MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

January 10, 1985

The meeting of the Judiciary Committee was called to order by Chairman Hannah on Thursday, January 10, 1985 at 9:00 a.m. in Room 312-e of the State Capitol Building.

ROLL CALL: Roll call was taken, and all the members were present.

HOUSE BILL NO. 69: Hearing commenced on HB 69 (Admissibility of statements of minor victim of abuse or molestation). Representative Dorothy Bradley, chief sponsor of the bill, testified in support of the bill. Representative Bradley stated that the intent of this bill is two-fold. She said children three years old and up would be able to make a statement describing any act of sexual contact performed with that particular child under this bill. She stated that the bill is simply aimed at admitting statements of young children. She explained that sometimes young children cannot provide competent testimony before a jury because they are too young. Also, it can be a very emotional and traumatic ordeal for the child to appear in a courtroom.

Representative Bradley stated that the constitution provides that the accused may be able to confront his witnesses face to face. She said for that reason, it is the potential conflict this bill faces. She informed the committee that many of her constituents fully support passage of this bill. She told the committee that the next question the committee had to address is if this bill is really needed. She outlined the provisions of the bill and stated that section 2 amends an existing section that allows for the use of videotaping in criminal cases. Subsection (2) of section 2 would simply allow the prosecutor or petitioner to make the request to have videotaped testimony. She referred the committee to the new proposed section (section 1) explaining that it would simply allow an out-of-court statement to be admissable in evidence in criminal proceedings if the minor would testify and be present in the court proceeding; or if the minor is unavailable, but there is corroborative evidence.

Also in support of the bill, Mike Salvagni, county attorney for Gallatin County, testified in support of the bill. He informed the committee that the bill involves a serious, technical legal matter. At this time, he submitted two documents to the committee which were marked as Exhibit A and Exhibit B and made a part of these minutes. Mr. Salvagni stated that there has been an ever increasing number of sexual related crimes against children. More and more cases are being presented each year. He related

the process taken when a child reports a sexual abuse case. First, the child is asked to relate what the alleged abuser did to her. Secondly, the county attorney arranges for a videotaped interview with the child which is usually done by a welfare worker. The county attorney then reviews the child's statement and the other investigative reports before bringing an action against the alleged child abuser. Mr. Salvagni informed the committee of some of the cases he has dealt with as a county attorney. He further said that we are asking the court to establish this proposed bill as an exception to the hearsay rule. He defined hearsay as being a statement made out of the court that is introduced in court to prove the matter. Hearsay is not always automatically excluded -- there are exceptions to the hearsay rule which the court recognizes. Again, Mr. Salvagni stressed the point that the constitution does not automatically exclude hearsay.

Under this bill, it would give the court guidance as to what the court can actually look at. Before the court can use the child's statement, there is a procedure that the bill provides for to determine whether that particular statement is reliable. Mr. Salvagni stated that this goes further than the rules of evidence. He feels that the court should determine whether or not the child's statement is trustworthy. If the child is present at the proceeding to testify, and if the court determines it is reliable, then that statement could be admitted. If the child is unavailable as a witness, the court would then again look at the circumstances of the statement. This statute would require that there be corroborative physical evidence to support said statement. Mr. Salvagni told the committee that this bill would not be in conflict with the sixth amendment to the constitution.

Representative Dennis Nathe, House District #19, testified in support of HB 69. He wants the committee to consider three things: 1. Children at the age of 10 years and younger go through a great amount of trauma when subjected to a court proceeding of this kind; 2. There is a reluctance on the part of the victim's parents to prosecute knowing the trauma the child may have to go through; 3. Children are placed in the same room to face the alleged abuser.

Marc Racicot, attorney from the Attorney General's Office, told the committee that he felt this was a very difficult bill to deal with. The bill tinkers with the dynamics of a system we have become very comfortable with, he went on to say. He said that HB 69 will face a constitutional test if it ever goes to court. He informed the committee of other possible problems that would arise in that the system treats many other victims poorly. He stated, furthermore, that nothing would prevent

the defendant from calling the child as his witness. Also, once there is a declaration of unavailability, there is nothing prohibiting the defendant from moving for a deposition.

Norma Harris, administrator of Community Services Division, Social and Rehabilitation Services, testified in support of HB 69. She stated by allowing videotaping to be done, it would relieve the trauma of the child. She stated that the bill would increase the likelihood of a child and his family of staying together because the child would not be forced to confront the family in public. (Her statement is attached as Exhibit C)

Candace Wimmer, representing the Family Teaching Center, appeared and offered testimony in support of the bill. She said that from her experience, it is her firm belief that offenders do not turn themselves in for treatment. To accomplish prosecution, they must have children able to provide the court with information regarding the alleged assault. She feels that subjecting the child to a court proceeding is going to further the psychological trauma that child is already undergoing. The child would be able to give a statement if she were put in a trustworthy situation. Ms. Wimmer pointed out that cross-examination can be very traumatic for a child. She feels that a child should not be subjected to this type of questioning over and over again. (Her statement is attached as Exhibit D)

Carolyn Clemens, deputy county attorney for Lewis and Clark County, offered testimony in support of the bill. She did not get into the legal arguments of the bill, but informed the committee of experiences she has had in the past dealing with these cases. She feels the bill is narrowly drawn and fully protects the rights of the defendant. Other problems she pointed out were simply getting the child to agree to testify. Many times the alleged abuser is the father. Another problem is the delays presented in the judicial process. By the time the case is tried, the child might have forgotten many of the details involving the crime. Ms. Clemens stated that in many of these cases, the county attorney has to compromise. (Exhibit E - statement)

Karl Englund, attorney for the Montana Trial Lawyers Association, stated his support for the bill. He fully supports the concept of the bill and section 2 of the bill. However, he does not think the provisions stated in section 1 need to be included because he feels it is already provided for in the present law.

Susan Cottingham, representing the American Civil Liberties Union of Montana, testified in support of the bill in that it deals with the rights of the child.

Phil Campbell, representing the Montana Education Association, wanted to go on record to support this bill because of its intent to protect children.

Representative Bradley made a brief closing statement. She again stated that she feels the bill will go further than the present statutes. She, too, felt precautions were sufficiently included in the bill.

Chairman Hannah opened the meeting up for discussion. Representative Keyser has no problem with the videotaping, but he wanted to know if the rules of procedure presently allow the defendant's attorney to cross-examine the child while the child is being videotaped under 46-15-401. Mr. Salvagni said it does.

Representative Mercer asked why section 2 of the bill did not apply to all sexual criminal offenses. He also questioned whether or not the inclusion of all proceedings under Title 41, Chapter 3 might not be overly broad.

Representative Eudaily pointed out a part of the bill where he had a problem. He felt that subsection (2)(b) would open up a lot of debate on the recommendations portion.

Representative Mercer inquired as to the expense videotaping would present. Representative Bradley felt that both money and time would be saved as a result of videotaping.

Representative Hannah expressed to Representative Bradley about the potential concern regarding Title 41, Chapter 3 as getting very broad.

HOUSE BILL 106: Hearing commenced on HB 106. In support of the bill, its chief sponsor, Mary Ellen Connelly, District #8, testified. She stated that the bill simply calls for a constitutional amendment to exclude defeated court judges from temporary service. She informed the committee that the new section of the bill would basically provide the people with a constitutional right to make the final choice.

There being no further proponents or opponents of the bill, Chairman Hannah opened for committee discussion. Representative Keyser asked Representative Connelly if the Supreme Court would forever be prohibited from assigning a former district judge who was defeated at the last election to fill in. Representative Connelly answered with a yes.

HOUSE BILL NO. 50: Hearing commenced on HB 50. In support of the bill, Representative Les Kitselman, testified. He said that 60% of the fatalities on the highways last year were alcohol related. He sees no purpose for a person to be behind the wheel of a car when he is drinking any kind of alcoholic beverage. Representative Kitselman stated that there was an

exception for recreational vehicles. Representative Kitselman further pointed out that one area does need to be addressed, and that being the need to define the sleeping compartment in commercial trucks. He said that fines are meant to be steep, and that passage of the bill would eliminate peer pressure for youngsters.

Ben Havdahl, representing the Montana Motor Carriers Association, appeared before the committee to testify. He stated that he has a problem with the portion of the bill that defines commercial carriers.

Larry Tobiason, president of the Montana Automobile Association, testified in support of the bill. He feels this bill will be beneficial and may cut down on the highway tragedies that occur in our state.

John Scully, representing the Montana Sheriff's and Peace Officer's Association, also went on record for the support of this bill.

George Allen, representing the Montana Retail Association, wishes to go on record in support of this bill.

There being no further proponents or opponents to testify on behalf of the bill, Chairman Hannah asked Representative Kitselman to make his closing statement. Mr. Kitselman pointed out that the intent of the bill would be to provide uniformity throughout the state in dealing with alcoholic beverages in open containers. At this time, Chairman opened the meeting up for discussion. Representative Brown pointed out some of the problems he saw with the bill. Mr. Kitselman informed Representative Brown that there might be some abuse of this law, but in order to get picked up, you would have to draw attention to yourself.

Representative Addy stated that he sees a problem with mandatory minimum as being too stiff. He had questions regarding the enforcebility of the bill in some instances. Representative Kitselman informed the committee that the state of Illinois has the present law in effect, and that it has been working quite well.

Representative Kitselman stated that many municipalities have existing laws making it illegal to transport an alcoholic beverage. Again, he stated that the intent of this bill would provide some uniformity throughout the state.

There being no further discussion, hearing on HB 50 closed.

Chairman Hannah informed the committee that HB #103 would be acted upon Monday, January 14, 1985. Also, he reminded the

committee that an executive session is scheduled tomorrow morning, January 11, 1985 at 8:00 a.m.

ADJOURN: There being no further business to discuss, Chairman Hannah adjourned at 11:10 a.m.

Tom Hannah

TOM HANNAH, Chairman

DAILY ROLL CALL

HOUSE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 1/10/85

NAME	PRESENT	ABSENT	EXCUSED
Tom Hannah (Chairman)	✓		
Dave Brown (Vice Chairman)	✓		
Kelly Addy	✓		
Toni Bergene	✓		
John Cobb	✓		
Paula Darko	✓		
Ralph Eudaily	✓		
Budd Gould	✓		
Edward Grady	✓		
Joe Hammond	✓		
Kerry Keyser	✓		
Kurt Krueger	✓		
John Mercer	✓		
Joan Miles	✓		
John Montayne	✓		
Jesse O'Hara	✓		
Bing Poff	✓		
Paul Rapp-Svrcek	✓		

Exhibit A
H.B. 69
1/10/85

A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases

The incidence of sexual abuse of young children has increased dramatically in recent years.[1] The crimes committed are predominantly nonviolent in nature[2] and almost always occur in secrecy, with the child usually being the only witness.[3] No particular age group is immune to sexual abuse,[4] nor are the offenders confined to any particular class of persons.[5] Indeed, more often than not, the offender is a parent, relative, or an acquaintance of the child.[6]

Detecting sex abuse, as well as convicting its perpetrators, is exceptionally difficult,[7] due to the lack of witnesses[8] and corroborative physical evidence,[9] and to the reluctance or inability of the victim to testify against the defend-

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1. The American Humane Association's national study of state child-protection statistics [illegible] a 200% increase in the reporting of sexual abuse since 1976. By 1980, there were 25,000 [illegible] cases of child sex abuse per year. Collins, Studies Find Sexual Abuse of Children is [illegible]spread, N.Y. Times, May 13, 1982, at C1, col. 1, C10, col. 2.

These statistics may, in fact, understate the problem, for a substantial number of the cases [illegible] never reported. Either the child does not report the incident, see National Center on Child [illegible] and Neglect, Child Sex Abuse: Incest, Assault and Sexual Exploitation 2 (1981); Landis, [illegible]ences of 500 Children with Adult Sexual Deviation, 30 Psychiatric Q. Supp. 91, 99 (1956), [illegible] parents refuse to go to the authorities, see Collins, supra, at C10, cols. 5-6.

[illegible] estimates of the actual number of sexual assaults have varied widely. The National Center on [illegible] and Neglect estimated that more than 100,000 cases of sexual abuse occur annually. [illegible] Center on Child Abuse and Neglect, supra, at 2. Other estimates have reached as [illegible] 200,000 to 500,000 sexual assaults per year for female children only. See Schultz, The [illegible] Victim: Social, Psychological and Legal Perspectives, 52 Child Welfare 147, 148 (1973).

2. See Flammang, Interviewing Child Victims of Sex Offenders, in The Sexual Victimology [illegible] 175, 177 (L. Schultz ed. 1980); MacFarlane, Sexual Abuse of Children, in The Victim[illegible] Women 86, 87 (1978); Schultz, supra note 1, at 149.

See Stevens & Berliner, Special Techniques for Child Witnesses, in The Sexual Victimo[illegible] Youth 246, 248 (L. Schultz ed. 1980).

3. The ages of the victims range from early infancy (one or two months) to 17 or 18 years. [illegible] Sexual Molestation of Children, Children Today, May-June 1975, at 18, 20.

[illegible] Collins, supra note 1, at C1, col. 1 (excerpt from an interview with Dr. Gene Abel, [illegible] the Sexual Behavior Clinic of the New York State Psychiatric Institute):

> [illegible] most part parents have told their children to stay away from men who are [illegible] raincoats and carrying candy. . . . But none of our patients (sex offenders of [illegible]) wear raincoats and carry candy. They come from all walks of life and all [illegible] economic categories, and they look just like the neighbor next door. They may even [illegible] neighbor next door.

See D. Finkelhor, Sexually Victimized Children 73 (1979); MacFarlane, supra note 2, at [illegible]; supra note 4, at 20; Stevens & Berliner, supra note 3, at 246.

[illegible] study of 250 cases of child sex abuse that had been reported to New York City's [illegible] services, less than one percent of the molesters were sent to jail. Collins, supra note 1, [illegible] 5.

[illegible] of the sex offenders (238 men) in the Sexual Behavior Clinic at the New York State [illegible] had ever spent time in jail. These men had committed a total of 16,666 acts of [illegible], an average of 68.3 molestations per offender. Id. at C1, col. 1, C10, col. 1.

See Stevens & Berliner, supra note 3, at 248; infra notes 47-49 and accompanying text.

See MacFarlane, supra note 2, at 87, 88; Schultz, supra note 1, at 149; infra notes 44-46 [illegible] text.

ant.[10] Even when the child does appear in court and testifies, he or she is often met with skepticism and disbelief.[11] Consequently, to establish the guilt of the defendant, many prosecutors have tried to introduce the out-of-court statements of the victim into evidence through the testimony of witnesses who heard the statements.[12] Since the hearsay rule[13] generally prohibits the introduction of these statements, an exception to the rule is often sought.[14] Courts have used a variety of approaches in determining whether an exception should apply.

