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Demetra John McBride

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NOTE

SEXUALLY ABUSED CHILDREN: THE BEST KEPT LEGAL SECRET

I. PREFACE

Our legal system is often characterized in metaphor as a "living Constitution" and the image of Justice as a maternal form holding a balance, limited only by blindness, so that she may proceed through adversity to an objective and pure attainment of the truth.

In general, the trust represented by these images is not misplaced. It is a firm conviction that maintains internal order in a society which is marred externally by a plethora of crime. Our legal system is exceptional to the extent that it does not exist as a force separate from the populace it governs, but rather as the essence of the corporeal body, and as the corporeal form rejuvenates itself from lifetime to lifetime, the essence remains and adapts itself to the demands of each generation.

This traditional relationship presently is being tested by the modern horror of child sexual abuse,¹ the various forms of which are being reported to police and private and public agencies in grandiose proportions. The facts of these case histories are emerging with incomparable ugliness and the urgency for an adequate response cannot be overstated. Unlike the perpetrators of all other crimes, the child sexual abuser generates the continuing

1. In 1974, Congress passed the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5115 (1974), which includes the following definition of sexual abuse:
the obscene or pornographic photographing, filming, or depiction of children for commercial purposes, or the rape, molestation, incest, prostitution, or other such forms of sexual exploitation of children under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary.

42 U.S.C. § 5104(b)(3)(a). Juvenile offenders are as equally subject to criminal liability for sex crimes perpetrated against minors as are their adult counterparts. *P.G. v. State*, 616 S.W.2d 635 (Tex. 1981).

existence of his offense.² Current studies reveal that sexually abusive behavior toward children creates a psychological legacy, threading its way like a genetic trait from generation to generation. An alarming percentage of today's offenders were themselves sexually abused as children,³ thereby ensuring a communication of the offense upon future victims not yet born.

The entire spectrum of child abuse, which includes physical abuse and neglect⁴ as well as sexual abuse, extends beyond the parameters of this note. Therefore, it is limited to the actual dynamics and cultural misconceptions relating to child sexual abuse, inadequacy of current legal procedures to address this problem, and proposals for innovations that vindicate the rights of children while ensuring fundamental rights of the accused.⁵

2. The masculine pronoun is used in this context based on statistics indicating that all but a negligible percentage of child sexual abuse crimes are committed by men or male juvenile offenders. Note, in addition, that father-daughter incest accounts for 75% of all incest cases reported, followed by brother-sister and uncle-niece incest. Comment, *Incest: The Need to Develop a Response to Intra-Family Sexual Abuse*, 22 DUQUESNE L. REV. 901, 903 (1984) [hereinafter *Response to Intra-Family Sexual Abuse*]. In contrast, however, approximately 60% of all child physical abuse and neglect crimes are purportedly committed by women. *Child Abuse and Neglect Litigation, A Manual For Judges*, U.S. Dept. of Health and Human Services, p. 4 (1981) [hereinafter *Child Abuse and Neglect Litigation*]. See also, Finkelhor and Hotaling, *Sexual Abuse in the National Incidence Study of Child Abuse and Neglect: An Appraisal*, from CHILD ABUSE AND NEGLECT, (1984), pp. 23-33, which attributes 81% of all child sexual abuse to male perpetrators.

3. See, Anderson, *Sexual Assault Services*, Hennepin County Attorney's Office, Minneapolis, Minnesota, 130, 137 (1981); A.B.A. NAT'L LEGAL RESOURCE CTR. FOR CHILD ADVOC. AND PROT. INNOVATIONS IN THE PROSECUTION OF CHILD ABUSE CASES (1981) [hereinafter INNOVATIONS]; see also, A.B.A. NAT'L LEGAL RESOURCE CTR. FOR CHILD ADVOC. AND PROT., RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD ABUSE CASES (1982) [hereinafter INTRAFAMILY CHILD ABUSE CASES].

4. Figures and commentators' reports indicate that the problem of physical abuse and neglect is equally as critical as that of sexual abuse. Comment, *The Medical, Legislative, and Legal Aspects of Child Abuse and Neglect*, 23 VILL. L. REV. 445, 451 (1978). Here also, legal and social atrophy deny victims adequate protection. *Id.* While sexual abuse ultimately taxes psychological casualties on a society, the manifestations of physical abuse and neglect produce less speculative logistics. A limited study of sample states reveals that approximately 25% percent of all child fatalities arising from abuse and neglect involve cases previously on record with child protective agencies. Besharov, *Child Protection: Past Progress, Present Problems, and Future Directions*, FAM. L.Q., Vol. XVII, No. 2, 151, 163 (Summer 1983) [hereinafter Besharov, *Child Protection*].

5. Legal foresight for the benefit of children seems to have focused on protection of the juvenile offender, by provision of the special juvenile court, the first of its kind in the world. Libai, *Protection of the Child Victim*, 15 WAYNE L. REV. 977, 1016 (1969) [hereinafter Libai]. On the whole, however, children remain the largest class in the United States disenfranchised from the legal sanctuary. Miller, *Protecting the Rights of Abused*

While the arguments made herein are applicable to child sexual abuse in general, the formal legal response must be bifurcated to accommodate the unique aspects of abuse which may be perpetrated on the one hand by strangers, and on the other by family members. In the former instance, laws exist which unduly impede conviction. In the latter, the child victim is betrayed by both the letter of the law and governmental unwillingness to intervene within the familial province. For those victims, the law does not remain blindly objective, it merely remains blind.

II. A STATISTICAL FOUNDATION

A. Cases Reported

The acute increase in reports of child sexual abuse is likely attributable in part to the implementation of general mandatory reporting statutes.⁶ Initially, these statutes applied to medical personnel and imposed a duty to report to legal authorities and/or child protection agencies cases fitting the profile of the "battered child syndrome." Additionally, these statutes not infrequently levied liability for a failure to report.⁷ At present, the varying statutory schemes among the states have brought within the purview of the reporting obligation not only medical personnel, but educational personnel, relatives, social workers⁸ and at-

and Neglected Children, TRIAL LAW GUIDE 68, 71, (June 1983) [hereinafter Miller]. This failure to bring children, in particular child victims, within the legal remedial sphere, guarantees a future penalty to be exacted from the society as a whole. *Id.* at 70.

6. Besharov, *Child Protection*, *supra* note 4, at 153-55.

7. *Landeros v. Flood*, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal Rptr. 69 (1976). Further, certain jurisdictions permit civil actions against a non-reporting physician and related defendants for intentional failures to report. See Comment, *Civil Action Against Physician for Failure to Report Cases of Suspected Child Abuse*, 30 OKLA. L. REV. 482 (1977). But see *State v. Groff*, 86 S.D. 345, 195 N.W.2d 521 (1972), holding that the statute is not unrestricted. (In *Groff*, the court refused to convict the physician defendant on the ground that he had examined and treated the victim's father only, and did not have knowledge of the victim's condition sufficient to confer obligation).

8. Due in no small part to the recent cases involving systematic sexual abuse practiced in day care centers and schools, several bills are presently pending in various state legislatures which would institute centralized agencies for the documentation of all child abuse and sexual abuse offenders for purposes of day care center and school personnel reference. These proposed bills have the express approval of the United States Attorney General. See, ATTY. GEN'S TASK FORCE ON FAMILY VIOLENCE, FEDERAL EXECUTIVE AND LEGISLATIVE AND STATE LEGISLATIVE ACTION, RECOMMENDATIONS, Final Report 96-97 (Sept. 1984) [hereinafter ATTY. GEN'S TASK FORCE].

torneys.⁹ Other states have liberally expanded the definition of "reporter" and, consequently, the compulsion to report, to any person having knowledge that abuse has occurred.¹⁰ At least 20 states have statutorily abridged the clergy-penitent privilege on confidential communications between priest and parishioner for confessions related to the abuse of children, the aged and the handicapped.¹¹ In a recent Florida case, a pastor was sentenced to 60 days for contempt of court in failing to testify with regard to a confession made to him concerning the sexual abuse of a six-year old girl.¹² Furthermore, several jurisdictions allow for actions brought against the passive parent who knowingly or intentionally fails to report and thereby derivatively contributes to child abuse within the family.¹³ Current authorities urge uniform adoption of mandatory reporting statutes, covering actual and constructive knowledge of abuse, which authorize appropriate criminal and/or treatment sentences for violations.¹⁴

As a consequence of the vigorous enforcement of these statutes, the generalized reporting of "abuse" cases has revealed the more specific occurrence of "sexual abuse."¹⁵ One current study reveals that perhaps one-third of the female population in the

9. See Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103 (1974). This broad application of the duty to report is similar to that practiced in Sweden pursuant to a 1960 revision of relevant statutes which expanded the duty to anyone "involved in child care." Miller, *supra* note 5, at 72.

10. Miller, *supra* note 5, at 72.

11. Ostling, *Confidence and the Clergy*, TIME, Oct. 1, 1984, at 66.

12. *Id.*

13. Alaska Stat. § 64.10.010(2)(d) (1979); Ariz. Rev. Stat. Ann. § 13-3613(a) (Supp. 1982); Cal. Penal Code § 273(a) (West Supp. 1982); Del. Code Ann. tit. 11, § 1102 (1979); Ill. Ann. Stat. ch. 38 § 2361 (Smith-Hurd Supp. 1982); Ky. Rev. Stat. § 199.011(6) (Supp. 1978); Mo. Rev. Stat. § 568.050 (1979); Mont. Code Ann. § 41-3-100 (Supp. 1979); N.J. Stat. Ann. § 9:6-8.21(c)(3) (West Supp. 1980); N.Y. Fam. Ct. Act. § 1012(e)(III) (McKinney Supp. 1978); N.C. Gen. Stat. § 7A-517(1)(c) (Supp. 1979); Tenn. Code Ann. § 39-1012 (Supp. 1981); Va. Code § 16.1-228(a)(4) (Supp. 1979); W. Va. Code § 49-1-3 (Supp. 1979); D.C. Code Ann. § 16-2301(9) (1978). See generally Bulkley, *Analysis of Civil Child Protection Statutes Dealing with Sexual Abuse*, CHILD SEXUAL ABUSE AND THE LAW, 81-88 (A.B.A. Nat'l Legal Resource Ctr. for Child Advoc. and Prot. (5th ed. 1984), [hereinafter CHILD SEXUAL ABUSE AND THE LAW] for a comprehensive breakdown of the application, breadth and nature of reporting and protection statutes and their enforcement in criminal and family courts among the states.

14. INTRAFAMILY CHILD ABUSE CASES, *supra* note 3, at 28.

15. A recent state survey conducted by the National Committee for Prevention of Child Abuse, *The Size of the Child Abuse Problem*, (Working Paper February 1985), shows 43 states reporting increases in sexual abuse cases. Reporting states indicate increases ranging from 10% (California) to 126% (Mississippi).

United States experienced some form of sexual abuse as a child,¹⁶ with approximately 100,000 new cases being reported annually.¹⁷ Yet another study deems this a conservative figure and estimates that irrespective of cases reported, the actual occurrence of this form of child abuse is more likely in the area of hundreds of thousands of cases each year, of which instances of parent or parent surrogate abuse constitute a substantial proportion.¹⁸ The familial proximity of the abuser to the abused prevents specificity in the determination of number and identity of victims. Incest, the most intimate form of child sexual abuse, is commonly unreported. Sexual abuse practiced by a non-family abuser is still often perpetrated by non-strangers, related by affiliation if not consanguinity.¹⁹ Even among cases involving the stranger offender, a common occurrence is that parents refrain from notifying authorities for reasons ranging from embarrassment to the desire to avoid further trauma to the victim through the protracted legal process. The operative result of non-reporting dynamics of child abuse is that an estimated mere 10% of all cases involving female victims under 12 years old are reported to police.²⁰ One commentator has predicted that incest occurs today at the rate of one in every twenty American families.²¹

B. Sexual Exploitation

In examining sexual abuse outside of the family, it is important to note supplementally the extent of sexual exploitation of

16. Landis, *Experience of 500 Children with Adult Sexual Deviation*, 30 *PSYCH. Q. SUPP.* 91 (1956).

17. *Child Sexual Abuse: Incest, Assault and Sexual Exploitation*, National Center on Child Abuse and Neglect, U.S. Dept. of Health and Human Services, at 2 (April 1981).

18. An estimated 75% percent of all incest cases involve father-daughter relations. *Response to Intra-Family Sexual Abuse*, *supra* note 2, at 903.

19. One illustrative sample from a Washington, D.C. hospital's Special Assault Unit indicates that almost 18% of the offenders were parents or parent-surrogates; over 18% were other relatives; and nearly 47% percent of the remaining assailants were known to their victims. Stranger assailants constituted less than 16%. Lloyd, *Corroboration of Sexual Victimization of Children*, *CHILD SEXUAL ABUSE AND THE LAW* *supra* note 13, at 122, n.88 [hereinafter Lloyd, *Corroboration*].

