MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Brown, on February 28, 1989, at 8:00 a.m.

ROLL CALL

Members Present: All members were present with the following exceptions:

Members Excused: Rep. Daily and Rep. Hannah.

Members Absent: None.

Staff Present: Julie Emge, Secretary
John MacMaster, Legislative Council

Announcements/Discussion: Rep. Brown announced the committee would hear SB 204, SB 23, SB 103, SB 140, SB 170 and then take executive action.

HEARING ON SENATE BILL 204

Presentation and Opening Statement by Sponsor:

Sen. Norman opened the hearing saying this bill relates to organ transplants and the Anatomical Gift Act. The bill is primarily a revision of law. The new law is necessitated because we have to adjust the concepts and the laws to the changing realities of modern technology. There is a uniform code commission. It functions in child custody, divorce, inheritance and other matters that are spread among the states. There's different language and concepts in the various state statutes. The uniform code commission was established to bring uniformity to these so that if a child custody case or anatomical gift case were considered in one state and the parties to litigation were in another state or scattered among states, the states would be better able to deal with the problem. This uniform code applies to the Anatomical Gift Act. There are many doctors and lawyers involved in this bill and understandably so. The doctors are interested in attending to the health and welfare of people with organ transplants and the lawyers find some difficulty with this because of privacy rights and individual rights. There isn't any great controversy but it requires some understanding. There are three coordinators in Montana; Great Falls, Missoula and Billings. When an organ may be available, one of these coordinators is summoned and a team is gathered with the idea of obtaining

the organ. A kidney may be removed at the local level by a vascular surgeon, packed with ice and sent to a donor but for other organs it is necessary that more knowledge or experience be available so a team would fly in from Seattle or Salt Lake or some major city facility. There have been no transplants in Montana. There were 13 donors in Montana. They provided hearts, livers, kidneys and corneas. According to federal law you cannot buy or sell organs or bodily parts. This bill has been extensively amended but the crux of the legislation is to extend the availability of organs and to do so in a timely fashion.

Testifying Proponents and Who They Represent:

Bob Sullivan, Commissioner to Uniform Laws Conference
Charles Gravely, Montana Coroners Association
Mickey Nelson, Montana Coroners Association
Jerry Loendorf, Montana Medical Association

Proponent Testimony:

Bob Sullivan spoke in favor of SB 204 (See EXHIBIT 1). Mr. Sullivan provided the committee with proposed amendments (EXHIBIT 2) and an editorial from the Fall 1988 Uniform Law Commissioners "Uniform Activities" (EXHIBIT 3).

Charles Gravely, on behalf of the Montana Coroners Association, spoke in support of SB 204. He offered an amendment to page 19, line 10. The words "dead or" would be stricken.

Mickey Nelson, Lewis and Clark County Coroner, spoke in favor of SB 204. The amendment Charles Gravely proposed is very important to the Montana Coroners Association. Mr. Nelson presented a copy of the proposed amendment (EXHIBIT 4). If this amendment does not pass, we will have nothing but problems in the field. He provided a scenario of what happens. When we have people who are obviously dead such as decapitation, this may not preclude organ donation but at the same time it does set up a situation where when wallets, purses, and personal property are searched for, it seems to be phenomena that everyone needs to take a look. However, no one ever replaces or gets to the proper person. Each of us has an inherent feeling that personal property, particularly wallets and purses, is very sacred to us. Many times they have no value and the purpose of this law is not for the value of the donor card but for things along the line of cash, photos and things that cannot be replaced. Most family members want those things no matter how badly they may be mutilated or stained or whatever. What typically happens is one ambulance attendant or law enforcement officer takes a piece of property and then the next one arrives and wants to look at it, the next one arrives and wants to see it and pretty soon it gets put on the dashboard of somebody's car, they go home, nobody knows what to do with it and then a family is after me wanting to

know what happened to this piece of property. The bottom line is I go on a search which is usually successful as far as finding the property but then there is always an element of doubt because of how much money may be there, what happened to a photo or whatever the case may be. This amendment is very minimal and we feel that changing that does nothing except enhance the act.

Jerry Loendorf supported SB 204 on behalf of the Montana Medical Association.

Testifying Opponents and Who They Represent:

None.

Opponent Testimony:

None.

Questions From Committee Members:

No questions were asked.

Closing by Sponsor: Sen. Norman closed saying there are enormous benefits from anatomical gifts. They are literally life saving at times but the person's own desires are paramount.

DISPOSITION OF SENATE BILL 204

Motion: Rep. Addy moved SB 204 BE CONCURRED IN. Rep. Stickney seconded the motion.

Amendments, Discussion, and Votes: Rep. Addy moved Mr. Sullivan's amendments. Rep. Knapp seconded the motion.

The motion to amend CARRIED unanimously.

Rep. Nelson moved an amendment. Rep. Rice seconded.

The motion FAILED with Rep. Gould and Rep. Rice voting aye.

Recommendation and Vote: Rep. Addy moved SB 204 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Strizich. A vote was taken on the motion and CARRIED with a unanimous vote.

HEARING ON SENATE BILL 23

Presentation and Opening Statement by Sponsor:

Sen. Jergeson opened the hearing saying that SB 23 serves the purpose of providing that a victim of a sex crime can offer videotape testimony on any other crimes that are associated with the sex crime. As often as not, when such a crime is committed, there are other crimes involved such as breaking and entering, kidnapping, perhaps burglary, and

this bill would provide that the victim could testify about those via videotape. The reason Montana allowed videotape testimony several years ago is that it is clear that the victim of a sex crime is often very much intimidated and afraid of the assailant. This is a broadening of the former act. It still covers the rights of the defendants.

Testifying Proponents and Who They Represent:

John Connor, Montana County Attorney's Association, Department of Justice
Michael Sherwood, Montna Trial Lawyers Association
Jerry O'Neal, President of Vocal of Montana
Earl Riley, citizen from Helena

Proponent Testimony:

John Connor said this is a bill that was requested by the County Attorneys Association to address a problem that exists in the statute relating to the videotaping of testimony by the victims of sex crimes. We've had, in Montana, a statute allowing the videotaping of victims of sex crimes since 1977. Originally it was enacted only to cover crimes of sexual intercourse without consent but it has been amended twice since 1977 to cover virtually all of the sex crimes that are felony offenses that are contained in the Montana code. There are some procedural requirements that have to be met before this videotaping can occur. It has to be done at the request of the victim with the consent of the county attorney. If that is done, then the taping is done in the presence of the defendant and the defendant's lawyer and the judge. Cross examination is conducted so all the procedural safeguards that are made available to the defendant in court as it relates to the trial, are available to the defendant when it comes to the videotaping of the testimony. This is not a prosecutor's bill. It is not designed to allow the prosecutor to hurt the defendant. It's designed to protect the victim and to encourage the victim to testify in crimes where she is a victim.

Michael Sherwood rose in support of SB 23. He told the committee he tried a homicide case two years ago and his worst nightmare was that a critical witness was ill in Denver and he had to videotape the testimony. You don't like videos if you can get live people. It is true on the defense side that I would rather have the complaining witness videotaped than on the stand. They don't look as good and it doesn't evoke as much sympathy on the video. It does, however, allow some cases to go to trial that may not go to trial. It doesn't give the prosecution any edge though.

Jerry O'Neal spoke in favor of SB 23 but proposed an amendment. (See EXHIBIT 5) Mr. O'Neal also presented a letter from Patricia Jacobson (EXHIBIT 6), a letter from Richard and Pamela Rough (EXHIBIT 7) and an analysis of audio and

videotapes of documented interrogations in sexual abuse of children. (See EXHIBIT 8)

Earl Riley urged caution and safeguard. He said the videotape may be desirable and necessary but precautions must be taken. He said sex crimes are the one kind of crime where the punishment goes with the accusation. The accusation is 95% of the conviction.

Testifying Opponents and Who They Represent:

None.

Opponent Testimony:

None.

Questions From Committee Members:

Rep. Boharski said he is unclear how this would work in the courtroom. He asked if the prosecuting attorney decides the victim can't testify in court but they need the testimony so it would be videotaped. Sen. Jergeson responded that the victim would have to request the use of videotape. The prosecutor cannot require the victim to do that.

Rep. Eudaily, referring to the amendment the Senate put on the bill asked John Connor how that amendment helped the bill. John Connor said when the bill was drafted by the County Attorney's Association the language as you see it in terms of the Senate amendment was essentially what was requested. When the draft request came out of legislative council it had been changed around to the deleted language there and we thought that from a technical standpoint that was not the most precise language.

Closing by Sponsor: Sen. Jergeson closed the hearing saying that were the house to amend the bill as proposed by Mr. O' Neal he would oppose the amendments on the Senate floor. This bill has nothing to do with expert witnesses and hearsay evidence. It is clear in its intent and to amend it otherwise would change the intent so much that it would violate my intent.

DISPOSITION OF SENATE BILL 23

Motion: Rep. Addy moved SB 23 BE CONCURRED IN. Rep. McDonough seconded the motion.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: A vote was taken on the motion and CARRIED unanimously.

HEARING ON SENATE BILL 140

Presentation and Opening Statement by Sponsor:

Sen. Jergeson opened the hearing saying that SB 140 would provide that P2P would be considered a drug precursor on its own without having to be a precursor held at the same time as another precursor. Currently P2P is a controlled substance. This would increase the penalty for possession of P2P.

Testifying Proponents and Who They Represent:

John Connor, Department of Justice, Montana County Attorneys Association

Proponent Testimony:

John Connor said this bill was introduced at the request of the County Attorneys Association to address an increasingly serious problem with the manufacture of methamphetamine in the state.

Testifying Opponents and Who They Represent:

None.

Opponent Testimony:

None.

Questions From Committee Members:

Rep. Boharski said there seems to be an inconsistency with this bill. He asked why, under all the other sections, are there"with the intent to manufacture" and in this bill it's not included? Sen. Jacobson said the other substances listed in that statute are not controlled substances in and of themselves so possession of those substances is not illegal.

Rep. Addy said you make it illegal to possess P2P and then you make it illegal to possess it in combination with two other drugs. If it's illegal to possess P2P, isn't it redundant to say it's illegal to possess P2P in combination with another substance? John Connor said that is true.

Closing by Sponsor: Sen. Jergeson closed.

DISPOSITION OF SENATE BILL 140

Motion: Rep. Addy moved SB 140 BE CONCURRED IN. Rep. Gould seconded the motion.

Amendments, Discussion, and Votes: Rep. Addy moved to amend so that instead of a, b, and c under 1, 1 would just read "a person commits the offense of criminal possession if he possesses P2P with the intent to manufacture amphetamines or methamphetamines". Rep. Gould seconded the motion.

Rep. Mercer moved to keep sub a "P2P with the intent to manufacture either amphetamines or methamphetamines or both" then have; or and turn d into b. Rep. Addy said he would agree and accepted Rep. Mercer's motion to amend. Rep. Gould seconded the motion.

The motion to amend CARRIED unanimously.

Recommendation and Vote: Rep. Addy moved SB 140 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Gould. Motion CARRIED unanimously.

HEARING ON SENATE BILL 170

Presentation and Opening Statement by Sponsor:

Sen. Jergeson opened the hearing stating that a judge is allowed to designate an offender as dangerous or non dangerous upon conviction if the person is being sentenced to serve time in prison. However, if the defendant is not sentenced to serve time but is given probation or some other kind of sentence, there is no designation of whether or not that person is dangerous or non dangerous. Occasionally law enforcement has found later, while the person is serving the probationary period, the person does something which causes consideration of sending the offender on to prison. The judge is not allowed to declare the offender as dangerous or non dangerous at that time. So, the assumption is that the offender is non dangerous. SB 170 provides an opportunity for the judge to weigh the issues and determine at the time the probation is revoked, whether or not the person should be declared a dangerous offender.

