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REFLECTIONS UPON LOUISIANA'S CHILD WITNESS VIDEOTAPING STATUTE: UTILITY AND CONSTITUTIONALITY IN THE WAKE OF *STINCER*¹

*Lucy S. McGough** and
*Mark L. Hornsby***

I. INTRODUCTION

Senate Bill 136, ultimately enacted as Louisiana Revised Statutes 15:440.1² encountered little resistance through its legislative rite of passage.³ As the committee minutes record its proponents' purpose:

[B]asically the bill provide[s] for a legal mechanism to protect juveniles who ha[ve] been physically or sexually abused from the trauma of proceedings of criminal prosecution and related proceedings. The bill provide[s] for a videotaping of the statement of the child and it also provide[s] for a mechanism of taking testimony of a child victim outside of the presence of a jury . . . in the best interest of the child.⁴

According to these minutes, it was also pointed out to the Senate Committee that under then current procedure "the child actually had to tell the story [of abuse by the defendant] many times, to grand juries and others, and if this material was taped, the child need not repeat the story."⁵

Like economic recovery legislation in the 1930's and "no-fault" divorce statutes in the 1970's, child victim protection laws have swept

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1. *Kentucky v. Stincer*, 55 U.S.L.W. 4901 (June 19, 1987).

2. 1984 La. Acts, No. 563, § 1.

3. Senate Bill No. 136 was reported out of the Senate Committee on the Judiciary to the legislature without dissenting vote. Minutes of the meeting of the Senate Committee on the Judiciary, Section C (May 15, 1984) (available at Legislative Research Library, Louisiana State Capitol).

4. The minutes attribute these sentiments to Pete Adams, Executive Director of the Louisiana District Attorneys Association. *Id.*

5. This statement is attributed by the minutes to John Mamoulides, District Attorney for Jefferson Parish. *Id.*

the country in the last three years, doubtlessly due to recent highly sensationalized child sex abuse prosecutions in Illinois, Minnesota, and California.⁶ As the assemblyman-sponsor of the California measure, similar to the Louisiana statute, noted in a press conference: "[Child sexual abuse] is the issue of 1985. . . It's the anguish, the volume of letters, the look in the eye. When an issue comes up like that, you add a row of stars next to it."⁷

Louisiana Revised Statutes 15:440.1 is one of a pair of statutes enacted in 1984⁸ as a product of this reform movement;⁹ this article, however, will focus only upon the new authorization for the pre-trial videotaping of a child witness's account. The expressed impetus for this statute, as the Louisiana legislative history indicates, is to minimize the number of times a child victim has to recount the details of his or her attack and to reduce what may be termed the "courtroom effect," the added trauma which can occur when a child is shuttled in and out of a series of public hearings. Such legislation actually can serve an equally important goal of enhancing the reliability of a child victim's testimony; however, this effect is less often mentioned in legislative debate or legal literature. Failure to insure the testimonial trustworthiness of child witnesses due to early bungling of the interviewing process may result in the abandonment of prosecutions.¹⁰

6. For a description of these prosecutions, some of which never surface in the appellate reports, see Moss, *Are the Children Lying?*, A.B.A. J. 58 (May 1987).

7. Girdner, *Out of the Mouths of Babes*, California Law. 57, 91 (June, 1985).

8. La. R.S. 15:283 (Supp. 1987). This statute permits a child to give simultaneous testimony at trial in a room apart from the trial courtroom which is displayed on television monitors. Unlike statutes enacted elsewhere, both defense counsel and the defendant may also be present in the room from which the child is testifying, but "[t]he court shall ensure that the child cannot see or hear the defendant unless such viewing or hearing is requested for purposes of identification." La. R.S. 15:283 (B) (Supp. 1987). For further discussion of this Louisiana statute, see Comment, *Television Trials and Fundamental Fairness: The Constitutionality of Louisiana's Child Shield Law*, 61 Tul. L. Rev. 141 (1986) [hereinafter *Tulane Comment*].

9. Other states enacted much more extensive child protection legislative packages. See, e.g., 1985 Fla. Laws Ch. 85-53, described in Hoffenberg & Skuthan, *Protecting Children in the Courts*, 59 Fla. B.J. 14-33 (Oct. 1985). As the variety of trauma-reducing measures has been popularly described:

In Massachusetts, judges bring in pint-size witness chairs so youngsters' feet won't dangle. In Maryland, children who have trouble speaking may draw what happened. In Minnesota, a child frozen with fear was permitted to testify from under the prosecutor's table. And from Manhattan Beach, Calif., to Brooklyn, N.Y., children in court use dolls to describe crimes whose names they don't know. "We have to quit pretending that kids have to testify like adults," says Kathleen Morris, a prosecutor in Minnesota. "If all they can do is show, that should be enough."

Children and the Courts, 103 Newsweek 32 (May 14, 1984).

10. For a summary of these aborted prosecutions, see Moss, *supra* note 6, at 58-59.

This article will evaluate the effectiveness of Louisiana Revised Statutes 15:440.1 in terms both of its reduction of testimonial trauma and its enhancement of testimonial reliability.

II. THE NEED FOR REFORM

A. *The Traumatization of Child Witnesses*

Many critics, including former Chief Justice Burger, have decried the plight of victims during the lumbering course of a criminal prosecution, from the victim's first outcry to the police to his last answer given on cross-examination at trial. While we are still willing to put adult victims through such an obstacle course in the name of protecting the accused's due process rights to full confrontation of his accuser, there is little to justify the exaction of such human costs when the victim is a child.

Though media coverage of child abuse trials in various parts of the country has made everyone aware of the fact that children often now appear as critical witnesses in prosecutions, the pretrial skirmishes in California's *McMartin* case,¹¹ more than any other investigation, exposed the potential for child abuse at the hands of the legal system itself.

As one commentator described the *pretrial* ordeal of the *McMartin* abuse victims:

The way the system worked, from the parent's point of view, was shocking. One child spent one day being examined by the prosecution and 17 days being cross-examined by the defense—an exhausting and intimidating experience for an adult, but a potentially shattering one to the child. But it is not only the parent who can fall victim to the badgering [and attempt to withdraw his child as a witness]—children as well have the fear of spending days on the witness stand, and children begin to understand what type of response can get them out of the situation.¹² According to [Dr. Roland] Summit, it is precisely

11. This case, popularly known as the "McMartin prosecution" after the director of the preschool, Virginia McMartin, is reported as *People v. Buckley*, No. A-750900 (Cal. Crim. Dist. Ct., 1984).

12. While not cited by this commentator, this phenomenon has long been recognized by social scientists. "Motivated" forgetting is a theory which takes into account the personal characteristics and situation of the subject which may affect not only his willingness but also his ability to recall all or particular details of some experience. See Hilgard, *Remembering and Forgetting*, Introduction to Psychology 294-97 (2d ed. 1957).

such intense questioning by a skeptical adult that can trigger a child to retract his story.¹³

The pre-trial traumatization of a child carries other costs over and above the tribute of fear and humiliation which a child victim and his parents may pay as a result of his encounters in police stations, grand jury sessions, and preliminary hearings. The victims of abuse may refuse to continue with the accusation or be deterred from filing an initial complaint in order to avoid the trauma of a prosecution, leaving the accused abuser free from public scrutiny or restraint. As one expert recently testified in a New Jersey case, dismissal of criminal charges is the result in over 90% of child abuse cases in order to spare the child the ordeal of trial.¹⁴

More subtle than the societal costs of refusals to prosecute is the potential that the child may mitigate the force of her accusation in order to avoid continuing encounters with the accused adult abuser. It would be the ultimate irony if our system's treatment of a witness, with its demands of multiple appearances, narratives, and grilling at each successive stage of a criminal proceeding, which was created to probe for and insure the emergence of truth, in fact contributes to testimonial unreliability. Yet a considerable body of social science data now supports the conclusion that the current criminal justice system is counterproductive toward the goal of insuring the reliability of a child witness's accusation.

B. Reliability Risks of Child Witnesses

The two principal reliability risks inherent in all testimony are memory-fade and pre-trial suggestibility.¹⁵ The question then arises whether a child witness is especially prone to memory-fade and concomitantly *more* vulnerable to suggestibility than an adult witness.

After years of experiments, social scientists now agree that the capacity to retain information, to "remember" it, increases with age

13. Rust, *The Nightmare is Real*, 14 *Student Law* 3, 19 (April, 1986).

14. *State v. Sheppard*, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984).

15. Existing social science data is only briefly described and cited in this article. A more comprehensive analysis of the reliability problems inherent in children's testimony is set out in McGough, *For What It May Be Worth: Enhancing the Probative Value of Children's Testimony* (1987) (available through the authors of this article). The best single published work to date is a special issue of the *Journal of Social Issues* which is wholly devoted to the topic of the child witness. 40 *J. Soc. Issues* 1-175 (1984).

until adulthood,¹⁶ although they disagree about *why* children are more susceptible to memory-fade than adults. Some postulate that this deficit is due to an incomplete maturation of critical portions of the brain;¹⁷ others reason that memory, like any other mental function, is a gradually acquired skill.¹⁸ Nevertheless, there is now substantial agreement within the scientific community that children are able to retrieve less information than adults when a significant period of time has passed before they must recall it. Findings that children's "long term" memory is weaker than adults' are enormously significant when coupled with the delays inherent in most felony prosecutions. Some memory loss ordinarily occurs after an interval of only one week in both adults and children, and such losses are more acute in children.¹⁹ While data testing children's memory over the span of months or even years does not exist, it seems plausible to project that lengthy delays before trial testimony is exacted create a serious reliability risk in a child's ultimate in-court account.

If gradual loss of memory fragments were the only implication of this long term memory research, then children's in-court testimony might be considered at least minimally probative. However, where a strand of memory is weakened over time it becomes more susceptible to twisting or fragmentary substitution of new information from some source other than the child's own memory.

Laboratory testing of the abstract susceptibility of children to suggestion has been undertaken by several social scientists. Although the

16. "[I]n general, children have greater difficulty than adults in retrieving information from long-term memory . . . [T]here is quite a bit of evidence to suggest that they do." Loftus & Davies, *Distortions in the Memory of Children*, 40 *J. Soc. Issues* 51, 54 (1984). For confirmation that memory-fade appears to be age-related, see also, Ornstein, *Introduction: The Study of Children's Memory*, *Memory Development in Children* (Ornstein ed. 1978); Brown, A.L., *Theories of Memory and the Problem of Development: Activity, Growth and Knowledge, Levels of Processing Memory* 225 (Cermak & Craik, es. 1979); and Perlmutter & Lange, *A Developmental Analysis of Recall-Recognition Distinctions*, *Memory Development in Children* (Ornstein ed. 1978).

17. See, e.g., Perry & Tepley, *Interviewing, Counseling and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 *Creighton L. Rev.* 1369, 1387 (1985).

18. Researchers also divide over whether the incipient missing skill is a lesser ability to absorb what one sees when observing, a learning disability, or whether it is instead a lack of sophisticated memory "retrieval" capacity. Compare, for example, Dempster, *Conditions Affecting Retention Test Performance: A Developmental Study*, 37 *J. Experimental Child Psychology* 65 (1984) with Chechile, Richman, Topinka & Eheresbeck, *A Developmental Study of the Storage and Retrieval of Information*, 52 *Child Development* 251 (1981).

19. Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 *Law & Hum. Behav.* 201 (1980) [hereinafter Cohen & Harnick]; Chance & Goldstein, *Face Recognition Memory: Implications for Children's Eyewitness Testimony*, 40 *J. Soc. Issues* 69 (1984). However, it should be noted that research is still thin on the impact of lengthy delays upon memory capacity of children. See Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40 *J. Soc. Issues* 33, 36 (1984).

results are mixed, all agree that resistance to suggestibility shows a "developmental trend," that is, young children are most suggestible and older adolescents are only slightly more likely to be misled than are adults. In one widely publicized study, nine-year-olds showed an increased inaccuracy rate of fifteen per cent (as compared to five per cent for college-aged subjects) when misleading, suggestive questions were asked.²⁰ As they concluded:

The data provide further evidence that memory may be comprised of information gleaned in the initial perception of events coupled with suggestions supplied after the fact. . . . Further, since this study has demonstrated that leading questions put by an interrogator on one occasion can affect responses to questions put by a different interrogator on a second occasion, this recommendation refers not only to courtroom interrogation but also to *precourtroom interrogation* by, for example, the police.²¹

If children display an especial proneness to suggestibility in a laboratory setting in which testing of observation is an expected occurrence and questioning is conducted by an impartial examiner, surely they are even more vulnerable to suggestion in a helter-skelter real world when unexpectedly victimized by an adult.²²

What happens to the diminished resistance to suggestion when the interviewer is a far from disinterested adult? Depending primarily upon

20. The following percentages express the degree of inaccuracy (acceptance of suggestion) displayed by each age group. In each column, the first reported percentage is the degree of inaccuracy resulting from tainted questions; the second percentage is the degree of inaccuracy which resulted from untainted questions about recall. Two different kinds of tests on separate groups of children and adults, reported below as "Test 1" and "Test 2," were used to test their hypothesis.

	9-year-olds	11-year-olds	College-Aged
Test 1:	75%, 60%	30%, 32%	20%, 15%
Test 2:	54%, 44%	69%, 65%	75%, 75%

Cohen & Harnick, *supra* note 19, at 207.

21. Cohen & Harnick, *supra* note 19, at 209 (emphasis added).

22. "Although there is a great deal of evidence of the young child's difficulty with tasks focused on the goal of remembering in and for itself, there is little information on whether the child has the means of remembering in situations where memory is subordinated to a meaningful activity." Brown, *The Development of Memory: Knowing, Knowing About Knowing, and Knowing How to Know*, 10 *Advances in Child Dev. and Behav.* 104, 116 (Reese ed. 1975). Not only are there distractions inherent in "everyday learning," but also stress can diminish an ability to recall harrowing encounters. This hypothesis seem intuitively true, though it is unlikely that additional empirical data testing this conclusion will or can occur. As Professor Melton has noted, laboratory experiments testing children's memory have not involved "recall under stress or in situations of great personal involvement." Among other obstacles, ethical constraints upon social science research would preclude such experiments. Melton, *Children's Competency to Testify*, 5 *Law and Hum. Behav.* 73, 77 (1981).

whether the abuser is a stranger or family member, pressure can be levered upon the child to either inflate or suppress the details of his memories of the abuse experience. In any felony prosecution for sexual or physical abuse, a child victim will predictably encounter a series of persuasive, authoritative interrogators, such as the child's concerned parents, the police, prosecutors, or defense counsel who may be consciously or unconsciously motivated to influence the child's memory of the attack.