This Note argues that the various approaches that have been taken by the courts to child hearsay statements in sex abuse cases are unsatisfactory. Given the unusual circumstances attendant to child sex abuse and the special characteristics of its young victims, the rationale of the hearsay rule and its exceptions requires that an alternative approach be employed to assess the admissibility of child hearsay statements. The Note begins by examining the traditional bases of the hearsay rule and the underlying logic of its exceptions. After analyzing the need for and reliability of out-of-court statements by children in such cases, the Note reviews and then critiques the various ways courts have treated these hearsay declarations. The Note concludes that these approaches inadequately assess the probative value of child hearsay statements in sex abuse cases. Instead, it proposes the adoption of an analysis similar to that embodied in a recently enacted Washington statute. The statute admits a child's out-of-court declaration if the time, content, and circumstances of the statement provide sufficient indicia of reliability.[15]

I. BACKGROUND LAW

A. *The Hearsay Rule*

Hearsay consists of "[out-of-court] statement[s] . . . offered in evidence to prove the truth of the matter asserted."[16] Under traditional formulations of

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10. See Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, *in* The Sexual Victimology of Youth 187, 233 (L. Schultz ed. 1980); MacFarlane, supra note 2, at 99–100; infra notes 60–62 and accompanying text.

11. See Brown v. United States, 152 F.2d 138, 139 (D.C. Cir. 1945); Fitzgerald v. United States, 443 A.2d 1295, 1299 (D.C. 1982); Stevens & Berliner, supra note 3, at 252.

12. See, e.g., United States v. Nick, 604 F.2d 1199 (9th Cir. 1979) (federal government attempts to introduce testimony of child's mother as to statement made by child after allegedly being sodomized by his babysitter); State v. Boodry, 96 Ariz. 259, 394 P.2d 196 (1964) (state tries to introduce testimony of child's mother and neighbor as to statements made by the child after her alleged rape); infra notes 72–115, 123–35, 141–53 and accompanying text.

13. The hearsay rule prohibits the introduction into evidence of testimony or written evidence of a statement made out of court when the statement is being offered as an assertion to show the truth of the matters asserted therein. See E. Cleary, McCormick on Evidence 579–80 (2d ed. 1972) [hereinafter cited as McCormick].

14. See infra notes 72–115, 123–35, 141–53, and accompanying text.

15. The statute also requires that the hearing on admissibility be conducted outside the presence of the jury and either that the child testify at the proceeding or, if the child is unavailable, corroborative evidence of the act be provided. 1982 Wash. Legis. Serv. ch. 129, § 2 (West).

16. Fed. R. Evid. 801(c); accord McCormick, supra note 13, at 584. Such statements may be oral or written and may even incorporate nonverbal conduct if the conduct was intended to be an assertion. Fed. R. Evid. 801(a).

the hearsay rule, evidence concerning these statements is barred from use in court unless the original declarant testifies in court, where he may be cross-examined as to the grounds of his out-of-court assertion and as to his qualifications to make the assertion.[17]

The rule against admission of hearsay statements stems from the long-established belief that cross-examination is the best vehicle for discovering the truth and that the most reliable statements come from the witness stand.[18] By questioning in court the person who made the original statement, the trier of fact can detect and eliminate any inaccuracies in the witness's perception, memory, and narration of the event.[19] The opportunity to put the declarant under oath and to observe his or her demeanor is another traditional reason for requiring an appearance in court.[20]

3. *Exceptions to the Hearsay Rule*

Despite the primacy attached to cross-examination, exceptions to the hearsay rule have long existed in evidentiary law.[21] The reasons for allowing hearsay to be used are twofold. First, reliability of certain hearsay statements can be assured even without cross-examination of the original declarant.[22] Trustworthiness can be inferred from the fact that the statement was made under or subjected to certain conditions that insure a degree of reliability comparable to that found in a cross-examined statement.[23] Moreover, the recurring need for hearsay evidence constitutes another justification for allow-

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17. See Fed. R. Evid. art. VIII advisory committee note; 5 Wigmore, Evidence in Trials at Common Law 32 (J. Chadbourn rev. 1974) [hereinafter cited as 5 Wigmore]; McCormick, supra note 13, at 579-81.

18. See Ohio v. Roberts, 448 U.S. 56, 64-65 (1980); California v. Green, 399 U.S. 149, 159 (1970); Fed. R. Evid. art. VIII advisory committee note; 5 Wigmore, supra note 17, at 32 (cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth").

19. See, e.g., Fully, An Introduction to the Law of Evidence 159 (1978); McCormick, supra note 13, at 581-82.

20. See California v. Green, 399 U.S. 149, 158 (1970); McCormick, supra note 13, at 582. Also see 5 Wigmore, supra note 17, at 10 (oath is merely incidental to cross-examination and is not the real justification for the hearsay rule).

21. See 5 Wigmore, supra note 17, at 158.

22. See id. at 252:

> There are many situations in which it can be easily seen that such a required test [of cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that the most scrupulous caution would look upon it as trustworthy . . . it would be pedantic to insist on a test whose chief object is already secured.

23. See Fed. R. Evid. art. VIII advisory committee note ("Common sense tells that much evidence which is not given under . . . [traditionally required] conditions may be inherently trustworthy, as it is that it is.").

24. See 4 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 800[01], at 800-11 (1981 & Supp. 1982) [hereinafter cited as Weinstein's Evidence] (credibility of declarant depends on "opportunity declarant had to observe event, circumstances surrounding the statement, declarant's relationship to the case; excluding statements merely because they have not been subjected to adversary testing [judicial process]).

ing its use in contravention of the hearsay rule.[24] Such need is usually found in situations where the declarant is dead or otherwise unavailable for cross-examination,[25] or where the statements contain unique evidentiary value, unobtainable from other sources.[26]

These two principles, trustworthiness and necessity, thus serve as the underlying rationales for exceptions to the hearsay rule.[27] In applying these two principles, judges over time have set aside certain classes of hearsay statements that possess similar or identical guarantees of trustworthiness.[28] The class-exception system constitutes the general framework under which hearsay statements are evaluated for their credibility, although in many jurisdictions the trial judge retains the power to admit evidence that falls outside a specific class exception but nevertheless is still reliable and necessary.[29] Today, the class-exception system exists in statutory form at the federal level[30] and in some states,[31] as well as in common law form in others.[32]

C. *Constitutional Constraints on the Use of Hearsay Statements*

Despite the widespread acceptance of hearsay rule exceptions, their use is constitutionally restricted. The sixth amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[33] This provision has never been read to exclude the

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24. See Fed. R. Evid. art. VIII advisory committee note ("[W]hen the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without.").

25. 5 Wigmore, supra note 17, at 253.

26. Id.

27. See Fed. R. Evid. 803 & 804 advisory committee notes; Cornelius v. State, 12 Ark. 782, 804 (1852); Garwood v. Dennis, 4 Binn. 314, 328 (Pa. 1811).

28. Fed. R. Evid. art. VIII advisory committee note; 5 Wigmore, supra note 17, at 253-55 ("the exceptions have been established casually in the light of practical experience, and with little or no effort . . . at generalization or comprehensive planning. The courts have had in mind merely to sanction certain situations as a sufficient guarantee of trustworthiness.").

29. See, e.g., Fed. R. Evid. 803(24) & 804(b)(5); Ariz. R. Evid. 803(24) & 804(b)(6); S.D. R. Evid. 19-16-35; Wyo. R. Evid. 803(24), 804(b)(6). But see Note, Residual Exception to the Hearsay Rule, 10 Loy. U. Chi. L.J. 611, 613-14 (1979) (Illinois retains a rigid common law system of hearsay exceptions; evaluation of evidence is restricted to the framework of these established exceptions.).

30. The Federal Rules of Evidence contain 24 exceptions to the hearsay rule that can be invoked regardless of whether the declarant is available for cross-examination. These exceptions include present sense impressions, recorded recollections, records of regularly conducted activity, and public records and reports. See Fed. R. Evid. 803. There are five additional exceptions in the Federal Rules that can be used only if the declarant is unavailable. These include former testimony and statements against interest. See Fed. R. Evid. 804.

31. See, e.g., Me. R. Evid.; Mont. R. Evid.; Okla. Stat. Ann. tit. 12 §§ 2803(24), 2804(5) (1980); Wyo. R. Evid. 803(24) & 804(b)(6). Approximately 22 states have statutory rules of evidence similar to the Federal Rules; the remaining states possess common law rules of evidence. See 4 Weinstein's Evidence, supra note 23, art. VIII.

32. See, e.g., People v. Robinson, 73 Ill. 2d 192, 383 N.E.2d 164 (1978) (court applies excited utterance exception); People v. Egan, 78 A.D.2d 34, 434 N.Y.S.2d 55 (1980) (court admits statements as declarations against penal interest). State hearsay exceptions, both statutory and common law, closely parallel the federal statutory exceptions.

33. U.S. Const. amend. VI.

admission of all hearsay evidence,[34] yet it has nonetheless placed significant limits on the use of such evidence.[35]

Although the Supreme Court has been reluctant to lay down principles that would determine the constitutionality of all hearsay exceptions under the confrontation clause,[36] admitting a declarant's out-of-court statements in situations where the declarant is available as a witness probably does not violate the confrontation clause.[37] However, when the declarant is not testifying and is unavailable to be cross-examined, the use of hearsay exceptions must fulfill certain constitutional requirements. In this context, to be admitted, the hearsay statement must either fall within a firmly rooted hearsay exception[38] or, if the statement does not qualify for any exception, present particularized guarantees of trustworthiness.[39]

II. Application of Hearsay Principles to Children's Hearsay Statements in Sex Abuse Cases

The principles underlying the hearsay rule require that an out-of-court statement be admissible only if the requisite need and reliability can be shown.[40] Because of the unique circumstances of child sex abuse, hearsay statements of the victim are especially necessary to establish the guilt of the defendant.[41] In addition, the reliability of such statements must be evaluated with careful attention to these circumstances. Even though out-of-court declarations by the victim may not be inherently reliable, they are, at the very least, as reliable as his or her in-court statements, and moreover, trustworthiness can ultimately be determined by looking to circumstantial indicia of reliability.[42]

A. *Need for Children's Hearsay Statements*

The unusually compelling need for children's hearsay statements in sex abuse cases is demonstrated primarily by the fact that the statements often constitute the only proof of the crime.[43] Physical corroboration is rare, for the

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34. See Ohio v. Roberts, 448 U.S. 56, 64 (1980); Mattox v. United States, 156 U.S. 237, 243 (1895).

35. See Mancusi v. Stubbs, 408 U.S. 204 (1972); Lilly, supra note 19, at 275.

36. California v. Green, 399 U.S. 149, 162 (1970).

37. Id. at 158-61.

38. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

39. Id.

40. See supra notes 16-39 and accompanying text.

41. See infra notes 43-51 and accompanying text.

42. See infra notes 52-71, 108-15 and accompanying text.

43. See Joint Hearings on SB 4461 before the Washington State Senate Judiciary Comm. and Washington State House Ethics, Law & Justice Comm., 47th Leg., 1982 sess. 23 (January 28, 1982) ("Child's hearsay statements are usually the only evidence in a child molesting case) (testimony of [illegible] Berliner, social worker, Sexual Assault Center in Seattle, Washington) (transcript [illegible] office of the Columbia Law Review) [hereinafter cited as Joint Hearings]; infra notes 44-51 and accompanying text.

crimes committed are predominantly nonviolent in nature.[44] Most crimes consist of petting, exhibitionism, fondling, and oral copulation, activities that do not involve forceful physical contact.[45] The lack of physical corroboration can also be attributed to the fact that most children, for a variety of reasons, do not resist their attackers and succumb easily.[46]

In addition, witnesses other than the victim and perpetrator are rare; people simply do not molest children in front of others.[47] Most often, the offender is a relative or close acquaintance of the child[48] who is likely to have many opportunities to be alone with the child.[49]

Finally, since a child's memory fades rapidly over time, the account given closer in time to the actual event is the one more likely to be accurate.[50] The

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44. See Hammond, supra note 2, at 177:

> Types of offenses run the totality of the continuum of the human sexual experience. The offenses include homosexuality, sodomy, incest, normally accepted acts of intercourse, various methods of oral copulation, and numerous incidents of sex play. The latter is most frequently encountered, due to the physical differences between the victim and the adult offender and the pain that is likely to occur during the act of penetration.

See also MacFarlane, supra note 2, at 87; Schultz, supra note 1, at 139; Joint Hearings, supra note 43, at 22-23 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington) (child sex abuse basically consists of nonviolent molestation).

45. See, e.g., Haley v. State, 157 Tex. Crim. 150, 151, 247 S.W.2d 400, 401 (1952); Hammond, supra note 2, at 177.

46. See MacFarlane, supra note 2, at 88:

> Children are accessible targets for a number of reasons. They have been conditioned to comply with authority; they are in subordinate positions and are fearful of threats; they are intensely curious; they are susceptible to bribes and the promise of reward. In addition, children are often naive with regard to social norms and values, and . . . may respond willingly to intimate and gentle contact which they may associate with feelings of being loved . . . . Thus, the use of physical violence is rare because it isn't necessary; children by their very nature make ideal victims of sexual exploitation.

Even when physical injury is inflicted, there is a chance that it may not be diagnosed as related to sex abuse due to the unwillingness of many parents and physicians to entertain the possibility that a child has been sexually assaulted.

> Recognition of sexual molestation in a child is entirely dependent on the individual's inherent willingness to entertain the possibility that the condition may exist. Unfortunately, willingness to consider diagnosis of suspected child molestation frequently seems to vary in inverse proportion to the individual's level of training . . . . The lack of preparation and willingness of many physicians to assist patients with sexual problems in general has often been noted. When the patient is a child, these deficiencies are extremely serious.

Sgroi, Sexual Molestation of Children, supra note 4, at 21; see also R. Brant & V. Tisza, The Sexually Misused Child, *in* The Sexual Victimology of Youth 46 (L. Schultz ed. 1980).

47. See Joint Hearings, supra note 43, at 23 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington).

48. See Finkelhor, supra note 6, at 73; MacFarlane, supra note 2, at 86; Sgroi, supra note 4, at 20; Stevens & Berliner, supra note 3, at 246; Joint Hearings, supra note 43, at 21 (testimony of Steve Adkins, detective, Special Assault Section of King County Police Department) (in King County, Washington, stepfathers constitute the highest percentage of sex offenders).

49. See United States v. Nick, 604 F.2d 1199, 1201 (9th Cir. 1979) (babysitter sexually assaults three year old victim in privacy of locked bedroom); State v. Ritchey, 107 Ariz. 552, 553-54, 490 P.2d 558, 559-60 (1971) (family friend molests two sisters while on an outing); Oldham v. State, 167 Tex. Crim. 644, 646, 322 S.W.2d 616, 618 (1959) (neighbor in his own house molests child who had come to play with neighbor's dogs).

