SOMETHING NOT SO FUNNY HAPPENED ON THE WAY TO CONVICTION: THE PRETRIAL INTERROGATION OF CHILD WITNESSES

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No doubt child sexual abuse is a contemporary social problem of shameful dimensions.[1] But some legal scholars, social scientists and others compare the public response to the seventeenth century witch hunts.[2] Three recent criminal trials shed some light on that contention and set the stage for a broader discussion about child witnesses, the pretrial process, and innovative protective procedures.

CASE #1: MICHAELS[3]

Margaret Kelly Michaels, a twenty-two year-old woman, began working at the Wee Care Nursery School as a teacher's aide in late September 1984.[4]

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1. *See* JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 4.2 (2d ed. 1992) (outlining the prevalence and effects of child sexual abuse); Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 203–05 (1992) (discussing relevant statistics); John C. Yuille et al., *Interviewing Children in Sexual Abuse Cases, in* CHILD VICTIMS, CHILD WITNESSES 95 (Gail S. Goodman & Bette L. Bommons eds., 1993) (discussing relevant statistics).

2. *See, e.g.*, RICHARD A. GARDNER, M.D., SEX ABUSE HYSTERIA: SALEM WITCH TRIALS REVISITED 127 (1991) (blasting the role of various professionals in contributing to the social crisis then and now); Margaret Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 564 (1992) (discussing the need to curb the over-zealousness of some child abuse prosecutions); Stephen J. Ceci et al., *The Suggestibility of Preschoolers' Recollections: Historical Perspectives on Current Problems, in* KNOWING AND REMEMBERING IN YOUNG CHILDREN 285–91 (Robyn Fivush & Judith A. Hudson eds., 1990) [hereinafter *Suggestibility of Preschoolers' Recollections*] (comparing the sociocultural contexts); Thomas L. Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 AM. J. CRIM. L. 227, 228–29 (1988) (comparing the current social atmosphere to the Salem witch hunts and McCarthy's "Red Scare"); Lenore C. Terr, M.D., *The Child Psychiatrist and the Child Witness: Traveling Companions by Necessity, if Not by Design*, 25 J. AM. ACAD. CHILD PSYCHIATRY 462, 470 (1986) ("False accusations from youngsters, the real stuff of the 17th century witch trials at Salem ... are becoming a problem.").

3. *See* State v. Michaels, 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993) (reversing Michaels' 1988 conviction). *See also* LISA MANSHEL, NAP TIME (1990) (chronicling the *Michaels* case).

4. *Michaels* at 494; MANSHEL, *supra* note 3, at 14.

She was promoted to teacher approximately a month later.[5] She worked at the school for seven months until her departure on April 26, 1985.[6] She apparently left Wee Care to teach at a nursery school closer to her home.[7] During her tenure at Wee Care, no allegations of child abuse arose.[8] On April 30, 1985, four days after Michaels terminated her employment at Wee Care, one of her former students, a four-year-old boy, awoke with a pinkish rash all over his body.[9] His mother matter-of-factly took him to the pediatrician.[10] While the young boy was having his temperature taken rectally at the pediatrician's office, he said to the nurse, "That's what my teacher does to me at school."[11] When he was asked to explain, he replied, "Her takes my temperature."[12] On the advice of the pediatrician, the child's mother notified the state's child protective agency.[13] During a follow-up interview with the assistant prosecutor, the child reported that two other boys had also had their temperatures taken.[14] When later questioned, these two boys denied the claim, but one indicated that Kelly Michaels had touched his penis.[15]

The first boy's mother informed Wee Care's director and board members about these events.[16] As a result, one of the board members interrogated his son, who told the father that Michaels had fondled his penis with a spoon.[17] Shortly thereafter, Wee Care board members sent a letter to parents indicating that a former employee was under investigation "regarding serious allegations," and the hysteria began.[18] Board members arranged an educational meeting for parents at the school.[19] At this meeting, a social worker explained to parents that child sexual abuse was very common, with one out of three children being victims of an "inappropriate sexual experience" by the age of eighteen.[20] She encouraged parents to examine their children for certain behavioral changes, like nightmares, bed-wetting, and masturbating, and encouraged parents to have their children examined by pediatricians for

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5. *Michaels* at 494; MANSHEL, *supra* note 3, at 14.
6. *Michaels* at 494–95; MANSHEL, *supra* note 3, at 14.
7. *Michaels* at 495; MANSHEL, *supra* note 3, at 11.
8. *Michaels* at 495.
9. MANSHEL, *supra* note 3, at 11.
10. *Michaels* at 495; MANSHEL, *supra* note 3 at 11.
11. MANSHEL, *supra* note 3, at 12.
12. *Id.*
13. *Id.* at 13.
14. *Michaels* at 495; MANSHEL, *supra* note 3, at 17.
15. *Michaels* at 495; MANSHEL, *supra* note 3, at 17.
16. MANSHEL, *supra* note 3, at 17.
17. *Id.*
18. *Id.* at 23–24.
19. *Id.* at 26.
20. *Id.* at 29. The citing of precarious statistics is not uncommon in this arena. Robin F. Badgley's 1984 report, SEXUAL OFFENSES AGAINST CHILDREN, endeavored to document the problem of child sexual abuse in Canada. The report concluded that "[a]bout one in two females and one in three males had been victims of sexual offenses" at some time in their lives. COMMITTEE ON SEXUAL OFFENSES AGAINST CHILDREN, 1 SEXUAL OFFENSES AGAINST CHILDREN 193 (1984) (reporting the findings from a national survey). As a Maclean's article observed:

> Of course, no sane person can be blind to the fact that some child abuse in our society exists. But the hype and hysteria of the Badgley report was given a pseudoscientific backing with statistics based on definitions of sexual abuse that lumped together a woman's experiences with an overzealous date at the age of 14—no sexual act took place—with the forced buggery of a seven-year-old boy.

Barbara Amiel, *The Hysteria Over Child Abuse*, MACLEAN'S, Aug. 22, 1988, at 5.

injury.[21]

Parents began to interrogate their children,[22] and these parental interrogations were followed by formal, investigative interviews by child protective services and the prosecutor's office.[23] Soon, many more allegations of abuse were leveled against Michaels. Indeed, Michaels was eventually indicted on 235 counts of child abuse involving thirty-one children, ages three to six.[24] She was said to have licked peanut butter off children's genitals, played the piano while nude, made children drink her urine and eat her feces, and to have raped and assaulted them with knives, forks, spoons and other objects.[25] Notably, none of the alleged acts were noticed by staff or reported by children to their parents during Michaels' seven month tenure at Wee Care.[26] She was eventually convicted of 115 counts of sexual abuse against twenty three- to five-year old children and was sentenced to forty-seven years in prison.[27]

CASE #2: CRAIG[28]

The alleged child victim, Brooke, attended Craig's preschool when she was between four and six years old from August 1984 through June 7, 1986, and Brooke's parents were entirely satisfied with the school during that time.[29] Nothing that Brooke said or that her parents observed apparently suggested any foul play. On June 21, 1986, Brooke's parents read a newspaper article recounting the complaints of children who had been abused at Craig's school.[30] A week or two later, they received an invitation to a meeting sponsored by the county's sexual assault center and social services and health departments.[31] Brooke's parents attended the meeting and, as a result of what they learned there, arranged to have Brooke evaluated by a therapist at the sexual assault center. It was not until the fourth or fifth session with the therapist that Brooke said things that suggested she had been the victim of abuse.[32] The therapist contacted the police and social services departments, which joined in the investigation of Brooke's complaints.[33] The prosecutor was allowed to sit in on

21. MANSHEL, *supra* note 3, at 26–30; Dr. Gardner, Clinical Professor of Child Psychiatry at Columbia University, argues that behavioral changes are not reliable indicators of child sexual abuse. He observes:

> [P]arents are alerted to be on the lookout for any bahavioral changes. Predictably, these are considered to be manifestations of sex abuse. In order to utilize this criterion, one must ignore the obvious fact that every child in the history of the world exhibits behavioral changes, often on a day to day basis. Normal children exhibit behavioral changes; if they did not. they would not be moving along the developmental track.... Development does not run an even course; rather, it moves in spurts and plateaus. Furthermore, children go ahead three steps and back two steps, and so it goes.

GARDNER, *supra* note 2, at 62.

22. MANSHEL, *supra* note 3, at 32–35.
23. *Id.* at 36-38.
24. *Id.* at 103.
25. *Michaels,* 625 A.2d at 495; MANSHEL, *supra* note 3, at 43, 83,205, 207, 226.
26. *Michaels,* 625 A.2d at 495.
27. *Michaels,* 625 A.2d at 492; MANSHEL, *supra* note 3, at 358, 361.
28. Craig v. State, 544 A.2d 784, 786 (Md. Ct. Spec. App. 1988), *rev'd,* 560 A.2d 1120 (1989), *and vacated,* 497 U.S. 836 (1990).
29. *Id.* at 786.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

twelve of the twenty "therapy" sessions with Brooke.[34] In ensuing conversations with her parents and in further sessions with her therapist, Brooke implicated several people. Among the accused were Ms. Craig, two of Ms. Craig's children, and other children at the school.[35]

As a result of Brooke's disclosures during "therapy," a six-count indictment was returned.[36] Several separate indictments, naming other children as victims, were returned against Ms. Craig, but only the indictment involving Brooke proceeded to trial.[37] Despite the fact that Ms. Craig was accused of having abused several children, the prosecutor apparently concluded that the abuse allegations pertaining to Brooke would most likely result in conviction. Indeed, Ms. Craig was convicted on all counts naming Brooke as a victim.[38]

CASE #3: MCMARTIN[39]

On August 12, 1983, Judy Johnson, a thirty-nine year-old part-time salesperson with a history of alcohol abuse, called the Manhattan Beach Police Department to report that her two and a half year-old son had been sodomized by Raymond Buckey at the reputable Virginia McMartin Preschool.[40] Although the preschool had been in existence for some twenty-eight years, Johnson's accusation was the first serious complaint lodged against a member of the staff.[41] Prompted by Johnson's phone call, the police searched the preschool and the Buckeys' Manhattan Beach homes.[42] The searches turned up nothing.[43] Moreover, two sets of doctors disagreed whether there were conclusive signs of sexual abuse.[44] Buckey, who had been arrested on September 7, 1983, was ordered released the same day for lack of evidence.[45]

A day later, the Manhattan Beach Police Department sent questionnaires to 200 parents of former and current McMartin preschoolers.[46] The questionnaires identified Buckey as a possible child molester and said the youngsters may have been the victims of various sexual offenses.[47] None of the questionnaires that were completed and returned to the police contained allegations of sexual abuse.[48] Nevertheless, at the behest of the district attorney's office, parents began sending their youngsters to Children's Institute International, a Los Angeles child sexual abuse clinic.[49] Institute director Kee MacFarlane and two colleagues conducted videotaped interviews with 400 children and

34. *Id.* at 790.
35. *Id.* at 786.
36. *Id.*
37. *Id.* at 786 n.1.
38. *Id.* at 787.
39. Norma Meyer & Paul Pringle, *No Convictions in McMartin Case: Critics Say Runaway McMartin Case Has Indicted Justice System*, SAN DIEGO UNION, Jan. 19, 1990, at A1 (chronicling the McMartin case).
40. *Id.* at A13.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* The text of the questionnaire is reproduced in PAUL & SHIRLEY EBERLE, THE ABUSE OF INNOCENCE: THE MCMARTIN PRESCHOOL TRIAL 18–19 (1993).
48. Meyer & Pringle, *supra* note 39, at A13.
49. *Id.*

concluded that 369 had been molested over the past decade.[50] Before the questionnaire and MacFarlane-directed interviews, none of the alleged victims had ever before complained of sexual abuse.[51] Nor had any family physician detected signs of molestation over the years.[52]

Before Raymond Buckey and six other preschool teachers were indicted in March 1984, Johnson would lodge molestation charges against her estranged husband, an AWOL Marine, and against Los Angeles school board member Roberta Weintraub, among others.[53] She even claimed that the family dog had been sodomized.[54] Johnson, however, would not live to see the end of the criminal proceedings that began with her complaint against Ray Buckey, since she died two years later from an alcohol-related liver disease.[55]

In March 1984, Ray Buckey, his sister, his mother, and his grandmother were arrested along with three other preschool teachers on charges of child sexual abuse.[56] A county grand jury had indicted them on 115 counts.[57] In May 1984, a criminal complaint superseded the indictment and charged them with 208 counts involving 41 children.[58] After an 18-month preliminary hearing, a judge ordered all seven defendants to stand trial on 135 counts.[59] The district attorney, nevertheless, dropped all charges against five of the defendants in January 1986.[60] Only Ray Buckey and his mother, Peggy McMartin Buckey, were tried.[61] On January 18, 1990, more than six years after Johnson's initial complaint, a jury acquitted Peggy McMartin Buckey.[62] Ray Buckey was acquitted on 40 counts and the jury deadlocked on 13 other counts.[63] In Ray Buckey's second trial on only eight counts, another jury deadlocked on all charges.[64] "Votes on seven of the eight counts leaned toward acquittal," and prosecutors declined to try Ray Buckey a third time.[65]

How did we go from a four-year-old's innocuous statement that his preschool teacher took his temperature to a 235–count indictment? From Brooke's silence and apparent well-being to her disclosures of abuse? Or from Johnson's dubious allegations to a 208–count criminal complaint? These introductory case descriptions reveal a disturbing pattern of pretrial interrogation of child witnesses in child sexual abuse cases. In each case, child sexual abuse allegations arose not because a child and offending adult were caught in the act or found in a compromising position,[66] or because the parent inquired after

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. Lois Timnick & Carol McGraw, *McMartin Verdict: Not Guilty*, L.A. TIMES, Jan. 19, 1990, at A1.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *McMartin Jury Deadlocks; Buckey Won't Be Retried*, L.A. TIMES, July 29, 1990, at A1.
63. *Id.*
64. *Id.*
65. *Id.*
66. Sometimes a non-offending adult stumbles upon suspicious circumstances. *See,*

observing the child acting out sexually or after observing an unusual physical condition, such as swelling, bleeding, or discharge in the child's genital area,[67] and certainly not because the child spontaneously reported the abuse.[68] Rather, the allegations of child sexual abuse materialized only after the children were repeatedly and pointedly interviewed.[69] The child abuse allegations had their genesis in alarming letters that introduced parents to the idea that abuse may have occurred, and those letters were followed by investigative and "therapeutic" interviews of children who would eventually level accusations but who originally voiced no complaint.

The pretrial interrogation of child witnesses emerges as a cause for concern. Informed by social science evidence and experience, Part I of this Article demonstrates that the pretrial interrogation of child witnesses can impair the search for truth in litigation and can traumatize child witnesses.[70]

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e.g., Windom v. State, 369 S.E.2d 311, 312 (Ga. Ct. App. 1988) ("The mother found the two victims awake about 4:00 a.m. after they had been alone in the house with [the defendant]. The elder child had baby oil rubbed on her torso and her panties had been pulled down. When questioned, [the child] told her mother that [the defendant] had put it on her."); Celis v. State, 369 S.E.2d 53, 54 (Ga. Ct. App. 1988) ("The mother found the defendant locked in a bedroom with her child [the defendant was clad in nothing but a T-shirt]. Her child was cowering between the dresser and the wall and was crying, upset and nervous. The mother took the child out of the bedroom, calmed her down and asked what had happened.").

67. Sometimes caretakers do notice physical abnormalities. *See, e.g.*, State v. Navarre, 498 So. 2d 194 (La. Ct. App. 1986) (In preparing his five-year-old daughter for her bath, the father noticed discharge staining the child's underwear. The child was subsequently diagnosed with gonorrhea.).

68. Sometimes children report spontaneously. *See, e.g.*, State v. Robinson, 153 Ariz. 191, 194, 735 P.2d 801, 804 (Ariz. 1987) ("Nicole complained to her mother at breakfast that her vagina hurt. Nicole's mother discovered blood on Nicole's panties and a bruise on her labia."); Hopper v. State, 489 N.E.2d 1209, 1213 (Ind. Ct. App. 1986) ("J.W. made the statement in response to a general question by her mother, within a few minutes of the incident.... [A]t the time of the statement, J.W. appeared upset, although she was not crying."), *cert. denied*, 479 U.S. 992 (1986); State v. Murphy, 542 So. 2d 1373, 1374 (La. 1989) ("The child complained to her mother after her evening bath that her 'tee-tee' hurt because 'Mr. Ralph' had stuck his finger in it.").

69. Eliciting sex abuse allegations through suggestive interviewing is a serious problem. *See, e.g.*, Cogburn v. State, 732 S.W.2d 807, 810 (Ark. 1987) (here the child's teacher called the mother and said that they were having trouble with the child at school. The mother took the child to a counselor. The counselor suggested asking the child if she might be a sexual abuse victim. The mother talked to the child as the counselor directed, and a week later the child told her mother about sexual incidents with the child's father.). *See also* Matthews v. State, 515 N.E.2d 1105, 1106 (Ind. 1987) ("The relationship between the child's divorced mother and father had been characterized by frequent conflict including court proceedings involving custody, visitation and contempt petitions. The child's father and the defendant had been antagonistic to the point of physical altercations." Although the child was over ten years old, she had the mental age of a five year old. According to the father, the child appeared to be staggering, dazed and despondent after a weekend visit with her non-custodial mother. "Despite questioning by her father and stepmother, the child did not initially provide any description of the charged offense. The disputed hearsay consists of the child's subsequent remarks in response to further questioning from her father once they arrived at home."); State v. Lanam, 444 N.W.2d 882, 884 (Minn. Ct. App. 1989) (the defendant, David Lanam, and the child's foster mother once had a brief dispute. The foster mother overhears S.E.'s report of abuse and elicits the fact that "David" did it. S.E. is interviewed by the authorities that same day and repeats the allegation. After stating that she did not know "David's" last name, S.E. is not asked in the interview to identify this "David" further. The foster mother eventually elicits statements from S.E. that point to the defendant.), *aff'd*, 459 N.W.2d 656 (1990), *and cert. denied*, 498 U.S. 1033 (1991).

70. Although this Article emphasizes criminal litigation and the constitutional issues unique to that context, much of the discussion about the effects of children's pretrial interrogation applies equally to civil dependency proceedings in which children's accusations

Such effects are not limited to child sexual abuse cases, although they are particularly prevalent there. Part II explores the videotaping of child witness interviews as a means of both ensuring the integrity of the fact-finding process and protecting child witnesses from abusive interviewing procedures. The American experience with legislation enacting videotaping procedures and the prospect of a particularly inventive, but problematic, videotaping proposal by Professor Lucy S. McGough are examined. Part III explores the need for more fundamental hearsay reform to account for the harsh realities of children's pretrial interrogation. Both Parts II and III make specific recommendations for remedial legislation.

I. EXTRACTING ACCUSATIONS FROM CHILDREN

Social science evidence of children's suggestibility indicates that persistent pretrial interrogation of child witnesses can impair the search for truth in litigation.[71] Indeed, the case can be made that the pretrial process not only refines, but actually manufactures children's accusations, however unwittingly.

Research psychologist Stephen Ceci has found that preschool children can be manipulated by interviewers to level false accusations against a stereotyped, target figure.[72] In his study, which simulated therapy in a child sexual abuse case, the children were given information that negatively stereotyped a fictitious character, Sam Stone, as someone who broke toys and stole things.[73] Then a man identified as Sam Stone briefly visited their classroom, but did nothing wrong.[74] The children were interviewed four times in the ten weeks following Sam Stone's visit.[75] Each interview lasted two minutes and included two erroneous suggestions.[76] A forensic interviewer subsequently asked the children what Sam Stone had done.[77] During the forensic interview, 72% of the children under age five said that Sam Stone spilled chocolate, ripped a book or did other things that were suggested in the earlier interviews but had not

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figure prominently.

71. For an excellent survey discussion on the suggestibility of child witnesses, see Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOL. BULL. 403 (1993) [hereinafter *Historical Review and Synthesis*]. *See also* Paul R. Lees-Haley, *Innocent Lies, Tragic Consequences-The Manipulation of Child Testimony*, 24 TRIAL 37 (April 1988) (a less than scientific but amusing and provocative "study" of children's suggestibility).

72. *Historical Review and Synthesis, supra* note 71, at 416–17; Stephen J. Ceci et al., *Interviewing Preschoolers: The Remembrance of Things Planted, in* THE CHILD WITNESS IN CONTEXT: COGNITIVE, SOCIAL AND LEGAL PERSPECTIVES (Douglas P. Peters ed., forthcoming Nov. 1993) (manuscript at 4–10) (unpublished manuscript, on file with the *Arizona Law Review*) [hereinafter *Interviewing Preschoolers*].

73. *Historical Review and Synthesis, supra* note 71, at 416; *Interviewing Preschoolers, supra* note 72 (manuscript at 6–7).

74. *Historical Review and Synthesis, supra* note 71, at 416; *Interviewing Preschoolers, supra* note 72 (manuscript at 5).

75. *Historical Review and Synthesis, supra* note 71, at 416; *Interviewing Preschoolers, supra* note 72 (manuscript at 8).

76. *Historical Review and Synthesis, supra* note 71, at 416; *Interviewing Preschoolers, supra* note 72 (manuscript at 8).

77. *Historical Review and Synthesis, supra* note 71, at 416–17; *Interviewing Preschoolers, supra* note 72 (manuscript at 5).

happened.[78] When pressed, 45% said they actually had seen these events.[79]

Researcher Alison Clarke-Stewart has also studied the effects of leading questions on a child's report about a target-figure.[80] In her study, the target-figure was a janitor who either cleaned or played with certain toys and invited the child-subjects to join in on his activities.[81] The children were subsequently questioned about the nature and specifics of the janitor's conduct. One hundred five- and six-year old children participated in the study.[82] One fifth of the sample reported false perceptual details in subsequent questioning.[83] Although the interrogator did not suggest the particular details, these children, who had seen the janitor playing with the toys, answered affirmatively (and inaccurately) that the janitor had wiped the doll's face, said the doll's clothes were dirty, cleaned the doll's shoes, straightened the doll's cap, tied the doll's bow, and dusted under the table.[84] "[A]ll children" who heard interrogations that were inconsistent with what they had observed eventually adopted the interrogator's interpretation of the janitor's activities.[85]

These results confirm that, at least for children, the interviewing process is a learning process. A recent San Diego case well illustrates the point.[86] The eight-year-old girl was living with her mother, stepfather and younger brother when the "abuse" allegations surfaced.[87] The daughter complained that her father had kissed and hugged her excessively during visitation.[88] A counselor discussed molestation with the girl and read from two books, *I Told My Secret* and *No More Secrets*.[89] The counselor then reported suspected sexual abuse to county Child Protective Services.[90] The girl recanted on the eve of trial, and the trial judge continued the case so that the counselor could "loosen some of the denial."[91] After three months of additional counseling, the girl repeated the allegations of abuse, and her father was convicted.[92] The case was reversed on appeal on speedy trial grounds, but the appellate court noted the girl's inconsistent testimony.[93]

Cases like this are the product of a milieu that calls for obtaining incrim-

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78. *Historical Review and Synthesis, supra* note 71, at 417; *Interviewing Preschoolers, supra* note 72 (manuscript at 10).

79. *Historical Review and Synthesis, supra* note 71, at 417; *Interviewing Preschoolers, supra* note 72 (manuscript at 10) (44%).

80. Gail S. Goodman & Alison Clarke-Stewart, *Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations, in* THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS, at 92 (John Doris ed., 1991) [hereinafter Goodman & Clarke-Stewart].

81. *Id.* at 99.

82. *Id.* at 100.

83. *Id.* at 101.

84. *Id.* at 101–02.

85. *Id.* at 102.

86. John Wilkins & Jim Oherblom, *Molesting Conviction Tossed Out*, SAN DIEGO UNION, June 20, 1992, at B1 (discussing People v. Zeeb, No. D013310 (Cal. Ct. App. June 15, 1992) (LEXIS, State Library, Cal file)).