If young children suffer greater memory fade and tend to be more suggestible, then lengthy delays before retrieval and recording a remembered account at trial greatly increases the risk that such testimony will be wholly or partially unreliable. The recording of a skillfully and neutrally conducted early interview can reduce or perhaps avoid entirely potential testimonial distortion resulting from memory fade or suggestive pretrial discussions with the child. Wigmore's observation about adult memory and the past-recollection-recorded exception to the hearsay rule is even more telling regarding a recorded early statement of a child witness:

A faithful memorandum is acceptable, not conditionally . . . but unconditionally; because, for every moment of time which elapses between the act of recording and the occasion of testifying, the actual recollection must be inferior in vividness to the recollection perpetuated in the record.²³

As will be discussed in greater detail in the next section, by providing for the early preservation of a child victim's eyewitness account, which can be used in pretrial proceedings in lieu of an actual appearance by the child, Louisiana's statute not only alleviates the trauma of multiple retellings of her abusive experience but also enhances the reliability of her account.

III. ANALYSIS OF THE LOUISIANA STATUTE

Videotaping statutes can be broken down into two groups: those that provide for the taping of testimony (a deposition procedure)²⁴ and

23. 3 J. Wigmore, *Wigmore on Evidence* § 738 at 76 (3d ed. 1940).

24. Alabama [Ala. Code § 15-25-2 (Supp. 1986)]; Alaska [Alaska Stat. § 12.45.047 (1986)]; Arizona [Ariz. Rev. Stat. Ann. §§ 13-4251-4253 (Supp. 1986)]; Arkansas [Ark. Stat. Ann. § 43-2035 (Supp. 1985)]; California [Cal. Penal Code § 1346 (West Supp. 1987)]; Colorado [Colo. Rev. Stat. § 18-3-413 (1986)]; Florida [Fla. Stat. Ann. § 92.53-.55 (West Supp. 1987)]; Hawaii [Haw. R. Evid. 616 (1985)]; Kansas [Kan. Stat. Ann. § 22-3434 (Supp. 1986)]; Kentucky [Ky. Rev. Stat. Ann. § 421.350 (Baldwin 1986)]; Louisiana [La. R.S. 15:440.1-.6 (West Supp. 1987)]; Main [Me. Rev. Stat. Ann. tit. 15, § 1205

those that provide for the taping of un-crossexamined statements.²⁵ At present more than twenty states provide for the taking of a child's deposition. Of these states, at least six also allow the taping of a child's statement. Only two states, Louisiana and Missouri,²⁶ solely provide for the taping of a child's statement.

The main features of Louisiana Revised Statutes 15:440.1 are: (1) to authorize the videotaping of an interview with an abused child; (2) to establish the requirements governing such an interview and its recording; (3) to regulate the use of such a videotaped recording as evidence in proceedings before a juvenile or criminal court; and (4) to impose confidentiality restrictions upon access to this recorded account by the child.

In essence, the Louisiana statute provides for videotaping of an out-of-court account given by child victims of physical or sexual abuse. If the videotape meets certain minimal requirements of evidentiary competence and if the child and any interviewer are available for testimony at trial, the videotaped recording is admissible as an exception to the hearsay rule in either a criminal prosecution or a juvenile proceeding.

A. Authorization: Availability of Videotaping Procedures

1. Statutory Requirements

The legislatively declared purpose of this statute is to minimize "additional intrusion into the lives of child victims," and it protects, by offering an alternative to multiple personal pretrial appearances, all children under the age of fourteen who are allegedly victims of direct,

(Supp. 1986)]; Minnesota [Minn. Stat. Ann. § 595.02 (3)-(4) (Supp. 1987)]; Montana [Mont. Code Ann. § 46-15-401 to 15-403 (1985)]; Nevada [Nev. Rev. Stat. § 174.227 (1985)]; New Hampshire [N.H. Rev. Stat. Ann. § 517-13-a (Supp. 1986)]; New Mexico [N.M. Stat. Ann. § 30-9-17 (1985)]; New York [N.Y. Crim. Proc. Law § 190.32 (McKinney Supp. 1987)]; Oklahoma [Okla. Stat. tit. 22, § 752-53 (Supp. 1987)]; Rhode Island [R.I. Gen. Laws § 11-37-13.2 (Supp. 1986)]; South Dakota [S.D. Codified Laws Ann. § 23A-12-9 (Supp. 1987)]; Tennessee [Tenn. Code Ann. § 24-7-116 (Supp. 1986)]; Texas [Tex. Crim. Proc. Code Ann. § 38.071 (Vernon Supp. 1987)]; Vermont [Vt. R. Evid. 807 (Supp. 1986)]; and Wisconsin [Wisc. Stat. Ann. § 967.04 (West 1985 & Supp. 1986)].

25. Arizona [Ariz. Rev. Stat. Ann. §§ 13-4251 to -4253 (Supp. 1986)]; Kansas [Kan. Stat. Ann. § 22-3433 (Supp. 1986)]; Kentucky [Ky. Rev. Stat. Ann. § 421.350 (Baldwin 1986)]; Minnesota [Minn. Stat. Ann. § 595.02 (Supp. 1987)]; Tennessee [Tenn. Code Ann. § 24-7-116 (Supp. 1986)]; and Texas [Tex. Crim. Proc. Code Ann. § 38.071 (Vernon Supp. 1987)].

26. La. R.S. 15:440.1 (Supp. 1987); Mo. Ann. Stat. § 492.304 (Vernon Supp. 1987).

personal assault.²⁷ Videotaping the child's account may be authorized upon the court's own motion or upon the motion of the district attorney, a parish welfare unit or agency, or the Department of Health and Human Resources.²⁸ Apparently, the consent of the child and his legal representative is a necessary precondition to a court's order for videotaping.²⁹

2. *Effectiveness in Protecting Child Victims*

Videotaping statutes vary in defining the class of children who are afforded protection. The Louisiana statute, following the typical tack taken by other states,³⁰ limits these special procedures to child victims under the age of fourteen. In adopting such a "bright line" approach, the statute encounters the usual policy trade-offs inherent in such a choice: efficiency and certainty of applicability are achieved, but at the expense of the arbitrary exclusion of some older children who might, on a case-by-case determination, be in need of special protection. For example, it is not hard to imagine that a retarded fifteen year old or a fifteen year old victim of years of incestuous assault might be severely traumatized by the prospect of giving multiple accounts of her sexual exploitation by her parent in open court. Drawing a bright line at age fourteen seems especially anomalous in view of the fact that a minor under the age of eighteen may be adjudicated a child in need of care

27. The identical provisions of La. R.S. 15:440.4 (4) and 440.5 (3) (Supp. 1987) require: "[t]hat the recording is accurate, has not been altered, and reflects what the witness or victim said" (emphasis added). Properly viewed this is *not* an expansion of the authorized use of videotaping procedures to child witnesses who are not direct victims of assault. The use of the word "witness" in this context seems, instead, to require that the recorded account also accurately reflect the questions or comments of any interviewers, supervisors or other witnesses to the videotaping of the child's account.

28. A coroner investigating the abuse of a child may also proceed to obtain a videotape of the child's report although it is not clear whether he must proceed by first obtaining a court order.

29. La. R.S. 15:440.2(A)(1) (Supp. 1987) makes a videotaping permissible, not mandatory: "A court . . . may . . . require that a statement . . . be recorded. . . ." Tucked away in La. R.S. 15:440.4(A)(1) (Supp. 1987) is the requirement that "such electronic recording was voluntarily made by the victim of the physical or sexual abuse." Since, under Louisiana law, the parent or tutor makes all decisions concerning the health and well-being of his child, by implication the consent of the adult caretaker and legal representative is also required. La. Civ. Code art. 216.

30. Those states which specify an upper age-limit of procedural availability range from a high of eighteen years, see, e.g., Nev. Rev. Stat. § 174.227 (1985) (where witness is a victim of sexual abuse, otherwise under fourteen), to a low of twelve years, see, e.g., Mo. Ann. Stat. § 492.304 (Vernon Supp. 1987).

and subject to the protective jurisdiction of the Louisiana juvenile courts.³¹

Nevertheless, the critical deficit of the Louisiana statute lies not so much in the arbitrariness of its choice of age fourteen as in its lack of an available procedure for older children who might demonstrate equivalent emotional harm, given the circumstances of a particular case. Uniform Rule 807 and some state statutes specify age limits but significantly provide for exceptions upon a showing of special need.³²

The Louisiana statute should be amended to permit videotaping for older children who appear to be as vulnerable to trauma as those under fourteen, who are within the statute's protection. Using the language of the Uniform Rules of Evidence, these special procedures could be made available upon a finding by the trial court that "there is a substantial likelihood that the minor will suffer severe emotional or

31. Article 13(9) of the Louisiana Code of Juvenile Procedure defines "child" as a person who has not attained seventeen years of age. . . .

(b) For the purpose of proceeding under R.S. 14.403 relative to abused and neglected children and for the purpose of proceedings in which children are alleged to be in need of care or supervision, the term "child" shall include persons who have not attained eighteen years of age.

32. E.g., Nevada extends its general rule of coverage for those under fourteen if a prospective witness is a victim of sexual abuse. Nev. Rev. Stat. § 174.227 (1985). The most elaborate provisions are found in the Wisconsin statute, which provides that videotaping is available when a child witness is twelve or younger, or under sixteen, if the court finds that the "interests of justice" warrant that his testimony be prerecorded. The factors which may be considered by the court are: the child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them; the child's general physical and mental health; whether the events about which the child is to testify constitute criminal or "antisocial" conduct against the child or a person with whom the child has a close emotional relationship; if the conduct constitutes a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused; the child's custodial situation and the attitude of other household members to the events about which the child will testify and to the underlying proceeding; the child's familial or emotional relationship to those involved in the underlying proceeding; the child's behavior at or reaction to previous interviews concerning the events involved; whether the child blames himself for the events involved or has ever been told by any person not to disclose them; whether prior reports have been ignored; the child's subjective belief as to the consequences; symptoms associated with post-traumatic stress disorder or other mental disorders, including guilt, etc.; the number of separate investigative, administrative, and judicial proceedings at which the child's testimony will be required; the mental or emotional strain associated with keeping the child's recollection of the events witnessed fresh for the required period of time; finally, whether the videotaping would reduce the mental or emotional strain of testifying and whether the deposition could be used to reduce the number of times the child will be required to testify. Wisc. Stat. Ann. § 967.04 (7)(6) (West Supp. 1986).

psychological harm if required to testify in open court."³³ As the Commissioners' comments note:

The rule requires that the court make an antecedent finding . . . before an extrajudicial statement may be admitted or alternative means of testifying employed. This standard is intended to require more than a showing of mere distress on the part of a child who is faced with the prospect of testifying. It is a strict standard, which is imposed in recognition of the fact that live testimony and cross-examination is the preferred mode of proof. It is not contemplated that the court will *necessarily* receive expert testimony concerning the minor's emotional state in making this determination. The court is in an adequate position to assess the surrounding circumstances and to form a judgment concerning the likely effect of live testimony in open court on the minor without expert assistance.³⁴

Currently most states confine videotaping procedures to criminal prosecutions³⁵ although such a limitation seems to be an unwarranted restriction of the concept of victimization. Perhaps the reason for this restrictive approach is that the opportunity for and advantages of civil applications have not been brought to the attention of legislatures. Media "hype," most notably that concerning the *McMartin* criminal trial, has overshadowed the potential for civil applications.

The Louisiana statute permits the recording of statements of children who have been either sexually or physically abused and extends not only to criminal prosecutions but to juvenile proceedings which involve such

33. Unif. R. Evid. 807(a)(i) (adopted Nov. 1986). For amplification of the factors which might be considered, see the Alabama statute, Ala. Code § 15-25-2 (Supp. 1986), and the Wisconsin statute summarized in *supra* note 32. Some states, such as Arkansas [Ark. Stat. Ann. § 43-2036 (Supp. 1985)], Nevada [Nev. Rev. Stat. § 174.227 (1985)], and New Mexico [N.M. Stat. Ann. § 30-9-17 (1985)] simply require a finding of "good cause shown" without further elaboration.

It should be noted that the uniform rule requires such a showing before the receipt of an extrajudicial statement by *any* child, regardless of age. There are no presumptions of trauma. Furthermore, such special showings of emotional or psychological harm are only available to children under twelve.

34. Unif. R. Evid. 807 (adopted Nov. 1986) official comments (emphasis supplied).

35. Furthermore, at least nine states restrict the applicability of these special procedures to sexual abuse prosecutions. See the statutes of Alaska, Arkansas, California, Colorado, Maine, Montana, New Mexico, Rhode Island, South Dakota, and Vermont set out in *supra* note 24. Such a restriction reinforces the hypothesis that these legislatures were responding in a myopic way to the notorious *McMartin* prosecution.

abuse.³⁶ However, it is difficult to justify the restriction of these special protections to only those children whose trauma stems from some actual physical violation of their bodies. Any purported distinction between battery vis-a-vis assault seems untenable. For example, is the trauma experienced by a child threatened with mayhem any less than the trauma of a child who has been struck or sexually fondled? Certainly the studies of child victims would not support such a distinction.³⁷ The key term, "physically or sexually abused," is not defined in this statute; therefore, arguably, the definition of abuse found in the child abuse reporting law³⁸ could be used to broaden the availability of these special video-taping procedures.

Even so, if protection of traumatized children (and their insulation from further courtroom trauma) is the policy fundament, then this statute should protect not only children who are direct victims of personal threats or actual harm but also those who are unwilling, unwitting witnesses to acts of violence directed toward others. "Trauma" is an elastic term, but is perhaps most succinctly defined as an individual's exposure to "an overwhelming event that renders him or her helpless in the face of intolerable danger, anxiety, and instinctual arousal."³⁹ An individualized determination of "traumatization" is necessary, but

36. At least five states, besides Louisiana, provide for a limited use of such procedures in special types of civil cases: Arizona (child dependency and termination of parental rights proceedings); Florida (civil cases arising out of sexual abuse or child abuse); Kentucky (all proceedings); Minnesota (all proceedings); Missouri (any proceeding at which sexual abuse is an issue); Tennessee (civil proceedings in which child sexual abuse is an issue). For citations to these statutes, see *supra* notes 24 and 25.

