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3) Whether the offense about which the child will testify constitutes criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if such conduct constituted a physical or sexual assault, it's duration and the extent of the physical and emotional injury thereby caused.

4) The child's custodial situation and the attitude of other household members to the events about which the child will testify in the underlying proceeding.

5) The child's familial and emotional relationship to the defendant in the underlying proceeding.

6) The child's behavior at or reaction to the previous interviews concerning the events involved.

7) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to

(Continued)

himself or herself, or persons with whom the child has a close emotional relationship, will ensue for providing testimony.

8) Whether the child manifests or has manifested symptoms associated with post-traumatic stress disorder or other mental disorders, or other emotional or psychological injury, including, without limitation, re-experiencing the events, fear of their reputation, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

9) The number of separate investigative and judicial proceedings at which the child's testimony may be required, the likely length of time until the last of such proceedings, and the mental or emotional strain associated with keeping the child's recollection of the events witnessed fresh for that period of time.

10) Whether a videotape deposition or alternative methods for presentation of the child's testimony would reduce the mental or emotional strain of testifying and

(Continued)

whether the procedure could be used to reduce the number of times the child will be required to testify.

Section VI: A.S. 12.50.220 shall read: Child video depositions or other alternative methods for presentation of testimony; how conducted.

a) In its order for videotaped deposition or other alternative methods to present testimony under A.S. 12.50.210 the court shall seek to ensure:

1) that the deposition is taken in a way which minimizes the child's mental and emotional strain;

2) that the method recorded of the testimony conveys to the viewer impressions as nearly identical as possible to those the viewer would receive in observing the child's testimony in person; and

3) that the defendant has the appropriate and adequate opportunity to cross-examine the child through defense counsel.

b) In discharging its obligations under this section; the court shall consider:

(Continued)

1) scheduling the videotaping or other alternative methods to present testimony on a date when the child's recollection is likely to be fresh and at a time of day when the child's energy and attention span are greatest;

2) scheduling the procedure in a room which provides adequate privacy, freedom from distractions, informality and comfort appropriate to the child's developmental age level;

3) order a recess whenever the energy, comfort or attention span of the child warrants;

4) determine that the child understands that it is wrong to tell a lie and will testify truthfully if the child's developmental level and verbal skills are such that administration of an oath or affirmation in the usual form would be inappropriate;

5) before questioning by the parties begins, attempt to place the child at ease, explain to the child the purpose of the procedure and identify all persons attending;

(Continued)

6) allow any questioner to have an advisor to assist the questioner and, upon permission of the judge, to conduct the questioning so long as this individual would be beneficial in assisting the child in their testimony.

7) supervise the spatial arrangements of the room in the location, movement and deportment of all persons in attendance;

8) allow the child to testify while sitting on the floor, on the platform, on an appropriately sized chair or on the lap of a trusted adult, which may include the guardian ad litem, or while moving about the room within the range of the visual and audio recording equipment or other electronic equipment utilized;

9) bar or terminate the attendance of any person whose presence is not necessary, or whose behavior is disruptive and/or unduly stressful to the child. The court may allow a reasonable number of persons deemed by the court supportive of the child to be "necessary" for any procedure under A.S. 12.50.220.

(Continued)

10) authorize the use of one-way mirrors or other physical devices whereby questions may be posed by parties to the child but provide a physical shield of the child's visual contact with any of the parties in attendance so as to safeguard the chil' from further emotional harm or stress.

Section VII: A.S. 12.50.230. The trial judge will determine those persons other than the district attorney, defendant, child's guardian ad litem, and the defendant's attorney who may attend the videotaping or alternative methods of of presenting the testimony. The trial judge may also order any of the parties or other individuals to be outside visual observation of the child if the trial judge determines, after considering the factors enumerated in A.S. 12.50.210(c) or other relevant factors, that because of their presence the child may suffer emotional harm and/or will hinder the child in recalling relevant events and facts. The trial judge may order that questions to the child be broadcast through the use of a one-way mirror and/or other methods to protect the child.

Section VIII: A.S. 12.50.240 shall read: In the event the court does not allow video, closed circuit television or other alternative procedures to present the child's testimony, it may order arrangements to minimize the emotional hardship of the child's testimony in open court consistent with A.S. 12.50.210; 12.50.220; and A.S. 12.45.048.

STATE OF ALASKA

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---DRAFT---

SUMMARY/EXPLANATION OF HB 323

"Relating to the Testimony of Children in Criminal Proceedings"

Reasons Supporting Enactment of the Legislation:

Legislation enacting procedures to protect child witnesses is necessary due to the high number of criminal cases involving abused and neglected children. The State of Alaska has made significant strides in prosecuting individuals who have abused children. Because of the increase in criminal prosecution of child abuse cases, many children are now faced with the trauma of appearing in court to testify against the abuser. Because in most child abuse cases the defendant is related to the child or is a significant adult in the child's life, the child is placed under emotional and mental stress as a witness on behalf of the state.

Currently, AS 12.45.047 allows videotaping of young victims of sexual abuse. This statute does not adequately address the need to protect child witnesses for two reasons. First, the statute as written is believed to be unconstitutional by the state's legal community and is not used by the District Attorney's office because of the constitutional problems. The current statute states the court shall order videotaping when requested. This stringent requirement will not meet constitutional standards because circumstances surrounding a criminal case involving a child witness must be decided on a case-by-case basis, e.g., in some cases a child may be able to testify in open court if the courtroom is rearranged to accommodate the child. Second, AS 12.45.047 does not meet the needs of children when called as witnesses because it addresses only cases where children have been sexually abused. The statute does not protect children who are called as witnesses in physical abuse cases, criminal neglect

cases, homicides, armed robberies, or other crimes committed where a child may be called as a witness in a criminal proceeding. Finally, the current statute allows the trial judge no discretion or flexibility to crafting means other than videotaping to accommodate the child witness.

Because currently there is no statute being utilized to protect children when called as witnesses, children are faced with the intimidating and hostile environment of a criminal courtroom.

Analysis of Proposed HB 323:

HB 323, while providing an alternative method to present children's testimony in criminal proceedings, does not adequately resolve the problem. The proposed legislation does not go far enough in establishing methods and procedures necessary to protect children from emotional harm when testifying as witnesses in criminal proceedings. It is the opinion of the Office of Public Advocacy that HB 323 should be amended to address a number of practical and legal problems discussed below.

1. HB 323 allows only for the use of closed-circuit television as an alternative method to broadcast a child's testimony. It is the position of the Office of Public Advocacy, that, in addition to closed-circuit television, other methods should be statutorily approved as alternatives for presenting the testimony of children. It is recommended HB 323 be amended to include a catch-all phrase allowing other alternative methods approved by the court on a case-by-case basis. It is also recommended that, among the alternative methods available for the presentation of children's testimony, the court be authorized to use closed circuit T.V., videotape, one-way mirrors, dividers or to rearrange the courtroom from its traditional setting to accommodate the child witness.

2. HB 323 needs to require the court to consider and make findings as to why alternative methods of presenting a child's testimony are necessary in each individual case. Without specific findings in individual cases, trial court orders establishing alternative methods for a child's testimony are subject to reversal. It is important that any statute elaborate the various factors which should be considered by a trial court in reaching a conclusion that alternative methods to present a child's testimony are warranted.

3. Currently, HB 323 seems to have arbitrarily selected the age 15 as to when a child as a witness may be allowed to testify by the use of closed-circuit television. It is the recommendation of the committee that the age 16 be selected.

4. The Office of Public Advocacy feels strongly that a guardian ad litem should also have standing to request the court consider alternative methods to presenting a child's testimony in criminal cases. The use of a guardian ad litem will ensure that the child has an independent advocate and that the court is fully apprised in each and every case of the need for protective measures regarding a child's testimony. By not establishing the appointment of a guardian ad litem for a child witness, a child's interests may not always be fully advocated when the interests of a child conflict with the trial strategy of the District Attorney. (See November 1987 American Lawyer article, attached.) This is not a criticism of District Attorneys' offices, but rather a reflection of the reality of criminal proceedings. It is essential, if we truly wish to protect the best interests of a child witness, to give standing to the guardian ad litem to independently represent the child's interests.

5. The Office of Public Advocacy believes that the HB 323 language, which states "only the attorneys may question the child", may be unconstitutional. This phrase may create

constitutional problems due to the fact that some criminal defendants will represent themselves pro per. The Office of Public Advocacy's substitute legislation would address these situations by allowing, in addition to video and closed-circuit television, the use of mirrors and other physical dividers to separate the defendant from the child witness. It is recommended that this language be modified or eliminated.

6. HB 323 would repeal AS 12.45.048 which currently allows the court to exclude the public during the testimony of children who are victims of sexual abuse. It is recommended that this statute not be repealed as it may be appropriate in some cases.

The Office of Public Advocacy believes a more detailed and comprehensive statute is necessary to adequately protect child witnesses in criminal proceedings and to ensure the defendant's constitutional rights are not violated. Given the important constitutional considerations involved, the Office of Public Advocacy recommends a substitute bill which allows the court, on a case-by-case basis, to assess alternative methods necessary to protect the best interests of the child witness. The substitute statute should allow the court a broad range of options so that the trial court may select an alternative method which has the least impact upon the defendant's constitutional rights. Attached is a draft of a proposed substitute bill the Office of Public Advocacy requests be reviewed.

Attachments

Guarding Kids' Rights At Preschool Trial

For Gregory Mooney, one of the toughest challenges of his work as counsel to the children in the McMartin Preschool molestation case has been maintaining his composure. "To hear the kids testify is hard," says Mooney, 43, a partner at Los Angeles's four-lawyer Karp & Mooney.

Although most of the children managed to get through their testimony, says Mooney, "I was breaking down and crying." The defendants, Raymond Buckey and Peggy McMartin Buckey, are charged with having sexually abused 14 children at the now-defunct preschool in Manhattan Beach, California.

Mooney has been representing the children and their families *pro bono* since late 1984. He became involved through his wife, the executive director of a counseling center where many of the children sought treatment.

The families in the McMartin case called on Mooney for help when they found that their interests sometimes conflicted with those of the prosecution. "A prosecutor might feel that he would just as soon have the kid, eyeball-to-eyeball in front of the jury, break down on the stand," says Mooney.

In preliminary hearings, Mooney acted on the behalf of 11 of the child witnesses to quash subpoenas from the defense. He also obtained protective orders denying the prosecution access to psychiatric and school records and preventing both sides from asking questions that invade privacy.

At the trial, which began last August and is expected to last more than a year, Mooney has standing to raise evidentiary objections. Thus far he has represented one of the 13 witnesses scheduled to appear. *—Susan Adams and Cariad Hayes*

Gregory Mooney

PHOTOGRAPHS BY PETER PORDES (PYLE, HAROLD SWEET (MOONEY)

HB323

[457 US 596]

GLOBE NEWSPAPER COMPANY, Appellant

v

SUPERIOR COURT FOR THE COUNTY OF NORFOLK

457 US 596, 73 L Ed 2d 248, 102 S Ct 2613

[No. 81–611]

Argued March 29, 1982. Decided June 23, 1982.

Decision: State statute which requires, under all circumstances, exclusion of press and general public from courtroom during testimony of minor victim in sex-offense trial, held violative of First Amendment.

SUMMARY

A newspaper publisher in the Boston metropolitan area sought admission to the courtroom during a trial of a defendant charged with the rape of three minor girls, but the Massachusetts trial court ordered the exclusion of the press and public from the courtroom in reliance on a Massachusetts statute providing for exclusion of the general public from trials of specified sexual offenses involving a victim under the age of 18. The publisher challenged the exclusion order, and ultimately, after the trial had resulted in the defendant's acquittal, the Supreme Judicial Court of Massachusetts construed the Massachusetts statute as requiring, under all circumstances, the exclusion of the press and public during the testimony of a minor victim in a sex-offense trial (423 NE2d 773).

On appeal, the United States Supreme Court reversed. In an opinion by BRENNAN, J., joined by WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., it was held that the Massachusetts statute, as construed by the Massachusetts Supreme Judicial Court, violated the First Amendment as applied to the states through the Fourteenth Amendment, and that the statute could not be justified on the basis of either the state's interest in protecting minor victims of sex crimes from further trauma and embarrassment or its interest in encouraging such victims to come forward and testify in a truthful and credible manner.

O'CONNOR, J., concurring, emphasized that the majority's decision carries no implications outside the context of criminal trials.

Briefs of Counsel, p 1452, infra.

BURGER, Ch. J., joined by REHNQUIST, J., dissenting, expressed the view that the statute did not violate the First Amendment in light of a balancing of the competing interests of the media for instant access to a sex-offense trial against the interests of the state in protecting child rape victims from the trauma of public testimony.

STEVENS, J., dissenting, expressed the view that the appeal should have been dismissed because the challenged statute, as construed by the state's highest court, had never been applied in a live controversy, the governing state law being materially changed after the trial court's order had expired by its own terms.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 944 — freedom of speech and press — exclusion of press and public from sex-offense trial

1a, 1b. A state statute which, as construed by the state's highest court requires under all circumstances exclusion of the press and general public during

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75 Am Jur 2d, Trial § 33

Federal Procedure, L Ed, Criminal Procedure §§ 22:805, 22:807

1 Am Jur Trials 303, Controlling Trial Publicity

USCS, Constitution, 1st Amendment

US L Ed Digest, Constitutional Law § 944

L Ed Index to Annos, Freedom of Speech, Press, Religion, and Assembly; Public Trial

ALR Quick Index, Freedom of Speech and Press; Public Trial

Federal Quick Index, Freedom of Speech and Press; Public Trial

ANNOTATION REFERENCES

Federal constitutional right to public trial in criminal case. 61 L Ed 2d 1018.

What circumstances render civil case, or issues arising therein, moot so as to preclude Supreme Court's consideration of their merits. 44 L Ed 2d 745.

The Supreme Court and the right of free speech and press. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

Right of accused to have press or other media representatives excluded from criminal trial. 49 ALR3d 1007.

Validity and construction of constitution or statute authorizing exclusion of public in sex offense cases. 39 ALR3d 852.

Exclusion of public during criminal trial. 48 ALR2d 1436.

the testimony of a minor victim in a sex-offense trial violates the First Amendment, the statute not being justified on the basis of either the state's interest in protecting minor victims of sex crimes from further trauma and embarrassment or its interest in encouraging such victims to come forward and testify in a truthful and credible manner. (Burger, Ch. J., and Rehnquist, J., dissented from this holding.)

Appeal and Error § 1662 — mootness — challenge to validity of state statute restricting access to criminal trials

2. The fact that a state court's order requiring the exclusion of the press and general public from a rape trial pursuant to a state statute expired with the completion of the trial at which the defendant was acquitted does not render moot a challenge to the validity of the statute by a newspaper publisher that had sought access to the trial, the controversy being capable of repetition, yet evading review, since it can reasonably be assumed that the publisher, whose newspaper serves a large metropolitan area, will someday be subjected to another order relying on the challenged statute, and because criminal trials are typically of short duration. (Stevens, J., dissented from this holding.)

Constitutional Law §§ 925, 961 — First Amendment — rights not enumerated

3. The First Amendment is broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.

Constitutional Law § 944 — freedom of speech and press — access to criminal trials

4. Underlying the First Amendment right of access to criminal trials is the common understanding that a major purpose of that Amendment was to protect the free discussion of governmental affairs; whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction.

Constitutional Law § 944 — freedom of speech and press — right of access to criminal trials

5. Although the right of access to criminal trials is of constitutional stature, it is not absolute; but the circumstances under which the press and public can be barred from a criminal trial are limited, and the state's justification in denying access must be a weighty one; where the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest, but limitations on the right of access that resemble "time, place, and manner" restrictions on protected speech would not be subjected to such strict scrutiny.

SYLLABUS BY REPORTER OF DECISIONS

Appellee Massachusetts trial court, relying on a Massachusetts statute providing for exclusion of the general public from trials of specified sexual offenses involving a victim under the age of 18, ordered the exclusion of the press and public from the courtroom during the trial of a defendant charged with rape of three minor girls. Appellant newspaper publisher challenged the exclusion order, and ultimately, after the trial had resulted in the defendant's acquittal, the Massachusetts Supreme Judicial Court construed the Massachusetts statute as requiring, under all circumstances, the exclusion of the press and public during the testimony of a minor victim in a sex-offense trial.

Held:

1. The fact that the exclusion order expired with completion of the trial at which the defendant was acquitted does not render the controversy moot within the meaning of Art III. The controversy is "capable of repetition, yet evading review," since it can reasonably be assumed that appellant will someday be subjected to another order relying on the Massachusetts statute and since criminal trials are typically of short duration.

2. The Massachusetts statute, as construed by the Massachusetts Supreme Judicial Court, violates the First Amendment as applied to the States through the Fourteenth Amendment.

(a) To the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that the constitutionally protected "discussion of governmental affairs" is an informed one. The right of access to *criminal trials* in particular is properly afforded protection by the First Amendment both because such trials have historically been open to the press and public and because such right of access plays a particularly significant role in the functioning of the judicial process and the government as a whole.

(b) The right of access to criminal trials is not absolute, but the circumstances under which the press and public can be barred are limited. The State must show that denial of such right is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.

3. The Massachusetts statute cannot be justified on the basis of either the State's interest in protecting minor victims of sex crimes from further trauma and embarrassment or its interest in encouraging such victims to come forward and testify in a truthful and credible manner.

(a) Compelling as the first interest is, it does not justify a *mandatory* closure rule. Such interest could be just as well served by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the minor victim's well-being necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.

(b) The second asserted interest is not only speculative in empirical terms but is also open to serious question as a matter of logic and common sense. Although the statute was construed to bar the press and public from the courtroom during a minor sex victim's testimony, the press is not denied access to the transcript, court personnel, or any other source that could provide an account of such testimony, and thus the statute cannot prevent the press from publicizing the substance of that testimony, as well as the victim's identity.

—— Mass ——, 423 NE2d 773, reversed.

Brennan, J., delivered the opinion of the Court, in which White, Marshall, Blackmun, and Powell, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment. Burger, C. J., filed a dissenting opinion, in which Rehnquist, J., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

James F. McHugh, III, argued the cause for appellant.
Mitchell J. Sikora, Jr., argued the cause for appellee.
Briefs of Counsel, p 1452, infra.

OPINION OF THE COURT

[457 US 598]

Justice Brennan delivered the opinion of the Court.

[1a] Section 16A of Chapter 278 of the Massachusetts General Laws,[1] as

1. Massachusetts Gen Laws Ann, ch 278, § 16A (West 1981), provides in pertinent part:

"At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime

construed by the Massachusetts Supreme Judicial Court, requires trial judges, at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim. The question presented is whether the statute thus construed violates the First Amendment as applied to the States through the Fourteenth Amendment.

I

The case began when appellant, Globe Newspaper Co. (Globe), unsuccessfully attempted to gain access to a rape trial conducted in the Superior Court for the County of Norfolk, Commonwealth of Massachusetts. The criminal defendant in that trial had been charged with the forcible rape and forced unnatural rape of three girls who were minors at the time of trial—two 16 years of age and one 17. In April 1979, during hearings on several preliminary motions, the trial judge ordered the courtroom closed.[2] Before the trial

[457 US 599]

began, Globe moved that the court revoke this closure order, hold hearings on any future such orders, and permit appellant to intervene "for the limited purpose of asserting its rights to access to the trial and hearings on related preliminary motions." App 12a–14a. The trial court denied Globe's motions,[3] relying on Mass Gen Laws Ann. ch 278, § 16A (West 1981), and ordered the exclusion of the press and general public from the courtroom during the trial. The defendant immediately objected to that exclusion order, and the prosecution stated for purposes of the record that the order was issued on the court's "own motion and not at the request of the Commonwealth." App 18a.

Within hours after the court had issued its exclusion order, Globe sought injunctive relief from a justice of the Supreme Judicial Court of Massachusetts.[4] The next day the justice conducted a hearing, at which the Commonwealth, "on behalf of the victims," waived "whatever rights it [might] have [had] to exclude the press." Id., at 28a.[5] Nevertheless,

[457 US 600]

Globe's request for relief

involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case."

2. "The court caused a sign marked 'closed' to be placed on the courtroom door, and court personnel turned away people seeking entry." Globe Newspaper Co. v Superior Court, 379 Mass 846, 848, 401 NE2d 360, 362–363 (1980) (footnote omitted).

3. The court refused to permit Globe to file its motion to intervene and explicitly stated that it would not act on Globe's other motions. App 17a–18a.

4. Globe's request was contained in a petition for extraordinary relief filed pursuant to Mass Gen Laws Ann. ch 211, § 3 (West 1958 and Supp 1982–1983).

5. The Commonwealth's representative stated:

"[O]ur position before the trial judge [was], and it is before this Court, that in some circumstances a trial judge, where the defendant is asserting his right to a constitutional, public trial, . . . may consider that as outweighing the otherwise legitimate statutory interests, particularly where the Commonwealth [acts] on behalf of the victims, and this is literally on behalf of the victims in the sense that they were consulted fully by the prosecutor in this case. The Commonwealth waives whatever rights it may have to exclude the press." App 28a.

Some time after the trial began, the prosecuting attorney informed the judge at a lobby conference that she had "spoke[n] with each of the victims regarding . . . excluding the press." Id., at 48a. The prosecuting attorney indicated that the victims had expressed some "privacy concerns" that were based on "their

was denied. Before Globe appealed to the full court, the rape trial proceeded and the defendant was acquitted.

Nine months after the conclusion of the criminal trial, the Supreme Judicial Court issued its judgment, dismissing Globe's appeal. Although the court held that the case was rendered moot by completion of the trial, it nevertheless stated that it would proceed to the merits, because the issues raised by Globe were "significant and troublesome, and . . . 'capable of repetition yet evading review.'" Globe Newspaper Co. v Superior Court, 379 Mass 846, 848, 401 NE2d 360, 362 (1980), quoting Southern Pacific Terminal Co. v ICC, 219 US 498, 515, 55 L Ed 310, 31 S Ct 279 (1911). As a statutory matter, the court agreed with Globe that § 16A did not require the exclusion of the press from the entire criminal trial. The provision was designed, the court determined, "to encourage young victims of sexual offenses to come forward: once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial." 379 Mass, at 860, 401 NE2d, at 369. Relying on these twin purposes, the court concluded that § 16A *required* the closure of sex-offense trials only during the testimony of minor victims; during other portions of such trials, closure was "a matter within the judge's sound discretion." Id., at 864, 401 NE2d, at 371. The court did not pass on Globe's contentions that it had a right to attend the entire

[457 US 601]

criminal trial under the First and Sixth Amendments, noting that it would await this Court's decision—then pending—in Richmond Newspapers, Inc. v Virginia, 448 US 555, 65 L Ed 2d 973, 100 S Ct 2814 (1980).[6]

Globe then appealed to this Court. Following our decision in Richmond Newspapers, we vacated the judgment of the Supreme Judicial Court, and remanded the case for further consideration in light of that decision. Globe Newspaper Co. v Superior Court, 449 US 894, 66 L Ed 2d 124, 101 S Ct 259 (1980).

On remand, the Supreme Judicial Court, adhering to its earlier construction of § 16A, considered whether our decision in Richmond Newspapers required the invalidation of the mandatory closure rule of § 16A. 383 Mass 836, 422 NE2d 773 (1981).[7] In analyzing the First

own privacy interests, as well as the fact that there are grandparents involved with a couple of these victims." Ibid. But according to the prosecuting attorney, the victims "wouldn't object to the press being included" if "it were at all possible to obtain a guarantee" that the press would not attempt to interview them or publish their names, photographs, or any personal information. Ibid. In fact, their names were already part of the public record. See 383 Mass 838, 849, 423 NE2d 773, 780 (1981). It is not clear from the record, however, whether or not the victims were aware of this fact at the time of their discussions with the prosecuting attorney.

6. Justice Quirico dissented, being of the view that the mandatory closure rule of § 16A was not limited to the testimony of minor victims, but was applicable to the entire trial.