20. Libai, *supra* note 5, at 1016, n.134.

21. Comment, *Characterization of the Daughter as an Accomplice in Incest Prosecutions: Does Texas Immunize the Father?*, 20 *HOUS. L. REV.* 1129, 1131 (1983) [hereinafter *Daughter as Accomplice*].

minors, that is, sexual abuse characterized by commercial exploitation of sexual activity. National reports indicate that between January 1976 and June 1977, approximately 300,000 minors were sexually exploited,²² alternatively and concurrently, through commercial film, magazine and sex ring enterprises, the gross profits of which aggregate between one-half to one billion dollars annually.²³ The prototype sexually exploited minor is psychologically and/or physically ignored by his parents, an underachiever at school and suffers from poor sociological development.²⁴ Out of this familial vacuum the child is drawn, sometimes irretrievably, into this underground industry in exchange for money, gifts and often, the attention they lack at home.²⁵

C. Actual Court Actions

The paucity of court actions related to child sexual abuse reflects the difficulty of accurately reporting its occurrence. It is estimated that only 24% of all cases nationwide result in criminal action.²⁶ More importantly, this figure diminishes drastically as the cases advance through the legal process. A correlation can be drawn between the body to whom the act is reported and the number of reports that ultimately reach the courtroom. Reports made to police result in court actions nearly half the time; reports to public agencies proceed only one in four; and reports made to private agencies are actively pursued in the courts at a

22. CHILD SEXUAL EXPLOITATION, A.B.A. Nat'l Legal Resource Ctr. for Child Advoc. and Prot. 1, n.7 (Rev. Ed. 1984) [hereinafter CHILD SEXUAL EXPLOITATION]. These victims are generally garnished from the societal fringes of homeless runaways or from families having little supervisory and emotional cohesion. *Id.* at 4.

23. *Id.* at 1.

24. *Child Sexual Abuse, Legal Issues and Approaches*, Nat'l Legal Resource Ctr. For Child Advoc. and Prot. 3-4 (August 1981).

25. *Id.* at 4. See also Hammer, *A Missing Boy Returns After a Strange Odyssey*, PEOPLE MAG., February 3, 1984, at 34-36. This article discussed the disappearance of Bobby Smith and return to his family after 21 months of apparently willing companionship with his accused molester, whom together they passed off as Smith's father during the near 2-year hiatus. Preliminary reports indicated that Smith was sexually molested, but otherwise cared for by the accused, and despite repeated opportunities to flee, Smith willingly remained in order to receive gifts such as video game toys. Smith's teachers revealed that he maintained a relationship with the accused for some time prior to his "abduction", and that his parents did little to discourage the relationship.

26. Finkelhor, *Removing the Child—Prosecuting the Offender in Cases of Sexual Abuse: Evidence from the National Reporting System for Child Abuse and Neglect*, 7 CHILD ABUSE AND NEGLECT, 195, 202 (1983) [hereinafter Finkelhor, *Removing the Child*].

rate of a mere four percent.²⁷

Incest cases, by virtue of the relationship between the perpetrator and victim, create unique impediments to successful prosecution, even after the difficulties of detection have been overcome. Conditions vitiating successful prosecution include: social skepticism about the reliability of accusations made by children; a general categorization of pedophilia as a mental disorder, rather than a criminal offense, better addressed under sexual psychopathy proceedings than criminal actions; present procedural systems that, absent creative and equitable reform, further traumatize the youthful victim; and reluctance on the part of prosecutors to pursue cases which rely in the main on the content and stability of a child's testimony.²⁸

In addition, detection and apprehension of commercial exploitation offenders are rare due to the clandestine nature of the ventures, the secrecy of the market and internalization of manufacture and distribution.²⁹

The exact reporting and adjudication of sexual abuse cases is uniquely disabled by acquiescence to the activity common to families in which incest occurs. Incestual abuse is perpetrated nearly exclusively, upon both male and female children, by male parents or parent surrogates within the family unit.³⁰ Consequently, the abuser indulges his sexual proclivities from a position of economic and emotional power, thereby immunizing himself from legal reproach.³¹ Fundamental to all forms of child

27. *Id.* at 203.

28. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. OF SOC. ISSUES 125, 126-27 (1984) [hereinafter *The Testimony of the Child Victim*]. See also Wulkan & Bulkley, *General Survey Findings Relating to Prosecutorial Practices and Policies*, INNOVATIONS, *supra* note 3, at 3:

The most frequent reason cited for not prosecuting an intra-family case was incompetency of the child witness, that is, the child was too young or forgot specific dates and places. A second reason listed was the lack of corroboration. While very few jurisdictions will require corroboration in child sex cases, it appears that most prosecutors still seem reluctant to prosecute such cases without evidence in addition to the children's testimony. (emphasis in the original).

29. CHILD SEXUAL EXPLOITATION, *supra* note 22, at 1.

30. See generally Finkelhor & Russel, How Much Child Sexual Abuse is Committed by Women (Nov., 1983) D. Finkelhor, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH (1984).

31. Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE L. REV. 609, n.4 (1983) [hereinafter *Tort Remedies*], reporting a study of 250 police reports of child sexual abuse in New York, of which only nine percent of the offenders received prison

abuse is what one commentator has termed "the greatest power differential,"³² the subjugation of the most subordinate actor in a family unit (or variation thereon) by the most dominant. This symbiotic relationship between the offender and victim requires the prosecuting attorney to combine roles as legal professional and strategic tactician in the face of the victim who recants,³³ and in one recent case has resulted in the prosecution impeaching its own witness-in-chief.³⁴ The sexual proxy of daughter for mother is premised upon the obsequious, yet physically remote relationship of mother to father. The typical, though not exclusive, profile of a mother within a family where incest occurs is that of a woman physically expended by multiple births, who gradually delegates her maternal and spousal obligations to an accommodating and obedient child, culminating with a bequest of her sexual involvement as well. Apprehensive of losing the financial and operative support of her husband, she chooses

sentences. The high attrition rate of cases proceeding through the legal system prior to trial is attributed to the dominance of father-offenders who are able to circumvent criminal redress through the psychological and emotional duress inflicted upon the victim in the home setting. An initial step to compensate for the seemingly insurmountable advantage the incest-offender maintains at home is the gradual elimination of the child/parent privilege. In a recent California case, the alleged victim of sexual abuse perpetrated by her physician step-father was sentenced for civil contempt for refusing to testify. *San Francisco Examiner*, Jan. 8, 1984 at 1, col. 4. See also *Three Juveniles v. Commonwealth of Massachusetts*, 390 Mass. 357, 455 N.E.2d 1203 (1983), cert. denied, *Keefe v. Massachusetts*, 465 U.S. 1068 (1984) (the court compelled the testimony of three minors in the highly publicized murder of Robin Benedict for which their father stood accused). Comment, *Evidence- Privileges-Compulsion of Child to Testify Against Parent*, 69 MASS. L. REV. 103 (1984).

32. Finkelhor, *Common Features of Family Abuse*, THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH (1983).

33. Pressure brought to bear upon the victim at home combined with internal guilt and responsibility for incarceration of the abusive parent, often results in a retraction of all prior allegations. Berliner, Blick and Bulkley, *Expert Testimony on the Dynamics of Intrafamily Child Sexual Abuse and Principles of Child Development*, 166, 172 [hereinafter *Expert Testimony*]; CHILD SEXUAL ABUSE AND THE LAW, *supra* note 13; Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, 40 J. OF SOC. ISSUES 157, 165 (1984) [hereinafter *The Child Witness*] ("[C]hildren not infrequently rescind their reports of sexual assault due to intimidation and guilt, even when the reports are true.").

34. *Peckinpugh v. State*, 447 N.E.2d 576 (Ind. 1983) (state offered into evidence prior inconsistent statements of two purported victims of incestuous molestation, aged 11 and 16, who at trial denied allegations made against their father in sworn statements to police). Curry, *Tactics When The Child Molestation Victim is a Poor Witness*, 8 J. OF JUV. L. 255, 257-58 (1984).

neither to risk confrontation nor force an ultimatum.³⁵ The emphasis on financial considerations, however, should not mislead the reader into assuming that incest is a malady peculiar to economically depressed families.³⁶ While the rate of occurrence is purportedly higher in lower income families, incest is a secret³⁷ nurtured just as carefully among the rich as the poor.³⁸

III. PROFILES

A. *The Abuser*

Contrary to social stereotype, the attack of a child sexual abuser is rarely occasioned by extreme physical violence. Rather, the pedophile seeks domination through enticement, encouragement or instruction, and may resort to threats, intimidation or physical coercion only when faced with a recalcitrant victim.³⁹ Generally, the attack stops short of penetration, and consists predominantly of passive, non-assertive conduct such as petting,

35. This acquiescence manifests itself also at trial when the passive parent chooses to invoke a marital privilege rather than testify against her spouse. In response, nearly every jurisdiction has judicially adopted an exception to the marital privilege in cases involving the physical abuse, neglect or sexual manipulation of a child of either spouse. See, e.g., *State v. Boodry*, 96 Ariz. 259, 394 P.2d 196, cert. denied, 379 U.S. 949 (1964). See generally Annot., 93 A.L.R.3d 1018 (1980).

36. Although poorer families are disproportionately represented in child abuse figures, this is principally attributable to the fact that families in this economic strata are disproportionately monitored by public agencies in relation to higher income families. *Child Abuse and Neglect Litigation*, supra note 2, at 4. Note, however, that while sexual abuse of boys occurs more frequently in lower-income families, and physical abuse of sons by mothers is more prevalent in black families, sexual exploitation by fathers of their daughters is a disproportionately white, middle-and upper-class phenomenon. Finkelhor, *Sexual Abuse of Boys: The Available Data* (Nov. 1981) (unpublished manuscript) [hereinafter Finkelhor, *Sexual Abuse of Boys*].

37. *Tort Remedies*, supra note 31, at 611, n.9. "Secrecy is an essential element of incestuous abuse." *Id.*

38. E.g., the California case involving an aerospace engineer found guilty of repeatedly molesting his four daughters between the ages of 8 and 17, for a period of nearly ten years, and the sensational trial of St. Louis millionaire, Mark Molasky, who forced his wife, prior to their marriage, to perform sexual acts with a three year old boy which he simultaneously filmed for the purpose of blackmailing her into accepting his matrimonial proposals. Miller, supra note 5, at 68-69. In contrast to general physical abuse, sexual abuse of children is particularly concentrated among the middle-class. Finkelhor, *Sexual Abuse of Boys*, supra note 36.

39. Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1750 (1983) [hereinafter *Child Hearsay Statements*]. See CHILD SEXUAL EXPLOITATION, supra note 22, at 3.

exhibitionism, fondling, and oral copulation.⁴⁰

Similarly erroneous are preconceptions of the pedophile as an older man,⁴¹ latently or actively homosexual, and prone to alcohol or drug abuse. Studies show that the typical pedophile committed his first offense while still an adolescent, that in many instances the pedophile is married, predisposed toward heterosexuality and perhaps an abuser of his own children, and that his attacks are the product of systematic, compulsive behavior and not erratic impulses released while under the influence of alcohol or drugs.⁴² Unfortunately, psychiatric rehabilitation is generally unsuccessful, although some positive results have been achieved through hormone therapy.⁴³

The incestuous offender is also susceptible to a degree of classification. While usually introverted and insecure outside his home,⁴⁴ the incestuous father is aggressive and domineering within its confines and tends to keep his household inextricably isolated from the outside world. Psychological research indicates that the incestuous abuser often suffers from poor impulse control, deep-seated feelings of inadequacy, low self-esteem and inability to maintain gratifying interpersonal relationships, symptoms which would naturally subside where the intimate partner is so vastly subordinate to the principal in age, maturity and personal, emotional and psychological development.⁴⁵ Incest most often occurs in intensely patriarchal families,⁴⁶ where the male authority figure may actually think himself entitled to obtain sexual gratification from all sources within his family. Often he is prone to alcohol abuse and may physically abuse other members of the family, although physical violence rarely accompanies the sexual assault.⁴⁷ The incestuous abuser rarely com-

40. CHILD SEXUAL EXPLOITATION, *supra* note 22, at 3.

41. The median age of men who commit sexual offenses against children is 31, although a significant percentage of that group is under 20. BASIC FACTS ABOUT SEXUAL CHILD ABUSE (1982) (distributed by The National Committee for Prevention of Child Abuse, 332 S. Michigan Avenue, Suite 1250, Chicago, Ill. 60604-4357).

42. CHILD SEXUAL EXPLOITATION, *supra* note 22, at 3.

43. Magnuson, *Private Violence*, TIME, Sept. 5, 1983, 20-21.

44. "Although they are acts of the strong against the weak, they seem to be carried out by abusers to compensate for their perceived lack of or loss of power." *Common Features of Child Abuse*, *supra* at note 32.

45. *Expert Testimony*, *supra* note 33, at 172.

46. *Tort Remedies*, *supra* note 31, at 611-12.

