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Introduction: Background and Overview of Child Sexual Abuse

Law Reforms in the Mid-1980's

JOSEPHINE BULKLEY*

The *University of Miami Law Review* has devoted this issue to an exploration of the major law reform issues in child sexual abuse cases in the mid-1980's. The *Review* chose all except two of the articles in this issue from papers presented at the recent National Policy Conference on Legal Reforms in Child Sexual Abuse Cases held in March, 1985, by the Child Sexual Abuse Law Reform Project of the American Bar Association's ("ABA") National Legal Resource Center for Child Advocacy and Protection. The symposium was designed as a forum for identifying problems and debating the benefits and detriments of legal reform efforts in child sexual abuse cases.¹

The articles in this issue do not focus solely on identifying and describing legal reforms in sexual abuse cases, which has been done in numerous other legal publications.² Rather, they critically discuss and analyze recent reforms in order to insure the development of sound laws and legal policies. Hopefully, this information will lead to laws and policies that both prevent unnecessary harm to children and preserve fundamental constitutional guarantees.

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1. The ABA published all of the conference papers as a report entitled *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases*, American Bar Association, Washington, D.C. (J. Bulkley ed. 1985).

2. See AMERICAN BAR ASSOCIATION, *CHILD SEXUAL ABUSE AND THE LAW* (J. Bulkley ed. 1981) [hereinafter cited as *CHILD SEXUAL ABUSE*]; *INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES*, AMERICAN BAR ASSOCIATION (J. Bulkley ed. 1981) [hereinafter cited as *INNOVATIONS*]; AMERICAN BAR ASSOCIATION, *RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES* (J. Bulkley ed. 1982) [hereinafter cited as *RECOMMENDATIONS*]; Ahlgren, *Maintaining Incest Victims' Supporting Relationships*, 22 J. FAM. L. 483 (1983-84); Kirkwood and Mihaila, *Incest and the Legal System: Inadequacies and Alternatives*, 12 U.C.D. L. REV. 673 (1979); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969); Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643 (1982); D. Whitcomb, E. Shapiro, & L. Stellwagen, *When the Victim Is a Child: Issues for Judges and Prosecutors*, United States Department of Justice, National Institute of Justice (Aug. 1985).

These articles suggest that legal reforms should be narrowly drawn to apply only where clearly necessary. The articles also explore the potential negative ramifications of the reform ideas, provide new information about child witnesses' abilities and raise new legal issues and problems not previously examined in the literature (such as special issues relating to young children and the potential infringement of certain constitutional rights of the defendant).

Due to heightened media attention, increased public awareness of the problem of child sexual abuse since the early to mid-1980's, and the recent dramatic rise in reported cases, more cases enter the legal system today, particularly the criminal justice system.³ These factors have led to a major law reform movement to improve the handling of child sexual abuse cases. Wide dissemination of a publication entitled *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases* ("Recommendations"),⁴ published in 1982 by the ABA Resource Center, also has influenced the adoption of reforms throughout the country. Moreover, the ABA's Criminal Justice Section proposed a set of guidelines entitled *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged*, which were passed by the ABA's House of Delegates in 1985.⁵ These guidelines now represent official ABA policy on making the legal system more sensitive to child abuse victims and should also lead to further law reform efforts.

The *Recommendations* of the ABA Resource Center offer suggestions for modifying state laws and local procedures. They address three major problems in the legal system including the emotional harm that the legal system causes child victims, the extreme difficulty of proving the crime of sexual abuse of a child, and the lack of appropriate treatment dispositions in criminal proceedings, especially for intra-family offenders.⁶ The *Recommendations* include suggestions for legislative reform in the following areas: (1) evidence reforms, such as special hearsay exceptions for childrens' out-of-court statements of abuse, elimination of competency tests

3. For example, in Montgomery County, Maryland, the number of cases filed in the first half of 1985 was the same number as that filed in all of 1984. Durcanin, *Sex Abuse Conviction Rate Drops in County*, *The Montgomery J.*, June 20, 1985, col. 1 at 1. See Roe, *infra* p. 97 (*Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985)).

4. See RECOMMENDATIONS, *supra* note 2.

5. For the text of the guidelines, see Graham, *infra* p. 19 n. 37 (*Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19 (1985)).