37. Terr, *The Child as a Witness*, *Child Psychiatry and the Law* 207 (Schetky & Benedek eds. 1980); Pynoos & Eth, *The Child as Witness to Homicide*, 40 *J. Soc. Issues* 87 (1984) [hereinafter Pynoos & Eth]; Barbieri & Berliner, *The Testimony of the Child Victim of Sexual Abuse*, 40 *J. Soc. Issues* 125 (1984).

38. 1987 La. Acts 626, to be codified at La. R.S. 14:403(B)(3) (Supp. 1987), defines "abuse" as "the infliction by a caretaker of physical or mental injury or the causing of the deterioration of a child including but not limited to such means as sexual abuse, sexual exploitation, or the exploitation or overwork of a child to such an extent that his health or moral or emotional well-being is endangered."

Although "abuse" is nowhere defined in the Code of Juvenile Procedure, the key term "child in need of care," the modern euphemism for abuse and neglect jurisdiction, clearly encompasses a broad use of these related terms. Article 13(14)(a) defines "child in need of care" as a child "[w]hose parent inflicts, attempts to inflict, or, as a result of inadequate supervision, allows the infliction or attempted infliction of physical injury or sexual abuse upon the child which seriously endangers the physical, mental, or emotional health of the child." In the statute authorizing the termination of parental rights, "abused child" is defined as "a child against whom has been inflicted physical or mental injury which causes severe deterioration to the child, including a child who has been abused sexually or a child who has been exploited or overworked to such an extent that his health, moral, or emotional well-being is endangered." La. R.S. 13:1600(1) (1983).

39. Pynoos & Eth, *supra* note 37, at 90.

psychiatrists agree that the term encompasses more than the experience of a direct, personal attack. As one rather obvious example, two researchers have reported that nearly four out of five of all children who witnessed a parent's homicide suffered from Post-traumatic Stress Disorder.⁴⁰ In its description of this diagnosis, the American Psychiatric Association observes:

The stressor [traumatic event] producing this syndrome would evoke significant symptoms of distress in most people, and is generally outside the range of such common experiences as simple bereavement, chronic illness, business losses, or marital conflict. The trauma may be experienced alone (rape or assault) or in the company of groups of people (military combat). Stressors producing this disorder include natural disasters (floods, earthquakes), accidental man-made disasters (car accidents with serious physical injury, airplane crashes, large fires), or deliberate man-made disasters (bombing, torture, death camps). Some stressors frequently produce the disorder (e.g., torture) and others produce it only occasionally (e.g., car accidents). Frequently there is a concomitant physical component to the trauma which may even involve direct damage to the central nervous system (e.g., malnutrition, head trauma). The disorder is apparently more severe and longer lasting when the stressor is of human design.⁴¹

Rule 807 of the Uniform Rules of Evidence acknowledges the fact that psychic trauma can be either a direct or indirect experience for a child. Upon a demonstration of severe emotional or psychological harm from testifying, its special videotaping option is available in either criminal or civil proceedings involving sexual conduct or physical violence directed at the child or another.⁴² As the Comments make clear:

The breadth of this approach is premised on the recognition that, if the court finds the prerequisite "substantial likelihood of severe emotional or psychological harm," the same considerations apply to child witnesses as to child victims and are equally applicable in civil as in criminal proceedings.⁴³

Rule 807 currently makes it optional for an adopting state to decide whether the witnessed violence must be directed toward any "parent, sibling or member of the familial household of the child" or may more

40. *Id.*

41. American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* § 308.30 (3d ed. 1980).

42. *Unif. R. Evid.* 807 (adopted Nov. 1986).

43. *Unif. R. Evid.* 807 (adopted Nov. 1986) official comments.

broadly be extended to any "other individual."⁴⁴ Again, the difficulty of line-drawing would seem to call for the broadest possible potential availability: a child who witnessed the bloody death of a playmate by a speeding automobile is as or more traumatized by that experience as he would be in witnessing the whipping of his sister or experiencing a slap to his own face.

Finally, Louisiana Revised Statutes 15:440.2 is unduly restrictive insofar as it allows only certain public officials to move for a videotaping order. All states with videotaping statutes permit the district attorney or the prosecuting attorney to file such a motion or application.⁴⁵ Some states extend this right to any party to the action.⁴⁶ The broadest possible extension of the right to seek a videotaping order is that contained in Uniform Rule 807 which provides that a motion may be filed by a party, the minor, or the court.⁴⁷ If videotaping is viewed as a trauma-reducing procedure rather than an evidence-gathering tool, then it is difficult to justify any restriction upon the power of someone legitimately concerned about the child's welfare, such as his parent, to seek to invoke this protective process.

Under Louisiana's law, only the court, the district attorney, or the local or state public welfare agency can move for a videotaping order. As a result, if a parent were troubled by his child's future involvement as a witness in the prosecution of a case, that parent would be forced to convince either the district attorney or the welfare agency to seek such an order. It seems horribly ironic, in view of the statute's purpose, to refuse standing to the individual who is both legally responsible for the child and most likely to be concerned about her child's well-being. Whatever social good might be derived from having some state representative "screen" parental requests for videotaping protection seems overcome by the insensitivity and inefficiency of a process which requires the child's parent or other representative to flounder through a bureaucratic maze to find some official willing and ready in time to secure the promised legislative protection.⁴⁸ It is difficult to envision that friv-

44. Unif. R. Evid. 807(a) (adopted Nov. 1986).

45. See, e.g., Alabama, California, and New York statutes, *supra* note 24.

46. See, e.g., Florida, Kansas, Kentucky, Minnesota, Oklahoma, South Dakota, Tennessee, Texas, Vermont, and Wisconsin statutes, *supra* note 24.

47. Unif. R. of Evid. 807 (approved Nov., 1986). Although Florida's statute authorizes only depositions of a child witness, it does provide the clearest elaboration of individuals who ought to be accorded standing: the victim or witness; the victim's or witness's attorney, parent, legal guardian, or guardian ad litem; a trial judge on his own motion; any party in a civil proceeding; or in a criminal action, the prosecuting attorney, the defendant, or the defendant's counsel. Fla. Stat. Ann. § 92.53 (West Supp. 1987).

48. "The bottom line for parents is that you have to think twice before you put

olous or otherwise abusive motions would be filed by the parent, legal custodian, guardian ad litem, or tutor of a child. Moreover, even if such occurs, surely it is the business of the courts to review and resolve such requests.

In sum, Louisiana's statute should be broadened to achieve the protection it promises for children who become caught up in traumatic experiences which they must recount in later litigation.

3. *Promoting the Reliability of Children's Testimony*

If our only concern about the testimony of child witnesses is to insulate them from testimonial trauma, then quite properly, as is currently the case, videotaping procedure should be made permissive and consensual. With the changes suggested in the immediately foregoing section, a potentially traumatized child can be fully protected under the Louisiana statute. However, if our concern also extends to the assurance of testimonial reliability, then the statute should clearly indicate that the court can compel a child to participate in the early recording procedure. Since a competent child may not refuse to honor a subpoena or to testify,⁴⁹ there would appear to be no justification for his refusal to give a pretrial videotaped statement or for his caretaker's refusal to submit him to such a procedure. In phrasing the requirement that the recording be "voluntarily made,"⁵⁰ the legislature may have only intended to imply that the child's recorded statement be "voluntary" in the evidentiary sense, that is, free from any coercion or undue influence which might induce false statements. If so, the authors submit that this concern can be more clearly expressed as a requirement that the trial court consider whether, at or before the time of the videotaping, there is any evidence of coercion, inducement, or undue influence leading the child to make a particular statement.

As has been discussed in Section II, social science data substantiates the conclusion that over time a child's memory fades, critical details may be lost, and original observations may become subject to distortion. Given the notorious delays in the legal system and the heightened vul-

your kid in court. . . . Originally the parents came to police out of a sense of responsibility and duty—not a sense of revenge. Then they found that the system did not operate the way they thought it would." Rust, *The Nightmare is Real*, 14 *Student Lawyer* 12, 18 (April, 1986).

49. La. Code Civ. P. arts. 1357, 1633; La. Code Crim. P. art. 737; La. Code Juv. P. arts. 19, 20. The definition of "delinquent act" which subjects a child to the jurisdiction of the juvenile court includes a "direct contempt of any court committed by a child." La. Code Juv. P. art. 13(7).

50. La. R.S. 15:440.4(A)(1) (Supp. 1987).

nerability of a child to memory-fade and adult suggestion, the rather obvious solution is an early recording of the child's account of the events which are the focus of litigation. If, as will be developed more fully in the next two sections, reliable testimony can be achieved by an early recorded interview of a child, and if, as the extant empirical data suggests, testimonial reliability is in fact *enhanced* by such early preservation of the child's memory, then videotaping of a child's statements should be required.

Legislation requiring the early videotaping of a child's account in all disputes in which a child is a witness necessitates a much more complex array of procedures than can be set out here. That expansion, however, may be a step which the Louisiana legislature is unwilling to make until it has more experience with the use of voluntary videotaping procedures. In the interim the Louisiana statute ought to be amended to include the defendant within the list of those authorized to seek pretrial videotaping. Under the current law, the prosecution can move to record a child's account of the accusation, but that right is denied the accused. In justification of this exclusion, the state may assert that the purpose of the statute is to protect the child from harassment and pretrial trauma and that the individual accused of harming a child is unlikely to be properly motivated in seeking to videotape the child's account. Note, however, that under the Louisiana statute, a movant for a videotaping order does not control nor participate in the actual videotaping process. Thus, there is little likelihood for defense harassment.

Furthermore, in authorizing a videotape in lieu of the child's direct testimony, the legislature must meet its due process burden by insuring that the resulting recording is at least as reliable, if not more reliable, than what would otherwise be testified to in open court.⁵¹ And if the Louisiana statute even indirectly is intended to produce a more reliable form of evidence, then the state cannot withhold access to such procedures from one whom it prosecutes. The interrelated commands of the Sixth and Fourteenth Amendments mean that a state may not by arbitrary rules of evidence deny a defendant the right to prepare for and present reliable testimony critical to his defense.⁵²

51. For a review of the principal United States Supreme Court decisions which illuminate the constitutional dimensions of evidentiary statutes, see *Rock v. Arkansas*, 55 U.S.L.W. 4925 (June 22, 1987).

52. In its most recent opinion on this issue, the Supreme Court held that the defendant's constitutional rights were violated by a state's per se rule excluding all hypnotically refreshed testimony on grounds of unreliability. The state's legitimate interest in barring unreliable evidence is inadequate to prevent an accused from demonstrating in a particular case that the use of such a procedure could result in his being able to give trustworthy testimony in his defense. *Rock v. Arkansas*, 55 U.S.L.W. 4925 (June 22, 1987).

At a minimum, we submit that the Louisiana statute ought to be amended to permit a defendant in a criminal prosecution to seek the videotaping of a child's statement by the neutral interviewing process currently available. If, as we suggest, videotaping procedures are to be extended to civil proceedings, then the Louisiana statute should authorize their use by any party affected by the child's account, following the lead of many other states and rule 807 of the Uniform Rules of Evidence. Although enhanced reliability is not an express purpose of the Louisiana statute, the glimmerings of legislative concern for testimonial reliability can be discerned from the strictures which currently surround the taking and taping of the child's statement and the admissibility of the resulting recording.

B. The Interview

1. Statutory Requirements

As enacted, Louisiana Revised Statutes 15:440.4 and 15:440.5 are not clearly differentiated functionally. Section 440.4 purports to govern the "competency" of any videotaped recording, whereas 440.5 purports to govern "admissibility." Re-sorting their collective requirements, there are seven competency prerequisites:

- (1) that the recording was "voluntarily made" by the child;⁵³
- (2) that no relative of the child was present in the room where the recording was made;⁵⁴
- (3) that no attorney for either party was present when the statement was made;⁵⁵
- (4) that the resulting statements were not the product either of interrogatories⁵⁶ or questions "calculated to lead the child to make a particular statement;"⁵⁷
- (5) that the recording is "both visual and oral and is recorded on film or videotape or by other electronic means;"⁵⁸
- (6) that the recording is "accurate, has not been altered, and reflects what the child said;"⁵⁹ and
- (7) the taking of the child's statement was "supervised by a

53. La. R.S. 15:440.4(A)(1) (Supp. 1987).

54. La. R.S. 15:440.4(A)(2) (Supp. 1987).

55. La. R.S. 15:440.5(A)(1) (Supp. 1987).

56. La. R.S. 15:440.4(3) (Supp. 1987).

57. La. R.S. 15:440.5(4) (Supp. 1987).

58. La. R.S. 15:440.5(2) (Supp. 1987).

59. La. R.S. 15:440.4(4), reiterated in 15:440.5(3) (Supp. 1987).

physician, a board-certified social worker, a law enforcement officer, a licensed psychologist, or an authorized representative of the Department of Health and Human Resources."⁶⁰

2. *Effectiveness in Protecting Child Victims*

If this is truly a trauma-avoidance procedure, then one would write a statute which would require the presence of some neutral monitor during the interview, to insure that the child is not badgered, brow-beaten, demeaned or otherwise traumatized during the trial-replacement procedure. To this end, the requirement that the statements are "voluntarily made" by the child may be read as a safeguard against adult coercion of a child to make a particular accusation or statement. So too, these criteria appear to envision a non-adversarial interview process. At least at this stage of the proceedings, the child is shielded from any confrontation or cross-examination by either the defendant or his counsel.

Arguably, the seventh requirement, which lists those who must supervise the interview, seeks to insure the presence of a neutral monitor of the process. If such was the legislative intent, the flaw in the current scheme is the inclusion of "law enforcement officer" within the permitted class. As has been amply critiqued elsewhere,⁶¹ such a broad term would permit the principal police investigator to supervise or conduct the child's interview.⁶² Furthermore, unlike the qualifications attached to the au-

60. La. R.S. 15:440.4(5) (Supp. 1987).

61. Tulane Comment, *supra* note 8, at 172-76.

62. We acknowledge the intuitive notion, albeit without much empirical proof, that a police officer may not be a neutral, non-partisan agent during an investigation when he engages in what the Supreme Court has on many occasions referred to as the "often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 369 (1984). Although less often expressed as a concern, it must be conceded that similar, human frailties of overzealousness can also arise in actions in which the Department of Health and Human Resources is or may become the "prosecuting party," such as in cases of parental abuse and neglect in which a child in need of care petition is filed in juvenile court. In juvenile court actions, a child welfare caseworker plays a role quite similar to that of a police officer in criminal investigations. In an abstract, absolute sense, it cannot be said that a caseworker who conducts or supervises the child's interview is perfectly impartial since he may well be the primary investigator and ultimately a principal witness if the action is presented in court. In an ideal world, one might require that the court supervise every interview of a child witness or that every interviewer be specially appointed on an ad hoc basis with no associations whatsoever with any state agency having prosecutorial responsibility. See, e.g., the suggestions in Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator*, 17 *New Eng. L. Rev.* 643 (1982). Within the scope of this article, all we can do is to note the problem.

thorization of other professionals within this class, there is no requirement whatsoever that the police officer need be specially-trained in the techniques of interacting with a young child.

