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## Have We Gone Far Enough? Children Who Are Sexually Abused and the Judicial and Legislative Means of Prosecuting the Abuser

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# HAVE WE GONE FAR ENOUGH? CHILDREN WHO ARE SEXUALLY ABUSED AND THE JUDICIAL AND LEGISLATIVE MEANS OF PROSECUTING THE ABUSER

Children have a very special place in life which law should reflect.<sup>1</sup>

Each year over 130,000 children are sexually abused in the United States.<sup>2</sup> While children are raped, sodomized, or physically

<sup>1</sup> *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

<sup>2</sup> See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, WORKING PAPER ONE: SUMMARY DATA COMPONENT 13 (1990) (in 1990 it was estimated that 138,257 children were victims of sexual abuse); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL CENTER ON CHILD ABUSE AND NEGLECT: A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: A BASIC MANUAL 8 (1992) [hereinafter NCCAN STUDY] (number of children victimized by sexual abuse tripled from 1980 to 1986); see also P. Kienberger Jaudes, M.D. & M. Martone, A.C.S.W., *Interdisciplinary Evaluations of Alleged Sexual Abuse Cases*, PEDIATRICS, June 1992, at 1164-68 (by age of eighteen, anywhere from one in ten, to one in three children will experience some form of sexual abuse).

While many think child abuse is a horror of modern society, the problem was evident in early Greek and Roman societies. See Margaret J. Ryan, Comment, *The Status of Civil Liability When Child Protection Workers Fail To Do Their Jobs*, 14 S. ILL. U. L.J. 573, 574 (1990). "Experts have demonstrated that the further back in history one goes, . . . the more likely children [were] to be killed, abandoned, beaten, terrorized, or sexually abused." *Id.* (quoting John Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. FAM. L. 149, 152-53 (1985-86)).

Some of the first reforms in the area of children's rights came between 1640 and 1680, when the Puritans of Massachusetts enacted the first laws "anywhere in the world" regulating "unnatural severity" to children. See Laura Oren, *The State's Failure To Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C. L. REV. 659, 665 (1990). Thereafter, from 1874 to 1890, organizations such as the Society for the Prevention of Cruelty to Children were started for the purpose of controlling abuse by Catholic ethnic and immigrant working-class families in urban Boston. *Id.* at 666. These early efforts, however, received only nominal support from legislators who were "hesitant to interfere with parental prerogatives." See Ryan, *supra*, at 575.

Parents have a natural and fundamental interest in the care and custody of their children which is derived from the common law and protected by the Constitution. See Edward L. Thompson, *Protecting Abused Children: A Judge's Perspective on Public Law Deprived Child Proceedings and the Impact of the Indian Child Welfare Acts*, 15 AM. INDIAN L. REV. 1, 8 (1990). However the parent's right to raise a child is not recognized in cases where there is abuse. *Id.* In these cases, the parent's right must be balanced against those of the child and where a conflict exists, the protection of the child is paramount. *Id.*

This balancing is the basis of the modern approach and is reflected in much of the legislation which has been passed in the twentieth century. See Ryan, *supra*, at 573. By the early

assaulted,<sup>3</sup> their abusers are rarely prosecuted.<sup>4</sup> The prosecutors' ability to press charges against child abusers is hindered by the large number of unreported cases,<sup>5</sup> the unwillingness of the child to testify against the abuser,<sup>6</sup> and often, the expiration of the statute of limitations.<sup>7</sup> Prosecution is further complicated by the abuser's control over the victim<sup>8</sup> and the child's inability to realize

1960s, the first state child abuse laws were enacted and today every state has such laws. *Id.* at 575. Under these statutes once a suspicion of child abuse has been reported to the child protective agency, an investigation is initiated to determine whether the child is in imminent danger. *Id.* With the urging of public interest groups, federal initiatives began with the Child Abuse Protection and Treatment Act in 1974. *See* 42 U.S.C. §§ 5101-5115 (1982 & Supp. 1987). This legislation helped to spur enormous expansion of programs to prevent child abuse and neglect. *See* Oren, *supra*, at 667.

<sup>3</sup> *See* NCCAN STUDY, *supra* note 2, at 7 (child may be sexually abused in variety of ways including fondling of genitals, intercourse, rape, sodomy and exhibitionism). For representative cases involving child abuse, see, e.g., Solano County Dep't of Social Services v. Ron B. (*In re Amber B.*), 236 Cal. Rptr. 623, 624 (Cal. Ct. App. 1987) (father sexually molested three-year old daughter); State v. Bentley, 721 P.2d 227, 228 (Kan. 1986) (child fondled and sexually touched by uncle); State v. Oslund, 469 N.W.2d 489, 489 (Minn. Ct. App. 1991) (father convicted of engaging in sexual acts with three-year old daughter); State v. Danielski, 348 N.W.2d 352, 353 (Minn. Ct. App. 1984) (stepfather sexually abused young girl for seven years); State v. Griffin, 754 P.2d 965, 966 (Utah Ct. App. 1988) (child sexually abused by friend's father); Hammer v. Hammer, 418 N.W.2d 23, 24 (Wis. Ct. App. 1987) (indecent touching and oral intercourse forced upon daughter).

<sup>4</sup> *See* James W. Harshaw, Comment, *Not Enough Time? The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation*, 50 OHIO ST. L.J. 753, 756 (1989) (children may repress feelings regarding their sexual abuse until after statute of limitations has expired); *see also* Denise M. DeRose, Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long Term Damages*, 25 SANTA CLARA L. REV. 191, 192 (1985) (estimating that seventy-five to ninety percent of victims do not reveal that they have been sexually abused prior to reaching majority); Kimberley Seals-Bressler, Comment, *Balancing the Right to Confrontation and the Need To Protect Child Sexual Abuse Victims: Are Statutes Authorizing Televised Testimony Serving Their Purpose?*, 12 U. PUGET SOUND L. REV. 109, 109 (1988) (despite increasing number of reported child sexual abuse cases, conviction rate of sexual offenders remains low).

<sup>5</sup> *See* Thomas G. Burroughs, Note, *Retroactive Application of Legislatively Enlarged Statutes of Limitations for Child Abuse: Time's No Bar to Revival*, 22 IND. L. REV. 989, 989 (1989). Charges are only filed in twenty-four percent of all child sex abuse cases. *Id.* at 989-94. Once a criminal proceeding is commenced, the probability of conviction is even lower. *Id.* at 994; *see also* Note, *Sexually Abused Children: The Best Kept Legal Secret*, 3 HUMAN RTS. ANN. 441, 446 (1986) (in majority of cases, courts rely on child's testimony which they view with great skepticism because evidence considered unreliable).

<sup>6</sup> *See infra* notes 21-22 (addressing adverse effects child suffers from testifying against sexual abuser).

<sup>7</sup> *See infra* notes 97-100 (discussing factors which cause statute of limitations to expire before authorities can take action against abuser).

<sup>8</sup> *See, e.g.*, People v. Wilkerson, 6 Cal. App. 4th 1571, 1579 (Cal. Ct. App. 1992) (child acquiesced to sexual abuse after implied threat); State v. Pick, No. C8-88-1026, 1989 WL 17576, at \*2 (Minn. Ct. App. Mar. 7, 1989) (parent told child she would be sent to foster home if child reported sexual abuse); People v. Keindl, 68 N.Y.2d 410, 411, 502 N.E.2d 577, 578, 509 N.Y.S.2d 790, 791 (1986) (stepchildren afraid to resist sexual demands due to stepfather's threats of physical injury); Duckett v. State, 797 S.W.2d 906, 907 (Tex. Crim. App. 1990) (child conditioned to accept advances under direct threat); State v. Grif-

that he or she has been injured.<sup>9</sup>

In an attempt to circumvent these barriers, courts have allowed the use of closed-circuit television to protect the child witness from the trauma of testifying in court before the defendant,<sup>10</sup> expanded the hearsay exception to allow testimony if the child lacks a motive to lie, or if the child uses sexual terminology unexpected of a child,<sup>11</sup> and created provisions that toll the statute of limitations until the abusive conduct is discovered.<sup>12</sup> While these efforts to aid children were initially established by the courts,<sup>13</sup> many state legislatures have followed the courts' initiatives and codified the closed-circuit television procedure and tolling provision into law.<sup>14</sup> Although these statutes are the result of carefully balancing an alleged abuser's constitutional rights and the state's interest in

fin, 754 P.2d 965, 966 (Utah Ct. App. 1988) (defendant threatened to "smack" child if she told anyone about sexual advances); *Hammer v. Hammer*, 418 N.W.2d 23, 24-25 (Wis. Ct. App. 1987) (father threatened daughter with harm if she disclosed the conduct).

The most common scenario involves a father sexually abusing his daughter. See Jocelyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189, 2193 (1991); see also Margaret J. Allen, Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609, 609-10 (1983) (explaining that child sexual abuse is typically incestuous); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 n.14 (1985) [hereinafter *Legislative Innovations*] (sexual abuser is family member in ninety-two percent of child sex abuse cases). In incestuous situations, the father is the dominating family figure who uses his authority to manipulate his daughter into believing that the activity is normal. See Lamm, *supra*, at 2192. While he may often be viewed by society as an introverted, quiet person, in actuality he may be an individual seeking control over his wife and children. See Allen, *supra*, at 611-12.

The victim, on the other hand, copes with the continued abuse through numbing, denial, and amnesia. See Lamm, *supra*, at 2194 n.37. By the time the victim is an adult, long-term effects will already have manifested. See Council on Scientific Affairs, American Medical Association, *Violence Against Women, Relevance for Medical Practitioners*, 267 JAMA 3184-89 (1992). Long-term effects include severe depression, suicidal tendencies, feelings of alienation, and difficulties relating to men and women. *Id.* Another long-term effect may be promiscuous behavior or involvement in sexually abusive relationships. See Burroughs, *supra* note 5, at 991 n.18.

<sup>9</sup> See *Hammer*, 418 N.W.2d at 25 (victim failed to understand abusive nature of father); see also Harshaw, *supra* note 4, at 757 (sexually abused child is often confused and may be unable to perceive wrongs); Lamm, *supra* note 8, at 2193 ("with persistent threats as to consequences of disclosure, an incestuous father can manipulate his daughter into believing she is a willing partner").

<sup>10</sup> See *infra* notes 57-66 (discussing Supreme Court's holding in *Maryland v. Craig*, 497 U.S. 836 (1990)).

<sup>11</sup> See *infra* note 70 (discussing various courts' recognition that hearsay testimony and other procedures are more appropriate when victim is child).

<sup>12</sup> See *infra* notes 139-142 (discussing statutes which toll statute of limitations until child reaches majority or responsible adult obtains knowledge of abuse).

<sup>13</sup> See *infra* note 43 (discussing Supreme Court's interpretation of various hearsay exceptions).

<sup>14</sup> See *infra* notes 139-41 (citing examples of tolling provisions).

protecting sexually abused children, it seems that most legislatures have tipped the scales of justice in favor of protecting the child.<sup>15</sup> However, although initial steps to aid children in reporting abuse and testifying at trial have been taken, further liberalization is necessary to reach the ultimate goal of having every abused child report and testify.

Part One of this Note will examine the constitutionality of the Supreme Court's expansion of hearsay exceptions and the use of closed-circuit television in light of the Sixth Amendment's Confrontation Clause. Part Two will analyze the issue of tolling the statute of limitations in criminal cases, and suggest that every state apply legislation that tolls the statute of limitations until a victim is twenty-three.

### I. CONSTITUTIONAL ISSUES: CHILD V. ABUSER

The Sixth Amendment to the Constitution<sup>16</sup> guarantees a defendant the right to confront his or her accusers at trial,<sup>17</sup> and is often thought to enhance the fact-finding process.<sup>18</sup> A literal interpretation of the Confrontation Clause would require a defend-

<sup>15</sup> See *infra* notes 21 & 138 and accompanying text (noting how Supreme Court and state legislatures effectively provide sexually abused children greater protection without circumventing abuser's substantive rights).