6. See RECOMMENDATIONS, *supra* note 2, at 6-16.

for child witnesses, abolition of the marital privilege and the corroboration requirement; (2) legislative authority for a court's issuance of protective orders in any judicial proceeding (for example, to order the offender out of the home); (3) reform of laws relating to judicial proceedings involving the non-abusive parent; and (4) where necessary to prevent trauma, methods to avoid childrens' testimony at grand jury, preliminary hearings, and trials, that will not violate the defendant's constitutional rights (for example, videotaping, or closed-circuit television of a child's testimony, or closing the courtroom during the child's testimony).⁷

By 1985, just three years after the ABA published these reform suggestions, many states had adopted legislation designed to reduce trauma to children and to improve the rate of successful legal outcomes. To illustrate, the last three jurisdictions to retain a corroboration requirement in child sexual offense crimes in 1981, eliminated the requirement by 1985.⁸ In 1982, only two states had special statutory hearsay exceptions (Kansas and Washington), whereas eighteen states had adopted such exceptions by October, 1985.⁹ Four states had legislation for videotaping a child's testimony in 1981, whereas by October of 1985, at least twenty five states provided for videotaping a child's testimony (by deposition or at preliminary hearing for use at trial, preliminary hearing, or grand jury) and sixteen states provided for closed circuit television of children's testimony at trial.¹⁰ By early 1985, nearly half the

7. *Id.* at 30-40.

8. New York, Nebraska, and the District of Columbia were the last three jurisdictions to require corroboration in all child sex offense cases. See Lloyd, *The Corroboration of Sexual Victimization of Children* in AMERICAN BAR ASSOCIATION, CHILD SEXUAL ABUSE AND THE LAW 103, 106 (J. Bulkley ed. 1981).

9. The following special hearsay exception statutes known to the author are: Alaska: ALASKA STAT. § 12.40.110 (1985); Arizona: ARIZ. REV. STAT. ANN. § 13-1416 (1985); Arkansas: ARK. R. EVID. 803(25)(A); Colorado: COLO. REV. STAT. § 18-3-411(3) (1984); Florida: Act of May 30, 1985, ch. 85-83, § 90.803(23), Fla. Laws 140, 141-42; Illinois: Ill. 83rd Gen. Assem. P.A. 83-1067 § 115-10; ILL. ANN. STAT. ch. 37, § 704-6(4)(c) (Smith-Hurd 1985); Indiana: IND. CODE § 35-37-4-6 (1985); Iowa: IOWA CODE ANN. § 232.96(6) (1985) (juvenile court only); Kansas: KAN. STAT. ANN. § 60-460(dd) (1983); Minnesota: MINN. STAT. § 595.02(3) (1985); Missouri: H.R. 366, § 491.075, 83rd Gen. Assembly, 1st Sess., 1985 Mo. Legis. Service 20, 60; Nevada: NEV. REV. STAT. § 48 (1985) (cases only); Rhode Island: R.I. GEN. LAWS § 14-1-69 (1985) (custody or parental termination cases only); South Dakota: S.D. CODIFIED LAWS ANN. § 19-16-38 (1985); Texas: TEX. CRIM. PROC. CODE ANN. § 38.072 (Vernon 1985); TEX. FAM. CODE ANN. § 54.03 (Vernon 1985); Utah: UTAH CODE ANN. § 77-35-15.5 (1985); Vermont: VT. R. EVID. 807(a); Washington: WASH. REV. CODE § 9A.44.120 (1985). See also Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645 (1985).

10. States continue to enact new legislation in this area so this figure may not be accu-

states had adopted rule 601 of the Federal Rules of Evidence, which establishes a presumption of competency for all persons,¹¹ only a dozen states had adopted this rule by 1981.

The *Recommendations* of the ABA Resource Center include a wide range of suggestions for modifying local procedures to make the legal system more sensitive to children. The suggestions in-

rate at the time of publication. The states presently known to have legislation on videotaped testimony include the following: **Alabama:** 1985 Ala. Acts No. 85-743; **Alaska:** ALASKA STAT. § 12.45.047 (1984); **Arizona:** ARIZ. REV. STAT. ANN. § 13-4235 (1985); **Arkansas:** ARK. STAT. ANN. §§ 43-2035 to 2037 (1985); **California:** CAL. PENAL CODE § 1346 (West 1985); **Colorado:** COLO. REV. STAT. § 18-3-413 (1984); **Connecticut:** 1985 Conn. Acts 85-587 Jan. Sess.; **Delaware:** DEL. CODE ANN. tit. 11, § 3511 (1985); **Florida:** FLA. STAT. § 90.90 (West 1984); Act of May 30, 1985, ch. 85-53, § 92.53, Fla. Laws 140, 146 (redesignated from § 90.90); **Kansas:** Kan. S.B. No. 107, 1985 Regular Session; **Kentucky:** KY. REV. STAT. § 421.350 (1984); **Maine:** ME. REV. STAT. ANN. tit. 15, § 1205 (1985); **Missouri:** H.R. 366, 83rd Gen. Assembly, 1st Sess., 1985 Mo. Legis. Service 20, 61-69 (Vernon); **Montana:** MONT. CODE ANN. § 46-15-401 to 403 (1977); **Nevada:** Act of June 3, 1985, ch. 462, 1985 Nev. Stat. 1423; **New Hampshire:** N.H. REV. STAT. ANN. § 517:13-a (1985); **New Mexico:** N.M. STAT. ANN. § 30-9-17 (1984); **New York:** N.Y. CRIM. PROC. LAW § 190.32 (Consol. 1984); **Oklahoma:** OKLA. STAT. ANN. tit. 22, § 753 (West 1984); **Rhode Island:** R.I. Gen. Laws § 11-37-13.1 (1985); **South Dakota:** S.D. CODIFIED LAWS ANN. § 23A-12-9 (1985); **Texas:** TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon 1985); **Utah:** UTAH CODE ANN. § 77-35-15.5 (1985); **Vermont:** VT. R. EVID. 807; **Wisconsin:** WIS. STAT. § 967.04(7) (1985).

