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Use of Videotaping to Avoid Traumatization of Child Sexual Abuse Victim-Witnesses

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COMMENT

Use of Videotaping to Avoid Traumatization of Child Sexual Abuse Victim-Witnesses

The sexual abuse of children is real and far more prevalent than most Americans are willing to believe. Approximately a half million American children will be sexually abused this year.[1] Less than six percent of the incidents of child sexual abuse are ever reported to the police.[2] Of the incidents reported, few ever go to trial. The majority of the cases that are prosecuted are disposed of through plea bargaining, which usually means probation and some form of treatment for the offender.[3] The plea bargain rarely gives adequate consideration to the plight of the child victim-witness.[4] Further, contrary to popular belief, over fifty percent of these incidents of child sexual abuse involve violence, and yet less than one percent of known offenders ever go to prison.[5]

Seeing these statistics, the reader may be incensed at the poor job prosecutors are doing to stop sexual abuse of children. If so, this wrath is misdirected. Admittedly, prosecuting attorneys are no more eager than anyone else to deal with the unpleasant subject of child sexual abuse. But

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1. *A Special Report: A Hidden Epidemic,* NEWSWEEK, May 14, 1984, at 30; Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse,* 18 J. MAR. L. REV. 1 n.1 (1984); Note, *The Sexually Abused Infant Hearsay Exception: A Constitutional Analysis,* 8 J. JUV. L. 59 (1984) [hereinafter cited as *The Sexually Abused Infant*]. *See also* Wenck, *Sexual Child Abuse: An American Shame That Can Be Changed,* 12 CAP. U.L. REV. 335, 356 (1983).

2. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act,* 17 WAKE FOREST L. REV. 535, 539 n.21 (1981).

3. Wenck, *supra* note 1, at 364. At present there is no real cure for the sexual abusers of children. Giarretto, *Humanistic Treatment of Father-Daughter Incest, reprinted in* THE SEXUAL VICTIMOLOGY OF YOUTH 140, at 148-49, 157-61 (L. Schultz ed. 1980) [hereinafter cited as SEXUAL VICTIMOLOGY].

4. Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System,* 15 WAYNE L. REV. 977, 1009 (1969). *See also* Thurman, *Incest and Ethics: Confidentiality's Severest Test,* 61 DEN. L.J. 619, 628 (1984) (presentence investigation rarely delves into cause of sexual abuse).

5. Parker, *The Child Witness Versus the Press: A Proposed Legislative Response to Globe v. Superior Court,* 47 ALB. L. REV. 408, 410-11 (1983) [hereinafter cited as *Child Witness*]. Judicial attitudes may, however, be changing. One judge observed:

> I do not know any girl who enjoys sex with her father. On the contrary, these girls testified as to beatings, physical cruelty and brutal threats to compel them to accede. As for the mother's alleged coldness, these incidents frequently occur when she is in the hospital giving birth to another child. . . . The stereotypes of the father lovingly and sexually stimulating the child, the child enjoying sex and the mother being an "accomplice" are, I believe, as false as the stereotypes of the happy "darkies" who sang in the cotton fields and loved "old Massa'. . . ."

Letter from Judge Lois G. Forer to the Editor, New York Times, (June 20, 1981), *quoted in* Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence,* 19 CAL. W.L. REV. 235, 267 n.132 (1983). *See also* Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases,* 83 COLUM. L. REV. 1745 n.7 (1983) [hereinafter cited as *Child Hearsay Statements*] (1969 study of 250 cases of child sex abuse showed less than one percent of the molesters were sent to jail. These men committed a total of 16,666 acts of child molestation, an average of 63.3 molestations per offender).

even when they want to prosecute an offender, the legal tools available to them are inadequate to do the job.