<sup>16</sup> U.S. CONST. amend. VI. 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." *Id.*

<sup>17</sup> See *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) ("We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (Confrontation Clause provides protection for criminal defendant, including right to physically meet face-to-face those testifying against him); see also *Kentucky v. Stincer*, 482 U.S. 730, 749-50 (1987) (Marshall, J., dissenting) (right to confront witness forms core of Confrontation Clause); *California v. Green*, 399 U.S. 149, 157 (1970). The Court has also stated that even in cases where a defendant is denied the right to confront his accuser at trial, the "literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause." *Id.*; cf. *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (Sixth Amendment right of accused to confront witnesses against him is made obligatory on states by Fourteenth Amendment); *Mattox v. United States*, 156 U.S. 237, 242 (1895) (primary goal of Confrontation Clause was to prevent ex parte affidavits in lieu of confrontation between witness and accused).

<sup>18</sup> See *Coy*, 487 U.S. at 1019-20 (face-to-face confrontation "may confound and undo the false accuser, or reveal the child coached by a malevolent adult."); see also *Stincer*, 482 U.S. at 739 ("[t]he right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial"); cf. *Pointer*, 380 U.S. at 404 ("[T]here is 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"); *infra* note 19 (citing cases denying defendant the absolute right to confront his accuser).

ant have the right to a face-to-face meeting with every witness. A defendant's right to confront, however, is not without limitations,<sup>19</sup> and courts have refused to read the Confrontation Clause as providing a defendant an absolute right to physical confrontation.<sup>20</sup> This has been especially apparent in cases involving child abuse.<sup>21</sup> Often, when the child sees the defendant face-to-face, he or she becomes silent and refuses to testify<sup>22</sup> and therefore the courts have sought to carve out areas of protection for child witnesses,<sup>23</sup> specifically in the interpretation of a defendant's right to confront the witness.

### A. *Right to Confront*

In 1990, the Supreme Court granted certiorari in two cases involving the sexual abuse of children.<sup>24</sup> The first case, *Idaho v. Wright*,<sup>25</sup> addressed the issue of whether the testimony of a doctor who examined an allegedly abused child could be admitted as evi-

<sup>19</sup> See, e.g., *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (Court has never held Confrontation Clause guarantees absolute right to face-to-face meeting with witness at trial); *Coy*, 487 U.S. at 1024 (O'Connor, J., concurring) (defendant's right to physically face those testifying against him, even if at core of Confrontation Clause, is not absolute); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (Court has recognized that competing interests, if closely examined, may warrant eliminating confrontation at trial); *Miranda v. Cooper*, 967 F.2d 392, 401 (10th Cir. 1992) (defendant's right to confront adverse witnesses is neither absolute nor unlimited and is tempered by policy considerations).

<sup>20</sup> See *Craig*, 497 U.S. at 844. The Court stated: "We have never held, however, that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial." *Id.*

<sup>21</sup> See *id.* at 856-57 (where there is finding that child would suffer from trauma of testifying in presence of defendant, Confrontation Clause does not prohibit use of videotape procedure which ensures reliability of evidence); *Nelson v. Farrey*, 874 F.2d 1222, 1228 (7th Cir. 1989) (court allowed child victim to testify by videotaped procedure to avoid psychological harm of testifying in presence of defendant), *cert. denied*, 493 U.S. 1042 (1990).

For examples of cases where the Supreme Court has stressed the need to protect children from adverse effects of the courtroom, see *Craig*, 497 U.S. at 853 (concluding that state interest in protecting child abuse victims may sufficiently outweigh defendant's right to face his accuser); *Ritchie*, 480 U.S. at 60 (allowing full disclosure would unnecessarily sacrifice Commonwealth's compelling interest in protecting child abuse victim's information); cf. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (safeguarding physical or psychological well-being of minor is compelling).

<sup>22</sup> *Craig*, 497 U.S. at 842. The Court found children would react differently if they were forced to testify in front of the defendant. *Id.* A psychologist testified that one would not be able to communicate effectively, another would withdraw completely, while others would refuse to talk or choose their own subject regardless of the question asked. *Id.* (citing *Craig v. State*, 560 A.2d 1120, 1128-29 (Md. 1989)).

<sup>23</sup> See *infra* notes 46 & 50 (discussing circumstances where children were afforded greater rights).

<sup>24</sup> *Craig*, 497 U.S. 836 (1990); *Idaho v. Wright*, 497 U.S. 805 (1990).

<sup>25</sup> 497 U.S. 805 (1990).

dence.<sup>26</sup> Although this evidence was held inadmissible as hearsay,<sup>27</sup> the criteria adopted by the *Wright* court nevertheless broadened the scope of protection afforded sexually abused children.<sup>28</sup> In the second case, *Maryland v. Craig*,<sup>29</sup> the Court upheld the constitutionality of a statute<sup>30</sup> which allowed an abused child to testify via closed-circuit television out of the presence of the defendant.<sup>31</sup>

### 1. *Idaho v. Wright*

In *Idaho v. Wright*, the defendant was charged with sexually abusing her two daughters.<sup>32</sup> The examining doctor testified that the physical condition of one of the children strongly suggested sexual abuse.<sup>33</sup> The Supreme Court held that the doctor's testimony concerning the child's statements were inadmissible as hear-

<sup>26</sup> *Id.* at 809. A doctor testified regarding a conversation he had with a child about apparent sexual abuse. *Id.* The prosecution tried to admit the doctor's testimony pursuant to an Idaho statute which allowed for admission of hearsay even if the declarant was available. *Id.* at 811-12.

<sup>27</sup> *Id.* at 827. The Court held that the testimony presented by the doctor did not fit into the hearsay exception of the Idaho statute because it lacked the required guarantee of trustworthiness. *Id.* For other cases discussing the need for guarantees of trustworthiness and reliability, see, e.g., *Shirley v. Seabold*, 929 F.2d 272, 274-75 (6th Cir. 1991) (statements offered do not satisfy *Wright* test "of particularized guarantees of trustworthiness" due to victim's incoherence); *Miller v. Miller*, 784 F. Supp. 390, 395 (E.D. Mich. 1992) (hearsay did not overcome presumption of unreliability so confession could not be admitted without violating defendant's Sixth Amendment rights).

<sup>28</sup> See *Wright*, 497 U.S. at 822. Whereas previous courts set forth criteria to be used in determining whether to admit hearsay, the *Wright* Court stated that such a demand must be judged from the totality of the circumstances. *Id.* at 820. For cases eliminating the requirement that the witness be unavailable for admission of hearsay, see, e.g., *White v. Illinois*, 112 S. Ct. 736, 741 (1992) (admitting hearsay where declarant is available and eliminating unavailability requirement outlined in *Ohio v. Roberts*, 448 U.S. 56 (1980)); *United States v. Inadi*, 475 U.S. 387, 394 (1986) (same).

<sup>29</sup> 497 U.S. 836 (1990).

<sup>30</sup> *Id.* at 860. The state invoked a procedure that permitted a child to testify through a closed circuit television. *Id.* at 840. This procedure requires the child witness, prosecutor, and defense counsel to withdraw to a separate room where the child is examined; the judge, jury and the defendant view from the courtroom. *Id.* at 841.

<sup>31</sup> *Id.* at 857. The Court held where the trauma caused by the presence of the defendant would impair the child's ability to communicate, the Confrontation Clause did not prohibit use of this technique. *Id.*

<sup>32</sup> See *Wright*, 497 U.S. at 809. The defendant had joint custody where each parent would have custody for six months. *Id.* At the time of the abuse the children were living with the defendant-mother and reported the abuse to their father's girlfriend. *Id.* The girlfriend immediately reported the incident to the police and took one of the victims to the hospital the next day. *Id.*

<sup>33</sup> *Id.* Dr. John Jambura, a pediatrician with extensive experience in child abuse cases, was the doctor who examined the child. *Id.* He found a physical situation "strongly suggestive of sexual abuse with vaginal conduct" which he felt was confirmed by his interview with the child. *Id.* at 809-11.

say due to the lack of precautions taken to ensure the reliability of the child's comments.<sup>34</sup> The Court did suggest, however, that had the doctor not asked blatantly leading questions with a preconceived notion about what the child would be disclosing, his testimony would have been admissible.<sup>35</sup>

Idaho law allowed the admission of hearsay if it dealt with a material fact, was more probative than any other evidence, served the interest of justice, and bore an indicia of reliability.<sup>36</sup> The Supreme Court, applying Idaho law, found that the doctor's testimony lacked the indicia of reliability required for admission under the residual hearsay exception,<sup>37</sup> and was not persuaded beyond a reasonable doubt that the admission was a harmless error.<sup>38</sup> Citing their holding in *Ohio v. Roberts*,<sup>39</sup> the Court explained that the tes-

<sup>34</sup> *Id.* at 827. The lack of safeguards made the statements by the child questionable as to their reliability. *Id.* Among those noted by the Supreme Court of Idaho were the lack of videotaping, blatantly leading questions, and a preconceived idea about what the child should be disclosing. *Idaho v. Wright*, 775 P.2d 1224, 1230 (1989), *aff'd*, 497 U.S. 805 (1990); *see also* *United States v. Ellis*, 935 F.2d 385, 394 (1st Cir.) ("to avoid conflict with the Confrontation Clause, evidence admitted under the residual [hearsay exception] must possess a high degree of independent trustworthiness" (citing *Idaho v. Wright*, 497 U.S. 805, 821 (1990))), *cert. denied*, 110 S. Ct. 201 (1991).

<sup>35</sup> *See Wright*, 497 U.S. at 826. The child made several statements with the requisite level of reliability but the previous prompting by the doctor negated the child's spontaneity as an indicator of trustworthiness. *Id.*

<sup>36</sup> *Id.* at 812. Idaho's residual hearsay exception provides that statements with guarantees of trustworthiness are allowed as an exception to the hearsay rule if: "(A) The statement is offered as evidence of a material fact; (B) the statement is more probative . . . than any other evidence which the proponent can procure through reasonable efforts; [and] (C) [the] purpose of these rules and the interests of justice will best be served by admission into evidence." IDAHO RULE EVID. § 803(24).

<sup>37</sup> *See Wright*, 497 U.S. at 813. The Court affirmed the lower court's ruling that the child's statements lacked reliability and should not have been admitted. *Id.*; *see also* *Ohio v. Roberts*, 448 U.S. 56, 62 (1980). The test for indicia of reliability requires the hearsay to either fall within a firmly-rooted exception or be supported by a showing of trustworthiness. *Id.*

An example of a statement containing indicia of reliability was found where statements were given voluntarily in front of two government employees and both of declarants' attorneys, in accordance with a plea agreement where the government was taking notes, and where the declarants knew the statements were to be used in a further investigation. *United States v. Ellis*, 951 F.2d 580, 583 (4th Cir. 1991); *see Shirley v. Seabold*, 929 F.2d 272, 274 (6th Cir. 1991) (statement admissible when declarant's truthfulness so clear that cross-examination would be of "marginal utility" (citing *Wright*, 497 U.S. 820 (1990))). *But see* *Lee v. McCaughtry*, 892 F.2d 1318, 1324 (7th Cir.) ("Violations of the Confrontation Clause have been found 'even though the statements in issue were admitted under an arguably recognized hearsay exception.'" (quoting *California v. Green*, 399 U.S. 149, 156 (1970))), *cert. denied*, 497 U.S. 1006 (1990).

<sup>38</sup> *Wright*, U.S. at 3145 (recognizing possibility that admission of unreliable statements may have prejudiced jury).

<sup>39</sup> 448 U.S. 56 (1980).



timony was only admissible if it encompassed a firmly-rooted hearsay exception such as an excited utterance, dying declaration or the medical treatment exception, or fell within the residual hearsay exception.<sup>40</sup> The firmly-rooted hearsay exceptions are recognized by the courts as inherently trustworthy, whereas the residual hearsay exception is less established and is only admitted where the facts demonstrate reliability, equal to that of the firmly-rooted hearsay exception.<sup>41</sup> Since the doctor's testimony did not fall within a firmly-rooted hearsay exception, admissibility had to be established within the residual hearsay exception.<sup>42</sup>

The Court noted that the indicia of reliability could be established if the child's statements were spontaneous and consistent, made with sexual terminology unexpected of a child of similar age, and if the child lacked the motive to lie.<sup>43</sup> Satisfaction of these requirements would help support the admission of the doc-

<sup>40</sup> *Wright*, 497 U.S. at 816 (indicia of reliability for admission of hearsay can be established under the firmly-rooted hearsay exception or residual hearsay exception); see *Roberts*, 448 U.S. at 65. The *Roberts* Court noted that the firmly-rooted hearsay exception "rest[s] upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Id.* at 66 (citing *Mattox v. United States*, 156 U.S. 237, 244 (1895)). The residual hearsay exception is allowed only when reliability is established and "'there is no material departure from the reason of the general rule.'" *Id.* at 65 (quoting *Snyder v. Massachusetts*, 291 U.S. 91, 107 (1934)); see also *United States v. Kikumura*, 947 F.2d 72, 76 (3d Cir. 1991) (hearsay admitted if sufficiently reliable or falls within accepted hearsay exception); *United States v. Workman*, 860 F.2d 140, 144 (4th Cir. 1988) (same); *Puleio v. Vose*, 830 F.2d 1197, 1205 (1st Cir. 1987) (same).