The statutes dealing with closed circuit television testimony include the following: **Alabama:** 1985 Ala. Acts. 85-743; **California:** CAL. PENAL CODE § 1347 (West 1985); **Connecticut:** 1985 Conn. Acts 85-587 Jan. Sess.; **Florida:** FLA. STAT. § 92.54 (1985); **Hawaii:** HAWAII REV. STAT. § 626(d) (1985); **Kansas:** Kan. S.B. No. 107, 1985 Regular Session; **Kentucky:** KY. REV. STAT. § 421.350 (1984); **Louisiana:** LA. REV. STAT. ANN. 15:283 (West 1984); **Maryland:** MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (1985); **New Jersey:** 1985 N.J. Sess. Law Serv. ch. 126 (West); **New York:** N.Y. CRIM. PROC. LAW §§ 65.00 to 65.30 (1985); **Oklahoma:** OKLA. STAT. ANN. tit. 22 § 753 (West 1984); **Rhode Island:** R.I. GEN. § 14-1-69 (1985); **Texas:** TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon 1983); **Utah:** UTAH CODE ANN. § 77-35-15.5 (1985); and **Vermont:** VT. R. EVID. 807(e) (1985). Since March, 1985, the number of new states that have passed closed circuit television or videotaping legislation has more than doubled.

11. Bulkley, *Evidentiary and Procedural Trends*, *supra* note 9, at 645, 668; Whitcomb, Shapiro & Stellwagen, *supra* note 2, at 27-29, 31-32. The statutes which set up the presumption of competency include the following as of August, 1985: **Arizona:** ARIZ. REV. STAT. ANN. § 12-2202 (1985); **Arkansas:** ARK. STAT. ANN. § 28-1001 (1975); **Colorado:** COLO. REV. STAT. § 13-90-106(1)(b); **Connecticut:** 1985 Conn. Acts 85-587 (Jan. Sess.); **Delaware:** DEL. R. EVID. 601; **Florida:** FLA. STAT. § 90.601 (1978); **Maine:** ME. R. EVID. 601 (1976); **Maryland:** MD. CTS. & JUD. PROC. CODE ANN. § 9-101, 9-103 (1985); **Michigan:** MICH. STAT. ANN. § 27A.2163 (1985); **Mississippi:** MISS. CODE ANN. § 13-1-3 (1972); **Missouri:** MO. ANN. STAT. § 491.060(2) (Vernon 1985); **Nebraska:** NEB. REV. STAT. § 27-601 (1979); **New Jersey:** N.J. STAT. ANN. § 2A:81-1 (1976); **New Mexico:** N.M. R. EVID. 601 (1985); **North Dakota:** N.D. R. EVID. 601 (1985); **Oklahoma:** OKLA. STAT. ANN. Civ. Proc. 12, § 12-2601 (West 1980); **Oregon:** OR. REV. STAT. § 40.310 (1983); **Pennsylvania:** 42 PA. CONS. STAT. ANN. § 5911 (Purdon 1982); **South Dakota:** S.D. CODIFIED LAWS ANN. § 19-12-1 (1985); **Tennessee:** TENN. CODE ANN. § 24-1-101 (1985); **Utah:** UTAH CODE ANN. §§ 78-24-2 (1985); **Washington:** WASH. REV. CODE § 5.60.050 (1985); **Wisconsin:** WIS. STAT. § 906.01 (1975); **Wyoming:** WYO. STAT. § 1-138 (1985).

clude: (1) use of interdisciplinary teams; (2) coordination of juvenile and criminal court proceedings; (3) provision of special advocates or guardian *ad litem*s for children in criminal and juvenile courts; (4) preventing repeated interviews of the children by using joint interviews or one interview with a designated person, or videotaping the interview, and providing special interviewing rooms; and (5) establishing special sexual abuse prosecution units, and assigning the same prosecutor to all stages of the case (vertical prosecution).¹²