7. The court again noted that the First Amendment issue arising from the closure of the then-completed trial was "'capable of repetition yet evading review.'" Id., at 841, n 4, 423 NE2d, at 775, n 4, quoting Southern Pacific Terminal Co. v ICC, 219 US 498, 515, 55 L Ed 310, 31 S Ct 279 (1911). But in contrast to the view it had taken in its prior opinion, supra, at 600, 73 L Ed 2d, at 253 the court held that the case was *not moot* because of this possibility of repetition without opportunity for review.

Amendment issue,[8] the court recognized that there is "an unbroken tradition of openness" in criminal trials. Id., at 845, 423 NE2d, at 778. But the court discerned "at least one notable exception" to this tradition: "In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult." Id., at 846, 423

[457 US 602]

NE2d, at 778. The court also emphasized that § 16A's mandatory closure rule furthered "genuine State interests," which the court had identified in its earlier decision as underlying the statutory provision. These interests, the court stated, "would be defeated if a case-by-case determination were used." Id., at 848, 423 NE2d, at 779. While acknowledging that the mandatory closure requirement results in a "temporary diminution" of "the public's knowledge about these trials," the court did not think "that Richmond Newspapers require[d] the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims." Id., at 851, 423 NE2d, at 781. The court accordingly dismissed Globe's appeal.[9]

Globe again sought review in this Court. We noted probable jurisdiction. 454 US 1051, 70 L Ed 2d 586, 102 S Ct 594 (1981). For the reasons that follow, we reverse, and hold that the mandatory closure rule contained in § 16A violates the First Amendment.[10]

II

[2] In this Court, Globe challenges that portion of the trial court's order, approved by the Supreme Judicial Court of Massachusetts, that holds that § 16A requires, under all circumstances, the exclusion of the press and general public during the testimony of a minor victim in a sex-offense trial. Because the entire order expired with the completion of the rape trial at which the defendant was acquitted, we must consider at the outset whether a live controversy remains. Under Art III, § 2, of the Constitution, our jurisdiction extends only to actual cases or controversies. Nebraska Press

[457 US 603]

Assn. v Stuart, 427 US 539, 546, 49 L Ed 2d 683, 96 S Ct 2791 (1976). "The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'" Ibid., quoting Southern Pacific Terminal Co. v ICC, 219 US, at 515, 55 L Ed 310, 31 S Ct 279.

The controversy between the parties in this case is indeed "capable of repetition, yet evading review." It can reasonably be assumed that Globe, as the publisher of a newspaper serving the Boston metropolitan area, will someday be subjected to

8. The court found it unnecessary to consider Globe's argument that the mandatory closure rule violated the Sixth Amendment rights of the criminal defendant who had been acquitted in the rape trial. Those Sixth Amendment rights, the court stated, were "personal rights" that, "at least in the context of this case, [could] only be asserted by the original criminal defendant." 383 Mass, at 842, 423 NE2d, at 776 (footnote omitted).

9. Justice Wilkins filed a concurring opinion in which he expressed concern whether a statute constitutionally could require closure "without specific findings by the judge that the closing is justified by overriding or countervailing interests of the Commonwealth." Id., 852, 423 NE2d, at 782.

10. We therefore have no occasion to consider Globe's additional argument that the provision violates the Sixth Amendment.

another order relying on § 16A's mandatory closure rule. See Gannett Co. v DePasquale, 443 US 368, 377–378, 61 L Ed 2d 608, 99 S Ct 2898 (1979); Richmond Newspapers, Inc. v Virginia, supra, at 563, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion). And because criminal trials are typically of "short duration," ibid., such an order will likely "evade review, or at least considered plenary review in this Court." Nebraska Press Assn. v Stuart, supra, at 547, 49 L Ed 2d 683, 96 S Ct 2791. We therefore conclude that the controversy before us is not moot within the meaning of Art III, and turn to the merits.

III

A

The Court's recent decision in Richmond Newspapers firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. Although there was no opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment. 448 US, at 558–581, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion); id., at 584-598, 65 L Ed 2d 973, 100 S Ct 2814 (Brennan, J., concurring in judgment); id., at 598–601, 65 L Ed 2d 973, 100 S Ct 2814 (Stewart, J., concurring in judgment); id., at 601–604, 65 L Ed 2d 973, 100 S Ct 2814 (Blackmun, J., concurring in judgment).[11]

[457 US 604]

[3, 4] Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment.[12] But we have long eschewed any "narrow, literal conception" of the Amendment's terms, NAACP v Button, 371 US 415, 430, 9 L Ed 2d 405, 83 S Ct 328 (1953), for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. Richmond Newspapers, Inc. v Virginia, 448 US, at 579–580, and n 16, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion) (citing cases); id., at 587–588, and n 4, 65 L Ed 2d 973, 100 S Ct 2814 (Brennan, J., concurring in judgment). Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs," Mills v Alabama, 384 US 214, 218, 16 L Ed 2d 484, 86 S Ct 1434 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in

11. Justice Powell took no part in the consideration or decision of Richmond Newspapers. But he had indicated previously in a concurring opinion in Gannett Co. v DePasquale, 443 US 368, 61 L Ed 2d 608, 99 S Ct 2898 (1979), that he viewed the First Amendment as conferring on the press a right of access to criminal trials. Id., at 397–398, 61 L Ed 2d 608, 99 S Ct 2898.

12. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const, Amdt 1.

and contribute to our republican system of self-government. See Thornhill v Alabama, 310 US 88, 95, 84 L Ed 1093, 60 S Ct 736 (1940); Richmond Newspapers, Inc. v Virginia, 448 US, at 587–588, 65 L Ed 2d 973, 100 S Ct 2814 (Brennan, J., concurring in judgment). See also id., at 575, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion) (the "expressly guaranteed freedoms" of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government"). Thus to the extent that the First Amendment embraces a right of access to criminal

[457 US 605]

trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one.

Two features of the criminal justice system, emphasized in the various opinions in Richmond Newspapers, together serve to explain why a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment. First, the criminal trial historically has been open to the press and general public. "[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." Richmond Newspapers, Inc. v Virginia, supra, at 569, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion). And since that time, the presumption of openness has remained secure. Indeed, at the time of this Court's decision in In re Oliver, 333 US 257, 92 L Ed 682, 68 S Ct 499 (1948), the presumption was so solidly grounded that the Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." Id., at 266, 92 L Ed 682, 68 S Ct 499 (footnote omitted). This uniform rule of openness has been viewed as significant in constitutional terms not only "because the Constitution carries the gloss of history," but also because "a tradition of accessibility implies the favorable judgment of experience." Richmond Newspapers, Inc. v Virginia, supra, at 589, 65 L Ed 2d 973, 100 S Ct 2814 (Brennan, J., concurring in judgment).[13]

[457 US 606]

Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.[14] Moreover, public access to

13. Appellee argues that criminal trials have not always been open to the press and general public during the testimony of minor sex victims. Brief for Appellee 13–22. Even if appellee is correct in this regard, but see Gannett Co. v DePasquale, supra, at 423, 61 L Ed 2d 608, 99 S Ct 2898 (Blackmun, J., concurring in part and dissenting in part), the argument is unavailing. In Richmond Newspapers the Court considered a First Amendment right of access to criminal trials based in part on the observation that as a general matter criminal trials have long been presumptively open. Whether the First Amendment right of access to criminal trials can be overcome in the context of any particular criminal trial, such as a murder trial (the setting for the dispute in Richmond Newspapers) or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction. See Part III-B, infra.

14. See Richmond Newspapers, Inc. v Virginia, 448 US, at 569, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion); id., at 596–597, 65 L Ed 2d 973, 100 S Ct 2814 (Brennan, J., concurring in judgment); Gannett Co. v DePasquale, 443 US, at 383, 61 L Ed 2d 608, 99 S Ct 2898; id., at 428–429, 61 L Ed 2d 608, 99 S Ct 2898 (Blackmun, J., concurring in part and dissenting in part).

e criminal trial fosters an appearice of fairness, thereby heightening ıblic respect for the judicial prooss.[15] And in the broadest terms, ıblic access to criminal trials perits the public to participate in and rve as a check upon the judicial rocess—an essential component in ır structure of self-government.[16] In ım, the institutional value of the pen criminal trial is recognized in oth logic and experience.

B

[5] Although the right of access to riminal trials is of constitutional tature, it is not absolute. See Richnond Newspapers, Inc. v Virginia, supra, at 581, n 18, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion); Nebraska Press Assn. v Stuart, 427 US, at 570, 49 L Ed 2d 683, 96 S Ct 2791. But the circumstances under which the press and public can be b: d from a criminal trial are limite. the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information,

[457 US 607]

it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. See, e.g., Brown v Hartlage, 456 US 45, 53–54, 71 L Ed 2d 732, 102 S Ct 1523 (1982); Smith v Daily Mail Publishing Co., 443 US 97, 101–103, 61 L Ed 2d 399, 99 S Ct 2667 (1979); NAACP v Button, 371 US, at 438, 9 L Ed 2d 405, 83 S Ct 328.[17] We now consider the state interests advanced to support Massachusetts' mandatory rule barring press and public access to criminal sex-offense trials during the testimony of minor victims.

IV

[1b] The state interests asserted to support § 16A, though articulated in various ways, are reducible to two: the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner.[18] We consider these interests in turn.

15. See Levine v United States, 362 US 610, 616, 4 L Ed 2d 989, 80 S Ct 1038 (1960); In re Oliver, 333 US 257, 268–271, 92 L Ed 682, 68 S Ct 499 (1948); Richmond Newspapers, Inc. v Virginia, 448 US, at 570–571, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion); id., at 595, 65 L Ed 2d 973, 100 S Ct 2814 (Brennan, J., concurring in judgment); Gannett Co. v DePasquale, supra, at 428–429, 61 L Ed 2d 608, 99 S Ct 2898 (Blackmun, J., concurring in part and dissenting in part).

16. See Richmond Newspapers, Inc. v Virginia, 448 US, at 570–571, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion); id., at 596, 65 L Ed 2d 973, 100 S Ct 2814 (Brennan, J., concurring in judgment); Gannett Co. v DePasquale, 443 US, at 394, 61 L Ed 2d 608, 99 S Ct 2898 (Burger, C. J., concurring); id., at 428, 61 L Ed 2d 608, 99 S Ct 2898 (Blackmun, J., concurring in part and dissenting in part).

17. Of course, limitations on the right of access that resemble "time, place, and manner" restrictions on protected speech, see Young v American Mini Theatres, Inc., 427 US 50, 63, n 18, 49 L Ed 2d 310, 96 S Ct 2440 (1976), would not be subjected to such strict scrutiny. See Richmond Newspapers, Inc. v Virginia, 448 US, at 581–582, n 18, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion); id., at 598, n 23, 65 L Ed 2d 973, 100 S Ct 2814 (Brennan, J., concurring in judgment); id., at 600, 65 L Ed 2d 973, 100 S Ct 2814 (Stewart, J., concurring in judgment).

18. In its opinion following our remand, the Supreme Judicial Court of Massachusetts described the interests in the following terms: "(a) to encourage minor victims to come forward to institute complaints and give testimony . . .; (b) to protect minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage . . .; (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment; (d) to promote the sound and orderly administration of justice . . .; (e) to preserve evidence and

We agree with appellee that the first interest—safeguarding the physical and psychological well-being of a minor[19]—is a compelling one. But as compelling as that interest is, it

[457 US 608]

does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.[20] Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim,[21] and the interests of parents and relatives. Section 16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence.[22] In the case before us, for example, the names of the minor victims were already in the public record,[23] and the record indicates that the victims

[457 US 609]

may have been willing to testify despite the presence of the press.[24] If the trial court had been permitted to exercise its discretion, closure might well have been deemed unnecessary. In short, § 16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by

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obtain just convictions." 383 Mass, at 848, 423 NE2d, at 779.

19. It is important to note that in the context of § 16A, the measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying *in the presence of the press and the general public.*

20. Indeed, the plurality opinion in Richmond Newspapers suggested that individualized determinations are *always* required before the right of access may be denied: "Absent an overriding interest *articulated in findings,* the trial of a criminal case must be open to the public." 448 US, at 581, 65 L Ed 2d 973, 100 S Ct 2814 (footnote omitted) (emphasis added).

21. "[I]f the minor victim wanted the public to know precisely what a heinous crime the defendant had committed, the imputed legislative justifications for requiring the closing of the trial during the victim's testimony would in part, at least, be inapplicable." 383 Mass, at 853, 423 NE2d, at 782 (Wilkins, J., concurring).

22. It appears that while other States have statutory or constitutional provisions that would *allow* a trial judge to close a criminal sex-offense trial during the testimony of a minor victim, no other State has a *mandatory* provision excluding both the press and general public during such testimony. See, e.g., Ala Code § 12-21-202 (1975); Ariz Rule Crim Proc 9.3; Ga Code § 81-1006 (1978); La Rev Stat Ann § 15:469.1 (West 1981); Miss Const, Art 3, § 26; NH Rev Stat Ann § 632-A:8 (Supp 1981); NY Jud Law § 4 (McKinney 1968); NC Gen Stat § 15-166 (Supp 1981); ND Cent Code § 27-01-02 (1974); Utah Code Ann § 78-7-4 (1953); Vt Stat Ann, Tit 12, § 1901 (1973); Wis Stat § 970.03(4) (1979–1980). See also Fla Stat § 918.16 (1979) (providing for mandatory exclusion of *general public* but not *press* during testimony of minor victims). Of course, we intimate no view regarding the constitutionality of these state statutes.

23. The Court has held that the government may not impose sanctions for the publication of the names of rape victims lawfully obtained from the public record. Cox Broadcasting Corp. v Cohn, 420 US 469, 43 L Ed 2d 328, 95 S Ct 1029 (1975). See also Smith v Daily Mail Publishing Co., 443 US 97, 61 L Ed 2d 399, 99 S Ct 2667 (1979).

24. See n 5, supra.

requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.[25]

Nor can § 16A be justified on the basis of the Commonwealth's second asserted interest—the encouragement of minor victims of sex crimes to come forward and provide accurate testimony. The Commonwealth has offered no empirical support for the claim that the rule of automatic closure contained in § 16A will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities.[26] Not only is the claim speculative in empirical

[457 US 610]

terms, but it is also open to serious question as a matter of logic and common sense. Although § 16A bars the press and general public from the courtroom during the testimony of minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony. Thus § 16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come forward depends on keeping such matters secret, § 16A hardly advances that interest in an effective manner. And even if § 16A effectively advanced the State's interest, it is doubtful that the interest would be sufficient to overcome the constitutional attack, for that same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward: Surely it cannot be suggested that minor victims of sex crimes are the *only* crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify. The State's argument based on this interest therefore proves too much, and runs contrary to the very foundation of the right of access recognized in Richmond Newspapers: namely, "that a presumption of openness in-

25. Of course, for a case-by-case approach to be meaningful, representatives of the press and general public "must be given an opportunity to be heard on the question of their exclusion." Gannett Co. v DePasquale, 443 US, at 401, 61 L Ed 2d 608, 99 S Ct 2898 (Powell, J., concurring). This does not mean, however, that for purposes of this inquiry the court cannot protect the minor victim by denying these representatives the opportunity to confront or cross-examine the victim, or by denying them access to sensitive details concerning the victim and the victim's future testimony. Such discretion is consistent with the traditional authority of trial judges to conduct in camera conferences. See Richmond Newspapers, Inc. v Virginia, supra, at 598, n 23, 65 L Ed 2d 973, 100 S Ct 2814 (Brennan, J., concurring in judgment). Without such trial court discretion, a State's interest in safeguarding the welfare of the minor victim, determined in an individual case to merit some form of closure, would be defeated before it could ever be brought to bear.

26. To the extent that it is suggested that, quite apart from encouraging minor victims to testify, § 16A improves the quality and credibility of testimony, the suggestion also is speculative. And while closure may have such an effect in particular cases, the Court has recognized that, *as a general matter*, "[o]penness in court proceedings may improve the quality of testimony." Gannett Co. v DePasquale, supra, at 383, 61 L Ed 2d 608, 99 S Ct 2898 (emphasis added). In the absence of any showing that closure would improve the quality of testimony of all minor sex victims, the State's interest certainly cannot justify a *mandatory* closure rule.

heres in the very nature of a criminal trial under our system of justice." 448 US, at 573, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion).

V

For the foregoing reasons, we hold that § 16A, as construed by the Massachusetts Supreme Judicial Court, violates

[457 US 611]

the First Amendment to the Constitution.[27] Accordingly, the judgment of the Massachusetts Supreme Judicial Court is reversed.

SEPARATE OPINIONS

Justice O'Connor, concurring in the judgment.

In Richmond Newspapers, Inc. v Virginia, 448 US 555, 65 L Ed 2d 973, 100 S Ct 2814 (1980), the Court held that the First Amendment protects the right of press and public to attend criminal trials. I do not interpret that decision to shelter every right that is "necessary to the enjoyment of other First Amendment rights." Ante, at 604, 73 L Ed 2d, at 255. Instead, Richmond Newspapers rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness. As the plurality opinion in Richmond Newspapers stresses, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." 448 US, at 575, 65 L Ed 2d 973, 100 S Ct 2814. Thus, I interpret neither Richmond Newspapers nor the Court's decision today to carry any implications outside the context of criminal trials.

This case, however, does involve a criminal trial. Moreover, it involves a statute mandating automatic exclusion of the public from certain testimony. As the Court explains, Massachusetts has demonstrated no interest weighty enough to justify application of its automatic bar to all cases, even those in which the victim, defendant, and prosecutor have no objection to an open trial. Accordingly, I concur in the judgment.

[457 US 612]

Chief Justice Burger, with whom Justice Rehnquist joins, dissenting.

Historically our society has gone to great lengths to protect minors *charged* with crime, particularly by prohibiting the release of the names of offenders, barring the press and public from juvenile proceedings, and sealing the records of those proceedings. Yet today the Court holds unconstitutional a state statute designed to protect not the *accused*, but the minor *victims* of sex crimes. In doing so, it advances a disturbing paradox. Although states are permitted, for example, to mandate the closure of all proceedings in order to protect a 17-year-old charged with rape, they are not permitted to require the closing of part of criminal proceedings in order to protect an

27. We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.

innocent child who has been raped or otherwise sexually abused.

The Court has tried to make its holding a narrow one by not disturbing the authority of state legislatures to enact more narrowly drawn statutes giving trial judges the discretion to exclude the public and the press from the courtroom during the minor victim's testimony. Ante, at 611, n 27, 73 L Ed 2d, at 260. I also do not read the Court's opinion as foreclosing a state statute which mandates closure except in cases where the victim agrees to testify in open court.[1] But the Court's decision

[457 US 613]

is nevertheless a gross invasion of state authority and a state's duty to protect its citizens—in this case minor victims of crime. I cannot agree with the Court's expansive interpretation of our decision in Richmond Newspapers, Inc. v Virginia, 448 US 55, 65 L Ed 2d 973, 100 S Ct 2814 (1980), or its cavalier rejection of the serious interests supporting Massachusetts' mandatory closure rule. Accordingly, I dissent.

I

The Court seems to read our decision in Richmond Newspapers, supra, as spelling out a First Amendment right of access to all aspects of all criminal trials under all circumstances. Ante, at 605, n 13, 73 L Ed 2d, at 256. That is plainly incorrect. In Richmond Newspapers, we examined "the right of access to places traditionally open to the public" and concluded that criminal trials were generally open to the public throughout this country's history and even before that in England. The opinions of a majority of the Justices emphasized the historical tradition of open criminal trials. 448 US, at 564–573; id., at 589–591, 65 L Ed 2d 973, 100 S Ct 2814 (Brennan, J., concurring in judgment); id., at 599, 65 L Ed 2d 973, 100 S Ct 2814 (Stewart, J. concurring in judgment); id., at 601, 65 L Ed 2d 973, 100 S Ct 2814 (Blackmun, J., concurring in judgment). The proper mode of analysis to be followed in determining whether there is a right of access was emphasized by Justice Brennan:

[457 US 614]

"As previously noted, resolution

1. It certainly cannot be said that the victims in this case consented to testifying in open court. During a lobby conference prior to trial, the prosecutor informed the trial judge that she had interviewed the victims, that they were concerned about publicity, and would agree to press attendance only if certain guarantees could be given:

"Each of [the three victims] indicated that they had the same concerns and basically they are privacy concerns.

"The difficulty of obtaining any kind of guarantee that the press would not print their names or where they go to school or any personal data or take pictures of them or attempt to interview them, those concerns come from their own privacy interests, as well as the fact that there are grandparents involved with a couple of these victims who do not know what happened and if they were to find out by reading the paper, everyone was concerned about what would happen then. And they stated that if it were at all possible to obtain a guarantee that this information would not be used, then they wouldn't object to the press being included. I explained that that is [a] very difficult guarantee to obtain because the Court cannot issue a conditional order, or anything like that, but I just wanted to put on the record what their concerns were and what they are afraid of." App 48a.

It is clear that the victims would "waive" the exclusion of the press only if the trial court gave them guarantees of strict privacy, guarantees that were probably beyond the authority of the court and which themselves would raise grave constitutional problems. See Oklahoma Publishing Co. v District Court of Oklahoma County, 430 US 308, 51 L Ed 2d 355, 97 S Ct 1045 (1977); Cox Broadcasting Corp. v Cohn, 420 US 469, 43 L Ed 2d 328, 95 S Ct 1029 (1975).

of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances." Id., at 597–598, 65 L Ed 2d 973, 100 S Ct 2814.

Today Justice Brennan ignores the weight of historical practice. There is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against r s. See, e. g., Harris v Stepher 1 F2d 888 (CA8 1966), cert de 386 US 964, 18 L Ed 2d 113, 87 S Ct 1040 (1967); Reagan v United States, 202 F 488 (CA9 1913); United States v Geise, 158 F Supp 821 (Alaska), aff'd, 262 F2d 151 (CA9 1958), cert denied, 361 US 842, 4 L Ed 2d 80, 80 S Ct 94 (1959); Hogan v State, 191 Ark 437, 86 SW2d 93 (1935); State v Purvis, 157 Conn 198, 251 A2d 178 (1968), cert denied, 395 US 928, 23 L Ed 2d 246, 89 S Ct 1788 (1969); Moore v State, 151 Ga 648, 108 SE2d 47 (1921), appeal dism'd, 260 US 702, 67 L Ed 471, 43 S Ct 98 (1922).[2] Several States have longstanding provisions allowing closure of cases involving sexual assaults against minors.[3]

It would misrepresent the historical record to state that there is an "unbroken, uncontradicted history" of open proceedings in cases involving the sexual abuse of minors. Richmond Newspapers, supra, at 573, 65 L Ed 2d 973, 100 S Ct 2814. Absent such a history of openness, the positions of the Justices joining reversal in Richmond Newspapers give no support to the proposition that closure of the proceedings during the testimony of the minor victim violates the First Amendment.[4]

[457 US 615]

II

The Court does not assert that the First Amendment right it discerns from Richmond Newspapers is absolute; instead, it holds that when a "State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Ante, at 606–607, 73 L Ed 2d, at 257. The Court's wooden application of the rigid standard it asserts for this case is inappropriate. The Commonwealth has not denied the public or the media access to information as to what takes place at trial. As the Court acknowledges, Massachusetts does not deny the press and the public access to the trial transcript or to other sources of information about the victim's testimony. Even the victim's identity is part of the public record, although the name of a 16-year-old accused rapist generally would not be a matter of public record. Mass Gen Laws Ann, ch 119, § 60A (West Supp 1982–1983). The Commonwealth does not deny access to information, and does nothing whatever to inhibit its disclosure. This case is quite unlike others in which we have held unconstitutional

2. Cf. Stamicarbon, N.V. v American Cyanamid Co. 506 F2d 532, 539–540 (CA2 1974), and cases cited therein.

3. See, e.g., Ala Const, Art VI, § 169 (1901) (repealed 1973); Fla Stat § 918.16 (1979); Ga Code § 81-1006 (1978); Miss Const, Art 3 § 26; NH Rev Stat Ann § 632-A:8 (Supp 1981); NY Jud Law § 4 (McKinney 1968); NC Gen Stat § 15-166 (Supp 1981); Utah Code Ann § 78-7-4 (1953).

