Fordham Law Review

Volume 63 | Issue 2 Article 7

1994

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Meredith Felise Sopher

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Recommended Citation

Meredith Felise Sopher, *"The Best Of All Possible Worlds'": Balancing Victims' and Defendants' Rights in the Child Sexual Abuse Case*, 63 Fordham L. Rev. 633 (1994).
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"THE BEST OF ALL POSSIBLE WORLDS"[1]: BALANCING VICTIMS' AND DEFENDANTS' RIGHTS IN THE CHILD SEXUAL ABUSE CASE

MERIDITH FELISE SOPHER

INTRODUCTION

> *"It hurts emotionally, and it hurts physically and once that happens, once that intercourse or that molestation takes place, that's the end of childhood. We know that."*[2]
>
> *"There are a lot of people who sexually offend their own children who are excellent parents, despite that one little hangup. . . . People think the worst thing that can happen to you is sexual abuse, but it's not. It's being removed from your parents."*[3]

* * *

Although the views expressed above are clearly contradictory, they share the emotional fervor characteristic of the topic of child molestation. The past two decades have witnessed the birth of both the battle against child sexual abuse[4] and the backlash against that battle.[5] Although child molestation has existed throughout history,[6] the horrific nature of the crime traditionally discouraged its recognition.[7] In the last ten years, however, the American media has focused intently on the issue of child sexual abuse. The coverage is overwhelming—

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1. Kee MacFarlane et al., Sexual Abuse of Young Children 87 (1986). For the complete passage, see *infra* note 95 and accompanying text.

2. David Hechler, The Battle and the Backlash: The Child Sexual Abuse War 274 (1988) (quoting incest survivor Eileen Wolfe, interviewed Dec. 14, 1986).

3. Hechler, *supra* note 2, at 126 (quoting Marilyn Gunther, founder and director of The Coalition of Concerned Citizens, a Seattle-based organization that defends those accused of child abuse).

4. The term "child sexual abuse" is used to describe many acts. For example, the federal statute includes child pornography within its definition. 42 U.S.C. § 5106g(7) (1989). For the purposes of this Note, however, "child sexual abuse" and "child molestation" will refer only to forced or coerced sexual activity between a person less than 16 years old and a substantially older person.

5. *See* Hechler, *supra* note 2, at 5-10.

6. *See* Florence Rush, The Best Kept Secret: Sexual Abuse of Children (1980) (tracing the existence of child sexual abuse from pre-biblical times to the present); *see also* James Selkin, The Child Sexual Abuse Case in the Courtroom 5-9 (2d ed. 1991) (demonstrating the existence of child molestation in ancient Greece); Karla Dee-Clark, Note, *Innocent Victims and Blind Justice: Children's Rights to Be Free From Child Sexual Abuse*, 7 J. Hum. Rts. 214, 222 (1990) (same).

7. The writings of Sigmund Freud provide one of the most dramatic examples of this self-imposed societal ignorance. Many of Freud's adult female patients reported that they had been molested as children. Freud attributed these reports to fantasy, concluding that "it was hardly credible that perverse acts against children were so general." Sigmund Freud, The Origins of Psychoanalysis: Letters to Wilheim Fliess, Drafts and Notes: 1887-1902 215 (1954). Freud's conclusions were accepted for most of the twentieth century.

magazine covers,[8] newspaper articles,[9] television programs[10] and celebrity confessions[11] relate stories of child molestation almost daily. Furthermore, the number of cases reported to authorities has steadily increased—over 200% in ten years.[12] This dramatic shift has pro-

8. *See, e.g.*, Bill Hewitt et al., *Dodging the Bullet*, People, Feb. 7, 1994, at 64 (cover story about allegations of child molestation against Michael Jackson); Miriam Horn, *Memories Lost and Found*, U.S. News & World Rep., Nov. 29, 1993, at 52 (cover story about recovered memories of child sexual abuse); Leon Jaroff, *Lies of the Mind*, Time, Nov. 29, 1993, at 52 (cover story about repressed-memory therapy, focusing on its effect in the molestation arena).

9. *See, e.g.*, Wendy Bounds, *Can a 3-Year-Old Murder? Is a Court The Place to Decide?*, Wall St. J., Mar. 3, 1994, at A1, A6 (identifying child as victim of sexual abuse); Karen Brandon, *Owner of Vernon Hills Tutoring Center Charged with Molestation*, Chi. Trib., Mar. 12, 1994, at 5 (owner of tutoring facility charged with child sexual abuse); Robert Enstad, *Father Charged in AIDS Case*, Chi. Trib., Feb. 24, 1994, at 2 (HIV-positive man charged with molesting his daughter); Jon Jeter, *P.G. Man Is Convicted Of Sexually Abusing Boy*, Wash. Post, Feb. 16, 1994, at B5 (conviction of alleged child molester); Bill Miller, *Woman Says Alexandria Priest Initiated Sex With Her When She Was 13*, Wash. Post., Feb. 6, 1994, at B5 (allegations of child sexual abuse); Ann W. O'Neill, *Panah Pleads Not Guilty in Girl's Death*, L.A. Times, Feb. 26, 1994, at B1 (man charged with molesting and murdering eight-year-old girl); Michael D. Shear, *GMU Student Charged with Sexual Abuse of Boy, 13*, Wash. Post, Mar. 22, 1994, at B6 (arrest of suspect in child molestation case); *Wayland Man Jailed for Abuse*, Boston Globe, Feb. 1, 1994, at 25 (defendant pleads guilty to sexually abusing three boys). The American media is not alone in its coverage of these cases. *See, e.g.*, Rachel Hawes, *Judge Calls for Uniform Child Law*, The Weekend Australian, Mar. 19-20, 1994, at 4 (reporting on child sexual abuse cases within Australia's legal system); D'arcy Jenish et al., *Every Parent's Nightmare*, Maclean's, June 22, 1992, at 24 (cover story about the problem of child sexual abuse in Canada).

10. For example, Ofra Bickel's recent documentary, *Innocence Lost: The Verdict*, questioned the fairness of the Little Rascals Day Care case, in which two employees were convicted of molesting preschool-age children. The documentary aired on 290 public broadcasting stations during the summer of 1993. *See also* Ronald Smothers, *In a Day-Care Case, New Questions, Few Answers*, N.Y. Times, July 23, 1993, at B7 (criticizing the outcome of the Little Rascals Day Care case and describing *Innocence Lost*). The major networks also are broadcasting documentaries on the issue of child sexual abuse, and have aired countless television movies on the subject over the years. *See, e.g.*, *Not In My Family* (ABC television broadcast, Feb. 28, 1993); *Shattered Trust* (NBC television broadcast, Sept. 27, 1993); *Ultimate Betrayal* (CBS television broadcast, Mar. 20, 1994); *see also* John Carmody, *The TV Column*, Wash. Post., Aug. 27, 1984, at C9 (reporting ratings for an NBC documentary on child molestation).

11. *See, e.g.*, Roseanne Arnold & Vickie Bane, *A Star Cries Incest*, People, Oct. 7, 1991, at 84 (discussing comedienne Roseanne Arnold's claims that she was molested repeatedly as a child); Sandra Dee & Todd Gold, *Learning to Live Again*, People, Mar. 18, 1991, at 86 (reporting that actress Sandra Dee was sexually abused as a child); Linda Grant, *A Past Imperfect?*, The Guardian, May 24, 1993, § 2, at 10 ("[S]cores of celebrities, from Sinéad O'Connor to Roseanne Arnold, have gone on the record to claim that they were abused."); David Mills, *Oprah, Children's Crusader*, Wash. Post, Nov. 13, 1991, at B1 (reporting talk-show host Oprah Winfrey admission that she is a survivor of child sexual abuse); Sylvia Rubin, *Sharing an Awful Secret*, S.F. Chron., Oct. 9, 1991, at B3 ("From the covers of magazines, on talk shows and in their autobiographies, celebrities are telling the world about their abusive childhoods. The last few weeks have brought an unprecedented number of celebrity confessions . . . .").

12. State v. Myatt, 697 P.2d 836, 841 (Kan. 1985). As of 1989, molestation was the fastest growing form of reported child abuse. L. Matthew Duggan III et al., *The Cred-*

duced a vociferous backlash, with many characterizing the growing concern as "mass hysteria."[13]

Nonetheless, "the *routine* occurrence of child molestation remains a subject from which people prefer to avert their eyes."[14] Only the most dramatic cases come to the public's attention, and popular myths remain undisturbed.[15] Government statistics on child molestation are scarce,[16] and researchers' attempts to compile data yield unsatisfactory results.[17] Child sexual abuse is extremely difficult to investigate. It is a crime of secrecy, with victims who are always unwilling, and

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ibility of Children as Witnesses in a Simulated Child Sex Abuse Trial, in Perspectives on Children's Testimony 71, 72 (Stephen J. Ceci et al. eds., 1989) [hereinafter Perspectives]; *see also* Doris Stevens & Lucy Berliner, *Special Techniques for Child Witnesses, in* The Sexual Victimology of Youth 246, 246 (Leroy Schultz ed. 1980) (noting a steady increase in the number of child sexual abuse victims referred to the Sexual Assault Center).

13. Maryanne George, *Experts Say Michigan Has Far to Go to Help Victims*, Det. Free Press, Apr. 12, 1993, at A1. Ms. George quotes Dr. Richard Gardner, who has testified for the defense in child sexual abuse cases for over 10 years. Dr. Gardner states:

> It used to be the Nazis, now it is sex abuse. There's a mass hysteria. The 1974 Federal Child Abuse Prevention and Treatment Act, which requires reporting, has drawn in zealots, people with axes to grind and validators who know if you document abuse, it will keep your clinic open.

Id. See also Michael H. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. Miami L. Rev. 19, 20 (1985) ("The last three years have brought the public to a state of awareness, often bordering on hysteria, concerning child sexual abuse."); Laura Shapiro et al., *Rush to Judgment*, Newsweek, Apr. 19, 1993, at 54 ("Americans are at fever pitch over child sex abuse these days: we haven't done very well at preventing it, but we're frantic to root it out and stomp it to death no matter where it lurks—or doesn't."). Some critics have even compared the increased attention to McCarthyism and the Salem Witch Trials. *See infra* note 86 and accompanying text.

14. Susan Brownmiller, Against Our Will: Men, Women, and Rape 301 (1975).

15. Mary de Young, The Sexual Victimization of Children 161 (1982). Among the most common myths are that children are molested primarily by strangers and that only girls are victims of sexual abuse. David Finklehor, Child Sexual Abuse: New Theory and Research 87 (1984).

16. *See* Billie W. Dziech & Charles B. Schudson, On Trial: America's Courts and Their Treatment of Sexually Abused Children 4 (2d ed. 1991).

17. MacFarlane et al., *supra* note 1, at 6 ("[E]stimates of the incidence of sexual abuse vary dramatically. . . . In terms of absolute numbers, current reliable estimates range from 100,000 to 500,000 cases per year. . . . [P]roportions of people reporting sexual contact with an adult prior to puberty or late adolescence range from about 8% to 35%.") *See also* Debra Whitcomb et al., When the Victim is a Child: Issues for Judges and Prosecutors 2-4 (1985) ("[F]indings suggest that anywhere from 12% to 38% of all women, and from 3% to 15% of men, are subjected to some form of sexual abuse in their childhood."); David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. Crim. L. & Criminology 1, 3 (1986) (citing studies that conclude that anywhere from 8% to 28% of women were sexually abused as children); John E.B. Myers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection*, 28 J. Fam. L. 1, 3 (1989) ("It is difficult to estimate how many children are sexually abused each year."). This statistical uncertainty is partially attributable to the underreporting of molestation. Rush, *supra* note 6, at 4.

often unable, to disclose what has happened.[18] Physical evidence of the abuse exists only in a small percentage of cases,[19] and witnesses are even less common.[20] These factors hinder the truth-seeking process at all levels—from the statistics lab to the courtroom.