47. *Daughter as Accomplice*, *supra* note 21, at 1136.

mences the pattern of abuse with actual intercourse but instead with gentle touching and fondling that gradually, over a period of time,⁴⁸ progresses to oral copulation, abstaining from intercourse until after the victim reaches puberty. The victim's postpubescent situation is marked by intense domination and constant surveillance, often made worse by the perpetrator's anger when the victim begins to show interest in boys and dating. Frequently, this postpubescent oppression results in the victim running away from or leaving home at an early age, or marrying young in order to leave. The pattern of the incestuous abuser, however, is cyclical, and should younger daughters remain at home, he is likely to repeat the same pattern upon them.⁴⁹

B. *The Passive Parent of the Incestuous Menage*

Conversely, mothers in families where incest occurs are passive and characterized by low self-esteem. Such a mother has often borne several children, rejects her husband sexually, and may suffer bouts of alcoholism or suffer from emotional disturbances.⁵⁰ Many were themselves victims of sexual, physical, or emotional abuse as children.⁵¹ The progressive sequence of nurturing interchangeable roles within the family fosters the daughter's role as sexual surrogate.⁵² In stark contrast to the shroud of secrecy that shields incest from the outside world, within the home incest is generally a known component of the familial infrastructure. Thus, acquiescence is an identifying characteristic of the incestuous family, represented by the mother who perceives no choice other than to submit to the pattern of role reversal she herself helped to architect. It is documented that as the rate of aggressive maternal objection rises, the instance of incest decreases.⁵³ Maternal passivity is the *sine qua non* of in-

48. The average time span of incestuous relationships is at least three years, and often as long as five to seven years. *Daughter as Accomplice*, *supra* note 21, at 1137.

49. *Id.* at 1136-37; *Response to Intra-Family Sexual Abuse*, *supra* note 2, at 904. See also Bienen, *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, 248, n.45 (1983) [hereinafter *A Question of Credibility*].

50. *Tort Remedies*, *supra* note 31, at 613.

51. BASIC FACTS ABOUT SEXUAL CHILD ABUSE, *supra* note 41.

52. *Response to Intra-Family Sexual Abuse*, *supra* note 2, at 907. See also *supra* text accompanying note 32.

53. Herman and Hirschman, *Father-Daughter Incest*, 2 SIGNS: J. WOMEN, CULTURE

cestuous abuse within the home.⁵⁴ It is important to note that while maternal acquiescence is a *sine qua non* factor, it is not the sole nor dominant factor essential to incest. Acquiescence by its very definition denotes a "yielding" and insinuates an "unwilling accord." The choice to accept father-daughter incest is often the product of what is perceived to be the total absence of any other alternative. It often reflects the dilemma of a non-participant father, several children and a mother financially unable to survive and provide for her children without the aid of her husband.⁵⁵

C. *The Abused*

The absence of violence in pedophilic attacks is not surprising since a child's natural curiosity, naivety, and complacency in relation to authoritarian adult figures, and vulnerability to promises of reward make him/her a cooperative victim.⁵⁶ The innocence is characteristic of the pre-attack victim. The immediate after-effects of the attack, however, include mental trauma, disturbed sleeping patterns, bedwetting, loss of appetite, loss of patience and frequent temper tantrums, a rapid manifestation of introverted behavior and difficulty in learning activities due to poor concentration and a shortened attention span.⁵⁷ Long-term effects are unique to each child, and may not emerge for a protracted period of time, but authorities note that promiscuity and prostitution are common, as well as a characteristic predisposition to engage in sexually abusive relationships later in life.⁵⁸

AND Soc'y, 735, 746 (1977); Burgess, Holstrom and McCausland, *Divided Loyalty in Incest Cases*, SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 115-16 (1978).

54. *Daughter as Accomplice*, *supra* note 21, at 1135-36.

55. *Tort Remedies*, *supra* note 31, at 613-14, n.31. There are instances, however, where disbelief is dominant when incest enters the family sphere. In these instances, the fear of family dissolution, apprehension of independency, and hesitation to force a confrontation renders more attractive the option merely to sustain marital loyalty and believe that the victim is lying. INTRAFAMILY CHILD ABUSE CASES, *supra* note 3, at 18; *Expert Testimony*, *supra* note 33, at 177; *Haley v. State*, 157 Tex. Crim. 150, 247 S.W.2d 400 (Tex. Crim. App. 1952).

56. *Child Hearsay Statements*, *supra* note 39, at 1750, n.50.

57. A MESSAGE TO PARENTS ABOUT: CHILD SEXUAL ABUSE, (distributed by The Child Sexual Abuse Victim Assistance Project, Children's Hospital National Medical Center, 111 Michigan Avenue, N.W., Washington, D.C. 20010).

58. Parker, *The Rights of Child Witnesses: Is the Court a Protector or a Perpetrator?*, 17 NEW ENG. L. REV. 643, 650, and n.41 (1982).

Caught between the paradoxical father-mother profiles in incestuous homes, is the child victim. Immediate effects on the victim are shame, anguish and frustration arising from the desire for maternal intervention that never occurs.⁵⁹ The short and long-term effects reported by various studies include anxiety; pseudo-seductive behavior;⁶⁰ alienation and antisocial, escapist behavior, perhaps resulting in drug and alcohol abuse; sexual frigidity and dysfunction;⁶¹ homosexuality,⁶² neurasthenia,⁶³ and various forms of psychosis including schizophrenia, depression and suicidal obsession.⁶⁴

IV. STATUTORY AND COURTROOM ASPECTS OF PROSECUTING CHILD ABUSE CASES.

A. *Competency to Testify*

While present laws among the individual states differ as to the threshold point below which a child⁶⁵ is deemed automatically incompetent to testify, the general rule treats competency as a question of law,⁶⁶ within the discretion of the court,⁶⁷ predi-

59. Finkelhor, *Common Features of Family Abuse*, *supra* note 32, at 20, citing Herman and Hirschman, *Father-Daughter Incest*, *supra* note 53.

60. Pseudo-seductive behavior is not a psychological aberration, but rather the learned behavioral by-product of acting out in public, that which produces loving responses from the parent-abuser, and is thus more common among younger victims. This behavior may include unzipping men's pants, exhibitionism, and mock-adult seductive mannerisms. *Response to Intra-Family Sexual Abuse* *supra* note 2, at 905, 916 n.107.

61. *Tort Remedies*, *supra* note 31, at 616.

62. Finkelhor, *Long Term Effects of Childhood Sexual Victimization In a Non-Clinical Sample* (Oct. 2, 1980) (unpublished manuscript).

63. Neurasthenia is "[n]eurosis manifested chiefly by exhaustion, mental and physical fatigue, irritability and poorly localized symptoms without any underlying physical disorder." BLACK'S LAW DICTIONARY 939 (5th ed. 1979).

64. See generally Finkelhor, *Long-Term Effects of Childhood Sexual Victimization in a Non-Clinical Sample* (1980) (unpublished manuscript); *Daughter as Accomplice*, *supra* note 21, at 1132-34; *Response to Intra-Family Sexual Abuse*, *supra* note 2, at 908; *Expert Testimony*, *supra* note 33.

65. 4 years old—*State v. Thrasher*, 233 Kan. 1016, 666 P.2d 772 (1983); 3 years old—*Kelluem v. State*, 396 A.2d 166 (Del. 1978).

66. *Smith v. U.S.*, 414 A.2d 1189, 1198 (D.C. 1980).

67. *Id.* at 1197. Note that in *Smith*, the court permitted prosecution counsel to participate in voir dire, *id.* at 1198, but excluded defense counsel participation. The higher court, while acknowledging that competency of minor witnesses is within the sole discretion of the court, ruled that the biased slant of the voir dire occasioned by prosecutorial involvement resulted in a constitutional violation of the accused's right to cross-examination. This abridgement during voir dire is not unqualified, and will not automatically

cated usually upon a voir dire of the child victim/witness conducted exclusively by the court. Through voir dire, the trial judge elicits responses indicating whether the child witness demonstrates levels of veracity,⁶⁸ intelligence,⁶⁹ memory⁷⁰ and verbal communication sufficient to protect the interests of the accused against false testimony.⁷¹ Furthermore, voir dire permits the court an opportunity to observe the witness under questioning. Thus the demeanor of the witness⁷² becomes an intangible but vital element in the balance between the state's entitlement to the best evidence probative on the facts and the accused's right to a just and fair trial.⁷³ Satisfaction of these elements, however, determines only admissibility and the court is free to give the jury instruction as to the weight to be accorded such testimony.⁷⁴ Cautionary instruction, however, will not cure an inadequate examination into the competency of a minor to testify. The trial judge is at all times under the responsibility to reach a determination only after a comprehensive evaluation of all elements fundamental to the inclusion of testimony against an accused. The accused is further entitled to challenge the finding of the court on appeal, and reversible error will be found upon a showing of discretionary abuse at the trial level.⁷⁵

validate reversal where the witness adjudged competent gives testimony which is merely cumulative, *id.* at 1199, or where the opportunity to cross-examine during the testimony-in-chief is deemed satisfactory for constitutional purposes. See INTRAFAMILY CHILD ABUSE CASES, *supra* note 3, at 30; Jackson v. Beto, 388 F.2d 409, 411 (5th Cir. 1968).

68. A present understanding of the difference between truth and falsity, as well as comprehension of the obligation equivalent to an oath to speak the truth. See Melton, Bulkeley and Wulkan, *Competency of Children as Witnesses*, CHILD SEXUAL ABUSE AND THE LAW, 125, 127 (1984) A.B.A. Nat'l Legal Resource Ctr. for Child Advoc. and Prot. [hereinafter *Children as Witnesses*].

69. The mental capability of the witness at the time of the occurrence(s) to retain accurate recall thereof. *Id.*

70. Sufficient to independently recollect the event(s). *Id.*

71. The ability to verbally communicate in the courtroom the recollection of the event(s). *Id.*

72. *Id.* at 131; INTRAFAMILY CHILD ABUSE CASES, *supra* note 3, at 31.

73. This voir dire procedure is analogous to that performed on potential witnesses assumed to be *non compos mentis* by reason of mental retardation or otherwise. People v. Freshly, 87 A.D.2d 104, 451 N.Y.S.2d 73 (N.Y. App. Div. 1982); People v. Johnson, 30 Mich. App. 284, 186 N.W.2d 94 (1971); People v. LaPorte, 103 Mich. App. 444 (1981).

74. *Children as Witnesses*, *supra* note 68, at 131.

75. *Id.* See also State v. Manlove, 79 N.M. 189, 191, 441 P.2d 229, 231 (1966).

B. *Misconceptions About the Ability of Children to Testify Accurately and Without Fabrication*

At all stages of any criminal trial dependent upon the testimony presented by a child victim/witness, the substantive and procedural aspects of the law are additionally encumbered by influential factors less malleable to judicial management. In particular, the strong undercurrent of doubt concerning the ability of the minor to be a lucid and factual witness has created a vortex into which the objective disposition of the crime is precariously swept. Among these centrifugal concepts are beliefs that children are predisposed to false allegations, unable to separate real occurrence from mental fantasy, and acutely susceptible to leading questions.⁷⁶ Wigmore, legal history's most revered academician of the law of evidence, went so far as to recommend the psychiatric examination of all female claimants alleging sexual misconduct on the grounds that these claimants in particular are prone to bring charges based on fantasy, psychosis or self-serving motives such as revenge or bribery.⁷⁷

Modern research, relying on realistic simulation of the judicial demands of eyewitness and identity witness testimony, rather than unsubstantiated theories based on antiquated bias, has produced results which almost totally controvert the validity

76.

A provocative illustration that the issue of children's testimony is complex was provided by Allport and Postman (1947) in *The Psychology of Rumor*. Adults who viewed a picture of a subway scene often erroneously reported that a black man was holding a razor, and holding it aggressively, when, in fact, a white man held the razor in the scene. Children, if they recalled this detail, never confused who was holding the razor. Freud (citation omitted) suggested that the "untrustworthiness of the assertions of children is due to the predominance of their imagination, just as the untrustworthiness of the assertions of grown-up people is due to the predominance of their prejudices." At this time, it remains unclear whether the imagination of children or the prejudice of adults is the more dangerous enemy of justice.

Johnson and Foley, *Differentiating Fact From Fantasy: The Reliability of Children's Memory*, 40 J. SOC. ISSUES, 33, 46 (1984) [hereinafter *Fact From Fantasy*].

77. 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, 924-a. "No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." A more searching examination into Wigmore's treatise regarding the competency of classes of witnesses reveals an appalling misogynist bent to his views. For exhaustive analysis into the underlying theories of Wigmore's interpretation of legal doctrine, see *A Question of Credibility*, supra note 49, at 235.

of these conceptions.⁷⁸ At the outset, medical research indicates that the power of recall and narrative communication is correlative to the cognitive capacities of the narrator. Therefore, it is unlikely, if not impossible, that a child witness would be able to repeat with any degree of consistency a detailed account of an imagined past sexual assault, insofar as their cognitive knowledge of explicit, sophisticated sex acts would not be developed to that extent.⁷⁹ Further, it appears that children have qualified but accurate memory capacities for the identification of adult faces.⁸⁰

In regard to a child's power to distinguish actual happenings from what may have been imagined to have happened, research indicates that while a minor below 8 is often unable to separate his own acts from his conscious thoughts of acting, 6-year olds performed equally with adults in distinguishing between the acts of *others* and what they were told to imagine others to be doing.⁸¹ More importantly, false accusations by children of sexual abuse appear to be the exception and not the rule.⁸² A five-year research program instituted by a Michigan police department using polygraph examinations of child claimants registered a false allegation rate of less than 1%.⁸³ Other statistics show that the rate of false reports for sexual offenses is generally parallel with that of other crimes.⁸⁴

Concurrently, children's memory recall of acts with which they are familiar sometimes exceeds that of adults.⁸⁵ Therefore,

78. *The Testimony of the Child Victim*, *supra* note 28, at 127. There exists no scientific basis upon which the theory that children usually make false accusations of sexual assault. In fact, high rates of admission by offenders are testimony to the general veracity and reliability of child claimants.