The primary problem facing prosecutors in child sexual abuse cases is the difficulty in obtaining admissible evidence, especially in cases involving young victims.[6] Prosecutors are frustrated because the evidence of sexual abuse is often overwhelming, but it depends almost wholly on the testimony of the young victim.[7] In the great majority of cases, the child is fully capable of relating the story of her abuse until she reaches the trial. When the trial begins, the child often is terrified of the severe surroundings and especially of the task of telling her story in front of the very person who hurt her, whether that person is her father, another relative, or a stranger. There is significant evidence that the usual trial system of justice, which stresses confrontation of the opposing parties, does great psychological harm to child-victims who are put on the witness stand.[8]

The California McMartin Pre-School case[9] exemplifies this problem. In that case, dozens of children claimed that the staff at the pre-school sexually abused them. They first told their stories to their parents and then to counselors and the police. The county prosecutors decided that the evidence was convincing against seven members of the staff and sought convictions. During the seventeen-month long preliminary hearing, however, many of the children were unable to relate their stories effectively because of the stress of facing their alleged abusers through an adversary proceeding in the awesome courtroom atmosphere. As a result, the prosecution dropped charges against five of the seven defendants.[10]

This case highlights the problems that must be dealt with when attempting to prosecute child sexual abuse cases. This comment will discuss the problems for the prosecutor, caused by the psychological trauma to the young victim-witness under the adversary system in child sex abuse cases. This comment will propose using videotaped testimony and presenting testimony via closed-circuit television to help minimize that psychological trauma.

EVIDENTIARY PROBLEMS IN CHILD SEXUAL ABUSE CASES

Until very recently, complaints from a child that she[11] had been sexually abused were met with skepticism or downright disbelief.[12] It was

6. Skoler, *supra* note 1, at 5-6.
7. *Id.*
8. *Id.* at 6-7.
9. *See 7 Must Stand Trial in Abuse Case,* USA Today, Jan. 10, 1986, at 3A, col. 2.
10. *The Nightmare is Real,* STUDENT LAWYER, April 1986, at 13.
11. The overwhelming majority of sexually abused children are females and most abusers are male. In this comment the victim will be referred to as "she" and the assailant as "he."
12. Note, *Child Hearsay Statements, supra* note 5, at 1746. For an explanation of the rationale underlying this skepticism, see Fitzgerald v. United States, 443 A.2d 1295, 1298-99 (D.C. App. 1982) (children are highly suggestible and fail to understand the consequences of their accusations). *But see* Weiss, *Incest Accusation: Assessing Credibility,* 11 J. PSYCH. T.L., 305, 307 (1983).

very unlikely that the charges would actually be prosecuted unless there was sufficient independent corroborating evidence, which in most cases was difficult or impossible to produce.[13] The stricture against a conviction on the victim's testimony alone was not found in common law before the 1930's.[14] Prior to this time victims of sexual assault were treated just like the victim of any other crime. Sigmund Freud and John Henry Wigmore were largely responsible for introducing the idea that charges of sexual abuse by young females should be considered inherently unreliable and probably false.[15]

The truthfulness of a child's statements about sexual abuse are no longer automatically questioned, and most authorities now accept them as highly reliable.[16] A child abuse expert, testifying in a trial in which the victim was under four years old stated that, "if a young child tells you that they have had sexual activity with somebody, then you had best believe it. . . . [Y]oung children do not lie or fabricate when they give you really graphic portrayals of sexual activity. That means they have experienced it."[17]

While it is generally agreed that children simply cannot fabricate stories of sexual abuse, sometimes on the witness stand the children cannot present their stories in a believable manner. In one trial, a five year old girl testified that her blue jeans had been pulled down, but after thirty minutes of vigorous cross-examination she said that her pants had not been taken off. The judge dismissed the case because her apparent contradiction rendered her story unreliable. The judge ignored the possibility that her pants could have been pulled down but not taken entirely off. The intimidated child could not explain the discrepancy in the courtroom setting.[18]

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13. State v. Myatt, 237 Kan. 17, 697 P.2d 836 (1985). Texas and the District of Columbia still require corroborating evidence to convict in sex crimes against *minor* females. *See* Bolin v. State, 505 S.W.2d 912, 913 (Tex. 1974); Fitzgerald v. United States, 443 A.2d 1295, 1298 (D.C. App. 1982). WYO. STAT. § 6-2-311 (1977) specifically makes such corroboration unnecessary in Wyoming.