50. See V.D. Yarmey, The Psychology of Eyewitness Testimony 204-05 (1979) (children possess inferior long-term and short-term memories when compared to adults); Stevens & Berliner, supra note 3, at 254 (child's memory of details blurs quickly). But see Altemeyer, Fulton & Berney, Long-Term Memory Improvement: Confirmation of a Finding by Piaget, 40 Child

child's inability to recollect details is especially significant in light of the great lapse of time between the commission of the crime and the trial.[51]

B. *Reliability of Children's Hearsay Statements*

Whether out-of-court statements by children are intrinsically reliable is questionable. Some courts and commentators hold that such statements, standing alone, are trustworthy. Two justifications are commonly offered. First, it is highly unlikely that children persist in lying to their parents or other figures of authority about sex abuse.[52] Second, children do not have enough knowledge about sexual matters to lie about them.[53] In contrast, other courts and commentators, focusing on the well-established tendency of children to fantasize and tell stories, have concluded that these statements are not inherently reliable.[54]

Nevertheless, in child sex abuse cases, the victim's out-of-court statements may, in fact, be more trustworthy than his or her in-court testimony. Requiring a child victim to testify in a sex abuse case adversely affects his or her perception[55] and memory[56] and yields poor and unconvincing evidence. The courtroom experience is extremely traumatic and stressful for most children,[57] despite the steps taken to alleviate this problem.[58] Children are fre-

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Dev. 545 (1969) (study finds that memories of kindergarten children improved over a period of six months).

51. See United States v. Jones, 477 F.2d 1213 (D.C. Cir. 1973) (eight- to nine-month lapse between incident and trial); People v. Debreczeny, 74 Mich. App. 371, 253 N.W.2d 776 (1977) (20-month lapse between date of defendant's arrest and commencement of trial); Stevens & Berliner, supra note 3, at 248 (average time for adjudication of child sex abuse cases in Seattle is six months).

52. Stevens & Berliner, supra note 3, at 250.

53. See Wold v. State, 57 Wis. 2d 344, 357-58, 204 N.W.2d 482, 491 (1973); Williams v. State, 145 Tex. Crim. 536, 549, 170 S.W.2d 482, 490 (1943). See also Flammang, supra note 2, at 184 (details about sexual acts are not within the common experiential knowledge of a child).

54.

> A woman's uncorroborated tale of a sex offense is not more reliable than a man's. A young child's is far less reliable. "It is well recognized that children are more highly suggestible than adults. Sexual activity, with the aura of mystery that adults create about it, confuses and fascinates them. Moreover they have, of course, no real understanding of the serious consequences of the charges they make . . . ."

Wilson v. United States, 271 F.2d 492, 492-93 (D.C. Cir. 1959) (citing Guttmacher & Weihofen, Psychiatry & the Law 374 (1952)); accord United States v. Wiley, 492 F.2d 547, 550 (D.C. Cir. 1973); Brown v. United States, 152 F.2d 138, 139 (D.C. Cir. 1945).

55. See infra notes 57-65 and accompanying text; cf. Yarmey, supra note 50, at 208-09 (citing 1977 study that found that children are adversely affected by the stress inherent in making identifications from lineups, in contrast to identifications made from colored slides; 12% accuracy compared to 29% accuracy).

56. Live testimony thus exacerbates a child's loss of memory over time. See supra note 50 and accompanying text.

57. See Joint Hearings, supra note 43, at 24 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington) (child froze in court despite pretrial confidence; testimony disjointed and jumbled); Libai, supra note 10, at 194-95 (description of "legal process [illegible]" experienced by children); MacFarlane, supra note 2, at 99; Stevens & Berliner, supra note 3, at 54-55.

58. Some courts, recognizing the trauma exerted on the child, have refused to require the child's [illegible] in certain situations. See State v. Boodry, 96 Ariz. 259, 264-65, 394 P.2d 196, 200,

quently subjected to long and extended series of questions and to hostile attacks on their credibility.[59] The stress is intensified if the victim must face the accused again,[60] or if he or she must testify against a close relative,[61] a situation that often occurs in sex abuse cases.[62] Under these circumstances, children, if they reply at all, often give confused and inaccurate answers.[63] Children are susceptible to leading questions[64] and often tailor their replies to appease the examining attorney.[65]

Consequently, in light of the unusual need for child hearsay statements in sex abuse cases,[66] as well as their potentially superior trustworthiness to in-court testimony,[67] the traditional reasons for barring use of such hearsay statements[68] become less compelling. If circumstantial guarantees of trustworthiness are present, the out-of-court declaration should be admitted.[69] Any

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cert. denied, 379 U.S. 949 (1964). But see Ketcham v. State, 240 Ind. 107, 113, 162 N.E.2d 247, 249-50 (1959) ("[T]he delicacies of the situation should not be permitted to outweigh the fact that a man's liberty and reputable life is at stake. The consequential embarrassment is a small price to pay in return for a showing of the witness' understanding of the details."; quoting Riggs v. State, 235 Ind. 499, 503, 135 N.E.2d 247, 249 (1956)).

59. See Schultz, supra note 1, at 120; Stevens & Berliner, supra note 3, at 255. See also State v. Berry, 101 Ariz. 310, 314, 419 P.2d 337, 341 (1966) (noting defense counsel's vigorous attempts to extract inconsistencies in six-year-old child's testimony by use of calendar dates; court finds no fatal variance between charge set forth and evidence at trial).

60. See Joint Hearings, supra note 43, at 24 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington) (speaker suggests that judges should allow children to sit away from the defendant to lessen courtroom trauma).

61.

> This author will never forget the look on the face of a 9-year-old incest victim when her father was brought into the courtroom with chains and handcuffs around his hands and waist. With support and reassurance from concerned professionals and family members, she had, up until that point, coped remarkably well with the rigors of the judicial process. Her only comment before she withdrew into a spasmodic, twitching episode . . . was "I did *that* to my Daddy!"

MacFarlane, supra note 2, at 99.

62. See, e.g., State v. Duncan, 53 Ohio St. 2d 215, 216, 373 N.E.2d 1234, 1235 (1978) (stepfather); State v. Boodry, 96 Ariz. 259, 261, 394 P.2d 196, 197, cert. denied 379 U.S. 949 (1964) (father); People v. Baker, 251 Mich. 322, 323, 232 N.W. 381, 382 (1930) (father).

63. Joint Hearings, supra note 43, at 8-9 (testimony of Mary Kay Barbieri, Chief, Criminal Division, King County Prosecutor's Office) (child's testimony is often confused, distorted and punctuated by long, painful silences).

64. Yarmey, supra note 50, at 200 (children are afraid of authority and will want to please adults by giving the "correct" answer).

65. See McCormick, supra note 16, at 10; Yarmey, supra note 50, at 213 (citing studies showing children's sensitive reactions to suggestive questions).

66. See supra notes 43-51 and accompanying text.

67. See supra notes 55-65 and accompanying text.

68. See supra notes 16-20 and accompanying text.

69. See infra notes 108-15 and accompanying text. In examining the underlying rationale for each of the established exceptions to the hearsay rule, it can be argued that the compelling need for children's hearsay statements, alone, justifies their admission. See 5 Wigmore, supra note 17, at 254:

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

prejudice to the defendant caused by attempts to introduce unreliable child hearsay statements[70] could be avoided by requiring the judge to make the evidentiary ruling outside the presence of the jury.[71]

III. JUDICIAL APPROACHES TO THE PROBLEM OF CHILD HEARSAY STATEMENTS IN SEX ABUSE CASES

Courts, in practice, have evaluated and admitted child hearsay statements using a variety of approaches and exceptions to the hearsay rule. For the most part, these judicial approaches have not properly dealt with the unique circumstances surrounding child sex abuse.

A. *Spontaneous Exclamation Exception*

1. *Description.* The hearsay statements of child victims of sex crimes have almost uniformly been handled under the spontaneous exclamation exception to the hearsay rule.[72] The underlying rationale of the exception is that under certain circumstances extreme excitement or shock may still the declarant's capacity to reflect and contrive.[73] Any statement arising during this

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70.

> In a trial for sexual assault, a child's out of court testimony is often the sole and crucial evidence the state has. The issue usually arises before a jury so that the witness is led up to the point of testifying concerning hearsay statements. Then objection is interposed by defense counsel. The trial judge is faced with a situation where so much of the foundation has already been presented to a jury that nothing will remove the impact of the witness' testimony and the inferences to be drawn therefrom.

Anderson, Children's Out-of-Court Statements Under Rule 908.03 of the Wisconsin Rules of Evidence, 47 Wisc. Bar. Bull. 47, 54 (1974).

71. The Federal Rules of Evidence state that evidentiary rulings should be made outside the presence of the jury "when the interests of justice require or, when an accused is a witness, if he so requests." Fed. R. Evid. 104(c); see also Fed. R. Evid. 103(c) ("In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."). Many states have similar provisions. See, e.g., S.D. Codified Laws Ann., § 19-9-9 (verbatim version of Fed. R. Evid. 104(c)); Wyo. R. Evid. 104(c) (same).

In light of the strong societal feelings against child sex offenders, a hearing out of the presence of the jury may well indeed be essential to the protection of the defendant's rights. See Brown & Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325, 333-34 (1956):

> One need not display an imposing list of statistics to indicate that community feelings everywhere are strong against sex offenders. Murderers and thieves may be evil persons, but in common parlance they are not degenerate or perverted, and their crimes are not unnatural and detestable. In the eyes of the layman, the normal person may kill or steal, but only the queer and the abnormal will stoop to the libidinous crimes of incest, sodomy, and rape. Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

See also People v. Burton, 55 Cal. 2d 328, 340-41, 359 P.2d 433, 11 Cal. Rptr. 65, 69 (1961) (court must be wary of jury's tendency to be easily swayed by improper evidence in sexual assault cases); Anderson, supra note 70, at 54 (recommending that rulings on child hearsay statements in sex abuse cases be made outside the hearing of the jury).

72. The author has found only four states that have looked beyond the spontaneous declaration exception: Michigan, Wisconsin, Washington and Kansas. See infra notes 123-35, 141-53, 163-[illegible], 189 and accompanying text.

73. See Lancaster v. People, 200 Colo. 448, 615 P.2d 720, 722 (1980); State v. Messamore, 2 [illegible] App. 643, 639 P.2d 413, 418 (1982); Fed. R. Evid. 803(2) advisory committee note; 6 J.

period is thus assumed to be free of conscious fabrication and is considered a sincere and trustworthy response.[74] The exception also entails an element of necessity. Once the condition of shock is over, subsequent utterances by the declarant may not possess the same superior assurance of reliability due to the declarant's regained capability to reflect and distort.[75]

The use of the spontaneous exclamation exception in child sex abuse cases is virtually indistinguishable from its use in cases involving adults. **First, there must be a sufficiently startling occurrence that produces, or is likely to produce, the requisite shock or nervous excitement in the child declarant.[76] Second, the resultant shock or nervous excitement must affect the child at the time the statement is made.[77]** Although this requirement has been phrased in a variety of ways, all interpretations emphasize the importance of the absence of "reasoned reflection" and premeditation.[78] Finally, the courts have required that the time lapse between the incident and the statement be relatively brief.[79]

Wigmore, Evidence in Trials at Common Law 195 (J. Chadbourn rev. 1976) [hereinafter cited as 6 Wigmore]. The spontaneous exclamation exception is also known as the "excited utterance," see Fed. R. Evid. 803(2), or "res gestae" exception. See Robinson v. State, 232 Ga. 123, 129, 205 S.E.2d 210, 214-15 (1974); Oldham v. State, 167 Tex. Crim. 644, 646-47, 322 S.W.2d 616, 618-19 (1959).

74. See supra note 73; Harnish v. State, 9 Md. App. 546, 549, 266 A.2d 364, 365 (1970) ("[T]he basis for the admission of declarations under the *res gestae* rule is the belief that spontaneous and instinctive utterances, made without opportunity or time for reflection or deliberation, are more likely to produce a true and accurate picture of the transaction or event . . . ").

75. See 6 Wigmore, supra note 73, at 199 (the superior trustworthiness of these extrajudicial statements creates a necessity of resorting to them for untainted testimony).

76. See State v. Ritchey, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971) (exception requires a "startling event"); People v. Orduno, 80 Cal. App. 3d 738, 746, 145 Cal. Rptr. 806, 810 (1978) (there must be "some occurrence startling enough to produce nervous excitement and render the utterance spontaneous and unreflective"), cert. denied, 439 U.S. 1074 (1979). Most courts assume, however, that the alleged sexual assault constitutes such an occurrence, especially for a young child. See People v. Miller, 58 Ill. App. 3d 156, 161, 373 N.E.2d 1077, 1080 (1978).

77. Compare People v. Stewart, 39 Colo. App. 142, 145, 568 P.2d 65, 68 (1977) (child was found to be still in a state of shock when she reported incident to the police), and Wheeler v. United States, 211 F.2d 19, 24 (D.C. Cir. 1953) (sufficient evidence existed to show that child was still highly distraught and in shock when she spoke), cert. denied, 347 U.S. 1019 (1954), with Ketcham v. State, 240 Ind. 107, 112, 162 N.E.2d 247, 249 (1959) (utterance was not made under "uncontrolled domination of the senses"; story was reluctantly drawn out by questions).

78. See Bass v. State, 375 So.2d 540, 543 (Ala. Crim. App. 1979) (statement must be "the reflex product of the immediate sensual impressions, unaided by retrospective mental action") (quoting McElroy's Ala. Evid. § 265.01(11) (1977)); People v. Orduno, 80 Cal. App. 3d 738, 746, 145 Cal. Rptr. 806, 810 (1978) (utterance must be made "while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance"), cert. denied, 439 U.S. 1074 (1979); Ketcham v. State, 240 Ind. 107, 112, 162 N.E.2d 247, 249 (1959) (utterance must be made under "the immediate and uncontrolled domination of the senses"); Oldham v. State, 167 Tex. Crim. 644, 647, 322 S.W.2d 616, 619 (1959) (declarations must be "the natural and spontaneous outgrowth of the main fact and must exclude the idea of premeditation").

Some courts in older cases drew a line between statements given in response to questions and statements given without prompting. See Smith v. United States, 215 F.2d 682, 683 (D.C. Cir. 1954); Ketcham v. State, 240 Ind. 107, 112, 162 N.E.2d 247, 249 (1959). Recent decisions, however, have not found the distinction compelling. See Fitzgerald v. United States, 443 A.2d 1295, 1304 (D.C. 1982).

