he contends the board relied upon "impermissible criteria" in arriving at its minimum term calculation based on those findings.

The contention is frivolous. The report of proceedings and presentence investigation indicate the victim was forced to have sex with Mr. Harris, that forethought was evident, that the victim suffered some injury and that in addition to the intercourse, Mr. Harris fondled his victim. The board was justified in calculating the minimum term as it did with respect to the offense.

[3] Next, Mr. Harris contends the board calculated his prior criminal history without the use of certified judgements and sentences or warrants of commitment. There is no such requirement. In *In re Acosta*, 37 Wn. App. 378, 680 P.2d 423 (1984), Division Two of this court ruled that the use of an FBI rap sheet to establish a minimum term (as opposed to a *mandatory* minimum term) was permissible and copies of certified judgments and sentences were unnecessary. Due process is satisfied by the prisoner's opportunity to contest the information to be used in setting the term. Mr. Harris indicates he was advised of that information, and the record confirms he received a copy but

ferred to a penal or correctional institution within such State or District.

refused to comment on the information. In addition, the FBI rap sheet supports the board's de ermination of Mr. Harris' criminal background.

The petitions are dismissed as frivolous.

GREEN and MCINTURFF, JJ., concur.

[No. 12888-4-I. Division One. September 24, 1984.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK A. SLIDER, *Appellant*.

[1] **Evidence — Hearsay — Excited Utterances — Passage of Time — Leading Questions.** Only spontaneous declarations caused by a startling event are admissible under the excited utterance exception to the hearsay rule (ER 803(a)(2)). Although neither of these factors is dispositive by itself, the combined effect of the passage of time and the leading nature of the questions asked may render the declarations untrustworthy.

[2] **Sexual Offenses — Statement of Child Victim — Unavailability as Witness — What Constitutes.** For purposes of admitting a child's statement regarding criminal sexual contact under RCW 9A.44.120, the child is "unavailable as a witness" if he has no recollection of the event.

[3] **Constitutional Law — Ex Post Facto Law — Evidentiary Change.** A new statute affecting the admissibility of evidence in a criminal case is not an ex post facto law unless it increases the punishment, changes the elements of the offense, or changes the degree of proof needed to convict.

[4] **Sexual Offenses — Statement of Child Victim — Validity — Ex Post Facto Law.** Admitting the statements of a child victim of a sex crime under RCW 9A.44.120 in a prosecution for a crime committed before the statute was enacted does not violate the constitutional prohibition against ex post facto laws.

[5] **Evidence — Rules of Evidence — Authority of Legislature.**

The Legislature has authority to enact evidentiary rules.

[6] **Constitutional Law — Right of Confrontation — Hearsay Evidence.** The admission of hearsay evidence which does not fall within a firmly rooted exception to the hearsay rule does not violate the defendant's constitutional right to confront the witnesses against him if particularized guaranties of trustworthiness, consisting of more than corroborative evidence, are present.

[7] **Sexual Offenses — Statement of Child Victim — Review — Discretion of Court.** A trial court's decision to admit the statements of a child victim of a sex crime under RCW 9A.44.120 is subject to reversal only for a manifest abuse of judicial discretion.

RINGOLD, J., concurs in the result only.

Nature of Action: Prosecution for first degree statutory rape. The 2½-year-old victim had implicated the defendant in answers to her mother's questions on the morning after the defendant had acted as her babysitter.

Superior Court: The Superior Court for King County, No. 82-1-02540-9, Charles V. Johnson, J., on February 8, 1983, entered a judgment on a verdict of guilty.

Court of Appeals: Holding that the victim's statements did not constitute excited utterances but that they were admissible under the statutory child abuse exception to the hearsay rule, the court *affirms* the judgment.

Michael Frost and *Jan P. Olson*, for appellant (appointed counsel for appeal).

Norm Maleng, *Prosecuting Attorney*, and *David H. Smith*, *Deputy*, for respondent.

SWANSON, J.—Frank A. Slider appeals his conviction of statutory rape in the first degree (RCW 9A.44.070), alleging that prejudicial hearsay evidence was erroneously admitted under the excited utterance exception (ER 803(a)(2)) and under the statutory child sexual abuse exception (RCW 9A.44.120). We affirm.

On the evening of May 19, 1979, Slider babysat Roberta's 2½-year-old child, Trina. When Roberta returned, she noticed blood on the back of Trina's underwear and promptly replaced it with clean underwear. As Roberta left the room, Trina began "screaming and hollering" and kept fighting as Roberta picked her up in an attempt to mollify her. Shortly thereafter Trina fell asleep.

While trying to get Trina ready to go to daycare on the following morning, Trina struggled to keep herself covered and, when finally uncovered, pointed to her vaginal area and said "Owee". Roberta then noticed more blood and, when cleaning Trina, noticed some swelling in that area. Roberta testified, over defense objection, that at that time she also asked Trina

> if Frank had done a no-no, and she said yes, and I said, "Did he touch you?" and she said, "Yes," and I said, "Did he use his finger?" and she said, "Yes, finger," and pointed to the vagina area.

Verbatim Report of Proceedings, at 118–19.

Dr. Turner, who examined Trina the day following the injury, testified that Trina had suffered a superficial laceration of her hymenal ring, which he believed was caused by the insertion of a sharp instrument. The trial court also admitted Slider's October 4, 1979 confession to having inserted the little finger of his right hand into Trina's vagina while babysitting her on the evening of May 19, 1979.

[1] The first issue before us is whether Trina's statements fell within the "excited utterance" exception to the hearsay rule. ER 803(a)(2) describes an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Although this hearsay exception comports with previous Washington law, *Johnston v. Ohls*, 76 Wn.2d 398, 405, 457 P.2d 194 (1969); Comment, ER 803, it is not to be interpreted as restrictively as the common law exception. *State v. Dixon*, 37 Wn. App. 867, 683 P.2d 1144 (1984).

> [N]evertheless, ER 803(a)(2) should be interpreted in a sufficiently restrictive manner as not to lose sight of the

basic elements which distinguish excited utterances from other hearsay statements. This is necessary in order to preserve the real purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present.

Dixon, at 873.

The principal elements of the excited utterance exception are a startling event and a spontaneous declaration caused by that event.[1] In other words, the event must speak through the declarant.

> The crucial question in all cases is whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.

Johnston, at 406.

Statements are not inadmissible solely due to the passage of time between the event and the declaration, *State v. Fleming*, 27 Wn. App. 952, 956, 621 P.2d 779 (1980); *State v. Downey*, 27 Wn. App. 857, 861, 620 P.2d 539 (1980), nor solely due to the fact that the declaration was made in response to a parent's questions. *Robbins v. Greene*, 43 Wn.2d 315, 321, 261 P.2d 83 (1953); *State v. Bouchard*, 31 Wn. App. 381, 384, 639 P.2d 761 (1982). Here, however, the aggregate effect of the passage of time and the leading nature of the mother's questions attenuated the degree of

[1] *Beck v. Dye*, 200 Wash. 1, 9-10, 92 P.2d 1113, 127 A.L.R. 1022 (1939) set forth the oft-quoted elements of the common law res gestae hearsay exception:

> (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

reliability of Trina's statements beyond that countenanced under the strict limits of the excited utterance exception. Hence, the trial court improperly admitted the hearsay declaration under ER 803(a)(2).

Such a conclusion, however, does not preclude the admission of the evidence under the broader statutory child sexual abuse exception. RCW 9A.44.120 provides:

> Admissibility of child's statement—Conditions. 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.

Slider contends that admitting the hearsay under this statute was improper because (1) Trina was not "unavailable" as a witness; (2) it amounted to an ex post facto application of the law; (3) the enactment of the statutory exception amounted to an unconstitutional usurpation of a judicial function; and (4) it denied him an opportunity to confront the witness in contravention of the state and federal constitutions.

A. Unavailability

[2] ER 804(a) defines "Unavailability as a witness" to include situations where the declarant "(3) Testifies to a

lack of memory of the subject matter of his statement; . . ." Trina's testimony at a pretrial hearing clearly showed that she lacked any memory of the event, although she did remember Slider having babysat her. Therefore, the court properly ruled that Trina was "unavailable" as a witness.[2]

B. Ex Post Facto

The United States Supreme Court defined ex post facto laws as those falling within the following four categories:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that changes the punishment, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence* and receives less, or different testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648 (1798), quoted in *State v. Clevenger*, 69 Wn.2d 136, 141, 417 P.2d 626 (1966).

[3, 4] In *Clevenger*, the defendant claimed that the application of a statute, which was passed after the commission of the crime but before trial and which made his wife competent to testify against him, ran afoul of the fourth category above. Rejecting his argument, our court quoted from *Hopt v. Utah*, 110 U.S. 574, 590, 28 L. Ed. 262, 4 S. Ct. 202 (1884):

> Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged.

Clevenger, at 142. *See also State v. Pope*, 73 Wn.2d 919, 924, 442 P.2d 994 (1968). Because RCW 9A.44.120 did not increase the punishment nor alter the degree of proof essential for a conviction, its application in the present case did not amount to a perversion of the prohibition against ex post facto laws.

C. Legislative Power To Enact RCW 9A.44.120

[5] Slider argues that the "separation of powers" doctrine prohibits the Legislature from promulgating evidentiary rules, and that our Supreme Court's refusal to adopt the federal "catch-all" hearsay exceptions (Fed. R. Evid. 803(24) and 804(b)(5))[3] prohibits the application of this particular statute. By adopting ER 802, however, our Supreme Court implicitly, if not expressly, recognized the Legislature's authority to promulgate evidentiary rules. "Hearsay is not admissible except as provided by these

[2]No question has been raised concerning Trina's competence to testify. Nevertheless, the fact that Trina may have been incompetent to testify at the time she made her declaration or at the time of trial is not dispositive with respect to the admission of the hearsay declarations, provided the circumstances sustain the theory upon which the exception was founded. *Beck v. Dye*, 200 Wash. 1, 14, 92 P.2d 1113, 127 A.L.R. 1022 (1939) (Jeffers, J., dissenting); *State v. Bloomstrom*, 12 Wn. App. 416, 418-19, 529 P.2d 1124 (1974).

[3]Fed. R. Evid. 803(24) and 804(b)(5) provide in part:

"Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

rules, by other court rules, *or by statute.*" (Italics ours.) ER 802. Our Supreme Court has also recognized (implicitly) the Legislature's authority to enact evidentiary rules when it analyzed the rape shield statute, RCW 9A.44.020. *See, e.g., State v. Ludlow*, 99 Wn.2d 1, 659 P.2d 514 (1983). Accordingly, we find that the Legislature has not overstepped its authority as limited by the "separation of powers" doctrine.

D. Witness Confrontation

[6] A defendant's right to confront witnesses against him (guaranteed by the sixth amendment to the United States Constitution and article 1, section 22 (amendment 10) of the Washington State Constitution) is not absolute. *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); *State v. Carter*, 23 Wn. App. 297, 299, 596 P.2d 1354 (1979). The United States Supreme Court recently ruled on the admissibility of hearsay statements with respect to the confrontation clause:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Ohio v. Roberts, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), quoted in *State v. Parris*, 98 Wn.2d 140, 145, 654 P.2d 77 (1982).

It cannot be disputed that the child sexual abuse exception is not a "firmly rooted" hearsay exception. Therefore, "particularized guarantees of trustworthiness" are required before the hearsay is admissible. It has been suggested that this phrase ("particularized guarantees of trustworthiness") requires a higher standard of reliability as a substitute for the traditional hearsay exceptions. Comment, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. Puget Sound L. Rev. 387, 402 (1984). We are inclined to agree.

The fact that the act requires "corroborative evidence of the act" does not fulfill this higher standard. Corroboration of the sexual abuse alone "does not lend particular trustworthiness to the child's statement regarding the identity of the abuser". 7 U. Puget Sound L. Rev. at 402. Nevertheless, this corroborative evidence may certainly be considered in the trial court's balancing process.[4]

To fulfill the judicial interpretations of a defendant's confrontation rights requiring "particularized guarantees of trustworthiness," our Legislature mandated that the trial court evaluate "in a hearing conducted outside the presence of the jury . . . the time, content, and circumstances" surrounding the child's statement.

First, although the "time" between the event and declarations may be too great to fulfill the strict requirements of the excited utterance exception, the declarations were made while the child was in some pain or discomfort as a result of the incident, with no intervening events, other than sleep, to impugn her memory or ability to relate the incident accurately.

Second, although the leading nature of the questions raises some concern, we find the "content" of both the declarations and questions to be framed in language that a child of tender years would be expected to use and understand. *See United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979).

Finally, the "circumstances" surrounding the declarations do not suggest that the child's statements were the result of fabrication or influence, or the exercise of choice or judg-

[4]Several attendant circumstances to be considered in this balancing process were set forth in footnote 10 in the case of *United States v. Alvarez*, 584 F.2d 694, 702 (5th Cir. 1978). These guidelines for the determination of the trustworthiness of extrajudicial statements include: (1) whether the out-of-court declarant had any apparent motive to misrepresent the matter; (2) the general character of the speaker; (3) whether other people heard the out-of-court statement; (4) whether the statement was made spontaneously; and (5) the timing of the declaration and the relationship between the speaker and the witness. These are not exclusive, however. *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982).

ment. Trina initiated the questioning with a spontaneous declaration, *i.e.*, "owee", and pointing to the area of pain. Also, Trina's very young age strongly militates against the likelihood of fabrication, as well as against a motivation to lie; such experiences would likely not be within her ability to invent nor would she be likely to have the capacity to lie to her mother.

[7] The determination that statements fall within the "excited utterance" exception is one within the trial court's sound discretion and will not be reversed absent a finding of manifest abuse of that discretion. *State v. Bouchard*, 31 Wn. App. 381, 639 P.2d 761 (1982). Similarly, a finding that the statements are within the statutory child sexual abuse exception should not be reversed absent a showing of manifest abuse of that discretion.

Because the trial court admitted the declarations under the strict "excited utterance" exception, it follows that it would also have admitted the declarations under the less strict statutory child sexual abuse exception. Therefore, it is appropriate to consider whether the trial court would have abused its discretion by admitting the evidence under the statutory child sexual abuse exception.

The trial court complied with the statutory requirements, holding a pretrial hearing outside the presence of the jury, finding sufficient indicia of reliability, and finding Trina to have been unavailable as a witness.

Balanced against the "particularized guarantees of trustworthiness" attending this case, particularly in light of Slider's confession, we find that the trial court would not have abused its discretion by admitting the hearsay and conclude that Slider's confrontation right was not contravened to an unconstitutional degree.

Accordingly, the judgment is affirmed.

SCHOLFIELD, J., concurs.
RINGOLD, J., concurs in the result.

[No. 12677-6-I. Division One. September 24, 1984.]

JAMES A. LEE, *Appellant*, v. JULIETTE SAUVAGE, *Respondent*.

[1] **Municipal Corporations — Landlord and Tenant — Ordinance Limiting Evictions — Conflict With State Law.** A municipality may validly legislate an additional defense to a landlord's eviction action provided the legislation does not purport to expand or contract the jurisdiction of the superior court or regulate its practice and procedure.

[2] **Landlord and Tenant — Eviction — Grounds — Landlord's Residence — Necessity.** Legislation requiring a landlord to intend to reside on property in order to evict an existing tenant is unconstitutional.

[3] **Statutes — Construction — Constitutionality.** A statute will be construed so as to be constitutional if possible.

[4] **Trial — Taking Case From Jury — Judgment n.o.v. — Sufficiency of Evidence.** A motion for judgment n.o.v. claiming insufficient evidence requires that the evidence be considered most favorably to the nonmoving party.

[5] **Evidence — Relevance — Determination.** The relevance of evidence lies within the trial court's discretion.

[6] **Costs — Depositions — In General.** The cost of a deposition is not recoverable unless it is used as substantive evidence.

[7] **Costs — Attorney Fees — Bad Faith — Determination.** Whether a party has pursued litigation in bad faith so as to provide equitable grounds for awarding attorney fees is a matter for the trial court's discretion.

Fayette Urban Cy. Gov't, 560 S.W.2d 10 (Ky. 1977); *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100 (1983); *Soo Line R.R. v. State*, 286 N.W.2d 459 (N.D. 1979); *Perkins v. County of Albemarle*, 214 Va. 416, 200 S.E.2d 566 (1973); *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 147 N.E.2d 633 (1967).

These state decisions primarily rely on the great financial and administrative hardship that would be entailed if retroactive effect were allowed, and the taxpayers' or tax authorities' justifiable reliance on a statute which is presumptively constitutional.

To the objection that an unconstitutional statute is void from its inception, the New Jersey Supreme Court noted the importance of recognizing "that we are acting within the framework of appropriate equitable relief with respect to an unconstitutional taxation statute . . ." *Salorio*, at 463. In fashioning an equitable remedy, reliance interest weighs heavily, and the court should seek a blend of what is necessary, fair and workable. *Salorio*, at 464. *See also Lemon*, at 200-03.

Retailers within the border counties and the Department of Revenue have relied on the provisions of RCW 82.04-.2902(1) and (2) since its effective date, March 1, 1983. The liability for the payment of a retail sales tax is upon the buyer, with the duty to collect and remit to the Department of Revenue upon the seller. RCW 82.08.050; *Murray v. State*, 62 Wn.2d 619, 623, 384 P.2d 337 (1963); *Kaeser v. Everett*, 47 Wn.2d 666, 667, 289 P.2d 343 (1955). It would be practically impossible for the border county retailers to collect the tax on transactions occurring prior to this opinion.

Retroactive application of the present decision would impose a substantial hardship on the retailers in the border counties. We will not impose such a burden upon the retailers that cannot legally be passed on to the buyers.

On the basis of the circumstances and equities of this case, the foregoing considerations and authorities persuade us of the appropriateness of prospective effect to our holding that RCW 82.04.2902(1) and (2) are unconstitutional.

Conclusion

We hold that RCW 82.04.2902(1) and (2) are unconstitutiona.. The statewide retail sales tax rate is 6.5 percent, and shall be uniformly applied and collected in all counties of the state prospectively commencing on January 1, 1985.

Williams, C.J., Rosellini, Utter, Brachtenbach, Dolliver, Dimmick, and Pearson, JJ., and Cunningham, J. Pro Tem., concur.

After modification, further reconsideration denied December 13, 1984.

[No. 50216-1. En Banc. November 26, 1984.]

The State of Washington, *Respondent*, v. John T. Ryan, *Appellant*.

[1] **Criminal Law — Evidence — Hearsay — Right of Confrontation — Test.** The admission of an out-of-court statement incriminating a defendant does not violate his right to confront an adverse witness if the declarant is shown to be legally unavailable to testify in court and the statement is shown to be trustworthy.

[2] **Criminal Law — Evidence — Hearsay — Unavailability of Witness — What Constitutes.** For purposes of determining the availability of a witness for cross examination regarding an out-of-court statement, a witness is not unavailable unless the proponent of the witness has made a good faith effort to obtain or excuse the witness' presence at trial. Unavailability may arise from physical absence or from refusal to testify, but incompetency does not necessarily establish unavailability.

[3] **Juveniles — Witnesses — Competency — Children — Determination.** Children under the age of 10 are competent to testify as witnesses unless the court has examined them and determined that they are incapable of perceiving facts or unable to truthfully relate facts under examination.

[4] **Criminal Law — Evidence — Hearsay — Reliability —**

Competency. Generally, a witness must have been competent at the time of making an out-of-court statement before the statement can be admitted.

[5] **Sexual Offenses — Statement of Child Victim — Reliability — Nature of Crime.** The reliability of an out-of-court statement is no less necessary because it is made by a child who is a sexual offense victim.

[6] **Sexual Offenses — Statement of Child Victim — Reliability — Corroboration.** RCW 9A.44.120, which provides for admission of an out-of-court statement by a child who is a sexual offense victim, requires that the trial court make separate and independent determinations as to reliability and corroboration of the statement.

[7] **Criminal Law — Confessions — Corroboration — Necessity.** A conviction cannot be based on a confession unless at least a prima facie case is established by evidence independent of the confession.

[8] **Statutes — Construction — Judicial Procedure — Rules on Same Subject.** Procedural statutes are valid unless in direct conflict with court rules.

[9] **Sexual Offenses — Statement of Child Victim — Subject and Title of Act — Sufficiency.** The title of Laws of 1982, ch. 129 provides sufficient notice and evidences a rational unity with the subject of the act, *viz.*, the admissibility of the statement of a child victim of a sexual offense.

DOLLIVER, DIMMICK, UTTER, and DORE, JJ., concur by separate opinions; ANDERSEN, J., did not participate in the disposition of this case.

Nature of Action: Prosecution for committing indecent liberties on two children under the age of 10.

Superior Court: The Superior Court for Okanogan County, No. 7125, James R. Thomas, J., on November 24, 1982, entered a judgment on a verdict of guilty after admitting evidence of out-of-court statements by the victims and finding that the victims were unavailable as witnesses.