Although no legislative history exists to explain the anomalous blanket inclusion of law enforcement personnel within the class of authorized supervisors, perhaps this addition came from a concern for implementation in smaller, rural parishes in which board-certified social workers or licensed psychologists are few and far between. However, every parish has a local child protection unit of the Department of Health and Human Resources and has access to juvenile justice personnel provided by the Department of Public Safety & Corrections. In the rare instance in which there is a specially trained juvenile specialist within a local police force, he could be appointed to conduct such interviews pursuant to the existing general catch-all provision as an "authorized representative of the Department of Health and Human Resources."⁶³ Removing the current authorization of law enforcement officers would serve the dual purposes of minimizing the potential intimidation of the child and enhancing the reliability of any resulting statement.

3. *Promoting the Reliability of Children's Testimony*

In the main, the criteria for creating a competent videotaped recording manifest a primary concern for the resulting reliability of this evidence, although, again, such is not an explicit goal of this statute. Oddly enough, however, there is no requirement in the Louisiana statute that the child be placed under oath or otherwise instructed about the importance of a truthful account before giving his statement. Although an oath is not ordinarily necessary for the admissibility of hearsay statements, here the process envisions the production of a piece of documentary evidence which can be used in court. A strong argument can be made that the creation of what may become a substitute for at least direct examination should be accompanied by an explanation and administration of an oath.⁶⁴

More important than the ritual of an oath taking is an explanation of the function of such a process. The purpose of the oath is to provide a symbolic reminder of the seriousness of the process and of society's expectation of a truthful account.⁶⁵ The interviewer should explicitly

63. La. R.S. 15:440.4(5) (Supp. 1987).

64. Among other gains, the resulting videotaped statement could then clearly meet the requirements for a witness's "appearance" before a grand jury. See *infra* note 80 and accompanying text.

65. See, e.g., Rowley, *The Competency of Witnesses*, 24 Iowa L. Rev. 482 (1939); Perry & Tepley, *supra* note 17.

emphasize to the child that if he is uncertain or cannot remember the facts necessary to answer a question or to complete his story, he should say so. The child should further explicitly be reassured that not knowing the answer to any particular question or issue is perfectly acceptable.⁶⁶ If these purposes are explained to a child in simple words, and if he acknowledges an understanding of the importance of giving a truthful account, there is everything to be gained and little, if anything, to be lost in the attempt. The authors submit that the videotaping statute should require that the interviewer or monitor should open a videotaping session with such an explanation.

Several limitations upon the interviewing process serve to eliminate at least some of the more obvious distorting influences.

The Louisiana statute does not expressly require that the taking of the child's statement be in an interview format. However, young children, particularly preschool victims, are rarely capable on their own of delivering a complete monologue about the abuse incident. Social scientists have documented two fundamental facts about children's memory: first, the ability to *spontaneously* recall details of some past encounter increases with age, and, thus, that very young children will need assistance;⁶⁷ and second, human memory capacity develops at a very early age, and, thus, children actually absorb more data than they are able to recall unassisted.⁶⁸ Consequently, not only will an interview by some adult ordinarily be necessary, but also skillful questioning of a child can actually enhance the reliability of any resulting account.

Paradoxically, empirical data also substantiates the conclusion that a child is more susceptible to memory distortion or memory manipulation by some influential interviewer than is an adult. As a result, the neutrality, knowledge, and sensitivity of the interviewer are critical to the reliability of any resulting account of events given by a child.⁶⁹ When the child has not only been a witness to an event but also was the direct victim of a physical or sexual encounter, accurate retrieval of his memories becomes an even more delicate and complex task.

While the Louisiana statute does not designate who must serve as the interviewer, it does deny the interviewer's role to two groups who

66. For further discussion, see Perry & Teply, *supra* note 17.

67. Marin, Holmes, Guth & Kovac, *The Potential of Children as Eyewitnesses*, 3 *Law and Hum. Behav.* 295 (1979); Perlmutter & Myers, *Development of Recall in 2- to 4-Year Olds*, 15 *Dev. Psychology* 73 (1979).

68. See, e.g., Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, 40 *J. Soc. Issues* 157, 162 (1984).

69. See, e.g., Cohen & Harnick, *supra* note 19; cf. Marin, *supra* note 67. For a summary of extant data on children's suggestibility, see Loftus & Davies, *Distortions in the Memory of Children*, 40 *J. Soc. Issues* 51 (1984).

are most likely to be motivated to skew the child's memory. Neither any of the victim's relatives⁷⁰ nor the attorney "for either party"⁷¹ are allowed in the interview room. (Since these procedures pertain to criminal prosecutions of the abuse perpetrator, presumably the attorney exclusion also includes prosecutors, albeit as representatives of the state rather than of a "party" in the ordinary sense of the term.)

A substantial body of research now exists about the nature and impact of trauma upon human memory. One symptom among the cluster known as the Post-traumatic Stress Disorder is a decline in cognitive performance.⁷² Studies of traumatized children, including victims of sexual or physical assault, reveal an increased misperception of both the duration and sequencing of actual events and a fixation upon certain perceptual details whereby the child relives and recounts over and over what for the child were his "worst moments."⁷³ Particularly where the child has been victimized by a stranger, distortions in cognitive functioning are predictable.

The complexity of the interviewer's task to unravel an accurate account of events from a child victim has been vividly illustrated by the psychiatrist who conducted a series of studies on the child victims of the Chowchilla schoolbus kidnapping incident:

[Six year old] Benji knows exactly what was done to him. He remembers the events of the kidnapping and what other children did and said. He elaborates upon what he himself did and said, hoping that he was more heroic than he actually was. He loses [temporarily] his accuracy in the field of perception, the ability to recognize the perpetrators, and in the field of cognition, understanding his own role in the traumatic event. Benji does not lie, or purposely change facts. He distorts the perception of the men themselves because he was so suddenly and intensely frightened when he saw them. He distorts his own role because his true helplessness is unacceptable to him and too remote from his ideals of strength and control to be tolerated.⁷⁴

70. La. R.S. 15:440.4(A)(2) (Supp. 1987) states: "That no relative of the victim of the physical or sexual abuse was present in the room where the recording was made."

71. La. R.S. 15:440.5(A)(1) (Supp. 1987) states as a precondition for the admissibility of the recording that "[n]o attorney for either party was present when the statement was made."

72. American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* §§ 308.30, 309.81 (3d ed. 1980).

73. Pynoos & Eth, *supra* note 37.

74. Terr, *supra* note 37, at 214-15.

The difficulties of obtaining a full account from a child traumatized by sexual abuse are so considerable that one scientist has identified what he has termed the "Child Sexual Abuse Accommodation Syndrome."⁷⁵ The manifest symptoms characterizing this phenomenon are the victim's secrecy, helplessness, entrapment, and accommodation to the assailant; delayed and unconvincing disclosure; and retraction of the accusation.⁷⁶

The interview with a trauma-stressed child victim is such a critical stage in the evolution of an abuse prosecution that some commentators have called for the appointment of new specialists, trained in child development and interaction, who can serve as pretrial interviewers.⁷⁷ The Louisiana statute stops short of requiring interviewer expertise, requiring, instead, only skilled supervision. Although it might be more efficient and less costly to impose qualifications of expertise upon the interviewer, rather than requiring monitoring by a skilled supervisor, there is nothing inherently wrong with the current Louisiana scheme, provided, as discussed previously, that law enforcement officers are excluded from the list of authorized monitors.⁷⁸ With the implementation of training and certification procedures by the Department of Health and Human Resources,⁷⁹ there may be in the near future a cadre of highly trained professionals who can oversee the videotaping process.

The statute's single limitation upon the manner or scope of the taking of the child's account is that neither leading questions nor leading interrogatories are to be used to elicit the child's statements.⁸⁰ The sanction for the abuse of the interviewer's role is that the resulting recording can be ruled incompetent and denied admissibility. There is nothing inherently vicious in leading questions so long as the witness's own will has not been overborne or his memories supplanted by the interviewer's suggested details.

The real danger in eliciting a child's recall lies in the use of *misleading* questions. In a widely reported study, two social scientists undertook a study of the relative suggestibility of nine year olds, twelve year olds, and college-aged students. In their test, the to-be-remembered episode

75. R. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *Int'l J. Child Abuse & Neglect* 177 (1983).

76. See Note, *The Admissibility of "Child Sexual Abuse Accommodation Syndrome,"* 17 *Pac. L.J.* 1361 (1986).

77. See Parker, *supra* note 62, at 655; Terr, *supra* note 37, at 220.

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

79. La. R.S. 15:440.4(B) (Supp. 1987) states that the Department "shall develop and promulgate regulations on or before September 12, 1984, regarding training requirements and certification for department personnel designated in Paragraph (A)(5) who supervise the taking of the child's statement."

80. La. R.S. 15:440.4(3) and 440.5(4) (Supp. 1987).

was presented in a film which showed a young woman, who was carrying a shopping bag, entering a bus. In subsequent tests, the subjects were asked a series of questions, half of which were misleading, for example, "The young woman was carrying a newspaper when she entered the bus, wasn't she?" The results showed a significant resistance to suggestibility which increases with age. In this study, the nine-year olds were more than twice as likely to agree with the suggested misleading question than were the older subjects.⁸¹

More troubling is the additional finding that once error is imprinted by misleading questioning, dislodging it later is very difficult. In a second test of "long-term" memory, conducted one week after the film's viewing, a multiple choice questionnaire was distributed which presented the following possible answers to the question of what the woman was carrying: a shopping bag, a newspaper, and two other neutral choices. Regardless of age, those subjects who had in fact been earlier swayed by the misleading question, almost always chose the response containing that piece of erroneous detail. Because the nine-year olds had been more likely initially to accept the misleading suggestion, they proved to be the most unreliable of the subject groups.⁸² As these researchers concluded:

The data provide further evidence that memory may be comprised of information gleaned in the initial perception of events coupled with suggestions supplied after the fact. . . . Further, since this study has demonstrated that leading questions put by an interrogator on one occasion can affect responses to questions put by a different interrogator on a second occasion, this recommendation refers not only to courtroom interrogation but also to precourtroom interrogation by, for example, the police.⁸³

C. *Pretrial Use of Videotapes*

In a typical case, a prosecution witness will undergo a series of pretrial encounters including informal interviewing by police and prosecuting attorneys as well as formal pretrial appearances, either at a preliminary hearing or before a grand jury, or both. Recall that the overriding purpose of the Louisiana videotaping statute was to eliminate as many interviews and appearances as possible which the child witness

81. Cohen & Harnick, *supra* note 19, at 207.

82. The proportions of wrong responses made on suggestive items, which were in the direction of the misleading suggestions were 94% (nine-year olds); 94% (twelve-year olds); and 88% (college-aged students). *Id.* at 208.

83. *Id.* at 209.

would otherwise be called upon to make. Reducing the number of times that the child will have to repeat her "story" in person, in front of strangers, ought to reduce the child's attendant trauma.

The informal, often unnecessary, bureaucratic interviews might well be eliminated in their entirety through the use of the videotaped statement. Although the child's resilience in the face of cross-examination would not have been tested, investigators might well be content to recommend or decline prosecution based upon their assessment of the child's credibility from the videotaped account. Similarly, since grand juries ordinarily hear only uncross-examined prosecution evidence,⁸⁴ a videotape would seem to be an adequate substitute for the child's appearance in person before the jurors. The only problem which arises is that the Louisiana Code of Criminal Procedure requires that a witness must be placed under oath before giving grand jury testimony.⁸⁵ In anticipation of this requirement, the child should be sworn to tell the truth at the beginning of the videotaped interview.

The use of the videotape at a preliminary hearing presents more complex issues. In most jurisdictions, including Louisiana, the preliminary hearing serves several discrete formal functions: it "screens" charges, resolving the issue of probable cause;⁸⁶ it decides the issue of pretrial restraint and sets bail, if appropriate;⁸⁷ and it can preserve testimony for trial if a witness later becomes unavailable.⁸⁸ There is no constitutional requirement that a preliminary hearing be provided so long as a state provides some mechanism for a judicial determination of probable cause, bail,⁸⁹ and for apprising the defendant of the nature of the charges

84. La. Code Crim. P. art. 442 states that the grand jury "shall hear" all evidence presented by the prosecution. It may hear defense evidence but is not required to do so.

85. The Louisiana Criminal Code requires that a witness must be administered an oath "to speak the truth . . . and to keep secret . . . matters which he learns at the grand jury." La. Code Crim. P. art. 440. Since a videotape is being offered in lieu of the child's appearance as a "witness," the oath of truthful testimony is arguably unnecessary for the receipt of the recorded hearsay statement. However, as we argue elsewhere, see *supra* note 64 and accompanying text, the recorded interview should properly contain a discussion of the necessity of truthful recollection and might also show that a formal oath was administered to the child. When the prosecution elects to submit a videotape rather than to summon the child as a live witness, obviously the child would not appear, and thus the secrecy of the grand jury would not be compromised.

86. La. Code Crim. P. art. 296.

87. *Id.*

88. La. Code of Crim. P. art. 295.

89. In *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975), the Supreme Court held that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to any significant pretrial restraint of liberty.

against him and his constitutional rights at trial.⁹⁰ By custom, however, the preliminary hearing also provides the defendant with an important discovery opportunity and encourages plea negotiations between the defense and prosecution.