79. *The Child Witness*, *supra* note 33, at 162; Lloyd, *Corroboration*, *supra* note 19, at 105.

80. Chance and Goldstein, *Face-Recognition Memory: Implications for Children's Eyewitness Testimony*, 40 *J. OF SOC. ISSUES* 69, 71 (1984) [hereinafter *Face-Recognition Memory*].

81. *The Child Witness*, *supra* note 33, at 161; *Fact From Fantasy*, *supra* note 76, at 42, 45.

82. Syllas, *Would A Kid Lie*, 71 *A.B.A. J.* 17 (1985).

83. *Children as Witnesses*, *supra* note 68, at 136. The program was implemented from 1969 through 1974 and yielded only one irregular polygraph out of 147 taken.

84. Lloyd, *Corroboration*, *supra* note 19, at 104.

85. *Fact From Fantasy*, *supra* note 76, at 35; Goleman, *Studies of Children as Witnesses Find Surprising Accuracy*, *N.Y. Times*, Nov. 5, 1984, C1, col. 1 [hereinafter *Studies of Children as Witnesses*].

the victim of a pattern of incest induced over a period of time could be expected to possess recollective powers exceeding that legally required for testimonial competency. In addition, several short-term and a few long-term studies show that loss of information over differing time intervals does not increase appreciably with decreases in the age of study subjects.⁸⁶

The singular quality peculiar to child testimony arises with the actual giving of testimony before a court. This aspect is characterized by children's responses to leading questions, the literal nature of children's language and response in testifying, and the effect of live confrontation on the courtroom testimony of children. Several studies show that children, in exhibiting the subordinate behavior to adult authoritarian figures that makes them, *ab initio*, a passive target for sexual abuse, respond affirmatively to leading questions. In addition to submissiveness on the stand, children are more likely to be led on questions involving subjects with which they are unfamiliar. They are thus easily confused by defense counsel and, in their discomfort, may answer affirmatively in a search for approval.⁸⁷

Courts are urged to exercise a constant awareness to the literal nature of child testimony, as well as language cues, in order to differentiate between what appear to be inconsistent statements from the natural translation of children's thought processes into verbal reenactment.⁸⁸ Otherwise, seemingly self-contradictory statements may be confused for what are, in actuality, the unshaking literal recollection of events from the memory of the victim. Language cues are likewise illuminating in the analysis of child testimony. Self-generated thoughts, as opposed to real happenings, are usually described in terms of what the child was thinking at the time of the purported "occurrence." Conversely, actual occurrences are usually stored in the children's memories in the context of their sensory, rather than mental, reactions. Therefore, verbal recollection of actual events will

86. *Fact From Fantasy*, *supra* note 76, at 36.

87. *Id.* at 37.

88. For instance, in one case a child witness/victim had sworn prior to trial that his abuser took him to an apartment. When questioned on the stand whether or not the man took him to his house, the witness answered in the negative. It was not until after trial that what appeared to be an inconsistent statement was actually a negative response to whether or not the child had been taken to a "house" since he remembered being taken to an "apartment." *Studies of Children as Witnesses*, *supra* note 85, at C4, col. 6.

likely be described using spatial, temporal and sensory terms.⁸⁹

Finally, like adults, accuracy in testimony is adversely affected by stress upon the child witness. As with adults, though not to as great an extent, questions from authority figures calculated to confuse the witness with the implication he or she is not telling the truth will produce stress on the stand. More particularly, while testing accuracy among the different methods of identification—black and white photographic identification, color photograph identification, one-way mirror line-up and live confrontation—optimum results were achieved through one-way mirror line-up when the witness had been assured that the subjects were not able to see the identifier. However, the same scenario reenacted with live confrontation produced marginal results, leading to the conclusion that live confrontation produces stress which results in the least probative and least accurate testimony on the stand.⁹⁰ This “inverted-U” relationship⁹¹ presents a strong argument for excepting face-to-face confrontation of victims and defendants in child sexual abuse cases.⁹²

C. Jury Bias

Arguments against procedural reform in the adjudication of child abuse and sexual abuse cases often include the conclusory assumption that juries are emotionally empathetic to the exploitation and manipulation of child victims. It is posited that this emotional predisposition taints the credibility of the defendant from the outset and colors an objective disposition of his case by jurors, thereby awarding the victim a distinct advantage at trial. Statistics show, however, that conviction rates for sexual offenses are substantially lower than that for other crimes.⁹³ In cases involving child victims, research data indicates that if any jury bias does exist prior to the presentation of evidence, it is indeed adverse to the victim.⁹⁴

89. *Fact From Fantasy*, *supra* note 76, at 39.

90. *Face-Recognition Memory*, *supra* note 80, at 81.

91. Melton, *Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings*, CHILD SEXUAL ABUSE AND THE LAW, A.B.A. Nat'l Legal Resource Ctr. For Child Advoc. and Prot. A.B.A. 184, 189 (5th ed. 1981).

92. *See infra* text accompanying notes 121-133.

93. Lloyd, *Corroboration*, *supra* note 19, at 104.

94. Goodman, Golding and Haith, *Jurors' Reactions to Child Witness*, 40 J. OF SOC.

There seems to have been little or no research conducted to determine the reasons why prospective jurors are hesitant to hand down criminal convictions based upon the testimony of a child witness. Therefore, it is at best only a presumption that the foregoing section dealing with misconceptions concerning the veracity and reliability of child testimony provides any plausible explanation. Findings do exist, however, to show that among a non-clinical sampling of prospective jurors and classes of professionals, less than 50% of any one group confirmed a belief in the accuracy of child testimony, and prospective jurors in general responded 69% against a presumption of accuracy.⁹⁵

Inquiry into the factors affecting jurors' evaluation of witnesses in general reveals that trustworthiness, consistency, certainty, confidence and objectivity are the criteria by which credibility is measured.⁹⁶ This does not imply that each factor carries equal weight, but in the areas of consistency and confidence, child witnesses are, by nature of their tender years, at a disadvantage.⁹⁷ As noted above, slight nuances in the presentation of questions may produce varying verbal communications from a child witness even though the mental picture of the occurrence is left intact. Self-contradiction is often fatal to the weight a jury places on testimonial evidence, regardless of the source. Confidence may also be undermined by the stress produced by face-to-face confrontation with the alleged abuser at trial. Studies indicate that the form of response is also vital to the trust a juror will place in testimony, favoring a running narrative over short, succinct answers that may appear to be rehearsed.⁹⁸ In this respect, children are again disadvantaged since questioning is likely to be restricted to short-form responses.⁹⁹

Assuming the above to be indicative of jurors in general, it appears that the triers of fact receive testimonial evidence in a way which unduly discriminates against child witnesses. The receipt of evidence, however, constitutes only the preliminary obligation of jurors. In summary, they are compelled to conduct de-

ISSUES, 134, 137 (1984) [hereinafter *Jurors' Reactions*].

95. *Id.* at 142.

96. *Id.* at 144.

97. *Id.*

98. *Id.* at 145.

99. *Id.*

liberations directed toward arriving at a verdict based upon an objective weighing of all evidence presented at trial. Research data indicates that the flow of adverse jury bias seeps into jury deliberations, impairing the strength of child testimony and its capacity to sustain a verdict. These findings show that jurors place more weight on defendant testimony and circumstantial evidence, if any, in the disposition of cases where the state's case-in-chief consisted primarily of a child victim's statements. Less emphasis is placed on these additional sources of evidence where the case-in-chief is built upon the testimony of an adult witness.¹⁰⁰ In short, absent corroborative evidence supporting a child's testimony, juror bias weighs against conviction. Characteristic of child sexual abuse and, in particular, incest, is the frequent lack or total absence of corroborative evidence. Under a legal system created, implemented and enforced by adults, the failure to provide for equitable modifications that compensate for imbalances created by the youth factor renders such a system ineffective for the child victim.

D. Corroboration Statutes

The element's of New York's corroboration statute are prototypical of legislation which inadvertently operates as a disadvantage, if not virtual barrier, to successful prosecution of child sexual abusers on behalf of the victim.

A person shall not be convicted of consensual sodomy, or an attempt to commit the same, or of any offense defined in this article of which lack of consent is an element but results solely from incapacity to consent because of the alleged victim's age . . . unsupported by other evidence tending to: (a) Establish that an attempt was made to engage the alleged victim in sexual intercourse, deviate sexual intercourse, or sexual contact, as the case may be, at the time of the alleged occurrence; and (b) Connect the defendant with the commission of the offense or attempted offense.¹⁰¹

The requirement of corroboration, like the misconceptions

100. *Id.* at 151.

101. N.Y. Penal Law § 130.16 (McKinney 1974).

surrounding the competency, accuracy and veracity of child witnesses, is based upon assumptions that may have had some basis in antiquity, but which have no viable support from modern scientific and medical data.¹⁰² Assuming, *arguendo*, that the burden of defending a sex offense charge is disproportionately onerous upon the defendant, the absence of a parallel statute for the crimes of threat, minor assault, attempted bribery, obstruction of justice and disorderly conduct is puzzling insofar as these crimes are just as easily charged and just as difficult to defend.¹⁰³ In light of the data produced above, no cogent rationalization exists for strict application of the corroboration requirement as a permissible safeguard on behalf of the defendant in sex crime cases involving child victims. New York's corroboration statute cited above is illustrative of the standard form utilized by states retaining such laws. Such statutes are often applied in conjunction with accomplice statutes which presume the victim to be an accomplice to an act characterized by the absence of force, threat of bodily harm or duress, and by the failure of the alleged victim to make a prompt report or complaint.¹⁰⁴

If an argument can be made as to the wisdom of theories postulated in support of such statutes, a more vigorous dispute can be taken with their application. Specifically applied to a case of incest, the practical effect would be to render a daughter-victim's testimony inadequate to return a conviction, notwithstanding that the last occurrence of abuse may have been distant enough in time so that corroborative medical evidence is unavailable, and notwithstanding that incestuous abuse is rarely accompanied by force, thereby foreclosing the possibility of physical evidence.¹⁰⁵ Statements made to teachers, acquaintances or relatives of the victim may be found inadmissible as out-of-court statements constituting impermissible hearsay. Even assuming the existence of a statutory or judicial exception to the marital privilege rule applicable to sexual abuse cases, social studies and profiles prove it unlikely that, absent the certainty of conviction of the accused, and subsequent liability of

102. See *INTRAFAMILY CHILD ABUSE CASES*, *supra* note 3, at 48.

103. Lloyd, *Corroboration*, *supra* note 19, at 105.

104. See *infra* notes 106-20 and accompanying text.

105. Lloyd, *Corroboration*, *supra* note 19, at 112.

the passive parent, a mother capable of giving corroboration testimony will step forward.¹⁰⁶ Ironically, in those cases involving stranger rather than intrafamily sexual abuse, the presence of a corroboration statute is merely *pro forma*, since these cases, unlike incest, are usually rapidly reported, thereby facilitating production of both physical and medical evidence, and even the admission of out-of-court statements made by the victim to others under an "excited utterance" exception to the hearsay rules.¹⁰⁷

E. Accomplice Statutes

Several new penal statutes include a corroboration requirement for the incest offense. Texas law, however, has long recognized that the consenting partner to incest is an accomplice witness whose uncorroborated testimony is insufficient to convict.¹⁰⁸

In the abstract, accomplice statutes appear to require no more than the law is entitled to demand. A finding of prior "consent" by an accuser to the acts or elements constituting any crime logically detracts from any outrage or violation claimed to have been suffered. It follows as a matter of course that where prior consent is present, the coupling of such a statute to another requiring corroboration works no undue infringement upon the rights of the alleged victim. However innocuous these evidentiary rules may appear in the abstract, their operative effect within the context of incest cases is often fatal to the pur-

106. See *supra* text accompanying notes 42-45; *Response to Intra-Family Sexual Abuse*, *supra* note 18, at 912 & n.76. Several states have recognized the unsuitability of corroboration and/or accomplice statutes to cases of incest and have judicially overruled them for purposes of this particular form of child sexual abuse. See, e.g., *Baker v. Georgia*, 245 Ga. 657, 266 S.E.2d 477 (1980); *State v. Hesse*, 281 N.W.2d 491 (Minn. 1979); *In re Lawson*, 273 S.C. 560, 257 S.E.2d 745 (1979); and *State v. Goff*, 86 S.D. 345, 195 N.W.2d 521 (1972). Yet other states have qualified their corroboration statutes to enforce the requirement only upon an impeachment of the accusing witness' testimony or a showing that the testimonial evidence is contradictory, inconvincing or inherently unbelievable, e.g., Arizona, Idaho, Illinois, Missouri, Montana, Oklahoma, South Dakota, Texas, West Virginia and Wisconsin. Wulkan & Bulkley, *Analysis of Incest Statutes CHILD SEXUAL ABUSE AND THE LAW*, A.B.A. Nat'l Legal Resource Ctr. for Child Advoc. and Prot. at 64 n.45 [hereinafter *Analysis of Incest Statutes*].

