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## Innocent Victims and Blind Justice: Children's Rights to be Free from Child Sexual Abuse

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# INNOCENT VICTIMS AND BLIND JUSTICE: CHILDRENS' RIGHTS TO BE FREE FROM CHILD SEXUAL ABUSE.

## I. INTRODUCTION

One of the most pervasive problems in the United States is sexual child abuse.<sup>1</sup> An increasing number of sexual abuse

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1. The Child Abuse Prevention and Treatment and Adoption Reform, 42 U.S.C.A. § 5102 (Supp. 1988), defines sexual abuse as:

(i) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having a child assist any other person to engage in, any sexually explicit conduct (or any simulation of such conduct) for the purpose of producing any visual depiction of such conduct, or (ii) the rape, molestation, prostitution, or other such form of sexual exploitation of children, or incest with child, 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; and (B) For the purpose of this clause, the term "child" or "children" means any individual who has not or individuals who have not attained the age of eighteen.

*Id.*

The National Center of Child Abuse and Neglect defines child sexual abuse as "[c]ontacts or interactions between a child and an adult when the child is being used as an object of gratification for adult sexual needs or desires." HHS Sexual Abuse of Children: Selected Readings I (1980) (quoted in Note, *The Unreliability Of Expert Testimony On The Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 429 (1985)). While states may have different statutory definitions of sexual abuse, most remain considerably similar to the definitions mentioned above. *Cf.* MONT. CODE ANN. § 45-5-625 (1987) which provides:

(1) A person commits the offense of sexual abuse of children if he knowingly: (a) employs, uses, or permits the employment or use of a child in an exhibition of sexual contact, actual or simulated: (b) photographs, films, videotapes, or records a child engaging in sexual contact, actual or simulated: (c) persuades, entices, counsels, or procures a child to engage in sexual contact, actual or simulated, for use as designated in (1)(a), (1)(b), or (1)(d); (d) processes, develops, prints, publishes, transports, distributes, sells, possesses with intent to sell, exhibits, or advertises material consisting of or concluding a photograph, photographic negative, undeveloped film, video-tape, or recording representing a child engaging in sexual contact, actual or simulated; or (e) finances any of the activities described in subsections (1)(a) through (1)(d) knowing that the activity is the nature described in those subsections.

(2) A person convicted of the offense of sexual abuse children shall be fined not to exceed \$10,000 or be imprisoned in the state prison for any term not to exceed 20 years, or both.

(3) For the purposes of this section, "child" means any person less than 16 years old.

*Id.* 1988 CAL. STAT. 288 provides:

Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years.

*Id.* KAN. STAT. ANN. § 15.900 (1985) provides:

(2) Child sexual abuse and exploitation means harm to a child's health or welfare by any person, responsible or not for the child's health or welfare, which harm, occurs or is threatened through non-accidental sexual contact . . . ."

*Id.* WASH. REV. CODE ANN. § 26.44.020 (1986) provides:

(12) "Child abuse or neglect" shall mean the injury, sexual abuse, sexual exploitation, or neglect treatment or maltreatment of a child by any person under circumstances which indicate that the child's health, welfare, and safety is harmed thereby. An abused child is a child who has been subjected to child abuse or neglect as defined herein: PROVIDED, That this sub-section shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not proved to be injurious to the child's health, welfare, and safety.

*Id.* The American Humane Association, Denver Research Institute, and the National Center on Child Abuse and Neglect Analysis of Official Child Neglect and Abuse Reporting, 1979 (1981) (cited in Davis, *Child Abuse: A Pervasive Problem of the 80's*, 61 N.D.L. REV. 195, 198-200 (1985)) reports that out of 711,142 cases of abuse and neglect throughout the nation and its territories, 5.76% involved sexual maltreatment. Sexual maltreatment includes "[t]he involvement of a child in any sexual act or situation, the purposes of which is to provide sexual gratification or financial benefit to the perpetrator; all sexual activity between an adult and a child is considered as sexual maltreatment." *Id.*

The Child Abuse Prevention & Treatment Act, 42 U.S.C.A. § 5102 (1983) defines child abuse and neglect as:

The physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen, or the age specified by the child protection law of the State in question, by a person who is responsible in the child's health or welfare under circumstances which indicate that the child's welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary.

*Id.* Cf. N.Y. FAM. CT ACT § 1012(e) (McKinney 1983) which provides:

(e) "Abused child" means a child less than eighteen years of age whose parent or other person legally responsible for his care . . .

(i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(iii) commits, or allows to be committed, a sex offense against such child,

cases are being reported each year.<sup>2</sup> While sexual abuse is not a new phenomenon to American society, the actual scope of the problem is just being realized.<sup>3</sup> Studies have shown that the sexual abuse of children is closely linked to the home environment with the majority of the acts of abuse being committed by fathers and stepfathers.<sup>4</sup> The victims are mostly children<sup>5</sup> of tender years<sup>6</sup> ranging in age from two months old

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as defined in the penal law, provided, however, that the corroboration requirements contained therein shall not apply to proceedings under this article.

*Id.*

2. The National Center on Child Abuse and Neglect estimates over a 100% increase in sexual abuse reports since 1976. N.Y. Times, Aug. 16, 1971, at 16, col. 1. Moreover, more than 100,000 incidents of sexual abuse occur each year. *Id.* In 1971, it was estimated that approximately 500,000 cases of abuse (sexual, physical, emotional) occurred annually throughout the nation. *Id.* In 1989, almost 100,000 incidents of child abuse or neglect were reported in New York City. Gallet, *Judicial Management of Child Sexual Abuse Cases*, 23 FAMILY L.Q., Fall 1989, at 477 [hereinafter Gallet].

3. In the early 1970's sexual abuse was regarded as a relatively uncommon problem. Finkelhor, *Sexual Abuse: A Sociological Perspective*, 6 INT'L. J. OF CHILD ABUSE & NEGLECT 95 (1982) [hereinafter Finkelhor]. Starting in the late 1970's, reports of abuse began to flourish at a rapid rate and have continued to rise. *Id.* at 95. The actual number of reported cases, however, constitutes only a fraction of the total number of actual incidents of sexual abuse that occur each year. *Id.* It has been suggested that changes in sexual behavior, religious beliefs, and the erosion of social norms that used to be associated with the traditional concept of the family have been among the principal causes of the recent acknowledgement of the existence of child sexual abuse. *Id.* at 96-97. "In part because society has for so long refused to recognize intrafamily child sexual abuse as an issue, and in part because of the continued popular characterization of the perpetrators as 'dirty old men in the alley,' many cases of child sexual abuse are often missed or discounted." Wells, *Expert Testimony To Admit or Not To Admit*, 57 FLA. BAR. J. 672, 673 (Dec. 1983).

4. Historically, many people believed that strangers posed the greatest danger to children. However, recent reports conclude that most of the abuse occurs within the family, often by fathers and stepfathers. See Finkelhor, *supra* note 3, at 96. Clinical studies now show that approximately 90% of the perpetrators are fathers, regardless of whether the child is a boy or girl. No child, including an infant, is too young to be sexually abused. BESHAROV, PROVING CHILD ABUSE, A GUIDE FOR PRACTICE UNDER THE NEW YORK FAMILY COURT ACT 51 (1984) [hereinafter BESHAROV]. The largest percentage of reported incest occurs between fathers and daughters. J. BULKLEY, CHILD SEXUAL ABUSE AND THE LAW, A.B.A. NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION 172 (1984) [hereinafter CHILD SEXUAL ABUSE].

5. COHEN, CHILD ABUSE AND NEGLECT 12 (1986) [hereinafter COHEN]. See, e.g., *State in Interest of J.D.*, 494 So. 2d 1196 (5th Cir. 1986) (child victim two years-old); *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987) (youngest victim age two); *Robinson v. Via*, 821 F.2d 913 (2d Cir. 1987) (abuse began when child was six years-old).

6. Michigan developed a tender years doctrine which allowed a child of tender years' detailed complaint to be admitted into evidence through a third party's testimony. Note, *A Tender Years Doctrine for the Juvenile Courts: An Effective Way to Protect the Sexually Abused Child*, 61 U. DET. J. URBAN LAW 249, 250 (1983-84). This doctrine was abolished by *People v. Kreiner*, 415 Mich. 372, 329 N.W.2d 716 (1982).

to eighteen years of age.<sup>7</sup> Furthermore, the abuse cuts across all social and economic backgrounds.<sup>8</sup>

Recently, the criminal justice system has been inundated with cases involving child sexual abuse and the delicate nature of the subject makes prosecutions extremely difficult. The victims are children who are either reluctant or unable to testify,<sup>9</sup> normally no eye witnesses are available,<sup>10</sup> and usually no distinct signs of abuse are present.<sup>11</sup> To combat this

7. See *supra* note 5.

8. GALLAGHER and DODDS, SPEAKING OUT, FIGHTING BACK: PERSONAL EXPERIENCES OF WOMEN WHO SURVIVED CHILDHOOD SEXUAL ABUSE IN THE HOME 171 (1985) [hereinafter GALLAGHER]. See generally COHEN, *supra* note 5.

9. Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1746 (1983) [hereinafter Yun] (citing Libai, *The Protection of The Child Victim Of A Sexual Offense In The Criminal Justice System*, in THE SEXUAL VICTIMOLOGY OF YOUTH 187, 233 (I. Schultz ed. 1980)). For older children who are more able to understand the difficulties inherent in the prosecution of the offenders, their unwillingness to go forward with the prosecution is justified. One study of sexual assault cases revealed that 60% of the cases actually went to court. Chicago Daily Law Bulletin, Nov. 7, 1984, at 8, col. 1. Out of this 60%, the children had to make an average of seven courtroom appearances. *Id.*

10. See COHEN, *supra* note 5, at 321.

11. Force is not usually used in child sexual abuse incidents. CHILD SEXUAL ABUSE, *supra* note 4, at 171. This is due in part to the strong psychological power the abusive parent has over the child. *Id.* Delayed reporting of sex abuse incidents also decreases the medical evidence. *Id.* Elements constituting proof of child abuse include:

*Direct Proof*

1. Is there an eyewitness to the parents' alleged abuse? Is there any reason why the witness should not testify?
2. Can the child testify about the alleged abuse?
3. Is there a prior statement by the child that should be introduced? And, can it be corroborated?
4. Did the parents make an inculpatory statement?

*Circumstantial Proof of Physical Abuse*

1. Did the child have apparently inflicted injuries?
2. Was the child in the parents' general custody during the relevant time?
3. Did the parents fail to explain how the child received the injuries? Or, was the explanation illogical, contradictory, or at variance with the child's injuries?
4. Does the behavior of the child or of the parents provide support for a finding that the injuries were inflicted?

problem, some courts are allowing expert testimony to establish that the child suffers from "Child Sexual Abuse Accommodation Syndrome."<sup>12</sup>

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*Circumstantial Proof of Sexual Abuse*

1. Did the child's body show signs of a violent sexual assault?
2. Is there circumstantial evidence of sexual activity? If so, does the totality of the circumstances make it unlikely that the child was engaged in voluntary sexual activity with a peer?
3. Was the child in the parents' general custody during the relevant time?
4. Did the parents fail to provide a satisfactory explanation of the child's condition?
5. Does the behavior of the child or of the parents suggest parental involvement in the child's apparent sexual activity?

BESHAROV, *supra* note 4, at 57. Compare this with circumstantial evidence of sexual activity:

CAVEAT: The following physical conditions indicate sexual activity. Whether they are *prima facie* evidence of sexual abuse depends on the child's apparent maturity and social situation, as well as the statements of the child and the parents.

1. Underclothing that is torn, blood stained, or showing signs of semen.
2. The presence of semen in oral, anal, or vaginal areas.
3. The presence of foreign objects in rectal or vaginal cavities.
4. Vaginas that are torn, lacerated, infected, or bloody (as well as broken hymens).
5. Penises or scrotums that are swollen, inflamed, infected, or showing signs of internal bleeding.
6. Bite marks on or around genitalia.
7. Anal areas that are swollen, torn, lacerated, infected, or that have very lax muscle tone suggestive of internal stretching.
8. Mutilation of sexual organs, or other parts of the body.
9. Venereal diseases in oral, anal, and urogenital areas (especially in pre-pubescent children).
10. Unusual vaginal or urethral discharges.
11. Repeated cystitis, especially in pre-pubescent girls.
12. Pregnancy, especially in early adolescence.

*Id.* at 51. In extremely young children, signs of sexual involvement, such as the ones outlined above, constitute *prima facie* evidence of sexual abuse for the reason that children of this age are deemed unaware of such activity.

12. Comment, *The Admissibility of "Child Sexual Abuse Accommodation Syndrome" in California Criminal Courts*, 17 PAC. L.J. 1361 (1986) [hereinafter Comment, CSAAS]. CSAAS was originally developed to provide an explanation for the child victim's peculiar behavior and to help diagnose and treat the victims. *Id.* at 1367. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 INT'L J. OF CHILD ABUSE AND NEGLECT 177 (1983). The elements of CSAAS are secrecy, helplessness, entrapment and accommodation, delayed disclosure, and retraction. *Id.* at 181. Although the first two elements are not caused by sexual abuse, the remaining three elements are a direct result of the abuse. Moreover, CSAAS is used primarily in cases where the sexual abuse is committed by a family member, relative, or trusted friend because such sexual abuse usually does not leave physical scars or outward signs, but rather emotional and psychological scars. Finkelhor, *supra* note 3, at 96 (sexual abuse leaves substantial psychological scars on its victims). See also Levy, *Using "Scientific" Testimony to Prove Child Sexual Abuse*, 23 FAMILY L.Q. 383, 393-95 (1989). Dr.

Further, in order to avoid evidentiary problems, prosecutors are increasingly relying on expert testimony.<sup>13</sup>

Astrid Heger, Director of the Child Sexual Abuse Program at the University of Southern California, reports that the abuse usually entails touching, fondling, mutual masturbation and oral sex. Jacobbi & Wright, *Mothers Who Go To Jail For Their Children*, GOOD HOUSEKEEPING, Oct. 1988, at 158.

Specifically, in infancy the child exhibits fretfulness, feeding disturbances, impairment of the ability to trust and impairment of developing pride. In childhood, there is thumb sucking or nail biting, fear, enuresis conduct problems, anxiety-provoking fantasies about sex, excessive masturbation, psychosomatic disorders, and acting "seductively" with all members of the opposite sex.

*Id.* Mele, *Major Evidentiary Issues in Prosecutions of Family Abuse Cases*, 11 OHIO N.U.L. REV. 245, 252 (1984) [hereinafter Mele]. Different behavioral signs also exist and are associated with sexual abuse:

CAVEAT: The following behavioral clues are not conclusive reason, in themselves, for a finding. Rather, they can be used to help assess the significance of signs of sexual activity found on the child's body:

1. Unwillingness to disrobe in the presence of others (e.g., unwillingness to change for gym class).
2. Excessive fear of being approached or touched by persons of the opposite sex.
3. Fear of going home.
4. Running away from home.
5. Adolescent prostitution.
6. Sexual behavior or references that are bizarre or unusual for the child's age.
7. Sexual knowledge that is too sophisticated for the child's age.
8. Seductiveness which is not age appropriate.
9. Behavior that is withdrawn, infantile, or filled with fantasy (the child may even appear to be retarded).
10. Attempted suicide.
11. Dramatic changes in behavior or school performance.
12. Unusual accumulations of money or candy.
13. Indirect allusions: A sexually abused child may seek out a special friend or a teacher to confide in. These confidences may frequently be vague and indirect, such as "I'm afraid to go home tonight," "I'd like to come and live with you," or "I want to live in a foster home."

BESHAROV, *supra* note 4, at 52 (quoted in BESHAROV, REPORTING CHILD ABUSE 1984)). Conversely, sexual abuse by a stranger is often accompanied by a violent assault. Due to the inherent differences in the scars left on the victim, expert testimony about CSAAS should not be required in all cases of child sexual abuse, but limited to those instances when the perpetrator is a family member, relative, or trusted friend, and the abuse occurred in a nonviolent manner. Comment, CSAAS, *supra* note 12, at 1389-90. *See also* People v. Payan, 173 Cal. App. 3d 27, 220 Cal. Rptr. 126 (2d Dist. Cal. Ct. App. 1985) (expert testimony regarding CSAAS admissible); Matter of Cheryl H., 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (2d Dist. Cal. Ct. App. 1984) (psychiatrist's opinion that three year-old suffered from sexual abuse admissible).