14. Fitzgerald v. United States, 443 A.2d 1295, 1307 (Newman, C.J., dissenting).

15. Bienen, *supra* note 5, at 236-41. Freud first accepted the complaints of his adult female patients that they had been sexually abused as children. Later he rejected those complaints. He simply could not believe that the fathers of Vienna could commit such heinous offenses against their small daughters. F. RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 82-83 (1980). Today many mental health experts believe that Freud had discovered reality, a reality impossible for him to accept. Freud never documented a *false* accusation of incest. Skoler, *supra* note 1, at 44. *See also* State v. Romero, 94 N.M. 22, 606 P.2d 1116 (1980) (outmoded notion of women's instability should be discarded). John Henry Wigmore knew of Freud's work and totally agreed with his concept of the basic unreliability of the complaints and testimony of females, especially very young females. Wigmore applied extraordinary rules of evidence *only* to female complaints of sexual abuse and openly concerned himself with protecting "innocent men" from "false accusations" of females. Bienen, *supra* note 5, at 238-40. *See also* Fitzgerald v. United States, 443 A.2d 1295, 1299 (D.C. App. 1982) (courts traditionally skeptical of sexual charges by children).

16. State v. Myatt, 237 Kan. 17, 697 P.2d 836 (1985). Pierron, *K.S.A. 60-460(dd): The New Kansas Law Regarding Admissibility of Child-Victim Hearsay Statements,* 52 J. KAN. B.A. 88, 92 (1983).

17. People In Interest of W.C.L., 650 P.2d 1302, 1305 (Colo. App. 1982).

18. Parker, *Child Witnesses, supra* note 5, at 652.

Other times, the courtroom and the adversary process so traumatize the young witness that she "freezes" and cannot tell her story at all. At that point, the judge has no alternative but to declare that she is incompetent to testify because witnesses must have the capacity to communicate the events about which they are to testify.[19] One defense attorney recognized this problem of stress overwhelming a child on the witness stand.

> [T]here is reasonable cause to believe that . . . due to his age and the nature of the subject matter, [he] would be unable to testify before a jury in an adversary atmosphere, or, if testimony were begun, he might "freeze" and become unable to sit through the remainder of direct or cross-examination due to the stress of exposure to a jury. . . ."[20]

COURT SOLUTIONS TO PROTECT CHILD VICTIM-WITNESSES

A prosecutor faced with a child sexual abuse case must anticipate these reliability and competency stumbling blocks. Many prosecutors have looked to hearsay exceptions to allow the children's vital testimony to be entered into evidence without the children having to testify in court.[21] The most frequently used exceptions are the excited utterance exception[22] and the medical diagnosis and treatment exception.[23] These exceptions, however, cover only two of the possible situations in which a child tells her story.[24] Often, children do not reveal their sexual abuse for months or even years after the incident,[25] which makes these two hearsay excep-

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19. Note, *The Problem of the Child Witness,* 10 WYO. L.J. 214, 217 (1956). *See also* Larsen v. State, 686 P.2d 583, 585 (Wyo. 1984) (applying WYO. R. EVID. 601).

20. Parker, *Child Witness, supra* note 5, at 656. However, children can be excellent witnesses.

> While the rules of evidence concerning admission of children's testimony have not changed, the attitude of the court has. Consequently children seem to meet the test of competency at a younger age.
>
> We have concluded from our own studies and those of others that children can be excellent witnesses—if conditions in the courtroom are . . . supportive[,] if parents do not impose their own views on their children's statements, and if lawyers do not ask them leading questions on the stand."

Goodman & Michelli, *Would You Believe a Child Witness,* PSYCHOLOGY TODAY, Nov. 1981, at 82, 83.

21. Note, *Child Hearsay Statements, supra* note 5, at 1753. *See also,* State v. Myatt, 237 Kan. 17, 697 P.2d 836 (1985) (often the child-victim's out-of-court statements constitute the only proof of the crime of sexual abuse. People simply do not molest children in front of others).

22. FED. R. EVID. 803(2). Wyoming adopted the Federal Rules of Evidence in 1978. For an application of the hearsay rules in the federal courts, see United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980) (district court did not abuse discretion by admitting child's statement following assault as an excited utterance).

23. FED. R. EVID. 803(4). For an explanation of Wyoming's application of these rules, see Note, *Child Abuse and the Medical Diagnosis or Treatment Exception to the Hearsay Rule,* 20 LAND & WATER L. REV. 735 (1985).