The defendant's discovery opportunities are eliminated when, instead of a live witness, the prosecution offers her videotaped statement in absentia. Although the defendant will be able to see and hear the child making his accusation, he will not be able to conduct any cross-examination of the child. In *Gerstein v. Pugh*,⁹¹ the Supreme Court expressly declined to hold that the Fourth Amendment requires an adversarial hearing for the determination of probable cause.⁹² Although the Constitution does not require pretrial cross-examination of adverse witnesses,⁹³ Article 294 of the Louisiana Code of Criminal Procedure does grant the defendant the right to cross-examine any prosecution witness offered at a preliminary hearing. However, in seeking to introduce a videotaped statement the prosecution is not offering the child as a witness but is instead offering a hearsay statement, which is permissible at the preliminary hearing under Louisiana law.⁹⁴ This interpretation is reinforced by the evidentiary distinction, preserved in the videotaping statute,⁹⁵

90. The formal notice of charges and rights is usually accomplished in a separate judicial hearing known variously as an arraignment or initial appearance. La. Code of Crim. P. arts. 230.1, 551.

91. 420 U.S. 103, 95 S. Ct. 854 (1975).

92. As Mr. Justice Stewart observed:

These adversary safeguards [counsel, confrontation, cross-examination, and compulsory process for witnesses] are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest [which] . . . traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof. . . . This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.

Id. at 120-22, 95 S. Ct. at 866-67 (footnote omitted).

93. There are constitutionally protected discovery rights which will be discussed in Part IV of this article.

94. "No preliminary examination shall be held invalid for any purpose because of an informality or error that does not substantially prejudice the defendant." La. Code of Crim. P. art. 298. Certainly there is no constitutional prohibition against the use of hearsay at the probable cause hearing. See *supra* note 86.

95. "The admission into evidence of the videotape of a child as authorized herein shall not preclude the prosecution from calling the child as a witness or taking the child's testimony outside the courtroom as authorized in R.S. 15:282." La. R.S. 15:440.5(B) (Supp. 1987).

between the videotape as documentary evidence and the calling of the child as a witness. If, instead, article 294 is rigorously construed, then the prosecution would be put to a choice: it may avoid a preliminary hearing by seeking an early indictment,⁹⁶ or it may present the videotape at a preliminary hearing and offer the child for cross-examination.

Beyond question, the opportunity to view a videotape of the child's statement enables the defendant to make a more informed plea decision and appears even to encourage the choice of a guilty plea. The authors of a study prepared for the Department of Justice conducted telephone interviews with police and prosecutors of child sexual abuse and have reported:

Many prosecutors have observed an unanticipated, yet welcome side effect of videotaping a child's early statement: it tends to prompt a guilty-plea when viewed by defendants and their attorneys. Apparently, the defense reasons that a child who performs well on videotape will perform equally well in court. . . .⁹⁷

Similarly, in a 1983 study of Minnesota child abuse prosecutions, 60 of 75 defendants pleaded guilty after having viewed videotaped interviews of the child victims.⁹⁸

D. Admissibility as Evidence at Trial

1. Statutory Requirements

The foundation for the authentication of any videotape is a showing that the resulting visual and oral recording is accurate, unaltered, and in fact purports to be what it is: "what the witness [any observer authorized to be present who speaks during the process] or victim said."⁹⁹ There are four clear elements of the proponent's burden:

(1) that, as previously discussed, the strictures of R.S. 15:440.5 which govern the conduct of the interview have been complied with;¹⁰⁰

96. La. Code of Crim. P. art. 292 expressly provides that "[a]fter the defendant has been indicted by a grand jury, the court may rescind its order for a preliminary examination."

97. Whitcomb, Shapiro & Stellwagen, *When the Victim Is a Child: Issues for Judges and Prosecutors* 1, 60 (U.S. Dept. Justice, 1985).

98. *Lawscope*, 70 A.B.A. J. 36 (April 1984).

99. La. R.S. 15:440.5(A)(3) (Supp. 1987).

100. See *supra* note 56. The admissibility section explicitly requires only a showing that no attorney for either party was present. La. R.S. 15:440.5(A)(1) (Supp. 1987). Presumably the additional requirements for a qualifying "competent" interview contained in 15:440.4 also must be demonstrated to the court's satisfaction.

- (2) that the recording is accurate and has not been altered;¹⁰¹
- (3) that every voice on the recording is identified;¹⁰² and
- (4) that the defendant or his attorney has been afforded the opportunity to view the recording during the pretrial stages of the case.¹⁰³

The remaining two prerequisites for admissibility are more problematic:

- (5) that both the child¹⁰⁴ and the person conducting the child's interview¹⁰⁵ are "available" for live testimony at trial;¹⁰⁶ and
- (6) that "the statement was not made in response to questioning [or interrogatories]¹⁰⁷ calculated to lead the child to make a particular statement."¹⁰⁸

2. *Filling in the Gaps*

Perhaps the greatest single gap in this legislation is its silence concerning trial procedures governing authentication and competency rulings, the receipt of the videotape into evidence, and the direct and cross-examination of the child. In an effort to read between the lines of the statute, as it is currently worded, let us reconsider the fact pattern of the first Louisiana videotaping case, *State v. R.C., Jr.*¹⁰⁹ As is usual,¹¹⁰ here the only witness to the sexual assault was the child victim. The prosecution had prepared and wanted to tender into evidence a videotape of the five year old victim's statement, a copy of which had been shared with the defendant. Unless waived by stipulation, what foundation, if any, is required of the prosecutor? Can the court simply first view the proffered videotape, reserving its ruling upon any objection? The defendant has several potential sets of challenges: that the child is not a

101. La. R.S. 15:440.5(A)(3) (Supp. 1987).

102. La. R.S. 15:440.5(A)(5) (Supp. 1987).

103. La. R.S. 15:440.5(A)(7) (Supp. 1987). While unambiguous, this requirement does present some constitutional issues which will be deferred until Part IV of this article.

104. La. R.S. 15:440.5(A)(8) (Supp. 1987).

105. La. R.S. 15:440.5(A)(6) (Supp. 1987).

106. The meaning of the "availability" requirement is discussed in greater detail in Part IV of this article.

107. This requirement is imposed by La. R.S. 15:440.4(A)(3) (Supp. 1987).

108. La. R.S. 15:440.5(A)(4) (Supp. 1987).

109. 494 So. 2d 1350 (La. App. 2d Cir. 1986).

110. "The more common scenario . . . is that there is no physical proof, either because the physicians examining the children were not looking for it or missed it, or because the abuse was such that it left the child with no telltale signs." Rust, *supra* note 13, at 15. See also Barbieri & Berliner, *supra* note 37, at 129.

competent witness;¹¹¹ that the videotaped interview has been improperly conducted or otherwise improperly recorded according to the statutory requirements; and perhaps that the resulting videotaped interview otherwise constitutes untrustworthy evidence.¹¹²

In *R.C., Jr.*, the first step in the trial court's process was to conduct a competency examination of the five-year-old victim.¹¹³ The question arises whether such a preliminary determination was essential to the admissibility of the videotape. The videotaping statutes make no reference to the general statutory procedure governing child witness competency.¹¹⁴ In fact, Louisiana Revised Statutes 15:440.4(A) expressly sets out the requirements necessary "[t]o render such a videotape *competent* evidence,"¹¹⁵ which certainly seems to indicate that a general competency inquiry is not only unnecessary but even superseded by the satisfaction of its special criteria.

The fundamental justification for the receipt of any hearsay evidence, as an exception to the hearsay rule, is that a particular declaration derives its credibility from the reassuring strength of the circumstances surrounding its making rather than from any abstract notions of the veracity of the declarant.¹¹⁶ Logically, ordinary competency voir dire ought to be precluded, provided that an enabling videotaping statute has adequately defined the criteria of reliability. But therein lies the problem with the Louisiana statute.

The core concept of any videotaping statute is the standard it creates for the measurement of the reliability of the out-of-court statement. For that matter, the touchstone for every evidentiary rule, including every

111. The interrelationship between the competency of videotapes as documentary evidence and the competency of the child declarant is an issue which has troubled many enacting states. See Whitcomb, *supra* note 97, at 73-74.

112. La. R.S. 15:440.5(A) (Supp. 1987) states that if its criteria are met, the videotape "may be offered into evidence" which seems to indicate that there is some residuum of discretion in the trial court, that is, even if the enumerated requirements were met, a defendant might successfully object on proof of other indications of unreliability.

113. 494 So. 2d 1350, 1351.

114. La. R.S. 15:469 (1981).

115. La. R.S. 15:440.4(A) (Supp. 1987) (Emphasis supplied).

116. For example, the classic explanation of the admissibility of a *res gestae* statement is that it is not regarded as deliberative or conscious expression of the declarant but as "the event speaking through" him. Stafford, *The Child as a Witness*, 37 Wash. L. Rev. 303, 307 n.32 (1962). However, as Wigmore has conceded:

These two principles—necessity and trustworthiness—are only imperfectly carried out in the detailed rules under the [hearsay] exceptions. . . . The two principles are not applied with equal strictness in every exception; sometimes one, sometimes the other, has been chiefly in mind. In one or two instances one of them is practically lacking.

5 J. Wigmore, *Evidence in Trials at Common Law* 254 (J. Chadbourn rev. ed. 1974).

exception to the hearsay rule, is its reliability quotient.¹¹⁷ In this sense, the heart of the Louisiana videotaping exception is hollow: no attempt has been made by the legislature to establish reliability criteria for the trial court's use, other than the oblique prohibition against leading questions. Although Louisiana's statute is not uniquely flawed,¹¹⁸ it is rather easily mended.

Rule 807 of the Uniform Rules requires simply that the court find that "the time, content, and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness."¹¹⁹ The comments are much more illuminating and could well be enacted as a list of appropriate, relevant criteria for reliability and hence admissibility.¹²⁰ To the potentially distorting circumstances already proscribed by the Louisiana statute, the following other considerations would be taken into account:

the age of the minor; his or her physical and mental condition; the circumstances of the alleged event; the language used by the minor; the existence of corroborative evidence; the existence of any apparent motive to falsify; . . . the time when the statement was made; the number of interviews of the minor prior to the statement; and whether there exists any evidence of undue influence or pressure on the minor at or before the time of recording.¹²¹

To this listing, we submit these two additional factors which should be included: the length of time between the observations and its first report to an adult; and any variations, including retractions, in the

117. Of course, there are also constitutional dimensions to procedural and evidentiary rules which conflict with an accused's trial rights. These concerns are addressed in Part IV of this article.

118. Only three state statutes do refer to such a standard, albeit using a general proviso that "the time, content, and circumstances of the statement provide sufficient indicia of reliability." See Minn. Stat. Ann. § 595.02 (Supp. 1987); Tenn. Code Ann. § 24-7-116 (Supp. 1986); Wash. Rev. Code Ann. § 9A-44-120 (Supp. 1987).

119. Unif. R. of Evid. 807 (adopted Nov. 1986). This standard apparently derived from that previously enacted in Washington. Wash. Rev. Code § 9A.44.120(1) (Supp. 1987).

120. The presence and role of attorneys, the manner of eliciting the minor's statements during the interview, the significance of the role played by any unidentified speaker, absolute prerequisites or disqualifications under Louisiana law, and the accuracy of the resulting audio-visual recording are circumstances which are to be taken into account under the Uniform Rule. Unif. R. of Evid. 807 (adopted Nov. 1986) official comments.

121. *Id.*

child's account which have occurred in the interim between the first report and the time of trial.¹²²

Until such time as the Louisiana statute is amended, we may expect to continue to hear defense objections on general grounds of the incompetency of the child-declarant. How then should such objections be handled? Must an initial examination of the child on the witness stand be conducted before the videotape is viewed? Louisiana Revised Statute 15:469 outlines the generally applicable procedure as well as the substantive test for "competency":

Understanding, and not age, must determine whether any person tendered as a witness shall be sworn; but no child less than twelve years of age shall, over the objection either of the district attorney or of the defendant, be sworn as a witness, until the court is satisfied, after examination, that such child has sufficient understanding to be a witness.¹²³

Early cases insistent upon belief in divine punishment and a specific understanding of the nature of an oath have long since been discarded in this jurisdiction.¹²⁴ While still focusing upon whether a child knows the difference between truth and falsehood as one of the determinants of "intelligence,"¹²⁵ the appellate courts have placed a growing emphasis upon the child's ability to receive a just impression of the facts, to retain an independent recollection of those facts, and to communicate those facts.¹²⁶ The Louisiana appellate courts have never disqualified a child¹²⁷

122. Factors suggested by other commentators include: whether the statement was made while the child was still upset or in pain because of the incident; whether the statement appears to be a product of the child's own making, that is, is it "age-appropriate" for the child or the product of another's engineering; whether anything occurred between the event and the child's narration which might otherwise account for the statement. See Whitcomb, *supra* note 97, at 74-75, summarizing suggestions made in Note, Sexual Abuse of Children: Washington's New Hearsay Exception, 58 Wash. L. Rev. 813, 827 (1983).

123. La. R.S. 15:469 (1981).

124. *State v. Williams*, 111 La. 179, 35 So. 505 (1903), overruling *State v. Washington*, 49 La. Ann. 1602, 22 So. 841 (1897).

125. *State v. Noble*, 342 So. 2d 170 (La. 1977).

126. This is basically a recapitulation of the factors put forward by Wigmore: "[c]apacity to observe; capacity to recollect; capacity to communicate; capacity to understand questions; capacity to frame intelligent responses; and, a sense of moral responsibility." 2 J. Wigmore, *Wigmore on Evidence* § 506 (3d ed. 1940). See, e.g., *State v. Arnaud*, 412 So. 2d 1013 (La. 1982), in which a four-year-old witness was found competent to testify to his mother's rape.

127. Although the statutory test of competency is not tied to the attainment of any specific age, the Louisiana courts have never yet upheld a trial court's determination of competency of any child below the age of four. See *State v. Wilson*, 109 La. 74, 33 So. 85 (1902), and *State v. Dykes*, 440 So. 2d 88 (La. 1983), where three-year-olds were found to be incompetent to testify. Both four-year-olds, *Arnaud*, 412 So. 2d 1013, and five-year-olds, *Noble*, 342 So. 2d 170 have been held competent.

simply because he becomes emotional,¹²⁸ hesitates when answering questions,¹²⁹ or is ignorant of proper anatomical terms.¹³⁰

Under the videotaping statute, however, the issue remains open whether the competency determination can be based solely upon the videotape, without additional direct examination. In view of the liberal construction of competency which is enjoined upon trial courts, it is difficult to see how a defendant could be prejudiced by a preliminary competency ruling based upon the videotape's demonstration of the child's demeanor, responsiveness, moral appreciation of the consequences of his accusation, and other elements of his "intelligence." Consequently, we assume that ruling on the competency objection is properly reserved until after the videotape is tendered and viewed.¹³¹ At that point, the defendant must be offered the right to cross-examine the child further on the issue of the reliability of the videotaped statement and the child's competency as a witness if he is to give testimony at the trial.¹³²

Unless waived by stipulation, the prosecutor's foundation for the admissibility of the videotape is met by calling the child interviewer (or the interview "supervisor") as a witness. For example, in *State v. R.C., Jr.*,¹³³ the state examined the DHHR Child Protection Investigator who had interviewed the child victim. Presumably, under the statute's current wording, this witness must be willing to testify that no attorney for either party nor any relative of the victim was present in the interviewing room and that the interview was supervised by some authorized individual. Further, the witness must be prepared to identify the voice of every person who speaks during the recording. This witness might also assert that the recording was voluntarily made by the child and that no misleading questions were asked, but, of course, these issues can only be resolved by viewing the videotape itself. Similarly, unless waived by

128. In *Noble*, 342 So. 2d 170, a recess was necessary so that the five-year-old rape victim could compose herself; and in *State v. Johanson*, 332 So. 2d 270 (La. 1976), a ten-year-old rape victim cried throughout her testimony.