In recent years, some of the local policy or procedural changes recommended by the ABA Resource Center have either been adopted or are being considered at the local level. According to the ABA's Child Sexual Abuse Law Reform Project, many jurisdictions now videotape interviews with children and use other methods to reduce the number of interviews. Some state prosecutors have established a vertical prosecution policy, others have created special child abuse or sexual offense units.¹³ Many jurisdictions have established multidisciplinary teams, with professionals that receive training on child sexual abuse issues.¹⁴ Victim advocates are often appointed to work with the children during criminal proceedings.¹⁵ These and other procedural changes have been made without the

12. See RECOMMENDATIONS, *supra* note 2, at 11.

13. Vertical prosecution involves appointment of one prosecutor for all stages of a case. Although no current survey of state prosecutor policies exists, anecdotal information received by the American Bar Association suggests that these changes are occurring. See INNOVATIONS, *supra* note 2.

14. In addition, the Federal Child Abuse Prevention and Treatment Act requires cooperation among courts, law enforcement and social service agencies and training of personnel as a condition of receiving federal funds. Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5116g (1985). All but a few states have been deemed eligible for this funding. Some state statutes require or authorize the establishment of multi-disciplinary teams. See, e.g., Florida: FLA. STAT. ANN. § 822.07(10)(c) (1981); Indiana: IND. CODE ANN. § 31-6-11-14 (1980); Minnesota: MINN. STAT. ANN. § 626.558 (West Supp. 1983); Montana: MONT. CODE ANN. § 41-3-100 (1981); Virginia: VA. CODE § 63.1-248-6 (1980).

Moreover, local, state, regional and national conferences on child sexual abuse or child abuse are frequently held throughout the country, often with hundreds of participants. The Third National Conference on Sexual Victimization of Children, sponsored by the Children's Hospital in Washington, D.C. in the spring of 1984, had over one thousand participants. They expect from 2,000-3,000 attendees at their fourth conference in the spring of 1986 in New Orleans.

15. Jurisdictions which require appointment of victim advocates include Annapolis, Maryland; Cambridge, Massachusetts; Seattle, Washington. See also INNOVATIONS, *supra* note 2, at 2 (Based on survey findings, almost every prosecutor works with a victim/witness assistance program or social services agency to assist the child through the court process. Most jurisdictions reported that there is a social services or victim assistance program outside of the prosecutor's office with which the prosecutor works closely on child sexual abuse cases.)

necessity of state legislation.

Several articles in this issue describe the non-legislative changes that have occurred.¹⁶ Some commentators believe that the child victim can be supported during criminal proceedings without the need for drastic alternatives such as videotaping or closed-circuit television.¹⁷ One researcher points out that the trial experience may cause little trauma if pre-trial support is provided.¹⁸ Children, like adults, react differently to the aftermath of the judicial process.¹⁹ Indeed, some child sexual abuse experts believe that when the child is supported, testifying in court may have a therapeutic effect for some children.²⁰ Researchers have called for empirically based research studies to determine the actual emotional and psychological effects of legal intervention on child victims and to determine the special vulnerabilities of particular victims, as well as the effectiveness of legal reforms.²¹ The United States government has recently provided federal funding for such research projects.²² The need for and scope of special approaches would be more certain if empirical data showed how children actually react to specific legal procedures.²³

16. See Berliner, *infra* p. 167, (*The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167 (1985)); Cramer, *infra* p. 209, (*The District Attorney as a Mobilizer in a Community Approach to Child Sexual Abuse*, 40 U. MIAMI L. REV. 209 (1985)); Roe, *infra* p. 97 (*Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985)). See also INNOVATIONS, *supra* note 2 (description of twelve community programs that have developed coordinated, special approaches in child sexual abuse cases).

17. See Paper presented by Debbie Whitcomb, *Assisting Child Victims in the Courts: The Practical Side of Legislative Reform*, 1985 American Bar Association, National Policy Conference on Legal Reforms in Child Sexual Abuse Cases, Wash., D.C. (March 8-9, 1985).

18. Melton, *Child Witnesses and the First Amendment: A Psycholegal Dilemma*, 40:2 J. Soc. ISSUES 109, 116 (1984).

19. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40:2 J. Soc. ISSUES 125, 135 (1984); Libai, *supra* note 2, at 1015.

20. Berliner & Barbieri, *supra* note 19, at 135.

21. Melton, *supra* note 18, at 116-21.

22. For example, the National Center on Child Abuse and Neglect, in the United States Department of Health and Human Services, has recently funded large research projects on the effects of legal intervention for children. Program Announcement 50 Fed. Reg. 25,860 (1985). Other agencies are also funding such research projects.