4. It is hard to find a limiting principle in the Court's analysis. The same reasoning might require a hearing before a trial judge could hold a bench conference or any *in camera* proceedings.

state laws which prevent the dissemination of information or the public discussion of ideas. See, e. g., Brown v Hartlage, 456 US 45, 71 L Ed 2d 732, 102 S Ct 1523 (1982); Smith v Daily Mail Publishing Co. 443 US 97, 61 L Ed 2d 399, 99 S Ct 2667 (1979); Landmark Communications, Inc. v Virginia, 435 US 829, 56 L Ed 2d 1, 98 S Ct 1535 (1978); Nebraska Press Assn. v Stuart, 427 US 539, 49 L Ed 2d 683, 96 S Ct 2791 (1976); Cox Broadcasting Corp. v Cohen, 420 US 469, 43 L Ed 2d 328, 95 S Ct 1029 (1975); NAACP v Button, 371 US 415, 9 L Ed 2d 405, 83 S Ct 328 (1963).

The purpose of the Commonwealth in enacting § 16A was to give assurance to parents and minors that they would have this moderate and limited protection from the trauma, embarrassment, and humiliation of having to reveal the intimate details of a sexual assault in front of a large group of unfamiliar spectators—and perhaps a television audience—and to lower the barriers to the reporting of such crimes which might come from the victim's dread of public testimony. Globe Newspaper Co. v Superior Court, 379 Mass

[457 US 616]

846, 865, 401 NE2d 360, 372 (1980); 383 Mass 838, 847–848, 423 NE2d 773, 779 (1881).

Neither the purpose of the law nor its effect is primarily to deny the press or public access to information; the verbatim transcript is made available to the public and the media and may be used without limit. We therefore need only examine whether the restrictions imposed are reasonable and whether the interests of the Commonwealth override the very limited incidental effects of the law on First Amendment rights. See Richmond Newspapers, 448 US, at 580–581, 65 L Ed 2d 973, 100 S Ct 2814 (plurality opinion); id., at 600, 65 L Ed 2d 973, 100 S Ct 2814 (Stewart, J., concurring in judgment); Pell v Procunier, 417 US 817, 41 L Ed 2d 495, 94 S Ct 2800, 71 Ohio Ops 2d 195 (1974); Saxbe v Washington Post Co. 417 US 843, 41 L Ed 2d 514, 94 S Ct 2811 (1974); Cox v New Hampshire, 312 US 569, 85 L Ed 1049, 61 S Ct 762, 133 ALR 1396 (1941). Our obligation in this case is to balance the competing interests: the interests of the media for instant access, against the interest of the State in protecting child rape victims from the trauma of public testimony. In more than half the states, public testimony will include television coverage.

III

For me, it seems beyond doubt, considering the minimal impact of the law on First Amendment rights and the overriding weight of the Commonwealth's interest in protecting child rape victims, that the Massachusetts law is not unconstitutional. The Court acknowledges that the press and the public have prompt and full access to all of the victim's testimony. Their additional interest in actually being present during the testimony is minimal. While denying it the power to protect children, the Court admits that the Commonwealth's interest in protecting the victimized child is a compelling interest. Ante, at 607, 73 L Ed 2d, at 258. This meets the test of Richmond Newspapers, supra.

The law need not be precisely tailored so long as the state's interest overrides the law's impact on First

Amendment rights and the restrictions imposed further that interest. Certainly this law, which excludes the press and public only

[457 US 617]

during the actual testimony of the child victim of a sex crime, rationally serves the Commonwealth's overriding interest in protecting the child from the severe—possibly permanent—psychological damage. It is not disputed that such injury is a reality.[5]

The law also seems a rational response to the undisputed problem of the underreporting of rapes and other sexual offenses. The Court rejects the Commonwealth's argument that § 16A is justified by its interest in encouraging minors to report sex crimes, finding the claim "speculative in empirical terms [and] open to serious question as a matter of logic and common sense." Ante, at 609–610, 73 L Ed 2d, at 259. There is no basis whatever for this cavalier disregard of the reality of human experience. It makes no sense to criticize the Commonwealth for its failure to offer empirical data in support of its rule; only by allowing state experimentation may such empirical evidence be produced. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (1932) (Brandeis, J., dissenting). See also Chandler v Florida, 449 US 560, 579–580, 66 L Ed 2d 740, 101 S Ct 802 (1981); Reeves, Inc. v State, 447 US 429, 441, 65 L Ed 2d 244, 100 S Ct 2271 (1980); Whalen v Roe, 429 US 589, 597, and n 20, 51 L Ed 2d 64, 97 S Ct 869 (1977).

The Court also concludes that the Commonwealth's assertion that the law might reduce underreporting of sexual offenses fails "as a matter of logic and common sense." This conclusion is based on a misperception of the Commonwealth's argument and an overly narrow view of the protection the statute seeks to afford young victims. The Court apparently believes that the statute does not prevent any significant

[457 US 618]

trauma, embarrassment, or humiliation on the part of the victim simply because the press is not prevented from discovering and publicizing both the identity of the victim and the substance of the victim's testimony. Ante, at 609–610, 73 L Ed 2d, at 259. Section 16A is intended not to preserve confidentiality, but to prevent the risk of severe psychological damage caused by having to relate the details of the crime in front of a crowd which inevitably will include voyeuristic strangers.[6] In most states, that crowd may be expanded to include a live television audience,

5. For a discussion of the traumatic effect of court proceedings on minor rape victims, see E. Hilberman, The Rape Victim 53–54 (1976); S. Katz & M. Mazur, Understanding the Rape Victim: A Synthesis of Research Findings 198–200 (1979), and studies cited therein.

6. As one commentator put it: "Especially in cases involving minors, the courts stress the serious embarrassment and shame of the victim who is forced to testify to sexual acts or whose intimate life is revealed in detail before a crowd of the idly curious." Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum L Rev 1, 88 (1977). The victim's interest in avoiding the humiliation of testifying in open court is thus quite separate from any interest in preventing the public from learning of the crime. It is ironic that the Court emphasizes the failure of the Commonwealth to seal the trial transcript and bar disclosure of the victim's identity. The Court implies that a state law more severely encroaching upon the interests of the press and public would be upheld.

with reruns on the evening news. That ordeal could be difficult for an adult; to a child, the experience can be devastating and leave permanent scars.[7]

The Commonwealth's interests are clearly furthered by the mandatory nature of the closure statute. Certainly if the law were discretionary, most judges would exercise that discretion soundly and would avoid unnecessary harm to the child, but victims and their families are entitled to assurance of such protection. The legislature did not act irrationally in deciding not to leave the closure determination to the idiosyncracies of individual judges subject to the pressures available

[457 US 619]

to the media. The victim might very well experience considerable distress prior to the court appearance, wondering, in the absence of statutory protection, whether public testimony will be required. The mere possibility of public testimony may cause parents and children to decide not to report these heinous crimes. If, as psychologists report, the courtroom experience in such cases is almost as traumatic as the crime itself,[8] a state certainly should be able to take whatever reasonable steps it believes are necessary to reduce that trauma. Furthermore, we cannot expect victims and their parents to be aware of all of the nuances of state law; a person who sees newspaper, or perhaps even television, reports of a minor victim's testimony may very well be deterred from reporting a crime on the belief that public testimony will be required. It is within the power of the state to provide for mandatory closure to alleviate such understandable fears and encourage the reporting of such crimes.

IV

There is, of course, "a presumption of openness [that] inheres in the very nature of a criminal trial under our system of justice." But we have consistently emphasized that this presumption is not absolute or irrebutable. A majority of the Justices in Richmond Newspapers acknowledged that closure might be permitted under certain circumstances. Justice Stewart's separate opinion pointedly recognized that exclusion of the public might be justified to protect "the sensibilities of a youthful prosecution witness . . . in a criminal trial for rape." 448 US, at 600, n 5, 65 L Ed 2d 973, 100 S Ct 2814.[9] The Massachusetts statute has a relatively minor incidental impact on First

[457 US 620]

Amendment rights and gives effect to the overriding state interest in protecting child rape victims. Paradoxically, the Court today denies the victims the kind of protection routinely given to

7. See Hilberman, supra; L. Holmstrom & A. Burgess, The Victim of Rape: Institutional Reactions 222, 227 (1978); Berger, supra, at 88, 92-93; Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne L Rev 977, 1021 (1969). 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.

8. See Bohmer & Blumberg, Twice Traumatized: The Rape Victim and the Court, 58 Judicature 390 (1975); Katz & Mazur, supra; Holmstrom & Burgess, supra; Hilberman, supra; Berger, supra.

9. See also 448 US, at 580-581, 65 L Ed 2d 973, 100 S Ct 2814; id., at 582, 65 L Ed 2d 973, 100 S Ct 2814 (White, J., concurring); 448 id., at 584, 65 L Ed 2d 973, 100 S Ct 2814 (Stevens, J., concurring); id., at 598, 65 L Ed 2d 973, 100 S Ct 2814 (Brennan, J., concurring in judgment).

juveniles who commit crimes. Many will find it difficult to reconcile the concern so often expressed for the rights of the accused with the callous indifference exhibited today for children who, having suffered the trauma of rape or other sexual abuse, are denied the modest protection the Massachusetts Legislature provided.

Justice Stevens, dissenting.

The duration of a criminal trial generally is shorter than the time it takes for this Court's jurisdiction to be invoked and our judgment on the merits to be announced. As a result, our power to review pretrial or midtrial orders implicating the freedom of the press has rested on the exception to the mootness doctrine for orders "capable of repetition, yet evading review." See Richmond Newspapers, Inc. v Virginia, 448 US 555, 563, 65 L Ed 2d 973, 100 S Ct 2814; Gannett Co. v DePasquale, 443 US 368, 377–378, 61 L Ed 2d 608, 99 S Ct 2898; Nebraska Press Assn. v Stuart, 427 US 539, 546–547, 49 L Ed 2d 683, 96 S Ct 2791.

Today the Court expands that exception in order to pass on the constitutionality of a statute that, as presently construed, has never been applied in a live controversy. In this case, unlike the three cases cited above, the governing state law was materially changed after the trial court's order had expired by its own terms. There consequently is no possibility " 'that the same complaining party will be subject to the same action again.' " Gannett Co. v DePasquale, supra, at 377, 61 L Ed 2d 608, 99 S Ct 2898 (quoting Weinstein v Bradford, 423 US 147, 149, 46 L Ed 2d 350, 96 S Ct 347).

The fact that the Massachusetts Supreme Judicial Court narrowly construed—and then upheld in the abstract—the state statute that the trial court had read to mandate the closure of the entire trial bears on our review function in other respects. We have only recently recognized the First

[457 US 621]

Amendment right of access to newsworthy matter. See ante, at 603, 73 L Ed 2d, at 255; Richmond Newspapers, Inc. v Virginia, supra, at 582, 65 L Ed 2d 973, 100 S Ct 2814 (Stevens, J., concurring). In developing constitutional jurisprudence, there is a special importance in deciding cases on concrete facts. Cf. Minnick v California Dept. of Corrections, 452 US 105, 120–127, 68 L Ed 2d 706, 101 S Ct 2211; United States v Raines, 362 US 17, 21, 4 L Ed 2d 524, 80 S Ct 519. Only in specific controversies can the Court decide how this right of access to criminal trials can be accommodated with other societal interests, such as the protection of victims or defendants. The advisory opinion the Court announces today sheds virtually no light on how such rights should be accommodated.

The question whether the Court should entertain a facial attack on a statute that bears on the right of access cannot be answered simply by noting that the right has its source in the First Amendment. See, e. g., Bates v State Bar of Arizona, 433 US 350, 380–381, 53 L Ed 2d 810, 97 S Ct 2691, 51 Ohio Misc 1, 5 Ohio Ops 3d 60; Young v American Mini Theatres, Inc. 427 US 50, 61, 49 L Ed 2d 310, 96 S Ct 2440. For the right of access is plainly not coextensive with the right of expression that was vindicated in Nebraska Press

Assn., supra.[1] Because statutes that bear on this right of access do not deter protected activity in the way that other laws sometimes interfere with the right of expression, we should follow the norm of reviewing these statutes as applied rather than on their face.

It is not clear when, if ever, the Court will need to confront the question whether a mandatory partial-closure statute is unconstitutional. If the order hypothesized by the Supreme Judicial Court, instead of the trial court's order, had actually been entered in this case, and if the press had been given prompt access to a transcript of the testimony of the minor victims, appellant might not even have appealed. At the

[457 US 622]

very least the press, the prosecutor, and defense counsel would have argued the constitutionality of the partial-closure order in the context of the facts relevant to such an order, and a different controversy would have been framed for appellate review. In future cases the trial courts may voluntarily follow the direction of Justice Wilkins and make specific findings demonstrating a compelling state interest supporting the mandated partial-closure order. See 383 Mass 838, 852–853, 423 NE2d 773, 782 (concurring opinion). Or the record in future cases may plainly disclose a justification for a partial closure that the Court would consider acceptable. Thus, aside from the illumination provided by live controversies, a decision to review only orders actually entered pursuant to the Massachusetts statute would advance the policy of avoiding the premature and unnecessary adjudication of constitutional questions;[2] it is at least conceivable that no such order may ever have to be justified by the conclusion of the legislature that the mandatory closure of the trial during the testimony of a minor victim of a sex crime is necessary to serve important state interests.

The Court does not hold that on this record a closure order limited to the testimony of the minor victims would have been unconstitutional. Rather, the Court holds only that if ever such an order is entered, it must be supported by adequate findings. Normally, if the constitutional deficiency is the absence of findings to support a trial order, the Court would either remand for factfinding, or examine the record itself, before deciding whether the order measured up to constitutional standards. The infeasibility of this course of action—since no such order was entered in this case and since the order that was entered has expired—further demonstrates

[457 US 623]

that the Court's comment on the First Amendment issues implicated by the Massachusetts statute is advisory, hypothetical, and, at best, premature.[3]

I would dismiss the appeal.

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1. For example, even though a reporter may have no right of access to a judge's side-bar conference, it surely does not follow that the judge could enjoin publication of what a reporter might have learned about such a conference.

2. "But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." United States v Lovett, 328 US 303, 320, 90 L Ed 1252, 66 S Ct 1073 (Frankfurter, J., concurring).

3. The "capable of repetition, yet evading review" exception to the mootness doctrine generally is compatible with our settled policy of avoiding the premature adjudication of

constitutional questions. see Franks v Bowman Transportation Co. 424 US 747, 756, n 8, 47 L Ed 2d 444, 96 S Ct 1251, for an order that is capable of repetition yet evading review generally is no less ripe for review the first time it is presented than it would be on subsequent occasions. But when the "order" that is presented for review the first time is formulated in the abstract, as was the ruling of the Supreme Judicial Court in this case, the policy requires the Court to defer review of such an order until it is entered in a live controversy.

HOUSE COMMITTEE REPORT

(7)

Date referred: 5/15/87 FURTHER REFERRALS: Finance

DATE: March 11, 1988

The Judiciary Committee has considered HB 323

"An Act relating to testimony of children in certain criminal proceedings; and providing for an effective date."

RECOMMENDS:

[✓] replace with CS HB 323 (Jud) [✓] the same title

[ ] attached amendment(s) [ ] a new title

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[ ] same as previous zero fiscal note published _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 323 (Jud.)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to testimony of children in certain criminal proceedings..."
Sponsor: House Judiciary
Requestor: Representative Swackhammer

Agency Affected: Department of Law
BRU: Prosecution
Components: First, Second, Third, and Fourth Judicial Districts

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	-0-	82.2	82.2	82.2	82.2	82.2
SUPPLIES						
EQUIPMENT	-0-	58.6	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	140.8	82.2	82.2	82.2	82.2
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	140.8	82.2	82.2	82.2	82.2
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services — Date: March 15, 1988

Richard I. Pegues /FOR/

Approved by Commissioner: Grace Berg Schaible, Atty. Gen. — Date: March 15, 1988
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

This bill adds new sections to AS 12.45 that provide for alternative methods for taking the testimony of a child in certain criminal proceedings (AS 11.41) in which that child was the victim or is to be a witness. The bill provides that closed circuit television, one-way mirrors or other spatial arrangements may be used in these proceedings so that a child's testimony may be viewed by the defendant, the court, and the finder of fact, but which also provides that the child does not have visual contact with the defendant and jurors.

The Department of Law believes that alternative methods for taking the testimony of a child, in those cases where normal court procedures would result in the child's inability to reasonably communicate, can be accomplished in three ways. One, closed circuit television would be used routinely at Anchorage, Fairbanks, and Juneau, when isolation of the child is required. If necessary, a modified closed circuit televised method would be used only occasionally at other locations. Two, a one-way mirror or perforated one-way screen method could be used routinely at most other locations when isolation of the child witness from the defendant or jurors is required. Three, use of child-size furniture for the child witness would be appropriate at all locations when it becomes necessary to schedule the proceeding in a room that provides adequate privacy, freedom from distractions, informality, and comfort appropriate to the child's developmental age.

Use of closed circuit television at Anchorage, Fairbanks and Juneau would be contracted out to private vendors. Video/audio communications from the victim/witness to the defendant, the court and the trier of fact would be required. Private audio communciation between the defendant and the defendant's counsel would also be required. The department estimates that about four hours of testimony will occur at each pretrial or trial proceeding. The department also estimates that a total of two hours of setup/takedown time will also be required for each proceeding, including vendor's chargable travel time. It is estimated that contracted costs for operator(s), audio/visual equipment, and cabeling will be $300 per hour, at these three locations.

Occasional use of a modified audio/visual method at other locations, using video recordings of testimony, and involving rental of a video camcorder and monitors, is estimated to $600 per year at each of the department's other locations. This cost is based upon three days rental, at $200 per day, of one camcorder, defense audio equipment, and monitors at each location. Operation of the equipment would be handled by existing Department of Law paralegals.

Use of one-way mirrors or some other method that provides one-way sight so that the witness may be viewed by the defendant and the jurors, but which prevents the witness from viewing the defendant and

the jurors, will require the manufacture or fabrication of freestanding (or attachable) portable, safe, and easily stored viewing/ screening devices. Thus far, the department has not been able to locate regularly manufactured devices of this nature. However, freestanding partitions providing a 96" x 96" "L" barrier, with two plexiglass 48" x 48" view areas retail for $1,890. Substitution of a one-way mirror, or other device, would probably cost $2,000 at a minimum. Devices of this type are not easily nor safely transported between locations by air carrier. For this reason, the cost for one-way screening devices at each of our district attorney office locations is included in this fiscal note request.

The cost of child furniture, at $150 for a table and chair, is included for each location, except Anchorage costs are for three sets, and Fairbanks costs are for two sets.

During FY 1987, 346 child sexual assault cases were referred to the department. Of this number, 125 cases, or 36% of the total number of cases referred, were declined. It is estimated that about 40% of the declined cases, or 51 complaints, would have been accepted for prosecution had the alternative child testimony methods, contained in this bill, been available to prosecutors. Moreover, due to the obvious trauma experienced by some child witnesses, it would have been appropriate to use the bill's alternate testimony methods on twenty or more occasions in cases that were accepted for prosecution.

A schedule is attached that details the cost of contractual services and equipment that will be necessary for the department to implement this bill.

Fiscal Note Analysis CSHB 323 (Jud.)

Court Room Close Circuit/Screening
Criminal Division

Office	Type	#cases	---One-Time--- Screen Jury	Screen Defendant	Furniture	Rental/ Contractual	Annual cost	73000 Contractual	75000 Equipment
Juneau DAO	CC	6	2000	2000	150	10800	14950		
Ketchikan DAO	SC	2	2000	2000	150	600	4750		
Sitka DAO	SC	2	2000	2000	150	600	4750		
First Judicial:		10	6000	6000	450	12000	24450	12000	12450
Barrow DAO	SC	3	2000	2000	150	600	4750		
Kotzebue DAO	SC	1	2000	2000	150	600	4750		
Nome DAO	SC	2	2000	2000	150	600	4750		
Second Judicial:		6	6000	6000	450	1800	14250	1800	12450
Anchorage DAO	CC	24	2000	2000	450	43200	47650		
Bethel DAO	SC	3	2000	2000	150	600	4750		
Dillingham DAO	SC	2	2000	2000	150	600	4750		
Kenai DAO	SC	4	2000	2000	150	600	4750		
Kodiak DAO	SC	3	2000	2000	150	600	4750		
Palmer DAO	SC	5	2000	2000	150	600	4750		
Valdez DAO	SC	2	2000	2000	150	600	4750		
Third Judicial:		43	14000	14000	1350	46800	76150	46800	29350
Fairbanks DAO/4th	CC	12	2000	2000	300	21600	25900	21600	4300
Grand Total:		71	28000	28000	2550	82200	140750	82200	58550

CC = Closed circuit: 1800 Per case
SC = Screen: 2000 One-Time
Rental $ 200 per day 600 based on three day average
Furniture/set 150 Children size

Sec. 12.45.047. Videotaping of testimony by young victims of sexual offenses. (a) Upon application by the prosecuting attorney and notice to the defendant, the court shall permit the state to videotape the testimony of a child who is the alleged victim of a violation of AS 11.41.410 — 11.41.455 and who is 16 years of age or younger at the time the court issues the order permitting the videotaping.

(b) The trial judge shall preside at the videotaping proceeding and shall rule on all questions as if at trial. The defendant shall be afforded all rights applicable to defendants during trial, including the right to an attorney and the right to confront and cross-examine the witness. The trial judge shall determine those persons other than the prosecuting attorney, the defendant, and the defendant's attorney who may attend the videotaping proceeding.

(c) Videotaped evidence taken in accordance with this section is admissible in evidence in the criminal trial of a defendant charged with a violation of AS 11.41.410 — 11.41.455. (§ 2 ch 67 SLA 1982)

Cross references. — For legislative findings and purpose, see § 1, ch. 67, SLA 1982, in the Temporary and Special Acts; for effect on court rules, see § 3, ch. 67, SLA 1982, in the Temporary and Special Acts.

Sec. 12.45.048. Exclusion of public from trial during testimony by young victim of sexual offense. (a) After notice to the defendant, the state may apply to the court for an order excluding the public from the courtroom during the testimony of a child who is the alleged victim of a violation of AS 11.41.410 — 11.41.455. The order shall be granted if the court finds that the child is 16 years of age or younger at the time of the trial.

(b) If the public is excluded from the trial under (a) of this section, the testimony given during the time the public is excluded shall be available to the public upon request within a reasonable time sufficient to allow preparation of a tape recording or transcript of the testimony.

(c) In this section "public" means all persons except

(1) the judge presiding over the trial;

(2) the members of the jury;

(3) the defendant and the attorney and an investigator for the defendant;

(4) the prosecuting attorney and an investigating officer for the state;

(5) the parents or legal guardians of the child;

(6) a guardian ad litem or attorney for the child;

(7) in the discretion of the court, an adult for whom the child has developed a significant emotional attachment who can provide emotional support for the child while the child testifies;

(8) court personnel, including those essential for taking the testimony. (§ 2 ch 67 SLA 1982)

Cross reference findings and purpos

Sec. 12.45.05 ecution witnes the possession of prospective pros of the state may until the witness hearing, or in th 22 SLA 1965)

Quoted in Miller No. 589 (File No. (1969).

Sec. 12.45.06(After a witness c the court shall, c any statement relates to the sub entire contents testimony of the to the defendant

Based on Jencks was modeled after th 18 U.S.C. § 3500, et faced with questions pretation of the st turned to federal cas Putnam v. State, Su (File No. 3475), 629

Criminal R. 16 a inconsistent. — Cri pretrial discovery w governs discovery du the same evidence under both the rule are not so overl inconsistent. Putnam No. 2251 (File No. (1980).

Duty of state to pr The duty of preservat to preserve any discoverable by the attaches once any arr

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 323 (Jud)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST: _____

Revision Date: _____
Title: An Act relating to testimony of children in certain...proceedings...
Sponsor: Swackhammer
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Barbara Miklos, Executive Director
Phone: 465-4356
Division: Council on Domestic Violence and Sexual Assault
Date: 3/9/88

Approved by Commissioner: Dale A. Hoelscher Dep. Comm.
Date: 3-10-88
Agency: Public Safety

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

HOUSE BILL 323

HB 323 INDEX

1. House Bill 323
2. Fiscal Note
3. Research and back up materials

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: Bill Version: HB 323
Publish Date:

Revision Date:
Title: An act relating to testimony of children in certain criminal cases
Sponsor: Swackhammer
Requestor:

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services		77.8	77.8	77.8	77.8	77.8
Travel		24.0	24.0	24.0	24.0	24.0
Contractual		14.5	14.5	14.5	14.5	14.5
Supplies						
Equipment		36.9				
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	153.2	116.3	116.3	116.3	116.3
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	153.2	116.3	116.3	116.3	116.3
Federal Funds						
Other						
TOTAL	0.0	153.2	116.3	116.3	116.3	116.3

POSITIONS:

Full-time		2.0	2.0	2.0	2.0	2.0
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached fiscal analysis.