<sup>41</sup> *Wright*, 497 U.S. at 817. Evidence admitted under the firmly-rooted hearsay exception is reliable because judicial and legislative experience has long found certain out-of-court statements reliable. *Id.* The residual hearsay exception, in contrast, includes instances not falling within a recognized hearsay exception but surrounding circumstances indicate enough reliability to be admitted. *Id.*; *Roberts*, 448 U.S. at 66 (explaining and defining two types of hearsay exceptions); see *supra* note 40 (listing cases that recognize difference between different types of hearsay exceptions).

<sup>42</sup> *Wright*, 497 U.S. at 818. The State recognized that the child's statements did not fall within a firmly-rooted hearsay exception and therefore, had to establish reliability under the residual hearsay exception. *Id.*

<sup>43</sup> *Wright*, 497 U.S. at 822. The *Wright* Court held that factors such as unexpected terminology and lack of motive to lie, although indicative of trustworthiness, are not exhaustive. *Id.*; see *White v. Illinois*, 112 S. Ct. 736, 742 (1992). "A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight . . . than a similar statement offered in the relative calm of the courtroom." *Id.*; *Dana v. Dep't of Corrections*, 958 F.2d 237, 239 (8th Cir.), *cert. denied*, 112 S. Ct. 3034 (1992). The *Dana* court noted that the child's testimony was trustworthy since the revelations were spontaneous, consistent, there was no motive to lie, and a graphic description would not be expected from a four year old child. *Id.* But see *Martinez v. McCaughtry*, 951 F.2d 130, 134 (7th Cir. 1991). By relying too heavily on these factors, a court may neglect its duty to inquire beyond the inference and look into the record for support of the statement. *Id.*

tor's testimony under the residual hearsay exception, insulate the child from the trauma of testifying,<sup>44</sup> and assist in the effective prosecution of the defendant.<sup>45</sup> By allowing these factors to be considered in determining whether an indicia of reliability had been established, the *Wright* court provided more flexibility in applying hearsay rules to aid children in testifying.<sup>46</sup> This refuted the state court's decision which suggested that specific requirements which are often impractical, such as videotaping and notetaking, were prerequisites to establishing reliability.<sup>47</sup>

<sup>44</sup> *Wright*, 497 U.S. at 821-22. Factors which help to establish the reliability of a child's statements, and free the child from taking the stand, are spontaneous and consistent repetition, use of terminology unexpected of a child, and lack of a motive to lie. *Id.*; see *Dana*, 958 F.2d at 238. The court, insulating the child from the trauma of testifying, held that the victimized child did not have to take the stand to testify in the prosecution against his father. *Id.*; see also *McCafferty v. Leapley*, 944 F.2d 445, 451 (8th Cir.) (child's statement to teacher and psychologist were admissible and as a result child was spared trauma of testifying in abuser's trial), *cert. denied*, 112 S. Ct. 1277 (1991). See generally Kermit V. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy*, 42 ME. L. REV. 283, 352 (1990). "Throughout the literature on sexual abuse there is a legitimate concern that the trial process revictimizes the already abused child." *Id.*

<sup>45</sup> *Wright*, 497 U.S. at 827 (reversing defendant's conviction because victim's statements to doctor were inadmissible); *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (child abuse typically difficult to prosecute because child is usually only witness); see *Theresa Cusick, Televised Justice: Toward a New Definition of Confrontation Under Maryland v. Craig*, 40 CATH. U. L. REV. 967, 967 (1991). "Child sex abuse victims are usually the only direct witnesses to their abuse and most states do not require the testimony . . . to be corroborated." *Id.*; Catherine M. Mahady-Smith, Comment, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 DICK. L. REV. 721, 731 (1985). The child's testimony is often the only available evidence in obtaining a conviction, and the child will often retreat into silence. *Id.*

<sup>46</sup> *Wright*, 497 U.S. at 822; see *Maryland v. Craig*, 497 U.S. 836, 860 (1990) (Court allowed children to testify via one-way television where they were unable or unwilling to testify in presence of defendant); see also *Wright*, 497 U.S. at 818 (courts must decide if leading questions go too far and infringe on defendant's rights or are justified due to child's situation); JOHN MYERS, CHILD WITNESS LAW & PRACTICE § 4.6., at 129, 134 (1987) (traditional practice restricts use of leading questions). For cases illustrating the new flexibility of the courts, see, e.g., *Doe v. United States*, 976 F.2d 1071, 1087 (7th Cir. 1992) (abused child's testimony admitted despite bizarre aspects of story, piecemeal fashion of story, and prompting by adult questioning); *McCafferty*, 944 F.2d at 451 (child's statements to teacher and psychologist were admitted as evidence); *United States v. Ellis*, 935 F.2d 385, 394 (1st Cir.) (social worker allowed to testify regarding observation that victim's half-sister played with anatomically correct dolls despite defendant's objection that it was hearsay), *cert. denied*, 112 S. Ct. 201 (1991); *Morgan v. Foretich*, 846 F.2d 941, 946 (4th Cir. 1988) (noting majority of courts have held child's statements admissible even if child incompetent to testify); *United States v. Nick*, 604 F.2d 1199, 1201-02 (9th Cir. 1979) (spontaneous declaration allowed despite child's incompetence).

<sup>47</sup> *Wright*, 497 U.S. at 818. The Idaho Supreme Court suggested that without certain precautions such as videotaping or notetaking the statements would not be reliable. *Id.* The United States Supreme Court, although admitting these procedures would enhance reliability, rejected the idea stating that child abuse cases often do not allow for these techniques and, as such, they should not be dispositive in determining reliability. *Id.*

The *Wright* majority noted that a bright-line test for admissibility under the residual hearsay exception should not be applied in child sex abuse cases,<sup>48</sup> since the child's testimony is often difficult to obtain,<sup>49</sup> and reiterated its policy of consistently affording greater protection to children.<sup>50</sup> The Court concluded that hearsay evidence must be analyzed in the context of all the circumstances, and that the final determination of admission be made on a case by case basis.<sup>51</sup>

Since this decision added to the discretion courts have in determining what constitutes hearsay,<sup>52</sup> they must be careful in its application. Admitting hearsay creates a confrontation issue because

<sup>48</sup> *Id.* at 819. "We decline to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviewers in which children make hearsay statements against a defendant." *Id.*

<sup>49</sup> *Id.* at 818 (children's statements concerning abuse arise in various situations and require flexibility in applying hearsay rules to facilitate the admission of victim's statements); see *supra* note 22 & *infra* note 61 (explaining difficulties often faced by authorities when trying to elicit testimony from child sex abuse victims).

<sup>50</sup> *Wright*, 497 U.S. at 821-22 (courts have established factors for establishing reliability particular to children); see *Craig*, 497 U.S. at 853 (recognizing that physical and psychological well-being of children may outweigh defendant's right to face accuser); Lipez, *supra* note 44, at 286. Typically, the abused child is the only witness to the sexual abuse. *Id.* Unlike other cases where there are generally additional witnesses, verifiable damage to persons, property, or contraband, in the typical sexual abuse case the focus of the prosecution is the testimony of the child. *Id.*

For examples of cases affording children greater rights by allowing leading questions, see *United States v. Demarrias*, 876 F.2d 674, 678 (8th Cir. 1989) (court permitted plaintiff to ask child leading questions); *United States v. Brady*, 579 F.2d 1121, 1130 (9th Cir. 1978) (noting in dicta that permitting leading questions of minor witnesses was not unusual occurrence), *cert. denied*, 439 U.S. 1074 (1979); *Rotolo v. United States*, 404 F.2d 316, 317 (5th Cir. 1968) (leading questions permitted of nervous and upset fifteen year old witness); *Antelope v. United States*, 185 F.2d 174, 175 (10th Cir. 1950) (leading questions permitted of minor statutory rape victim). See generally *Legislative Innovations*, *supra* note 8, at 808. One commentator has noted that with a growing public awareness of the difficulties of prosecuting child sex abuse cases, state legislatures have acted to strengthen the prosecutor's hand, while easing the burden that the judicial system places on the child victim." *Id.* For example, many "states have broadened their definition of child sex abuse, extended statutes of limitation, and eased various rules of procedures and evidence." *Id.*

<sup>51</sup> *Wright*, 497 U.S. at 820. Evidence used in establishing reliability, however, is limited to circumstances that make the statement inherently trustworthy. *Id.* at 819. These statements cannot be given the status of trustworthiness solely because they are corroborated by reliable evidence. *Id.* at 824; see *United States v. Harty*, 930 F.2d 1257, 1263 (7th Cir.) ("[t]est must now conform to the requirement that the hearsay . . . be reliable 'by virtue of its inherent trustworthiness'" (quoting *Idaho v. Wright*, 497 U.S. 805, 822 (1990)), *cert. denied*, 112 S. Ct. 262 (1991).

<sup>52</sup> See *Wright*, 497 U.S. at 822. Courts have great discretion in determining what statements are reliable. *Id.* However, they must be careful to ensure that admission of evidence is based on inherent trustworthiness and not by reference to other evidence. *Id.* This prevents bootstrapping which could lead to admission of unreliable evidence. *Id.* at 833; see also *United States v. Ellis*, 935 F.2d 385, 394 (1st Cir.) (advocating conservative approach to hearsay exceptions), *cert. denied*, 112 S. Ct. 201 (1991).

the defendant is limited to the examination of facts obtained second-hand and denied the opportunity to extract the story from the actual victim.<sup>53</sup> Although the Supreme Court broadened hearsay exceptions in child sex abuse cases,<sup>54</sup> it has consistently balanced the defendant's Sixth Amendment rights with the interest of the state to ensure the defendant's rights are protected.<sup>55</sup> This balancing is apparent in *Maryland v. Craig* where the Court weighed the interests of both sides before holding that testimony received via closed-circuit television was constitutional.<sup>56</sup>

<sup>53</sup> *Wright*, 497 U.S. at 809 (defendant limited to second-hand facts when limited to cross-examination of doctor who examined victim and not victim); *McCafferty v. Leapley*, 944 F.2d 445, 454 (8th Cir. 1991) (defendant limited to second-hand facts when only allowed to cross-examine clinical psychologist and teacher of victim, but not actual victim), *cert. denied*, 112 S. Ct. 1277 (1992); *Myatt v. Hannigan*, 910 F.2d 680, 682 (10th Cir. 1990) (defendant not allowed to cross-examine the victim, but only caseworker and police officer who took victim's statement); *Nelson v. Farrey*, 874 F.2d 1222, 1224 (7th Cir. 1989) (defendant limited to facts elicited on cross-examination of victim's psychologist and not victim), *cert. denied*, 493 U.S. 1042 (1990); *see also Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (right to cross-examine ensures integrity of fact-finding process); *Pennsylvania v. Ritchie*, 480 U.S. 39, 54 (1987) (no confrontation problem because cross-examination complete). *But see United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991) (absence of proper confrontation calls integrity of fact-finding process into question).

<sup>54</sup> *Wright*, 497 U.S. at 822. The federal courts admit hearsay where the child's statement includes spontaneity and consistent repetition, use of terminology unexpected of a child, and lack of motive to fabricate. *Id.*; *see Doe v. United States*, 976 F.2d 1071, 1079 (7th Cir. 1992) (court's basis for admitting hearsay was general consistency of details, element of spontaneity, and use of childlike terms); *Morgan v. Foretich*, 846 F.2d 941, 947 (4th Cir. 1988). The child's extensive knowledge of sexual activities and lack of motive to lie were considerations in admitting hearsay of child. *Id.* The *Morgan* court explained that spontaneity serves as a check against the threat of fabrication. *Id.* at 946. *But see* Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1756 (1983) (discussing criticism aimed at courts which place undue emphasis on spontaneity requirement in child abuse cases).