23. CHILD SEXUAL ABUSE, *supra* note 2; V. DE FRANCIS, *PROTECTING THE CHILD VICTIM OF SEX CRIMES* (1969) (American Humane Association); Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in *SEXUAL ABUSE OF CHILDREN: SELECTED READINGS* 47 (1980) (National Center on Child Abuse and Neglect, United States Department of Health and Human Services); MacFarlane, *Sexual Abuse of Children*, in *THE VICTIMIZATION OF WOMEN* 81 (J. Chapman & M. Gates eds. 1978); Sgroi, *Introduction: A National Needs Assessment for Protecting Child Victims of Sexual Assault*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* xv (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi eds. 1978).

Nevertheless, although empirical research should be encouraged, it is clear from many who have worked closely with child victims that children often suffer trauma from insensitive legal procedures. Moreover, if as the Supreme Court of the United States noted in *Globe Newspaper*, it can be shown on a case by case basis that a particular child would suffer harm, special procedures would seem to be justified. From a social policy perspective, however, the issue may not be whether a child may be traumatized by the legal process, but whether children experience more severe emotional reactions than the average adult²⁴ in order to justify special procedures or laws. Indeed, alternatives similar to those advocated in child sexual abuse cases have been utilized or sought in cases involving other crimes, such as adult rape and kidnapping. For example, South Carolina has statutes allowing videotaped depositions for the testimony of adult rape victims. Courts also have admitted the former testimony of adult rape victims and child sexual offense victims in lieu of live trial testimony where the court found that testifying at trial would seriously jeopardize the health of the victim.²⁵ Further, many state statutes give courts discretion to close the courtroom, when necessary, to prevent emotional trauma to rape victims during their testimony.²⁶ Finally, in a case that has become important in the child sexual abuse area, in *United States v. Benfield*,²⁷ the Eighth Circuit addressed the issue of whether to admit videotaped testimony of a female kidnapping victim.²⁸ The court disallowed videotaped deposition because it was made outside the defendant's presence.²⁹

As a matter of social policy, it might be argued that protective legislation should apply to any crime victim who can show that without it, he or she would be severely traumatized by the legal process. As noted earlier, without research showing that children are more sensitive to trauma than other crime victims, it could be argued that they should not receive special legislative or govern-

24. Melton, *Child Witnesses and the First Amendment*, *supra* note 18. Melton states that "there is also reason to believe that children's responses might be *less* severe on the average than are adult's." *Id.* at 116 (emphasis added).

25. S.C. CODE ANN. §§ 15-28-20, 16-3-660, 16-3-670 (Law. Co-op. 1976); *People v. Gomez*, 26 Cal. App. 3d 225, 103 Cal. Rptr. 80 (1972); *Warren v. United States*, 436 A.2d 821 (App. D.C. 1981).

26. For a list of such provisions, see J. WIGMORE, *EVIDENCE IN TRIALS OF COMMON LAW* § 1835 (1976).

27. 593 F.2d 815 (8th Cir. 1979).

28. *Id.* at 817.

29. *Id.* at 821.

mental attention. A recent study of elderly crime victims showed that, contrary to popular belief, elderly victims recover from their victimization better than other crime victims.³⁰

Many of the articles in this issue point out that reforms may have potentially harmful consequences.³¹ When practitioners and scholars first identified the problems with the legal system's handling of child sexual abuse cases and suggested reforms, these early suggestions generally were not subject to close scrutiny or analysis. Even with relatively uncontroversial issues, such as the need to abolish the corroboration requirement, scholars and others later discovered unforeseen problems with the legal changes. For example, at the ABA's National Policy Conference, some participants pointed out that the corroboration requirement could be beneficial because it made it possible to explain to parents why their child's case could not be prosecuted. In the absence of such a requirement, the state may prosecute where the only evidence is the child's testimony. A possible unfortunate consequence of abolition of the requirement coupled with the increasing number of prosecutions is that many cases which previously were not prosecuted due to lack of corroboration may now result in acquittals.³²

Another area of reform with substantial support is the movement to abolish competency tests for children and to replace it with a presumption of competency.³³ Some participants at the Na-

30. K. FRIEDMAN, H. BISCHOFF, R. DAVIS & A. PERSON, *VICTIMS AND HELPERS: REACTIONS TO CRIME* (1982) (National Institute of Justice, United States Department of Justice); J. HERNON & B. FORST, *THE CRIMINAL JUSTICE RESPONSE TO VICTIM HARM* (1984) (National Institute of Justice, United States Department of Justice).

31. See Graham, *infra* p. 19 (*Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19 (1985) (defendants rights may be impinged when exceptions to rules of evidence are too liberally extended)); MacFarlane, *infra* p. 135 (*Diagnostic Evaluations and The Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985) (videotaped interviews reduce trauma but may impeach the child)); Mylniec & Dally, *infra* p. 115 (*See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering The Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115 (1985) (defendant's rights may be impinged when victim not face-to-face with defendant when testifying)); Roe, *infra* p. 97 (*Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985) (expert testimony can turn trial into battle of experts)); Comment, *infra* p. 217 (*Other Crimes Evidence to Prove the Corpus Delicti of a Child Sexual Offense*, 40 U. MIAMI L. REV. 217 (1985) (unrestricted admission of other crimes evidence would be prejudicial to defendants)).