79. See State v. Ritchey, 107 Ariz. 552, 555-56, 490 P.2d 558, 561-62 (1971).

In applying these standards, several courts have barred the introduction of narratives by

This requirement, in essence, is merely an additional assurance that the statements have been made spontaneously, before the child has had time to contrive and misrepresent.[50]

In *State v. Boodry*[51] and *People v. Miller*,[52] the children's statements were admitted under the spontaneous exclamation exception. Both courts found that the sexual acts committed constituted sufficiently startling events[53] and that the children spoke spontaneously and without fabrication within minutes of the alleged assault.[54] By contrast, in *Ketcham v. State*,[55] a child's hearsay statement was excluded for lack of spontaneity.[56] This finding was supported by the fact that the child did not report the incident until two hours after the alleged attack and had to be repeatedly questioned in order to bring out the "full story."[57]

2. *Inadequacy of Spontaneous Exclamation Exception in Child Sex Abuse Cases.* The analytic framework of the spontaneous exclamation exception in child sex abuse cases and the exception's criteria of trustworthiness are built on the premise that the declarant has the psychology, behavior, and experience of an adult and reacts accordingly. Invocation of the exception in this context assumes that the rationale, criteria, and application of the exception are identical for the statements of both children and adults.[58] This view, however, is unfounded. By treating child declarants as adults, the exception fails to take into account the special circumstances surrounding child sex

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children, stating that such relation of past events does not contain the requisite spontaneity. See Brown v. United States, 152 F.2d 138, 139 (D.C. Cir. 1945); State v. Shambo, 133 Mont. 305, 319, 322 P.2d 657, 660 (1958). But see Comment, Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana, 29 La. L. Rev. 661, 669 (1969) (arguing that form of statement is irrelevant).

50. See 6 Wigmore, supra note 73, at 202-03. Since the crucial element that buttresses the reliability of such declarations is their spontaneity, the authorities and the case law are concerned that the time span between the event and the making of the statement be very short. State v. Mesamore, 2 Hawaii App. 643, 639 P.2d 413, 418 (1982). Generally, courts have not applied this requirement strictly, see Beausoliel v. United States, 107 F.2d 292, 295 (D.C. Cir. 1939); Williams v. State, 145 Tex. Crim. 536, 548-49, 170 S.W.2d 482, 490 (1943), but most are still wary of admitting statements made after a significant delay without a special showing that the child was still under emotional stress. See State v. Wilson, 20 Or. App. 553, 559-60, 532 P.2d 825, 828 (1975) (event producing excited state of declarant was ongoing; victim fled from father and told first person she encountered what had happened); State v. Pace, 301 So. 2d 323, 326 (La. 1974) (victim was in company of defendant until she returned home); Haley v. State, 157 Tex. Crim. 150, 161-62, 247 S.W.2d 400, 401 (1952) (defendant remained in child's home until the following morning).

51. 96 Ariz. 259, 394 P.2d 196, cert. denied, 379 U.S. 949 (1964).

52. 58 Ill. App. 3d 156, 373 N.E.2d 1077 (1978).

53. Id. at 161, 373 N.E.2d at 1080; State v. Boodry, 96 Ariz. 259, 264-65, 394 P.2d 196, 200, cert. denied, 379 U.S. 949 (1964).

54. Boodry, 96 Ariz. at 264-65, 394 P.2d at 200; *Miller*, 58 Ill. App. at 160-61, 373 N.E.2d at 1079.

55. 240 Ind. 107, 162 N.E.2d 247 (1959).

56. Id. at 112, 162 N.E.2d at 249.

57. Id. at 109, 112, 162 N.E.2d at 248, 249.

58. See supra notes 72-87 and accompanying text.

abuse.[89] It ignores the unusual need for child hearsay statements and, in addition, fails to analyze properly their reliability.[90]

The major weakness of the exception in this context stems from its undue reliance on spontaneity as an indicator of trustworthiness, to the exclusion of other equally valid indicia of reliability.[91] This emphasis on spontaneity is improper for two reasons. First, most children do not view a sexual episode as shocking[92] or even as particularly unusual.[93] Children thus often do not recount the event with the shock or emotion required under the exception. Children are simply not as highly sexualized or moralized as adults. They may not know what has happened to them is wrong.[94] This may be especially true if the child has been involved in an incestuous relationship. A parental imprimatur on the entire situation may often cause the child to view everything as normal.[95] A sexual incident may not be traumatic for other reasons as well. Often, the victims themselves are searching for warmth and affection. "For some, it represents the first time they experience what they perceive to be recognition or special attention from the parent or parent figure."[96] Sexual relationships of substantial duration between children and adults are not uncommon.[97]

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89. See supra notes 43-65 and accompanying text.

90. Id.

91. See infra notes 108-15 and accompanying text.

92. See Finkelhor, supra note 6, at 65 (only 26% of women assaulted as children surveyed felt shock; 20% felt surprised; 8% remember feeling pleasure); Landis, supra note 1, at 98 (only 12.9% of men and 25.3% of women surveyed viewed experience as shocking); Schultz, supra note 1, at 149.

93. T. McCahill, L. Meyer & A. Fischman, The Aftermath of Rape 44 (1979) ("In many cases, the nature of the event (or events) is merely confusing. Whereas the event is disturbing to the victim, it is perhaps no more disturbing than so many other aspects of a child's life.").

94.

> [C]hildren have only a dim sense of adult sexuality. What may seem like a horrible violation of social taboos from an adult perspective need not be so to a child. A sexual experience with an adult may be something unusual, vaguely unpleasant, even traumatic at the moment, but not a horror story. Most children's sexual experiences involve encounters with fondlers and exhibitionists, . . . and "it is difficult to understand why a child, except for its cultural conditioning, should be disturbed at having its genitals touched, or disturbed at seeing the genitals of other persons."

Finkelhor, supra note 6, at 31, quoting A. Kinsey, Sexual Behavior in the Human Female 121 (1953). See also Joint Hearings, supra note 43, at 23 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington) (children act normally because they are not taught what child molesting is).

95. See People v. Taylor, 66 Mich. App. 456, 460, 239 N.W.2d 627, 629 (1976):

> She [the victim] testified further that she never told anyone because her father said that "it wouldn't be right" to tell, and that she felt that "it was private" and thought that "he could get in trouble." In her words: "Because, you know, I mean he never told me it was really wrong, because he was my father and everything."

See also Joint Hearings, supra note 43, at 25 (testimony of Brian Leavitt) (testifying witness was raped and molested repeatedly by stepfather; did not discover such behavior was wrong until sex education teacher told him).

96. MacFarlane, supra note 2, at 88-89.

97. See People v. Taylor, 66 Mich. App. 456, 457, 239 N.W.2d 627, 628 (1976) (father had sexual relations with daughter for four years on a regular basis); Joint Hearings, supra note 43, at 25 (testimony of Brian Leavitt) (testifying witness was raped and molested by stepfather for one to one and one-half years); Finkelhor, supra note 6, at 3; Schultz, supra note 1, at 149-50.

This childhood perspective on sexual experiences naturally does not produce the shock or excitement that the law presumes to exist after such an event. Quite often, the incident is related as part of the day's activities without any indication from the child that it was traumatic or unusual. For example, in *Brown v. United States*[98] the three-year-old victim calmly reported her assault in school that day during the course of normal dinnertime conversation. The statement was subsequently excluded for lack of spontaneity.[99]

Second, a significant delay frequently precedes the child's statement, thereby violating the time requirement of the spontaneous exclamation exception.[100] Even when a child is aware of the nature of his or her assault, a report of the event may still not be instantly forthcoming.[101] This delay may be caused by a variety of factors: the victim's fears of not being believed,[102] feelings of confusion and guilt,[103] efforts to forget,[104] and threats against the victim by the defendant.[105] Consequently, a child often keeps silent until something compels him or her to relate what has happened. For example, in one case[106] the five-year-old victim broke silence about his prior sexual assault to prevent being sent to the defendant's house again.[107]

The spontaneous exclamation exception thus unnecessarily bars a significant proportion of probative evidence that should be admitted. By relying solely on spontaneity, the exception ignores the presence of other cogent

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98. 152 F.2d 138 (D.C. Cir. 1945).

99. Id. at 138; see also Smith v. United States, 215 F.2d 682, 683 (D.C. Cir. 1954) (child spent the time between the alleged offense and the telling of it to her mother in a normal manner in the household); Oldham v. State, 167 Tex. Crim. 644, 646, 322 S.W.2d 616, 618 (1959) (child relates incident in asking for a glass of chocolate milk).

Indeed, many child psychologists note that children are traumatized more by the reactions of their family and society to the incident than by the incident itself. See MacFarlane, supra note 2, at 87; National Center on Child Abuse & Neglect, supra note 1, at 5; Renshaw & Renshaw, Incest, *in* Traumatic Abuse and Neglect of Children at Home 420 (1980).

100. See supra notes 79-80 and accompanying text.

101. See Joint Hearings, supra note 43, at 22 (testimony of Doris Stevens, Director, Sexual Assault Center in Seattle, Washington) ("[T]he younger the victim is and the closer the relationship is to the assailant, the more likely it is to be a longer period of time [before the child reports the incident]. Most children do not report immediately.").

102. Id. at 23.

103. See Stevens & Berliner, supra note 3, at 251; Schultz, supra note 1, at 150; National Center on Child Abuse and Neglect, supra note 1, at 2.

104. See Joint Hearings, supra note 43, at 23 (testimony of Lucy Berliner, social worker, Sexual Assault Center in Seattle, Washington).

105. See Fitzgerald v. United States, 443 A.2d 1295, 1298 (D.C. 1982); Ketcham v. State, 240 Ind. 107, 109, 162 N.E.2d 247, 248 (1959); People v. Bonneau, 323 Mich. 237, 239, 35 N.W.2d 161, 161-62 (1948); see also Joint Hearings, supra note 43, at 19 (testimony of Steve Adkins, Detective, Special Assault Section of King County Police Department) (children feel great fear from even the mildest of threats).

A child may not spontaneously relate the event for other reasons as well. He or she may want to protect younger siblings, see MacFarlane, supra note 2, at 90, or may fear blame for the incident. See National Center on Child Abuse and Neglect, supra note 1, at 2.

106. Harnish v. State, 9 Md. App. 546, 266 A.2d 364 (1970).

107. Id. at 365; see also State v. Messamore, 2 Hawaii App. 643, 639 P.2d 413, 416 (1982) [illegible] control her urination as a result of being raped, tells mother what happened in [illegible] being spanked for urinating on the stairs); People v. Taylor, 66 Mich. App. 456, [illegible] N.W.2d 627, 629-30 (1976) (victim reports being sexually assaulted by her father

circumstantial guarantees of trustworthiness, and the fact that the requisite need for and reliability of children's hearsay statements can be established independently of a showing of shock. To determine accuracy, circumstances such as the age of the child,[108] his or her physical and mental condition,[109] the exact circumstances of the alleged event,[110] the language used by the child,[111] the presence of corroborative physical evidence,[112] the relationship of the accused to the child,[113] the child's family, school, and peer relationships,[114] and the reliability of the testifying witness,[115] can be examined.

3. *Attempts to Mitigate the Harshness of the Spontaneous Exclamation Exception.* Some courts, recognizing the flaws inhering in a mechanical application of the spontaneous exclamation exception to child hearsay statements in sex abuse cases,[116] have attempted to mitigate the arbitrariness of the rule.

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after being told that her younger sister had told others of being sexually molested by father as well).

108. See Beausoliel v. United States, 107 F.2d 292, 295 (D.C. Cir. 1939) (reflective powers of a young child less likely to be used in sex abuse situation); State v. Ritchey, 107 Ariz. 552, 556, 490 P.2d 558, 562 (1971); Smith v. State, 6 Md. App. 581, 587, 252 A.2d 277, 281 (1969) (tender age of child makes it unlikely that exciting influence of event had subsided quickly); Williams v. State, 145 Tex. Crim. 536, 549, 170 S.W.2d 482, 490 (1943) (tender age of victim makes it unlikely that she knew anything about sexual matters).

109. See United States v. Iron Shell, 633 F.2d 77, 86 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981); State v. Wilson, 20 Or. App. 553, 559, 532 P.2d 825, 828 (1975).

110. See State v. Price, 301 So. 2d 323, 326 (La. 1974); Haley v. State, 157 Tex. Crim. 150, 151-53, 247 S.W.2d 400, 401-02 (1952) (delay in reporting incident due to the fact that child was in the company of the defendant for an extended period of time; child reported assault at first available opportunity).

111. See United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979) ("The childish terminology has the ring of verity and is entirely appropriate to a child of his tender years."); Williams v. State, 145 Tex. Crim. 536, 549, 170 S.W.2d 482, 490 (1943) (childlike manner in which statement was related was entirely appropriate and natural for the victim; disproves notion that statement was premeditated); Joint Hearings, supra note 43, at 9 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (children's statements are often phrased in language that tells a story that the event occurred).

112. See United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979) (sperm on pants, medical examination); Soto v. Territory, 12 Ariz. 36, 40, 94 P. 1104, 1105 (1908) (lacerated and bleeding rectum); Johnson v. State, 201 Tenn. 11, 13, 296 S.W.2d 832, 833 (1956) (bruises around rectum); Bertrang v. State, 50 Wis. 2d 702, 705-06, 184 N.W.2d 867, 868-69 (1971) (blood on panties).

113. See United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979) (victim knew defendant-babysitter well, not likely to mistake his assailant); People v. Taylor, 66 Mich. App. 456, 460, 239 N.W.2d 627, 629 (1976) (delay in reporting assault is natural when father is the perpetrator; victim likely to have no sense of outrage) (citing People v. Baker, 251 Mich. 322, 326, 232 N.W. 2d 381, 383 (1930)).

114. See People v. Price, 33 Misc. 2d 476, 479, 226 N.Y.S.2d 460, 463 (N.Y. Ct. Spec. Sess. 1962) (hearsay statement was not made "in the setting of a hate-filled controversy where the child finds itself involved as a partisan, which setting so often renders children's testimony untrustworthy and even dangerous"); Haley v. State, 157 Tex. Crim. 150, 154, 247 S.W.2d 400, 402 (1952) (child had been reared by her mother; natural for her to tell neighbors about incident).

115. See United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979) (mother not likely to forget her child's simple shocking seven word statement; mother was also subjected to cross-examination); Bertrang v. State, 50 Wis. 2d 702, 708, 184 N.W.2d 867, 870 (1971); Joint Hearings, supra note 43, at 8 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (relationship between defendant and testifying witness important in determining reliability of child's statement); see also infra notes 132-35 and accompanying text.

116. See supra notes 91-101 and accompanying text.

Although ostensibly applying the exception, they have gone beyond its established limits and have admitted statements which would normally be excluded under traditional formulations of the spontaneous exclamation exception.