87. *Id.* at B7.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* The California Supreme Court denied the prosecution's petition for review and directed the Reporter of Decisions not to publish the appellate court opinion in the Official Reports. People v. Zeeb, No. SO27902 (Cal. Sept. 3, 1992) (LEXIS, States library, Cal file).

inating statements from children at all costs. They are particularly troubling because they involve priming the child witness to say what we want the child to say. The problem, of course, is that the innocent may be falsely accused and wrongly condemned. Some doubt that this occurs with any sort of frequency[94] and take comfort in the notion that where there is smoke there is fire. But we will not always be confronted with the question of guilt or innocence in absolute terms. Sometimes the number of appropriate charges and/or victims will be at issue. Sometimes the degree of guilt will be at issue, as when lesser-included or lesser-related offenses are more appropriately charged,[95] and when allegations of penetration or force can make the difference between concurrent or consecutive sentencing and additional years in prison.[96]

In *State v. Smith*,[97] for example, the child testified at trial that the defendant touched her *during the day*.[98] She said *her clothes were on* and that the defendant had his on but took them off.[99] The child indicated *that the defendant lay on her and used his hand* to touch her "private parts."[100] She said it hurt when the defendant touched her there.[101] The child had been interviewed about one year earlier several times by police officers and social service workers.[102] In her earliest statement, she indicated that *she was on top* and that *she and the defendant were naked.*[103] *She did not indicate any manual contact.*[104] Two days later, she again made *no mention of touching by fingers* or any intrusion.[105] But she indicated that the contact occurred *at night.*[106] Approximately one month later, the child was again interviewed.[107] She indicated that *the defendant touched her with his finger.*[108] *When asked if he "put his finger in there," the child said yes.*[109] A few days later, the child was again

94. For instance, in Chambers v. State, 726 P.2d 1269 (Wyo. 1986), a child sexual abuse case, Chief Justice Thomas, dissenting, remarked: "Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of the crime." *Id.* at 1282 (quoting Learned Hand in United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923)). In contrast, the majority opinion observed, "[w]e must also be cognizant of statistics that tell us that innocent persons are convicted and imprisoned for crimes they did not commit." *Id.* at 1278.

95. *See, e.g.*, Buckner v. State, 719 S.W.2d 644, 646 (Tex. Ct. App. 1986) (In the videotaped statement, the child indicates that she was wearing her panties when the defendant kissed her in the vaginal area. The defendant, who was charged with aggravated sexual assault, argued that the videotaped statement by the child witness raised the lesser offense of indecency with a child), *disavowed by* Clark v. State, 728 S.W.2d 484, 486 (Tex. Ct. App. 1987).

96. *See, e.g.*, CAL. PENAL CODE § 667.6(d) (West 1988) (mandating consecutive sentencing when lewd or lascivious acts are performed on or with a child under the age of 14 by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, §§ 288(a) and (b), if the crimes involve separate victims or the same victim on separate occasions).

97. 384 N.W.2d 546 (Minn. Ct. App. 1986).

98. *Id.* at 547.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 547–48.

106. *Id.* at 548.

107. *Id.*

108. *Id.*

109. *Id.* (emphasis added).

interviewed. She indicated that *the defendant was on top.*[110] She also mentioned *digital penetration.*[111] And so the tale was spun, with external touching evolving into a story of penetration, a more serious allegation.

Some doubt that children are capable of successfully maintaining a false accusation,[112] but Professor Ceci contends otherwise. He was struck by "the number of false perceptual details children provided to embellish the non-events" in the Sam Stone study and observed that these reports were "strikingly believable."[113] Indeed, when videotapes of various child witness interviews from the Sam Stone study were presented to researchers and clinicians, a majority of the "expert" audiences were unable to judge correctly whether children were relating true or fabricated accounts.[114]

Professor Ceci offers an explanation for the believability of the children's false reports. He argues that erroneous suggestions may actually distort a child's memory.[115] There is some empirical support for the proposition that erroneous suggestions can overwrite or alter the original memory, resulting in the loss of the original memory.[116] This phenomenon is particularly troubling because, as some have argued, "[t]he interviewing process ... can actually change what exists in the child's memory. Once such a change takes place, it is virtually irreversible ..., and no conventional trial tactics

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110. *Id.*

111. *Id.*

112. Gail S. Goodman, child rights advocate and research psychologist, has observed:

> A child is more likely than an adult to lack the knowledge or cognitive ability to construct a believable false statement. For example, although young children know that sex differences exist, research indicates that they typically know little about sexuality and reproduction (references omitted). Young children would be unlikely, therefore, to be able to make up a detailed account of a sexual incident unless it had actually occurred.

Gail S. Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, 40 J. SOC. ISSUES 157, 165 (Summer 1984).

These comments can too easily be taken out of context. While children may be unlikely to make up such stories *sua sponte*, children may be able to learn what is suggested to them by adults in some child witness interviews.

113. *Interviewing Preschoolers, supra* note 72 (manuscript at 10).

114. *Id.* The videotapes were presented at two conferences. The American Psychological/Law Society meeting in San Diego on March 15, 1992, and the N.A.T.O. Advanced Study Institute on child witnesses in Italy on May 22, 1992. The audiences included researchers, clinicians, and most notably, specialists in the area of statement validity assessment. The expert audiences performed at a level statistically below chance. *Id.* For a description of statement validity assessment, see David C. Raskin & John C. Yuille, *Problems in Evaluating Interviews of Children in Sexual Abuse Cases, in* PERSPECTIVES ON CHILDREN'S TESTIMONY 195–204 (Stephen J. Ceci et al. eds., 1989).

115. *Interviewing Preschoolers, supra* note 72 (manuscript at 11). Dr. Alison Clarke-Stewart agrees. In her study, parents ultimately asked their children what the janitor had done. Goodman & Clarke-Stewart, *supra* note 80, at 100. Children did not change their inaccurate accounts when questioned by their parents. Instead, their reports were consistent with the interrogators' interpretation of the janitor's activities. *Id.* at 101. These results led Dr. Clarke-Stewart to conclude that children's answers were more than the product of the interrogators' social pressure, the childrens' memories had actually been impaired. Dr. Alison Clarke-Stewart, *Differentiating Between Genuine and Fabricated Allegations of Child Sexual Abuse*, Address at a Western State University College of Law conference in San Diego (June 5, 1993).

116. Stephen J. Ceci et al., *Suggestibility of Children's Memory: Psycholegal Implications*, 116 J. EXPERIMENTAL PSYCHOL.: GEN. 38–49 (1987) [hereinafter *Psycholegal Implications*] (describing research supporting the proposition that post event suggestions can distort children's memories).

should be able to show that she is 'lying,' because she is not."[117] There is, however, also empirical support for the contrary proposition that the erroneous suggestions survive as coexisting memories such that the original memory remains retrievable.[118] According to this latter hypothesis, child witnesses may report inaccurately for social reasons, but retain the ability to draw on the original memory and report accurately.

Despite the problem of children's susceptibility to suggestion, rather than take extra precautions at trial to ensure the reliability and fairness of the proceedings, all the child witnesses in the Michaels matter and Craig case testified, not in the courtroom in the physical presence of the accused as is typically required in criminal trials, but by one-way closed circuit television.[119] In his dissenting opinion in *Maryland v. Craig*[120], Justice Scalia identified the delicate nature of child witness interviewing and its risky interplay with the subsequent use of child witness protective procedures at trial, including testimony by closed circuit television in lieu of the traditional courtroom encounter of accuser and accused.[121] Interestingly, child witness protective procedures, like testimony by one-way closed circuit television and pre-recorded testimony, have been promoted on the theory that standard courtroom procedures revictimize the child abuse complainant.[122] But some have argued that the pretrial process of unearthing and developing child abuse allegations may be even more traumatic for children.[123]

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117. Feher, *supra* note 2, at 232–33.

118. Maria S. Zaragoza, *Preschool Children's Susceptibility to Memory Impairment, in* THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS 27 (John Doris ed., 1991) (describing several of her experiments and finding "little support for the hypothesis that young children are susceptible to memory impairment," but also noting that "no studies have assessed children's (or adults') susceptibility to memory impairment when they are misled repeatedly, and over long periods of time, as might occur in real-world situations in which a child is witness to a crime.").

119. *See* Craig v. State, 544 A.2d 784, 787 (Md. App. 1988), *rev'd*, 560 A.2d 1120 (1989), *and vacated*, 497 U.S. 836 (1990); MANSHEL, *supra* note 3, at 124. One of the child witnesses in the McMartin case testified by one-way closed circuit television during the preliminary hearing. EBERLE & EBERLE, *supra* note 47, at 26–27. Indeed, the California legislation providing for children's testimony by one-way closed circuit television was "introduced in response to the McMartin Preschool child molestation case...." S. 46, 1985–86 Reg. Sess., Cal. Assembly File Analysis at 2 (April 9, 1985).

120. 497 U.S. 836, 867–70 (1990) (Scalia, J., dissenting).

121. In his dissent, joined by Justices Brennan, Marshall, and Stevens, Justice Scalia recounted the infamous child abuse investigations that took place in Jordan, Minnesota in 1983–84. *Id.* In particular, Justice Scalia highlighted the repetitive interviewing of the children and how it was only after weeks or months of interviewing that some children would "'admit' their parents abused them." *Id.* at 869 (quoting HUBERT H. HUMPHREY III, ATTORNEY GENERAL, REPORT ON SCOTT COUNTY INVESTIGATIONS 10 (1985)). Justice Scalia characterized the shielding of child witnesses from their parents under these circumstances as unconscionable. *Id.* For similar reasons, I have argued elsewhere that shielding standards should include an inquiry into any case specific need for physical confrontation and not begin and end with an inquiry into the child's perceived testimonial needs, as *Craig* does. *See* Jean Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 HASTINGS L.J. 1259, 1314–18 (1992).

122. *See, e.g.*, Ellen Forman, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 HASTINGS L.J. 437 (1989) (advocating alternative testimonial procedures); David Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE. L. REV. 977, 1016–18 (1969) (one of the seminal articles on child witness rights, advocating the use of one-way glass to shield the testifying child witness from the courtroom and the defendant); Jacqueline Y. Parker, *The Rights of Child Witnesses: Is the Court A Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643 (1982) (developing Libai's ideas to shield child witnesses).

123. *See* Wallace J. Mlyniec & Michelle M. Dally, *See No Evil? Can Insulation of Child*

Experience tells us that the pretrial interrogation of child witnesses can be abusive. Suspected child sexual abuse victims and witnesses are often relentlessly re-interviewed. Minnesota State Attorney General, Hubert H. Humphrey III, reported the circumstances of the notorious Scott County investigations:

> A therapist's report in February, 1984 notes one child who had already been interviewed by nine individuals about the alleged abuse. The mother of another child indicated that her daughter had been interviewed at least thirty and possibly as many as fifty times by law enforcement or Scott County authorities. A number of other children also were repeatedly interviewed.... In one Scott County case a trial court judge refused to allow into evidence the testimony of a nine-year-old.... The judge noted that this child had steadfastly denied any criminal sexual conduct on the part of his parents until he had been placed with new foster parents, who questioned him extensively.[124]

Abusive re-interviewing was similarly apparent in a San Diego child abuse case that has gained some national attention.[125] In this case, a licensed counselor, who was appointed by the court to provide therapy for Alicia, rejected the girl's repeated assertions that a stranger raped her and spent the sessions urging her to "disclose" that her father was the attacker.[126] After 13 months of therapy—and almost total isolation from her family—Alicia identified her father as the rapist.[127] She later told a court that she was "sick" of hearing the counselor accuse her father and finally just told her what she wanted to hear.[128] DNA tests ultimately cleared the father.[129]

Children who are suspected sexual abuse victims are not only repeatedly interviewed but also threatened and cajoled into making certain incriminating statements. For instance, in *United States v. Spotted War Bonnet*,[130] the dissenting judge observed that "both children felt threatened with the prospect of placement in a foster home if they failed to accuse their father of sexual abuse."[131] It was precisely this sort of case that prompted a recent opinion piece in which the writer observed:

> These cases are themselves a form of child abuse committed by the state. "Believe the children," a slogan popularized by the McMartin parents, takes on an awful irony in the context of interrogations that coach, cajole, badger, even threaten small children into saying what the grown-ups want to hear. These children, as much as any incest victim, have had their reality traumatically denied and warped. If for no other reason, this insanity must be exposed and stopped.[132]

Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?, 40 U. MIAMI L. REV. 115, 134 (1985) (arguing that legislators should focus on pretrial process so that child witnesses are traumatized less during the early stages of a case).

124. HUBERT H. HUMPHREY III, ATTORNEY GENERAL, REPORT ON SCOTT COUNTY INVESTIGATIONS 9 (1985).

125. John Wilkins & Jim Oherblom, *Grand Jury Tallies the "Horribles" in False Rape Charge Against Dad*, SAN DIEGO UNION-TRIBUNE, June 24, 1992, at A1.

126. *Id.* at A7.

127. *Id.*

128. *Id.*

129. *Id.* at A1.

130. 882 F.2d 1360 (8th Cir. 1989), *vacated*, 497 U.S. 1021 (1990), *and cert. denied*, 112 S. Ct. 1187 (1992).

131. *Id.* at 1366. The older child, then age six, had originally identified her uncle. *Id.* at 1364–65.

132. Ellen Willis, *Child Abuse: The Search for Scapegoats*, NEWSDAY, May 30, 1990, at

Indeed, Dr. Gardner, Clinical Professor of Child Psychiatry at Columbia University, has observed:

> Although children who have been genuinely abused have certainly been victimized, those who have been subjected to the kinds of interrogations and validations described herein have also been victimized.... It is safe to say that both forms of victimization can result in lifelong psychological damage; but it is difficult to know which type produces more trauma—especially because the type of victimization focused on in this book is such a recent phenomenon.[133]

Moreover, there is no reason to limit our concern for child witnesses and the pretrial process to cases of child sexual abuse. Children are socially, cognitively and developmentally children irrespective of the charges, and overzealous interviewers may be as motivated to resolve a murder or kidnapping case as they are to resolve a case of suspected child sexual molestation.[134] In a criminal case that recently received national attention, Clarence Chance and Benny Powell, both wrongly convicted of killing an off-duty sheriff's deputy, were released from prison after serving seventeen years.[135] Children's testimony, manipulated by overzealous police officers, figured prominently in the trial that resulted in the wrongful convictions. Police officers had apparently made various promises to and threatened the child witnesses. One thirteen year old child, Tammy Jackson, was threatened with being taken away from her grandmother and being sent to juvenile hall.[136] Jackson, who was fourteen when she testified, later remarked about her testimony, "I testified the way that [Officers] Knott and Hall wanted me to."[137]

The testimony of the state's star witness, another child, also evolved over time. The murder took place on December 12, 1973.[138] Although Priscilla Gulley, an eleven year old eyewitness,[139] was shown photographs and a lineup including Clarence Chance,[140] Gulley did not identify Chance as one of the men she saw that night until June 26, 1974,[141] more than six months after the inci-

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133. GARDNER, *supra* note 2, at 97. *See also* Terr, *supra* note 2, at 469 (discussing "the serious effects of police or 'therapist' interviews upon children's lives").

134. *See* Stephen J. Ceci, *Some Overarching Issues in the Children's Suggestibility Debate, in* THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS (John Doris ed. 1991) (discussing the diversity of cases in which abusive interrogation of child witnesses can take place).

135. Sheryl Stolberg, *Judge Apologizes, Frees 2 Men in 1973 Murder,* L.A. TIMES, March 26, 1992, at A1 (discussing the release of Chance and Powell).

136. Declaration of Tammy P. Jackson, submitted in support of the Petition for Writ of Habeas Corpus in *In re* Benny Gene Powell, No. A309863, at 2–3 (filed in the Superior Court of the State of California for the County of Los Angeles on March 9, 1992) [hereinafter *In re Benny Gene Powell*] ("My mother died when I was sleeping beside her in our bed when I was six years old and my grandmother was all that I had left.").

137. *Id.* at 7. See also the Declaration of Bernadine Kelly, submitted in support of the Petition for Writ of Habeas Corpus in *In re Benny Gene Powell*, at 2–3 (Investigating officers promised the then sixteen year old Kelly that "they would get me out of Juvenile Hall ... and get [me] some of the reward money if I would testify the way they wanted me to.").

138. *See* Memorandum of Points and Authorities in Support of the Petition for Writ of Habeas Corpus, *In re Benny Gene Powell*, at 15.

139. *Id.* at 18.

140. *Id.* at 34.

141. *Id.* at 30. Special thanks to Sandra E. Smith of O'Melveny & Myers who passionately represented Benny Gene Powell and willingly shared pleadings and transcripts with this Author.

dent. Only Officer Knott was present when Gulley reversed her months long position.[142] There is no record of what Knott said to Gulley that day.[143]

Pretrial child witness interrogation, a multifaceted problem, thus raises at least two concerns: the appropriateness of allowing convictions to turn on allegations that are wrenched from a child, as opposed to spontaneously reported by the child; and the necessity of affording child witnesses protection from the pretrial process, and in particular, investigative and "therapeutic" interviewing abuses. One prominent child psychiatrist has argued that the "adult indoctrination of children for the purposes of legal witnessing must be made unlawful."[144] Other approaches to the problem are explored below.

II. VIDEOTAPING CHILD WITNESS STATEMENTS

If we acknowledge the suggestibility and vulnerability of child witnesses, then child witness interrogation warrants scrutiny and regulation. Professor Ceci writes:

> [I]t is of the utmost importance to examine the conditions prevalent at the time of a child's original report about a criminal event in order to judge the suitability of using that child as a witness in the court. It seems particularly important to know the circumstances under which the initial report of concern was made, how many times the child was questioned, the hypotheses of the interviewers who questioned the child, the kinds of questions the child was asked, and the consistency of the child's report over a period of time.[145]

Law commentators have similarly argued that trial courts should review pretrial interviewing procedures as a necessary predicate to admitting child witness testimony.[146] This would entail a pretrial evidentiary hearing that received the testimony and records of those who conducted the pretrial interviews,[147] and perhaps expert testimony, independent of the testimony of the interviewers, to show why the interviewing procedures might or might not have been unduly suggestive.[148] If the child's testimony passed a trial court's threshold tests of reliability and admissibility, the child's suggestibility would

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142. *Id.*

143. *Id.* at 33.

144. Terr, *supra* note 2, at 469. Of course, the subornation of perjury is already criminal and carries severe penalties, *see, e.g.*, CAL. PENAL CODE §§ 118, 126, 127 (West 1988), but this crime would probably not embrace the sort of reckless interviewing at issue here.

145. *Historical Review and Synthesis*, *supra* note 71, at 433; *see also* Dr. Martha L. Rogers, *Truth Finding in Child Abuse: What Do We Know? How Do We Find Out?*, Paper presented at a Western State University College of Law Conference ,entitled Differentiating Between Genuine and Fabricated Allegations of Child Sexual Abuse (June 5, 1993)) (describing the "social interaction matrix of events occurring within 24 hours of the time of first disclosure" and the "evolution of the statements across time" as important "clues to the validity or invalidity of a claim of sexual abuse").

146. John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 715–18 (1987) (analyzing children's suggestibility as a witness competency problem). *See also* Feher, *supra* note 2, at 245–53 (exploring witness competency and due process theories as the basis for excluding children's testimony).

A similar inquiry could be required for the admission of a child's out-of-court statement as it would speak to the statement's trustworthiness. *See infra* part III.

147. Christiansen, *supra* note 146, at 717.

148. *Id.* at 718.

remain an issue for the fact finder.[149]

The reality is that it is difficult to reconstruct child witness interviews. In the Report on Scott County Investigations, describing the abuses in the Jordan, Minnesota scandal, Minnesota State Attorney General, Hubert H. Humphrey III, observed:

> The problem of over-interrogation was compounded by a lack of reports. For example, Scott County investigators' notes show that one nine-year-old girl was interviewed by law enforcement authorities approximately twenty times and yet there were only four written reports concerning those interviews. In addition, her meetings with the County Attorney were undocumented. That pattern was not at all unusual.[150]

This practice of failing to document or inadequately documenting child witness interviews can make it impossible to examine the circumstances under which children's accusations arise. Some would argue, therefore, that child witness interviews should be videotaped.[151]

A. The Ineffectiveness of Current Legislation

The idea of videotaping child witness interviews has gained the support of legislators and legal scholars in the United States and abroad. These videotapes potentially serve several purposes apart from recording interviewing procedures for later review. First and most importantly, videotaping a child's account of abuse at the earliest opportunity records the child's account when it is relatively fresh in the child's memory.[152] Second, a videotape of the child's early account can be shared among the various agencies investigating the allegations of abuse, rather than subjecting the child to potentially traumatizing, duplicative interviews.[153] Third, the videotape can facilitate plea bargaining in

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149. *Id.* The same would be true for a child's out-of-court statements. *See infra* part III.

150. HUMPHREY, *supra* note 124. *See also* Feher, *supra* note 2, at 238 ("What takes place in the interviews may be the most important issue in a sexual abuse trial. And yet, the interviewing process is not always well-documented.").

151. *See, e.g.*, Berger, *supra* note 2, at 611–12 (arguing that prosecutorial questioning of children should be videotaped); Christiansen, *supra* note 146, at 714; *cf.* John E.B. Myers, *Investigative Interviews of Children: Should They Be Videotaped?* 7 NOTRE DAME J. L., ETHICS & PUB. POL'Y 371, 386 (1993) (advocating experimentation with videotaping child witness interviews).

The Court already determined in Idaho v. Wright, 497 U.S. 805 (1990), that the Confrontation Clause does not require the videotaping of child witness interviews, but acknowledged that such procedures might well enhance the reliability of the child's out-of-court statement. *Id.* at 819.

152. LUCY MCGOUGH, FRAGILE VOICES: THE CHILD WITNESS IN THE AMERICAN LEGAL SYSTEM (forthcoming Spring 1994) (manuscript ch. 10, at 20) [hereinafter FRAGILE VOICES] ("If we accept the powerful data that a child's memory fades rapidly over time, then ordinarily the earliest account is the one most likely to be accurate."). *See also* JACK C. WESTMAN, M.D., WHO SPEAKS FOR THE CHILDREN—THE HANDBOOK OF INDIVIDUAL AND CLASS CHILD ADVOCACY 102 (1991) (arguing that "[t]he value of making a permanent, firsthand record of initial statements is particularly obvious in a field characterized by the high likelihood of retraction by child victims").

153. *See* BILLIE WRIGHT DZIECH & JUDGE CHARLES B. SCHUDSON, ON TRIAL—AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN 149 (1989) ("[A]s family, therapists, police, and prosecutors evaluate their options, they can review the videotape and spare the child repeated interviews."); WESTMAN, *supra* note 152, at 100–02 (identifying "repeated interviewing by authorities" as a traumatic aspect of the legal process for children and advocating joint interviewing by multidisciplinary teams or videotaping of child witness interviews for shared viewing by concerned agencies).

that both the prosecution and the defense are better able to assess the child's credibility.[154] Fourth, a videotape of the child's early account can be admitted at trial in lieu of the child's live testimony and thereby shield the child from the potentially traumatizing courtroom process.

Approximately a dozen state legislatures have enacted procedures for admitting a child's videotaped statement or interview as evidence at trial.[155] When these procedures have been challenged on appeal, the United States Supreme Court has consistently denied *certiorari*.[156] Arizona's videotaping statute, typical of such statutes, provides:

> A. The recording of an oral statement of a minor made before a proceeding begins is admissible into evidence if all of the following are true:
>
> 1. No attorney for either party was present when the statement was made.
>
> 2. The recording is both visual and aural and is recorded on film or videotape or by other electronic means.
>
> 3. Every voice on the recording is identified.
>
> 4. The person conducting the interview of the minor in the recording is present at the proceeding and available to testify or be cross-examined by either party.
>
> 5. The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence.
>
> 6. The minor is available to testify.
>
> 7. The recording equipment was capable of making an accurate recording, the operator of the equipment was competent and the recording is accurate and has not been altered.
>
> 8. The statement was not made in response to questioning calculated to lead the minor to make a particular statement.
>
> B. If the electronic recording of the oral statement of a minor is admitted into evidence under this section, either party may call the minor to testify and the opposing party may cross-examine the minor.[157]

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154. DZIECH & SCHUDSON, *supra* note 153, at 149 ("Prosecutors have observed ... [that] the videotape prompts guilty pleas.... Of course, the opposite can occur if the child appears uncertain."); FRAGILE VOICES, *supra* note 152 (manuscript ch. 10, at 54) ("[A]fter his viewing of the videotape of a highly credible child, the defendant may decide to forego trial and enter instead a plea of guilty.").

155. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13–4252 (1989); HAW. REV. STAT. § 626, Rule 616 (1985); ILL. ANN. STAT. ch. 38, para. 106A–2 (Smith-Hurd Supp. 1992) (repealed effective Jan. 1, 1992); IND. CODE ANN. § 35–37–4–6 (Burns Supp. 1992) (a statement or videotape); KAN. STAT. ANN. § 22–3433 (1988); KY. REV. STAT. ANN. § 421.350(2) (Baldwin 1992); LA. REV. STAT. ANN. § 15:440.5 (West 1992); MINN. STAT. ANN. § 595.02.3 (West 1988) (child hearsay statute that embraces video and audio recorded out-of-court statements); MO. ANN. STAT. § 492.304 (Vernon 1993); OKLA. STAT. ANN. tit. 22, § 752 (West 1992); TENN. CODE ANN. § 24–7–116(c) (Supp. 1992) (deleted by 1991 amendment); TEX. CODE CRIM. PROC. ANN. art. 38.071. §§ 2, 5 (West Supp. 1993); WIS. STAT. § 908.08 (1993).

156. Burke v. State, 820 P.2d 1344 (Okla. Crim. App. 1991), *cert. denied*, 112 S. Ct. 2940 (1992) (statute held unconstitutional); State v. Schaal, 806 S.W.2d 659 (Mo. 1991), *cert. denied*, 112 S. Ct. 976 (1992) (statute upheld); State v. Pilkey, 776 S.W.2d 943 (Tenn. 1989), *reh'g denied, and cert. denied*, 494 U.S. 1032 (1990) (statute held unconstitutional).

157. ARIZ. REV. STAT. ANN. § 13–4252 (1989).

Similar procedures have been the subject of legislation abroad.[158]

These videotaping statutes are part of a broader movement to protect child witnesses. This movement is evidenced by the advent of various testimonial devices in the mid-1980's. These devices, like testimony by closed-circuit television[159]and pre-recorded testimony,[160] were designed to protect child

158. For instance, Canadian legislation provides:

> In any proceeding relating to [various types of child molestation and sexual assault], in which the complainant was under the age of eighteen years at the time the offense is alleged to have been committed, a videotape made within a reasonable time after the alleged offense, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.

R.S.C. § 715.1 (1985).

Similar legislation, applicable in England and Wales, provides:

> (2) ...[A] video recording of an interview which—
>
> (a) is conducted between an adult and a child...; and
>
> (b) relates to any matter in the proceedings, may, with the leave of the court, be given in evidence in so far as it is not excluded by the court under subsection (3) below.
>
> (3) Where a video recording is tendered in evidence under this section, the court shall (subject to the exercise of any power of the court to exclude evidence which is otherwise admissible) give leave under subsection (2) above unless—
>
> (a) it appears that the child witness will not be available for cross-examination;
>
> * * *
>
> (5) Where a video recording is admitted under this section—
>
> (a) the child witness shall be called by the party who tendered it in evidence;
>
> (b) that witness shall not be examined in chief on any matter which, in the opinion of the court, has been dealt with in his recorded testimony.
>
> (6) Where a video recording is given in evidence under this section, any statement made by the child witness which is disclosed by the recording shall be treated as if given by that witness in direct oral testimony.

The Criminal Justice Act, 1988, § 32A, (as amended by the Criminal Justice Act 1991).

159. For statutes providing for testimony by one-way closed circuit television, see ALA. CODE § 15–25–3 (Supp. 1992); ALASKA STAT. § 12.45.046 (1990); ARIZ. REV. STAT. ANN. § 13–4253 (1989); CONN. GEN. STAT. ANN. § 54–86g (West Supp. 1993); FLA. STAT. ANN. § 92.54 (West Supp. 1993); ILL. ANN. STAT. ch. 38, para. 106B–1 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 35–37–4–8 (Burns Supp. 1992); IOWA CODE ANN. § 910A.14 (West Supp. 1993); KAN. STAT. ANN. § 22–3434 (1988 & Supp. 1992); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1992); LA. REV. STAT. ANN. § 15:283 (West 1992); MD. CODE ANN., CTS. & JUD. PROC. § 9–102 (1989 & Supp. 1992); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1993); MICH. COMP. LAWS ANN. § 600.2163a (West Supp. 1991); MINN. STAT. ANN. § 595.02 (West 1988); MISS. CODE ANN. § 13–1–405 (Supp. 1992); N.J. STAT. ANN. § 2A:84A–32.4 (West Supp. 1993); OKLA. STAT. ANN. tit. 22, § 753 (West 1992); OR. REV. STAT. § 40.460(24) (Supp. 1992); 42 PA. CONS. STAT. ANN. § 5985 (Supp. 1993); R.I. GEN. LAWS § 11–37–13.2 (Supp. 1992); TEX. CODE CRIM. PROC. ANN. § 38.071 (West Supp. 1993); UTAH R. CRIM. P. 15.5; WASH. REV. CODE ANN. § 9A44.150 (West Supp. 1993).

For statutes providing for testimony by two-way closed circuit television, see CAL. PENAL CODE § 1347 (West Supp. 1993); GA. CODE ANN. § 17–8–55 (Harrison Supp. 1992), (GA. CODE ANN. § 81–1006.2 (Harrison Supp. 1992)); HAW. REV. STAT. § 626, Rule 616 (1985); IDAHO CODE § 19–3024A (Supp. 1992); N.Y. CRIM. PROC. LAW §§ 65.00–65.30 (McKinney 1992); OHIO REV. CODE ANN. § 2907.41 (Baldwin 1992); VT. R. EVID. 807; VA. CODE ANN. § 18.2–67.9 (Michie 1988); *see also* 18 U.S.C.A. § 3509 (West Supp. 1991).

160. For statutes providing for pre-recorded testimony, see ALA. CODE § 15–25–2 (Supp. 1992); ARIZ. REV. STAT. ANN. § 13–4253 (1989); ARK. CODE ANN. § 16–44–203 (Michie 1987); COLO. REV. STAT. ANN. § 18–6–401.3 (West 1990); CONN. GEN. STAT. ANN. § 54–86g (West Supp. 1993); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. ANN. § 92.53 (West Supp. 1993); IND. CODE ANN. § 35–37–4–8 (Burns Supp. 1991); IOWA CODE ANN. § 910A.14 (West Supp. 1991); KAN. STAT. ANN. § 22–3434 (1988 & Supp.

witnesses from the potential psychological trauma of testifying in the courtroom and in the physical presence of the defendant.[161] With testimony by closed-circuit television and pre-recorded testimony,the witness is not in the same room with the judge, the jury, and the accused. Instead, although the child witness is still subject to direct and cross-examination, the child testifies under oath from a testimonial room outside the presence of the jury and sometimes outside the physical presence of the defendant. The testimony is then either transmitted simultaneously to the courtroom or recorded for later showing in the courtroom during trial. Thus, these devices protect the child witness from what can be a traumatic courtroom environment, filled as it often is with strangers who are the judge, jury, counsel, press, and public. These devices may also provide additional protection for the child witness by shielding the child witness from the intimidating physical presence of the defendant.

The basic difference between testimony by closed circuit television or pre-recorded testimony and videotaping child witness statements for later use at trial is that the videotaped statements are statements, or more exactly interviews. That is, although the child witness is usually interrogated during the taping (the videotape typically records the child's interview by a non-attorney adult), the child witness is not examined under oath by attorneys, at least not on the videotape. The child is, nevertheless, subject to direct and cross-examination at trial.

Videotaping statutes currently in effect in the United States therefore serve rather modest purposes. If the various agencies interested in child abuse manage to coordinate their efforts, the child witness will be protected from the stress of duplicative interviews. If the videotape is shared with the defense in a timely manner, it may facilitate the plea bargaining process. A guilty plea, prompted by a timely reviewing of the videotape, would resolve the criminal case short of trial, and the child would be able to begin the healing process sooner.

The videotaping statutes do not, however, necessarily protect the child witness from testimonial stress. Admitting the videotaped interview of the child witness in lieu of the child's live testimony at trial would shield children from the courtroom process. But most of the statutes, like Arizona's, condition admissibility of the videotape on the child's testimony or availability to testify.[162] Moreover, these statutes typically make no attempt to circumscribe

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1992); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1992); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1993); MICH. COMP. LAWS ANN. § 600.2163a (West Supp. 1993); MINN. STAT. ANN. § 595.02 (West 1988); MISS. CODE ANN. § 13–1–407 (Supp. 1992); MO. ANN. STAT. § 491.680 (Vernon Supp. 1993); MONT. CODE ANN. § 46–15–401 (1989) (repealed 1991); NEB. REV. STAT. § 29–1926 (1989); NEV. REV. STAT. ANN. § 174.227 (Michie 1992); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1992); N.M. STAT. ANN. § 30–9–17 (Michie 1984); OHIO REV. CODE ANN. § 2907.41 (Baldwin 1992); OKLA. STAT. ANN. tit. 22, § 753 (West 1992); 42 PA. CONS. STAT. ANN. § 5984 (Supp. 1993); R.I. GEN. LAWS § 11–37–13.2 (Supp. 1992); S.C. CODE ANN. § 16–3–1410 (Law. Co-op. 1976 & Supp. 1990); S.D. CODIFIED LAWS ANN. § 23A–12–9 (1988 & Supp. 1993); TENN. CODE ANN. § 24–7–116 (Supp. 1992); TEX. CODE CRIM. PROC. ANN. § 38.071 (West Supp. 1993); UTAH R. CRIM. P. 15.5; VT. R. EVID. 807; WIS. STAT. ANN. § 967.04 (West 1985 & Supp. 1992); WYO. STAT. § 7–11–408 (1987); *see also* 18 U.S.C.A. § 3509 (West Supp. 1993).

161. For a discussion of these shielding procedures, see generally Montoya, *supra* note 121.

162. *See supra* note 157 and accompanying text.

attorney examination of the child.[163] Rather, as with testimony by one-way closed circuit television and pre-recorded testimony, the child is subject to being called and fully interrogated as a witness.[164] Thus, unless the procedure is coupled with one of the other child witness protection devices, like testimony by closed-circuit television or pre-recorded testimony, the child is still exposed to what can be the harsh, courtroom environment if and when the child is summoned for direct or cross-examination.

State legislatures seem to be hedging their bets that the videotaping procedure will protect child witnesses from the courtroom process. They seem to presume that the prosecutor will rely on the videotape and not call the child, and that the defense attorney will be disinclined to call the child to the stand under these circumstances.[165] This is a good bet, because the defendant will not want to alienate the jury by calling the vulnerable child witness to the stand.[166] Moreover, cross-examination turns on much more than what a witness has said on prior occasions. It turns on the direct examination as well. It turns on a witness's current story, tone, and demeanor. Defense counsel takes a big risk cross-examining the child witness without first having observed the child's contemporaneous performance on direct examination.[167] Thus, while defense

163. *See supra* note 157 and accompanying text.

164. *See, e.g.*, State v. Guidroz, 498 So.2d 108, 111 (La. Ct. App. 1986) (After the tape was viewed by the jury, the victim was called to the stand and testified on direct. On cross-examination defense counsel inquired into all relevant details and further pointed out minor inconsistencies between the videotaped statement and the victim's testimony.); State v. Seever, 733 S.W.2d 438, 439–40 (Mo. 1987) (After the videotape was viewed by the jury and other testimony was heard the victim was called to the stand and gave full testimony, without reference to the videotape, sufficient to support the charge. She was then cross-examined.); Burke v. State, 820 P.2d 1344, 1345 (Okla. Crim. App. 1991) (The child testified at trial and was cross-examined. The jury was also allowed to view a videotape filmed prior to trial, of the child describing the same incident to Oklahoma City Police Detective Daniel Garcia.), *cert. denied*, 112 S. Ct. 2940 (1992); State v. Schoenwetter, 452 N.W.2d 549, 550 (S.D. 1990) (The child testifies at trial about the details of the incident and the court admits the child's videotaped interview); Briggs v. State, 789 S.W.2d 918, 919–22, 922 n.4 (Tex. Crim. App. 1990) (M.T. testified and the defendant briefly cross-examined her. M.T.'s videotaped interview with the Department of Human Services was published to the jury. "If the purpose of [the statute is] to insulate child victims entirely from the necessity of testifying in open court, it would seem to be self defeating.").

165. *See* Long v. State, 742 S.W.2d 302 , 315 (Tex. Cr. App. 1987) (en banc) (discussing the legislative history of the Texas videotaping statute).

166. *See* State v. Tarantino, 458 N.W.2d 582, 585, 588 (Wis. Ct. App. 1990) (The jury observed the child complainants on videotape and the state declined to pursue further direct. Tarantino did pursue live cross-examination. Tarantino argued on appeal that the statute required him to offend the sensibilities of the jury by calling the videotaped complainant.), *review denied*, 461 N.W.2d 444 (1990).

Some have perceived a fairness problem with placing the criminal defendant in the awkward position of having to call the child as a witness when the child's videotaped statement has been received. Some remedy the problem by having the court inform the jury that the court is calling the child as a witness. *See, e.g.*, Eberhardt v. State, 359 S.E.2d 908, 909 (Ga. 1987), *cert. denied*, 484 U.S. 1069 (1988). Others require the state to call the child in its case-in-chief if expressly requested by the defense. *See, e.g.*, State v. Larson, 453 N.W.2d 42, 47 (Minn. 1990). Others have perceived a problem of constitutional dimensions in that the defendant is thereby denied his right to do nothing. Buckner v. State, 719 S.W.2d 644, 650 (Tex. Ct. App. 1986) ("The statute denies the defendant due process of law because it compels him to forego either his right of confrontation or his right to remain passive."), *disavowed by* Clark v. State, 728 S.W.2d 484 (Tex. Ct. App. 1987); State v. Tarantino, 458 N.W.2d at 588 (The statute burdens the defendant with calling the child victim as a witness if the defendant wants to preserve his right to confrontation.).

167. *See* ROGER HAYDOCK & JOHN SONSTENG, TRIAL: THEORIES, TACTICS,

counsel as a practical matter may not seek the child's trial testimony, the statutes on their face do not shield the child witness from the courtroom process or limit the child's testimonial experience.

More importantly, the videotaping statutes do not promote the integrity of the fact-finding process or protect children from relentless re-interviewing. While the statutes typically disallow questioning calculated to lead the child witness during the interview,[168] the statutes do not give any guidance about the timing of the videotape in relation to the alleged offense or the child's first report of the abuse, let alone address the quality of those intervals.[169] Nevertheless, the failure to reckon with these most critical intervals can be disastrous, and the case law is replete with examples.

Miller v. State[170] is instructive. In that case, the abuse allegations arose innocently enough. The child's mother discovered blood on her three and one-half year old daughter's underwear.[171] Several hours later the father questioned the child.[172] When the father questioned the child a second time a short while later, the child said that "Richard" hurt her.[173] During the afternoon of the same day she was examined by a doctor.[174] The next day another doctor examined her.[175] The child was questioned at the sheriff's department that same afternoon around 5:00 p.m., but the interview produced no incriminating statements.[176] The child was questioned again at 6:45 p.m., and this interview was recorded.[177] This time the child stated that "Richard" hurt her with his "potty."[178] The court observed, "What occurred here and seems able to reoccur

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TECHNIQUES 518 (1991) ("The decision to cross-examine must be made both before trial and again during trial, immediately after the witness has testified. Whether cross-examination should be conducted as planned, or whether any cross-examination should be conducted at all, are questions that must be finally resolved after the witness has completed direct examination.").

Moreover "cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney." People v. Bastien, 541 N.E.2d 670, 676 (Ill. 1989) (quoting Penny v. Leeke, 488 U.S. 272, 282 (1989)).

168. *See supra* note 157 and accompanying text.

169. A minority of the statutes require the trial court to make the amorphous determination that the "time, content and circumstances" of the child's statement provide sufficient indicia of reliability. *See, e.g.*, KAN. STAT. ANN. § 22-3433(a)(1) (1988); MINN. STAT. ANN. § 595.02.3(a) (West 1988); OKLA. STAT. ANN. tit. 10 § 1147.B.1 (West 1987); WIS. STAT. ANN. § 908.08(3)(d) (West 1993).

170. 531 N.E.2d 466 (Ind. 1988) (holding the videotaping statute unconstitutional as applied), *superseded by statute as stated in* Poffenberger v. State, 580 N.E.2d 995 (Ind. Ct. App 1991).

171. *Id.* at 467.

172. *Id.* Parental interrogations are not uncommon and are often encouraged in this arena. *See, e.g.*, Commonwealth v. Amirault, 535 N.E.2d 193, 196 (Mass. 1989) ("The meeting alerted parents to the symptoms of sexual abuse, and directed parents to question their children about sexual abuse at Fells Acres."), *cert. denied*, 113 S. Ct. 602 (1992).

Because well-meaning but untrained parents are often the first to interview the child, we have a recipe for disaster. GARDNER, *supra* note 2, at 91 (discussing "parental impact prior to the first interview"); Feher, *supra* note 2, at 227 ("Parents, lacking the requisite training, will not be able to avoid supplying significant suggestion."). "[E]ven examiners who consider themselves to be coming in 'fresh' may not be able to conduct a 'clean' interview because of these earlier contaminations by a programming parent." GARDNER, *supra* note 2, at 92.

173. *Miller*, 531 N.E.2d at 467.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 468.

178. *Id.*

under a literal interpretation of the statute is that an interview of a child, carefully orchestrated following earlier questioning (or even rehearsal), with questions designed to elicit the desired responses, would be admissible against a defendant in a sexual abuse case."[179]

In an even more egregious case,[180] the investigating officer interviewed the child approximately ten times between the start of the investigation and the videotaping of her statement.[181] Because some of those interviews were tape recorded and transcribed, the court was able to determine that the detective had used strongly leading questions and that the child's initial descriptions of the attacks were somewhat inconsistent with her videotaped statement.[182] The transcriptions also revealed that the police induced the child to talk by promises that she would be helping her molested cousin and eventually might visit her.[183] The investigating officer and a social worker eventually interviewed the child on videotape.[184] Although the officer led the questioning, the social worker interjected questions when the child appeared hesitant or did not offer the answer which the detective obviously was seeking.[185]

State v. Schaal[186] is even more troubling. In that case the child began counseling with a psychologist on December 1, 1986.[187] On April 28, 1987, the psychologist made a videotape in which the child told of her sexual intercourse with the defendant.[188] At one point near the end of the interview, the videotape was stopped and reviewed by the child.[189] The psychologist then restarted the tape and the child related more incidents.[190] The record revealed that several days before the making of this videotape, the psychologist aborted an attempt to videotape an interview with the child.[191] The psychologist recorded the second videotape over the aborted first recording.[192]

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179. *Id.* at 471. *See also* State v. Gray, 533 So.2d 1242, 1249 (La. Ct. App. 1988) (Gray claimed that he was prejudiced because his daughter was allegedly able to "rehearse" her video testimony. Apparently, the first tape she made did not have sound, and it was the second tape which was shown to the jury. "There is no provision limiting the number of tapes made or specifying which tapes may be admitted."), *writ denied*, 546 So.2d 1209 (1989); Woods v. State, 713 S.W.2d 173, 174 (Tex. App. 1986) (The defendants were not advised of the existence of a videotaped interview of the child made two months before the videotape actually introduced at trial. In the earlier tape, the victim at first denies that anybody assaulted her and states that any injuries she suffered were as a result of falling off a slide.), *rev'd*, 761 S.W.2d 377 (1988).

Gaines v. Commonwealth, 728 S.W.2d 525 (Ky. 1987), stands in sharp contrast. There the dissent noted that the videotaped interview was conducted only five hours after the initial interview, and that there was no evidence of any contact in the interim by the social workers so as to permit any influencing or rehearsing of the taped statement. *Id.* at 529.

180. Miller v. State, 517 N.E.2d 64 (Ind. 1987) (upholding the constitutionality of the videotaping legislation).

181. *Id.* at 65.

182. *Id.*

183. *Id.*

184. *Id.* at 66.

185. *Id.*

186. 806 S.W.2d 659 (Mo. 1991) (en banc) (upholding the constitutionality of the videotaping legislation), *cert. denied*, 112 S. Ct. 976 (1992).

187. *Id.* at 661.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

Should these videotapes be admissible at trial as a practical matter? While it may be true that "[t]he videotape brings the child's demeanor to the jury and erases most questions about whether an adult directed the child,"[193] that is precisely the problem and not the answer. The videotape, undoubtedly a powerful medium,[194] captures only a glimpse of history. What we don't know can hurt us, however, and we usually don't know what preceded the videotaped interview. The seemingly neutrally conducted videotaped interview may be preceded by days, weeks or even months of suggestive interrogation. Indeed, the lax standards of current videotaping legislation practically invite interrogators to rehearse the child. Thus, the admissibility of these videotapes does nothing to protect either the fact-finding process or the child witness from interviewing abuses.

If current videotaping legislation is therefore grossly inefficacious, it may also violate the Confrontation Clause. To the extent that a videotaped child witness interview is hearsay, an out-of-court statement offered for the truth of the matter asserted, the prosecution must demonstrate its trustworthiness to satisfy the requirements of the Confrontation Clause. This typically requires showing that the hearsay is reliable or producing the declarant for interrogation at trial.[195] Reliability is established when the statement falls within a firmly rooted hearsay exception, or the prosecution demonstrates that the statement possesses "particularized guarantees of trustworthiness."[196] Current videotaping legislation makes no pretense of falling within a firmly rooted hearsay exception. It also does little to promote the integrity of the fact-finding process, and the videotapes are therefore particularly untrustworthy.[197] It is not surprising then that the legislation typically requires the child's testimony or availability to testify. Courts, nevertheless, disagree whether the opportunity to cross-examine the child witness at trial can resolve the trustworthiness issue.

In *California v. Green*,[198] the Court had observed:

> [I]f the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections [normally afforded by contemporaneous cross-examination].... [A]s far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury....[199]

Accordingly, some courts conclude that the child's cross-examination at trial resolves the question of the videotape's trustworthiness for Confrontation

193. DZIECH & SCHUDSON, *supra* note 153, at 150 (Its "ultimate value ... is that it helps the jury gain a full and accurate sense of the child.").

194. Montoya, *supra* note 121, at 1304–05 (arguing that the use of television in our video-addicted age might imbue the child witness's testimony with undeserved credibility).

195. *See* Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521, 524–31 (1992) (discussing the standards of admissibility for prosecution-proffered hearsay) [hereinafter *Constitutionalization of Hearsay*].

196. Idaho v. Wright, 497 U.S. 805, 815 (1990).

197. Courts have likened the trustworthiness of children's videotaped statements to the hearsay in Idaho v. Wright, 497 U.S. 805 (1990), concluding that they lack sufficient indicia of reliability for Confrontation Clause purposes. *See, e.g.*, Lowery v. Collins, 988 F.2d 1364, 1370 (5th Cir. 1993); *In re* Troy P., 842 P.2d 742, 745 (N.M. 1992). *Wright* is discussed more fully below. *See infra* notes 395–402 and accompanying text.

198. 399 U.S. 149 (1970), *petition for review dismissed*, 404 U.S. 801 (1971).

199. *Id.* at 158–59.

Clause purposes.[200] Since there is "no reason to believe that a majority of the Court is ready to abandon the *Green* theory,"[201] these courts rest in *Green's* strong, precedential value.

Many of the current videotaping statutes, however, expressly require only the child's availability.[202] Even if trial cross-examination of the child witness is sufficient to satisfy the trustworthiness requirements of the Confrontation Clause, the child's mere availability for testimony should not suffice. Indeed, the hearsay declarant's mere availability tells us nothing about the hearsay's trustworthiness,[203] and *Green* contemplated the more telling encounter of actual cross-examination of the declarant.[204]

Other courts distinguish *Green* and find a Confrontation Clause violation despite the opportunity to cross-examine the child witness.[205] *Green* involved a prior inconsistent statement of sorts. Cross-examination was able to contrast the witness's preliminary hearing testimony, in which the witness incriminated the defendant, with his trial testimony, in which the witness claimed memory failure.[206] The Court was therefore satisfied that trial cross-examination retained its impeachment value. The Court, nevertheless, also 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 suggestions of others...."[207]

This is precisely the problem when children are witnesses and a videotape is prepared in accordance with the lax standards of current videotaping legislation. Children's suggestibility and memory distortion are factors that diminish the value of trial cross-examination as an impeachment tool. Thus, courts appropriately demand a trustworthiness showing irrespective of the child's testimony or availability to testify at trial when determining the admis-

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200. *See* United States v. Spotted War Bonnet, 933 F.2d 1471, 1473–74 (8th Cir. 1991) (relying on *Green*, 399 U.S. 149, in finding no violation of the confrontation clause when the child witness is subject to cross-examination at trial), *cert. denied*, 112 S. Ct. 1187 (1992); Briggs v. State, 789 S.W.2d 918, 921–22 (Tex. Crim. App. 1990) (same).