Prepared by: Dan Strandberg, General Counsel Phone: 264-8215
Division: Alaska Court System Date: 1-27-88

Approved by: Arthur H. Snowden, II, Administrative Director Date: 1-27-88
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)
Senate Secretary

ALASKA COURT SYSTEM

HB 323 - FISCAL ANALYSIS

Personal Services:

	Salary	Benefits	Total
2 - Electronic Technician, Range 14A, Anchorage, PFT - 12 months	$56,760	$21,012	$77,772

Travel:

Air fare and per diem for Electronic Technician to travel to outlying courts	24,000

Contractual:

Freight charges for transporting video equipment to outlying courts	14,500

Equipment: (one time cost)

Recording camera and tripod, 4 units @ $3,000	12,000
Monitors, 16 units @ $400	6,400
Headsets, 4 units @ $2,000	8,000
Equipment transport boxes, 4 units @ $2,000	8,000
Backup camera, 1 unit @ $2,500	2,500
	36,900

Total First Year Cost	$153,172

ALASKA COURT SYSTEM

HB 323 - FISCAL ANALYSIS

This bill would require video equipment and an operator for every criminal proceeding involving the testimony of a child under the age of 13. The Alaska Judicial Council has estimated that approximately 120 criminal cases per year will involve testimony of children. This estimate is based on the council's felony sentencing study that was published in March 1987 as well as on House research memo 85-339 on child sexual assault. Given the volume of anticipated cases, it is assumed that video equipment will be required in each judicial district and that two full-time technicians will be needed to operate the equipment.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

May 27, 1987

MEMORANDUM

TO: Representative C.E. Swackhammer

ATTN: Tom Wright

FROM: Penelope Weyhrauch
Legislative Analyst

RE: **Sexual Assault: Television Testimony by Minor Victims of Sexual Assault**
Research Request 87.308

You asked us to address the constitutionality of legislation which allows a child's testimony to be videotaped or shown on closed-circuit television for use in court. You asked us to discuss how videotape or closed-circuit television legislation could avoid constitutional challenges.

Child Sexual Abuse Legislation

A statute which allows the videotaping or closed-circuit televising of a minor in a sexual abuse case may be constitutionally challenged on the ground that it deprives a defendant of the opportunity to confront his accuser face to face. A defendant's right of confrontation is established in the U.S. and Alaska Constitutions. These articles state that "...in all criminal prosecutions...the accused shall enjoy [have] the right...to be confronted with the witnesses against him."[1] The confrontation clause generally requires that witnesses be present at trial and that the defendant be allowed to cross examine them.

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[1]U.S. Constitution, Sixth Amendment; Alaska Constitution Article 1, Section 11. These provisions are attached to this memorandum.

The use of videotaped testimony at trial may face another legal challenge--as hearsay--which is not admissible in court unless the statement falls within a hearsay exception.[2] When faced with a hearsay issue, the U.S. Supreme Court has placed major emphasis on the "reliability" of the statement. Three indicators are considered in regard to reliability: 1) whether or not a statement was made under oath; 2) whether the declarant of the statement was subjected to prior cross-examination; and 3) whether the jury had the opportunity to view the witness's demeanor.[3] A videotaped testimony may or may not meet the requirements of reliability.

Some cases have also required that the declarant of the statement be deemed "unavailable" for trial as a prerequisite to admissibility of the statement.[4] It is unclear how unavailability would apply to the videotaping of a child's testimony to avoid facing the defendant in a courtroom situation.[5]

Videotape Statutes. At least twelve states have enacted videotaping statutes since 1977, six of them since 1983.[6] The statutes treat videotaped testimony as the functional equivalent of testimony at trial. Some statutes explicitly demand that the defendant be present and that cross-examination be allowed at the videotaping session; three states--Kentucky, Texas and Wisconsin--allow, in certain circumstances, the admission of videotapes made without the benefit of cross-examination.

A separate provision of the Texas and Kentucky statutes raises another confrontation clause issue. It provides that a videotape made in the presence of both prosecution and defense attorney and put to the test of cross-examination may be admitted in lieu of a child's testimony. It also states that during the videotaping session the court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. At least one federal court of appeals has held, in a context other than child sexual

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[2]David Wise, "Criminal procedure--child witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," 7 Whittier Law Review 639, 649, 1985.

[3]Ibid., p. 650.

[4]Ibid.

[5]Ibid., p. 654.

[6]Note, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," 98 Harvard Law Review 813, (1985). The following three paragraphs are taken in large part from this article. We have limited our discussion to Arizona, Kentucky, Texas, and Oklahoma--the states mentioned in your request.

abuse cases, that the lack of a face-to-face encounter renders the use of videotaped testimony unconstitutional.

In 1982, an **Arizona** appellate court affirmed a conviction obtained with the videotaped statement of a sexually abused six-year-old girl.[7] The defendant and his counsel had been present at the taping, and cross-examined had been allowed. In reaching its decision, the court weighed the state's interest in presenting the videotaped testimony against possible infringements of the defendant's right of confrontation. The determinative factor in admitting the tape was the threat of the child becoming uncommunicative if placed on the witness stand.[8]

Penny Warren, Assistant Attorney General for **Kentucky**, said that a recent (1986) state Supreme Court decision upheld the use of a videotape deposition in a child sexual abuse case.[9] The court rejected the defendant's constitutional challenge in finding that the defendant's right of confrontation was satisfied through the mechanisms used to conduct the videotaping.

The court found that: "The statute requires that the defendant be present in person so that he may see and hear the witness but he shall not be seen by the child. The...procedure permits the testimony to be taken prior to trial and preserved by videotape. The availability of procedures permits the defendant to fully participate in cross-examination and to adequately see and hear the witness. The reproduced testimony must be of adequate quality for the jurors to assess the demeanor of the witness and to evaluate credibility. The trial judge paraphrased the issue as to whether the privilege of viewing a witness through a one-way mirror or a video monitor is a constitutionally acceptable substitute for face-to-face confrontation. We believe that it is. The legislative authorization of videotape or closed-circuit trial testimony by certain child victims...does not violate a defendant's right to confrontation."[10]

Ms. Warren believes that if a child is required to be administered an oath and if the competency of the child has been established prior to the videotaping, a state statute allowing videotaping may pass constitutional muster.

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[7] State v. Melendez, 661 P.2d 654 (1982).

[8] "Criminal Procedure--Child Witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," p. 639.

[9] Commonwealth v. Willis, 716 S.W.2d 224 (1986).

[10] Willis, p. 228.

State district courts in Texas have differed on whether the state's videotape statute meets the constitutional right-to-confront mandate. At least one Texas appellate court has upheld a conviction based on videotaped statements, ruling that the procedure does not violate the confrontation clause since the defendant retains the opportunity to cross-examine the declarant at trial. Several cases involving videotaped testimony in Texas are currently facing a constitutional challenge in the Texas Supreme Court. According to Steve Lamirand, Assistant Attorney General for **Oklahoma**, a constitutional challenge has not been made on the state's videotaping or closed-circuit television statutes.

The **Alaska** videotaping statute--AS 12.45.047--has not been constitutionally challenged, according to Gayle Horetski, Assistant Attorney General. She said this is probably because the procedure established by the statute has not been used by the State because it believes it to be unconstitutional--as a violation of a defendant's right of confrontation. In addition, she believes that the procedure authorized by the statute creates a more frightening situation for a child than a courtroom does. The statute requires that testimony by the child be taken in front of the defendant in a room other than a courtroom. Ms. Horetski said that this may bring the child and the defendant into much closer contact--in a small room--than would occur in a courtroom setting.

Closed-circuit Television Statutes. The states of **Kentucky and Texas** have legislation which allows a child's testimony to be given at trial from a room other than the courtroom by closed-circuit television.[11] Neither of these states have addressed the constitutionality of this legislation. Ms. Warren, with the Attorney General's office in **Kentucky**, believes that because Kentucky's videotape statute has been found to be constitutional, their closed-circuit television statute will also be found to be constitutional. Ms. Horetski said that closed-circuit television statutes have been both upheld and struck down in other states under constitutional challenges. She believes that closed-circuit television statutes are less constitutionally vulnerable than videotape statutes because a child's testimony occurs at trial; providing the defendant and the jury the opportunity to witness testimony that is contemporaneous with the trial.

Other legal scholars are divided on whether a closed-circuit television statute will meet constitutional muster. One constitutional concern expressed about the use of closed-circuit television is that the defendant is deprived of the opportunity of physically confronting his accuser. No case law requires eye contact, but "this procedure could be deemed constitutional only if cross-examination alone is preserved in such a way to fully satisfy the strict constraints of the sixth amendment."[12]

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[11] Other states may also have closed-circuit testimony statutes. I was unable to find a compilation of these statutes for the fifty states. Thus, I limited my search to states in which you were interested.

[12] "Criminal Procedure--Child Witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," p. 659.

Another writer stated that "...The United States Supreme Court has not literally construed the confrontation clause. In the 1980 case of Ohio v. Roberts, the court said that the clause merely states a preference for face-to-face confrontation at trial but that the 'primary interest secured by the provision is the right of cross-examination'.[13] Competing interests when closely examined may justify dispensing with confrontation at trial. Adequate opportunity for cross-examination might meet the requirements of the clause without actual confrontation."[14]

Alaska does not currently have a closed-circuit television statute.

Developing Constitutionally Sound Statutes

In a paper presented at the National Policy Conference on Legal Reforms in Child Sexual Abuse Cases, Professor Michael Graham outlined his suggestions for enacting constitutionally sound child sexual abuse legislation:[15]

- provide specifically for unavailability of witness based upon the presence of, or potential for, severe psychological injury to a child witness if forced to face the defendant in open court;

- provide for the use of closed-circuit television or a children's courtroom for eliciting testimony in child sexual abuse prosecutions where the child witness is unavailable for live face to face confrontation, but is available to give testimony in an alternative setting.[16] The statutes should provide for projection to the jury of the demeanor of both child witness and defendant. Statutes should also provide for projection of the image of the defendant before the child witness where the witness is willing and able to testify under such circumstances; and

- provide that testimony of an unavailable child witness taken outside the physical presence of the accused--but subject to cross-examination--is admissible as an exception to the hearsay rule. The child's testimony may be presented to the jury by either

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[13]Ohio v. Roberts, 448 U.S. 56 (1980).

[14]Comment, "Use of Videotaping to Avoid Traumatization of Child Sexual Abuse Victim-Witnesses," 21 Land and Water Law Review 565, 574, 1986.

[15]Michael H. Graham, "Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions," 40 University of Miami Law Review 19, 92, 1985.

[16]A children's courtroom is a room set up for the comfort and security of children where a minor's testimony is heard.

> closed-circuit television, use of a children's courtroom, or a videotape of the child's testimony given at a prior trial, hearing, or other proceeding. Admissability should be conditioned upon a showing that the child's testimony possesses a guarantee of trustworthiness equivalent to those required of statements that are admitted under a traditional hearsay exception.

Mr. Graham also stated that "It is...very likely that oath, demeanor, whether live, via closed-circuit television, or videotaped, and cross-examination, if combined with [the] projection of the defendant's image before the child witness, alone create adequate [the]...reliability to be admissible."[17]

Another legal scholar stated that "Videotaping statutes should permit the child to testify on videotape and out of the presence of the defendant if the trial court finds that testimony in open court or a face-to-face confrontation with the defendant would cause the child substantial emotional trauma. The court should defer the taking of videotaped testimony until after the trial has commenced unless substantial delay would thereby result. Once the child has testified on videotape, the court should generally bar both parties from calling the child at trial. Finally, videotaping statutes should prescribe standards regulating taping procedures and the technical quality of the videotaping equipment." [18]

A third opinion rendered by a legal scholar stated that "The interests of the [sexually abused] child are countered by the defendant's sixth amendment rights which guarantee him the opportunity to confront and cross examine...witnesses who testify against him. The Supreme Court has stated, however, 'that competing interests, if closely examined, may warrant

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[17]Ibid., p. 94.

[18]Note, "The testimony of child victims in sex abuse prosecutions: two legislative innovations," 98 Harvard Law Review 806, 826, 827, 1985.

dispensing with confrontation at trial.'"[19] The writer went on to say that if the videotaping procedure includes confrontation by the defendant and cross-examination of the child by the defendant's attorney, the defendant is not denied his constitutional rights.[20]

* * * *

I hope this information is useful to you. The state statutes discussed in this memorandum are attached. If you have any questions or would like additional information, please contact our agency.

Attachments

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[19] Ohio v. Roberts, p. 64.

[20] "Criminal Procedure--Child Witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," p. 660.

U.S CONSTITUTION

ARTICLE VI.

Right to speedy trial, witnesses, etc. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[14]

ALASKA CONSTITUTION

Section 11. Rights of Accused. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARIZONA

§ 13–4252. Recording of testimony

A. The recording of an oral statement of a minor made before a proceeding begins is admissible into evidence if all of the following are true:

1. No attorney for either party was present when the statement was made.

2. The recording is both visual and aural and is recorded on film or videotape or by other electronic means.

3. Every voice on the recording is identified.

4. The person conducting the interview of the minor in the recording is present at the proceeding and available to testify or be cross-examined by either party.

5. The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence.

6. The minor is available to testify.

7. The recording equipment was capable of making an accurate recording, the operator of the equipment was competent and the recording is accurate and has not been altered.

8. The statement was not made in response to questioning calculated to lead the minor to make a particular statement.

B. If the electronic recording of the oral statement of a minor is admitted into evidence under this section, either party may call the minor to testify and the opposing party may cross-examine the minor.

Added by Laws 1985, Ch. 364, § 38, eff. May 16, 1985.

Source:
Laws 1978, Ch. 89, § 1.
A.R.S. former § 12-2312.

Library References
Criminal Law ⇐627(2).
Infants ⇐207.
Witnesses ⇐5.
C.J.S. Criminal Law § 942.
C.J.S. Infants §§ 51, 52, 62, 64 to 67.
C.J.S. Witnesses § 16.

§ 13–4253. Out of court testimony; televised; recorded

A. The court, on motion of the prosecution, may order that the testimony of the minor be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the

equipment and any person whose presence would contribute to the welfare and well-being of the minor may be present in the room with the minor during his testimony. Only the attorneys may question the minor. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the minor during his testimony but does not permit the minor to see or hear them. The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant.

B. The court, on motion of the prosecution, may order that the testimony of the minor be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection A may be present during the taking of the minor's testimony, and the persons operating the equipment shall be confined from the minor's sight and hearing as provided by subsection A. The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant. The court shall also ensure that:

1. The recording is both visual and aural and is recorded on film or videotape or by other electronic means.

2. The recording equipment was capable of making an accurate recording, the operator was competent and the recording is accurate and is not altered.

3. Each voice on the recording is identified.

4. Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

C. If the court orders the testimony of a minor to be taken pursuant to this section, the minor shall not be required to testify in court at the proceeding for which the testimony was taken.

Added by Laws 1985, Ch. 364, § 38, eff. May 16, 1985

NOTES TO DECISIONS

1. Denial of Continuance.

There was no abuse of discretion in the court's denying the defendant a continuance because of the absence of a witness who was in the penitentiary where the defendant did not seek to procure his attendance under the law nor make an attempt to take his deposition. Wooldridge v. Commonwealth (1970), 459 S.W.2d 404, cert. denied, 404 U.S. 909, 92 S. Ct. 225, 30 L. Ed. 2d 182 (1971).

The court did not abuse its discretion in overruling the defendant's motion for a continuance in the RCr 11.42 hearing to secure out-of-state witnesses and evidence which he alleged were material in proving his ineffective assistance of counsel claim; this section was not applicable, since the alleged error was in an RCr 11.42 hearing to resolve the defendant's ineffectiveness of counsel claim, not a prosecution. Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

421.350. Testimony of child allegedly victim of illegal sexual activity. — (1) This section applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under KRS 510.040 to 510.150, 529.030 to 529.050, 529.070, 530.020, 531.310, 531.320, and 531.370, the offense of endangering the welfare of a minor, all dependency proceedings pursuant to KRS Chapter 208, and the criminal offense of unlawful transaction with a minor when the minor is induced, assisted or caused to engage in illegal sexual activity, when the act is alleged to have been committed against a child twelve (12) years of age or younger, and applies only to the statements or testimony of that child.

(2) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:

(a) No attorney for either party was present when the statement was made;

(b) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;

(c) The recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;

(d) The statement was not made in response to questioning calculated to lead the child to make a particular statement;

(e) Every voice on the recording is identified;

(f) The person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;

(g) The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and

(h) The child is available to testify.

If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

(3) The court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

(4) The court may, on the motion of the attorney for any party, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection (3) of this section may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by subsection (3) of this section. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

(a) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;

(b) The recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;

(c) Each voice on the recording is identified; and

(d) Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

(5) If the court orders the testimony of a child to be taken under subsection (3) or (4) of this section, the child may not be required to testify in court at the proceeding for which the testimony was taken. (Enact. Acts 1984, ch. 382, § 19, effective July 13, 1984; 1986, ch. 439, § 2, effective July 15, 1986.)

421.355. Admissibility of victim's out-of-court statements. — (1) Notwithstanding any other provision of law or rule of evidence, a child victim's out-of-court statements regarding physical or sexual abuse, or neglect of the child are admissible in any criminal or civil proceeding, including a proceeding to determine the dependency of the child if, prior to admitting such a statement, the court determines that:

(a) The general purpose of the evidence is such that the interest of justice will best be served by admission of the statement into evidence; and

(b) The statements are determined by the court to be reliable based upon the court's consideration of: the age and maturity of the child, the nature and duration of the abuse, the emotional or psychological effects of said abuse or neglect upon the child, the relationship of the child to the offender, the reliability of the child witness, and the circumstances surrounding the statement.

(2) If the statement is admitted into evidence either party may call the child to testify and the opposing party may cross-examine the child. (Enact. Acts 1986, ch. 439, § 1, effective July 15, 1986.)

CRIME VICTIM AND WITNESS PROTECTION

421.500. Definitions — Applicability — Required notifications — Duties of public officers and agencies. — (1) As used in KRS 421.510 to 421.550, "victim" means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime classified as criminal homicide, robbery, rape, assault, sodomy, kidnapping, burglary in the first or second degree, sexual abuse, wanton endangerment, criminal abuse, or incest. If the victim is a minor or legally incapacitated, "victim" means a parent, guardian, custodian or court appointed special advocate. If the victim is deceased and the relative is not the defendant, the following relatives shall be designated as "victim" for the purpose of exercising those rights contained in KRS 421.510 to 421.550:

§ 1147. Admissibility of prerecorded statements of child age 12 or under who is victim of abuse

A. This section shall apply only to a proceeding affecting the parent-child, guardian-child or family relationship in which a child twelve (12) years of age or younger is alleged to have been abused, and shall apply only to the statement of that child or other child witness.

B. The recording of an oral statement of the child made before the proceedings begin is admissible into evidence if:

1. The court determines that the time, content and circumstances of the statement provide sufficient indicia of reliability;

2. No attorney for any party is present when the statement is made;

3. The recording is both visual and aural and is recorded on film or videotape or by other electronic means;

4. The recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;

5. The statement is not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the child's statement and not made solely as a result of a leading or suggestive question;

6. Every voice on the recording is identified;

7. The person conducting the interview of the child in the recording is present at the proceeding and is available to testify or be cross-examined by any party; and

8. Each party to the proceeding is afforded an opportunity to view the recording before it is offered into evidence, and a copy of a written transcript transcribed by a licensed or certified court reporter is provided to the parties.

Added by Laws 1984, c. 111, § 1, emerg. eff. April 9, 1984.

Section 4 of Laws 1984, c. 111 provides for severability.

Title of Act:

An Act relating to children and criminal procedure; providing for admissibility of prerecorded statements and testimony of a child twelve years of age or under who is a victim of abuse; providing for admissibility of testimony of a child twelve years of age or under who is a victim of certain other offenses, allowing court to order such child's testimony to be given outside the courtroom through closed-circuit television, stating circumstances under which child may or may not be called to testify; providing certain procedures, providing for codification; providing severability; and declaring an emergency. Laws 1984, c. 111.

Library References

Assault and Battery ⇐8, 100.
Infants ⇐15.
C.J.S. Assault and Battery §§ 13 to 29, 130.
C.J.S. Infants §§ 92, 94.

§ 1148. Taking testimony of child age 12 or under in room other than courtroom—Recording

A. This section shall apply only to a proceeding affecting the parent-child, guardian-child or family relationship in which a child twelve (12) years of age or younger is alleged to have been abused, and shall apply only to the testimony of that child or other child witness.

B. The court may, on the motion of a party to the proceeding, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court, the finder of fact and the parties to the proceeding. Only an attorney for each party, an attorney ad litem for the child or other person whose presence would contribute to the welfare and well-being of the child and persons necessary to operate the equipment may be present in the room with the child during his testimony. Only the attorneys for the parties may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them.

C. The court may, on the motion of a party to the proceeding, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court, the finder of fact and the parties to the proceeding.

OKLAHOMA

Note 1

Only those persons permitted to be present at the taking of testimony under subsection B of this section may be present during the taking of the child's testimony. Only the attorneys for the parties may question the child and the persons operating the equipment shall be confined from the child's sight and hearing. The court shall ensure that:

1. The recording is both visual and aural and is recorded on film or videotape or by other electronic means;

2. The recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;

3. Every voice on the recording is identified; and

4. Each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom, and a copy of a written transcript transcribed by a licensed or certified court reporter is provided to the parties.

D. If the testimony of a child is taken as provided by subsections B or C of this section, the child shall not be compelled to testify in court during the proceeding.

Added by Laws 1984, c. 111, § 2, emerg. eff. April 9, 1984.

§ 1149. Aggravated assault and battery upon employee of state facility for delinquent children

A. Every person who, without justifiable or excusable cause, knowingly commits any aggravated assault and battery upon the person of an employee of a state facility maintained primarily for delinquent children, while the employee is in the performance of his duties, shall upon conviction thereof be guilty of a felony.

B. This act shall not supersede any other act or acts, but shall be cumulative thereto.

Added by Laws 1984, c. 276, § 1, emerg. eff. May 30, 1984.

Section added as § 1147 of this title and editorially renumbered as this section to avoid a duplication in numbering.

ARTICLE II. COUNTIES WITH POPULATION OF OVER 100,000

Sections 1101 through 1504 of this title were enacted by Laws 1968, c. 282. The Act contained an emergency clause and was approved May 7, 1968. It also provided in section 1504 thereof that the Act should take effect January 13, 1969.

§ 1201. Juvenile bureau and citizens' advisory committee

A. In each county having a population of one hundred thousand (100,000) or more, as shown by the last preceding Federal Decennial Census, there is created a juvenile bureau and a citizens' advisory committee.

B. In each county having a duly constituted juvenile bureau as of January 1, 1981, as provided for in subsection A of this section, the juvenile bureau shall remain in place and continue in operation. No other counties shall establish juvenile bureaus. The Department of Human Services shall provide intake, probation, and parole services in all counties not having juvenile bureaus as provided for in Section 602 of this title.

Laws 1968, c. 282, § 201, eff. Jan. 13, 1969. Amended by Laws 1981, c. 170, § 1.

Section 2 of Laws 1981, c. 170 provides that this act shall become effective October 1, 1981.

Notes of Decisions

Audits 2

Construction and application 1

1 Construction and application

The County Excise Board [illegible] separate budget estimates for [illegible] Juvenile Bureau of Oklahoma County and [illegible]

Note 1

though she was herself an accomplice witness, substantially corroborated that of victim. (Per dissenting opinion of Baskin, J., 636 S.W.2d 617.) Hernandez v. State (App. 4 Dist.1983) 665 S.W.2d 181, review refused.