This Note addresses the difficulties encountered in the effective adjudication of child sexual abuse cases within the American criminal justice system, and argues for an interdisciplinary[21] effort to overcome evidentiary hurdles. Part I of this Note discusses whether the criminal courts should have a role in combatting child molestation. This Part identifies the arguments for and against criminal prosecution of the alleged abuser, particularly where the abuse is intrafamilial,[22] and concludes that prosecution is crucial in the majority of cases. Part II examines the evidentiary difficulties involved in these prosecutions in light of the constitutional protections afforded the criminal defendant. These protections make the complainant's success in the criminal arena considerably more difficult than in civil court. This Part also demonstrates how traditional prosecutorial techniques have failed in this arena. Part III advocates the implementation of an interdisciplinary approach to these prosecutions. While such an approach has been successfully instituted in several jurisdictions, most jurisdictions have limited their efforts to the civil arena. Furthermore, the potential of this approach as a tool for overcoming evidentiary hurdles has not been explored. A "team effort" diminishes many of the evidentiary problems encountered in these prosecutions. This Note concludes that a streamlined, interdisciplinary approach to prosecution of child sexual abuse cases benefits both victim and defendant. This approach minimizes potential revictimization of the child without sacrificing the defendant's constitutional rights. Ultimately, the justice system cannot effectively handle child sexual abuse cases until criminal prosecution is restructured to meet the particular needs of these cases.

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18. *See infra* notes 74, 78-81 and accompanying text; *see also* Roland Summit, *No One Invented McMartin 'Secret'*, L.A. Times, Feb. 5, 1986, § 2, at 5 ("Children who have been molested are typically ashamed, fearful and specifically forbidden to tell. . . . It is simply not normal for a child to tell, or for a parent to believe, that a solid citizen could be sexually dangerous.").

19. *See infra* notes 77-78 and accompanying text.

20. *See infra* notes 74-76 and accompanying text.

21. This Note uses the term "interdisciplinary" to connote cooperation among the various persons involved in the investigation and prosecution of a child sexual abuse case, e.g., physicians, psychologists, police officers and lawyers.

22. This Note uses the term "intrafamilial" to include abuse perpetrated by those living in the same household as the victim, and not cases involving extended family members outside the household.

I. The Role of the Criminal Courts in Child Sexual Abuse Cases

Even among those committed to battling child sexual abuse, there is much debate over whether molesters should be treated as criminals. Society traditionally has viewed all forms of child abuse as a behavioral disorder rather than a criminal activity.[23] Where the abuse is intrafamilial, this perception has resulted in an approach that focuses on treating the "sick" family member while preserving the family structure.[24] Therefore, until recently, intrusion by criminal authorities was minimal.[25]

Heightened public awareness of child abuse has led to a concomitant increase in the number of abuse prosecutions, most notably in the area of molestation.[26] While all child advocates welcome the increased recognition of child sexual abuse, they are divided sharply as to the proper role of the criminal system in this arena.[27] For some, concern for the child victim reinforces the traditional notion that these cases, particularly where the abuse is incestuous, should not be criminally prosecuted.

A. *Arguments Against Criminal Prosecution*

Many child protective professionals argue that criminal prosecution is an inappropriate response to child sexual abuse. These professionals principally contend that any state action should be directed at ensuring the welfare of the child victim.[28] Criminal courts lack authority to issue orders regarding the complainant, and prosecution is aimed at deterring, punishing, and rehabilitating the defendant. Those who identify molestation as a psycho-social problem question the effective-

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23. Ellen Gray, Unequal Justice 13 (1993); Laurie S. Boerma, *How to Overcome Barriers and to Develop Creative and Innovative Approaches in the Prosecution of Child Sexual Abuse Cases*, *in* Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases 31, 32 (National Legal Resource Center for Child Advocacy and Protection 1985) [hereinafter National Conference].

24. Gray, *supra* note 23, at 13.

25. Douglas J. Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 Am. Crim. L. Rev. 315, 318-19 (1987); John P. Serketich, Note, *A Conflict of Interests: The Constitutionality of Closed-Circuit Television in Child Sexual Abuse Cases*, 27 Val. U. L. Rev. 217, 217 (1992).

26. *See supra* note 12 and accompanying text.

27. *See infra* notes 27-65 and accompanying text. Sometimes civil suits provide the only available remedy—often abuse is not discovered until adulthood, long after the criminal statute of limitations has expired. For a discussion of the issues raised in these cases, see generally Lisa Bickel, Note, *Tolling the Statute of Limitations in Actions Brought by Adult Survivors of Childhood Sexual Abuse*, 33 Ariz. L. Rev. 427 (1991). This Note is concerned only with those cases where the victim has the option of filing a criminal complaint.

28. David Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 978 (1969); William W. Patton, *Child Abuse: The Irreconciliable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 U. Louisville J. Fam. L. 37, 41 (1992).

ness of criminal prosecution as a means of deterrence or rehabilitation.[29] They further argue that those convicted usually serve only a short sentence, and are likely to resume abusive behavior upon release.[30]

Furthermore, criminal prosecution may carry a significant emotional cost for the child witness. The criminal system's defendant-oriented procedures discourage, and often disallow, the court from accommodating children's special needs. For example, the Sixth Amendment right to confrontation, which is not implicated in civil proceedings, may require the child to face the defendant—an often traumatic experience.[31] The emotional difficulty is heightened when the alleged abuser is a family member. In such a case, the child may feel additional guilt if the defendant is convicted.[32] Conflicting feelings toward the abuser are often a significant cause of the trauma experienced by the child victim.[33]

Authorities who dismiss the role of criminal courts in dealing with intrafamilial child sexual abuse generally advocate the use of the civil system in these cases. Civil proceedings may take two forms.[34] First, a parent or guardian may sue on behalf of the child to obtain money damages from the alleged wrongdoer.[35] Although the tangible result is only monetary, such a suit arguably has psychological benefits for the child victim.[36] Second, a civil suit may be instituted by the appropriate state agency against the alleged abuser.[37] This type of case, often brought in family or juvenile court,[38] is often the fastest means of removing the child from an abusive environment. In contrast to

29. Howard A. Davidson et al., Child Abuse and Neglect Litigation: A Manual for Judges 143 (1981).

30. Ronald M. Holmes, The Sex Offender and the Criminal Justice System 171 (1983); Brian G. Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 Am. Crim. L. Rev. 103, 119 (1974).

31. *See infra* part II.B.

32. Josephine Bulkley et al., Dealing With Child Sexual Abuse 7 (2d ed. 1982); Diana S. Everstine & Louis Everstine, Sexual Trauma in Children and Adolescents 183 (1989).

33. Everstine & Everstine, *supra* note 32, at 183.

34. Custody disputes that involve allegations of molestation are not included because they are not proceedings specifically designed to deal with the abuse.

35. Hechler, *supra* note 2, at 56.

36. *See id.* at 237 (noting that a victim's therapist viewed victorious lawsuit as "the first step in her patient's struggle to change 'from victim to survivor' ").

37. *Id.* at 56-58.

38. The courts hosting these cases are different in different jurisdictions. They are most commonly brought in family court. In other states, however, juvenile courts have jurisdiction over abused and neglected children. Because the juvenile court's purpose is to implement nonpunitive, individualized justice for children, the focus is on help and treatment, not punishment. Vincent DeFrancis, The Court and Protective Services: Their Respective Roles 10-16, *reprinted in* Davidson et al., *supra* note 29, at 27-28. *See generally* Juvenile Justice Philosophy (Frederic L. Faust & Paul J. Brantingham eds., 2d ed. 1979) (describing the evolution of the juvenile court system).

criminal trials, these proceedings may focus on the "best interests of the child" to protect the victim from further harm.[39] Civil court action also is facilitated by the standard of proof, which is considerably lower than that required in a criminal trial.[40] Following a showing of abuse by a preponderance of the evidence, the civil court can take the necessary steps to ensure the child's safety.[41] For example, the court may order child protective agencies to provide treatment for the child and family members.[42] The civil court therefore may address the root of the abuse in a manner that the criminal system cannot.

Moreover, an attorney or guardian *ad litem*[43] usually represents the child in civil court.[44] Federal statute mandates the appointment of a guardian *ad litem*, who need not be an attorney, for all civil abuse proceedings in states receiving federal block grant money.[45] Many states have similar statutes, often requiring that the *ad litem* be an attorney.[46] Under both schemes, an effective *ad litem* ensures that the child's interests are represented at all stages of the adjudicatory process. The *ad litem* is not the child's mouthpiece—he or she deter-

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39. Bulkley et al., *supra* note 32, at 5; Jeffry H. Gallet, *Judicial Management of Child Sexual Abuse Cases*, 23 Fam. L.Q. 477, 477 (1989).

40. Hechler, *supra* note 2, at 60-61. In a criminal trial, the State must prove the defendant's guilt "beyond a reasonable doubt." *In re* Winship, 397 U.S. 358, 364 (1970) (explicitly holding "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). This is the highest evidentiary standard. Colorado v. Connelly, 479 U.S. 157, 186 (1986) (Brennan, J., dissenting).

41. Gallet, *supra* note 39, at 480; Dee-Clark, *supra* note 6, at 220-21. Some actions require a greater showing than others. For example, the Supreme Court has held on due process grounds that the termination of parental rights requires a minimum showing of "clear and convincing evidence." Santosky v. Kramer, 455 U.S. 745, 769 (1982).

42. Hechler, *supra* note 2, at 61. The court's power to provide this type of remedy is provided by state statute. *See, e.g.*, Cal. Family Code § 6343 (West 1994).

43. Guardians *ad litem* who are attorneys are often referred to as "law guardians." Hechler, *supra* note 2, at 349 n.7.

44. ABA, Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases 9 cmt. 1.4.1 (1982) [hereinafter ABA Recommendations].

45. 42 U.S.C. § 5103(b)(2)(G) (1974).

46. Twenty-six states require appointment of a guardian *ad litem* in all civil abuse proceedings. *See* Ala. Code § 26-14-11 (1992); Cal. Welf. & Inst. Code § 326 (West 1984 & Supp. 1994); Colo. Rev. Stat. Ann. § 19-1-105 (West Supp. 1993); Conn. Gen. Stat. Ann. § 17a-101 (West 1992); Ga. Code Ann. § 15-11-55 (1990); Idaho Code § 16-1618 (1979 & Supp. 1994); Iowa Code Ann. § 232.71 (West 1994); Ky. Rev. Stat. Ann. § 26A.140 (Michie/Bobbs-Merrill 1992); Me. Rev. Stat. Ann. tit. 22, § 4005 (West 1992); Mo. Ann. Stat. § 210.160 (Vernon 1983 & Supp. 1994); Mont. Code Ann. § 41-3-303 (1993); Neb. Rev. Stat. § 43-272.01 (1988); Nev. Rev. Stat. Ann. § 432B.500 (Michie 1991); N.J. Stat. Ann. § 9:6-8.23 (West 1993); N.M. Stat. Ann. § 32A-4-10 (Michie Supp. 1993); N.Y. Fam. Ct. Act. § 249 (McKinney 1983 & Supp. 1993); N.C. Gen. Stat. § 7A-586 (1989 & Supp. 1993); N.D. Cent. Code § 50-25.1-08 (1989); Ohio Rev. Code Ann. § 2151.28.1 (Baldwin 1992); Okla. Stat. Ann. tit. 21, § 846 (West 1983 & Supp. 1994); 23 Pa. Cons. Stat. Ann. § 6382 (1991); R.I. Gen. Laws § 40-11-14 (1990); S.C. Code Ann. § 20-7-110 (Law. Co-op. 1985 & Supp. 1993); Tenn. Code Ann. § 37-1-149 (1991); Utah Code Ann. § 78-7-9 (Supp. 1994); Wash. Rev. Code Ann. § 13.34.100 (West 1993).

mines what outcome will serve the child's best interests, and petitions the court accordingly.[47]

Although the use of an *ad litem* has been recommended for criminal sexual abuse proceedings, few courts appoint guardians *ad litem* in criminal cases.[48] The victim in a criminal trial is not a party to the proceeding and therefore typically lacks representation—the rights of the defendant take priority. To appoint a guardian *ad litem* may prove, in effect, similar to appointing another prosecutor. This result is appealing to no one—it infringes on the rights of the defendant and thereby increases the likelihood of an overturned conviction.[49] The current resistance to the appointment of *ad litems* in criminal proceedings is thus unlikely to subside significantly in the near future.