201. *Constitutionalization of Hearsay*, *supra* note 195, at 531.

202. *See, e.g.*, ARIZ. REV. STAT. ANN. §13–4252 (1989); HAW. REV. STAT. § 626, Rule 616 (1985); ILL. ANN. STAT. ch. 38, para. 106A–2 (Smith-Hurd Supp. 1992) (repealed effective Jan. 1, 1992); KAN. STAT. ANN. § 22–3433 (1988); LA. REV. STAT. ANN. § 15:440.5 (West 1992); MO. ANN. STAT. § 492.304 (Vernon Supp. 1992); WIS. STAT. ANN. § 908.08 (West 1993).

203. We must distinguish between availability as it speaks to hearsay's trustworthiness and availability as it speaks to a preference for face-to-face accusation. *See infra* Part II.C. Availability may be sufficient insofar as it relates to the preference. In United States v. Inadi, 475 U.S. 387 (1986), the Court had described as unwarranted an unavailability rule that required the prosecution to call a hearsay declarant as a witness, as opposed to simply insuring that the declarant was available for testimony if needed. *Id.* at 398 n.10. But *Inadi* had deemed the hearsay uniquely trustworthy. *See also* State v. Larson, 453 N.W.2d 42 (Minn. 1990) (discussing the admissibility of a child's videotaped statement).

204. *See* Lowery v. Collins, 988 F.2d 1364, 1369–70 (5th Cir. 1993) (asserting that *Green* requires production of the child declarant).

205. *See, e.g.*, People v. Bastien, 541 N.E.2d 670, 675–76 (Ill. 1989) (distinguishing the facts in *Green* and holding the videotaping statute unconstitutional); State v. Pilkey, 776 S.W.2d 943, 950–51 (Tenn. 1989) (citing the *Bastien*, 541 N.E.2d 670, discussion), *cert. denied*, 494 U.S. 1032 (1990), *and cert. denied*, 494 U.S. 1046 (1990).

206. *Green*, 399 U.S. at 151–52.

207. *Id.* at 159.

sibility of these videotapes under the Confrontation Clause. The videotapes should be inadmissible, at least absent clear and convincing evidence that the child's memory was uncontaminated by adult suggestion between the time of the alleged event and the taping.

B. Ground Gained and Lost with McGough's Proposal

Professor Lucy McGough, Vinson & Elkins Professor of Law at Louisiana State University, is one of the chief proponents of videotaping child witness statements. In her book, *Fragile Voices: The Child Witness in the American Legal System*,[208] McGough synthesizes the social science literature to identify the reliability risks inherent in children's testimony.[209] She discerns two significant and interrelated reliability risks: long-term memory fade and suggestibility.[210] These empirically-based revelations are the touchstones of her proposed statute allowing the admission of children's videotaped, pretrial statements in criminal trials.

McGough specifically recommends that "a neutral professional," "uninvolved in the investigation, prosecution or defense of [the] crime, who is either a specialist employed by the juvenile court or certified and appointed by that court as having equivalent or superior expertise in interviewing children,"[211] conduct a videotaped interview of the child "as soon as possible after the observed events" and "immediately after the child's involvement as a witness or victim of a crime becomes known."[212] The suggested statute further provides that a qualifying videotape is admissible at trial in lieu of the child's live, direct testimony about the events.[213] McGough fancies the procedure a form of the recollection-recorded hearsay exception.[214]

McGough's proposal to videotape child witness interviews makes remarkable advances toward the goal of preserving a child's unadulterated account for trial. Because McGough concludes that children suffer from long-

208. In recent years, we have seen a proliferation of books on child witnesses. Not surprisingly, the problem—or should we say the challenge—of the child witness has invited interdisciplinary study and solutions. Hence, the authors of these books have ranged from legal scholars to doctors and psychologists. *See, e.g.*, MYERS, *supra* note 1 (legal scholar); NANCY W. PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS (1991) (psychologists); WESTMAN, *supra* note 152 (doctor).

McGough's book is an interdisciplinary study distinguished by its vision. While other books are wonderful resources and commentaries on the current state of the law, *see e.g.*, MYERS, *supra* note 1, McGough's book is not for the rushed practitioner. Instead, her book is for the creative lawyer, the policy maker, the jurist, for all those who are interested in what can be, and her proposed statutes are the substance of her vision.

209. FRAGILE VOICES, *supra* note 152 (manuscript chs. 1–6).

210. *Id.* (manuscript ch. 5).

211. LUCY S. MCGOUGH, *Appendix of Proposed Statutes: Statute 3. Recollection-Recorded Videotapes of Children's Statements for Use in Criminal Trials, Section 2(2) in* FRAGILE VOICES: THE CHILD WITNESS IN THE AMERICAN LEGAL SYSTEM (forthcoming Spring 1994) [hereinafter MCGOUGH, *Statute 3*].

212. *Id.* at Section 2(1).

213. The proposed statute in pertinent part provides:

> Admissibility. If the court finds that the videotape is a qualifying videotape and also finds that the child, after being summoned as a witness, affirms that all material parts of his videotaped statement are accurate, the videotape may be admitted into evidence as past recollection recorded in lieu of any further direct testimony of the child at trial.

Id. at Section 4.

214. FRAGILE VOICES, *supra* note 152 (manuscript ch. 10, at 17–27).

term memory fade and suggestibility, her statute addresses the integrity of the fact-finding process in light of those factors. She counters children's long-term memory fade by recording the child's account while it is relatively fresh in the child's memory, and counters children's suggestibility by requiring an "immediate" taping that precludes the child's memory from being altered and hardened by repetitious, suggestive interviewing.[215] What gives her statute bite is that "[n]o child under the age of [twelve] who has witnessed the commission of a crime shall testify as a witness in any resulting criminal trial unless [the child's] account has been videotaped in accordance with the requirements."[216] This competency provision ensures consistent compliance with the videotaping statute by exacting a price for failure to comply: no compliance, no testimony.

Some would argue that McGough's proposal would operate too harshly in those instances where no videotape had been prepared or when any videotape had not been prepared in a timely fashion. This objection, however, could be remedied by adding the qualifying clause, "absent excusing circumstances," before her competency provision. Nevertheless, it only makes sense to rethink our adult-oriented processes, both pretrial and trial, when children are witnesses. For instance, we recognize that a child witness might be intimidated by the defendant's physical presence in a criminal proceeding; and we are prepared to shield this child witness from the defendant and forego the defendant's right to face-to-face confrontation at least when the child's ability to communicate will be impaired.[217] We justify this action in the name of truth-seeking.[218] We argue that if an intimidated child's ability to communicate is impaired, the reliability of that child's testimony is undermined. Thus, shielding the child witness is preferred to no testimony or impaired testimony from the child. If we also recognize children's long-term memory fade and suggestibility, then in the name of truth-seeking we should be at least equally prepared to exclude a child's testimony when the child's statement has not been timely recorded and appropriately elicited. Of course, we want to hear the child's story, but it may be impossible to recapture that story at trial, especially if the child has been persistently re-interviewed. Thus, it is incumbent upon legislatures to advance the integrity of the fact-finding process and preserve the child's unadulterated account, as McGough endeavors to do.

McGough's proposed statute, nevertheless, misses the mark. It fails to address the hard and ever more common cases of allegations that arise in the context of protracted and suggestive, investigative and "therapeutic" interviewing. In the three cases that introduced this Article, child sexual abuse allegations arose only after the children were repeatedly and pointedly interviewed. McGough's proposed statute requires only that the child witness interview have been videotaped "immediately after the child's involvement as a witness or victim of a crime becomes known."[219] Well, sometimes the child's

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215. *See supra* note 209 and accompanying text.

216. LUCY S. MCGOUGH, *Appendix of Proposed Statutes: Statute 2. Child Witnesses in Criminal Proceedings, Section 1, Competency, in* FRAGILE VOICES: THE CHILD WITNESS IN THE AMERICAN LEGAL SYSTEM (forthcoming Spring 1994) [hereinafter MCGOUGH, *Statute 2*].

217. Maryland v. Craig, 497 U.S. 836 (1990).

218. *Id.* at 857.

219. MCGOUGH, *Statute 3, supra* note 211, at section 2(1). *See also* Nancy Walker Perry & Bradley D. McAuliff, *The Use of Videotaped Child Testimony: Public Policy Implications* 7 NOTRE DAME J. L., ETHICS & PUB. POL'Y 387, 421 (1993) (similarly recommending the videotaping of a child witness interview as soon as possible after a child discloses).

involvement is suspected, but does not become "known" (i.e., the child does not disclose) until after the child has been through four or five "therapy" sessions or investigative interviews.[220] If there is no videotaped footage of these sessions, it may be difficult, if not impossible, to evaluate the suggestiveness of the interviewing procedures used. Yet under McGough's model, the fact finder is presented with a videotaped interview that is the product of these undocumented interviewing procedures. Given children's suggestibility, her statute should account for the origin and evolution of the abuse allegations in these hard cases. For at least in these cases, the legislation she proposes does not ensure the integrity of the fact-finding process or protect child witnesses from abusive interviewing procedures.

McGough's recollection-recorded procedure does, however, afford the videotaped child witness certain unique protections. The procedure would "supplement" rather than "supplant" the protective testimonial devices, like testimony by closed circuit television and pre-recorded testimony;[221] but McGough takes additional steps to protect the child witness. She does what current videotaping legislation does not and limits both direct and cross-examination at trial. At least when the child's videotaped statement is received, McGough prohibits the prosecution from calling the child to the stand to reiterate the substance of the child's earlier, taped accusation,[222] and thereby protects the child from testimonial trauma by limiting the child's role as a live witness on direct examination. This statutory feature also assures the defense that the prosecution will not gain an undue advantage from the taping: the prosecution cannot use the child to tell the child's story twice, once on videotape and then again live. As for cross-examination she writes:

> No serious advocate of the protection of child witnesses would design a proposal which eliminated only the lesser anxiety about courtroom formality but retained cross-examination and the confusion generated by lawyers' jargon. Such a proposal would be like finding a child closeted in a room with a bear, a snake, and a rabbit and removing the rabbit to protect the child.[223]

Hence, she also limits the child's role as a live witness during cross-examination.

McGough's proposal guts the role of cross-examination at trial. According to the terms of the statute, following the viewing of the videotaped interview by the court and jury, defense counsel can "cross-examine the child concerning his honesty and integrity or his ability to observe personally and accurately report in his videotaped statement the events or interactions which the child experienced."[224] McGough explains: there is "a presumption that the recollection-recorded account is more reliable than the child's present memory of those events,"[225] and therefore "[t]he single impermissible subject of interro-

220. Craig v. State, 544 A.2d 784, 786 (Md. App. 1988), *rev'd*, 560 A.2d 1120 (1989), *and vacated*, 497 U.S. 836 (1990).

This scenario should be contrasted with the child who spontaneously reports (maybe to a teacher), and child protective services promptly meets with the child and videotapes the initial or second interview.

221. MCGOUGH, *Statute 3*, *supra* note 211, at Section 1.

222. FRAGILE VOICES, *supra* note 152 (manuscript ch. 10, at 56–57).

223. *Id.* (manuscript ch. 10, at 17).

224. MCGOUGH, *Statute 3*, *supra* note 211, at Section 7.

225. FRAGILE VOICES, *supra* note 152 (manuscript ch. 10, at 56–57).

gation [on cross-examination] is the quality of the child's current recollection at trial."[226] That is, the defense is precluded from examining the child about the allegedly historical events placed in issue by the charges.[227]

McGough relies on *Kinsey v. State*[228] to justify the circumscribing of cross-examination in her recollection-recorded framework.[229] However, in *Kinsey*, the Arizona Supreme Court observed that the forgetful witness whose memory cannot be refreshed cannot well be cross-examined as to the accuracy of his recollection of the past events, "for he has already stated that he has no independent recollection of the event, which is all that could be brought out by the most rigid cross-examination."[230] That is, the proponent of the recorded recollection demonstrates the declarant's actual memory loss. In contrast, McGough's statute presumes memory failure from the empirical evidence of memory-fade and requires no showing of actual memory loss.

McGough's circumscribing of cross-examination simply cannot be supported by the rationale undergirding the recollection-recorded hearsay exception. The admission of recollection-recorded, despite the inability to cross-examine the witness, makes sense when a witness genuinely and unforeseeably forgets an event or even feigns forgetfulness at trial,[231] *if* the early recording provides the fact finder with trustworthy information and fills what would otherwise be an information void caused by the witness's memory loss. However, when that forgetfulness is foreseeable and even presumed at the time of the recording, the recording is prepared in anticipation of litigation, and the element of trustworthiness is lost.[232] With McGough's proposed statute, not only is trustworthiness lacking in that the videotape is prepared for admission at trial, but the element of necessity—the necessity to replace live, direct testimony and to forego cross-examination[233]—is also lost in that the memory loss is presumed, but not shown. Thus, her circumscribing of cross-examination cannot be justified on the basis of traditional evidentiary concerns.

If McGough's circumscribing of cross-examination thus makes for bad evidence law, it also makes for bad constitutional law. A startling premise of

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226. *Id.* (manuscript ch. 10, at 58). McGough's writing is typically lucid, but her evasive construction here betrays a lack of confidence in her proposal's viability.

227. It is unclear how this prohibition on cross-examination constitutionally jibes with McGough's further clarification that "nothing in the proposal ... would preclude the prosecutor from eliciting further testimony from the child so long as he is clarifying minor inaccuracies in his interviewed account ...." *Id.* (manuscript ch. 10, at 57). Is that to say that the prosecution can clarify details of the event in question on direct but the defense is precluded from doing so on cross? Is that to say that the child's memory is sufficiently intact for the prosecution but not for the defense?

228. 65 P.2d 1141 (Ariz. 1937) (approving the admission of recollection-recorded evidence in a criminal case despite the inability to cross-examine the witness about the accuracy of his recollection of past events).

229. FRAGILE VOICES, *supra* note 152 (manuscript ch. 10, at 57-58.).

230. 65 P.2d at 1150.

231. For instance, in Van Hatten v. State, 666 P.2d 1047 (Alaska Ct. App. 1983), the child witness acknowledged her grand jury testimony and testified that she had been truthful in relating the events to the grand jury, but expressed a complete loss of memory at trial as to those events.

232. *See* Palmer v. Hoffman, 318 U.S. 109, 113–14 (1943), *reh'g denied*, 318 U.S. 800 (1943) (discussing the business records exception, a doctrinal first cousin to recollection-recorded).

233. MYERS, *supra* note 1, § 7.37 (describing past recollection recorded as a need-based hearsay exception).

McGough's statutory proposal is that a skillful interview by a neutral professional is an adequate substitute for uncircumscribed cross-examination.[234] I say "startling" because the concept of neutrality, particularly in the context of alleged child sexual abuse, a subject that evokes great passions, is somewhat elusive. Moreover, it would appear that someone "employed by the juvenile court or certified and appointed by that court" has already thrown their lot behind the cause of children and cannot be classified as neutral.[235] But her premise is startling for yet another reason. Assuming that a neutral interview is realizable, and I would concede the relative neutrality of interviewers, what does cross-examination have to do with neutrality? Cross-examination is not about neutrality; it is about advocacy, and no one will champion the defendant's cause like the defendant's lawyer, certainly not McGough's specter of neutrality. Nevertheless, she makes the case that children are emotionally and linguistically ill-equipped for the rigors of cross-examination and are easily confused.[236] She justifies circumscribing cross-examination by arguing that the neutrality of her fact-gathering process, therefore, better serves the truth-seeking goal of confrontation,[237] an emphasis admittedly invited by the Court.[238] I argue not with the proclaimed goal, truth-seeking, but with whether there is a single, attainable truth, whether an interview by a neutral professional is the best path to truth when children are witnesses, and whether we can constitutionally circumscribe cross-examination, as McGough suggests, in any event.[239]

There are at least two sides to every story.[240] Yes, we seek truth at trial,

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234. FRAGILE VOICES, *supra* note 152 (manuscript ch. 10, at 76).

235. In an essay entitled, *Using "Scientific" Testimony to Prove Child Sexual Abuse*, 23 FAM. L.Q. 383 (1989), Professor Robert J. Levy discusses the institutional bias of juvenile courts. He observes that juvenile courts are "more concerned about 'false negatives'—abusing parents left free to continue to abuse their children—than about 'false positives'—parents not guilty of abuse who are nonetheless subjected to a neglect finding." *Id.* at 389–90. Regarding child abuse experts, he observes: "[they] are fiercely committed to the role of children's advocate, devoted to preferring child protection to any other value if a choice must be made." *Id.* at 396. The question is whether McGough's "neutral professional" can escape this mire of bias.

236. FRAGILE VOICES, *supra* note 152 (manuscript ch. 10, at 75–76).

237. *Id.*

238. *See, e.g.*, Tennessee v. Street, 471 U.S. 409, 415 (1985) (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970), "the Confrontation Clause's very mission [is] to advance 'the accuracy of the truth-determining process in criminal trials.'"). *But see* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988) (arguing that the true purpose of the Confrontation Clause is to work in conjunction with other six amendment rights to preserve the American adversary system); Toni M. Massaro, *The Dignity Value of Face-To-Face Confrontations*, 40 U. FLA. L. REV. 863, 888 (1988) ("The confrontation guarantee is a defendant-centered right and cannot reasonably be read as a general assurance of trials based on reliable evidence.").

In describing the purpose of confrontation, the Court recently soft-pedaled the elevation of truth-seeking and reliability over adversarial testing. The Court observed: "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845 (1990).

239. *See* Philip Halpern, *The Confrontation Clause and the Search for Truth in Criminal Trials*, 37 BUFF. L. REV. 165, 200 (1988–89) ("[T]he emphasis on reliability marks a dangerous trend in criminal adjudication. Unqualified truth concerning facts disputed in litigation cannot consistently, if ever, be attained.").

240. CALJIC 2.21.1, a classic jury instruction on discrepancies in testimony recognizes this reality. It reads in pertinent part:

> Discrepancies in a witness's testimony or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness should be

but we recognize that the truth about past events is elusive and hope that through the clash of adversaries we will at least approach that truth so that the fact finder can reach a fair, if not perfect, resolution of the issues. Thus, the Court has recently observed, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[241] In stark contrast McGough's model of mediated fact-gathering, coupled with the restrictions on cross-examination, resembles the inquisitorial model of the European continent and reflects an un-American faith in the ability to approach truth outside the context of competitive fact-gathering and presentation.

Neither is it obvious that an interview by a neutral professional, as opposed to adversarial examination, is the best course to truth about past events when children are witnesses. Rhona Flin, a Scottish research psychologist, has argued that "[o]nly in the most enlightened proposals is it suggested that a specialist child examiner could, if necessary, question the child on behalf of both parties."[242] But Eva Smith, Professor of Law at the University of Copenhagen, makes the point that it makes a difference who asks the questions, because different interrogators may ask different questions or ask the same questions differently. Professor Smith writes:

> A nine-year-old girl had been kidnapped by a man. The defending counsel asked the policeman to ask the child if the accused was present all the time, and if she could not have run away. The policeman went back to the room and asked, "Was the man present all the time?" She said: "No, he went out and chopped some wood, and he went shopping." "Could you then have run away?" There was a silence, and the policeman said: "Or were you really too scared to go anywhere?" And the child said: "Yes."[243]

Indeed, we know that even very young children can accurately relate

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discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently.

CALJIC 2.21.1 (5th ed. 1988).

241. United States v. Cronic, 466 U.S. 648, 655 (1984) (quoting Herring v. New York, 422 U.S. 853, 862 (1975)), *appeal after remand*, 900 F.2d 1511 (10th Cir. 1990).

242. Rhona H. Flin, *Hearing and Testing Children's Evidence, in* CHILD VICTIMS, CHILD WITNESSES 296 (Gail S. Goodman & Bette L. Bottoms eds., 1993) (discussing the role of direct and cross-examination at trial).

243. Eva Smith, *How to Deal with Children's Evidence, in* CHILDREN'S EVIDENCE IN LEGAL PROCEEDINGS 23 (John R. Spencer et al., eds., 1990).

In a presentation at the May 1992 N.A.T.O. Advanced Study Institute in Italy entitled *The Child Witness in Context: Cognitive, Social and Legal Perspectives*, Professor Eva Smith explained that it was customary in Denmark for defense counsel to observe the investigative interview of a suspected child abuse victim from behind a two-way mirror or by one-way closed circuit television. A similar procedure has been used in Colorado, where both the defense and prosecution are present in adjacent rooms and can communicate with the interviewer during the child witness interview. *See, e.g.*, People v. Newbrough, 803 P.2d 155, 157 (Colo. 1990) (The interviewer had an earpiece through which she could hear comments and questions from the lawyers. The interviewer also had lists of questions provided by the prosecutor and the defense counsel.); Thomas v. People, 803 P.2d 144, 151 (Colo. 1990) (In this case, the child was interviewed by two therapists, one chosen by the prosecution, the other by the defense. The attorneys could not communicate electronically with the interviewers, but could pass them notes.), *habeas corpus denied*, Thomas v. Guenther, 754 F. Supp. 833 (1991), *and aff'd* 962 F.2d 1477 (10th Cir. 1992).

historical events, but we also know that they often provide relatively little information on free recall.[244] Instead, the younger child witnesses are dependent on adult interrogation to guide their recall process and often will not report information unless it is specifically requested.[245] In other words, you get what you ask for;[246] and we certainly can imagine that the defense would ask different questions than the hypothetical, neutral interviewer.[247]

For instance, in a study by Karen Saywitz, Gail Goodman, Elisa Nicholas, and Susan Moan, five- and seven-year-old girls received physical examinations.[248] Midway through the exam, half of the children received genital and anal examinations, while the other half received examinations for scoliosis (curvature of the spine).[249] The children were subsequently interrogated about what happened.[250] The researchers observed:

> [O]f the 36 girls in the genital condition, 28 failed to mention genital touching in free recall.... However, when specifically asked the yes/no question regarding whether they were touched in the vagina, all but 5 finally disclosed the experience. The same pattern held true for anal touching.[251]

The researchers further observed few "commission" errors, reports that something occurred when it actually had not, as opposed to "omission" errors, neglecting to report something that did occur.[252] They noted:

> Of the three commission errors made, one child who had the scoliosis exam, said "yes" when asked if she had been touched in the vagina. However, when questioned further ..., she was not able to provide any details. Two children in the scoliosis condition said "yes" when asked if they had been touched on the buttocks. One of them was unable to provide any details in further questioning. However, the other child did in fact describe that it tickled and that the doctor used a long stick.[253]

The study prompted Professor Goodman to later remark,

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244. Margaret-Ellen Pipe et al., *Cues, Props, and Context: Do They Facilitate Children's Event Reports?, in* CHILD VICTIMS, CHILD WITNESSES 25 (Gail S. Goodman & Bette L. Bottoms eds., 1993) (examining various methods of enhancing children's event reports).

245. *See generally* Robyn Fivush, *Developmental Perspectives on Autobiographical Recall, in* CHILD VICTIMS, CHILD WITNESSES 1, 8–9 (Gail S. Goodman & Bette L. Bottoms eds., 1993) (focusing on the abilities of preschool children to recall and report accurately).

246. *Id.* at 19 (noting that "the questions asked will largely determine the information recalled.").

247. For instance, in the MEMORANDUM OF GOOD PRACTICE, a manual detailing the making of video recordings of child witness interviews for use in criminal proceedings in England and Wales, interviewers are told to be familiar with the evidentiary concerns of the trial courts and the elements of various offenses. MEMORANDUM OF GOOD PRACTICE, at 2–3, 9 (1992). Nothing about documenting potential defenses appears, but the defense does enjoy uncircumscribed cross-examination at trial. *See* The Criminal Justice Act, § 32A(3)(a), 1988 (as amended by the Criminal Justice Act 1991).

Special thanks to Dr. Wendy Stainton Rogers, Institute of Health, Welfare and Community Education, The Open University, England, and Professor Ray Bull, Department of Psychology, Portsmouth Polytechnic, England, for keeping me informed of relevant developments in the United Kingdom.

248. Karen Saywitz et al., *Children's Memories of Genital Examinations: Implications for Cases of Child Sexual Assault* (April 1989) (paper presented at the meeting of the Society for Research on Child Development, Kansas City, Mo.).

249. *Id.* at 3.

250. *Id.*

251. *Id.* at 7.

252. *Id.* at 7–8.

253. *Id.* at 8.