Testifying Proponents and Who They Represent:

John Connor, Department of Justice

Proponent Testimony:

John Connor told the committee this bill was requested to deal with a problem in terms of determination of parole eligibility. Section 46-23-201 provides that a person cannot be paroled until he has served one half of his time less good time. The statute also says if a person is designated as a non dangerous offender he is eligible for parole after serving one fourth of his time. The court has to make a determination at the time the defendant is sentenced, then, as to whether or not he is dangerous or non dangerous. If there is no designation made, according to

the statute the person is assumed to be non dangerous. The problem this bill is trying to address occurs because of the fact that in most cases people are not sent to prison, they are put on probation. So, when they appear for sentencing no determination of dangerous or non dangerous appears in the judgment. They are simply given a suspended or deferred sentence with conditions imposed and the question of dangerous or non dangerous is not addressed. If the person then violates probation and comes back before the court on a revocation proceeding, the court is prohibited from making a determination of dangerous or non dangerous.

Testifying Opponents and Who They Represent:

None.

Opponent Testimony:

None.

Questions From Committee Members:

No questions were asked.

Closing by Sponsor: Sen. Jergeson closed.

DISPOSITION OF SENATE BILL 170

Motion: Rep. Gould moved SB 170 BE CONCURRED IN. Rep. Addy seconded the motion.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: A vote was taken on the motion and CARRIED unanimously.

HEARING ON SENATE BILL 103

Presentation and Opening Statement by Sponsor:

Sen. Jergeson opened the hearing saying the original bill said a person who is injured in the commission of a felony or while fleeing from the commission of a felony could not sue to recover damages. The Senate added amendments before sending it to the House. Currently a judge, when he is sentencing a person who has been convicted of a crime, has the right to deny that particular offender some of their civil rights including the right to sue people for injuries he has sustained. This bill would make it mandatory rather than leaving it to the judge's discretion.

Testifying Proponents and Who They Represent:

John Connor, Department of Justice and Montana County Attorneys Association

Proponent Testimony:

John Connor said he does have some concern with the legal and constitutional rights of criminal defendants and doesn't think it should be the purpose of prosecutors to do what they can to make life totally miserable for criminal defendants. This bill is viewed by the County Attorneys Association as a victim's rights bill. He believes this bill does something to enhance the position of the victim in criminal offenses. In its introduced form, there did appear to be some constitutional problems. Those have been addressed by limiting the application of the restrictions which were contained in the original bill. Mr. Connor told the committee he believes Mr. Sherwood's sample cases which support his contention that this bill is unconstitutional, are of situations much broader than what this bill involves.

Testifying Opponents and Who They Represent:

Michael Sherwood, Montana Trial Lawyers Association

Opponent Testimony:

Michael Sherwood spoke in opposition to SB 103 (See EXHIBIT 9). Mr. Sherwood also provided the committee with sample cases to support his testimony (EXHIBITS 10, 11, and 12).

Questions From Committee Members:

Rep. Boharski asked if the intent of this bill was to protect the victim of a crime from civil action. Sen. Jergeson said that was correct.

Rep. Boharski asked Mr. Connor if it wouldn't be more appropriate to put this in the section of code somewhere that stated "the victim of a criminal offense may not be held liable for civil damages incurred". John Connor said that after the Senate Judiciary hearing there were amendments considered which were along those lines. Sen. Jergeson chose to pursue this line with the bill because he felt it more important to make the bill more inclusive and less restrictive in its application.

Rep. Addy said he's concerned about situations in which deadly force might be used. He said it's his understanding that the present law justifies a peace officer or person to use deadly force in defense of themselves or to defend others from death or bodily harm. If this were to pass it would be hunting season for the police. He asked Sen. Jergeson if that was correct. Sen. Jergeson said what he's particularly interested in is that victims not feel they need to use force to defend themselves. At this point even those who have used no force at all have no protection from a lawsuit. John Connor said he doesn't believe this bill would

encourage a police officer to shoot. Their job is to apprehend, not shoot the defendant.

Closing by Sponsor: Sen. Jergeson suggested that the responsibility of legislators is to exercise sound judgment and common sense and that's the spirit in which this bill is introduced.

DISPOSITION OF SENATE BILL 103

Motion: Rep. Aafedt moved SB 103 BE CONCURRED IN. Rep. Gould seconded the motion.

Discussion: Rep. Boharski said this bill is out of hand but what the sponsor is after is a good idea. We need to make sure we relieve the victim of a crime from civil damages.

Amendments, Discussion, and Votes: Rep. Boharski moved to amend page 3, end of line 8, insert the words "as a result of an act or failure to act by a victim of the offense". Thus, if the felon has sustained his injuries because of an act or failure to act by one of the victims, then he can't sue the victim. Rep. Addy seconded the motion.

Rep. Mercer said the amendment is an improvement over what the bill says but it still leaves many of the fundamental flaws. Rep. Knapp said the bill is good in its present form but we should give an effort to make it better. Rep. Mercer, Rep. Knapp and Rep. Boharski discussed several examples that the bill could impact.

Rep. Boharski withdrew the motion to amend the bill.

Recommendation and Vote: Rep. Boharski moved to TABLE HB 103, motion seconded by Rep. Mercer. Motion CARRIED with Rep. Gould voting against the motion.

ADJOURNMENT

Adjournment At: 10:30 a.m.

REP. DAVE BROWN, Chairman

DB/je

4708.min

DAILY ROLL CALL

JUDICIARY COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date FEBRUARY 28, 1989

NAME	PRESENT	ABSENT	EXCUSED
REP. KELLY ADDY, VICE-CHAIRMAN	X		
REP. OLE AAFEDT	X		
REP. WILLIAM BOHARSKI	X		
REP. VIVIAN BROOKE	X		
REP. FRITZ DAILY			X
REP. PAULA DARKO	X		
REP. RALPH EUDAILY	X		
REP. BUDD GOULD	X		
REP. TOM HANNAH			X
REP. ROGER KNAPP	X		
REP. MARY McDONOUGH	X		
REP. JOHN MERCER	X		
REP. LINDA NELSON	X		
REP. JIM RICE	X		
REP. JESSICA STICKNEY	X		
REP. BILL STRIZICH	X		
REP. DIANA WYATT	X		
REP. DAVE BROWN, CHAIRMAN	X		

CORRECTED STANDING COMMITTEE REPORT

March 1, 1989

Mr. Speaker: We, the committee on Judiciary report that SENATE BILL 204 (blue reference copy) be concurred in as amended .

Signed: _____
Dave Brown, Chairman

[REP. STICKNEY WILL CARRY THIS BILL ON THE HOUSE FLOOR]

And, that such amendments read:

1. Page 11, line 11.
Strike: "NURSE,"

2. Page 12, line 19.
Strike: "(C)"

3. Page 18, line 10.
Following: line 9
Insert: "(1) On or before admission to a hospital, or as soon as possible thereafter, a person designated by the hospital shall ask each patient who is at least 18 years of age: "Are you an organ or tissue donor?" The designated person shall then make available to a person who answers in the negative basic information regarding the option to make or refuse to make an anatomical gift. The question must be asked, and the basic information must be made available, with reasonable discretion and sensitivity to the circumstances of the patient and is not required if a gift is not suitable, based upon accepted medical standards, for a purpose specified in 72-17-202 or if there are medical or emotional conditions under which the question or the information would contribute to severe emotional distress. If the answer is affirmative the person shall request a copy of the document of gift. The answer to the question, an available copy of any document of gift or refusal to make an anatomical gift, and any other relevant information, must be placed in the patient's medical record."
Renumber: subsequent subsections

STANDING COMMITTEE REPORT

February 28, 1989

Mr. Speaker: We, the committee on Judiciary report that SENATE BILL 23 (blue reference copy) be concurred in .

Signed: _____
Dave Brown, Chairman

[TO BE SPONSORED BY REP. McDONOUGH]

STANDING COMMITTEE REPORT

February 28, 1989

Mr. Speaker: We, the committee on Judiciary report that SENATE BILL 140 (third reading copy -- blue) be concurred in as amended .

Signed: _____
Dave Brown, Chairman

[TO BE SPONSORED BY REP. MERCER]

And, that such amendments read:

1. Page 1, lines 15 and 18.
Strike: ";" on each line

2. Page 1, lines 16 and 17.
Strike: "(b) both" on line 16 through "time" on line 17

3. Page 1, lines 19 through 21.
Strike: "~~(b)~~ (c) both" on line 19 through "manufacture" on line 21
Insert: "or"

4. Page 1, line 21.
Following: "methamphetamine"
Insert: "or both"
Renumber: subsequent subsection

STANDING COMMITTEE REPORT

February 28, 1989

Mr. Speaker: We, the committee on Judiciary report that SENATE BILL 170 (blue reference copy) be concurred in .

Signed: _____
Dave Brown, Chairman

[TO BE SPONSORED BY REP. GOULD]

The Big Sky Country

2-28-89

MONTANA HOUSE OF REPRESENTATIVES

REPRESENTATIVE DAVE BROWN
HOUSE DISTRICT 72

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COMMITTEES:
JUDICIARY, CHAIRMAN
LOCAL GOVERNMENT
RULES

TO: John Vincent, Speaker of the House

FROM: Dave Brown, Chairman, House Judiciary Committee

DATE: Feb. 28, 1989

SUBJECT: Senate Bill 103

The House Judiciary Committee has TABLED SB 103 on Feb. 28, 1989.

DB/je

EXHIBIT 1
DATE 2-28-89
SB 204

S. B. # 204

Hearing before House Judiciary Committee 2/28/89
Proponent: Robert E. Sullivan
Suggested Amendments

1. to correct internal cross reference
   Section 8, page 12, line 19 - bracketed section
   delete ~~(c)~~ so that the cross reference will read [Section 11(1)]

2. To Remove as unnecessary and as creating uncertainty a word added by the Senate:
   Section 6, page 11, line 11 - middle of the line
   delete ~~nurse~~ so that the line will read enucleator, technician, or other person who acts in
   Comment: Nurse is not a defined term in the Act

3. to Restore with an amendment a sub section deleted by the Senate:
   Section 13, page 17, lines 22-25, page 18, lines 1-9
   delete, page 18, line 2 the sentence commencing ~~"If the answer is"~~, lines 3, 4 and 5, and the first word on line 6 ~~"Gift"~~
   Insert at the end of line 2 in place of the deletion:
   The person designated shall make available basic information regarding the option to make or refuse to make an anatomical gift

EXHIBIT 12
DATE 2-28-89
HB SB 204

THE SENATE
FOURTEENTH LEGISLATURE, 19 88
STATE OF HAWAII

S.B. NO. 1541 S.D. 2 H.D. 2 C.D. 1

A BILL FOR AN ACT

RELATING TO HEALTH.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 327, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

"PART I. UNIFORM ANATOMICAL GIFT ACT

§327-1 Definitions. As used in this chapter:

"Anatomical gift" means a donation of all or part of a human body to take effect upon or after death.

"Decedent" means a deceased individual and includes a stillborn infant or fetus.

"Document of gift" means a card, a statement attached to or imprinted on a motor vehicle operator's or chauffeur's license, a will, or other writing used to make an anatomical gift.

"Donor" means an individual who makes an anatomical gift of all or part of the individual's body.

"Enucleator" means an individual who has successfully completed a course of training acceptable to the board of medical examiners to remove or process eyes or parts of eyes.

"Hospital" means a facility licensed, accredited, or approved as a hospital under a state law.

"Part" means an organ, tissue, eye, bone, artery, blood, fluid, or other portion of a human body.

"Person" means an individual, corporation, business trust, estate, trust, partnership, joint venture, association, government, governmental subdivision or agency, or any other legal or commercial entity.

"Physician" or "surgeon" means an individual licensed or otherwise authorized to practice medicine and surgery under chapter 453 or osteopathy and surgery under chapter 460.

"Procurement organization" means a person licensed, accredited, or approved under the laws of any state for procurement, distribution, or storage of human bodies or parts.

"State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

"Technician" means an individual who, under the supervision of a licensed physician, removes or processes a part.

§327-2 Making, amending, revoking, and refusing to make anatomical gifts by individual. (a) An individual who is at least eighteen years of age may:

(1) Make an anatomical gift for any of the purposes stated in section 327-6;

(2) Limit an anatomical gift to one of those purposes; or

(3) Refuse to make an anatomical gift.

(b) An anatomical gift may be made only by a document of gift signed by the donor. If the donor cannot sign, the document of gift shall be signed by another individual and by two witnesses, all of whom have signed at the direction and in the presence of the donor and of each other, and state that it has been so signed.