Supreme Court: Holding that the victims were not shown to be unavailable, that their statements were not shown to be reliable, and that the conviction could not be sustained on the basis of the defendant's confession alone, the court *reverses* the conviction and *remands* for further proceedings.

John G. Burchard, Jr., for appellant.

Douglas S. Boole, Prosecuting Attorney, for respondent.

James E. Lobsenz of *Washington Appellate Defender Association*, amicus curiae for appellant.

WILLIAMS, C.J.—Hearsay statements of child victims of sexual abuse are conditionally admissible in criminal trials under RCW 9A.44.120. Defendant (appellant) John Ryan was convicted in Okanogan County of two counts of indecent liberties in a trial where hearsay statements of the two alleged victims were admitted under this statutory exception to the hearsay rule. Division Three of the Court of Appeals certified to this court the question whether RCW 9A.44.120 violates the confrontation clauses of the state and federal constitutions. The admission of the statements did not comply with the statute's requirements, and resulted in a denial of defendant's right of confrontation under the sixth amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10). We, therefore, reverse the convictions.

Count 1 charged that the defendant committed indecent liberties upon 4½-year-old boy "M" on or about June 25, 1982, and count 2 charged the same conduct with a 5-year-old boy "J", on or about June 1, 1982. At trial, in September 1982, neither child testified. Both parties stipulated that the boys were incompetent. The basis for the defendant's stipulation is not apparent, but the State argued that the boys were "statutorily incompetent". Report of Proceedings, vol. II, at 17–18. The State further argued that the children's incompetency rendered them unavailable.[1]

Out-of-court statements made by the two children were

[1]Defendant disputed the issue of unavailability in his trial, but concedes it in his appeal. As amicus correctly points out, and as this opinion confirms, this concession is erroneous.

offered through the testimony of M's mother and aunt, and J's mother. This hearsay testimony, the State argued, was permitted by RCW 9A.44.120, which provides in relevant part:

> 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.

The trial court accepted the State's argument that the children were statutorily incompetent, and also unavailable. In satisfaction of the corroboration requirement, the trial court found that the defendant's knowing and voluntary confession established corroboration. The record reveals that the defendant admitted the charged conduct regarding M to M's mother, and later to a police officer. The record does not disclose an admission of the charged misconduct in regard to J.

The following circumstances surrounded the making of the children's statements: On June 25, 1982, M's aunt, while babysitting, questioned M about the source of some candy he brought to her house. M initially indicated that a person across the street had given it to him, but later said that "John would give it to him" if he permitted certain sexual contact. Report of Proceedings, vol. II, at 10. M's aunt reported these statements to M's mother who again questioned M. M told his mother the same story. M's mother also testified that she had forbidden M to accept candy.

M's mother reported what she had been told to J's mother. On June 27, 1982, J's mother questioned her son, and he told his mother substantially the same thing M had told his mother. J's mother testified that on June 24, she had questioned J about candy in his possession, and he responded that it had been given to him for his birthday. Neither mother was able to state with certainty when the charged acts had occurred, as neither child had a solid conception of time.

Defendant challenges his conviction on several theories: (1) He contends that RCW 9A.44.120 (Laws of 1982, ch. 129, § 2, p. 559, effective June 10, 1982) denies him the right of confrontation under the sixth amendment to the United States Constitution, and the right to face-to-face confrontation guaranteed under Const. art. 1, § 22 (amend. 10). (2) He argues that his confession is inadmissible without the State's first establishing the corpus delicti. (3) He challenges the legislative authority to enact evidentiary rules as violative of separation of powers doctrine. (4) Defendant contends that the passage of the act violated Const. art. 2, § 19 notice provisions. Finally, (5) he argues that the effective date of the act, June 10, 1982, being subsequent to June 1, 1982, the date of the alleged count 2 incident, renders the act ex post facto as to that count.

I

Confrontation

The Sixth Amendment's confrontation clause provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." Const. art. 1, § 22 (amend. 10) provides: "In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . ." Neither clause has been read literally, for to do so would result in eliminating all exceptions to the hearsay rule. *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980). The confrontation clause is more than a codification of common law hearsay rules, and may be violated even though hearsay

statements are admitted under recognized exceptions. *California v. Green*, 399 U.S. 149, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970). The right to confrontation excludes some hearsay, and "countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Roberts*, at 65, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107, 78 L. Ed. 674, 54 S. Ct. 330, 90 A.L.R. 575 (1934).

[1] The general approach employed by the Supreme Court to test hearsay admissions against confrontation rights requires: (1) Either the production of the out-of-court declarant or a demonstration of unavailability, and (2) assurances of reliability of the statement. *Roberts*, at 66. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." (Footnote omitted.) *Roberts*, at 66.

RCW 9A.44.120 is not within the category of firmly rooted hearsay exceptions, and by its terms is to be used when the child's out-of-court declaration is "not otherwise admissible by statute or court rule".

The requirements for admission under RCW 9A.44.120 comport with the general approach utilized to test hearsay against confrontation guaranties. The statute requires a preliminary determination "that the time, content, and circumstances of the statement provide sufficient indicia of reliability . . .". It requires the child to testify at the proceedings, or to be unavailable, and does not alter the necessary showing of unavailability. Neither unavailability nor reliability were shown prior to admitting the hearsay testimony.

A

UNAVAILABILITY

The Sixth Amendment requires a demonstration of unavailability when the declarant witness is not produced. *Roberts*, at 65. A witness may not be deemed unavailable unless the prosecution has made a good faith effort to obtain the witness' presence at trial. *Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968). When a confrontable witness is not produced unavailability must be certain. *State v. Smith*, 85 Wn.2d 840, 540 P.2d 424 (1975).

The State accounted for the children's absence by saying they were not subpoenaed. Report of Proceedings, vol. II, at 17. Apparently, they were not subpoenaed because the prosecutor believed they were "statutorily incompetent", and hence unavailable. Report of Proceedings, vol. II, at 18. The State's equation of unavailability and incompetency is faulty in several respects. First, incompetency and unavailability serve separate purposes, and mean different things. Second, as the discussion on reliability below indicates, a resolution that a witness is incompetent precludes most hearsay statements of that witness whether available or not. Third, the State has misconstrued the statutory definition of incompetency.

[2] Unavailability means that the proponent is not presently able to obtain a confrontable witness' testimony. It is usually based on the physical absence of the witness, but may also arise when the witness has asserted a privilege, refuses to testify, or claims a lack of memory. *See* ER 804(a); 5A K. Tegland, Wash. Prac., *Evidence* § 393 (2d ed. 1982). Unavailability in the constitutional sense additionally requires the prosecutor to make a good faith effort to obtain the witness' presence at trial. *Roberts*, at 74.

Competency, on the other hand, means that the witness "has sufficient mental capacity to understand the nature and obligation of an oath and possessed of sufficient mind and memory to observe, recollect, and narrate the things he has seen or heard." *State v. Moorison*, 43 Wn.2d 23, 28-29, 259 P.2d 1105 (1953). The statutory categories of persons who are incompetent to testify illustrate its meaning:

> (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
> (2) Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting

which they are examined, or of relating them truly. RCW 5.60.050.

[3] It is clear that children under 10 are not statutorily incompetent. Only those children who are incapable of perceiving or truthfully relating the facts of the case are incompetent.[2] Competency is a matter to be determined by the trial court within the framework of RCW 5.60.050. *State v. Froehlich*, 96 Wn.2d 301, 635 P.2d 127 (1981). Guidelines for the trial court in reaching its determination presume that the court has examined the child, observed his manner, intelligence, and memory. *Laudermilk v. Carpenter*, 78 Wn.2d 92, 457 P.2d 1004, 469 P.2d 547 (1969); *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967).

Stipulated incompetency based on an erroneous understanding of statutory incompetency is too uncertain a basis to find unavailability. To excuse production of a witness whose testimony is offered against a criminal defendant through hearsay repetition, a more certain showing is required. *Roberts* recognized that the good faith effort incumbent on the State to produce the witness does not require a futile act. "But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation." *Roberts*, at 74. The unexplained failure of the State to produce the children exemplifies the fears of one commentator that RCW 9A.44.120 may serve as a disincentive to call the child witness. Comment, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. Puget Sound L. Rev. 387, 398 (1984). Because the State made no apparent effort to produce the children or to excuse their production, the first of the *Roberts* requirements, production or demonstrated unavailability, is not met.

[2]CrR 6.12(c) specifies no age at which children's competency is suspect, providing: "The following persons are incompetent to testify: . . . (2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly." Thus the material measure of competency is not age.

B

RELIABILITY

[4] One of the reasons for finding a child incompetent is inability to receive just impressions of the facts concerning the event. RCW 5.60.050(2). If the trial court had examined the children and found them incompetent on this basis, their testimony would be too unreliable for admission.

The declarant's competency is a precondition to admission of his hearsay statements as are other testimonial qualifications.

> The hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible. The admission of hearsay statements, by way of exception to the rule, therefore presupposes that the assertor possessed the *qualifications of a witness* . . . in regard to knowledge and the like.

(Footnote omitted.) 5 J. Wigmore, *Evidence* § 1424, at 255 (rev. 1974).

[5] If the declarant was not competent at the time of making the statements, the statements may not be introduced through hearsay repetition. 5 J. Wigmore, *supra* at 304. The exceptions to this general rule are res gestae utterances or fresh complaints.[3] *State v. Lounsbery*, 74 Wn.2d 659, 661, 445 P.2d 1017 (1968); *State v. Murley*, 35 Wn.2d 233, 236–37, 212 P.2d 801 (1949); *State v. Beaudin*, 76 Wash. 306, 307, 136 P. 137 (1913). *See also* 4 J. Weinstein & M. Berger, *Evidence* ¶ 804(a)[01], at 804–40 (1981). Exceptions to the general rule are based on the historically established trustworthiness of the statement.

> A review of the subject indicates that cases involving an indecent assault upon a child seem to receive rather special treatment. The courts quite frequently have admitted hearsay statements of a child tending to incriminate the defendant. Usually such statements are

[3]The term "res gestae" has fallen into disuse in favor of the more precise evidentiary rules of present sense impression, excited utterance, then existing mental, emotional, or physical condition, and statements for purposes of medical diagnosis or treatment. *See* ER 803(a)(1), (2), (3), (4); E. Cleary, *McCormick on Evidence* § 288 (2d ed. 1972).

> justified on the basis of *res gestae*, or because they tend to show the condition of the child at the time of the statement. However, some cases leave the impression that the testimony was allowed purely because of abhorrence of the crime involved. The better-reasoned cases seem to require that, with the exception of *res gestae utterances*, all hearsay statements introduced under any exception to the rule should be made by someone competent as a witness at the time the statement was made.

(Footnotes omitted.) Stafford, *The Child as a Witness*, 37 Wash. L. Rev. 303, at 307 (1962). The trial court did not determine whether the children were competent when they made the statements. If they were not, their statements must be excluded as being unreliable.

[6] Adequate indicia of reliability must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act. "The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight." *Huff v. White Motor Corp.*, 609 F.2d 286, 292 (7th Cir. 1979). The trial court stated that it found reliability in the time, content, and circumstances of the statement, but in so finding indicated only one factor—the defendant's confessions. The trial court was apparently persuaded that the statements of the children must be reliable, if, in hindsight they prove to be true. RCW 9A.44.120 demands more.

The statute requires separate determinations of reliability *and* corroboration when the child is unavailable. The word "and" is conjunctive. *State v. Carr*, 97 Wn.2d 436, 436, 645 P.2d 1098 (1982). The Legislature would have used the word "or" had it intended the disjunctive. *Childers v. Childers*, 89 Wn.2d 592, 575 P.2d 201 (1978); *State v. Dixon*, 78 Wn.2d 796 479 P.2d 931 (1971). Although defendant's confession was offered as corroboration, wholly absent are the requisite circumstantial guaranties of reliability.

The Supreme Court allowed that hearsay exceptions bear adequate indicia of reliability when "marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Ohio v. Roberts*, 448 U.S. 56, 65, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107, 78 L. Ed. 674, 54 S. Ct. 330, 90 A.L.R. 575 (1934)). The rationale underlying hearsay exceptions is well expressed by Wigmore:

> The purpose and reason of the hearsay rule is the key to the exceptions to it.
>
> The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.

5 J. Wigmore, *Evidence* § 1420, at 251 (rev. 1974). Any statement offered as an exception to the hearsay rule must be made under circumstances comparable in their inherent trustworthiness to serve as a substitute for cross examination.

Where cross examination would be superfluous, the right of confrontation is not offended. Where cross examination would serve to expose untrustworthiness or inaccuracy, denial of confrontation "'"would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." . . .'" (Citation omitted.) *Davis v. Alaska*, 415 U.S. 308, 318, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974) (citing *Smith v. Illinois*, 390 U.S. 129, 131, 19 L. Ed. 2d 956, 88 S. Ct. 748 (1968)).

Recently this court adopted a set of factors applicable to determining the reliability of out-of-court declarations. *State v. Parris*, 98 Wn.2d 140, 654 P.2d 77 (1982). Those factors are: "(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more

than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness." *Parris*, at 146. We added that these factors were not exclusive and should be considered with the additional factors in *Dutton v. Evans*, 400 U.S. 74, 88–89, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970): (1) the statement contains no express assertion about past fact, (2) cross examination could not show the declarant's lack of knowledge, (3) the possibility of the declarant's faulty recollection is remote, and (4) the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

Applying the *Parris* factors to the circumstances of the present case, the statements cannot be deemed sufficiently trustworthy to deprive the defendant of his right of confrontation. First, there was a motive to lie, and each child initially told a different version of the source of the candy they were not supposed to have. Second, all the record reveals about the character of the children is the parties' stipulation that the children were incompetent witnesses due to their tender years. Third, the initial statements of the children were made to one person, although subsequent repetitions were heard by others. Fourth, the statements were not made spontaneously, but in response to questioning. Fifth, as regards timing, both mothers had been told of the strong likelihood that the defendant had committed indecent liberties upon their children *before* the mothers questioned their children. They were arguably predisposed to confirm what they had been told. Their relationship to their children is understandably of a character which makes their objectivity questionable.

The reliability of the statements does not fare better under the *Dutton* factors. The statements were undeniably assertions of past facts. While the defendant admitted to misconduct with M, he denied any wrongdoing as to J. Cross examination was appropriate regarding this dispute.

There is no contention that the statements were either spontaneous or against interest.

The State argues that the factors used to test reliability in *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979) are more appropriate because that case involved the out-of-court statements of a young child victim of sexual abuse. *Nick*, however, is a very different case from the present one. There, the statements fell into two well recognized hearsay exceptions—excited utterances and statements made to a physician for purpose of diagnosis. Fed. R. Evid. 803(a)(2) and (4). *See* ER 803(a)(2) and (4). In addition, the child's statement in *Nick* was made in direct response to the mother's observation of the child's soiled clothing, upset condition, and apparent pain and distress shortly after the mother discovered him asleep in a locked room with the defendant, and with his pants unzipped. *Nick*, at 1204. In the present case, an indeterminate amount of time elapsed between the alleged act and the child's reporting of it, and there were apparently no observable indications of assault, pain, or distress.

The most important distinction between *Nick* and the case before us is the hearsay statements offered in *Nick* fell into existing hearsay exceptions grounded in reliability in the circumstances of their making. RCW 9A.44.120 requires the trial court to examine the circumstances of the statement for indicia of reliability. The measure of reliability is that which is equivalent to other firmly rooted hearsay exceptions. The time, content, and circumstances of the statements offered against Ryan do not bear adequate indicia of reliability sufficient to make cross examination and face-to-face confrontation superfluous. The trial court erred in permitting the introduction of the children's statements through hearsay repetition.

II

Corpus Delicti

Defendant is correct in contending that a conviction cannot be sustained on a confession alone.

[7] Some corroborative evidence establishing the corpus delicti is necessary to sustain a conviction based on a confession. *State v. Bean*, 89 Wn.2d 467, 474, 572 P.2d 1102 (1978). The independent evidence need only establish a prima facie case that a crime has been committed. *State v. Goranson*, 67 Wn.2d 456, 460, 408 P.2d 7 (1965). The corpus delicti need not be proven beyond a reasonable doubt, or even a preponderance of the evidence, but a confession alone does not establish it. *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951). Without the hearsay statements of the children, the State has not established the corpus delicti, and we must reverse the conviction.

III

SEPARATION OF POWERS

Defendant argues that the enactment of RCW 9A.44.120, a hearsay exception, violates the separation of powers doctrine in that the statute is a legislative invasion of the judicial province. We disagree.

[8] Where a rule of court is inconsistent with a procedural statute, the court's rulemaking power is supreme. *Petrarca v. Halligan*, 83 Wn.2d 773, 522 P.2d 827 (1974). Nonetheless, apparent conflicts between a court rule and a statutory provision should be harmonized, and both given effect if possible. *Emwright v. King Cy.*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981).

Legislative enactment of hearsay exceptions is specifically contemplated by the Rules of Evidence. ER 802 states: "Hearsay is not admissible except as provided by these rules, by other court rules, or *by statute*." (Italics ours.) Nevertheless, statutory enactments of evidentiary rules are subject to judicial review, this court being the final arbiter of evidentiary rules.

Defendant suggests that the statute is in conflict with court rules regarding competency. *See* CrR 6.12. The statute does not provide that an incompetent's statement is admissible, and as this opinion makes clear, such a statement is inadmissible absent particularized guaranties of trustworthiness.

IV

SUFFICIENCY OF TITLE OF ACT

[9] Defendant contends that the title of the act was insufficient to give notice of its contents as required by Const. art. 2, § 19, which provides: "No bill shall embrace more than one subject, and that shall be expressed in the title." The title of Laws of 1982, ch. 129, begins "Child Abuse—Admissibility of Child's Statement".

The test of the title's sufficiency is whether it provides sufficient notice to lead an interested person to inquire into the bill's contents. *State v. Lounsbery*, 74 Wn.2d 659, 664–65, 445 P.2d 1017 (1968). The title of the present act was clearly sufficient to put the public on inquiry, and evidences a "rational unity" between the general subject and its contents. *See Barde v. State*, 90 Wn.2d 470, 584 P.2d 390 (1978).

V

EX POST FACTO APPLICATION

Defendant argues that the application of RCW 9A.44.120 was ex post facto as to count 2. We need not decide whether the application of RCW 9A.44.120 would be ex post facto as the State attempted to prove the charged conduct occurred after the effective date of the act. In any event, an application of this statute would not be ex post facto, as it neither increases punishment, changes the nature of the crime charged, nor alters the necessary degree of proof required. *State v. Clevenger*, 69 Wn.2d 136, 142, 417 P.2d 626 (1966).

CONCLUSION

We reverse and remand for further proceedings. RCW 9A.44.120 facially conforms to the requirements of the constitutional right to confrontation. Nonetheless, the State did not meet the statutory and constitutional burdens of showing unavailability, and reliability preliminary to introduction of the hearsay statements. As a conviction cannot

be sustained on an uncorroborated confession alone, defendant's conviction must be reversed. The enactment of RCW 9A.44.120 neither violates the separation of powers doctrine, constitutional notice requirements, nor ex post facto restrictions.

ROSELLINI, BRACHTENBACH, and PEARSON, JJ., and CUNNINGHAM, J. Pro Tem., concur.

DOLLIVER, J. (concurring)—I concur with the result reached by the majority. This concurrence is based solely on the fact the record does not disclose that in fact the prosecution made a "good faith effort" to obtain M's presence at the trial. *See Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968). While I agree the parties and the court apparently misunderstood RCW 5.60.050 (persons incompetent to testify), it is appropriate to point out that both parties, at trial, *stipulated* as to the incompetence and thus the unavailability of M at the trial. Furthermore, on appeal defendant *conceded* "the State has met the constitutional unavailability standard required under *Barber v. Page*" (Brief of Appellant, at 12), *i.e.*, the good faith standard. Given these stipulations and admissions by defendant, it is a long reach for the court to find M was not unavailable as a witness. Nonetheless, since the record is devoid of any underlying justification for the stipulation and concession by counsel on behalf of the defendant, I am constrained to join the majority in its reversal of defendant's conviction on both counts.

There are two other items which I believe need comment: (1) Although in this case the parties and the court misconstrued the statute on competency, RCW 5.60.050, it is my belief that if it is shown the meaning of the statute is understood and a finding of incompetency is made by the court, this then may be considered the legal equivalent of unavailability. *See, e.g., Lancaster v. People*, 200 Colo. 448, 615 P.2d 720 (1980). *See* Joint Hearings on SB 4461 before the Washington State Senate Judiciary Comm. & Washington State House Ethics, Law & Justice Comm., 47th Leg., January 28, 1982. *See also* ER 804.