Defendant who was charged with sexual abuse of child and who elected not to cross-examine victim in order to prevent admission of evidence of outcry or corroboration, was not deprived of fair trial as a result of his reliance on this article providing that conviction of sexual abuse of a child is supportable on victim's uncorroborated testimony if victim informed any person, other than defendant, of alleged offense within six months of the offense, despite fact that Court of Criminal Appeals subsequently found an exception to said article which permitted defendant's conviction on the uncorroborated testimony of victim who made no outcry within the six-month period. Wilson v. State (App. 2 Dist.1984) 665 S.W.2d 222.

This article did not apply in rape prosecution where complaining witness was under age of legal consent. Hill v. State (App. 5 Dist.1984) 672 S.W.2d 302.

Victim's testimony that defendant accosted her with knife on the street and held knife to her throat during rape was sufficient to support conviction for aggravated sexual abuse, where victim's outcry coincided with police officer's discovery of victim and defendant at the scene of rape. Holloway v. State (App. 2 Dist.1985) 695 S.W.2d 112.

2. Purpose

Object sought to be obtained by this article is liberalizing of onerous evidentiary requirements of proof in sexual attack cases. Brown v. State (App.1983) 649 S.W.2d 160.

3. Hearsay

Father's hearsay testimony that his young son complained to him of sexual attack a few hours after attack allegedly occurred was improperly admitted where State produced eyewitness to offense aside from complainant, but in light of fact that father's testimony was, at best, merely cumulative of same evidence adduced from other witnesses, no reversible error was shown. Brown v. State (App.1983) 649 S.W.2d 160.

This article is not exception to hearsay rule. Id.

4. Physicians

Examining physician's testimony concerning victim's statement that he was sexually attacked by man was not admissible under this article where State produced eyewitness to offense aside from complainant. Brown v. State (App. 1983) 649 S.W.2d 160.

5. Instructions

In prosecution for sexual abuse of child, court's refusal to give defendant's requested instruction that State's case depended upon uncorroborated testimony of victim who did not tell anyone about event within six months after its occurrence was not error; court's instruction that time which elapsed between alleged offense and time it was reported should be considered only for purpose of assessing weight to be given testimony of victim was all that was statutorily required by this article. Waldrop v. State (App. 14 Dist.1983) 662 S.W.2d 612.

Alleged rape victim who is under legal age of consent cannot be "accomplice" witness, either as matter of law or fact, and thus, her testimony as to rape need not be corroborated to sustain conviction, regardless or whether or not she reported crime to person other than defendant within six months; overruling Nemecek v. State, 621 S.W.2d 404. Id.

6. Outcry

Testimony that five-year-old child informed others of sexual activity with his father was not hearsay and was admissible as "outcry" for purposes of statute [Vernon's Ann.Texas C.C.P. art. 38.07] providing that conviction for sexual assault or aggravated sexual assault is supportable on uncorroborated testimony of victim if victim informed any person, other than defendant, of offense within six months of date of offense. Heckathorne v. State (App. 14 Dist. 1985) 697 S.W.2d 8, review refused.

Admission of corroborative testimony of State's outcry witnesses was not error in trial for aggravated sexual abuse of a child, even though corroborative testimony was not prerequisite to prosecution. Newman v. State (App. 1 Dist.1985) 700 S.W.2d 307.

7. Uncorroborated testimony

"Uncorroborated testimony" means absence of any eyewitness other than victim of sexual offense, for purpose of allowing "outcry" testimony under statute [Vernon's Ann.Texas C.C.P. art. 38.07] providing that conviction for sexual assault or aggravated sexual assault is supportable on uncorroborated testimony of victim if victim informed any person, other than defendant, of offense within six months of date of offense and, thus, testimony that five-year-old child informed others of sexual activity with his father did not corroborate child's testimony so as to render statute inapplicable. Heckathorne v. State (App. 14 Dist.1985) 697 S.W.2d 8, review refused.

8. Age of victim

Prerequisite that victim of sexual offense 14 years of age or older inform someone of offense within six months of offense for conviction for sexual assault or aggravated sexual assault to be supportable on uncorroborated testimony of victim did not apply to victim under 14 years of age and did not preclude admission of testimony of "outcry" by victim under age of 14. Heckathorne v. State (App. 14 Dist.1985) 697 S.W.2d 8, review refused.

9. Penetration

Testimony of sexual assault victim alone is sufficient evidence of penetration to support conviction, even if victim is child. Villanueva v. State (App. 13 Dist.1985) 703 S.W.2d 244.

Art. 38.071. Testimony of child who is victim of offense

Section 1. This article applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under Chapter 21, Penal Code, as amended, or Section 43.25, Penal Code, as amended, alleged to have been committed against a child 12 years of age or younger, and applies only to the statements or testimony of that child.

Sec. 2. (a) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:

(1) no attorney for either party was present when the statement was made;

(2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;

(4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;

(5) every voice on the recording is identified;

(6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;

(7) the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and

(8) the child is available to testify.

(b) If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

Sec. 3. The court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

Sec. 4. The court may, on the motion of the attorney for any party, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under Section 3 of this article may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by Section 3. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate recording, the operator was competent, and the recording is accurate and is not altered;

(3) each voice on the recording is identified; and

(4) each party is afforded an opportunity to view the recording before it is shown in the courtroom.

Sec. 5. If the court orders the testimony of a child to be taken under Section 3 or 4 of this article, the child may not be required to testify in court at the proceeding for which the testimony was taken.

Added by Acts 1983, 68th Leg., p. 3828, ch. 599, § 1, eff. Aug. 29, 1983.

Cross References

Prior statements by witness not considered hearsay, see Rules Crim. Evidence, rule 801(e)(1)(D).

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½. Validity

Statute providing for admission into evidence of videotape recording of child sexual assault victim, Vernon's Ann.Texas C.C.P. art. 38.071, § 2, did not unconstitutionally deny confrontation and due process rights of defendant charged with aggravated sexual assault of a child, where statute gave defendant opportunity to call child as witness. Alexander v. State (App. 11 Dist. 1985) 692 S.W.2d 563, review granted.

Vernon's Ann.Texas C.C.P. art. 38.071, permitting videotape testimony of child witnesses, is unconstitutional in that it compelled defendant in sexual abuse prosecution defendant to forego either his right to confrontation or his right to remain passive since it did not command presence of child complainant a witness indispensable to State's case, but simply provided defendant a right to call complainant to testify. Long v. State (App. 5 Dist.1985) 694 S.W.2d 185, review granted.

Statute which precludes a child complainant from being required to testify in court [Vernon's Ann.Texas C.C.P. art. 38.071, § 5], insofar as it can be interpreted to allow introduction of a videotaped interview of the complainant, allows the complainant to testify without ever actually confronting the defendant face-to-face and, as such, is unconstitutional as violative of right to confrontation and cross-examination. Powell v. State (App. 5 Dist.1985) 694 S.W.2d 416, review granted.

Statute [Vernon's Ann.Texas C.C.P. art. 38.071, § 2] permitting admission of child's recorded statement provided, among other things, that child is available to testify, subjects child to full and effective cross-examination at trial, and therefore, statute is not prima facie violative of the Sixth Amendment's confrontation clause; disagreeing with *Long v. State*, 694 S.W.2d 185. Tolbert v. State (App. 1 Dist.1985) 697 S.W.2d 795.

This article is constitutional, although it may not allow defendants contemporaneous confrontation of witness as guaranteed by Sixth Amendment. Woods v. State (App. 6 Dist.1986) 718 S.W.2d 173.

1. In general

In prosecution for aggravated sexual abuse of a child, videotape of interview with child, which was recorded after complaint was filed but before trial, was made "before the proceeding begins" within meaning of this article. Jolly v. State (App. 14 Dist 1984) 681 S.W.2d 689, review granted.

Since no definitions are included within Article 38.071, which controls use of a child's videotaped statement, word used should be construed according to the connotative meaning of the words within the article itself. Lawson v. State (App. 1 Dist.1985) 697 S.W.2d 803.

2. Videotapes

In prosecution for aggravated sexual abuse of a child, videotape recording of interview of seven-year-old alleged victim was not inadmissible as hearsay, since Vernon's Ann.C.C.P. art. 38.071 dealing with admissibility of recorded statement of child who is victim of an offense explicitly authorizes admission into evidence of videotape recordings. Jolly v. State (App. 14 Dist. 1984) 681 S.W.2d 689, review granted.

Denial of defense motion to obtain a copy of videotaped interview with alleged child victim of aggravated sexual assault, to have expert witness, a psychologist, view videotape along with defense counsel, or to have expert view tape simultaneously with jury and be excused from

witness rule so that he could testify, was an abuse of discretion. Reynolds v. Dickens (App. 2 Dist.1985) 685 S.W.2d 479.

Record established that videotaped testimony of four-year-old sexual assault victim, made with aid of an anatomically correct doll, viewed either in its entirety or as to specific incriminating statements, was not rendered inadmissible by § 2(a)(4) of Art. 38.071, which bars statements made in response to leading questions. Alexander v. State (App. 11 Dist.1985) 692 S.W.2d 563, review granted.

Admission of videotaped interview of victim in trial for aggravated sexual assault did not violate Vernon's Ann.Texas C.C.P. art. 38.071, § 2(a)(5) requiring that every voice or recording be identified, where interviewer testified she was only person in room with victim, where video camera operator testified he left room, and where voices complained of were mostly unintelligible and had no relevance to interview, being picked up from nearby hallway. Caldwell v. State (App. 9 Dist.1985) 696 S.W.2d 606.

Permitting employee of Department of Human Resources who conducted videotaped interview of six-year-old sexual assault victim to interpret victim's videotaped gesticulations with doll was not reversible error since same facts were testified to by victim's mother. Crispen v. State (App. 12 Dist.1986) 702 S.W.2d 753.

Where three-year-old child was not competent to testify in prosecution of her father for aggravated sexual abuse, she was not available to testify within meaning of Vernon's Ann.Texas C.C.P. art. 38.071, and thus her videotaped statement was not admissible. Rhea v. State (App. 6 Dist.1985) 705 S.W.2d 165.

If minor victim knows what it means to tell the truth and understands that she has an obligation to do so, she is competent to testify, and videotape of that testimony is admissible into evidence if it otherwise complies with this article. Woods v. State (App. 6 Dist.1986) 713 S.W.2d 173.

3. Oath

Videotaped recording of interview with seven-year-old child, who was alleged victim of sexual abuse, was not inadmissible due to failure of child to be placed under oath before recording was made, since child was thoroughly questioned by interviewer as to her appreciation of the truth and what happens to persons who do not tell it and she promised to tell truth to interviewer. Jolly v. State (App. 14 Dist.1984) 681 S.W.2d 689, review granted.

Fact that victim was not placed under oath prior to videotaped interview wherein victim reported alleged sexual abuse incident to police officer was not matter for jury's consideration in trial for aggravated sexual abuse of a child. Newman v. State (App. 1 Dist.1985) 700 S.W.2d 307.

In order to understand obligation of oath, child need not know the meaning of "obligation" or "oath"; obligation to tell the truth may take many forms, but child must recognize a requirement to tell the truth and know that some penalty attaches when the truth is not told. Rhea v. State (App. 6 Dist.1985) 705 S.W.2d 165.

Testimony of minor victim was sufficient to support convictions for aggravated sexual assault of minor, although no formal oath was administered before videotaped interview. Woods v. State (App. 6 Dist.1986) 713 S.W.2d 173.

4. Indictment, information or complaint

Although one count of indictment in prosecution for aggravated sexual abuse of a child alleged that victim was younger than 14 years and two other counts stated victim's age as younger than 17 years, such allegations did not preclude admissibility of videotape recording of interview with victim under Vernon's Ann.C.C.P. art. 38.071 authorizing admission into evidence of recordings of statements by victims 12 years of age or younger, since allegations in indictment were made in order to satisfy requisites of crime under V.T.C.A. Penal Code § 21.11 and former V.T.C.A. Penal Code §§ 21.05 and 21.11 (see, now, V.T.C.A. Penal Code § 22.021) and since State, in its pretrial motion for court to rule on admissibility of recording, alleged that victim was a child of seven years of age, without contradiction from defendant. Jolly v. State (App. 14 Dist.1984) 681 S.W.2d 689, review granted.

5. Leading questions

In prosecution for aggravated sexual abuse, small percentage of leading questions asked seven-year-old victim during videotaped interview did not require exclusion of 40-minute interview. Jolly v. State (App. 14 Dist.1984) 681 S.W.2d 689, review granted.

Videotaped statement by seven-year-old alleged sexual assault victim was not the product of leading questions calculated to produce a particular statement so as to be inadmissible under article 38.071, § 2(a), which provides that recording of oral statement of child is admissible into evidence if certain conditions are met, where most of leading questions pertained only to details of acts already testified to by child in response to nonleading questions. Mallory v. State (App. 6 Dist.1985) 699 S.W.2d 946.

Leading minor witness will invalidate videotaped testimony only if, taken as a whole, statement is a product of leading questions. Woods v. State (App. 6 Dist.1986) 713 S.W.2d 173.

Videotaped testimony of minor victim, as a whole, was not the product of leading questions calculated to produce a particular statement; therefore, videotape was not invalidated. Woods v. State (App. 6 Dist.1986) 713 S.W.2d 173.

Note 6

6. Confrontation and cross-examination

Defendant charged with aggravated sexual abuse of child could not complain on appeal that admission of videotaped interview of victim by child placement worker violated his right to confront and cross-examine victim, where victim, a seven-year-old child, was available at trial but defendant chose not to call her to witness stand. Jolly v. State (App. 14 Dist.1984) 681 S.W.2d 689, review granted.

Statutory videotaped child testimony procedure used in prosecution for sexual abuse of a child, permitting complainant to be taped in conversation with therapist and forbidding presence of defendant or counsel, violated defendant's protections under confrontation clause since it denied him face to face confrontation and cross-examination, testimony was not under oath, and protective, nontrial, nonadversarial setting may have distorted complainant's credibility, although jury could evaluate demeanor to extent permitted by videotape and complainant had stated she understood difference between truth and falsehood and that a lie would get her into trouble. Long v. State (App. 5 Dist.1985) 694 S.W.2d 185, review granted.

Defendant's right to call child complainant in sexual abuse prosecution and cross-examine her was not sufficient to obviate or rectify the constitutional error in statutory procedure for videotaped testimony which violated defendant's right to confrontation, although belated cross-examination can sometimes serve as an adequate substitute for confrontation, since statute guarantees neither a simultaneous nor effective contemporaneous right to cross-examine child; disagreeing with *Jolly v. State*, 681 S.W.2d 689. Long v. State (App. 5 Dist.1985) 694 S.W.2d 185, review granted.

Admission into evidence of videotaped testimony of rape complainant made without presence of defendant or counsel was not violation of defendant's right to confrontation, particularly where complainant was subsequently called to testify at trial; disagreeing with *Long v. State*, 694 S.W.2d 185 (Tex.App.-Dallas). Whittemore v. State (App. 9 Dist.1986) 712 S.W.2d 607.

When the state offered child victim's Article 38.071 videotaped statement into evidence in prosecution for aggravated sexual assault the accused was entitled to cross-examine the child, either after completion of presentation of the statement or at the earliest practical moment thereafter; it was error to require accused to delay cross-examination until presentation of defense evidence. Lawson v. State (App. 1 Dist. 1985) 697 S.W.2d 803.

7. Review

Defendant's objection to admissibility of videotape of interview with seven-year-old alleged victim of sexual abuse on ground that child's statements were made in response to leading questions was not preserved for review, since defendant cited no questions in particular; however, Court of Appeals would elect to address issue due to fact that case was one of first impression under Vernon's Ann.C.C.P. art. 38.071 dealing with admissibility of recording of statement by child who is victim of offense. Jolly v. State (App. 14 Dist.1984) 681 S.W.2d 689, review granted.

Defendant could not complain on appeal that admission of videotaped statements of alleged sexual abuse victim abridged defendant's Sixth Amendment right to confront witnesses against him in trial for aggravated sexual abuse of a child, where trial court explicitly made victim available to defense for confrontation and cross-examination, but defendant chose not to call victim to the stand. Newman v. State (App. 1 Dist.1985) 700 S.W.2d 307.

8. Age

In prosecution for aggravated sexual abuse of a child, testimony by victim's mother that victim was four years old, and victim's statement on videotape that she was "four," was sufficient to establish that she was 12 years of age or younger, as required by Art. 38.071 for admission of videotaped statements. Alexander v. State (App. 11 Dist.1985) 692 S.W.2d 563, review granted.

Videotape of interview with 11-year-old complainant was admissible under Vernon's Ann. Texas C.C.P. art. 38.071, which applies in prosecution of offense alleged to have been committed against a child 12 years of age or younger, though the indictment did not allege that complainant was under 12, where complainant testified that she was 11 years old before court admitted the videotape. Tolbert v. State (App. 1 Dist.1985) 697 S.W.2d 795.

Three-year-old child did not possess sufficient intellect to relate transactions about which she was questioned when placed under oath as a witness, and thus was not competent to testify in prosecution of her father for aggravated sexual assault. Rhea v. State (App. 6 Dist.1985) 705 S.W.2d 165.

There is no precise age limit which determines competency of child witness. Rhea v. State (App. 6 Dist.1985) 705 S.W.2d 165.

9. Stipulations

Statute requiring that an agreement to stipulate evidence be in writing [Vernon's Ann.Texas C.C.P. art. 1.15] was not applicable in jury cases and, hence, was not applicable in prosecution before jury when parties orally stipulated to introduction of a videotaped interview of child complainant. Powell v. State (App. 5 Dist.1985) 694 S.W.2d 416, review granted.

10. Due process

Videotape statute [Vernon's Ann.Texas C.C.P. art. 38.071], as applied, may violate due process where the procedures used do not adequately insure fundamental fairness and therefore, in this context, the procedures used in making the videotape of interview with child complainant

may be reviewed to determine whether the evidence is sufficiently reliable to comport with admission of the videotape. Tolbert v. State (App. 1 Dist.1985) 697 S.W.2d 795.

11. Proceedings

The term "proceeding," as used in Vernon's Ann.Texas C.C.P. art. 38.071, § 2(a), pertaining to admissibility of videotaped interview with victim 12 years of age or younger, made before the proceeding begins, encompasses the entire legal process from the initiation of the "criminal action"; declining to follow *Jolly v. State*, 681 S.W.2d 689. Lawson v. State (App. 1 Dist.1985) 697 S.W.2d 799.

Term "proceeding," in statute controlling use of a child's videotaped statement, encompasses entire legal process from initiation of the "criminal action"; declining to follow *Jolly v. State*, 681 S.W.2d 689. Lawson v. State (App. 1 Dist. 1985) 697 S.W.2d 803.

12. Time of recording

Trial court erred in admitting videotaped statement of child victim which was made under procedures of Vernon's Ann.Texas C.C.P. art. 38.071, § 2(a), which applies to recordings made before proceeding begins, where the videotape was made only after defendant was charged in the case. Lawson v. State (App. 1 Dist.1985) 697 S.W.2d 799.

Requirement of Article 38.071, which controls use of a child's videotaped statement, that recording be made before the "proceeding" begins was not satisfied where child's videotaped statement was made 51 days after commencement of aggravated sexual assault proceeding, i.e., 51 days after defendant's arrest. Lawson v. State (App. 1 Dist.1985) 697 S.W.2d 803.

Under article 38.071, which provides that recording of oral statement of child made before proceeding begins is admissible, the language "before the proceeding begins" refers to beginning of trial, and thus, videotaped statement of child made after complaint was filed but before trial satisfied such statutory requirement. Mallory v. State (App. 6 Dist.1985) 699 S.W.2d 946.

13. Competence

Competency requirements of Article 38.06 apply to Article 38.071, which controls use of a child's videotaped statement, and, hence, a witness making a videotaped statement must be competent to testify, both at time of making the videotape and at time of trial. Lawson v. State (App. 1 Dist.1985) 697 S.W.2d 803.

14. Purpose

Sections one and two of Article 38.071 [illegible] controls use of a child's videotaped [illegible] were intended as a statutory method for [illegible] a videotaped statement of a child as an investigatory aid and to allow the statement to be [illegible] evidence if the statutory prerequisites are complied with. Lawson v. State (App. 1 Dist.) 697 S.W.2d 803.

15. Alteration

Fact that second videotape of statement of seven-year-old alleged sexual assault victim, made by interviewer in order to comply with statutory predicates not satisfied in first tape, did not constitute an alteration of the [illegible] tion of requirement, under article 38.071 § 2(a)(3), that, in order to be admissible, recording of oral statement of child must not have been altered. Mallory v. State (App. 1 Dist.) 699 S.W.2d 946.

16. Counsel

Fact that defendant was not represented by counsel at time of videotaped interview with victim reported alleged incident of sexual abuse to police officer did not preclude admission of videotaped testimony in trial for aggravated sexual abuse of a child where defendant had been charged or arrested and was in custody at time of videotaped interview. Newman v. State (App. 1 Dist. 1985) 700 S.W.2d 307.

17. Waiver

Defendant waived his objection [illegible] constitutionally questionable statute, Art. 38.071 § 2, which authorizes admission of [illegible] oral statement by child victim, on grounds of violation of right to confrontation, by failing to object at trial, where defense counsel affirmatively volunteered that he had seen tape and had no objections, indicating that decision not to object was a tactical decision, and where there was no long-established practice sanctioned by statute that would have made objection to constitutionality of statute, which was subsequently held unconstitutional, either novel or futile. Norwood v. State (App. 5 Dist.1986) 70[illegible] S.W.2d [illegible], review refused.

18. Quality of recording

No harm could be shown in trial court's exercise of discretion to admit videotaped testimony of rape complainant, challenged as unintelligible and garbled where complainant subsequently testified before jury. [illegible] State (App. 9 Dist.1986) 712 S.W.

Art. 38.072. Hearsay statement of child abuse victim

Sec. 1. This article applies to a proceeding in the prosecution of an offense [illegible] of the following provisions of the Penal Code, if committed against a child [illegible] or younger:

(1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);

(2) Section 25.02 (Incest);

(3) Section 25.06 (Solicitation of a Child, added by Chapter 413, Acts of the 65th Legislature, Regular Session, 1977); or

(4) Section 43.25 (Sexual Performance by a Child).

Sec. 2. (a) This article applies only to statements that describe the alleged offense that:

(1) were made by the child against whom the offense was allegedly committed; and

(2) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense.

(b) A statement that meets the requirements of Subsection (a) of this article is not inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:

(A) notifies the adverse party of its intention to do so;

(B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and

(C) provides the adverse party with a written summary of the statement;

(2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child testifies or is available to testify at the proceeding in court or in any other manner provided by law.

Added by Acts 1985, 69th Leg., ch. 590, § 1, eff. Sept. 1, 1985.

Art. 38.08. [710] [790] [770] Defendant may testify

Notes of Decisions

4. Procedure generally

When a defendant takes stand as witness he waives his right to silence and is subject to same rules as any other witness. Bridges v. State (App.1981) 624 S.W.2d 718, review refused, certiorari denied 102 S.Ct. 2304, 456 U.S. 1010, 73 L.Ed.2d 1306.

When defendant takes stand, he is treated in every respect as any other witness except where some statute forbids certain matters to be used against him, such as under this article his failure to testify at former hearing. Ricondo v. State (App. 4 Dist.1983) 657 S.W.2d 439.

20. Examination of defendant generally

Right of self-incrimination does not end with jury finding defendant guilty. Brown v. State (Cr.App.1981) 617 S.W.2d 234.

22. —— Scope of cross-examination

As at guilt-innocence stage of trial, if defendant exercises his right to testify at punishment hearing, he is subject to same rules governing examination and cross-examination as any other witness; he may be contradicted, impeached, discredited, attacked, sustained, bolstered up, made to give evidence against himself, cross-examined as to new matter, and treated in every respect as any other witness testifying, except where there are overriding constitutional or statutory prohibitions. Brown v. State (Cr.App.1981) 617 S.W.2d 234.

36. —— Matters raised by defendant, cross-examination

Prosecutor's question to defendant on cross-examination which asked what prevented defendant from telling magistrate at bond hearing that defendant had nothing to do with crime was not impermissible comment on defendant's assertion of right to remain silent where defendant on direct examination had specifically complained of prior lack of opportunity to tell his version of how offense occurred. Ricondo v. State (App. 4 Dist.1983) 657 S.W.2d 439.

