1985

Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition

Jean L. Kelly

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol34/iss4/7
LEGISLATIVE RESPONSES TO CHILD SEXUAL ABUSE CASES: THE HEARSAY EXCEPTION AND THE VIDEOTAPE DEPOSITION

An increasing number of child sexual abuse cases are reported every year in the United States.1 Increased attention has been focused on this crime recently in light of several highly publicized allegations of child sexual abuse.2 The extent of this social and legal problem is not known, however, because it is grossly underreported.3 An estimated 100,000 to 500,000 American children will be molested this year.4 Alleged assaults on children

1. The American Humane Association reported 71,961 cases of child sexual abuse in 1983, the last available statistical year. This figure reflects an 852% increase over cases reported in 1976. Twenty-five percent of the cases involved children under the age of five. Backlash Feared on Child Sex Cases, Wash. Post, Mar. 23, 1985, at A13, col. 1. Sexual abuse has been defined as “the utilization of the child for sexual gratification or an adult's permitting another adult to so use the child.” R. Geiser, Hidden Victims 7 (1979). It has also been defined as “forced, pressured, or stressful sexual behavior committed on a person under the age of 17.” A. Burgess, A. Groth, L. Holmstrom, & S. Sgoi, Sexual Assault of Children & Adolescents 8 (1978) [hereinafter cited as A. Burgess]. “Sexual activity with children is prohibited by custom in all known societies and is illegal in every state of this country . . . regardless of the degree or type of coercion by the adult, or accommodation by the victim.” Berliner & Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. of Soc. Issues 125, 126 (1984). For an in-depth, state-by-state analysis of criminal child sexual abuse statutes, see Kocen & Bulkley, Analysis of Criminal Child Sex Offense Statutes, A.B.A., Nat'l Legal Resource Center for Child Advocacy and Protection, Child Sexual Abuse & the Law 1-51 (1983).

2. “Molesters cut across economic, social, ethnic and educational lines. They may be rich or poor, well-educated or ignorant, blue-collar or white, married or single.” The Child Molester: No 'Profile,' L.A. Times, Apr. 25, 1984, at § 1, col. 1.

3. The National Center on Child Abuse and Neglect (NCCAN) has stated that accurate statistics for child sexual abuse may never be obtained because “it is perhaps the most easily concealable and hidden form of child maltreatment . . . .” A. Russell & C. Trainor, Trends in Child Abuse and Neglect: A National Perspective (a publication of the American Humane Ass'n, Denver, Colo.); see Russell, The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children, 7 Child Abuse & Neglect 133, 145 (1983) (“[o]ver one-quarter of the population of female children have experienced sexual abuse before the age of 14 and over one-third by the age of 18,” although only a “minute percentage of cases ever get reported to the police”).

4. As the number of reported cases grows, so does the number of false accusations. See generally Molestation: Dilemma for Authorities, L.A. Times, July 16, 1984, at § 1, col. 1. It is significant to note, however, that “[n]ot a single study has ever found false accusations of sexual abuse a plausible interpretation of a substantial portion of cases.” Berliner & Barbieri, supra note 1, at 127; The Rights of Suspects, N.Y. Times, Sept. 21, 1984, at 19 (a teacher at the Praca Day-Care Center in New York was arrested and charged with molestation of young
take place on playgrounds, in day-care centers, and in the family home.\textsuperscript{5}

\textsuperscript{5} Day-care centers from Manhattan Beach, California (see People v. Buckey, Docket No. A750900 (filed Mar. 22, 1984)) to New York City have been investigated for suspected child sexual abuse. Seven teachers at one California preschool have been charged with 208 counts of sexual abuse. \textit{What Price Day Care?}, NEWSWEEK, Sept. 10, 1984, at 19. In California, more than 6,000 day-care centers, preschools, and family day-care homes are licensed by the state to care for approximately 300,000 children. \textit{Abuse in the Nursery School—A License Is No Safety Guarantee}, L.A. Times, Apr. 2, 1984, § I, at 3, col. 4. It is estimated that “countless more” operate without state licenses. \textit{Id}. Sexual abuse complaints are the “leading cause of license revocation in family day-care operations . . . .” \textit{Id}. A state license in California may be revoked “for conduct by the operator of the facility which is inimical to the health, morals, welfare or safety of . . . an individual receiving services from the home . . . .” CAL. HEALTH & SAFETY CODE § 1550(c) (West Supp. 1984). In California day-care centers, licensing requirements are minimal and the centers are inspected only once every three years. L.A. Times, supra § I, at 3, col. 4. One protective measure taken has been the requirement that those employees who work with the children (“teachers, for example, but not cooks or gardeners”) are fingerprinted and that “there is a check of the criminal records relating offenses dealing with children and violence.” \textit{Id}. Before the complaints surfaced about the sexual abuse that allegedly has been taking place over the last ten years at the McMartin Preschool in Manhattan Beach, there “was never a complaint on it before,” according to Anne Bersinger, deputy director in charge of community care licensing for the state Department of Social Services. \textit{Id}. The House Select Committee on Children, Youth and Families and the Ways and Means Subcommittee on Oversight held hearings on September 17, 1984, to examine the many recent reports of sexual assaults on children in day-care centers. \textit{House Select Comm. on Children, Youth, and Families, Families and Child Care: Improving the Options, 98th Cong., 2d Sess.} 103-05 (Comm. Print 1984). Statistics show 11 million children are in day-care centers, with a growth rate of 10% annually. \textit{Child Abuse Task Force Urged}, USA Today, Sept. 18, 1984, at 7A, col. 1. Seventy percent of the children in day-care are in unlicensed centers. Reports surface regularly of suspected child sexual abuse in day-care situations. \textit{See, e.g.}, \textit{Day-Care Home Operator Is Charged in Anne Arundel Child Abuse Case}, Wash. Post, Sept. 28, 1984, at B8, col. 2 (an operator of a home day-care program, registered with the county Department of Social Services, charged with sexually abusing a five-year-old girl in her care; an aide at Early Learning, Inc. charged with the sexual assault of a child attending the facility); \textit{Guilt Haunts Molested Kids’ Parents}, USA Today, Sept. 17, 1984, at 11A, col. 2 (operators of the Country Walk Babysitting Service in Miami, Fla., were charged with 10 counts of sexual battery on children under 11 and face possible sentences of 25 years to life in prison; the day-care center had been unlicensed and one of the operators had been on probation from a 1982 child molestation conviction and the Florida State Corrections Department did not inform the Health and Rehabilitative Services agency about the operator’s previous conviction). A Bethesda, Md. man was arrested and charged with sexual offenses against six boys, ages 6 to 11, in his neighborhood. \textit{Man Charged in Sex Cases Had 2 Prior Convictions}, Wash. Post, Feb. 5, 1985, at A1, col. 1. He was employed by a private Bethesda school as a gymnastics instructor. \textit{Id}. The instructor had been convicted of child molesting in 1972 and again in 1980. The 1980 conviction resulted from the molestation of a boy he coached in a community soccer league. School authorities stated that they did not know of either conviction. \textit{Id}. In Maryland, schools and other facilities that care for children are not required to run criminal background checks, “nor is the information readily available.” \textit{Id}. In response to this arrest and other recent sexual abuse cases, the Maryland General Assembly is presently
More children are sexually abused in their own homes than anywhere else.\(^6\) The child victim may be abused by a relative, a family friend, or an authority figure.\(^7\) Strangers constitute only a "small percentage" of abusers.\(^8\) The child victim of sexual abuse is most often female,\(^9\) and the victims, both male and female, range in age from one or two months up to eighteen years.\(^10\) One commentator estimates that one-half of the child victims of sexual abuse are under the age of eleven.\(^11\)
Because the sexual assaults most often take place in the privacy of the home, as confirmed by statistics on the relationship of the perpetrator to the victim, there are few, if any, witnesses. The trust relationship between the child and her abuser enables the abuser to cloak the assault in a secretive and conspiratorial atmosphere. In many cases, the abuse consists of a continuing series of sexual activities between the abuser and his victim. This is especially so in incestuous relationships. Dr. Roland Summit, a leading authority on child molestation, has described a child sexual abuse accommodation syndrome. What the child perceives and acts upon in a sexual abuse situation, according to Dr. Summit, usually contradicts many common adult assumptions. He asserts that in many, though not all, child sexual abuse cases there is a delay between the assault and a statement by the child disclosing the assault.

Fear of reprisal by the abuser and fear that disclosure of the assault may be met with punishment, rejection, or disbelief are reasons a child will delay reporting abuse, if she reports it at all. In addition, if the child sees the assailant as an authority figure, she may interpret the sexual activity as an extension of this authority. In the significant number of intra-familial as well as extra-familial cases involving a child’s authority figure, force is not necessarily used. Thus, physical evidence of the assault is minimal or perhaps nonexistent.