(2) I disagree with the majority's finding that the statements of M did not contain sufficient indicia of reliability. Since the matter is to be reversed, no purpose would be gained by detailing the sordid record in this case. I believe the statements of M, however, had a ring of verity and that the trial court properly exercised its discretion in so finding. *See United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979); Comment, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Colum. L. Rev. 1745 (1983); Comment, *Sexual Abuse of Children—Washington's New Hearsay Exception*, 58 Wash. L. Rev. 813 (1983). *Compare* RCW 9A.44.120(1) *with* ER 803 and ER 804.

UTTER, DORE, and DIMMICK, JJ., concur with DOLLIVER, J.

[En Banc. December 6, 1984.]

DIMMICK, J. (concurring)—I concur with the majority. Reversal is appropriate under the circumstances of this case, in which the trial court made a legal error as to the competence and availability of child witnesses. Justice Dolliver's concurring opinion touches on issues that concern me, but does not reach all of them. While I agree with the majority's interpretation of the statute to conform with the federal and state constitutions, I would reverse solely on the basis of misinterpretation of the law on competency. In addition, I write to emphasize the distinction between the present and past competence of a child witness.

The statute in conformity with the confrontation clause dictates that a witness testify at trial unless unavailable. RCW 9A.44.120. A witness is unavailable only when the prosecutor has made a good faith effort to secure his presence. *Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968). *See also State v. Smith*, 85 Wn.2d 840,

951, 540 P.2d 424 (1975) (unavailability must be certain to excuse nonproduction of a witness).

The trial court and the parties erred in determining unavailability of the child witnesses on the basis of statutory incompetence. The judge had not examined the children and determined them to be incompetent. That is, he had not found them "incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050. Had he found them incompetent, however, the children would have been unavailable as witnesses.[4] This is not to say, however, that a determination of incompetency at the time of trial necessarily indicates that a child was incompetent at the time of making the hearsay statement.

I consider this to be the significance of the new statute RCW 9A.44.120. In effect, the trial judge faced with a child victim of sexual misconduct must make two separate determinations: First, is the child competent to take the stand as a witness? (If he is competent, then he must testify.) Second, was there sufficient indicia of reliability surrounding the child's out-of-court statement to admit it as evidence?

In this respect, I find the majority's opinion lacks clarity. It could be misconstrued as implying that present incompetence presumes incompetence or unreliability at the time the statement was made. But one does not necessarily follow from the other. Young children present special problems as witnesses because of their short memories and possible traumatic reaction as victims. The statute has been written to recognize the possible validity of a child's earlier statements (not unlike the hearsay exceptions allowed for excited utterances or present sense impressions).

Reliability may be indicated by the spontaneity of the out-of-court statement, a recitation of acts generally unknown to children, or other circumstances surrounding the statement. A finding of incompetence at time of trial would not invalidate an out-of-court statement by a child

[4]On this issue, I agree with Justice Dolliver's interpretation of ER 804.

which had the mark of reliability at the time it was made.

The accused is protected by the law's requirements that the hearsay statement be examined in a special hearing to determine its reliability. Additionally, the accused will have the opportunity to challenge the circumstances in which the statement was made, the possible motives of the recounter of the statement, and, finally, to confront any child witness determined to be competent to testify.

I would reverse on the basis of the faulty legal premise of incompetency leading to a faulty conclusion of unavailability. I form no conclusion as to the evidence of the children's reliability on retrial.

[No. 50105-0. En Banc. December 6, 1984.]

WALTHEW, WARNER, KEEFE, ARRON, COSTELLO AND THOMPSON, *Respondent*, v. THE DEPARTMENT OF REVENUE, *Appellant*.

[1] **Statutes — Construction — Administrative Construction — Effect.** A construction of a statute by the agency charged with enforcing it is not binding on the courts.

[2] **Attorney and Client — Taxation — Business and Occupation Tax — Reimbursements — Expenses of Litigation.** Under RCW 82.04.080 and .090, which define "gross income of the business" and "value proceeding or accruing" for purposes of the business and occupation tax, reimbursements by clients for advances for expenses of litigation specifically limited by CPR DR 5-103(B) are not a part of the attorney's gross income for purposes of computing the business and occupation tax. Administrative regulations implementing the statutes are construed to exclude reimbursement for such litigation expenses when incurred by the attorney acting solely as an agent for the client and passed through directly to the client without additional charge.

DORE, J., concurs by separate opinion.

(a) Where the victim did not consent as defined in RCW 9A.44.010(6), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony. [1979 ex.s. c 244 § 3; 1975 1st ex.s. c 14 § 6. Formerly RCW 9.79.190.]

9A.44.070 Statutory rape in the first degree. (1) A person over thirteen years of age is guilty of statutory rape in the first degree when the person engages in sexual intercourse with another person who is less than eleven years old.

(2) Statutory rape in the first degree is a class A felony. No person convicted of statutory rape in the first degree shall be granted a deferred or suspended sentence except for the purpose of commitment to an inpatient treatment facility. [1979 ex.s. c 244 § 4; 1975 1st ex.s. c 14 § 7. Formerly RCW 9.79.200.]

9A.44.080 Statutory rape in the second degree. (1) A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

(2) Statutory rape in the second degree is a class B felony. [1979 ex.s. c 244 § 5; 1975 1st ex.s. c 14 § 8. Formerly RCW 9.79.210.]

9A.44.090 Statutory rape in the third degree. (1) A person over eighteen years of age is guilty of statutory rape in the third degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is fourteen years of age or older but less than sixteen years old.

(2) Statutory rape in the third degree is a class C felony. [1979 ex.s. c 244 § 6; 1975 1st ex.s. c 14 § 9. Formerly RCW 9.79.220.]

9A.44.100 Indecent liberties. (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or

(b) When the other person is less than fourteen years of age; or

(c) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section, "sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(3) Indecent liberties is a class B felony. [1975 1st ex.s. c 260 § 9A.88.100. Formerly RCW 9A.88.100.]

9A.44.110 Communication with a minor for immoral purposes. Any person who communicates with a child under the age of seventeen years of age for immoral purposes shall be guilty of a gross misdemeanor, unless such person has previously been convicted of a felony sexual offense or has previously been convicted under this section or *RCW 9.79.130, in which case such person shall be guilty of a class C felony. [1975 1st ex.s. c 260 § 9A.88.020. Formerly RCW 9A.88.020.]

*Reviser's note: *RCW 9.79.130* was repealed by 1975 1st ex.s. c 260 § 9A.92.010, effective July 1, 1976; see RCW 9A.92.010(212).

9A.44.120 Admissibility of child's statement——Conditions. 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. [1982 c 129 § 2.]

Severability——1982 c 129: See note following RCW 9A.04.080.

9A.44.900 Decodification and addition of RCW 9.79.140 through 9.79.220, 9A.88.020, and 9A.88.100 to this chapter. RCW 9.79.140, 9.79.150, 9.79.160, 9.79-.170 as now or hereafter amended, 9.79.180 as now or hereafter amended, 9.79.190 as now or hereafter amended, 9.79.200 as now or hereafter amended, 9.79-.210 as now or hereafter amended, 9.79.220 as now or hereafter amended, 9A.88.020, and 9A.88.100 are each decodified and are each added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW. [1979 ex.s. c 244 § 17.]

9A.44.901 Construction——Sections decodified and added to this chapter. The sections decodified by RCW 9A.44.900 and added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW shall be construed as part of Title 9A RCW. [1979 ex.s. c 244 § 18.]

9A.44.902 Effective date——1979 ex.s. c 244. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1979. [1979 ex.s. c 244 § 19.]

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NEW HEARSAY EXCEPTIONS FOR A CHILD'S STATEMENT OF SEXUAL ABUSE

GLEN SKOLER*

INTRODUCTION

Within the last two decades the American consciousness has gradually faced the grim reality that each year approximately 400,000 children are sexually abused.[1] This realization has led to increasing criticism of the legal profession for its failure to effectively respond to this pervasive social problem.[2] Some commentators have even suggested that legal intervention in response to child sexual abuse often constitutes a second

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1. CHILD SEXUAL ABUSE: INCEST ASSAULT AND SEXUAL EXPLOITATION, NAT'L CENTER ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVICES (1981) (reporting authorities offering a range of possible incidence figures). Most studies, based on statistical projections estimate between 200,000-500,000 cases a year. Estimates vary due to such factors as the age range covered, the definition of sexual abuse utilized, whether or not boys were included in the estimate and whether statistical projections were generated from reported incidents or retrospective interviews. The U.S. Government's National Center on Child Abuse and Neglect describes its own estimate of over 100,000 cases per year as conservative. *See generally Id.* at 1-3. Reported cases probably represent only the "tip of the iceberg." In studies of college students, over 25% of respondents of both sexes reported that they had been subjected to some form of sexual abuse as children. *Id.* at 2-3.

2. CHILD SEXUAL ABUSE AND THE LAW, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, AMERICAN BAR ASSOCIATION (J. Bulkley 4th ed. 1983) [hereinafter cited as CHILD SEXUAL ABUSE AND THE LAW]; RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, AMERICAN BAR ASSOCIATION (J. Bulkley 1982) [hereinafter cited as ABA RECOMMENDATIONS]; Parker, *The Rights of Child Witnesses: Is The Court A Protector or Perpetrator?*, 17 NEW ENGL. L. REV. 643 (1982) [hereinafter cited as Parker, *Child Witnesses*].

victimization of the child.[3] Such critical commentary has inspired several reform proposals designed to mitigate both the incidence and consequence of child sexual abuse.[4] This article will assess one of these reform proposals: a new hearsay exception for a child's out-of-court statements of sexual abuse.

To this point, this new hearsay proposal has taken two quite different forms. The first variant would simply create a new hearsay exception for a child's statements of sexual abuse.[5] Washington[6] and Kansas[7] have adopted this alternative and their inspiration has stimulated interest and advocacy in other jurisdictions. The second variant involves the use of videotaped interviews and depositions which insulate the child victim from the trauma of open courtroom testimony. The taped proceedings allow for substantial cross-examination but not direct confrontation.[8] This approach, to a varying degree, has been adopted in a few states.[9]

The proposed hearsay reform will be analyzed from a psycho-legal perspective. The issue will be critically evaluated both on the basis of current legal theory and case law, and on the basis of our current understanding of child psychology and the complex dynamics of sexual abuse. Part I briefly outlines

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3. SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS (A. Burgess, A. Groth, L. Holmstrom, & S. Sgroi eds. 1978); Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 398-99 (1975); Melton, *Child Witnesses and the First Amendment: A Psycholegal Dilemma*, —— J. SOC. ISSUES —— (1984) [hereinafter cited as Melton, *A Psycholegal Dilemma*]; Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, in CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2, at 134; Parker, *Child Witnesses*, *supra* note 2 at 643. *See also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (Burger, J., dissenting) (exclusion order in trial of defendant charged with rape of three minor girls upheld).

4. ABA RECOMMENDATIONS, *supra* note 2.

5. Some commentators advocate a new additional exception to the hearsay rule. Others suggest expansion of the *res gestae* category to include the dynamics of child sexual abuse. *See, e.g.*, Parker, *Child Witnesses*, *supra* note 2, at 674. Still others recommend increased reliance on modern residual exceptions. *See, e.g.*, Bulkley, *Evidentiary Theories for Admitting a Child's Out-of Court Statement of Sexual Abuse at Trials*, in CHILD SEXUAL ABUSES AND THE LAW, *supra* note 2, at 153.

6. WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1982).

7. KAN. STAT. ANN. § 60-460(dd) (Supp. 1982).

8. Libai, *The Protection of a Child Victim of a Sexual Offense in The Criminal Justice System*, 15 WAYNE L. REV. 977 (1969); *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 J. L. REFORM 131 (1981) [hereinafter cited as *Proving Parent-Child Incest*]; Parker, *Child Witnesses*, *supra* note 2.

9. Generally, however, state deposition procedures preserve the defendant's full rights to confrontation and cross-examination. *See, e.g.*, FLA. STAT. ANN. § 918.17 (West Supp. 1981); MONT. CODE ANN. § 46-15-401 (1981); N.M.R. CRIM. P. (Dist. Ct.) rule 29.1 (1980) *implementing* N.M. STAT. ANN. § 12-2312 (1982).

the modern approach to dealing with the problem of child sexual abuse, emphasizing developments and rationales which have led to the proposed hearsay reform. Part II details the two variants of the proposed hearsay reform. Part III explores the constitutionality of the new proposals, primarily by considering the relationship between the Confrontation Clause and the hearsay doctrine. Part IV suggests two important theoretical issues raised by the new hearsay exceptions: 1) whether the traditional rationales which underlie the hearsay rule and the Confrontation Clause retain their validity when the out-of-court declarant is a child victim of sexual abuse; and 2) whether the balancing of competing individual rights and societal interests is adequately resolved by the essentially evidentiary approach which the Supreme Court has used to reconcile the hearsay rule with the Confrontation Clause. Part V uses the legal criteria of the hearsay rule-Confrontation Clause aggregate, necessity and indicia of reliability, to organize a brief review of the psychological evidence which may speak to the merits of the hearsay proposals. Part VI summarizes the results of this psycho-legal analysis and favors further implementation of the proposed hearsay reform.

I. The Need For Reform

In recent years members of both the legal and mental health professions have carefully documented the general problem of child sexual abuse which includes society's long refusal to reconginze this problem, the power of the incest taboo, and the dynamics which typify sexual abuse and incestuous families.[10] The initial efforts to confront the public with the issue were well justified in a society which denied the reality of widespread sexual abuse. Historically, Wigmore appears to have been the most influential legal authority to formally discount such reports. In his treatise on evidence he supported his highly personal and prejudiced beliefs with questionable, inaccurate and sometimes purposely distorted "scientific evidence."[11] Due, partly, to Wigmore's influence, some states still require that a child's report of

10. S. Butler, Conspiracy of Silence (1978); DeFrancis, *Protecting Child Victims of Sex Crimes Committed by Adults*, American Humane Association (1969); J. Herman, Father-Daughter Incest (1981); Sexual Assault of Children and Adolescents, *supra* note 3; *The Sexual Victimology of Youth* (Shultz ed. 1980); Katz, *Incestuous Families*, 1 Det. C. L. Rev. 79 (1983).

11. *See* Beinen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 Cal. W.L. Rev. 235 (1983).

sexual abuse be independently corroborated.[12] From the psychology perspective, Freud was the most influential figure to deny patient reports of child sexual abuse.[13] He initially believed the reports, but then attributed them to universal incestuous fantasy.[14] Freud's theory of the Oedipal complex would become one of the central tenets of psychoanalytic theory.

Our society unquestionably lives under the authority of the incest taboo and has developed strictures to proscribe and punish child sexual abuse.[15] The power of the taboo, however, accounts for the paradox that society not only outlaws child sexual abuse, but also denies its threatening reality. In prior years, the issue of child sexual abuse was brought before the public only by professional commentators. Recently, however, the mass media has recognized the enormous societal interest in the ancient taboo. Today, it is cultural commonplace to see both the victims and perpetrators of incest, along with their therapists, appearing on national talk shows.[16] In many American cities, school children are informed of the dangers of sexual abuse and are urged to report such incidents.[17] While these progressive changes do not typify the general societal response to child sexual abuse, they do represent a marked reversal of the long process of societal denial.

One of the major consequences of our changing attitudes is that the problem is slowly being shifted from the legal profession to the mental health and social welfare systems. Traditional legal intervention, emphasizes punishment of the offender over protection of the child.[18] Several experts believe that this type of intervention constitutes a second or double victimization of the child.[19] The victim may feel punished when removed from the home, guilty for reporting the offender, and

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12. Lloyd, *The Corroboration of Sexual Victimization of Children*, CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2, at 103.

13. *See infra* notes 168 to 202 and accompanying text.

14. S. FREUD, AN AUTOBIOGRAPHY STUDY (1925); S. FREUD, THE HISTORY OF THE PSYCHOANALYTIC MOVEMENT (1914).

15. S. FREUD, TOTEM AND TABOO (1913).

16. Within the last year child sexual abuse has also been the subject of special news features, a T.V. movie and even a popular situation comedy featuring a child star.

17. For young children, sexual abuse is phrased in terms of "touching that feels uncomfortable" or "good touching" and "bad touching." Private parts of the body are sometimes called "red light" areas where the touching should stop.

18. Katz, *supra* note 10, at 94; INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, AMERICAN BAR ASSOCIATION (J. Bulkley 3d ed. 1983).

19. *See, e.g.*, J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 64 (1979); Melton, *A Psycholegal Dilemma*, *supra* note 3; Parker, *Child Witnesses*, *supra* note 2.

responsible for destroying the family.[20] Progressive programs now try to remove the offender from the home rather than the victim.[21] Subsequent intervention often involves family and individual therapy, with the objectives of returning the offender to the home, improving the spousal relationship, and reversing the "incest dynamics" within the family.[22]

The foregoing is offered as a preface to emphasize that any need for hearsay reform to facilitate the prosecution of child sexual abuse does not imply that prosecution is always recommended. Usually individual and family treatment will be the preferred intervention depending on the particular strengths of the offender and the family for positive change. Legal coercion, however, such as the threat of prosecution or imprisonment, often serves as an effective catalyst to initiate treatment. Therefore, the ability and willingness of the state to move forward with an effective prosecution has suddenly become a shared concern of both the legal and mental health professions.

Rationales for a New Hearsay Exception

Child sexual abuse cases are generally considered difficult to prosecute.[23] Often the only witnesses to the incident are the adult perpetrator and the child victim. Depending on the type of

20. GOLDSTEIN, FREUD & SOLNIT, *supra* note 19, at 64; SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS, *supra* note 3; THE SEXUAL VICTIMOLOGY OF YOUTH, *supra* note 10; Katz, *supra* note 10. These reactions are in part related to certain incest dynamics which inappropriately place a great deal of responsibility and blame on the incest victim.

21. INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES, *supra* note 18; Katz, *supra* note 10; MacFarlane & Bulkley, *Treating Child Abuse: An Overview of Current Program Models*, in *Social Work and Child Sexual Abuse*, I, J. HUM. SEXUALITY & SOC. WORK (1982).

22. Giaretto, *Humanistic Treatment of Father-Daughter Incest*, 1 CHILD ABUSE & NEGLECT 411 (1977); Giaretto and Sgroi, *Coordinated Community Treatment of Incest*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 231 (1978); Katz, *supra* note 10; MacFarlane & Bulkley, *supra* note 21. Offenders, however, are not as amenable to treatment as one might expect. They tend to use a strong system of denial and rationalization to account for their inappropriate contacts with children. Denial and rationalization are common defenses. Typical excuses include claims that the perpetrator was performing a medical or hygienic examination, was conducting sex education and checking for signs of sexual activity. It is also common to accuse the victim of lying, being sexually provocative or taking revenge for parental discipline. Although treatment can be effective, some level of coercion is often initially required. A pre-trial diversion program which offers treatment in lieu of prosecution is one alternative which has been successfully used to insure the offenders initial investment in the treatment process. Post conviction alternatives offer other means of requiring treatment for the offender. ABA RECOMMENDATIONS, *supra* note 2, at 24-26. *See also* INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES, *supra* note 18.

23. *See* CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2; ABA RECOMMENDATIONS, *supra* note 2.

sexual contact, corroborating physical evidence may be absent or inconclusive.[24] It is not unusual for a child to retract a true report of sexual abuse due to guilt, fear of reprisal or anxiety that the offender will be sent to prison.[25] When a child retracts his report and refuses to testify, that child becomes unavailable as a witness.[26] The child victim may also be rendered unavailable as a witness due to his "extremely tender years."[27] Under such circumstances, the child's prior out-of-court statements are often the only probative evidence available. These factors make it difficult to prosecute a child sexual abuse case. The use of a child victim's out-of-court statements would enhance the prosecution of an alleged child abuser without violating the defendant's constitutional rights.

Even if the child is legally available to testify as a witness, there are many factors which suggest that the child's out-of-court statements may be inherently reliable. Indeed several commentators question the reliability of the child victim's testimony in an open courtroom.[28] In addition, there are cognitive and developmental limitations which constrain the child's ability to relate events under the pressures of cross-examination.[29] Because of these emotional and cognitive factors, a child's out-of-court statements of sexual abuse may be more reliable than a child's actual in-court testimony, regardless of the child's availability as a witness.[30]

Another rationale for creating a new hearsay exception for child reports of sexual abuse is to avoid the trauma of trial preparation and testimony.[31] Conceivably the trauma could be so severe as to render the child's testimony unreliable or render him unavailable. Many child advocates feel that the victims should be spared the trauma of testifying regardless of the issues of availability or reliability. Chief Justice Burger expressed the common held belief that, the experience of testifying in an open

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24. Lloyd, *supra* note 12.

25. *See infra* notes 67 to 167 and accompanying text.

26. *See, e.g.*, FED. R. EVID. 804(a)(2) (witness "unavailable" when he "persists in refusing to testify"). *See also* State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983).