99. Counsel's reference to failure to testify— In general

Comment on failure of accused to testify on his own behalf is a contravention of federal constitutional guarantee against self-incrimination contained in the Sixth Amendment, made applicable to the states by the Fourteenth Amendment. Stafford v. State (Cr.App.1978) 578 S.W.2d 394.

In order for comment made by prosecution to violate this article language used when viewed from standpoint of jury must make the inference that comment has reference to defendant's failure to testify a necessary one. Id.

Failure of accused to testify on his own behalf cannot be made subject of comment by prosecution. Id.

Before an argument of prosecution will constitute comment on failure of accused to testify, language used must be looked to from standpoint of jury, and implication that language used had reference to accused must be necessary one. Campos v. State (Cr.App.1979) 589 S.W.2d 424.

In order to constitute prohibited comment on an accused's failure to testify, implication that language used had reference to accused's failure to testify must be a necessary one, it is not sufficient that language might be construed as implied or indirect allusion thereto. Rogers v. State (Cr.App.1980) 598 S.W.2d 258.

Prosecutor's argument, when taken in context in which it was made, merely indicated that prosecutor was making reasonable deductions from the evidence as to defendant's intent, and thus argument did not constitute prohibited comment on defendant's failure to testify. Id.

Indirect comment by prosecutor that labels certain evidence as uncontroverted, unrefuted or uncontradicted is impermissible comment on defendant's failure to testify if only defendant could offer the rebutting evidence. Todd v. State (Cr.App.1980) 598 S.W.2d 286.

In order to constitute impermissible comment on accused's failure to testify, implication that language used by the prosecutor had reference to such failure must be a necessary one; it is not sufficient that language might be construed as implied or indirect allusion to accused's invocation of Fifth Amendment right to silence. Id.

This article prohibited comment on defendant's failure to testify at pretrial hearings about exculpatory matters to which he testified at trial, even though he testified at pretrial hearings about other matters. Franklin v. State (Cr.App. 1978) 606 S.W.2d 818, appeal after remand 693 S.W.2d 420, certiorari denied 106 S.Ct. 1238, 99 L.Ed.2d 346.

Fifth Amendment guarantees an accused right to remain silent during his trial and prevents prosecution from commenting on defendant's exercise of that right. Will[illegible] v. State (Cr.App 1980) 607 S.W.2d 577.

Defendant in criminal action shall be permitted to testify in his own behalf, but failure of accused to testify at his trial, at guilt-innocence stage, shall not be taken as circumstance against him nor shall it be alluded to or commented on by counsel in cause. Brown v. State (Cr.App 1981) 617 S.W.2d 234.

In order to constitute violation of this article, language must be either manifestly intended, or of such a character that jury would naturally and necessarily take it to be a comment on the defendant's failure to testify. Angel v. State (Cr.App.1982) 627 S.W.2d 424.

Insanity defense does not permit state to imply during argument that if defendant is truly innocent he would not remain silent. Id.

Failure of accused to testify may not be subject of comment by prosecution. Barber v. State (App.1981) 628 S.W.2d 104, review refused, certiorari denied 103 S.Ct. 164, 459 U.S. 874, 74 L.Ed.2d 136.

Comment by prosecution on failure of accused to testify violates both privilege against self-incrimination and specific mandate of code of criminal procedure that failure of any defendant to testify shall not be taken as circumstance against him nor be alluded to or commented on by counsel. Id.

A prosecutor's argument is not improper reference to defendant's failure to testify unless it must necessarily be so considered when viewed from standpoint of jury. Thomas v. State (App. 1981) 629 S.W.2d 112, affirmed 638 S.W.2d 451.

It is basic and fundamental constitutional and statutory law that failure of an accused to testify during his trial may not be subject of direct or indirect comment by prosecuting attorney during his final jury argument. Garrett v. State (Cr.App.1982) 632 S.W.2d 350.

In determining whether the State's argument constitutes improper comment on defendant's failure to testify, reviewing court must view the statement from the standpoint of the jury and conclude that the language was either manifestly intended, or of such character that the jury would naturally and necessarily take it to be a comment on defendant's failure to testify. The language must be more than an implied and indirect allusion to defendant's silence. Brown v. State (App.1982) 639 S.W.2d 505, review refused.

In considering whether the prosecution commented on the failure of the accused to testify the language used must be looked at from the standpoint of the jury, and the implication that the language used had reference to the accused's failure to testify must be a necessary one. Green v. State (App.1982) 640 S.W.2d 64[illegible].

In considering whether the prosecution commented on the failure of the accused to testify, test is whether language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the accused's failure to testify. Id.

Prosecution cannot comment on the failure of an accused to testify. Id.

In order to violate right against self-incrimination under U.S.C.A. Const.Amend. 5 or this article prohibiting comment on defendant's failure to testify, prosecutor's language, when viewed from jury standpoint, must be manifestly intended or of such character that jury would necessarily and naturally take it as comment on accused's failure to testify; it is not sufficient that language might be construed as implied or indirect allusion. Banks v. State (Cr.App.1982) 64[illegible] S.W.2d 129, certiorari denied 104 S.Ct. 259, 464 U.S. 904, 78 L.Ed.2d 244.

Comment on accused's failure to testify encroaches upon protection accorded by U.S.C.A. Const.Amend. 5, made applicable to states by virtue of U.S.C.A. Const.Amend. 14, and also violates both Const. Art. 1, § 10, and this article. Martinez v. State (App.1982) 644 S.W.2d [illegible].

Sec. 12.45.048. Exclusion of public from trial during testimony by young victim of sexual offense. (a) After notice to the defendant, the state may apply to the court for an order excluding the public from the courtroom during the testimony of a child who is the alleged victim of a violation of AS 11.41.410 — 11.41.455. The order shall be granted if the court finds that the child is 16 years of age or younger at the time of the trial.

(b) If the public is excluded from the trial under (a) of this section, the testimony given during the time the public is excluded shall be available to the public upon request within a reasonable time sufficient to allow preparation of a tape recording or transcript of the testimony.

(c) In this section "public" means all persons except

(1) the judge presiding over the trial;

(2) the members of the jury;

(3) the defendant and the attorney and an investigator for the defendant;

(4) the prosecuting attorney and an investigating officer for the state;

(5) the parents or legal guardians of the child;

(6) a guardian ad litem or attorney for the child;

(7) in the discretion of the court, an adult for whom the child has developed a significant emotional attachment who can provide emotional support for the child while the child testifies;

(8) court personnel, including those essential for taking the testimony. (§ 2 ch 67 SLA 1982)

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crime.[8] He or she may be found incompetent to testify,[9] or upon testifying may be unable to recall crucial details[10] or to relate them to the jury.[11] Children are easily confused by cross-examination.[12] They are reluctant witnesses[13] and sometimes recant, disclaiming prior testimony to absolve an assailant who is often a relative or family friend.[14] And parents sometimes decline to press charges rather than subject their abused child to the ordeal of extended litigation requiring endless repetition of a painful and best-forgotten episode.[15]

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[8] *See* Stevens & Berliner, *Special Techniques for Child Witnesses*, in THE SEXUAL VICTIMOLOGY OF YOUTH 246, 248 (L. Schultz ed. 1980).

[9] *See infra* p. 818.

[10] *See* A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 204–05 (1979) (arguing that children possess inferior long-term and short-term memories). Memory is an important factor given the span of time separating the alleged abusive incident from trial. *See* Stevens & Berliner, *supra* note 8, at 248 (noting that average time for adjudication of child sex abuse cases in Seattle is six months). *But see* Melton, *Children's Competency To Testify*, 5 LAW & HUM. BEHAV., Spring 1981, at 73, 76–77 (citing studies showing that children remember specific facts as well as adults do).

[11] "A four-year-old doesn't know dates. You're lucky if you can get 'around Christmas' or 'around my birthday.' Ten 'I don't knows' or 'I don't remembers' in a row make the child sound as though he or she doesn't know what he's talking about." N.Y. Times, Sept. 23, 1984, § 4, at 8, col. 1 (quoting Linda Fairstein, chief of the sex crimes prosecution unit of the New York County District Attorney's Office).

[12] At the trial of Robert and Lois Bentz, accused of participating with 22 other adults and one teenager in two child sex abuse rings in the small town of Jordan, Minnesota, "[t]he defense team relied on traditional courtroom tactics to shake the children's stories and weaken their credibility with the jury. They badgered them in an effort to confuse them about dates and places. They accused them of lying and leaped onto the least inconsistency." The Bentzes were acquitted on all counts. N.Y. Times, Sept. 23, 1984, § 4, at 8, col. 1. All charges against other defendants were subsequently dropped. N.Y. Times, Oct. 16, 1984, at A18, col. 1. Some of the former defendants have formed a nationwide group called Victims Of Child Abuse Laws (VOCAL) and have filed suits against the county and the county attorney for damages exceeding $150 million. L.A. Times, Dec. 29, 1984, at 1, col. 4, pt. I, 27, col. 4.

[13] At the Bentz trial, *see supra* note 12, all six child witnesses, aged six to twelve, "seemed reluctant and embarrassed to speak about what they said had occurred. They had to be coaxed into describing sex acts. They often wept." N.Y. Times, Sept. 3, 1984, at 10, col. 1.

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> When the family denies that incest has occurred and tries to get their child to reverse his or her statements to the police and others, the pressure on the child victims of incest becomes enormous. . . . In many instances, the family pressure becomes too strong for the child to bear and before a court proceeding occurs, the incest victim capitulates to the pressure and denies that any sexual relations ever occurred . . . . It must be emphasized that in incest cases, there is frequently a bond of affection that exists between the child and the incest partner. The child, therefore, experiences ambivalence in that he or she does not want the parent punished, but rather wishes only that the sexual relations be discontinued.

E. Weiss & R. Berg, Child Victims of Sexual Assault: Impact of Court Procedures 10–12 (paper presented at 1980 annual meeting of the American Academy of Child Psychiatry).

Of 583 cases of child sex abuse examined in one survey, the offender was a family member in 47% of the cases, otherwise an acquaintance of the child in 42%, and a stranger in only 8%. *See* Conte & Berliner, *Sexual Abuse of Children: Implications for Practice*, J. CONTEMP. SOC. WORK 601, 603 (198

[15] "s no probl[illegible] cases where we have lost victims when the parents have said

to be confronted with the witnesses against him."[18] The Supreme Court has defined standards, examined in Part I below, that limit the admission of out-of-court statements against criminal defendants. The drafting of hearsay and videotaping statutes and the review they have encountered in state courts, considered in Part II, reflect concern for these standards. Nevertheless, as argued in Part III, current hearsay and videotaping statutes fail to meet constitutional demands. The hearsay statutes create too loose a test for finding the child "unavailable" to testify and thus deprive the defendant in many cases of any chance to cross-examine his accuser. Moreover, the statutes provide the trial judge too little guidance in weighing the sufficiency of evidence offered to corroborate the child's out-of-court statements. The videotaping statutes grant the prosecutor advantages and options not enjoyed in other trials and fail to set any standards regarding the technical quality of the videotapes. These problems, however, are not intractable. An integrated legislative scheme like the one proposed in Part IV could remedy the constitutional shortcomings of present hearsay and videotaping statutes while achieving those statutes' important aims: buttressing the state's case in child sex abuse prosecutions and protecting the child from further victimization, this time by the judicial process.

I. Limitations Placed by the Confrontation Clause on the Admission of Hearsay

Both hearsay and videotaping statutes permit the admission at trial of "hearsay" evidence: out-of-court statements offered to prove the truth of the matter asserted.[19] If literally applied, the sixth amendment's guarantee of confrontation would bar the admission of all hearsay evidence unless the out-of-court declarant testified at trial.[20] Such a literal view would prevent the mother of a sexually abused child from repeating in court the child's first, unrehearsed account of the abusive act. Even the child's videotaped testimony, given under oath and subject to cross-examination, would be barred as inadmissible hearsay.[21] But courts have never interpreted the confrontation clause to exclude all out-of-court statements.[22] As the Supreme Court ruled in 1895 in *Mattox v. United States*,[23] the general prohibition of

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adequate "indicia of reliability."[35] The state can demonstrate reliability by showing either that the evidence falls within a "firmly rooted" hearsay exception[36] or that it bears "particularized guarantees of trustworthiness."[37]

II. Compatibility of Hearsay and Videotaping Statutes with the Confrontation Clause: Legislative Drafting and Judicial Review

A. Hearsay Statutes

At least seven states have enacted hearsay statutes since 1982.[38] The language of the Washington statute, the model for all but one of the others,[39] reflects a genuine attentiveness to the guidelines established in *Roberts*:

> 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 . . . if:
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> (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

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[35] *Roberts*, 448 U.S. at 66.

[36] *Id.* The statements of child victims in sex abuse cases have often been admitted under certain traditional exceptions to the hearsay rule. *See* Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1753–63 (1983). Most commonly employed is the "spontaneous exclamation" or "excited utterance" exception, which allows admission of statements made by a person still under the stress of excitement caused by a startling event. Recognizing that children often delay in reporting instances of sex abuse, many state courts have extended the allowable time lapse in cases of child sex abuse, admitting statements made several hours or even days after the event. *See, e.g.*, State v. Noble, 342 So. 2d 170, 172–73 (La. 1977); Smith v. State, 6 Md. App. 581, 586–88, 252 A.2d 277, 280–81 (1969). Besides straining the rationale of the excited utterance exception, such extensions still exclude many statements made by children weeks or months later.

[37] *Roberts*, 448 U.S. at 66.

[38] *See* COLO. REV. STAT. § 13-25-129 (Supp. 1984) (enacted 1983); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1984) (enacted 1984); KAN. STAT. ANN. § 60-460(dd) (1983) (enacted 1982); Act of Apr. 26, 1984, ch. 588, § 4, 1984 Minn. Sess. Law Serv. 415–16 (West) (to be codified at MINN. STAT. § 595.02(3)); S.D. CODIFIED LAWS ANN. § 19-16-38 (Supp. 1984) (enacted 1984); UTAH CODE ANN. § 76-5-411 (Supp. 1983) (enacted 1983); WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1984) (enacted 1982).

For analyses of particular hearsay statutes, see McNeil, *The Admissibility of Child Victim Hearsay in Kansas: A Defense Perspective*, 23 WASHBURN L.J. 265 (1984), and Note, *Sexual Abuse of Children — Washington's New Hearsay Exception*, 58 WASH. L. REV. 813 (1983).

[39] Only the Kansas statute differs substantially. It applies *only* if the child victim is not available to testify at trial, and it applies to *any* crime in which the victim is a child. *See* KAN. STAT. ANN. § 60-460(dd) (1983).

CORRECTION

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NOTES

THE TESTIMONY OF CHILD VICTIMS IN SEX ABUSE PROSECUTIONS: TWO LEGISLATIVE INNOVATIONS

One in five females and one in eleven males are sexually victimized as children.[1] Such troubling statistics have grown all too familiar as local and national media have focused attention on the problem of child sex abuse.[2] The McMartin Preschool scandal[3] and others that followed[4] have quickened public sensitivity to the issue and stimulated legislative activity in statehouses across the country. Many state legislatures have acted with remarkable swiftness to stiffen penalties for child sex abuse.[5] But the effectiveness of stiffer penalties is limited by strikingly low conviction rates for alleged child sex abusers.[6] Many cases go unreported,[7] and those that are reported prove exceptionally difficult to prosecute. The child is usually the only witness to the

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[1] *See* D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 53 (1979) (citing survey results).

[2] *See, e.g.*, *Studies Find Sexual Abuse Of Children Is Widespread*, N.Y. Times, May 11, 1982, at C1, col. 1; *Child Sexual Abuse: What Your Children Should Know* (PBS Sept. 1984) (television program produced by WTTW, Chicago); *Silent Shame: The Sexual Abuse of Children* (NBC Aug. 25, 1984) (television program).

[3] In September 1983, charges of sexual abuse were leveled at an employee of the Virginia McMartin Preschool in Manhattan Beach, California. Six other employees were later arrested and charged with 208 counts of child molestation and conspiracy involving 42 children. *See* NAT'L. L.J., Sept. 10, 1984, at 1, col. 1. Alleged victims have testified that the defendants mutilated small animals as a warning to the children not to tell about the sexual acts. *See* N.Y. Times, Feb. 2, 1985, at 22, col. 1. Spectators and reporters viewed the testimony via closed-circuit television. *See* N.Y. Times, Jan. 23, 1985, at A9, col. 1.

[4] *See* Boston Herald, Sept. 14, 1984, at 1, col. 1, 4, col. 1 (reporting arrests of staff members of day-care centers in Malden, Massachusetts, and the Bronx on suspicion of child sex abuse). Federal legislation passed in 1984 calls for FBI and local background checks of child-care operators, teachers, and employees. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 401(c)(2)(A), 98 Stat. 1837, 2196.

[5] *See, e.g.*, COLO. REV. STAT. § 18-3-405 (Supp. 1984) (amended in 1983 to increase from four to eight years the maximum penalty for sexual assault on a child by a person in a position of trust, *see* Act of June 15, 1983, ch. 197, § 2, 1983 Colo. Sess. Laws 693).

[6] In a study of 250 cases of child sex abuse reported to New York City protective services in 1966 and 1967, there were 173 arrests, 53 convictions, and 23 offenders sentenced to prison. (Fifteen cases were still pending when the study was published, and information was not available on the disposition of eight cases.) *See* V. DE FRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS 26, 190 (1969). *But see* Bureau of Justice Statistics, U.S. Dep't of Justice, Tracking Offenders: The Child Victim 1, 2 (1984) (bulletin citing "initial data" from six states showing that about one-half of all those arrested on charges of sexually abusing children are convicted, compared to one-third of all felony arrestees).

[7] In two out of three cases, the child never reports the abusive act. *See* D. FINKELHOR, *supra* note 1, at 106 (citing survey results). Yet reports of child sex abuse have increased 652% since 1976, exceeding 56,000 cases annually in 1982. *See* Boston Globe, Nov. 26, 1984, at 41, col. 3.

crime.[8] He or she may be found incompetent to testify,[9] or upon testifying may be unable to recall crucial details[10] or to relate them to the jury.[11] Children are easily confused by cross-examination.[12] They are reluctant witnesses[13] and sometimes recant, disclaiming prior testimony to absolve an assailant who is often a relative or family friend.[14] And parents sometimes decline to press charges rather than subject their abused child to the ordeal of extended litigation requiring endless repetition of a painful and best-forgotten episode.[15]

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[12] At the trial of Robert and Lois Bentz, accused of participating with 22 other adults and one teenager in two child sex abuse rings in the small town of Jordan, Minnesota, "[t]he defense team relied on traditional courtroom tactics to shake the children's stories and weaken their credibility with the jury. They badgered them in an effort to confuse them about dates and places. They accused them of lying and leaped onto the least inconsistency." The Bentzes were acquitted on all counts. N.Y. Times, Sept. 23, 1984, § 4, at 8, col. 1. All charges against other defendants were subsequently dropped. N.Y. Times, Oct. 16, 1984, at A18, col. 1. Some of the former defendants have formed a nationwide group called Victims Of Child Abuse Laws (VOCAL) and have filed suits against the county and the county attorney for damages exceeding $150 million. L.A. Times, Dec. 29, 1984, at 1, col. 4, pt. I, 27, col. 4.

[13] At the Bentz trial, *see supra* note 12, all six child witnesses, aged six to twelve, "seemed reluctant and embarrassed to speak about what they said had occurred. They had to be coaxed into describing sex acts. They often wept." N.Y. Times, Sept. 3, 1984, at 10, col. 1.

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> When the family denies that incest has occurred and tries to get their child to reverse his or her statements to the police and others, the pressure on the child victims of incest becomes enormous. . . . In many instances, the family pressure becomes too strong for the child to bear and before a court proceeding occurs, the incest victim capitulates to the pressure and denies that any sexual relations ever occurred . . . . It must be emphasized that in incest cases, there is frequently a bond of affection that exists between the child and the incest partner. The child, therefore, experiences ambivalence in that he or she does not want the parent punished, but rather wishes only that the sexual relations be discontinued.

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[15] "It's no problem listing cases where we have lost victims when the parents have said

Faced with growing public awareness of the difficulties of prosecuting child sex abuse cases, state legislatures have acted to strengthen the prosecutor's hand while easing the burden that the judicial system places on the child victim. States have broadened their definitions of child sex abuse, extended statutes of limitations, and eased various rules of procedure and evidence.[16] Two legislative innovations, child hearsay statutes and videotaping statutes, have been most prominent. The hearsay statutes create a special exception to the hearsay rule for statements made by child victims of sex abuse, enabling the child's mother or doctor, for instance, to repeat in court the child's description of the abusive acts. The videotaping statutes allow the child's testimony to be preserved on videotape for presentation to the jury at trial, thus sparing the child repeated appearances in court and permitting the child to withdraw quickly from the judicial process. Both hearsay and videotaping statutes have proved highly popular in state legislatures, typically winning rapid, bipartisan approval.[17] Their emotional appeal demands that they be closely scrutinized for possible infringements of defendants' constitutional rights. Political passion often obscures the reality that as the offensiveness of the crime increases, so too do prosecutorial zeal, the ignominy of conviction, and the need to guard against wrongful prosecution.

Both hearsay and videotaping statutes may deprive defendants of the opportunity to confront their accusers face to face before a jury. Arguably such statutes violate the sixth amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . .

. . . , 'You do what you want to, but I'm taking my kid out of the system.'" Telephone interview with John Lynch, legislative advocate for the Los Angeles County District Attorney's Office (Sept. 13, 1984).

Many observers have described the ordeal that confronts child sex abuse victims in the criminal justice system. *See, e.g.*, Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 647–56 (1982); *The Jeopardy of Children on the Stand*, N.Y. Times, Sept. 23, 1984, § 4, at 8, col. 1.

[16] *See, e.g.*, Act of Sept. 25, 1984, ch. 1423, § 1, 1984 Cal. Legis. Serv. 5344 (West) (to be codified at CAL. EVID. CODE § 767(b)) (allows leading questions to be asked of child witnesses); WASH. REV. CODE ANN. §§ 9A.64.020, 9A.04.080 (Supp. 1984) (amended in 1982 to expand statutory definition of incest and to extend the statute of limitations for child sex abuse prosecutions, *see* Act of Apr. 1, 1982, ch. 129, §§ 1, 3, 1982 Wash. Laws 559–60); WIS. STAT. ANN. §§ 950.055(2)(a), 971.105 (West Supp. 1984) (enacted in 1984 to require that legal proceedings be conducted in language children can understand and that courts and prosecutors ensure a speedy trial to minimize the time the child spends in the court system, *see* Act of Apr. 16, 1984, Act 197, §§ 5, 7, 1984 Wis. Legis. Serv. 1786 (West)).

[17] The Washington hearsay statute, for example, passed the state house of representatives 93 to 0, WASH. HOUSE J., Mar. 5, 1982, at 711, and the state senate 47 to 1, WASH. SENATE J., Mar. 8, 1982, at 1365. United States Senator Paula Hawkins has introduced federal legislation that would further enhance the political popularity of videotaping and hearsay statutes by creating financial incentives for states to enact them. *See* Children's Justice Act, S. 1, 99th Cong., 1st Sess. (1985).

to be confronted with the witnesses against him."[18] The Supreme Court has defined standards, examined in Part I below, that limit the admission of out-of-court statements against criminal defendants. The drafting of hearsay and videotaping statutes and the review they have encountered in state courts, considered in Part II, reflect concern for these standards. Nevertheless, as argued in Part III, current hearsay and videotaping statutes fail to meet constitutional demands. The hearsay statutes create too loose a test for finding the child "unavailable" to testify and thus deprive the defendant in many cases of any chance to cross-examine his accuser. Moreover, the statutes provide the trial judge too little guidance in weighing the sufficiency of evidence offered to corroborate the child's out-of-court statements. The videotaping statutes grant the prosecutor advantages and options not enjoyed in other trials and fail to set any standards regarding the technical quality of the videotapes. These problems, however, are not intractable. An integrated legislative scheme like the one proposed in Part IV could remedy the constitutional shortcomings of present hearsay and videotaping statutes while achieving those statutes' important aims: buttressing the state's case in child sex abuse prosecutions and protecting the child from further victimization, this time by the judicial process.