129. In *State v. Foy*, 439 So. 2d 433 (La. 1983), a six-year-old witness to the murders of two other children was held competent: "[A] child's sometimes hesitant or unresponsive answers do not necessarily indicate incompetency. . . . Instead, they may be part of the child's overall demeanor in the unfamiliar courtroom experience that favorably reflects testimony only as to what is clear to the child. . . ." *Id.* at 435.

130. *Johanson*, 332 So. 2d 270.

131. In *Jolly v. State*, 681 S.W.2d 689 (Tex. App. 14 Dist. 1984), the appellate court affirmed a trial court ruling that no preliminary inquiry into the child's competence was necessary. After an independent viewing of the tape, the appellate court affirmed the competency ruling.

132. See the discussion of *Kentucky v. Stincer*, 55 U.S.L.W. 4901 (U.S. June 19, 1987), a child witness competency case, in Part IV of this article.

133. 494 So. 2d 1350 (La. App. 2d Cir. 1986).

stipulation, the videotaping cameraman, videotape custodian, or an electronics expert (or conceivably all three) would need to be called to attest to the unaltered accuracy of the videotape.

Once these preliminaries are concluded in favor of the proponent, can the videotape now be shown, or must the state summon the child for direct examination? In *R.C., Jr.*, the state put the child victim on the stand as a witness and adduced testimony confirming the accuracy of her prior videotaped statement.¹³⁴ This is, however, not a required step under the Louisiana statute, which says simply that the child must be "available to testify."¹³⁵

The introduction of a qualifying videotape is an additive means available to a Louisiana prosecutor for eliciting the child's narrative of the abusive encounter. If he so chooses, the prosecutor may decide to call the child as a witness or produce a deposition of the child, apparently either in lieu of or in addition to the introduction of a videotape into evidence.¹³⁶ Although predictably a defendant may assert that his constitutional rights to confrontation are violated when the child is not produced as the state's witness on direct examination,¹³⁷ the Louisiana videotaping statute does not require the extraordinary precautions taken by the prosecutor in *R.C., Jr.*

After the trial court views the videotape, any objections to the use of misleading questions, lack of voluntariness, or other aspects of potential unreliability can be resolved. However, it must be noted that the Louisiana statute's absolute prohibition of the use of leading questions¹³⁸ can lead to absurd results. Arguably, should a defendant be able to demonstrate the use of *any* leading question, the competency of the entire recording would be jeopardized. Suppose the interviewer, confronted with a child who is frozen by nervousness, resorts to a series of inconsequential, warm-up questions, such as, "Aren't you eight years old?" or "Do you live at 34 Jones Street with your parents and younger sister?" Though these questions are undeniably leading, in the accepted connotation of that term, their use ought not to vitiate the force of a

134. "The victim was called by the state as a witness. On direct examination, she referred to the defendant as 'Junior,' his nickname, and identified him. She testified that she had related the incident to her mother and to [the DHHR interviewer] and that if she were asked the same questions as [the interviewer] had asked her before, she would give the same answers." *R.C., Jr.*, 494 So. 2d at 1351.

135. La. R.S. 15:440.5(A)(8) (Supp. 1987).

136. La. R.S. 15:440(B) (Supp. 1987).

137. This issue will be explored in Part IV which concerns constitutional challenges to the Louisiana statute.

138. La. R.S. 15:440.4(A)(3) (Supp. 1987) mandates "[t]hat such recording was not made of answers to interrogatories calculated to lead the child to make any particular statement." See also La. R.S. 15:440.5(A)(4) (Supp. 1987).

remaining account of the child's assault, provided the child thereafter recovers his balance and displays an independent recollection of the critical encounter.¹³⁹

Although the Louisiana statute does not distinguish between the use of material and immaterial leading questions, Louisiana jurisprudence has long recognized that some greater leeway should be afforded counsel faced with the task of adducing a child's testimony.¹⁴⁰ In construing this statute, courts should evaluate the impact of any question found to be "leading" upon the reliability of a particular strand of inquiry or upon the recording taken as a whole by using a distortion analysis, permitting untainted portions to be received into evidence. Apparently this tack was taken by the Third Circuit Court of Appeals in its recent videotaping decision, *State v. Feazell*.¹⁴¹ The defendant there urged that leading questions had been used to interview the seven year old victim. The court brushed aside this argument, stating: "[N]otwithstanding the general rule against leading questions, the matter is largely within the discretion of the trial court and in the absence of the palpable abuse of that discretion resulting in prejudice to the accused, a finding of reversible error is not warranted."¹⁴²

In contrast, if the defendant can demonstrate that the child's version has been distorted through the interviewer's manipulation, then the recording should not be received into evidence at trial. For example, the defendant might well be able to demonstrate that the recording, taken as a whole, reveals little by way of an independent recollection by the child but is, instead, a course of suggestive questioning in which the child has simply acquiesced.

As currently written, the Louisiana videotaping statute does not clearly reserve the right of the defendant to object to portions of the recording, even if, taken as a whole, the videotape appears to have been reliably conducted. Suppose, for example, that in the course of identifying the defendant as her assailant, the child adds that she was afraid of him because everyone in the neighborhood knew that the

139. See *Mallory v. State*, 699 S.W.2d 946, 950 (Tex. App. 6 Dist. 1985):

Leading questions that are isolated, or those concerning the details of testimony already given in response to proper interrogation, or those concerning matters not directly related to the offense, will not destroy the tape's admissibility so long as the overall product is not the result of suggestion.

Accord, *Jolly v. State*, 681 S.W.2d 689 (Tex. App. 14 Dist. 1984); *Woods v. State*, 713 S.W.2d 173 (Tex. App.-Texarkana 1986).

140. See, e.g., *State v. Kelly*, 456 So. 2d 642 (La. App. 2d Cir. 1984), writ denied, 461 So. 2d 312 (La. 1984).

141. 486 So. 2d 327 (La. App. 3d Cir. 1986), writ denied, 491 So. 2d 20 (La. 1986).

142. *Id.* at 330.

defendant had just gotten out of jail, because the defendant had raped another friend the day before, or because her mother had told her that he was a "bad man." The defendant ought to be able to object to the admissibility of any portion of the videotaped interview which contains highly prejudicial information, "hearsay within hearsay," or is otherwise objectionable under the general rules of evidence. In instances in which objections are sustained, the tape could rather simply be edited, under court supervision, to remove the offending portions. The statute should be clarified to provide that the court must entertain and resolve any objections to the admissibility of the recording, either in whole or in part, before submitting it to a jury.

Predictably in most cases, defense objections to the admissibility of the videotaped recording can be resolved by the court's simply viewing the recording. However, it is potentially quite possible that through cross-examination of the child or some other individual as an adverse witness, the defendant may be able to present evidence of distortion which would not be apparent on the face of the recording. As previously discussed, the authors are recommending that the Louisiana statute be amended to provide that the videotape must provide sufficient circumstantial indicia of reliability,¹⁴³ in addition to the rather minimal safeguards of its current wording. For example, in situations in which the defendant makes an offer of proof that the child was "prepped," "woodshedded," or otherwise suggestively interviewed before the recording was made, the court quite properly should reserve ruling on the admissibility of the videotaped recording until these issues are explored and resolved.

E. Confidentiality

The confidentiality provision of any videotaping law is an important feature of its child-protection armament¹⁴⁴ but is universally non-controversial. The Louisiana version¹⁴⁵ presents an unambiguous command. In order to protect the privacy of the child, any videotape, which becomes a part of the court record, must be preserved under a protective order of the court. Unless an appeal is filed, the court must order the destruction of the videotapes after an elapse of five years from the date of the final judgment.

143. See *supra* notes 49-52 and accompanying text.

144. "Even if videotapes are not intended for use as evidence at trial, their mere existence may pose a threat to the victim's privacy. Confidentiality cannot be guaranteed and videotape excerpts have reportedly appeared on media broadcasts." Whitcomb, *supra* note 97, at 62.

145. La. R.S. 15:440.6 (Supp. 1987).

IV. THE CONSTITUTIONALITY OF THE LOUISIANA STATUTE

When new procedural or evidentiary rules are authorized which affect the trial rights of an accused, issues of constitutional dimension arise. Furthermore, we know that assertion of the state's *parens patriae* duty to protect children is not a cure-all justification.¹⁴⁶ Until the 1986-87 term of the United States Supreme Court, one could have predicted rather comfortably the constitutionality of the Louisiana statute. However, with the release of the Court's recent decision in *Kentucky v. Stincer*,¹⁴⁷ some more impassioned defense of that prediction now seems necessary.

A. *The Right of Confrontation*1. *Postponed Cross-examination*

The creation of a new explicit exception to a state's hearsay rule¹⁴⁸ raises rather serious questions of the compatibility of the new exception with an accused defendant's right of confrontation under the Sixth and Fourteenth Amendments.¹⁴⁹ The constitutional vulnerability of videotaping statutes arises out of their attempt to provide an alternative procedure to the deposition mechanism.

Under this special statute, before trial, the child will either give an unaided narrative of the assault or be interviewed about the event without contemporaneous cross-examination by the accused assailant, indeed out of the presence of either the defendant or his counsel. Shielding a young victim from confrontation with an alleged assailant seems to run precisely counter to a defendant's right to face his accuser. Much has already been written concerning the constitutionality of child victim videotaping

146. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 569, 102 S. Ct. 2513 (1982), the Supreme Court held that the state's generalized concern in avoiding further trauma for minor victims of sexual offenses and its interest in encouraging such victims to come forward and testify provided inadequate justification for excluding the public while the child testified in a criminal proceeding. Such a broadly drawn statute unduly compromised the First Amendment rights of the public and press to have access to criminal trials.

147. 55 U.S.L.W. 4901 (June 19, 1987).

148. Arguably, the existing past-recollection-recorded exception to the hearsay rule could be used to permit the introduction of a child's videotaped statement. Fed. R. Evid. 803(5); La. R.S. 15:434 (1981). In terms of reliability indicia, the premises underlying the receipt of past recollections recorded are indistinguishable from those supporting the admissibility of a videotape. See *supra* note 23 and accompanying text.

149. U.S. Const. amend. VI and XIV. See also, La. Const. art. 1, § 16.

statutes which are similar in design to Louisiana's law.¹⁵⁰ More importantly, in the six states which have enacted statutes similar to Louisiana's, all states but Texas have rejected constitutional challenges when asserted.¹⁵¹ Two Courts of Appeal in Louisiana have upheld the constitutionality of the Louisiana statute.¹⁵² These developments have occurred, however, before the Supreme Court's latest interpretation of the Confrontation Clause in *Kentucky v. Stincer*.¹⁵³

In *Stincer*, the confrontation claim arose out of an in-chambers competency examination of two child witnesses from which the defendant had been excluded, though he was represented by counsel. A majority of the Court ultimately rejected the defendant's assertion of constitutional error¹⁵⁴ and affirmed his conviction for first degree sodomy. Said Mr. Justice Blackmun for the majority, the appropriate test for a Confrontation Clause violation is not whether the challenged procedure is a "critical stage" of the criminal proceedings but "whether the defendant's presence at the proceeding would have contributed to the defend-

150. Note, *The Testimony of Child Abuse Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806 (1985); Note, *The Use of Videotaped Testimony of Victims in Cases Involving Sexual Abuse: A Constitutional Dilemma*, 14 Hofstra L. Rev. 261 (1985); Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 Mich. L. Rev. 475 (1985); Note, *Child Hearsay Statements in Sex Abuse Cases*, 83 Colum. L. Rev. 1745 (1983).

151. Arkansas: *McGuire v. State*, 706 S.W.2d 360 (Ark. 1986); *Chappell v. State*, 710 S.W.2d 214 (Ark. App. 1985); Kansas: *State v. Johnson*, 240 Kan. 325, 729 P.2d 1160 (Kan. 1986); Kentucky: *Gaines v. Commonwealth*, No. 86-SC-39-MR (Ky. Sup. Ct., Mar. 17, 1987) (held unconstitutional on other grounds); Minnesota: *In re Welfare of M.S.M.*, 387 N.W.2d 194 (Minn. App. 1986); *In the Matter of the Welfare of W.W.M.*, 400 N.W.2d 203 (Minn. App. 1987); Tennessee: *State v. Powell*, No. 255 (Tenn. Ct. Crim. App., Mar. 17, 1987). The sixth state, Arizona, has yet to consider an appeal on the issue of its statute's constitutionality.

The Texas statute was recently held unconstitutional on both due process and confrontation grounds in *Long v. State*, No. 867-85 (Tex. Crim. App. July 1, 1987). Prior to *Long*, constitutional challenges were rejected in at least eight cases: *Jolly v. State*, 681 S.W.2d 689 (Tex. App. 14 Dist. 1984); *Alexander v. State*, 692 S.W.2d 563 (Tex. App. 11 Dist. 1985); *Clark v. State*, 748 S.W.2d 484 (Tex. App. Ft. Worth 1987); *Newman v. State*, 700 S.W.2d 307 (Tex. App. 1 Dist. 1985); *Tolbert v. State*, 697 S.W.2d 795 (Tex. App. 1 Dist. 1985); *Mallory v. State*, 699 S.W.2d 946 (Tex. App. 6 Dist. 1985); *Pierce v. State*, 724 S.W.2d 928 (Tex. App. Austin 1987); and *Gibson v. State*, No. A14-86-409CR (Tex. App. 14 Dist. April 16, 1987).