For example, in *Smith v. State*,[117] the Maryland Court of Special Appeals admitted the hearsay statement of a four-year-old rape victim despite the fact that four-and-one-half to five hours had elapsed before she spoke to her mother about the incident.[118] The court ignored the fact that the child was calm at the hospital, hours before she made her statement,[119] and that at trial, the examining doctor had characterized the child's demeanor as "placid."[120]

However, in avoiding the harsh results of the spontaneous exclamation exception in this manner, courts have virtually destroyed the integrity of the exception, stretching it far beyond its traditional bounds,[121] and creating much uncertainty in its application. What courts are in fact doing is looking to various circumstantial guarantees of trustworthiness, of which spontaneity is just one.[122]

B. *Tender Years Exception*

1. *Description.* The Michigan courts have also attempted to escape the arbitrary strictures of the spontaneous exclamation exception through the development of a "tender years" exception specifically applicable to out-of-court statements made by child victims of sex crimes.[123] Although the exception has been recently eliminated by the adoption of the Michigan Rules of

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117. 6 Md. App. 581, 252 A.2d 277 (1969).

118. Id. at 583-85, 252 A.2d at 278-79.

119. Id. at 583, 252 A.2d at 278.

120. Id. Similarly in State v. Ritchey, 107 Ariz. 552, 490 P.2d 558 (1971), the Arizona Supreme Court allowed the admission of hearsay statements by two sisters, four and six years of age, who had been molested by a family friend. Id. at 555-56, 490 P.2d at 559-60. The statements were accepted under the spontaneous exclamation exception despite the fact that the children did not exhibit any shock or nervous excitement and were merely subdued in their manner. Id. at 555, 490 P.2d at 561; see also People v. Stewart, 39 Colo. App. 142, 145, 568 P.2d 65, 68 (1977) (court admits statement of a six-year-old victim made to police officer two hours after sexual assault, even though child had opportunity to tell others earlier); State v. Noble, 342 So. 2d 170, 172-73 (La. 1977) (court admits statement of four-year-old victim made two days after rape); Haley v. State, 157 Tex. Crim. 150, 151-52, 247 S.W.2d 400, 401 (1952) (court admits statement of four-and one half-year-old victim made more than eight hours after rape).

121. See Joint Hearings, supra note 43, at 9 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (Washington courts have extended the excited utterance exception for children in sex abuse cases).

122. See supra notes 108-15 and accompanying text.

123. See, e.g., People v. Turner, 112 Mich. App. 381, 316 N.W.2d 426 (1982), vacated, 332 N.W.2d 150 (Mich. 1983); People v. Dermartzev, 29 Mich. App. 213, 185 N.W.2d 33 (1970), rev'd, 386 Mich. 410, 213 N.W.2d 97 (1973). The exception has been expressly confined to these situations. See People v. Washington, 84 Mich. App. 750, 753-54, 270 N.W.2d 511, 512 (1978) (court refuses to apply "tender years" exception to hearsay statements of young child who witnessed murder of parents; exception limited to sex crime situations). However, the Michigan courts, in at least one case, have extended the exception to child witnesses of sex crimes. See People v. Lovett, 85 Mich. App. 534, 543-45, 272 N.W.2d 126, 129-30 (1978).

Evidence,[124] its genesis and development is still instructive in the area of child hearsay statements in sex abuse cases.

The tender years exception has been characterized as a variation of the spontaneous exclamation exception,[125] but is, in fact, markedly different. The requirement of contemporaneity is dispensed with entirely. The exception admits statements of young victims regardless of how much time has elapsed between the assault and the statement.[126] The delay, however, must be properly explained either by fear instilled in the child or by another "equally effective circumstance."[127] The underlying rationale appears to be the assumption that the child is under continuing duress throughout the entire period.[128] Moreover, the tender years exception allows hearsay to be introduced only for the purposes of corroborating the child's in-court testimony.[129] The exception was first recognized in *People v. Gage*,[130] where the court admitted the hearsay statements of a ten-year-old victim of sexual assault that were made approximately three months after the incident.[131]

By merely requiring that the delay be adequately explained, the tender years approach properly recognized that spontaneity is not the sole indicator of trustworthiness in evaluating children's statements. Michigan courts used the exception to incorporate more appropriate criteria of reliability by broadly

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124. See People v. Kreiner, 415 Mich. 372, 329 N.W.2d 716, 717 (1982) (tender years exception to the hearsay rule no longer exists).

125. See People v. Baker, 251 Mich. 322, 326, 232 N.W. 381, 383 (1930) ("the admissibility of details of complaint, in the case of very young girls, has been permitted on a liberal extension of the res gestae doctrine"); People v. Turner, 112 Mich. App. 381, 383, 316 N.W.2d 426, 427 (1982) ("[T]he tender years exception is a species of the res gestae exception."), vacated, 332 N.W.2d 150 (Mich. 1983).

126. See People v. Gage, 62 Mich. 271, 275, 28 N.W. 835, 836 (1886) ("[T]he lapse of time occurring after the injury, and before complaint made, is not the test of admissibility. . . ."); infra note 127 and accompanying text.

127. People v. Baker, 251 Mich. 322, 326, 232 N.W. 381, 383 (1930); see also People v. Bonneau, 323 Mich. 237, 240, 35 N.W.2d 161, 162 (1948) (delay excusable due to defendant's threats); People v. Debieczeny, 74 Mich. App. 371, 394, 253 N.W.2d 776, 778 (1977) (delay adequately explained by fact that child interviewer at police station was off duty; statement was made at earliest opportunity the following morning); People v. Dermartzex, 29 Mich. App. 213, 218, 185 N.W.2d 33, 35 (1970), aff'd, 390 Mich. 410, 213 N.W.2d 97 (1973) (delay properly explained by fear engendered in victim by defendant; court notes that defendant was a large man of about 225 pounds and that victim's parents lived in Canada).

128. See People v. Gage, 62 Mich. 271, 275, 28 N.W. 835, 836-37 (1886):

> The female outraged was a girl of tender years . . . and through fear caused by threats made by the accused she refrained from telling her parents of the outrage until they heard it from others whom she had told. She appears to have been under a sort of duress, caused by fear of the whipping which the respondent had impressed upon her mind would befall her if she told her parents, and it was with great reluctance she finally disclosed the facts to her mother, caused by the fear respondent had engendered in her mind.

See also People v. Edgar, 113 Mich. App. 528, 317 N.W.2d 675 (1982).

129. See People v. Kreiner, 415 Mich. 372, 329 N.W.2d 716, 719 (1982) (exception permits hearsay only to corroborate the testimony of the complainant); People v. Taylor, 66 Mich. App. 456, 461, 239 N.W.2d 627, 630 (1976) (hearsay testimony corroborating the details of the alleged statutory rape is permissible under the tender years exception).

130. 62 Mich. 271, 28 N.W. 835 (1886).

131. Id. at 273-74, 28 N.W. at 835-36.

interpreting what constitutes an "equally effective circumstance" for purposes of justifying the delay. Such circumstances have been read to include the presence of threats by the offender,[132] the absence of the child's parents at the time of the assault,[133] the relationship of the offender to the child,[134] and the nature and duration of sexual relations between the child and offender.[135]

2. *Inadequacy of the Tender Years Approach.* Despite the flexibility and sensitivity of the Michigan courts towards the statements of child sex abuse victims, the tender years exception, as it was employed, is flawed. It ignores the unique problems posed by child hearsay statements in these situations and fails to require the presence of sufficient assurances of reliability.

The major shortcoming of the tender years approach is that in many situations the exception allowed impermissible bootstrapping: statements, whose delay was explained solely by the child's hearsay statement itself rather than by independent corroborative evidence, were admitted under the exception. For example, in *People v. Edgar*,[136] the court justified admitting a victim's out-of-court statement made one week after the event because the child's hearsay statement alleged threats of whipping by the defendant.[137] The court ignored the fact that children's statements are not inherently truthful,[138] and that a child's memory is likely to fade quickly over time.[139] While the reliability of the assertion itself may be one factor indicating its admissibility, it cannot be the only factor. To allow the content of the hearsay statement to determine its own validity merely begs the question.[140]

C. *The Residual Exception*

1. *Description.* Another approach that has been used to determine the admissibility of child hearsay statements is the residual hearsay exception. The exception has been employed in Wisconsin[141] and is embodied in sections

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132. See People v. Bonneau, 323 Mich. 237, 240, 35 N.W.2d 161, 162 (1948); People v. Gage, 62 Mich. 271, 275, 28 N.W. 835, 837 (1886); People v. Edgar, 113 Mich. App. 528, 534, 317 N.W.2d 675, 678 (1982).

133. See People v. Dermanizen, 29 Mich. App. 213, 218, 185 N.W.2d 33, 35 (1970), aff'd, 386 Mich. 410, 213 N.W.2d 97 (1973).

134. See People v. Taylor, 66 Mich. App. 456, 460, 239 N.W.2d 627, 629 (1976).

135. Id.

136. 113 Mich. App. 528, 317 N.W.2d 675 (1982).

137. Id. at 530-31, 317 N.W.2d at 676-78; see also People v. Bonneau, 323 Mich. 237, 239, 35 N.W.2d 161, 162 (1948) (child's statement alleges that defendant "would get after her" if she [illegible]); People v. Gage, 62 Mich. 271, 273, 28 N.W. 835, 836 (1886) (child's statement reported "threats by defendant of whipping").

138. See supra notes 52-54 and accompanying text. See also Anderson, supra note 70, at 51 (there is no reason for attaching any trustworthiness to that part of the out-of-court statement [illegible] the reasons for the delay unless there are other independent facts to render the [illegible] reliable).

139. See supra notes 50-51 and accompanying text.

140. When the child's in-court testimony corroborates her hearsay statements, the bootstrapping problem remains unsolved. The hearsay statement still has no guarantee of reliability independent of the child.

141. See Bertrang v. State, 50 Wis. 2d 702, 184 N.W.2d 867 (1971); see also Thomas v. State, 92 Wis. 2d 572, 577, 284 N.W.2d 917, 921 (1979) (State attempts to admit hearsay statement of fo-

908.03(24) and 908.045(6) of the Wisconsin Rules of Evidence.[142] The exception, which parallels rules 803(24) and 804(b)(5) of the Federal Rules of Evidence,[143] admits hearsay statements falling outside the enumerated exceptions if they possess "comparable circumstantial guarantees of trustworthiness."[144]

The Wisconsin courts have employed the residual approach to go beyond the limits of the spontaneous exclamation exception and, like the Michigan courts, have looked for indicia of reliability more suitable for young children. In *Bertrang v. State*,[145] the Supreme Court of Wisconsin admitted the hearsay statement of a nine-year-old victim made two days after she was sexually assaulted by the defendant.[146] In assessing the trustworthiness of the statement, the court looked at the age of the child,[147] the nature of the assault,[148] the presence of physical evidence of the assault,[149] the relationship of the child to the defendant,[150] and the spontaneity of the statement.[151]

Because of its flexibility, the residual exception is superior to the judicial approaches to child hearsay statements examined thus far. Unlike the excited utterance exception, the rule allows the court to look to indicia of reliability in addition to spontaneity, which by itself does not specifically address the special nature of sex abuse cases.[152] Moreover, the residual approach requires that these indicia be independent of the hearsay statement, thereby preventing the bootstrapping problems of the tender years exception.[153]

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year-old mentally deficient victim of rape under rule 908.03(24); court allows statement in as a prior consistent statement under 908.01(4)(a)).

142. Both rules state: "A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness [is admissible]." Wis. R. Evid. 908.03(24), 908.045(6). Rule 908.03(24) applies whether or not the declarant is available to testify; rule 908.045(6) can be used only when the declarant is unavailable. Cf. Fed. R. Evid. 803(24), 804(b)(5) (residual exceptions under the federal rules).

143. The Wisconsin Rules of Evidence were modeled after the Federal Rules of Evidence, see Wis. R. Evid., 59 Wis. 2d Rp. (Foreword by Chief Justice Hallows); the federal advisory committee notes to the Federal Rules were accordingly included for informational purposes, see id. at R2.

144. Wis. R. Evid. 908.03(24), 908.045(6).

145. 50 Wis. 2d 702, 184 N.W.2d 867 (1971).

146. Id. at 708, 184 N.W.2d at 870.

147. Id. at 706, 184 N.W.2d at 869.

148. Id. at 708, 184 N.W.2d at 870.

149. Id.

150. Id.

151. Id. at 707-08, 184 N.W.2d at 869-70. The court also stated that the reliability of the assertions themselves and the reliability of the testifying witness could also be considered in determining the admissibility of a child's statement. Id. at 708, 184 N.W.2d at 870.

Although purporting to apply the spontaneous exclamation exception, id. at 706-08, 184 N.W.2d at 869-70, the court in *Bertrang* went far beyond the traditional limitations of the exception; the statement was made after a two-day time lapse and was prompted by direct questioning by the victim's mother. Id. at 705-06, 184 N.W.2d at 868-69. See Mitchell v. State, 84 Wis. 2d 325, 332, 267 N.W.2d 349, 352 (1978) (statements in *Bertrang* "were of a type normally covered by a specific exception [spontaneous utterance], but the facts presented did not satisfy the requirements of the specific exception"). In fact, the Judicial Council Committee used *Bertrang* as a basis for establishing the residual exception in the Wisconsin Rules of Evidence and as an example of how the exception should properly be employed. Wis. R. Evid. 908.03(24) (judicial council committee note).

152. See supra notes 91-107 and accompanying text.

153. See supra notes 136-39 and accompanying text.

2. *Inadequacy of the Residual Exception.* Despite the potential application of the residual exception to child hearsay statements in child sex abuse cases, the availability of the exception is sharply limited. **The exception was never intended to create formal class exceptions to the hearsay rule and cannot be applied to child hearsay statements as a group.**[154] **Rather, it was intended to be used rarely and only in exceptional circumstances.**[155] Thus, the mere availability of the residual exception does not guarantee that courts will not resort to the more traditional analyses that thus far have proved inadequate.[156]

Even if the residual approach is used in the form of a class exception for child hearsay statements, there is great potential for judicial abuse of discretion. Beyond requiring the presence of circumstantial guarantees of trustworthiness, the exception, as it exists in Wisconsin, provides no guidance to the courts in considering the special circumstances of these statements.[157] The open-ended nature of the residual approach is simply not suited for class exceptions, including child hearsay statements in sex abuse cases. These exceptions require more particularized standards of need and trustworthiness.[158]

IV. Solution: Washington Statutory Exception

The unique nature of child sex abuse cases imposes rigorous demands on courts when assessing the admissibility of child hearsay statements. Not only must the courts be sensitive to the critical need for these statements,[159] but they must also address the various reliability problems posed by the statements.[160] This is essential if the underlying principles of the hearsay rule are to be followed[161] and the defendant's rights under the confrontation clause

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154. See Wis. R. Evid. 908.03(24) federal advisory committee note, 59 Wis. 2d R301-02 (1973) (**exception does not contemplate an unfettered exercise of judicial discretion; it should be used only to treat new and presently unanticipated situations**).