<sup>55</sup> *Wright*, 497 U.S. at 825 (defendant's rights were violated when hearsay was admitted without showing of indicia of reliability); *see White v. Illinois*, 112 S. Ct. 736, 741 (1992) (acknowledging state's attempt to "steer a middle course" between admitting hearsay that protects state's interest and safeguarding defendant's constitutional rights (citing *Ohio v. Roberts*, 448 U.S. 56, 68 (1980)); *Maryland v. Craig*, 497 U.S. 836, 850 (1990) ("Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process."); *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (in camera review of sensitive evidence protects interests of defendant as well as commonwealth); *Roberts*, 448 U.S. at 64 (state has strong interest in effective law enforcement which must be weighed against other considerations such as defendant's constitutional rights); *Mattox v. United States*, 156 U.S. 237, 243 (1895) ("[G]eneral rules . . . must occasionally give way to considerations of public policy and the necessities of the case."); *cf. Taylor v. United States*, 484 U.S. 400, 410-16 (1988) ("State's interest in the orderly conduct of a criminal trial is sufficient to justify deviation from rules [regarding] presentation of witnesses and evidence"); *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) (state's right to conduct orderly trial given priority over defendant's right to be present at trial, where trial judge removed defendant for disruptive behavior).

<sup>56</sup> *See Craig*, 497 U.S. at 860 (child testimony received through television monitor was constitutional after balancing rights of both parties).

## 2. *Maryland v. Craig*

In *Maryland v. Craig*, a kindergarten teacher was accused of sexually abusing several of her students.<sup>57</sup> The Court, in determining that the children would be adversely affected by testifying in the presence of the defendant, allowed the children to testify by way of closed-circuit television.<sup>58</sup> To safeguard the defendant's constitutional rights, the Court mandated that the child's testimony be subject to cross-examination, and given under oath in view of the jury.<sup>59</sup> The Court explained that this procedure would be restricted and utilized only in situations where the trauma of testifying would inhibit the child from serving as a witness.<sup>60</sup> This finding of trauma is often established by a psychologist's testimony regarding the effects of testifying on the victim.<sup>61</sup>

The *Craig* Court limited this "trauma of testifying" to situations where the defendant, and not the courtroom setting, was the cause of the trauma.<sup>62</sup> If the courtroom setting was the cause of

<sup>57</sup> *Id.* at 840. The defendant owned and operated her own kindergarten and had allegedly abused a number of her students. *Id.*

<sup>58</sup> *Id.* at 840-41. The procedure allowed for testimony to be given via closed circuit television when it was demonstrated that the abused child would suffer emotional distress from testifying in the presence of the defendant. *Id.* Under the Maryland closed circuit procedure, the child witness, the prosecutor, and defense counsel withdraw to a separate room away from the defendant, judge, and jury. *Id.* However, the defendant remains in electronic communication with defense counsel, and objections are made and ruled on as if the witness were testifying in the courtroom. *Id.*

<sup>59</sup> *Id.* at 857 (defendant's rights were protected as victim was cross-examination under oath and observed by judge, jury, and defendant during testimony); *California v. Green*, 399 U.S. 149, 158 (1970). The *Green* Court set out the following guidelines to safeguard a defendant's Sixth Amendment rights where face-to-face confrontation has been denied: (1) the witness must give testimony under oath; (2) the defense must be given the opportunity to cross-examine the witness; and (3) the jury must be able to observe the demeanor of the witness while the witness testifies. *Id.*; see *Hardy v. Wigginton*, 922 F.2d 294, 299 (6th Cir. 1990). The court upheld a procedure similar to *Craig* where there was a finding of specific traumatization, and allowed a videotape of the witness, taken in the presence of the defendant, to be admitted. *Id.* In addition, the defendant was allowed full and effective cross-examination and the jury was able to scrutinize the demeanor of the witness. *Id.* at 296; *Vigil v. Tansy*, 917 F.2d 1277, 1279 (10th Cir. 1990) (videotape in presence of defendant did not violate defendant's rights since he was afforded face-to-face confrontation), *cert. denied*, 111 S. Ct. 995 (1991).

<sup>60</sup> *Craig*, 497 U.S. at 847 (trial judge must first find that testifying in courtroom will result in serious emotional distress) (citing MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989)).

<sup>61</sup> See *Hardy*, 922 F.2d at 296 (board-certified psychologist indicated that testifying in court might permanently damage victim); *Nelson v. Farrey*, 874 F.2d 1222, 1225 (7th Cir. 1989) (ruling child victim was unavailable because of psychologist's testimony that testifying would have a traumatic impact), *cert. denied*, 493 U.S. 1042 (1990).

<sup>62</sup> *Craig*, 497 U.S. at 885 (trauma must be result of testifying in presence of defendant); *Spigarolo v. Meachum*, 934 F.2d 19, 24 (2d Cir. 1991) (affirming lower court's decision to

the distress, there were alternate means of lessening the intimidation, such as having the child testify on videotape before trial,<sup>63</sup> or in a less intimidating setting,<sup>64</sup> both of which would be in the presence of the defendant. If the trauma was due to the presence of the defendant, then the child would testify in another room in front of the judge, prosecutor, and defense counsel while the defendant and jury viewed the testimony via closed-circuit television.<sup>65</sup> During cross-examination, the defendant remains in constant communication with his attorney to ensure full and effective cross-examination.<sup>66</sup> In allowing removal of the victim from defendant's physical presence, the *Craig* decision reflected concerns previously noted by the Court in *Coy v. Iowa*.<sup>67</sup>

In *Coy*, the Court questioned whether a defendant's right to physically confront his or her accuser was absolute,<sup>68</sup> and held that an Iowa statute which presumed that confrontation would have adverse effects on children, without requiring individualized findings of such effects, was unconstitutional.<sup>69</sup> However, in dicta, the Court posited that if a statute required individualized findings

allow videotape when witness is traumatized by presence of defendant); see Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, And the Power and Limits of Textualism*, 48 WASH. & LEE L. REV. 1323, 1368 (1991) (finding of trauma must be result of testifying in presence of defendant and not from testifying in courtroom).

<sup>63</sup> See *Hardy*, 922 F.2d at 300 (videotaped testimony taken weeks before trial in presence of defendant was admissible); *Vigil*, 917 F.2d at 1279 (videotaping witness in defendant's presence is allowed when courtroom itself would be traumatic experience for child).

<sup>64</sup> *Craig*, 497 U.S. at 856. The Court suggested that it would be willing to change the procedure to allow a witness to testify in a less intimidating room, but still in the presence of the defendant. *Id.*

<sup>65</sup> *Id.* at 841; see *supra* note 58 (discussing Maryland's closed circuit television procedure).

<sup>66</sup> *Craig*, 497 U.S. at 841-42; see *supra* note 58 & 59 (discussing Maryland's closed circuit television and precautions taken to protect defendant's rights when witness is removed to separate room).

<sup>67</sup> 487 U.S. 1012 (1988). In *Coy*, the Court rejected a statute which presumed adverse effects on children testifying at trial without mandating that the court make individualized findings of adverse effects prior to invoking the procedure. *Id.* at 1021; cf. *Hardy*, 922 F.2d at 296 n.1. Although the relevant Kentucky statute in *Hardy* presumed adverse effects on children testifying in court, the trial court relied on other grounds to invoke the videotaping procedure. *Id.*

<sup>68</sup> *Coy*, 487 U.S. at 1021. The Court has found some exceptions to the implicit rights found in the Confrontation Clause, but has not decided whether there are any exceptions to the literal right to confront the accuser. *Id.*

<sup>69</sup> *Id.* (statute which presumed adverse consequences on children testifying in front of defendant found to be unconstitutional); *Hardy*, 922 F.2d at 296 n.1 (noting that trial judge believed statute was unconstitutional due to similarity of statute struck down in *Coy*); Todd H. Neuman, Note, *A Child's Well Being v. A Defendant's Right to Confrontation*, 93 W. VA. L. REV. 1061, 1080 (1991) (statute presuming need to protect child from adverse effects of testifying will not withstand constitutional attacks).

of adverse effects on children, it could also prescribe the use of a television monitor to receive the child's testimony.<sup>70</sup> Applying the *Coy* rationale, the *Craig* Court required individualized findings of adverse effects, and concluded that use of a television to transmit the testimony was constitutional and did not impair the defendant's rights.<sup>71</sup> While *Wright* questioned the admissibility of hearsay because the right to cross-examine was hindered, the *Craig* Court preserved the defendant's right to cross-examine,<sup>72</sup> despite the absence of the victim from the courtroom.<sup>73</sup>

### B. Right to Cross-Examine

The *Craig* Court listed several factors that safeguard a defendant's Sixth Amendment confrontation rights when he or she has been denied the opportunity to physically confront the accuser.<sup>74</sup> The most important of these factors is the defendant's right to cross-examine his or her accuser.<sup>75</sup>

<sup>70</sup> See *Craig*, 497 U.S. 857-58 (right to confrontation may be abridged where there is specific finding of necessity); *Spigarolo v. Meachum*, 934 F.2d 19, 23 (2d Cir. 1991) (upholding Connecticut statute allowing videotaped testimony where there is specific finding of need in light of *Craig*); see also *Neuman*, *supra* note 69, at 1073 (if Court makes specific finding of necessity, confrontation right of defendant may give way to state interest of protecting child). But see *Gilpin v. McCormick*, 921 F.2d 928, 932 (9th Cir. 1990). The fact that a specialized finding is required to permit the use of videotaped testimony does not conversely mean that defendant can demand a psychiatric evaluation when the child is willing to take the stand. *Id.*; *Virgin Islands v. Riley*, 750 F. Supp. 727, 728 (D. Virgin Islands 1990). The court denied the use of videotaped testimony because there was no child witness protection statute applicable in the district. *Id.*

<sup>71</sup> See *supra* note 70 (explaining how lower courts interpreted *Craig* in deciding whether testimony of child through television with specific finding of adverse effects is admissible).

<sup>72</sup> *Craig*, 497 U.S. at 849-50. The Court required that the child be competent to testify, that the child's testimony be given under oath, in front of the jury, and that the child be subject to cross-examination. *Id.* The Court concluded that retention of these elements ensured that the testimony would be tested in an adversarial context. *Id.*; see *California v. Green*, 399 U.S. 149, 165 (1970). The statements by a witness given at a preliminary hearing, and subsequently used at trial were not in violation of the Confrontation Clause, despite the fact that the witness was not present at the trial. *Id.* The statements in question were held admissible because the defendant had the previous opportunity to cross-examine the witness under oath before a judicial tribunal ensuring his rights were protected. *Id.*; *Neuman*, *supra* note 69, at 1070 (to extent that testimony is given under oath, subject to cross-examination, and made in front of judge, Confrontation Clause is not violated).

<sup>73</sup> See *Craig*, 497 U.S. at 857. In *Craig*, the child was placed in a room adjacent to the courtroom with the judge, opposing counsel, and technicians present. *Id.* at 841. A television monitor was set up in the courtroom to enable the defendant and jury to view the child's testimony from the courtroom. *Id.* The defendant was allowed to communicate with his lawyer to ensure full cross-examination of the child. *Id.* at 841-42.

<sup>74</sup> See *supra* notes 58 & 59 (explaining safeguards used to protect defendant's rights when witness is removed from defendant's presence).

<sup>75</sup> See, e.g., *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) (right to cross-examine ensures

The right to cross-examine is the main right embodied in the Confrontation Clause and was designed to evoke truth from the trial process.<sup>76</sup> Although face-to-face confrontation may enhance this goal,<sup>77</sup> it is not required to satisfy a defendant's Sixth Amendment guarantees.<sup>78</sup> The Court has been especially willing to restrict the rights of a defendant where the crime involves a sexually abused child.<sup>79</sup> The Supreme Court, however, has required that a defendant be afforded the opportunity for full and effective cross-examination.<sup>80</sup>

integrity of fact-finding process); *Kentucky v. Stincer*, 482 U.S. 730, 747 (1987) (defendant's rights were not violated by his exclusion from competency hearing when he was given opportunity for full and effective cross-examination); *Pennsylvania v. Ritchie*, 480 U.S. 39, 54 (1987) (denying defendant state files did not violate defendant's constitutional rights when cross-examination was guaranteed); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (primary right secured by Confrontation Clause is cross-examination of witness); *United States v. Begay*, 937 F.2d 515, 520 (10th Cir. 1991) (noting Supreme Court has emphasized importance of cross-examination as element of Confrontation Clause); see also JOHN H. WIGMORE, *WIGMORE ON EVIDENCE* § 1367 (3d ed. 1940) (cross-examination is "greatest legal engine" ever invented for discovery of truth). *But see* Wildenthal, *supra* note 62, at 1337 (courts unjustifiably expanded right to cross-examine to be exclusive right guaranteed by Confrontation Clause).