13. *See* People v. Dunnahoo, 152 Cal. App. 3d 561, 199 Cal. Rptr. 796 (2d Dist. Cal. Ct. App. 1984); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983); State v. Kim, 64 Haw. 598, 645 P.2d 1330 (1982); Commonwealth v. Stago, 267 Pa. Super. 90, 406 A.2d 533

Additionally, a number of states have recently adopted legislative reforms<sup>14</sup> to the hearsay exception,<sup>15</sup> the delineation of corroboration requirements,<sup>16</sup> and the admission of the child victims' testimony.<sup>17</sup> While these reforms are contributing to an increase in the number of convictions<sup>18</sup> for sexual abuse, offenders are still not being convicted even when the evidence supports the allegations of sexual abuse. This failure to convict can be attributed, at least in part, to the strict evidentiary requirements for these types of cases. In most instances, then, the offenders are not convicted, they continue to have access to their children and often the sexual abuse continues. A majority of these cases deal specifically with fathers who are alleged to have sexually abused their children or step-children during visitation periods. In a majority of these cases, the evidence, which consists mainly of the child's out-of-court statements, supports the allegations against their fathers. However, absent a strong finding of sexual abuse the courts are often unwilling to terminate the father's visitation rights.<sup>19</sup> Usually, second proceedings are held after the family court hearing to determine whether the father's visitation rights should be discontinued. Moreover, cases involving the termination of parental rights are now subjected to a clear and convincing standard of proof,<sup>20</sup> whereas, during abuse proceedings, the burden of proving sexual abuse is by a

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(1979).

14. Legislative reforms in the area of child abuse serve three purposes, (1) to modify legal procedures to make them more sensitive to child victims, (2) to improve prosecution and conviction rates, (3) to provide treatment programs for the offender, the child, and the family. Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645, 645 (1984).

15. The following states have enacted special hearsay exception statutes: Alaska, Arizona, Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nevada, Rhode Island, South Dakota, Texas, Utah, Vermont, and Washington. For details see *infra* notes 210-46 and accompanying text and Appendix.

16. See *infra* note 60 and accompanying text.

17. See *infra* notes 210-46 and accompanying text.

18. See *supra* note 14 and accompanying text.

19. See, e.g., *infra* note 270 and accompanying text.

20. See *infra* notes 266-70 and accompanying text.



preponderance of the evidence, an easier burden for the prosecution.<sup>21</sup> The prosecution is faced with a second trial using the identical evidence used in the family court proceedings, but must subject it to a higher evidentiary standard. In far too many instances, the child remains a potential victim of abuse as the father's visitation privileges remain intact, the sexual abuse continues, and if the prosecution continues with the second trial, the child will once again have to testify.

This note will examine child sexual abuse committed by male abusers, followed by a specific examination of the reluctance of courts across the nation to terminate a father's visitation rights in child sexual abuse cases upon a showing of abuse by a preponderance of the evidence. Alternative standards and rules are necessary to insure that the victim's rights are fully protected. Part II will develop the history of child sexual abuse. Part III will examine evidentiary requirements and their relationship to the dearth of knowledge possessed by some courts hearing abuse cases, along with the inadequacy of the system to effectively deal with an increasing overflow of sexual abuse cases. Specifically, Section A discusses corroboration and the child victim as a witness. Section B addresses current hearsay exceptions applicable to child sexual abuse. Subdivision (B)(1) focuses on the relevant background law and (B)(2) on the mother's and expert witnesses' testimony. Subdivision (B)(3) addresses current legislative developments regarding hearsay. Section C addresses the doctrine of excited utterance. Part IV addresses the termination of a father's parental rights. Finally, Part V will propose standards and guidelines which would allow for a greater conviction rate for sex abuse crimes and termination of a father's visitation rights while not infringing on the father's constitutional right to due process.

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21. See *infra* notes 38-40 and accompanying text.

## II. BACKGROUND

Proof of the existence of the sexual abuse of children has been present throughout human history.<sup>22</sup> In Greece, during the fourth century B.C., children were subjected to ritual sacrifices, harsh treatment, exploitation, and abandonment.<sup>23</sup> Evidence of child abuse, both physical and sexual, also appeared in the Rome, Scandinavian cultures, England, India and China.<sup>24</sup> Perhaps the earliest court case involving child abuse took place in 1655.<sup>25</sup> In one such case, the master was "burned in the hand" for the severe abuse and manslaughter of his child servant.<sup>26</sup>

During the eighteenth century, parents were rarely held liable for abusing their children. Under the common law, parents could be held civilly liable only for the excessive punishment of children.<sup>27</sup> Furthermore, in criminal prosecutions, parents would only be held liable when the punishment was viewed as grossly unreasonable, cruel and merciless, or when the child was permanently injured.<sup>28</sup> In keeping with the traditional moral and social values of the time in general and particularly the societal views of the autonomy of the family unit, it was inconceivable that a child

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22. Thomas, *Child Abuse and Neglect Part 1: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293, 293 (1972) [hereinafter *Overview*].

23. *Id.* at 294.

24. *Id.* at 295-300.

25. See I Children and Youth 123-24.

26. *Id.*

27. *Overview*, *supra* note 22, at 304.

28. The courts usually presumed the reasonableness of the parents' actions. Additionally, it was believed that parents, as central authority figures, should maintain control over their children. Because very few laws offered protection for the children, the abuse continued. *Id.* at 304-05. The first child saving efforts were launched by a private corporation in New York which opened the New York House of Refuge in 1825. Many other cities began to open similar institutions which housed abused, abandoned and neglected children who were placed there by their parents or the courts. *Id.* at 306. Today, punishments for child sexual abuse vary from state to state. CHILD SEXUAL ABUSE, *supra* note 4, at 9. A detailed listing of each states' punishments is available. *Id.* at 21-51.

could ever be sexually abused by a family member.<sup>29</sup> Many believed that threats of sexual abuse came solely from strangers outside the family.<sup>30</sup> Because of such mistaken beliefs, as well as the lack of support services and protection for the child victims, almost all incidents went unreported.

It was not until the 1960's that formal protection of abused children began to take form.<sup>31</sup> In the mid 1970's the first concerted efforts on behalf of sexually abused children were initiated<sup>32</sup> and in the 1980's, the number of reported cases steadily increased.<sup>33</sup>

Since the 1970's, attitudes and perceptions toward the sexual abuse of children have shifted drastically from traditional beliefs.<sup>34</sup> Presently, nationwide acknowledgment of child sexual abuse exists and it is considered one of the most heinous acts that can occur between parent and child.<sup>35</sup> These societal views have resulted in increased pressure on state legislatures for intervention. In working to achieve the ultimate goal of protecting children from abuse, a delicate balance must be reached between intervention to protect the children and the heavily valued belief in the family autonomy. The paramount concern in all child sexual abuse cases is, and

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29. It was virtually unacceptable to entertain the idea that parents whom children loved and turned to for protection could ever abuse their own children. This accounts for the suppression of the unthinkable notion that a parent might be the perpetrator. *Overview, supra* note 22, at 293.

30. Finkelhor, *supra* note 3, at 96.

31. In the 1960's public social agencies were authorized to protect physically abused and neglected children through their child protective service staffs. Johnson, *Child Sexual Abuse: Case Handling Through Public Social Agencies in the Southeast of the USA*, 5 INT'L J. OF CHILD ABUSE & NEGLECT 123, 123 (1981).

32. See generally *In re Armentrout*, 207 Kan. 366, 485 P.2d 183 (1971); *In re Involuntary Termination of Parental Rights*, 499 Pa. 543, 297 A.2d 117 (1972); *In re Van Vlack*, 81 Cal. App. 2d 838, 185 P.2d 346 (1947). An increase in the number of cases has also occurred since 1970. GALLAGHER, *supra* note 8, preface.

33. See *supra* note 3 and accompanying text.

34. *Id.*

35. Wald, *State Intervention on Behalf of Endangered Children- A Proposed Legal Response*, 6 INT'L J. OF CHILD ABUSE AND NEGLECT 16, 16 (1982).

should remain, the safety and well-being of the child.<sup>36</sup>

Adding to the intricacies of sexual abuse cases, allegations of abuse must meet the fair preponderance standard.<sup>37</sup> In *Matter of Nicole V.*,<sup>38</sup> the court confirmed that findings of child abuse need only be based on a preponderance of the evidence,<sup>39</sup> as criminal sanctions are not imposed and permanent termination of parental rights does not occur at such proceedings.<sup>40</sup> Further, no violation of due process exists by using this standard. On the other hand, in light of a recent United States Supreme Court decision,<sup>41</sup> proceedings to terminate parental rights require clear and convincing evidence.<sup>42</sup>

### III. EVIDENTIARY REQUIREMENTS

#### A. *The Child Victim's Testimony and Corroboration*

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36. *Id.* See also *Matter of Erin G.*, 139 A.D.2d 737, 527 N.Y.S.2d 488 (2d Dep't 1988) (finding of abuse was sufficient by a preponderance of the evidence); *Matter of Tammie Z.*, 66 N.Y.2d 1, 484 N.E.2d 1038, 494 N.Y.S.2d 686 (1985). N.Y. FAMILY COURT ACT § 1046 (b)(i) (McKinney 1983) provides "[a]ny determination that the child is an abused or neglected child must be based on a preponderance of the evidence." *Id.* Abuse proceedings in Family Court do not lead to any type of criminal penalties against the parent. CHILD SEXUAL ABUSE, *supra* note 4, at 193.

37. This standard is defined as proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence. Cleary, MCCORMICK ON EVIDENCE § 339 (3d ed. 1984) [hereinafter MCCORMICK]. A preponderance of the evidence may not be determined by the number of witnesses, but by the greater weight of all the evidence including number of witnesses, opportunity for knowledge, information possessed, and manner of testifying. BLACK'S LAW DICTIONARY 1064 (5th ed. 1979). "Fair preponderance of evidence" is defined as "[e]vidence sufficient to create in the minds of the triers of fact the conviction that the party upon whom the burden has established its case. The greater and weightier evidence, the more convincing evidence." *Id.* at 538.

38. 123 A.D.2d 97, 510 N.Y.S.2d 567 (1st Dep't 1987).

39. *Id.* at 101, 510 N.Y.S.2d at 570. In New York, "[o]nce it has been established that the child has been abused, even if there has been no evidence that the parent is the abuser, the burden shifts to the parent to prove lack of culpability." Gallet, *supra* note 2, at 478.

40. See *supra* note 36.

41. *Santosky v. Kramer*, 455 U.S. 745 (1982).

42. *Id.* at 747-48. See also *infra* notes 266-70 and accompanying text.

In most cases, the child must testify and there is little or no corroborative<sup>43</sup> evidence<sup>44</sup> because generally there are no eye witnesses to the abuse committed by a father upon his child.<sup>45</sup> Due to the small amount of credence given to the child's story and the nature of the offense, child victims find themselves confined within the secrecy of the crime.<sup>46</sup> Adding to these pre-existing complications is the delay in reporting the offense which increases the difficulty of prosecuting the case. Delays in reporting occur for the obvious reason that most perpetrators threaten their victims with retaliation for telling anyone about the incident. In a child's mind, these threats of possible physical violence are enormous and the emotional, along with the psychological trauma of relating the incident to anyone, including a family member, is thereby increased.

Further, most children have extreme difficulty testifying in court. Problems arise not only with the age of the witness,<sup>47</sup> but also with the delicacy of their emotional state. Under the

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43. Corroboration is defined as:

To strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witnesses, or to comport with some facts otherwise known or established.

BLACK'S LAW DICTIONARY 311 (5th ed. 1979). The Washington court of appeals defined corroborative evidence as "[a]ny evidence, outside of the complainant's testimony itself, which has probative value - any evidence which could convince the trier of fact that the crime was committed, . . . and which tends to connect the defendant with the crime." *State v. Jones*, 50 Wash. App. 709, 711, 750 P.2d 281, 282 (Wash. Ct. App. 1988). Cf. MONT. CODE ANN. § 26-1-102 (1987) which defines corroborative evidence as "additional evidence of a different character to the same point."

44. McGrath and Clemens, *The Child Victim as a Witness in Sexual Abuse Cases*, MONT. L. REV. 229, 230 (1985) [hereinafter McGrath].

45. See *supra* note 10 and accompanying text.

46. See generally *supra* note 9 and accompanying text.

47. The extremely young child victim presents other special problems as a witness. The problems may arise either from disqualification because of age or other infirmity or the child's refusal to testify out of fear, shyness, or trauma. The latter is especially problematic if the offender is a parent or a member of the victim's household, as there is often subtle pressure placed on the children not to testify.

McGrath, *supra* note 44, at 231 (quoted in Berliner, Blick, & Bulkley, *Expert Testimony on the Dynamics of Intra Family Child Sexual Abuse and Principles of Child Development*, in CHILD SEXUAL ABUSE AND THE LAW 166 (4th ed. 1983)).

Child Abuse Prevention and Treatment and Adoption Reform Act,<sup>48</sup> a "child" is defined as a person under eighteen.<sup>49</sup> Although this is the general age limit for "children," age limits among the states vary.<sup>50</sup> Gail Goodman, Director of the Psychology and Law Program at the University of Denver, argues that children eight years of age and older have the ability to relate the details of an experience in a straight forward manner, but children seven and under usually have difficulties.<sup>51</sup>

Because of the scarcity of other types of evidence, the child's courtroom experience increases in importance and should be made as painless as possible.<sup>52</sup> To accomplish this goal, prosecutors should be aware of necessary steps which should be taken to allow the story to be retold, while, at the same time protecting the child from further emotional trauma.<sup>53</sup>

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48. 42 U.S.C.A. § 5102 (Supp. 1988).

49. See *supra* note 1.

50. In Montana, a child is any person under sixteen years of age. MONT. CODE ANN. § 45-5-632 (1987). In New York, an abused child is a person under eighteen years of age. N.Y. FAM. CT. ACT § 1012(e) (McKinney 1983).

51. *Would a Kid Lie? and When Kids Testify*, 71 A.B.A. J. 17, 17-18 (Feb. 1985).

52. *Id.* at 18. But see Slicker, *Child Sex Abuse: The Innocent Accused*, 91 CASE & COMMENT, Nov.-Dec. 1986, at 12. While the author sets forth the proposition that children's statements are not that reliable, research indicates otherwise. See *infra* notes 109, 110 and accompanying text. One study revealed that very young children may have an ability to recall that is superior to adults. Chicago Daily Law Bulletin, Nov. 7, 1984, at 3, col. 2. Dr. Mary Ann Foley, Psychologist at Nazareth College, also found that when comparing six year old children to adults, children were no worse in distinguishing real and imagined events. *Id.* at 8, col. 1. Recently, researchers have studied and developed data on how children compare to adult witnesses. Penrod, Bull & Lengnick, *Children as Observers and Witnesses: The Empirical Data*, 23 FAMILY L.Q., Fall 1989, at 411-31.

53. Gail Goodman, University of Denver, Donald Boss with the Kempe National Center in Denver, and Jonathan Horowitz of Carney Hospital in Boston have researched methods of dealing with young witnesses:

1. If possible, have a child psychologist or other trained person do the first interview. Often police and lawyers do not know how to talk with children and so may not get the best from them. Try to reduce the number of times a child is asked to recount the experience. An accurate and complete first interview is crucial. Use videotape if possible.
2. When questioning or cross-examining a child in court, do not ask leading questions, cross-examination techniques used by lawyers are generally designed for adults, but children must be handled differently.

When a child is going to be a witness, competency must be established. In Wyoming, courts dealing with this issue make sure that the following five elements are present: (1) the child witness must demonstrate an understanding of the obligation to tell the truth;<sup>54</sup> (2) the court must have an accurate impression of the child's mental capacity at the time of the occurrence which he is to testify about;<sup>55</sup> (3) the child's memory must be demonstrably sufficient to retain an independent recollection;<sup>56</sup> (4) the child must have the capacity to express in words the memory of the occurrence;<sup>57</sup> and (5) the capacity to understand simple questions about it.<sup>58</sup> Similar provisions exist in the other states regarding competency of child witnesses.<sup>59</sup>

Although a child may testify, it is widely believed, especially by prosecutors, that corroboration is essential to obtaining a conviction.<sup>60</sup> Without corroboration, hearsay

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3. Explain to the child what will happen during the trial. Take the child to the courtroom before the trial. Let the child meet the judge and other courtroom personnel.

4. If the child is particularly young and frightened, let him or her sit on the lap of a parent or other adult during testimony.