B. *Arguments For Criminal Prosecution*

Other child protective professionals strongly contest the idea of eliminating criminal prosecution, asserting that it is not only an appropriate but a necessary means of combatting child molestation. They argue that child sexual abuse must be treated as a crime, regardless of any familial relationship between perpetrator and victim.[50] To support this position, proponents of prosecution cite the fact that all fifty state legislatures have passed statutes that criminalize child molestation, regardless of the relationship of those involved.[51] They maintain that "[r]etribution is exceptionally important in view of the public perception of child abuse as a heinous act."[52] In other words, the justice system must hold all offenders responsible for their actions in order to demonstrate that sexual abuse of children is loathsome behavior.

These professionals also question the efficacy of court-ordered therapy for sexual offenders. Most therapists maintain that involuntary treament is ineffective, and hesitate to accept responsibility for the prevention of future abuse.[53] Some child interest advocates further assert that molesters can only be deterred, not rehabilitated.[54] To sup-

47. *See* Hechler, *supra* note 2, at 62.

48. Mark Hardin, *Guardians Ad Litem for Child Victims in Criminal Proceedings*, 25 U. Louisville J. Fam. L. 687, 687 (1987); Tara Lea Mulhauser, *From "Best" to "Better": The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. Rev. 633, 643-47 (1990). Florida requires guardians *ad litem* in criminal proceedings as well as civil. Fla. Stat. Ann. § 914.17 (West Supp. 1994).

49. Hardin, *supra* note 48, at 693.

50. Gray, *supra* note 23, at 14.

51. Irving J. Sloan, Child Abuse: Governing Law and Legislation 105 (1983); *see* Davidson et al., *supra* note 29, at 142. However, most states also have statutes that specifically prohibit incest, which carry lesser sentences than those for child molestation. M.P. Taylor, *Keeping Vigil*, The Dallas Morning News, Feb. 2, 1993, at C5.

52. Davidson et al., *supra* note 29, at 141.

53. Tilman Furniss, The Multi-professional Handbook of Child Sexual Abuse 313 (1991).

54. *Id.* at 34 ("[S]exual abusers are not 'cured' after successful treatment. In circumstances of stress and in situations which may give them the opportunity, sexual

port this view, they cite studies that indicate no deviation from the standard rate of recidivism in cases where psychiatric treatment is ordered.[55] Because therapy is futile, they argue, only longer prison sentences can keep children safe.[56]

Champions of both defendants' rights and the sanctity of the family unit similarly support criminal prosecution, particularly in cases of incest.[57] Criminal prosecution affords the defendant full due process rights and forces the state to prove sexual abuse beyond a reasonable doubt.[58] Separation of family members thus occurs only after the strictest evidentiary standard has been met. A civil court, on the other hand, often renders rulings based on a preponderance of the evidence.[59] The criminal system better protects the falsely accused, as well as the integrity of the family unit, than does the civil system.

The fundamental principle that both victims' and defendants' advocates who support criminal action hold to is that child molestation must be treated as other criminal acts. If the prison system is an effective deterrent,[60] it follows that the threat of prosecution and conviction will deter potential child abusers. Criminal prosecution is more visible to the community than a civil suit and may serve as a warning that this conduct will not be tolerated.[61] In addition, prosecution satisfies society's desire for justice.[62]

The criminal system also may have advantages for the incest victim. When a criminal arrest is made, police can remove the offender from the home immediately and, if the judge sets high bail, for a substantial period of time. The civil system, in contrast, may be unable to control

abusers can remain in danger of re-abusing again."); Holmes, *supra* note 30, at 167 (noting that sex offenders can be habilitated but not rehabilitated); Andrew Vachss, *Sex Predators Can't Be Saved*, N.Y. Times, Jan. 5, 1993, at A15 ("[Sex offenders] can[not] be rehabilitated since they cannot return to a state that never existed.").

55. For example, Andrew Vachss cites a Canadian study that found a 43% recidivism rate among child molesters regardless of therapy. Vachss, *supra* note 54, at A15. Vachss also cites a study in which those offenders receiving treatment had a higher recidivism rate than those who did not. *Id. But see* Marti Kranzberg, *Treatment Does Help Sex Offenders*, The Dallas Morning News, Feb. 28, 1993, at J6 ("Five studies done between 1979 and 1991 have shown a low recidivism rate following treatment.").

56. *See* Vachss, *supra* note 54, at A15; *cf.* President's Child Safety Partnership, A Report to the President 8 (1987) [hereinafter President's Report] (emphasizing the importance of punishing child abusers).

57. *Cf.* Davidson et al., *supra* note 29, at 146 (detailing different groups' arguments in favor of the criminal system).

58. *See supra* note 40 and accompanying text.

59. Hechler, *supra* note 2, at 61; *see supra* note 40 and accompanying text. There also are fewer evidentiary restrictions in civil court than in criminal. *See infra* part II.B.

60. The issue of whether our criminal system serves to deter potential offenders is hotly debated, and is beyond the scope of this Note. For this discussion, the assumption is that the criminal justice system, as currently constituted, is effective as a deterrent.

61. President's Report, *supra* note 56, at 91-94; Fraser, *supra* note 30, at 121 n.66.

62. Fraser, *supra* note 30, at 121 n.66.

the offender's actions, and therefore may place the child in foster care, a step that fails to prevent the abuser from molesting other children.[63] A conviction not only removes the perpetrator from society, but can be therapeutic for the victim by placing the blame for the abuse on the defendant.[64]

C. *Conclusion*

Ultimately, the exemption of any form of child molestation from criminal classification cannot be justified. The hesitancy to prosecute family members accused of molestation is similar to the traditional refusal to acknowledge that a husband could rape his wife—it is morally unjustifiable.[65] The argument for differentiation between incest and other molestation is succinctly refuted by one attorney's statement that "you should [not] get any immunity because you grew your own victim."[66] Despite the difficulties of prosecution, child sexual abuse, in all its forms, must be treated as any other heinous crime.

II. Present Attempts To Meet the Particular Needs of Child Sexual Abuse Criminal Prosecutions

The evidentiary nature of a criminal proceeding is significantly more complex than its civil counterpart. Although the Supreme Court has stated that "[t]he basic purpose of a trial is the determination of truth,"[67] criminal justice clearly is predicated on notions other than factual accuracy. Discovery of truth is not the primary concern of the American criminal system.[68] The criminal justice system prioritizes

63. Hechler, *supra* note 2, at 61. The foster care system also is criticized for its negative impact on the children involved. Many are stuck in the "limbo" of the system for years, where they rarely receive treatment and may be further abused. Besharov, *supra* note 25, at 320. Foster care may therefore feel like punishment to the child. One victim asked: "Why should I have been taken out of the home? I was the victim. I had nothing. I did nothing wrong. My father should have been taken out, not me." Whitcomb et al., *supra* note 17, at 6.

64. Whitcomb et al., *supra* note 17, at 7.

65. Statement of The Honorable Norman S. Early, Jr., District Attorney, Denver, Colorado, *in* Symposium, Protecting Our Children in the Fight Against Molestation 30, 30 (1984) [hereinafter Symposium]. Mr. Early states, "[M]olestation is molestation, and . . . a child's dreams and a child's heart, and the attitudes and the fears that a child grows up with are there, regardless of the fact of whether we're dealing with a grandfather or a stranger." *Id.*

66. Sherrye Henry, *Suffer the Children: How the Legal System Fails Neglected and Abused Children*, Woman's Day, Oct. 30, 1990, at 52 (quoting attorney Andrew Vachss).

67. Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966).

68. For a general discussion of this proposition, see Monroe H. Freedman, *Judge Frankel's Search for Truth*, *in* Lawyers' Ethics 124 (Allan Gerson ed., 1980). Freedman writes: "[T]he constitutional rights that are provided by our system of justice serve independent values that may well outweigh the truth-seeking value; a fact made manifest when we realize that those rights, far from furthering the search for truth, may well impede it." *Id.* at 126.

process, often placing procedural ahead of substantive justice.[69] The pursuit of absolute truth—defined here as historical fact—is therefore subordinated to considerations of individual dignity.[70]

The constitutional protections afforded the criminal defendant often translate into evidentiary limitations on the prosecution. These limitations combine with the high burden of proof to make obtaining a conviction a difficult task. This difficulty is increased in child sexual abuse cases. Evidentiary hurdles join with Bill of Rights guarantees to make it extremely hard to prove child molestation beyond a reasonable doubt.[71] Evidence in these cases is often scarce, and any existing evidence may be excluded on hearsay grounds or effectively suppressed by Confrontation Clause requirements.[72] Furthermore, the reliability of the evidence is often far more difficult to assess than in the average criminal case. The particularly difficult evidentiary nature of these prosecutions has led to erroneous convictions and acquittals.[73] Recognizing these problems, courts and legislatures have taken various steps to accommodate these cases.

A. *Evidentiary Difficulties in Child Sexual Abuse Cases*

The Supreme Court has recognized child abuse as "one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim."[74] Where the abuse is sexual, the difficulty is even greater, and the likelihood of eyewitnesses is decreased.[75] Sexual abuse almost invariably occurs in secret.[76]

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69. Procedural justice refers to "the mechanisms and processes by which society enforces its substantive law and deals with those who violate that law." N. Gary Holten & Lawson L. Lamar, The Criminal Courts: Structures, Personnel, and Processes 9 (1991). Substantive justice, on the other hand, concerns the substance of the laws themselves as determined by societal values. In the criminal context, therefore, substantive justice refers to the acts prohibited and the sanctions provided. It is primarily concerned with questions of fact, such as whether the acts alleged were actually committed. *Id.* at 8-9.

70. Freedman, *supra* note 68, at 127.

71. *See infra* part II; *see also* Sol Taylor, Letter to the Editor, L.A. Times, Feb. 1, 1986, § 2, at 2 ("The truth is that in this type of crime the victim has far less chance at seeing justice done than in almost any other, including rape."). These difficulties often prevent the district attorney from prosecuting at all. According to the director of the National Institute of Justice, fewer than 10% of all child abuse cases went forward to prosecution as of 1985. Whitcomb et al., *supra* note 17, at i. This statistic has hardly changed—prosecutors remain extremely hestitant to bring these cases to trial. Gray, *supra* note 23, at 17.

72. *See infra* part II.B.

73. *See infra* part II.D.

74. Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

75. *See* People v. McClure, 779 P.2d 864, 866 (Colo. 1989) (en banc); *In re* Nicole V., 518 N.E.2d 914, 915 (N.Y. 1987); State v. Jones, 772 P.2d 496, 499 (Wash. 1989) (en banc); Doris Stevens & Lucy Berliner, *Special Techniques for Child Witnesses*, *in* The Sexual Victimology of Youth, *supra* note 12, at 246, 248.

76. Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Colum. L. Rev. 1745, 1750 (1983); *see also* Roland C. Summit,

The scarcity of physical evidence further hinders both detection and prosecution. Physical signs of molestation are rare—medical examinations reveal evidence of sexual abuse in only twenty to thirty percent of victims.[77] Delays in reporting the abuse, which are common, decrease the likelihood of discovering physical proof.[78] As a result, the only evidence usually comes from the child, whose ability to communicate effectively may be hampered by several factors.

First, testifying in court is an unpleasant experience for any witness, but it can be extremely traumatic for a child. Children typically are unfamiliar with the legal system, and often fail to understand the nature and purpose of a trial.[79] Some children mistakenly believe that the judge is there to punish them.[80] The formality of the courtroom setting may frighten them to the point where they are unable or unwilling to testify truthfully.[81] These fears are compounded by the close proximity of the defendant in the courtroom.[82]

There also is growing concern that a child's memory may be confused by the months of interviews that follow the reporting of abuse. Recent findings indicate that interviewing methods designed to discover the truth in these cases may in fact irretrievably bury that truth. In one highly publicized study, children aged four to six were repeat-

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The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177, 181 (1983) ("[C]hild sexual abuse . . . happens only when the child is alone.").

77. Furniss, *supra* note 53, at 214; William F. Enos et al., *Forensic Evaluation of the Sexually Abused Child*, 78 Pediatrics 385, 386 (1986); William N. Marshall, Jr., et al., *New Child Abuse Spectrum in an Era of Increased Awareness*, 142 Am. J. Diseases Children 664, 665 (1988). *See also* Gail S. Goodman & Alison Clarke-Stewart, *Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations*, *in* The Suggestibility of Children's Recollections 92, 93 (John Doris ed., 1991) [hereinafter Recollections] ("[U]nlike many other crimes, sexual abuse of children often leaves no physical evidence and excludes other witnesses and thus pits a child's word against that of the accused."); John McCann, et al., *Labial Adhesions and Posterior Fourchette Injuries in Childhood Sexual Abuse*, 142 Am. J. Diseases Children 659, 659 (1988) ("The search for findings that may be considered conclusive physical evidence of sexual abuse in children suspected of having been molested is a difficult and oftentimes a perplexing task."). *But see* Mary E. Rimsza & Elaine H. Niggemann, *Medical Evaluation of Sexually Abused Children: A Review of 311 Cases*, 69 Pediatrics 8, 10 (1982) (finding that only 23% of victims show no physical abnormalities).

78. Carolyn J. Levitt, *Sexual Abuse in Children*, 80 Postgraduate Med. 201, 202 (1986).

79. Karen J. Saywitz, *Children's Conceptions of the Legal System: "Court Is a Place to Play Basketball,"* *in* Perspectives, *supra* note 12, at 136, 149-50; Amye Warren-Leubecker et al., *What Do Children Know About the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research*, *in* Perspectives, *supra* note 12, at 158, 180.

80. *See* Warren-Leubecker et al., *supra* note 79, at 158, 159.

81. Whitcomb et al., *supra* note 17, at 18; *see* Dominic J. Foté, Note, *Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 Pepp. L. Rev. 157, 164-65 (1985). The Supreme Court recently addressed children's fear of confronting defendants in Maryland v. Craig, 497 U.S. 836 (1990). *See infra* notes 114, 116-22 and accompanying text.

82. Whitcomb et al., *supra* note 17, at 17-18.

edly questioned about events that had not occurred.[83] By the eleventh week, fifty-six percent of the children claimed that at least one false event was true.[84] Furthermore, child abuse professionals were able to discern which statements were false only one-third of the time.[85] These studies have led some critics to assert that the majority of child abuse allegations are fabricated, analogizing the nation's "child sexual abuse hysteria" to the Salem Witch Trials and McCarthyism.[86]

Although these comparisons are extreme, they illustrate a real dilemma facing child abuse professionals. Most researchers dispute the contention that the majority of child abuse claims are fabricated;[87] nonetheless, they cannot deny that suggestion may occur during the interview process. For example, psychologists conducted a study in which a pediatrician examined seventy-two girls aged four to seven.[88] All of the girls were naked during the examination, but only half received a genital checkup.[89] In subsequent interviews, none of the children revealed the genital touching until specifically asked.[90] Three of the girls, misled by specific questioning, falsely reported that they had been genitally examined.[91] The researchers concluded that although specific questioning may increase the chance of obtaining a false report, children may not disclose genital contact unless specifically asked.[92] Furthermore, "when all of the chances to reveal genital/anal

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83. Daniel Goleman, *Studies Reveal Suggestibility of Very Young as Witnesses*, N.Y. Times, June 11, 1993, at A1, A23.

84. *Id.* at A23.

85. *Id.*

86. Rorie Sherman, *Gardner's Law*, Nat'l L.J., Aug. 16, 1993, at 1; Hechler, *supra* note 2, at 4.

87. *See, e.g.*, ABA, Child Abuse and Neglect Reporting and Investigation: Policy Guidelines for Decision Making 12 (Rapporteur Douglas J. Besharov 1988) (estimating that between four and ten percent of sexual abuse reports are fictitious); David P.H. Jones & J. Melbourne McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. Interpersonal Violence 27, 31 (1987) (finding only eight percent of reports to the Denver Social Services Department in 1983 to be fictitious). The misconception that most reports are fabricated is partly attributable to the lack of distinction between those reports that are deliberate falsehoods and those that are simply unsubstantiated. Many reports remain unproven due to insufficient evidence; however, there is rarely any indication that these reports were deliberately fabricated. 1 John E.B. Myers, Evidence in Child Abuse and Neglect Cases § 4.4, at 227 (2d ed. 1992). Furthermore, fabrication, which implies intent, should be distinguished from mere fallacy or suggestion. Sometimes the suggestibility of children's memories prevents the children from knowing the truth themselves. Stephen J. Ceci, *Some Overarching Issues in the Children's Suggestibility Debate*, *in* Recollections, *supra* note 77, at 7-9.

88. Karen Saywitz et al., *Children's Memory for a Genital Examination: Implications for Child Sexual Abuse Cases*, *discussed in* Goodman & Clarke-Stewart, *supra* note 77, at 98-99.

89. *Id.* at 98.

90. *Id.*

91. *Id.*

92. *Id.* at 99.

contact were considered, children failed to disclose it 64% of the time, whereas the chance of obtaining a false report of genital/anal touching was only 1%."[93]

Although this study indicates that the risk of suggestion is minimal, any risk poses a dilemma for child abuse professionals. Kee MacFarlane, a social worker who is widely considered to be an expert on child molestation,[94] writes:

> In the best of all possible worlds, it would be advisable not to ask children leading questions, in order to avoid the concern that children are responding to suggestions that certain things occurred or that they are being compliant and acquiescent to an adult authority figure. But, in the best of all possible worlds, children are not sexually assaulted in secrecy, and then bribed, threatened, or intimidated not to talk about it. In the real world, where such things do happen, leading questions may sometimes be necessary . . . .
>
> As a consequence, those who take on the task of evaluating alleged child victims must also be prepared to become the objects of attack when cases enter the legal system and their conclusions and techniques are challenged. . . . However, for those who can withstand the process in the interest of insuring that the voices of sexually abused children are heard, the risks and the battles are part of the job.[95]

Thus, interviewers are caught between the danger of failing to uncover actual cases of molestation and the consequences of leading children to report crimes that did not occur. The latter choice may cause these children to believe that they have been victimized, and thus experience all of the associated traumas.[96] In addition, these misstatements may lead not only to false accusations, but also to convictions of innocent people.

B. *Children's Testimony and the Confrontation Clause*

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[97] This provision, commonly referred to as the Confrontation Clause, entitles criminal defendants to cross-examine witnesses and be present when witnesses testify against

93. *Id.*

94. Hechler, *supra* note 2, at 154.

95. MacFarlane et al., *supra* note 1, at 87, 99-100.

96. Adult survivors of child sexual abuse often suffer long-term trauma as a result of the molestation. They are likely to be anxious, depressed, self-deprecating, or addicted to alcohol or drugs. Finklehor, *supra* note 15, at 188-99; Myers, *supra* note 87, § 4.2, at 220-24.

97. U.S. Const. amend. VI. The Due Process Clause of the Fourteenth Amendment makes the Confrontation Clause binding on the states. Pointer v. Texas, 380 U.S. 400, 405 (1965).

them.[98] The Supreme Court has stated that the guarantee is based on "something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' "[99]

This guarantee is an integral part of the hearsay rules,[100] which are designed to function "as an adjunct to the confrontation right."[101] Both the hearsay rules and the Confrontation Clause are devised to ensure the veracity of the testimony presented.[102] In child sexual abuse prosecutions, however, requiring the child complainant to confront the defendant may inhibit the child's truthful testimony.[103] Moreover, the most accurate allegations may be contained in the earliest reports,[104] the admission of which is dependent upon the availability of exceptions to the hearsay rule. Strict application of the confrontation requirement and hearsay prohibitions may therefore impede the fact-finding process in these prosecutions.

1. Children's In-Court Testimony

The Supreme Court first considered this issue in *Coy v. Iowa.*[105] In *Coy*, the defendant challenged the constitutionality of a statutory procedure that allowed child complainants to testify from behind a

98. Christopher B. Mueller & Laird C. Kirkpatrick, Evidence Under the Rules 421-22 (2d ed. 1993).

99. Coy v. Iowa, 487 U.S. 1012, 1017 (1988) (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)).

100. Although child sexual abuse cases are usually brought in state court, this Note will use the Federal Rules of Evidence as a model. Most states' evidentiary rules are very similar to the Federal Rules. Mueller & Kirkpatrick, *supra* note 98, at 3. Rule 801 defines hearsay as an out-of-court statement "offered . . . to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Generally, hearsay is not admissible. Fed. R. Evid. 802. Exceptions are set forth in Rules 801(d), 803, and 804.

101. Advisory Committee's Introductory Note to Article VIII: The Hearsay Problem, *reprinted in* Federal Rules of Evidence with Advisory Committee Notes and Legislative History 174 (Christopher B. Mueller & Laird C. Kirkpatrick eds., 1993).

102. Mueller & Kirkpatrick, *supra* note 97, at 115-18 (identifying theories underlying hearsay rules); Maryland v. Craig, 497 U.S. 836, 845 (1990) (stating that the primary purpose of the Confrontation Clause is to ensure the veracity of evidence).

103. Timothy J. McCarvill & James M. Steinberg, Note, *Have We Gone Far Enough? Children Who Are Sexually Abused and the Judicial and Legislative Means of Prosecuting the Abuser*, 8 St. John's J. Legal Comment. 339, 343 (1992); Maria H. Bainor, Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 Fordham L. Rev. 995, 997-99 (1985); Serketich, supra note 25, at 222-23; *supra* note 82 and accompanying text.

104. *See* Edward Cone & Lisa Scheer, *The Demons of Edenton*, Elle, Nov. 1993, at 139, 140 (quoting F.B.I. Supervisory Special Agent Kenneth Lanning, America's "top cop" on child molestation, as saying "I happen to believe that in most of these cases, there's a core of truth and usually that's what comes out in the early disclosures"). The earliest reports may be the most accurate because subsequent interviews sometimes affect the child's memory. *See supra* notes 82-95 and accompanying text. However, the interviewing process may enable the child to express more fully what happened. *See supra* note 91 and accompanying text.