12. See supra notes 7-8 and accompanying text.
13. Of all the . . . explanations provided by the adult [abuser], the only consistent and meaningful impression gained by the child is one of danger and fearful outcome based on secrecy. . . . [T]he secrecy makes it clear to the child that this is something bad and dangerous. The secrecy is both the source of fear and the promise of safety: ‘Everything will be all right if you just don’t tell.’ . . . A child with no knowledge or awareness of sex and even with no pain or embarrassment from the sexual experience itself will still be stigmatized with a sense of badness and danger from the pervasive secrecy.
15. Summit, supra note 7, at 181-91. Dr. Summit believes that a child who reports a sexual assault “may feel so anxious and guilty and fearful that he’ll immediately take it back.” Child-Molestation Testimony Reveals Inherent Problems, Wash. Post, Jan. 28, 1985, at A3, col. 2. “Retraction is just about as universal as denial.” Id.
16. Summit, supra note 7, at 186-88; see, e.g., People v. Davison, 12 Mich. App. 429, 163 N.W.2d 10 (1968) (nine-year-old girl delayed making statement for two weeks after assault because of her fear of defendant).
18. Id.
19. See supra note 7 and accompanying text.
Although corroboration of the sex offense in all cases involving minors is mandated by statute in only one state, prosecutors often feel corroboration is necessary to obtain a conviction or to avoid a judgment of acquittal for insufficient evidence. Corroboration is often lacking. In addition to the delay in the reporting of the abuse, the absence of eyewitnesses, and the dearth of physical evidence, the prosecutor also must deal with the fact that the child victim, possessing limited cognitive and verbal skills, may lack credibility. Despite a child’s inability to articulate her story as well as an


21. Id.. Nebraska requires corroboration in all sex offense cases involving minors. See State v. Aby, 205 Neb. 267, 287 N.W.2d 68 (1980) (testimony of prosecutrix alone, uncorroborated by any other evidence, not sufficient to sustain a conviction for sexual assault). The District of Columbia recently repealed its corroboration requirement for a child’s testimony in a sex offense case. Prior to the statutory change, in “17 percent of all child sexual abuse cases during one 2-year period [in the District of Columbia] which were referred to prosecutors by the police department, charges were not filed because of a lack of corroborative evidence.” A.B.A., NAT’L LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, CHILD SEXUAL ABUSE, LEGAL ISSUES AND APPROACHES 16 (1981); see New War on Child Abuse, Nat’l L.J., June 25, 1984, at 1, col. 1. Defense lawyers in the District of Columbia opposing changing the corroboration rule but a District Attorney in New York believes a new New York law that eliminates the corroboration requirement in child sexual abuse cases will have a “substantial impact on our ability to prosecute child-molestation cases.” New War on Child Abuse, supra at 27 (quoting District Attorney Holtzman). Many states still require corroboration of a child victim’s testimony in limited circumstances, such as when unclear or inconsistent testimony is given by the complainant. See, e.g., State v. Munoz, 114 Ariz. 466, 561 P.2d 1238 (1976) (corroboration required if complainant’s testimony recites facts that are physically impossible); LeBlanc v. People, 161 Colo. 274, 276, 421 P.2d 474, 476 (1967) (corroboration necessary if conflicting testimony given).

22. See The Culprit Behind Sexual Child Abuse, Chi. Trib., Sept. 23, 1984, § 1, at 14, col. 1. Twenty-four adults in Jordan, Minnesota were charged with participating in an “organized sexual child abuse ring” of 37 children. The Scott County prosecutor based her case on the children’s testimony and the first two adults on trial were acquitted of child molestation. One juror commented, “The kids alone weren’t enough . . . the supporting evidence wasn’t there . . . .” Id.; see Child Sex-abuse Trial Begins, Chi. Trib., Aug. 28, 1984, § 1, at 6 (only adult to corroborate the children’s statements in the Jordan, Minn. case was a man twice convicted of child molesting); “Sex Ring” Fallout, A.B.A. J., Feb. 1985, at 17 (only adult who corroborated the children’s stories confessed in November 1984 that “he made up the tale”); Charges Dropped, Wash. Post, Oct. 16, 1984, at A9, col. 6 (prosecutors dropped charges against remaining adults charged in the Jordan, Minn. child sexual abuse case because “dismissing the charges would be in the best interest of the children and of justice”); “Sex Ring” Fallout, A.B.A. J., Feb. 1985, at 17 (six of the Jordan, Minn. families have filed multimillion-dollar civil suits against the prosecutor, county officials, and therapists involved in the initial criminal proceedings); see also Jurors’ Reactions to Child Witnesses, 40 J. OF SOC. ISSUES 139, 141 (1984).

23. A.B.A., NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES (1982); Out of the Mouths of Babes, TIME, Jan. 31, 1983, at 58. To assist young children with limited vocabularies and biological knowledge, courts frequently allow the children on the witness stand to demonstrate the sexual activity through the use of
adult victim, however, there is little evidence indicating that a child's account of an event is less reliable.\textsuperscript{24} If the child renders several accounts of the incident, the one closest in time to the sexual activity is usually the most reliable. This is true because a child's memory fades faster than an adult's.\textsuperscript{25} As the time between the incident and the trial may be many months,\textsuperscript{26} the prosecutor may wish to present into evidence the child victim's original—and thus most accurate—account.

If the prosecutor decides not to have the child victim appear in court and testify,\textsuperscript{27} he may seek to introduce the child's account of the sexual abuse in two ways. First, he may seek to introduce, under the excited utterance exception to the hearsay rule, the out-of-court statement made by the child when first revealing the event to an adult.\textsuperscript{28} Courts have applied different standards in judging the applicability of hearsay exceptions to the statements of sexually abused children. Second, the prosecutor may use videotape to preserve the child's deposition and introduce the videotape at trial in lieu of the child's in-court testimony.\textsuperscript{29} In recognition of the difficulties inherent in

\begin{itemize}
  \item Berline & Barbieri, \textit{supra} note 1, at 127.
  \item Loftus & Davies, \textit{Distortions in the Memory of Children}, 40 J. OF SOC. ISSUES 51 (1984).
  \item Bernstein, \textit{Out of the Mouths of Babes: When Children Take the Witness Stand}, 4 CHILDREN'S LEGAL RTS. J. 11, 14 (1982).
  \item Id.
  \item Id.
  \item See \textit{infra} notes 32, 35-36 and accompanying text.
  \item At the preliminary hearings in two California child molestation cases, judicial approval was given to the introduction of the victims' testimony through closed-circuit television. In People \textit{v}. Greenup, the child victims testified, via television, from a nearby jury room. \textit{Girls Will Testify by TV in Sex Abuse Case}, L.A. Times, May 15, 1984, \S\,II, at 1, col. 5. Los Angeles Municipal Court Judge Candace D. Cooper approved the plan, which allowed a parent or "other supporting representative," a bailiff, and a television technician to be in the jury room with the children as they testified. \textit{Id}. The defendant, an operator of a private elementary school in 1980 and 1981, agreed to the television testimony and his counsel supported it because it "eliminated the highly charged emotional state that a small child will display to a jury." \textit{New War on Child Abuse}, \textit{supra} note 21, at 28. The cost of the closed-circuit camera
the prosecution of child sexual abuse cases, some state legislatures specifically have authorized the prosecutor's use of one or both of these options. Several states have enacted special child sexual abuse hearsay exceptions to ensure that an abused child's statements, if qualified, will be admitted. Ten states recently have enacted statutes allowing videotape depositions to be admitted into evidence.

This Comment will examine statutory alternatives to in-court testimony by a child victim of sexual abuse. These alternatives can be used to reduce psychological trauma to the victim and to produce more reliable testimony. In examining the statutory child victim hearsay exceptions, this Comment will outline the courts' interpretations of the present excited utterance hearsay exception and discuss its inadequacy in covering the statements of child sexual abuse victims in many cases.

This Comment will also examine the newly enacted videotape child deposition statutes in light of the defendant's sixth amendment right to cross-examine witnesses. This Comment will conclude that innovation in the adversary system is necessary to accommodate the child victim as witness but should not be used to reduce the rights of the defendant.

I. TRADITIONAL JUDICIAL APPROACHES TO CHILD SEXUAL ABUSE VICTIMS' OUT-OF-COURT STATEMENTS: THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE

A. Hearsay and the Excited Utterance Exception

Hearsay is defined in the Federal Rules of Evidence as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The Federal Rules generally prohibit introduction into evidence of out-of-court assertions to prove the facts stated in them. A child's spontaneous declaration or
narrative account of a sexual incident would be barred from introduction at trial under this rule as inadmissible hearsay. The Federal Rules, however, include several exceptions to the hearsay rule, including one that permits the admission into evidence of “excited utterances.” Under this exception, statements by child victims regarding sexual abuse could be admitted as evidence.

Two federal courts of appeals have upheld the admissibility of a child sexual abuse victim’s hearsay statements under the excited utterance exception. In United States v. Nick, the United States Court of Appeals for the Ninth Circuit affirmed a conviction for sexual assault on a child based on testimony admitted under the excited utterance exception to the hearsay rule. The testimony at issue was that of the victim’s mother, who, in court, discussed her child’s statements, including his identification of the defendant as his assailant. The assault in question occurred when the defendant, Nick, was baby-sitting a three-year-old boy in his home on an Indian reservation. When the mother arrived to pick up her child, she found him asleep with the defendant and discovered the child’s pants were unzipped. The child made no statements at this time, but when they arrived home, the mother found a white substance on the child’s clothing. The mother then began to question him. In response, the child described an act of anal intercourse with the defendant. The sexual act was confirmed a day later by a physician.