*Id.*

54. In Interest of C.B., 749 P.2d 267 (Wyo. 1988).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Montana requires that a factual determination be made as to whether the child qualifies to testify. Even if the child can tell the difference between the truth and a lie, if he/she is incapable of relating the details of the offense so that he/she would be understood by the judge and jury, the child could be found incompetent to testify. McGrath, *supra* note 44, at 231-32; State v. D.B.S., 216 Mont. 234, 242, 700 P.2d 630, 636 (1985). In New York, children under twelve years of age are not allowed to testify under oath unless the judge is satisfied that the child understands the oath. N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 1981); N.Y.L.J., Nov. 4, 1985, at 1, col. 1. This section of the C.P.L. creates a rebuttable presumption that all children under the age of twelve are incompetent to testify. To overcome this presumption, the child must show an understanding of the oath and intelligence sufficient to allow his testimony to be received. N.Y.L.J., Nov. 4, 1985, at 2, col. 1; *see also* N.Y.L.J., Aug. 28, 1986, at 1, col. 3.

60. In 1981, New York, Nebraska, and the District of Columbia were the only three jurisdictions maintaining a corroboration requirement for child sex crimes. In 1985 these requirements were eliminated. Bulkley, *Introduction: Background and Overview of Child Sexual Abuse*, 40 U. MIAMI L. REV. 5, 7 (1985). Further support for the necessity of

statements form the bulk of the case against the offender. If corroborative evidence is available, the prosecution, as well as the court, can be more certain that the conviction of the alleged offender will not be wrongful.

Major deficiencies exist, however, with those statutes requiring corroboration. For example, when the child is to be excused from testifying, most hearsay statutes require a showing of unavailability and corroborative evidence<sup>61</sup>

corroboration was evinced in the notorious Jordan, Minnesota incident. Children were removed from their homes as a result of the alleged existence of ritualistic sex parties with adults. Following questions by the police, some of the children admitted that the charges were true. Eventually charges against twenty-one of the accused adults were dropped. The police later admitted to destroying videotapes on which the children denied the allegations of molestation. Silas, *'Sex Ring' Fallout*, 71 A.B.A. J., Feb. 1985, at 17. The experience was very traumatic for all the families involved. Some children were placed in foster homes until the charges were dropped. *Id.* at 18.

61. IND. CODE ANN. § 35-37-4-6 (West 1988) provides:

- (a) This section applies to criminal actions for the following:
  - (1) Child molesting (IC 35-42-4-3).
  - (2) Battery upon a child (IC 35-42-2-1(2)(b)).
  - (3) Kidnapping (IC 35-42-3-2).
  - (4) Confinement (IC 35-42-3-3).
  - (5) Rape (IC 35-42-4-1).
  - (6) Criminal deviate conduct (IC 35-42-4-2).
- (b) A statement or videotape that:
  - (1) Is made by a child who was under ten (10) years of age at the time of the statement or videotape;
  - (2) Concerns an act that is a material element of an offense listed in subsection (a) that was allegedly committed against the child; and
  - (3) Is not otherwise admissible in evidence under statute or court rule; is admissible in evidence in a criminal action for an offense listed in subsection (a) if the requirements of subsection (c) are met.
- (c) A statement or videotape described in subsection (b) is admissible in evidence in a criminal action listed in subsection (a) if, after notice to the defendant of a hearing and of his right to be present:
  - (1) The court finds, in a hearing:
    - (A) Conducted outside the presence of a jury; and
    - (B) Attended by the child; that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability; and
  - (2) The child:
    - (A) Testifies at the trial; or
    - (B) Is found by the court to be unavailable as a witness because:
      - (i) A psychiatrist has certified that the child's



supporting the out-of-court statements. Not one statute, however, even attempts to set guidelines for determining what constitutes sufficient corroborative evidence.<sup>62</sup> Moreover, states have formulated different requirements of what constitutes sufficient corroboration, evincing no clear and precise standard.

For example, in Indiana after four cases of child sexual abuse appeared before the Indiana Court of Appeals for the

participation in the trial would be a traumatic experience for the child;

(ii) A physician has certified that the child cannot participate in the trial for medical reasons; or

(iii) The court has determined that the child is incapable of understanding the nature and obligation of an oath.

(d) If a child is unavailable to testify at the trial for a reason listed in subsection (c)(2)(B), a statement or videotape may be admitted in evidence under this section only if there is corroborative evidence of the act that was allegedly committed against the child.

(e) A statement or videotape may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant's attorney of:

(1) His intention to introduce the statement or videotape in evidence; and

(2) The content of the statement or videotape; within a time that will give the defendant a fair opportunity to prepare a response to the statement or videotape before the trial.

*Id.* (citations omitted). The Indiana statute was created to allow "[a] very young child's testimony . . . submitted at trial without subjecting the child to a further harmful ordeal." *Miller v. State*, 498 N.E.2d 1008, 1012 (Ind. App. 1986). This statutory section does not impinge upon a defendant's Sixth Amendment right to confrontation or his rights under Section 13 of the Indiana Constitution. *Miller v. State*, 517 N.E.2d 64, 72 (Ind. 1987). See also WASH. REV. CODE ANN. § 7.69030-7.69A (Supp. 1989). Utah is the only state that does not require a showing of unavailability. UTAH CODE ANN. § 76-5-411 (Supp. 1988). But see *Ohio v. Roberts*, 448 U.S. 56 (1980), which set forth requirements for hearsay statements to meet the confrontation clause requirements if the declarant does not testify: (1) declarant must be shown to be unavailable and (2) hearsay must bear the indicia of reliability. *Id.* at 66. Under the *Roberts* standard, indicia of reliability can be shown with evidence that possesses a "particularized guarantee of trustworthiness" or a hearsay exception. *Id.* *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 811-13 (1984-85) [hereinafter *Legislative Innovations*].

62. It is suggested that the express lack of statutory standards governing sufficiency of corroborative evidence confers a troublesome, broad discretionary power on the judge to decide whether the corroboration constituted trustworthiness. *Legislative Innovations, supra* note 61, at 819.

First and Second Districts and the Supreme Court in one year, no definite guidelines or standards concerning the boundaries of corroboration<sup>63</sup> could be determined. In *Hopper v. State*,<sup>64</sup> two eye witnesses testified to seeing the two-and-one-half year-old victim laying partially clothed with her legs spread apart next to the defendant, whose pants were unzipped.<sup>65</sup> Reddening around the child's vagina was found during a medical examination.<sup>66</sup> Although the victim was found to be incompetent,<sup>67</sup> her out-of-court statement made in response to a general question by her mother,<sup>68</sup> only a few minutes after the event occurred, was held to constitute an "excited utterance"<sup>69</sup> and was admissible. This, along with the two witness' testimonies that were deemed to be corroborative evidence of the act, was sufficient evidence to allow the jury to convict the defendant.<sup>70</sup>

In *Altmeyer v. State*,<sup>71</sup> however, the court interpreted Indiana's hearsay statute<sup>72</sup> slightly differently. There, based upon a psychiatrist's testimony that court participation by the victim would be a "severe traumatic experience,"<sup>73</sup> the child was found to be unavailable as a witness.<sup>74</sup> On appeal, it was decided that the child's videotaped statement would not be admissible until the judge specifically entered "findings of fact

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63. 20 JUV. & FAM. L. DIG., Nov. 1988, at 400. See *State v. Petry*, 524 N.E.2d 1293, 1298 (Ind. App. 1988).

64. 489 N.E.2d 1209 (Ind. App. 1986), *cert. denied*, 479 U.S. 992 (1986).

65. *Id.* at 1211. 20 JUV. & FAM. L. DIG., Nov. 1988, at 400.

66. *Hopper*, 489 N.E.2d at 1211.

67. *Id.* at 1212-13. The victim could not understand "the nature and obligation of an oath." *Id.* at 1212.

68. *Id.* Entering the house moments after the act occurred, the mother took the child into the bathroom and asked her what Hopper did to her. The child responded "mommy, he touched my 'pee-pee' and my butt with his 'peter.'" *Id.* at 1211.

69. Excited utterances are exceptions to the traditional hearsay rule. See *infra* note 249 and accompanying text.

70. *Hopper*, 489 N.E.2d at 1209.

71. *Altmeyer v. State*, 496 N.E.2d 1328 (Ind. App. 1986).

72. See *supra* note 61 and accompanying text.

73. *Altmeyer*, 496 N.E.2d at 1331.

74. *Id.*

and conclusions of law concerning the reliability of the videotaped statement."<sup>75</sup> In the court's view, this would insure the trustworthiness of the child's testimony.<sup>76</sup>

One month later, while affirming the earlier decision that only the act needs to be corroborated and not the assailant's identity, medical testimony of repeated acts of vaginal penetration was deemed sufficient corroboration.<sup>77</sup> It was further explained that due to a lack of physical corroboration in such cases, medical testimony may suffice.<sup>78</sup>

In *Miller v. State*,<sup>79</sup> a five year-old girl had been subjected to four years of sexual molestation by her grandparents and father.<sup>80</sup> A psychiatrist who examined the girl testified at trial that a courtroom appearance would be too traumatic for her. The child was found to be unavailable as a witness.<sup>81</sup> In this instance, the corroborative evidence consisted of prior statements and history elicited directly from the child which related acts of molestation committed upon other female family members.<sup>82</sup> This, in conjunction with medical testimony establishing that the child had experienced vaginal and anal penetration,<sup>83</sup> constituted sufficient corroboration. Because the child was found to be unavailable to testify at trial, the young girl's pre-trial videotaped statement was found to be reliable and was admitted into evidence.<sup>84</sup> The conviction was reversed on appeal, however,

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75. *Id.*

76. *Id.*

77. *Miller v. State*, 498 N.E.2d 1008 (Ind. Ct. App. 1986), *rev'd.*, 517 N.E.2d 64 (Ind. 1987).

78. *Miller*, 498 N.E.2d at 1014.

79. *Id.* at 1008.

80. *Id.* at 1010-12, 1014.

81. *Id.* at 1012.

82. *Id.*

83. The young girl was described as being physically similar to a sexually active woman. *Id.* at 1013.

84. These findings were in accordance with the Indiana statute which allows a child, under ten years of age at the time of the videotape, to be found unavailable as a witness. IND. CODE ANN. § 35-37-4-6(b)(1) (West 1988). One factor that must support a child's unavailability to testify is a psychiatrist's certification that such participation in the trial would

because the defendant was not given the opportunity to cross-examine the victim at the hearing.<sup>85</sup> In *Dayton v. State*,<sup>86</sup> bruises found on the victim after she was with the defendant established a *prima facie* case of abuse although the issue of corroboration was not directly addressed.<sup>87</sup> Two years later, the Indiana court allowed a trial court, in its discretion, to find that psychological evidence, standing alone, provided the basis for admission of a child's out-of-court statement.<sup>88</sup>

In many respects the 1984 Indiana statute mirrors Washington's hearsay statute.<sup>89</sup> However, Washington's corroboration requirement for children who have been excused from testifying has received greater attention.<sup>90</sup> In Washington, the most complete examination of the sufficiency of corroborative evidence occurred in *State v. Hunt*.<sup>91</sup> There, expert psychological testimony, along with evidence of the child's behavior at the day facility, adequately fulfilled the

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be a traumatic experience for the child. *Id.* § (c)2(B)(1). However, such videotape is only admissible if other corroborative evidence of the act exists. *Id.* at § (d).

85. This may have been judicial error because the judge refused to allow the attorneys to question the child or submit questions for the child to ask. *Miller v. State*, 517 N.E.2d 64, 73 (Ind. 1987). Rather, the court found that even though the judge had the right to question the child, not allowing any questions by counsel (under any method) was too broad and was interpreted as a general bar on questioning. *Id.*

86. 501 N.E.2d 482 (Ind. Ct. App. 1986).

87. *Id.* at 484 n.3. See 20 JUV. & FAM. L. DIG., Nov. 1988, at 399.

88. *State v. Pety*, 524 N.E.2d 1293, 1300 (Ind. Ct. App. 1988). The court noted that the trial court may find that psychological evidence in and of itself may still be inadequate to provide sufficient corroboration. *Id.* at 1300. In *Pety*, the psychiatrist's testimony that common symptoms exist among sexually abused children was held to be insufficient in meeting the corroboration requirement. *Id.*

89. 20 JUV. & FAM. L. DIG., Nov. 1988, at 400.

90. *Pety*, 524 N.E.2d at 1298.

91. 48 Wash. App. 840, 741 P.2d 566 (Wash. Ct. App. 1987). The defendant was charged with committing indecent liberties with his two and one half year-old daughter. Day care employees described the child's unusual behavior; she would lie down "[w]ith two blankets under her crotch and thighs so her bottom was elevated six to twelve inches off the mat . . . and would take her blankets and tuck them between her legs and would rock herself to sleep on them." *Id.* at 841, 741 P.2d at 567. Furthermore, the child was found by a day care employee with her "[f]ace down in prone position with her panties down and a little boy was rubbing her fanny." *Id.* The child also described conduct between her father and herself using anatomically correct dolls. A psychologist testified that such explicit sexual behavior was usually "learned activity," but not always indicative of sexual abuse. *Id.* at 842, 741 P.2d at 568.

corroboration requirement.<sup>92</sup> The court noted that because a statutory definition of corroborative evidence did not exist, the ordinary definition would be employed.<sup>93</sup> Additionally, both direct and indirect evidence<sup>94</sup> could be used to establish independent corroborative evidence,<sup>95</sup> because only a *prima facie* case need be put forth that a crime has been committed.<sup>96</sup> Nevertheless, *Hunt* never officially determined whether behavioral evidence in and of itself would be sufficient. Therefore, the issue of expert testimony was still not resolved.

The *Hunt* analysis of required corroboration of a child's testimony was further extended in *State v. Jones*<sup>97</sup> to include

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92. *Id.* at 868-49, 741 P.2d at 571. Corroborative evidence of the act was also defined as "[e]vidence of sufficient circumstances which would support a logical and reasonable inference that the act of abuse described in the hearsay statement occurred." *Id.* at 849, 741 P.2d at 571-72. In this instance, corroboration of the act consisted of the victim's sexual contact with the little boy at the day care center. *Id.* at 842, 741 P.2d at 568.

93. Mary Kay Barbieri, Chief of the Criminal Division, gave the following example of indirect corroborative evidence during a joint State Senate Judiciary Committee and State House Ethics Hearing: "[i]t might be that the [child abuse victim], who had no way of getting money, said 'he gave me a dollar if I'd perform a sex act,' and indeed this four year-old shows up with a dollar." *Id.* at 848, 741 P.2d at 571 n.8 (citing 47 Leg., 1982 Sess. (January 28, 1982 at 10)). See also *State v. Doe*, 105 Wash. 2d 889, 719 P.2d 554 (1986).

94. Due to the lack of physical evidence in a majority of child sexual abuse cases, indirect evidence in the form of expert testimony must also be considered. *Hunt*, 48 Wash. App. at 848, 741 P.2d at 571 (Wash. Ct. App. 1987).

95. Independent evidence must not be of the same character to support a conviction or send the case to the jury. *Id.* at 849, 741 P.2d at 571.

96. *Id.* at 849, 741 P.2d at 571. See also *State v. Jones*, 50 Wash. App. 709, 750 P.2d 281 (Wash. Ct. App. 1988), where indirect corroborative evidence of defendant's indecent liberties with his four year-old daughter consisted of nightmares and behavioral changes. *Id.* at 710-11, 750 P.2d at 282. Cf. *State v. Ryan*, 103 Wash. 2d 165, 691 P.2d 197 (1984). Defendant's conviction for sexually abusing two boys was overturned due to the failure to establish the children's unavailability to testify and the lack of circumstantial guaranties made concerning the children's incompetency to testify. *Id.* at 178, 691 P.2d at 203. Because the boys were not available to testify and their out-of-court statements did not meet the indicia of reliability, the statements were not admissible. However, it should be noted that forcing children to testify in court, which allows for cross-examination, never insures the full reliability of their statements. Finding a child to be incompetent to testify does not mean that the child's statements are unreliable. Hence, *Ryan* rests on faulty ground.

97. 50 Wash. App. 709, 750 P.2d 281 (Wash. Ct. App. 1988). Unlike *Hunt*, no expert testimony was presented in *Jones*. Rather, the corroborative evidence consisted of the testimony of three other witnesses whom the defendant had solicited or engaged in similar activity along with offered testimony about the four year-old's nightmares and behavioral changes. *Id.* at 710-11, 750 P.2d at 282.

behavioral changes and nightmares experienced by the child.<sup>98</sup> Thus, any relevant evidence supporting a reasonable inference that the act occurred could be corroborative evidence under the Washington hearsay statute.<sup>99</sup>

Of all the states with child sexual abuse hearsay statutes, Kansas<sup>100</sup> is one of the only states in which corroboration of the act is not required even though the child is available to testify. As long as the child's hearsay statements are reliable, they are admitted into evidence.<sup>101</sup>

Similarly, corroboration is not required for sexual assault cases in Montana.<sup>102</sup> In *State v. A.D.M.*,<sup>103</sup> the

98. *Id.*

99. *Id.*

100.