107. For a complete discussion of hearsay statements in the context of sexual abuse cases, see *infra* text accompanying notes 135-54.

108. TEX. PENAL CODE ANN. § 25.02 (Vernon 1974).

suit of valid claims.

Statutory classification of an incest victim as an accomplice is disqualified, *ab initio*, by reason of the judicial presumption that minors cannot "consent" to sexual activity.¹⁰⁹ In addition, there is unquestioned authority for the proposition that, absent a principal's adoption or authorization of an accomplice's statements, admission of such statements into evidence violates constitutional due process.¹¹⁰ Hypothetically then, if someone other than the victim, pursuant to mandatory reporting statutes, alerted police to an incest offense, any statement made by the victim, now characterized as an accomplice, would be inadmissible prior to its affirmation by the accused. This is tantamount to requiring a guilty plea or confession in order to be able to present a case-in-chief at trial.

Courts have constructively found "consent" based upon a mere absence of physical force¹¹¹ duress or undue influence,¹¹² threats of physical violence,¹¹³ or failure to promptly report the offense.¹¹⁴ Furthermore, in connection with any alleged "threats," apprehension on the part of the abused, and the abuser's capacity to enforce such threats, must be proven. Such an evidentiary burden is unduly onerous upon the claimant and wholly unresponsive to the myriad subtleties of the incest offense which command meticulous judicial sensitivity.

As previously noted, the pattern of incestuous abuse rarely entails physical trauma to the victim.¹¹⁵ Rather, the methodol-

109. *People v. Hurd*, 5 Cal. App. 3d 865, 875 n.5, 85 Cal. Rptr. 718, 724 n.5 (1970); *State v. Borne*, 224 N.W.2d 14, 16-17 (Iowa 1974), *cert. denied*, 422 U.S. 1008 (1975); *Komurke v. State*, 562 S.W.2d 230, 234 (Tex. Crim. App. 1978); *Analysis of Incest Statutes*, *supra* note 106, at 59.

110. In *Dutton v. Evans*, 400 U.S. 74, 98 (1970), Justice Blackmun in his concurrence stated: "Alternatively, I would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent, some circumstances indicating authorization or adoption." *Id.* (Blackmun J., concurring).

111. *Tindall v. State*, 119 Tex. Crim. 153, 43 S.W.2d 1101 (1931).

112. *Bolin v. State*, 505 S.W.2d 912, 913 (Tex. Crim. App. 1974).

113. *Id.*

114. *Masten v. State*, 100 Tex. Crim. 30, 34, 271 S.W. 920, 922 (1924) (regardless of fact that defendant threatened to kill accused and her family if she reported fact that relations continued until pregnancy gave rise to inference of complicity); *Mercer v. State*, 17 Tex. App. 452 (1885) (failure of victim to cry out even though others were within hearing range cast her as an accomplice).

115. *Supra* text accompanying notes 42 and 99. See also, *Daughter as Accomplice*,

ogy is to offer inducements likely to attract and entice the youthful victim, such as gifts, attention and favored treatment.¹¹⁶

Court-made law requiring prompt reporting of sexual abuse discounts the importance of why minor victims remain silent. In this regard, the law rigidly imposes an adult standard without compensating for the cognitive and emotional difficulties children experience as the victims of adult crimes.

Commonly, reports of sexual abuse by children are made only, if ever, after a lengthy time interval.¹¹⁷ Studies approximate that among adults currently reporting sexual abuse as children, between 67%-75% had never reported the assault before.¹¹⁸ Experts in the field report that an inverse relationship exists between delay of report and the victim-abuser relationship; as the familiarity among victim and abuser increases, the likelihood of reporting decreases. Consanguinity among the victim and abuser produces the least reported cases.¹¹⁹

Commentators cite fear of being blamed for the relationship,¹²⁰ fear of punishment and rejection,¹²¹ fear of being accused of lying,¹²² feelings of confusion and guilt,¹²³ and threats of the abuser,¹²⁴ as militating against swift and accurate reporting by victim.¹²⁵

Judicial exception from accomplice statutes of compliance by duress or undue influence merely pays lip service in the absence of a clear and adequate definition of those terms. Most jurisdictions applying the statute have declined to equate the power of parental dominion and intimidation with either exception.¹²⁶

supra note 21, at 1135-37.

116. Lloyd, *Corroboration*, *supra* note 19, at 112.

117. *Expert Testimony*, *supra* note 33, at 174 (citing transcript of expert testimony by Lucy Berliner in *State v. Doyle*, Slip. No. 80-1-03135-6 (Super. Ct. Wash., Dec. 19, 1980)).

118. *Id.*

119. *Id.* at 176.

120. *Response to Intra-Family Sexual Abuse*, *supra* note 2, at 906.

121. *Id.*

122. *Id.*

123. *Child Hearsay Statements*, *supra* note 39, at 1757.

124. *Id.*

125. *See also Expert Testimony*, *supra* note 33, at 171.

126. *Cf. State v. Richardson*, 349 Mo. 1103, 163 S.W.2d 956 (1942). *The Richardson*

The lack of clear guidelines delineating duress and undue influence has produced and will sustain inconsistent results among jurisdictions. An understanding of intrafamily dynamics, and the characteristics unique to families within which incestuous abuse is fostered, should assuage legal ambivalence toward alleviating antiquated evidentiary burdens. The incestuous parent practices the most insidious form of duress. Incest occurs where familial love, trust, and admiration have coalesced with manipulation, advantage and self-gratification. When parental influence is exercised to coerce sexual subjugation, it is an exercise of "undue" influence.

V. CONSTITUTIONAL RIGHTS OF THE ACCUSED VS. LEGAL PROTECTION OF THE VICTIM: STRIKING A BALANCE

A. *The Right of Confrontation*

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.¹²⁷ As pointed out to me by a colleague, the Constitution gives a right of confrontation, not intimidation.¹²⁸

Within the procedural, emotional and regimentary arena of the criminal law process, victims are often the most manipulated and least willing of its subjects. Their participation has been enlisted, in effect, by proxy—the fatalistic and irrational kismet of having been singled out as a target by the offender. Subsequently, the target becomes the tool with which the legal ma-

case involved prosecution of an abusing father under the forcible rape statute, rather than the incest statute, and therefore the victim's out-of-court complaint of rape statements were sought to be admitted solely for the purpose of negating the affirmative defense of consent. Case law involving child/victims below the statutory age had held that the admissibility issue was moot, since even willing minors are incapable of consenting. Nonetheless, the *Richardson* court ruled that it would admit such statements into evidence where additional, corroborative evidence existed showing the act to have been committed by use of force. While the issue approximates that confronted in accomplice statute cases, the *Richardson* decision is fundamental insofar as it recognized that force could be exerted "under the compulsion of long continued parental duress." 349 Mo. at 1111, 163 S.W.2d at 960-61. See also *Daughter as Accomplice*, *supra* note 21, at 1143, 1153.

127. U.S. CONST. amend. VI. This federal right was deemed held applicable to the states through the fourteenth amendment in *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

128. *Response to Intra-Family Sexual Abuse*, *supra* note 2, at 924 n.137.

chinery of the state, on its own behalf, seeks to obtain retribution. Thus, the intimate suffering of the victim is transmitted into the social debt of the convicted offender.¹²⁹ When the victim is a child, trauma suffered by reason of the pre-trial process compounds the psychological harm and may even exacerbate the mental and emotional injuries derivative of the actual abuse.¹³⁰ This pre-trial stress is further and perhaps primarily aggravated in court as a result of direct confrontation with the accused. The crowded courtroom, imbued with a high degree of anonymity, places the child witness in an unfamiliar environment, in which the accused stands apart as a startling reference point to a grim recollection. The natural consequence is trauma to the minor victim,¹³¹ particularly when the offender is a prior acquaintance or relative,¹³² which is more often the case than not.¹³³

Still, courts have ruled that in the absence of proof to the effect that an adverse psychological impact will ensue as a result

129. The paradox between exclusivity of suffering and societal mutuality in vindication further disrupts a child victim's ability to comprehend his/her own blamelessness. A principal at the time of the offense, but subordinated to evidentiary conduit at trial, the child victim may feel that society has likewise homogenized the offense across the public. As a result, child victims do not feel as though justice has intervened on their behalf.

A few unique cases and several authorities now stand for the proposition that, in sexual abuse cases involving children, civil actions should be instituted on behalf of the victim in order to assess tort damages for the physical and/or psychological damage suffered, e.g., *Elkington v. Foust*, 618 P.2d 37 (Utah 1980) (awarding \$42,000 to defendant-molestor's step-daughter, of which \$30,000 was deemed punitive damages); *X. v. Melder*, 3 Civil 20125 (on appeal from the Superior Court, Butte Cty., California) awarding sexually abused daughter nearly \$1 million (cited in *Tort Remedies*, *supra* note 31, at 617 n.55, 618 n.58).

130. "Frequently, abused children suffer additional harm from the justice system. . . . The most disturbing example is the practice in some jurisdictions of repeated interrogation of the child. In many cases, children are subjected to over a dozen grueling and detailed investigative interviews." *ATTY. GEN'S TASK FORCE*, *supra* note 8, at 15. *Cf.*, Sweden's employment of special female investigators who are both qualified police-women and trained nurses. In addition, Swedish law permits the recordation of interviews on tape for future use in lieu of repeated interrogation of the victim. Miller, *supra* note 5, at 72 (citing Nat'l Ctr. on Child Abuse and Neglect, U.S. Dept. of Health, Education, and Welfare. *CHILD ABUSE AND NEGLECT REP. 2* (1979)).

131. "One study of a random sample of child sex victims compared the emotional condition of those who participated in judicial proceedings with those that did not and found that children who went to court showed more psychic harm." Parker, *supra* note 58, at 649.

132. *Id.* at 646. Psychic trauma is more profound in child witnesses testifying against prior acquaintance or relative defendants than when testifying against a stranger.

133. *Id.* In 75% of cases involving child victim-witnesses to sex crimes, the offender was known to the child.

of testifying, a defendant's sixth amendment right of confrontation, which guarantees cross-examination by the defense, and speaks to production of the witness before the jury for inclusion of demeanor evidence into the assessment of credibility, may not be compromised.¹³⁴

The covetous immunity reserved to confrontation by the Constitution is related to the abhorrence of the evil sought to be cured by its institution, namely, the imported practice of trial by *ex parte* affidavit.¹³⁵ This form of "legal" proceeding effectively removed any obligation of the state to prove its case. Often evidence was coerced or merely fabricated. Conviction was obtained by judicial fiat and unbridled infringements on the integrity of the legal process. The continued vitality of Star Chamber tactics

134. *Matter of S Children*, 424 N.Y.S.2d 1004, 1007, 102 Misc.2d 1015, 1019 (1980) (child custody hearing for termination of visiting rights in which respondent-father was accused of sexually molesting his 3-year old son in the presence of a second son, age 6; the elder son refused to testify in presence of father and all motions to sequester respondent during child's testimony were denied on confrontation grounds); and *Herbert v. Superior Court*, 117 Cal. App. 3d 664, 669, 172 Cal. Rptr. 850, 853 (1981) (seating arrangement in courtroom whereby defendant could hear, but not see, 5-year old victim-witness during testimony regarding her alleged molestation violated defendant's right of confrontation, interpreting the right as specifically "face-to-face" meeting of accused and witnesses in the courtroom). The *Herbert* court placed great emphasis on the ability of a defendant to look upon, and be seen by, the witness. Does this mean that blind witnesses automatically abridge the sixth amendment by reason of their incapacity to see the defendant? *Cf. State v. Gallon*, 115 Wis.2d 592; 340 N.W.2d 912, 913 (1983), finding that *adult* rape victim was "unavailable" for courtroom testimony purposes by reason of severe, medically confirmed, mental illness which would be aggravated by courtroom appearance. In *Gallon*, the witness was, at the time of trial, diagnosed as mentally disturbed. This is distinguishable, however, from the latent mental effects visited upon child victims of sexual abuse. Even if courts were to recognize an exception from live testimony for victims presently affected by severe psychic disturbance, the exception would prove fatally narrow. In light of the long gestation of abuse-derivative illness, such an exception would serve only those witnesses so obviously affected so as to place doubt on whether they could, in any event, meet competency requirements.