32. See *supra* note 3.

33. See, MCCORMICK ON EVIDENCE § 62 (3rd ed. 1984); J. WIGMORE, *EVIDENCE IN TRIALS OF COMMON LAW* § 509 (1940); RECOMMENDATIONS, *supra* note 2, at 30; Melton, Bulkley & Wulkan, *Competency of Children as Witnesses*, in AMERICAN BAR ASSOCIATION, *CHILD SEXUAL ABUSE AND THE LAW* 134 (J. Bulkley, ed.); see also Melton, *Children's Competency to Testify*, 5 LAW & HUM. BEHAVIOR 73 (1981). Deans Wigmore and McCormick long have

tional Policy Conference pointed out that a competency hearing could be beneficial for other reasons. For example, it could show that the child is a good witness or provide the child with a sense of confidence so that he or she might become a *better* witness at trial. Further, if the judge specifically determines that the child is competent, this determination may encourage the judge or jury to believe that the child is also a credible witness. Finally, as with abolishing the corroboration requirement, abolishing competency requirements may lead to an increase in the number of cases that are prosecuted, especially those involving two, three and four year old witnesses. Unfortunately, there is a risk that even if the court assumes that these children are competent, the jury may still acquit the defendant if they do not perceive the child as a credible witness.

Other areas addressed in this issue, such as videotaped interviews,³⁴ expert testimony,³⁵ and videotaping or televising a child's testimony,³⁶ raise problems as well as provide solutions. Admission of expert testimony on the characteristics of the victim or offender, or on the credibility of the child witness raise problems. Some psychologists recommend that expert testimony should not be admitted for these purposes. One psychologist contends that experts should not be permitted to conclude, while being questioned, that a victim exhibits the characteristics of the "sexually abused child syndrome" and therefore have been sexually abused.³⁷ The psychologist argues that this conclusion is not reasonable because not all victims possess such characteristics, and many persons who do possess them have not been abused, but instead may be suffering

argued that children of any age should be allowed to testify without prior qualification. Dean McCormick notes that "the remedy of excluding such a witness, who may be the only person who knows the facts, seems inept and primitive." McCORMICK, *supra*, § 62, at 156. See also Comment, *infra* p. 245 (*The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon it?*), 40 U. MIAMI L. REV. 245 (1985)).

34. MacFarlane, *infra* p. 135 (*Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985)).

35. Roe, *infra* p. 97 (*Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985)).

36. Mylniec & Dally, *infra* p. 115 (*See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115 (1985)).

37. Presentation by Gary Melton, *Establishing Children's Competency and Credibility to Stand Trial*, National Institute on Child Sexual Abuse Victims, National Council of Juvenile and Family Court Judges, Kansas City, Missouri (Aug. 18-21, 1985) (Director, Law-Psychology Program, University of Nebraska); accord Roe, *infra* p. 97 (*Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985)).

from other psychological problems.³⁸

When prosecutors use this type of evidence to show that a child was abused, defense lawyers may also put on mental health experts to say that the child could not have been abused because the child does not have the characteristics of the sexually abused child syndrome. The Child Sexual Abuse Law Reform Project recently learned of cases in which the defense has used such experts. As noted in this issue, expert testimony on offender characteristics is even more problematic.³⁹ Aside from its legal inadmissibility as character evidence (evidence showing the defendant possesses certain characteristics common to sex offenders), it raises serious questions about whether it is statistically probable that an individual with certain characteristics is likely to be a sexual offender.⁴⁰

The delicate nature and balance of the trial process must also be considered when suggesting alternatives to a child's testimony in open court, or when admitting a child's out-of-court statement of abuse under a special hearsay exception.⁴¹ According to McCormick, "In order to encourage witnesses to put forth their best efforts and to expose inaccuracies . . . [in perception, memory and narration], the Anglo-American tradition evolved three conditions under which witnesses ordinarily will be required to testify: oath, personal presence at the trial and cross-examination."⁴² The due process clause of the fourteenth amendment, in addition to the specific constitutional rights guaranteed to all defendants in criminal trials (for example, sixth amendment right to jury and public trial, right to be confronted with witnesses, and right to compulsory process) protects defendants in these cases. The due process clause accords a presumption of innocence to persons accused of crimes. The state has the burden of proving the defendant's guilt beyond a reasonable doubt. In addition, the defendant has the right to a fair trial, which includes the right to demand proof by reliable, trustworthy evidence. For this reason, the criminal courts adhere strictly to the rules of evidence in criminal courts, particularly the rule against admitting hearsay.