105. 487 U.S. 1012 (1988). For a thorough discussion of this case, see Ellen Forman, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 Hastings L.J. 437 (1989).

screen.[106] Although the screen completely blocked the complainant's view of the defendant, the defendant was able to "dimly perceive" the witness.[107]

Writing for the majority, Justice Scalia devoted most of the *Coy* opinion to a history of the Confrontation Clause, citing the Bible, Shakespeare and President Eisenhower to "illustrate . . . both the antiquity and the currency of the human feeling that a criminal trial is not just unless one can confront his accusers."[108] Asserting that confrontation is essential to a fair trial, the majority viewed any trauma suffered by the victim as a necessary cost of guaranteeing a defendant's constitutional rights.[109]

The Court concluded that the barrier violated the defendant's right to confront his accuser.[110] The majority held that although past cases had compromised those rights "reasonably implicit"[111] in the Confrontation Clause, the right at issue in *Coy*—to face one's accuser—was the "irreducible literal meaning"[112] of the Clause. The Court acknowledged that exceptions to this right also may exist, but it declined to identify them, and stated that "[w]hatever they may be, they would surely be allowed only when necessary to further an important public policy."[113] Concurring, Justice O'Connor wrote that "protection of child witnesses is . . . just such a policy,"[114] thereby paving the way for her majority opinion in *Maryland v. Craig*.[115]

Two years later, in *Craig* and *Idaho v. Wright*,[116] the Court reconsidered the issue of confrontation in child sexual abuse prosecutions, weighing the defendant's right to confront his accuser against the state's interest in protecting child witnesses. In *Craig*, the Court again stated that face-to-face confrontation is not an indispensable requisite of the Confrontation Clause.[117] Writing for the majority, Justice O'Connor asserted that protecting the child witness in abuse cases is a sufficiently important state interest to counter the defendant's Sixth Amendment rights.[118] The Court held that a child witness may testify

106. *Coy*, 487 U.S. at 1014-15.
107. *Id.*
108. *Id.* at 1018 n.2.
109. *Id.* at 1020.
110. *Id.* at 1020-22.
111. *Id.* at 1020. The Court enumerated these rights as "the right to cross-examine, the right to exclude out-of-court statements, and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself." *Id.* (citations omitted).
112. *Id.* at 1021.
113. *Id.* (citations omitted).
114. *Id.* at 1025 (O'Connor, J., concurring).
115. 497 U.S. 836 (1990).
116. 497 U.S. 805 (1990).
117. *Craig*, 497 U.S. at 847.
118. *Id.* at 853. The Court supported this proposition by citing statutes enacted by the majority of states allowing the use of various protective procedures to procure the testimony of abused children. *Id.* at 853-54 nn. 2-3. Justice Scalia dissented in *Craig*,

without face-to-face confrontation if the state makes an adequate, case-specific showing that the defendant's presence would traumatize the witness.[119]

Specifically, the *Craig* Court allowed the child to testify via one-way closed-circuit television, a procedure now authorized in most states.[120] These statutes provide that, following a finding by the trial court of potential trauma to the victim, in accordance with *Craig*, the child witness may testify from a separate room.[121] Typically, both the prosecutor and defense counsel accompany the witness and conduct their examinations in person.[122] The direct and cross-examinations are instantaneously transmitted into the courtroom.[123] Closed-circuit television thereby permits the defendant, judge and jury to see and hear the witness, and does not compromise defense counsel's ability to cross-examine. The procedure protects the child witness from the trauma of

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writing that "[s]eldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion." *Id.* at 860 (Scalia, J., dissenting).

119. *Id.* at 855-56. The Court failed to specify what constitutes trauma, other than to say that the child's emotional distress must be more than " 'mere nervousness or excitement or some reluctance to testify.' " *Id.* at 856 (quoting Wildermuth v. State, 530 A.2d 275, 289 (Md. 1987)). The Court did state that "the Maryland statute, which requires . . . 'serious emotional distress such that the child cannot reasonably communicate,' clearly suffices to meet constitutional standards." *Id.* (citation omitted).

120. Prior to the *Craig* decision, 26 states statutorily authorized the use of closed circuit television in child abuse prosecutions. *See* Ala. Code § 15-25-3 (Supp. 1989); Alaska Stat. § 12.45.046 (Supp. 1989); Ariz. Rev. Stat. Ann. § 13-4253 (1989); Conn. Gen. Stat. Ann. § 54-86g (West 1989); Fla. Stat. Ann. § 92.54 (1989); Ga. Code Ann. § 17-8-55 (Supp. 1989); Haw. R. Evid. 616 (1985); Ill. Rev. Stat. ch. 38, para. 106A-3 (1987); Ind. Code § 35-37-4-8 (1988); Iowa Code § 910A.14 (Supp. 1990); Kan. Stat. Ann. § 38-1558 (1986); Ky. Rev. Stat. Ann. §§ 421.350(1), (3) (Baldwin Supp. 1989); La. Rev. Stat. Ann. § 15:283 (West Supp. 1990); Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989); Mass. Ann. Laws ch. 278, § 16D (West Supp. 1990); Minn. Stat. Ann. § 595.02(4) (1988); Miss. Code Ann. § 13-1-405 (Supp. 1989); N.J. Stat. Ann. § 2A:84A-32.4 (West Supp. 1989); Okla. Stat. Ann. tit. 22, § 753(B) (West Supp. 1988); Or. Rev. Stat. § 40.460(24) (1989); 42 Pa. Cons. Stat. Ann. §§ 5982, 5985 (1988); R.I. Gen. Laws § 11-37-13.2 (Supp. 1989); Tex. Code Crim. Proc. Ann. art. 38.071, § 3 (West Supp. 1990); Utah R. Crim. Proc. 15.5 (1990); Vt. R. Evid. 807(d) (Supp. 1989); Va. Code Ann. § 18.2-67.9 (Michie 1988). Since *Craig*, seven states have adopted similar statutes. *See* Cal. Pen. Code § 1347 (West Supp. 1994); Idaho Code § 19-3024A (Supp. 1994); Iowa Code § 910A.14 (1994 Supp.); N.Y. Crim. Proc. Law §§ 65.00-65.30 (McKinney 1992); 1993 N.C. Sess. Laws 723; Ohio Rev. Code Ann. § 2907.41 (Baldwin 1993); Wash. Rev. Code Ann. § 9A.44.150 (West Supp. 1994).

121. *E.g.*, Cal. Penal Code § 1347(b) (West Supp. 1994); Haw. R. Evid. 616(d); Idaho Code § 19-3024A(2) (Supp. 1994); Ohio Rev. Code Ann. § 2907.41(C) (Anderson 1993); Va. Code Ann. § 18.2-67.9 (Michie 1988).

122. *E.g.*, Haw. R. Evid. 616(d); Ohio Rev. Code Ann. § 2907.41(C) (Anderson 1993); Va. Code Ann. § 18.2-67.9(C) (Michie 1988). *Contra* Cal. Penal Code § 1347(b) (West Supp. 1994) (allowing child to testify "out of the presence of the judge, jury, defendant, and attorneys"); Idaho Code § 19-3024A(2) (Supp. 1994) (same).

123. *E.g.*, Cal. Penal Code § 1347(b) (West Supp. 1994); Idaho Code § 19-3024A(2) (Supp. 1994); Ohio Rev. Code Ann. § 2907.41(C) (Anderson 1993); Va. Code Ann. § 18.2-67.9(D) (Michie 1988).

the defendant's presence and, incidentally, of the courtroom atmosphere. The Supreme Court's approval of the use of closed-circuit television removed some of the obstacles that may prevent children from testifying accurately. *Wright*, however, decided on the same day as *Craig*, placed a new obstacle in the prosecutor's path.

2. Introduction of Hearsay Statements

Unlike *Coy* and *Craig*, which focused on the child accuser's testimony at trial, *Wright* addressed the question of whether the child's prior statements could properly be introduced under an exception to the hearsay rules without violating the Confrontation Clause.[124] The *Wright* Court elaborated upon an earlier holding in *Ohio v. Roberts*[125] that established a two-pronged test for determining whether use of a hearsay statement violated the Confrontation Clause.[126] Under the *Roberts* test, the declarant must be "unavailable,"[127] and the statement must either be within a "firmly-rooted" hearsay exception or have "adequate indicia of reliability."[128] In *Wright*, the Court adhered to the traditional view that these indicia include "particularized guar-

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124. Idaho v. Wright, 497 U.S. 805, 815-16 (1990).

125. 448 U.S. 56 (1980).

126. *Id.* at 65-66.

127. *Id.* at 65. Federal Rule of Evidence 804(a) defines unavailability:

> "Unavailability as a witness" includes situations in which the declarant—
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of his statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Fed. R. Evid. 804(a).

In a line of cases following *Roberts*, the Court held that the requirement of unavailability did not apply to out-of-court statements that fell within certain "firmly-rooted" hearsay exceptions. *See, e.g.*, White v. Illinois, 112 S.Ct. 736, 743-44 (1992) (holding that the government need not show the declarant to be unavailable when introducing statements under either the "spontaneous declaration" or "medical treatment" exception); Bourjaily v. United States, 483 U.S. 171, 183-84 (1987) (holding that the government need not show the declarant to be unavailable when introducing statements under the co-conspirator exception to the hearsay rule); United States v. Inadi, 475 U.S. 387, 399-400 (1986) (same). In *Wright*, the defense stipulated that the witness was unavailable, and the Court therefore found it unnecessary to address whether unavailability was constitutionally required. *Wright*, 497 U.S. at 815-16.

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

antees of trustworthiness"[129] derived from the "totality of circumstances."[130] The Court departed from tradition, however, by ruling that the circumstances to be examined were limited to those surrounding the making of the statement.[131] Corroborating evidence could not be considered.[132]

The *Wright* decision frustrates the prosecution of child molestation cases. While the availability of corroborative evidence is rare,[133] it can be an invaluable tool in determining the trustworthiness of hearsay statements. Many of the child's statements are made during professional interviews, the accuracy of which is extremely difficult to assess.[134] The *Wright* Court specifically declined to adopt a mechanical test for determining proper interview procedures for eliciting accurate statements.[135] In light of *Wright*, prosecutors and courts must sift through a large, unfamiliar body of research on the suggestibility of children's memories and then evaluate the procedures used to procure the offered statement. The *Wright* decision therefore presents yet another evidentiary hurdle in the criminal arena.

C. *The Introduction of Expert Testimony Regarding the Alleged Victim*

Prosecutors often use expert witnesses to bolster the credibility of a child complainant who is testifying in court. An expert witness may be used in a number of ways, from explaining delays in reporting to opining that the complainant is telling the truth.[136] This type of testimony most often involves the identification of Child Sexual Abuse Accommodation Syndrome ("CSAAS").[137] Proponents of CSAAS believe that the majority of child victims demonstrate similar symp-

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129. *Wright*, 497 U.S. at 816 (quoting *Roberts*, 448 U.S. at 66).

130. *Id.* at 819.

131. *Id.*

132. *Id.* The Court reasoned that physical evidence was inadmissible for the purpose of determining trustworthiness because it "sheds no light on the reliability of the child's allegations regarding the identity of the abuser." *Id.* at 824. One author appropriately questions whether this reasoning would apply to medical evidence of a sexually transmitted disease. Nancy Schleifer, *Might Versus Fright: The Confrontation Clause and the Search for "Truth" in the Child Abuse Family Court Case*, 16 Nova L. Rev. 783, 794 (1992).