135. Accusation by *ex parte* affidavit, a historical means of instituting proceeding throughout seventeenth century Europe, generally used an anonymous complaint declared at court, supported by allegations of absent, anonymous witnesses, and, frequently, the obstruction of defense efforts to call rebuttal evidence and witnesses. They were commonly referred to as "Star Chamber" trials. The pervasive contamination of bias at every level of these proceedings rendered presentation of a defense merely illusory, *see, Libai, supra* note 5, at 1023; Baker, *The Right of Confrontation, The Hearsay Rules, and Due Process— A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529, 548 (1974) [hereinafter *Confrontation and Due Process*]; *California v. Green*, 399 U.S. 149, 180 (1970); *Dutton v. Evans*, 400 U.S. 74, 94-95 (1970).

would compel a strict and literal application of the right of confrontation. However, that argument loses much of its import given the panoply of objective safeguards that characterize our modern criminal trial system. The right of confrontation is an enhancement and not a singular bastion of defense entitlements. It shares its purifying influence with, *inter alia*, the right to a public trial, the right to call witnesses and testify in one's own behalf, the right to compel production of evidence and the right to trial by a jury of one's peers. Hence, the right of confrontation, as a contributory, and not solitary, guarantee of a defendant's interests, is not an inert declaration, but one capable of assimilation into a broader chemistry of interests, including those of a victim-witness.¹³⁶

Inflexible application of broad guarantees which are open to varying interpretation,¹³⁷ at the expense of psychic injury to the minor witness, produces equally undesirable side-effects on the validity of the judicial process.¹³⁸ The marginal quality of child

136. *Mattox v. U.S.*, 156 U.S. 734, 742-43 (1895):

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness. . . . But general rules of law of this kind, however beneficent in their operation and value to the accused, must occasionally give way to *considerations of public policy* and the necessities of the case. . . . The law in its wisdom declares that *the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.* (emphasis added).

137. *Dutton v. Evans*, 400 U.S. 74, 96 (1970). "Regardless of the interpretation one puts on the words of the Confrontation Clause, the clause is simply not well designed for taking into account the numerous factors that *must* be weighted in passing on the appropriateness of rules of evidence." No argument is implied that confrontation is or should be construed as anything less than a fixed guarantee to defendants in criminal proceedings. In light of the values sought to be protected, however, and the amorphous nature of the language in which it is cast, the sixth amendment is susceptible to influences arising from the exigencies of the case. There is no constitutional edict which explicitly states that confrontation is to be construed in a *physical* sense. The interests of the criminal defendant, in proceedings which affect personal liberty, are arguably satisfied in the operation of *judicial* confrontation. See *infra* notes 169-75 and accompanying text.

138. "The stress is intensified if the victim must face the accused again, or if he or she must testify against a close relative, a situation that often occurs in sex abuse cases. Under these circumstances, children, if they reply at all, often give confused and inaccurate answers." *Child Hearsay Statements*, *supra* note 39, at 1752. Children are generally not required to testify at child custody cases because the purpose of the proceeding is to protect the child's best interests and such hearings are assumed to be unusually stressful for child witnesses. It would be anomalous for the judiciary to unduly inflict what it has been called upon to prevent. Weighed against protection of the defendant, however,

testimony elicited under the duress of in-court, live, adversarial conditions injects impurity into the presumption of a utopian attainment of evidence thought to arise automatically upon satisfaction of the sixth amendment. Compassion is not the operative factor. In a system devised, dispensed and enforced by adults, the practical implications of compelling minors to testify expose the minor victim-witness as a class disadvantaged by status—the immutable characteristics of immaturity and non-sophistication.

This note is not intended to argue for a blanket rule exempting from legal obligation *all* child claimants,¹³⁹ but between the freshly recognized interests of the youthful victim and the time honored rights of alleged offenders lies the legal fissure that, unnegotiated, continues to either conceal or discount fundamental evidence.¹⁴⁰ Using established doctrines of evidence and innovative theory as collateral, it is possible to purchase the validity of one interest without bankrupting the value of the other.

courts refuse to enforce this same standard in criminal cases. Sinner, *Children As Witnesses*, monograph available by writing to the U.S. Department of Justice, Office of Justice Assistance, Research and Statistics, Washington, D.C. 20531. See also *State v. Gilbert*, 109 Wis.2d 501, 326 N.W.2d 744 (1982) (criminal court denied a request of the state to waive personal in-court testimony of child witness over psychiatric evidence warning against production of the witness because of expected resulting psychic injury).

139.

Psychiatric opinions and studies emphasize that each child victim reacts to an offense and its aftermath in his own individual way. . . . Thus, there can be no more justification for excusing all victims from testifying than for imposing the duty on all of them. Each case merits its own individual decision.

Libai, *supra* note 5, at 1009.

140.

The logic of the proceeding discussion might suggest that no testimony be received unless in full compliance with the three ideal conditions [cross-examination, taking of oath and opportunity to have demeanor examined by the jury]. No one advocates this position. Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these conditions and the desirability of giving testimony under ideal conditions.

Confrontation and Due Process, *supra* note 135, at 542, n.46 (citing PROPOSED FEDERAL RULES OF EVIDENCE, Introductory Note: The Hearsay Problem, 56 F.R.E. 198, 289 (1972)).

B. *The Hearsay Counterweight*

Right of confrontation contentions have been entered with equal vigor against evidence arising from outside the courtroom. Prosecutors, seeking to circumvent confrontation obstacles to untraditional sources of testimony in the courtroom, have most frequently resorted to the hearsay doctrine in an attempt to submit prior out-of-court statements by the victim in lieu of live production at trial.¹⁴¹ Hearsay presumes the "unavailability" of the declarant, and permits, upon a showing of trustworthiness, reliability and necessity, submission into evidence of prior out-of-court statements. Judicial determinations on hearsay focus, in the main, on whether the above elements applied to such statements render their submission consistent with the contours of the sixth amendment's protective sphere.¹⁴² Insofar as face-to-face confrontation is a moot issue in hearsay analysis, and demeanor and examination evidence are thus lacking, need, trustworthiness and reliability are emphasized to compensate the natural diminution of the defendant's interests arising from the declarant's absence at trial. Moreover, hearsay statements will not be admitted if it appears that the accused would thereby be denied a reasonable opportunity to respond with rebuttal evidence. Inability to rebut will not act as an automatic bar so long as the unfettered opportunity to do so has been secured.¹⁴³

Approval and utilization of hearsay, in any event, forecloses the presumption of the confrontation clause as absolute. Although hearsay may appear to represent, in disguise, the confrontation clause as applied to extrajudicial statements, the two doctrines are not mutually inclusive.¹⁴⁴ Hearsay rules constitute

141. Hearsay is generally defined as an out of court statement offered at trial, by a witness not the original declarant, to prove the truth of the matter asserted. *But see* *People v. Taylor*, 66 Mich. App. 456, 461, 239 N.W.2d 627, 630 (1976) (admissible only as corroborative evidence); *People v. Kreiner*, 329 N.W.2d 716, 717, (Sup. Ct. Mich. 1982) (holding that insofar as tender years exception developed by courts had not been codified in recent adoption of state's rules of evidence, it could only be used for the purpose of corroborative evidence and not to bring in out of court statements as part of the case in chief).

142. The disposition of hearsay statements is neither frivolous nor arbitrary. Laxity in application of any one element of the hearsay principles conjures regression into trial by *ex parte* affidavit. That concept is equally as offensive to the hearsay doctrine as it is to the confrontation clause. *Dutton v. Evans*, 400 U.S. 74, 94-95 (1970).

143. Note, *Right to Confrontation*, 113 U. Pa. L. Rev. 741, 748 (1965).

144. *California v. Green*, 399 U.S. 149, 155-56 (1970):

an adaptive mutation where an otherwise pivotal link¹⁴⁵ in the confrontational progression—cross-examination—is missing.¹⁴⁶ As a compensatory measure, meticulous and overbearing legal scrutiny is required in order that the substitutional utility of the hearsay exception does not exhalt convenience over fundamental fairness to an accused. The objective of the hearsay doctrine is neither to capitalize on situational contingencies nor to short-change constitutional guarantees. The object is to recover otherwise irretrievable probative evidence, provided adequate likelihood of essential trustworthiness and necessity have been established.¹⁴⁷ Thus, the substance of the confrontation clause is preserved in the event academic conditions cannot be met. Hearsay doctrine does not countenance “material departure from the general rule.”¹⁴⁸

Of the various forms of hearsay exception, the “excited utterance” or “res gestae,” and “declaration of present bodily feel-

While it may readily be conceded that hearsay rules and the confrontation clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the confrontation clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. (citations omitted). The converse is equally true; merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

145. Cross-examination, of which demeanor is a component, has been described as the indispensable element of confrontation. Comment, *A Not Very Clear Say on Hearsay*, 13 U.C.L.A. L. REV. 366, n.4 (1966).

146. “The right of confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.” *Barber v. Page*, 390 U.S. 719, 725 (1968); accord *Dutton v. Evans*, 400 U.S. 74, 101 (1970).

147.

Both the right to confrontation and the hearsay rule reflect the belief that some evidence which might be of probative value should not be admitted unless the declarant has actually appeared in court and has been cross-examined with regard to his sincerity, memory, perception, and ability to communicate . . . courts have admitted hearsay in criminal trials . . . within one of the established common-law hearsay exceptions which have developed because of a notion of potential trustworthiness, or because of necessity. However, the purpose of the common-law exceptions appears to be to facilitate the admission of probative evidence.

Right to Confrontation, supra note 143, at 747.

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

ings, symptoms and conditions" rules have been most often used in regard to the out-of-court statements of children.¹⁴⁹ "Declarations of present bodily feelings" include statements given to medical personnel who receive information relating to the occurrence in the course of administering examination and treatment. Because treatment of a complaint or illness is involved, the law presumes also the accuracy of the statements made.¹⁵⁰

More often, declarations by children are advanced as "res gestae" or "excited utterance" statements, arising from and directly related to a shocking or startling event and communicated spontaneously or so contemporaneously thereafter as to preclude the inference that such statements could be the product of reflection or fabrication.¹⁵¹ In addition, the res gestae exception does not preliminarily require "unavailability" of the declar-

149. "Complaint of rape," though not a hearsay exception *per se*, is sometimes used in a similar manner, as corroborative evidence to negate any allegation of consent. Generally, it is unavailable for purposes of our facts since the issue of "consent" is presumptively moot when the victim is a minor.

150. See, Buckley, *Evidentiary Theories for Admitting a Child's Out-of-Court Statements of Sex Abuse at Trial*, CHILD SEXUAL ABUSE AND THE LAW 153, 157 (5th ed. 1984) [hereinafter *Evidentiary Theories*]. See also FED. R. EVID. 803(2). Rule 803(1), the present sense impression exception, covers statements made during the occurrence or immediately afterwards. This may facilitate the admission of statements of witness-siblings whose utterances made contemporaneously with, or temporally immediate to, events of incestuous abuse may be entered into evidence at trial regardless of the competency of the declarant to testify.

151. FED. R. EVID. 803(4). In effect, the statements are categorized as part of the transaction itself.

The fact that the prosecutrix was not more definite or explicit in her statements and in the identifying of her assailant tends strongly to disprove the idea that what she said was the result of thought or premeditation, but to the contrary, demonstrates that what she said was the act of speaking through her . . .

Williams v. State, 145 Tex. Crim. 536, 170 S.W.2d 482, 490 (1943). *Res gestae* is composed of simultaneous exclamations and verbal acts. Spontaneous exclamations generally explain the event. Verbal acts are statements accompanying and forming an integral part of the transaction, without which the event would lack legal effect, e.g., in states retaining an accomplice/corroboration statutory scheme, the protestations of a sexual abuse victim would be the verbal acts quotient of the event negating consent. In the former sense, the statements arise from the transaction, while in the latter, they form a component thereof. Courts have used both theories in order to bring out-of-court statements within the purview of the exception. See generally Annot., 83 A.L.R.2d 1368, 1371 § 2 (1962). See also *State v. Simmons*, 52 N.J. 538, 247 A.2d 313, cert. denied 395 U.S. 924 (1965); Annot., 83 A.L.R.2d 1368, Later Case Service, § 11 (1979), which admitted into evidence under the *res gestae* exception, the physical actions of deaf-mute rape victim, which acts were construed to identify her assailant.

ant.¹⁵² Further, several courts, in conceding the non-sophistication of minor victims, and the psychological influences that militate against prompt reporting, have liberally construed the breadth of a startling occurrence, and hence the temporal parameter which is the essential element of the rule, according to a so-called "tender years" exception.¹⁵³ A blanket rule for automatically excusing all child witnesses from testifying would therefore result in a violation of the hearsay doctrine and of the right of an accused to call his accuser before the court. The court-created "tender years" exception requires an ad hoc, case by case analysis of factors such as age of the declarant, nature of the claim asserted, relationship between the accused and the victim, as well as facts dispositive of the spontaneity and trustworthiness of the statements made.¹⁵⁴ It is not fatal to the application of the exception either that the statements were made in response to a question or, peculiar to cases involving victims of tender years, that the statements were not temporally proximate

152. *Evidentiary Theories*, *supra* note 150, at 155.