24. Note, *The Sexually Abused Infant, supra* note 1, at 67-68.

25. Wenck, *supra* note 1, at 359. For an example, see State v. Hummel, 132 N.J. Super. 412, 334 A.2d 52 (1975) (delay of six weeks in reporting incident not an unreasonable delay under state's "fresh complaint" rule).

tions inapplicable. Although the exceptions do not apply, sometimes courts stretch them in order to convict child abusers who would otherwise go free.[26]

A less common approach which prosecutors can take to avoid putting young victims through the stress of the courtroom is to assert the catch-all exceptions to the hearsay rule.[27] These exceptions justify entering the statements which a victim of sexual abuse made to her parents or other adults concerning the incident even though these statements do not fit into one of the other exceptions to the hearsay rule. Allowing these statements into evidence depends on the court's discretion based on the statements' trustworthiness, materiality, probity, and on the interests of justice.[28]

The catch-all exceptions also can be used to justify entering the child's deposition into evidence. The most effective means of recording that deposition and presenting it in the trial is by way of videotape. Generally, the defense counsel is present to cross-examine the child or to provide questions to the judge who will ask them of the child.[29] Courts have allowed videotaped testimony to be admitted into evidence in many different kinds of cases. For example, in *People v. Moran*,[30] a California appeals court held that where an unavailable witness had testified at a preliminary hearing and the entire tape of the preliminary hearing was previewed by the court, having carefully monitored the tape to assure that there had been no editing or shortening, with consideration of all motions and objections prior to presentation, and with a careful foundation having been laid, the videotape was properly admitted.[31]

The court said that the jury could adequately weigh the videotaped witness' credibility and that, "the process does not significantly affect the flow of information to the jury," and that it "fulfilled the broad purposes of the confrontation clause."[32] The court felt that the "filtering effect" of the medium was evenhanded and that there was no "inherent unfairness." The court stated that television was a stranger only in the justice system and that videotaping was a "modern technique that better protects the rights of all concerned."[33]

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26. Skoler, *supra* note 1, at 8. Several states have by legislation created a new hearsay exception for out-of-court statements of abused children. Among the first were Kansas and Washington. Kansas construed KAN. STAT. ANN. § 60-460(dd) (1983) in State v. Myatt, 237 Kan. 17, 697 P.2d 836 (1985). Washington's Supreme Court found WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1985) constitutional in State v. Ryan, 103 Wash. 2d 165, 691 P.2d 197 (1984). Colorado, Utah and Arizona have adopted similar statutes.

27. FED. R. EVID. 803(24), 804(5). *See* Note, *The Sexually Abused Infant*, *supra* note 1, at 64, 67.

28. United States v. Nick, 609 F.2d 1199, 1203 (9th Cir. 1977). *See generally* Pierron, *supra* note 16 (discussing the new Kansas child-victim hearsay exception).

29. State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1332 (1984).

30. 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974).

31. *Id.* at 421.

32. *Id.* at 420.

33. *Id. See* Hendricks v. Swenson, 456 F.2d 503 (8th Cir. 1972). The *Moran* court quotes extensively from *Hendricks* calling it the "leading and most thoughtful case on the use of video tapes in criminal proceedings."

Other cases in which courts have permitted videotaped testimony include *Davis v. State*,[34] where after a store robbery the manager joined the armed forces and was overseas at the time of trial. He testified on videotape. *Stratso v. Song*[35] was a medical malpractice suit where an expert witness was permitted to testify on videotape. In *People v. Zehr*,[36] a case of home invasion, burglary and aggravated battery, the appellate court held that granting permission for a witness to testify on videotape was within the sound discretion of the trial court.

Prosecutors who attempt to get a videotaped deposition into evidence for a child sexual abuse victim must convince the courts that the videotape comes under the catch-all exceptions to the hearsay rule. They may find that courts are reluctant to use these exceptions even in compelling cases. A way around all hearsay problems is the use of two-way closed-circuit television. Under these circumstances, the child is in a room apart from the courtroom. She can observe the proceedings in the courtroom and, during her testimony, she can be seen and heard in the courtroom.[37] Testimony via closed-circuit television is considered direct, not hearsay, testimony because it is not a statement other than one made by the declarant while testifying at the trial or hearing.[38]

The New Jersey case of *State v. Sheppard*[39] illustrates the use which courts have made of closed-circuit television in child abuse cases. The *Sheppard* court discussed the danger to the child of severe psychological harm if she was forced to testify in court. The court also was impressed by the testimony of the forensic psychiatrist who felt that the telecast of the child's testimony would "enhance, not diminish, the prospect of obtaining the truth."[40] The psychiatrist offered convincing reasons for his conclusion: the child's ambivalent position, her fear, guilt, and anxiety would become greater if she was subjected to the courtroom atmosphere, whereas these stressful emotions would be lessened by the use of closed-circuit television.[41]