133. *See supra* notes 74-78 and accompanying text.

134. *See supra* notes 83-92 and accompanying text.

135. *Wright*, 497 U.S. at 819.

136. Rebecca J. Roe, *Expert Testimony in Child Sexual Abuse Cases*, *in* National Conference, *supra* note 23, at 289; McCord, *supra* note 17, at 41-53; Myers, *supra* note 17, at 18-20.

137. CSAAS was introduced by Dr. Roland C. Summit in 1983, *see* Summit, *supra* note 76, and may also be referred to as "Child Sexual Abuse Syndrome." Neither of these are recognized by the Diagnostic and Statistical Manual of Mental Disorders. Some expert witnesses, therefore, refrain from defining a syndrome, but still identify "common characteristics" of sexually abused children. Even this type of testimony is hotly contested. *See infra* note 148 and accompanying text; *see also* Kee MacFarlane, *Sexual Abuse of Children*, *in* The Victimization of Women 81, 97 (J. Chapman & M.

toms, the most common of which include nightmares, loss of appetite, age-inappropriate sexual knowledge, delay in reporting abuse and recantation.[138] Other symptoms are ambiguous, and seem to have little probative value. For example, the child may either regress or be "pseudo-mature," withdraw or act out.[139]

The most common use of this expert testimony is to explain weaknesses in the child's accusations.[140] Specifically, the prosecutor may introduce testimony regarding CSAAS to rehabilitate the impeached credibility of a child witness. For example, where reporting is delayed, defense attorneys often argue that a truly victimized child would have come forward immediately—that delayed reporting indicates that the allegation is fabricated.[141] An expert witness may rebut these assertions by testifying that fear and confusion cause many children to delay, or even forgo, reporting sexual abuse.[142] The expert also may address other allegedly unusual behavior by the child witness, such as inconsistencies and recantation.[143] The majority of courts have upheld the admissibility of expert testimony for rehabilitative purposes.[144]

A second, and more controversial, use of an expert witness is to introduce evidence of CSAAS to prove that the abuse actually occurred. Based upon the identification of CSAAS symptoms exhibited by the child complainant, the expert witness typically will conclude that the child has been sexually abused.[145] Courts are divided as to the admissibility of this testimony. Many courts have reversed convictions where this evidence was admitted.[146] These decisions conclude

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Gates eds., 1978) ("Generalizations about the effects of any kind of interpersonal crisis often do a disservice to all individuals involved.").

138. John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 Pac. L.J. 801, 833-34 (1987); Summit, *supra* note 76, at 177-88.

139. Myers, *supra* note 138, at 833.

140. Myers, *supra* note 137, at 841-48.

141. McCord, *supra* note 17, at 58-59.

142. McCord, *supra* note 17, at 59; Myers, *supra* note 137, at 826.

143. Myers, *supra* note 137, at 841-48.

144. *See* People v. Beckley, 456 N.W.2d 391, 407 (Mich. 1990); State v. J.Q., 617 A.2d 1196, 1209 (N.J. 1993); State v. Middleton, 657 P.2d 1215, 1220 (Or. 1983); State v. Pettit, 675 P.2d 183, 185 (Or. Ct. App. 1984); Sapien v. State, 705 S.W.2d 214, 216-17 (Tex. Ct. App. 1985); State v. Haseltine, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984). *But see* Commonwealth v. Dunkle, 602 A.2d 830, 837 (Pa. 1992) ("Not only is there no *need* for testimony about the reasons children may not come forward, but permitting it would infringe upon the jury's right to determine credibility.").

145. Myers, *supra* note 138, at 836-41.

146. *See* Hellstrom v. Commonwealth, 825 S.W.2d 612, 613 (Ky. 1992); State v. Miller, 377 N.W.2d 506, 508 (Minn. Ct. App. 1985); People v. Knupp, 579 N.Y.S.2d 801, 802 (N.Y. App. Div. 1992); People v. Fogarty, 446 N.Y.S.2d 91, 92 (N.Y. App. Div. 1982); Black v. State, 634 S.W.2d 356, 357 (Tex. Ct. App. 1982). Lucy Berliner, a social worker at the Sexual Abuse Center in Seattle and supervisor of the National Institute of Mental Health's research on the impact of sexual abuse on children, addressed this issue at the National Symposium on Child Molestation: "I caution you

that this type of testimony goes to the ultimate issue in the case, effectively usurping the jury's role as trier of fact. Other courts have allowed this testimony on the grounds that the expert opinion, "although embracing an ultimate issue, represents both the peculiar expertise and consummate purpose of an expert's analysis."[147]

The problems with this second use of expert testimony arise from the basis for the expert's conclusion, rather than the role of the jury. There are three major problems with this type of testimony. First, children may perceive that they have been abused without actually having been abused as defined by law.[148] Second, the assertion that a child has been abused is not evidence that the child was abused on a particular date by a particular defendant. Third, while it is possible that all children who are sexually abused exhibit similar symptoms,[149] it does not logically follow that all children exhibiting these symptoms have been sexually abused. These symptoms may result from other causes as well.[150] Attempts to show otherwise indicate the confusion with which attorneys and courts regard evidentiary issues in these prosecutions.[151]

D. *The Apparent Failure of Traditional Prosecution Techniques*

It is increasingly clear that traditional prosecutorial techniques are insufficient in child sexual abuse cases. According to the chief of one sexual battery unit, "Traditional methods of prosecution are essen-

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about using expert witnesses. We got a little carried away .... The prosecutors asked a lot of questions that they were pretty excited about being able to ask, and as a result, we've had cases overturned on appeal." Symposium, *supra* note 65, at 149.

147. Townsend v. State, 734 P.2d 705, 708 (Nev. 1987); *see also* Glendening v. State, 536 So. 2d 212, 220 (Fla. 1988) ("A qualified expert may express an opinion as to whether a child has been the victim of sexual abuse."); State v. Kim 645 P.2d 1330, 1338 (Haw. 1982) ("[S]uch testimony insofar as it may, upon occasion, serve the simple purpose of clarifying and consolidating the gist of the expert's testimony ...."); State v. Myers 359 N.W.2d 604, 611-12 (Minn. 1984) (approving such testimony where defendant challenged witness's truthfulness); State v. Timperio, 528 N.E.2d 594, 597 (Ohio Ct. App. 1987) (allowing such testimony because "[t]he nature ... of the sexual abuse of children places lay jurors at a disadvantage").

148. Gary B. Melton & Susan Limber, *Psychologists' Involvement in Cases of Child Maltreatment: Limits of Role and Experience*, 44 Am. Psych. 1225, 1229 (1989).

149. The assertion that all children who are sexually abused exhibit similar symptoms is widely debated. Josephine A. Bulkley, *The Prosecution's Use of Social Science Expert Testimony in Child Sexual Abuse Cases: National Trends and Recommendations*, 1 J. Child Sexual Abuse 73, 82 (1992); John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 74-78 (1989).

150. Alvin A. Rosenfeld, *The Clinical Management of Incest and Sexual Abuse of Children*, 22 Trauma 2, 3 (1980).

151. The Honorable Phylis Skloot Bamberger has written, "From the perspective of a judge, the single most difficult criminal case to try is a child sex abuse case. It must be equally so for the attorneys." Phylis S. Bamberger & Richard N. Allman, *Some Special Concerns in the Trial of Child Sexual Abuse Cases*, N.Y. St. B.J., June 1992, at 18, 18.

tially useless in dealing with child victims of sexual assault."[152] Despite good intentions, most prosecutors and judges lack the information and resources necessary to face the particular challenges posed by these cases. For example, the Rhode Island Supreme Court reversed a sexual assault conviction by overturning a trial court's decision to admit testimony from the child victim's doctor.[153] The doctor testified as to statements made by the child during a medical examination.[154] Such testimony generally is admissible under the medical examination exception to the hearsay rule.[155] The court nevertheless stated, "If the child could tell the story to the doctor, she could have told it on the witness stand to the jury."[156] The court's insensitivity to the child witness's situation reflects attitudes pervasive throughout the legal community, the majority of which lacks an understanding of the peculiar evidentiary nature of these cases.

A recent New Jersey case, *State v. Michaels*,[157] provides a more dramatic illustration of the problems encountered in these prosecutions. The defendant, Margaret Kelly Michaels, was a nursery school teacher.[158] While a pediatrician took a former student's temperature rectally, the child stated, "That's what my teacher does to me at school."[159] When asked to which teacher he was referring, the boy identified Michaels.[160] His mother later discovered that no rectal

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152. Christopher Rundle, *A Discussion of Evidentiary and Procedural Problems and Methods for Improving Child Sexual Abuse Prosecutions, and Special Approaches with Pre-School Age Victims*, *in* National Conference, *supra* note 23, at 145, 147.

153. State v. Paster, 524 A.2d 587, 590-91 (R.I. 1987).

154. *Id.*

155. Fed. R. Evid. 803(4). In 1992, the Supreme Court indirectly approved the admissibility of a statement regarding the identity of the abuser under this exception. White v. Illinois, 112 S. Ct. 736, 744 (1992). The identity of the perpetrator was specifically held to be "reasonably pertinent" to treatment in United States v. Iron Shell, 633 F.2d 77, 83 (8th Cir. 1980). For a discussion of the role of this exception in child sex abuse cases, see generally Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. Rev. 257 (1989).

156. *Paster*, 524 A.2d at 591. This case is discussed in Dziech & Schudson, *supra* note 16, who write:

> While the Rhode Island decision is astounding in its lack of understanding of both children and law, the attitudes it reflects are not peculiar to that case or state. The prosecutor and judge in the Greenbrook [Rhode Island] case were not evil, but all too typical. In courtrooms throughout America, the discrepancy between education and ignorance, between sensitive theory and insensitive practice, between pure legal tradition and perverse legal implementation, revictimizes children.

Id. at 162.

157. 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993).

158. *Id.* at 494. Michaels resigned more than one year before the investigation began. *Id.* at 495.

159. David G. Savage, *Abuser or Abused? Ruling Triggers Question Over Who's Real Victim in N.J. Molestation Case*, L.A. Times, Apr. 20, 1993, at E1. The defense argued that the boy's comment referred to the rubbing of his back and not anal penetration. *Michaels*, 625 A.2d at 495.