155. See Wis. R. Evid. 908.03(24) federal advisory committee note, 59 Wis. 2d R301-02 (1973); U.S. Rep. No. 1277, 93rd Cong., 2d Sess. 20, reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7066 ("**The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule . . . .**"); 4 Weinstein's Evidence, supra note 23, ¶ 803(24)[01], at 803-296 (emphasis added):

> Congress did not wish to see the courts create new, formal exceptions to the hearsay rule except by the formal method of promulgation by the Supreme Court subject to the veto of Congress . . . [;] it authorized *individual case decisions* admitting hearsay not within the precise bounds of a recognized exception.

156. See supra notes 72-140 and accompanying text.

157. See Wis. R. Evid. 908.03(24) and 908.045(6). Indeed, some commentators have noted that the *ordinary*, as opposed to class, application of the *federal* residual exception, which is more detailed than its Wisconsin counterpart, has resulted in widely varying standards of trustworthiness enforced among the circuits. See Yasser, Strangulating Hearsay: The Residual Exceptions to the Hearsay Rule, 11 Tex. Tech. L. Rev. 587, 597, 603-04 (1980); Note, The Residual Exceptions to the Hearsay Rule in the Federal Rules of Evidence: A Critical Examination, 31 Rutgers L. Rev. 687, 707 (1978); see also Note, The Federal Courts and the Catenall Hearsay Exceptions, 25 Wayne L. Rev. 1361, 1377 (1979) (recommending that trial courts' discretion under the residual exception be restricted to prevent standards of trustworthiness from falling too low).

158. See supra notes 21-32 and accompanying text.

159. See supra notes 43-51 and accompanying text.

160. See supra notes 52-71 and accompanying text.

161. See supra notes 16-32 and accompanying text.

protected.[162] None of the approaches examined above, however, has adequately met these demands.[163]

An approach that properly addresses the need for children's hearsay statements, realistically and effectively ensures their trustworthiness, and poses no threat to defendants' rights, is found in a newly enacted Washington statute. The statute establishes a specific hearsay exception for child declarants in sex abuse cases:[164]

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
>
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.[165]

A. *Analysis of Washington Statutory Exception*

The Washington exception addresses the special nature of child hearsay statements in sex abuse cases in several ways. First, unlike the spontaneous exclamation exception, admissibility is not conditioned upon the fulfillment of one inflexible criterion of trustworthiness.[166] The exception permits the courts to look to other pertinent and persuasive indicia of reliability, indicia which have in fact been recognized as suitable guarantees of trustworthiness in these cases.[167] This allows a broad range of reliable statements to be admitted that would otherwise be summarily excluded because they failed to meet the requirements of the spontaneous exclamation exception. For example, in *Ketcham v. State*,[168] the court might have decided differently[169] if instead of focusing on spontaneity, its attention had been directed to the fact that there

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162. See supra notes 33-39 and accompanying text.

163. See supra notes 72-158 and accompanying text.

164. 1982 Wash. Laws, Sess. ch. 129, § 2 (West).

165. Id.

166. See supra notes 88-115 and accompanying text.

167. See supra notes 108-15, 132-35, 145-51 and accompanying text.

168. 230 Ind. 107, 162 N.E. 2d 237 (1959).

169. See supra notes 88-97 and accompanying text (child's statement in *Ketcham* was excluded for lack of spontaneity; requirements of the excited utterance exception not met).

was physical evidence of the assault[170] and that the defendant had been seen alone with the child around the time of the alleged crime.[171]

While the exception permits the court to examine a variety of indicia indicating reliability, the exception avoids the bootstrapping problem of the tender years exception.[172] The statute requires the court to examine not only the content of the out-of-court declaration, but the time and circumstances surrounding the statement as well.[173] Moreover, the exception requires the presence of corroborative evidence if the child is unavailable to testify.[174]

The Washington statute is also superior to the residual exception approach, as adopted in Wisconsin. The statute requires courts to look for alternative indicia of reliability if the statement falls outside all of the established class exceptions.[175] It therefore ensures that courts will not be limited to traditional hearsay analyses. The exception, in effect, is a class one, intended to prevent children's hearsay statements from being arbitrarily evaluated and excluded.[176] The residual exception, in contrast, does not provide this guarantee of judicial scrutiny. Since it was never intended as a catch-all for any class of statements,[177] there is no assurance that courts will not continue to resort to the conventional—and flawed—approaches.

In addition, the Washington exception mitigates the possibility of judicial abuse of discretion and provides detailed guidance to the courts seeking to apply it.[178] It prescribes specific substantive rules to determine how child hearsay statements should be assessed, as well as procedural rules governing the exception's operation.[179]

Finally, the statute goes to great lengths to prevent prejudice to the defendant. All rulings on the admissibility of child hearsay statements must, under the exception, be made outside the hearing of the jury.[180] Given the emotional nature of child sex abuse[181] and the potential prejudicial effects of foundation testimony,[182] this additional requirement represents a significant advance over all the other approaches.

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170. Ketcham v. State, 240 Ind. 107, 112, 162 N.E.2d 247, 249 (1959) (physician testified as to bruises and injuries around the pelvis and vagina of the child).

171. Id.

172. See supra notes 136-40 and accompanying text.

173. 1982 Wash. Legis. Serv. ch. 129, § 2 (West).

174. Id.

175. Id.

176. See Joint Hearings, supra note 43, at 9 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (excited utterance exception too limited despite efforts of Washington courts to stretch its requirements; much trustworthy evidence still excluded).

177. See supra notes 154-56 and accompanying text.

178. See supra notes 157-58 and accompanying text.

179. See 1982 Wash. Legis. Serv. ch. 129, § 2 (West).

180. Id.

181. See People v. Burton, 55 Cal. 2d 328, 340-41, 359 P.2d 433, 437, 11 Cal. Rptr. 65, 69 (1961) (court must be wary of jury's tendency to be easily swayed by improper evidence in sexual assault cases); Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325, 333-34 (1956) (community feelings are strong against sex offenders); supra notes 70-71 and accompanying text.

182. See Anderson, supra note 70, at 54 (in most child sex abuse cases, much foundation evidence will be already introduced before an objection to the hearsay statement is interposed; the [illegible] of this foundation testimony upon the jury is impossible to remove).

B. *Constitutionality*

The Washington exception was carefully drafted to avoid any confrontation clause problems.[183] In fact, it appears to go beyond the constitutional requirements set forth by the Supreme Court.[184] The exception demands that the hearsay statement contain "sufficient indicia of reliability" whether or not the child is available to testify.[185] Such indicia have been required by the Supreme Court only when the declarant is unavailable.[186] If the declarant testifies, the sixth amendment imposes no such standard of trustworthiness.[187] In addition, the Washington exception requires the concurrent presence of corroborative evidence if the child is unavailable to testify.[188] The Supreme Court merely requires that the statement contain "adequate indicia of reliability;" independent corroboration is not necessary under the confrontation clause.[189]

CONCLUSION

Thus far, courts have improperly analyzed the hearsay statements of children in child sex abuse cases. A new approach is needed, one which is sensitive to the special circumstances of child sex abuse and its victims. This Note proposes that the newly adopted Washington statute serve as a model for other states. Using this approach not only provides a means by which the probative value of child hearsay statements can be cogently assessed, but also ensures proper protection for the accused.

Judy Yan

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183. See Joint Hearings, supra note 43, at 2-7.

184. See Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970), supra notes 33-39 and accompanying text.

185. 1982 Wash. Legis. Serv. ch. 129, § 2 (West).

186. See Ohio v. Roberts, 448 U.S. 56, 66 (1980); supra note 39 and accompanying text.

187. See California v. Green, 399 U.S. 149, 158-59 (1970) (any inaccuracies in declarant's prior statement are exposed by cross-examination).

188. 1982 Wash. Legis. Serv. ch. 129, § 2 (West); see also Joint Hearings, supra note 43, at 10 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (discussing what type of corroboration satisfies the exception; such corroboration includes the presence of venereal disease or medical trauma).

189. See Ohio v. Roberts, 448 U.S. 56, 66 (1980); see also supra notes 33-39 and accompanying text; Joint Hearings, supra note 43, at 6 (testimony of Mary Kay Barbieri, Chief, Criminal Division in King County Prosecutor's Office) (corroborative evidence requirement goes beyond what the Constitution requires).

Kansas has recently enacted a statutory exception for child hearsay statements similar to Washington's. See Kan. Stat. Ann. ch. 60, art. 460 § dd (Supp. 1982). However, the Kansas exception is noticeably more relaxed in its admissibility standards. A statement need only be "apparently reliable" if the child is unavailable as a witness. Id. Doubts concerning the statement's trustworthiness affect the *weight* of the statement rather than its admissibility. Id. Therefore, although the exception is a much needed liberalization of present evidentiary law, it is of questionable constitutional validity. See supra notes 33-39 and accompanying text.

gence and understanding has fair notice of conduct prohibited by statute and ascertainable standards by which to guide his or her conduct, statute is neither vague nor overbroad. State v. Schimmelpfennig (1979) 92 Wash.2d 95, 597 P.2d 442.

State has a strong interest in protecting children against exposure to sexual speech which may be harmful, and thus speech directed at engaging minors in acts of sexual misconduct is subject to regulation by the state even though the words, spoken to an adult, may not be obscene. State v. Schimmelpfennig (1979) 92 Wash.2d 95, 594 P.2d 442.

Since only language prohibited by § 9A.88.020 defining offense of communication with a minor for immoral purposes is language directed toward sexual misconduct with a minor, it is not protected by First Amendment, U.S.C.A. Const. Amend. 1, and statute is not overbroad. State v. Schimmelpfennig (1979) 92 Wash.2d 95, 594 P.2d 442.

The words "immoral purposes" as used in § 9A.88.020 defining offense of communication with a minor for immoral purposes were not unconstitutionally vague for purposes of prosecution of defendant who allegedly asked small child to climb into van and engage in sexual activities. State v. Schimmelpfennig (1979) 92 Wash.2d 95, 594 P.2d 442.

Under § 9A.88.020 defining offense of communication with a minor for immoral purposes, scope of statutory prohibition is limited by its context and wording to communication for the purposes of sexual misconduct. State v. Schimmelpfennig (1979) 92 Wash.2d 95, 594 P.2d 442.

9A.44.120. Admissibility of child's statement—Conditions

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:

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

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

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

Added by Laws 1982, ch. 129, § 2.

Severability—Laws 1982, ch. 129: See Historical Note following § 9A.04.080.

C.J.S. Criminal Law §§ 740 to 745.

Library References

Criminal Law ⇐415(1 to 7).

9A.44.900. Decodification and addition of RCW 9.79.140–9.79.220, 9A.88.020, and 9A.88.100 to this chapter

RCW 9.79.140, 9.79.150, 9.79.160, 9.79.170 as now or hereafter amended, 9.79.180 as now or hereafter amended, 9.79.190 as now or hereafter amended, 9.79.200 as now or hereafter amended, 9.79.210 as now or hereafter amended, 9.79.220 as now or hereafter amended, 9A.88.020, and

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9A.88.100 are each decodified and are each added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW.

Enacted by Laws 1979, Ex.Sess., ch. 244, § 17, eff. July 1, 1979.

9A.44.901. Construction—Sections decodified and added to this chapter

The sections decodified by RCW 9A.44.900 and added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW shall be construed as part of Title 9A RCW.

Enacted by Laws 1979, Ex.Sess., ch. 244, § 18, eff. July 1, 1979.

9A.44.902. Effective date—1979 ex.s. c 244

This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1979.

Enacted by Laws 1979, Ex.Sess., ch. 244, § 19, eff. July 1, 1979.

CHAPTER 9A.48—ARSON, RECKLESS BURNING, AND MALICIOUS MISCHIEF

9A.48.020. Arson in the first degree

(1) A person is guilty of arson in the first degree if he knowingly and maliciously:

(a) Causes a fire or explosion which is manifestly dangerous to any human life, including firemen; or

(b) Causes a fire or explosion which damages a dwelling; or

(c) Causes a fire or explosion in any building in which there shall be at the time a human being who is not a participant in the crime; or

(d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

(2) Arson in the first degree is a class A felony.

Amended by Laws 1981, ch. 203, § 2.

Notes of Decisions

1. In General

Knowingly and maliciously causing a fire in a dwelling constitutes first-degree arson under this section. A prosecutor does not have discretion to charge such act as second-degree arson under § 9A.48.030 even though the latter statute refers to fires in buildings and "building" is defined as including any dwelling. State v. Lunstrum (1978) 19 Wash.App. 597, 576 P.2d 453.

This section, providing that person is guilty of arson in the first degree if he knowingly and maliciously causes fire which is manifestly dangerous to any human life, including firemen, is not vague and uncertain on theory that arsonist acts without certain knowledge that firemen will come to put out fire. State v. Levage (1979) 23 Wash.App. 33, 594 P.2d 949.

Officers had reasonable basis for concluding that fire was result of arson because of thick black smoke emanating from burning building. State v. Maesse (1981) 29 Wash.App. 642, 629 P.2d 1349.

Where police officers are acting together as a unit, cumulative knowledge of all officers involved in arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect. State v. Maesse (1981) 29 Wash.App. 642, 629 P.2d 1349.

Officers had probable cause to arrest juvenile who fit description of person observed leaving scene of fire and whose statement that he discovered fire

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4) If a defendant granted probation under this section fails to cooperate in atment or violates probation to any substantial degree, the sentence previously posed for the offense shall be immediately executed.

History: C. 1953, 76-5-406.5, enacted by L. 3, ch. 88, § 27

'6-5-407. Married persons' conduct exempt — Limitations of actions — enetration" or "touching" sufficient to constitute offense. (1) The provisions this part shall not apply to conduct between persons married to each other; pro- ed, however, that for purposes of this part, persons living apart pursuant to a ful order of a court of competent jurisdiction shall not be deemed to be married.
2) In any prosecution for unlawful sexual intercourse, rape, or sodomy, any ual penetration or, in the case of sodomy, any touching, however slight, is suffi- nt to constitute the offense.

History: C. 1953, 76-5-407, enacted by L. 3, ch. 196, § 76-5-407; L. 1974, ch. 32, § 13; 7, ch. 86, § 5; 1979, ch. 73, § 5.

Compiler's Notes.

The 1979 amendment deleted former subsec. (2); and designated former subsec. (3) as subsec. (2). For prior version, see parent volume.

6-5-409. Corroboration of admission by child's statement. (1) Notwithstand- any provision of law requiring corroboration of admissions or confessions, and withstanding any prohibition of hearsay evidence, a child's statement indicat- in any manner the occurrence of the sexual offense involving the child is suffi- nt corroboration of the admission or the confession regardless of whether or not child is available to testify regarding the offense.
2) A child, for purposes of subsection (1), is a person under the age of 14.