Another possible due process issue arises when the defendant

38. Presentation by Gary Melton *supra* note 37.

39. See Roe, *infra* p. 97 (*Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985)).

40. See Hall v. State, 692 S.W.2d 769 (Ark. Ct. App. 1985); State v. Maule, 35 Wash. App. 287, 667 P.2d 96, (1983). See also Roe, *supra* note 35 at 97.

41. See Graham, *infra* p. 19 (*Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecution*, 40 U. MIAMI L. REV. 19 (1985)).

42. MCCORMICK ON EVIDENCE § 245, at 726-27 (1984).

represents himself and the court permits the child to testify by closed-circuit television or videotaping.⁴³ In addition to the problem created for defendants who exercise their constitutional right to assistance from counsel and thereby forego the right of confrontation, it may be argued that it is discriminatory and violates due process to limit the defendant's presence only when the defendant is represented by counsel.⁴⁴

With respect to other constitutional rights, defendants often claim their right of confrontation is violated when the prosecution uses closed-circuit television, videotaped depositions or other methods that prevent the child from having to see the defendant while testifying. One debate at the National Policy Conference touched on the issue of the effect of the televised testimony on the jury, and whether it diminished or enhanced the witness' credibility.⁴⁵ These procedures may violate the defendant's right to a jury or public trial, if, for example, evidence is distorted or not fully conveyed (especially the witness' demeanor) to the jury.⁴⁶ Other authors have suggested that a suitable "child courtroom" should be constructed.⁴⁷

In terms of confrontation, two authors in this publication, other commentators and some courts believe that the reliability requirement of the confrontation right will be satisfied without the defendant's presence, if the child has been cross-examined under oath and if the jury has had an opportunity to view the child's demeanor.⁴⁸ In contrast, other courts and commentators suggest

43. See Mlyniec & Dally, *infra* p. 115 (*See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?* 40 U. MIAMI L. REV. 115 (1985)).

44. *Id.*

45. Paper presented by Josephine Bulkley, *Summary of Conference Papers and Discussion*, 1985 American Bar Association, National Policy Conference on Legal Reforms in Child Sexual Abuse Cases, Wash., D.C. (Mar. 8-9, 1985).

46. *Hocheheiser v. Superior Court*, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984); *Brakel, Videotape in Trial Proceedings: A Technological Obsession?*, 61 A.B.A. J. 956 (1975); *Doret, Trial By Videotape—Can Justice Be Seen To Be Done?*, 47 TEMP. L.Q. 228 (1974); *Comment, The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. REV. 567 (1976).

47. *Comment, Libai's Child Courtroom: Is It Constitutional?*, 7 JUV. L. 31 (1983).

48. *Graham, infra* p. 19 (*Indicia of Reliability and Face to Face Confrontation Emerging Issues in Child Sexual Abuse Projections*, 40 U. MIAMI L. REV. 19 (1985)); Mlyniec & Dally, *infra* p. 115 (*See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115 (1985)). *See also State v. Strable*, 313 N.W.2d 497 (Iowa 1981); *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984); 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1396 (1974). *Dean Wigmore* states, "If there has been a cross-examination, there has been a confrontation." *Id.* at 154. He also states that requiring the personal appearance of the wit-

that the right of confrontation is satisfied only if the child and defendant can see and hear each other.⁴⁹ The traditional hearsay exception for former testimony or depositions has three requirements: (1) unavailability of the witness at the time of the trial; (2) cross-examination of the witness; and (3) presence of the defendant.⁵⁰ If this issue reaches the Supreme Court of the United States, the Court may require the defendant's presence, in addition to unavailability and reliability, in order to admit pre-recorded videotaped testimony or testimony by closed-circuit television of a child victim. In support of a defendant's constitutional right to self-representation has stated:

The sixth amendment does not provide merely that a defense shall be made for the accused; it grants the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with witnesses against him,' and who must be 'accorded compulsory process for obtaining witnesses in his favor.'⁵¹

In most reform areas, it appears that the benefits outweigh the detriments. Perhaps even with positive changes, one may expect some negative aspects. If controversial reforms are applied on a case-by-case basis, many of the problems may not exist. For example, some have contended that if the child is intimidated by the defendant, the child may find it more difficult to videotape a depo-

ness does not mean the opponent and witness must confront each other, but that the witness must be present before the tribunal. *Id.*