I. Limitations Placed by the Confrontation Clause on the Admission of Hearsay

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hearsay evidence "must occasionally give way to considerations of public policy and the necessities of the case."[24]

The confrontation clause reflects a belief that face-to-face confrontation at trial enhances the truth-seeking process. Confrontation generally requires that witnesses be present at trial and that the defendant be allowed to cross-examine them.[25] The jury may thus observe the demeanor of witnesses, under oath and subject to challenge by the defense.[26] The law bars hearsay statements because they elude this test of reliability.[27] But as the Supreme Court has noted, "[a] number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination."[28] These exceptions rest on the notion, supported by common sense, that certain classes of out-of-court statements are more likely to be reliable. For example, the exception for "dying declarations"[29] is based on the belief that a person facing imminent death is prone to speak the truth.[30]

The Supreme Court has established general principles for determining whether admission of a given hearsay statement violates the confrontation clause.[31] When the declarant is available to testify at trial, the Court has consistently found hearsay evidence admissible, reasoning that the opportunity to cross-examine the declarant about the content of out-of-court statements sufficiently tests their reliability.[32] When the out-of-court declarant does not testify, hearsay statements are admissible only if they meet the two requirements established by *Ohio v. Roberts*.[33] First, the state must show that the declarant is "unavailable."[34] Second, the hearsay evidence must bear

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[24] *Id.* at 243, *quoted in Roberts*, 448 U.S. at 64.

[25] *See* Pointer v. Texas, 380 U.S. 400, 406–07 (1965); *Mattox*, 156 U.S. at 242–43.

[26] *See* California v. Green, 399 U.S. 149, 158 (1970).

[27] *See* Chambers v. Mississippi, 410 U.S. 284, 298 (1973) (citing *Green*, 399 U.S. at 158).

[28] *Id.* at 298–99; *see Roberts*, 448 U.S. at 66.

[29] *See* FED. R. EVID. 804(b)(2). Most common law hearsay exceptions have been incorporated into the Federal Rules of Evidence. *See* FED. R. EVID. 803(1)–(23), 804(b)(1)–(4).

[30] *See* Mattox v. United States, 156 U.S. 237, 244 (1895).

[31] The common law hearsay exceptions are merely rules of evidence; they do not mark the boundary of the confrontation clause. *See* Dutton v. Evans, 400 U.S. 74, 82, 86 (1970). The Supreme Court has both upheld the admission of hearsay evidence not embraced by traditional exceptions and held unconstitutional the admission of hearsay falling within arguably recognized exceptions. *See* California v. Green, 399 U.S. 149, 155–56 (1970).

For a thorough analysis of the relationship between the confrontation clause and the admissibility of hearsay statements in criminal prosecutions, see Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979).

[32] *See* Chambers v. Mississippi, 410 U.S. 284, 301 (1973); Nelson v. O'Neil, 402 U.S. 622, 626–27 (1971); *Green*, 399 U.S. at 158–61.

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[34] *Id.* at 66. Standards for determining unavailability are discussed on pp. 818–19.

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[35] *Roberts*, 448 U.S. at 66.

[36] *Id.* The statements of child victims in sex abuse cases have often been admitted under certain traditional exceptions to the hearsay rule. *See* Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1753–63 (1983). Most commonly employed is the "spontaneous exclamation" or "excited utterance" exception, which allows admission of statements made by a person still under the stress of excitement caused by a startling event. Recognizing that children often delay in reporting instances of sex abuse, many state courts have extended the allowable time lapse in cases of child sex abuse, admitting statements made several hours or even days after the event. *See, e.g.*, State v. Noble, 342 So. 2d 170, 172–73 (La. 1977); Smith v. State, 6 Md. App. 581, 586–87, 252 A.2d 277, 280–81 (1969). Besides straining the rationale of the excited utterance exception, such extensions still exclude many statements made by children weeks or months later.

[37] *Roberts*, 448 U.S. at 66.

[38] *See* COLO. REV. STAT. § 13-25-129 (Supp. 1984) (enacted 1983); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1984) (enacted 1984); KAN. STAT. ANN. § 60-460(dd) (1983) (enacted 1982); Act of Apr. 26, 1984, ch. 588, § 4, 1984 Minn. Sess. Law Serv. 415–16 (West) (to be codified at MINN. STAT. § 595.02(3)); S.D. CODIFIED LAWS ANN. § 19-16-38 (Supp. 1984) (enacted 1984); UTAH CODE ANN. § 76-5-411 (Supp. 1983) (enacted 1983); WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1984) (enacted 1982).

For analyses of particular hearsay statutes, see McNeil, *The Admissibility of Child Victim Hearsay in Kansas: A Defense Perspective*, 23 WASHBURN L.J. 265 (1984), and Note, *Sexual Abuse of Children — Washington's New Hearsay Exception*, 58 WASH. L. REV. 813 (1983).

[39] Only the Kansas statute differs substantially. It applies *only* if the child victim is not available to testify at trial, and it applies to *any* crime in which the victim is a child. *See* KAN. STAT. ANN. § 60-460(dd) (1983).

(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.[40]

All the statutes except one[41] require a showing of unavailability if the child is not to testify at trial. All but one[42] require corroboration of the abusive act in lieu of the child's testimony — apparently a response to the *Roberts* requirement of "particularized guarantees of trustworthiness."[43] Five of the statutes provide an additional safeguard not required by the confrontation clause.[44] They direct that even if the child is available to testify, the court should admit hearsay statements only if it finds — in a hearing conducted outside the presence of the jury — that the statement is supported by "sufficient" indicia of reliability. The Indiana statute further requires the child's attendance at this hearing.[45] Such precautions demonstrate that legislators have aimed not only to facilitate the prosecution of sex offenses against children, but also to avoid wrongful prosecution and discourage constitutional challenges to the new laws.

Only the Washington hearsay statute has received significant judicial attention. In *State v. Ryan*,[46] defendant John Ryan was convicted of sexually abusing two boys, aged four and five.[47] Pursuant to the Washington hearsay statute,[48] the trial court allowed the mothers of both boys and the aunt of one to repeat out-of-court statements in which the boys accused the defendant of sexual acts.[49] The prosecution and the defense stipulated that the youths were incompetent to testify at trial,[50] and the trial court held that admissions made by Ryan sufficiently corroborated the hearsay statements.[51]

On appeal Ryan challenged the constitutionality of the Washington statute, relying heavily on a vague Supreme Court dictum that "cru-

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[40] WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1984). For an analysis relating the Washington statute to the jurisprudence of hearsay exceptions, see Note, *supra* note 36, at 1763–66.

The Indiana hearsay statute applies not only to sex offenses, but also to the battery, kidnapping, or confinement of a child. *See* IND. CODE ANN. § 35-37-4-6(a) (Burns Supp. 1984).

[41] UTAH CODE ANN. § 76-5-411 (Supp. 1983).

[42] KAN. STAT. ANN. § 60-460(dd) (1983).

[43] *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[44] *See* COLO. REV. STAT. § 13-25-129(1)(a) (Supp. 1983); IND. CODE ANN. § 35-37-4-6(e)(1) (Burns Supp. 1984); Act of Apr. 26, 1984, ch. 588, § 4, 1984 Minn. Sess. Law Serv. 415–19 (West) (to be codified at MINN. STAT. § 595.02(3)(a)); S.D. CODIFIED LAWS ANN. § 19-16-38(1) (Supp. 1984); WASH. REV. CODE ANN. § 9A.44.120(1) (Supp. 1984).

[45] *See* IND. CODE ANN. § 35-37-4-6(c)(1)(B) (Burns Supp. 1984).

[46] No. 50216-1 (Wash. Nov. 26, 1984).

[47] *See id.*, slip op. at 1.

[48] WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1984), *quoted supra* pp. 811–12.

[49] *See Ryan*, No. 50216-1, slip op. at 2.

[50] *See id.* at 1–2; *infra* p. 818.

[51] *See Ryan*, No. 50216-1, slip op. at 2. Because of the nature of the offenses, there was no physical evidence of abuse.

cial" or "devastating" hearsay evidence may not be admitted unless the defendant has had some opportunity to cross-examine the declarant.[52] The Washington Supreme Court ignored Ryan's argument and held that the hearsay statute "facially conforms" to the requirements of the confrontation clause as set forth in *Roberts*.[53] But the court overturned Ryan's conviction, finding three separate errors in the trial court's application of the statute. First, the court held that the state cannot establish the unavailability of child witnesses simply by stipulating to their incompetency, but must make a good-faith effort to produce them.[54] Second, the court held that if the boys were in fact found incompetent to testify, their incompetency would render their hearsay statements unreliable and hence inadmissible.[55] Third, the court confirmed that Ryan's admissions constituted sufficient corroboration of the abusive acts but ruled that the trial court had failed to find *circumstantial* guarantees of the reliability of the boys' statements as required by both the statute and the confrontation clause.[56]

B. Videotaping Statutes

At least twelve states have enacted videotaping statutes since 1977, six of them since 1983.[57] The texts of the statutes reveal little recognition that videotaped statements are hearsay; only one statute refers to them as such.[58] Legislatures have not, however, been blind to the

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[52] Appellant's Opening Brief at 21–22, 24, *Ryan* (No. 50216-1) (quoting Dutton v. Evans, 400 U.S. 74, 87 (1970)). In *Dutton* the Court noted that "[t]his case does not involve evidence in any sense 'crucial' or 'devastating.'" 400 U.S. at 87. Lower courts have pondered whether this dictum limits admission of hearsay evidence. *See* United States v. Fielding, 630 F.2d 1357, 1368 n.12 (9th Cir. 1980); United States v. Medico, 557 F.2d 309, 316 n.6 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977). *Roberts* gives no indication that crucial or devastating evidence should be excluded.

[53] *Ryan*, No. 50216-1, slip op. at 4–5, 17.

[54] *See id.* at 8.

[55] *See id.* at 8–10.

[56] *See id.* at 10–15.

[57] *See* ARIZ. REV. STAT. ANN. §§ 12-2311 to -2312 (1982) (enacted 1978); ARK. STAT. ANN. §§ 43-2035 to -2036 (Supp. 1983) (enacted 1981; amended 1983); CAL. PENAL CODE § 1346 (West Supp. 1984) (enacted 1982; amended 1984); COLO. REV. STAT. § 18-3-413 (Supp. 1984) (enacted 1983); FLA. STAT. ANN. § 918.17 (West Supp. 1984) (enacted 1979; amended by Act of May 21, 1984, ch. 84-36, § 1, 1984 Fla. Sess. Law Serv. 97–99 (West)); KY. REV. STAT. § 421.350 (Supp. 1984) (enacted 1984); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1983) (enacted 1983); MONT. CODE ANN. § 46-15-401 (1983) (enacted 1977; amended 1979 and 1983); *id.* § 46-15-402 (enacted 1977); N.M. STAT. ANN. § 30-9-17 (Supp. 1984) (enacted 1978); S.D. CODIFIED LAWS ANN. §§ 23A-12-9 to -10 (Supp. 1984) (enacted 1983); TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1984) (enacted 1983); WIS. STAT. ANN. § 967.04(7) (West Supp. 1984) (enacted 1984).

A New York statute enacted in 1984 allows videotaped statements of alleged child victims of sex abuse to be admitted as evidence before a grand jury but not at trial. *See* Act of Aug. 5, 1984, ch. 804, § 1, 1984 N.Y. Adv. Legis. Serv. 1658 (Consol.) (to be codified at N.Y. CRIM. PROC. LAW § 190.30(4)).

[58] *See* ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1983).

constraints of the confrontation clause. The statutes treat videotaped testimony as the functional equivalent of testimony at trial; accordingly, some statutes explicitly demand that the defendant be present and that cross-examination be allowed at the videotaping session. The New Mexico statute, enacted in 1978, typifies those that follow:

> In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed . . . in the same manner as permitted at trial . . . . Any videotaped deposition taken under the provisions of this act . . . shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.[60]

Of the statutes that do not explicitly provide for cross-examination, most describe the videotaping session in terms such as "preliminary hearing" or "deposition," implying that cross-examination must be allowed.[61]

But three of the most recently enacted videotaping statutes allow, in certain circumstances, the admission of videotapes made without the benefit of cross-examination. The 1984 Wisconsin statute requires cross-examination at the taping session only if the videotape is to be presented *in lieu of* the child's testimony at trial.[62] Similarly, the 1983 Texas statute and the 1984 Kentucky statute modeled after it allow the admission of videotaped statements made outside the presence of both prosecution and defense attorneys as long as the child testifies at trial.[63] A Texas appellate court recently upheld a conviction based on such videotaped statements, ruling that the procedure does not

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[59] *See* ARK. STAT. ANN. § 43-2035 (Supp. 1983); ME. REV. STAT. ANN. tit. 15, § 1205(2) (Supp. 1983); MONT. CODE ANN. § 46-15-402 (1983); N.M. STAT. ANN. § 30-9-17(A) (Supp. 1984).

[60] N.M. STAT. ANN. § 30-9-17(A) (Supp. 1984).

Other videotaping statutes prescribe maximum age limits ranging from 11 to 17; Montana's statute is applicable to all victims of sex offenses and has no age limit. MONT. CODE ANN. § 46-15-401 (1983). The Florida statute, as amended in 1984, allows videotaped testimony of any child witness to a sex crime, not merely child victims. *See* Act of May 21, 1984, ch. 84-36, § 1, 1984 Fla. Sess. Law Serv. 97–99 (West) (amending FLA. STAT. ANN. § 918.17(1) (West Supp. 1984)). The Wisconsin statute applies to all crimes, not merely sex crimes, involving a child victim or witness. *See* WIS. STAT. ANN. § 967.04(7)(b) (West Supp. 1984).

[61] *See, e.g.*, CAL. PENAL CODE § 1346(a) (West Supp. 1984) ("preliminary hearing"); COLO. REV. STAT. § 18-3-411(1) (Supp. 1983) ("deposition").

[62] WIS. STAT. § 967.04(7)(b) (West Supp. 1984).

[63] KY. REV. STAT. § 421.350(2)(a), (b) (Supp. 1984); TEX. CRIM. PROC. CODE ANN. § 38.071(2)(a)(1), (a)(3) (Vernon Supp. 1984).

iolate the confrontation clause since the defendant retains the opportunity to cross-examine the declarant at trial.[64]

A separate provision of the Texas and Kentucky statutes raises another confrontation clause issue. It provides that a videotape made in the presence of both prosecution and defense attorneys and put to the test of cross-examination may be admitted in lieu of the child's testimony. It specifies further that during the videotaping session "[t]he court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant."[65] At least one federal court of appeals has held, in a different context, that the lack of a face-to-face encounter renders the use of videotaped testimony unconstitutional.[66] Many observers, however, have maintained that child witnesses are traumatized and often intimidated into silence by the presence of the accused.[67]

Few courts have scrutinized the use of videotaped testimony in the prosecution of child sex abuse. In 1982 an Arizona appellate court affirmed a conviction obtained with the videotaped statement of a sexually abused six-year-old girl.[68] The defendant and his counsel had been present at the taping, and cross-examination had been allowed.[69] In reaching its decision, the court weighed the state's interest in presenting the videotaped testimony against possible infringements of the defendant's right of confrontation.[70] The child had expressed fear of testifying before a jury, and the court cited a clinical psychologist's opinion that the child would probably become uncommunicative if called to testify before a jury.[71] Although the court acknowl-

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[64] *See* Jolly v. State, No. C14-83-693-CR, slip op. at 7 (Tex. Ct. App. July 19, 1984); *supra* note 810.

[65] KY. REV. STAT. § 421.350(4) (Supp. 1984); TEX. CRIM. PROC. CODE ANN. § 38.071(4) (Vernon Supp. 1984).

[66] *See* United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979) ("Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge."). *Benfield* did not concern child sex abuse. The court suggested that the heinousness of certain crimes might justify excusing the victim from testifying face to face before the alleged assailant. *Id.*

[67] *See, e.g.*, Melton, *Procedural Reforms To Protect Child Victim/Witnesses in Sex Offense Proceedings*, in CHILD SEXUAL ABUSE AND THE LAW 184, 189 (J. Bulkley ed. 1982). According to Los Angeles Deputy District Attorney Glenn Stevens, one of the prosecutors in the McMartin preschool case, *see supra* note 3, "The defense is better able to intimidate a young witness if he or she is physically present — he can stare the child down, make him uncomfortable and cause him to break down on the stand or say anything to get out of there." NAT'L L.J., Sept. 3, 1984, at 10, col. 4.

[68] *See* State v. Melendez, 135 Ariz. 390, 661 P.2d 654 (1982). For reasons that are not clear, *Melendez* makes no direct reference to the Arizona videotaping statute, ARIZ. REV. STAT. ANN. §§ 12-2311 to -2312 (1982), though the procedure the court reviewed is that prescribed by the statute.

[69] *Melendez*, 135 Ariz. at 393, 661 P.2d at 657.

[70] *See id.* at 392–93, 661 P.2d at 656–57.

[71] *See id.* at 392, 661 P.2d at 656.

edged that videotaping could obscure the child's demeanor during testimony and thus hamper the jury's evaluation of her credibility. It argued that "[t]his, of course, could operate in defendant's favor." The court concluded that the defendant's case had not been prejudiced and that the problems posed by the victim's age justified the innovative trial technique.[73]

III. Problems in Applying Hearsay and Videotaping Statutes Within Constitutional Constraints

Despite the care legislatures have taken to make hearsay and videotaping statutes conform to constitutional demands, several difficult issues must be resolved to ensure that the statutes as applied will not offend the confrontation clause. The guidelines established in *Roberts*[74] require courts applying the hearsay statutes to determine, first, what circumstances justify finding that a child is "unavailable" to testify and, second, what sort of corroboration constitutes "particularized guarantees of trustworthiness." Most videotaping statutes, in contrast to hearsay statutes, do not require a finding of unavailability;[75] apparently, most legislators regard videotaped testimony not as mere hearsay evidence but as the functional equivalent of testimony in court. In applying videotaping statutes, therefore, courts must consider whether the technical constraints of videotaping belie such functional equivalence. Courts must also determine the constitutionality of statutes that deny the defendant a face-to-face encounter with the child during the videotaping session. Moreover, the use of videotaped testimony may confer certain advantages on the prosecution that — independent of confrontation clause issues — implicate fundamental fairness and thus warrant scrutiny under the due process clause of the fourteenth amendment.[76]

When elaborating the terms and scope of the *Roberts* requirement, courts must recognize that the protection offered by the confrontation clause is not absolute. As the Supreme Court held in *Mattox*, "A technical adherence to the letter of a constitutional provision may

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[73] *Id.* at 393, 661 P.2d at 657. It should be noted that hampering the jury's assessment of the child's credibility can operate in the defendant's favor only if he is guilty. If the defendant is in fact innocent, and the child lying, then hampering the jury's assessment of credibility prejudices the defendant.

[74] *See id.*

[75] *See supra* pp. 810–11.

[76] Only three videotaping statutes demand a finding of unavailability. *See* CAL. PENAL CODE § 1346(d) (West Supp. 1984); COLO. REV. STAT. § 18-3-413(4) (Supp. 1983); S.D. COMPILED LAWS ANN. § 23A-12-9 (Supp. 1984). Although the New Mexico statute requires no showing of unavailability, the court rules of procedure incorporating it specify that the videotape may be admissible only if "the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm." N.M. CHILDREN'S CT. R.P. 34.1(b)(1) (Supp. 1982); N.M. DIST. CT. R. CRIM. P. 29.1(b)(1) (Supp. 1980).

[77] *See infra* pp. 824–25.

occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant."[77] Courts must distinguish, therefore, between those elements of confrontation that are central to the defendant's ability to expose flaws in the state's case and those elements that are merely peripheral. Courts should not, of course, tolerate even marginal infringements of the defendant's basic rights in the absence of competing interests.[78] But hearsay and videotaping statutes advance two powerful competing interests. First, these statutes attempt to remedy the unusual difficulties encountered in prosecuting crimes in which the only witness is a young, fearful, and uncommunicative child. Second, they protect young victims of sexual abuse from the prolonged ordeal of recounting the abusive acts in open court. Courts should ensure that the application of hearsay and videotaping statutes substantially advances one or both of these interests without significantly diminishing the defendant's ability to rebut the state's evidence.

A. Hearsay Statutes

As long as the alleged victim of abuse is available to testify and to be cross-examined at trial, the confrontation clause erects no barrier to admission of the child's out-of-court statements.[79] The admission of hearsay in addition to the child's testimony might significantly strengthen the state's case when the child is inarticulate, embarrassed, or forgetful.[80] But often the court deems the child "unavailable" to

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[77] Mattox v. United States, 156 U.S. 237, 243 (1895). In *Mattox* the Court reasoned that the admission of dying declarations, though "directly contrary to the letter" of the confrontation clause, was justified by "the necessities of the case, and to prevent a manifest failure of justice." *Id.* at 243–44; *accord* Chambers v. Mississippi, 410 U.S. 284, 295 (1973) ("Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.").

[78] "The Court . . . has recognized that competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." Ohio v. Roberts, 448 U.S. 56, 64 (1980) (quoting *Chambers*, 410 U.S. at 295).

[79] *See supra* p. 810.

[80] Testifying in favor of the Washington hearsay statute, Mary Kay Barbieri, chief of the criminal division of the King County Prosecutor's Office and co-author of the act, explained the need to admit hearsay statements of child victims of sexual abuse. She drew from the facts of State v. Johnson, 96 Wash. 2d 926, 639 P.2d 1332 (1982):

> Dad's making spaghetti, just minding his own business cooking; and his little daughter says, "Does milk come out of your penis, Dad?" Dad says no; and the little girl says, "It comes out of Melody's dad's penis and tastes yukky." . . . When [the little girl] comes to court, she doesn't say graphic things like that. She's scared. She sits there, and the prosecutor, who's trying to be nice, says, . . . "Did Melody's dad do something to you you didn't like?" and she goes, nodding. "What did he do?" — long, painful silence. Maybe the prosecutor starts to lead — "Did he put something in your mouth?" "Yes." "What was it?" Long, painful silence — maybe the prosecutor shows a doll and says, "Can you point on this doll to what it was?" How does that look to the jury? It looks like there's a little girl who's coached or making it up or doesn't know what she's talking about. But if the jury also hears the statement that the little kid made while Dad was

testify, thus denying the defendant an opportunity for cross-examination. In such cases the court may admit hearsay statements only if they bear "particularized guarantees of trustworthiness."[81] Most hearsay statutes respond to the need for such guarantees by requiring independent corroboration of the abusive act.[82]

1. Unavailability. — The requirement of unavailability expressed in *Roberts* reflects a balancing of competing interests: on the one hand, the defendant has the right to confront the declarant *when at all possible*;[83] on the other hand, when confrontation is not possible, the prosecution may present hearsay evidence rather than no evidence at all.[84] Therefore, the state must demonstrate the *impossibility* of in-court testimony to justify frustrating the defendant's clear interests in confronting and cross-examining the witness.

Of the seven hearsay statutes, only the Indiana statute specifies the grounds for a finding of unavailability:

> (i) A psychiatrist has certified that the child's participation in the trial would be a traumatic experience for the child;
>
> (ii) A physician has certified that the child cannot participate in the trial for medical reasons; or
>
> (iii) The court has determined that the child is incapable of understanding the nature and obligation of an oath.[85]

The first and third of these conditions are the more likely to arise: only a rare child could fail to be traumatized by the experience of testifying in court; and finding a young child incapable of understanding the oath — that is, incompetent to testify[86] — is generally well within the court's discretion. But only the second condition — medical unavailability — suggests that the child's participation at trial is impossible.[87]

Since neither the likelihood of emotional trauma nor the incom-

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cooking spaghetti, can't we all agree that that statement was more reliable and better evidence about what happened[?]

Joint Hearings on S.B. 4461 Before the Washington State Senate Judiciary Comm. and the House Ethics, Law & Justice Comm., 47th Leg., 23d Sess. 8–9 (1982).

[81] *See supra* p. 811.

[82] *See supra* p. 312.