<sup>76</sup> See *Craig*, 497 U.S. at 845 (central concern of Confrontation Clause is to ensure reliability of evidence); *Stincer*, 482 U.S. at 736 (idea of confrontation is to promote reliability of fact-finding process); *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985) (*per curiam*) (cross-examination protected by Confrontation Clause is designed to promote truth in criminal proceeding). See generally *Stincer*, 482 U.S. at 749 (Marshall, J., dissenting) (Confrontation Clause is broader than merely allowing cross-examination).

<sup>77</sup> See *Coy*, 487 U.S. at 1020. "The face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.* Although often thought of as contradictory, hearsay and the Confrontation Clause are both designed to obtain the truth from the court proceeding. See, e.g., *White v. Illinois*, 112 S. Ct. 736, 741 (1992) (Court balances Confrontation Clause and admission of hearsay and steers middle course recognizing they protect similar values); *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (Confrontation Clause and hearsay rules "stem from the same roots"); *California v. Green*, 399 U.S. 149, 155 (1970) (hearsay rules, like Confrontation Clause are generally designed to protect comparable values).

<sup>78</sup> See *supra* note 19 and accompanying text (stating that defendant's face-to-face confrontation is not absolute under Confrontation Clause).

<sup>79</sup> See, e.g., *Stincer*, 482 U.S. at 747 (defendant denied access to competency hearing in case involving sexually abused children); *Pennsylvania v. Ritchie*, 480 U.S. 39, 61 (1987) (defendant in child sex abuse case denied access to statements made by witness to government agency); *United States v. Central Dist. of Cal.*, 858 F.2d 534, 543 (9th Cir. 1988) (court narrowly interpreted statute and penalized defendants for using minors in sexually explicit materials). *But see* *Idaho v. Wright*, 497 U.S. 805, 827 (1990) (hearsay was inadmissible because it was so unreliable and therefore violated defendant's Sixth Amendment right to confront witnesses).

<sup>80</sup> See *Green*, 399 U.S. at 158. The Court held "[t]here is good reason to conclude that the Confrontation Clause is not violated . . . as long as [the witness is] subject to full and effective cross-examination." *Id.*



For example, in *Kentucky v. Stincer*,<sup>81</sup> the defendant was prohibited from attending the competency hearing of the state's intended witnesses.<sup>82</sup> The Court held that since the rights contained in the Confrontation Clause were not absolute, the defendant's rights were not violated by his exclusion from the hearing.<sup>83</sup> The Court explained the defendant would have the opportunity for full and effective cross-examination at trial.<sup>84</sup>

In *Pennsylvania v. Ritchie*,<sup>85</sup> the defendant was denied discovery of files<sup>86</sup> maintained by the Children's Youth Services of Pennsylvania which contained the abused child's accusations.<sup>87</sup> The Supreme Court held that the Confrontation Clause was not violated when the defendant was denied these records since he was afforded the opportunity for full cross-examination of the victim during trial.<sup>88</sup> One factor that affected the decision was the state's

<sup>81</sup> 482 U.S. 730 (1987).

<sup>82</sup> *Id.* at 732. The state planned on calling two of the three victims as witnesses. *Id.* A competency hearing was conducted outside the presence of the defendant, and the judge determined the children were competent to testify. *Id.* at 733.

<sup>83</sup> *Id.* at 745. Following the Kentucky Supreme Court ruling which barred the defendant from the competency hearing, the Supreme Court held that he did not have an absolute right to be present at every phase of the trial. *Id.* "[T]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Id.* at 739 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (*per curiam*)). *But see Stincer*, 482 U.S. at 753 (Marshall, J., dissenting). If the defendant represented himself he would have been allowed attendance. *Id.* The majority's decision forced him to choose between hiring counsel and being presented at this critical stage of trial. *Id.* "Having the defendant present ensures that these inaccuracies are called to the judge's attention immediately—before the witness takes the stand with the trial court's *imprimatur* of competency. . . ." *Id.* at 750.

<sup>84</sup> *See Stincer*, 482 U.S. at 743. Even though the respondent had not been present at the competency hearing, at trial he had the opportunity to assist counsel fully in cross-examining the two witnesses. *Id.*

<sup>85</sup> 480 U.S. 39 (1987).

<sup>86</sup> *Ritchie*, 480 U.S. at 43. During pre-trial discovery, the defendant subpoenaed files from Children Youth Services. *Id.* The defendant sought files concerning the victim's statements as well as files of a previous investigation, to better explore weaknesses in his accuser's story, but was denied access. *Id.* at 51.

<sup>87</sup> *Id.* at 43. The state of Pennsylvania created the Children Youth Services to help tackle the problem of child sexual abuse. *Id.* The Service maintained current files on alleged abusers, which included accusations against the defendant dating back to 1978. *Id.*

<sup>88</sup> *Id.* at 54. The Court held that the defendant's interests were protected by in camera review, and any material necessary for his defense could be provided as the trial progressed. *Id.* at 60. The Court also imposed an affirmative duty on the judge to continue to release new material as it became relevant. *Id.* *See generally* *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991) (defendant denied access to videotape after district court decided that tape would not help defense in child abuse case); *Hopkinson v. Shillinger*, 866 F.2d 1185, 1221 (10th Cir. 1989) (in camera inspection by district court protects state's interest of maintaining secrecy while ensuring defendant is provided with any information needed for his defense).

compelling interest in keeping the files concerning sex abuse confidential<sup>89</sup> and to protect child victims from the trauma and embarrassment associated with testifying.<sup>90</sup> This factor was apparent in both *Stincer* and *Ritchie* when the Court limited the information available to the defendant to protect the child victim.<sup>91</sup> However, both decisions stated that even when information is limited, the defendant's rights are preserved through full cross-examination.<sup>92</sup>

The use of closed circuit television, limitations on discovery, and expansion of hearsay exceptions are essential where a child is unwilling or unable to testify in the courtroom setting. However, other methods should be implemented to assist the child witness. Allowing the child to testify in the comfort of his or her home, via videotaped testimony, or in a specially created "play room" established in the courthouse would diminish the trauma of testifying. In all these settings the defendant's counsel and presiding judge would be present during cross-examination. By adopting these procedures, it is suggested that the court would be furthering the state's interest in protecting the well-being of child victims while aiding in the prosecution of sexual abusers.

## II. EXPANDING THE STATUTE OF LIMITATIONS FOR CRIMINAL PROSECUTION OF CHILD SEX ABUSERS

### A. *The Need for Tolling Provisions in the Statute of Limitation for Sex Abuse*

Over thirty years ago, James R. Porter allegedly molested ninety-six children while serving as a Roman Catholic priest in North Attleboro, Massachusetts.<sup>93</sup> The case was first brought to

<sup>89</sup> *Ritchie*, 480 U.S. at 60. The state has a compelling interest in both assuring that the names of those who report abuse will be kept confidential and encouraging them to come forward. *Id.* at 60-61; see *supra* note 21 (showing state's interest in preventing child abuse).

<sup>90</sup> See *Maryland v. Craig*, 497 U.S. 836, 852 (1990) (state's interest in protecting well-being of children is compelling).

<sup>91</sup> See *Stincer*, 482 U.S. at 739; *Ritchie*, 480 U.S. at 53 (right to cross-examine does not include power to require pre-trial disclosure of any and all information); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (right to cross-examine is not absolute).

<sup>92</sup> *Stincer*, 482 U.S. at 747 (defendant's rights were not violated by his exclusion from competency hearing when he was given opportunity for full and effective cross-examination); *Ritchie*, 480 U.S. at 54 (denying defendant state files did not violate defendant's constitutional rights where cross-examination was guaranteed).

<sup>93</sup> Fox Butterfield, *Ex-Priest Accused of Sex Abuse is Extradited*, N.Y. TIMES, Sept. 23, 1992, at A25 (while serving at St. Mary's Church from 1960 to 1967, Mr. Porter allegedly raped

public attention when a forty year old man accused Mr. Porter of raping him as a child.<sup>94</sup> While the District Attorney intends to prosecute Mr. Porter for thirty-two of these crimes, the state will be faced with the defense that the six-year statute of limitations has expired,<sup>95</sup> precluding Mr. Porter's prosecution.<sup>96</sup> As this extreme situation illustrates, the severe trauma associated with child sex abuse necessitates legislative reform in order to allow abusers to be prosecuted at any time.<sup>97</sup>

The successful prosecution of the sex abuser is typically undermined because the child is afraid to report the abuse<sup>98</sup> or denies that the abuse has occurred.<sup>99</sup> The child often refuses to reveal the identity of the abuser because he or she feels guilty, embarrassed, or afraid.<sup>100</sup> The trauma causes the child to become introverted and often results in the child denying that he or she was sexually abused.<sup>101</sup> Without a tolling provision, the statute of limi-

or fondled ninety-six children).

<sup>94</sup> *Id.* After Mr. Frank Fitzpatrick accused Mr. Porter of sexually abusing him, ninety-five other men and women filed similar complaints with the District Attorney of Bristol County. *Id.*

<sup>95</sup> *Id.* Although Mr. Porter admitted to sexually abusing children, because the crimes occurred so long ago the Bristol County District Attorney has acknowledged that it will be difficult to successfully prosecute Mr. Porter on many of the charges because corroborating evidence, such as a statement a victim made as a child, does not exist. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See Lamm, *supra* note 8, at 2193 n.3 (child victim usually will not reveal the abuse until he or she is adult at which time statute of limitations has expired); *Legislative Innovations*, *supra* note 8, at 806 n.7 (two out of three cases of sexual abuse go unreported). The child will often keep the abuse a secret for a variety of reasons including fear, shame, and embarrassment. See Allen, *supra* note 8, at 614-15 (abused child will not report abuse because fears family will have to split up or that he or she will be sent away).

<sup>98</sup> See *supra* note 8 (discussing how abuser uses his or her authority to threaten child into submission).

<sup>99</sup> See Harshaw, *supra* note 4, at 756 (child often represses memory of abuse); Lamm, *supra* note 8, at 2194 n.37 (abused child will deny that he or she has been sexually abused).

<sup>100</sup> See *supra* note 8 and accompanying text (child will remain silent because of fear, threats, or embarrassment). The most usual way the abuser keeps the child silent is through threats and coercion. See Lamm, *supra* note 8, at 2193. The child is threatened with the prospect that the family will be broken up or that the abuser will be sent to jail if the child tells anyone. *Id.*; see also *State v. Canton*, No. L-90-256, 1991 WL 163497, at \*1 (Ohio App. Aug. 23, 1991) (stepfather threatened harm to child and mother if sexual activity reported to anyone); Jessica E. Mindlin, Comment, *Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform*, 65 WASH. L. REV. 189, 190 n.10 (1990) (father told daughter how he would be treated in prison if she told anyone of sexual abuse).

