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Glen Skoler

ARTICLES

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

GLEN SKOLER*

INTRODUCTION

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

* M.A. (Psychology) University of Nebraska, 1984; B.A. Georgetown University, 1977. The author is currently a psychology intern at St. Elizabeths Hospital, National Institute of Mental Health, Washington D.C. 20032. This article was written prior to the author's employment at St. Elizabeths Hospital and does not represent the views of St. Elizabeths Hospital or the National Institute of Mental Health.

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

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

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

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

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

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3. SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS (A. Burgess, A. Groth, L. Holmstrom, & S. Sgroi eds. 1978); Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 398-99 (1975); Melton, *Child Witnesses and the First Amendment: A Psycholegal Dilemma*, —— J. SOC. ISSUES —— (1984) [hereinafter cited as Melton, *A Psycholegal Dilemma*]; Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, in CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2, at 184; Parker, *Child Witnesses*, *supra* note 2 at 643. *See also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (Burger, J., dissenting) (exclusion order in trial of defendant charged with rape of three minor girls upheld).

4. ABA RECOMMENDATIONS, *supra* note 2.

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

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

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

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

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

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

I. THE NEED FOR REFORM

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

10. S. BUTLER, CONSPIRACY OF SILENCE (1978); DeFrancis, *Protecting Child Victims of Sex Crimes Committed by Adults*, American Humane Association (1969); J. HERMAN, FATHER-DAUGHTER INCEST (1981); SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS, *supra* note 3; *The Sexual Victimology of Youth* (Shultz ed. 1980); Katz, *Incestuous Families*, 1 DET. C. L. REV. 79 (1983).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rationales for a New Hearsay Exception

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

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

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

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

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

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

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

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

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24. Lloyd, *supra* note 12.

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

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

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

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

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

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

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

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

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

Is A New Hearsay Exception Really Necessary?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. THE HEARSAY PROPOSALS: TWO VARIANTS

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

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

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

44. ABA RECOMMENDATIONS, *supra* note 2, at 35; CHILD SEXUAL ABUSE AND THE LAW, *supra* note 2, at 158-59.

45. WASH. REV. CODE ANN. § 9A.44.120 (West Supp. 1984). KAN. STAT. ANN. § 60-640(dd) (1983). There is also a notification clause similar to that found in the federal residual exception. FED. RULE EVID. 803(24) & 804(b)(5).

46. WASH. REV. CODE ANN. § 9A.44.120 (West Supp. 1984).

47. *Id.*

48. KAN. STAT. ANN. § 60-640(dd) (1983).

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

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

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

Child Courtrooms and Videotaped Depositions

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

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

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

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

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

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

55. *See supra* note 31.

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

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

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

56. *Proving Parent-Child Incest*, *supra* note 8.

57. *See* Libai, *supra* note 8, at 1000.

58. *Id.* at 1002.

59. *Id.* at 1014-25. The defendant would be required to be seated outside the physical presence of the child, behind a one way mirror.

60. *Proving Parent-Child Incest*, *supra* note 8.

61. *Id.*

62. Parker, *Child Witnesses*, *supra* note 2.

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

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

63. *Id.*

64. *Id.* at 668-69.

65. *Id.* at 670.

66. *Id.* at 674-77.

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

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

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

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

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

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

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

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

III. HEARSAY, THE CONFRONTATION CLAUSE AND CROSS-EXAMINATION

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

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

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

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

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

4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 418 at 123 (1980).

72. *Id.* at 133.

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

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

75. U.S. CONST. amend. VI.

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

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

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

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

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

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

77. *Id.*

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

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

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

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

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

of trustworthiness.[83]

Roberts and the Child Victim Declarant

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

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

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

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

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

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

89. State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983).

90. 400 U.S. 74 (1970).

91. *Roberts*, 448 U.S. at 65 n.7.

92. *Id.* at 67.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

105. *See supra* note 95.

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

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

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

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

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

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

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

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

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

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

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

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

Nick, Iron Shell AND *Benfield*

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

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

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

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

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

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

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

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

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

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

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

119. 604 F.2d 1199, 1203 (9th Cir. 1979).

120. 658 F.2d 654, 661 n. 6 (9th Cir. 1981).

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

122. Ohio v. Roberts, 448 U.S. 56, 67 (1980) (excited utterances and statements made to a treating physician).

123. 593 F.2d 815 (8th Cir. 1979).

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

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

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

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

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124. *Id.*

125. *Id.*

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

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

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

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

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

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

129. 593 F.2d at 821.

130. *Id.*

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

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

133. *Id.* at 821-22.

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

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

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

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

136. *Id.*

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

The Limits of the Confrontation Clause—And Other Constitutional Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

171. *Id.* at 340.

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

173. Gutman, *supra* note 102.

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

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

176. 448 U.S. at 65.

177. *Id.* at 66.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

198. *Id.* at 64.

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

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

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

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

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

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

200. Love v. State, 64 Wis. 2d 432, 434, 219 N.W.2d 294, 299 (1974); C. Adams & J. Fay, No More Secrets 63 (1981); Melton, *Procedural Reforms*, *supra* note 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

208. *Id.* at 608.

209. *Id.* at 608-09.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Are Child Reports of Sexual Abuse Inherently "Reliable?"

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

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

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

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224. Bienen, *supra* note 11.

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

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

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

Years later Freud commented:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Summary and Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

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