[83] *See, e.g.*, Mancusi v. Stubbs, 408 U.S. 204, 212 (1972) (holding that test of unavailability is whether state is "powerless" to compel witness's attendance); Barber v. Page, 390 U.S. 719, 725–26 (1968) (holding that state must show witness to be "actually unavailable").

[84] *See* Mattox v. United States, 156 U.S. 237, 243 (1895).

[85] IND. CODE ANN. § 35-37-4-6(c)(2)(B) (Burns Supp. 1984).

[86] In most states the formula for determining competency includes four testimonial capacities: (1) recognition of the difference between truth and falsehood and of the duty to speak the truth; (2) the capacity to observe events accurately, (3) sufficient memory, and (4) communication skills. *See* Melton, Bulkley & Wulkan, *Competency of Children as Witnesses*, in CHILD SEXUAL ABUSE AND THE LAW, *supra* note 67, at 125, 127.

[87] Medical unavailability is also the only one of these three justifications included in the definition of unavailability in the Federal Rules of Evidence. *See* FED. R. EVID. 804(a)(4).

petency of the child makes it impossible for him or her to testify in court, neither warrants a finding that the child is unavailable as a witness. Some trauma is inevitable whenever a child takes the stand, and although the trauma of testifying should be minimized to the extent possible, it cannot justify depriving the defendant of a fundamental aspect of his right to a fair trial.[88] And the child's competency — his or her ability to relate events truthfully and intelligibly — is best left to the determination of the jury;[89] the reliability of both the child's testimony and the child's out-of-court statements[90] will depend not so much on the child's general truthfulness as on the content of his or her statements, the circumstances under which they were made, and the child's apparent capacity to fabricate stories of sexual abuse. If, having been called to testify, the child proves too frightened or inarticulate to allow any meaningful examination, then a finding of unavailability would be justified, and the child's hearsay statements should be admitted if properly corroborated.

2. Corroboration. — No statute defines what constitutes sufficient corroboration of the child's hearsay statements. This lack of statutory standards and the variety of possible forms of corroborative evidence combine to confer broad discretion on the trial judge and to encourage, on appeal, the assertion that the proffered corroboration did not constitute "particularized guarantees of trustworthiness."[91] One solution would be to hold that children's statements in sex abuse cases are, by their very nature, apt to be trustworthy. The opinion that "kids don't lie about things like that" is widely held.[92] Arguably the commonsense

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[88] The Wisconsin Supreme Court, citing the public's right to "every person's evidence," has held that a claim of emotional harm cannot excuse a child witness from the obligation to testify. State v. Gilbert, 109 Wis. 2d 501, 505, 512, 326 N.W.2d 744, 746, 749 (1982).

[89] Most states have rebuttable statutory presumptions that children below a certain age, usually 10 or 14, are incompetent to testify. Melton, Bulkley & Wulkan, *supra* note 86, at 126. But at least 13 states have adopted Federal Rule of Evidence 601, which abolishes the presumption of incompetency and leaves to the jury the task of determining the weight and credibility of the child's testimony. *See id.* at 127, 141 n.20; *see also* FINAL REPORT OF ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE 39 (1984) (federal report recommending that children be presumed competent to testify with credibility being determined by the jury). Colorado has eliminated the presumption of incompetency exclusively in cases of child sex abuse. *See* COLO. REV. STAT. § 13-90-106(1)(b)(II) (Supp. 1985).

[90] *But see* State v. Ryan, No. 50216-1, slip op. at 8–10 (Wash. Nov. 26, 1984); Note, *Confronting Child Victims of Sex Abuse: The Unconstitutionality of the Sexual Abuse Hearsay Exception*, 7 U. PUGET SOUND L. REV. 387, 392–98 (1984) (arguing that the out-of-court statements of children found incompetent to testify are inherently unreliable and hence inadmissible).

[91] *See supra* p. 811.

[92] The prosecuting attorney's offer of this opinion to prove the reliability of the children's statements in *State v. Ryan* was rejected by the trial court. *See* Washington Appellate Defender, Amicus Curiae Brief at 29, *Ryan* (No. 50216-1); Appellant's Opening Brief at 36, *Ryan* (No. 50216-1).

Two experts on child sex abuse claim that "there is little or no evidence indicating that children's reports are unreliable, and none at all to support the fear that children often make

intuition that such statements are reliable could fulfill the requirement of "particularized guarantees." Common sense, after all, underlies the common law exceptions to the hearsay rule specifically affirmed by *Roberts*.[93]

Creating a general exception to the hearsay rule for the statements of children in sex abuse cases would render a separate requirement of corroboration superfluous. But such a step would place the defendant in the untenable position of having to refute, without the benefit of cross-examination, statements charged with powerful emotional appeal yet supported only by questionable commonsense suppositions. Moreover, the presumption that children's reports of sex abuse are inherently reliable will become increasingly less valid as children are more commonly instructed on the nature of sex abuse, advised to "tell" if it happens, and assured that if they tell they will be believed.[94] The public's heightened awareness of child sex abuse may also lead worried parents to question children about their relationships with adults and to misconstrue innocuous replies.[95] Because the state's case will typically rest largely on the child's hearsay statement, a general requirement of corroboration is a necessary safeguard against wrongful conviction.

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false accusations of sexual assault or misunderstand innocent behavior by adults." Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES, no. 2, at 125, 127 (1984). One study of child sex abuse cases found that roughly 95% of children's accusations were accurate. *See Would a kid lie?*, A.B.A. J., Feb. 1985, at 17. Linda Fairstein, chief of the New York County District Attorney's sex crimes prosecution unit, believes that "it is impossible for a child who has not experienced the sexual activity described to fantasize about it." N.Y. Times, Sept. 23, 1984, § 4, at 8, col. 1. *But see* Wilson v. United States, 271 F.2d 492, 493 (D.C. Cir. 1959) (citing M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 374 (1952), for the proposition that children have no real understanding of the serious consequences of the charges they make); People v. Scholl, 225 Cal. App. 2d 558, 563, 37 Cal. Rptr. 475, 478 (1964) (remarking that children may act out of malice or be the victims of sexual fantasies).

[93] *See supra* pp. 810–11.

[94] "When Kermit the Frog tours all the elementary schools in town, and tells all the children that they should tell someone if an adult is touching them in a 'bad' or 'sexual' way, this can implant ideas for false accusations in a child's brain where formerly there would have been only ignorance." Washington Appellate Defender, Amicus Curiae Brief at 25–26, *Ryan* (No. 50:16-1). *But see* Berliner & Barbieri, *supra* note 92, at 127–28 (noting that there is no evidence that a "climate of belief" has spawned an increase in false accusations).

The Illusion Theater, a dramatic organization that specializes in programs to prevent child sex abuse, has performed on stage to almost 500,000 elementary school youngsters in 35 states. After one Illusion performance, 22 children came forward reporting instances of sex abuse. *See* Brockton (Mass.) Enterprise, Sept. 21, 1984, at 12, col. 1; *see also Facing Up to Sex Abuse Prevention Programs Proliferate in Classrooms Across the U.S.*, TIME, Nov. 12, 1984, at 91; *The Amazing Spider-Man: Secrets*, Boston Globe, Feb. 17, 1985 (supplement teaching children to protect themselves from sex abuse); *TV Spots Designed To Combat Child Abuse*, Boston Globe, Nov. 23, 1984, at 29, col. 2.

[95] A list of tips provided by the FBI for preventing sex abuse advises parents to "be suspicious of any strong bond that develops between your child and an adult figure in their life." Brockton (Mass.) Enterprise, Sept. 21, 1984, at 12, col. 4.

However elusive, standards defining sufficient corroboration must be established through either legislative action or judicial opinion.[96] Two principles should govern these standards. First, the state must produce corroborative evidence of the abusive act itself and not merely of the circumstances surrounding the act as described by the child. To corroborate the abusive act, the state may offer eyewitness testimony (including that of another child),[97] physical evidence,[98] a confession, or any clear evidence that the child has been the victim of sexual abuse, including psychiatric testimony that the child displays behavioral symptoms of having been sexually abused.[99] Second, the state must present separate corroboration of the assailant's identity if it offers the child's statement to establish identity. To corroborate identity, the state may offer eyewitness testimony, a confession, evidence that the alleged assailant had the opportunity to commit the offense, or verification of the child's description of the assailant's clothing or possessions at the scene of the crime.

In *State v. Ryan*,[100] the Washington Supreme Court held that no kind or amount of corroborative evidence can justify admitting the out-of-court statements of a child who is not available to testify at trial. In the court's view, the confrontation clause requires *circumstantial* guarantees of the reliability of such statements.[101] Since the

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[96] Many states formerly required corroboration of a child's statements in *all* prosecutions of child sex abuse, even if the victim testified at trial. This general corroboration requirement survives only in Nebraska and the District of Columbia. *See* Fitzgerald v. United States, 412 A.2d 1, 4–5 (D.C. 1980); State v. Fisher, 190 Neb. 742, 212 N.W.2d 568 (1973).

[97] *But see* People v. St. John, 74 A.D.2d 85, 89, 426 N.Y.S.2d 863, 865 (1980) (holding that unsworn testimony of a child is insufficient to corroborate unsworn testimony of another child).

[98] Both eyewitnesses and physical evidence are rare in cases of child sex abuse. *See* Berliner & Barbieri, *supra* note 92, at 129.

[99] At least two state supreme courts have allowed psychiatrists to testify in prosecutions of child sex abuse that the alleged victim exhibited behavioral symptoms of a familial child-abuse syndrome, such as anxiety, depression, and running away from home. *See* State v. Kim, 64 Hawaii 598, 645 P.2d 1330 (1982); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983). For an account of largely unsuccessful attempts to admit similar expert testimony in other state courts, see Wells, *Child Sexual Abuse Syndrome: Expert Testimony — To Admit or Not To Admit*, 57 FLA. B.J. 672, 675 (1983). A recent student-written note advocates the admission, in *adult* rape cases, of psychiatric testimony that the alleged victim exhibits behavioral symptoms common to rape victims. *See* Note, *Expert Testimony on Rape Trauma Syndrome*, 33 AM. U.L. REV. 417 (1984).

Child victims of sex abuse typically display such symptoms as psychosomatic pain in the throat, abdomen, genitals, or buttocks, regression into outgrown behavior, fatigue, bedwetting, fears, aggression, introversion, frequent masturbation, and seductive behavior. *See* Lloyd, *The Corroboration of Sexual Victimization of Children*, in CHILD SEXUAL ABUSE AND THE LAW, *supra* note 67, at 103, 109–10. Parents of children who attended the McMartin Preschool, *see supra* note 3, "have recited sadly similar lists: screaming night terrors, . . . fears of going outside and on the freeways, precocious sexual behavior, nightmares, clinginess, . . . teeth-grinding, . . . [and] panic at the sight of needles . . . ." NAT'L L.J., Sept. 10, 1984, at 8, col. 4.

[100] No. 50216-1 (Wash. Nov. 26, 1984); *see supra* pp. 812–13.

[101] *See Ryan*, No. 50216-1, slip op. at 10–15.

defendant will have no opportunity to cross-examine the child, the child's statements must be supported by indicia of reliability that adequately substitute for cross-examination. Such indicia of reliability, the court held, "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."[102]

The court's holding rests on the unsound assumption that cross-examination serves merely to test the reliability of a witness's testimony in light of the circumstances under which it is given. Cross-examination, however, also tests the consistency of that testimony with other known facts. A defendant being prosecuted for child sex abuse would no doubt inquire both about the circumstances of the child's testimony (for instance, whether the child has a motive to injure the defendant) and about the presence or absence of corroborative evidence (why there was no physical evidence of abuse), as well as about factors that do not fit easily into either category (why the child waited so long to report the event) and about factors that fit into both (whether the child is suffering emotional trauma as a result of the incident). No statutory requirement of reliability could wholly substitute for such thorough cross-examination. *Roberts* demands only that out-of-court statements be supported by "particularized guarantees of trustworthiness." A requirement of corroboration satisfies that demand and has an important advantage over a requirement of circumstantial guarantees: hearsay statutes can define proper corroborative evidence with some particularity and hence narrow the scope of judicial discretion.

B. Videotaping Statutes

1. Videotapes as the Functional Equivalent of In-Court Testimony. — Although the confrontation clause demands that the child testify if possible, it does not require that the child make repeated appearances in crowded courtrooms. The procedures prescribed in videotaping statutes spare the child from having to testify in open court and allow the child an early exit from the judicial system. But videotaped testimony is technically hearsay — an out-of-court statement offered to prove the truth of the matter asserted[103] — and the Supreme Court held in *Roberts* that past testimony can be admitted only under the same constraints as other hearsay evidence.[104] Treating videotaped testimony as ordinary hearsay would eliminate much of its benefit. Under the rules established in *Roberts*, videotaped testimony would not be admissible unless the child was available to testify at trial or the state could show the child to be unavailable. In very few cases,

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[102] *Id.* at 10.

[103] *See supra* p. 809.

[104] *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980).

however, could the state show that a child who was available to testify on videotape is not available to testify at trial.

Most current videotaping statutes require no finding of unavailability. They treat videotaped testimony not as hearsay but as the functional equivalent of testimony in court. Two arguments support this approach. First, in those cases in which the Supreme Court has treated past testimony as ordinary hearsay, it has done so either because the defendant had no adequate opportunity for cross-examination at the earlier hearing[105] or because the defendant had no way of knowing that the witness would not testify at trial and hence may have failed to conduct vigorous cross-examination.[106] In contrast, videotaping statutes provide full opportunity for cross-examination and alert the defendant that the videotaped testimony may be offered in lieu of the child's testimony at trial. Second, the statutes preserve the essential elements of confrontation — the oath, the opportunity to observe the witness's demeanor, and the right to cross-examine. These elements provide "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement.'"[107] Even the defendant's right to confront the child face to face during the videotaping session is not critical to the purposes of cross-examination.[108] As long as the defendant can observe the child's testimony and can confer with his attorney, the essential safeguards of cross-examination are preserved.

Undeniably, however, videotaping alters the nature of confrontation and renders it a marginally less effective defensive tool. Videotapes may not faithfully convey the witness's demeanor and may impede the jury's determination of credibility.[109] Reliance on advanced technology could reduce, if not eliminate, these problems, yet no existing videotaping statute offers meaningful standards governing technical quality. Although videotapes thus fall short of complete functional equivalence with in-court testimony, videotaping statutes do not violate the confrontation clause. To determine the scope of the right of confrontation, courts must balance the competing interests of defendant and state.[110] Against marginal infringements of defen-

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[105] *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 407 (1965).

[106] *See, e.g.*, Barber v. Page, 390 U.S. 719, 725 (1968).

[107] *Roberts*, 448 U.S. at 69 (quoting California v. Green, 399 U.S. 149, 166 (1970)).

[108] Admittedly, the Supreme Court has used the words "face to face" to describe the guarantee of the confrontation clause. *See id.* at 63; Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Mattox v. United States, 156 U.S. 237, 242 (1895). It has been argued, however, that this language supports the right of cross-examination rather than of physical confrontation per se and that the Court's choice of words may have resulted from its inability to foresee technological developments permitting cross-examination and confrontation without physical presence. *See* Melton, *supra* note 67, at 188.

[109] *See* German, Merin & Rolfe, *Videotape Evidence at Trial*, 6 AM J. TRIAL ADVOC. 209, 210 (1982); *supra* pp. 815–16.

[110] *See supra* pp. 816–17.

d[illegible] rights, courts must weigh "society's transcendent interest in protecting the welfare of children."[111] Specifically, the state holds an interest in protecting young children, allegedly the victims of sexual abuse, from the trauma of repeated appearances and extended testimony in open court in the presence of the alleged assailant. The trial judge should therefore allow the child to testify on videotape if testifying in open court would cause the child substantial emotional trauma. The judge should likewise order that the defendant be kept out of the sight and hearing of the child at the videotaping session if the defendant's presence would cause the child substantial emotional trauma.

2. Due Process and Videotaping. — Videotaping statutes raise other constitutional concerns by granting the prosecution advantages and options it does not generally enjoy. Due process considerations of fundamental fairness[112] forbid investing the state with advantages unrelated to the needs of protecting child witnesses and facilitating the factfinding process. These options and advantages must therefore be closely examined and strictly confined.

All of the videotaping statutes so far enacted allow the child's testimony to be recorded *before* trial commences.[113] Exercising this option arms the prosecution with a potent weapon in plea bargaining negotiations[114] and affords it the luxury of planning trial strategy while already familiar with the recorded testimony of its chief witness. Videotaping statutes should instead require, as a general rule, that videotaped testimony be taken only after trial begins. Unfortunately, the resulting delay would in some cases thwart two goals of videotaping statutes: capturing the child's testimony while events are fresh in his or her memory and allowing the child an early withdrawal from the court system. The need to achieve these goals balances whatever disadvantages pretrial videotaping might impose on the defendant. Ideally, videotaping statutes should provide that testimony not be

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[111] Ginsberg v. New York, 390 U.S. 629, 640 (1968) (quoting People v. Kahan, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334, 258 N.Y.S.2d 391, 392 (1965) (Fuld, J., concurring)). In *Ginsberg* the Court held that society's interest in the well-being of its youth justifies banning the sale of sexually explicit literature to minors. *See id.* at 640–43. In a later case, the Court invoked similar arguments to uphold a ban on "indecent" radio broadcasts even though such a ban necessarily impairs the first amendment rights of adults as well as children. *See* FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978).

[112] *See* California v. Trombetta, 104 S. Ct. 2528, 2532 (1984) ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.").

[113] A former requirement of the Florida statute that videotaping be conducted only after the trial had commenced was eliminated by a 1984 amendment. *See* Act of May 21, 1984, ch. 84-30, § 1, 1984 Fla. Sess. Law Serv. 97–99 (West).

[114] Minneapolis police videotaped the accounts of sex abuse given by 75 alleged child victims in 1983 and reported that 60 defendants pleaded guilty. *See Videotaping: Device for Fighting Child Abuse*, A.B.A. J., Apr. 1984, at 36.

videotaped until trial begins, unless the court determines before trial that substantial delay would thereby result. In such cases the court should ensure that the videotape be available during the pretrial period to the defense as well as the prosecution.

Of the twelve existing videotaping statutes, only two clearly provide that the child, having testified on videotape, may not be required to testify before the court in the proceeding for which the videotape was made.[115] Each of the other statutes either explicitly or implicitly reserves to the prosecutor the option of calling the child at trial if the videotaped testimony for any reason proves inadequate.[116] This option gives the prosecution a unique strategic advantage while substantially denying child victims the potential benefits of videotaping statutes. Far from protecting the child, these videotaping statutes leave open the possibility that the defense will confront the child during testimony at trial with any inconsistent statements made on videotape.[117] Videotaping statutes should therefore provide that once the

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[115] *See* KY. REV. STAT. § 421.350(5) (Supp. 1984); TEX. CRIM. PROC. CODE ANN. § 38.071(5) (Vernon Supp. 1984). *But see supra* p. 814.

[116] The Arkansas and Wisconsin statutes explicitly allow testimony of the child at trial in addition to presentation of the videotaped deposition. *See* ARK STAT. ANN. § 43-2036 (Supp. 1983); WIS. STAT. ANN. § 967.04(7)(b) (West Supp. 1984).

The Montana statute, by its silence, apparently allows both recorded and live testimony. *See* MONT. CODE ANN. §§ 46-15-401 to -402 (1983).

Three statutes allow either recorded or live testimony but not both, specifying that the videotape will be admitted only if the child is unavailable to testify. *See* CAL. PENAL CODE § 1346(d) (West Supp. 1984); COLO. REV. STAT. § 18-3-413(4) (Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1984). There is no guarantee, however, that the determination of availability cannot be influenced by the prosecutor.

Four statutes seem to require that once a videotape is made, the child cannot be called to testify at trial. *See* ARIZ. REV. STAT. ANN. §§ 12-2311 to -2312 (1982); FLA. STAT. ANN. § 918.17(1) (West Supp. 1984) (as amended by Act of May 21, 1984, ch. 84-36, § 1, 1984 Fla. Sess. Law Serv. 97–99 (West)); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1983); N.M. STAT. ANN. § 30-9-17(A) (Supp. 1984). But these statutes are less than explicit.

[117] Certain alternatives to videotaping statutes avoid some of these problems. For instance, both the Texas and Kentucky statutes allow the child's testimony to be transmitted into the courtroom via closed-circuit television. *See* KY. REV. STAT. § 421.350(3) (Supp. 1984); TEX. CRIM. PROC. CODE ANN. § 38.071(3) (Vernon Supp. 1984).

Proposed "child courtrooms" would separate the child and court officers from the jury and spectators by a one-way glass partition. *See* Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1016–18 (1969).

Simple "closure" of the courtroom — excluding unnecessary persons — would protect children from crowds of spectators but would not isolate them from the jury. In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the Supreme Court struck down a Massachusetts statute requiring closure of the courtroom during the testimony of child victims of sex offenses although the Court held that the press is generally entitled to attend public prosecutions, it did not preclude the trial judge from ordering closure in unusual circumstances. *Id.* at 608.

None of these alternatives, however, delivers the greatest advantages of videotaping: protecting the child from endless repetition of testimony, allowing the child to withdraw from the court system at an early stage in the proceedings, and securing the child's testimony against forgetfulness and retraction.

child has testified on videotape, neither party may call the child to testify at trial unless the court rules that the interests of justice require further direct or cross-examination. In such cases the court should permit the child to give further testimony on videotape or by closed-circuit television.

IV. Toward an Integrated Statutory Scheme

There is a manifest need for innovative approaches to child testimony in sex abuse prosecutions. Child sex abuse is a pervasive wrong. Discouragingly low conviction rates merely confirm what is intuitively clear: that child victims, even when competent to testify and not removed from the court system by their parents, make reluctant and undependable witnesses. Even when a conviction is secured with a child's testimony, it often comes at the expense of a prolonged emotional ordeal for the child.

Legislative approaches to the problem should proceed in light of two objectives: enabling the prosecutor to develop the full strength of the state's case and protecting the child from victimization within the court system. The ideal solution would advance both objectives while protecting the defendant's right to confront his accuser. Hearsay statutes effectively strengthen the prosecutor's hand by allowing the child's earliest, unrehearsed description of the abusive act to be presented to the jury. The hearsay statutes outlined by this Note, however, do not relieve a child who is "available" to testify from the duty of testifying over an extended period in open court. Videotaping statutes do spare the child this trauma, and legislatures should therefore enact them in tandem with hearsay statutes.[118]

When drafting these statutes, legislatures must take care to avoid serious impairments of defendants' right of confrontation. To this end, hearsay statutes should require the child to testify on videotape or at trial unless it is impossible for the child to do so. Neither incompetency nor the likelihood of emotional trauma should be grounds for finding the child unavailable. As long as the child is available to testify, the trial court should admit the child's out-of-court statements. If the child is unavailable to testify because of sickness, death, or demonstrated incapacity, then hearsay statements should be admitted only if accompanied by corroborative evidence ensuring reliability.

Videotaping statutes should permit the child to testify on videotape and out of the presence of the defendant if the trial court finds that testimony in open court or a face-to-face confrontation with the defendant would cause the child substantial emotional trauma. The

[118] Only Colorado has both a hearsay and a videotaping statute. *See* Colo. Rev. Stat. §§ 13-25-129, 18-3-413 (Supp. 1985).

court should defer the taking of videotaped testimony until after the trial has commenced unless substantial delay would thereby result. Once the child has testified on videotape, the court should generally bar both parties from calling the child at trial. Finally, videotaping statutes should prescribe standards regulating taping procedures and the technical quality of the videotaping equipment.

Such an integrated statutory scheme, involving enactment of both videotaping and hearsay statutes, presents perhaps the best possible solution to a dilemma facing state legislatures across the country. The public is now keenly aware of the problem of child sex abuse. Current evidentiary and procedural rules have frustrated the effective prosecution of sex offenders while submitting their child victims to a prolonged ordeal in court. Any legislative alteration of these rules must respect defendants' sixth amendment right of confrontation. The statutory scheme described here would facilitate the prosecution of alleged child sex abusers and relieve the burden placed on the child victim; yet it would not significantly diminish the defendant's ability to rebut the state's evidence. Its enactment would be a just and effective first step as society at last confronts the long-neglected problem of child sex abuse.