(c) If a document of gift is attached to or imprinted on a donor's motor vehicle operator's or chauffeur's license, the document of gift shall comply with subsection (b). Revocation, suspension, expiration, or cancellation of the license shall not invalidate the anatomical gift.

(d) A document of gift may designate a particular physician or surgeon to carry out the appropriate procedures. In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the anatomical gift may employ or authorize any physician, surgeon, technician, or enucleator to carry out the appropriate procedures.

(e) An anatomical gift by will shall take effect upon death of the testator, whether or not the will is probated. If, after death, the will is declared invalid for testamentary purposes, the validity of the anatomical gift is unaffected.

(f) A donor may amend or revoke an anatomical gift, not made by will, only by:

(1) A signed statement;

(2) An oral statement made in the presence of two individuals;

(3) Any form of communication during a terminal illness or injury addressed to a physician or surgeon; or

(4) The delivery of a signed statement to a specified donee to whom a document of gift had been delivered.

(g) The donor of an anatomical gift made by will may amend or revoke the gift in the manner provided for amendment or revocation of wills, or as provided in subsection (f).

(h) An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death.

(i) An individual may refuse to make an anatomical gift of the individual's body or part by:

EXHIBIT 2
DATE 2-28-89
HB SB 204

S.B. NO. S.D. 2 H.D. 2 C.D. 1

(1) A writing signed in the same manner as a document of gift;

(2) A statement attached to or imprinted on a donor's motor vehicle operator's or chauffeur's license; or

(3) Any other writing used to identify the individual as refusing to make an anatomical gift. During a terminal illness or injury, the refusal may be an oral statement or other form of communication.

(j) In the absence of contrary indications by the donor, an anatomical gift of a part is neither a refusal to give other parts nor a limitation on an anatomical gift under section 327-3 or on a removal or release of other parts under section 327-4.

(k) In the absence of contrary indications by the donor, a revocation or amendment of an anatomical gift is not a refusal to make another anatomical gift. If the donor intends a revocation to be a refusal to make an anatomical gift, the donor shall make the refusal pursuant to subsection (i).

§327-3 Making, revoking, and objecting to anatomical gifts, by others. (a) Any member of the following classes of persons, in the order of priority listed, may make an anatomical gift of all or a part of the decedent's body for an authorized purpose, unless the decedent, at the time of death, has made an unrevoked refusal to make that anatomical gift:

(1) The spouse of the decedent;

(2) An adult son or daughter of the decedent;

(3) Either parent of the decedent;

(4) An adult brother or sister of the decedent;

(5) A grandparent of the decedent; and

(6) A guardian of the person of the decedent at the time of death.

(b) An anatomical gift may not be made by a person listed in subsection (a) if:

(1) A person in a prior class is available at the time of death to make an anatomical gift;

(2) The person proposing to make an anatomical gift knows of a refusal or contrary indications by the decedent; or

(3) The person proposing to make an anatomical gift knows of an objection to making an anatomical gift by a member of the person's class or a prior class.

(c) An anatomical gift by a person authorized under subsection (a) shall be made by:

(1) A document of gift signed by the person; or

(2) The person's telegraphic, recorded telephonic, or other recorded message, or other form of communication from

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the person that is contemporaneously reduced to writing and signed by the recipient.

(d) An anatomical gift by a person authorized under subsection (a) may be revoked by any member of the same or a prior class if, before procedures have begun for the removal of a part from the body of the decedent, the physician, surgeon, technician, or enucleator removing the part knows of the revocation.

(e) A failure to make an anatomical gift under subsection (a) is not an objection to the making of an anatomical gift.

§327-4 Authorization by medical examiner, coroner, coroner's physician, or director of health. (a) A medical examiner, coroner, or coroner's physician, as applicable, may release and permit the removal of a part from a body within that official's custody, for transplantation or therapy, if:

(1) The official has received a request for the part from a hospital, physician, surgeon, or procurement organization;

(2) The hospital, physician, surgeon, or procurement organization certifies that the entity or person making the request has made a reasonable effort, taking into account the useful life of the part, to locate and

examine the decedent's medical records and inform persons listed in section 327-3 of their option to make, or object to making, an anatomical gift;

(3) The official does not know of a refusal or contrary indication by the decedent or objection by a person having priority to act as listed in section 327-3;

(4) The removal will be by a physician, surgeon, or technician; but in the case of eyes, by one of them or by an enucleator;

(5) The removal will not interfere with any autopsy or investigation;

(6) The removal will be in accordance with accepted medical standards; and

(7) Cosmetic restoration will be done, if appropriate.

(b) If the body is not within the jurisdiction of a medical examiner, coroner, or coroner's physician, the director of health may release and permit the removal of any part from the body in the director's jurisdiction for transplantation or therapy if the requirements of subsection (a) are met.

(c) An official releasing and permitting the removal of a part shall maintain a permanent record of the name of the decedent, the person making the request, the date and purpose of

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the request, the part requested, and the person to whom it was released.

§327-5 Routine inquiry and required request; search and notification. (a) On or before admission to a hospital, or as soon as possible thereafter, a person designated by the hospital shall ask each patient who is at least eighteen years of age: "Are you an organ or tissue donor?" If the answer is affirmative the person shall request a copy of the document of gift. The person designated shall make available basic information regarding the option to make or refuse to make an anatomical gift. The answer to the question, an available copy of any document of gift or refusal, if any, to make an anatomical gift, and any other relevant information, shall be placed in the patient's medical record.

(b) If, at or near the time of death of a patient, there is no medical record that the patient has made or refused to make an anatomical gift, the hospital administrator or a representative designated by the administrator shall discuss the option to make or refuse to make an anatomical gift and request the making of an anatomical gift pursuant to section 327-3. The request shall be made with reasonable discretion and sensitivity to the circumstances of the family. A request is not required if the

gift is not suitable, based upon accepted medical standards, for a purpose specified in section 327-6. An entry shall be made in the medical record of the patient, stating the name and affiliation of the individual making the request, and of the name, response, and relationship to the patient of the person to whom the request was made. The director of health may adopt rules to implement this subsection.

change

(c) The following persons shall, at the person's discretion and if time and resources permit, and if doing so would be inoffensive to anyone in the vicinity of the body, make a reasonable search of the person and the person's immediate personal effects for a document of gift or other information identifying the bearer as a donor or as an individual who has refused to make an anatomical gift:

(1) A law enforcement officer, firefighter, paramedic, or other emergency rescuer attending an individual who the searcher believes to be dead or near death; and

(2) A hospital, upon the admission of an individual at or near the time of death, if there is not immediately available any other source of that information.

(d) If a document of gift or evidence of refusal to make an anatomical gift is located by the search required by subsection

(c)(1), and the individual or body to whom it relates is taken to a hospital, the hospital shall be notified of the contents and the document or other evidence shall be sent to the hospital.

(e) If, at or near the time of death of a patient, a hospital knows that an anatomical gift has been made pursuant to section 327-3 or a release and removal of a part has been permitted pursuant to section 327-4, or that a patient or an individual identified as in transit to the hospital is a donor, the hospital shall notify the donee if one is named and known to the hospital; if not, it shall notify an appropriate procurement organization. The hospital shall cooperate in the implementation of the anatomical gift or release and removal of a part.

(f) A person who fails to discharge the duties imposed by this section is not subject to criminal or civil liability but is subject to appropriate administrative sanctions.

§327-6 Persons who may become donees; purposes for which anatomical gifts may be made. (a) The following persons may become donees of anatomical gifts for the purposes stated:

(1) A hospital, physician, surgeon, or procurement organization, for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science;

(2) An accredited medical or dental school, college, or university for education, research, advancement of medical or dental science; or

(3) A designated individual for transplantation or therapy needed by that individual.

(b) An anatomical gift may be made to a designated donee or without designating a donee. If a donee is not designated or if the donee is not available or rejects the anatomical gift, the anatomical gift may be accepted by any hospital.

(c) If the donee knows of the decedent's refusal or contrary indications to make an anatomical gift or that an anatomical gift by a member of a class having priority to act is opposed by a member of the same class or a prior class under section 327-3, the donee may not accept the anatomical gift.

§327-7 Delivery of document of gift. (a) Delivery of a document of gift during the donor's lifetime is not required for the validity of an anatomical gift.

(b) If an anatomical gift is made to a designated donee, the document of gift, or a copy, may be delivered to the donee to expedite the appropriate procedures after death. The document of gift, or a copy, may be deposited in any hospital, procurement organization, or registry office that accepts it for safekeeping

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or for facilitation of procedures after death. On request of an interested person, upon or after the donor's death, the person in possession shall allow the interested person to examine or copy the document of gift.

§327-8 Rights and duties at death. (a) Rights of a donee created by an anatomical gift are superior to rights of others except with respect to autopsies under section 327-11. A donee may accept or reject an anatomical gift. If a donee accepts an anatomical gift of an entire body, the donee, subject to the terms of the gift, may allow embalming and use of the body in funeral services. If the gift is of a part of a body, the donee, upon the death of the donor and before embalming, shall cause the part to be removed without unnecessary mutilation. After removal of the part, custody of the remainder of the body vests in the person under obligation to dispose of the body.

(b) The time of death shall be determined by the physician or surgeon who attends the donor at death or, if none, the physician or surgeon who certifies the death. Neither the physician or surgeon who attends the donor at death nor the physician or surgeon who determines the time of death may participate in the procedures for removing or transplanting a part unless the document of gift designates a particular physician or surgeon pursuant to section 327-2.

(c) If there has been an anatomical gift, a technician may remove any donated parts and an enucleator may remove any donated eyes or parts of eyes, after determination of death by a physician or surgeon.

§327-9 Coordination of procurement and use. Each hospital in this State, after consultation with other hospitals and procurement organizations, shall establish agreements or affiliations for coordination of procurement and use of human bodies and parts.

§327-10 Sale or purchase of parts prohibited. (a) A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy, if removal of the part is intended to occur after the death of the decedent.

(b) Valuable consideration does not include reasonable payment for the removal, processing, disposal, preservation, quality control, storage, transportation, or implantation of a part.

(c) A person who violates this section shall be guilty of a felony and upon conviction is subject to a fine not exceeding $50,000 or imprisonment not exceeding five years, or both.

§327-11 Examination, autopsy, liability. (a) An anatomical gift authorizes any reasonable examination necessary

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to assure medical acceptability of the gift for the purposes intended.

(b) The provisions of this chapter are subject to the laws of this State governing autopsies.

(c) A hospital, physician, surgeon, medical examiner, the director of health, an enucleator, a technician, or other person, who acts in accordance with this chapter or with the applicable anatomical gift law of another state or attempts in good faith to do so shall not be liable for that act in a civil action or criminal proceeding.

(d) An individual who makes an anatomical gift pursuant to section 327-2 or 327-3 and the individual's estate shall not be liable for any injury or damage that may result from the making or the use of the anatomical gift.

§327-12 Transitional provisions. This chapter shall apply to a document of gift, revocation, or refusal to make an anatomical gift signed by the donor or a person authorized to make or object to making an anatomical gift before, on, or after the effective date of this chapter.

§327-13 Uniformity of application and construction. This chapter shall be applied and construed to effectuate its general

purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

§327-14 Short title. This part may be cited as the "Uniform Anatomical Gift Act"."

SECTION 2. Chapter 327, part I, Hawaii Revised Statutes, is repealed.

SECTION 3. If any provision of this Act or its application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 4. This Act shall take effect upon its approval.

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Uniform Law Commissioners

uniform activities

Fall 1988

EDITORIAL

By John McCabe,
ULC Legislative Director

The furor over routine inquiry suggests a certain ambivalence in the medical community over the entire issue of organ donation. The medical community would like to increase the incidence of organ donation. The ULC's primary reason for taking on the Anatomical Gift Act, once again, is to improve the record of organ donations. The ULC was told that the original act has not been adequate.

The problem is, what can really be done to increase the level of donations while retaining the fundamental donative character of the law? There is substantial evidence that the medical community does not do much to solicit donors. What empirical information exists, suggests that people favor donation and are not reluctant when asked. And there are programs that use routine inquiry with some success. The success of such programs indicates that a little self-help from the medical community itself can make a significant difference. Bob Sullivan, whose research as Reporter for the Act identified routine inquiry as a strategy for increasing donor numbers, firmly believes that it will make a greater difference in improving the quantity of organ donations than just about any of the other new additions to the Anatomical Gift Act. So the ULC opted for routine inquiry, a slight step beyond "required request," which involves the family on or about the time of the donor's death rather than the individual. It is the medical community that is now reluctant.