27. United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979).

28. Melton, *Procedural Reforms*, *supra* note 3, at 184.

29. Melton, *Children's Competency to Testify*, 5 L. & HUM. BEHAV. 73 (1981) [hereinafter cited as Melton, *Children's Competency*].

30. Melton, *Procedural Reforms*, *supra* note 3, at 189.

31. Melton, *A Psycholegal Dilemma*, *supra* note 3 (discussing the controversy over the presumed trauma of testimony for child victim/witnesses).

courtroom "can be devastating and leave permanent scars."[32]

There are three rationales which are generally offered in support of a new hearsay exception for child reports of sexual abuse. The first rationale is necessity. The second rationale recognizes the inherent reliability of the child's hearsay testimony. The third rationale acknowledges the need to protect child victims from the trauma of courtroom testimony. These rationales support the argument that a new hearsay exception for child reports of sexual abuse is necessary, inherently reliable and serves a sound societal interest in protecting children from "devastating" and "permanent scars."

Is A New Hearsay Exception Really Necessary?

Even if the reasons for admitting a child's out-of-court statements of sexual abuse into evidence are persuasive, there still remains the question of whether a new exception to the hearsay rule is necessary to accomplish that purpose.[33] In the past, hearsay has been admitted under the traditional exceptions to the hearsay rule and more recently under modern residual or "catch-all" exceptions.[34] Reliance on the traditional hearsay exceptions to admit child statements of abuse often results in "tortured" interpretations of the traditional exceptions.[35] The use of the excited utterance or *res gestae* exception demonstrates the judicial system's frustrated attempts to stretch a traditional hearsay exception to cover the pervasive and unique problem of child sexual abuse. In the course of expanding the allowable time intervals for excited utterances, some courts have demonstrated a good understanding of the dynamics of sexual abuse, noting that children may not immediately complain because of threats, fear, guilt and other pressures to keep the incident "a secret."[36] Other courts have observed that "children of tender years are generally not adept at reasoned reflection and the con-

32. Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 608 (1982) (Burger, J., dissenting).

33. Bulkley, *supra* note 2, at 153; ABA RECOMMENDATIONS, *supra* note 2, at 34-36.

34. Bulkley, *supra* note 2, at 153. For example, depending on the circumstances of each case, child statements of sexual abuse could be admitted into evidence under the following exceptions of the federal hearsay rule: FED. R. EVID. 803(1) (present sense impression); FED. R. EVID. 803(2) (excited utterances); FED. R. EVID. 803(3) (then existing mental emotional or physical condition); FED. R. EVID. 803(4) (statements for purposes of medical diagnosis or treatment); FED. R. EVID. 803(24) & 804(b)(5) (other exceptions, i.e., the "catch-all"); FED. R. EVID. 801(d)(1) (prior statement by witness as non-hearsay); FED. R. EVID. 804(b)(1) (former testimony).

35. Bulkley, *supra* note 2, at 153.

36. *Id.* at 156, 163 n.29.

coction of false stories under such circumstances."[37] Despite such an enlightened approach to the problem, courts are still placed in a difficult situation when the traditional exception is the only means of admitting a child's statements of sexual abuse. Either the court is bound by the inherent limitations of the excited utterance exception, which does not and cannot fit even the typical report of abuse, or the court is forced to liberalize the exception until it has lost its original meaning. Thus, courts have admitted "excited utterances" which have been the subject of much reflection and which have been uttered days, weeks and even months after the "startling event."[38]

After considering the limitations of the traditional hearsay exceptions some commentators have urged liberal use of the modern residual or catch-all exception to admit child reports of abuse into evidence.[39] Most residual exceptions, however, are still "exceptions in search of a rule."[40] Courts vary in their interpretation. While the interests of justice may be served by admitting reliable hearsay on a case by case basis, there appears to be no clear understanding of how a new hearsay exception could be established under the residual exceptions—if in fact that was ever the drafters' intent. Another drawback to reliance on the residual exceptions is that they are too strict. In certain instances they are stricter than Confrontation Clause requirements. Specifically, it is unreasonable to require that a child's statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."[41] Moreover, residual exceptions will often face Confrontation Clause challenges, and still courts seem confused about the relationship between the two.[42] There is some language in *Ohio v. Roberts*[43] which suggests that "indicia of reliability" may be established differentially, depending on whether the hearsay falls within a firmly rooted exception.

Given the present confusion, to assume that the residual exceptions are adequate to comprise child reports of sexual abuse,

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37. Soto v. Territory, 12 Ariz. 36, 94 P. 1104 (1908) (utterance of minor child need not be contemporaneous with event in order to be admissible as it is unlikely to be premeditated); Lancaster v. People, 200 Colo. 448, 450, 615 P.2d 720, 723 (1980).

38. Bulkley, *supra* note 2, at 156, 163 n.28.

39. ABA RECOMMENDATIONS, *supra* note 2, at 35; CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2 at 158-61.

40. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions In Search of a Rule*, 57 N.Y.U. L. REV. 867 (1982).

41. United States v. Perez, 658 F.2d 654, 661 n.6 (9th Cir. 1981) (*citing* the residual exceptions in FED. R. EVID. 803(24)(b)) and 804(b)(5)(B).

42. Sonenshein, *supra* note 40, at 895-98.

43. 448 U.S. 56, 67 (1980).

is merely to say that judges, without guidance and with varying appreciation of the problem of child sexual abuse, will decide these issues on a case by case basis. The theoretical issue of whether the residual exceptions will finally put an end to the common law tradition of individualized exceptions to the hearsay rule is an important issue.[44] The need, however, under the present law, is for a new exception.

II. The Hearsay Proposals: Two Variants

Washington and Kansas were the first two states to recognize the need for a new hearsay exception.[45] The Washington exception requires that the child victim be under ten years of age and applies only to incidents of sexual contact.[46] The court must find that the time, content and circumstances of the child's statement provide sufficient "indicia of reliability." If the child is unavailable as a witness, then corroborative evidence of the act must be established.[47]

The Kansas statute,[48] on the other hand, is not limited to sexual abuse but includes criminal proceedings, as well as child deprivation and need of care proceedings. The court must find that the child victim is unavailable as a witness, that the statement is "apparently reliable," and that the child was not induced to make the statement.

Both statutes were drafted with the knowledge that this new type of admissible hearsay would be subject to Confrontation Clause challenges. Both statutes adopt the standards set forth in *Ohio v. Roberts* for resolving Confrontation Clause challenges to the hearsay rule.[49] Conceptually, the statutes are quite similar but there are differences. The Kansas law requires a finding of reliability, while the Washington statute requires not only indicia of reliability but corroborative evidence of the act when the witness is unavailable. This additional requirement for corroborative evidence not only acts as an added guarantee of trustworthiness, but also addresses the due process problem of convicting a defendant solely on the basis of hearsay

44. ABA Recommendations, *supra* note 2, at 35; Child Sexual Abuse and the Law, *supra* note 2, at 158-59.

45. Wash. Rev. Code Ann. § 9A.44.120 (West Supp. 1984). Kan. Stat. Ann. § 60-640(dd) (1983). There is also a notification clause similar to that found in the federal residual exception. Fed. Rule Evid. 803(24) & 804(b)(5).

46. Wash. Rev. Code Ann. § 9A.44.120 (West Supp. 1984).

47. *Id.*

48. Kan. Stat. Ann. § 60-640(dd) (1983).

49. Ohio v. Roberts, 448 U.S. 56, 67-68 (1980).

declarations.[50] Interestingly, the Kansas law requires unavailability, while the Washington law does not. The Supreme Court has held that subsequent cross-examination of the declarant at trial satisfies the Confrontation Clause.[51] Nevertheless, the state or federal jurisdiction must establish some provision for admitting the evidence under the hearsay rule. It is difficult to discern from the Kansas statute whether the drafters of the provision erroneously considered only *Ohio v. Roberts*,[52] an unavailability case, or whether they intended to exclude the hearsay declarations of available child witnesses. The statutes also differ in that the Washington law is limited to only incidents of sexual abuse and establishes an age limit of nine, a time which precedes significant developmental gains in cognitive, social, and sexual maturity.[53]

Aside from these differences, however, the Washington and Kansas laws are basically the same. Both laws recognize the need for and establish a new hearsay exception for a child's out-of-court statements of abuse. Both clearly rely on the necessity and reliability standards of *Ohio v. Roberts* as a means of withstanding Confrontation Clause challenges. Whether these laws will ultimately be upheld as constitutional is still a matter of speculation.

Child Courtrooms and Videotaped Depositions

There is a second type of proposal for admitting a child's statements of sexual abuse into evidence. Although this proposal involves admitting hearsay testimony, it is conceptually different from the approach adopted by Washington and Kansas. This second proposal has many variants, but generally involves the use of closed circuit or videotaped interviews and depositions which are offered into evidence at the criminal trial. Such procedures usually permit cross-examination of the child victim, but prohibit direct confrontation.[54] The child victim is thereby insulated from the trauma of repetititous courtroom testimony.[55]

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50. This "corroboration" requirement should not be confused with the controversial laws requiring additional evidence to "corroborate" the child complainant's account.

51. Nelson v. O'Neill, 402 U.S. 622 (1971); California v. Green, 399 U.S. 149 (1970), *on remand sub. nom.* People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971), *cert. granted* Green v. California 404 U.S. 801 (1972).

52. 448 U.S. 56 (1980).

53. *See infra* notes 168 to 202 and accompanying text.

54. Libai, *supra* note 8; Parker, *Child Witnesses*, *supra* note 2; *Proving Parent-Child Incest*, *supra* note 8.

55. *See supra* note 31.

This second proposal takes many different forms, ranging on a continuum from a formal deposition with full cross-examination in the physical presence of the defendant, to a videotaped interview in a playroom between the child victim and a trained social worker.[56] Modern commentators who favor such alternatives often credit David Libai[57] for underscoring the plight of the child victim-witness and initiating legal reforms. After documenting the problem of child sexual abuse and noting the often deleterious effects of classical legal intervention, Libai offered several proposals to protect the child victim in the course of legal proceedings. He urged that the initial interview with the child victim be conducted by a specially trained police officer and that the interview be taped and later admitted into evidence.[58] He also suggested that under certain circumstances the child victim should be declared unavailable to testify. Another Libai proposal involved a special child courtroom which would ensure a less intimidating environment.[59]

Inspired by Libai, Dustin Ordway advocated that the child victim's only contact with the legal system be through a social worker.[60] All interviews would be taped. If legal proceedings progressed, all inquiries would be submitted by attorneys to the social worker who would then question the child. After viewing videotaped responses, attorneys could again submit questions through the social worker until the social worker felt that the limit of reasonable inquiry had been reached. Ordway's is one of the most liberal and non-traditional proposals and, according to Ordway, should apply only to incest cases.[61]

One of the most recent, comprehensive and scholarly proposals has come from Jacqueline Parker.[62] Her model act refines and augments several of Libai's proposals. She advocates that the child be protected and interviewed by a child hearing officer (CHO) who is an attorney, specially trained in child psychology, social work, clinical interviewing, and nursing. Parker's is a far ranging proposal which allows the court to make various modifications to standard procedures at which the child would normally be required to testify and submit to cross-examination. One such procedure would be a special deposition taken in a child hearing courtroom (CHC) which would include only the

56. *Proving Parent-Child Incest*, *supra* note 8.
57. *See* Libai, *supra* note 8, at 1000.
58. *Id.* at 1002.
59. *Id.* at 1014-25. The defendant would be required to be seated outside the physical presence of the child, behind a one way mirror.
60. *Proving Parent-Child Incest*, *supra* note 8.
61. *Id.*
62. Parker, *Child Witnesses*, *supra* note 2.

judge, child victim, CHO, and perhaps a trusted adult.[63] The defendant and members of the public would sit behind a one-way mirror. Actual questioning both on direct and cross-examination would be conducted by the CHO or by the parties' attorneys, with the CHO reserving the right to disallow or rephrase questions which are too harsh or upsetting for the child. This special deposition would be admissible in lieu of live testimony under the rationale that, by participating in the deposition procedure, the defense has waived the right to any furter cross-examination, and that the judge, by granting the request for a deposition, has deemed the child "psychologically unavailable" to testify at a subsequent trial.[64] Under the hearsay doctrine, the deposition would be admitted as prior testimony based on the unavailability of the witness. In addition to this deposition procedure, Parker would also allow for testimony at trial, but only in the special child hearing courtroom. Even during this phase of testimony, Parker suggests that portions of taped interviews between the CHO and the child victim could be introduced in lieu of live testimony when questions during cross-examination have previously been posed by the CHO in other taped proceedings or interviews.[65] Parker also advocates expansion of the spontaneous utterances or *res gestae* exception to the hearsay rule to include child reports of abuse.[66] This additional proposal is similar to the Washington and Kansas state laws; the difference is that Parker would simply expand the *res gestae* exception rather than trying to establish a new hearsay exception.[67]

The public policy interest in protecting child victims of sexual assault is not limited to the United States. In fact the United States would be rather embarrassed to compare its treatment of child victims to that of its European allies.[68] However, foreign

63. *Id.*

64. *Id.* at 668-69.

65. *Id.* at 670.

66. *Id.* at 674-77.

67. To date, at least 4 states have some type of provision which allows for the videotaped deposition of a child victim of sexual abuse. *See supra* note 9. New Mexico, for example, provides that such a deposition is admissible into evidence as an exception to the hearsay rule if the child is unable to testify without suffering unreasonable and unnecessary mental or emotional harm. N.M.R. CRIM. P. (Dist. Ct.) Rule 29.1(a) (1980). However, unlike Parker's Model Act, the New Mexico statute stipulates that the defendant be present, represented by counsel and given an adequate opportunity to cross-examine at the deposition. Even in the course of drafting this provision, serious questions were raised about the constitutionality of not requiring an available witness to confront the accused at trial. *See infra* text accompanying notes 67 to 167.

68. Scandinavian countries, which have preserved the right to confrontation, use specially trained police women to investigate child reports of

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judicial systems are not constrained by the Confrontation Clause of the sixth amendment of the United States Constitution. To institute similar systems in this country, one must address the complex and confusing relationship between the hearsay doctrine and the Confrontation Clause. Although Libai's original proposals have stimulated much interest in this country, Parker [69] accurately notes that his legal analysis is outdated and weak, particularly in his attempts to analogize between the sixth and first amendments. Subsequent commentators, like Ordway and Parker who admire Libai more as a child advocate than a legal scholar, have adopted Libai's reform proposals while developing more updated and convincing rationales. Their arguments for admitting into evidence taped interviews and special depositions are, on the surface, very seductive, and are as follows:

> In *Ohio v. Roberts* the Supreme Court approached the problem of reconciling the Confrontation Clause with the hearsay rule by establishing the criteria of unavailability and indicia of reliability. Proposals for admitting into evidence taped interviews and special depositions meet both of these tests. The unavailability test is met because the nature of the crime and the trauma of subsequent testimony renders the child victim "psychologically unavailable." Even if the child is literally available to testify at trial, surely the societal costs of traumatizing child victims are just as severe as the undue delay or cost of obtaining out-of-state witnesses. The reliability test is also fulfilled because specially structured taped interviews and depositions which provide for the substantial equivalent of cross-examination, imbue this type of hearsay testimony with a very high degree of reliability. This degree of reliability, provided by substantial cross-examination, even exceeds the reliability of other hearsay exceptions, which have been admitted in the past over Confrontation Clause challenges.[70]

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child sexual abuse. In Stockholm these special police officers are actually nurses. The child's statements are tape recorded with the goal of reducing the need for the child to repeat his story. Melton, *Procedural Reforms*, *supra* note 3, at 185, 195 n. 8. England provides that the deposition of a child may be admitted into evidence in lieu of live testimony when the court finds evidence that the process of testifying would endanger the child's life or health. Parker, *Child Witnesses*, *supra* note 2, at 680. The most progressive system for protecting child victims of sexual abuse was instituted by Israel in 1955. Melton, *Procedural Reforms*, *supra* note 3, at 185, 195 nn. 4-7. In any sex offense case involving a child under 14, a specially trained youth examiner interviews the child. No interrogation of the child or testimony by him may occur without the approval of the youth examiner. Children testify in only 14% of the cases. Usually only the youth examiner appears in court. D. Reifen, *Court Procedures in Israel to Protect Child-Victims of Sexual Assault* in 3 VICTIMOLOGY: A NEW FOCUS 106 (I. Drapkin & E. Viano eds. 1975).

69. Parker, *Child Witnesses*, *supra* note 2, at 646-47.

70. This argument is a summary of the reasoning offered in Parker, *Child Witnesses*, *supra* note 2 and *Proving Parent-Child Incest*, *supra* note 8. Oddly, Parker only briefly references *Roberts*. She does cite, however, the line of cases leading to *Roberts*. Relying on earlier commentary, she pri-

There are several problems with this reasoning. These problems will be analyzed in the next part which discusses *Roberts* and the Supreme Court's attempt to reconcile the hearsay rule with the Confrontation Clause. The two hearsay proposals for child victims of sexual abuse, one establishing a new hearsay exception and the other advocating the use of special depositions, rely on *Roberts* for their justification. An understanding of the Court's approach in *Roberts* therefore is essential to assess the constitutionality of these two new hearsay proposals.

III. Hearsay, the Confrontation Clause and Cross-examination

Reconciling the Confrontation Clause with the hearsay rule is a complex and confusing problem.[71] In fact, there have been only nine major decisions rendered by the Supreme Court on this subject since 1965.[72] The Court itself has acknowledged the slow formulation of a clear policy:

> True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. The Court has not sought to "map out a theory of the Confrontation Clause that would determine the validity of all hearsay 'exceptions.' "[73]

The common-law doctrine against hearsay is riddled with exceptions.[74] The Confrontation Clause of the sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him."[75] Taken literally, the Clause would render all hearsay exceptions inadmissible. This approach has long been rejected by the Court, which instead interprets the Clause as reflecting a "preference for face-to-face confrontation at trial, and that 'a primary interest secured by (the provision) is the right of cross-examina-

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marily views unavailability as the touchstone of the Confrontation Clause while minimizing the reliability issue.

71. Few tasks in criminal evidence are more perplexing than to describe the effect of the Confrontation Clause of the Sixth Amendment upon the hearsay doctrine. Signals from the Supreme Court point in different directions, the views of commentators differ, and while the subject is as potentially vast as the hearsay doctrine itself, benchmarks in the form of authoritative decisions are few and far between.

4 D. Louisell & C. Mueller, Federal Evidence § 418 at 123 (1980).

72. *Id.* at 133.

73. Ohio v. Roberts, 448 U.S. 56, 64-65 (1980) (quoting California v. Green, 399 U.S. 149, 162 (1970)).

74. Fed. R. Evid. art. VIII, Advisory Committee's Note, Introductory Note, at 89 (West 1975).

75. U.S. Const. amend. VI.

tion.' "[76] The right of confrontation is not absolute and may give way to competing public policy interests.[77] In those nine cases since 1965, the Court has tried to reconcile the Confrontation Clause with the hearsay doctrine and considerations of public policy.[78]

Ohio v. Roberts[79] represents the Court's most recent attempt to accomplish this difficult task. *Roberts*, although the leading case, is not original in its analysis or interpretation of the Confrontation Clause. Rather it represents an articulation and clarification of themes developed in prior cases. In *Roberts*, the Court noted the divergence of scholarly commentary and forcefully stated that it does not intend to "start anew" its Confrontation Clause analysis.[80] Therefore, *Roberts* may be considered "highly significant as an expositor of the Confrontation Clause."[81]

The facts in *Roberts* are notable in that they differ markedly from the fact situation which will usually be presented under the two new hearsay proposals for child reports of sexual abuse. *Roberts* involved prior (preliminary hearing) testimony of a witness who was physically unavailable to testify at trial. This form of hearsay is different than the type of "excited utterance" which would be admitted under the Washington and Kansas state laws. It is also different from formalized child depositions intended for use at trial.[82]

The Supreme Court held that the prosecution made a good faith effort to locate the witness and that the preliminary hearing testimony, although not formal cross-examination, bore the substantial equivalence of cross-examination to establish its reliability. The Court used the criteria of unavailability and reliability to set forth a general approach for reconciling the hearsay doctrine with the Confrontation Clause:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees

76. Ohio v. Roberts, 448 U.S. 56, 63 (quoting Douglas v. Alabama, 380 U.S. 415, 418(1965)).

77. *Id.*

78. *See supra* note 71, at 133.

79. 448 U.S. 56 (1980).

80. *Id.* at 67 n.9.