(dd) *Actions involving children.* In a criminal proceeding or a proceeding pursuant to the Kansas juvenile offender's code or in a proceeding to determine if a child is a child in need of care under the Kansas Code for care of children, a statement made by a child, to prove the crime or that a child is a juvenile offender of a child in need of care, if:  
 (1) The child is alleged to be a victim of the crime or offense of a child in need of care, and  
 (2) The trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises. If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor.

KAN. STAT. ANN. § 60-460(dd) (Supp. 1987). *Cf.* *State v. Matlock*, 233 Kan. 1, 660 P.2d 945 (1983).

101. Note that this statutory scheme poses problems. If a child witness similarly situated to the child victim was present during the incident, the non-victim's testimony would not be admitted. McNeil, *The Admissibility of Child Victim Hearsay in Kansas: A Defense Perspective*, 23 WASHBURN L.J. 265, 278 (1984) [hereinafter McNeil].

102. *State v. Metcalf*, 153 Mont. 369, 378, 457 P.2d 453, 458 (Mont. 1969); MONT. CODE ANN. § 26-1-301 (1987).

103. 216 Mont. 419, 701 P.2d 999 (1985).

defendant was convicted of felony sexual assault of his five year-old daughter.<sup>104</sup> A videotaped statement was obtained from the victim while she was in a foster home.<sup>105</sup> The court concluded that corroboration of the victim's statement was unnecessary because her testimony was consistent with her prior statements. Moreover, the examining psychologist also testified that the child's description of the activity was unusual for a five year-old and was not likely to have resulted from viewing pornography.<sup>106</sup>

In circumstances similar to *Jones*, most defendants will attempt to argue that the child's testimony must be corroborated because a lengthy amount of time has passed between the offense and any interviews, counseling, or testimony. In most child sexual abuse cases, no witnesses are present and the abuse has continued over a long period of time.<sup>107</sup> Research has generally shown that young children are incapable of fabricating detailed stories of sexual abuse.<sup>108</sup>

New York has also made inroads in the area of corroboration. In 1985 the legislature discontinued the application of the corroboration requirement for sex offenses under the Penal Law to civil proceedings under Article 10.<sup>109</sup>

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104. *Id.* at 419, 701 P.2d at 999.

105. *Id.*

106. *Id.* at 420, 701 P.2d at 1000. In very unusual detail for a five year-old, the victim explained how her father forced her "to play with his 'winker dinker'" and her performance of oral sex with descriptions of the color, taste, and smell of semen. During the interview, the child also related, with anatomically correct dolls, how her father "put his penis inside her . . . to demonstrate how her father had 'humped her.'" *Id.* at 420, 701 P.2d at 999.

107. See COHEN, *supra* note 5, at 321.

108. McGrath, *supra* note 44, at 240 (citing Lloyd, *The Corroboration of Sexual Victimization of Children*, in *SEXUAL ABUSE AND THE LAW* 103, 105 (4th ed. 1983)).

109. N.Y. FAM. CT. ACT § 1046 (a)(vi) (McKinney 1985) provides:

(a) In any hearing under this article

(vi) previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect. Any other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in this subdivision shall be sufficient corroboration. The testimony of the child shall not be necessary to make a fact-finding of

This relaxation is illustrative of the legislature's acknowledgment that children's statements are inherently trustworthy.<sup>110</sup> The broad, flexible rule now allows a child's out-of-court statements to be corroborated by any other evidence which tends to support its reliability.<sup>111</sup> This tips the scale too far in the opposite direction, however, by vesting too much discretion with a judge in determining whether a statement has been reliably corroborated. Specific statutory guidelines should be established to curtail the judges' open-ended discretionary power.

To safeguard the defendant's right to confront the declarant<sup>112</sup> in termination proceedings, corroboration of a child's out-of-court statements is needed. Uniform corroboration standards should be maintained for all jurisdictions, as opposed to a case by case determination of what may, in that instance, constitute sufficient corroboration. In some states only the act needs to be corroborated while others also require corroboration of the identity of the assailant. In addition, psychological testimony may be deemed

abuse or neglect.

*Id.* Because abuse proceedings are civil in nature, criminal rules of evidence do not apply. The Family Court Act § 1046 (a)(vi) was amended in 1985 to make clear that the old provisions of the penal law requiring specific forms of corroboration were not applicable in civil proceedings. These requirements included establishing proof of occurrence and the offender's identity when the victim was unable to consent due to his/her age. Thus, the amended section now allows for corroboration by any other evidence of the child's statements. N.Y. FAM. CT. ACT §§ 1046 (a)(i)-(a)(v), (a)(vii) (McKinney 1983). *Matter of Nicole V.*, 71 N.Y.2d 112, 118, 518 N.E.2d 914, 917, 524 N.Y.S.2d 19, 21-22 (1987). *See People v. Daniels*, 37 N.Y.2d 624, 339 N.E.2d 139, 376 N.Y.S.2d 36 (1957); N.Y.L.J., Sept. 15, 1986, at 1, col. 3.

110. *Matter of Nicole V.*, 123 A.D.2d 97, 510 N.Y.S.2d 56 (1st Dep't 1987), *aff'd.*, 71 N.Y.2d 112, 518 N.E.2d 914, 524 N.Y.S.2d 19 (1987) (comments on the application of N.Y. FAM. CT. ACT § 1046 (a)(vi)). *See also Gallet*, *supra* note 2, at 478.

111. *Matter of Kimberly K.*, 123 A.D.2d 865, 507 N.Y.S.2d 654 (2d Dep't 1986) (medical evidence was sufficient corroboration of a child's out-of-court statements); *Matter of Tina H.*, 123 A.D.2d 864, 507 N.Y.S.2d 653 (2d Dep't 1986) (child's unsworn testimony was sufficient corroboration of out-of-court statements concerning a description and demonstration of sexual abuse); *Matter of Cindy JJ.*, 105 A.D.2d 189, 484 N.Y.S.2d 249 (3d Dep't 1984) (two other daughters who had been sexually abused by the father supported the finding that the youngest daughter was abused); *Matter of Tara H.*, 129 Misc.2d 508, 494 N.Y.S.2d 953 (Fam. Ct. 1986) (proof that five year-old contracted gonorrhoea was sufficient corroboration).

112. U.S. CONST. amend. VI provides "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*



sufficient in some cases but not in others.

Although the relaxation of corroboration requirements is aiding prosecutors in obtaining convictions of sex offenders, it also presents many new problems. Statutory schemes which do not allow the non-victim child to corroborate the child victim's hearsay statements may lead to a deficiency of evidence, resulting in an acquittal.<sup>113</sup> Conversely, states with excessively flexible standards permit too much judicial discretion in deciding whether the evidence is reliable hearsay.<sup>114</sup> Statutory reforms which will allow for uniform corroboration standards with sufficiently narrow reliability guidelines to circumscribe judicial discretion are needed.

## B. The Hearsay Rule and Exception

### 1. Background Law

Many problems exist with the hearsay rule and its exceptions in the prosecution of child sexual abuse cases. The increase in the number of convictions may be attributed in part to the development of the exceptions to the hearsay rule. Hearsay is "[a] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."<sup>115</sup> A statement is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."<sup>116</sup>

Historically, hearsay statements were not admitted as evidence because "the statement may not have been made under oath; the declarant may not have been subjected to

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113. See *supra* note 102.

114. *Id.*

115. FED. R. EVID. 801(c); accord MCCORMICK, *supra* note 37, § 246.

116. FED. R. EVID. 801(a). The effect of this definition was to exclude from the hearsay rule evidence of conduct, whether verbal or nonverbal, that was not intended to be an assertion. Verbal assertions readily fall into the category of a statement. *Id.* (advisory Committee Notes and Legislature History). See also Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 214-17 (1948).

cross-examination when he made the statement; and the jury cannot observe the declarant's demeanor at the time he made the statement."<sup>117</sup> Hearsay statements were also excluded because of the opponent's lack of an opportunity to cross-examine the declarant to test the strength and sincerity of the statement.<sup>118</sup> Although a statement may appear to be true, cross-examination eliminates the dangers of allowing it as evidence without further scrutiny.

Despite the traditional, overwhelming support for cross-examination, the basic rule against hearsay is riddled with exceptions which have developed over three centuries.<sup>119</sup> Perhaps the most pervasive exception is the twenty-fourth:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by the admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or

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117. *California v. Green*, 399 U.S. 149, 154 (1970). See also Morgan & McGuire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909 (1937) (historical approach to the development of the hearsay rule and exceptions).

118. See Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239, 243 (1978).

119. *Ohio v. Roberts*, 448 U.S. 56, 62 (1980); FED. R. EVID. 803, 804. The twenty four exceptions to the hearsay rule may be invoked even though the declarant is available as a witness. Included within the exceptions are: recorded recollections, vital statistics, excited utterances, reputation as to character, family records, and statements for purposes of medical diagnosis or treatment. FED. R. EVID. 803.

hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.<sup>120</sup>

Each state's modifications of the hearsay rules<sup>121</sup> inevitably raise questions regarding the exceptions and the defendant's right to confrontation.<sup>122</sup> Under the United States Constitution, the Sixth Amendment provides "[t]he accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>123</sup> The original vice that led to the confrontation claim was "the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact."<sup>124</sup> A literal reading of this clause would exclude all of a declarant's statements not made during a trial<sup>125</sup> and would clearly be untenable as almost every hearsay exception would be forbidden. Hence, the United States Supreme Court has recognized that certain competing interests, if closely examined, may bring about a relaxation of the right of confrontation at trial.<sup>126</sup>

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120. FED. R. EVID. 803(24).

121. See *infra* Appendix.

122. *California v. Green*, 399 U.S. 149, 156 (1970).

123. U.S. CONST. amend. VI. The sixth amendment was made applicable to the states in 1965 via the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 403-05 (1965); see also *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Berger v. California*, 393 U.S. 314 (1969).

124. *Green*, 399 U.S. at 156. Because the confrontation clause only applies to criminal prosecutions, with most litigation involving child sexual abuse being brought in juvenile and divorce court, this concept may have to be rethought to be applied in noncriminal contexts. *Levy, Preface to Special Issue on Child Sexual Abuse*, 23 *FAMILY L.Q.*, Fall 1989.

125. See *Mattox v. U.S.*, 156 U.S. 237, 243 (1895) (the admission of dying declarations would be contrary to the letter of the provision).

126. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980). However, recently the United States Supreme Court upheld a defendant's right to confrontation in a child abuse case. In *Coy v. Iowa*, 108 S. Ct. 2798 (1988), the court denied the use of a screen which would have allowed

In restricting the range of admissible hearsay, the confrontation clause has two functions.<sup>127</sup> First, a rule of necessity is established.<sup>128</sup> In such a case, the prosecution must show the unavailability of the declarant whose statements the prosecution wishes to use against the defendant.<sup>129</sup> Second, once the witness has been shown to be unavailable, the prosecution must show the trustworthiness of the statement.<sup>130</sup> The concept of 'trustworthiness' revolves around the well-phrased term 'indicia of reliability,'<sup>131</sup> which concludes that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"<sup>132</sup>

The admission of hearsay statements when the declarant is available to testify poses no significant problem and the out-of-court statements regain virtually all of the lost protection as a result of the fact that the declarant may be cross-examined.<sup>133</sup> Normally, when the declarant is not present to be a witness at trial, it must be shown that the declarant is unavailable.<sup>134</sup> The declarant's statement must bear the indicia of reliability, which can be established when the statement falls under one of the firmly rooted hearsay exceptions.<sup>135</sup> Absent a showing of particularized guarantees

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the child victim to testify without the visual contact with the defendant. *Id.*

127. *Roberts*, 448 U.S. at 65.

128. *Id.* See also Note, *Minnesota's Hearsay Exception For Child Victims of Sexual Abuse*, 11 WM. MITCHELL L. REV. 799, 806 (1985) [hereinafter *Minnesota*]. The two considerations which underlie the hearsay rule are a circumstantial probability of the statement's trustworthiness and a demonstrated necessity for admission into evidence. *Id.* at 805. The mere necessity, without some indicia of trustworthiness, will not suffice. *Id.* at 806.

129. *Id.* But see *Dutton v. Evans*, 400 U.S. 74 (1970) (prosecution was not required to produce the witness because utility of confrontation was remote); Cf. *Read, The New Confrontation - Hearsay Dilemma*, 45 S. CAL. L. REV. 1, 43 (1972).

130. *Roberts*, 448 U.S. at 65.

131. *Id.* at 66.

132. *Id.* (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)). See also *Pointer v. Texas*, 380 U.S. 400, 407 (1965).

133. *California v. Green*, 399 U.S. 149, 158 (1970).

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

135. *Id.*

of trustworthiness, however, the evidence must be excluded.<sup>136</sup>

## 2. Use of Hearsay in Sexual Child Abuse Cases

In *United States v. Iron Shell*,<sup>137</sup> the court held that two hearsay statements admitted into evidence did not violate the defendant's right to confrontation.<sup>138</sup> The defendant was charged with assault with the intent to commit rape. A medical examiner and a police officer examined and questioned the nine year-old victim.<sup>139</sup> Their statements during the trial relating the story the victim told them about the physical abuse did not violate the hearsay rule and were admitted into evidence.<sup>140</sup> Specifically, the doctor's testimony was admitted under the hearsay exception which allows "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pains, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."<sup>141</sup> Also, the victim's motive in making the statements<sup>142</sup> to the doctor fell within the patient-doctor relationship.<sup>143</sup> Thus, the victim's motive was held to satisfy the 'guarantees of trustworthiness.'<sup>144</sup> In deciding whether the child's statements to the officer were within the hearsay exceptions, the court considered Federal

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136. *Id.*

137. 633 F.2d 77 (8th Cir. 1980).

138. *Id.* at 87.

139. *Id.* at 81.

140. *Id.* at 82-87.

141. FED. R. EVID. 803(4).

142. The usual question when applying FED. R. EVID. 803(4) is whether the victim's statements made to the doctor are pertinent to the treatment. *Iron Shell*, 633 F.2d at 83. If they are, it is presumed that the victim was motivated to tell the truth. *Id.* at 83-84. In this case, during the examination the girl told the doctor that she was forced into bushes, her pants and panties were pulled off, and the defendant tried to put something in her vagina which made it hurt. *Id.* at 82.

143. *Id.* at 84.

144. *Id.*

Rules of Evidence § 803(2).<sup>145</sup> In support of its reasoning that the officer's testimony was admissible, the court highlighted that only an hour had elapsed between the event and the victim's statements<sup>146</sup> and that her "short bursts about the incident"<sup>147</sup> qualified as "excitement" for the excited utterance exception.

This case was unusual because the child, as a witness at trial,<sup>148</sup> was subjected to cross-examination, and her demeanor and veracity could therefore be determined.<sup>149</sup> Even if the child-witness testifies at trial, however, a confrontation claim may not be precluded if the declarant is too young to be thoroughly cross-examined.<sup>150</sup> In *Iron Shell*, during direct examination, the child was unable to remember in full detail the statements she had made to the doctor and the officer. Moreover, while no details were given concerning the subject matter of the cross-examination, the victim was not questioned about the assault or her statements made to the officer and the doctor.<sup>151</sup> The court found it "[d]ifficult to conclude on this record that a more thorough cross-examination would not have provided the protections inherent in the confrontation clause."<sup>152</sup> Indeed, even if the victim was unable to testify, the statements made by the doctor and the officer were found to

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145. "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FED. R. EVID. 803(2).

146. Although only an hour had passed since the act occurred, time lapse between the actual act and the victim's out-of-court statement is not dispositive under Rule 803(2). *Iron Shell*, 633 F.2d at 85. Further, other factors may be considered such as the declarant's age, his/her physical and mental condition, the subject matter of the out-of-court statements, and the characteristics of the event. *Id.* at 86. Most importantly, it must appear that the declarant's statements were spontaneous. *Id.*

147. *Id.*

148. *Id.* at 87.

149. *Id.*

150. *Id.* (citing *United States v. Nick*, 604 F.2d 1199, 1202 (9th Cir. 1979)).

151. *See id.* at 87.