<sup>101</sup> See Petersen v. Bruen, 792 P.2d 18, 22 n.4 (Nev. 1990) (victim suffering from Post-Traumatic Stress Disorder ("PTSD") may suffer nightmares and flashbacks, along with decreased concentration and lack of interest in activities); see also Harshaw, *supra* note 4, at 756. A child who represses all knowledge of sexual abuse suffers from PTSD. *Id.* A child suffering from PTSD may exhibit the symptoms of secrecy, helplessness, delayed or conflicting disclosure, retraction and various phobias. *Id.*

tations often expires prior to a complaint being filed.<sup>102</sup> Since the unyielding nature of the statute of limitations frequently prevents abusers from being prosecuted, a majority of state legislatures have mandated that the statute of limitations be tolled so that sex offenders do not escape prosecution.<sup>103</sup>

### B. *Revising the Statute of Limitations*

A statute of limitations is a procedural tool used to avoid stale claims, by compelling the assertion of a cause of action within a specified period after it has accrued.<sup>104</sup> In the majority of cases, a cause of action accrues when the injured party knows or has reason to know of his or her injury.<sup>105</sup> Since no federal statute of limitations exists, the length of any statute of limitations is solely determined by the law of the respective states.<sup>106</sup>

<sup>102</sup> See Mindlin, *supra* note 100, at 190-91. Once the statute of limitations expires, the prosecution of the abuser is barred. *Id.* A strict application of the statute of limitations in civil actions has been advocated by some courts. *Id.*; see also Lindabury v. Lindabury, 552 So. 2d 1117, 1118 (Fla. Dist. Ct. App. 1989) (complaint held to be time-barred even though memory was repressed until plaintiff entered therapy); Tyson v. Tyson, 727 P.2d 226, 228-29 (Wash. 1986) (court rejected delayed discovery citing burden placed on court).

<sup>103</sup> See *infra* notes 139-41 (discussing legislative approaches to tolling statute of limitations).

<sup>104</sup> See Note, *Developments in the Law: Statutes of Limitation*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter *Developments in the Law*] (primary consideration underlying statutes of limitation is fairness to defendant); see also Board of Regents of Univ. of State of New York v. Tomanio, 446 U.S. 478, 487 (1980) (statutes of limitation considered not only procedural tools but fundamental to "well-ordered judicial system"); Kavanagh v. Noble, 332 U.S. 535, 539 (1948) (traditional procedural aspects of statutes of limitation strictly adhered to). But see Burnett v. New York Cent. R.R. Co., 380 U.S. 424, 428 (1964). The Supreme Court held that where the interests of justice necessitated an adjudication of plaintiff's claim, the expiration of the applicable statute of limitations would not be a defense. *Id.* The Burnett Court recognized the protection that a statute of limitations afforded the defendant, but explained that a federal statute of limitations could be tolled as long as the plaintiff had not "slept on his rights." *Id.* at 429.

<sup>105</sup> See Urie v. Thompson, 337 U.S. 163, 170 (1949) (cause of action accrued when locomotive fireman became aware of accumulated effects of deleterious substance). The discovery rule set forth in *Urie* has been applied to product liability, employment, and personal injury actions. See, e.g., Albert v. Maine Cent. R.R. Co., 905 F.2d 541, 543 (1st Cir. 1990) (statute of limitations for action concerning employee's hearing loss accrued from moment he knew cause of injury); Raymond v. Eli Lilly & Co., 412 F. Supp. 1392, 1400 (D.N.H. 1976) (statute of limitations tolled until plaintiff actually became blind from consistent use of birth control pill), *aff'd*, 556 F.2d 628 (1st Cir. 1977).

<sup>106</sup> See United States v. Kubrick, 444 U.S. 111, 117 (1979). The application of any statute of limitations depends upon what the legislature deemed a reasonable time for a plaintiff to commence an action, while still protecting courts and defendants from stale claims. *Id.*; Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (statutes of limitation are result of legislative determination); see also Liebig v. Liebig, 257 Cal. Rptr. 574, 575 (Cal. Ct. App. 1989). The Liebig court held that the legislature has the power to expressly revive time-barred civil common law causes of action. *Id.* at 578; Burroughs, *supra* note 5,

## 1. Judicial Responses to Tolling

Prior to judicially-created tolling doctrines and legislative enactments, the expiration of a statute of limitations was an impermeable barrier to bringing any cause of action.<sup>107</sup> Finding such a strict application of the statute of limitations to be unjust, courts sought ways to circumvent this barrier in particular instances.<sup>108</sup> One method, based in tort law, provided the statute of limitations to be tolled to afford an injured party the opportunity to obtain proper compensation for his or her injuries.<sup>109</sup> This approach has been used to allow a party to litigate a personal injury claim against his or her abuser based upon sexual abuse which occurred when the plaintiff was a minor.<sup>110</sup> The courts adopted this approach to afford the aggrieved party a remedy when prosecution of the alleged abuser was time-barred.<sup>111</sup> While this doctrine holds the

at 1014-15. The use of legislative means to extend the statutory period for commencing an action in civil case is not an abuse of discretion because "statutes of limitations are measures of legislative grace, subject to legislative control." *Id.* at 1015; Durga M. Bharam, *Statute of Limitations for Child Sexual Abuse Offenses: A Time for Reform Utilizing the Discovery Rule*, 80 J. CRIM. L. & CRIMINOLOGY 842, 845 (1989). "State legislatures have created a wide range of statutory limitation periods. Nationally, there is no consensus of an ideal limitation period or applicable exceptions. State statutes of limitation range in the number of years, the time at which the limitation period commences, and exceptions which toll the limitation period." *Id.*

<sup>107</sup> See *infra* note 151 (citing Supreme Court decisions respecting strict application of statutes of limitation).

<sup>108</sup> See *infra* note 109 (discussing application of tolling provisions as means of affording injured parties compensation for stale tort claims).

<sup>109</sup> See, e.g., *Wilson v. Johns-Mansville Sales Corp.*, 684 F.2d 111, 120 (D.C. Cir. 1982) (cancer did not manifest itself at same time asbestos discovered; therefore widow's wrongful death action was not time-barred); *VaSalle v. Celotex Corp.*, 515 N.E.2d 684, 687 (Ill. Ct. App. 1987) (discovery rule applied where plaintiff, who was aware he had lung cancer, did not discover it was caused by asbestos poisoning until later); *Pierce v. Johns-Mansville Sales Corp.*, 464 A.2d 1020, 1027 (Md. Ct. App. 1983) (statute of limitations tolled because cause of decedent's cancer was not discovered until after his death); *Romano v. Westinghouse*, 336 A.2d 555, 560 (R.I. 1975) (plaintiff unaware of malfunction which caused television to explode and house to be set afire until event actually occurred).

<sup>110</sup> See *Johnson v. Johnson*, 701 F. Supp. 1363, 1370 (N.D. Ill. 1988) (cause of action allowed because plaintiff suppressed memory of abuse until undergoing therapy); *Hammer v. Hammer*, 418 N.W.2d 23, 26 (Wis. Ct. App. 1987). In *Hammer*, the plaintiff was allowed to sue her father under tort theory because she discovered that her father had sexually abused her only after undergoing therapy. *Id.* The court explained that the daughter's lack of mental stability kept her from acquiring the information necessary to determine the nature of her injuries. *Id.*; see also *Osland v. Osland*, 442 N.W.2d 907, 908-09 (N.D. 1989) (statute of limitations tolled because plaintiff suffered from severe emotional trauma which resulted in her being unable to fully understand or discover her injuries within applicable statute of limitations period).

<sup>111</sup> See *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 338 (1978) (Burger, C.J., concurring). The authority of the federal court to toll the statute of limitations on equitable grounds is well established. *Id.* While the general rule is that even potential de-

abuser responsible for past illegal conduct in civil actions, courts and legislatures have begun to apply the same rationale to criminal cases.<sup>112</sup>

Prior to legislative codification of tolling provisions, the continuing crime doctrine under Minnesota law,<sup>113</sup> the concealment doctrine under Kansas law,<sup>114</sup> and the secret manner approach under Nevada law<sup>115</sup> were judicial attempts to adopt the civil tolling provisions to criminal sex abuse cases. For example, the continuing crime doctrine recognizes that the abuser is often a family member who uses his or her position of power to prevent the child from reporting the abuse.<sup>116</sup> If the abuser is a family member or

defendants should be protected from prosecution against claims in which facts may be obscured by the passage of time, there are instances where the interests of justice will supersede defendant's right to be free from stale claims. *Id.* (citing *United States v. Kubrick*, 444 U.S. 111, 117 (1979)); *see also* *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1964) (policy of repose frequently outweighed where interests of justice require vindication of plaintiff's rights); Camille W. Cook & Pamela Kirkwood-Millsaps, Note, *Redressing Wrongs of the Blamelessly Ignorant Survivor of Incest*, 26 U. RICH. L. REV. 1, 2 (1991) (unique nature of incest survivor's injuries is exception to statute of limitations rule).

<sup>112</sup> *See infra* notes 113-15 (discussing concealment, secret manner, and continuous crime doctrine as three approaches which allow courts to toll statute of limitations). While courts initially took the initiative, most legislatures have amended their statutes of limitation to provide for delayed discovery. *See* *Bharam*, *supra* note 106, at 843; *see also infra* notes 139-42 (discussing state legislatures applying tolling provisions).

<sup>113</sup> *See* *State v. Danielski*, 348 N.W.2d 352, 355-56 (Minn. Ct. App. 1984). In *Danielski*, the parents' control over the child, which prevented outside intervention for eight years, constituted continuing crime. *Id.* "Where the same parental authority that is used to accomplish criminal sexual acts against a child is used to prevent the reporting of the act, the statute of limitations does not begin to run until the child is no longer subject to that authority." *Id.* at 357; *see also* *Mindlin*, *supra* note 100, at 198 (parental authority used to commit crime also used to prevent victim from reporting abuse). *But see* *State v. French*, 392 N.W.2d 596, 599 (Minn. Ct. App. 1986) (statute of limitations not tolled where defendant did not control day-to-day movements or communications of victim).

<sup>114</sup> *See* *State v. Bentley*, 721 P.2d 227, 230 (Kan. 1986). "To constitute concealment, it must appear the accused's statements or conduct were calculated and designed to prevent discovery of the crime with which he or she is charged." *Id.* at 229; *see also* *State v. Palmer*, 810 P.2d 734, 737 (Kan. 1991) (statute of limitations suspended for concealment of fact of crime if defendant committed positive acts calculated to prevent discovery); *cf.* *Morris v. State*, 595 So. 2d 840, 844 (Miss. 1991) (parental authority over child, including threats to whip and abuse her if she told anyone, constituted concealment); *State v. Tidwell*, 775 S.W.2d 379, 389 (Tenn. Crim. App. 1989) (although defendant told children not to tell anyone, children had ample opportunity to tell someone they were sexually abused and therefore did not constitute concealment).

<sup>115</sup> *See, e.g.*, *Walstrom v. State*, 752 P.2d 225, 227 (Nev. 1988). A crime is committed in a secret manner if "it is committed in a deliberately surreptitious manner that is intended to and does keep all but those committing the crime unaware that an offense has been committed." *Id.* at 228.

<sup>116</sup> *See* *Danielski*, 348 N.W.2d at 356 (parents' success in maintaining coercive control over victim did not bar state's prosecution); *see also* *People v. Higgins*, 11 Cal. Rptr. 2d 694, 699 (Cal. Ct. App. 1992) (victim of sexual abuse unwilling to report abuse to authorities due to fear of physical retaliation); *Commonwealth v. Haber*, 505 A.2d 273, 282 (Pa.

other individual who continuously exercises power and control over the child,<sup>117</sup> the courts have held that such control constitutes a continuing crime.<sup>118</sup> Minnesota courts will therefore toll the statute of limitations until the child is released from the abuser's control.<sup>119</sup>

Similar to the continuing crime doctrine, the concealment doctrine requires the abuser to exercise control over the victim in order to invoke the statute of limitations toll.<sup>120</sup> Kansas courts define "control" as the situation when the abuser's statements or conduct are calculated and designed to prevent another person from acquiring knowledge of the sexual abuse.<sup>121</sup>

In Nevada, the courts have held that the secrecy doctrine will be applied to toll the statute of limitations until discovery of the offense if the abuser physically threatened the child into silence.<sup>122</sup> While a crime against a person is not secret since the victim is aware of the crime,<sup>123</sup> the Nevada courts have explained that a child, unlike an adult, generally cannot perceive the extent of his or her injuries and therefore should not be held to the same re-

Super. Ct. 1986) (fear is relevant factor when court is ascertaining why child delayed reporting abuse).

<sup>117</sup> *Danielski*, 348 N.W.2d at 352. Due to the stepfather's position of authority which he exercised over the victim, the court determined that the crime continued even after he raped her. *Id.* at 356.

<sup>118</sup> *Id.* at 357 (defendant's acts in maintaining coercive control prevented victim from reporting conduct and made offense continuing crime).