If the courts alone try to implement the use of videotaped depositions and two-way closed-circuit television for the testimony of minor victims of sexual abuse, there are likely to be several problems. The implementa-

34. 284 Ark. 557, 683 S.W.2d 926 (1985).
35. 17 Ohio App. 3d 39, 477 N.E.2d 1176 (1984).
36. 103 Ill. 2d 472, 469 N.E.2d 1062 (1984).
37. State v. Sheppard, 197 N.J. Super. 411, 415, 418-19, 484 A.2d 1330, 1332, 1333-34.
38. Note, *Child Hearsay Statements, supra* note 5, at 1746-47.
39. 197 N.J. Super. 411, 484 A.2d 1330 (1984).
40. *Id.* at 434, 484 A.2d at 1344.
41. *Id.* at 416, 484 A.2d at 1332. *See* Thurman, *supra* note 4, at 626 (victim may be traumatized by events prior to proceedings). *See also* State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (child-victims of sex abuse commonly retract their reports of abuse because of pressure from their family. Their acceptance of responsibility for what is happening to the assailant creates strong feelings of guilt); Note, *Child Hearsay Statements, supra* note 5, at 1752 n.61 (nine-year-old incest victim seeing her father brought into court in manacles and chains cried out, "I did *that* to my daddy?" and fell into a spasmodic twitching episode) (emphasis in original); Wenck, *supra* note 1, at 366 (great efforts are made by relatives to silence child).

tion would likely be uneven and inconsistent when used because each court would have to fashion its own procedures. Each court would be required to do extensive research in this area before permitting the procedures to be used. Because of this piecemeal approach the probabilities of appeal from conviction would greatly increase.

LEGISLATIVE SOLUTIONS TO THE PROBLEM OF CHILD VICTIM-WITNESSES

Statutes enacted by state legislatures would allow statewide introduction of the procedures, provide basic guidelines for courts, and eliminate the need for extensive research and deliberations. The statutes would provide protection from psychological trauma to minor victims who cannot or should not have to face trial in an open court.

Four states have adopted comprehensive statutory solutions to the problem of child victim-witnesses.[42] Montana's statute uses three short sections[43] to permit the recording of the victim's testimony in a videotaped deposition. The recording is to be admitted into evidence and shown at the trial, and the victim need not be present in court. The statute names the people who may be present at the taping. These people are the district court judge, the prosecuting attorney, the victim, the defendant, the defense attorney, and technicians. The statute specifies that normal courtroom procedures apply in the deposition. The legislation does not confine its application only to minor victims of sexual offenses.

New Mexico's statute[44] is directed to the testimony of victims age sixteen or under. Otherwise, it is very similar to Montana's statute. Neither Montana nor New Mexico allows for the alternative of two-way closed-circuit television. For many children, closed-circuit television would insulate them from the stress of direct testimony while changing courtroom procedure as little as possible. Further, these two statutes still permit direct confrontation between the young victim and her alleged assailant. This confrontation still subjects the young victim to a psychological trauma similar to that which she would have suffered in an open courtroom. Additionally, these statutes do not provide for a support person for the child.

The Texas legislation is more detailed than Montana's and New Mexico's statutes.[45] The statute applies only to the statements and testimony of victims twelve years old and under. The statute provides three options for the court to use in any criminal proceeding involving child abuse, which proceeding could be either a preliminary hearing, a grand jury investigation, or a trial. The first option allows an out-of-court interview to be videotaped and shown in the proceeding as evidence. No attorney for either

42. Those states are Montana, New Mexico, Texas, and California. *See* MONT. CODE ANN. §§ 46-15-401 to -403 (1984); N.M. STAT. ANN. § 30-9-17 (Supp. 1984); TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1986); CAL. PENAL CODE §§ 1346, 1347 (West Supp. 1986).

43. MONT. CODE ANN. § 46-15-401 to -403 (1984).

44. N.M. STAT. ANN. § 30-9-17 (Supp. 1984).

45. TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1986).

side nor the defendant can be present at this interview, which is advantageous to the child's sense of security. However, the child must then be available to testify at the proceeding, which nullifies the child's potential insulation from psychological damage. At least this option is helpful in presenting material evidence. The court's second option allows the victim to testify via closed-circuit television. Only the attorneys for both sides, a support person for the child, and technicians may be in the room with the child. This option permits the defendant to see the child through a one-way mirror, but the mirror prevents the child from seeing or hearing the defendant. If the court uses only this option, the child must testify at least twice because the option does not provide for videotaping the proceedings.