> These results highlight the dilemma faced by professionals who interview children in sexual abuse cases. The findings suggest that children may not disclose genital contact unless specifically asked, but that asking may increase the chance of obtaining a false report.[254]

Indeed, a child witness could just as well fail to disclose exculpatory evidence unless specifically asked by the defense in a timely fashion.[255] Thus, Professor Ceci has emphasized the importance of testing rival hypotheses when interrogating children about historical events.[256]

Moreover, the Court highly values cross-examination. In *Maryland v. Craig*, the Court was willing to sacrifice the element of a face-to-face meeting, but noted that testimony by one-way closed circuit television retained the oath, cross-examination and observation of the witness's demeanor.[257] McGough's statute, on the other hand, continues to chip away at the confrontation right by retaining the semblance of an oath[258] and the opportunity to observe the witness's demeanor, but by presuming memory loss and circumscribing cross-examination of the child witness accordingly.

Significantly, the Court has also previously considered the constitutionality of curtailing cross-examination by a criminal defendant in a case in which the state had an interest in protecting a child witness. In *Davis v. Alaska*,[259] the defendant sought to expose the probationary status of the prosecution's witness, a minor.[260] The state, however, moved for a protective order to prevent disclosure of Green's juvenile record during cross-examination.[261] The trial court, relying on statutory law designed to protect juveniles from the stigmatizing effect of such disclosures, granted the prosecution's motion for a protective order.[262] The Court disapproved and wrote:

> [T]he right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if

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254. Goodman & Clarke-Stewart, *supra* note 80, at 99.

255. If the interviewer's neutrality is problematic for the defense, it can be problematic for the prosecution too. The prosecution listens for a persuasive, legal story. The prosecution must prove each element of precise charges beyond a reasonable doubt or face an acquittal if not a directed verdict on the specific charge. For instance, penetration, as opposed to external touching, typically affects the gravity of the charge. The neutrally elicited, "Richard hurt me with his potty," does not answer the question of whether or not penetration occurred. If penetration has occurred, but the videotaped interview must be received in lieu of the child's direct testimony, the prosecution has effectively delegated its duty to do justice. But the prosecution enjoys an escape hatch under McGough's statutory scheme. The qualifying videotape "*may* be admitted into evidence," MCGOUGH, *Statute 3, supra* note 211, at Section 4 (emphasis added), but apparently need not be. The prosecution retains the choice. Once the videotaped recording of the child's statement is admitted, however, the defense has no choice. Cross-examination is statutorily circumscribed. The defense cannot explore the child's current recollection of the events at trial. Yet, cross-examination would be particularly useful in exploring this child's use of ambiguous language (Richard "hurt me") and euphemism (with his "potty").

256. *Interviewing Preschoolers, supra* note 72 (manuscript at 13–14).

257. Maryland v. Craig, 497 U.S. 836, 844–45 (1990).

258. MCGOUGH, *Statute 3, supra* note 211, at Section 2(4) (requiring the interviewer to explain the importance of giving a truthful account and then to administer an oath in language appropriate to the child's understanding).

259. 415 U.S. 308 (1973).

260. *Id.* at 311.

261. *Id.* at 310.

262. *Id.* at 311.

> the prosecution insisted on using him to make its case is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.[263]

Indeed, in *United States v. Owens*[264] the Court distinguished cross-examination hampered by a witness's actual memory loss from that hampered by court imposed limits and evidentiary rules, like privileges, the former being constitutionally tolerable and the latter disfavored.[265] Thus, McGough's statutorily imposed limits on cross-examination are unlikely to pass constitutional muster. Such limits are simply intolerable to a Court for which cross-examination is practically sacrosanct.[266]

Furthermore, even if McGough is right and cross-examination of children is less effective than cross-examination of adults as a truth seeking device, the Court has been careful to preserve the defendant's right to present a defense,[267] even when the proffered evidence was of questionable reliability.[268] For instance, in *Rock v. Arkansas*,[269]discussing the admissibility of the defendant's hypnotically refreshed testimony,[270] the Court underscored the modern tendency against incompetency rulings and observed:

> [T]he conviction of our time is that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or the court.[271]

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263. *Id.* at 319.

264. 108 S. Ct. 838 (1988).

265. *Id.* at 844.

266. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) ("[T]he right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."); Davis v. Alaska, 415 U.S. 308, 315 (1974) ("Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.' Douglas v. Alabama, 380 U.S. 415, 418 (1965)."); Barber v. Page, 390 U.S. 719, 721 (1968) ("[I]n holding the Sixth Amendment right of confrontation applicable to the States through the Fourteenth Amendment, this Court said, 'There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' Pointer v. Texas, 380 U.S. 400, 405 (1965)."). *See also Ex Parte* Strickland, 550 So. 2d 1054, 1056 (Ala. 1989) (Upholding a statute providing for videotaped depositions of child witnesses and observing, "[i]f this statute had merely provided district attorneys with an opportunity to let the child give a rehearsed speech with no cross-examination, it would be unconstitutional.").

267. The right to present a defense flows from both the right of confrontation and the right to compulsory process. *See* California v. Green, 399 U.S. 149, 176 (1970) (Harlan, J., concurring), *petition for review dismissed*, 404 U.S. 801 (1971); Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 613 (1978).

268. *See* EDWARD J. IMWINKELRIED, EXCULPATORY EVIDENCE: THE ACCUSED'S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE (1990) (discussing the liberality of the Court in admitting defense evidence).

269. 483 U.S. 44 (1987).

270. The defendant could not remember the precise details of her husband's shooting. At her attorney's suggestion, she submitted to hypnosis in order to refresh her memory. When the prosecutor learned of the hypnosis sessions, he filed a motion to exclude the defendant's testimony. The trial court limited the defendant's testimony to matters remembered and stated before being hypnotized. *Id.* at 46–47.

271. *Id.* at 54 (quoting Rosen v. United States, 245 U.S. 467 (1918)).

Although the Court acknowledged the controversy surrounding the use of hypnotically refreshed testimony in criminal cases,[272] the Court concluded that Arkansas's rule excluding all hypnotically refreshed testimony as unreliable violated the defendant's constitutional right to testify on her own behalf.[273] Accordingly, even if the case can be made that cross-examination is confusing for children, the court is unlikely to exclude children's cross-examination testimony and, more appropriately, to allow the fact finder to determine the weight to be accorded the testimony.

C. The Shared Objection: A Lack of Necessity

The preceding discussion demonstrated that McGough's proposal is more effective than current videotaping legislation in protecting the child witness and the fact-finding process from the vagaries of pretrial interrogation, but that peculiar aspects of both current videotaping legislation and McGough's proposal invite Confrontation Clause objections. It appears that the opportunity to cross-examine the child witness cannot cure the untrustworthiness of videotapes prepared in accordance with current legislation, and that the trustworthiness of videotapes prepared in accordance with McGough's proposal cannot justify circumscribing cross-examination of the child witness. However, assuming the trustworthiness of the videotapes, current videotaping legislation and McGough's proposal raise an additional question: Is a necessity or unavailability showing a prerequisite to the admission of the videotapes under the Confrontation Clause?

The clear majority of the current videotaping statutes, including Arizona's, at least on their face, do not require the child's testimony, but will admit the child's videotaped statement if the child is "available" for testimony.[274] While McGough's proposal does require the child to testify, the child witness merely affirms the accuracy of the videotape on direct examination and submits to a circumscribed cross-examination. Both thereby endeavor to shield the child witness from the trial process. Nevertheless, two arguments based on the Court's reasoning in *White v. Illinois*[275] and an independent rationale indicate that the child's testimony or unavailability for testimony is constitutionally required.

In *White*, a child sexual abuse prosecution, the trial court admitted the out-of-court statements of a four-year-old girl under the spontaneous

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272. *Id.* at 58–61. In an article on children's suggestibility, research psychologists Elizabeth Loftus and Graham Davies compared the effects of child witness interviewing and hypnosis. *See* Elizabeth Loftus & Graham Davies, *Distortions in the Memory of Children*, 40 J. OF SOC. ISSUES 51, 65 (1984).

273. *Rock*, 483 U.S. at 62. Similarly, in Washington v. Texas, 388 U.S. 14 (1967), a state statute prevented persons charged as principals, accomplices, or accessories in the same crime from being introduced as witnesses for one another. The Supreme Court held:

> [T]he petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.

Id. at 23.

274. *See supra* note 157 and accompanying text. A minority of the current videotaping statutes require the child's testimony or unavailability. *See, e.g.*, MINN. STAT. ANN. § 595.02(3) (West 1988); OKLA. STAT. ANN. tit. 22, § 752.B.2(i) (West 1992).

275. 112 S. Ct. 736 (1992).

declaration and medical examination exceptions to the hearsay rule.[276] The child did not testify, and the prosecution made no attempt to justify the child declarant's non-production.[277] On appeal, the defendant made two arguments, both aimed at the prosecution's failure to produce the child declarant for testimony.

In one argument, the defendant relied on *Maryland v. Craig*,[278] in which the Court conditioned the admissibility of children's testimony by one-way closed circuit television on a showing of necessity.[279] Based on this holding, the defendant in *White* asserted that a child's out-of-court statement should not be admitted in lieu of live-testimony absent a showing of necessity.[280] The Court rejected this argument. The Court distinguished *Craig's* necessity requirement as relevant to the constitutionality of "in-court procedures," procedures employed "once a witness is testifying."[281] However, the Court observed that this concern was "quite separate from that of what requirements the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations."[282] The Court concluded that there is no necessity requirement when out-of-court declarations are admitted under "established" exceptions to the hearsay rule.[283] The Court further observed that the statements at issue, spontaneous declarations and statements made for purposes of medical diagnosis or treatment, fell within "firmly rooted" exceptions.[284]

There is a strong argument that at least McGough's proposal is an in-court procedure requiring a necessity showing and not simply a hearsay exception. In *Maryland v. Craig*, testimony by one-way closed circuit television might have been characterized as hearsay, an out-of-court statement offered for the truth of the matter asserted, since the child witness testified not in the courtroom in the physical presence of the jury and the defendant, but from a separate room.[285] The Court skirted this issue in *Craig*[286] and, in *White*, described testimony by one-way closed circuit television not as hearsay but as an in-court procedure.[287] Testimony by one-way closed circuit television is appropriately described as an in-court procedure, because although the child witness is removed from the courtroom, the child nevertheless testifies

276. *Id.* at 740.
277. *Id.* at 739.
278. 497 U.S. 836 (1990).
279. *Id.* at 855.
280. *White*, 112 S. Ct. at 743.
281. *Id.* at 743–44.
282. *Id.* at 744.
283. *Id.* Apparently, out-of-court declarations that do not fall within "established" exceptions may require a showing of necessity. *See* Josephine A. Bulkley, *Recent Supreme Court Decisions Ease Child Abuse Prosecutions: Use of Closed-Circuit Television and Children's Statements of Abuse Under the Confrontation Clause*, 16 NOVA L. REV. 687, 697 (1992) (noting that even after *White v. Illinois*, the parameters of any unavailability requirement remain unresolved).
284. *White*, 112 S. Ct. at 742 n.8. It is unclear from the Court's opinion whether or not there is a distinction between "established" exceptions and "firmly rooted" exceptions to the hearsay rule.
285. *See* Eileen Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 639 n.69 (1992) (observing that closed-circuit television testimony falls within the statutory definition of hearsay).
286. 497 U.S. at 851 (The Court observed that testimony by one-way closed circuit television "may be said to be technically given out of court (though we do not so hold).").
287. 112 S. Ct. at 743–44.

contemporaneously, responding under oath to interrogatories from the attorneys, and the child's demeanor during examination is transmitted to the jury.[288] Testimony by one way closed-circuit television is, nevertheless, an in-court procedure requiring a necessity showing because it alters the normal method of taking testimony by shielding the child witness from the courtroom and the defendant.[289]

McGough describes her statute as a hearsay exception. However, her statute, like testimony by one-way closed circuit television, undeniably alters the normal method of taking testimony and is therefore also an in-court procedure. To the extent that McGough's proposed statute is a hearsay exception, it is best described as a variation of recollection-recorded, and at least the Arizona Supreme Court has described such statements as the equivalent of live testimony.[290] Not surprisingly, the recollection-recorded hearsay exception has also been described as a need-based exception.[291] But McGough's statute is much more than a hearsay exception. Her procedure, like testimony by one-way closed circuit television, admits the formalized interrogation of a child witness (albeit by a neutral interviewer) and admits demeanor evidence.[292] More significantly, her statute also places the child witness on the stand to adopt the earlier videotaped interview and dictates what the lawyers can and cannot explore during their examination of the child witness, instead of allowing normal and full, direct and cross-examination of the witness by the attorneys. Because her statute thereby alters the normal method of taking testimony, the Court should apply *Craig*, not *White*, and require a showing of necessity as it does with testimony by one-way closed circuit television.[293]

Nor should her presumption of children's long-term memory fade suffice to establish necessity.[294] The Court has rejected generalized, legislative findings

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288. *See* MYERS, *supra* note 1, § 7.2.2 (1992) (writing: "contemporaneous video testimony should not be treated as out-of-court for hearsay purposes. The testimony is live, the jury sees the child *as the child testifies*, and the child is subject to contemporaneous cross-examination.").

289. *See White*, 112 S. Ct. at 743–44.

290. *See* Kinsey v. State, 65 P.2d 1141, 1149 (Ariz. 1937) ("[W]hen the person who witnessed the event testifies to the accuracy of the memorandum as made, that memorandum is just as much direct and not hearsay evidence as the language of the witness when he testifies to his independent recollection of what he saw.").

291. MYERS, *supra* note 1, § 7.37. *See also* Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 690 n.132 (1986) (arguing that certain hearsay exceptions should not be tied to the production or unavailability of the declarant for Confrontation Clause purposes, but distinguishing recorded-recollection, which by its own terms requires a showing of necessity).

292. *See, e.g.*, Buckner v. State, 719 S.W.2d 644, 651 (Tex. App. 1986) (Burdock, J., dissenting) (The child is "called" to the stand when the jury watches the video. Viewing the tape affords the jury the chance to observe the child's demeanor and judge his credibility.), *disavowed by* Clark v. State, 728 S.W.2d 484 (Tex. App. 1987). Even McGough acknowledges that "[a] videotaped record is a close facsimile of in-court testimony since it preserves both the sound and sight of the child's process of recall." FRAGILE VOICES, *supra* note 152 (manuscript ch. 10, at 22).

293. *See* State v. Lamb, 798 P.2d 506, 510 (Kan. App. 1990) ("The criteria articulated in *Craig* are applicable to the admission of J.S.'s videotaped statement.").

294. Although the presumption is described as a rebuttable presumption, the child witness may testify only if the child "now believes that material parts of his videotaped account are inaccurate," that is, if the child disclaims the accuracy of the videotape, and the court "finds that he is capable of giving trustworthy testimony." MCGOUGH, *Statute 3*, *supra* note 211, at Section 5. But if the child is capable of giving trustworthy testimony, and the court is capable of making that determination, then the defendant's assertion of the Confrontation Clause should be

of children's needs and has instead required individualized findings by the trial court that the particular child witness is in need of special protection. For instance, in *Coy v. Iowa*,[295] the Court concluded that Iowa's implied, legislative finding that child witnesses suffer trauma testifying in their assailant's presence was insufficient to overcome a criminal defendant's right to confront the witnesses against him or her.[296] Similarly, in *Globe Newspaper Co. v. Superior Court*,[297] the Court held that a Massachusetts statute barring press and public access to criminal sex-offense trials during the testimony of minor victims violated the First Amendment because the statute mandated uniform closure rather than selective closure based on a case-by-case determination of the particular child's needs.[298] In contrast, in *Maryland v. Craig*, the Court allowed the child witnesses to testify by one-way closed circuit television, despite a confrontation clause challenge, because the prosecution presented expert testimony regarding the testimonial needs of each child witness.[299] In the context of McGough's proposal, a necessity standard would require the prosecution to demonstrate the particular child's failure of recollection in much the same way that *Craig* requires the prosecution to demonstrate that a defendant's presence impairs a particular child's ability to testify.

Like McGough's proposal, current videotaping legislation arguably prescribes an in-court testimonial procedure,[300]requiring a showing of necessity.[301] After all, the videotape transmits much more than an out-of-court statement, it transmits demeanor evidence as well. However, since the statutes do not limit attorney examination of the child witness, current videotaping legislation may more readily be classified as a simple hearsay exception.[302]

If current videotaping legislation and McGough's proposal were characterized as hearsay exceptions and not as in-court procedures, they nevertheless would not be characterized as "established" or "firmly rooted" exceptions, which according to *White* require no showing of necessity.[303] Firmly rooted

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sufficient to require the child's testimony, quite apart from any assertion by the child that the videotaped account is or is not inaccurate.

295. 487 U.S. 1012 (1988).

296. *Id.* at 1021.

297. 457 U.S. 596 (1982).

298. *Id.* at 607–09.

299. 497 U.S. at 842 (quoting Craig v. State, 560 A.2d 1120, 1128–29 (Md. 1989)).

300. *See, e.g.*, State v. Johnson, 729 P.2d 1169, 1170–71 (Kan. 1986) (where the court interchangeably refers to the child's videotaped statement as "testimony" and "hearsay."), *cert. denied*, 481 U.S. 1071 (1987); Gaines v. Commonwealth, 728 S.W.2d 525, 526–27 (Ky. 1987) (Although both the defense and prosecution characterized the videotaped interview as an unsworn out-of-court statement, the court concluded that admitting the videotape was tantamount to allowing the child to testify without first finding the child competent and administering the oath); Chambers v. State, 805 S.W.2d 459, 461 (Tex. Cr. App. 1991) (The child "testified" via her videotaped statement that appellant had engaged in sexual acts with her.).

301. *See* Lowery v. Collins, 988 F.2d 1364 (5th Cir. 1993) (relying post-*White* on *Craig* to find a confrontation clause violation where the child's videotaped interview was admitted without a case-specific finding of necessity).

302. *See* State v. Schaal, 806 S.W.2d 659, 663 (Mo. 1991) (The defense argued that the statute was unconstitutional because it required "no special finding that the child would be disabled by emotional distress. *Coy* and *Craig* are inapposite. Those cases illuminate the extent of the right to confrontation at trial. This case involves a different factual milieu. Here we consider the use of an out of court statement where the witness is fully available at trial."), *cert. denied*, 112 S. Ct. 976 (1992).

303. *White*, 112 S. Ct. at 744.

hearsay exceptions enjoy a "tradition of reliability,"[304] "the weight accorded longstanding judicial and legislative experience in assessing ... trustworthiness."[305] Current videotaping legislation makes no pretense of falling within the terms of a firmly rooted hearsay exception. Although McGough characterizes her statute as recollection-recorded, "[o]ne of the ancient hearsay exceptions,"[306] it departs from the classic recollection-recorded formula.[307] Furthermore, McGough's "proposed" statute is by definition of such recent origin that it cannot be described as "established" or "firmly rooted."

McGough's proposal involves the recording of a child witness interview. Appropriate child witness interviewing technique remains a controversial subject among cognitive and developmental research psychologists. For instance, Dr. Geiselman, Professor of Psychology at the University of California, Los Angeles, developed and actively promotes a popular, memory-retrieval procedure known as the cognitive interview.[308] He recently received funding from the U.S. Department of Justice to study the effectiveness of this interviewing procedure in the child witness context.[309] Yet the step-wise interview, an alternative memory-retrieval method, has received much attention in Canada and the United Kingdom.[310] Not to mention the debate over the use of props,[311] especially anatomically-detailed dolls,[312] during interviews. Bootstrapping videotaped child witness interviews onto the better known recollection-recorded hearsay exception may be a clever lawyer's ploy, but it does little to remedy the fact that child witness interviews enjoy no "tradition of reliability," and no label can change that.[313] Accordingly, a showing of necessity may be required when the videotapes are proffered, even if they are characterized as out-of-court declarations.

In a second argument, the defendant in *White* relied on *Ohio v. Roberts*,[314] in which the Court conditioned the admissibility of prior testimony

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304. Idaho v. Wright, 497 U.S. 805, 817 (1990).
305. *Id.*
306. FRAGILE VOICES, *supra* note 152 (manuscript ch. 10, at 18).
307. *See supra* notes 228–233 and accompanying text.
308. *See* R. Edward Geiselman et al., *Effects of Cognitive Questioning Techniques on Children's Recall Performance, in* CHILD VICTIMS, CHILD WITNESSES 73–74 (Gail S. Goodman & Bette L. Bottoms eds., 1993).
309. *Id.* at 90. *See also* NATIONAL INSTITUTE OF JUSTICE, RESEARCH IN BRIEF, NEW APPROACH TO INTERVIEWING CHILDREN: A TEST OF ITS EFFECTIVENESS, (May 1992) (describing the cognitive interview and the results of the study).
310. Yuille et al., *supra* note 1, at 95–115 (incorporating some aspects of the cognitive interview).
311. *See, e.g.*, Pipe et al., *supra* note 244, at 25–45 (optimistically discussing context reinstatement and reinstatement of actual items and objects to facilitate memory retrieval but advocating further research).
312. *Compare* Barbara W. Boat & Mark D. Everson, *The Use of Anatomical Dolls in Sexual Abuse Evaluations: Current Research and Practice, in* CHILD VICTIMS, CHILD WITNESSES, 47–65 (Gail S. Goodman & Bette L. Bottoms eds., 1993) ("The preponderance of research supports the use of anatomical dolls as an interview tool but not as a litmus test for sexual abuse.") *with* Levy, *supra* note 235, at 407–08 (advocating the inadmissibility of children's statements elicited in doll-aided interviews) *and* Diana Younts, Note, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691 (1991) (detailing the controversy surrounding doll-aided interviews and concluding that testimony based on these interviews should be excluded).
313. Courts, however, have been known to stretch the traditional hearsay exceptions to accommodate children's hearsay. *See infra* notes 410–416 and accompanying text.
314. 448 U.S. 56 (1980).

upon a showing of the declarant's unavailability. Based on this holding, the defendant in *White* asserted that the child's out-of-court statements should not be admitted in lieu of live-testimony absent a showing of unavailability.[315] The Court rejected this argument too. An unavailability rule would bar the admission of hearsay unless the declarant were unavailable or available and produced for trial.[316] The Court in *White* observed that an unavailability rule makes no sense when the reliability of an out-of-court statement arises from the context in which the statement is made and cannot be recaptured by later in-court testimony, the situation with spontaneous declarations and statements made for purposes of medical diagnosis or treatment.[317] It distinguished *Roberts'* unavailability rule as applying to the admission of prior testimony,[318] there being "no threat of lost evidentiary value if the out-of-court statements were replaced with live testimony," since "the out-of-court statements sought to be introduced were themselves made in the course of a judicial proceeding."[319] Indeed, in *United States v. Inadi*,[320] the Court described prior testimony as "weaker" evidence than the declarant's trial testimony.[321]

Does the child witness interview context infuse the child's out-of-court statements with special evidentiary value or is live testimony superior to videotaped interviews, as it is with prior testimony? Some would argue that children cannot effectively and accurately relate historical events in a courtroom setting but can do so in an informal, non-adversarial setting.[322] According to this

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315. *White*, 112 S. Ct. at 741.
316. *Id.* at 742.
317. *Id.* at 742–43.
318. *Id.* at 741.
319. *Id.* at 743.
320. 475 U.S. 387 (1986).
321. *Id.* at 394–395 (contrasting a co-conspirator's out-of-court statements with prior testimony).
322. There is empirical support for the proposition that children give more complete and accurate answers in an informal, non-adversarial setting, but these studies have been primarily concerned with the effect of the defendant's presence on the child's testimony. For instance, in a Michigan study involving seventeen girls and twenty boys between the ages of seven and nine, the children watched a simulated father-daughter confrontation on videotape. Paula E. & Samuel M. Hill, Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 814 & n.19 (1987). Half the children were questioned by an unfamiliar male interviewer in a private setting. *Id.* at 814 n.20. The other half were questioned by two "attorneys" in a courtroom. *Id.* A "judge" presided over the proceedings, and the ill-tempered father in the videotape sat at counsel's table. *Id.*

> The results ... which either indicated a trend toward, or actually attained statistical significance, indicated that, compared to children in a courtroom, children in a small room tend to (1) relate more central items in free recall; (2) answer specific questions correctly more often; and (3) say "I don't know" or give no answer when asked specific questions significantly less often.

Id. at 814–15.