34. See Fed. R. Evid. 803, 804.
35. Federal Rule of Evidence 803(2) defines an “excited utterance” as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” The advisory committee note states: "The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." 6 J. Wigmore, Evidence § 1747, at 195 (Chadbourn rev. 1976). Spontaneity is the key factor. Under rule 803(2), the “standard of measurement is the duration of the state of excitement.” Fed. R. Evid. 803 advisory committee note.
37. 604 F.2d 1199 (9th Cir. 1979).
38. Id. at 1202.
39. Id. at 1200-01.
40. Id. at 1201.
41. Id.
42. Id.
43. Id.
44. Id. The physician testified to the child’s statements of the assault that were relevant regarding the cause of the injury, omitting the identity of the assailant. Id. at 1201-02. This testimony was admitted pursuant to Federal Rule of Evidence 803(4) as statements “made for purposes of medical diagnosis or treatment . . . .” Nick, 604 F.2d at 1202. Expert testimony identified the white substance on the child’s clothing as semen. Id. at 1201.
The defendant charged that admission of the testimony under the excited utterance exception was inappropriate because the child was not "suffering distress" when he related the incident to his mother. The court, relying on the record and the district court's conclusion, agreed that the statement was made while the child was "still suffering pain and distress from the assault."\footnote{45}

In an analogous case,\footnote{46} United States v. Iron Shell,\footnote{47} the United States Court of Appeals for the Eighth Circuit affirmed the conviction of defendant Iron Shell for assault with intent to commit rape on a female child on the Rosebud Indian Reservation in South Dakota.\footnote{48} Nine-year-old Lucy was assaulted by the defendant, who threw her into bushes and partially removed her pants.\footnote{49} The assault occurred somewhere between 6:00 and 6:30 p.m.\footnote{50} A Bureau of Indian Affairs Law Enforcement Officer was notified by a witness who saw Lucy immediately after the assault.\footnote{51} The officer interviewed Lucy between approximately 7:15 p.m. and 7:30 p.m.\footnote{52} In response to a question by the officer regarding what had happened, Lucy described the assault in a "halting manner."\footnote{53} She was not hysterical or crying, but to the investigating officer, she "appeared nervous and scared."\footnote{54}

Lucy testified at trial but could only partially confirm the events surrounding the assault.\footnote{55} The interviewing officer was allowed, under the excited utterance exception to the hearsay rule, to testify to the statements Lucy made to her.\footnote{56} The defendant objected to the admission of the officer's hearsay testimony as the interview took place between forty-five minutes and one hour and fifteen minutes after the assault, when Lucy, arguably, was no longer "'under the stress of excitement caused by the event.'"\footnote{57} The defendant also asserted that Lucy's statements were not spontaneous because they were made in response to questioning and thus were the product of "reasoned reflection fostered by conversations between herself and her companions following the assault."\footnote{58}

\footnote{45. \textit{Id.} at 1204.}  
\footnote{46. 633 F.2d 77 (8th Cir. 1980), \textit{cert. denied}, 450 U.S. 1001 (1981).}  
\footnote{47. \textit{Id.} at 80.}  
\footnote{48. \textit{Id.} at 81.}  
\footnote{49. \textit{Id.}}  
\footnote{50. \textit{Id.}}  
\footnote{51. \textit{Id.}}  
\footnote{52. \textit{Id.} at 81 n.5.}  
\footnote{53. \textit{Id.} at 81.}  
\footnote{54. \textit{Id.} at 82. For a representative sample of the prosecutor's direct examination of Lucy, see \textit{id.} at 82 n.7.}  
\footnote{55. \textit{Id.} at 85.}  
\footnote{56. \textit{Id.} (quoting from \textit{FED. R. EVID.} 803(2)).}  
\footnote{57. \textit{Id.} The court stated that it was not controlling that Lucy's statement was made in}
The court stated that resolution of this issue was a "close question." 58 The court listed several factors to be considered by a trial court in determining whether such statements should be admitted under the excited utterance exception to the hearsay rule. Relevant factors, the court stated, include "the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event and the subject matter of the statements." 59 The court's recognition of these factors, instead of reliance solely on the lapse of time between the event and the statement, was instrumental in the affirmance of the admission of Lucy's statements.

The text of rule 803(2) of the Federal Rules of Evidence merely requires the declarant to be "under the stress of excitement caused by the event." 60 In terms of minutes and seconds, the time period contemplated by the rule is difficult to determine. By applying the factors listed by the Iron Shell court to the varying circumstances of the cases before them, courts have recognized the presence of stress over a broad range of time periods following the stressful event. When the declarant is a child in a sexual abuse case, the courts are especially apt to consider factors other than time in determining whether the child's statements fit within the excited utterance exception. 61

B. State Application of the Excited Utterance Exception

Not surprisingly, given the importance of the hearsay doctrine and the heat generated in discussions of its many exceptions, state adoptions of rule 803 of the Federal Rules of Evidence depart from the federal model in several ways. 62 Twenty-five states have adopted the excited utterance exception, rule 803(2), of the Federal Rules verbatim. 63 Several other states employ common law rules of evidence providing for some type of excited

response to a question. Id. "The single question 'what happened' has been held not to destroy the excitement necessary to qualify under this exception to the hearsay rule." Id. at 86. The court cited two cases in which excited utterances were made in response to inquiries: United States v. Glenn, 473 F.2d 191, 194 (D.C. Cir. 1972) ("The decisive factor is that the circumstances reasonably justify the conclusion that the remarks were not made under the impetus of reflection. Whether this conclusion is justified depends upon the facts of each case . . . ."); McCurdy v. Greyhound Corp., 346 F.2d 224, 226 (3d Cir. 1965) (because car accident victim was noticeably in an excited state when police arrived and questioned him, "there is little danger that he had either the time to reflect or sufficient use of his reason to fabricate and manufacture an account of the accident").

58. 633 F.2d at 86.
59. Id.
60. FED. R. EVID. 803(2).
61. See supra notes 16-18, 20; infra note 93 and accompanying text.
63. Id. at 467-82.
utterance exception in many cases. A review of state cases indicates, however, that the adoption of the federal rules or the application of similar common law rules does not necessarily assure that state court judges will follow federal case law interpreting the rules.

In *State v. Ritchey*, a child sexual assault case, the Arizona Supreme Court upheld the admission into evidence of a six-year-old girl's statements under the excited utterance exception. In *Ritchey*, the defendant, a friend of the family, took the two girls in the family, ages four and six, "to a place near the airport where they could watch the airplanes." It was there, the children alleged, that the defendant molested them. Upon returning the girls to their home, the defendant left the house after some ten minutes, returned with beer approximately fifteen minutes later, and left the house again a few minutes later. The mother noted several changes in the children's demeanor after they returned, and in the manner in which they acted toward the defendant. After the defendant left, the mother asked the girls where they had been. Their responses to that question were the focus of the defendant's objections.

The court used the traditional excited utterance test to allow hearsay statements into court over the defendant's objections. The court specifically stated that the age of the children involved and the identity of the perpetrator of the crime should be taken into account. The court further noted that children of four and six years of age know "little if anything about sexual matters." The court found the perpetrator's position as a "good family friend" to be a consideration that could affect a child's reaction to a sexual

---

64. 107 Ariz. 552, 490 P.2d 558 (1971).
65. Id. at 556, 490 P.2d at 562.
66. Id. at 553, 490 P.2d at 559.
67. Id.
68. Id. at 555, 490 P.2d at 561.
69. Id. The girls were unusually quiet instead of rowdy. The mother thought the elder child may have been crying because of streaks on her face. Further, the girls did not sit near the defendant although they usually did when he visited (at least two to three times a week).
70. Id.
71. Id. The court identified the three requisites that compose this test:

1. There must be a startling event.
2. The words spoken must be spoken soon after the event so as not to give the person speaking the words time to fabricate.
3. The words spoken must relate to the startling event.

Id. (citing 6 J. WIGMORE, supra note 35, at § 1750).
72. Id. at 556, 490 P.2d at 562.
73. Id. The mother was also asked if she had ever "discussed sex" with the children and the mother replied that she had not done so. Id.
In this specific factual situation, the court acknowledged that it would apply a less strict test in determining whether a startling event had occurred.\textsuperscript{75} Thus, that the children were not hysterical or outwardly upset about the assault, in the court’s opinion, was not decisive in determining whether the children were still under the stress of the event. The fact that their demeanor had changed was sufficient to prove that stress was present.

The statements by the children were in response to a question asked forty-five minutes after the assault and thus did not fit within the excited utterance exception as traditionally applied. Nevertheless, the court admitted the statements. In doing so, the court highlighted a key difference between children and adults. Adults often react more quickly and emotionally to a sexual assault. Children may not view the assault as the startling event that adults perceive it to be.\textsuperscript{76}

Courts have considered other mitigating factors in cases involving statements not readily fitting into the excited utterance exception. In \textit{People v. Bonneau},\textsuperscript{77} the Michigan Supreme Court upheld the conviction of a defendant for taking indecent liberties with a seven-year-old girl. On her way to visit her grandmother, the victim was offered a ride by the defendant, who had never before met the girl. It was in his car that the alleged assault occurred.\textsuperscript{78} When the girl arrived at her grandparents’ home, she was nervous, excited, and frightened. Her face was swollen and her hair messed.\textsuperscript{79} Despite repeated questioning from both her mother and grandparents, she disclosed nothing about the offense for three days. On the third day, after more questions from her mother, she told of the defendant’s assault.