152. *Id.* *See also* Skoler, *New Hearsay Exceptions For A Child's Statement of Sexual Abuse*, 18 J. MARSHALL L. REV. 1 (1984-85) [hereinafter Skoler]. The *Iron Shell* decision also rested on statements that fell within the firmly rooted hearsay exceptions of excited utterances and statements made to a treating physician. *Id.* at 24 n.122. Additionally, reliance was placed on the then recent *Roberts* decision. *Id.* at 23.

contain sufficient indicia of reliability to render their admission harmless error.<sup>153</sup>

Similarly, in *United States v. Frazier*,<sup>154</sup> the defendant was convicted of assault with the intent to commit rape. Four hearsay statements made within twenty-four hours to the victim's sister, her mother, a naval security officer, and a detective were admitted into evidence despite discrepancies inherent in their factual content.<sup>155</sup> Nevertheless, the defendant's confrontation claim was unfounded because, as in *Iron Shell*,<sup>156</sup> the victim testified at trial, repeated her story, and was subjected to cross-examination.<sup>157</sup> In determining admissibility under the hearsay exception 803(24),<sup>158</sup> the court found that the testimony contained the five required elements:

[T]he circumstantial guarantees of trustworthiness . . . [the statements] were made to people to whom [the child] would naturally have made the statements and I've also considered her very young age as a factor on credibility . . . . Secondly, the statements are offered as evidence of material facts . . . . Third, [they are] more probative on the point . . . than any other evidence that the government can procure. . . and (fourthly) . . . the interest of justice (is) best served by the admission of the statements into evidence and the purposes of the rules of evidence are served. The last element . . . the proponent must give the adverse party notice

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153. *Iron Shell*, 633 F.2d at 86-87.

154. 678 F. Supp. 499 (E.D. Pa. 1986).

155. *Id.* at 501-02. The variations ranged from the fourteen year-old's description of the defendant's touching her genital area, to forcible rape by the defendant. Nevertheless, all of the descriptions conveyed the allegation of sexual assault sustained by the child. *Id.*; accord 20 JUV. & FAM. L. DIG., Aug. 1988, at 313.

156. See *supra* notes 13-53 and accompanying text.

157. *Frazier*, 678 F. Supp. at 502.

158. See *supra* note 120 and accompanying text.

sufficient to have an opportunity to meet the statements . . . all of the four statements were provided some time ago.<sup>159</sup>

Similarly, in *Commonwealth v. Lloyd*,<sup>160</sup> the defendant's confrontation claim was held to be without merit. The court refused to allow defendant's counsel to review the records of the victim's psychiatric treatment in which it was concluded that the defendant's history of venereal disease was relevant to the victim's vaginal discharge.<sup>161</sup> The court emphasized that the ability to question witnesses does not include pretrial disclosure of any and all information useful in contradicting unfavorable testimony.<sup>162</sup> In short, the confrontation clause "[o]nly guarantees 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish.'"<sup>163</sup>

Due to the unique nature of child sexual abuse, the victim's hearsay statements are highly relevant to the disposition of the case.<sup>164</sup> As has been pointed out, such statements may constitute the only proof of the crime, as the existence physical evidence is very rare. Although there has been a significant amount of controversy concerning the reliability of the victim's out-of-court statements,<sup>165</sup> few have questioned the reliability of the victim's in-court statements. In such a high-pressure setting, where the child-victim is subjected to the intensity of these types of proceedings,

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159. *Frazier*, 678 F. Supp. at 502.

160. *Commonwealth v. Lloyd*, 367 Pa. Super. 139, 532 A.2d 828 (Pa. Super. Ct. 1987), appeal docketed, 542 A.2d 1367 (1988); accord 20 JUV. & FAM. L. DIG., April 1988, at 177.

161. *Lloyd*, 367 Pa. Super. 139, 145, 532 A.2d 828, 831 (1987).

162. *Id.* at 146, 532 A.2d at 831 (citing *Pensylvania v. Ritchie*, 480 U.S. 39 (1987)).

163. See *id.* (quoting *Ritchie*, 480 U.S. at 39).

164. See Yun, *supra* note 9, at 1749.

165. *Id.* at 1751. Some commentators believe that these statements are inherently trustworthy because a young child is unlikely to persist in lying to adults about sexual abuse. Also, their knowledge of sexual encounters is usually limited. *Id.* Conversely, other commentators feel that young children simply fantasize and tell stories, thus rendering their statements unreliable. *Id.*



confronting her assailant, the trauma of being in a courtroom, and the possibility of lengthy questioning and cross-examination, it would appear that out-of-court statements, usually given in a more relaxed atmosphere, would be more trustworthy.<sup>166</sup>

### 3. *The Mother's and Expert Witnesses' Testimony*

An overwhelming majority of the hearsay statements asserted in child sexual abuse cases revolve around the victim's out-of-court statements made to a mother or doctor. An additional question which poses trouble in many cases is whether an expert should be allowed to testify that a child's behavior typifies the behavior associated with victims of sexual abuse.<sup>167</sup>

*State v. J.S.*<sup>168</sup> involved the admission of hearsay statements made to the victim's mother which led to the conviction of her father for aggravated sexual assault of their eleven year-old daughter. On appeal, the father's conviction was reversed. The child told her friend the day after the alleged incident that her father had placed his hands on her private areas.<sup>169</sup> The friend retold the story to her mother who questioned the child and told the child's mother.<sup>170</sup> Twelve days later, the child answered her mother's questions by saying that her father had come in and out of her room during an overnight visit, "feeling her body [and] putting his

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166. *Id.* at 1752-53. One suggestion that has been made to mitigate any prejudice to the defendant from the use of out-of-court statements as evidence is requiring the judge to conduct an evidentiary ruling outside the jury's presence. *Id.* at 1753 n.71; FED. R. EVID. 104(c), 103(c). Some states have mirrored the federal rules by providing for similar provisions. Yun, *supra* note 9, at 1753 n.71.

167. Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 431 (1985) [hereinafter *Expert Testimony*].

168. 222 N.J. Super. 247, 536 A.2d 769 (N.J. Super. Ct. App. Div. 1988), *cert. denied*, 111 N.J. 588, 546 A.2d 513 (1988).

169. *Id.* at 251, 536 A.2d at 771.

170. *Id.*

fingers in her vagina."<sup>171</sup> This testimony, received under New Jersey's fresh complaint rule<sup>172</sup> was held not to be a "complaint," and the conviction was reversed. Furthermore, the court decided that the child did not volunteer the information, but responded to a line of questioning by her mother.<sup>173</sup> In the court's view, the child's statements should not have been extracted by 'interrogation,' but should have been self-motivated as expression of grief or outrage on the child's part.<sup>174</sup>

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171. *Id.*

172. The fresh complaint rule permits the state to show, in sexual abuse prosecutions, that the victim complained of the act within a reasonable time to someone the victim would turn to for sympathy, protection, or advice. *Id.* (citing *State v. Tirone*, 124 N.J. Super. 530, 308 A.2d 38 (N.J. Super. 1973), *rev'd*, 64 N.J. 530, 314 A.2d 601 (1974)). Note that the definition of what constitutes a reasonable time may vary from case to case and opens the door for a vast amount of judicial discretion.

173. When the mother first questioned her daughter, she cried and did not want to talk. The mother then asked her daughter about the event and the child just answered "yes" or "no." *State v. J.S.*, 222 N.J. Super. 247, 253, 536 A.2d 769, 772 (N.J. Super. 1988).

174. *Id.* at 253, 536 A.2d at 772. The court relied on Professor Wigmore's statement:

(1) Only the fact of the complaint, not the details. The purpose is to negative the supposed inconsistency of silence by showing that there was not silence. Thus, the gist of the evidential circumstances is merely non-silence, i.e., the fact of a complaint, but the fact only. That she complained of a rape, or an attempt at rape, is all that principle permits; the further terms of her utterance (except so far as to identify the time and place with that of the one charged) are not only immaterial for the purpose, but practically turn the statement into a hearsay assertion, and as such it is inadmissible (except on the third theory).

*Id.* at 254, 536 A.2d at 772-73 (citation omitted). In overruling *State v. Ramos*, 203 N.J. Super. 197, 496 A.2d 386 (N.J. Super. Ct. Law Div. 1985), which allowed the victim's statement to corroborate her assertion of assault, the court offered principles to guide the trial court in receiving statements under the fresh complaint rule.

First, details of the offense should be confined to those minimally necessary to identify the subject matter of the victim's complaint. Second, the court should specify for the jury in its instructions the particular testimony to which the fresh complaint rule applies. Third, the jury should be informed that the testimony was allowed only to show that within a reasonable time the victim reported the criminal event to one in whom she would naturally confide under the circumstances, not for the truth of the victim's complaint. Fourth, the purpose of the rule should be explained as one which enables the State to meet in advance the internal contradiction which might appear from an apparent failure of the victim to make such a complaint; the explanation should be given in language which does not fail to inform the jurors that its use is confined to neutralizing the inference that might otherwise be drawn that her behavior was inconsistent with a claim of sexual abuse. Reference to the

*State v. J.S.* is extremely troublesome because it evinces the court's lack of knowledge concerning signs of sexual abuse.<sup>175</sup> In many instances, children are so traumatized by acts of sexual abuse that it is emotionally and psychologically difficult to voluntarily explain what happened.<sup>176</sup> If the court was fully aware of and sensitive to the nature of child sexual abuse, they may have understood that because the perpetrator in this instance was the father, the child was probably more reluctant to tell her mother. Moreover, even though outward signs of abuse are not displayed by a child, she may be emotionally scarred.<sup>177</sup> For the court to claim that the child's statements were not self-motivated demonstrates the court's inability to appreciate the delicate nature of the abuse.

Thus, the court in *J.S.* overruled *State v. Ramos*<sup>178</sup> which allowed statements made to the victim's mother as corroborative of the victim's assertion. In *Ramos*, the child victim's out-of-court statements were admitted into evidence on three different theories.<sup>179</sup> One of them, the fresh complaint rule, allowed the out-of-court statements to be admitted "[n]ot for the purpose of proving the truth of the assertion made, but to show that it was in fact made as corroboration of the victim's assertion that she was assaulted - - a way to bolster her testimony."<sup>180</sup> This dispels any beliefs that the acts did not transpire as it is deemed a natural

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complaint as "supporting" or "bolstering" her credibility should not be made.

*J.S.*, 222 N.J. Super. at 257, 536 A.2d at 774. Emphasis was further placed on the fact that these statements will only serve "to rebut in advance the assumption that the victim failed to report the fact that she had been defiled" and "not to rehabilitate the credibility of an impeached victim or as proof of an excited utterance." *Id.*

175. See *supra* note 11 and accompanying text.

176. See *supra* notes 9-12 and accompanying text.

177. *Id.*

178. 203 N.J. Super. 197, 496 A.2d 386 (N.J. Super. Ct. Law Div. 1985).

179. *Id.* at 202-05, 496 A.2d at 388-90. The out-of-court statements were admitted based upon the common law concept of the fresh complaint rule, excited utterance, and spontaneous declaration. *Id.*

180. *Id.* at 202-03, 496 A.2d at 338.

reaction for the child victim to complain about the abuse.<sup>181</sup> This common law doctrine does not involve the use of the hearsay statute or any of the hearsay statements.<sup>182</sup> Thus, admitting the child's statements to show consistency with the acts allegedly committed and to provide additional support for the child's testimony served the function of rendering the child's statements admissible.<sup>183</sup> Moreover, the fresh complaint rule, which seems to serve no other purpose than to prove that the victim did not remain silent about the act, does not aid the victim in proving abuse.

The use of expert testimony in child sexual abuse cases is just beginning to take form.<sup>184</sup> While advocates for children believe that expert testimony is necessary because of the scarcity of legally acceptable proof in child sexual abuse cases, defense attorneys believe juries can adequately comprehend the manifestations of abuse without the aid of expert testimony.<sup>185</sup>

The Federal Rules of Evidence provide for a hearsay exception for medical testimony, consisting of "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception of general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."<sup>186</sup> Narrowing the focus of expert testimony, the true questions become: under what circumstances should expert testimony be admissible into

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181. *Id.* at 202, 496 A.2d at 388.

182. *Id.*

183. *Id.* at 202-03, 496 A.2d at 388. Because of this, the substance of the 'fresh complaint' was "immaterial and inadmissible." *Id.* at 203, 496 A.2d at 388.

184. See *Expert Testimony*, *supra* note 167, at 432. There are various types of expert testimony, including the diagnosis of sexual abuse to prove that the abuse occurred, to vouch that the complainant is a credible witness, to enhance the child's credibility by explaining unusual behavior, and to explain the overall capabilities of children as witnesses. Borgida, Greshman, Swim, Bull & Gray, *Expert Testimony in Child Sexual Abuse Cases: An Empirical Investigation of Partisan Orientation*, 23 FAMILY L.Q., Fall 1989, at 434.

185. *Expert Testimony*, *supra* note 167, at 431 nn.9-11.

186. FED. R. EVID. 803(4).

evidence?, what types of testimony are permitted?, and are any regulations or guidelines needed to provide a standard basis to determine the credibility of the testimony? Each state has answered these questions differently.

In *State v. Danielski*,<sup>187</sup> the court refused to admit expert testimony regarding typical symptoms of familial sexual abuse into evidence.<sup>188</sup> The child's step-father was charged with seventeen counts of various sexual offenses for acts of penetration and sexual conduct with his seventeen year-old step-daughter<sup>189</sup> which began when the child was nine.<sup>190</sup> To admit expert testimony under the Minnesota Rules of Evidence it must be "[h]elpful to the jury and its probative value must not be substantially outweighed by the danger of unfair prejudice."<sup>191</sup> The decision of whether the testimony meets this standard is left to the trial court's discretion.<sup>192</sup> Relying heavily on *State v. Saldana*,<sup>193</sup> the court held that a

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187. *State v. Danielski*, 350 N.W.2d 395 (Minn. Ct. App. 1984).

188. *Id.* at 398.

189. *Id.* at 396.

190. *Id.*

191. *Id.* at 396-97; accord, MINN. R. EVID. 702. "If scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Danielski*, 350 N.W.2d 396-97; See also *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982).

192. *Danielski*, 350 N.W.2d at 397. Furthermore, "[a]s long as the trial court makes an initial determination that the expert is sufficiently qualified to testify, we ordinarily do not disturb its discretionary evaluation of the probative value of the testimony versus the danger of unfair prejudice." *State v. Myers*, 359 N.W.2d 604, 611 (Minn. 1984).

193. *Saldana*, 324 N.W.2d at 227. Expert testimony regarding typical post-rape symptoms and the behavior of rape victims, also known as the rape trauma syndrome, were inadmissible. *Id.* at 227. It was feared that this type of evidence would result in undue prejudice in the minds of the jurors. The only relevant question to have been decided was whether the crime occurred, not what the typical manner in which the victim reacted was. Moreover, only the elements of the crime had to be proven beyond a reasonable doubt. *Id.* at 229-30. Although the description of the syndrome was the substance of the expert testimony, it was not regarded as 'reliable enough' to surpass the jurors' common sense:

Permitting . . . an expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome, the complainant was therefore raped, unfairly prejudices the appellant by creating an aura of special reliability and trustworthiness. Since jurors of ordinary abilities are competent to consider the evidence and determine whether the alleged crime occurred, the danger of unfair prejudice outweighs any

licensed psychologist's expert testimony concerning the familial sexual abuse syndrome and its relation to the victim's behavioral signs of sexual abuse was inadmissible.<sup>194</sup> No distinction was made between the rape trauma syndrome in *Saldana* and the familial abuse syndrome in *Danielski*. Moreover, the court applied the *Saldana* rule without considering whether consent was an issue.<sup>195</sup>

In distinguishing cases that admitted expert testimony on the battered child syndrome, the court reasoned that the battered child syndrome is "victim oriented" and explained that the victim's injuries were not accidental.<sup>196</sup> However, the same can be said concerning the familial abuse syndrome. The abuse is not accidental, in most cases no eye witnesses are present, and the abuse occurs at the hands of a family member.<sup>197</sup> While the court in *Danielski* acknowledged these facts,<sup>198</sup> it reasoned that the victim was seventeen years-old and could testify on her own behalf. Therefore, no testimony concerning typical sexual abuse symptoms needed to be put forth because the jury could decide on its own whether she was telling the truth.<sup>199</sup> Allowing courts to venture out on the slippery slope of age differentiation in these discretionary matters will inevitably lead to bad decisions. Too much discretion will be left in the hands of judges in determining whether a child is old enough and has intelligence sufficient to convey the information.<sup>200</sup> Maintaining this level of

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probative value. To allow such testimony would inevitably lead to a battle of experts that would invade the jury's province of fact-finding and add confusion rather than clarity.

*Id.* at 230.

194. *Danielski*, 350 N.W.2d at 396, 398.

195. *Id.* at 397.

196. *Id.*

197. See generally COHEN, *supra* note 5.

198. *Danielski*, 350 N.W.2d at 397-98.

199. *Id.* at 398.