Undoubtedly, there will be a substantial number of introductions of the new Anatomical Gift Act. Undoubtedly, there will be expressed concern over routine inquiry in the legislatures. The ULC may not be able to convince legislatures to accept routine inquiry in all instances, but we are entitled, I believe, to point out what is sacrificed when it is left out of the Act, and we are entitled to question the real concern of those who urged the renewed drafting effort. That way, everybody will be clear as to the real source for the continuing problem of sufficient organs for transplantation.

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SENATE BILL NO. 23

INTRODUCED BY JERGESON

A BILL FOR AN ACT ENTITLED: "AN ACT TO ADMIT THE VIDEOTAPED TESTIMONY OF A SEX CRIME VICTIM INTO EVIDENCE FOR PROSECUTION OR DEFENSE OF THE SEX CRIME AND OF OTHER OFFENSES ARISING FROM THE SAME TRANSACTION: AND AMENDING SECTION 46-15-401, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 46-15-401, MCA, is amended to read:

"46-15-401. **When videotaped testimony admissible.** For any prosecution commenced under 45-15-502(3), 45-5-503, 45-5-505, or 45-5-507, OR FOR THE DEFENSE THEREOF, and for the prosecution OR DEFENSE of any offense arising from the SAME TRANSACTION, AS DEFINED IN 46-11-501, the testimony of the victim, at the request of such victim and with the concurrence of the prosecuting attorney, OR AT THE REQUEST OF THE DEFENDANT, SHALL be recorded by means of videotape for presentation at trial. The testimony so recorded may be presented at trial and shall be received into evidence. The victim need not be physically present in the courtroom when the videotape is admitted into evidence."

-End-

SOCIAL WORKERS
UNTRUTHFULNESS

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1). The social worker told the court that it was the psychiatrists ~~recc~~ recommendation that the child stay with her mother, when in reality the (Dr. Simes) did not recommend that at all & it was unverified information from the childs' mother.

2). Guilt was determined by a popularity contest. The social worker "really liked" Gary & Susan (the ex-wife & current husband) & "just didn't like" Curt & myself. Therefore the least liked person was "guilty" & the best liked innocent.

3). Guilt was determined by a "gut feeling" as opposed to substantiated facts.

~~4). A statement made by the~~

~~social worker to the child's attorney,~~
~~"I don't care what the facts are,~~
~~I know what really happened."~~

5). When the natural mother sought sole custody of the child with only supervised visitation by Curt, an action which DFS supported her in, federal Supreme Court justice Frank Naswell concluded, "the evidence submitted was so contradictadory, & lacking in substance that a determination of the perpetrator could not be made, even assuming that the sexual abuse did take place." Yet DFS kept the child in it's custody & allowing only supervised visitation for 18 months based on evidence lacking in substance.

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6). The social worker testified under oath that she suspected the stepfather, the natural father or possibly someone else. the social worker ~~allowed~~ allowed the child to live with the stepfather while the stepfather was suspected of sexually abusing her & allowing the natural father only supervised visitation

7). The child named the stepfather first as the abuser, then, after a private visit by the natural mother in the foster home, the child stated that the natural father was abusing her & after a period of approximately 6 months the child stated no one had abused her & ~~stat~~ the social worker ignored that & we had no proof of the statements because the social worker didn't tape (audio or video)

any interviews done.

8). The initial interview with child stating that the ~~natural~~ stepfather was the abuser was neither audio or video taped nor was the interviews where the natural father was named as the abuser, both were written up ~~as~~ from the social workers' "recollection" of the interview & with a social worker totally biased against Curt, "recollections" are not always accurate.

9). There was confusion with the child as to who Daddy was. The natural mother & the stepfather had left the state for a period of nine months where the natural mother had made every attempt to replace the natural father

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with the Stepfather in the child's affections, so there was a confusion as to who Daddy really was. The sheriff's deputy "investigating" the case, when asked concerning this confusion she stated, "There was some confusion as to who Daddy was, but we got her (the child) straightened out." How? As this interview was not taped, we have no idea what "straightened out" means, or how this straightening out was done or handled.

Ladies & Gentlemen of the Committee: I could go on & on where statements made by the child were twisted around to support the social workers tunnel vision theory & fear of being wrong, or making a

a mistake in their "investigation" If ~~not~~ all the interviews with the child had been taped it would of cleared my husband of all charges & innuendo many months before it finally was ended. It is, in my ~~opinion~~ ~~opinion~~ opinion ~~allowing a social worker to testify to hearsay~~ is A VERY DANGEROUS PRECIDENT to allow heresay testimony to be given by a social worker without video or audio verification to accompany it. It is well known that children in these type of cases want to please the adult in authority & a social worker can manipulate a child's testimony through facial movements signalling approval or disapproval. If

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the testimony is videotaped, such manipulations can be pointed out to a jury & hopefully less innocent men will go to prison for "abusing" their children. Don't kid yourselves ladies & gentlemen, there are social workers out there, more than any of us would like to admit, who CAN & DO LIE to the court, under oath, to support their gut feelings & theories. In our case, if hearsay had been allowed, my husband would be sitting in prison for a crime he didn't commit & all parties involved now agree he didn't commit it. In our case not one, but two social workers lied to the court under oath. I am the first person who say that we must protect our children, but must we

sacrifice the family to protect our children? My stepdaughter was more emotionally maimed by the DFS "investigation" & their handling of her than by the phantom abuser. We MUST still protect the family as well as the children & believe me, social workers DO NOT work to reunite the family, they work to destroy the very fabric of it. PLEASE amend this bill to state that ALL HERESAY TESTIMONY MUST BE VIDEOTAPED! Don't have parents in this state be afraid (as I am) to ~~th~~ raise their children. I wish I could be there today but I had no funds for a baby sitter. Our "bout" with DFS cost us approximately

(9)

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$15,000.00 & we still owe $12,000.00 after four years, so I had no money for a sitter. If any of you wish to call me & talk with my number is 755-7881 Please think about what I've written. I know speak for hundreds of others.

Respectfully yours,

Patrice Jacobson
265 Caroline Rd
Kalispell, MT

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DATE 2-28-89
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Montana State House Judiciary Committee

Helena, MT.

Regarding Senate Bill 23 &
Senate Bill 66

We are requesting these bills be amended to require mandatory video taping of all alleged child victims while being interviewed by social service, police, and psychological professionals investigating incidents of suspected child abuse. This procedure is more than professionally sound, it is considered the best method of retaining accurate testimony by the child concerning allegations of abuse - particularly allegations of child sexual abuse. The use of video tapes will document more than the childs statement, it will also document through

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expression of body language the traumatic effects of the abuse. Furthermore, it will provide for the court, the family of the child, and for the defense of the accused, proper and essential recording of the childs statements. It will document professional handling of the interview by the persons interviewing the child in regards to the use of leading questions and intimidation of the child. The use of video taping will also prevent unnecessary traumitization of the child by repeated interviews and questioning by various professionals attempting to assist the child, because it does preserve the original statements of the child. It is very important that Society does not further victimize the child and its family while attempting to discover if in fact the child has been abused.

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In November 1984, our daughter was video taped by a social worker in Billings for alleged sexual abuse. She was unaware she was being taped because the camera was behind a one way mirror and therefore not affected by its presence. However, because the taped interview did not support and substantiate the allegations of abuse, the social worker destroyed the tapeing and would not allow us to see the tape. We feel very strongly that preserving this evidence would have allowed us, as parents, to address the psychological difficulties our daughter was having at that time and has continued to experiance.

My wife and I, as parents, believe all child abuse interviews with children should be required as protection for children and their families. It is important that you understand and pass into law mandatory requirements for video taping of children.

2/27/89 Pamela A. Lough Richard Lough 2/27/89

EXHIBIT 8
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SB 23

Analysis of Audio- and Videotapes of Documented Interrogations in Sexual Abuse of Children

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The way children are interrogated when sexual abuse is suspected shows a common pattern across the nation. The structure of reporting laws, child protection agencies, law enforcment officials, prosecutors, and the laws and regulatory codes governing these agencies shape the pattern. The observations that follow are based upon examination of transcripts, audio and video tapes, charges, psychological evaluations, testimony from all procedural levels of the justice system, depositions, and histories of hundreds of cases.

Usually an adult suspects possible sexual abuse of a child. The most frequent trigger for the suspicion is some sort of change in the child's behavior or condition such as a slight redness in the genital area. Sometimes one of the alleged behavioral indicators that has been widely described in the media is the basis for suspicion. The adult then often questions the child and may seek advice from friends.

The adult then reports to the authorities. If the adult is not a parent, ordinarily the parents are also informed although in some instances the first the parent learns of the accusation is when the authorities arrive and begin an investigation. An initial report may be made either to law enforcement agencies or to the child protection agency. If the first report is made to law enforcement agencies, the child protection group is usually informed and their cooperation elicited. The first person who has contact with the child or the child's family is usually a social worker.

Prior to the first official contact, if the parent has been informed, there will have been an interrogation by the parent or parents. The nature of this first interrogation is widely varied and indeterminate. Retrospective description of the first interrogation of a child by the adult begins when the investigating official first talks to the reporting adult and gets the information that led to the report. If the investigating official has the bias that children must always be believed and that all accusations are true, the initial official contact with the child will be based upon the proior assumaption that the alleged abuse really happened. This bais markedly affects the ourcome of the investigation.

What transpires in this first interrogation is extremely important in understanding the nature and reliability of statements a child is reported to have made. The younger and more suggestible the child is, the greater the significance and effect of this first interrogation. It will set the direction and the scope for all future contacts with the child. Yet, it is often the least documented and most likely distorted of the succession of interrogations.

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The first interrogation of a child by an official may range from a single social worker interrogating the child in the home to a group of social workers, police and prosecutors descending unannounced upon a child and within a half hour removing the child to the police station for continued interrogation (Jordan, Minnesota). The interrogation may take place in school with the child being taken from class to be seen by officials with no advance knowledge, no explanation, and without the knowledge of parents. There may be two social workers, a social worker and a police officer, or more than two officials. The child may be brought to an official building or taken to an office of a person deemed to be expert in dealing with sexual abuse for interrogation.

The initial interrogation by officials may or may not be recorded with audio- or videotape. There may or may not be notes or reports available from the officials later on in the process. Generally the amount of information available about the process of interrogation is minimal for the first steps.

While there are differences due to age, ability, and competency of the child, the nature of the report and the variables connected with the interrogator(s), a cluster of techniques has arisen that are widely used. These include the use of "anatomically correct" dolls, books such as "Red Flag Green Flag People", puppets, establishing rapport with the child, establishing the credibility of the interrogator, role play, and rudimentary and simplistic efforts at determining the competency of the child.

The child may be referred to a physician who attempts to assess physical factors related to sexual abuse. But there are seldom clear physical signs of sexual abuse nor are there solidly established medical procedures for assessing physical evidence. Apart from obvious signs of trauma such as tearing, rending, scarring and the presence of semen or foreign objects there is no persuasive physical evidence possible.

Subsequent to the initial interrogation by officials there is again wide variation in the actual procedures followed. Occasionally there is only the initial interrogation. There may be one or two additional interrogations which are recorded in audio- or videotape. Frequently, the initial interrogation is followed by a recorded session in which whatever was done in the initial sessions is repeated and taped for future use. There are, of course, rehearsal and practice effects when this is done.

The child may be interrogated repeatedly, however, by a wide variety of persons, including officers, social workers, prosecutors, therapists, parents and foster parents, siblings, and others. The child may be taken from the parents and placed in an institution or foster care. If a child, with all good intent, is referred to a therapist by officials or by the parents, the child may spend months seeing a therapist where the type of therapy provided is to talk about the abuse, get the feelings out, and learn to express anger and hurt toward the alleged perpetrator. All of this is done long before

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the justice system makes the determination that the child has been abused.

If the issue is brought to adjudication, either in criminal, civil, family, or juvenile court, the child is very likely to be interrogated frequently by the prosecutor or attorney, brought into the courtroom to "familiarize" the child with the environment, and, in effect, rehearsed. Interrogators use a host of behaviors to create a good relationship so that the child will tell more about the alleged abuse.