160. *Michaels*, 625 A.2d at 495.

thermometers were used at the school, and the investigation began.[161] Almost three years later, a jury convicted Michaels of 115 counts of sexual abuse involving twenty students.[162] Michaels was incarcerated for five years before the appellate court reversed all convictions and remanded to the law division for a new trial.[163]

The appellate court reversed on three grounds. First, the trial court admitted the use of expert testimony as substantive evidence of abuse.[164] Specifically, the state's expert testified as to the symptoms of CSAAS, and then gave her opinion as to whether the children's behavior was consistent with their allegations.[165] While some states have allowed this use of expert testimony,[166] New Jersey has held that it is only admissible for rehabilitative purposes.[167] Although New Jersey's holding on this issue came several years after the *Michaels* trial, the appellate court found that admission of the testimony nonetheless constituted reversible error.[168]

Second, the court held that the trial judge inappropriately "cross[ed] the line between an impartial judge and the prosecution."[169] The children's testimony was televised to the jury from chambers, where the judge played with the children, exchanged whispers with them, and held them on his lap.[170] He often took charge of the questioning, thereby turning the State's witnesses into his own.[171] While recognizing that the judge "clearly felt he was doing the right thing by assisting in the search for the 'truth,' "[172] the appellate court condemned these actions as sacrificing the required impartiality.[173]

Finally, the appellate court found that pretrial interviews had tainted the children's testimony.[174] The interviewers continually referred to the defendant as "bad," and encouraged the children to help the police "bust[ ] this case wide open."[175] They praised the children

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161. Savage, *supra* note 159, at E1.
162. *Michaels*, 625 A.2d at 492.
163. *Id.* at 493, 524.
164. *Id.* at 499-501.
165. *Id.* at 499. The expert concluded that all of the children except one had been molested. *Id.*
166. *See supra* notes 145-46 and accompanying text.
167. State v. J.Q., 617 A.2d 1196, 1210 (N.J. 1993).
168. *Michaels*, 625 A.2d at 502. The *Michaels* court stated that the expert's testimony "constituted nothing less than substantive evidence of the defendant's guilt .... This constituted error because syndrome evidence is not probative of sexual abuse. The syndrome assumes the presence of sexual abuse and only seeks to explain the child's reaction to it." *Id.* at 499 (citation omitted).
169. *Id.* at 508.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 510-19. The court's statement that the children's memories may have been irreparably altered leads one to wonder how a retrial could possibly be conducted.
175. *Id.* at 511.

for using sexual language, and threatened disclosure of those that were uncooperative.[176] Some told the children what others had said prior to interviewing them.[177] The State therefore conceded that many of the interviews included suggestive questioning.[178]

The length of the appellate court's opinion indicates the breadth of issues raised in these cases.[179] Acknowledging that the amount of literature on the topic of interviewing alone is "overwhelming,"[180] the court attempted to summarize the research in five pages and thus relied heavily on a few sources.[181] The *Michaels* opinion vividly demonstrates the complex nature of these prosecutions.

An even more striking illustration of the problems inherent in these cases comes from the highly publicized McMartin Preschool trials in California. The first of the McMartin prosecutions spanned more than six years and cost taxpayers over thirteen million dollars, making it the longest and costliest criminal case in American history.[182]

The investigation began in August of 1983, when a woman reported that Raymond Buckey, a staff member at the reputable Virginia McMartin Preschool, had sodomized her two-and-a-half-year-old son.[183] Medical examinations yielded contradictory findings.[184] Searches of the preschool and the Buckey home were fruitless.[185] Police nevertheless arrested Buckey on September 7, 1983 and then released him the same day due to insufficient evidence.[186]

On September 8, 1983, the Manhattan Beach, California police department sent questionnaires to 200 families of former and current McMartin preschoolers.[187] The questionnaires, later deemed "the in-

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176. *Id.*

177. *Id.*

178. *Id.* at 510-11.

179. The opinion spanned 35 pages in the Atlantic Reporter, 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993), and 64 pages in the state reporter, 264 N.J. Super. 579 (1993).

180. *Michaels*, 625 A.2d at 511.

181. *Id.* at 511-16. For example, the court cited Diana Younts, Note, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 Duke L.J. 691 (1991), 14 times on these pages.

182. Jay Mathews, *Seven Years and $13.2 Million Dollars Later, Child Molestation Case Nears End*, Wash. Post, July 3, 1990, at A16.

183. Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 Ariz. L. Rev. 927, 930 (1993). The reporting parent, Judy Johnson, later filed similar charges against several others, including her estranged husband. Ms. Johnson, who later died from alcohol-induced liver damage, even claimed that her dog had been sodomized. *Id.* at 931.

184. Norma Meyer & Paul Pringle, *Critics Say Runaway McMartin Case Has Indicted Justice System*, San Diego Union, Jan. 19, 1990, at A13.

185. *Id.*

186. *Id.*

187. Cynthia Gorney, *A Textbook Example of What Not to Do: Complex, Costly Child Molestation Prosecution Overwhelmed Criminal Justice System*, Wash. Post, Jan. 19, 1990, at A6.

vestigators' first major mistake,"[188] identified Buckey as a potential child molester and asked parents to question their children about various sexual acts that may have occurred at the school.[189] Although none of the completed surveys contained allegations of abuse, the District Attorney's office encouraged parents to probe further.[190] Prosecutors advised parents to bring their children to a Los Angeles child sexual abuse clinic, where videotaped interviews of 400 children were eventually conducted.[191] The three interviewers concluded that 369 children had been molested by seven McMartin staff members.[192]

Following indictment and an eighteen month preliminary hearing, Municipal Judge Aviva K. Bobb ordered all seven to stand trial on 135 of more than 300 charged counts of sexual abuse.[193] Prosecutors ultimately dropped charges against five of the defendants, leaving only Raymond Buckey and his mother, Peggy McMartin Buckey, to be tried.[194] Thirty-three months, 124 witnesses, 974 exhibits and almost 64,000 pages of transcript later, the Buckeys were acquitted on fifty-two counts of abuse.[195] The jury deadlocked on the remaining thirteen, all of which were against Raymond Buckey.[196] Two new prosecutors retried Buckey on eight counts involving only three children.[197] Another jury deadlocked on these charges, and the judge declared a mistrial.[198]

On July 28, 1990, the McMartin case ended without a single conviction, despite the fact that seven of the jurors believed the children had been molested "in some sense, by someone."[199] An assistant district attorney acknowledged that it was "quite possible that there are some people in this case who were wrongfully accused."[200] The enormous resources expended and the inconclusive resolution led supporters of

188. *Id.*

189. Meyer & Pringle, *supra* note 184, at A13; *see also* Paul Eberle & Shirley Eberle, The Abuse of Innocence: The McMartin Preschool Trial 18-19 (1993) (reproducing the text of the questionnaire).

190. Meyer & Pringle, *supra* note 184, at A13.

191. *Id.*

192. *Id.* Although there was initially an eighth suspect, Robert Hamill Winkler, he died before charges were brought. Mr. Winkler was awaiting trial on unrelated molestation charges at the time of his death. Lois Timnick, *Uncharged McMartin Case Suspect Found Dead*, L.A. Times, Nov. 14, 1985, § 2, at 2.

193. Lois Timnick, *All 7 McMartin Defendants Are Ordered to Stand Trial*, L.A. Times, Jan. 10, 1986, § 1, at 10, 28.

194. Katherine MacDonald, *5 of 7 Won't Stand Trial in McMartin Molestation Case*, Wash. Post, Jan. 18, 1986, at A2. The District Attorney's Office reportedly cited "incredibly weak evidence" as the basis for this decision. *2 Cities Ask State to Try All 7 Original McMartin Defendants*, L.A. Times, Feb. 13, 1986, § 9, at 2.

195. Dziech & Schudson, *supra* note 16, at 182-83.

196. Mathews, *supra* note 182, at A16.

197. *Id.*

198. *McMartin Jury Deadlocks: Buckey Won't Be Retried*, L.A. Times, July 29, 1990, at A1.

199. Dziech & Schudson, *supra* note 16, at 184.

200. Mathews, *supra* note 182, at A16.

both sides to characterize the McMartin case as a gross miscarriage of justice.[201]

The *Michaels* and McMartin cases demonstrate the problems that occur at all levels of the criminal process, from investigation to trial. These problems cannot merely be attributed to unfamiliarity with legal precedent or child psychology. The difficulties encountered are not surmountable solely through the implementation of evidentiary exceptions; they must be anticipated and avoided at every level of investigation and adjudication.

III. An Interdisciplinary Approach

> Less than one-half of the reported child sexual abuse cases are referred to the criminal justice system. Contrary to common belief, the child and family may benefit from involvement in the criminal justice system. This can only be accomplished with a sensitive and patient approach to the child and the child's family. It cannot be accomplished without the involvement of a therapist and an advocate from the criminal justice system.[202]

Most child interest advocates agree that cooperation among the various disciplines involved in child sexual abuse investigations is a necessary step in the search for justice.[203] A prompt, fair disposition cannot be reached as long as the professionals involved fail to communicate with each other. Traditionally, these efforts were relegated to the civil arena.[204] The advances in civil court proceedings were neither reflected adequately in nor coordinated with their criminal counterpart.[205] This disparity further discouraged criminal prosecution of these cases.

Recognizing this problem, many jurisdictions have implemented a "team approach" to criminal prosecution of child molestation.[206] Although the precise nature of these efforts varies from county to county, all focus on protecting the child from revictimization by both the abuser and the criminal system, and many have been successful in

201. *See* Lois Timnick, *McMartin Inquiry Attacked as Inept*, L.A. Times, June 16, 1985, § 2, at 1 ("[D]efense attorneys and parents of many of the alleged victims found themselves in rare agreement on one point: that the investigation and prosecution of the case had been botched from the beginning.").

202. Robert E. Cramer, Jr., *The District Attorney as a Mobilizer in a Community Approach to Child Sexual Abuse*, 40 U. Miami L. Rev. 209, 214 (1985).

203. Furniss, *supra* note 53, at 101-08; Hechler, *supra* note 2, at 221-24; MacFarlane et al., *supra* note 1, at 318, 323; President's Report, *supra* note 56, at 83-88.

204. *See* Davidson et al., *supra* note 29, at 141-46. *See generally* Family Law: An Interdisciplinary Perspective (Howard H. Irving ed., 1981) (advocating cooperation between law and the behavioral sciences in the family law field).

205. *See* Jeffrey E. Froelich, *Family Crisis Intervention*, 29 Juv. & Fam. Ct. J. 3, 3-7 (1978).

206. ABA Recommendations, *supra* note 44, at 7; National Network of Children's Advocacy Centers, *National Listing of Children's Advocacy Centers*, Sept. 1994 [hereinafter *National Listing*] (on file with the *Fordham Law Review*).

this regard.[207] However, they also have been attacked by defendants' rights advocates as tipping the criminal justice scales in favor of the alleged victim.[208] The ways in which these efforts benefit defendants as well as victims have not previously been explored.

A. *Madison County, Alabama: A Model*

The first, and most widely acclaimed, of these efforts was instituted by Robert E. Cramer, Jr. in Madison County, Alabama.[209] Cramer, previously assigned to Juvenile Court, was elected District Attorney in 1981, when reports of child molestation in his county, and around the nation, were on the rise.[210] Initially, Cramer scheduled meetings with protective service agency workers to review the cases.[211] As the scope of the problem became apparent, Cramer increased the frequency of these meetings, and invited law enforcement personnel and family therapists to attend.[212] Soon meetings were held biweekly instead of monthly, and the different disciplines began to consult each other at earlier stages of the investigation.[213] Cramer describes the early developments:

> Team review strengthened relations between the police detectives and the protective service social workers. The social workers and the law enforcement detectives jointly investigated and reported on all child sexual abuse cases. They performed the initial interview together and later decided whether to confront the alleged offender. We saw a dramatic turnaround in the attitude of both the law enforcement detectives and social workers. The team review experience helped each agency better understand the philosophy of the other and prevented duplication of effort.[214]

By promoting teamwork among those involved, Cramer minimized the child's discomfort while maximizing efficiency. In 1983, Cramer led his community to form a child sexual abuse task force, the primary purpose of which was to establish an even wider network of child abuse and law enforcement professionals.[215] While all involved had experience in the child sexual abuse arena, many had never met, and,

207. *See infra* notes 220-21 and accompanying text.

208. *See infra* note 236 and accompanying text.

209. For a detailed history of the Huntsville Center, see generally Robert E. Cramer, Jr., *A Community Approach to Child Sexual Abuse: The Role of the Office of the District Attorney*, 9 Response 10 (1986). Approximately 122 such centers—many of them private, with no official ties to the justice system—have since been developed nationwide. *National Listing*, *supra* note 206, at 1. Because almost all of these centers are modeled after the Madison County approach, this Note uses Madison County as a paradigm.