To avoid having the child testify twice, the court may combine the second option with the third one, which allows the the child's testimony to be recorded on videotape. The same persons allowed to be present in the closed-circuit television option may be present at the taping. The court may use this third option by itself, which would ensure that the child only will be forced to testify once. This statute, with its three options, gives the court a great deal of flexibility in determining which procedure best serves all concerned in any given case.

California has by far the most detailed and comprehensive statutes governing the presentation of the testimony of child abuse victims.[46] Like Texas, California gives its judges discretion to permit the victims to testify through closed-circuit television and videotape. Until 1985, California only permitted videotaping of the preliminary hearing to be shown later at trial. However, California's recent experience with the McMartin Pre-School case has prompted the legislature to enact even greater safeguards for child-victims ten years old and under.[47]

The parents of the young victims in that case were outraged by the treatment of their children in the preliminary hearing. The preliminary hearing lasted over seventeen months. Fourteen children actually testified;[48] many more children would have testified, but they could not cope with the psychological stress. The children who did take the stand were battered for hours at a time by attorneys' questions. The parents felt that the proceedings further abused their children, who had already undergone a great deal of suffering. The parents formed a powerful lobby to strengthen existing protections for child victim-witnesses.

The California legislature enacted a lengthy new statute outlining a closed-circuit television procedure for witnesses aged ten years and under.[49] The major difference between this statute and the Texas closed-circuit television option is that under the California statute the child is in another room from the judge, jury, defendant, and attorneys. The legislature expressed its intent in this way:

46. CAL. PENAL CODE §§ 1346, 1347 (West Supp. 1986).

47. Comment, *Criminal Procedure—Child Witnesses—The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639, 659 N.182 (1985).

48. *7 Must Stand Trial in Abuse Case, supra* note 9, at cols. 2, 4.

49. CAL. PENAL CODE § 1347 (West Supp. 1986).

> It is the intent of the Legislature in enacting this section to provide the court with discretion to employ unusual court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures.[50]

A PROPOSAL FOR WYOMING

The need for special protection for child victim-witnesses is just as great in Wyoming as in her sister states. The Wyoming legislature should enact specific legislation providing such protection. The intent of the proposed legislation[51] for Wyoming, like that of California's, should be to protect young victims from the psychological trauma induced by our adversary system of justice while retaining all possible protections for the rights of the defendant, and to preserve the integrity of the judicial process.

The act should give broad discretion to district courts to allow innovative use of modern technology and flexibility in structuring court procedures to meet the needs of young victims who otherwise may be unable to testify. It should provide for both videotaped testimony and testimony via closed-circuit television at any proceeding, at the discretion of the court. Children too young to testify or unable to adequately describe what was done to them may demonstrate with the aid of anatomically correct dolls.[52] This demonstration should also be videotaped to preserve it for the record and for viewing at the trial.[53] The videotapes should be subject to a protective order and should be destroyed after five years to preserve the privacy of the victim.[54]

The use of closed-circuit television and videotape for child victim-witnesses benefits the children in two ways. First, the child does not need to testify repeatedly. Some children are only emotionally capable of giving their testimony once or a few times. Second, she does not have to confront her alleged assailant and everyone else in the courtroom. The distance provided by television cameras saves the young victim from the severe trauma of telling the embarrassing details of the sexual incident before her assailant and strangers in the courtroom.[55] Children are easily intimidated; they often "freeze" or "choke" on the witness stand, making it impossible for them to testify at trial.[56] Children are familiar with the

50. *Id.* § 1347(a).
51. The proposal is set out in Appendix A.
52. State v. Tuffree, 35 Wash. App. 243, 249, 666 P.2d 912, 916 (1983).
53. *See* TEX. CODE CRIM. PROC. ANN. art. 38.071(4)(1) (Vernon Supp. 1986).
54. *See* CAL. PENAL CODE § 1347(d)(5) (West Supp. 1986).
55. State v. Sheppard, 197 N.J. Super. 411, 435, 484 A.2d 1330, 1344-45.
56. *Id.* at 417, 484 A.2d at 1330, 1333. *See also* State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (videotaped testimony may assist jury).

television format and are delighted to see themselves on the monitors. This use of videotape or closed-circuit television will permit the admission of the best evidence, which is the child telling her story in her own words while all persons in the courtroom see and hear her.