<sup>119</sup> *Id.* at 356-57. The *Danielski* court explained that the statute of limitations could be tolled because it will not be strictly applied when defendant's actions are the *direct* cause of the delay in prosecution. *Id.* (emphasis added).

<sup>120</sup> See *State v. Bentley*, 721 P.2d 227, 230 (Kan. 1986). The court reasoned that the defendant did not have the necessary control over the child to establish concealment. *Id.* Although the uncle threatened his niece, the victim saw him infrequently and therefore could not rely on concealment to toll the statute of limitations. *Id.*; see also *State v. French*, 392 N.W.2d 596, 598 (Minn. Ct. App. 1986) (no control over day-to-day activities); *State v. Tidwell*, 775 S.W.2d 379, 389 (Tenn. Crim. App. 1989) (concealment negated when child told friends).

<sup>121</sup> *Bentley*, 721 P.2d at 229. The court also noted that "[c]rimes against persons, by their very nature, cannot be concealed." *Id.* at 230.

<sup>122</sup> *Walstrom v. State*, 752 P.2d 225, 227 (Nev. 1988). The court noted that when a crime is committed in a secret manner, the defendant has acted in a calculated and intended manner to keep others from discovering what he has done. *Id.* at 228; see also NEV. REV. STAT. ANN. § 171.095 (Michie 1991) (secret manner exception tolls statute of limitations).

<sup>123</sup> See *Walstrom*, 752 P.2d at 228. The traditional view is that crimes against individuals cannot be secret because "the victim is aware of the crime and has a responsibility to report it." *Id.*; see also *Bentley*, 721 P.2d at 230. The *Bentley* court refused to toll the statute of limitations under the secrecy doctrine because while "[o]ther people may not know a crime has occurred, [the] victim necessarily knows that a crime has been committed" and has the ability to report. *Id.*

porting time period.<sup>124</sup> While most courts were establishing judicial exceptions to the statute of limitations, a few courts were unwilling to apply a tolling provision.<sup>125</sup> For example, in *Tyson v. Tyson*,<sup>126</sup> the Washington Supreme Court held that a tolling provision was applicable only if the objective nature of the evidence presented facts which supported a legitimate cause of action.<sup>127</sup> To determine whether a legitimate claim existed and the statute of limitations tolled, the judge would have to examine the evidence that supported the cause of action and determine whether it was reliable.<sup>128</sup> The *Tyson* court explained that the alleged abuser should not have to defend against a claim based solely on alleged recollection of events which were repressed from the plaintiff's consciousness, and for which no means of independent verification existed.<sup>129</sup>

New York courts have been less responsive to requests for a tolling provision in criminal cases, and have remarked that it is the responsibility of the legislature to address the issue.<sup>130</sup> While

<sup>124</sup> *Walstrom*, 752 P.2d at 229. Due to the "inherent vulnerab[ility] of the child," the court reasoned that a more flexible approach to the statute of limitations was necessary. *Id.* at 228. The Nevada Supreme Court further stated that it was not willing to assign to a child the adult responsibility of immediately reporting the crime. *Id.* at 228-29. Addressing the Kansas Supreme Court's holding in *Bentley*, the *Walstrom* court emphasized the difficulty for a child in reporting the crime, and noted that his or her limited emotional, intellectual, psychological, and physical development should be taken into consideration when determining whether to toll the statute of limitations. *Id.* at 228.

<sup>125</sup> See *Lindabury v. Lindabury*, 552 So. 2d 1117, 1117-18 (Fla. Dist. Ct. App. 1989) (victim's repressed memory was no reason to toll statute of limitations); *Sears v. State*, 356 S.E.2d 72, 74-75 (Ga. Ct. App. 1987) (statute of limitations not tolled when victim had knowledge of offense); *Bentley*, 721 P.2d at 230 (holding it is province of legislature, not court, to make exception to statute of limitations); *Bassile v. Covenant House*, 192 Misc. 2d 88, 92, 575 N.Y.S.2d 233, 236 (Sup. Ct. New York Cty. 1991) (failure to perceive injury will not toll statute of limitations).

<sup>126</sup> 727 P.2d 226 (Wash. 1986), *superseded by statute as stated in* *North Coast Air Services, Ltd. v. Grumman Corp.*, 759 P.2d 405, 409 (Wash. 1988) (*Tyson* overruled by enactment of WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1993) (commencement of an action tolled for a child until child reaches age of eighteen)).

<sup>127</sup> *Id.* at 229. The *Tyson* court determined that the plaintiff lacked objective evidence because her testimony was of events which occurred over seventeen years ago. *Id.* The court feared that tolling would effectively eliminate the statute of limitations and increase the likelihood of spurious claims. *Id.*

<sup>128</sup> *Id.* To toll the statute of limitations, the *Tyson* court explained that the objective nature of the evidence would have to make it substantially certain that facts could be fairly determined. *Id.* The court refused to rely on the testimony of the treating physician or psychiatrist to support the plaintiff's claim that she had only recently discovered she had been abused, because of the subjective nature of their methods of investigation. *Id.*

<sup>129</sup> *Id.* at 229-30 ("potential for spurious claims would be great and the probability of the court's determining the truth would be unreasonably low").

<sup>130</sup> See, e.g., *Anonymous v. Anonymous*, 154 Misc. 2d 46, 58, 584 N.Y.S.2d 713, 724



the New York courts generally agree that a tolling provision should be applied to child sexual abuse cases,<sup>131</sup> they are unwilling to initiate a tolling doctrine on their own.<sup>132</sup> Instead, they emphasize that any exception to the statute of limitations must be enacted through the state legislature.<sup>133</sup> However, while three pieces of legislation have been drafted, two bills were never addressed by the rules committee,<sup>134</sup> and a third was approved by the Senate, but vetoed by the Assembly.<sup>135</sup> The Assembly refused to approve this bill because it would only benefit the victim who discovered the abuse between the ages of eighteen to twenty-four, and not the majority of victims, who do not discover the facts of their abuse until after age twenty-five.<sup>136</sup>

Governor Mario Cuomo recently proposed a bill which would give a child until his or her twenty-third birthday to file a complaint.<sup>137</sup> The problem with this proposal is it merely tolls the statute of limitations until a victim is eighteen years old, and does not address the problem the Assembly had with the previous Senate proposal. Instead, legislation which tolls the statute of limitations

(Sup. Ct. Suffolk Cty. 1992) (court noted that it was "appropriate at this time for the legislature to consider whether such a compelling need exists with respect to the victim of childhood sexual abuse"); *Bassile v. Covenant House*, 152 Misc. 2d 88, 92, 575 N.Y.S.2d 233, 236 (Sup. Ct. New York Cty. 1991) (departures from any statute of limitations are subject for resolution by legislature).

<sup>131</sup> See *Anonymous*, 154 Misc. 2d at 58, 584 N.Y.S.2d at 724 (suggesting legislature should establish tolling provisions for crimes involving sexual abuse of children).

<sup>132</sup> See *Bassile*, 152 Misc. 2d at 92, 575 N.Y.S.2d at 236 (suggesting legislature is appropriate venue for resolution of tolling issue).

<sup>133</sup> *Id.* The *Bassile* court explained that the legislature "has in fact decreed otherwise in particular instances in which a compelling need has been felt [for example, toxic tort cases]" and stated that until legislation is passed to provide for tolling, the basic approach will be to strictly apply the statute of limitations. *Id.*

<sup>134</sup> See S. Res. 4954, 214th Leg., 1991 N.Y. Reg. Sess. (extend "statute of limitations in criminal matters to five years after twenty-first birthday or discovery, whichever comes first"); S. Res. 5461, 214th Leg., 1991 N.Y. Reg. Sess. (extend "statute of limitations in civil matters to three years after eighteenth birthday or discovery, whichever comes first").

<sup>135</sup> See S. Res. 8881-A, 215th Leg., 1992 N.Y. Reg. Sess. ("extend statute of limitations for criminal and civil action to within five and three years of discovery of the crime or the twenty-first or eighteenth birthday, whichever comes first, respectively").

<sup>136</sup> See Letter from Victoria Mayo, Legislative Assistant to New York State Senator David A. Paterson, to James M. Steinberg, Staff Member, *St. John's Journal of Legal Commentary* (Oct. 21, 1992) (on file with *St. John's Journal of Legal Commentary*). This piece of legislation was unacceptable to the New York State Assembly because it would not aid the group of victims who so desperately need access to the courts. *Id.* The Assembly has placed priority on the passage of this legislation and expects negotiations to intensify during the 1993 session. *Id.*

<sup>137</sup> Nicholas Goldberg, *New Sex-Abuse Law is Proposed*, NEWSDAY, Mar. 24, 1993, at 35 ([victims] "would have until they turn twenty-three years old to notify authorities of an incident").

until a victim is twenty-three years old should be enacted. Such a tolling provision would give a victim an adequate amount of time to "discover" his or her injury and therefore file a claim.

## 2. Legislative Approach to Tolling

Beyond judicial doctrines, most state legislatures have addressed the necessity of providing a tolling provision to the statute of limitations.<sup>138</sup> While a number of states do not apply a statute of limitations at all if a sexual crime is committed against a child,<sup>139</sup> the majority of states have enacted legislation which tolls the statute of limitations<sup>140</sup> until the child reaches majority<sup>141</sup> or a responsible adult or state agency is informed of the abuse.<sup>142</sup>

The majority approach allows for tolling in cases where the victim represses all memories of the sexual abuse or is afraid to report the abuse.<sup>143</sup> Legislatures have recognized that the emotional

<sup>138</sup> See Burroughs, *supra* note 5, at 989. Numerous state legislatures have enacted legislation expanding the criminal statute of limitations for child sex abuse offenses in an effort to facilitate criminal prosecution. *Id.* The Attorney General's office has also recognized the need for an extension of such statutes of limitation. *Id.*; see also Kristin Rodgers, Note, *Childhood Sexual Abuse: Perceptions on Tolling the Statute of Limitations*, 8 J. CONTEMP. HEALTH L. & POL'Y 309, 316 (1992) (legislators realize that relationship between authoritarian adult offender and helpless child make reporting abuse unlikely).

<sup>139</sup> See, e.g., ALA. CRIM. CODE § 15-3-5(a)(4) (Supp. 1992) (no statute of limitations for sex offense involving children under sixteen years of age); MD. CTS. & JUD. PROC. CODE ANN. § 5-106 (1991) (no statute of limitations for felonies, which include sexual abuse of children); VA. CODE ANN. § 19.2-8 (Michie 1992) (no statute of limitations for felonies, which include sexual abuse of children); see also Bharam, *supra* note 106, at 845. Kentucky and Rhode Island do not apply a statute of limitations to felonies, including child sexual abuse. *Id.* The legislatures of North Carolina, South Carolina, West Virginia, and Wyoming have remained silent with regard to this issue, so it is implied that an action may be commenced at any time. *Id.*

<sup>140</sup> See, e.g., ARK. CODE ANN. § 5-1-109(h) (Michie 1992) (statute of limitations tolled until victim turns eighteen); COLO. REV. STAT. ANN. § 16-5-401(1)(b)(7) (West 1992) (if victim under fifteen years old, statute tolled for seven years); FLA. STAT. ANN. § 775.15(3)(b)(7) (West 1992) (statute of limitations tolled until victim is sixteen years old); LA. CODE CRIM. PROC. ANN. art. 573(4) (West Supp. 1992) (statute tolled until victim is seventeen years old).

<sup>141</sup> See, e.g., ARK. CODE ANN. § 5-1-109(h) (Michie 1987) (action must be brought within three years after victim reaches age of eighteen); ILL. ANN. STAT. ch. 38, para. 3-6(d) (Smith-Hurd 1989) (action may be commenced up until one year after victim attains age of eighteen); N.J. STAT. ANN. § 2C:1-6(b)(4) (West Supp. 1992) (permits commencement of prosecution until five years after victim turns eighteen).

<sup>142</sup> See, e.g., *State v. Hensley*, 571 N.E.2d 711, 715 (Ohio 1991) (statute of limitations tolled until responsible adult learns of the abuse and its criminal nature); see also FLA. STAT. ANN. § 775.15(3)(b)(7) (West 1992) (statute of limitations tolled until violation reported to law enforcement agency); MASS. GEN. L. ANN. ch. 277, § 63 (West 1972) (amended 1987) (statute of limitations tolled until victim is sixteen or abuse reported to law enforcement agency).