There is no research evidence whatsoever establishing the utility of these procedures as reliable or valid assessment techniques in dealing with children. The reality that is completely overlooked is that each of these experiences of interrogation is a learning experience for the child.

In every exposure to interrogation the child learns more about what the interrogator expects. The child learns the language game of the sexual abuse literature, for example, the distinction between "good touch" and "bad touch." The child learns about explicit sexual behavior. The child learns what adults, including parents, want and expect from the child. The child learns what to say or do that will get a reinforcing response from the interrogator. The child learns what attitude is expected towards the alleged abuser. The child learns the victim role. The child learns the tale and, by repetition, may come to experience the subjective reality that it happened, even when it never did happen. But the persons interrogating children seldom show any awareness of their own stimulus value or of the impact of their procedures as a learning experience upon the children and the reliability of statements made by them.

The examiner must have some knowledge of the event that is being investigated in order to ask any questions. This means that he must base his questions on his own assumptions about the event. The direction of the interrogation is determined by the choices of the interrogator. This introduces a necessary bias into the interrogation procedures of even the most skillful investigators. The stronger and more certain the beliefs of the interrogator are about the event being investigated the stronger and more powerful the bias will be.

The bias results in readily picking up information that corresponds to and supports prior beliefs and not responding to details which suggest a different direction or which tend to falsify the assumptions. When the interrogator interprets the information he has perceived, the bias will influence him in the same way. Statements that contradict or do not fit into his beliefs will be seen as lies or evasions or confusions. This is particularly evident in the interrogation of children when a child says that nothing happened. The interrogators almost universally just keep on plowing ahead, repeating the question, asking other questions about the hypothesized, believed-in event, and finally eliciting from the child the desired response. The more strongly the interrogator is convinced that he is right the greater the danger that he will falsely confirm his theory.

The child also produces responses that increase the likelihood of error. All of us know very

early in life that we must show some discretion in our answers to other people. We look to tone of voice, inflections, small body movements and postures. We closely observe reactions and, guided by them, select agreeable facts and details to give as answers. When a child is interrogated, the variables of power, authority, status, credibility, and group effect interact with the limited capacity and competencies of the child to produce a powerful confounding of the interrogation process. The child, in his responses, tries to figure out and produce what he believes the adult wants to hear. These procedures contaminate, confuse, and lower the reliability of statements made by children. The younger the child the more powerful the teaching and learning experience.

In an interrogation, different kinds of questions will elicit different responses from a witness. An open-ended question calls for spontaneous, free recall. For example, a parent might ask a weeping child "What happened?" If open-ended questioning does not produce sufficient information, the interviewer may turn to more specific questions, such as "Did he hit you?" At this point the questioner has taken a more active role and the witness a more passive one. Research has shown that while specific questions result in an over-all increase in the number of statements a witness makes in comparison to free recall, the increase is due to a rise in both accurate and inaccurate statements (Dent & Stephenson, 1979; Lipton, 1977). Thus the memory for an event can be made more elaborate, but the greater detail will include more false memories as well as more truth. Child witnesses may be more subject to the introduction of this sort of error than adults because they give fewer answers in free recall (Kobasigawa, 1974; Mandler & Johnson, 1977; Perlmutter & Ricks, 1979) and therefore may cause interviewers to turn sooner to specific, closed questions and to use proportionately more of them.

Young children are likely to give the interviewer what they think the interviewer wants to hear. King and Yuille (1987) emphasize the importance of the interviewer communicating to the child that the interviewer is only interested in what the child remembers and that admissions of memory failure and memory gaps are expected. Saywitz (1987) reports that children are apt to add material when they do not remember and states that the practice of asking children "what else" is likely to increase the number of errors of adding extraneous and contradictory information. Cole and Loftus (1987) state that " . . .the demand characteristics of being given certain information by an adult, and even of being questioned by an adult are powerful components of suggestibility in young children." (p. 199).

Turtle and Wells (1987), commenting on the recent research on children as witnesses, observe that the paucity of children's recall:

> ". . . can lead to an inordinate amount of subsequent questioning from various agents throughout the legal proceeding and hence to a greater exposure to possible misleading information. Unfortunately for the system. . . children suffer from a greater susceptibility to having their testimony distorted by such misleading information" (p. 240).

Adults are more suggestible when an authoritative rather than a nonauthoritative person asks leading questions (Eagly, 1983, Loftus, 1979). Ceci, Ross & Toglia. (1987) state that the young children's suggestibility could be partially accounted for by the fact that they are expecially likely to conform to what they believe to be the expectations of the adult. It may well be that young children are especially affected by suggestion and leading questions simply because so many people are generally authoritive in relation to them. This would be particularly pronounced if the child is being interrogated by someone identified as a doctor, a therapist, or a police officer. Parents are also authority figures to their children.

In a more active line of questioning, the interrogator is supplying information to the witness. "Did Allen hit you on the arm?" and similar questions can give shape and content to the recall of a memory that is, in fact, vague. There have been many studies that demonstrate how the memories of both children and adults can be distorted by the introduction of false information into questions (see Loftus & Davies, 1984, for a review). When an unsure or reluctant witness causes the questioner to guess at what might have occurred and thereby provide information, perhaps true and perhaps false, for the witness to affirm or deny, the resultant testimony may be the truth or it may be a fabrication that is mutually agreed upon and believed to be true by both parties.

We are engaged in an ongoing research project of analyzing audio- and videotaped interviews from actual cases of alleged sexual abuse. To date, following a pilot study, we have analyzed twenty-two cases. We have reviewed additional videotapes in many other cases; the twenty-two cases where we performed the analysis are typicial of the ones we have seen.

The project does not seek to establish the truthfulness or untruthfulness of the statements of the children. It is an examination of the behaviors, statements, and questions of the participants in an actual interviews. The analysis gives information on the interviewing process and the responses of children. This is not a laboratory simulation but the real world. The video and audiotapes are interrogations in actual cases. This is the way interrogation of children in an accusation of sexual abuse has been done in the cases we have examined, not what manuals or description by the interviewers claim.

Sample

The audio-and videotapes were from cases on which we consulted. In each of the cases, the persons accused of the sexual abuse had denied the allegations. An attorney contacted us and we agreed to review the documents and available tapes. In three of the cases we also interviewed the children and in eight cases we evaluated the accused person(s). The audio-and videotape analysis was done when the attorney requested this service. The cases came from Hawaii (2), Alaska (2), Minnesota (1) Texas (1), New Jersey (4), Indiana (1), Wisconsin (1), Florida (3),

North Dakota (1), Massachusetts (1), Washington (2), Mississippi (1), Nevada (1), North Carolina (1). Seven of the cases involved accusations in day care centers, seven were in divorce and custody situations, and eight involved accusations by neighbors, friends, or others.

There were seventy-nine children in tapes we analyzed. In seven cases there was one child; in seven cases two children; in three cases, three children; and in four cases five to nineteen children. The larger numbers of children were from the day care cases. The children ranged from age three to twelve--sixty-six were ages three to six, ten were seven to nine, two were ten and one was twelve.

There were 109 interviews. There was only one interview for each child in eight of the cases; the others had two or three interviews. Internal evidence suggested that the audio- or videotaped interviews were seldom the first interview (for example, the interviewer said "Remember when we talked before?" or " Do you remember the other day when we were playing with the dolls?" or the child said "I forgot what I was supposed to say to you."). The recorded interviews took place anywhere from a few weeks to two years after the alleged event. The length of the interviews ranged from a few minutes in a couple of the cases to ninety minutes; most were from thirty to sixty minutes.

There were a total of forty-two interviewers, twenty-five women and seventeen men. The interviewers included social workers, psychologists, police, psychiatrists, and, in two interviews, the mother of the child. In a few of the interviews, the child was alone with one interviewer. In the others two, three, or more interviewers were present. In several cases the mother was present and participated in the questioning. In some cases two children were interviewed at the same time.

Procedure

In developing the analysis techniques, we first surveyed the research on children's memory capabilities, their ability to distinquish truth from falsehood or fantasy from reality, and how methods used to question witnesses can distort what adults and children recall. The studies indicate that not only what we conceive of as leading questions but even just specific questions that probe beyond witnesses' free recall can create false memories.

From this information, we developed categories of open-ended and closed questions. The pilot study included only seven interrogator behaviors and six child behaviors. We then added new scoring categories because of what actually transpired in the interviews. For example, no ethical researcher would ever tell a child that he is a "fraidy cat," but interviewers sometimes applied such pressure on the witnesses, so we added a category for that. We now have operationally defined twelve adult interrogator behaviors and fifteen child behaviors. The rules for sorting observed behaviors into categories were defined as objectively as possible so that

others could use them in similar research.

In the pilot study two college graduates, unacquainted with sexual abuse issues, were hired, trained, and did the rating. In subsequent analyses, scoring of the tapes was performed by three women, two social workers and a mental health practitioner. All but one of the tapes was analyzed by two of the three women (one woman analyzed all of the tapes with one of the other women). The raters were not familiar with the details of the cases. The ratings were done separately by the two women who rated from a transcript of the interview while they viewed and/or listened to the audio-or videotape. The goal was to score every act by the participants in the interviews. Some actions were entered into more than one category. For example, a closed question may be perceived as also applying pressure.

Six categories of interviewer behaviors were defined as error-inducing: closed questions, modeling, pressure, rewards, aids, and paraphrase. Closed questions and modeling can give information to the child on how to respond. Along with pressure and rewards, paraphrasing can reinforce the child's response. Aids such as the anatomically-correct dolls, which were used in most of the interviews, can provide a modeling effect to the child and can potentially generate false information (McIver, Wakefield & Underwager,1987; Underwager, Wakefield, Legrand, Bartz, & Erickson, 1986; Wakefield & Underwager, in press).

Interrater reliability was calculated by dividing the number of agreements between raters by the number of agreements plus disagreements. Interrater reliability in the twenty-two cases ranged from 69% to 83%, the mean was 75%.

Results

A summary of the results are given in Tables 1 and 2. The actual number of scored behaviors varies with the amount of material available.

[INSERT TABLE #1]

[INSERT TABLE #2]

The frequency of behaviors in major categories for both adults and children is similar across the twenty-two cases. In most cases studied, the adults are two to three times more active than the children ranging from 53% to 82% of the total interview (the mean is 68%). The behaviors of the adults that potentially convey information to the children on how to respond are closed questions, pressure, reward, modeling, use of aids, and paraphrase. When these categories are combined, they total from 53% to 80% (the mean is 65%) of the interviewers'

behaviors in the twenty-two cases.

[INSERT TABLE # 3]

Discussion

The proportions of adult to child and the proportion of adult behaviors that are error-inducing are fairly similar in the twenty-two cases. Perhaps this pattern is a reflection of what happens when young children are questioned by adults. Or, this pattern may reflect the fact that children have been interrogated before by parents, social workers, psychologists, or law officers, in which case the audio- and videotaped sessions represent recitals of more or less rehearsed material. The picture that emerges is one in which the child played a relatively passive role.

The behaviors of the adults appear more geared to extract testimony rather than to allow the children to tell their own accounts free from pressure and suggestion. The categories of closed questions, pressure, rewards, use of aids, and modeling are adult behaviors that are known to produce error and unreliability. Overall, around two-thirds of the adult behavior in the twenty-two cases fell into these error-inducing categories. They are adult behaviors that teach a child what is expected, what story to tell, and what pleases the adult.

Studies on eyewitness testimony and memory and suggestibility of children typically have a much smaller proportion of leading questions. For example, Marin, Holmes, Guth, & Kovac (1979) only used two out of twenty-two. Our analyses suggest that in the real world children being interviewed are given much more error-inducing information than in the laboratory research. There is a much higher level of coercion and pressure. Also, the behavior of interviewers is more extreme than in the studies.

In many of the tapes, the adult demonstrates sexual behavior with dolls. For example the interviewer states, "This is what Daddy did, isn't it. Now you take the dolls and show me." In other cases, the interviewer told the child that he couldn't go home (or play with the toys or get a treat) until he made a desired statement. In several others, following a statement, children were told that they were brave, courageous and that their parents would be proud of them. In one tape, when the child denied what the interviewer had previously agreed with the social worker to ask, the interviewer asked the child the same question eighteen times.