81. LOUISELL & MUELLER, *supra* note 71, § 418 at 150 (1980).

82. Ohio v. Roberts, 448 U.S. 56 (1980).

of trustworthiness.[83]

Roberts and the Child Victim Declarant

How well do the two new hearsay proposals for child reports of sexual abuse conform to the holding in *Ohio v. Roberts*? The first proposal, established by Washington[84] and Kansas,[85] read literally, conforms quite well to the *Roberts* standards. This is not surprising since both statutes were carefully drafted with *Roberts* in mind. The Washington state law, for example, admits sufficiently reliable hearsay whether the declarant is available or not. *Roberts* seems to require unavailability because, under the facts of that case, there were no means to confront the hearsay declarant through the process of cross-examination. However, in the line of cases leading to *Roberts*,[86] the Court had indicated that subsequent cross-examination of the hearsay declarant at trial would satisfy the Confrontation Clause, because, under such circumstances, the defendant does have the opportunity to confront the witness against him. If the witness is unavailable, then both statutes require a finding of particularized reliability while the Washington state law also requires corroborating evidence of the act to protect both confrontation and due processs interests. Thus, in the case of a hearsay declarant who does not testify at the proceeding, both laws appear to meet the necessity and reliability standards of *Roberts*.

The fact that the Washington and Kansas hearsay exceptions adopted the Language of *Roberts*, however, does not guarantee the constitutionality of the new exceptions. *Roberts* left many questions unanswered. For example, what constitutes unavailability? In *Roberts*, that issue was clear. The witness could not be located and the only related question was whether the prosecution made a reasonable and good faith effort to locate her. Nevertheless, there are many different ways to view a child victim as unavailable to testify. The case of a child victim who is too traumatized to testify or who refuses to testify appears to constitute unavailability and is consistent with evidentiary definitions of unavailability.[87] What about the child victim of incest who retracts her or his story prior to trial?[88] This situation is a typical one and raises the odd constitutional possibility of declaring a victim-witness unavailable due to a formal recantation

83. *Id.* at 67.
84. WASH. REV. CODE ANN. § 9A.44.120 (West Supp. 1984).
85. KAN. STAT. ANN. § 60-640(dd) (1983).
86. *See supra* note 58.
87. FED. R. EVID. 804(a)(2); FED. R. EVID. 804(a)(4).
88. *See infra* text accompanying notes 67 to 167.

as a means of admitting the hearsay version of the original charge. One state supreme court has recently allowed expert testimony as to whether a child's recantation of a rape accusation against her father was congruent with a pattern of intrafamilial sexual abuse.[89]

Another question pertains to the good faith effort to make a chi.. witness available to testify. In the case of an out-of-state witness, like *Roberts*, it might involve sending subpoenas and trying to locate the witness. In a case of child abuse, could it involve having to refer the child to a special incest counselor to help the child feel more comfortable about testifying in court? And then there is the concept of "psychological unavailability." Can an available witness be rendered unavailable to testify because there is a probability that he or she will suffer psychological damage during the process of testifying? There is some language in *Roberts* which suggests that unavailability, in the sense of physical absence, is not always required. This dictum referes to *Dutton v. Evans*,[90] one of the major cases prior to *Roberts*, in which "the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness."[91] It would be difficult to apply this dictum to cases of child sexual abuse in which the child victim is usually the key and often the only witness against the defendant. Naturally, many child right's advocates and mental health professionals would like all of these questions regarding unavailability to be resolved in favor of the child victim. *Roberts*, however, left most of these questions unanswered.

There are just as many unanswered questions regarding "indicia of reliability" in cases of child sexual abuse. *Roberts* suggests that reliability can be inferred when the evidence falls within a firmly rooted hearsay exception; otherwise a showing of particularized guarantees of trustworthiness is required.[92] *Roberts*, however, may not really be on point with the Washington and Kansas statutes. How courts will assess the reliability of children too frightened to testify or who retract their stories is unknown. Will expert testimony on typical incest dynamics be admissible to help assess the reliability of both the hearsay declaration and the retraction? Often the same expert who first hears the child's report will later assess its reliability. What role will this expert play in establisning reliability?

89. State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983).
90. 400 U.S. 74 (1970).
91. *Roberts*, 448 U.S. at 65 n.7.
92. *Id.* at 67.

In summary, although it may be easy to see that the new Washington and Kansas hearsay exceptions conform to the wording of *Roberts*, *Roberts* is not a child abuse case, nor did it struggle with the difficult issues which arise under the Washington and Kansas hearsay exceptions. In fact, *Roberts* establishes phrases which are rather vague and subjective, as are many newly pronounced principles of constitutional interpretation. Unavailability must be established by good faith and reasonable efforts. Reliability must be established by certain "indicia of reliability" and "guarantees of trustworthiness." What *Roberts* really means, and how it will be applied in cases of child sexual abuse, if at all, remains unanswered.

Videotaped Depositions and Roberts*: "Is it Hearsay?"*

Proposals for admitting into evidence taped interviews and special depositions in cases of child sexual abuse also rely heavily on *Roberts* for their justification.[93] The basic argument is that a child victim is rendered "psychologically unavailable" to testify, and that taped interviews and deposition procedures, which have a substantial equivalence of cross-examination, guarantee a very high degree of reliability.[94] This reliance on *Roberts* appears straightforward, but there are several problems with this type of reasoning. First, it expands the notion of unavailability far beyond the holding in *Roberts*. Second, to argue that the prior testimony exception is reliable is unconvincing. Depositions have always been acknowledged as highly reliable but are relegated to the judicial preference for live testimony. Third, it confuses and ignores the public policy interests and considerations which distinguish depositions from other forms of hearsay. Finally, it ignores the real issue in advocating the use of taped interviews and depositions which is the balancing of interests between protecting the child victim and the judicial preference of available witnesses. Sole reliance on *Roberts*, in an attempt to conform to *Roberts*, may not be necessary and may confuse the examination of important competing public interests.

The notion of psychological unavailability is radically different from the kind of physical unavailability which the *Roberts* court considered. Many evidence codes, such as the Federal Rules of Evidence, recognize that a witness may be unavailable due to a then existing mental illness or infirmity.[95] But the concept of psychological unavailability is meant to be broader in

93. *Proving Parent-Child Incest*, *supra* note 8.
94. *See supra* note 70 and accompanying text.
95. FED. R. EVID. 804(a)(4).

scope and would be invoked for many children solely because the experience of testifying might produce further psychological harm.[96] At this point, "psychological unavailability" becomes merely a way of using the language in *Roberts* to assert that the unavailability requirement of *Roberts* should be balanced against the competing state interest in protecting child victims of sexual abuse.[97]

The *Roberts* criterion of unavailability is thus supposedly overcome by the notion of "psychological unavailability." Once this hurdle is cleared, the *Roberts* criterion of "indicia of reliability" seems easily satisfied because the proposed taped child interviews and depositions allow for the "substantial equivalence of cross-examination"[98] in the form of questions submitted to the child. The basic problem with hearsay is that it usually lacks the protections of live testimony which require the witness to testify: (1) under oath, (2) in the personal presence of the trier of fact and (3) subject to cross-examination. Today, hearsay analysis tends to center on cross-examination.[99] To absolutely require all three conditions and ban all hearsay would, however, deprive the trier of fact of probative evidence. The common law solution has been to establish a rule against hearsay but to admit several necessary exceptions under circumstances which theoretically guarantee trustworthiness.[100] While the Confrontation Clause is meant to exclude some forms of hearsay, the Supreme Court has repeatedly recognized the "truism that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values. . .and stem from the same roots.' "[101] Actually the necessity and reliability criteria of *Roberts* are not much different than the usual common law rationales for allowing hearsay exceptions.[102] Advocates of taped interviews and depositions argue that they are reliable because they contain the recognized protections of live testimony.[103] Furthermore this type of proposal is said to provide a much

96. Melton, *A Psycholegal Dilemma*, *supra* note 3; *see infra* text accompanying notes 67 to 167.

97. *See infra* text accompanying notes 67 to 167.

98. *Roberts*, 448 U.S. at 67-73.

99. FED. R. EVID. art. VIII, Advisory Committee's Note, Introductory Note; *see also Roberts*, 448 U.S. at 70.

100. Ohio v. Roberts, 448 U.S. 56, 67 (1980). *See* E. CLEARY, MCCORMICK ON EVIDENCE § 244 (2d ed. 1972) (history of rule).

101. Ohio v. Roberts, 448 U.S. 56, 67 (1980).

102. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 331-55 (1981); *see infra* notes 67 to 167 and accompanying text.

103. *See* Parker, *Child Witnesses*, *supra* note 2, at 695; *Proving Parent-Child Incest*, *supra* note 8, at 149-51.

greater degree of reliability than other hearsay exceptions which lack all three conditions of live testimony and which the Supreme Court has repeatedly allowed over Confrontation Clause challenges.[104]

The problem with this type of analysis is that it ignores, for no apparent reason, the important policy issue of regularly using taped depositions of available witnesses as a substitute for the trial process. The fact that deposition testimony is just as good as or better than other forms of hearsay is therefore unconvincing. Deposition testimony has long been acknowledged to be one of the most reliable forms of hearsay, yet it is usually admitted only under strict standards of unavailability.[105] Perhaps the area of confusion here is that a deposition, although technically hearsay under the prior testimony exception, is conceptually different than most forms of hearsay and implicates related, but different policy interests. This difference creates the supposed logical inconsistencies identified by commentators when they assess the constitutionality of new forms of depositions by relying on a case such as *Roberts*.[106]

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104. Such exceptions include dying declarations, *see* Ohio v. Roberts, 448 U.S. 56, 64 (1980) and excited utterances, *see* United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980).

105. *See supra* note 95.

106. McCormick includes depositions (depositions to preserve evidence only) in the definition of former testimony and notes that deposition testimony may be classified, depending upon the precise formulation of the rule against hearsay, as an exception to the hearsay prohibition or as a class of evidence in which the requirements of the hearsay rule are complied with. C. MCCORMICK, LAW OF EVIDENCE § 254, at 614 (2d ed. 1972). *See, e.g.*, FED. R. CRIM. P. 15. Wigmore favored this latter position, which is interesting, given Wigmore's minimization and misinterpretation of the Confrontation Clause. C. MCCORMICK, LAW OF EVIDENCE § 254, at 614; 5 WIGMORE, EVIDENCE 131 (3d ed. 1940); *see also* Gutman, *supra* note 102. McCormick takes the former position, that deposition testimony is hearsay, for the reason that it is the familiar usuage to the profession and that it facilitates the wider admissions of former testimony under a liberalized exception. C. MCCORMICK, *supra*, § 254, at 614-15. He does however emphasize the need for further reform. Like the modern advocates of taped child depositions, McCormick realizes that, compared to other hearsay exceptions such as excited utterances, the restrictions upon declarations in the form of sworn testimony seem "fantastically strict." C. MCCORMICK, *supra* § 261 at 626. McCormick's solution is to urge liberality under the former testimony. by suggesting that the standard of unavailability of the witness should be no more exacting than that for depositions under the Federal Rules of Civil Procedure, with this caveat: "In criminal cases, the constitutional right of confrontation imposes stricter standards of unavailability." C. MCCORMICK, § 261 at 626.

One commentator who advocates the liberal use of videotape in criminal proceedings, takes a more radical position and argues that Confrontation Clause considerations may not even be pertinent:

> [T]he "trial" includes both the taping session and the presentation of the tape to the jury. The "court" includes both the room in which the jury observes the testimony and the room in which the testimony was

The foregoing analysis is not offered to discourage the use of videotaped depositions in cases of child abuse, but to suggest that reliance on the *Roberts* unavailability and reliability standards is misleading. The concept of psychological unavailability will usually mean little more than that there are important competing public policy interests in protecting child victims of sex-

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taped. For these same reasons, questions of availability to not arise. The witness is available, and he is testifying before the jury.

Barber & Bates, *Videotape in Criminal Proceeding*, 25 HASTINGS L. J. 1017, 1037. This "modern" interpretation sounds more like Wigmore's almost ancient view of both former testimony and the Confrontation Clause, which McCormick and the Supreme Court have soundly rejected. California v. Green, 399 U.S. 149, 155 (1970); C. MCCORMICK, *supra*, § 254 at 614; 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 800[04], at 800-19 (1979). Yet it is argued that the electronic deposition, like the new personal computer, is "a tool for modern times," which allows for accurate preservation of evidence, testimony under oath, cross-examination, and demeanor evidence. Some even speculate whether the right of confrontation was an attempt to secure these guarantees of reliability in a pre-technological society. Parker, *Child Witnesses*, *supra* note 2, at 695. Although the more psychologically minded may still feel that the pre-technological requirement of face-to-face confrontation with the defendant and jury adds an important dimension to the reliability of testimony. *See, e.g.*, United States v. Benfield, 593 F.2d 815 (8th Cir. 1979).

This argument, that videotaped depositions and interviews are just as good as other forms of hearsay or even the trial process itself, confuses important considerations of public and judicial policy. These considerations are clearly expressed in the Advisory Committee's note to the former testimony exception to the federal hearsay rule, which explains why former testimony, although highly reliable, is included under Rule 804 (declarant unavailable) instead of Rule 803 (availability of declarant immaterial):

> Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of the trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803. . . . However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. . . . In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

FED. R. EVID. 804, Advisory Committee's Note, at 270 (West 1983).

Assessed against these policy interests, the argument that special child depositions would be just as or reliable than other forms of hearsay seems less cogent. Even the use of videotape, which would in part overcome the absence of demeanor evidence, could probably not satisfy the policy preference for the presence of available witnesses. Any notion of psychological unavailability would have to be carefully defined and limited to preserve this policy. There is adequate precedent for using depositions for highly traumatized and essentially unavailable witnesses such as rape victims. At the other end of the continuum it is difficult to imagine a victim of any sexual or other violent crime who could not make a strong argument for "psychological unavailability.

ual abuse. To assert that videotaped or closed-circuit depositions are just as reliable as other admissible hearsay ignores the policy preference for the presence of available witnesses. The proper justification for admitting into evidence specially taped child depositions and interviews is that the strong public policy interest in protecting child victims of sexual assault should be balanced against the strong public policy interest which favors the presence of available witnesses. Unfortunately, the Supreme Court, in its analysis and interpretation of the Confrontation Clause, has left no possiblity of this kind of "balancing test," except to assert, somewhat unconvincingly, that a strict analysis of unavailability and indicia of reliability will adequately accommodate all competing interests.[107] Moreover, the Court has been emphatic in declaring its intention not to begin its Confrontation Clause analysis anew.[108] Therefore, it is not surprising that advocates of special depositions for child victims of sexual abuse have felt the need to present their views only in terms of the unavailability and reliability language of *Roberts*.

There are several ironies that result from the Court's attempt to reconcile the hearsay doctrine with the Confrontation Clause. One such irony involves the constitutional support that the two hearsay proposals for child victims will probably receive. The Washington and Kansas statutes, which simply create a new hearsay exception, will probably be held constitutional, although they lack all of the protections of live testimony: oath, demeanor evidence and cross-examination. On the other hand, the second proposal, which favors the use of videotaped depositions and preserves all three of these conditions will probably receive less constitutional support.

Nick, Iron Shell AND *Benfield*

Two recent cases in the same federal circuit indicate how differently the same court can approach Confrontation Clause issues raised first, by a recognized exception to a hearsay rule, and second, by a special closed-circuit, videotaped deposition. Both cases are analogous to the two new hearsay proposals for a child's statements for sexual abuse. *United States v. Iron Shell*[109] involved hearsay admitted under established exceptions to the federal hearsay rule, but it was the kind of hearsay that would be admitted under the new Washington and Kansas

107. *See infra* note 172 and accompanying text; *see also* Ohio v. Roberts, 448 U.S. 56, 65 (1980).

108. *Roberts*, 448 U.S. at 66 n.9.

109. 633 F.2d 77 (8th Cir. 1980).

exceptions. *United States v. Benfield*[110] involved the use of videotaped depositions to protect a traumatized adult victim of kidnapping.

John Louis Iron Shell was convicted of assault with intent to rape a nine-year-old girl. Her statements after the assault to a police officer were held admissible under the federal excited utterances exception,[111] and her statements to a treating physician were held admissible under the federal medical treatment exception.[112] The Eight Circuit[113] was willing to stretch the allowable time interval for an excited utterance considering the child's age, physical and mental condition, the characteristics of the event and the subject matter quoted.[114] Even though the girl was available to testify, the defense raised a Confrontation Clause objection which questioned whether the child was truly available for effective cross-examination due to her young age. The court held that even if the girl was thus "unavailable," the admitted hearsay bore sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.[115] In so ruling, the *Iron Shell* court relied heavily on the then very recent Supreme Court decision in *Ohio v. Roberts*.

In the course of its opinion, the *Iron Shell* court also cited *United States v. Nick*.[116] *Nick* is not as conceptually clear as *Iron Shell*, but it is one of the few recent court of appeals cases that deals directly with the issue of admitting a child's out-of-court statements of sexual abuse. In *Nick*, the victim was three years old, and the victim's hearsay statement, as in *Iron Shell*, was admitted under Federal Rule of Evidence 803(2) and 803(4). The *Nick* court noted that the child was not subjected to cross-examination and could not have been due to his "extremely tender years."[117] In this pre-*Roberts* case, the court turned to one of *Roberts'* predecessor, *Dutton v. Evans*,[118] to assess the reliability of the hearsay. The *Nick* court then went on to rely on the criteria of the federal residual exception to accomplish the task of determining whether the hearsay was sufficiently reliable. Using the residual exception criteria, the *Nick* court upheld

110. 593 F.2d 815 (8th Cir. 1979).
111. FED. R. EVID. 803(2).
112. FED. R. EVID. 803(4).
113. United States v. Benfield, 633 F.2d 77, 86 (8th Cir. 1980).
114. *Id.*
115. *Id.* at 87.
116. 604 F.2d 1199 (9th Cir. 1979).
117. *Id.* at 1202.
118. 400 U.S. 74 (1970).

the admission of the hearsay as highly reliable and probative.[119] Later in 1981, the same circuit in *United States v. Perez*[120] found the *Nick* court's reliance on Federal Rule of Evidence 803(24) unjustified. Specifically, the residual exception requirement that the statement be more probative on the point for which it is offered than any other evidence seemed unnecessarily strict under *Dutton* (and now *Roberts*). The *Nick* case has value, however, because it introduced the concept that a child, although physically available to testify, may be "unavailable" due to cognitive limitations and perhaps even trauma. *Iron Shell* cites *Nick* as representing the kind of case which poses a "special type" of unavailability.[121] Both cases may lend precedential support to the notion of psychological unavailability, which is thought to typify child sexual abuse.

Nick and *Iron Shell* involved "firmly rooted"[122] hearsay exceptions. Both courts found particularized indicia of reliability under either *Dutton* or *Roberts* when there was a question as to the victim's availability to testify. Neither court had any problems upholding the admission of a child's out-of-court statements of sexual abuse over Confrontation Clause objections. The question then remains whether the new Washington and Kansas exceptions for child victims will receive the same level of constitutional support. It also remains to be seen whether courts will consider the new laws as "firmly rooted exceptions" which provide the hearsay with an inherently high degree of reliability, or if they will require very particularized indicia of reliability. The standards for assessing these questions come from *Roberts*, which was a prior testimony case that required very particularized findings. The *Roberts* case itself may not be good precedent for consideration of the Washington and Kansas laws when compared to cases like *Nick* and *Iron Shell*. Although these latter cases rely on traditional hearsay exceptions, the hearsay which they allowed is very similar to the kind of hearsay which will be admitted under the new child sexual abuse exceptions. While the constitutional criteria may come from the language in *Roberts*, the *Nick* case and in particular, the *Iron Shell* decision are more on point.

The Eighth Circuit decided *Iron Shell* in 1980. A year earlier the same circuit had decided *United States v. Benfield*,[123] a case which involved a closed-circuit taped deposition procedure for a

119. 604 F.2d 1199, 1203 (9th Cir. 1979).
120. 658 F.2d 654, 661 n. 6 (9th Cir. 1981).
121. United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980).
122. Ohio v. Roberts, 448 U.S. 56, 67 (1980) (excited utterances and statements made to a treating physician).
123. 593 F.2d 815 (8th Cir. 1979).

traumatized adult kidnap victim. The victim developed a psychiatric "infirmity" following the ordeal and her treating psychiatrist indicated that she could not be subpoenaed for trial for months.[124] The Government then filed a request for a videotaped deposition. The trial court granted the request and ordered that the defendant could be present at the deposition, but not within the vision of the victim. During the deposition, the defendant sat in another room and observed the proceedings on a monitor. He was allowed to stop the questioning by sounding a buzzer in order to consult with counsel. Counsel was allowed to conduct cross-examination. The victim was kept unaware of the defendant's presence in the building.[125]

Despite these protections for the defendant, the court held the procedure unconstitutional. The opinion in *Benfield* is perplexing because it appears to minimize modern Confrontation Clause analysis while relying heavily on turn-of-the-century case law. Note that *Benfield* is a pre-*Roberts* but a post-*Mancusi* case.[126] While the court grudgingly acknowledged pre-*Roberts* line of cases, it none the less relied primarily on a series of cases decided between 1895 and 1911. The gist of the *Benfield* opinion is that the necessity-reliability cases which ultimately led to *Roberts* do not substantially mitigate the right to a "face-to-face" confrontation between the witness and the accused. As the Court stated:

> Normally the right to confrontation includes a face-to-face meeting at trial at which time cross-examination takes place. . . . While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment. . . . While a deposition necessarily eliminates a face-to-face meeting between witness and jury, we find no justification for further abridgement of the defendant's rights. A videotaped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally infirm.[127]

The court must have placed great importance on the face-to-face confrontation to have characterized the defendant in *Benfield* as

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124. *Id.*

125. *Id.*

126. Mancusi v. Stubbs, 408 U.S. 204 (1972). The line of cases leading to *Roberts* runs in the following order: Pointer v. Texas, 380 U.S. 400 (1965) (applying the Confrontation Clause to the states through the due process clause of the fourteenth amendment); Douglas v. Alabama, 380 U.S. 415 (1965); Barber v. Page, 390 U.S. 719 (1968); Bruton v. United States, 391 U.S. 123 (1968); California v. Green, 399 U.S. 149 (1970); Dutton v. Evans, 400 U.S. 74 (1970); Nelson v. O'Neill, 402 U.S. 622 (1971); Mancusi v. Stubbs, 408 U.S. 204 (1972); Ohio v. Roberts, 448 U.S. 56 (1980).