Although the girl testified fully about the assault at trial, the child’s mother was allowed to testify to the details of the girl’s story as it was related to her three days after the assault.\textsuperscript{80} The appeals court affirmed the lower court’s ruling admitting the girl’s statements to her mother under the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id. \textit{But cf.} State v. Rivera, 139 Ariz. 409, 678 P.2d 1373 (1984). In Rivera, the Arizona Supreme Court upheld the less strict Ritchey test but further refined it. 139 Ariz. at 412, 678 P.2d at 1376. The court did not allow into evidence under an excited utterance exception a statement by a three-year-old girl five to ten hours after the alleged molestation where the girl showed no change in her behavior or demeanor. \textit{Id.} at 413, 678 P.2d at 1377. In dicta, the court acknowledged that, given the nature of child sexual abuse, “the excited utterance rule is therefore broadened . . . .” \textit{Id.} at 412, 678 P.2d at 1376.
\item \textsuperscript{76} 107 Ariz. at 556, 490 P.2d at 562.
\item \textsuperscript{77} 323 Mich. 237, 35 N.W.2d 161 (1948).
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id.
\end{itemize}
\end{footnotesize}
res gestae exception. The court discounted the delay factor in upholding the statements' admissibility. The girl's feeling of fear, the court reasoned, explained the delay between the assault and the account of the assault. The girl testified that the defendant had threatened her by telling her that if she told anybody "he would get after her again." According to the court, the child's age, combined with her fear of reprisal, readily explained her delay in making the statement. Therefore, the court concluded, the statement should be treated as if made "upon the first opportunity shortly after the occurrence of the offense."

Similarly, the Florida Supreme Court, in Purdy v. State, affirmed the conviction of a defendant and upheld the admission of a seven-year-old girl's statement following a sexual assault. The child's statement was admissible under the excited utterance exception, the court found, to refute any doubts concerning the assailant's identity. Witnesses at the trial were allowed to testify that the child, while at the house in which the defendant and the child were found together, stated that the defendant was the perpetrator of the sexual assault. The child did not testify at trial. The court stressed that the child's out-of-court declaration was not the only evidence that was used to convict the defendant. There was sufficient physical evidence from which a jury could conclude that the defendant had committed the sexual assault. The court also noted that the child showed no signs of extreme emotional or psychological distress at the time of making the statement or immediately

81. Id. at 162; accord People v. Davison, 12 Mich. App. 429, 163 N.W.2d 10 (1968) (nine-year-old girl's statement to her older sister within two weeks after sexual assault was admissible as part of excited utterance exception). Res gestae is a "spontaneous declaration made by a person immediately after an event and before the mind has an opportunity to conjure a falsehood. It represents an exception to the hearsay rule and should be referred to as a spontaneous exclamation rather than res gestae." BLACK'S LAW DICTIONARY 1173 (5th ed. 1979).

82. See Summit, supra note 7, at 181.
83. 323 Mich. at 237, 35 N.W.2d at 162.
84. Id. at 231, 35 N.W.2d at 162. There was a "tender years" presumption in Michigan. The court recognized that:

the rule in [Michigan] is that, where the victim is of tender years, the testimony of the details of her complaint may be introduced in corroboration of her evidence, if her statement is shown to have been spontaneous and without indication of manufacture; and delay in making the complaint is excusable so far as it is caused by fear or other equally effective circumstance.

85. 343 So. 2d 4 (Fla. 1977).
86. Id. at 5; see FLA. STAT. ANN. § 90.803(2) (West 1979).
87. 343 So. 2d at 5. The court cited the defendant's nakedness in his room where the witnesses discovered the girl, his proximity to the child, and the actual physical condition of the child. Expert medical testimony indicated that penetration of both the vagina and anus had occurred. Id.
afterwards. In contrast, the Indiana Supreme Court, in *Ketcham v. State*, overruled the trial court’s admission into evidence of a five-year-old girl’s statements to her mother under a *res gestae* exception. Though her mother testified in detail about the story her daughter had told her when the mother questioned her about bruises in the pelvic region, the child victim did not testify. The child’s out-of-court declarations were made approximately two hours after the alleged rape. Because of this delay, the court concluded, spontaneity was lacking for purposes of the excited utterance exception. The court came to this conclusion even though the mother testified that when she asked her daughter about her delay in recounting the alleged rape, the child answered that she was afraid because the defendant had threatened to kill both mother and daughter if she told. The court stated that “[i]f a small child could tell the story to her mother, she could have told it on the witness stand to the jury, where it could be subjected to the usual tests of credibility.”

Courts frequently have looked to the childlike phrasing of the child’s description of the sexual assault to determine the reliability of the accusation. In *State v. Bloomstrom*, the Court of Appeals of Washington admitted into evidence, under the excited utterance exception, an eight-year-old girl’s statement made moments after the defendant returned the girl to her mother. The element of spontaneity, the court held, was not destroyed by the questions put forth to the child by the mother. The nature of the child’s response was one element the court looked to in determining whether the

---

88. *Id.*; see People v. Orduno, 80 Cal. App. 3d 738, 145 Cal. Rptr. 806 (1978) (statements of three-year-old girl to her mother immediately upon leaving defendant’s apartment and while still in a state of excitement were admissible into evidence under the excited utterance exception in a prosecution for child molestation even if the child would be too young to testify in court).

89. 240 Ind. 107, 162 N.E.2d 247 (1959).

90. *Id.* at 107, 162 N.E.2d at 248.

91. *Id.* at 107, 162 N.E.2d at 249. The court recognized the existence of cases that “stretch the time within which the details of a complaint may be admissible” as an excited utterance but was not persuaded by such reasoning, including the reasoning used in People v. Bonneau, 323 Mich. 237, 35 N.W.2d 161 (1948).

92. 240 Ind. at 107, 162 N.E.2d at 250.

93. See, e.g., United States v. Nick, 604 F.2d 1199, 1201 (9th Cir. 1979) (child’s statement to mother: “Yeah, Eneas [Nick] stuck his tutu in my butt”); People in Interest of O.E.P., 654 P.2d 312, 318 (Colo. 1982) (“A child . . . is hardly adept at the type of reasoned reflection necessary to concoct a false story relating to a bizarre sexual experience implicating the child’s mother.”); State v. Padilla, 110 Wis. 2d 414, 427, 329 N.W.2d 263, 270 (1980) (“[T]he young victim’s account of the present sexual assault must be true because the victim could have no other source for the considerable knowledge of the details of sexual intercourse that her account displayed.”).


95. *Id.* at 416, 529 P.2d at 1125.
excited response exception was applicable.96

The court noted that a young child should not be expected to relate a tale of sexual assault in the "generic terms" used by adults.97 Use of adult phrases—for example, "he raped me"—would lend credence to a charge that the child's statement was a fabrication, the court stated.98 The childlike use of children's terms and expressions to describe the assault lend credibility to the utterance.

This same reasoning was used by the Iowa Supreme Court, in State v. Brown,99 to explain the reliability of a child's out-of-court statements of sexual abuse. Although the introduction of the five-year-old boy's statements to his mother and her friend under the excited utterance exception at trial was not an issue on appeal, the court explained the rationale behind such an admission. Because a child rarely has extensive knowledge of sexual matters, the court stated, the "foreign acts, in effect, speak through the child victim because his or her knowledge of them suggests a previous firsthand experience with sex."100

The courts' diversified views regarding the nature of child sexual abuse and the varying facts of the cases before them have resulted in an inconsistent application of the excited utterance exception. Relaxation or distortion of the excited utterance exception to admit children's out-of-court statements into evidence in sexual abuse cases aids in the prosecution of abusers. Such relaxation, however, often may serve to undermine the reliability of an 803(2)-type exception. To retain the trustworthiness of the excited utterance exception while accommodating the special circumstances surrounding a child sexual abuse case, innovation in the law of evidence is necessary.

II. STATUTORY APPROACHES TO CHILD SEXUAL ABUSE VICTIMS' OUT-OF-COURT STATEMENTS IN CRIMINAL PROSECUTIONS

A. Existing Statutory Child Sexual Abuse Hearsay Exceptions—An Overview

Seven states—Colorado, Illinois, Indiana, Kansas, Minnesota, Utah, and Washington—have enacted statutes that specifically permit out-of-court statements of child sexual abuse victims to be admitted into evidence if there

96. Id. at 416, 529 P.2d at 1126. "When the mother asked what had happened, the child replied to the effect that the defendant had a big finger in his pants; that he took her pants down and pushed the big finger into her real hard." Id. at 416, 529 P.2d at 1125.
97. Id. at 416, 529 P.2d at 1126.
98. Id.
99. 341 N.W.2d 10 (Iowa 1983).
100. Id. at 14.
are sufficient indicia of reliability. All but one of the statutes, the Illinois


Statements of a child victim of unlawful sexual offense against a child—hearsay exception. (1) An out-of-court statement made by a child, describing any act of sexual contact, intrusion, or penetration, performed with, by, or on the child declarant, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in criminal proceedings in which the child is a victim of an unlawful sexual offense, if:

(a) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(b) The child either:

(I) Testifies at the proceedings; or

(II) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(2) If a statement is admitted pursuant to this section, the court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement.

(3) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

Id.

ILL. ANN. STAT. ch. 38, § 115-10 (Smith-Hurd 1984):

In a prosecution for a sexual act perpetrated upon a child under the age of 13, the following evidence shall be admitted as an exception to the hearsay rule:

(1) testimony by such child that he or she complained of such act to another; and

(2) testimony by the person to whom the child complained that such complaint was made in order to corroborate the child's testimony.

Id.

IND. CODE ANN. § 35-37-4-6 (Burns 1984):

(a) This section applies to criminal actions for the following:

(1) Child molesting . . .

(b) A statement that:

(1) Is made by a child who was under ten years of age at the time of the statement;

(2) Concerns an act that is a material element of an offense listed in subsection (a) that was allegedly committed against the child; and

(3) Is not otherwise admissible in evidence under statute or court rule; is admissible in evidence in a criminal action for an offense listed in subsection (a) if the requirements of subsection (c) are met.