200. The court stated:

Under *Saldana* such expert testimony is inadmissible for this purpose when the victim here is a 17 year-old of at least average intelligence. No reason exists for reaching a different result simply because the alleged

differentiation is illustrative of the prevalent indifference toward understanding the true nature of child sexual abuse and the various effects it has on the victim.

Six months after the *Danielski* decision, the Minnesota Supreme Court held that expert testimony concerning typical characteristics and traits of sexually abused children was admissible.<sup>201</sup> In 1984, James Alan Myers was convicted of criminal sexual conduct in the second degree for the sexual abuse of the daughter of the woman with whom he lived.<sup>202</sup> The abuse began when the victim was six years-old and continued for approximately one year.<sup>203</sup> A psychologist testified as to characteristics observed in children who had been sexually abused.<sup>204</sup> The court did not question the doctor's competency as she had significant practical experience and her educational qualifications were more than adequate.<sup>205</sup>

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abuser was a step-father and the charge is familial sexual abuse rather than when the abuser is unrelated and the charge is criminal sexual conduct.

*Id.*

201. *State v. Myers*, 359 N.W.2d 604 (Minn. 1984).

202. *Id.* at 606. Due to the tender age of the victim (6 years old) she was not able to differentiate between sexual penetration and contact. *Id.* at 607. However, she could testify that the defendant touched her chest and her legs. *Id.*

203. *Id.* at 606.

204. Describing what the psychologist referred to as incest, "sexual abuse by any person occupying a caring-parental role with respect to the child victim, whether or not there is any legal or blood relationship between them." *Id.* at 608 n.2. Characteristics include:

Fear - the child is afraid to tell of the abuse because she will be blamed or punished, she fears the possible breakup of the family, she fears she won't be believed; confusion, particularly in young children - the child feels this is not right, but the adult perpetrator, a person in authority, tells the child it is right; a poor relationship between the mother and daughter - the child does not trust the mother, is afraid of what she will do with the information, and does not look to her mother for support.

*Id.* at 608. The proper role for a psychiatrist "[i]s that of information processing, not decision making. If the judge is to benefit from such expert testimony in making the ultimate decision, the testimony must be delivered completely as well as neutrally - even if some of it is ignored by the law." Hall, *The Role of Psychologists as Experts in Cases Involving Allegations of Child Sexual Abuse*, 23 FAMILY L.Q., Fall 1989, at 454.

205. *Meyer*, 359 N.W.2d at 609; *Cf. State v. Kim*, 64 Haw. 598, 608, 645 P.2d 1330, 1333-34 (1982). The following is the testimony of a qualified expert in pediatrics and child psychiatry:

Q Based upon your experience, Dr. Mann, have you had an opportunity to - in the past - to assess the

Therefore, the court only had to resolve the question of whether such testimony consisted of the proper subject matter to be rendered admissible.<sup>206</sup> Acknowledging the nature of child abuse and the possibility that lay jurors could be "placed at a disadvantage," the court stated:

In the case of a sexually abused child consent is irrelevant and jurors are often faced with determining the veracity of a young child who tells of a course of conduct carried on over an ill-defined time frame and who appears an uncertain or ambivalent accuser and who may even recant. Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children, and particularly of children as young as this complainant.<sup>207</sup>

While the topic of expert testimony in child sex abuse cases has not been fully developed, states are beginning to acknowledge its value.<sup>208</sup> Nonetheless, uniform federal procedures governing the admission of expert testimony should

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credibility of reported rape cases by children involving family members?

- A Yes.
- Q Approximately how many times have you done this?
- A I would say about 70 times, 70 cases.
- Q And, as a result of your interviews and examinations of these witnesses, have you arrived at conclusions with respect to the truthfulness of these reported rape cases involving family members?
- A Yes.
- Q Upon what do you base your conclusions as to the credibility of such claims?
- A There are several factors. One is the consistency of the account of the alleged sexual abuse. There are some common emotional reactions we frequently find in victims, which consists of a fear of safety, fear of future sexual abuse, feelings of depression or anxiety, embarrassment to have the alleged happenings known to peers or other people around them, a negative view of sex, some doubts that one parent might be strong enough to protect further sexual abuse. It is also important to see whether the mental status is basically normal. That means there is no disturbing thinking. That memory functions are intact, and that there is a good sense of right or wrong or fairness and no excessive fantasizing.
- Q Now, as a result of your experience and training in



be established. This would provide a foundation for the judges' decisions regarding the credibility of expert/medical witnesses.

Conversely, if uniform procedures are not workable, guidelines should be established which would remedy the discrepancies created by the vast amount of discretion left to judges. Moreover, prosecutors would have guidance in determining, prior to trial, whether the testimony of their expert would be more likely to be found credible or incredible.

Even if uniform procedures or guidelines are not established, medical testimony should be allowed during the trial, unless the doctor is found to be incredible. This would eliminate much of the discretion otherwise given to judges in deciding whether the victim is of proper age to adequately and intelligently inform the court of the crime committed.

#### 4. *Survey of Legislative Developments*

An increasing number of states have enacted legislation dealing with child victims of sexual abuse.<sup>209</sup> Washington and Kansas were in the forefront of adopting relevant hearsay exceptions.<sup>210</sup> Although other states have developed hearsay exceptions, statutory schemes differ. While some states only require a finding of reliability, others require corroborative evidence when the witness is unavailable.<sup>211</sup> For example, Arizona, Minnesota, and South Dakota require that the out-of-court statement(s) must bear sufficient indicia of reliability.<sup>212</sup> Also, if the victim is unavailable as a witness, corroborative proof must be offered into evidence.<sup>213</sup> The

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209. Over 23 states have developed hearsay exceptions specifically addressing child sexual abuse. See *supra* note 62 and accompanying text. See also Appendix.

210. Skoler, *supra* note 152, at 9. See also Yun, *supra* note 9, at 1746 (discussion of Washington hearsay statute); McNeil, *supra* note 101 (discussion of Kansas hearsay statute).

211. See *infra* Appendix.

212. *Id.*

213. *Id.*

states vary as to the type of corroborative evidence that must be offered. While Arizona requires corroboration of the out-of-court statement, Minnesota and South Dakota require corroboration of the act.<sup>214</sup> Furthermore, while parts of the statutes are very specific, other areas are phrased very broadly.<sup>215</sup> Most of the statutes only state that the out-of-court statements must bear sufficient indicia of reliability, but very few describe in detail what factors to consider in determining reliability.<sup>216</sup> Arkansas specifically lists thirteen detailed factors to consider in determining the likelihood of trustworthiness in out-of-court statements.<sup>217</sup>

Including this list in the statute divests judges of their open ended discretion and sets guidelines on which their determinations are to be based. Judges should be required to specifically state why certain statements do not have sufficient indicia of reliability. For those states that do not have a list in the statute similar to Arkansas', it would at least provide a common law basis to which judges could refer. Additionally, state statutes have applied different age limitations concerning their application to children.<sup>218</sup> Nevertheless, the statutes are similar to the extent that they comply with the *Ohio v. Roberts*<sup>219</sup> standard regarding the hearsay rule and the confrontation clause in sexual abuse cases.<sup>220</sup> *Roberts* stated that a defendant has the right to confront the witnesses against him.<sup>221</sup> If the declarant cannot

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214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* Application of the different states' hearsay statutes vary according to the childrens' ages. Alaska, Arizona, Arkansas, Minnesota, Nevada, South Dakota, Vermont, and Washington have hearsay statutes that are applicable if the child is under ten years of age. *Id.* The hearsay statutes of Missouri and Texas apply to children under twelve years of age, Illinois and Rhode Island apply under 13, and Georgia's applies to children under 14 years of age. *Id.* Note that Minnesota's also applies to those who are mentally impaired. *Id.*

219. 448 U.S. 56 (1980).

220. *Id.* at 62-66.

221. *Id.* at 63-64.

testify and the prosecution intends to introduce the declarant's statement(s) into evidence, the prosecution has the burden of showing that the declarant is unavailable.<sup>222</sup> To enable the declarant's statements to be admissible as evidence, however, these statements must also meet "adequate 'indicia of reliability.'"<sup>223</sup> The court in *Roberts* defined reliable statements as including those statements which fall "within a firmly rooted hearsay exception"<sup>224</sup> or that show "particularized guarantees of trustworthiness."<sup>225</sup>

States without special hearsay exceptions are beginning to see the need to adopt such legislative reforms in the area of child sexual abuse. For example, the New Jersey Supreme Court has proposed amendments to the Evidence Act to allow a child's out-of-court statements to be admitted under certain circumstances.<sup>226</sup> The decision to propose the amendments was made after *State v. D.R.* was decided.<sup>227</sup>

In *State v. D.R.*, a two and one-half year-old girl was sexually assaulted by her grandfather.<sup>228</sup> The appellate division adopted a previously unstated exception to the hearsay rule which allowed the court to admit the child's out-of-court statements relating the details of the sexual contact made to a non-treating psychologist.<sup>229</sup> The exception adopted by the court would also authorize the admission of a child's out-of-court statements made to a parent, physician, other professional or confidant as long as sufficient indicia of

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222. *Id.* at 65.

223. *Id.* at 66.

224. *Id.*

225. *Id.*

226. *State v. D.R.*, 214 N.J. Super 278, 518 A.2d 1122 (1986), *rev'd*, 109 N.J. 348, 537 A.2d 667 (1988). See also 20 JUV. & FAM. L. DIG., Oct. 1988, at 365.

227. *Id.*

228. *State v. D.R.*, 109 N.J. 348 (1988), 537 A.2d 667 (1986). The grandfather made a tape recorded confession in which he admitted that he inserted his penis into the child's mouth, allowed her to touch and kiss his penis, and that he also had incidental contact with her vagina. This confession was repudiated at trial. *Id.* at 353, 537 A.2d at 669.

229. *State v. D.R.*, 214 N.J. Super. 29, 518 A.2d 1122 (N.J. Super. 1986).

reliability could be shown.<sup>231</sup>

On appeal, the New Jersey Supreme Court reversed the defendant's conviction holding that the statements were inadmissible hearsay. Aside from the defendant's confession, which was repudiated at the trial,<sup>232</sup> the only evidence the prosecution could put forth, because the child was found to be an incompetent witness, were the child's statements to the psychologist.<sup>233</sup> Without a hearsay exception, the evidence could not be admitted and the prosecution failed to meet its burden of proof. The court strongly believed that the legislature and the Governor should implement the necessary changes to the rules of evidence, not the judiciary.<sup>234</sup> The court did, however, set forth proposed amendments to the New Jersey Rules of Evidence for the hearsay exception invoked by the appellate division.<sup>235</sup> In recognizing the need for prompt attention to this matter, the court by-passed submitting the proposed rules to the Judicial Conference.<sup>236</sup> Rather, the amendments were transmitted directly to the legislature and the Governor and would become effective immediately upon their approval.<sup>237</sup> *State v. D.R.*, then, is a perfect example of a case in which the need for settled hearsay exceptions on state levels was clear. That need should not arise, however, when the issue is first presented in court.

States which have already enacted legislative reforms to hearsay statutes have recognized the need for innovation in the area of child sexual abuse, but many of these reforms fail

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231. *Id.*

232. *Id.* at 353, 537 A.2d at 669.

233. *Id.* The victim was unable to differentiate between lying and telling the truth. On some occasions she would respond to questions and on other occasions she would not. The court found that it would not be appropriate to let her testify. *State v. D.R.*, 214 N.J. Super. 278 (1986), 518 A.2d 1122 (1986), *rev'd*, 109 N.J. 348, 537 A.2d 667 (1988).

234. *State v. D.R.*, 109 N.J. 348, 537 A.2d 667 (1988). *See also* 20 JUV. & FAM. L. DIG., Oct. 1988, at 372.

235. *D.R.*, 109 N.J. at 362, 537 A.2d at 681.

236. *Id.*

237. *Id.* at 362.

to acknowledge that a child's statements are inherently reliable.<sup>238</sup> In some instances, corroboration of the act is also required under the hearsay exception and such evidence may not be available. The prosecution's entire case almost always revolves around the child's out-of-court statements made to close friends, relatives, or physicians.<sup>239</sup> To demand a strict test for the indicia of reliability of a child's out-of-court statements is not tenable while finding the child's in-court testimony to be inherently reliable. It is more likely that a child would be under pressure to falsify or invent statements while in court. The intimidation of the courtroom, unfamiliar crowds of people, and having to confront the offender may result in unclear or fragmented testimony, lapses of memory, and possible recantation. A more straight forward voluntary account of the incident would probably be elicited in a less intimidating atmosphere as when the child is being examined by a physician, telling the story to her mother or someone to whom the child looks to for guidance.

Furthermore, while states require reliability for out-of-court statements, most do not provide guidelines for determining what constitutes sufficient reliability.<sup>240</sup> Although the hearsay exceptions are somewhat flexible, in certain areas they are either too broad or too rigid.<sup>241</sup> More conclusive, uniform and fully defined exceptions which will admit the child's out-of-court statements on the assumption that they are inherently reliable are urgently needed.

With the acknowledgment by society that child sexual abuse is a national problem, more research has been conducted by psychologists and other professionals and their

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238. See Yun, *supra* note 9, at 1756.

239. See Bulkley, National Legal Resource Center for Child Advocacy and Protection, Young Lawyers Division, American Bar Association, Recommendations for Improving Legal Intervention in Intrafamily Child Abuse Cases 30 (1982).

240. *But see* Arkansas' hearsay statute which lists thirteen criteria to determine whether the out-of-court statement possesses "a reasonable likelihood of trustworthiness." See *infra* Appendix.

241. See *supra* notes 138-248 and accompanying text.

testimony is available to support the reliability of the child's out-of-court statements. Moreover, young children are not aware of adult sexuality and behavior which would enable them to falsify or fantasize such accounts.<sup>242</sup> An exception which takes all of these facts into account, however, would have to meet the mandates of the confrontation clause.<sup>243</sup>

Finally, the children's ages in which the exceptions would be applicable should also be reconsidered.<sup>244</sup> For example, while an eleven year-old may be extremely, psychologically traumatized and found to be an incompetent witness, she would not fit into the ten year-old age limit under Washington's statutory hearsay exception.<sup>245</sup> The correlation between a child's reaching a certain age and the development of his/her own ability to testify at trial cannot be arbitrarily drawn. It is clear that each individual may mature differently. This may directly relate to their individual personalities, life experiences, or ethnic background. For state legislatures to choose such arbitrary age limits in applying the statutory hearsay exceptions, therefore, is truly unfounded. In the eyes of the federal law, sexually abused children and children in general are defined as those individuals under eighteen years of age.<sup>246</sup> States should not be allowed to maintain their own age limits. If the federal age definition of a child is not adopted by all the states, however, the state legislatures should be fully informed about all aspects of child sexual abuse before such age differentiations are finalized.

### C. *Excited Utterances*

There also exists a hearsay exception which enables prosecutors to admit the child victim's out-of-court statements

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242. See *supra* note 108.

243. See *supra* notes 219-26 and accompanying text.

244. See *supra* note 218 and accompanying text.

245. See *infra* Appendix.

246. See *supra* note 1.

made to an adult,<sup>247</sup> regardless of whether the child testifies at trial. Under the Federal Rules of Evidence, an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."<sup>248</sup> The exception to the hearsay rule for excited utterances was developed from the term *res gestae* which has generally been defined as follows:

A statement is admissible as explanatory of an event or occurrence provided the statement was spontaneous and, when considering all the circumstances under which it was made, sufficient time had not elapsed to contrive or fabricate so as to render the declaration in the nature of a self-serving statement.<sup>249</sup>

Two of the key criteria in determining whether a child's statement is an excited utterance is the timeliness of the statement and whether the child was under "stress or excitement caused by the event or condition."<sup>250</sup> These criteria were set up to avoid the problem of fabrication or reflection. While each factor may be considered separately, they are somewhat intertwined, as the timeliness in reporting the incident may or may not support the amount of stress portrayed.<sup>251</sup> For example,<sup>252</sup> assume father (F) sexually assaulted his five year-old daughter (D). One month later the mother questioned D about her unusual behavior. (D is very

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247. Comment, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition*, 34 CATH. U.L. REV. 1021, 1026 (1985).

248. Fed. R. Evid. 803(2).

249. Note, *A Tender Years Doctrine for the Juvenile Courts: An Effective Way to Protect the Sexually Abused Child*, 61 U. DET. J. URB. L. 249, 253 (1984).

250. Fed. R. Evid. 803(2). See also *Legislative Responses*, *supra* note 247, at 1030.

251. Mele, *supra* note 12, at 266. But see *Brown v. U.S.*, 152 F.2d 138 (D.C. Cir. 1945) (cited in *Minnesota*, *supra* note 128, at 809 n.55), where the three year-old victim calmly reported the assault during a dinner time conversation.