127. *Benfield*, 593 F.2d at 821.

unable to participate in the deposition, since he viewed the entire proceeding, could stop it at will and was able to assist his attorney in the process of questioning and cross-examination.

The *Benfield* court indicated that any exception to direct confrontation should be narrow in scope and based on necessity or waiver.[128] The *Benfield* court considered the possibility that a defendant could commit a crime so heinous as to excuse the victim from face-to-face confrontation.[129] Thus, *Benfield* approached the concept of psychological unavailability by means of a waiver theory. The court ruled, however, that the facts did not involve conduct of that magnitude, and to find such a waiver in this case would essentially destroy the right of confrontation in nearly all cases of alleged crimes against persons.[130] Oddly, the court did not, on the facts, find a showing of necessity, even though a psychiatrist testified that the victim's mental infirmity was directly related to the crime and rendered her unable to testify under normal trial conditions. The *Benfield* depositions procedure fell under Federal Rules of Criminal Procedure 15, which relies for its definition of unavailability on Federal Rules of Evidence 804(a), the latter includes then existing physical or mental illness or infirmity and thus seemingly applies to the *Benfield* fact situation. Rule 15, however, also guarantees the defendant the right to be in the presence of the witness during the examination.[131] Although this provision is, in part, meant to protect confrontation rights, the *Benfield* court was unclear in stating whether its decision relied solely on Confrontation Clause theory or on this specific provision of the applicable rules of criminal procedure. The court did, however, specifically refer to the right to face-to-face confrontation as a constitutional right, even though it conceded that often necessary hearsay is admitted despite the absence of confrontation with the accused.[132] The court indicated that it did favor the development of electronic video technology which more nearly approximates the traditional courtroom setting, specifically "face-to-face" confrontation with a witness who is aware of the defendant's presence.[133]

On its surface *Benfield's* analysis seems archaic and unenlightened in its interpretation of the Confrontation Clause. It

128. *Id.* at 821. For an example of a defendant's behavior acting as waiver of confrontation rights, see United States v. Thevis, 665 F.2d 616 (5th Cir. 1982).

129. 593 F.2d at 821.

130. *Id.*

131. FED. R. CRIM. P. 15(b).

132. 593 F.2d at 819-21.

133. *Id.* at 821-22.

minimizes the line of cases which led to *Roberts* just one year later and instead, reaches back to the turn-of-the-century for support of its literalistic reliance on "face-to-face" confrontation. There appears to be a natural tension between *Dutton*, and *Roberts* on one hand, and *Benfield* on the other. The logical inconsistencies are apparent. Other less reliable hearsay is regularly admitted with virtually no confrontation, participation of the defendant or cross-examination but *Benfield* requires a face-to-face meeting for a psychologically unavailable witness who testifies under stringent standards of reliability and cross-examination. Although the *Benfield* court did not articulate the issue clearly, if at all, it seemed to sense the differences between a traditional hearsay exception and a deposition procedure intended to substitute for a part of the trial process.[134] The court clearly did not view *Benfield* as a hearsay case, and seemed to understand that a deposition implicates different policy values.[135] This may explain the court's repeated and apparently illogical insistence that none of the necessity-reliability cases (like *Dutton*) deny that confrontation requires a "face-to-face" meeting."[136] Viewed this way, *Benfield* is a little less unenlightened and archaic. However, the *Benfield* court failed to clearly articulate the different policy implications between depositions and other forms of hearsay. Various hearsay exceptions try to approximate conditions of reliability which substitute for trial reliability, while depositions try to approximate conditions of the trial as a substitute for the trial itself. This creates the irony that the policy preferences in taking depositions, such as requiring "face-to-face" confrontation are stronger than the policy preferences in the trial itself, which repeatedly yield to adequate substitutes of reliability.

After considering the two new hearsay proposals for child sexual abuse cases and analyzing *Roberts, Nick, Iron Shell* and *Benfield*, there appears to be more constitutional support for simply establishing a new hearsay exception for child reports of sexual abuse than for establishing a new class of "child depositions." This result seems ironic because child deposition procedures place only minor limits on the defendant's rights to cross-examination and confrontation while other hearsay exceptions provide no such protections other than certain "indicia of reliability." Yet this irony has already been played out within the

134. *See supra* text accompanying notes 45 to 167.

135. In one sense a deposition falls somewhere between a hearsay exception (in this case former testimony) and trial confrontation. The *Benfield* court never discussed the deposition procedure as a hearsay issue and instead focused on the trial right of face-to-face confrontation. 593 F.2d at 821.

136. *Id.*

same circuit of the United States court of appeals.[137]

The Limits of the Confrontation Clause—And Other Constitutional Rights

The introduction of hearsay at a criminal trial raises complex Confrontation Clause issues which have constituted the bulk of the foregoing analysis. Actually, several clauses of the United States Constitution are potentially implicated by the two new hearsay proposals for child sexual abuse: the public trial, compulsory process and confrontation clauses of the sixth amendment,[138] the due process clauses of the fifth and fourteenth amendments[139] and the freedom of the press clause of the first amendment.[140]

While the relationship of the Confrontation Clause and the Compulsory Process Clause makes for an interesting discussion,[141] the Supreme Court in its most recent hearsay doctrine-Confrontation Clause cases has been unconcerned with the Compulsory Process Clause.[142] The Compulsory Process Clause would appear to guarantee the defendant a "right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."[143] Thus, defendants have a right to call available and competent witnesses on material and relevant issues. The right is not absolute, for example, there is no right of compulsory process when the witness is unavailable, as when he or she invokes the fifth amendment right against self-incrimination, or otherwise refuses to testify.[144] Perhaps one reason Confrontation Clause analysis has not required an examinations of the Compulsory Process Clause is that, to date, the former has required a strong showing of unavailability, which would seem to satisfy the latter. Parker, a strong advocate of taped child testimony, concedes that to automatically disqualify all children from testifying to a certain type of crime would "run afoul" of the Compul-

137. *Compare* United States v. Benfield, 593 F.2d 815 (8th Cir. 1979) *with* United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980).

138. U.S. CONST. amend. VI.

139. U.S. CONST. amend. XIV.

140. U.S. CONST. amend. I.

141. *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978).

142. *See* Ohio v. Roberts, 448 U.S. 56 (1980).

143. Washington v. Texas, 388 U.S. 14, 23 (1967).

144. *See, e.g.*, Washington v. Texas, 388 U.S. 14, 23 n.21 (1967); United States v. Roberts, 503 F.2d 598, 600 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); Myers v. Frye, 401 F.2d 18, 21 (7th Cir. 1968).

sory Process Clause. However, Parker suggests that a court-appointed attorney charged with protecting the rights of the child victim could invoke the privilege not to testify on behalf of an individual child.[145] Much will depend on how courts respond to the argument that a child victim is "psychologically unavailable" and what circumstances will constitute a showing of psychological unavailability.

These new child hearsay proposals may also affect the public nature of the trial process. Under the sixth amendment, the defendant has a right to a public trial[146] and under present first amendment law, the public and press have a right of access to criminal trials.[147] Special procedures which protect the child by limiting access to the courtroom may affect these rights. However, these rights are not absolute. There seems to be adequate precedent for curtailing the defendant's right to a public trial in order to protect the psychological well-being of victim-witnesses.[148] In fact, some states have enacted legislation which excludes the general public from trials for certain sex crimes.[149] The leading case, *Globe Newspaper Co. v. Superior Court*,[150] is discussed in the next section of this article which explores the Court's different approaches to protecting child victims under the first and the sixth amendments.[151] One recognized generalization about the Supreme Court's resolution of right to trial issues is that the Court seems more willing to resolve the competing interests of the defendant and the press by means of a balancing test.[152] Confrontation Clause analysis, however, although referring to competing interests, is either more literalistic and absolutist, or relies on traditional hearsay analysis such as the *Roberts* necessity and reliability criteria.[153] This difference in interpretation raises the question of whether the most effective and constitutionally acceptable way to protect children is by clearing the courtroom or taking a special deposition.[154]

145. Parker, *Child Witnesses*, *supra* note 2, at 704.

146. U.S. CONST. amend. VI.

147. Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 604 (1982).

148. *Id.* at 606-07; *see also* Parker, *Child Witnesses*, *supra* note 2, at 712-16.

149. *See* statutes collected in 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1835 at 449 n.3 (1976). *But see* MASS. GEN. LAWS ANN. ch. 278 § 16A (West 1972) which was held unconstitutional in Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982).

150. 457 U.S. 596 (1982).

151. *See supra* text accompanying notes 67 to 167.

152. *See* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982).

153. *Roberts*, 448 U.S. at 66.

154. Ghent, *Victim Testimony in Sex Crime Prosecutions: An Analysis of the Rape Shield Provision and the Use of Deposition Testimony Under the Criminal Sexual Conduct Statute*, 34 S. C. L. REV. 583, 588-93 n.29 (1982).

Although these other clauses of the sixth amendment are conceivably relevant to the new hearsay proposals for child sexual abuse, the Supreme Court, in its own analysis of the hearsay-Confrontation Clause aggregate, has not felt the need to address these issues. The foregoing analysis has therefore primarily involved the Confrontation Clause. It should be remembered, however, that the Clause reads: "In all *criminal* prosecution, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."[155] The Clause does not apply to civil cases involving child abuse and neglect heard before juvenile or family courts.[156] This is an important distinction because most cases of child sexual abuse, for various reasons, do not reach criminal trial.[157] One could easily argue that loss of fundamental rights resulting from a termination of parental rights for abuse is far more serious than many potential criminal penalties, yet to date the Court has extended confrontation rights only to proceedings in which the juvenile is subject to loss of liberty.[158] By reason of these limits upon the Confrontation Clause, many of the reforms discussed in this article may be more easily implemented in civil proceedings[159] as long as due process protections are preserved.

One issue that has occasionally occupied the Court in the course of its Confrontation Clause analysis is the relationship between the Due Process Clause and the Confrontation Clause. Justice Harlan, in his concurring opinion in *California v. Green*,[160] clouded this relationship when he suggested that the Confrontation Clause requires the presence of available witnesses, while the Due Process Clause acts to bar convictions based on unreliable testimony.[161] In *Dutton v. Evans*,[162] Justice

155. U.S. CONST. amend. VI.

156. Actually the Supreme Court has not addressed the specific issue of whether the Confrontation Clause applies in civil trials for child abuse and neglect. However the Court has recently declined to extend other sixth amendment protections to juvenile and family courts. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 37 (1981) (appointment of counsel is not consitutionally required in every case involving termination of parental rights); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (extending the right to jury trial to all juvenile actions is not constitutionally required and would effectively end the unique nature of the juvenile process).

157. C. Rogers, *Child Sexual Abuse and the Courts: Empirical Findings*, Paper Presented at the Annual Convention of the American Psychological Association, Montreal, Canada, September, 1980 (Child Protection Center Special Unit, Children's Hospital, National Medical Center, Washington, D.C.).

158. *See In re* Gault, 387 U.S. 1, 13 (1967).

159. *See, e.g.*, N.Y. FAM. CT. ACT. § 1046(a)(vi) (McKinney 1983).

160. 339 U.S. 149 (1970).

161. *Id.* at 179-89 (Harlan J., concurring).

162. 400 U.S. 74, 96-97 (1970).

Harlan, in another concurring opinion, recanted his Confrontation Clause-due process dichotomy.[163] He suggested that the Confrontation Clause was "simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence. . . . The task is far more appropriately performed under the aegis of the Fifth and Fourteenth Amendments. . . ."[164] Both of Justice Harlan's theories have received some support from commentators but were rejected by the *Roberts* court.[165] *Roberts* solves the confusion by suggesting that the Confrontation Clause requires both necessity and reliability.

In terms of the necessity/unavailability and reliability/trustworthiness criteria of *Roberts*, Justice Harlan first attributed the reliability issue to the Due Process Clause and the unavailability issue to the Confrontation Clause.[166] Then in *Dutton* he rejected the unavailability requirement as too strict and relied on the Due Process Clause only.[167] The *Roberts* court, on the other hand, interpreted the requirements for unavailability and reliability as both emanating from the Confrontation Clause and did not discuss the due process clause. *Roberts'* analysis is neither surprising nor radical since it basically relies on an "evidentiary" approach to the Confrontation Clause; necessity and trustworthiness have always been requirements for hearsay exceptions under the common law. Such an evidentiary approach does not require any analysis of the Due Process Clause, and, in fact, predates both the Confrontation Clause and the Due Process Clause.

IV. The Problem of an Evidentiary Approach to a Constitutional Right

To this point, the constitutionality of the two new hearsay proposals for child sexual abuse cases has been assessed on the basis of case law, specifically the leading case of *Ohio v. Roberts*.[168] This approach seemed sensible because both proposals relied primarily on *Roberts*. *Roberts* was clearly intended to represent a forceful consolidation and clarification of the Court's Confrontation Clause theory and to quell the wide divergence of scholarly commentary.[169] However, the problem of child sexual

163. *Id.*
164. *Id.*
165. 448 U.S. 56, 67 n.9 (1980).
166. *See supra* note 160.
167. *See supra* note 162.
168. 448 U.S. 56 (1980).
169. *Id.* at 67 n.9.

abuse raises such a salient public policy issue that it highlights a fundamental flaw in the Supreme Court's attempt to reconcile the hearsay doctrine with the Confrontation Clause. This is a difficult point to underscore conceptually due to the long jurisprudential history by which the constitutional right of confrontation has come to be interpreted by means of an essentially evidentiary analysis based on the common law. That analysis utilizes the criteria of necessity and reliability as set forth in *Roberts*. As long as the Supreme Court continues to rely upon its common-law approach to the sixth amendment, it will be difficult to protect sexually abused children within our legal system.

In a well reasoned article, Howard Gutman noted the significant discrepancies between the Court's approach to the Confrontation Clause and other constitutional rights:

> All scholars and courts agree that the right of confrontation like all rights, cannot be absolute. However, despite the evolution of the various tests developed in constitutional jurisprudence to mediate rights and government interests, in the past eighty-one years no test has been formulated or identified to accommodate the right to confrontation and the state's countervailing interest . . . no scholar or judge has ever suggested reliance on the compelling state interest test to assess the constitutional validity of abridgements of the right of confrontation. Even conceding arguendo that the right of confrontation is less fundamental than other interests, no court or writer has ever applied the minimum rationality test, currently employed in mediating the state's interest with regard to less fundamental interests. Rather, since the time of Wigmore, the mediation of the government's interest and the guarantee of confrontation has been achieved, *sub silentio*, by reliance on the terms 'necessity' and 'reliability' to redefine the scope of the protection provided by the clause to conform to the requirements of the laws of evidence. . . .
>
> The inconsistency between the mode of mediation employed with regard to most constitutional rights and that relied on in confrontation cases is generally unrecognized. Where it is recognized, it is tolerated by jurists and scholars because of the different perspective from which the rights are viewed, and from which the tests were formulated. Constitutional rights today are viewed as existing by virtue of their inclusion in the Bill of Rights; their meaning is interpreted either by reference to the text of the Constitution alone, or as informed by changing social norms and values. Therefore, rights can be limited only by compelling and well-tailored states' interests. In contrast, the right to confrontation exists as an added rule of evidence whose scope has been defined with reference to pre-existing law of evidence, by the same balance of factors (reliability and necessity) that shape all rules of admissibility.[170]

While acknowledging that it would be a "gross overstatement" to blame one man's personal views for the present state

170. Gutman, *supra* note 102, at 344.

of confusion and inconsistency, Gutman nevertheless accused Wigmore,[171] whose minimization and misinterpretation of the Confrontation Clause has been well-documented and explicitly rejected by the Supreme Court.[172] Ironically, while the Supreme Court consciously rejects Wigmore's limited view of the Confrontation Clause, the Court nonetheless is unconsciously influenced by the powerful Wigmorean legacy which initially subjected the Confro- ation Clause to common-law rules of evidentiary admissibility.

Although Gutman's article was publi_hed in 1981,[173] it appears to have been drafted prior to the *Ohio v. Roberts* decision.[174] Gutman's analysis relied on *Dutton v. Evans*,[175] but it is equally applicable to *Roberts*. This in part confirms Gutman's hypotheses. Interestingly, the court used language in *Roberts* which suggested that it was aware of the need to balance confrontation rights against competing societal interests:

> The Court, however has recognized that competing interests, if closely examined . . . may warrant dispensing with confrontation at trial . . . (general rules of law of this kind, however beneficient in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case). . . . This Court, in a series of cases, has sought to accommodate these competing interests.[176]

Immediately thereafter, however, the Court launched into a definition of the key words of its opinion: necessity and reliability.[177] Apparently the Court was implying that all competing societal interests were automatically balanced solely by reliance on the pre-constitutional criteria of necessity and reliability.

The problem of child sexual abuse underscores the inadequacy of using a common-law, evidentiary approach to interpret a clause of the United States Constitution. Advocates of new hearsay proposals to protect child sex abuse victims must go to absurd lengths to reconcile their proposals with the reasoning in *Roberts*. They have to establish the notion of "psychological unavailability" for victims who may be available to testify and who may be psychologically sound. In many cases "psychological

171. *Id.* at 340.

172. Dutton v. Evans, 400 U.S. 74, 86 (1970) ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stems from the same roots; California v. Green, 399 U.S. 149, 155 (1970). But this Court has never equated the two and we decline to do so now."). *See also* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 800[04] at 800-19 (1979).

173. Gutman, *supra* note 102.

174. 448 U.S. 56 (1980).

175. 400 U.S. 74 (1970).

176. 448 U.S. at 65.

177. *Id.* at 66.

unavailability" will only mean relying on the language of *Roberts* to express the thought. We should not require testimony from a limited class of traumatized child victims due to the competing societal interest in protecting all child victims of sexual abuse. *Benfield* suggests that any special deposition designed to protect the child victim must resemble live testimony so closely that the protections afforded the child are minimal.[178] However, due to the wording of *Roberts*, advocates of these deposition proposals feel they must go to great lengths to make the obvious argument that depositions are "just as reliable" as other forms of hearsay.[179] The problem of the Court's evidentiary approach to the Confrontation Clause may also complicate implimentation of a new hearsay exception for child reports of sexual abuse, similar to the laws of Washington and Kansas.[180] Those statutes contain the unavailability/reliability language of *Roberts*. Is this really the purpose of a hearsay exception and is this approach much better than a residual or catch-all exception approach?[181] The Court's present approach to the Confrontation Clause seems too limited to allow for the progressive growth of the hearsay doctrine in response to newly identified social issues and our expanding knowledge of the human condition. We are left with a variety of "firmly rooted",[182] archaic, unreliable hearsay exceptions.[183] Those exceptions receive almost unquestioned constitutional support. At the same time, new forms of reliable hearsay, which serve significant societal interests, are admitted on essentially a case-by-case basis.

The inconsistencies between the Court's approach to the Confrontation Clause and other clauses of the Bill of Rights is demonstrated in *Globe Newspaper Co. v. Superior Court.*[184] *Globe* raised the issue of protecting a child victim of sexual assault within the legal system. *Globe* was, however, a first amendment case involving a Massachusetts statute. The Massachusetts statute required the exclusion of the press and public from the courtroom during the testimony of victims at trials for specified sexual offenses involving victims under the age of eighteen.[185] The Globe Newspaper Company challenged the

178. 593 F.2d 815 (8th Cir. 1979).

179. *Proving Parent-Child Incest*, *supra* note 8, at 137-38; *see also* note 70 and accompanying text.