152. *State v. Feazell*, 486 So. 2d 327 (La. App. 3d Cir. 1986), writ den. 491 So. 2d 20 (La. 1986); *State v. Guidroz*, 498 So. 2d 108 (La. App. 5th Cir. 1986).

153. 55 U.S.L.W. 4901 (June 19, 1987).

154. The majority rejected both the defendant's confrontation and due process claims. It refused to review his effective assistance of counsel claim because it was not raised before the lower court nor did it arise to the level of "an exceptional case." *Id.* at 4905, n.22. The dissenters, Justices Marshall, Brennan, and Stevens, would find a violation of the Confrontation Clause and withhold ruling on due process because the issue was not addressed by the state court below.

ant's opportunity to defend himself against the charges."¹⁵⁵ In adopting this case-by-case, functional approach, Mr. Justice Blackmun identified four important factors in the application of this test to the challenged in-chambers procedure: (1) all questions and answers given in the challenged procedure could have been easily repeated in the defendant's presence at trial; (2) the two child witnesses thereafter did appear and testify in open court; (3) they were then subject to a full and complete cross-examination on the competency issue;¹⁵⁶ and (4) the challenged procedure did not involve substantive testimony about the alleged offense.¹⁵⁷

The Court's special emphasis on the final, fourth factor presents the most troublesome hurdle for a constitutional defense of statement videotaping statutes. As Mr. Justice Blackmun appeared to have been warning in the opinion's conclusion:

Thus, although a competency hearing in which a witness *is asked to discuss upcoming, substantive testimony* might bear a substantial relationship to a defendant's opportunity better to defend himself at trial, that kind of inquiry is not before us in this case.¹⁵⁸

Clearly the Louisiana statute envisions that a child will give a complete account of the substance of the criminal charges which will bring it squarely within the constitutional determination reserved in *Stincer*. The statute will withstand constitutional scrutiny if and only if the combination of its particular features¹⁵⁹ are sufficient to overcome the denial of the right of the defendant and his counsel to be present during the taping session.

First, unlike the competency hearing under review in *Stincer*, the optimal time for scheduling the videotaping session will be shortly after the commission of the alleged offense, when no charging decision may have yet been made concerning a particular defendant. At least historically, the Sixth Amendment guarantee of counsel (and presumably confrontation as well) does not attach until the onset of adversary judicial

155. Id. at 4904 n.17.

156. Id. at 4903.

157. Id. at 4905.

158. Id. (emphasis added).

159. Rather obviously, the legislature's general acknowledgment of the defendant's confrontation rights offers little protection. If the defendant has a constitutional right to be present and cross-examine at the videotaping session, then the statute is gutted. The interpretational admonition that "[n]othing in this section shall be construed to prohibit the defendant's right of confrontation" would become useless. La. R.S. 15:440.5 (Supp. 1987).

criminal proceedings.¹⁶⁰ Second, even if the videotaping session occurs after indictment or accusation, it is purposefully and explicitly a *non-adversarial* process. Not only is the defense excluded but so also are the prosecution and any relatives of the child victim who potentially at least might exert an influence over the child. The presence of a neutral supervisor is required to monitor and insure the detachment of the process from the usual sorts of partisan examination.

From the interrelationship of timing and neutrality of the process, we derive the central notion that an early videotaping of a child witness's statement can produce a more reliable testimonial account than is otherwise achievable through the ordinary processes of examination and cross-examination. If, as this article has attempted to document, this premise is true, then it is difficult to understand how the defendant is harmed in fact. As it has been construed, the Confrontation Clause ordinarily includes the right of cross-examination.¹⁶¹ However, in the case of child witnesses, if it is provable that an adversarial process at the early stages of a child's outcry diminishes rather than secures reliability, then surely an exception could be justified. The Constitution ought not to be interpreted to permit a defendant to use it as a shield against the production of more reliable evidence about the accusation against him.

The third feature of the Louisiana videotaping statute which might spare it from a ruling of unconstitutionality is that it creates a new discovery right for an accused.¹⁶² Using the cost-benefit analysis of recent Supreme Court precedent,¹⁶³ it is important to underscore the fact that as a direct result of the use of videotaping procedure, the defendant receives an important benefit which would not otherwise be his: the right to have a copy of the videotaped statement of the individual who will undoubtedly become the prosecution's principal witness at trial. Under the general provisions of Louisiana law, a defendant does not have the right to interview or depose a prosecution witness before trial.¹⁶⁴

As to the other factors enumerated in *Stincer*, the Louisiana statute would appear constitutionally sufficient. The child will subsequently appear and testify in open court, if called by either party, and will be subject to a full and complete cross-examination at trial. More impor-

160. Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877 (1972).

161. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065 (1965).

162. This new right is discussed infra at notes 162-64 and accompanying text.

163. See, e.g., Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037 (1976); Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285 (1985).

164. Article 723 of the Louisiana Code of Criminal Procedure states: "[T]his chapter does not authorize the discovery . . . of statements made by witnesses or prospective witnesses, other than the defendant, to the district attorney, or to agents of the state."

tantly, unlike the competency procedure before the Court in *Stincer*, the defendant will have a record of the prior statement to use for the preparation and conduct of his cross-examination. According to the Louisiana statute, the videotape is not admissible unless both the child and his interviewer, if any, are also "available to testify" at trial;¹⁶⁵ and the defendant must be permitted pre-trial review of any videotape.¹⁶⁶

The timing of the assessment of compliance with a defendant's confrontation rights makes all the difference. Viewed from a point in time immediately after the creation of the videotaped evidence, the exclusion of the accused and counsel from that process might then appear to be a denial of confrontation. However, in the interim between the videotaping and trial, the defendant is given access to the recording which enables him to prepare any objections to its admissibility and prepare his defense to the child's recorded assertions. At trial, the availability of the child and any interviewer for any necessary cross-examination seems to provide adequate protection of the defendant's right of confrontation.

The argument that postponed or non-simultaneous cross-examination somehow violates the Confrontation Clause¹⁶⁷ appears to have been finally put to rest in the *Stincer* case. As the dissenters characterize the majority opinion: "The Court today defines respondent's Sixth Amendment right to be confronted with the witnesses against him as guaranteeing nothing more than an opportunity to cross-examine these witnesses *at some point* during the trial."¹⁶⁸ However, in defense of the majority's position, it must be noted that the Supreme Court has never yet found a violation of the Confrontation Clause in situations where a witness concedes having made recorded statements *and* is subject to full cross-examination at trial. In each of the seven Supreme Court cases which address this issue, the declarant was *not* available for full cross-examination about his prior statements at a later trial.¹⁶⁹

165. La. R.S. 15:440.5(A)(6) and (8) (Supp. 1987).

166. La. R.S. 15:440.5(A)(7) (Supp. 1987).

167. See Tulane Comment, *supra* note 8, at 166-80. The basis for the argument that postponing confrontation and cross-examination until trial is unconstitutional stems from concern voiced by the Supreme Court in *California v. Green*, wherein the Court observed:

The main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness' "[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others. . . ."

399 U.S. 149, 159, 90 S. Ct. 1930, 1935 (1970) (quoting an earlier Minnesota decision, *State v. Saporen*, 205 Minn. 358, 285 N.W. 898 (1939)).

168. *Stincer*, 55 U.S.L.W. at 4905 (Marshall, J., dissenting) (emphasis in original).

169. In *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065 (1965), the victim was unavailable and the state sought to introduce prior testimony at a preliminary hearing at which the

Furthermore, insofar as the due process challenge is concerned, the *Stincer* majority takes a functional view of the right of cross-examination, placing the burden squarely upon the defendant to demonstrate how his presence at the earlier hearing would have enhanced the reliability of the procedure.¹⁷⁰

Respondent has given no indication that his presence at the competency hearing in this case would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify. He has presented no evidence that his relationship with the children, or his knowledge of facts regarding their background, could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency.¹⁷¹

2. "Availability" of the Child as a Witness

Much has been made of the fact that under the Louisiana statute the prosecution may elect not to present the child victim as a witness, relying instead upon the probity of the videotaped statement.¹⁷² In constitutional terms, it is argued that forcing the accused to call the child

defendant was unrepresented. The Court found a violation of the Confrontation Clause. In *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074 (1965), an accomplice refused to testify at trial and the state sought to introduce police officer's testimony about a confession by the accomplice which incriminated the defendant. The Court found a violation of the Confrontation Clause. In *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318 (1968), the witness was inexplicably not present at trial, and the state sought to introduce his prior testimony at a preliminary hearing. The Court found a violation of the Confrontation Clause. In *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968), a co-defendant was not offered for testimony, and the state sought simply to introduce his confession which incriminated the defendant. The Court found a violation of the Confrontation Clause. In *Green*, 399 U.S. 149, 90 S. Ct. 1930, the witness claimed a lapse of memory, and the state sought to introduce prior testimony at a preliminary hearing. No violation of the Confrontation Clause resulted. In *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531 (1980), the witness failed to appear at trial, and, in rebuttal to a defense claim about her probable testimony, the state offered her prior testimony at a preliminary hearing. No violation of the Confrontation Clause resulted. In *Tennessee v. Street*, 471 U.S. 409, 105 S. Ct. 2078 (1985), the state offered an accomplice's confession as rebuttal to a defense claim that he had been compelled to model his own confession on the prior one given by the accomplice. Although the accomplice did not testify, the sheriff did. No violation of the Confrontation Clause was found.

170. Consequently, *Stincer* falls in line with other Sixth Amendment right to counsel precedent, such as *Kirby v. Illinois*, 406 U.S. 182, 92 S. Ct. 1877 (1972), and *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972).

171. *Stincer*, 55 U.S.L.W. at 4905.

172. Tulane Comment, *supra* note 8, at 179-80. For a discussion of this option under the Louisiana statute, see *supra* note 130 and accompanying text.

as an adverse witness compels him to elect between two guarantees: the right of confrontation and the "right to remain passive,"¹⁷³ that is, the right to make the state entirely shoulder the burden of proof.¹⁷⁴

This argument was accepted in a recent Texas Court of Appeal decision, *Long v. State*.¹⁷⁵ *Long* might well be dismissed as simply an aberrant ruling¹⁷⁶ were it not for the fact that it may have already influenced the course of Louisiana jurisprudence.¹⁷⁷ The most incredible part of the Texas opinion in *Long* is the following passage:

[N]either our record nor the legislative history contains evidence that the child was, or that sex-abuse victims generally are, emotionally disturbed, reluctant to testify, or intimidated by the accused, or evidence that the videotape procedure was more likely than in-court testimony to elicit a reliable response.¹⁷⁸

Certainly, as a general proposition, there is overwhelming documentation available that child abuse victims are emotionally disturbed by in-court reiteration of their ordeal, and that an early, videotaped account is more reliable than later testimony.¹⁷⁹ However, the court's ignorance may be due to the fact that such data was not preserved in the legislative history of the Texas statute nor argued before the court in defense of the legislation.

173. Tulane Comment, *supra* note 8, at 179.

174. In *Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967 (1968), the Court held that a forced choice between two fundamental constitutional rights is forbidden by due process. The procedure invalidated in *Simmons* permitted the government's use at trial (in violation of Fifth Amendment rights) of the defendant's prior suppression hearing testimony in support of his Fourth Amendment rights. This issue is raised in the context of videotaping statutes by the dissenters in *Stincer*, 55 U.S.L.W. at 4907 (Marshall, J., dissenting).

175. 694 S.W. 2d 185 (Tex. App. 5 dist. 1985).

176. First of all, the Texas court interpreted the Confrontation Clause to require either a deposition or that the child witness reiterate the former statement as direct testimony for the state, despite the more limited rights acknowledged by the United States Supreme court as previously discussed. See *supra* notes 160 and 161 and accompanying text. Secondly, even though the child witness was available at trial, the court imposed the duty upon the state, as the proponent of the statement, to demonstrate that there was sufficient indicia of reliability to justify admitting the prior videotaped statement. As several commentaries point out, the state's burden of proving indicia of reliability of the hearsay declaration has been imposed only when the declarant is *unavailable* for later testimony at trial. See Comment, *Child Hearsay Statements in Sex Abuse Cases*, 83 Colum. L. Rev. 1745 (1983).

177. See *State v. R.C., Jr.*, 494 So. 2d 1350, 1355, which cites *Long* and in dictum notes that the Louisiana statutory scheme "severely compromises the defendant's constitutional rights." *Id.* at 1356.

178. *Long*, 694 S.W.2d 185.

179. See *supra* notes 15-22 and accompanying text.

A similar failure of proof occurred in *State v. R.C., Jr.*¹⁸⁰ before the Second Circuit Court of Appeal of Louisiana. At stake was the proper interpretation of the statute's requirement that "[t]he child must be available to testify."¹⁸¹ In this case, a videotaped recording had been made, and the five-year-old victim answered a few questions on direct. Then, the child lapsed into muteness when defense counsel sought to conduct a cross-examination. When asked whether she was going to answer any of the defense counsel's questions, the child shook her head negatively. Defense counsel argued that the victim was "unavailable" and, therefore, the statutory requirements for the videotape's admissibility had not been satisfied. In an opinion which carefully avoided the constitutional issue, though its lengthy discussion of *Long* and other Texas precedent is disturbing, the Court of Appeal affirmed the trial court's ruling that the videotape was inadmissible due to the child's "unavailability".

The Court of Appeal seems to have arrived at the correct result in *R.C., Jr.* When the defendant is denied the right of cross-examination during the making of the videotape and is precluded from effective cross-examination due to the child's intransigence at trial, a strong argument can be made that his fundamental rights to a fair trial and to confront his accuser have been violated.¹⁸² Nevertheless, even if no constitutional infringement occurs when a child witness refuses to respond to cross-examination,¹⁸³ the clear requirement of "availability" under the Louisiana statute remains unmet.

180. 494 So. 2d 1350 (La. App. 2d 1986).

181. It should be noted that the Louisiana legislature did not clearly articulate whether a child victim must be subject to *cross-examination* by the defendant. La. R.S. 15:440.5(A)(6) (Supp. 1987) explicitly provides that "[t]he person conducting the interview of the child in the recording [must be] present at the proceeding and available to testify *or be cross-examined by either party.*" However, Subsection (A)(8), the parallel provision concerning the child victim, says simply: "The child [must be] available to testify."