252. Any facts used in the hypothetical are not intended to be related to any case.

withdrawn and refuses to be left alone with F). In response to the mother's general question "what is wrong?" D began crying as she answered in a descriptive and excited manner (using terminology consistent for a 5 year-old) and related the details of the abuse.

There will most likely be an argument regarding the admission of the child's statement. The prosecution would probably try to argue that while no dispositive time limits have been set to determine "timeliness of the statement,"<sup>253</sup> the child was still under extreme stress caused by the sexual assault. In response, the defense would probably maintain that the report one month after the event is too far removed and thus is subject to fabrication or falsification.

As the hypothetical demonstrates, the answer to the question of what constitutes an excited utterance is not readily apparent. Depending on each states' laws, the results will inevitably vary.<sup>254</sup>

In *State In Interest of C.A.*,<sup>255</sup> a three year old sister and her two year-old brother were sexually assaulted by their cousin. The children reported the incident to their mother.<sup>256</sup> During the trial, the state attempted to admit all of the oral out-of-court statements under the excited utterance exception to the hearsay rule.<sup>257</sup> The defense argued that because the children were found incompetent to testify, the hearsay statements were unreliable.<sup>258</sup> While the trial court only admitted the childrens' statements which were made on the

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253. See *supra* note 250 and accompanying text.

254. *Evidence, Sexual Abuse of Children: The Justification for a New Hearsay Exception*, 5 Miss. L. Rev. 177, 181 (1985). See also *State v. Bauer*, 704 P.2d 264 (Ariz. App. 1988) (victim's excited utterance included the act of rubbing her vagina); *Commonwealth v. Adams*, 503 N.E.2d 1315 (Mass. App. 1987) (child's statement still res gestae even though the mother told the police four months later).

255. 210 N.J. Super. 28, 492 A.2d 683 (N.J. Super. App. Div. 1985). See also 17 Juv. & Fam. L. Dig., Dec. 1985, at 416.

256. *State In Interest of C.A.*, 201 N.J. Super. 28, \_\_\_, 492 A.2d 683, 685 (N.J. Super. App. Div. 1985).

257. *Id.* at \_\_\_, 492 A.2d at 685.

258. *Id.*



first day,<sup>259</sup> the court was reversed on appeal and none of the statements were admitted into evidence.<sup>260</sup> In justifying the reversal, the court declared:

A court may make allowances for a child's youth and naivete in extending the time during which the nervous excitement continues to enhance the reliability of the statement. A child's youth and naivete, however, are not substitutes for the stress of a nervous excitement, which is the basis for the hearsay exception. If the children here were not speaking under that stress, their statements are "far more of the character of testimony at trial than . . . of the character of an excited utterance."<sup>261</sup>

Despite the fact that the excited utterance exception to allows a child's spontaneous declarations to be admissible and that some states have relaxed the requirements, prosecutors are still experiencing difficulties in admitting such out-of-court statements into evidence. Because no time limits have been mandated under the exception, judges have been vested with an inordinate amount of discretion in determining whether the statement was rendered in a timely manner. Further, this exception does not cover those situations where a child may report the sexual abuse in a quiet and calm demeanor. Just as it is true that individuals deal with situations in a variety of ways, not all children will react with outward displays of stress or trauma. The inward scars that such a heinous crime leaves within the victims will not always manifest themselves in a visible, out-pouring of emotion.

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259. The trial court judge determined that these statements were given in a close proximity to the time of the event. *Id.* Thus, there was no opportunity for the children to fabricate their stories. *Id.*

260. *Id.*

261. *Id.* at \_\_\_, 492 A.2d at 686 (citations omitted).

Without indications of stress or excitement resulting from the act, it seems less likely that the oral out-of-court statements will fall within the excited utterance hearsay exception. The excited utterance doctrine should be extended to allow for specific application to child sexual abuse cases.

#### IV. TERMINATION OF A FATHER'S PARENTAL RIGHTS

In some instances, legislative reforms in the area of hearsay<sup>262</sup> have led courts to terminate the father's right to custody and/or visitation after he has been convicted for sexual abuse.<sup>263</sup> In most instances, however, fathers who are found guilty of sexual abuse retain their visitation rights. Thus, not only is the child victim exposed to the trauma of the initial proceeding to determine whether sexual abuse actually occurred, a dispositional hearing must also be held to determine whether the father's parental rights should be terminated.<sup>264</sup> This second stage rarely occurs at the lower or family court level. Often it is held before a supreme or district court and the justices/judges tend to be less familiar with family law matters.<sup>265</sup> Additionally, the child victim is often required to testify (if available) at both hearings.

Recently, the United State Supreme Court established a minimum evidentiary standard (clear and convincing evidence) for terminating parental rights.<sup>266</sup> Due to the

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262. See *supra* note 210-46 and accompanying text.

263. *In re Interest of A.C.B.*, 743 S.W.2d 875 (Mo. Ct. App. 1988) (father's right to natural child terminated); *State in Interest of J.D.*, 494 So. 2d 1196 (5th Cir. 1986) (father's rights terminated as to two adoptive daughters and natural son); *U.S. v. Azure*, 845 F.2d 1503 (8th Cir. 1988); *U.S. v. St. Pierre*, 812 F.2d 417 (8th Cir. 1987); *In re Tanya P.*, 120 Cal. App. 3d 66, 174 Cal. Rptr. 533 (Cal. Ct. App. 1981); *In Interest of E.J.R.*, 400 N.W.2d 531 (Iowa 1987); *People v. Groff*, 71 N.Y.2d 101, 578 N.E.2d 908, 524 N.Y.S.2d 13 (1987); *Matter of Ryan D.*, 125 A.D.2d 160, 512 N.Y.S.2d 601 (4th Dep't 1987).

264. See 23 JUDGES J. 1 (1984).

265. *Id.*

266. *Santosky v. Kramer*, 455 U.S. 745 (1982) (prior to completely severing the parents' rights in their child, due process requires the allegations to be proven by clear and convincing evidence).

severity of a complete termination of rights, including the right to visit, communicate, or regain custody of the child,<sup>267</sup> the Supreme Court found that the standard of fair preponderance of the evidence did not provide adequate safeguards for protecting parents' due process rights.<sup>268</sup> Applying the factors set forth in *Mathews v. Eldridge*,<sup>269</sup> the fair preponderance standard was deemed inconsistent with due process because "[i]n parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight."<sup>270</sup> It seems apparent, however, that this higher standard does not take the child victim and the possible future physical and the psychological consequences that could result if the father's rights are not terminated into consideration. Additionally, no consideration has been given to the fact that the prosecution, who was able to prove sexual abuse at the initial hearing by a preponderance of the evidence, will almost invariably find it extremely difficult to meet the clear and convincing evidentiary standard at the termination proceeding.<sup>271</sup> It is difficult to understand why the prosecution has the burden of meeting such a high standard of proof when the defense, the father who is often the perpetrator of this outrageous crime, shares none of the none of the burden.

Many cases of child sexual abuse continue to flood the courts, resulting in an increase in the number of parental

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267. *Id.* at 749.

268. *Id.* at 753. The court found that a more critical need for procedural protections exists in those persons facing the dissolution of their parental rights rather than in ongoing state intervention into family affairs, such as a finding of abuse. *Id.* See also Note, *Santosky v. Kramer: Clear and Convincing Evidence in Actions to Terminate Parental Rights*, 36 U. MIAMI L. REV. 369 (1982).

269. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

270. *Santosky*, 455 U.S. at 758. See also *Mathews*, 424 U.S. at 335 (three factors set forth to balance in regard to termination proceedings).

271. It is argued that these offenders (note that they have already been found guilty of sexual abuse) have a due process right to a higher evidentiary standard because it is now a constitutional issue, not strictly a family law issue.

rights termination proceedings. The allegations often arise in custody and divorce proceedings. The increase in litigation has also brought to the criminal justice system a new type of problem. At the forefront of this litigation is the most highly publicized and controversial case<sup>272</sup> *Morgan v. Foretich*.<sup>273</sup> In *Morgan*, the child victim Hilary was born to Dr. Elizabeth Morgan and Dr. Eric Foretich after they had separated.<sup>274</sup> Two years later, Dr. Morgan was awarded custody of Hilary while Dr. Foretich received liberal visitation privileges.<sup>275</sup> Soon afterwards, Dr. Morgan began to suspect that Hilary was being sexually abused because she began making inappropriate statements regarding sexual encounters.<sup>276</sup> Upon visiting a child sexual abuse specialist, Dr. Morgan was convinced that Hilary was being abused and commenced an action to have Dr. Foretich's visitation rights terminated.<sup>277</sup> Although visitation was not terminated, accusations by Dr. Morgan continued against Dr. Foretich. Dr. Foretich filed motions to have Dr. Morgan held in contempt, alleging noncompliance with his court-ordered visitation privileges.<sup>278</sup> The trial court found that although evidence existed which caused hesitation, child sexual abuse was not proven by a preponderance of the evidence.<sup>279</sup> In subsequent litigation, Dr. Morgan was held in contempt for not allowing Dr. Foretich to visit with Hilary.<sup>280</sup> Dr. Morgan was incarcerated<sup>281</sup> because she did not justify her

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272. *Girl in Custody Case Emerges in New Zealand*, N.Y. Times, Feb. 24, 1990, at A9, col. 4 [hereinafter *Girl in Custody*].

273. 846 F.2d 941 (4th Cir. 1988).

274. 521 A.2d 248, 249 (App. D.C. 1987).

275. *Id.*

276. *Morgan*, 846 F.2d at 942.

277. *Id.* at 942-43.

278. *Morgan*, 521 A.2d at 249.

279. *Morgan*, 528 A.2d at 429.

280. Various issues were presented in the *Morgan* litigation.

281. Dr. Morgan was held in prison for 25 months for contempt of court. She was released in September, 1989, after President Bush signed a law limiting incarceration to 12 months in District of Columbia child abuse cases. N.Y. Times, Feb. 24, 1990, at A9, col. 4, 6. The bill provides that:

In any proceeding for custody of a minor child conducted in the Family

actions or have a valid excuse for keeping Hilary from visiting with her father.<sup>282</sup>

To protect Hilary from her father, Dr. Morgan has kept Hilary in hiding since August, 1987.<sup>283</sup> However, she was recently located with her grandparents in Christchurch, New Zealand.<sup>284</sup> For three years, they concealed Hilary's identity and remained on the run.<sup>285</sup> After she was located in New Zealand, Dr. Foretich immediately petitioned the New Zealand Family Court Judge for custody.<sup>286</sup> However, the Family Court Judge, G. T. Mahon, is not bound to follow the orders of the United States Courts.<sup>287</sup> New Zealand did not sign the Hague Convention which allows one country to enforce the orders of another.<sup>288</sup> Thus, Judge Mahon is only bound by his determination of Hilary's best interests.<sup>289</sup>

Judge Mahon has begun the process of Hilary's evaluation by ordering psychological examinations.<sup>290</sup> Isabel

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Division of the Superior Court under paragraph (1) or (4) of section 11-11-1, no individual may be imprisoned for civil contempt for more than 12 months (except as provided in paragraph (2)), pursuant to the contempt power described in subsection (a), for disobedience of an order or for contempt committed in the presence of the court. This limitation does not apply to imprisonment for criminal contempt or for any other criminal violation.

Pub. L. No. 101-97, 103 Stat. 633 (1989).

282. *Morgan*, 528 A.2d at 428.

283. *Girl in Custody*, *supra* note 272, at A9, col. 4.

284. *Id.* Her grandparents, William and Antonia Morgan, are both psychologists. *Efforts Grow to Shield Girl in Custody Battle*, N.Y. Times, Feb. 27, 1990, at A9, col. 2. During a 31 month period, they lived on three continents. *Id.*

285. *Id.*

286. *Child's 15,000-Mile Odyssey In a Troubling Custody Case*, N.Y. Times, Feb. 25, 1990, at A22, col. 5. Dr. Foretich traced Hilary to New Zealand when he was interviewed in London, England in a program involving child custody cases. *Id.* During the program, Hilary's picture was shown and a parent recognized Hilary. *Id.* at col. 6.

287. *Id.* at col. 5.

288. *Id.*

289. *Id.*

290. *Girl in Custody*, *supra* note 272, at col. 5. In the interim, custody has been awarded to the grandparents. *Efforts Grow to Shield Girl*, *supra* note 284, at col. 4. Mary Froning, the psychologist who interviewed Hilary two and one half years prior to her disappearance, stated that the award "[o]f interim custody to the grandparents 'was a signal to me that the courts were going to listen to Hilary and determine what to do based on her wishes.'" *Id.*

Mitchell, the court-appointed attorney for Hilary who has expertise in investigating child sexual abuse,<sup>291</sup> stated that "[t]he idea is to protect this child from intensive interviews and putting her through the hoops about 500 times; its just not necessary."<sup>292</sup>

New Zealand custody laws do not allow the child to appear in court during the court hearings.<sup>293</sup> If the child is needed to testify and sexual abuse is suspected, the interview between a court-appointed expert psychiatrist and the child is videotaped.<sup>294</sup> The expert's report may be given to the attorneys, but the court has the power to prevent the parties from seeing the actual written report.<sup>295</sup> The court proceedings are highly confidential and no one outside of the attorneys and the parties will know when the actual case occurs.<sup>296</sup> Any breach of this confidentiality is subject to punishment of a three month jail term and a fine.<sup>297</sup> There is no doubt that the New Zealand Family Court is concerned about Hilary's welfare and will act in her best interests.

This case has received nationwide attention for various reasons.<sup>298</sup> The parties in this action are prominent individuals. In accordance with other related myths about child sexual abuse, many have a tendency to believe that child sexual abuse cannot occur in middle and upper class families.

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291. *Id.*

292. *Efforts Grow to Shield Girl, supra* note 284, at col. 1.

293. *Id.* at col. 5.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* The New Zealand Family Court is going to great efforts to keep the media within the guidelines of the strict regulations. *Id.* Concern definitely exists for Hilary's well-being and as Isabel Mitchell stated, "I think it's patently absurd to think it could be in the best interests of the child [to allow any interviews with Hilary]." *Id.*

298. The custody battle has gained national attention. Supporters of Dr. Morgan have portrayed her as a mother going to any length necessary to insure the welfare of her child, while Dr. Foretich's partisans have portrayed him as the victim of a vindictive former wife who is using the most heinous available charge against him.

*Girl in Custody, supra* note 272, col. 6.

*Morgan* represents the reality of this heinous crime by showing that the possibility of abuse does indeed cut across all social and class status lines. Additionally, what was originally commenced as a child sexual abuse case actually contains several different, viable issues. On appeal after appeal, litigation has focused on charges of civil contempt of court, the right to a public hearing, due process rights and the credibility of expert witness testimony. *Morgan* is also representative of the actions that mothers are now willing to take to protect their children as a result of the lack of response they have been met with in the judicial system.<sup>299</sup>

Dr. Morgan is not alone in her fight against the system. Many mothers across the United States refuse to consent to have their children turned over for continued visitation with their fathers when they are convinced that sexual abuse has occurred. The basic scenario remains the same. The parents are in the process of getting a divorce, are divorced or separated. The mother usually retains custody while the father is granted visitation rights with the child/children. In various ways, the child displays evidence that he/she is being sexually abused. The mother brings an action to have the father's visitation privileges terminated. The court denies the request and usually the abuse continues. Faced with the nightmare of having her child/children continuously abused, the mother enters a haven now called the "new underground

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299. Rather than comply with Judge Herbert Dixon's order (of the Superior Court of the District of Columbia), which required Dr. Morgan to produce Hilary for unsupervised visits with Dr. Foretich, Dr. Morgan spent 25 months in jail until she was released under Congressional legislation. *Child's 15,000-Mile Odyssey*, *supra* note 286, at col. 1.

railroad.<sup>300</sup> The mothers choose to remain "on the run" with their children and risk possible imprisonment to protect them from an unjust system.

The primary question to be addressed is whether something has gone wrong within the system. Richard Ducote, an attorney who specializes in child sexual abuse allegations, labels what has occurred during litigation as the "backfire syndrome."<sup>301</sup> The courts turn against the mother and feel she is paranoid despite adequate proof of abuse.<sup>302</sup> As Ducote stated, "[i]t's easier to see the mother as hysterical and manipulative than to accept the fact that a parent is sexually assaulting his child."<sup>303</sup>

Generally, abuse is a ground upon which parental rights may be terminated.<sup>304</sup> In most states, two hearings are held prior to deciding whether to terminate parental rights.<sup>305</sup> The fact finding hearing usually establishes whether abuse and/or neglect has occurred by a fair preponderance of the evidence.<sup>306</sup> Then, using a clear and convincing evidentiary standard, a dispositional hearing determines whether the parent's rights should be completely severed.<sup>307</sup>

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300. Jacobbi & Wright, *Mothers Who Go To Jail For Their Children*, Good Housekeeping, Oct. 1988, at 158. "Sanctuary organizations estimate that there are as many as 200 women and children on the run in this country. These women have left behind their homes, their families, their jobs, and usually, their real identities." *Id.* at 236.