180. *See supra* text accompanying notes 10 to 66.

181. *See supra* text accompanying notes 10 to 44.

182. Ohio v. Roberts, 448 U.S. 56, 67 (1980).

183. E. CLEARY, MCCORMICK ON EVIDENCE § 261 at 625-26 (2d ed. 1972) (comparing questionable reliability of traditional exceptions with the high reliability of prior testimony).

184. 457 U.S. 596 (1982).

185. MASS. GEN. LAWS ANN., ch. 278 § 16A (West 1972).

trial court's barring of the press and public from the courtroom under this statute. Using language typical of first amendment interpretation, the Court held the statute unconstitutional. The right of access to criminal trials was found to be of "constitutional stature" but not absolute.[186] Any state limitation on the press and public's right of access must be a "weighty one" based on a "compelling governmental interest," and must be "narrowly tailored" to serve that interest.[187] The Court objected to the Massachusetts statute because the statute's mandatory-closure rule was overbroad and not tailored to serve the compelling state interest of safeguarding the physical and psychological well being of child victims of sexual assault.[188] In a forceful dissenting opinion, the Chief Justice deplored the Court's holding.[189] He noted that minors charged with rape are automatically insulated from the press, while minors who are victims of rape do not even have the right to mandatory courtroom closure while they testify.[190] The Chief Justice's opinion is also noteworthy for its strong reliance on "psychological" and "empirical" evidence to support his contention that the experience of open courtroom testimony can leave "devastating and permanent scars" on victims of sexual assault.[191]

Globe is a controversial case that has stimulated much commentary;[192] however, all of the justices, including the Chief Justice, agreed on the same principle of interpretation. The mandatory closure order infringed on the first amendment right to public access to criminal trials, while at the same time represented a compelling state interest in protecting child victims of sexual assault. The only real issue was whether the mandatory closure order was narrow enough to serve the compelling state interest. If the fact situation in *Globe* was altered so as to transform it into a hearsay-Confrontation Clause case, the result might have been different.

Suppose, for example, a victim had been so traumatized as to be unable to testify and that the victim might have made statements to a specially trained police investigator who had interviewed him ninety minutes after the attack, and the prosecution might have sought to admit those statements into evidence

186. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602 (1982).
187. *Id.*
188. *Id.* at 603.
189. *Id.* at 605.
190. *Id.*
191. *Id.* at 603.
192. Melton, *A Psycholegal Dilemma*, *supra* note 3; Parker, *Child Witnesses Versus The Press: A Proposed Legislative Response to* Globe v. Superior Court, 47 ALB. L. REV. 408 (1983).

under the hearsay exception. Instead of considering the balance between the constitutional right to confrontation and the compelling state interest in protecting the victim, the court would instead immediately turn to a consideration of the unavailability and reliability criteria of *Roberts*. First, there would probably be a long analysis of whether the victim-witness was actually available. The court would have to define "psychological unavailability" and determine its limits. There would be a consideration of the prosecution's "good faith" efforts to establish the unavailability of the witness. Regardless of the Confrontation Clause issues, some exception to the hearsay rule would have to exist to admit into evidence the out-of-court declaration made to the police investigator. The prosecution would have to find an exception such as the excited utterance exception. The defense would argue that ninety minutes was too long of a time for the statement to qualify as an excited utterance. The prosecution would then have the officer testify to the child's distraught state, her disheveled hair and clothes, and the blood and bruises. If a traditional exception could not be found, the prosecution would rely on a residual exception, if one was available in that jurisdiction. If a residual exception applied, the prosecution would have to establish that the hearsay was more probative than any other evidence.[193] The trial court would then have to find particularized indicia of reliability, and decide whether the hearsay was to be admitted under a traditional exception, a residual exception or a special child sexual abuse exception. The court would have no real standards on which to base its decision. It might decide to interview the victim privately, it might require corroborating evidence, or it might ask the investigating police officer to testify as to the reliability of the child's report based on the officer's training in child sexual abuse investigations. This would, however, create the problem of asking the witness to assess the reliability of the hearsay statement the witness is about to utter.

This hypothetical case emphasizes how differently the Supreme Court would interpret the right to confrontation compared to other constitutional rights such as those involved in *Globe*. Arguably, the first and sixth amendments should be interpreted differently because they represent different constitutional rights.[194] Nonetheless, the comparison between the two amendments underscores how unresponsive present Confronta-

193. *See, e.g.*, FED. R. EVID. 804(b)(5)(B).

194. This argument however can quickly become circular, because to rely on the common law roots of the Confrontation Clause, is to ignore the constitutional issue. That constitutional issue is more properly viewed as whether the Confrontation Clause solely serves the instrumental end of facilitating the admission of probative and reliable evidence, or whether the

tion Clause analysis is to newly identified competing societal interests. The tone of the *Roberts* opinion suggests that the Court is not about to change its approach to the Confrontation Clause. For the present, it appears that the compelling state interest in protecting child victims of sexual abuse can only be achieved by stretching the evidentiary concepts of necessity and reliability beyond their original and intended meanings.

Do the Assumptions Underlying the Hearsay Rule and Confrontation Clause Apply to Child Victims of Sexual Abuse?

The legal principles of cross-examination, hearsay and the right to confrontation were developed at a time when children were generally regarded as incompetent witnesses.[195] Emphasis on the basis of the hearsay rule today tends to focus on the condition of cross-examination.[196] The solution developed under the common law was that certain guarantees of trustworthiness or reliability were required to compensate for the great disadvantage of not subjecting the hearsay declarant to cross-examination. The hearsay doctrine and the Confrontation Clause are said to protect similar but not identical interests.[197] In *Roberts*, the Supreme Court held that a primary interest secured by the Confrontation Clause is the right to cross-examination.[198]

These assumptions are simply not valid when the hearsay declarant is a child victim of sexual abuse. Child reports of sexual abuse are inherently reliable and often have the "ring of verity" which only a child could utter.[199] A young victim of sexual abuse who is cross examined in court with the defendant (who

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right to confrontation protects intrinsic value. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, 12-1 (1978); Gutman, *supra* note 102, at 347.

195. The modern trend is to admit the testimony of children, leaving the question of the weight and credibility of the testimony to the jury. *See, e.g.*, FED. R. EVID. 601, Advisory Committee's Note, at 203 (West 1983). In most states the rule for assessing competency of a child witness is established by case law. In states with statutory guidelines, often children above age 10 are presumed competent and children under 10 are presumed incompetent. However these presumptions are usually rebutable. Courts have held children as young as four years old competent to testify. United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980). But it should be remembered that even a young competent witness maybe too young to be fully confronted and cross-examined by a defendant exercising her or his Confrontation Clause rights. *See* United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980). *See generally* Melton, *Children's Competency*, *supra* note 29, at 73 n.1.

196. 5 WIGMORE, EVIDENCE § 1367, at 29 (1972).

197. Ohio v. Roberts, 488 U.S. 56, 64 (1980).

198. *Id.* at 64.

199. *See infra* text accompanying notes 67-167. United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980); United States v. Nick, 604 F.2d 1199 (9th Cir.

may be a family member) present, may appear to be unreliable even though the victim is telling the truth.[200] Guilt, fear, trauma, cognitive immaturity, and "incest dynamics" may all undermine the child's ability to testify effectively.[201] In contrast, the child is much more likely to provide a reliable account when interviewed and videotaped in a playroom by a specially trained child abuse investigator who understands child psychology and who uses dolls to facilitate the child's description of the incident. The difference between these two situations is the difference between obtaining truth from an adult and obtaining truth from a frightened child. Naturally, the latter procedure is more humane and better serves the compelling societal interest in protecting child victims of sexual assault. However, the focus here is not to further these interests but rather to better serve the stated purpose of the hearsay doctrine and the Confrontation Clause, which is to further the interests of justice by providing the trier of fact with only the most reliable forms of evidence.

Our present knowledge of child psychology and child sexual abuse indicates that a child's hearsay report of sexual abuse will often be more reliable than the child's courtroom testimony.[202] In such a paradoxical situation, the right to confrontation and cross-examination may not further the interests of justice nor protect the truth-seeking process. If we must use the "necessity" and "reliability" criteria as present Confrontation Clause analysis requires us to do, then "reliability" should be viewed as a double edged sword. When child victims of sexual abuse are involved, the inherent reliability of the hearsay report should be balanced against the inherent reliability or unreliability of the child's ability to testify effectively. This type of "balancing test" will yield a different result depending on the interpretation of the Confrontation Clause.

V. The Reliability and Necessity of New Hearsay Exceptions for Sexually Abused Children

This article has focused on the Confrontation Clause keywords of necessity and reliability to assess the constitutionality of two new proposals for admitting into evidence a child's

1979); Lancaster v. People, 200 Colo. 448, 452, 615 P.2d 720, 723 (1980); Love v. State, 64 Wis. 2d 432, 442, 219 N.W.2d 294, 299 (1974).

200. Love v. State, 64 Wis. 2d 432, 434, 219 N.W.2d 294, 239 (1974); C. Adams & J. Fay, No More Secrets 63 (1981); Melton, *Procedural Reforms*, *supra* note 3.

201. *See supra* text accompanying notes 168 to 202.

202. Melton, *Procedural Reforms*, *supra* note 3, at 189.

prior statements of sexual abuse. In this section, these legal keywords will be used to organize a discussion of the available psychological evidence which may lend support to these two hearsay proposals. However, an important caveat is in order for those unfamiliar with empirical methodology.

One of the most unfortunate impediments to the conceptual integration of law and psychology has been the senseless controversy over the applicability of empirical social science research to legal issues. The justices of the Supreme Court have at times scorned the use of "numerology derived from statistical studies,"[203] and deplored "the judicial equivalent of a doctoral examination" in social science methods.[204] Social scientists generally view the Court's intuitive skepticism of empirical research as unfortunate, ignorant, and totally unscientific.[205] However, when the Court does rely on empirical data, the same social scientists point out that the data has been misapplied, misinterpreted and is full of methodogical flaws.[206]

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203. Ballew v. Georgia, 435 U.S. 223, 246 (1978).

204. Craig v. Boren, 429 U.S. 190, 224 (1976) (Rehnquist, J., dissenting).

205. Meehl, *Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist*, 27 J. Soc. Issues 65 (1971).

206. Melton, *A Psycholegal Dilemma*, *supra* note 3. Each profession, law and psychology, relies on different epistemological methods. Professor Paul Meehl, one of the leading pioneers in modern clinical psychology research, characterizes the legal method as one of "fireside inductions" (common sense, ancedotal introspective, and culturally transmitted beliefs about human behavior). Meehl, *supra* note 205, at 65. Layman, lawyer's and psychologist's method of human understanding, while often effective, contains considerable sources of error. However, Professor Meehl notes that the empirical, statistical methods of social scientists "are plagued with methodological" problems which often render their generalized conclusions equally dubious. Meehl, *supra* note 205, at 65. Fireside inductions can result in broad conclusions about the most complex human behavior but lack empirical support and are often untestable. *See generally* Meehl, *supra* note 205. Empirical research, on the other hand, is usually limited to the specific controlled conditions of the experiment. Causal relationships between variables are rarely absolutely established but instead must be inferred from only statistical correlations. Meehl, *Theoretical Risks and Tabular Asterisks: Sir Karl, Sir Ronald, and the Slow Process of Psychology*, 46 J. Consulting & Clin. Psy. 806 (1978) [hereinafter cited as Meehl, *Progress of Psychology*]. *See also* Meehl, *supra* note 205, at 65. Even if a causal relationship can be clearly established, the conditions of the experiment must be so closely controlled and defined that the empirical results cannot be generalized to to other "Real-World" situations. Most empirical research regarding complex human behavior, although "scientific in method," is often inconclusive. Consequently, the concluding platitude of many a social science research article is "that we need more research." Meehl, *supra* note 205, at 96. Interestingly, many of the most influential psychological theories are themselves more like fireside inductions than modern day empirical research. Meehl notes that the possible irony that modern psycholanalytic theories fall under this definition of fireside inductions, but he avoids taking a stand on this issue and instead chooses to highlight the differences between the law and empirical psychology. *See* Meehl, *supra* note 205, at 66. *See also*, Meehl, *Progress of Psychology*, *supra* at 829-

Is A New Hearsay Exception For Child Sexual Abuse "Necessary?"

One of the primary rationales for the new hearsay proposals is that most child victims are psychologically unavailable to testify, and that they would be traumatized and psychologically damaged by the experience of having to recount sexual abuse under normal courtroom conditions. The debate over this assumption recently reached the Supreme Court in *Globe Newspaper Co. v. Superior Court.*[207] In *Globe* the Court concluded that there was insufficient "empirical support" for the state's mandatory courtroom closure rule to protect child victims of sexual assault. In his dissenting opinion, the Chief Justice characterized the Court's search for empirical evidence as a "cavalier disregard of the reality of human experience."[208] However, the Chief Justice cites six authorities in support of his contention that for a child victim the ordeal of testifying in an open courtroom could "be devastating and leave permanent scars."[209]

Globe underscores the debate between empiricism and fireside inductionism. It also serves as a reminder that neither approach can establish with absolute scientific certainty that most child victims of sexual assault are psychologically damaged by the experience of testifying. Even a rather obvious truth based on the "reality of human experience" is difficult to scientifically prove. One such assertion is that, "the majority of survivors of commercial jetliner disasters are psychologically but perhaps unconsciously scarred by the experience."[210] The present methodological obstacles to measuring such long-term, unconscious and complex human reactions are simply too numerous. The assertion that child victims are permanently harmed by their courtroom experience may similarly be one of these obvious but empirically unprovable truths based on the "reality of human experience."

Despite this debate, a growing body of empirical data, case studies and increasingly sophisticated "fireside inductions", however, suggests that child sexual assault victims are in fact traumatized by the experience of testifying, regardless of whether they are victims of a violent sexual assault or a non-

31. Freud's theory of the oedipal complex, for example, is essentially untestable and derived from his "fireside induction" that his empirical results could not possibly be true.

207. 457 U.S. 596 (1982).

208. *Id.* at 608.

209. *Id.* at 608-09.

210. Meehl, *Progress of Psychology*, *supra* note 205.

violent molestation.[211] While good empirical studies are scarce,[212] many experts draw their conclusions from case studies and their experience in working with sex abuse victims and their families. These case study conclusions, while lacking empirical validity, are based on clinical experience. They fall somewhere between an empirical study and a simple fireside induction.[213] Some commentators object to these conclusions as premature. They note the scarcity of good empirical studies, as well as the fact that child sexual abuse is typically "non-violent" and therefore not analogous to the experience of adult rape victims.[214] Some commentators even hypothesize that at least for some children the experience of testifying may be cathartic, may provide a means of emotionally taking control of the situation and may help achieve a sense of vindication.[215] However, at present, such hypotheses also lack empirical support and only serve as competing untested theories.

New hearsay exceptions for child reports of sexual abuse are also necessary because of the frequency with which children falsely retract their stories of abuse or refuse to cooperate once the criminal prosecution has commenced.[216] A child may retract the report out of fear, guilt, shame, or self-blame. In cases of incest, even more pressures on the child to retract the report exist. If the child is removed from the home for protection, the child may feel punished and lonely. If the child is kept in the

211. *See* E. HIBERMAN, THE RAPE VICTIM 53-54 (1976); S. KATZ & MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 1982-2000 (1979); SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS, *supra* note 3; Katz, *supra* note 10, at 91-96; Melton, *Procedural Reforms*, *supra* note 3; *Proving Parent-Child Incest*, *supra* note 8.

212. *But see* Burgess & Holmstrom, *The Child and the Family in the Court Process*, SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS (A. Burgess, A. Groth, L. Holmstrom & S. Sgrois eds. 1978); DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS (American Humane Association 1969).

213. Such techniques include interviewing victims, see Burgess & Holmstrom, *supra* note 212, and the clinical observations of psychotherapists who treat the victims and help them deal with the experience of testifying. For the opinions of judges who regularly assess the state of such victim-witnesses see Bohmar, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303, 306 (1974) (reporting a survey of judges' perceptions of the traumatic effects of testimony).

214. Melton, *A Psycholegal Dilemma*, *supra* note 3. *But see* Glove Newspaper Co. v. Superior Ct., 457 U.S. 596, 608 n.7 (1982) (Burger, J., dissenting) ("Holmstrom and Burgess report that nearly half of all adult rape victims were disturbed by the public setting of their trials. Certainly the impact on children must be greater."). *Id.*

215. Melton, *A Psycholegal Dilemma*, *supra* note 3; Rogers, *supra* note 157.

216. Love v. States, 64 Wis. 2d 432, 442, 219 N.W.2d 294, 299 (1974); Goodwin, Sahd & Rada, *Incest Hoax: False Accusations, False Denials*, 6 BULL AM. ACAD. PSYCHIATRY & LAW 269 (1978) [hereinafter cited as *Incest Hoax*].

home and the offender is removed, the child may feel responsible and guilty for causing the offender to be taken away. The child may also have to deal with the mixed feelings of other family members. Many children fear that participation in the process of legal intervention, could cause the offender to be sent to prison. In cases of incest, the child victim may have mixed feelings toward the offender. By making the report, most children are simply asking for their parents to love them in the right way.[217] Pre-trial recantations of sexual abuse can be considered a typical reaction which is congruent with a pattern of intrafamilial sexual abuse.[218]

Admitting hearsay reports of child abuse is also considered necessary because many victims are simply too young to be available as witnesses due to their cognitive immaturity. Even if the prosecution is willing to put such a vulnerable witness on the stand, the defense may claim that the child is too young to be subjected to effective cross-examination and trial confrontation.[219] While the modern trend is to admit the testimony of younger children,[220] many child victims of sexual abuse are so young that they are incompetent to testify.[221]

A final reason that such hearsay exceptions are necessary is that the sexual abuse cases are difficult to prosecute. Often the only witnesses to the event are the offender and the child victim.[222] Corroborating physical evidence may be inconclusive or non-existent, depending on the type of sexual abuse.[223] Under

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217. Because of the complex dynamics of infrafamilial sexual abuse children may have mixed feelings about the abuse because the offender inappropriately uses sexual contact to give the child a measure of affection, attention and importance; most children continue to want these things—but without the sexual contact. *See* Katz, *supra* note 10, at 88; Lloyd, *supra* note 12, at 112; K. MacFarlane, *Sexual Abuse of Children*, in THE SEXUAL VICTIMIZATION OF WOMEN 94-96 (J. Chapman & M. Gates eds. 1978).

218. State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983); Berliner, Blick and Bulkley, *Expert Testimony on the Dynamics of Intra-Familial Child Sexual Abuse and the Principles of Child Development*, in CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2; S. Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool For Families*, in LEGAL REPRESENTATION OF THE MALTREATED CHILD 70 (1979) (describing the "sexually abused child syndrome"). *See Defiance*, TIME, Jan. 23, 1984, at 35 (reporting a highly publicized case in which a judge sent a twelve year old incest victim to solitary confinement until she would agree to testify against her father).

219. United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980).

220. *See infra* note 221 and accompanying text.

221. Many victims are two or three years old or younger. *See, e.g.*, United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979) (victim-witness in case of child sexual abuse "could not have been subjected to cross-examination . . . by reason of his extremely tender years").

222. *See supra* text accompanying notes 10 to 44.

223. *See* Lloyd, *supra* note 12.

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such conditions, the ability to consider a child's prior report of the incident may provide the trier of fact with necessary and highly probative evidence.

Are Child Reports of Sexual Abuse Inherently "Reliable?"

The criteria of reliability are two fold. The first aspect is whether child reports of abuse are inherently truthful. The second aspect is whether there are factors, other than truthfulness, which would enhance or mitigate the reliability of a child's out-of-court report of abuse. The question of truthfulness must be assessed in an historical context. For most of the twentieth century, both law and psychology institutionalized theories and practices which formally discounted reports of child sexual abuse. As noted, Wigmore was the most influential legal authority to assert that reports of sexual abuse were often false. In a scathing but scholarly law review article, Leigh Bienen reveals that Wigmore supported his own personal and prejudiced beliefs with questionable, inaccurate and sometimes purposely distorted "scientific evidence."[224] Despite modern evidence to the contrary, Wigmore's legacy of misinformation lives on.[225] Today, Wigmore's theories about both child reports of sexual abuse and the Confrontation Clause are disfavored.[226]

In the field of psychology, Freud is the most influential figure to have formally discounted reports of child sexual abuse. In his early psychoanalytic career, Freud believed his patients' reports of child sexual abuse. When he decided the reports could not be true, he was devestated. Only Freud himself can do justice to his own confused thinking:

> Influenced by Charcot's view of the traumatic origin of hysteria, one was readily inclined to accept as true and aetiologically significant the statements made by patients in which they ascribed their symptoms to passive sexual experiences in early childhood—broadly speaking, to seduction. When this aetiology broke down under its own improbability and under contradiction in definitely ascertainable circumstances, the result at first was helpless bewilderment. Analysis had led by the right paths back to these sexual traumas, and yet they were not true. Reality was lost from under one's feet. At that time I would have gladly given up the whole thing, just as my predecessor, Breur, had done when he made his unwelcome discovery. Perhaps I persevered only because I had no choice and could not then begin again at anything else.[227]

224. Bienen, *supra* note 11.

225. This legacy is reflected in modern statutes requiring corroborative evidence in cases of child sexual abuse. *See* Lloyd, *supra* note 12.