182. A similar ruling was made in a Texas case, *Gibson v. State*, No. A14-86-409CR (Ct. App. 14th Dist., April 16, 1987). There, after a finding of competency, a four-year-old refused to testify as to any particulars of the alleged abuse and even denied she was sexually abused. The state then attempted to introduce a videotape of a prior statement made by the child. The court held that the statutory requirement of "availability" means that the witness must be willing and able to testify.

183. Arguably, even in cases of witness unavailability, the Constitution does not foreclose the state from using the witness's prior hearsay statements. According to Supreme Court precedent, the state is permitted to make a showing in such cases that the prior recorded statement is trustworthy and its receipt "necessary" because unavailable from other sources.

As the Supreme Court stated in *California v. Green*:

As in the case where the witness is physically unproducible, the State here has made every effort to introduce its evidence through the live testimony of the

B. Discovery Rights

Before the videotape can be admitted into evidence, the defendant or his attorney must be "afforded an opportunity to view the recording. . . ."¹⁸⁴ The Louisiana statute makes no provision, however, for the defendant's previewing of any tape which the prosecution does *not* intend to offer into evidence. Such a situation is quite likely to occur.

Suppose, for example, that the District Attorney is sufficiently impressed with a child's story of his victimization that the decision to prepare a case is made. The first step is to make a videotape of an interview with the child. However, during the taped interview, the child becomes elusive, the equivocal in his memory of certain details of the assault. In the extreme case, the child recants his identification of the accused adult, although in this instance other evidence exists which seems to establish the defendant's culpability, such as, the testimony of another witness, the defendant's confession, or circumstantial evidence connecting the defendant to this offense. Because the District Attorney would undoubtedly elect not to use the child's videotaped statement at trial, there would be no clear requirement under the current statute to alert the defendant to the statement's existence, much less afford him the opportunity to view it.

The question which arises under such a foreseeable scenario¹⁸⁵ is whether the defendant's due process rights to exculpatory evidence are violated by the failure of the videotaping statute to anticipate and affirmatively acknowledge those rights? The authors submit that Louisiana Revised Statute 15:440.5(A)(7) need not specifically address this issue *so long as the general rules of pre-trial discovery are amended to include access to videotapes and to reflect current requirements of federal*

witness. . . . Whether [the witness] then testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege against compulsory self-incrimination, or simply refused to answer, nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case against [the accused].

399 U.S. 149, 167-68, 90 S. Ct. 1939-40 (1970).

184. La. R.S. 15:440.5(A)(7) (Supp. 1987).

185. A second foreseeable fact pattern is illustrated by *Woods v. State*, 713 S.W.2d 173 (Tex. App.-Texarkana 1986). There two videotapes were made of the child's account. In the first, the victim denied that anyone had assaulted her, maintaining instead that her injuries were the result of a fall. Two months later, in the second videotape, the child described the assault and identified the defendant as the perpetrator. Only this second videotape was presented to the defendant. Upon learning of the prior videotape, the defendants moved for a new trial claiming that the state had wrongfully withheld exculpatory evidence. Rather narrowly construing the *Brady* command, the Texas court held that while arguably the first tape was exculpatory, taken as a whole, its admission would not have changed the outcome of the case.

constitutional law. However, for purposes of clarifying the defendant's discovery rights to this new type of evidence, certainly the better course might be to include an affirmative right of access to exculpatory videotaped statements within this statute or at least to provide an explicit cross-reference to the general discovery rules.

Article 718 of the Louisiana Code of Criminal Procedure provides that:

[O]n motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect, copy, examine, . . . photograph, or otherwise reproduce books, papers, documents, photographs, tangible objects, . . . or copies or portions thereof, which are within the possession, custody, or control of the state and which: . . . are favorable to the defendant and which are material and relevant to the issue of guilt or punishment. . . .¹⁸⁶

Note that this requirement is not limited to evidence that the District Attorney intends to offer at trial. Hence, even in the situation described in the above hypothetical, the defendant under this general discovery right might well be entitled to inspect the videotape.

When enacted, article 718 adequately reflected the state of federal constitutional law as it had been laid down by the Supreme Court in *Brady v. Maryland*.¹⁸⁷ *Brady* seemed to impose a duty of disclosure of exculpatory material upon the prosecutor only upon a request by the defendant. However, since *Brady*, the Supreme Court has decided *United States v. Bagley*,¹⁸⁸ holding that the *Brady* duty of disclosure is operative even in absence of any request for exculpatory evidence by the accused.¹⁸⁹ Consequently, article 718 needs to be amended to reflect this important procedural change.

186. La. Code of Crim. P. art. 718.

187. 373 U.S. 83, 83 S. Ct. 1194 (1963). The Supreme Court held that the suppression by the prosecution of evidence favorable to the accused, upon request by the defendant, violates due process where the evidence is material to either guilt or punishment.

188. 473 U.S. 667, 105 S. Ct. 3375 (1985). According to *Bagley*, evidence is "material" only if there is a reasonable probability that either the guilt determination or the punishment imposed would have been affected had the defendant been given pre-trial access. *Id.* at 682, 105 S. Ct. 3375, 3384. In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), the Court had previously defined "reasonable probability" as a probability sufficient to undermine confidence in the outcome.

189. The materiality standard is "sufficiently flexible to cover the 'no request', 'general request', and 'specific request' cases for failure to disclose evidence favorable to the accused." *Bagley*, 473 U.S. at 682, 105 S. Ct. at 3384. As a result, the standard of materiality of *Brady* no longer depends on the degree of specificity of the defendant's request for exculpatory material or indeed the lack of any such request by the accused.

Deciding when particular evidence must be shared with the defendant will always present close questions of due process and ethical responsibility for prosecutors and reviewing courts, no less so when videotaped statements of child victims are the source of dispute. What is the prosecutor's burden (or the defendant's right) when, for example, the child's videotape reveals some detail confusion, identification ambiguity, or immaterial, though provable inaccuracy of memory? While arguably not "exculpatory" in the ultimate sense of *Brady*, the videotape might well provide an accused with important impeachment evidence.¹⁹⁰ In *Bagley*, the Supreme Court expressly held that "Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule."¹⁹¹

In support of the Louisiana position that the defendant be supplied with the videotape only if the child is to testify at trial, others have argued that the child cannot be otherwise protected from the rigors of defense harassment. As the authors of one influential book reason:

[C]hildren's interviews are seldom straightforward, and the child may volunteer information that is detrimental to the case and cannot be excised. For example, we viewed a videotape of a three-year old who wavered on the question of whether she had a dog. An astute defense attorney could exploit the child's statement. Indeed, the child may even deny the allegation at the time the videotape is made.¹⁹²

There is, however, little extant data which would suggest an inability of jurors or the bench to ignore immaterial fact confusion, such as whether the child actually possesses a dog.¹⁹³ Furthermore, the court has a duty to protect any witness, especially a child, from harassment,¹⁹⁴ and there is no empirical data which would suggest courts' failure to provide protection. If anything, defense counsel probably conducts a

190. The due process right and right of confrontation are interrelated. In *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105 (1974), the defendant was denied the right under the state's confidentiality statute to question a prosecution witness about his juvenile court record. The Supreme Court held that the Confrontation Clause had been violated because the defendant was denied the right "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Id.* at 318, 94 S. Ct. 1105, at 1111.

191. *Bagley*, 473 U.S. 667, 105 S. Ct. 3375.

192. Whitcomb, *supra* note 97, at 138.

193. Goodman, Golding & Haith, *Jurors' Reactions to Child Witnesses*, 40 *J. Soc. Issues* 139 (1984).

194. La. R.S. 15:275 (1981) provides: "In the discipline of his court, the trial judge is vested with a sound discretion to stop the prolonged, unnecessary and irrelevant examination of a witness, whether such examination be direct or cross, and even though no objection be urged by counsel."

grueling cross-examination of a child at the defendant's peril.¹⁹⁵ But of paramount importance is the fact that the potential for unreliability is simply too great to deny the defense every opportunity to prepare a meaningful cross-examination of the child.

In sum, although providing a defendant access to any videotaped statement, regardless of whether the prosecution intends to introduce it at trial, may not be constitutionally compelled, we submit that the legislature should take this step.¹⁹⁶

V. REFORM PROPOSALS

The experience with videotaping statutes in Louisiana and other jurisdictions has provided us with a much better grasp of the predictable problems which arise in its administration. Because of the jurisprudence which has accumulated in the interim and particularly because of Rule 807 of the Uniform Rules of Evidence, we are now in a better position to improve the basic statute so that both the minimization of trauma and the enhancement of reliability can be achieved.

Based upon the discussion of this article, we submit the following proposed statute:

440.1 Purpose

It is declared to be in the best interest of the state to provide for the early recordation of the statement of a child witness or victim's testimony in order to promote testimonial reliability and to minimize the infliction of additional, unnecessary emotional or psychological harm upon the child.

440.2 Definitions

As used in this Subpart, these terms are defined as follows:

195. As one author noted:

A juror [Monique Weiner] on a child molestation case in Los Angeles [in 1985] said that at times in a deputy public defender's cross-examination of a 9-year-old girl, she hoped the lawyer's children would be molested so he could see a defense lawyer doing to them what he was doing to the witness. . . . The jury convicted. . . . Defense attorney [Barry] Plotkin says his experience in [defending child molestation cases] has taught him that when it comes to children, the defense lawyer must restrain his drive to destroy a witness. "You have to be very careful with a kid," he says. "You press to a point and then you quit while you're ahead. If you press too far, suddenly 12 angry pairs of eyes are focused on you, wanting to know why you're riding rough-shod over the child."

Girdner, *supra* note 7, at 89.

196. Although prosecutors might predictably be opposed to such an extension, in view of the data which suggests that viewing videotaped statements encourages guilty pleas, perhaps their position will change. See *supra* note 92.

A. "Child" means:

(1) Any person under the age of 14 who has been the direct victim of abuse or has been an eyewitness to such abuse perpetrated upon another person, or who is a witness to an act of violence directed at himself or another person,

(2) Any person under the age of 18 whom the court finds will suffer severe emotional or psychological harm if not afforded the special protections of this Act.

B. "Videotape" means any visual recording produced by electronic means together with its associated oral record.

C. "Abuse" means the infliction or attempted infliction of physical, mental, or emotional injury, prohibited sexual contact or sexual exploitation, including threats of such action which seriously endanger the physical, mental, or emotional health of the victim.

D. "Circumstantial indicia of reliability" includes the following:

- (1) the age of the child;
- (2) the child's physical and mental condition;
- (3) the circumstances of the alleged event;
- (4) the language used by the child;
- (5) the existence, if any, of corroborative evidence;
- (6) the existence of any apparent motive to falsify;
- (7) the existence of any coercion, inducement, or undue influence given the child to make a particular statement, at or before the time of the statement;
- (8) the time when the statement was made, including the interval between the alleged event and the recording of the child's recollection;
- (9) the number of interviews of the child prior to the recording;
- (10) any variations or retractions of the recorded account which have occurred before trial.

440.3 Authorization

A. Any court may, on its own motion or on the motion of the district attorney, a parish welfare unit or agency, law enforcement personnel, the legal representative of the child, or any party to the proceedings, require that a statement of a child be recorded on videotape.

B. There shall be a presumption of severe emotional or psychological harm when the child witness has himself been the victim of abuse, an eyewitness to such abuse perpetrated against another individual, or an eyewitness to any event of physical violence.

C. Upon a showing that there is a substantial likelihood that a child witness under the age of eighteen will suffer severe emotional or psychological harm, the court may require such a recording when the child

has himself been the victim of abuse, an eyewitness to such abuse perpetrated against another individual, or any eyewitness to any event of physical violence. In ruling on such a claim, the court may receive expert testimony about the potential for such harm for the particular child.

440.4 Method of making a qualifying videotape

A. A videotaped statement of a child which meets the requirements of this Subpart qualifies for admission into evidence in addition to or in lieu of the child's direct testimony.

B. The child may be interviewed by a physician, a board-certified social worker, or any other specially trained individual authorized to conduct such interviews by the Department of Health and Human Resources although the interviewer may not through his own statements or questions mislead the child to make any particular statement material to the child's recollection of the witnessed events.

C. The taking of the child's statement must be supervised by a physician, a board-certified social worker, or any other specially trained individual authorized to conduct such interviews by the Department of Health and Human Resources.

D. No one except the child, an interviewer, the supervisor of the interview, if not the interviewer, and the operator of the videotaping equipment may be present in the room in which the child's statement is made.

E. The resulting recording must:

1. Identify every person who is present in the room during the taking of the child's statement and state his role and authorization;

2. Identify the voice of every person who speaks on the videotape; and

3. Show an exchange and discussion with the child before beginning to make any statement that he understands the importance of a truthful statement and accepts the responsibility for giving an accurate account of his recollections. A formal oath may be required of the child, if such would contribute to the child's understanding of his obligations.

F. The Department of Health and Human Resources shall develop and promulgate regulations regarding training requirements for and certification of any individual authorized to conduct or supervise the taking of a child's statement.

440.5 Rights of a defendant

When the statement of a child witness in a criminal prosecution is taken pursuant to the provisions of this Act, the defendant is entitled to:

A. Be provided with and to examine a copy of the resulting videotape or videotapes, regardless of whether the prosecution intends to introduce any at trial, at least ten days before trial; and

B. Have the opportunity to summon and to fully cross-examine at trial any person who participated in the preparation of the videotaped interview, including the child, about the contents of the videotaped statement.

440.6 Admissibility

A. A videotape may be admitted into evidence at the trial of any matter without further proof of the child's competency as a witness, if the court, after viewing it and hearing cross-examination, if any, finds:

1. That the videotape meets the requirements of 440.4;
 2. That the recorded statement of the child is the product of his own recollection and was not distorted in any material way as a result of any influence practiced by the interviewer or any other party who was present during its taking;
 3. That the time, content, and circumstances of the statement otherwise provide sufficient circumstantial indicia of reliability;
 4. That the resulting videotape was mechanically accurate and has not been edited or altered since the time of its recording;
- and

B. Any videotape admitted under this Act may constitute the entire direct evidence from the child. However, nothing herein shall preclude the proponent from calling the child as a witness to give testimony or from taking the child's testimony outside the courtroom as authorized in R.S. 15:283. Nothing in this Act shall be construed to prohibit the defendant from calling the child for cross-examination.

440.7 Confidentiality

Any videotape taken pursuant to the provisions of this Act becomes a part of the court record and shall be preserved under a protective order of the court to protect the privacy of the parties to the action. The court shall order the destruction of the videotape after five years have elapsed from the date of final judgment or after a final judgment on appeal.