History: C. 1953, 76-5-409, enacted by L. 3, ch. 88, § 28.

6-5-410. Child victim of sex offense as competent witness. Notwithstanding other provision of law or rule of evidence, a child victim of sexual abuse, under age of ten, shall be considered a competent witness and shall be allowed to tify without prior qualification in any judicial proceeding. The trier of fact shall permitted to determine the weight and credibility to be given to the testimony.

History: C. 1953, 76-5-410, enacted by L. 3, ch. 88, § 29.

6-5-411. Admissibility of out of court statement of child victim of sex ense. (1) Notwithstanding any other provision of law or rule of evidence, a child im's out of court statement regarding sexual abuse of the child is admissible evidence though it does not qualify under an existing hearsay exception, so g as: (1) the child testifies; or (2) in the event the child does not testify, there ther corroborative evidence of the abuse. Before admitting such a statement evidence, the judge shall determine whether the general purposes of the evi- ce are such that the interest of justice will best be served by admission of the tement into evidence. In addition, the court shall consider the age and maturity the child, the nature and duration of the abuse, the relationship of the child the offender, the reliability of the assertion, and the reliability of the child wit- in deciding whether to admit such a statement.

(2) A statement may be admitted under this exception only if the proponen of it makes known to the adverse party sufficiently in advance of the trial or hear ing to provide the adverse party with an opportunity to prepare to meet it, hi intention in offering the statement, and the particulars of it.
(3) For purposes of this section, a child is a person under the age of ten.

History: C. 1953, 76-5-411, enacted by L. 1983, ch. 88, § 30.

CHAPTER 5a

SEXUAL EXPLOITATION OF CHILDREN

Section
76-5a-1. Legislative determinations — Purpose of chapter.
76-5a-2. Definitions.
76-5a-3. Sexual exploitation of a child.
76-5a-4. Determination whether material violates chapter.

76-5a-1. Legislative determinations — Purpose of chapter. The legislatur of Utah determines that the sexual exploitation of children under the age of 1 is excessively harmful to their physiological, emotional, social, and mental develop ment; that children under the age of 14 cannot intelligently and knowingly consen to sexual exploitation; that regardless of whether it is classified as legally obscen material that sexually exploits children is not protected by the First Amendmen of the United States Constitution or by the First or Fifteenth sections of Artic I of the Utah Constitution and may be prohibited; and that prohibition of and pun ishment for the distribution and production of materials that sexually exploit chil dren is necessary and justified to eliminate the market for those materials and t reduce the harm to the child inherent in the perpetuation of the record of hi sexually exploitive activities. It is the purpose of this act to prohibit the productio and distribution of materials which sexually exploit children under the age of 1 regardless of whether the materials are classified as legally obscene.

History: C. 1953, 76-5a-1, enacted by L. 1983, ch. 87, § 1.

Title of Act.

An act relating to criminal law; providing a definition of the crime of sexual exploitation of children.

This act enacts chapter 5a, Title 76, Utal Code Annotated 1953; and repeals sectio 76-10-1206.5, Utah Code Annotated 1953, a last amended by chapter 96, Laws of Utal 1981. — Laws 1983, ch. 87.

76-5a-2. Definitions. As used in this chapter:
(1) "Child" means any person of either sex who has not yet attained his or her 14th birthday.
(2) "Distribute" means the selling, exhibiting, displaying, wholesaling, retailing, providing, giving, granting admission to, or otherwise transferring or presentin material or live performances with or without consideration.
(3) "Live performance" means any act, play, dance, pantomime, song, or other activity performed by live actors in person.
(4) "Material" means any visual representation including photographs, motion pictures, slides, videotapes, or other pictorial representations produced or recorded by any mechancial, chemical, photographic, or electrical means and includes undeveloped photographs, negatives, or other latent representational objects.
(5) "Nude or partially nude" means any state of dress or undress in which the human genitals, pubic region, buttocks, or the developed female breast, at a point

ine claims located on federal land is derived rom federal law, there is no provision made as o the quantum of proof necessary to prevail in dispute over title to those claims. Thus, the pplication of state law imposing a preponderice of the evidence regarding burden of proof s not in conflict with the national policy for ining claims. Silver Core Mining Co. v. DeBell, 42 Colo. App. 169, 595 P.2d 269 1979).

Section does not apply to public official/public igure defamation cases. Manuel v. Fort Collins Newspapers, Inc., 42 Colo. App. 324, 599 P.2d 31 (1979), rev'd on other grounds, 631 P.2d 114 (Colo. 1981).

Applied in Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975); Page v. Clark, 40 Colo. App. 24, 572 P.2d 1214 (1977); Sherman Agency v. Carey, 195 Colo. 277, 577 P.2d 759 (1978); Roberts v. Bucher, 41 Colo. App. 138, 584 P.2d 97 (1978); Frick v. Abell, 198 Colo. 508, 602 P.2d 852 (1979); Diversified Mgt., Inc. v. Denver Post, Inc., 653 P.2d 1103 (Colo. 1982); Littlehorn v. Stratford, 653 P.2d 1139 (Colo. 1982); Honeywell Information Systems v. Board of Assmt. Appeals, 654 P.2d 337 (Colo. Ct. App. 1982); King v. Horizon Corp., 701 F.2d 1313 (10th Cir. 1983).

13-25-128. Rules of evidence - grant of authority subject to reservation. The upreme court of the state of Colorado shall have the power to prescribe general rules of evidence for the courts of record in the state of Colorado. Such rules of evidence shall be construed to be rules of practice and procelure and shall not be construed in such manner that such rules would fix, bridge, enlarge, modify, or diminish any substantive rights. The general ssembly specifically reserves to itself the power to enact laws relating to ubstantive rights including, but not limited to, laws modifying or eliminating aid rules of evidence.

Source: Added, L. 79, p. 620, § 1.

13-25-129. Statements of child victim of unlawful sexual offense against a hild - hearsay exception. (1) An out-of-court statement made by a child, s child is defined under the statutes which are the subject of the action, escribing any act of sexual contact, intrusion, or penetration, as defined section 18-3-401, C.R.S., performed with, by, or on the child declarant, ot otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in criminal proceedgs in which the child is a victim of an unlawful sexual offense, as defined section 18-3-411 (1), C.R.S., or the subject of a proceeding alleging that e child is neglected or dependent under section 19-1-104 (1) (c), C.R.S.,

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

(b) The child either:

(I) Testifies at the proceedings; or

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

(2) If a statement is admitted pursuant to this section, the court shall struct the jury that it is for the jury to determine the weight and credit be given the statement and that, in making the determination, it shall conder the age and maturity of the child, the nature of the statement, the cir- [redacted] the [redacted] as [redacted] an [redacted] ot [redacted] elev [redacted]

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

Source: Added, L. 83, p. 629, § 1.

FEES AND SALARIES

ARTICLE 30

Compensation of Justices and Judges

13-30-102. Legislative declaration.
13-30-103. Compensation of justices and judges.
13-30-104. Judicial compensation adjustment.

13-30-102. Legislative declaration. In carrying out its responsibility to provide for judicial salaries pursuant to section 18 of article VI of the state constitution, the general assembly hereby declares that the purpose of this article is to set the amount of judicial compensation for justices of the supreme court, judges of the court of appeals, judges of the district courts, judges of the county courts, and judges of the probate, juvenile, and superior courts of the city and county of Denver.

Source: R & RE, L. 80, p. 575, §1.

13-30-103. Compensation of justices and judges. (1) Effective July 1, 1980, the following salaries for the following officers shall apply:

(a) The chief justice of the supreme court shall receive an annual salary of fifty-three thousand dollars.

(b) Each associate justice of the supreme court shall receive an annual salary of fifty thousand dollars.

(c) The chief judge of the court of appeals shall receive an annual salary of forty-seven thousand dollars.

(d) Each judge of the court of appeals, other than the chief judge, shall receive an annual salary of forty-six thousand dollars.

(e) The judges of the district courts shall each receive an annual salary of forty-two thousand five hundred dollars.

(f) Each judge of the juvenile court of the city and county of Denver shall receive an annual salary of forty-two thousand five hundred dollars.

(g) The judge of the probate court of the city and county of Denver shall receive an annual salary of forty-two thousand five hundred dollars.

(h) The judge of the superior court of the city and county of Denver shall receive an annual salary of forty-two thousand five hundred dollars.

(i) Each judge of the county court of the city and county of Denver shall receive an annual salary as provided by the ordinances of said city and county.

(j) The annual salary of judges of the county court in Class [redacted] as [redacted] ed [redacted] ctio [redacted] 6-20 [redacted] shall [redacted] thirty-six [redacted] thousand five hundred dollars.

scheme, or design, is admissible under section 16-10-301 (1). People v. Whitesel, 200 Colo. 362, 615 P.2d 678 (1980).

Where evidence of many acts, prosecution compelled to select specific transaction for conviction. Where there is evidence of many acts, any one of which would constitute the offense charged, the prosecution may be compelled to select the transaction on which it relies for a conviction, and although it is not required to identify the exact date of the offense, it must individualize and select a specific act. People v. Estorga, 200 Colo. 78, 612 P.2d 520 (1980).

Mental state required is "knowingly". The general assembly intended that the mental state requirement for this crime be "knowingly", and that this supersedes any indication of mens rea suggested by the term "intentional" in section 18-3-401. People v. Salazar, 648 P.2d 157 (Colo. Ct. App. 1981).

Evidence insufficient for class 3 conviction sufficient for class 4 conviction. Evidence which was insufficient to support a conviction for a class 3 felony charge was sufficient to convict for a lesser included class 4 felony. People v. Whitesel, 200 Colo. 362, 615 P.2d 678 (1980).

Attempt to commit sexual assault on child is offense under Colorado law. People v. Martinez, 42 Colo. App. 257, 592 P.2d 1358 (1979).

Applied in Continental Liquor Co. v. Kalbin, 43 Colo. App. 438, 608 P.2d 353 (1977); People v. Lake, 195 Colo. 454, 580 P.2d 788 (1978); People v. Cavalier, 41 Colo. App. 119, 584 P.2d 92 (1978); People v. Boyette, 635 P.2d 552 (Colo. 1981); People in Interest of W.C.L., 650 P.2d 1302 (Colo. Ct. App. 1982); People v. Green, 658 P.2d 281 (Colo. Ct. App. 1982); People v. Corbett, 656 P.2d 687 (Colo. 1983).

18-3-407. Victim's prior history - evidentiary hearing.

Law reviews. For article, "Hearsay in Criminal Cases Under The Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979).

Basic purpose of section is one of public policy: to provide rape and sexual assault victims greater protection from humiliating and embarrassing public "fishing expeditions" into their past sexual conduct, without a preliminary showing that evidence thus elicited will be relevant to some issue in the pending case. People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978).

No denial of right to confront accuser. This section strikes a balance by conditioning admission of evidence of the victim's sexual history on the defendant's preliminary showing that it is relevant, and involves no denial of the defendant's right to confront his accuser for there is no constitutional right to introduce irrelevant and highly inflammatory evidence. People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978).

Section neither wholly substantive nor procedural. This section cannot be characterized as either purely substantive and thus entirely within the general assembly's power, or purely procedural and thus subject solely to this court's rulemaking power, but rather it is "mixed" in nature. People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978).

Section does not unconstitutionally intrude into matters exclusively judicial nor does it violate § 21 of art. III or art. VI, Colo. Const. People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978).

Evidence of prior sex act of prosecutrix. It is essential that an accused lay a proper foundation for the introduction of the evidence of the prosecutrix's prior sex act. People v. Martinez, 634 P.2d 26 (Colo. 1981).

Evidence of a specific instance of sexual activity, offered to show the source or origin of semen, is not precluded by the statutory presumption of irrelevance or the procedural safeguards which are given to other evidence of a prosecutrix's past sexual activity. People v. Martinez, 634 P.2d 26 (Colo. 1981).

Evidence of a prior sexual act with another man, which could explain the presence of semen in the prosecutrix's vaginal tract, is relevant in that it tends to render more probable the inference that defendant did not have sexual intercourse with the prosecutrix. People v. Martinez, 634 P.2d 26 (Colo. 1981).

Applied in People v. Blalock, 197 Colo. 320, 592 P.2d 406 (1979); People in Interest of M.M., 43 Colo. App. 65, 599 P.2d 968 (1979); People v. Gallegos, 644 P.2d 920 (Colo. 1982).

18-3-408. Jury instruction prohibited.

Section not unconstitutional. This section does not operate to deprive a defendant of due process of law by prohibiting the exercise of trial court discretion with respect to giving this instruction, nor does it violate the constitutional requirement of separation of powers by interfering with the rule-making power of the Colorado supreme court. People v. Fierro, 199 Colo. 215, 606 P.2d 1291 (1980).

This section does violate the constitutional requirement of separation of powers (art. III, Colo. Const.) by interfering with the rulemaking power of the court established in § 21 of art. VI, Colo. Const. People v. Estorga, 200 Colo. 78, 612 P.2d 520 (1980).

18-3-409. Marital exception.

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Marital exception of this section is neither arbitrary nor irrational as it may remove an obstacle to the resumption of normal marital relations and also avoids the difficult emotional issues and problems of proof inherent in this sensitive area. People v. Brown, 632 P.2d 1025 (Colo. 1981).

Section 18-3-402 and this section are severable, so that even if the former were invalidated the latter would still be capable of enforcement. People v. Brown, 632 P.2d 1025 (Colo. 1981).

18-3-411. Sex offenses against children - unlawful sexual offense defined - limitation for commencing proceedings - evidence - statutory privilege. (1) As used in this section, "unlawful sexual offense" means sexual assault in the first degree, as defined in section 18-3-402, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the second degree, as defined in section 18-3-403 (1) (a), (1) (b), (1) (c), (1) (d), (1) (g), or (1) (h), when the victim at the time of the commission of the act is a child less than fifteen years of age, or as defined in section 18-3-403 (1) (e), when the victim is less than fifteen years of age and the actor is at least four years older than the victim, or as defined in section 18-3-403 (1) (f), when the victim is less than eighteen years of age and the actor is the victim's guardian or is responsible for the general supervision of the victim's welfare; sexual assault in the third degree, as defined in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), when the victim at the time of the commission of the act is a child less than fifteen years of age, or as defined in section 18-3-404 (1) (e), when the victim is less than eighteen years of age and the actor is the victim's guardian or is otherwise responsible for the general supervision of the victim's welfare; sexual assault on a child, as defined in section 18-3-405; aggravated incest, as defined in section 18-6-302; trafficking in children, as defined in section 18-6-402; sexual exploitation of a child, as defined in section 18-6-403; soliciting for child prostitution, as defined in section 18-7-402; pandering of a child, as defined in section 18-7-403; keeping a place of child prostitution, as defined in section 18-7-404; pimping of a child, as defined in section 18-7-405; patronizing a prostituted child, as defined in section 18-7-406; or criminal attempt, conspiracy, or solicitation to commit any of the acts specified in this subsection (1).