Along the same vein, a study by Douglas P. Peters concluded "that child witness-defendant confrontations can have a substantial negative effect on the child's ability or willingness to be accurate." Douglas P. Peters, *The Influence of Stress and Arousal on the Child Witness, in* THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS 75 (John Doris ed. 1991). Half the children in this study witnessed a simulated theft of money and, to identify the perpetrator, later viewed either a photograph lineup or a live lineup. *Id.* at 68. The responses of children who viewed a target-present photograph lineup were 75% correct, and 8% were false non-identifications (that is, the child incorrectly asserted that the "thief" was not in the lineup). *Id.* at 69. The responses of children who viewed a target-present live lineup were 33% correct and 58% were false non-identifications. *Id.* These studies suggest that live, in-court testimony in the defendant's presence may be unreliable because such presence may impair the child's ability to communicate and may

argument, no unavailability showing should be required because the child witness interview context infuses the child's statement with special evidentiary value. In contrast, others would argue that live testimony, including cross-examination of the child witness, is superior to the videotaped interview, because the videotaped interview, like prior testimony, simply records a prior interrogation of the child witness.[323]

The latter argument enjoys the weight of reason. As long as the Court is going to make a distinction between prior testimony and other hearsay and require a showing of unavailability when prior testimony is offered,[324] unavailability should also be a prerequisite for the admission of a child's videotaped interview. Indeed, inasmuch as the videotaped interview records the unilateral interrogation of the child witness, it is inferior even to prior testimony, which is the product of an adversarial proceeding and even then requires an unavailability showing for admission.

Nevertheless, apart from analogizing the videotapes to in-court procedures and prior testimony, their status as *ex parte* affidavits should

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promote inaccurate testimony. *See also* GOODMAN ET AL., TESTIFYING IN CRIMINAL COURT: EMOTIONAL EFFECTS ON CHILD SEXUAL ASSAULT VICTIMS 94 (1992) (reporting the results of a study that examined the effects of criminal court testimony on a sample of 218 alleged child sexual assault victims and observing: "[C]hildren's attitudes about testifying in front of the defendant were reliably associated with their ability to answer the prosecutors' questions, $r = -.41$, $N = 40$, $p < .025$, and to provide a detailed response when they did answer, $r = -.45$, $N = 40$, $p < .01$. The children who were most upset about testifying in front of the defendant had a more difficult time answering the prosecutors' questions.").

In any event, the ability to generalize from these studies has been criticized. *See* Montoya, *supra* note 119, at 1281 n.109, 1282 nn.112 & 116, 1287.

323. *See, e.g.*, Nelson v. Farrey, 874 F.2d 1222, 1231 (7th Cir. 1989) (Flaum, J. concurring) ("Unlike *Inadi* [discussing the admissibility of a co-conspirator's hearsay statements, the child's] statements were not made during the course of the critical event but rather represented her recollection of past events. Thus it cannot be said that the statements derived much of their significance from the context in which they were made."), *cert. denied*, 493 U.S. 1042 (1990). *See also* People v. Bastien, 541 N.E.2d 670, 676 (Ill. 1989) (observing that if the child is available for testimony, "'there is little justification for relying on the weaker version—the videotaped statement.'"); Miller v. State, 531 N.E.2d 466, 471 (Ind. 1988) ("It seems unfailingly important that in weighing the value of the child's statement the trier of fact have the opportunity to consider the child's responses when questioned by someone other than a sympathetic interviewer."), *superseded by statute as stated in* Poffenberger v. State, 580 N.E.2d 995 (Ind. App. 1991); Burke v. State, 820 P.2d 1344, 1348 (Okla. Crim. App. 1991) ("We should not allow the State to present a tape made with one-sided questions, by an expert questioner, who could coach, lead and gain the required result without the defendant having his Sixth Amendment right of confrontation."), *cert. denied*, 112 S. Ct. 2940 (1992); Long v. State, 742 S.W.2d 302, 315 (Tex. Crim. App. 1987) ("[T]he idea of acquiring the testimony in a 'neutral, safe environment ...' absent cross-examination is certainly not indicative of the testimony having an indicia of reliability."), *cert. denied*, 485 U.S. 993 (1988), *and overruled by* Briggs v. State, 789 S.W.2d 918 (Tex. Crim. App. 1990).

It could also be argued that an interviewing context does not adequately communicate to the child the importance of being truthful. For instance, the atmosphere of the interview in People v. Newbrough, 803 P.2d 155, 161 (Colo. 1990), raised doubts about the reliability of the procedure. The child was unresponsive most of the time. She wanted to color, to wash the table or to play. When she spoke with the interviewer, she insisted that the interviewer pretend to be "grandma" while she pretended to be the mother of several dolls and that they pretend to talk on the phone or to be on an airplane. *Id.* at 161.

324. *See* Nancy H. Baughan, Recent Development, White v. Illinois: *The Confrontation Clause and the Supreme Court's Preference for Out-of-Court Statements*, 46 VAND. L. REV. 235, 257–59 (1993) (describing the necessity requirement for prior testimony but not other hearsay as counter-intuitive given that prior testimony is the only hearsay developed under adversarial safeguards).

require the application of an unavailability rule. In *White*, the United States as *amicus curiae* argued that the Court should reject the defendant's claim because the only out-of-court statements that implicate the Confrontation Clause are *ex parte* affidavits, out-of-court statements made for the principal purpose of accusing or incriminating the defendant, and the child declarant's statements did not fit that description.[325] Justices Thomas and Scalia agreed with the government that the Confrontation Clause should only apply to *ex parte* affidavits, but suggested a more narrow definition: out-of-court statements "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[326] The majority of the Court disagreed and insisted that all hearsay admitted in a criminal trial implicated the Confrontation Clause.[327] The Court also gratuitously disavowed the significance of characterizing an out-of-court statement as an *ex parte* affidavit.[328] Contrary to this position, however, the earliest American Confrontation Clause jurisprudence recognized that "[t]he primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness...."[329]

A videotaped child witness interview qualifies as an *ex parte* affidavit,[330] because the interview is conducted and videotaped in a non adversarial setting with the intention of offering the videotape as evidence against the defendant at

325. 112 S. Ct. at 740–41. Professor Michael H. Graham had similarly argued that the confrontation clause applied only to those hearsay statements that were accusatory when made. *See* Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 593 (1988).

326. *White*, 112 S. Ct. at 747.

327. *Id.* at 741.

328. In *White*, 112 S. Ct. 736, the Court observed, "In *Mattox* itself ... the Court allowed the recorded testimony of a witness at a prior trial to be admitted. But, in the Court's view, the result was justified not because the hearsay testimony was unlike an *ex parte* affidavit, but because it came within an established exception to the hearsay rule." *Id.* at 741.

The recorded testimony of a witness at a prior trial is, however, unlike an *ex parte* affidavit, because the defense has had the opportunity to cross-examine the witness under oath at the prior trial, and the transcript of that cross-examination is presented to the trier of fact along with the transcript of the direct examination. Indeed, *Mattox* emphasizes that the defendant enjoyed cross-examination at the prior trial. Mattox v. United States, 156 U.S. 237, 244 (1895) ("The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.").

329. Mattox v. United States, 156 U.S. 237, 242 (1895). *See also* Dutton v. Evans, 400 U.S. 74, 94 (1970) (Harlan, J., concurring) ("[T]he paradigmatic evil the Confrontation Clause was aimed at—trial by affidavit.").

330. Burke v. State, 820 P.2d 1344, 1350, 52–53 (Okla. Crim. App. 1991) (Lumpkin, J., specially concurring) ("[T]he procedure set forth is totally foreign to the historical foundations of recognized exceptions to the hearsay rule.... [The statute] in effect creates a procedure to take a 'deposition or *ex parte* affidavit' to be used against the accused. This procedure runs contra to the basic foundations of the Confrontation Clause as discussed in *Mattox*. The type of statement sought to be taken, while it is hearsay, is not the type of hearsay which can qualify as an exception to the right of confrontation when analyzed in the light of the historical foundation established for the exemption of certain types of hearsay—statements made in the normal course of events and not a part of a procedure to preserve the statement for use at trial."), *cert. denied*, 112 S. Ct. 2940 (1992). *See also* State v. Pilkey, 776 S.W.2d 943, 947 (Tenn. 1989) (describing the admission of a child's videotaped interview as an *ex parte* unsworn statement that violated the defendant's Sixth Amendment confrontation right), *cert. denied*, 494 U.S. 1032 (1990), *and cert. denied*, 494 U.S. 1046 (1990).

trial. *United States v. Thevis*,[331] a trial court decision on the admissibility of hearsay, demonstrates the particularly troublesome aspects of McGough's proposal.

In *Thevis*, the government had obtained statements from an informant, knowing that there had been two attempts to murder him.[332] The trial court concluded that the government was aware a third attempt on the informant's life might preclude live presentation of his testimony,[333] and that use of the statements at trial following the declarant's death was therefore "tantamount to prosecution by affidavit or deposition."[334] McGough's statutory proposal similarly calls for the taking of statements from child witnesses, knowing that, and indeed precisely because, children's memories fade. The only difference is that the government obtained the statements from the informant in *Thevis*, and under McGough's model, a "neutral" professional (albeit pursuant to statutory design) conducts the child's interview. In both cases, the prepackaged witness statement is particularly insidious because it is recorded with the expectation that it will go untested by cross-examination, in the one instance because the witness is dead, and in the other because cross-examination is circumscribed by the proposed legislation. Indeed, in at least one sense McGough's statute is more troubling than *Thevis*. In *Thevis*, the defendant presumably kills the prosecution's witness to silence him. Under McGough's statutory scheme, the state kills the witness—so to speak—by circumscribing cross-examination at trial and offering no statutory alternative for the defense to examine the child witness about the historical events in issue.[335]

Both contexts, however, stand in sharp contrast to *California v. Green*,[336] where the witness unexpectedly forgets (and perhaps feigns memory loss) at trial, and the statement, preliminary hearing testimony including cross-examination, is admitted. In *Green*, the defense enjoyed unbridled cross-examination at trial, and the witness's memory loss was unpredictable when the prior testimony was recorded in an adversarial setting. When a statement is recorded in a non adversarial setting with the intention of offering the recording as evidence at trial, the statement is not only suspect,[337] but an affront to the adversary process. When limited cross-examination is foreseeable, the recording is particularly suspect and repugnant to our adversary system of justice.

Assuming that trustworthiness could be shown,[338] it would be appropriate

331. 84 F.R.D. 57 (N.D. Ga. 1979), *reh'g denied*, 671 F.2d 1379 (5th Cir. 1982), *cert. denied*, 459 U.S. 825 (1982).

332. *Id.* at 70.

333. *Id.*

334. *Id.* at 71.

335. In United States v. Flores, 985 F.2d 770 (5th Cir. 1993), the court similarly noted the government's complicity in generating the hearsay declarant's unavailability. *Id.* at 781. There, Navarro testified before the grand jury and incriminated Flores. "The government's choice of trying Navarro jointly with Flores in essence guaranteed that Navarro ... would invoke his Fifth Amendment privilege. The government, in effect, created its own unavailable declarant." *Id.* The court held that the admission of Navarro's grand jury testimony against Flores and over his objection violated Flores' Confrontation Clause rights. *Id.* at 783.

336. California v. Green, 399 U.S. 149 (1970), *petition for review dismissed*, 404 U.S. 801 (1971).

337. See *supra* note 232 and accompanying text.

338. *But see* Graham, *supra* note 325, at 585 (arguing that children's videotaped statements are unlikely to possess sufficient indicia of reliability to satisfy confrontation clause requirements since they are made in anticipation of litigation).

to require a showing of unavailability when *ex parte* affidavits, like videotaped child witness interviews, are offered. The Court has recognized that the Confrontation Clause excludes some evidence that would otherwise be admissible under an exception to the hearsay rule.[339] Requiring unavailability when *ex parte* affidavits are proffered recognizes the danger in admitting evidence created by the government in a non adversarial context,[340] and the imperative of checking this sort of evidence with cross-examination. Accordingly, videotapes prepared under McGough's proposal should be inadmissible absent the child's uncircumscribed cross-examination or unavailability. Videotapes prepared in accordance with current legislation should also be inadmissible absent the child's production at trial or unavailability. However, when the child's unavailability at trial can be predicted at the time the videotape is made, and the prosecution makes no effort to depose the child witness in a setting affording the defense adversarial testing, the videotapes should be inadmissible. Only in this way do we preserve the adversarial process that is the hallmark of our criminal justice system.

D. Reconstructing a Viable Solution

Both current videotaping legislation and McGough's proposal fail to require a necessity or unavailability showing as a prerequisite to the admission of the videotapes, and accordingly raise constitutional objections. Current videotaping legislation also fails miserably to meet critical objectives. While McGough's proposal advances us well beyond the current videotaping statutes in its efforts to protect the child witness and preserve the child's unadulterated account, McGough's proposal is also flawed. It guts cross-examination and fails to address those situations in which the child's allegations "become known" only after investigative and "therapeutic" interviewing. I reconstruct a viable solution to the child witness problem by ensuring the defense meaningful cross-examination and preventing the manufacturing of children's testimony when a child's involvement as a victim or witness of a crime is unknown but suspected.

1. Ensuring Meaningful Cross-Examination by the Defense.

Irrespective of whether or not the prosecution proceeds by videotape or live, direct testimony, child witnesses who have had an early statement videotaped should be subject to cross-examination regarding their memory of all relevant historical events. Under my proposal, when the child witness has no recollection of the events, the otherwise qualifying videotape would ordinarily be disallowed as an untrustworthy *ex parte* affidavit, at least absent evidence of substantial guarantees of trustworthiness.

The harder question is the timing of the uncircumscribed cross-examination. Given children's long-term memory fade, requiring the defense to wait for trial to cross-examine the child witness may be unfair and undermine the integrity of the fact-finding process. In one case of note,[341] the alleged victim

339. Idaho v. Wright, 497 U.S. 805, 814 (1990) (discussing the requirements of the Confrontation Clause when hearsay falls within a residual hearsay exception, as opposed to a firmly rooted exception).

340. *See* Berger, *supra* note 2, at 560–62 (arguing that a central concern of the Confrontation Clause is to restrain governmental abuse of power in the creation of evidence).

341. *See* Romines v. State, 717 S.W.2d 745 (Tex. App. 1986), *disavowed by* Clark v. State, 728 S.W.2d 484 (Tex. App. 1987).

was three years old.[342] The fondling incident in question took place on February 17, 1984.[343] The videotape was made on March 30, 1984.[344] The trial began on December 3, 1984.[345] As the court observed: "Eight months after the videotape, we can hardly expect a three year-old child's memory of peripheral details to be improved, and therefore belated cross-examination as to the incident itself would hardly seem worthwhile."[346]

If we accept that children's memories fade, then it is incumbent upon legislatures to develop a mechanism whereby the accused can probe the child's story pretrial. It is no answer to say that criminal defendants can simply assert their speedy trial rights and set the matter for trial at the earliest opportunity. Many cases, especially cases involving child sexual abuse allegations, involve lengthy investigation and expert consultation. Criminal defendants should not have to choose between meaningful cross-examination of a child witness and a competently prepared defense. Moreover, the state, having provided for the admission of the child's videotaped interview, enjoys the benefit of the child's pretrial memory at trial. Progressive jurisdictions will therefore want to provide by statute for the pretrial deposition of the child witness at the request of the defense when the child's pretrial statement has been videotaped and state legislation provides for the admission of the videotape at trial. Of course, the prosecution would also be present at the deposition to clarify the child's cross-examination answers and the child's videotaped statements.

There is precedent for pretrial depositions in criminal cases. Many jurisdictions have statutes providing for the deposition of witnesses in criminal proceedings when it appears that the witness may be ill, dead or otherwise unavailable by the time trial proceedings begin.[347] The Oklahoma statute is typical and provides:

> When a material witness in any criminal case is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant or the State of Oklahoma may apply for an order that the witness be examined conditionally.[348]

Many jurisdictions also have statutes providing for the pre-recorded testimony of child witnesses.[349] In the wake of *Craig*, these statutes, designed to shield the child witness from the courtroom process and sometimes from the

342. *Id.* at 747.
343. *Id.* at 752.
344. *Id.*
345. *Id.*
346. *Id.* at 752–53.
347. *See, e.g.*, ALA. CODE § 12–21–260 (1986); ARIZ. REV. STAT. ANN. §§ 13–4101–4102 (1989); ARK. CODE ANN. § 16–44–201 (Michie 1987); CONN. GEN. STAT. ANN. § 54–86 (West Supp. 1993); D.C. CODE ANN. § 23–108 (1989); GA. CODE ANN. § 24–10–130 (Harrison 1990); IDAHO CODE § 19–2516 (1987); ILL. ANN. STAT. ch. 110A, para. 414 (Smith-Hurd 1985); IND. CODE ANN. § 35–37–4–3 (Burns 1985); KAN. STAT. ANN. § 22–3211 (1988); MO. ANN. STAT. § 545.380 (Vernon 1987); NEB. REV. STAT. § 29–1904 (1989); NEV. REV. STAT. ANN. § 174.175 (Michie 1992); N.H. REV. STAT. ANN. § 517.13 (Supp. 1992); N.Y. CRIM. PROC. LAW § 660.20 (McKinney 1984); N.C. GEN. STAT. § 8–74 (1986); OHIO R. CRIM. P. 15; OKLA. STAT. ANN. tit. 22, § 762 (West 1992); S.D. CODIFIED LAWS ANN. § 23A–12–1 (1988); TEX. CRIM. PROC. CODE ANN. § 39.02 (West 1979); W. VA. CODE § 62–3–1 (1992); WIS. STAT. ANN. § 967.04 (West 1985 & Supp. 1992). *See also* FED. R. CRIM. P. 15.
348. OKLA. STAT. ANN. tit. 22, § 762 (West 1992).
349. *See supra* note 160 and accompanying text.

defendant, require the prosecution to demonstrate a case-specific showing of necessity.[350]

Defendants applying for a pretrial deposition should not be held to a necessity standard. First, the defense will ordinarily not have access to the child witness for purposes of psychological testing and would therefore be hard put to make any sort of individualized showing of necessity. Second, the empirical evidence of children's long-term memory fade, as documented by McGough, is significant and certainly more substantial than the unfounded legislative finding to support child witness shielding in *Coy*,[351] and the lack of social science evidence offered to support mandatory closure of the trial courts in *Globe Newspaper Co.*[352] Third, allowing the child's pretrial deposition preserves adversarial testing of the child's memory, while disallowing the deposition can result in the permanent loss of this evidence should the child's memory fail before trial. Allowing the child's pretrial deposition only gives the defense what the state has already allowed the prosecution: the opportunity to preserve the child's pretrial memory for admission at trial.

Pragmatism and fairness recommend a scheme whereby the qualifying videotape and pretrial deposition tape are admissible at trial in lieu of the child's live testimony, at least in the absence of good cause to inquire further at trial. Since the child witness has already submitted to pretrial cross-examination at the request of the defense and to examination by the prosecution, the child would ordinarily not be required to submit again, irrespective of availability. Such a statutory provision would circumvent the presentation of the child's live testimony at trial. Indeed, under the proposed statutory scheme, the child is truly freed from the courtroom process, unless of course a party shows good cause for live testimony at trial.[353] Thus, there is no need for the child to

350. *See, e.g.*, KAN. STAT. ANN. § 22-3434(b) (Supp. 1992) ("The state must establish by clear and convincing evidence that to require the child who is the alleged victim to testify in open court will so traumatize the child as to prevent the child from reasonably communicating to the jury or render the child unavailable to testify.").

351. In Coy v. Iowa, 487 U.S. 1012, 1021 (1988), the Court dismissed the adequacy of a "legislatively imposed presumption of trauma" to justify shielding child witnesses from the accused. But even Professor Myers, a noted child rights advocate, having reviewed the social science literature, concedes that "[a]lthough testifying is difficult, there is little support for the position that a substantial number of children are seriously harmed," and "some children benefit from testifying." MYERS, *supra* note 1, § 8.8 (1992). Professor Ceci has further observed that the "presumption of increased accuracy [of children's testimony] under modified conditions [i.e., shielding] has never been empirically satisfied." *Interviewing Preschoolers, supra* note 72 (manuscript at 4).

352. In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the Court observed:

> Nor can [mandatory closure] be justified on the basis of the Commonwealth's second asserted interest—the encouragement of minor victims of sex crimes to come forward and provide accurate testimony. The Commonwealth has offered no empirical support for the claim that the rule of automatic closure contained in § 16A will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities. Not only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense.

Id. at 609–10.

353. Good cause for at least limited, live testimony at trial might be found when a new line of questioning is developed based on recently discovered, post-deposition evidence. Good cause would also arise when it is important for the fact finder to see the child in person, as when the child describes the perpetrator's coloring or height relative to the child's, and the limitations of videotaped testimony impair the fact finder's ability to evaluate that sort of evidence.

appear in court and go through even the recollection-recorded formula that McGough's procedure prescribes. In addition, unlike McGough's statute which is permissive,[354] this statute and any other applicable hearsay exceptions would be the exclusive means of getting the child's story before the fact finder, again absent a showing of good cause.

Such a statutory scheme makes good sense. It makes good sense because it provides the defendant an extraordinary opportunity for early cross-examination, affords the fact finder an opportunity to view and assess the demeanor of the child witness while being cross-examined by the defense,[355] encourages plea bargaining since both sides will have not only observed but actually tested the child's story, and in most instances will in any event detour the child witness from the courtroom process. Moreover, assuming trustworthiness, the qualifying videotape may be received into evidence—pretrial cross-examination of the child witness satisfying any necessity or unavailability requirement and providing the adversarial testing required to offset the offensive aspects of admitting an *ex parte* affidavit.

Such a statutory scheme should also pass constitutional muster. Although the statute is a variation of the former testimony exception to the hearsay rule, and although admissibility for Confrontation Clause purposes ordinarily turns on a showing of the declarant's unavailability at trial,[356] no unavailability showing should be required.[357] "[T]he prosecution may not invoke the Constitution to restrict the admission of hearsay testimony."[358] At the same time, the defendant elects the pretrial deposition procedure fully understanding the ramifications: the admissibility of the videotapes at trial; the opportunity to cross-examine the child witness and explore potential defenses while the child's memory about pertinent events is relatively fresh; and ordinarily no opportunity to cross-examine the child witness in person at trial.[359] Since the defense

354. MCGOUGH, *Statute 3, supra* note 211, at Section 4, Admissibility ("the videotape *may* be admitted into evidence") (emphasis added).

355. In United States v. Inadi, 475 U.S. 387 (1986), the Court described former testimony as a "weaker version" of live testimony. *Id.* at 394. However, while it may be true that the cold reading of a transcript (the ordinary method of communicating prior recorded testimony to the fact finder) is clearly inferior to live testimony, *Inadi* simply did not anticipate the use of videotaped testimony to transmit not only the words but the demeanor of a child witness.

356. *See* Ohio v. Roberts, 448 U.S. 56 (1980). Thus, other statutes and proposals have included an unavailability requirement. *See, e.g.*, TEX. CRIM. PROC. CODE ANN. § 38.071.1, 5–7 (West Supp. 1993) (uniquely providing for pretrial cross-examination of a child witness when the child's pretrial statement has been videotaped, but requiring a showing of unavailability for purposes of admissibility). *See also* Parker, *supra* note 122, at 669 (advocating a deposition procedure and the admissibility of the deposition testimony in lieu of the child's live testimony, but deeming the child psychologically unavailable to retestify).

357. If the admissibility of the videotapes were conditioned on the unavailability of the child witness at trial, some child witnesses could be subject to cross-examination twice, once pretrial and then again at trial. Child witness advocates would probably oppose such a proposal inasmuch as they favor insulating the child witness from the criminal process.

358. *Constitutionalization of Hearsay*, *supra* note 195, at 523.

359. In Ohio v. Roberts, 448 U.S. 56 (1980), the Court considered the admissibility at trial of an absent witness's preliminary hearing testimony in the face of a Confrontation Clause objection. There was some question whether or not defense counsel at the preliminary hearing had the same objectives as trial counsel and as to the fairness of admitting the testimony otherwise. *Id.* at 58–62, 68–71. With the modified, former testimony exception advanced here, defense counsel would be well aware that the deposition is admissible and the preferred evidence at trial.

triggers the applicability of the exception by requesting a pretrial deposition of the child witness, any Confrontation Clause objection based on the child's non-production at trial should be deemed waived.