April Curtis and her daughter have spent the last couple of years on the run. *Id.* Fighting in court for almost two years, she was finally told that there was not enough evidence to prove the allegations of sexual abuse, despite reports stating that her daughter Amanda had "contracted sexually transmitted genital warts." *Id.* Even with a federal warrant out for April Curtis' arrest, April's new husband echo's her belief by stating "it is a thousand times better than having Amanda abused." *Id.*

301. *Id.* at 237.

302. *Id.*

303. *Id.* Ducote's partial solution of this problem is to educate the judges/justices. *Id.* at 238.

304. *Due Process and the Termination of Parental Rights*, 19 FAM. L. Q. 245, 282-85 (1985-86) [hereinafter *Due Process*].

305. *Id.* at 282 n.292.

306. See *supra* notes 38-40 and accompanying text.

307. See *supra* notes 266-70 and accompanying text.



The new standard evinced under *Santosky*<sup>308</sup> will not add any weight to either side of the balance between the state's *parens patriae* interest<sup>309</sup> or to the administrative interest in reducing the costs of such proceedings<sup>310</sup> while safeguarding the defendant's rights. The prosecution often has a difficult time proving the abuse by a fair preponderance of the evidence because the evidence usually consists of the child victim's out-of-court statements which constitute inadmissible, or at least troublesome, hearsay. Raising the standard of proof for termination proceedings, however, will not lower the total number of proceedings<sup>311</sup> and will result in higher costs for the court system.<sup>312</sup> These costs include lawyers' fees to continue with the termination hearing, court costs, and possibly the fees for expert witnesses. To this end, the fair preponderance standard is an adequate measure by which to determine whether parental rights should be terminated and sufficiently protects both the child's interests as well as the parent's procedural rights.

If the prosecution has proven sexual abuse by a preponderance of the evidence, the verdict should automatically terminate the father's contacts with the child. A finding of sexual abuse without this *per se* denial is akin to no finding at all. Without denying visitation, the sexual abuse in many cases will continue, along with the danger of further psychological trauma to the child.

Use of the fair preponderance standard also begs legislative reforms in the area of hearsay exceptions to facilitate findings of abuse during fact finding hearings.<sup>313</sup>

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308. *Santosky v. Kramer*, 455 U.S. 745, 749 (1982); See *supra* notes 266-70 and accompanying text.

309. The interest is preserving and promoting the child's welfare. *Santosky*, 455 U.S. at 766.

310. *Id.*

311. Note, *In Whose Best Interest?: Balancing the Need for Child Protection with the Parental Right in Due Process in Parental Rights Termination Proceedings*, 5 PROB. L.J. 213, 224 (1983).

312. *Id.*

313. *Due Process*, *supra* note 304, at 293.

Without this vital, initial stage, many allegations of sexual abuse will not be provable and, consequently, the dispositional hearing regarding visitation, if it is necessary, will never be held. In essence, each element of the system will determine whether termination proceedings will be initiated and whether the parent's rights will be terminated.

Finally, judges not within the family court system should be educated in the area of child sexual abuse. Too frequently, judges are exposed to this area of family law during their first child sexual abuse case. Understanding the nature of the abuse goes hand in hand with rendering a sound, well-informed decision. Without this necessary foundation courts are severely handicapped.

## V. CONCLUSION

The heinous crime of child sexual abuse has infected our society for hundreds of years and must now be halted by the full force of the justice system. Although the American public has finally acknowledged one of the worst "best kept secrets," similar acknowledgement by the courts and government is long overdue.<sup>314</sup>

Sexual abuse is unique in some respects because there are few physical signs of the abuse. Most incidents involve fondling, sexual contact, masturbation, and oral copulation. Many of the victims are very young, sometimes infants. The offenders are usually fathers or step-fathers, and in a few cases very close relatives. Usually, the abuse does not occur in one isolated incident, but continues over a period of time that eventually destroys the child's life. Thus, children are

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314. If ever a topic came to national consciousness overnight, this is certainly it. The newspapers, the popular journals, all the media are full of the topic: of mothers jailed because of the protest, of children emotionally battered by injury which is as terrible as it is difficult to detect.

23 FAMILY L.Q., Fall 1989, preface v-vi. See also V.J. FONTANA, SOMEWHERE A CHILD IS CRYING 95-99 (1973). See generally DZIECH & SCHUDSON, ON TRIAL: AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN (1989).

reluctant to disclose *to anyone* exactly what has happened, confusion clouds their minds because the abuse has been inflicted by a parent whom they love, and the perpetrator has often threatened the child.

When the abuse is discovered and allegations are made against the father, the victim is exposed to a double dose of abuse. Outside of the victim's testimony, the prosecution has little evidence to base a case on because normally no eye witnesses are present.<sup>315</sup> The child is exposed to the trauma of testifying in unfamiliar and intimidating surroundings (often more than once) and confronting his/her offender.<sup>316</sup> If the child is unavailable or unable to testify, hearsay statements must meet high standards of reliability prior to their admission into evidence.<sup>317</sup> While the hearsay exceptions have provided for some flexibility and have generally made it much easier to prosecute sex abuse offenders, many areas still need to be improved to assure their maximum effectiveness.

In fashioning such rules and guidelines, the best interests of the children should be paramount. Additionally, the standards should be tailored to disallow an over abundance of judicial discretion. States without hearsay exceptions should take the initiative to enact such statutes as soon as possible. While this may not be accomplished overnight, lobbyists, child sexual abuse support groups, and various other organizations and agencies should recognize the need and speak out to their representative legislators. Until this is accomplished, child sexual abuse will continue to be ineptly handled by the courts.

Following are suggested reforms in the area of child

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315. See *supra* notes 43-44 and accompanying text.

316. See *supra* notes 47-62 and accompanying text. "The mere fact that a child is to be called as a witness does not mean that she has to take the witness stand in open court. Judges have done everything from allowing a full examination in open court to informally discussing the case with the child in chambers." Gallet, *supra* note 2, at 485. Due to the destructive nature of the overall trial, one judge in the New York City Family Court permits settlement conferences before and during a child sexual abuse trial. *Id.* at 479. They occur in the context of child protective proceedings. *Id.*

317. See *supra* notes 66 and accompanying text.

sexual abuse which will hopefully be enacted in the future. While some may view these reforms as unworkable, they are nevertheless realistic when one considers the realm of child sexual abuse.

#### NEW STANDARDS

1. *Per se* denial of all visitation rights upon a finding of sexual abuse, or,
2. On appeals regarding the termination of parental rights, shift the burden to the defendant father to prove, by clear and convincing evidence, that his visitation rights should be reinstated.

#### REVISION OF OLD STANDARDS

(If the above are not adopted)

1. Shift the burden of proof during the termination hearing to require the defendant father to prove, by clear and convincing evidence, why his parental rights should be maintained, or (if the above is not adopted),
2. If a separate hearing is required to determine whether the father's visitation rights should be terminated, the standard the prosecution must meet should be by a preponderance of the evidence.
3. If the child is available as a witness, only require him/her to testify one time at the initial abuse proceeding. Establish an accurate and complete record which can be used if further proceedings become necessary (videotape). This would avoid subjecting the child to the trauma of the additional courtroom experience.
4. Adopt federal and state rules mandating the use of videotapes or two-way videos at all times to record the child's testimony during the initial hearing. The child should never be allowed in person at the court hearings. This would still enable the judge as well as the parties involved, to observe the demeanor of the witness without forcing the victim to testify directly or appear in the presence of the perpetrator.

## EVIDENTIARY STANDARDS

1. Adopt uniform federal hearsay statutes governing the admission of childrens' out-of-court statements.
2. Under the statute, establish the types of corroboration needed and specific time limitations on the admission of excited utterances.
3. Establish state statutory uniform "age definitions" of a child.

*Karla-Dee Clark*

## APPENDIX

*See also* WASH. REV. CODE ANN. § 9A.44.120 (1988); FLA. STAT. ANN. § 92.53 (West 1988); N.C. GEN. STAT. § 8C-1 (1986); TEX. CRIM. PROC. CODE ANN. § 38.072 (Vernon 1988); Vt. R. EVID. 804(a).

ALASKA STAT. § 12.40.110 (Supp. 1988) provides:

(a) In a prosecution for an offense under AS 11.41.410, 11.41.440 or 11.41.455, hearsay evidence of a statement related to the offense, not otherwise admissible, made by a child who is the victim of the offense may be admitted into evidence before the grand jury if

- (1) the circumstances of the statement indicate its reliability;
- (2) the child is under 10 years of age when the hearsay evidence is sought to be admitted;
- (3) additional evidence is introduced to corroborate the statement; and
- (4) the child testifies at the grand jury proceeding or the child will be available to testify at trial.

(b) In this section "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion (Sec. 1 ch. 41 SLA 1985).

*Id.* ARIZ. REV. STAT. ANN. § 13-1416 (1989) provides:

A. Except as otherwise provided in title 8, a statement made by a minor who is under the age of ten years describing any sexual offense or physical abuse performed with, on or witnessed by the minor, which is not otherwise admissible by statute or court rule, is admissible in evidence in any criminal or civil proceeding if both of the following are true:

1. The court finds, in an in camera hearing, that the time, content and circumstances of the statement provide sufficient indicia of reliability.

2. Either of the following is true:

(a) The minor testifies at the proceedings.

(b) The minor is unavailable as a witness, provided that if the minor is unavailable as a witness, the statement may be admitted only if there is corroborative evidence of the statement.

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

*Id.* ARK. R. EVID. 803(25)(A) (Supp. 1989) provides:

(25)(A) A statement made by a child under ten (10) years of age concerning any act or offense against that child involving sexual offenses, child abuse or incest is admissible in any criminal proceeding in a court of this State, provided:

(1) The Court finds, in a hearing conducted outside the presence of the jury, that the statement offered possesses a reasonable likelihood of trustworthiness using the following criteria:

- a. the age of the child
- b. the maturity of the child
- c. the time of the statement

- d. the content of the statement
- e. the circumstances surrounding the giving of the statement
- f. the nature of the offense involved
- g. the duration of the offense involved
- h. the relationship of the child to the offender
- i. the reliability of the assertion
- j. the reliability-credibility of the child witness before the Judge
- k. the relationship or status of the child to the one offering the statement
- l. any other corroborative evidence of the act which is the subject of the statement
- m. any other factor which the Court at the time and under the circumstances deems relevant and appropriate.

(2) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(3) If a statement is admitted pursuant to this Section the Court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other



relevant factors.

(4) This Section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable Rule of Evidence.

*Id.* COLO. REV. STAT. § 18-3-411(3), (5) (Supp. 1989) provides:

(3) Out-of-court statements made by a child describing any act of sexual contact, intrusion, or penetration, as defined in section 18-3-401, performed with, by, or on the child declarant, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, may be admissible in any proceeding in which the child is a victim of an unlawful sexual offense pursuant to the provisions of section 13-25-129, C.R.S.

(5) The statutory privilege between the husband and the wife shall not be available for excluding or refusing testimony in any prosecution of an unlawful sexual offense.

*Id.* ILL. ANN. STAT. ch. 38 § 115-10 (Smith-Hurd 1989) provides:

(a) In a prosecution for a sexual act perpetrated upon a child under the age of 13, including but not limited to prosecutions for violations of Sections 12-13 through 12-16 of the Criminal Code of 1961, the following evidence shall be admitted as an exception to the hearsay rule:

(1) testimony by such child of an out of court statement made by such child that he or she complained of such act to another; and

(2) testimony of an out of court statement made by such child describing any complaint of such act

or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual act perpetrated upon a child.

(b) Such testimony shall only be admitted if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child either:

(A) Testifies at the proceeding; or  
(B) Is unavailable as a witness and there is corroborative evidence of the act which is the subject matter of the statement.

(c) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(d) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement. Laws 1963, p. 2836, § 115-9, added by P.A. 82-782, § 1, eff. Jan. 1, 1983. Renumbered § 115-10 and amended by P.A. 82-1057, Art. II, § 7, eff. Feb. 11, 1983. Amended by P.A. 83-1067, § 3, eff. July 1, 1984; P.A. 85-837, §1, eff. Jan. 1, 1988. Paragraphs 12-13 through 12-16 of this chapter.

*Id.* IOWA CODE ANN. § 232.96(5)(6) (West Supp. 1989) provides:

(5) Neither the privilege attaching to confidential communications between a health practitioner or mental health professional and patient nor the prohibition upon admissibility of communications between husband and wife shall be ground for excluding evidence at an adjudicatory hearing.

(6) A report, study, record, or other writing or an audiotape or videotape recording made by the department of human services, a juvenile court officer, a peace officer or a hospital relating to a child in a proceeding under this division is admissible notwithstanding any objection to hearsay statements contained in it provided it is relevant and material and provided its probative value substantially outweighs the danger of unfair prejudice to the child's parent, guardian, or custodian. The circumstances of the making of the report, study, or record or other writing or an audiotape or videotape recording, including the maker's lack of personal knowledge, may be proved to affect its weight.

*Id.* MINN. STAT. ANNOT. § 595.02(3) (West 1988) provides:

An out-of-court statement made by a child under the age of ten years or a person who is mentally impaired as defined in section 609.341, subdivision 6, alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child or the person who is mentally impaired by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:

(a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the

presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the child or person mentally impaired as defined in Section 609.341, subdivision 6, either:

(i) testifies at the proceedings; or  
(ii) is unavailable as a witness and there is corroborative evidence of the act; and

(c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

For purposes of this subdivision, an out-of-court statement includes video, audio, or other recorded statements. An unavailable witness includes an incompetent witness.

*Id.* MO. ANN. STAT. § 491.075 (Vernon Supp. 1990) provides:

1. A statement made by a child under the age of twelve relating to an offense under chapter 565, 566 or 568, RSMo, performed with or on a child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of this state as

substantive evidence to prove the truth of the matter asserted if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness.

2. Notwithstanding subsection 1 of this section or any provision of law or rule of evidence requiring corroboration of statements, admissions or confessions of the defendant, and notwithstanding any prohibition of hearsay evidence, a statement by a child when under the age of twelve who is alleged to be a victim of an offense under chapter 565, 566 or 568, RSMo, is sufficient corroboration of a statement, admission or confession regardless of whether or not the child is available to testify regarding the offense.

3. A statement may not be admitted under this section unless the prosecuting attorney makes known to the accused or his counsel his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the accused or his counsel with a fair opportunity to prepare to meet the statement.

4. Nothing in this section shall be construed to limit the admissibility of statements, admissions or confessions otherwise admissible by law.

*Id.* NEV. REV. STAT. § 51.385 (1987) provides:

Admissibility; notice of unavailability or inability of child to testify.

1. In addition to any other provision for

admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child is admissible in a criminal proceeding regarding that sexual conduct if the:

- (a) Court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and
- (b) Child either testifies at the proceeding or is unavailable or unable to testify.

(2) If the child is unavailable or unable to testify, written notice must be given to the defendant at least 10 days before the trial of the prosecution's intention to offer the statement in evidence.

*Id.* R.I. GEN. LAWS § 14-1-69 (Supp. 1988) provides:

Hearsay permitted. - In any custody and/or termination trial where a petition has been filed by the department for children and their families in accordance with §§ 14-1-11, 40-11-7 and/or 15-7-7 in the family court, the court may, in its discretion, permit as evidence any statement by a child under the age of thirteen (13) years old about a prescribed act of abuse, neglect or misconduct by a parent or guardian, if such statement was made spontaneously within a reasonable time after the act is alleged to have occurred, and if the statement was made to someone the child would normally turn to for sympathy, protection or advice.

*Id.* S.D. CODIFIED LAWS ANN. § 19-16-38 (1987) provides:

A statement made by a child under the age of ten describing any act of sexual contact or rape

performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings against the defendant or in any proceeding under chapter 26-8 in the courts of this state if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness.

However, if the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

No statement may be admitted under this section unless the proponent of the statement makes known his intention to offer the statement and the particulars of it, including the name and address of the declarant to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

*Id.* GA. CODE ANN. § 24-3-16 (Supp. 1989) which provides:

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the

proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability. (Code 1981, § 24-3-16, enacted by G.A. L. 1986, p. 668, § 1.)