210. Cramer, *supra* note 202, at 210.

211. *Id.*

212. *Id.* at 211.

213. *Id.*

214. *Id.* at 211.

215. *Id.* at 212.

therefore, neither trusted nor understood the other fields.[216] Although communication fostered cooperation, the agencies continued to function independently.[217]

In 1984, the participants formed a multidisciplinary, child-focused program called the Children's Advocacy Center (the "Center").[218] The Center, located in a house in Huntsville, Alabama, serves as a nexus for all molestation-related investigation and treatment. Each of the agencies involved in these cases signed a written agreement to coordinate their activities through the Center.[219] All reports of child sexual abuse are referred to the Center, where liaisons from each organization confer with each other and their respective offices.[220] Instead of being shuffled from police departments to protective service offices to emergency rooms to therapy to the prosecutor's office, victims of child sexual abuse visit only the Center.[221] The Center provides a familiar, comforting environment—it becomes "the child's 'turf.' "[222]

The Center not only supplies a safe haven for child victims, but also streamlines investigation. Duplicate interviews are avoided because each agency is involved at every step of the process.[223] Fewer interviews are conducted, and those that are conducted may be more effective. The team interviewer establishes trust by helping the child explore the Center, and answering any questions the child might

216. *Id.*
217. *Id.* at 212-13.
218. *Id.* at 213.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 214. This idea of the Center as a second home has been adopted at centers around the nation. *See, e.g.*, Kathy Boccella, *One Stop Center Eases the Pain of Child Abuse*, Phila. Inquirer, Mar. 13, 1992, at B1 (quoting child interest advocate's description of interdisciplinary center: " 'It's less traumatizing for the child . . . in an environment that's not frightening.' "); Mike Folks, *Easing the Trauma: "Home Safe" Program Will Help Children Recount Stories of Abuse*, Sun Sentinel, Aug. 11, 1993, at 3 (quoting founder of child-oriented center: " 'The concept is to bring the child to a home-like setting.' "); Robert Kelly, *Amy Center Has New Home*, St. Louis Post-Dispatch, May 31, 1993, at 1 ("The atmosphere is important, because the Amy Center exists to give children who are victims of sexual abuse a place where they can relax and calmly tell their stories . . . .").
223. Cramer, *supra* note 202, at 212-14. For example, the results of the first interview are discussed at the biweekly team review session, at which all participating agencies are represented. *Id.* at 214. If the interview was videotaped, the tape is played at the meeting. *Id.* This minimization has been repeatedly identified as the single most important feature of these types of centers. *See, e.g.*, Folks, *supra* note 222, at 3 (quoting founder of child-oriented center: " 'We want to get away from multiple interviews.' "); Kelly, *supra* note 222, at 1 ("[T]he Amy Center was started . . . [because] many victims of child sexual abuse 'were suffering from being questioned over and over and over again by authorities.' "); Stevenson Swanson, *Glen Ellyn Joins County's Child Sex-Abuse Program*, Chi. Trib., Oct. 6, 1986, at 6 ("The center is designed to reduce the number of interviews a child must undergo after an incident of sexual abuse has been reported . . . .").

have.[224] By forming a relationship with the child prior to the interview, the Center increases the first interview's productivity. Children are more likely to disclose abuse to persons with whom they are comfortable.[225] Unlike many adults, they will not trust someone simply because they are told the stranger has professional status, or "is just there to help."

The Center also seeks to facilitate children's in-court testimony. The district attorney's victim-witness coordinator (the "Coordinator") functions as the child complainant's advocate within the criminal justice system.[226] If the Center and the district attorney decide that a case should go forward to prosecution, the Coordinator, who is already familiar with the child, eases the alleged victim into the criminal process.[227] The Coordinator introduces the child to the assistant district attorney handling the case, explains the criminal system and gives a tour of the courthouse.[228] Introducing children to the system before the trial process begins may alleviate some of the trauma experienced by the child complainant[229] and thus assist their testimony.

The Madison County approach has been tremendously successful. In addition to streamlining investigations, it has aided children by improving the skills of the professionals involved.[230] The success of the interdisciplinary method is reflected in the number of cases accepted for prosecution, which increased 500% in the first two years.[231] Professionals have concluded that prosecutions handled in this manner can actually be therapeutic for the child complainant.[232] The Center has proven that the criminal justice system can benefit child victims of sexual abuse.

B. *The Rights of the Defendant*

The Madison County Center and those modeled after it were designed with one purpose: aiding child victims.[233] Although these

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224. Cramer, *supra* note 202, at 214.

225. Kathleen C. Faller, Child Sexual Abuse: An Interdisciplinary Manual for Diagnosis, Case Management, and Treatment 156-57 (1988). The traditional method of accommodation was to have a known and trusted person accompany the child to the interview. Patricia A. Graves & Suzanne M. Sgroi, *Law Enforcement and Child Sexual Abuse*, *in* Handbook of Clinical Intervention in Child Sexual Abuse 309, 320 (Suzanne M. Sgroi ed., 1982). The Center's approach, whereby the person conducting the interview is known and trusted, is clearly preferable. The Center further enhances the child's comfort by providing three special interviewing rooms, each geared toward a specific age group. Cramer, *supra* note 202, at 213.

226. Cramer, *supra* note 202, at 214.

227. *Id.*

228. *Id.*

229. *See supra* notes 78-81 and accompanying text.

230. Cramer, *supra* note 202, at 216.

231. *Id.*

232. *Id.*

233. Cramer, *supra* note 202, at 213; Boccella, *supra* note 222, at B1; Swanson, *supra* note 223, at 6.

centers have been extremely effective in this regard, critics question the appropriateness of this focus within the criminal system.[234] Emphasizing that the defendant-oriented nature of our criminal system is constitutionally mandated,[235] these individuals contend that centers affiliated with criminal justice institutions place too much priority on the victim's needs. Critics worry that the attempts to accommodate children may sacrifice defendants' due process rights, thereby endangering the falsely accused.[236]

The potential of these efforts to increase the efficacy of the adjudicatory process, thereby aiding innocent defendants as well as victims, has not been explored. These centers prevent many of the previously identified evidentiary difficulties[237] from arising. The most obvious benefit to victims—a more efficient interviewing process[238]—also benefits defendants. Because law enforcement officials and child specialists are sharing information from the outset, the likelihood of improper interviewing procedures is significantly decreased. Law enforcement officials can advise child specialists regarding legal precedent, and specialists can update law enforcement as to research on suggestibility. Combining the resources of these disciplines diminishes the chances of eliciting false reports. Had such a system been used in the *Michaels* trial,[239] Ms. Michaels might have been spared five years in prison.

Similarly, the erroneous use of scientific testimony[240] might have been avoided in the *Michaels* case if the prosecution had been coordinated with an interagency organization. These organizations can more easily follow case law developments than can the average assistant district attorney, whose caseload is generally both heavy and diverse. Prosecutors thus have an invaluable resource in these centers. While the decision that would ultimately lead to reversal on this issue in *Michaels* had not yet come down at the time of trial,[241] one can speculate that a greater familiarity with the case law developments on this issue might have cautioned the prosecutor against using this testimony, because the majority of jurisdictions have disallowed this use of syndrome evidence.[242]

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234. *See* George, *supra* note 13, at A1.

235. *See supra* note 71 and accompanying text.

236. Robert H. King, Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights Be Transformed into the Bill of Preferences?*, 53 Ohio St. L.J. 49, 74-76, 96-99 (1992); Terese L. Fitzpatrick, Note, *Innocent Unitl Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. Bridgeport L. Rev. 175, 208 (1991).

237. *See supra* part II.A-C.

238. *See supra* notes 223-24 and accompanying text.

239. *See supra* notes 157-80 and accompanying text.

240. *See supra* notes 164-67 and accompanying text.

241. *See supra* note 167 and accompanying text.

242. *See supra* note 146 and accompanying text.

Moreover, as noted above,[243] testifying in court may be easier for children participating in an interdisciplinary program. This development is of particular importance to both prosecution and defendant. Although *Craig* held that the defendant's Confrontation Clause rights may not be violated by the use of closed-circuit television, the prosecution must show that the defendant's presence would "traumatize" the victim to be permitted to use this method of testifying.[244] The vagueness of this standard troubles prosecutors, because the decisions may easily be overturned on appeal. Thus, in-court testimony is preferable to closed-circuit testimony. Furthermore, the *Wright* decision makes it difficult to admit hearsay statements from prior interviews, again increasing the importance of in-court testimony to the prosecutor's case.[245]

Perhaps more significantly from a constitutional perspective, live testimony benefits defendants as well. In-court testimony is clearly the best method of safeguarding defendants' constitutional right to confrontation, and of obtaining the accurate testimony the Confrontation Clause was designed to facilitate. Infringement upon Confrontation Clause rights, a constant risk in these prosecutions,[246] is therefore less likely to occur in an interdisciplinary arena.

Finally, these centers have the general advantage of streamlining the entire trial process by minimizing the amount of testimony introduced and number of witnesses called by the prosecution. The significance of this minimization should not be underestimated—a glance at the McMartin statistics reveals its importance.[247] Millions of taxpayers' dollars and years of incarceration for defendants can be avoided with a streamlined approach.

CONCLUSION

In 1990, the highly publicized McMartin trials outraged the American public. The failure of the criminal system to effectuate justice was apparent to parties on both sides.[248] Although McMartin was by no means a typical case, it was "the quintessentially abusive child sexual abuse case . . . . [It became] a case about the vulnerability of both defendants and children in a legal world of adults stumbling in their search for the truth."[249] The McMartin ordeal, "a textbook example

243. *See supra* notes 226-27 and accompanying text.
244. *See supra* notes 115-18 and accompanying text.
245. *See supra* notes 126-34 and accompanying text.
246. *See supra* part II.B.
247. *See supra* note 195 and accompanying text.
248. *See* Dziech & Schudson, *supra* note 16, at 184 ("One Los Angeles television station that solicited viewers' responses after the verdict reported that 11,255 people called in to say that justice had not been served, whereas only 1,663 believed that it had.").
249. Dziech & Schudson, *supra* note 16, at 186.

of everything that might go wrong in a child-molestation case,"[250] put the legal process itself on trial.

The aftermath of McMartin has realized prosecutors' worst fears—a heightened hesitancy to pursue criminal action in child sexual abuse cases. McMartin warned supporters of victims around the nation that children will not be believed, certainly not "beyond a reasonable doubt."[251] The doubts of those who dismissed the role of the criminal courts in these cases seemingly were confirmed.[252] These critics erroneously view McMartin and similar cases as representative of the criminal process as it must be; instead, these cases should be recognized as highlighting the flaws of the system as currently constituted. The heinous crime of child sexual abuse need not be exempted from the rigors of the criminal justice system. As evidenced by the Madison County experiment and its progeny, the criminal process can work for both victims and defendants in these cases.

To withdraw these cases from the criminal process would be an injustice to those abused and those falsely accused, but to maintain the system presently implemented in the vast majority of jurisdictions is an even greater tragedy. Ultimately, America cannot effectively battle the problem of child molestation until our criminal justice system can avoid victimizing children and innocent defendants while successfully removing child abusers from society. As recognized by Robert E. Cramer, Jr., district attorneys have "a responsibility to redesign the system which [is] supposed to respond to child victims of sexual abuse."[253] Only through systemic reform can the interests of justice be served.

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250. Gorney, *supra* note 188, at A6.
251. Dziech & Schudson, *supra* note 16, at 186; Summit, *supra* note 18, at 5.
252. *See supra* part I.A.
253. Cramer, *supra* note 202, at 216.