In any event, we must reckon with McGough's observation that the criminal process was not developed with the child witness in mind, and that traditional cross-examination is therefore particularly trying on the child witness and perhaps less effective as a truth-seeking device. While the defense may be entitled to cross-examine the child witness, the defense is not entitled to a vulnerable and unprepared child witness. Instead, while the child is locked in the closet with the bear and the snake, we should give the child a sword. I have argued elsewhere for an empowerment (versus protectionist) model of child witness advocacy that does not compromise defense interests.[360] If children are ill-equipped for cross-examination, as McGough argues, we should be about the business of equipping them. A pilot project in Canada's London Family Court Clinic has had great success in preparing child witnesses for the courtroom experience. The pilot project focuses on reducing the child's stress in the courtroom not only by educating the child about courtroom procedures and the role of key courtroom figures, but also by teaching the child witness stress reduction techniques, providing support and follow-up for the child before, during, and after the child's involvement in court, and providing for consultations with police and prosecutors regarding the particular child's ability to testify.[361] Child witnesses who were prepared by the pilot project and testified were much more likely to have a finding of guilt in their case than child witnesses who testified but simply received a court tour and twenty-minute lecture on court procedures (60% versus 40% guilty verdicts).[362]

Even more sophisticated research on preparing child witnesses for testifying has been conducted. This research has focused less on reducing the stress of child witnesses and more on improving the accuracy of their testimony. In these studies, children were trained to report more completely by using non-leading, visual cues, to resist misleading questions, and to cope with incomprehensible questions by stating that they did not understand and asking the interrogator to rephrase.[363] While the first technique would enhance the child's testimony on direct examination, the latter two could enhance the child's performance on cross-examination.

These and other efforts at preparing the child witness for courtroom testimony need to be encouraged and generously supported. It may also be appropriate to couple expert testimony on the poor fit between attorney examination and children's cognitive and linguistic abilities with an instruction informing the jury that a child's limited abilities may be considered in assessing a child's answers to attorney interrogatories.

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360. *See* Montoya, *supra* note 121, at 1312 n.253.

361. LONDON FAMILY COURT CLINIC, INC., REDUCING THE SYSTEM-INDUCED TRAUMA FOR CHILD SEXUAL ABUSE VICTIMS THROUGH COURT PREPARATION, ASSESSMENT AND FOLLOW-UP 18 (1991).

362. *Id.* at 110. Child participants had been randomly assigned to the two conditions. *Id.* at 43.

363. *See* Karen J. Saywitz & Lynn Snyder, *Improving Children's Testimony with Preparation, in* CHILD VICTIMS, CHILD WITNESSES 117–146 (Gail S. Goodman & Bette L. Bottoms eds., 1993).

2. Preventing the Manufacturing of Children's Testimony.

Preventing the manufacturing of children's testimony is a more ambitious goal than assuring the defense meaningful cross-examination. It is aimed at protecting child witnesses from abusive interviewing procedures and promoting the integrity of the fact-finding process. In light of this dual goal, the party offering the child's videotaped interview into evidence should first demonstrate that at the time of taping the child's memory was free of adult suggestion. Carrying such a burden would require evidence that adequately documented the interviewing procedures used. It would appear, however, that the child witness's welfare during the pretrial process is a legitimate governmental concern and that investigative and "therapeutic" interviewing of child witnesses would improve best when there was some accountability for the interviewing procedures used or for the absence of a record of those procedures. This goal would require the mandatory videotaping of child witness interviews,[364] not only when the child's involvement "becomes known," but also when the child's involvement is only suspected and until the child's involvement is dismissed or confirmed and a qualifying videotape prepared. Such a statutory provision would have bite, because it holds the interviewers accountable for their procedures by requiring reviewable documentation of those procedures and exacting a price for non-compliance: no documentation, no testimony.

In *Nelson v. Farrey*,[365] Judge Posner asserts that the videotaping of children's therapy sessions would not be feasible.[366] He questions how a therapist can foresee that a criminal trial will ensue.[367] But the question is not whether the therapist can foresee a criminal trial, but whether the therapist or other interrogator suspects that the child has been the victim or witness of a crime, such as child sexual abuse, and is interviewing the child to explore the specifics of the child's experience or observations. In *Nelson v. Farrey*, the domestic relations court specifically referred the child's mother to Dr. McLean because the mother suspected that the child was being sexually abused by her ex-husband during visitation.[368] The child's mother certainly explained this to Dr. McLean upon retaining him to evaluate her child, and Dr. McLean certainly explored the mother's suspicion with the child. Indeed, in many instances, the therapist works hand in hand with law enforcement.[369]

We should, nevertheless, expect some resistance to videotaping from therapists and other professionals conducting evaluative interviews. Although a videotaping requirement would not be unreasonable to ask of law enforcement

364. Research psychologists Elizabeth Loftus and Graham Davies first suggested videotaping child witness interviews in a 1984 article entitled *Distortions in the Memory of Children*. *See* Loftus & Davies, *supra* note 272.

365. 874 F.2d 1222 (7th Cir. 1989), *cert. denied*, 493 U.S. 1042 (1990).

366. *Id.* at 1229.

367. *Id.*

368. *Id.* at 1224.

369. *See, e.g.*, United States v. Spotted War Bonnet, 882 F.2d 1360, 1365 (8th Cir. 1989), *vacated*, 497 U.S. 1021 (1990), *and cert. denied*, 112 S. Ct. 1187 (1992) (the evaluating psychologist was paid by the FBI); Craig v. State, 544 A.2d 784, 790 (Md. App. 1988), *rev'd*, 560 A.2d 1120 (1989), *and vacated*, 497 U.S. 836 (1990) (the prosecutor sat in on twelve of the twenty "therapy" sessions); EBERLE & EBERLE, *supra* note 47, at 19 (the prosecutor and Kee MacFarlane organized informational meetings for parents), 20 (Kee MacFarlane identified the children who would make the most viable witnesses for the prosecution), 385 (MacFarlane admitted "working closely" with the prosecution and law enforcement), 386 (therapists were compensated by the state victim-witness fund).

personnel, child protection workers, therapists and medical staff, who commonly interview children and are already subject to reporting laws where child abuse is concerned,[370] documentation of interviewing procedures means more accountability for those procedures. Many professionals will not want their interviewing procedures scrutinized by counsel and the courts.[371] For instance, Kee MacFarlane, the principal interrogator in the McMartin investigation, has expressed ambivalence on the subject of videotaping child witness interviews, noting that the defense may use the tapes to discredit the interviewer.[372] Nevertheless, we need to be concerned about the children and the process jeopardized by inappropriate interviewing procedures. Exposing these procedures will educate concerned professionals and advance the larger goal of improving the methods employed in the evaluative interviewing of children.

A related argument is that videotapes can be used to impeach the child witness. For example, Westman identifies as a downside to videotaping child witness interviews that defense attorneys can use these tapes to the disadvantage of the children.[373] But Westman misses the point. If the interviewer has been heavy-handed and unduly suggestive, then the defense should be allowed to highlight the matter for the jury. The issue is not these "bad," child-hating defense attorneys, but these poorly trained or unskilled interviewers who invite defense attorneys to exploit the interviewer's errors. In myopically focusing on the child, Westman loses sight of the bigger picture: justice. In sharp contrast, McGough observes: "[C]ommentators have opposed videotaped records because they may contain specific indications of unreliability."[374] She illustrates the point with a child witness who wavers on the question of whether or not she has a pet dog. But McGough responds, "Dog or no dog, the desire to protect a child cannot justify the suppression of information simply because it might detract from the child's credibility. This defeats the very purpose of recording the child's account."[375] Moreover, at least one forensic psychologist, Dr. Martha L. Rogers, has found that her analysis of recorded interviews generally supports the child's accusations.[376]

Judge Posner next asserts that clients would be "shocked" if therapists had a routine practice of videotaping therapy sessions with children.[377] But therapy sessions would not be routinely videotaped. Child witness interviews would be videotaped pursuant to legislation when a child's involvement as a victim or witness of a crime initially becomes known, and when the child's involvement is not known but suspected. Thus, once a child reports, and an early report is

370. *See* Mosteller, *supra* note 1, at 211–215 (tracing the expansion of mandatory reporting requirements). *See also* State v. Bellotti, 383 N.W.2d 308, 317–18 (Minn. App. 1986) (Crippen, J., specially concurring) ("Interviews ... by police, social workers, and doctors are by now a systematized part of abuse case investigations. As such, the interview practice could be uniformly regulated. It may be feasible, for example, to require that interviews be filmed.").

371. Yuille et al., *supra* note 1, at 100–01 (advocating the recording of child witness interviews in the face of professional resistance).

372. Kee MacFarlane with Sandy Krebs, *Videotaping of Interviews and Court Testimony, in* SEXUAL ABUSE OF YOUNG CHILDREN: EVALUATION AND TREATMENT 190 (Kee MacFarlane & Jill Waterman eds., 1986).

373. WESTMAN, *supra* note 152, at 102.

374. FRAGILE VOICES, *supra* note 152 (manuscript ch. 10, at 49).

375. *Id.*

376. *See* Rogers, *supra* note 145, at 14.

377. Nelson v. Farrey, 874 F.2d at 1229.

videotaped, the child would not be subject to further videotaping. The videotape of that initial interview would be admissible at trial. But when the child's involvement is not "known" and only suspected, then all investigative and therapeutic interviewing leading up to the production of a qualifying videotape would be subject to taping, for this is a critical period in the discovery and development of children's accusations.

A related issue is the child's confidentiality interest in these tapes, but any breach appears necessary and can be minimized. Otherwise confidential communications have not enjoyed protection from disclosure when those communications concern child abuse. For instance, child abuse reporting laws have displaced various privileges, like the husband-wife and physician-patient privileges.[378] Even mental health professionals have been required to reveal information disclosed by perpetrators during voluntary therapy,[379] communications that would otherwise enjoy protection under a psychotherapist-patient privilege. The reporting laws were designed to protect children from further abuse, and it makes sense that otherwise privileged communications may be revealed when child abuse is disclosed. In this way, the authorities can take appropriate steps to protect the child and punish the perpetrator. In much the same way that child abuse reporting laws displace various privileges in order to protect abused children, mandatory videotaping of certain child witness interviews and limited disclosure of the tapes for evaluative purposes has the prophylactic effect of protecting children from abusive interviewing. In addition, empirical research suggests that the utility of confidentiality and privilege laws is questionable,[380] and we can imagine that this would be particularly true when children are the beneficiaries of such laws, since they are probably less knowledgeable than adults about their rights.

Safeguards should nevertheless be employed to limit disclosure of the tapes. For instance, the tapes should be discoverable only when a child's disclosure leads to a criminal prosecution and even then, only when the prosecution is dependent upon the child's in-court testimony or out-of-court statements. Tapes should be subject to a protective order limiting who has access to the tapes and for what purposes. For instance, the videotapes may be limited to viewing by counsel and a consulting expert, but not the press.[381] If portions of the videotapes are to be tendered at trial and are deemed relevant by the trial court during motions *in limine*, legislation could also condition the admissibility of the child's testimony and statements upon waiver of the applicable privilege or confidentiality interest in the videotapes.[382] The legislature could also wisely conclude that any interest the child has in protecting the disclosure of abusive, coercive or suggestive pretrial interrogation is outweighed by the interest in reliable fact-finding and public awareness.

Judge Posner also asserts that it would be impractical to videotape and impossible to edit all pre-disclosure evaluation and treatment sessions with a child witness.[383] In *Nelson v. Farrey*, for instance, the child attended 59

378. *See* Mosteller, *supra* note 1, at 212.
379. *Id.* at 263.
380. *Id.* at 258 n.166 (discussing the utilitarian justification for privileges).
381. *See* MYERS, *supra* note 1, at 45 (discussing discovery of privileged and confidential records).
382. *See id.* at 41–42 (finding merit in such an approach).
383. Nelson v. Farrey, 874 F.2d at 1229.

evaluation and treatment sessions with Dr. McLean between January and September 1984.[384] But if we are serious about monitoring child witness interviewing to protect the child from abusive procedures and protect the accused from "manufactured" testimony, then taping is necessary. And again, the issue of potentially voluminous tapes arises only when child abuse is suspected but not yet confirmed, precisely the time when taping would serve the dual purposes described above. Moreover, the legislature having deemed the videotapes subject to limited disclosure, the lawyers would review and edit the tapes, not the trial court. Lawyers in the criminal arena have become accustomed to this role in specialized criminal litigation, like drug trafficking[385] and organized crime[386] cases, involving wiretaps. Interestingly, in these cases, expert witnesses often testify and decode recorded conversations for the fact finder in much the same way that an expert might deconstruct a child witness interview to determine whether or not the interviewing techniques used were unduly suggestive.[387]

In the end, we must reckon with the fact that a child's videotaped report, even an early report, paints an incomplete picture. Allowing pretrial cross-examination to preserve the child's full testimony while the events are relatively fresh in the child's memory, as an alternative to allowing uncircumscribed cross-examination at trial, presents a unique opportunity to put that picture in perspective. Requiring the videotaping of child witness interviews when the child's involvement as a victim or witness of a crime is suspected, and not only when it first becomes "known," provides yet more perspective and protects the child witness and the integrity of the fact-finding process from the vagaries of pretrial interrogation. Indeed, irrespective of legislation allowing for the use of the child's early, videotaped disclosure as substantive evidence at trial, legislation requiring child witness interviews to be videotaped when a child's involvement as a victim or witness of a crime is suspected, stands on its own as a worthy child and process protective procedure.

Legislators will have to identify the age at which any regulation of pretrial interrogation should apply. Of course, that age will depend on the objectives of the legislation. For instance, Professor Ceci has observed that

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384. *Id.* at 1225.

385. *See, e.g.*, United States v. Lasanta, 978 F.2d 1300, 1306 (2d Cir. 1992) (noting that the government's case consisted of numerous wiretapped conversations); United States v. Nersesian, 824 F.2d 1294, 1305 (2d Cir. 1987) (noting that the government introduced into evidence numerous transcriptions of conversations intercepted via wiretaps), *cert. denied*, 484 U.S. 958 (1987); United States v. Garcia, 785 F.2d 214, 226 (8th Cir. 1986) (noting that the jury heard 130 plus wiretap tapes), *cert. denied*, 475 U.S. 1143 (1986).

386. *See, e.g.*, United States v. Zannino, 895 F.2d 1, 3 (1st Cir. 1990) (noting that judicially sanctioned electronic surveillance of certain apartments resulted in the recording of numerous conversations), *cert. denied*, 494 U.S. 1082 (1990); United States v, Scarfo, 711 F. Supp. 1315, 1344 (E.D. Pa. 1989) (involving voluminous tapes of intercepted phone conversations associated with gambling operations), *aff'd by* U.S. v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), *and cert. denied*, 111 S. Ct. 2009 (1991).

387. *See, e.g.*, *Zannino*, 895 F.2d at 10 (upholding as "sufficiently record-rooted" the government's use at trial of an expert who, based on tape recorded conversations and other evidence, concluded that certain persons were involved in a particular gambling operation); *Nersesian*, 824 F.2d at 1307–09 (discussing the government's use of an expert to explain narcotics jargon and codes in various intercepted conversations); *Scarfo*, 711 F. Supp. at 1344 (ruling that it was unnecessary for the government to offer into evidence all the tapes upon which the expert based his opinion, since the defense had the opportunity to offer into evidence any of the other tapes and to cross-examine the expert about his opinion).

preschool-aged children are disproportionately more vulnerable to suggestion than either school-aged children or adults.[388] Not surprisingly, the particularly disturbing cases that introduced this Article involved preschool-aged children. A legislator primarily concerned with protecting the integrity of the fact-finding process may want to draw the line here. Yet the *Benny Gene Powell* litigation[389] suggests a higher age based on the social, if not cognitive and linguistic vulnerability of even young teenagers. A legislator primarily concerned with protecting children from abusive interviewing procedures will therefore want to draw the line higher.

III. THE INTERRELATIONSHIP OF CHILDREN'S HEARSAY AND PRETRIAL INTERROGATION

Apart from videotaping child witness interviews, hearsay reform promises another solution to the child witness problem. Indeed, it makes no sense to videotape child witness interviews intending to insulate the child witness, the child's account and ultimately the child's testimony from the deleterious effects of heavy-handed interviewing, if adults are free to side-step the measure by reporting children's hearsay at trial. If we want to protect the child witness and the fact-finding process from intentionally and unwittingly abusive interviewing, we must assume more fundamental hearsay reform too.

Many states have a special children's hearsay exception,[390] but none of these statutes on its face appears to be preemptive. Instead, the special exception

388. *See Historical Review and Synthesis, supra* note 71, at 431 (synthesizing the research to date).

389. *See supra* notes 135–143 and accompanying text.

390. *See, e.g.*, ALA. CODE §§ 15–25–31, 15–25–32 (Supp. 1992) (limited to sexual abuse cases, but not apparently limited to the child declarant as victim); ALASKA STAT. § 12.40.110 (1990) (limited to sexual abuse cases); COLO. REV. STAT. ANN. § 13–25–129 (West 1989) (applicable in sexual abuse and other child abuse cases, and not limited to the child declarant as victim); FLA. STAT. ANN. §90.802(23) (West Supp. 1993) (applicable in sexual abuse, child abuse or neglect cases, and not limited to the child declarant as victim); GA. CODE ANN. § 24–3–16 (Harrison Supp. 1992) (applicable in sexual abuse and physical abuse cases); IDAHO CODE § 19–3024 (1987) (applicable in sexual abuse, physical abuse and other criminal conduct cases); ILL. ANN. STAT. ch. 38, para. 115–10 (Smith-Hurd 1990) (limited to sexual abuse cases); IND. CODE ANN. § 35–37–4–6 (Burns Supp. 1992) (applicable in sexual abuse, battery upon a child, kidnapping and neglect cases); KAN. STAT. ANN. § 60–460(dd) (Supp. 1988) (broadly applicable to criminal, juvenile delinquency and neglect cases); ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1992) (limited to sexual abuse cases); MD. CODE ANN., CTS. & JUD. PROC. § 9–103.1 (1989 & Supp. 1992) (applicable in sexual abuse, child abuse and neglect cases); MASS. GEN. LAWS ANN. ch. 233, §§ 81–83 (West Supp. 1990) (limited to sexual abuse cases); MINN. STAT. ANN. § 595.02 (West 1988) (applicable in sexual abuse and physical abuse cases); MISS. CODE ANN. § 13–1–403 (Supp. 1992) (applicable in sexual abuse and child abuse cases, and not limited to the child declarant as victim); MO. ANN. STAT. § 491.075 (Vernon Supp. 1993) (broadly applicable in a variety of criminal cases, including sexual abuse, and neglect cases, and not limited to the child declarant as victim); NEV. REV. STAT. ANN. § 51.385 (Michie 1986) (limited to sexual abuse); N.J. R. EVID. 63(33) (limited to sexual abuse); OKLA. STAT. ANN. tit. 12, § 2803.1 (West Supp. 1991) (applicable in sexual abuse and physical abuse cases); OR. REV. STAT. § 40.460(18a)(b) (Supp. 1992) (limited to sexual abuse cases); PA. STAT. ANN. tit. 42, § 5985.1 (Supp. 1993) (limited to sexual abuse cases); S.D. CODIFIED LAWS ANN. § 19–16–38 (1987 & Supp. 1993) (applicable in sexual abuse, physical abuse and neglect cases); TEX. CRIM. PROC. CODE ANN. § 38.072 (West Supp. 1993) (applicable in sexual abuse and physical abuse cases); UTAH CODE ANN. § 76–5–411 (1990) (limited to sexual abuse cases); VT. R. EVID. 804a (limited to sexual abuse cases); WASH. REV. CODE ANN. § 9A.44.120 (West 1988 & Supp. 1993) (limited to sexual abuse cases).

is available in addition to the array of more traditional hearsay exceptions. Many of the statutes, however, are limited to statements by children who are alleged to be the victim of a sex offense. This limit is particularly curious since the child witness reliability risks of memory fade and suggestibility do not appear to be limited to that context. The Washington statute is touted as the prototype and in relevant part provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another or describing any attempted act of sexual contact with or on the child by another, not otherwise admissible by statute or court rule, is admissible ... if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.[391]

In contrast, McGough proposes a special children's hearsay exception which appropriately focuses the trial court's attention, not upon the alleged offense or the child's status as a victim, but upon the reliability risks inherent in children's hearsay. Given children's suggestibility, she particularly focuses the court upon the potential biases of the adult to whom the child makes the alleged statements.[392] However, although McGough concedes that the traditional

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391. WASH. REV. CODE ANN. § 9A.44.120 (West 1988 & Supp. 1993).

392. FRAGILE VOICES, *supra* note 152 (manuscript ch. 8, at 57). The relevant portion of McGough's special children's hearsay exception provides:

> Section 3. Reliability of the hearsay. The hearsay is shown to possess particularized guarantees of trustworthiness according to these criteria:
>
> (1) the age and the maturity of the child demonstrate that he has the capacity accurately to perceive the events or identify the person in question;
>
> (2) the duration, nature and other relevant circumstances of the child's reported experience demonstrate that he had an adequate opportunity to form an accurate impression of the events or identity in question;
>
> (3) other evidence confirms that the child had the opportunity to experience that which he reports;
>
> (4) the interval between the experience and its report, the apparent stimulus for the child's report, including whether the report was initiated by the child or was instead prompted by questioning, and other relevant circumstances surrounding the giving of the hearsay demonstrate that the report was the voluntary and independent act of the child;
>
> (5) the relationship between the child and the person to whom he reported discloses no apparent motive by the listener to fabricate the child's report, to induce its making, or to distort its content;
>
> (6) the relationship between the child and any person adversely affected by the report discloses no apparent motive for the child to fabricate the report or to distort any actual experience;
>
> (7) the content of the report, including its language and expression are appropriate to the child's age, maturity and experience, and demonstrate that the report was the product of a child's perceptions and not that of the listener; and
>
> (8) there are no material variations in the child's reported account which

hearsay exceptions were designed for adults and not children,[393] she argues that there is no reason to treat children's out-of-court statements differently,[394] except to add a special children's hearsay exception. Accordingly, like the Washington statute, McGough's special exception is not preemptive, but simply appended to the array of more traditional hearsay exceptions.[395]

The fact that the hearsay declarant is a child witness should, nevertheless, be relevant to an admissibility inquiry even when the child's statement falls within an otherwise traditional hearsay exception. A comparison of the facts in *Idaho v. Wright*[396] and *White v. Illinois*[397] demonstrates why.

In *Wright*, the United States Supreme Court implicitly recognized the suggestibility of child witnesses and the consequent frailties of child witness interviewing. In *Wright*, the Court examined the admissibility of a child's hearsay statements to a pediatrician to determine their admissibility under the Confrontation Clause. The child declarant was not available to testify.[398] Since the state offered the child's out-of-court statements under Idaho's residual hearsay exception and not under a firmly rooted hearsay exception, the Court reviewed the statements to determine if they possessed particularized guarantees of trustworthiness.[399] The Court concluded that the child's statements to her pediatrician did not pass muster under the Confrontation Clause and based that conclusion on the suggestive manner in which Dr. Jambura conducted the interview.[400]

The Court's examination of the child witness interview in *Wright* is instructive. Dr. Jambura's interview apparently began with a few minutes of chitchat and culminated in four questions: "Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?"[401] In reversing the conviction, the Supreme Court of Idaho

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have subsequently occurred which cast doubt upon the accuracy of the original hearsay declaration.

LUCY S. MCGOUGH, *Appendix of Proposed Statutes: Statute 1, Special Children's Hearsay Exception, in* FRAGILE VOICES: THE CHILD WITNESS IN THE AMERICAN LEGAL SYSTEM (forthcoming Spring 1994) [hereinafter MCGOUGH, *Statute 1*].

393. FRAGILE VOICES, *supra* note 152 (manuscript ch. 8, at 31–32).

394. *Id.* at 37.

McGough argues: "lacking empirical data that children's out-of-court statements are inherently less reliable than adults, we may safely continue the traditions of over three hundred years of the hearsay rule development." *Id.* But her synthesis of the social science literature supports a finding that children are particularly suggestible under certain circumstances, and McGough concedes that the most popular hearsay exceptions in child abuse litigation do not take this reliability risk into consideration. *Id.* at 38.

Her conservative approach to hearsay reform is all the more curious in light of her readiness to challenge child witness competency laws. She rejects what she describes as the oath understanding test, the full inquiry rule, and the no inquiry rule, because they do not focus on the reliability risks inherent in children's testimony. *Id.* (manuscript ch. 7, at 13, 20, 26–28). In opposition to the trend calling for the elimination of child witness voir dire, McGough advocates a limited voir dire focused on the reliability risks of memory-fade, fantasization and suggestibility. *Id.* at 29–30.

395. MCGOUGH, *Statute 1, supra* note 392,at Section 1.

396. 497 U.S. 805 (1990).