<sup>143</sup> See *supra* note 97 (children repress memories of sexual abuse to overcome mental

trauma suffered by children results in their inability to discover their "injury" within the applicable statute of limitations period.<sup>144</sup> Therefore, similar to the courts, legislatures have incorporated the tolling provision used in a personal injury claim based on sexual abuse into criminal statutes of limitation.<sup>145</sup>

A minority of states follow an approach which tolls the statute of limitations until a responsible adult<sup>146</sup> has knowledge that the child is the victim of sexual abuse.<sup>147</sup> For example, in *State v. Hensley*,<sup>148</sup> the Ohio Supreme Court acknowledged that barring a criminal prosecution based on the expiration of the statute of limitations must be balanced against the need to ensure that those who have committed sexual abuse do not escape criminal prosecution

anguish associated with abuse).

<sup>144</sup> See *Mary D. v. John D.*, 264 Cal. Rptr. 633, 639 (Cal. Ct. App. 1989) (delayed discovery applied if plaintiff can establish psychological repression due to tortious act); *Osland v. Osland*, 442 N.W.2d 907, 908 (N.D. 1989) (daughter allowed to maintain assault and battery against father due to severe emotional trauma); *Hammer v. Hammer*, 418 N.W.2d 23, 26-27 (Wis. Ct. App. 1987) (daughter maintained tort cause of action against father although statute of limitations expired).

<sup>146</sup> See *supra* note 138 and accompanying text (discussing legislative recognition of difficulty in getting children to report abuse); see also *Mary D.*, 264 Cal. Rptr. at 634 (psychological mechanisms of denial and repression caused victim to be unaware of her psychological injuries); *State v. Bentley*, 721 P.2d 227, 231 (Kan. 1986) (Herd, J., dissenting) (horrified victim does not "necessarily know" that the acts of a trusted adult constitute a crime punishable at law); Rebecca L. Thomas, Note, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 WAKE FOREST L. REV. 1245, 1254 n.69 (1991) (PTSD is clinically diagnosed disorder where memory of psychologically unacceptable experience is partially or completely repressed).

<sup>148</sup> See *infra* notes 147-49 (discussing legislation which requires responsible adult to report sexual abuse of minor). For an example of a statute that defines responsible adult, see, e.g., OHIO REV. CODE ANN. § 2151.421 (Baldwin 1990). According to the statute, a responsible adult includes:

[An] attorney, physician, dentist, podiatrist, practitioner of a limited branch of medicine or surgery as defined in § 4731.15 of the Revised Code, registered nurse, licensed practical nurse, visiting nurse, other health care professionals, licensed psychologist, licensed school psychologist, speech pathologist, or audiologist, coroner, administrator or employee of a child day-care center, or other public or private services agency, school teacher, school employee, social worker or person rendering spiritual treatment through prayer in accordance with the tenets of a well known religion.

*Id.*

<sup>147</sup> See *supra* note 142 (citing Ohio, Florida, and Massachusetts legislative provisions which toll statute of limitations until responsible adult has knowledge of abuse); see also *Planned Parenthood Affiliates of Cal. v. Van de Kamp*, 226 Cal. Rptr. 361, 363 (Cal. Ct. App. 1986) (California law imposes mandatory reporting requirement on individuals whose professions bring them into contact with children); *State v. Willette*, 421 N.W.2d 342, 345 (Minn. Ct. App. 1988) (person responsible for child's care must report sexual abuse under Child Abuse Reporting Act).

<sup>148</sup> 571 N.E.2d 711 (Ohio 1991).

due to a child's failure to report the abuse.<sup>149</sup>

Upon examination of the existing legislation, it seems the best way to protect children is to combine the majority and minority approaches to create one doctrine. States should amend or enact legislation to toll the statute of limitations until either the victim is twenty-three years old or a responsible adult has knowledge of the sexual abuse. Since the protection of the child is of paramount concern, such legislation would protect the child's interests by holding the abuser responsible beyond the statutory period. A careful analysis of such legislation reveals that it would not hinder an accused abuser's constitutional rights.

### C. *Balancing Child's and Defendant's Rights*

The traditional purpose of a statute of limitations has been to protect a defendant's reasonable expectation that he or she will not be brought into court long after the event,<sup>150</sup> and to encourage a potential plaintiff to timely file a claim before evidence becomes unreliable.<sup>151</sup> These policy considerations support what has been described as a procedural tool of the judicial system rather than a substantive right.<sup>152</sup> In other words, tolling provi-

<sup>149</sup> *State v. Hensley*, 571 N.E.2d 711, 714 (Ohio 1991). Revised Code § 2151.421 is an attempt to balance the defendant's interest in having an action timely commenced against him or her and the need to ensure that the abuser is prosecuted. *Id.* The guarantee of defendant's right of repose should be outweighed "in light of the scope of the incest problem." See DeRose, *supra* note 4, at 217-18 (no public benefit in shielding incest perpetrators from consequences of their actions); see also Harshaw, *supra* note 4, at 753 (legislature's role is to balance policy considerations to determine statute of limitations).

<sup>150</sup> See *Toussie v. United States*, 397 U.S. 112, 115-16 (1970) ("purpose of statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions"); *Developments in the Law, supra* note 104, at 1185 (primary consideration underlying statute of limitations is fairness to defendant).

<sup>151</sup> See *United States v. Kubrick*, 444 U.S. 111, 117 (1979). "The right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.* (citing *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)); see also *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) ("even if one has a just claim it is unjust to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them"); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (statutes of limitation "are pragmatic devices to spare the courts from litigation of stale claims"); Patrick J. Kelley, *The Discovery Rule for Personal Injury Statutes of Limitation: Reflections on the British Experience*, 24 WAYNE L. REV. 1641, 1643 (1978) (statute of limitations necessary to prevent injustice and fraudulent manipulation of judicial process).

<sup>152</sup> See *Chase Securities*, 325 U.S. at 314 (statutes of limitation have never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual); *F.D.I.C. v. Petersen*, 770 F.2d 141, 142 (10th Cir. 1985) (statute of limita-

sions are procedural devices which assist the substantive goal of adjudicating charges of child sexual abuse, while respecting the accused's substantive rights.<sup>153</sup>

While a defendant's reasonable expectations as to when he or she may be prosecuted should be recognized, a policy of repose should be outweighed by the interests of justice.<sup>154</sup> The policy concerning the protection of a defendant's reasonable expectations relies heavily upon principles of self-reformation and rehabilitation.<sup>155</sup> While this policy may be served in most cases, the reality of child sex abuse indicates that the abuser does not reform but continues to abuse children.<sup>156</sup> Therefore, since this traditional policy is not served, it is appropriate to use a tolling provision.

Lastly, proponents of a strict application of the statute of limitations believe defendants should be protected from having to defend against stale allegations which are supported by evidence which may no longer be reliable.<sup>157</sup> While this consideration is

tions generally considered procedural rather than substantive law); *see also Developments in the Law*, *supra* note 104, at 1180 (statutes of limitation do not create substantive rights).

<sup>153</sup> *See supra* note 111 (citing case law recognizing that statutes of limitation not substantive). For defendants who fear the loss of substantive rights, modern rules of evidence will suffice to exclude unreliable and prejudicial evidence. *See DeRose, supra* note 4, at 218-19. Such an approach therefore does not compromise the defendant's opportunity for a fair trial. *See Mindlin, supra* note 100, at 206 n.96.

<sup>154</sup> *See Burnett*, 380 U.S. at 428 (statute of limitations should be waived in interests of justice); *United States v. Meyer*, 808 F.2d 912, 921 (1st Cir. 1987) (interests of justice promote tolling where defendant aware government sought to punish him); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 108 (2d Cir. 1978) (tolling appropriate where defendant actively misled plaintiff respecting cause of action or plaintiff prevented from asserting rights).

<sup>155</sup> *See Harshaw, supra* note 4, at 753 n.11 (courts have recognized that policy behind statute of limitations includes "recognition of self-reformation by potential defendants"). In believing a potential defendant will reform, he must be allowed to carry on and make plans for the future without having to worry about the threat of a late claim. *See Kelley, supra* note 151, at 1644.

<sup>156</sup> *See Nora Underwood, The Abuse of Children, MACLEAN HUNTER LTD.*, Nov. 27, 1989, at 56. Even after treatment, pedophiles are more likely to repeat their offense because they suffer from a life-long sexual attraction to children which cannot be cured with drugs and therapy. *Id.*; *see also* Elsa L. Walsh, *Health Professionals Discuss Sexual Abuse*, WASH. POST, June 5, 1980, at 10 (places percentage of repeat offenders at thirty-five percent); Vivienne Walt, *State Lawmakers Eye Rape Bills*, NEWSDAY, May 5, 1991, at 43 ("national crime statistics show that about forty-two percent of sex criminals repeat their offenses").

<sup>157</sup> *See Chase Securities v. Donaldson*, 325 U.S. 304, 313 (1945) (statutes of limitation are practical and pragmatic devices to spare courts and citizens from litigating stale claims); *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038 (2d Cir. 1992) (function of statute of limitations is to bar claims asserted after "evidence has been lost, memories have faded, and witnesses have disappeared" (citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974))); *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir. 1990) (statute of

based on fairness to a defendant,<sup>158</sup> such a policy should be outweighed by the necessity of a procedural device which affords the victim additional time to report abuse. Since the prosecution of child abusers is hindered by the victim's inability to "discover" the crime within the statutory period,<sup>159</sup> the victim should not be penalized for what he or she has no control over. Further, the modern rules of evidence protect a defendant's rights.<sup>160</sup> Hearsay rules exclude evidence which may be unreliable or prejudicial.<sup>161</sup> Therefore, while charges may be filed, an alleged abuser's fate will depend on all the evidence presented and not solely the accusation.

### CONCLUSION

Despite the initiatives of courts and legislatures, barriers to the successful prosecution and conviction of child sex abusers remain. A flexible approach to the Confrontation Clause and expanded hearsay exceptions assist the child with the traumatic experience of testifying about the sex abuse in front of the defendant. However, these measures do not go far enough. Further legislation allowing videotaped testimony and a courthouse "play room" are necessary to calm the child's fear of testifying. In addition, uniform legislation which tolls the statute of limitations until the victim is twenty-three years old or until an adult is informed of the

limitations puts end to possibility of litigation after reasonable time); *Gould v. United States Dep't of Health & Human Services*, 905 F.2d 738, 741 (4th Cir. 1990) (right to be free from stale claims prevails over right to prosecute); *see also* *Tyson v. Tyson*, 727 P.2d 226, 229 (Wash. 1986) ("recollections of memories usually become unreliable in a matter or minutes, much less years").

<sup>158</sup> *See Developments in the Law, supra* note 104, at 1185 n.83 (defendant should not be "called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared'" (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944))).

<sup>159</sup> *See supra* note 8 (discussing a victim's penchant to "block out" all memory of sexual abuse).

<sup>160</sup> *See DeRose, supra* note 4, at 218. The strict date-of-injury accrual seems less compelling today. *Id.* An inflexible statute of limitations was necessary in the past because exclusionary rules were not developed. *Id.* (citing *Kelley, supra* note 151, at 1645-46). "The need for an inflexible statute of limitations to prevent injustices must have seemed greater than it does now when more narrowly tailored evidentiary rules eliminate unreliable evidence." *Id.*

<sup>161</sup> *See, e.g.,* FED. R. EVID. 801(c) (hearsay is statement, other than one made by declarant while testifying at trial or hearing, offered in evidence to prove truth of matter asserted); FED. R. EVID. 802 (hearsay not admissible except as provided by federal rules and as prescribed by Supreme Court).

abuse is necessary to protect all victims of child abuse. While these initiatives will assist in the prosecution of child sex abusers, they also ensure that the substantive rights of the alleged abusers are not compromised.

These proposals must be adopted by the few remaining states that have been slow to act. While New York, for example, has legislation which provides for closed-circuit televised testimony, the legislature has failed to address the compelling need for a tolling provision. However, New York is not alone. Even those states which have eased the burdens of testifying should incorporate the proposals outlined above to fulfill their commitment to assisting child victims. Only by taking these final steps can the law prevent child abusers from walking free, simply because the victim they preyed upon was a child.

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