At least 20 videotaping and closed circuit television statutes either authorize or require that the defendant be excluded, or do not allow the child to see the defendant, but provide for jury viewing of the testimony and cross-examination of the child. For the citations to these statutes, see *supra* note 10. The following states have statutes regarding videotaped testimony or closed circuit television of a child victim's testimony which state that the defendant may or must be hidden from the child's view: Connecticut, Delaware, Florida, Kansas, Kentucky, Louisiana, Maryland, Missouri, New Jersey, Oklahoma, Rhode Island, Vermont (only for closed circuit television testimony, defendant is present during videotaped testimony), and Texas. *Id.* A few states have statutes that say nothing about the defendant's presence, including Nevada, Maine, and Utah. The Wisconsin statute states that the judge must decide who is present, the defendant is not mentioned at all. In Kentucky and Texas, however, two courts have held that videotaping and television statutes violate the confrontation clause. *Commonwealth v. Willis*, No. 84 CR 346 (Ky. Cir. Ct. Feb. 20, 1985); *Powell v. Slater*, No. 05-84-00646-CR (Ct. App. Tex. 5th Dist. May 28, 1985).

49. See, e.g., *United States v. Benfield*, 593 F.2d 815, 821-22 (8th Cir. 1979); *Commonwealth v. Willis*, No. 84 CR 346 (Ky. Cir. Ct. Feb. 20, 1985); *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975); *Powell v. Slater*, No. 05-84-00646-CR (Ct. App. Tex. 5th Dist. May 28, 1985); Bulkley, *Evidentiary and Procedural Trends*, *supra* note 9, at 651-52.

50. See *supra* note 33, § 253, at 753-58.

51. *Faretta v. California*, 422 U.S. 806, 819 (1975).

sition in the presence of the defendant, pursuant to some state legislation, than to testify in a courtroom.⁵² A videotaped deposition may be proper, however, if the child is likely to suffer serious psychological harm from testifying at trial in front of the jury, judge, and public, or where the courtroom setting would be so intimidating as to render the child unable to communicate.⁵³ As noted earlier, when a particular approach raises possible violations of constitutional rights, the court should decide on a case-by-case basis whether the approach is necessary because of harm to a particular victim.

Although this journal tackles many of the key legal problems in child sexual abuse cases, it leaves other areas for future exploration. For example, civil tort litigation is rapidly gaining popularity as a remedy for child sexual abuse.⁵⁴ In those cases, plaintiffs range from multiple victims of abuse by school personnel, day care teachers, and priests, to adult victims of incest. These new actions raise many problems for commentators to examine, including deposition of victims, parental immunity,⁵⁵ statutes of limitation,⁵⁶ insurance company coverage, increased costs, and lengthy litigation.⁵⁷

Another area of concern involves sexual abuse allegations in divorce and custody actions. Experts believe, in part due to the increased awareness of the problem of child abuse, that a vindictive parent could influence his or her child to falsely accuse the other parent.⁵⁸ Others believe that domestic relations courts often ignore valid sexual abuse complaints made by children. Domestic relations courts need to be educated about the dynamics of child sexual abuse. Furthermore, there are issues concerning jurisdiction of and coordination between the juvenile and domestic relations courts that need to be examined and resolved. Indeed, a federal grant was recently jointly awarded to the American Bar Associa-

52. Whitcomb, *supra* note 17, at 19.

53. See MacFarlane, *infra* p. 135 (*Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985)).

54. Salten, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189 (1984); Sawyer, *Priest's Child-Molestation Case Traumatizes Catholic Community*, Washington Post, June 9, 1985, at A6, col. 1; Curry, *Incest: The Victim Fights Back, Some File Suits for Damages*, L.A. Times, May 21, 1982, at V1, col. 1.

55. Note, *Parental Immunity Doctrine*, 7 J. Juv. L. 267 (1983); Note, *The Parent-Child Immunity Doctrine*, 5 J. Juv. L. 75 (1981).

56. Salten, *supra* note 54, at 203.

57. *The Youngest Witnesses*, Newsweek, Feb. 18, 1985, at 72.

58. See, e.g., Paper presented by E. Benedek & D. Schetky, *Allegations of Sexual Abuse in Child Custody Cases*, Annual Meeting of the American Academy of Psychiatry and the Law, Nassau, Bahamas (Oct. 26, 1984).

tion's National Legal Resource Center for Child Advocacy and Protection and to the Association of Family and Conciliation Courts for the development of educational materials for domestic court judges and personnel who must resolve child sexual abuse allegations.

Hopefully, this special issue of the *University of Miami Law Review* will expose readers to new ways of thinking about how changes in our legal system can accommodate the needs of child victims who must be witnesses, while making efforts to preserve the basic constitutional framework of our criminal justice system. Because many of these issues are very new, they will not be settled for some time to come. These issues cut across many substantive areas of law and are heavily intertwined with other disciplines, especially the social sciences. For this reason, it is particularly difficult to establish a body of knowledge known as "child sexual abuse law." Child sexual abuse cases, however, do present special problems in our legal system and perhaps with more time and serious academic attention, some fundamental and generally acceptable legal principles can be established.