In one of the cases, the interviewer told several children that another child, interrogated earlier that day, had already told him about being abused. He used statements like "I talked to C____ earlier today and C____ told me that M____ put spoons up her butt and she told me that you were there. Now, you tell me about it." When tapes of the earlier sessions with the child

named as telling about abuse were examined, such statements were not there. The first child had not said anything remotely resembling what the investigator claimed to the second child.

This analysis of actual interrogations shows that the real world is much tougher on children than is the research laboratory. No research study comes close to the magnitude of pressure and coercion that is applied to children in the tapes that we analyzed. Research manipulations that tried to match the real world would be considered unethical. This means that there is a limitation on the applicability and generalizability of the research studies that have been done. (The problem of ecological validity is acknowledged by several researchers in Ceci, Toglia & Ross, 1987.) The findings of the research studies are likely understatements of the effects of adult behaviors in interrogating children.

While these findings do not invalidate the children's statements, they raise serious questions about the possible role of adult influences upon children's behavior. The interrogation process cannot be accepted as neutral, objective, or unbiased. In each case, what has actually been done with a child by all of the people involved in talking to the child, including other children, must be carefully scrutinized as a possible source of error. Our conclusion from our analyses is that it is not possible to interrogate children to get at the truth unless every effort is made to control contaminating influence.

Future research needs to examine the temporal relationship between adult behaviors and child behaviors. Procedures and methods for an analysis of social interactions have been demonstrated by Snyder and Patterson (1986). They show that adult behaviors cause a change in child behaviors in a natural social interaction. A complete analysis is extremely time consuming and we have done this in only one case. We found that the children are pressured primarily to produce descriptions and agreements. They are then rewarded for doing so. Denials or negations of abuse are ignored. The behaviors rewarded increase in frequency while the behaviors not reinforced decrease.

Our impression from the tapes is that if a child says nothing happened, the question is most often repeated again and again until the response desired is obtained. That response is then reinforced. This is the fundamental learning paradigm that psychology has shown to be characteristic of all learning organisms. Evoke a behavior and then reinforce it. That behavior will then increase in frequency. When an undesired behavior occurs, do not reinforce it. This behavior will then decrease in frequency.

This picture is more disturbing when it is placed against the fact that the children usually had been interrogated several times before they were brought before the camera or tape recorder. It is reasonable to ask what effect being recorded has on the adults. It is likely that knowing the interrogation was being recorded would result in efforts by the interrogator to avoid obvious

questionable behavior. The undocumented and unknown interrogations that precede the documented one are likely to contain more error-inducing behaviors.

Conclusions

There is a nationwide structure that produces a common pattern of behavior by adults with the responsibility for dealing with child sexual abuse. The reality is that children, interrogated with these common approaches, are being taught. The interrogations are learning experiences for children.

The analyses of twenty-two cases of actual interviews of children demonstrates that the way children are interviewed has a high potential for introducing error into the statements of children. This can reduce the reliability of statements that children make. These findings raise serious questions about the possible role of adult social influence upon children's behavior. When there is no corroborating data or no admission from the alleged perpetrator, children's statements standing alone must be viewed with great caution.

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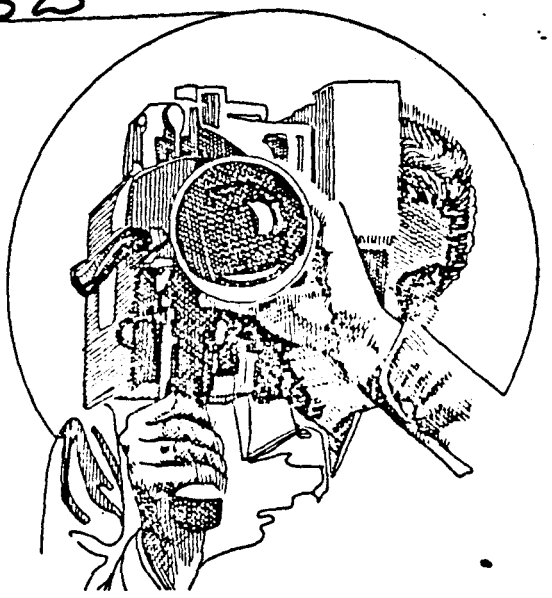
SPECIAL REPORT

Videotaping Interviews with Child Sex Offense Victims



by Ross Eatman

Child protective and law enforcement personnel are increasingly using videotape to preserve a child victim's account of sexual victimization. The videotapes serve several purposes. They are an adjunct to investigations and may, under certain circumstances, be used as evidence in later legal proceedings. They can also reduce the child's protracted and often traumatic contact with the legal system. First, videotaping one in-depth interview can spare the child repeated questioning by protective services workers, law enforcement personnel, prosecutors and other professionals. Second, alleged offenders often plead guilty to criminal charges when confronted with a child witness' videotaped statement, thereby preventing further proceedings. Third, a child's videotaped statement might be shown to a grand jury, obviating the child's testimony at that proceeding. Potential therapeutic uses of videotaped interviews have been discussed elsewhere.[1]

If the videotaped statement is used as evidence in court, the roles of interview participants, and the child's statement may be scrutinized and possibly challenged. Defense attorneys may even use it to undermine a child's live testimony. The ability to introduce videotaped interviews in court, therefore, may dictate a change in current interviewing procedures and reexamination of the wisdom of videotaping such interviews.

This article will help agencies examine their policies regarding videotaped interviews. It recommends protocols for the videotaping of interviews, discusses some of its in-court uses, and identifies legal and constitutional issues raised when videotapes are offered as evidence. The article does not deal with videotaped depositions, which may substitute for the child's in-court testimony if certain requirements are satisfied.

Developing a Protocol

Recent developments in child sexual abuse case management have emphasized an interdisciplinary approach,[2] since it is generally recognized that children may be harmed by a fragmented and prolonged legal response to abuse. Development of a protocol for videotaping interviews is one method of ensuring the child victim is not subjected to unnecessary or repeated interrogations. If the protocol carefully delineates the responsibilities of those participating in the investigation, the process will be streamlined, fewer cases will be mishandled, and the videotape will be used more effectively in any resulting criminal proceedings. Most important, a decision must be made that the videotape will replace all other in-depth interviews, or its primary purpose will be undermined.

Ex. #8
2-28-89

Review State Laws

It is essential that local prosecutors, child protective services agency representatives, and affiliated professionals first determine the impact of state discovery, privilege, confidentiality, and evidentiary rules on the videotaping of interviews. State laws may require that agencies maintain the confidentiality of information procured in their investigations. This may pose questions pertaining to the prosecution's access to videotapes of a child's statement. Social workers and other professionals involved in interviews may have to seek waivers of confidentiality from parents or children to disclose information contained in the videotape. Finally, the complex interaction of state laws (along with mandatory child abuse reporting laws) may actually impose *conflicting* mandates on an agency or individual. A careful study of state laws is thus an indispensable first step to the development of protocols.

Identify Appropriate Cases and Timing

Participating agencies should then establish a means for identifying cases in which an interview is desired. If local experience demonstrates, for instance, that regular videotaping minimizes the child victim's contact with the system and results in a high proportion of guilty pleas, broad use of the procedure may be considered. A different experience, on the other hand, may dictate that a case-by-case approach be utilized. The videotaping of a child who is interviewed prematurely or is uncommunicative may prove more costly than constructive since further interviews will be required, investigators may doubt the veracity of the victim, and the videotape may be used on the accused's behalf. It is important that agencies monitor the disposition of cases in which videotaping is used to determine the extent to which the videotapes are fulfilling their function.

Interviewers and investigators must also determine the appropriate stage at which to videotape a child victim's statement. Even skilled interviewers of sexually abused children may need several interviews to elicit the child's account. It is common for some sexually abused children to disclose details of the abuse gradually over several sessions.[3] A statement prematurely videotaped may be ineffective and even jeopardize a subsequent criminal prosecution. If, on the other hand, the videotaping follows numerous interviews, the procedure will have failed to minimize the victim's involvement. The statement may also lack spontaneity, thereby undermining its effectiveness and fostering defense allegations that the child was coached or encouraged by adult participants.

Assume Later Scrutiny

The interview itself should be conducted under the assumption that the videotape will later be scrutinized by defense attorneys, prosecutors, judges, grand jurors, and jurors. If a state statute governs the videotaping and subsequent use of a child victim's statement, the statutory requirements should be incorporated in any protocol. These statutes generally establish procedural requirements for conducting the videotaped proceeding to ensure admissibility of videotaped statements in criminal proceedings. In almost all of the statutory schemes, for example, the presence of an attorney for either party in the interview room would probably preclude the prosecution from presenting the tape as evidence in a criminal proceeding. Statutes authorizing videotaped depositions, on the other hand, require that the child be subject to direct and cross-examination, usually in the presence or view of the defendant. The taped deposition may then substitute for the child's in-court testimony. Under all the statutes, the interviewer must be available to testify at the proceeding in which the videotape is offered.

Use Trained Interviewers

Videotaping guidelines should require that a trained professional elicit the child victim's

statement, using questioning techniques and props appropriate in child sexual abuse inquiries. The interviewer's skill and professional conduct are critical to the interview's effectiveness and to its later impact as evidence. The interviewer must not only extract accurate and persuasive information, but must do so in a legally acceptable way if the videotape is to be offered in court. Under both traditional rules of evidence and new statutes allowing for the use of videotaped interviews in court, the interviewer must avoid unduly leading questions. An interviewing technique that is overly suggestive may persuade a court that the child was coached or his or her responses are unreliable. Some mental health professionals believe that "leading questions may sometimes be necessary in order to enable frightened young children to respond and talk about particular subjects."[4] A therapist who decides to videotape an interview designed to help children disclose the abuse, however, must accept the fact the tape may be used by defense counsel and ultimately may jeopardize a criminal prosecution. If the videotape is subsequently used in court, the defense attorney will use any weaknesses in the child's account or the interviewer's technique to discredit the reliability of the statement.

Prosecution and Defense Uses of Videotaped Statements

Videotaped statements can help prosecutors at trial by providing evidence of the abuse that supplements the child's testimony. A pretrial videotaped interview may show a more relaxed, natural account of the abuse since it generally occurs in an environment less likely to intimidate a child than the formal courtroom. A properly timed interview also may capture spontaneity of expression and attention to detail absent in the child's later live testimony. Further, the prosecutor could use the videotape to rebut defense claims that the child recently fabricated the account. On the other hand, some prosecutors question the persuasiveness of videotaped statements or testimony, believing that a live witness is much more effective. They also may be reluctant to present two versions of the child's account — the videotaped statement and live testimony — if they contain inconsistencies.

Hearsay Exceptions

If the prosecutor decides to offer the videotaped statement at a criminal proceeding as evidence of abuse, he or she must first satisfy the legal requirements of the hearsay rule and the sixth amendment confrontation clause. Although judicial decisions and statutes have noted a number of exceptions to the hearsay rule, videotaped interviews do not generally fall within a traditional exception. Thus, eight states have passed (and others are considering) statutes creating a special hearsay exception for videotaped statements of child victims of sexual assault, in order to permit the prosecution to offer them as evidence that the child was abused.[5]

> *". . . videotaped interviews do not generally fall within a traditional exception."*

These statutes prescribe conditions for the admission of videotaped interviews at a criminal proceeding. The statutes all require that competent technicians operate the recording equipment, the recording be accurate and unaltered, and every voice on the recording be identified. Under the statutes, the child's account cannot be elicited by questioning designed to elicit a particular statement. Further, the interviewer must attend and be available to testify at the criminal proceeding. Most of the statutes preclude attorneys for either party from attending the interview. Most statutes have provisions governing the child's availability at the criminal proceedings and a criminal defendant's opportunity to view the videotape before the proceeding.

Ex #2-28-94

Confrontation Rights

Even if a statement is admissible under one of these statutes governing the admission of videotaped statements, it still must satisfy requirements of the confrontation clause of the Sixth Amendment. If the child testifies at trial and the videotaped statement is offered into evidence, no confrontation issue is presented. However, if the child does not testify at trial and the videotape is offered into evidence, the defendant's "right to be confronted with the witnesses against him"[6] probably is violated.