153. The decisions further state that when the declarant is a young child, the impact of an event forestalls reflection for longer periods than is the case with adults. Therefore, longer time intervals may pass without subjecting the defendant to accusations produced from calculated fabrication. *See State v. Padilla*, 110 Wisc.2d 414, 419, 329 N.W.2d 263, 266 (Wisc. App. 1982) (permitting testimony of victim's mother as to statements made 3 days after the event and testimony of juvenile officers as to statements made even later, on the theory that the interval used against children must be measured by duration of the excitement and not time); *State ex rel Harris v. Schmidt*, 69 Wis.2d 668, 230 N.W.2d 890 (1975) (in which victim's statements to mother 1 day after assault and to probation officer 15 days later were both admitted into evidence); *People v. Gage*, 62 Mich. 271, 28 N.W. 8 (1866) (time lapse of 3 months between assault and statements by victim to others, statements admitted as "*res gestae*" declarations); *Bertrang v. State*, 50 Wis.2d 702, 184 N.W.2d 867 (1971) (statements made to mother 1 day later); *U.S. v. Nick*, 604 F.2d 1199, 1202 (9th Cir. 1979) (admitting statements of 3 year-old made some hours later to mother under Rule 803(2) and subsequent statements to examining physician under Rule 803(4)); *State v. McFall*, 75 S.D. 630, 71 N.W.2d 299 (1955) (statements made 2 weeks later deemed to be admissible under *res gestae* exception); *State v. Broody*, 96 Ariz. 259, 394 P.2d 196 (1964).

154.

Each case must be viewed on its particular facts and exercising its discretion of whether to admit testimony about statements made by a child . . . [T]he court should consider the age of the child, the nature of the assault, physical evidence of such assault, relationship of the child to the defendant, contemporaneity and spontaneity of the assertions in relation to the alleged assault, reliability of the assertions themselves, and the reliability of the testifying witness.

Bertrang v. State, 50 Wis.2d 702, —, 184 N.W.2d 867, 870 (1971). *See also Child Hearsay Statements*, *supra* note 39, at 1758.

to the assault.¹⁵⁵

More importantly, courts have admitted such statements into evidence regardless of whether the declarant could be deemed, either by reason of age¹⁵⁶ or physical disability¹⁵⁷ incompetent to personally testify at trial.¹⁵⁸ Even assuming that admission of the out-of-court statements is in violation of either hearsay or confrontation principles, if they merely represent cumulative evidence, the error will be deemed harmless error and the trial court's verdict will not be disturbed.¹⁵⁹

It is possible, however, that another argument exists in support of admission at trial of a victim's hearsay statements by a witness other than the declarant. This proposition virtually treats the statements as something other than hearsay, removing the need for analysis of court-made exceptions and the restrictions attendant thereto. By way of example, if the out-of-court declarations may be fixed as verbal acts, integrated into the entirety of the event, then the witness at trial, at the time of hearing such declarations, is, in effect, witnessing part of the event first-hand. If the *actus* of the assault may be said to attach to and continue with the statements, then the witness at trial is converted into a direct witness-party and, on the stand, is simultaneously witness and declarant.¹⁶⁰

155. *U.S. v. Ironshell*, 633 F.2d 77, 85 (8th Cir. 1980); *People v. Miller*, 58 Ill. App. 3d —, 373 N.E.2d 1077, 1080 (1978); *Bertrang v. State*, 50 Wisc.2d 702, 184 N.W.2d 867, 870 (1971); *State v. Broody*, 96 Ariz. 259, —, 394 P.2d 196, 200 (1964). See also *Hale v. State*, 164 Tex. Crim. 482, 300 S.W.2d 75 (1957) (statements made to grandmother); *Holmes v. State*, 165 Tex. Crim. 200, 305 S.W.2d 588 (1957) (to female parking attendant); *Wilder v. State*, 169 Tex. Crim. 255, 333 S.W.2d 367 (1960) (to policeman); *State v. Withrow*, 142 W. Va. 522, 96 S.E.2d 913 (1957) (to teacher); *People v. Woodward*, 21 Mich. App. 549, 175 N.W.2d 842 (1977) (to policewoman).

156. Annotation, *Declarant's Age as Affecting Admissibility as Res Gestae*, 83 A.L.R.2d 1368 (1962).

157. See *State v. Simmons*, 52 N.J. 538, 247 A.2d 313, cert. denied 395 U.S. 924 (1965).

158. See *supra* note 67 and accompanying text. The common thread of reasoning cited as justifying the admission of statements made out-of-court by a declarant of tender years is that the prior knowledge of minors regarding sexual matters is not so developed as to make it probable such statements are self-serving allegations derived from fabrication or connivance, and that delays in reporting, in light of the nature of the offense and the immaturity of the victim, are understandably the product of influence relevant to determination of the reliability of statement by minors. See also *Child Hearsay Statements*, *supra* note 39, at 1751.

159. *U.S. v. Ironshell*, 633 F.2d 77, 87 (8th Cir. 1980).

160. See *Dutton v. Evans*, 400 U.S. at 88:

C. *Proposals for a Fair and Equitable Compromise.*

In the continuing tension between the rights of accused and victim, the child victim introduces a factual element—age—which impacts upon rules of procedure and evidence at every level. The greatest obstacle to advocates of reform for the benefit of child victims is the confrontation clause, and various, perhaps excessively, innovative modifications have been urged upon the courts and legislatures. The argument for a tender years exception based on *res gestae* principles is convenient insofar as “availability” of the declarant is not an issue upon which the exception depends. Therefore, the confrontation clause is circumvented, and at the pre-codification stage, a tender years exception presents an attractive alternative. However, this embryonic stage is enhanced by the freedom to conduct a thorough, case-by-case analysis which may not occur in the face of a codified rule requiring mechanical application.

This note supports the theory that confrontation does not entitle an accused to face-to-face confrontation with a victim, particularly in the instance of youthful victims where the potential of intimidation is too great.¹⁶¹ However, the production of witnesses at trial and the asset of demeanor evidence incident thereto, is meant to facilitate the jury’s task in the synthesis of evidence. Personal appearance at trial only derivatively benefits the defendant when witness demeanor diminishes the weight of the evidence.¹⁶² Further, cross-examination is a right held in

The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard.

161. See *Rice v. Marshall*, 709 F.2d 1100 (6th Cir. 1983), wherein in the court permitted substitution of a witness’ live testimony by inclusion into the record of his out-of-court statements, on grounds of witness intimidation. The court rejected defendant’s confrontation clause contentions on the theory that but for the intimidation occasioned by defendant himself, live testimony would have been possible. The capacity of an accused to intimidate a child victim-witness, particularly when a familial relationship exists between them, is sufficient cause to demand the avoidance of a face-to-face encounter.

162.

Part of this effective cross-examination is the opportunity to compel the witness “to stand face to face with the jury in order that they may look at him, and

trust and exercised on behalf of the defendant-beneficiary by his attorney and not by the accused himself.¹⁶³

This interpretation of the confrontation clause is in accordance with the application of hearsay rules. A federal codification of the tender years exception¹⁶⁴ would be excessive in light of the constitutional criteria it acts to avoid. If contoured along the same lines as now-existing state regulations,¹⁶⁵ it would leave unanswered the issue of legally excusing production of the victim face-to-face with the defendant at trial, since present statutes accommodate corroborative evidence only when the declarant is unavailable. To utilize the exception solely for the purpose of corroborative evidence does nothing to change the status of incompetents and victims who refuse to testify, because of coercion or otherwise, from that of an unrepresented class of victims.¹⁶⁶ Yet a more liberalized statute represents a danger to rights of defendants in that it would rob an accused of the right of cross-examination, and the jury of an acceptable basis on which to weigh evidence.¹⁶⁷ A system that produces any incen-

judge by his demeanor upon the stand and manner in which he gives his testimony, whether he is worthy of belief."

Libai, *supra* note 5, at 1025 (citing *Mattox v. U.S.*, 156 U.S. 237, 242-43 (1895)).

163. Several commentators have come to this conclusion relying on the case of *Pointer v. Texas*, 380 U.S. 400 (1965). In *Pointer*, the accused, proceeding *pro se* at preliminary trial, declined the opportunity to cross-examine a particular witness even though he had chosen to cross-examine others. When the transcript of the preliminary hearing was sought to be submitted at trial, in lieu of producing the same witness, the Supreme Court ruled that introduction of the transcript constituted a violation of the accused's sixth amendment right insofar as defendant had been denied at preliminary hearing the representation of counsel and an adequate opportunity to have such counsel cross-examine.

164. *E.g.*, state statutes codifying the rule: KAN. STAT. ANN. ch. 60, art. 460 § dd (1983); S.D. CODIFIED LAWS ANN. § 19-16-38 (Supp. 1984); 1982 WASH. LEGIS. SERV. ch. 129, § 2 (West).

165. These statutes will permit introduction of out-of-court statements only as corroborative evidence if the witness is unavailable to testify at trial.

166. *The Testimony of the Child Victim*, *supra* note 28, at 131-32.

167. A more basic flaw inherent in the limited tender years exception is likely to erupt if a more liberalized form were adopted. The tender years rationale focuses on the temporal element and the socio-psychological justifications for its suspension. Neutralization of the time requirement is what separates the tender years exception from *res gestae*. In focusing on spontaneity *per se*, the proposal exalts form over substance. The temporal element in *res gestae* serves as a proxy for indicia of reliability and has no counterpart in the tender years exception. A liberal tender years exception thus represents impermissible boot-strapping. See *Child Hearsay Statements*, *supra* note 39, at 1761. A more acceptable form would be to require some corroborative evidence in the

tive either to jury bias or to even a narrow class of wrongfully convicted defendants is just as symptomatic of an anemic form of justice as one which perpetuates a broad class of unrepresented victims.¹⁶⁸

As noted earlier, hearsay generally presumes unavailability except in those few cases, such as the residual exception, where it is immaterial. The gravitational pull exerted by the hearsay rule that draws out-of-court statements permissibly into trial occurs when necessity aligns with the absence of alternate sources for probative evidence.¹⁶⁹ Necessity, alone, is a powerful component of the argument for introduction of a minor's extrajudicial statements.¹⁷⁰

Rather than resort to purely theoretical contortions, this reliance on legal fictions and hypothetical gymnastics should be replaced by pragmatic procedural reforms.¹⁷¹ Positive results have been obtained by the use of anatomically correct dolls,¹⁷²

nature of "sexually abused syndrome" indicators. See *supra* notes 57, 60-64 and accompanying text, in combination with age of the declarant. See also *Response to Intra-family Sexual Abuse*, *supra* note 2 at 916, n.107.

168. One suggestion has been to subsume a form of tender years exception under the residual hearsay exception. See FED. R. EVID. 803(24). The residual exception permits introduction of statements not qualifying under any other specific rule, but which evinces equivalent circumstantial guarantees of trustworthiness, are probative on the issue to which they speak, and simultaneously serve the best interests of justice. Proponents of utilizing the residual exception additionally argue that the continuing use of the *res gestae* exception is destined to result in a total emasculation of the rule through successive torturing of the contemporaneity element. See, *Evidentiary Theories*, *supra* note 150, at 158-59.

169. *Child Hearsay Statements*, *supra* note 39, at 1748. One commentator has proposed a "reciprocal sliding scale" whereby reliability and need is measured over probativeness of the evidence. A high degree of trustworthiness of the evidence and necessity of its inclusion would lessen the degree of probativeness needed for admission, and at the same time guard the defendant's right in requiring such high levels of reliability. Comment, *supra* note 145, at 376.

170. *Child Hearsay Statements*, *supra* note 39, at 1752, n.69; Annot., 83 A.L.R.2d 1368, 1372, § 3 (1962) (with infant declarants, the evidence is admitted on the grounds of necessity); *United States v. Nick*, 604 F.2d at 1203. The court indicated that the real issue is whether the admissible hearsay statements have a high degree of reliability and trustworthiness, and a need for the evidence can be demonstrated. *Id.* at 1203.

171. "About 30 percent of the jurisdictions reported having protocols or guidelines for interviewing child victims in order to minimize the trauma of the court system upon the child." *Prosecutorial Practices and Policies*, *supra* note 28, at 7.

172. *Id.* Currently in use in Brooklyn, New York and Hennepin County, Minnesota, the dolls are used by child witnesses for demonstrational purposes in describing an event rather than be confronted with questions in connection with actions and functions with which they have little familiarity.

special interview rooms for prosecutor's interviews of the victims,¹⁷³ vertical proceedings,¹⁷⁴ and partial closure of legal proceedings.¹⁷⁵

A more crucial system of reforms has been suggested by at least one commentator with regard to alleviating the tension of courtroom trauma sufficient to excuse appearance of the victim-witness while honoring both the necessity of acquiring testimony for the jury and the defendant's constitutional rights. The proposed scheme consists of "Special Hearings,"¹⁷⁶ alone, or in conjunction with testimony taken in a "Child's Courtroom."¹⁷⁷ The child's courtroom would be designed to induce a more relaxed state in the witness.¹⁷⁸ Actually present would be the judge, prosecutor, defense counsel, and a child examiner.¹⁷⁹ The defendant would view the questioning electronically, out of sight of the witness.¹⁸⁰ In addition, the defendant would maintain contact with his counsel by radio and the proceedings would be transmitted by videotape to the jury.¹⁸¹

Videotaped testimony is uniquely tailored to satisfy the interests of witnesses, defendants and the jury.¹⁸² Under this proposal, the defendant is excluded from the room, but participates in his defense via transmissions with his counsel. Oath is administered, cross-examination is conducted in person by defense

173. *Id.* In Seattle, Washington, an interview/play room with a one-way mirror is available and prosecutors are provided with special training on how to conduct interviews with children.