Videotape and television cameras are already familiar to Wyoming's police and sheriff departments. They use them to record interrogations and interviews with person suspected of DWUI, and to otherwise record the demeanor or behavior of suspects, witnesses, or victims, including child abuse victims.[57] We have only nine judicial districts in Wyoming, and twenty-three court houses. To provide the necessary equipment would cost approximately $69,000. This is a very small price to pay to protect our most helpless and innocent victims of sexual offenses from the psychological trauma of being subjected to our adversary system in open court.

CONFRONTATION CLAUSE OBJECTIONS

Once enacted, the major hurdle the new act would have to clear is the defendant's constitutional right to confrontation. This right is granted by the Sixth Amendment of the United States Constitution and was made binding on the states through the fourteenth amendment in *Pointer v. Texas.*[58] If literally followed, the confrontation clause would eliminate all hearsay exceptions[59] as well as the use of closed-circuit television and videotaped testimony in child sexual abuse trials.

The United States Supreme Court, however, has not literally construed the confrontation clause. In the 1980 case of *Ohio v. Roberts*,[60] the Court said that the clause merely states a preference for face-to-face confrontation at trial but that the "primary interest secured by [the provision] is the right of cross-examination."[61] Competing interests when closely examined may justify dispensing with confrontation at trial. Adequate opportunity for cross-examination might meet the requirements of the clause without actual confrontation.[62] The Supreme Court in *California v. Green*[63] even omitted face-to-face confrontation as an indispensable element of the confrontation clause.

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57. Interviews with Sergeant Pat Branigan, Detective Division, Cheyenne Police Department (April 7, 1986), Lawrence E. Cozzens, Detective-Polygraph Examiner, Cody Police Department (Feb. 22, 1986).

58. 380 U.S. 400, 403 (1965).

59. Ohio v. Roberts, 448 U.S. 56, 63 (1980). The confrontation clause may be waived, however. *See* United States v. Carlson, 547 F.2d 1346, 1357-59 (8th Cir. 1976) (discussion of express waiver, waiver by stipulation as to admission of evidence, waiver by guilty plea, waiver by absence from the jurisdiciton, and waiver by misconduct).

60. 448 U.S. 56 (1980).

61. *Id.* at 63 (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965) (brackets supplied by the *Roberts* Court).

62. Ohio v. Roberts, 448 U.S. 56, 63-64 (1980); Douglas v. Alabama, 380 U.S. 415, 418 (1965).

63. 399 U.S. 149 (1970).

The Eighth Circuit in *United States v. Benfield*,[64] however, reinstated face-to-face confrontation as a usual requirement of the sixth amendment's confrontation clause. The court held that, where the victim testified by a videotaped deposition because she feared psychological harm, the defendant's rights were violated, even though the defense counsel was in the room while the deposition was taken and the defendant could see the victim through one-way glass and also hear the proceeding.[65] The court conceded that a closed-circuit television procedure would not necessarily violate the confrontation clause.[66]

Contrary to *Benfield*, there is no particular safeguard inherent in having the witness eyeball to eyeball with her assailant.[67] What is essential is that the judge and the jury be able to observe the victim-witness, hear her voice, and reach their own conclusions about the weight to give her story.[68] The other essential element to protect the defendant's right of confrontation is to provide opportunity for cross-examination. The *Sheppard* court determined:

> The Confrontation Clause is not implacable in its demands. Nearly every authority agrees that it is subject to exceptions. . . . [T]he use of videotaped testimony in this case of child abuse is permissible[;] it is accepted as a fact that only a modest erosion of the clause, if any, will take place.[69]

The child, through closed-circuit television or videotaped testimony, "will not be obliged to see the defendant or to be exposed to the usual courtroom atmosphere."[70]

CONCLUSION

Young victims are greatly harmed by sexual abuse; their lives can be destroyed. Known sexual abusers of children often go free because the evidence against them cannot be presented using present procedures. Children who do testify in court might even be harmed more by the adversary system than by the sexual abuse they suffered. Clearly, something must be done.