(c) A statement described in subsection (b) is admissible in evidence in a criminal action listed in subsection (a) if, after notice to the defendant of a hearing and of his right to be present:

(1) The court finds, in a hearing:

(A) Conducted outside the presence of the jury; and

(B) Attended by the child;

that the time, content, and circumstances of the statement provide sufficient indications of reliability; and

(2) The child:

(A) Testifies at the trial; or

(B) Is found by the court to be unavailable as a witness because:
statute, require either the child victim’s testimony at trial or proof that the

(i) A psychiatrist has certified that the child’s participation in the trial would be a traumatic experience for the child;

(ii) A physician has certified that the child cannot participate in the trial for medical reasons; or

(iii) The court has determined that the child is incapable of understanding the nature and obligation of an oath.

(d) If a child is unavailable to testify at the trial for a reason listed in subsection (c)(2)(B), a statement may be admitted in evidence under this section only if there is corroborative evidence of the act that was allegedly committed against the child.

(e) A statement may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant’s attorney of:

(1) His intention to introduce the statement in evidence; and

(2) The content of the statement; within a time that will give the defendant a fair opportunity to prepare a response to the statement before the trial.

Id.

KAN. STAT. ANN. § 60-460 (1983):
Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: . . . (dd) In a criminal proceeding or in a proceeding to determine if a child is a deprived child under the Kansas juvenile code or a child in need of care under the Kansas code for care of children, a statement made by a child, to prove the crime or that the child is a deprived child or a child in need of care, if:

(1) The child is alleged to be a victim of the crime, a deprived child or a child in need of care; and

(2) The trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.

If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor.

Id.

MINN. STAT. § 595.02(3) (1984):
Subd. 3 Certain out-of-court statements admissible. An out-of-court statement made by a child under the age of ten years alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child by another, not otherwise admissible by statute or rule of evidence, is admissible in evidence if:

(a) the court, or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the child either:

(i) testifies at the proceedings; or

(ii) is unavailable as a witness and there is corroborative evidence of the act; and

(c) the proponent of the statement notifies the adverse party of his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which he intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.
child victim is unavailable as a witness. If the child victim does not testify, five of the states require corroboration of the act that is the subject of the child's out-of-court statement. In addition, these same five states re-

Id.

**Utah Code Ann.** § 76-5-411 (Supp. 1983):

(1) Notwithstanding any other provision of law or rule of evidence, a child victim's out of court [sic] statement regarding sexual abuse of the child is admissible into evidence... so long as:

(1) the child testifies; or

(2) in the event the child does not testify, there is other corroborative evidence of the abuse. Before admitting such a statement into evidence, the judge shall determine whether the general purposes of the evidence are such that the interest of justice will best be served by admission of the statement into evidence. In addition, the court shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness, in deciding whether to admit such a statement.

(2) A statement may be admitted under this exception only if the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with an opportunity to prepare to meet it, his intention in offering the statement, and the particulars of it.

(3) For purposes of this section, a child is a person under the age of ten.

**Id.**

**Washington Code Ann.** § 9A.44.120 (1985):

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, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington 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.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

Id.

102. The Illinois statute does not contemplate the unavailability of the child as a witness. It assumes the child victim will testify to a previous complaint or a witness will testify to the child's complaint in order to corroborate the child's testimony. Illinois Senate Bill 741, which failed in the House Subcommittee, "would have created an exception to the hearsay rule in prosecutions for sexual acts perpetrated on a child under the age of 13, by allowing an adult to testify as to the details of the child's timely out-of-court statement about such an act." **Illinois Legislative Investigating Commission, The Child Victim, A Report to the General Assembly** 26 (1983).

quire that advance notice be given to the adverse party in each case indicating the statement will be offered under the exception.

To determine the statement's reliability, the Washington statute requires the court to first conduct a hearing outside of the presence of the jury. The statute allows the court to look to indicia of reliability (for example, content, time, and circumstances) other than spontaneity. The excited utterance exception is a "class" exception intended to insure that the court will have guidelines in judging children's statements and, therefore, will not admit or exclude these statements arbitrarily. The statements will not be judged by criteria, such as a strict time reporting requirement, that fail to recognize the nature of child sexual abuse. The Washington statute protects the defendant by requiring the court to conduct its reliability hearing outside the presence of the jury. The purpose of the reliability hearing is to avoid the "potential prejudicial effects of foundation testimony," which usually is introduced prior to the hearsay statement or prior to the objection to the hearsay statement. The Indiana and Minnesota hearsay exception statutes are substantially similar to the Washington statute.

The Colorado statute provides instructions to the jury that it is the jury's function to assess the weight, credibility, and reliability of the child's statements. Utah's statute does not require an admissibility hearing per se, but does state that the judge shall determine whether the statement's admission will best serve the interest of justice.

The Indiana statute outlines three categories of unavailability excusing a child from testifying at the trial. Unavailability, under the Indiana statute, may be established by: (1) a psychiatrist's determination that participation in the trial would be a traumatic experience for the child; (2) a physician's certification that the child cannot participate for medical reasons; or (3) a court determination that the child is incapable of understand-

---

104. WASH. REV. CODE ANN. § 9A.44.120(1) (Supp. 1985); see Comment, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 COLUM. L. REV. 1745, 1763-65 (1983) (characterizing the Washington statutory exception as the "solution" to the confusion surrounding children's hearsay statements).
105. WASH. REV. CODE ANN. § 9A.44.120(1) (Supp. 1985); see Comment, supra note 104, at 1764; see also supra notes 13 and 93 and accompanying text.
106. Comment, supra note 104, at 1765.
107. WASH. REV. CODE ANN. § 9A.44.120(1) (Supp. 1985); see Comment, supra note 104, at 1765.
108. Comment, supra note 104, at 1765.
109. See IND. CODE ANN. § 35-37-4-6 (Burns 1984); MINN. STAT. § 595.02 (Supp. 1985).
111. UTAH CODE ANN. § 76-5-411(1) (Supp. 1983).
112. IND. CODE ANN. § 35-37-4-6(c)(2)(B) (Burns 1984).
The statute explicitly recognizes that a child’s participation in the trial often can be traumatic. Psychiatrists have verified this fact. While excusing a child’s participation for two valid reasons, Indiana’s statute errs in declaring a child witness unavailable for failing to understand the “nature and obligation of an oath.” The purpose of requiring testimony under oath is to impress upon the witness the importance of testifying truthfully. Often the abstract nature of a formal oath is beyond the conceptual ability of a child. Moreover, in a child sexual abuse case, a formal oath is unnecessary. The judge can dispense with the “oath” requirement by examining the child, informally, regarding her understanding of the importance of telling the truth, and the consequences of lying. Therefore, the Indiana statute’s definition of unavailability is too broad. By rendering a child unavailable to testify because she does not understand an oath, the statute improperly implies that the child’s account of the assault may not be trustworthy.

In contrast to the somewhat strict reliability requirements of the Washington, Colorado, Utah, Indiana, and Minnesota statutes, the Kansas statute does not require corroboration of the child’s statement if the child is unavailable.

113. Id.
114. Id.
115. Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 WAYNE L. REV. 976 (1969). Libai was an early advocate for the protection of child sexual abuse victims in the courtroom. He observed that psychiatrists have identified several aspects of the adversarial system that place a child under mental stress. Id. at 984. These aspects include the repeated interrogations and cross-examination, the child’s facing the accused again, the official courtroom atmosphere, the possible acquittal of the defendant based on the lack of corroborating evidence, and the possible conviction of an abuser who is the child’s parent or relative. Id.; see Melton, Child Witness and the First Amendment: A Psycholegal Dilemma, 40 J. OF SOC. ISSUES 109, 109-10 (1984) (“It is typically argued that the process of investigation and trial results in an exacerbation of psychological trauma and embarrassment. . . . This emotional fallout of the legal process may be heightened by the requirement of testimony in open court . . . .”); Stevens & Berliner, Special Techniques for Child Witnesses 4 (on file at the Center for Women Policy Studies, Wash., D.C.) (discussing the trauma in-court testimony presents for child witnesses).
118. See, e.g., State v. Bowie, 119 Ariz. 336, 580 P.2d 1190 (1978) (“[W]here a child witness understands the difference between truth and falsehood and understands that he must tell the truth at trial,” the Bowie court stated, “it is of no consequence that the child did not comprehend ‘oath.’” Id. at 342, 580 P.2d at 1196;); see also Miller v. State, 391 So. 2d 1102 (Ala. Crim. App. 1980) (four-year-old girl only eyewitness in sodomy case; three and one-half pages of the record reflect the direct and redirect examination of the girl as to her understanding of the difference between truth and lies).
119. See IND. CODE ANN. § 35-37-4-6(c)(2)(B) (Burns 1984).
able to testify. The Kansas statute merely requires the judge to determine that the statement is "apparently reliable and the child was not induced to make the statement falsely by the use of threats or promises." This standard of inquiry is less searching than the standard used in the previously discussed statutes. The trial judge must instruct the jury that it is its responsibility to address the weight and credibility to be given to the statement.