226. *See supra* note 172 and accompanying text.

227. S. FREUD, THE HISTORY OF THE PSYCHOANALYTIC MOVEMENT 51-52 (1914).

Years later Freud commented:

> If the reader feels inclined to shake his head at my credulity, I cannot altogether blame him. . . . When, I was at last obliged to recognize that these scenes were only phantasies which my patients had made up or which I myself forced on them, I was for a time completely at a loss.[228]

Freud's solution, of course, was the Oedipal complex, one of the central tenets of psychoanalytic theory. Since that time, psychoanalytic theory has been used to attribute child reports of sexual abuse, not to reality, but to fantasy.

Today many mental health experts believe that Freud had discovered reality, a reality that was too difficult for him to accept.[229] Freud never reported a false accusation of incest. In addition, there is evidence that he purposely suppressed evidence of an actual incident in one of his most influential case studies.[230] However, psychoanalytic theory need not be discarded in order to maintain the inherent trustworthiness of child reports of sexual abuse. Childhood fantasy can take many forms, but it is bound by the child's cognitive limitations and psychological immaturity.[231] Oedipal fantasy could not account for the fact that child reports of sexual abuse often include vivid descriptions of penile erection, ejaculation, semen, anal intercourse, fellatio and other "adult" behaviors.[232] Child reports which include detailed accounts of sexual behavior are inherently more reliable than vague assertions which are congruent with a young child's way of perceiving and fantasizing about the world.

The foregoing discussion addresses the issue of unconscious fantasy but does not address the problem of conscious lying. Do children lie about such incidents of sexual abuse? Do they make false reports? The overwhelming opinion of mental health workers, social welfare workers, and police investigators is that children almost never make false reports.[233] Empirical studies (one which involved the use of a polygraph) confirm the

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228. S. FREUD, AN AUTOBIGRAPHICAL STUDY 34 (1925).

229. F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN (1980); *Incest Hoax*, *supra* note 216. Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. PSYCHOTHERAPY 398, 402 (1976). *See generally* Beinen, *supra* note 11, at 237 nn. 4-7.

230. Peters, *supra* note 229, at 402.

231. RUSH, *supra* note 229, at 80-81; Lloyd, *supra* note 12, at 105-6; Peters, *supra* note 229, at 420.

232. Lloyd, *supra* note 12, at 105.

233. F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONAL 111 (1976); RUSH, *supra* note 229, at 156; *Incest Hoax*, supra note 216.

fact that false reports are extremely rare.[234] Studies also indicate that false denials or retractions by the victim are actually more common than false reports.[235] Of the few reported false accusations, the child is usually coaxed to lie by an adult and readily admits the lie upon direct questioning.[236]

The Washington statute, which establishes a hearsay exception for child reports of sexual abuse, applies only to children under ten years of age.[237] There is no empirical evidence to suggest that older children are more likely to make false reports, but there are some sound psychological reasons for establishing an age limit around ten years old. At this age, children are not physically or psychologically sexually developed, nor have they developed the cognitive facilities of adulthood. Children in the age range of seven to eleven are still in the concrete-operational stage of cognitive development.[238] Their thinking is often characterized by logical inconsistencies based on incapacities to use symbolic logic, manipulate logical categories and consider logical alternatives.[239] These skills are not fully developed until the child reaches the stage of formal-operational thought in early adolescence.[240] Arguably, effective cross-examination depends on the witness's ability to function at this more advanced stage of cognitive development.[241]

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234. *Incest Hoax*, *supra* note 216; Groth, *The Psychology of the Sexual Offender*, Workshop Presented By Psychological Associates of the Albemarle in Charlotte, N.C. (March 1980).

235. DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS, AMERICAN HUMANE ASSOCIATION (1969); *Incest Hoax*, *supra* note 216.

236. *Incest Hoax*, *supra* note 216, at 270.

237. *See supra* note 135 and accompanying text.

238. J. FLAVELL, COGNITIVE DEVELOPMENT 61-100 (1977).

239. *Id. See generally* Melton, *Children's Competency*, *supra* note 32.

240. J. Flavell, *supra* note 238, at 101-12.

241. These theories of cognitive stages were developed by Jean Piaget, who also believed that children passed through different stages of moral development. J. PIAGET, THE MORAL DEVELOPMENT OF THE CHILD (1932). Lawrence Kohlberg, who has developed Piaget's theories of moral judgment, suggests children up to the age of nine are at the pre-conventional level of moral judgment which roughly corresponds to Piaget's stage of heteronomous morality. Kohlberg, *Moral Stages and Socialization: The Cognitive Development Approach*, MORAL DEVELOPMENT AND BEHAVIOR: THEORY RESEARCH AND SOCIAL ISSUES (T. Lickona ed. 1976). Children at this stage are characterized by their egocentrism and their inability to effectively view social relations from the perspective of others. To lie effectively about being sexually abused in order to punish someone requires considerable cognitive skill which most young children do not have. This does not mean that children do not lie, but only that their ability to lie is limited by their egocentrism, cognitive functioning and social immaturity. Burton, *Honesty and Dishonesty*, MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES, (T. Lickona ed. 1976). As children grow older

One irony of these cognitive-developmental considerations is that the lack of the child's cognitive skills increases rather than decreases the inherent reliability of reports of sexual abuse. A second irony is that the child's hearsay report of sexual abuse may be more inherently reliable than the child's courtroom testimony under cross-examination. A child's testimony could be completely truthful but suffer from lapses of memory, incomplete details and even logical inconsistencies.[242] Trauma, guilt and fear resulting from testifying in an open courtroom and in the presence of the offender, may further reduce the child's ability to testify effectively. One leading commentator on psycholegal issues speculates: "[I]t is plausible that face-to-face confrontation by particularly vulnerable victims (like children) may actually diminish reliability of their testimony rather than enhance it. . . ."[243]

This brief review of the relevant psychological literature suggests that a child's out-of-court statements of sexual abuse are inherently reliable. False accusations are extremely rare; false denials and recantations are much more common. Psychoanalytic theories of incestuous fantasy do not detract from the inherent reliability of reports of sexual abuse. Limiting such new hearsay exceptions to children under ten or eleven years old may, however, provide an extra measure of reliability due to factors of emotional cognitive and sexual development. These same cognitive and emotional limitations may significantly detract from the child's ability to testify reliably and effectively. A child's out-of-court statement of abuse may be more reliable than the child's in-court testimony.

VI. Summary and Conclusions

Legal intervention in response to child sexual abuse is often said to constitute a second victimization of the child. Reform efforts to protect child victims within the legal system include two recent proposals to admit into evidence a child's prior statements of sexual abuse. The first proposal would simply create a new hearsay exception for child reports of abuse. The second proposal would admit into evidence special videotaped interviews and depositions which, depending on the specific proposal, may or may not provide for full cross-examination and direct face-to-face confrontation. The present system of traditional

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they are capable of assuming the perspective of others to create more convincing lies and to use lies more cleverly to punish others.

242. C. Adams & J. Fays, No More Secrets 63 (1981); Melton, *Children's Competency*, *supra* note 29.

243. Melton, *Procedural Reforms*, *supra* note 3, at 189.

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hearsay exceptions and modern residuals allows some flexibility for admitting a child's prior statements of sexual abuse. However, the existing exceptions to the hearsay rule do not adequately protect the child victim through the legal process

Today, attitudes toward societal intervention have shifted away from a punitive model which removed the child from the home, prosecuted the offender and destroyed the family. Progressive intervention models are based on temporary removal of the offender from the home, individual and family psychotherapy and ultimate reunification and strengthening of the family. However, offenders often rely on a strong system of denial and rationalization to avoid voluntary treatment. Coercive legal pressure, such as pre-trial diversion, is often necessary to initiate the offender's investment in treatment. Therefore, new hearsay exceptions which potentially facilitate prosecution should be a shared goal of the legal system and mental health community.

Statutes which establish new hearsay exceptions for a child's out-of-court statements of sexual abuse appear to be constitutionally sound. In fact, these statutes incorporate the necessity and reliability criteria of the leading Supreme Court cases which attempt to reconcile the hearsay doctrine and the Confrontation Clause. However, it remains unclear how courts will interpret the necessity and reliability criteria in cases of child sexual abuse. Specifically, it is unclear how far courts will go in recognizing new forms of "psychological unavailability" for victim-witnesses who are physically available to testify. It is also unclear how courts will assess the inherent reliability of newly legislated hearsay exceptions under present Confrontation Clause analysis.

Proposals to admit videotaped interviews and depositions into evidence may not receive a similar degree of constitutional support. While there is adequate precedent for taking depositions of traumatized victims, many proposals to protect child victims place some limits on the right to cross-examination and face-to-face confrontation. Such limitations are said to satisfy the necessity and reliability criteria which the Supreme Court uses to reconcile the Confrontation Clause with the hearsay doctrine. However, courts treat depositions differently from other forms of hearsay because of strong policy interests which favor live testimony, the presence of available witnesses, the right to face-to-face confrontation and other Confrontation Clause values.

Ironically, courts may be willing to uphold new hearsay exceptions for child reports of sexual abuse which provide for no

cross-examination and confrontation, while at the same time striking down new taped interview and deposition procedures which only minimally restrict the defendant's right to cross-examination and face-to-face confrontation. This irony has already been tested in the United States court of appeals.

One reason for this irony is the strict evidentiary approach which the Supreme Court takes to the Confrontation Clause. By relying on the keywords of necessity and reliability, the Court reduces all considerations of competing societal interests to evidentiary criteria which date back to the common law. In contrast, the Court balances first amendment rights against the compelling state interest in protecting child victims of sexual assault. While the first and sixth amendments may be said to protect different rights and require differential analysis, it is unlikely that common-law evidentiary criteria can resolve these subtle constitutional tensions.

For the present, the hearsay doctrine and the Confrontation Clause are reconciled by the criteria of necessity and reliability. The available psychological evidence, although incomplete, suggests that the newly proposed hearsay exceptions for child statements of sexual abuse are necessary and inherently reliable. Children are often psychologically or otherwise unavailable to testify in such cases. A child's out-of-court statements of sexual abuse are not only inherently reliable but may even be more reliable than the same child's in-court testimony. This would prove an exception to the most fundamental assumptions underlying the hearsay doctrine and Confrontation Clause, which after all, were formulated at a time when children were generally regarded as incompetent witnesses and when society denied the problem of child sexual abuse.

Although present Confrontation Clause analysis and present psychological theory leave many questions unanswered, there is sufficient constitutional support and psychological evidence to justify continued implementation of new hearsay exceptions and taped deposition procedures for a child's statements of sexual abuse. These new proposals will challenge the judicial system to reconcile the Confrontation Clause, the hearsay doctrine and competing societal interests. Perhaps these proposals will serve as a social experiment, testing the flexibility of modern Confrontation Clause analysis to allow for the progressive growth of the hearsay doctrine in response to newly identified social issues and our expanding knowledge of the human condition.

p 1749 physical corroboration rare

p 1764 Washington law

A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases

The incidence of sexual abuse of young children has increased dramatically in recent years.[1] The crimes committed are predominantly nonviolent in nature[2] and almost always occur in secrecy, with the child usually being the only witness.[3] No particular age group is immune to sexual abuse,[4] nor are the offenders confined to any particular class of persons.[5] Indeed, more often than not, the offender is a parent, relative, or an acquaintance of the child.[6]

Detecting sex abuse, as well as convicting its perpetrators, is exceptionally difficult,[7] due to the lack of witnesses[8] and corroborative physical evidence,[9] and to the reluctance or inability of the victim to testify against the defend-

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1. The American Humane Association's national study of state child-protection statistics showed a 200% increase in the reporting of sexual abuse since 1976. By 1980, there were 25,000 reported cases of child sex abuse per year. Collins, Studies Find Sexual Abuse of Children is Widespread, N.Y. Times, May 13, 1982, at C1, col. 1, C10, col. 2.

These statistics may, in fact, understate the problem, for a substantial number of these cases are never reported. Either the child does not report the incident, see National Center on Child Abuse and Neglect, Child Sex Abuse: Incest, Assault and Sexual Exploitation 2 (1981); Landis, Experiences of 500 Children with Adult Sexual Deviation, 30 Psychiatric Q. Supp. 91, 99 (1956), or the parents refuse to go to the authorities, see Collins, supra, at C10, cols. 5-6.

Estimates of the actual number of sexual assaults have varied widely. The National Center on Child Abuse and Neglect estimated that more than 100,000 cases of sexual abuse occur annually. See National Center on Child Abuse and Neglect, supra, at 2. Other estimates have reached as high as 200,000 to 500,000 sexual assaults per year for female children only. See Schultz, The Child Sex Victim: Social, Psychological and Legal Perspectives, 52 Child Welfare 147, 148 (1973).

2. See Flammang, Interviewing Child Victims of Sex Offenders, *in* The Sexual Victimology of Youth 175, 177 (L. Schultz ed. 1980); MacFarlane, Sexual Abuse of Children, *in* The Victimization of Women 86, 87 (1978); Schultz, supra note 1, at 149.

3. See Stevens & Berliner, Special Techniques for Child Witnesses, *in* The Sexual Victimology of Youth 246, 248 (L. Schultz ed. 1980).

4. The ages of the victims range from early infancy (one or two months) to 17 or 18 years. Sgroi, Sexual Molestation of Children, Children Today, May-June 1975, at 18, 20.

5. See Collins, supra note 1, at C1, col. 1 (excerpt from an interview with Dr. Gene Abel, Director of the Sexual Behavior Clinic of the New York State Psychiatric Institute):

> For the most part parents have told their children to stay away from men who are wearing raincoats and carrying candy. . . . But none of our patients [sex offenders of children] wear raincoats and carry candy. They come from all walks of life and all socioeconomic categories, and they look just like the neighbor next door. They may even be the neighbor next door.

6. See D. Finkelhor, Sexually Victimized Children 73 (1979); MacFarlane, supra note 2, at 86; Sgroi, supra note 4, at 20; Stevens & Berliner, supra note 3, at 246.

7. In a 1969 study of 250 cases of child sex abuse that had been reported to New York City's protective services, less than one percent of the molesters were sent to jail. Collins, supra note 1, at C10, col. 5.

Only 50% of the sex offenders (238 men) in the Sexual Behavior Clinic at the New York State Psychiatric Institute had ever spent time in jail. These men had committed a total of 16,666 acts of child molestation, an average of 68.3 molestations per offender. Id. at C1, col. 1, C10, col. 1.

8. See Stevens & Berliner, supra note 3, at 248; infra notes 47-49 and accompanying text.

9. See MacFarlane, supra note 2, at 87, 88; Schultz, supra note 1, at 149; infra notes 44-46 and accompanying text.

ant.[10] Even when the child does appear in court and testifies, he or she is often met with skepticism and disbelief.[11] Consequently, to establish the guilt of the defendant, many prosecutors have tried to introduce the out-of-court statements of the victim into evidence through the testimony of witnesses who heard the statements.[12] Since the hearsay rule[13] generally prohibits the introduction of these statements, an exception to the rule is often sought.[14] Courts have used a variety of approaches in determining whether an exception should apply.

This Note argues that the various approaches that have been taken by the courts to child hearsay statements in sex abuse cases are unsatisfactory. Given the unusual circumstances attendant to child sex abuse and the special characteristics of its young victims, the rationale of the hearsay rule and its exceptions requires that an alternative approach be employed to assess the admissibility of child hearsay statements. The Note begins by examining the traditional bases of the hearsay rule and the underlying logic of its exceptions. After analyzing the need for and reliability of out-of-court statements by children in such cases, the Note reviews and then critiques the various ways courts have treated these hearsay declarations. The Note concludes that these approaches inadequately assess the probative value of child hearsay statements in sex abuse cases. Instead, it proposes the adoption of an analysis similar to that embodied in a recently enacted Washington statute. The statute admits a child's out-of-court declaration if the time, content, and circumstances of the statement provide sufficient indicia of reliability.[15]

I. Background Law

A. *The Hearsay Rule*

Hearsay consists of "[out-of-court] statement[s] . . . offered in evidence to prove the truth of the matter asserted."[16] Under traditional formulations of

10. See Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, *in* The Sexual Victimology of Youth 187, 233 (L. Schultz ed. 1980); MacFarlane, supra note 2, at 99-100; infra notes 60-62 and accompanying text.

11. See Brown v. United States, 152 F.2d 138, 139 (D.C. Cir. 1945); Fitzgerald v. United States, 443 A.2d 1295, 1299 (D.C. 1982); Stevens & Berliner, supra note 3, at 252.

12. See, e.g., United States v. Nick, 604 F.2d 1199 (9th Cir. 1979) (federal government attempts to introduce testimony of child's mother as to statement made by child after allegedly being sodomized by his babysitter); State v. Boodry, 96 Ariz. 259, 394 P.2d 196 (1964) (state tried to introduce testimony of child's mother and neighbor as to statements made by the child after her alleged rape); infra notes 72-115, 123-35, 141-53 and accompanying text.

13. The hearsay rule prohibits the introduction into evidence of testimony or written evidence of a statement made out of court when the statement is being offered as an assertion to show the truth of the matters asserted therein. See E. Cleary, McCormick on Evidence 579-86 (2d ed. 1972) [hereinafter cited as McCormick].

14. See infra notes 72-115, 123-35, 141-53, and accompanying text.

15. The statute also requires that the hearing on admissibility be conducted outside the presence of the jury and either that the child testify at the proceeding or, if the child is unavailable, corroborative evidence of the act be provided. 1982 Wash. Legis. Serv. ch. 129, § 2 (West).

16. Fed. R. Evid. 801(c); accord McCormick, supra note 13, at 584. Such statements may be oral or written and may even incorporate nonverbal conduct if the conduct was intended to be an assertion. Fed. R. Evid. 801(a).

the hearsay rule, evidence concerning these statements is barred from use in court unless the original declarant testifies in court, where he may be cross-examined as to the grounds of his out-of-court assertion and as to his qualifications to make the assertion.[17]

The rule against admission of hearsay statements stems from the long-established belief that cross-examination is the best vehicle for discovering the truth and that the most reliable statements come from the witness stand.[18] By questioning in court the person who made the original statement, the trier of fact can detect and eliminate any inaccuracies in the witness's perception, memory, and narration of the event.[19] The opportunity to put the declarant under oath and to observe his or her demeanor is another traditional reason for requiring an appearance in court.[20]

B. *Exceptions to the Hearsay Rule*

Despite the primacy attached to cross-examination, exceptions to the hearsay rule have long existed in evidentiary law.[21] The reasons for allowing hearsay to be used are twofold. First, reliability of certain hearsay statements can be assured even without cross-examination of the original declarant.[22] Trustworthiness can be inferred from the fact that the statement was made under or subjected to certain conditions that insure a degree of reliability comparable to that found in a cross-examined statement.[23] Moreover, the recurring need for hearsay evidence constitutes another justification for allow-

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17. See Fed. R. Evid. art. VIII advisory committee note; 5 Wigmore, Evidence in Trials at Common Law 12 (J. Chadbourn rev. 1974) [hereinafter cited as 5 Wigmore]; McCormick, supra note 13, at §§ 579-81.

18. See Ohio v. Roberts, 448 U.S. 56, 64-65 (1980); California v. Green, 399 U.S. 149, 159 (1970); Fed. R. Evid. art. VIII advisory committee note; 5 Wigmore, supra note 17, at 32 (cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth.").

19. See G. Lilly, An Introduction to the Law of Evidence 159 (1978); McCormick, supra note 13, at 581-82.

20. See California v. Green, 399 U.S. 149, 158 (1970); McCormick, supra note 13, at 582. But see 5 Wigmore, supra note 17, at 10 (oath is merely incidental to cross-examination and is not an essential justification for the hearsay rule).

21. See 5 Wigmore, supra note 17, at 158.

22. See id. at 252:

> There are many situations in which it can be easily seen that such a required test [of cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy . . . it would be pedantic to insist on a test whose chief object is already secured.

See also Fed. R. Evid. art. VIII advisory committee note ("Common sense tells that much evidence which is not given under . . . [traditionally required] conditions may be inherently superior to much that is.").

23. See 4 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 800[01], at 800-11 (1981 & Cum. Supp. 1982) [hereinafter cited as Weinstein's Evidence] (credibility of declarant depends upon the opportunity declarant had to observe event, circumstances surrounding the statement, and declarant's relationship to the case; excluding statements merely because they have not been given in court cripples judicial process).