Indeed, several existing videotape interview statutes are probably unconstitutional since they do not require the child to testify at trial or require proof of the child's unavailability and the statement's reliability.[7] A Texas court of appeals recently held that the state's videotaped interview statute was unconstitutional on this ground. In *Long v. State*,[8] the prosecution offered as evidence the videotaped interview of the child victim but did not call the child to testify in its case-in-chief, although the child was an available witness. The court held that by allowing the child's videotaped statement to be admitted without requiring the prosecution to produce the child, the statute did not afford the defendant protections guaranteed by the confrontation clause.

Negative Uses

Although videotaped statements are designed to give prosecutors additional evidence, the videotapes may be used in court for other purposes. When the child's videotaped story shows the child's reluctance to talk, provides little detail or includes initial denials of the abuse, and later interviews and testimony present a more complete account, the defense attorney will seek to use the previous statement to impeach the child's trial testimony, thus casting serious doubt on the child's credibility and veracity.

Discovery Rules

In order for a defense attorney to use a videotaped statement, however, he or she must have access to it. The principle of discovery determines whether or when the prosecutor must provide such evidence to the defense. State statutes, judicial decisions and court rules govern discovery, and they vary widely from state to state. In seven of the states that have videotaped interview statutes, the statutes specifically give the defendant or his attorney the opportunity to view the videotape before the prosecution offers it into evidence in a criminal proceeding. If the prosecution does not plan to use a videotaped interview — usually because it is ineffective or inconsistent with the child's probable trial testimony — the defense would still want access to the tape. His or her right of access in this situation would be controlled by the state's general discovery rules. Similarly, in states without special videotape statutes regular discovery rules apply.

One significant constitutional limitation has been imposed on a prosecutor's ability to shield relevant materials from the defendant. Due process requires that upon defense request, the prosecutor must disclose any evidence favorable to the defendant, often called exculpatory evidence, when the evidence is material to guilt or punishment.[9] The decision as to the *materiality* and *exculpatory* value of the evidence is, in the first instance, the prosecutor's. The United States Supreme Court has held that the prosecutor violates constitutional duty of disclosure only when nondisclosure denies the defendant right to a fair trial.[10] The prosecutor would therefore have a duty to disclose an exculpatory videotaped statement of the victim, independent of the state's discovery rule and videotaping statute.

The Videotape's Quality

Discussion of discovery practices has focused so far on the defendant's access to the videotaped statements and the timing of such access. The content and quality of the child's videotaped account, however, may have a profound influence on both pretrial and trial proceedings, depending upon the state's discovery rules. If the videotape demonstrates the child

may be an effective witness and his or her account is credible, the prosecutor will probably offer the videotape to the defendant before trial in the hope of inducing a guilty plea. In both states having pretrial disclosure and states having delayed disclosure, the prosecutor would probably pursue the same course with an effective videotape. When the defendant has a pretrial right of access, the prosecutor would have to disclose the tape; when there is no such obligation he would disclose it voluntarily.

The course of events may be very different when the prosecutor has an ineffective videotape. Although an ineffective videotape might discourage the prosecutor from pursuing the prosecution, he or she might nonetheless seek a conviction if there is other corroborative evidence of the abuse and if the child is likely to be a good witness at trial. If the defendant has a pretrial right of access to the statement, the prosecutor would have to disclose it and suffer the consequences. In a state that delays discovery of a witness' statement, the prosecutor is likely to resist disclosure of an ineffective videotape. Thus, the defendant who knows the prosecutor has a videotaped statement might presume that his or her refusal to produce it before trial is an indication of the tape's ineffectiveness. Without pretrial access to the videotape the defendant does not have the benefit of time to prepare possible defenses based on the videotape. However, as noted earlier, if a trial ensues and the child testifies, the defendant will be able to use an ineffective videotape to impeach the child's in-court testimony, since even those states barring pretrial access generally require the prosecutor to disclose the statement after the witness testifies.

Be Aware

Although videotaping a child victim's statement has many benefits, jurisdictions considering the use of this technique must be aware of the potential detrimental legal consequences. Some of the dangers may be avoided if highly trained interviewers are aware of the pitfalls discussed in this article. Greater experimentation with this innovative technique is probably necessary to truly evaluate its effectiveness.

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Footnotes

1 For a thorough discussion of the therapeutic and legal uses of videotape, *see* MacFarlane, "Diagnostic Evaluations and the Uses of Videotapes in Child Sexual Abuse Cases," in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases* (J. Bulkley ed. 1985). Other practical and legal implications of using videotape in sexual abuse cases are discussed in Lloyd, "Practical Issues in Avoiding Confrontation of a Child Witness and the Defendant in a Criminal Trial," in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases. See also* Haas, "Use of Videotape in Child Abuse Cases," 8 Nova L.J. 373 (1984).

2 J. Bulkley, *Recommendations for Improving Legal Intervention in Child Sexual Abuse Cases*, American Bar Association, Washington, D.C. (1982); *Innovations in the Prosecution of Child Sexual Abuse Cases*, American Bar Association (J. Bulkley ed. 1981).

3 MacFarlane, "Diagnostic Evaluations and the Uses of Videotapes in Child Sexual Abuse Cases," *supra* note 1.

4 *Id.* at 136.

5 Hawaii, Kansas, Kentucky, Louisiana, Missouri, Rhode Island, Texas and Utah have such statutes. Tennessee has a statute that allows the introduction of a videotaped interview into evidence only at a preliminary hearing.

6 *See Ohio v. Roberts*, 448 U.S. 55 (1980); *California v. Green*, 399 U.S. 149, 158 (1970). *See generally* Graham, "Child Sex Abuse Prosecutions: Hearsay and Confrontation Clause Issues," in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases* (J. Bulkley ed. 1985); J. Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues*

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in Child Sexual Abuse Cases (American Bar Association Monograph 1985).

7 The U.S. Supreme Court recently held in *Ohio v. Roberts* that when an out-of-court statement is offered into evidence and the person who made the statement does not testify at trial, the confrontation clause imposes two conditions for admission of this statement. First, the person who made the statement must be shown to be unavailable as a witness. Death, testimonial privilege, physical or mental disability, absence from the jurisdiction, and likelihood the child will suffer severe trauma from testifying may constitute grounds of unavailability. Second, the hearsay statement must possess "indicia of reliability." The Court stated that reliability of a hearsay statement may be presumed when the statement falls within a firmly rooted hearsay exception. However, if the statement does not fall within one of these exceptions, it must be excluded unless it possesses "particularized guarantees of trustworthiness."

8 *Long v. State,* 694 S.W. 2d 185 (Tex. Ct. App. 1985).

9 *Brady v. Maryland,* 373 U.S. 83 (1963).

10 *United States v. Agurs,* 427 U.S. 97, 108 (1976). Of eight statutes that allow the admission of a videotaped statement at trial, only one, the Kansas statute, does not address the child's availability to testify at trial. The statute is probably unconstitutional since it satisfies none of the confrontation concerns. The Utah statute requires that the child be available or be found by a court to be unavailable, and imposes on all videotaped statements a reliability requirement. The six remaining statutes require that the child be "available to testify" at trial. Four of these six statutes provide additionally that "either party *may* call the child to testify, and the opposing party may cross-examine the child." (emphasis added) This provision suggests that the prosecution is not mandated to produce the child for direct and cross-examination. These statutes are probably unconstitutional because the confrontation clause requires that the prosecution "produce, or demonstrate the unavailability, of the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts,* 448 U.S. at 65.

Exhibit # 8
2-28-89
SB 23

Children's Testimony Blocked

BY LEE CATTERALL
Special to The National Law Journal

HONOLULU — A state court judge here has declared two preschool-age girls incompetent to testify in the trial of a man accused of sexually assaulting them in 1984.

Circuit Judge Robert Klein's mid-trial ruling left the prosecution with no remaining witnesses and defendant James E. McKellar with an almost certain acquittal when the trial resumes this week. *State v. McKellar*, CR-85-0553.

Judge Klein said in a 20-page ruling on Jan. 15 that he doubted whether the incident, which triggered a public outcry, a preschool's license suspension, and Mr. McKellar's eventual indictment, ever occurred.

Instead, the judge said, the girls' accusations more likely were the result of "layers and layers of interviews, questions, examinations, etc., which were fraught with textbook examples of poor interview techniques."

Mr. McKellar, 45, a real estate salesman, was accused of abducting the two girls — then ages 3 years, 11 months and 4½ years — from Windward United Preschool on March 2, 1984. The girls told authorities that he and several other adults sexually abused them and took photographs of them in the nude. They said a 5-year-old boy also was abducted and subjected to the sexual abuse, but the boy denied having been a part of any such incident.

Mr. McKellar was indicted last year on charges of kidnapping, rape, assault, sexual abuse and promoting child abuse. After Mr. McKellar had waived a jury trial, Judge Klein began hearing the case in November. The trial was halted in early December during the presentation by Deputy City Prosecutor Reinette Cooper after defense attorney Brook Hart of Honolulu's Hart, Wolff & Wilson questioned the girls' competence to testify.

Expert Testimony

Mr. Hart relied heavily on the testimony of clinical psychologist Ralph Underwager of Minneapolis in maintaining not only that Mr. McKellar was innocent but also that the sexual-assault incident never happened.

Dr. Underwager, director of the Institute of Psychological Therapies, compared the case with that of 25 adults accused of sexually abusing children in Jordan, Minn., earlier in 1984. He was the chief defense expert in

Continued on page 34

THE NATIONAL LAW JOURNAL Monday, February 3, 1986

Girls' Testimony on Abuse Held Incompetent

Continued from page 6

hat case, which was dropped because f insufficient evidence.

Dr. Underwager testified in Mr. IcKellar's hearing that "highly coerive, highly pressurized" questioning f the girls by parents, the parents' civ attorneys, police and prosecutors ad "a confounding and contaminating ffect" on the girls' recollections, rendering them "completely unreliable."

The girls' allegations originated rom concern by the younger girl's nother about what appeared to be urns on her daughter's arms and legs. The girl said the marks were mosquito ites. The mother questioned further nd the daughter finally said they ere marks inflicted by a gun-shaped ighter held by a man who took her rom the school to his home.

The mother then reported the allega-

girl's account became more elaborate. She told of the older girl's presence in the alleged incident, and that girl, through what the judge termed "cross-germination of information," corroborated the account.

Dr. Underwager's explanation of the information sharing provided "one of the most compelling bits of evidence" that the second girl "neither perceived the 'events' nor had any memory of them until she began to take lessons" from the younger girl, Judge Klein asserted.

No 'Present Memory'

The judge agreed with the psychologist "that what the children now know to be fact is what they have learned through the process of questioning over the span of time and under the circumstances of the investigation/therapy."

events from which they can testify. In addition, cross-examination as a tool to bare misperception and faulty memory would be totally ineffective."

The judge wrote that the girls "have been led and taught by the adults to produce the hoped-for responses." Every adult who questioned them, he said, "accepted as fact" that the girls had been abused and, "consciously and unconsciously, their questions were shaped to satisfy their own benefits."

A Honolulu psychologist diagnosed post-traumatic stress syndrome in the younger girl in the months following the alleged incident, but Judge Klein said it was "impossible" to attribute that condition to any incident.

"In fact," he wrote, "because the children now believe that such abuse occurred, they are unable to separate the facts from the learned experience and, consequently, their behavior is just the

EXHIBIT 9
DATE 2-28-89
SB 103

Testimony of Michael J. Sherwood
Representing MTLA
Re: Senate Bill 103
Before the House Judiciary Committee

OPPOSING

Statutes similar to this bill are called "civil death" laws. They are derived from British laws and have been described as an "archaic remnant of an era which viewed inmates as being stripped of their constitutional rights at the prison gate." This bill attempts to go even beyond the restriction of prisoner's rights to include an absolute bar to anyone person who finds himself under state supervision.

Article II, Section 16, of the Montana Consitution provides, in part:

> Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. . . .

The only constitutional restriction upon this right of full legal redress is found in Article II, Section 28, which reads as follows:

> Laws for the punishment of crime shall be founded on the principles of prevention and reformation. Full rights are restored by termination of state supervision for any offense against the state.