B. Videotape Depositions of Child Sexual Abuse Victims

Ten states recently have enacted statutes allowing for videotape depositions of child victims of sexual offenses. Ordinarily, a deposition is taken "whenever due to exceptional circumstances it is in the interests of justice" to preserve the testimony of a witness. Several state legislatures have cited the trauma a child suffers in testifying in a courtroom as a reason why the protective statutes were enacted. The courtroom experience subjects a

121. Id.
122. McNeil, The Admissibility of Child Victim Hearsay in Kansas: A Defense Perspective, 23 Washburn L.J. 265 (1984). McNeil reviews the Kansas child hearsay statute and highlights its inadequacy by discussing the fact that it does not require that the child's statement be made before the commencement of the action pertaining to the statement. Id. McNeil also argues that the new statute's treatment of child victim hearsay as inherently reliable is without regard to "earlier and longstanding reservations surrounding such evidence." Id. at 285.
124. Fed. R. Crim. P. 15(a), 18 U.S.C. § 3503(a) (1982); see also Ark. Stat. Ann. § 43-2035 (Supp. 1985). The Arkansas statute defines "videotaped deposition" thus: 'Videotaped deposition' means the visual recording on a magnetic tape, together with the associated sound, of a witness testifying under oath in the course of a judicial proceeding, upon oral examination and where an opportunity is given for cross-examination in the presence of the defendant and intended to be played back upon the trial of the action in court.
125. See notes accompanying Ark. Stat. Ann. § 43-2036 (Supp. 1983) (General Assembly stated that the purpose of the Act was "to protect the minor victim from the trauma of testifying in open court"); Fla. Stat. Ann. § 90.90 (West Supp. 1985) (court may order videotaping in lieu of trial testimony if "there is a substantial likelihood that a victim or wit-
child to questioning, in front of strangers, about intimate details of a little
understood sexual act. The child must face these people as she sits alone in
an adult-sized witness chair, with little comprehension of the formalities and
procedures going on about her. In addition, even the prosecutor, who often
has established a rapport with the child witness, finds it difficult to transfer
the rapport to the trial setting because, once in the courtroom, he seems
compelled to revert to legal terminology.126

State statutes allowing videotape depositions of children have, in most
cases, preserved the defendant’s rights. A deposition videotaped under these
statutes may be used in trial as substantive evidence only if the prospective
witness is “unavailable” to testify at trial. While state evidence rules vary in
defining “unavailability” for purposes of admitting depositions, approxi-
mately half the states allow the use of depositions in place of live testimony
when a witness suffers from physical or mental infirmity.127 Several state
videotape statutes expand on the traditional methods of defining “mental
infirmity” for purposes of unavailability. For example, the Maine statute
refers to the “emotional or psychological well-being” of a minor child,128
and the New Mexico rule of evidence permits the child to forgo testifying if
the child would suffer “unreasonable and unnecessary mental or emotional
harm.”129

Although the videotape statutes are similar in expanding the meaning of
unavailability, they differ in classifying the videotape deposition as either an
additional hearsay exception or as former testimony.130 Under most of the

ness who is under the age of 16 would suffer severe emotional or mental distress if he were
required to testify in open court”); N.M. STAT. ANN. § 30-9-17 (1984); N.M.R. CRIM. P.
DIST. CTS. 29.1 (committee commentary indicates that “[t]he purpose of 30-9-17 . . . is to
protect a child who has been allegedly sexually abused from further mental stress”); see also S.

(2) . . . states should consider and enact laws which contain innovative approaches
to the handling of child sexual abuse cases, which protect the victim’s legal rights,
including—

(F) establishing procedures for the videotaping of victims’ statements and
testimony.
S. Con. Res. 120, supra; see also Goodman & Michelli, Would You Believe a Child Witness,

126. Stevens & Berliner, supra note 115, at 5.

127. Parker, The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?, 17


129. N.M.R. CRIM. P. DIST. CTS. 29.1(b)(2).

130. See CAL. PENAL CODE § 1346(d) (West Supp. 1985) (former testimony); COLO. REV.
STAT. §§ 13-25-129, 18-3-411(3) (Supp. 1984) (former testimony); N.M. STAT. ANN. § 30-9-17
(1984); N.M.R. CRIM. P. DIST. CTS. 29.1(b) (deposition is “additional exception to the hear-
say rule of the Rules of Evidence”).
videotape statutes, a trial judge must preside. In addition, the defendant must receive reasonable notice in advance of the taping so that he may adequately prepare for the cross-examination of the child, which will be included on the videotape. Such notice apprises the defendant and his counsel that the deposition is, or probably will be, the defendant’s only opportunity to cross-examine the child. The Federal Rules of Criminal Procedure, as well as the Maine, Arkansas, and South Dakota statutes, expressly allow for the cross-examination of the child at the deposition to be of the same scope and manner that would be allowed if the child were to testify in the courtroom at trial.

C. Judicial Response to the Existing Statutory Innovations

As a result of their recent enactment, there has been little case law interpreting these statutes. In *State v. Slider*, the Court of Appeals of Washington, by affirming a defendant’s conviction for the statutory rape of a toddler for whom he was baby-sitting had its first opportunity to rule on Washington’s new statute. Under the statutory excited utterance exception, the trial judge admitted the child victim’s statements to her mother. The court of appeals, however, determined that the aggregate effect of the time delay and the leading nature of the mother’s questions weakened the statements made by Trina, the child victim, beyond the degree of reliability contemplated by the excited utterance exception. Accordingly, the court ruled that the trial judge improperly admitted the hearsay declaration under the excited utterance exception.

The court of appeals then analyzed the statement under the requirements of the “broader” statutory child sexual abuse exception. Finding “particularly guarantees of trustworthiness” among such factors as the time, content, and circumstances of the declaration, corroborative evidence of the abuse, and the defendant’s confession, the court held that the trial court would not have abused its discretion by admitting the declaration under this

---

135. *Id.* at 540.
136. *Id.* at 544.
137. *Id.* at 541.
138. *Id.*
139. *Id.;* WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1985).
140. 688 P.2d at 540.
new exception. The court found the victim "unavailable" because she showed, at the pretrial hearing, that she lacked any memory of the event, excluding the fact that the defendant had been her baby sitter. The court also addressed the defendant's contention that his right to confront the witnesses against him had been denied. Beginning with the premise that a defendant's right to confront witnesses is not absolute, the court undertook the Ohio v. Roberts sixth amendment confrontation clause analysis of the witness' unavailability and the statement's particularized guarantees of trustworthiness. The court concluded that the defendant's confrontation right had not been "contravened to an unconstitutional degree."

The Florida District Court of Appeals ruled on Florida's child videotape deposition statute in Washington v. State. Paul Washington was convicted of sexual battery and attempted lewd assault on an eleven-year-old child. Appealing this conviction, he raised the issue of trial court error in allowing videotaped testimony by the victim. Washington argued that before a court admits videotape testimony by a child victim, an expert must establish the necessity of videotaping the child's testimony under section 918.17 of the Florida law. Rejecting Washington's argument, the court held that because there was evidence that the child victim was under "a severe emotional strain," it was within the trial judge's discretion to permit the videotaping.

As prosecutors increasingly bring child sexual abuse cases to trial, the novel expansion of the hearsay exception in these cases and the ever-increasing use of the videotape deposition sanctioned under state statute no doubt will come under more searching constitutional scrutiny as more and tougher challenges to these devices are mounted by defendants.

141. Id. at 544.
142. Id. at 541.
143. Id.
144. Id. at 542.
145. 448 U.S. 56 (1980). The Supreme Court summarized its holding:

[When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66.
146. 688 P.2d at 544.
148. Id. at 83.
149. FLA. STAT. ANN. § 918.17 (West Supp. 1984). This section of Florida's statutes has been renumbered as FLA. STAT. ANN. § 90.90 (West Supp. 1985).
150. Washington, 452 So. 2d at 83.
III. HEARSAY EXCEPTIONS AND VIDEOTAPE DEPOSITIONS IN CHILD SEXUAL ABUSE CASES: STRENGTHENING PROTECTION FOR THE RIGHTS OF THE ACCUSED

A. The Accused's Sixth Amendment Rights and Child Sexual Abuse Hearsay Exceptions

The sixth amendment guarantees that the accused in a criminal prosecution "shall enjoy the right . . . to be confronted with the witnesses against him . . . ." 151 Professor McCormick has stated that the purpose of the American right to confrontation is "to guarantee the maintenance in criminal cases of the hard-won principle of the hearsay rule . . . ." 152 This rationale, however, has not rendered all hearsay inadmissible under the sixth amendment. 153 Hearsay statements must undergo an analysis outlined by the United States Supreme Court in Ohio v. Roberts 154 and California v. Green. 155 If the declarant, a child victim, testifies at trial, the admissibility of her hearsay statements does not present a constitutional issue as long as the defendant has the opportunity to cross-examine the child about those statements. 156 If the prosecutor does not wish to call the child as a witness, but nevertheless seeks to introduce the child's hearsay statements, he must demonstrate that the child declarant is unavailable to testify, in accord with the requirements of the Federal Rules or the statutory hearsay exceptions for child sexual abuse cases. 157

The Utah hearsay exception for child sexual abuse cases, for example, does not specifically require the child to be legally unavailable for her out-of-court statement to be considered admissible. The Utah rule simply states that such statements are admissible "in the event the child does not testify, [and] there is other corroborative evidence of the abuse." 158 Although there has been no judicial interpretation of the clause "in the event the child does not testify," it should be interpreted to require legal unavailability under the Utah rules of evidence to prevent unnecessary use of the statute by child witnesses who are capable of testifying. Moreover, state rules of evidence should be amended to specify that emotional and psychological trauma

151. U.S. Const. amend. VI (applicable to the states through the fourteenth amendment, Pointer v. Texas, 380 U.S. 400, 407-08 (1965)).
152. C. McCormick, supra note 33, § 249, at 750.
156. Id. at 158.
preventing children from testifying in court is a form of medical unavailability reflecting the heavy toll a courtroom appearance exacts from a child.