From reporting to sentencing, the needs of the child-victim of sexual abuse have been poorly served if at all. Child victim-witnesses are just beginning to receive the attention they deserve, as some jurisdictions modify procedures to limit the trauma that accompanies testifying before the alleged assailant, parents, family, and strangers in open court.

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64. 593 F.2d 815 (8th Cir. 1979). For an analysis of *Benfield*, see Note, *Criminal Defendant has Sixth Amendment Rights to Physically Confront Witness at Video-Taped Deposition*, 4 WASH. U.L.Q. 1106 (1979).
65. *Benfield*, 593 F.2d at 821-22.
66. *Id.* at 822 n.11.
67. State v. Sheppard, 197 N.J. Super. 411, 432, 484 A.2d 1330, 1343 (1984).
68. *Id.* at 429-31, 484 A.2d at 1341-42.
69. *Id.* at 432, 484 A.2d at 1342-43.
70. *Id.* at 432, 484 A.2d at 1343.

When balancing the competing interests of the defendant's right to confrontation and the child victim-witness' need for protection and support, videotaped depositions and testifying via closed-circuit television at the trial provide viable compromises. The proposed legislation to permit the use of such videotaped depositions and closed-circuit television in Wyoming's courts would better serve the needs of the young victims.

MARGERY BOYD COZZENS

APPENDIX A
PROPOSED CHILD VICTIM-WITNESS STATUTE

(a) In any prosecution for criminal sexual intrusion or criminal sexual contact upon a minor (W.S. 6-2-303, 6-2-304), upon a motion by the county attorney, with at least three days notice to defense counsel, the district court may order the taking of a videotaped deposition of the minor-witness. The videotaping shall be done under the guidance of the court in a place determined by the court. The videotaped deposition shall be viewed and heard at the trial and entered into the record in lieu of direct testimony of the minor-witness.

(i) Persons allowed to be present at the videotaping of the deposition are the minor-witness, the judge, county attorney, defendant and defense counsel, a support person for the minor-witness and any technicians required to operate the equipment. If technicians are present they should be screened from the minor-witness' view or be in another room with a one-way mirror.

(b) The court may in its discretion or on the motion of any party order that the minor-witness shall be put in a room other than the courtroom and his or her testimony contemporaneously received in the courtroom via two-way closed-circuit television. Only a support person and those technicians needed to operate the equipment may be in the room with the minor-witness. Technicians should be screened from the minor-witness' view as in subsection (a)(i). The attorneys will examine or cross-examine the minor-witness under the Wyoming Rules of Evidence. The defendant will be able to hear and see the minor-witness testify, and the minor-witness will see and hear the attorneys who are questioning him or her.

(c) Special deposition: The court may at its discretion order the deposition of the minor-witness to be taken as specified in subsection (a) but without the actual presence of the defendant, providing simultaneous viewing of the minor-witness while testifying to the defendant via closed-circuit television, if the circumstances of the particular case warrant this additional protection for the minor-witness. Attorneys for all parties may be present in the room with the minor-witness and may examine or cross-examine the minor-witness. However, the court may at its discretion require that the attorneys submit all questions to the court which will then ask the minor-witness those questions. Circumstances which will permit use of this procedure are, but are not limited to instances:

(i) in which the minor-witness is closely related to the defendant, especially in cases of incest.

(ii) in which the minor-witness has been threatened or intimidated by the defendant.

(iii) in which the assault was particularly brutal, or there was physical abuse as well as sexual abuse, or the minor-witness was seriously injured psychologically by the assault.

(d) If the court orders testimony taken under either subsection (a) or subsection (c) of this article, the minor-witness shall not be required to testify in court at the proceedings for which the deposition was taken.

(e) Children incompetent to testify or unable to articulate what was done to them will be permitted to demonstrate the sexual act or acts committed against them with the aid of anatomically correct dolls. Such demonstrations will be under the supervision of the court and shall be videotaped to be viewed at trial, and shall be received into evidence as demonstrative evidence.

(f) The Supreme Court of Wyoming may adopt rules of procedure and evidence to govern and implement this act.

(g) The cost of videotaping will be paid by the state.

(h) Videotapes which are part of the court record are subject to a protective order to preserve the privacy of the minor-witness.

(i) The videotape of a proceeding shall be destroyed five years after the entry of final judgment.