397. 112 S. Ct. 736 (1992).

398. 497 U.S. at 816.

399. *Id.* at 818.

400. *Id.* at 826–27.

401. *Id.* at 810–11. This rendition of the interview is drawn from the doctor's testimony at trial. I say "apparently" because the doctor did not videotape the interview, his interview notes

characterized the doctor's questions as "blatantly leading,"[402] and the United States Supreme Court concurred.[403] In doing so, the Court identified several factors that speak to the reliability of out-of-court statements by a child witness in a sexual abuse case: spontaneity and consistent repetition; the child's mental state; the child's terminology; and lack of motive to fabricate.[404] Moreover, although Dr. Jambura characterized one of the child's incriminating statements as "volunteered" because it followed a change in her affect and some silence, the Court was unpersuaded and observed, "'[i]f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness.'"[405] Thus, the Court acknowledged the precarious nature of child witness interviewing and began to chart a course to guide lower courts in their reliability determinations.

Just when it seemed that the Court was coming to terms with the child witness context and all its complexities, the significance of *Wright* was undercut by the Court's subsequent decision in *White*. In *White*, the Court ignored the child witness context, and engaged in a functional analysis of the Confrontation Clause.[406] It identified the basic purpose of confrontation as the "promotion of the 'integrity of the fact-finding process.'"[407] In light of this purpose, the Court concluded that where statements fall within a firmly rooted hearsay exception, like spontaneous declarations and statements made for purposes of medical diagnosis or treatment, the statements carry sufficient guarantees of reliability and the Confrontation Clause is satisfied—apparently without any particularized inquiry into the statements' trustworthiness.[408] The Court reasoned that, when a statement is made "in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation," or when a statement is made "in the course of procuring medical services, [and] the declarant knows that a false statement may cause misdiagnosis or mistreatment," the statements carry "special guarantees of credibility."[409]

The problem is that the categorical exceptions are often stretched beyond recognition when children are the hearsay declarants.[410] In *White*, the child's statements to an emergency room nurse and the physician on duty were admitted over defense objection. The defense objected that the statements were hearsay, but the prosecution argued that the statements were admissible as both spontaneous declarations and as statements made for medical purposes.

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were not detailed, and he admitted on cross-examination that he had discarded a picture that he had drawn during his questioning of the child. *Id.*

402. *Id.* at 813.

403. *Id.* at 826.

404. *Id.* at 821–22.

405. *Id.* at 826–27 (quoting State v. Robinson, 735 P.2d 801, 811, 153 Ariz. 191, 201 (1987)).

406. For a discussion of the advantages and disadvantages of a functional analysis as compared to a historical or conceptual analysis, see Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 103–106 (1972).

407. *White*, 112 S. Ct. at 743.

408. Bulkley, *supra* note 283, at 692.

409. *White*, 112 S. Ct. at 742–43.

410. *See* State v. Myatt, 697 P.2d 836, 842 (Kan. 1985) ("Courts have thus tended to stretch existing hearsay exceptions to accommodate a child victim's out-of-court statements because they are deemed uniquely necessary and trustworthy."), *habeas corpus dismissed by* Myatt v. Hannigan, 910 F.2d 680 (10th Cir. 1990).

Although the objection was clearly overruled, it is unclear whether the trial judge concluded that the statements fell within only one or both of the hearsay exceptions. But the merits of both exceptions are quite weak. By the time the child spoke to the nurse at 8:00 a.m.[411] and later the doctor at 8:20 a.m.,[412] she had already been interrogated by her baby-sitter at 4:00 a.m.,[413] her mother at 4:30 a.m.[414] and the police at 4:47 a.m.[415] Thus, her statements to the nurse and the doctor can hardly be described as spontaneous. The Court also failed to reckon with the fact that the patient in *White* is a four-year-old girl; and it can hardly be said that she "procured" the medical services in the sense that she took the initiative to obtain a diagnosis or treatment, let alone that she could appreciate that a false statement might lead to misdiagnosis or mistreatment and the consequences of either.[416] This sort of expansive application of the traditional hearsay exceptions has appropriately engendered scholarly criticism.[417]

Doctrinal stretching aside, even hearsay statements that fall squarely within the terms of a firmly rooted hearsay exception may lack trustworthiness when the hearsay declarant is a child witness. When it comes to the highly charged subject of child sexual abuse, the doctors conducting these child-patient interviews are no less prone to bias than any other member of our society.[418] As Dr. Gardner, Clinical Professor of Child Psychiatry at Columbia University, has observed, it was a physician who first "diagnosed" the children in the Salem witchcraft trials as being possessed by the devil, and doctors using questionable criteria to diagnose child abuse are no less complicitous in the

411 Brief for Petitioner at 8, *White* (No. 90-6113).
412. *See id.* at 9.
413. *Id.* at 3–4.
414. *See id.* at 5.
415. *Id.* at 6.
416. *See* Ring v. Erickson, 983 F.2d 818, 820 (8th Cir. 1992) ("[The] underlying basis of reliability is not present in a case such as this one, where not only did the [three-year-old] patient not seek the doctor's help, but there is no evidence that she even knew she was talking to a doctor."), *habeas corpus granted by* 983 F.2d 818 (1992); Morgan v. Foretich, 846 F.2d 941, 952 (4th Cir. 1988) (Powell, J., dissenting) ("[A]t the time Hilary was questioned and examined by Dr. Harrison, she was only four years of age. There is no evidence in the record that her frame of mind was comparable to a patient seeking treatment."); State v. Robinson, 735 P.2d 801, 805, 809–10 (Ariz. 1987) (When Dr. Kroft was preparing to swab Nicole's mouth to obtain a culture, Nicole said, "Mike put his weenee in there." The court concluded that the statement was not admissible under the medical examination exception because young children may not always grasp the relation between their statements and receiving effective medical treatment, and the child's statement was spontaneous rather than elicited by the doctor for purposes of effective treatment.). *See generally* Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257 (1989) (untangling the patient's selfish interest and the expert's reliance rationales of the medical examination exception). Professor Mosteller has argued that courts should require "a concrete indication that the declarant subjectively appreciates that the statement has potential treatment consequences," when the child patient's interest is relevant in determining the admissibility of the child's statements. *Id.* at 284–85.
417. *See, e.g.*, Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 490–501 (1992) (examining the expanded application of the excited utterance and medical statement exceptions).
418. *See* MYERS, *supra* note 1, § 7.35 (conceding, however begrudgingly, that "medical or mental health workers may lose their professional bearings and become 'cops in white coats.'"). *But see* FRAGILE VOICES, *supra* note 152 (manuscript ch. 8, at 48) (writing that "the medical treatment exception uses a professional as the testifying witness, the doctor or nurse who has examined the child. The objectivity of the physician lends great credibility to his repetition of any statement made by the child.").

present day hysteria.[419] Indeed, recently, in Cleveland, England, 197 children were wrenched from their families when a doctor, influenced by a child abuse seminar, began applying the controversial technique of reflex anal dilatation (RAD) as a means of diagnosing sexual abuse.[420] The RAD test was subsequently discredited for giving false positives,[421] and the physician was barred from dealing with cases of child abuse.[422] Closer to home, the San Diego Grand Jury recently cited doctors at the local Center for Child Protection for failing to render objective medical opinions in child abuse cases.[423] And in *Wright*, the Supreme Court of Idaho specifically rejected the reliability of the child's out-of-court statement in part because Dr. Jambura had a "preconceived idea of what the child should be disclosing" and asked "blatantly leading questions."[424] Simply put, he was biased.

If the primary interest is the efficient administration of justice, then it may make sense to end a trustworthiness inquiry with a determination that an out-of-court statement falls within a firmly rooted hearsay exception. But if the primary interest is the integrity of the fact-finding process, as *White* professes, then the *Wright/White* dyad is the perfect vehicle for illustrating the shortcomings of the pigeon-holing approach when the declarant is a child witness. In *Wright*, as in *White*, the child is brought to the hospital in the wake of a child abuse investigation, and the child makes incriminating statements to the examining physician.[425] The only difference of doctrinal significance between *Wright* and *White* is that *Wright* proceeded on the theory that the child's statements to the doctor fell within Idaho's residual hearsay exception,[426] and such exceptions are not firmly rooted,[427] while *White* proceeded on the theory that the child's statements to the doctor fell within the medical examination exception,[428] which is firmly rooted.[429] Apparently, had the child's incriminating, out-of-court statements in *Wright* been classified as falling within the medical examination exception, the very same statements that were deemed inadmissible under the Confrontation Clause following a particularized inquiry into their trustworthiness, would have been sanctified on the basis of a label and without any such inquiry. Surely the integrity of the fact-finding process should turn on more than a label.[430]

Although the *Wright* Court perfunctorily remarked that the child's out-

419. GARDNER, *supra* note 2, at 64.
420. Amiel, *supra* note 20, at 5.
421. Peter Pallot, *Police Surgeon Raises Doubts on Cleveland Claim*, THE DAILY TELEGRAPH, Feb. 25, 1989, at 6.
422. Jack O'Sullivan, *Child Abuse Row Doctor Is To Resign*, THE INDEPENDENT, Sept. 28, 1990, at 3.
423. 1991–92 San Diego County Grand Jury, Families in Crisis 37–38 (Feb. 6, 1992) ("In *Alicia W., Esmerelda B.*, and other cases, patently erroneous testimony by members of the CCP medical staff played a significant and most disturbing role in the outcome.").
424. *Wright*, 497 U.S. at 813.
425. *Id.* at 809; *White*, 112 S. Ct. at 739.
426. *Wright*, 497 U.S. at 811.
427. *Id.* at 817.
428. *White*, 112 S. Ct. at 740.
429. *Id.* at 742 n.8.
430. Greg B. Schwab, Comment, Idaho v. Wright: *Is It a Step in the Wrong Direction in Determining the Reliability of Hearsay Statements for the Confrontation Clause?*, 53 OHIO ST. L.J. 663, 674–78 (1992) (challenging the automatic admission into evidence of "firmly rooted" hearsay exceptions as running contrary to the purported Confrontation Clause purpose of augmenting the accuracy of trials).

of-court statements to Dr. Jambura were not made under circumstances of reliability comparable to those required for the admission of statements made for purposes of medical diagnosis or treatment,[431] the Court apparently overlooked the fact that had the out-of-court statements been classified under the medical examination exception, the trial court would not be required by the Confrontation Clause to explore the circumstances of the statements. A comparison of the *Wright* and *White* opinions underscores the point. While *Wright* labored over the particulars of Dr. Jambura's exchange with the child-patient,[432] *White* is devoid of any such discussion.[433] Indeed, it is difficult to see why the child's statements to Dr. Jambura would not qualify for classification under the typical, medical examination exception to the hearsay rule. If the statute at issue in *White* is typical,[434] and the Court does describe it as a firmly rooted hearsay exception, nothing in the language of the statutory exception would appear to exclude even a suggestive exchange between a doctor and a child-patient. But the child witness context should not be ignored.

Children's out-of-court statements that fall within firmly rooted hearsay exceptions may not be trustworthy as an evidentiary matter, if not also as a matter of Confrontation Clause jurisprudence. While the Court's constitutionalization of hearsay (its equation of hearsay statements falling under a firmly rooted hearsay exception with hearsay statements that satisfy the trustworthiness requirements of the Confrontation Clause) can be criticized,[435] we also need to be critical of hearsay law in and of itself. What does it mean for a child, caught in the throws of a custody dispute or child care scandal, to make an incriminating statement? The context would appear to be highly probative of the statement's trustworthiness, even when the statement otherwise falls within the medical examination, state of mind, spontaneous declaration or statement against interest exceptions to the hearsay rule. For instance, clinicians have observed an increased incidence of false allegations of abuse in the context of divorce or custody proceedings,[436] and social scientists have documented the

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431. *Wright*, 497 U.S. at 826.

432. *Id.* at 810.

433. *White*, 112 S. Ct. at 739 (indicating only that, "in response to questioning," the child-patient gave a certain account of events).

434. *See id.* at 740 n.2 ("In a prosecution for violation of [certain crimes], statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.").

435. *See, e.g.*, Berger, *supra* note 2, (arguing that Confrontation Clause jurisprudence should be concerned with process and in particular government generated evidence); Jonakait, *supra* note 238, at 557 (arguing that confrontation is not about the reliability of the proceedings but about guaranteeing an adversarial process); Scallen, *supra* note 285, at 623 (accepting the evidentiary dimension of the Confrontation Clause but arguing that the Clause is multidimensional).

436. *See* Elissa P. Benedek & Diane H. Schetky, *Allegations of Sexual Abuse in Child Custody and Visitation Disputes, in* EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW 145 (1985) (failing to document charges of sexual abuse in 10 of 18 children evaluated during disputes over custody and visitation, an incidence of 55%); Spencer Eth, *The Child Victim as Witness in Sexual Abuse Proceedings*, 51 PSYCHIATRY 221 (1988) (attributing the rise in false reports during divorce and child custody disputes to "the judicial trend of awarding joint custody, a decree that forces angry, spiteful ex-spouses to continue to share their children"); Arthur H. Green, *True and False Allegations of Sexual Abuse in Child Custody Disputes*, 25 J. AMER. ACAD. CHILD PSYCHIATRY 449 (1986) (documenting 4 false allegations in 11 children reported to be sexually abused by the non custodial parent, an incidence of 36%).

desire of children to please authority figures during interrogation.[437] We therefore should be suspicious of statements that a four-year-old child makes to a psychologist, who spends over one hundred hours examining the child after being retained by a parent to testify in a highly contested custody proceeding. Instead, we embrace the statements as falling within the medical examination exception of the hearsay rule.[438]

It is pure legal fiction, a lie of the law, to say that such a statement is "so trustworthy that adversarial testing can be expected to add little to its reliability."[439] The accused pays a price for that lie, but so too does the child declarant. Unless adult interviewers, be they police officers, doctors, or parents, are held accountable for their interrogation of children, child witnesses will continue to be manipulated by overreaching adults. These adults, however well-meaning, are often more concerned with obtaining a conviction, or custody, than with the child's welfare or the integrity of the fact-finding process.

Despite the course that hearsay reform takes for adult out-of-court statements,[440] the child witness context requires special handling. Legislatures must acknowledge that children are dependent on adults for protection, sustenance, and approval and that adult interrogation and children's statements will be shaped by these and other factors. Accordingly, I propose that all children's out-of-court statements be subject to a trustworthiness inquiry under the rubric of preemptive, children's hearsay legislation.[441]

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437. Social scientists have documented the desire of children to please authority figures. This tendency is implicated when children are subjected to repetitive and leading questioning. *See Psycholegal Implications*, *supra* note 116, at 38 (Suggestibility can be explained in part by children's tendency to conform to the wishes of an adult. Children exposed to a seven-year-old questioner were significantly more likely to recognize correctly the original event than were their peers who were exposed to an adult questioner.); Carol B. Cole & Elizabeth F. Loftus, *The Memory of Children, in* CHILDREN'S EYEWITNESS MEMORY 178, 199 (1987) ("Being given certain information by an adult, and even being questioned by an adult, are powerful components of suggestibility in young children."); Goodman & Clarke-Stewart, *supra* note 80, at 103 ("Clarke-Stewart's findings indicate that children can be led by a persistent interrogator to change their descriptions of what they have seen or what has been done if the event is somewhat ambiguous to start."); Warren et al., *Inducing Resistance to Suggestibility in Children*, 15 LAW & HUM. BEHAV. 273, 283 (1991) ("Recent research indicates that children tend to interpret repeated questioning alone as feedback that their initial responses are incorrect and thus exhibit a greater propensity toward changing their answers.").

438. Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988) (The majority admitted the statements under the medical examination exception, but Powell, Associate Justice, United States Supreme Court (Retired), dissented.). *See also* FRAGILE VOICES, *supra* note 152 (manuscript ch. 8, at 23) (observing that "[a]s originally conceived, the medical treatment exception presupposed that symptoms and causative events would be related by a patient as part of his medical history to a professional at the initial interview.").

439. White v. Illinois, 112 S. Ct. 736, 743 (1992) (discussing statements that qualify for admission under a firmly rooted hearsay exception).

440. The hearsay reform debate is really quite lively. For a wonderful review of the current debate, see 76 MINN. L. REV. (1992). The articles contained therein are the product of a September 1991, hearsay reform conference at the University of Minnesota Law School.

441. An early commentator on the subject advocated the adoption of a child sexual abuse hearsay exception apart from and in addition to other codified exceptions because of the poor fit between a child's psychology and the adult psychology upon which the codified exceptions are based, and because that poor fit leads to the exclusion of otherwise reliable out-of-court statements or judicial "stretching" of the exceptions beyond recognition. Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745 (1983). This poor fit, however, can lead not only to the exclusion of otherwise reliable hearsay, but to the inclusion of otherwise unreliable hearsay. Thus, I argue for

The legislation would guide trial court determinations by enumerating factors pertinent to the trustworthiness of children's hearsay.[442] Hearsay proponents would also be able to offer hearsay not otherwise falling into one of the statutory exceptions by demonstrating that the enumerated factors point to the hearsay's trustworthiness. However, the hearsay opponent would be able to challenge the admissibility of children's hearsay otherwise admissible under one of the statutory exceptions (including the firmly rooted exceptions) by establishing that one or more of the enumerated factors indicates that the hearsay is untrustworthy. In either event, the proponent would ultimately have the burden of demonstrating that, in light of all the enumerated factors, the hearsay carries substantial guarantees of trustworthiness and special evidentiary value that cannot be recaptured by in-court testimony.[443] The trial court would then be expected to make findings on the record indicating why the statement is trustworthy.

Some would argue against vesting the trial court with so much discretion.[444] As Professor Swift has observed, "[t]he categorical structure of the [hearsay] rule is intended to control the effects of judicial bias or favoritism."[445] Professor Swift's survey of the case law indicates, however, that trial courts are already injecting a trustworthiness analysis into the otherwise categorical exceptions, and it makes sense for hearsay reform to consider the reality of what the trial court judges are doing.[446] She has observed that, while trial courts correctly refuse to consider factors related to an out-of-court statement's untrustworthiness to exclude hearsay falling within a categorical exception, the courts inappropriately engage in a trustworthiness analysis to admit out-of-court statements under the otherwise categorical exceptions.[447] Thus, the trustworthiness of out-of-court statements is already being considered by trial courts, but consideration operates in only one direction—in favor of admission.[448] She has further observed that the "expansive readings" of the traditional hearsay exceptions and the "liberal use" of catch-all exceptions indicate that "much of what a child victim says outside court about being sexually abused will be admitted."[449] This double standard is troubling, but the proposed reform should force trial courts to apply a trustworthiness analysis

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preemptive children's hearsay legislation.

442. *See supra* note 392 and accompanying text.

443. Professor Imwinkelried has recognized asymmetrical standards for the admission of defense- and prosecution-proffered hearsay. *Constitutionalization of Hearsay, supra* note 195, at 538–48.

444. For a discussion on the relative merits of rules that dictate versus standards that guide trial court decisions, see Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 B.Y.U. L. REV. 917 (1992).

445. Swift, *supra* note 417, at 473 (examining how the hearsay rule works in practice to enlighten reform efforts). *See also Constitutionalization of Hearsay, supra* note 195, at 527 (echoing Justice Marshall's complaint that "indicia of reliability are 'easy to come by.'"); Christopher Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 397 (1992) (observing that "[p]ractitioners strongly believe they need protection against broad judicial discretion.").

446. Myrna S. Raeder, *Commentary: A Response to Professor Swift*, 76 MINN. L. REV. 507, 519 (1992) (discussing hearsay reform).

447. Swift, *supra* note 417, at 491.

448. *Id.* at 491–92.

449. *Id.* at 498. Moreover, trial courts inappropriately exercising discretion do so with impunity, since appellate courts review the admission of hearsay for abuse of discretion and harmless error. *Id.* at 478–80; Raeder, *supra* note 446, at 517–18 ("[A]ppellate decisions are not offering an effective stopgap.").

evenly, both to exclude and to admit children's out-of-court statements.

For those with less faith in judicial discretion, however focused by legislation, there is an alternative to a full-blown trustworthiness inquiry. The preemptive children's hearsay legislation could simply require trial courts to condition the admissibility of children's hearsay, whether falling under one of the traditional exceptions or under a special children's hearsay exception, upon a finding that the child's out-of-court statement is not the product of adult suggestion.

Applying either of the proposed inquiries in every instance that a child's hearsay statement is offered will not add considerably to the trial court's work or the appealable error. The trial court must in any event determine the admissibility of hearsay statements and consider whether an adequate foundation is laid when a hearsay exception is asserted. The proposed inquiries merely subsume that inquiry. Thus, the trial court is not called upon to engage in an additional hearing, but merely to reframe the current hearsay exception inquiry to reflect the context of the child witness.

IV. CONCLUSION

Legislators and commentators have been quick to indict and reform the trial process when children are witnesses. The driving force has been the perceived need to protect children from testimonial stress.[450] The United States Supreme Court, however, has been motivated by truth-seeking concerns and has observed that the traditional mode of taking testimony may impair a child's ability to communicate and thereby undermine the reliability of trial proceedings.[451]

Part I demonstrated that the pretrial process also screams for legislative action. Children and the fact-finding process need protection from the relentless re-interviewing of child witnesses. Nevertheless, effective legislation has been slow-coming.

Part II demonstrated that current videotaping legislation fails miserably. Indeed, the argument can be made that current videotaping legislation actually invites interviewing abuses, because adult interrogators are motivated to rehearse the child witness.

McGough's proposal to videotape child witness interviews moves us forward. Because it requires taping "immediately after the child's involvement ... becomes known," it allows interrogators little opportunity to manipulate the child before recording the child's interview. The procedure is designed to protect child witnesses from pre-taping interviewing abuses and to preserve the child's unadulterated "voice" for trial.

McGough's proposal, however, fails to embrace some of the most troubling cases: those instances in which the child's involvement is suspected, but not "known." These are the cases in which the child's accusations arise only after investigative and therapeutic interviews. In Part II, I argue for mandatory videotaping of all investigative and therapeutic interviews of children when the child's involvement as a victim or witness of a crime is suspected but uncon-

450. *See supra* note 120 and accompanying text.
451. *See supra* notes 214–215 and accompanying text.

firmed. Videotaping would continue until the child's involvement is dismissed or the child's involvement is established and a qualifying videotape prepared. Taping should curb interviewing abuses and preserve a record of the interviews that can be professionally evaluated to ensure that we are hearing the child's voice on the qualifying videotape. The procedure thus protects both the child witness and the integrity of the fact-finding process from the vagaries of pretrial interrogation in the most troubling cases.

My recommendations for videotaping legislation differ from current legislation and McGough's proposal in another important respect: my recommendations promote the adversarial testing of the child's story. Current videotaping legislation often puts on the accused the onus of calling the child as a witness.[452] McGough's approach is to leave the onus of calling the child on the prosecution, but to circumscribe the scope of cross-examination.[453] Protecting the child from testimonial stress appears to be the motivation underlying both approaches, but McGough's proposal is in part also driven by a theory of mediated fact-gathering. According to McGough, an interview by a "neutral professional" is an adequate substitute for uncircumscribed cross-examination.

Part II demonstrated that McGough's model of mediated fact-gathering, coupled with circumscribed cross-examination, is impractical and probably unconstitutional. The goal of limiting the child's testimonial experience, however, may be worthwhile. Accordingly, in Part II, I link the admissibility of the child's videotaped interview to the child's videotaped, pretrial deposition, including uncircumscribed cross-examination, as an alternative to uncircumscribed cross-examination at trial.

Of course, videotaping legislation is only the beginning. Part III demonstrated that the meaningful regulation of children's pretrial interrogation must embrace hearsay reform too. Although we have seen the proliferation of special children's hearsay exceptions,[454] these statutes operate only to admit otherwise inadmissible children's hearsay. The normative value appears to be giving children voice. I argue that all children's out-of-court statements, including those otherwise falling under firmly rooted hearsay exceptions, should be subject to a trustworthiness inquiry that focuses on the possibility of adult contamination of the child's statement. The import of the recommended reform is to ensure that we are hearing the child's voice.

In conclusion, tackling the child witness problem is an ambitious project, and myopically focusing on trial reform is a mistake. We also need to turn our attention to reforming the pretrial process, and in particular, the pretrial interrogation of child witnesses. The reforms proposed here both advance truth-seeking and protect the child witness.

452. *See supra* note 164 and accompanying text.
453. *See supra* notes 221–223 and accompanying text.
454. *See supra* note 387 and accompanying text.