After a satisfactory demonstration of unavailability by the prosecutor through the use of medical or psychological expert testimony or by a trial judge through discretionary determination, the judge still must find that the child's statements contain adequate "indicia of reliability." If the child's statements fall within a "firmly-rooted" exception to the hearsay rule, such as the excited utterance exception, adequate indicia of reliability are inferred without more proof.

Because the child sexual abuse hearsay exceptions have been enacted recently, and therefore are not "firmly-rooted," the child's statements must show "particularized guarantees of trustworthiness." If the child is unavailable to testify, the statutory exceptions require corroboration of the act in question and judicial determination of admissibility. Corroboration of the sexual assault is often difficult to obtain due to the nature of the crime. A physical examination of the child by a physician after the assault may provide the required corroboration. Any evidence discovered through such an examination constitutes sufficient corroboration if it is consistent with the child's hearsay statement. The fact that only the accused had an opportunity to commit the offense, within the time period and under the circumstances described by the child, also may provide corroboration.

The recently enacted child sexual abuse exceptions provide sufficient particularized guarantees of trustworthiness to meet constitutional scrutiny. Many states still rely on the excited utterance exception to admit a child victim's hearsay statements even when the presence of spontaneity, the essence of the excited utterance, is questionable. The new statutes remove the need for strong reliance on spontaneity and instead allow the judge to consider and to weigh various factors indicative of reliability. The trustwor-

159. E.g., IND. CODE ANN. § 35-37-4-6 (Burns 1984).
161. See, e.g., C. McCormick, supra note 33, § 249, at 732.
164. See Comment, supra note 104, at 1749-51.
165. See, e.g., United States v. Nick, 604 F.2d 1199, 1201 (9th Cir. 1979) (physician testified as to results of examination of child that indicated penetration of the child's rectum). Because most sexual abuse is predominantly nonviolent, there is usually little physical evidence. Comment, supra note 104, at 1750. "Most crimes consist of petting, exhibitionism, fondling, and oral copulation, activities that do not involve forceful physical contact." Id.
167. See supra notes 77, 85 and accompanying text.
thiness of a child's out-of-court declarations can be ensured by judicial use of these factors in determining admissibility. The courts should ensure the gradual acceptance of the new exceptions by carefully scrutinizing proffered declarations. In addition, courts should not abuse the new statutory exceptions. Where possible, courts should fit the child victim’s out-of-court declarations into one of the “traditional” exceptions to the hearsay rule.

B. Cross-Examination and Videotape Depositions

The videotaped testimony of a child witness introduced at trial in lieu of in-court testimony may be challenged by a defendant under the sixth amendment confrontation clause. The United States Supreme Court in California v. Green held that the confrontation clause was not violated by admitting the preliminary hearing testimony of a witness where the witness, at the preliminary hearing, was under oath, the defendant was represented by counsel, and there was full opportunity for cross-examination. In Ohio v. Roberts, the United States Supreme Court addressed the admissibility of the transcript of a witness’ preliminary hearing testimony where the witness was not present at the trial. The court concluded that good-faith efforts to locate the witness determine the unavailability of the witness. The burden is on the prosecution to establish these efforts. Once unavailability is established, it is proper for the court to admit the declarant’s cross-examined preliminary hearing testimony.

The purposes served by the sixth amendment confrontation clause were

169. The witness in Green, 16-year-old Melvin Porter, was available to testify at trial despite being “markedly evasive and uncooperative on the stand.” Id. at 151-52. Porter claimed an inability to remember many of the events that were the subject of his testimony. Id. at 152. The Court stated that if the witness had died “or was otherwise unavailable” to testify at trial, the confrontation clause still would not have been violated by admitting Porter’s preliminary hearing testimony for two reasons. Id. at 166. First, the right of cross-examination available to the defendant and his counsel at the preliminary hearing provided “substantial compliance” with the purposes of the confrontation clause. Id. Further, the declarant’s unavailability at trial was not “in any way the fault of the State.” Id.
171. Id. at 74-75.
172. Because the defense counsel in Roberts did not necessarily have reason to believe that Anita Isaac, the witness, would be unavailable at trial, the court examined the extent of counsel’s questioning at the hearing to determine whether it satisfied the confrontation clause. Id. at 70-71. The Court noted that the defense counsel, at the hearing, asked leading questions, a significant component of cross-examination. Id. The Court concluded that the questioning was consistent with the principal purpose of cross-examination. Id. That purpose, the Court stated, is to challenge “whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant’s intended meaning is adequately conveyed by the language he employed.” Id. at 71 (quoting Davenport, The Confrontation Clause and the Co-Conspirator Ex-
summarized by the Supreme Court in *California v. Green*. The three principal functions of confrontation, the Court stated, are: (1) to ensure that the witness testifies under oath; (2) to ensure that the witness undergoes cross-examination; and (3) to allow the jury to assess the credibility of the witness by observing the witness' demeanor as he testifies. Videotape depositions that grant the defendant the right to full cross-examination at the deposition fulfill these purposes.

Requiring the witness to testify under oath, the first purpose of confrontation, is designed to impress upon the witness the importance of testifying truthfully. The use of a formal oath for child witnesses does not necessarily ensure greater truthfulness, especially when the child may be instructed merely to recite the oath as requested without any explanation of its meaning. Informally, the judge can examine the child regarding her understanding of the importance of telling the truth and the consequences of not doing so. Under the statutes not providing for a presiding judge at the deposition, counsel for either party or both the state and the accused can question the child regarding her competency.

The second and most important function of confrontation is to permit the accused the opportunity to cross-examine the witness. A videotape deposition allows the accused to prepare to cross-examine the child as if at trial because the accused is on notice that the videotape may, and probably will, replace in-court testimony by the child. Federal Rule of Criminal Procedure 15 allows broad cross-examination, to the extent allowed at a trial.

Two cases have discussed the defendant's rights to be physically present at the deposition and to cross-examine the witness. The United States Court of Appeals for the Eighth Circuit held in *United States v. Benfield* that the confrontation clause requires active participation by the defendant if he so

173. 399 U.S. at 158.
174. Id.
175. See supra note 116 and accompanying text.
176. See supra note 117 and accompanying text.
177. See 5 J. Wigmore, Evidence § 1367 at 32 (Chadbourn rev. 1974) (cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth").
178. Fed. R. Crim. P. 15(d). But see C. McCormick, supra note 33, § 255, at 762. At a preliminary hearing, "an argument can be made that strategy often dictates little or no cross-examination at that stage, since ample opportunity will be afforded at trial." Id. California's child videotape deposition statute prescribes that the deposition be taken at the preliminary hearing. Cal. Penal Code § 1346 (West Supp. 1985); see S.D. Codified Laws Ann. § 23A-12-9 (Supp. 1984) (child's testimony videotaped at preliminary hearing, but statute specifically requires that cross-examination shall be of the scope and manner allowed at trial).
179. 593 F.2d 815 (8th Cir. 1979).
requests. The Indiana Supreme Court, however, in *Jones v. State*, held that a defendant's rights were not abridged in a state proceeding where he was refused permission to attend a deposition at which his counsel cross-examined the witnesses.

In *United States v. Benfield*, the defendant was convicted in federal district court of misprision of a felony relating to a kidnapping. At a hearing held to determine if the government's request to take a videotape deposition of the witness was proper, her psychiatrist stated that either the victim should not testify or "circumstances less stressful than a trial courtroom [should] be arranged." The trial court granted the deposition request and allowed Benfield to be present at the deposition "but not within the vision of [the witness]." The videotape of the deposition was admitted into evidence at trial. The court of appeals relied on rule 15 of the Federal Rules of Criminal Procedure which ensures the right of the defendant to be present at the deposition. In addition to her right to be present, the court concluded that Benfield had a right to confront the witness under the sixth amendment. Confrontation requires a "face-to-face" meeting as well as cross-examination, the court concluded. The court explained that the importance of a face-to-face confrontation is that "in some undefined but real way recollection, veracity, and communications are influenced."
The court stated that a deposition necessarily eliminates a face-to-face meeting between the witness and the jury, and it could not find justification for "further abridgement of the defendant's rights" by excluding him from the deposition.\textsuperscript{190} Although a videotape deposition "supplies an environment substantially comparable to a trial," the court stated, this procedural substitute did not pass constitutional muster because the defendant was not allowed to participate actively.\textsuperscript{191} The partial confrontation allowed at the deposition was not sufficient, the court said, to test the accuracy of the witness' perception of the event or her recollection or expression of those events.\textsuperscript{192}

In contrast, the Indiana Supreme Court in Jones v. State\textsuperscript{193} affirmed a defendant's conviction for child molestation even though the defendant was refused the right to be present at the prosecution's taking of depositions.\textsuperscript{194} Denying that the defendant's right of confrontation had been abridged, the court relied on the fact that the deposed witnesses testified in open court, thus enabling the defendant to confront and cross-examine them at that time.\textsuperscript{195}

The third purpose of the confrontation clause is to enable the jury to observe the demeanor of the witness. A videotape deposition, by its very nature, is uniquely qualified to present the demeanor of the child as she gives her statement and is cross-examined by opposing counsel. By viewing the

\textsuperscript{190} 593 F.2d at 821. A defendant may lose his right to be present at trial, or presumably at a deposition, if his conduct is disruptive and disrespectful toward the court so that the trial cannot be carried on with him in the courtroom. Illinois v. Allen, 397 U.S. 337, 343 (1970). In Benfield, the right of confrontation was curtailed by the procedures employed in the taking of the deposition. Curtailment of a defendant's right of confrontation that is constitutionally permissible depends on the facts of the case, including defendant's conduct. 593 F.2d at 821.