(2) No person shall be prosecuted, tried, or punished for an unlawful sexual offense other than the misdemeanor offense specified in section 18-3-404, unless the indictment, information, complaint, or action for the same is found or instituted within ten years after commission of the offense. No person shall be prosecuted, tried, or punished for a misdemeanor offense specified in section 18-3-404, unless the indictment, information, complaint, or action for the same is found or instituted within five years after the commission of the offense.

(3) Out-of-court statements made by a child describing any act of sexual contact, intrusion, or penetration, as defined in section 18-3-401, performed with, by, or on the child declarant, not otherwise admissible by a statute

or court rule which provides an exception to the objection of hearsay, may be admissible in any proceeding in which the child is a victim of an unlawful sexual offense pursuant to the provisions of section 13-25-129, C.R.S.

(4) All cases involving the commission of an unlawful sexual offense shall take precedence before the court; the court shall hear these cases as soon as possible after they are filed.

(5) The statutory privilege between the victim-patient and his physician and between the husband and the wife shall not be available for excluding or refusing testimony in any prosecution of an unlawful sexual offense.

Source: Added, L. 82, p. 313, § 1; (3) to (5) added, L. 83, pp. 630, 694, § § 2, 3.

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

18-3-412. Habitual sex offenders against children - indictment or information - verdict of the jury. (1) For the purpose of this section, "unlawful sexual offense" means sexual assault in the first degree, as defined in section 18-3-402, when the victim at the time of the commission of the act is a child less then fifteen years of age; sexual assault in the second degree, as defined in section 18-3-403 (1) (a), (1) (b), (1) (c), (1) (d), (1) (g), or (1) (h), when the victim at the time of the commission of the act is a child less than fifteen years of age, or as defined in section 18-3-403 (1) (e), when the victim is less than fifteen years of age and the actor is at least four years older than the victim, or as defined in section 18-3-403 (1) (f), when the victim is less than eighteen years of age and the actor is the victim's guardian or is responsible for the general supervision of the victim's welfare; sexual assault in the third degree, as defined in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), when the victim at the time of the commission of the act is a child less than fifteen years of age, or as defined in section 18-3-404 (1) (e), when the victim is less than eighteen years of age and the actor is the victim's guardian or is otherwise responsible for the general supervision of the victim's welfare; sexual assault on a child, as defined in section 18-3-405; aggravated incest, as defined in section 18-6-302; trafficking in children, as defined in section 18-6-402; sexual exploitation of a child, as defined in section 18-6-403; soliciting for child prostitution, as defined in section 18-7-402; pandering of a child, as defined in section 18-7-403; keeping a place of child prostitution, as defined in section 18-7-404; pimping of a child, as defined in section 18-7-405; patronizing a prostituted child, as defined in section 18-7-406; or criminal attempt, conspiracy, or solicitation to commit any of the acts specified in this subsection (1).

(2) Every person convicted in this state of an unlawful sexual offense who has been previously convicted upon charges prior to the commission of the present act, which were separately brought, either in this state or elsewhere, of an unlawful sexual offense or who has been previously convicted under the laws of any other state, the United States, or any territory subject [illegible]diction of the United States of an unlawful act which, if committed [illegible] be [illegible]nlaw[illegible] sexu[illegible]fens[illegible]ll b[illegible]udg[illegible] sex offender against children. If the second or subsequent unlawful

sexual offense for which a defendant is convicted constitutes a felony, the sentence imposed shall not be less than the upper limit of the presumptive range for that class felony as set out in section 18-1-105. If the second or subsequent unlawful sexual offense for which a defendant is convicted constitutes a misdemeanor, the sentence imposed shall not be less than the maximum sentence for that class misdemeanor as set out in section 18-1-106.

(3) Any previous conviction of an unlawful sexual offense shall be set forth in apt words in the complaint, indictment, or information. For purposes of trial, a duly authenticated copy of the record of previous convictions and judgments of any court of record for any of said crimes of the party indicted, charged, or informed against shall be prima facie evidence of such convictions and may be used in evidence against such party. A duly authenticated copy of the records of institutions of treatment or incarceration, including, but not limited to, records pertaining to identification of the party indicted, charged, or informed against, shall be prima facie evidence of the facts contained therein and may be used in evidence against such party.

(4) Any person who is subject to the provisions of this section shall not be eligible for probation or suspension of sentence.

(5) The procedures specified in section 16-13-103, C.R.S., shall govern the verdict of the jury in a trial to which the provisions of this section are alleged to apply based on a previous conviction or convictions for an unlawful sexual offense as set out in the complaint, indictment, or information.

Source: Added, L. 82, p. 316, § 1.

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

18-3-413. Video tape depositions - children - victims of sexual offenses. (1) When a defendant has been charged with an unlawful sexual offense, as defined in section 18-3-411 (1), and when the victim at the time of the commission of the act is a child less than fifteen years of age, the prosecution may apply to the court for an order that a deposition be taken of the victim's testimony and that the deposition be recorded and preserved on video tape.

(2) The prosecution shall apply for the order in writing at least three days prior to the taking of the deposition. The defendant shall receive reasonable notice of the taking of the deposition.

(3) Upon timely receipt of the application, the court shall make a preliminary finding regarding whether, at the time of trial, the victim is likely to be medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence. Such finding shall be based on, but not be limited to, recommendations from the child's therapist or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child. If the court so finds, it shall order that the deposition be taken, pursuant to rule 15 (d) of the Colorado rules of criminal procedure, and preserved on [illegible]eo tape. The prosecution shall transmit the video tape to the clerk of t[illegible] court in which the action is pe[illegible]

(4) [illegible] at the time of trial the court finds that further testimony would

or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence, the court may admit the video tape of the victim's deposition as former testimony under rule 804 (b) (1) of the Colorado rules of evidence.

Source: Added, L. 83, p. 694, § 4.

18-3-414. Payment of treatment costs for the victim or victims of a sexual offense against a child. (1) In addition to any other penalty provided by law, the court may order any person who is convicted of an unlawful sexual offense, as defined in section 18-3-411 (1), to meet all or any portion of the financial obligations of treatment prescribed for the victim or victims of his offense.

(2) At the time of sentencing, the court may order that an offender described in subsection (1) of this section be put on a period of probation for the purpose of paying the treatment costs of the victim or victims, which, when added to any time served, does not exceed the maximum sentence imposable for the offense.

Source: Added, L. 83, p. 694, § 5.

ARTICLE 4

Offenses Against Property

PART 1

ARSON

18-4-101. Definitions.

PART 2

BURGLARY AND RELATED OFFENSES

18-4-202. First degree burglary.
18-4-202.1. Habitual burglary offenders — punishment — legislative declaration.
18-4-203. Second degree burglary.
18-4-204. Third degree burglary.

PART 3

ROBBERY

18-4-303. Aggravated robbery of controlled substances.
18-4-304. Robbery of the elderly or handicapped — legislative declaration.

PART 4

THEFT

18-4-409. Aggravated motor vehicle theft.
18-4-411. Transactions for profit in stolen goods.
18-4-412. Theft of medical records or medical information — penalty.

PART 5

TRESPASS, TAMPERING, AND CRIMINAL MISCHIEF

18-4-501. Criminal mischief.
18-4-503. Second degree criminal trespass.
18-4-504. Third degree criminal trespass.
18-4-505. First degree criminal tampering.
18-4-506. Second degree criminal tampering.
18-4-506.5. Tampering with a utility meter — penalty.
18-4-508. Defacing, destroying, or removing landmarks, monuments, or accessories.
18-4-511. Littering of public or private

PART 1

ARSON

18-4-101. Definitions. (3) Property is that of "another" if anyone other than the defendant has a possessory or proprietary interest therein.

Editor's note: This subsection (3) is reprinted for reenactment to correct an editorial error made in the preparation of C.R.S. 1973 wherein the quotation marks around "another" were erroneously placed around "Property of another".

When fenced enclosure not "building". A fenced enclosure surrounding a concrete building which serves as a dog pound is not within the statutory meaning of "building" in subsection (1) so as to support a second-degree burglary charge for the unlawful entry of the enclosure, where the fenced enclosure's design is directed to containment or exclusion and affords little protection against inclement weather and extreme temperatures. People v. Moyer, 635 P.2d 553 (Colo. 1981).

But within definition of "occupied structure". A fenced enclosure surrounding a concrete building which serves as a dog pound is within the definition of "occupied structure" in subsection (2), so as to support a second-degree burglary charge for the unlawful entry of the enclosure. People v. Moyer, 635 P.2d 553 (Colo. 1981).

"Dwelling" includes attached garage. A garage attached to a residence is part of a "dwelling" within the meaning of section 18-4-203(2), burglary of a dwelling. People v. Jiminez, 651 P.2d 395 (Colo. 1982).

"Proprietary interest" is a protean concept, the meaning of which emerges from contextual use and application. People ex rel. VanMeveren v. District Court, 619 P.2d 494 (Colo. 1980).

Term "proprietary interest" is sufficiently broad to include a legally recognized security interest, such as that of a credit union, which the defendant has neither the right nor the authority to defeat or impair, even though he also had an interest in the secured property. People ex rel. VanMeveren v. District Court, 619 P.2d 494 (Colo. 1980).

18-4-102. First degree arson.

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Conviction of this offense not equal protection violation. Prosecution, conviction, and sentencing for a class 3 felony under the first degree arson statute, section 18-4-102 (1), rather than for a class 4 felony under the third degree arson statute, section 18-4-104(1), C.R.S., did not violate defendant's right to equal protection under the fourteenth amendment to the United States Constitution. People v. Calvaresi, 198 Colo. 321, 600 P.2d 57 (1979).

Distinguished from third degree arson. The more serious first degree arson statute contains an element not contained in the less serious third degree arson statute (section 18-4-104). That element is the requirement that the property damaged or destroyed be a "building or occupied structure of another". People v. Calvaresi, 198 Colo. 321, 600 P.2d 57 (1979).

And distinction not unreasonable. The general assembly's decision to provide a more serious penalty for intentionally burning a "building or occupied structure" than for intentionally burning "[illegible]" arbitrary or unreasonable. People v. Calvaresi, 198 Colo. 321, 600 P.2d 57 (1979).

At common law arson was crime against possession or occupancy, rather than ownership. People ex rel. VanMeveren v. District Court, 619 P.2d 494 (Colo. 1980).

Tenant may commit arson upon building owned by other. Where a tenant sets fire to a unit which he occupies, he also damages the property interests of the owner in that building; thus, he may be deemed to have committed first-degree arson upon the building of another. People v. Brown, 44 Colo. App. 397, 622 P.2d 573 (1980).

Testimony showing motive admissible. Introduction of evidence that defendant's father was the major creditor and general manager of the club allegedly arsoned, that the club had been financially unsuccessful and had lost its lease, and that the club premises were insured, offered to show defendant's motive for setting the fire, was admissible when offered in combination with testimony concerning the close business association between the defendant and his father and defendant's desire to ensure the financial success of his father's investment in the club. People v. Calvaresi, 198 Colo. 321.

EXHIBIT C
HB 69
1/10/85

SOCIAL AND REHABILITATION SERVICES
Norma Harris, Administrator
COMMUNITY SERVICES DIVISION

January 9, 1985

TESTIMONY ON HB 69 - Support

REDUCES TRAUMA TO CHILD

by keeping child out of court

by keeping child from having to confront the parents

by reducing number of times child must repeat story in a non-therapeutic setting

Increases chances of prosecution/conviction

County attorneys are reluctant to prosecute, either criminally or civilly with only young victim's testimony

Will increase chance of perpetrator getting help because of prosecution

Increases likelihood of child and family staying together becaus child is not forced to confront family in public

kh

EXHIBIT D
HB 69
1/10/85

WITNESS STATEMENT

NAME Janice Wimmer BILL No. 69

ADDRESS Forest Park, Clancy MT DATE 1/10/85

WHOM DO YOU REPRESENT Family Teaching Center

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

Having had experience with victims and their families I believe that

1. Children do not lie about having been sexually abused except in the harest cases.

2. Prosecution of sex abuse cases is usually beneficial to everyone involved as most courts order the offenders into treatment unless they have been determined untreatable by psychological exam. In those cases — even then Judge offers treatment.

3. To accomplish prosecution we must have children able to provide the court with information regarding the alleged assault.

4. That child victim should not have to experience significant further psychologic trauma as a result of the need to deliver this information.

FORM CS-34
1-81

EXHIBIT E
HB 69
1/10/85

WITNESS STATEMENT

NAME CAROLYN Clemens BILL No. HB 69

ADDRESS 1054 Breckenridge Helena DATE

WHOM DO YOU REPRESENT Lewis & Clark's Co. Atty

SUPPORT X OPPOSE AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

As an attorney, I believe that this bill is sufficiently narrow to preserve a Defendant's constitutional rights to confront his witnesses. There are safeguards to insure the reliability of the statements in question, which is what the right to confront is designed to ensure.

Having worked with child victims for 3½ years, I have seen numerous situations in which children are unable to testify because of who the defendant is; because the parents won't allow it; or because the charges were brought so long before that the child is unable to remember. I have entered into very lenient plea bargains because I have had no witnesses to take before the court. In all of these cases, a child molester or rapist is permitted to continue his offenses, merely because a child is unable to cope with a system directed at adults.

FORM CS-34
1-81

WITNESS STATEMENT

NAME Norma Harris BILL No. HB 69

ADDRESS PO Box 4210 Helena DATE 1-10-85

WHOM DO YOU REPRESENT SRS

SUPPORT X OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

FORM CS-34
1-81

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

USE BILLS 106, 69, 50 DATE 1/10/85

SPONSOR

PLEASE PRINT YOUR NAME PLAINLY AND INCLUDE BILL YOU'RE INTERESTED

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Norma Harris	Helena	SRS	HB 69 X	
Carolyn Clemens	Helena	L&C Co. AHU	X	
Pat Edwards	Missoula	Mt. Trial Lawyers	69 ✓	
Susan Cottingham	Helena	ACLU	69 ✓	
[illegible]	[illegible]	Sheriff's Off	[illegible]	
Candace Wimmer	Forest Park Center	Family Teaching	69	
Gail Kline	Helena.	WLF		
Mike Campbell		MEA	69	
Mike Abler	Helena	Sup Court		
Jeff McDowell	Helena	Montana Karmin	N/A	
~~Dennis Nathan~~	~~Helena~~			
George Allen	Helena	MTP Retail Assn	50	
Larry Tobiason	"	Mont Auto Assoc	50	
Ben Havdahl	Helena	Mont Motor Carriers Assn	50	

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

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33