174. *Id.* at 8. "Vertical proceedings" coordinate civil, criminal and family actions arising among the same parties in order to reduce the number of interviews and court appearances required to be made by a minor victim-witness.

175. *Id.* at 7.

176. Libai, *supra* note 5, at 1028-32.

177. *Id.* at 1016-18.

178. *Id.* at 1017.

179. *Id.*

180. *Id.*

181. *Id.* at 1016. Compare English law, permitting substitution of deposition for live testimony when medical opinion is presented indicating that production of the witness in court will involve serious physical or mental impact, Children and Young Persons Act, 1933, 23 Geo. 5., ch. 12, §§ 41-43; and that of Israel, dealing specifically with victims of sexual abuse under 14, permitting the introduction into evidence the report of a "youth examiner" who has sole discretion as to the breadth of questioning and the number of interviews of the victim-witness based on the probability of psychological harm involved, Law of Evidence Revision (Protection of Children) 5715-1955.

182. Comparatively, it is far superior to any form of hearsay to the extent that it permits observance of the declarant by the jury in order to adduce demeanor evidence.

counsel, and the testimony is simultaneously monitored by audio-visual device to the jury, whereby demeanor evidence is effectively obtained.¹⁸³ One court has deemed film testimony a superior form of evidence¹⁸⁴ inasmuch as defendants are accorded the right to exercise cross-examination and have the jury weigh their belief in the testimony, not against the bare record of a deposition, but under circumstances closely approximating those available during live production of the witness on the stand.¹⁸⁵

The same reasons supporting the videotaping of testimony for use at trial are available for the filming of "Special Hearings" prior to trial.¹⁸⁶ As proposed, the structure of the Special Hearing is analogous to testimony at preliminary hearings, but is actually more effective. In contrast to a preliminary hearing, the Special Hearing not only permits full and unlimited cross-examination, but provides defense counsel, prior to the hearing, with a complete record of the statements previously given to police, child examiners, medical personnel and/or the prosecution, as well as information relating to any and all evidence in the possession of police or the prosecution.¹⁸⁷

Like hearsay, substitution by videotape of live testimony

183. See Parker, *The Rights of Child Witnesses*, *supra* note 58, at 694-95 (citing *Commonwealth v. Stasko*, 370 A.2d 350 (Pa. 1977)) (in which the court upheld a conviction for murder over contentions that defendant's right of confrontation was violated by admission of videotaped deposition in lieu of live testimony. Although the witness was being treated for severe medical illnesses which prevented her appearance at trial, the court declined to treat the issue as one concerning "unavailability," finding instead that the witness was available [on film]).

184. *Id.* Cf. Comment, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 ORE. L. REV. 567, 574 (1976), which supports the theory that videotape testimony is not a comparable, but potentially distorted and biased form of live testimony in the courtroom. *But see* Attorney General's recommendations in support of videotaping testimony. ATTY. GEN'S TASK FORCE *supra* note 8, at 32, 39.

185. Libai, *supra* note 5, at 1028-32.

186. Libai predicted in 1969 that this system of full disclosure of evidence adverse to the defendant, in addition to the opportunity for both counsel to accurately assess their respective cases subsequent to viewing the testimony given at Special Hearing, would likewise precipitate either (1) a retraction of charges where prosecution felt its case was too weak to go to trial, or (2) a guilty plea from the defense after review of the case against it. *Id.* at 1029-30 n.185. Sixteen years later, the Minneapolis Police Department has issued a report stating that their two-year program of videotaping preliminary testimony under the guidelines set forth above has resulted in an 80% guilty plea rate. Of the remaining cases, not a single defendant chose to call the victim to testify and no acquittals were handed down. *Videotaping—Device for Fighting Child Abuse*, 73 A.B.A. J. 36, col. 3 (1984).

187. Cf. *Commonwealth v. Stasko*, *supra* note 183.

may often require some foundational equivalent to "unavailability"¹⁸⁸ prior to its implementation. Unavailability of a witness at trial may be by reason of death,¹⁸⁹ loss of memory, and even mere refusal to testify. Under these circumstances, courts have permitted use of hearsay exceptions, when applicable, to validate introduction of prior statements by such witnesses. When unavailability becomes a prerequisite in cases relating to sexual abuse of minors, abundant authority exists for the proposition that a psychological form of unavailability may be asserted, indeed, it may be required by public policy.¹⁹⁰

The more crucial legal concern vis-a-vis the child witness of sexual abuse relates to statutory and policy practices concerning the crime of incest, and the yet untapped forms of corroboration relevant to combatting the unduly destructive effect of corroboration/accomplice¹⁹¹ and other evidentiary restraints on otherwise justiciable offenses.

Unless promptly reported, sexual abuse visited upon children, rarely accompanied by violence and rarely evidenced by

188. The hearsay exception for dying declarations is actually less reliable than the one sought to be asserted relating to statements of child victims. The rationale is that faced with their mortality, men do not lie. This assumption finds its basis in religious beliefs that, while pervasive in the country at the time the common law rule was adopted, are arguably no longer characteristic of our society. Hearsay statements of children undoubtedly carry the same stigma of reliability that is no longer valid given the results of recent studies. To assume today that dying men speak only the truth and, concurrently, that children are prone to fabricate explicit sexual assaults upon their person, is anomalous to our notion of a "living law" that tailors itself to the significant changes in society. See Note, *supra* note 143, at 748-51.

189. *U.S. v. Nick*, 604 F.2d 1199; *accord*, *U.S. v. Ironshell*, 633 F.2d 77. In *Nick* and *Ironshell*, both courts appeared to question whether, given the tender years of the witness (victims) in issue, adequate cross-examination could in any event be possible. The courts' decisions seem to support an interpretation of the right as entailing more than mere witness presence and compulsion to respond under cross. *Nick* and *Ironshell* are susceptible to an interpretation that courts will require a threshold of capacity to respond and a quality of response on the part of the witness, below which potential the witness may be deemed "not present." Other jurisdictions still require medical testimony as to the certainty of physical or mental harm before "unavailability" will be presumed. *People v. Gomez*, 26 Cal. App. 3d 225, 103 Cal. Rptr. 80 (1972).

190. See, *supra* note 168-73, 175-81, and accompanying text.

191. The child abuse syndrome is a medically recognized condition characterized by signs of physical trauma, bone breakage and organ damage which show indications of healing at various rates, thus significant of spatially and temporally separate injuries, which could not have been caused in normal activity by children. The child abuse syndrome is commonly used as corroborative evidence in child custody and criminal court actions.

physical trauma, leaves little legally effective evidence directly connecting the offender with the offense. This problem is particularly acute in instances where the lack of physical evidence, coupled with corroboration/accomplice statutes, critically dilutes the possibility of prosecutorial action. Often, hearsay exceptions, which may furnish the avenue for introduction of out of court statements into a case in chief, are obstructed by a preliminary requirement of corroborative evidence before non-production of the witness-victim will be tolerated.

One suggested approach postulated borrows from the "child abuse" syndrome.¹⁹² As previously noted,¹⁹³ the sexually abused child manifests certain uniform symptoms, albeit primarily emotional and behavioral, which, taken together, form a "sexually abused syndrome."¹⁹⁴ Suggestion has been made by several authorities that the expert testimony verifying the presence of such a syndrome be admissible as *res ipsa loquitur* proof that such abuse has occurred, or, in the alternative, be admissible to shift the burden of proof to the defense that the manifestations are symptomatic of some condition other than sexual abuse of the subject.¹⁹⁵

Tangentially relevant to evidentiary issues, but fundamentally related to procedural obstructions, it has been urged by the U.S. Attorney General that statutes of limitation for the criminal offenses subsumed under the greater category of "child sexual abuse" be extended to run from the date of disclosure by the victim.¹⁹⁶ Otherwise offenders, acting upon parental or guardianship dominion, would be able to insulate themselves from punishment by intimidating victims into silence until such time as legal proceedings are time-barred.

Four states have decriminalized incest, retaining only the blood-marriage prohibition.¹⁹⁷ While those states still retain

192. See *supra* notes 50-51 and accompanying text.

193. See *supra* notes 52-55 and accompanying text.

194. Lloyd, *Corroboration*, *supra* note 19, at 109-10; S. Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool for Families*, in *LEGAL REPRESENTATION OF THE MALTREATED CHILD*, 70, 82 (National Association Counsel for Children 1979); *INTRAFAMILY CHILD ABUSE CASES*, *supra* note 3, at 40-41.

195. *ATTY. GEN'S TASK FORCE*, *supra* note 8, at 103.

196. Michigan, New Hampshire, Ohio and Vermont.

197. *E.g.*, states such as Arkansas, with statutes protecting minors up to the age of 14 from "sexual contact," would be unavailing to the 15-year old victim of incest.

child sexual abuse and/or carnal knowledge statutes, there are age differentials among the states, which create, in some instances, faults in the cloak of legal protection which expose children to incestuous abuse with impunity.¹⁹⁸

Of all cases of physical and sexual abuse reported to child protective agencies nationwide, less than 5% of the substantiated cases are pursued in criminal actions.¹⁹⁹ While this figure is not representative of only sexual abuse or incest cases, those offenses are included in the calculation. In any event, the figures for criminal prosecution evince a serious discrepancy between sanctions for the same crime depending on whether or not the offender is related to the victim. "The legal response to family violence must be guided primarily by the nature of the abusive act, not the relationship between the victim and the abuser."²⁰⁰ At present the nature of incest impedes prosecution to the extent that prosecutors feel that such crimes are evidentially unmanageable. The recent exposure of the gravity of the problem has yet to produce remedial modifications to a judicial system in which intrafamily crimes are largely untouched and historical taboos prevent legal intervention.

However, a sweeping reform which merely criminalizes incest is not wholly adequate. Creative sentencing must be employed in order that the offender be punished and yet still be called upon to compensate and stabilize the remaining family members.²⁰¹ A further recommendation urges restitution to the victim by the offender for treatment and tort damages.²⁰² More-

198. Besharov, *Child Protection*, *supra* note 4, at 159-60. While this figure is not representative of only sexual abuse or incest cases, those offenses are included in the calculation. In any event, the figures for criminal prosecution evince a serious discrepancy between sanction of the same crime dependent on whether the offender is related to the victim.

199. ATTY. GEN'S TASK FORCE, *supra* note 8, at 4.

200. The U.S. Attorney General's recommendations for sentencing include weekend and evening incarceration that permits the offender to work and render financial support to his family. *Id.* A derivative repercussion of this form of sanction is that the acquiescent role generally assumed by mothers in incest families, *see supra* notes 32, 47-48 and accompanying text, would be tempered by the hope of financial security in conjunction with punishment of the offender.

201. *Id.* *See generally Tort Remedies*, *supra* note 31.

202. *Child Abuse and Neglect Litigation*, *supra* note 2, at 142-44 (citing Institute of Judicial Administration/ABA, *Juvenile Justice Standards Projects*, "Standards Relating to Abuse and Neglect — Tentative Draft" (New York: Ballinger Pub. Co., 1977) and Urzi, "Cooperative Approaches to Child Protection, A Community Guide" (Minnesota

over, adequate reform must be prefaced by widespread recognition of incest as a serious crime well within the *parens patriae* role of the state to police.²⁰³

VI. CONCLUSION

The issues confronted in a legal analysis of child sexual abuse do not lend themselves to scrutiny in a purely legal context. The status of current law, and its frequent inability to devise adequate responses to the underrepresentation of child victims, is the product of time-honored misconceptions and judicial presumptions having no basis in science, psychology, sociology or fact. Education of the public, legislatures, and the judiciary is required to dispel irrational notions and their effect on a legal system designed so that no class be disadvantaged in seeking protection of the law. Adequate, just and compassionate reform can only be undertaken when it is recognized that innovations in criminal prosecution arising from child abuse are not asserted to award special treatment, but merely to attain the legal balance that is the entitlement of all citizens, and effect the special solicitude that is the system's obligation to children.

Demetra John McBride

Dept. of Public Welfare)).

203. At least one legal commentator has urged legal and judicial restraint from intervention in incest cases. Wald, *Neglected Children*, 27 *STAN. L. REV.* 985, 1026-27 (1975). This article claims that since the effects of sexual abuse do not immediately manifest themselves, *id.* at 1025, and are, in any event, "usually emotional," *id.*, the trauma caused by involvement of the legal system may outweigh that caused by "parental behavior." *Id.* Further, the author states that the term "abuse" may be inappropriate because he believes that such conduct may not always be harmful. *Id.* at 1024, n.203. This precise minimization of the nature of incest, the apprehension to term it "abuse" and the preference toward deeming it "parental behavior" are the philosophical evils sought to be avoided.