\textsuperscript{191} 593 F.2d at 821. In addition, the court stated that its decision should not be regarded as "prohibiting the development of electronic video technology in litigation. Where the parties agree to a given procedure or where [it] more nearly approximates the traditional courtroom setting, our approval might be forthcoming." Id.

\textsuperscript{192} Id. at 822; see Herbert v. Superior Court, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981). In Herbert, the defendant was charged with sexual offenses against a five-year-old child, who was the only inculpatory witness against the defendant. Without the defendant's consent, the physical arrangements of the courtroom were changed so that the defendant and the child could not see each other while the child testified at the preliminary hearing. Id. at 664-65, 172 Cal. Rptr. at 851. It was held that the trial court denied defendant his right of confrontation as well as an effective method for determining veracity. Id. at 671, 172 Cal. Rptr. at 855.

\textsuperscript{193} 445 N.E.2d 98 (Ind. 1983).

\textsuperscript{194} Id.

\textsuperscript{195} Id. at 100.
videotape as opposed to reading a transcript of the child's testimony, the jury is better able to assess the child's credibility. Because the child often is less upset, frightened, shy, or humiliated in the more informal deposition proceeding, the jury has a more accurate and less emotional view of the child.

The three aspects of the confrontation clause considered above are preserved by the videotape deposition in which the defendant participates and is present in the room in which the proceedings take place.

IV. THE NEED FOR SPECIAL CHILD SEXUAL ABUSE EVIDENTIARY INNOVATIONS

A child sexual abuse victim's statements traditionally have been admitted into evidence under the excited utterance exception. Often the child victim's statements do not fit easily into this already carved-out exception. The reasons for this vary, but center most often on the age of the child and her corresponding behavioral and intellectual growth. An older child, in her early teens, is more apt immediately to react by reporting an assault. A younger child, abused by a trusted adult such as a parent, stepparent, or babysitter, may react in many different ways but usually not by reporting the abuse spontaneously to someone. In many cases, the person to whom she ordinarily would report or relate something of importance is the very person who is abusing her. The use of expert testimony to explain the "dynamics of child sexual abuse" is useful to both the judge and the jury in that it can provide a "richer context within which to interpret the child's testimony."

196. See, e.g., Hutchins v. State, 286 So. 2d 244, 246 (Fla. Dist. Ct. App. 1973). One commentator has explained this fact as follows:

The tape can detect whether the child's narration was hurried or deliberate, angry or satisfied, calm or excited. Spontaneous statements can easily be distinguished from responses to leading questions, and hesitant voices can be identified and compared with confident ones. The tape reveals whether the child is decisive or ambiguous . . . . Furthermore, a written statement does not convey the child victim's original story as authentically as a taped conversation.

Libai, supra note 27, at 990 (footnotes omitted).

197. See supra notes 35, 36 and accompanying text.

198. See supra notes 32-100 and accompanying text.

199. See supra note 15.

200. Expert testimony on the dynamics of child sexual abuse is used in some jurisdictions to rebut defense contentions that the child did not report an incident immediately because she is lying. Expert testimony can explain "typical child reactions to sexual abuse, including certain symptoms characteristic of posttraumatic stress in such cases: disturbances in physical and cognitive functioning, re-experiencing the traumatic event, withdrawal from usual and familiar activities, and numbing of affective responses." Berliner & Barbieri, supra note 1, at 134.

201. Id.
A statement admitted under a Federal Rule of Evidence 803(2)-type exception is considered reliable because the spontaneity of the statement—made during a startling event—acts to still the normal reflective thought process of the declarant. This reasoning does not usually apply to statements made by children. Children do not always react with shock, revulsion, or immediate excitement or disgust within moments after a sexual assault. It has been asserted that children's reactions "can run the entire gamut of behaviors in response to a sexual assault, ranging from the negative to the positive." In sum, the stress and excitement required by rule 803(2) do not correlate with many children's responses to sexual assaults.

The spontaneity additionally required under rule 803(2) has caused difficulties for the courts in assessing when the lapse in time between the assault and the child's statement is too long. A victim's fear caused by threats from the abuser often results in a substantial delay before the victim relates the story to anyone. This delay erodes the safeguard of spontaneity inherent in a rule 803(2)-type exception and undermines the trustworthiness of the exception.

Children's hearsay statements can be and, in many instances, are reliable. To trust only spontaneous statements made by children is to ignore other signs of reliability within the statement itself and the surrounding circumstances. The newly enacted state hearsay exceptions for child witnesses recognize the need for special judicial scrutiny of the statements of a child who has been sexually abused. The judge is not required to base his decision as to admissibility solely on time and spontaneity factors. He is allowed to look to a wider realm of circumstances peculiar to the testing of the reliability of a child's statement.

Videotape depositions, while a more technical innovation than an excep-

202. C. McCormick, supra note 33, § 297, at 854.
203. See, e.g., Comment, supra note 104, at 1756 & nn.92-94; see also Brown v. United States, 152 F.2d 138 (D.C. Cir. 1945). In Brown, a three-year-old girl related a story of an "alleged act of indecent character" that took place at her nursery school while telling her mother the events of the day. 152 F.2d at 138. The appeals court overruled the statement's admissibility under the excited utterance exception because it was merely a "calm narrative." Id. at 139.
204. Burgess, supra note 1, at 135.
206. See, e.g., COLO. REV. STAT. § 13-25-129 (Supp. 1984). This statute requires the judge to instruct the jury that the various factors they must consider are the age and maturity of the child, the nature of the child's statement, the circumstances under which the statement was made, and any other relevant factor. Id. This instruction provides the jury with relevant criteria that the jurors, without the instruction, might not take into consideration.
tion to the hearsay rule, are nonetheless reliable and trustworthy as well as protective of the defendant's rights. An important question for a prosecutor is whether a videotape deposition should be used instead of the child hearsay exception. If a child has not made any relevant, useful hearsay statements, a videotape deposition may be necessary. The use of a deposition in lieu of in-court testimony also depends upon the ability of the child to be an effective witness. The child should be able to recall and relate facts to the cameras and thus to the jury in a manner that will convey information.  

A child's inability to relate the facts of a sexual encounter before the jury in a crowded courtroom is not unusual. In addition, a trial may finally occur months or even a year or two after the alleged assault. A child's memory will fade more quickly than an adult's and in many cases the adults involved in the case can begin to suggest ideas that are implanted into the child's version of the event. For these reasons, a prosecutor might wish to present a videotape deposition. Under some statutes, the deposition may be taken as soon as the state decides to prosecute. A videotape deposition should take place in the judge's chambers or a conference-type room. Because the defendant will be present, the child should be accompanied by a guardian, probably a parent, to lessen her fear. If the state permits the introduction of a videotape deposition in lieu of in-court testimony, the child will have to testify only once, and the testimony will be taken as soon after the assault as possible. The more quickly the child victim is relieved of her responsibilities imposed by the criminal justice system, the sooner the child may begin to overcome the emotional problems created by the assault.

The defendant's constitutional rights are protected by these evidentiary

207. Federal Rule of Evidence 601 raises a presumption of competency for each witness. See C. McCORMICK, supra note 33, § 62, at 156:

The major reason for disqualification of [a child] . . . is the judge's distrust of a jury's ability to assay the words of a small child. . . . Conceding the jury's deficiencies, the remedy of excluding such a witness, who may be the only person available who knows the facts, seems inept and primitive.

Id.

208. See supra note 26 and accompanying text.

209. See Bernstein, supra note 26, at 14; Meyers, supra note 7, at 51 (often an incident is discussed with, or in the presence of, the child by parents, siblings, neighbors, or other children). "What really matters when dealing with children as witnesses, insisted (a defense attorney), is who they have talked to before the trial, such as psychologists, parents, teachers, police, etc. 'I hate to use the word "contamination," but that is a big danger,' he said." Kiddie Power in Court: Children on the Witness Stand, Chi. Trib., Feb. 20, 1983, § 2, at 1, col. 1.

210. The child should of course testify in a deposition proceeding or at trial if the testimony will "substantially increase the chance of a conviction and will not do serious harm to the child." Berliner & Barbieri, supra note 1, at 134. Even if the child can give some sort of statement, there may be so little chance of conviction that the child should not be forced to endure the stress of the proceedings. Id.
innovations. The accused is assured that the court can only admit hearsay statements that show particularized guarantees of trustworthiness. In a videotape deposition of a child victim, the accused is accorded the same right to confront and cross-examine the witness that he has at trial.211 In short, there is no abrogation of the defendant’s rights.

V. CONCLUSION

Child sexual abuse is no longer a hidden crime in American society. The reported cases are too numerous. Child offenders and juvenile delinquents have long been protected by special juvenile courts and proceedings and this special protection should also be accorded to child victims of sexual abuse. Legislative acknowledgement of the trauma experienced by children in testifying, which is inflicted so often by the current criminal justice system, is a significant step towards the protection of child victims.

The public outcry at the reports of the trauma suffered by child victims in sexual abuse cases will prompt more protective legislation. Challenges to the constitutionality of the legislative reforms will continue to grow as more convictions are achieved with the aid of the legislative innovations. Challenges to the new hearsay and deposition statutes should be rejected. They are constitutionally sound means of shielding the child victim from the rigors of courtroom testimony. Most importantly, the new statutes aid in the prosecution of child molesters and abusers by providing the court with the statements of the only witnesses to the event.

Jean L. Kelly

211. See, e.g., N.M.R. CRIM. P. DIST. CT. 29.1(a), (b).