As initially proposed Senate Bill 103, was patently unconstitutional

EXHIBIT 9
DATE 2-23-89
HB SB 103

under the terms of both the Montana and U.S. constitutions because it was a blanket bar to suit. The bill as you see it has been amended to prohibit

suit or recovery only by those persons under state supervision in attempt to make it pass the requirements of the Montana Constitution. It still does not meet the requirements of the U.S. Constitution.

I have provided Ms. Emge with copies of three cases setting forth holdings that the U.S. constitution prohibits restrictions on the access to courts by prisoners in seeking civil redress. Those cases contain cites to multiple other jurisdictions that have reached the same holdings.

The Florida case, McQuiston v. Wanicka, involved a prisoner who wanted to sue a sheriff for failing to prevent the prisoner's being severely beaten while in jail. A Florida statute suspended the civil rights of convicted felons and barred suits by prisoners. The Florida supreme court held that this was a violation of the due process and equal protection clauses of the fourteenth amendment to the U.S. Constitution. The court went on to say:

> We reject [the] assertion that the loss of the right to sue is simply an additional punishment validly assessed for felony cases.

An Alaska law which forbade a lawsuit by a parolee was struck down on the same grounds in Bush v. Reid. Missouri also struck down a statute restricting the rights of the imprisoned to bring civil actions in Thompson v. Bond.

EXHIBIT 9
DATE 2-23-89
HB SB 103

The five year tolling of the statute of limitations currently found in the law and left in the proposed amendment is an unsatisfactory remedy.

This delay assures that the evidence will become stale and the risk of losing witnesses due to death or relocation is increased. The Missouri court indicated that such a delay could well render the legal process meaningless for an incarcerated victim of a civil wrong. (See page 884 of that opinion)

Finally, the bill would allow severe injustices to occur to those who have committed even non-violent property related offenses. An 18 year old vandalizing cars but posing no threat to the owners of those cars could be gunned down and seriously injured. The perpetrator of the armed assault would be civilly immune. The same would hold true for someone attempting to pass a bad check in excess of $300.

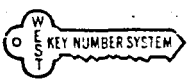
I urge this committe to please reject this proposed legislation.

proceedings were pursued was based on independent sources of information and free from taint of the poison fruit from the vine of the compelled testimony. The evidence failed to show that the poison from this vine did not in fact permeate the State Grand Jury proceedings.

Schwartz is entitled to the full protection of the immunity granted him by the United States District Court for the Eastern District of Illinois, pursuant to which his testimony was received. Since this Court has previously granted immunity to Marvin Charles Schwartz, it has the duty to enforce the order granting the immunity to fully guarantee the protection afforded by the Organized Crime Control Act, namely, § 6002, Title 18, United States Code.

[3] Accordingly, the Court will grant a permanent injunction, restraining and enjoining the defendant, his successors in office, and all persons acting in concert with him, from proceeding with Case No. 76–CF–560 in the Circuit Court of the Twentieth Judicial Circuit, entitled "The People of the State of Illinois, Plaintiff, versus Marvin Schwartz, Defendant," all as per order of Court on file simultaneously herewith, signed by the Judge.

See Order.



Douglas W. THOMPSON and Gary Vincent Johnson, Plaintiffs,

v.

Christopher BOND, Governor, State of Missouri, and John C. Danforth, Attorney General of Missouri, Defendants.

No. 74 CV 91–C.

United States District Court, W. D. Missouri, C. D.

Oct. 15, 1976.

State prisoners brought action challenging constitutionality of civil death statute. A three-judge court, Elmo B. Hunter, J., held that right of access to the courts was central to the First Amendment right to petition for redress of grievances; that the Missouri civil death statute infringed upon that right; that fact that a trustee can be appointed for a prisoner and that statute of limitations is tolled during incarceration did not render the infringement insubstantial; and that neither the state interest in restricting the filing of frivolous lawsuits nor the state interest in avoiding disruption of prison administration were sufficient to justify the infringement.

Order accordingly.

1. Constitutional Law ⇐42.3(1)

Two prisoners who desired to entertain civil actions in Missouri state courts had standing to bring action challenging constitutionality of civil death statute. V.A.M.S. § 222.010.

2. Federal Civil Procedure ⇐181

Action brought by two prison inmates to challenge constitutionality of civil death statute would be certified as a class action with inmates representing the class of all adults presently incarcerated in Missouri penal institutions pursuant to conviction of a circuit court of the State of Missouri and sentence of imprisonment for a term of years or life. V.A.M.S. § 222.010; Fed. Rules Civ.Proc. rule 23(a, b), 28 U.S.C.A.

3. Convicts ⇐4

Missouri civil death statute destroys or suspends prisoner's right to enter into any contract or judicially enforceable instrument. V.A.M.S. § 222.010.

4. Convicts ⇐6

State prisoner in Missouri is unable to file any civil action in the courts, other than those related to the validity or constitutionality of his confinement, as long as he is incarcerated; civil litigation which is barred by civil death statute includes lawsuits of a personal nature not affecting real and personal property, such as a suit for divorce, or

Based upon the foregoing information, Southern Bell filed a motion for relief from judgment, pursuant to Florida Rule of Civil Procedure 1.540(b)(3). This motion alleged that Welden secured her judgment against Southern Bell by fraud, misrepresentation, or misconduct, by offering false testimony at trial on the issue of her damages. Along with its motion for relief from judgment, Southern Bell sought both an evidentiary hearing, as well as permission to conduct discovery prior to the hearing. The trial court denied these motions for evidentiary hearing and discovery in an order finding, in essence, that even assuming, arguendo, the truth of all factual matters relied upon by Southern Bell in its motions, the proffered evidence constituted mere impeachment of Welden's trial testimony, rather than fraud sufficient to warrant granting Southern Bell's motion for relief from judgment. We find that the court erred in denying the motions.

[1] A reading of the trial court's order denying Southern Bell's requested hearing and discovery discloses that the order relied in part upon an erroneous finding of fact: namely, that "[a]t trial no one inquired nor was evidence presented that [Welden] had ever contemplated suicide [prior to her injury]." On the contrary, Welden clearly was questioned at trial by her counsel as to this very issue:

> Q. ... it sounds like from what you told us, Mrs. Welden, you had been through at least a divorce in the past. Had you ever had any situation that—or *had you ever contemplated suicide in the past?*
>
> A. *No, sir.* (emphasis supplied)

In light of this trial testimony by Mrs. Welden concerning suicide, we agree with Southern Bell that Ms. August's testimony, if credited, may support a finding of fraud upon which relief from the judgment below may be granted. *Cf., Louisville & Nashville Railroad Co. v. Hickman*, 445 So.2d 1023, 1027–1028 (Fla. 1st DCA 1983), *rev. dismissed*, 447 So.2d 887 (Fla.1984) (wife's false testimony concerning lack of marital difficulty prior to incident from which wife filed loss of consortium claim supported granting new trial on that claim). In circumstances such as this where the moving party's allegations raise a colorable entitlement to rule 1.540(b)(3) relief, a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required. *Rosenthal v. Ford*, 443 So.2d 1077 (Fla. 2d DCA 1983); *Pelekis v. Florida Keys Boys Club*, 302 So.2d 447 (Fla. 3d DCA 1974), *cert. denied*, 312 So.2d 751 (Fla.1975); *Stella v. Stella*, 418 So.2d 1029 (Fla. 4th DCA 1982).

[2] We have examined Southern Bell's arguments and the record on the issue of excessiveness of the damage award, and conclude that reversal is not warranted on this issue. *Eichholz v. Pepo Petroleum Company, Inc.*, 475 So.2d 1244 (Fla. 1st DCA 1985); *Orlando Executive Park, Inc. v. P.D.R.*, 402 So.2d 442, 449 (Fla. 5th DCA 1981), *approved*, 433 So.2d 491 (Fla.1983); *cf., Seaboard Coastline Railroad v. Addison*, 481 So.2d 3 (Fla. 1st DCA 1985).

Accordingly, the order appealed from is REVERSED, and the cause is REMANDED for discovery and an evidentiary hearing on appellant's motion for relief from judgment.

WENTWORTH and JOANOS, JJ., concur.

Timmy Ray McCUISTON, Petitioner,

v.

Frank WANICKA, as Sheriff of Lee County, Florida, Respondent.

No. 85–2493.

District Court of Appeal of Florida, Second District.

Feb. 14, 1986.

Prisoner filed action against sheriff who allegedly could have prevented assault

The portion of the judgment entered below awarding appellees $13,000 for personalty taken, plus interest and attorney's fees thereon, is vacated and the case remanded for a new trial on the issues as limited by this opinion.

James F. BUSH, Appellant,

v.

James REID and Clarence Reid, Appellees.

No. 1841.

Supreme Court of Alaska.

Dec. 14, 1973.

Parolee brought action for injuries sustained in automobile accident and defendants filed motion to dismiss. The Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., granted defendants' motion and the parolee appealed. The Supreme Court, Boochever, J., held that statutes suspending parolee's civil rights during time he was in custody of parole board denied parolee due process and equal protection to extent that they denied him the right to institute a civil suit.

Reversed and remanded.

Connor, Erwin and Fitzgerald, JJ., did not participate.

1. Constitutional Law ⇐250.3(2), 272 Pardon and Parole ⇐2

Statutes suspending parolee's civil rights during time he was in custody of parole board denied parolee his right to initiate a civil suit but, to that extent, statutes denied parolee due process and equal protection. AS 11.05.070, 33.15.190; Const. art. 1, §§ 7, 12; U.S.C.A.Const. Amend. 14.

2. Constitutional Law ⇐277(1)

A chose in action is a form of "property" within due process protection. U.S.C.A.Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

Barry Donnellan, Anchorage, Stephen C. Cowper, Fairbanks, Edgar Paul Boyko, Edgar Paul Boyko & Associates, Anchorage, for appellant.

No appearance for appellees.

Robert Wagstaff as amicus curiae, for American Civil Liberties Union.

Before RABINOWITZ, Chief Justice, BOOCHEVER, Justice, and EBEN H. LEWIS, Superior Court Judge.

OPINION

BOOCHEVER, Justice.

James F. Bush originally filed this lawsuit in superior court to recover damages for injuries received in an automobile accident. At the time of the accident and the filing of the suit, appellant Bush was a felon on parole. The Reids, as defendants below, filed, and the superior court subsequently granted, a motion to dismiss the complaint on the ground that AS 11.05.070[1] suspends the civil rights of a person sentenced to imprisonment in the penitentiary for a term less than life. Bush here appeals on the grounds that the superior court erred in interpreting the statute, or, alternatively, that the statute if interpreted to bar appellant from access to the courts, violates the Alaska and United States constitutions.

AS 11.05.070 and AS 33.15.190[2] when read together clearly indicate that a parol-

1. AS 11.05.070 provides:
A judgment of imprisonment in the penitentiary for a term less than for life suspends the civil rights of the person sentenced, and forfeits all public offices and all private trusts, authority, or power during the term or duration of imprisonment.

2. AS 33.15.190 provides:
The board may permit a parolee to return to his home if it is in the state, or to go elsewhere in the state, upon such terms and conditions, including personal reports from the paroled person as the board prescribes. The board may permit the parolee

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. SENATE BILL 204 DATE FEB. 28, 1989

SPONSOR SENATOR NORMAN

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Robert E. Sullivan	Montana Commissioners on Uniform State Laws	✓	
M.E. "Micky" Nelson	MT Coroners Assn. Lewis + Clark Co. Coroner	✓	
Jean Landa	Mon G	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. SENATE BILL 23 DATE FEB. 28, 1989

SPONSOR SENATOR JERGESON

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
EARL J. REILLY	SELF		X
John Connor	Dept of Justice Mt County Atty Assn	✓	
Jenny O'Neil	VOCAL of Montana	Amend	

AS WRITTEN

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. SENATE BILL 140 DATE FEB. 28, 1989

SPONSOR SENATOR JERGESON

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
John Connor	Dept of Justice Mt. County Attys Assn	✓	

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JUDICIARY COMMITTEE

BILL NO. SENATE BILL 170 DATE FEB. 28, 1989

SPONSOR SENATOR JERGESON

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
John Connot	Dept of Justice Mt County Atty Assn	✓	

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VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. SENATE BILL 103 DATE FEB. 28, 1989

SPONSOR SENATOR JERGESON

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Mike Sherwood	MTLA		X
John Connor	Dept of Justice Mt County Atty Assn	✓	

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